IN THE SUPREME COURT OF IOWA

NO. 16-1534

THERESA SEEBERGER,

***Petitioner-Appellee/Cross-Appellant*,**

vs.

DAVENPORT CIVIL RIGHTS COMMISSION,

Respondent-Appellant Cross-Appellee

MICHELLE SCHREURS,

Intervenor-Appellant/Cross-Appellee

PETITIONER-APPELLEE/CROSS-APPELLANT'S APPLICATION FOR FURTHER REVIEW

FROM THE IOWA COURT OF APPEALS' APRIL 18, 2018
DECISION; ON APPEAL FROM THE
DISTRICT COURT FOR POLK COUNTY
THE HONORABLE MICHAEL D. HUPPERT

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QUESTIONS PRESENTED FOR REVIEW

1. Davenport Municipal Code Section 2.58.305(C) (Division III Fair Housing) prohibits any discriminatory statements with respect to the rental of a dwelling. As applied to an individual who is exempt under the housing code because she owns only one house, does this ordinance violate the First Amendment of the Constitution and the Iowa Constitution?

2. Davenport Municipal Code Section 2.58.340(F)(3) provides the remedies for a violation of the Fair Housing Division, and this Section does not include an award of attorney's fees. The district court held that a Davenport fair housing complainant was not entitled to attorney's fees citing *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841 (Iowa 2009). Did the Court of Appeals commit error in holding fees could be awarded based on a different code section for employment discrimination?

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STATEMENT SUPPORTING FURTHER REVIEW

This is a case about the First Amendment right to freedom of speech. Theresa Seeberger (who owned a single house in Davenport) lawfully terminated Michelle Schreurs's residential lease after hearing that Schreurs's teenage daughter was pregnant. Schreur's asked: why? Seeberger believed that Schreurs was an irresponsible parent, and she told Schreurs as much: "You don't even pay rent on time the way it is, and . . . [n]ow you're going to bring another person into the mix." Appendix 138. The Davenport Civil Rights Commission ("DCRC") prosecuted Seeberger solely for her words, but not her acts in terminating the tenancy, because Seeberger is exempt from wrongful eviction as the owner of fewer than four rental properties. The local commission awarded Schreurs $17,500 in emotional distress damages, $23,200 in attorney fees, and assessed Seeberger a $10,000 civil penalty for her language.

The Court of Appeals held that Seeberger's speech was not entitled to First Amendment protection. The Court found that Seeberger's speech contained no independent value, but was the

purely "commercial" termination of a tenancy: "While Seeberger may hold political, religious, or other beliefs the expression of which might be protected in some contexts, the statements, made to Schreurs were plainly directed at telling Schreurs her tenancy was being terminated because of her familial status." (Decision at 9) The Court of Appeals next held the government has a substantial interest in preventing tenants from hearing discriminatory statements and upheld the Davenport ordinance as simply a ban on commercial speech under the lower standard of scrutiny announced in *Central Hudson Cps & Elec. Corp v. Pubic Serv. Comm'n of NY*, 447 U.S. 557 (1980).

Further review is warranted under Rule 6.1103(1)(b)(2) because the Court of Appeals has decided a substantial question of constitutional law, and also, an important question of law that has not been, but should be, settled by the Supreme Court. The Davenport ordinance in question is nearly identical to 42 U.S.C. § 3604(c). No federal or state court in the nation has addressed the constitutionality of this law. In spotting the issue of an exempt landlord being prosecuted solely for language, but not deciding the

issue, Judge Easterbrook warned that applying this law to exempt landlords would "encounter[] serious problems under the first amendment." *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

Further, with regard to the award of attorney fees, the Supreme Court held in *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841 (Iowa 2009) that a civil rights complainant is not entitled to attorney fees under a municipal ordinance unless there is a specific section providing attorney's fees as a remedy. Here, the Davenport ordinances on fair housing do not provide for attorney fees. Nevertheless, the Court of Appeals reversed the district court and reinstated the award of fees by cross-referencing a different section of the Davenport ordinances on employment discrimination. Further review is necessary under Rule 6.1103(1)(b)(1) because the Court of Appeals has entered a decision in conflict with *Botsko*. In rendering its decision, The Court of Appeals did not even cite to *Botsko*, or any other cases for that matter.

BRIEF

Facts

In 2012, Appellee/Cross-Appellant Theresa Seeberger owned a single house in Davenport. Seeberger got married and moved in with her wife, Stacey. App. 137. Stacey was allergic to cats, so Seeberger left her four pets at her house. App. 137; 14. Seeberger also left all her furniture, her kitchen wares, her filing cabinets, and even her clothes in the house. App. 14, 15, 17.

Towards the end of 2012, Seeberger began renting some of the rooms in her house to tenants. App. 14-15. About seven months later, Intervenor-Appellant/Cross-Appellee Michelle Schreurs, and her daughter, Trinity, moved in. App. 138. At the time, Seeberger was also renting rooms to two others: Roberta Hodges and Peter King, Schreurs's boyfriend. App. 137-38.

Shortly after Schreurs moved in, Seeberger separated from Stacey and moved to an apartment a few blocks from her house. App. 138. Even with tenants in the house, Seeberger kept her belongings there and would stop in most days. App. 137-38.

In September 2014, Seeberger was in the house and noticed a bottle of prenatal vitamins on the kitchen counter. At that time, both Hodges and King had moved out; Schreurs and Trinity were the only tenants left. Seeberger took a picture of the vitamins with her cellphone and sent it to Schreurs, asking: "Something I should know about?" App. 138. Schreurs did not respond.

The next day, Seeberger went to the house and asked about the vitamins. Seeberger assumed that it was Schreurs who was having the baby. App. 26. Schreurs, who had not seen the text, became excited and started to giggle. App. 138. Schreurs told Seeberger that it was her teenage daughter, Trinity, who was pregnant. App. 138. Upon hearing that it was Trinity, Seeberger told Schreurs "You're going to have to leave." App. 138. Schreurs asked: why? Seeberger responded: "You don't even pay rent on time the way it is, and . . . [n]ow you're going to bring another person into the mix." App. 138. During the ensuing discussion, Seeberger also remarked that "she [Trinity] is taking prenatal vitamins," so "obviously you're going to keep the baby." App. 138.

Schreurs moved out three weeks later. Schreurs filed a complaint with the DCRC, alleging that Seeberger had violated the Davenport Civil Rights Ordinance (Davenport Municipal Code Division III Fair Housing, 2.58.300 et seq.) by making discriminatory statements based upon familial status.[1] The complaint did not allege that the *act* of terminating the tenancy amounted to unlawful discrimination, because both the Davenport Civil Rights Ordinance (and the Fair Housing Act after which it's modeled) contain an exception for landlords who own less than four single-family houses.[2]

Administrative Law Judge Heather Palmer, held a public hearing and issued a proposed order finding that Seeberger had violated the Ordinance by making discriminatory statements. ALJ

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[1] Section 2.58.305 of the Davenport Civil Rights Ordinance makes it unlawful "to make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation." The Fair Housing Act contains a nearly identical provision. *See* 42 U.S.C. § 3604(c).

[2] Davenport Municipal Code section 2.58.310(A)(1)(a). App. 127.

Palmer awarded $35,000 in emotional distress damages to Schreurs, awarded $23,200 in attorney fees to Schreurs's private attorney, and recommended that Seeberger pay a $10,000 civil penalty. App. 146, 153. The DCRC adopted the proposed order, except that it reduced the emotional distress damage award to $17,500. App. 152.

On judicial review, the district court affirmed in part and reversed in part. The court rejected Seeberger's First Amendment challenge. The court held that Seeberger's speech was "commercial" and was "illegal," thus failing the first part of the test for commercial speech under *Central Hudson Cps & Elec. Corp. v. Pub Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

The district court upheld the commission's finding on liability, but it reversed the DCRC's remedies award. The ALJ had awarded Schreurs damages based solely upon the "stress she experienced when Seeberger terminated her tenancy" and the fact that she "had to move in with her parents." (Dist. Ct. 17). That was error because Seeberger's liability was based upon her speech rather than the actual termination of the tenancy (that was legal).

The district court therefore reversed the emotional distress award and the civil penalty, and remanded the case for a new public hearing. (Dist. Ct. Op. 17).

The district court also reversed the attorney fee award because the Davenport Fair Housing code does not provide authority for it. The housing-discrimination section limits relief "to an award of actual damages, equitable or injunctive relief and the assessment of a civil penalty." Dist. Ct. Op. 17-18 (citing Davenport Mun. Code § 2.58.340(F)(3)). The court rejected Schreurs's and the DCRC's argument that attorney fees can be awarded by looking at a prior section of the Ordinances, section 2.58.175(A)(8), which outlines the remedies for employment discrimination. App. 123.

The Court of Appeals affirmed the district court's holding with regard to the First Amendment. The Court of Appeals held that Seeberger's speech contained no inherent value or worth because her words were uttered in conjunction with the termination of the tenancy. Without citing any cases, the Court held that Seeberger's speech was not "inextricably intertwined

with any form of fully-protected speech." Attachment at 9. Thus, the Court applied the lower scrutiny accorded pure commercial speech cases under *Central Hudson*. Unlike the district court, the Court of Appeals "assume[d] without deciding that her statements concerned a lawful activity." Attachment at 10. The Court upheld the Davenport law, however, concluding it was not more extensive than necessary to achieve the substantial governmental interest of not exposing tenants to the stigma of hearing discriminatory statements.

I. Davenport Municipal Code Section 2.58.305(C), as Applied to Seeberger, Violated her Right to Freedom of Speech

Seeberger expressed her opinion that Schreurs was irresponsible for allowing her teenage daughter to become pregnant and for bringing a child into the family when they could not afford it. Whether or not one agrees with that opinion, it is just that—an opinion on a matter of national debate and subject to full constitutional protection. It's true that Seeberger's speech related to a commercial transaction (renting a room in the house), but because that speech was "inextricably intertwined" with

Seeberger's philosophical or ideological message, it is classified as noncommercial, fully protected speech under the First Amendment. *See Riley v. Nat'l Federation of the Blind of N. C., Inc.,* 487 U.S. 781, 795–96 (1988).

A. The commercial-speech doctrine does not apply because the commercial aspect of Seeberger's speech was inextricably intertwined with fully protected speech.

When analyzing a First Amendment claim, the U.S. Supreme Court makes a distinction between commercial speech—"expression related solely to the economic interests of the speaker and its audience"—and "other varieties" of speech that express political, religious, philosophical, or ideological opinions and ideas. *Cent. Hudson,* 447 U.S. at 561-62. The "other varieties" of speech are subject to almost full constitutional protection, while commercial speech has traditionally been analyzed under a lesser, though still stringent standard. *Id* at 563. That distinction is narrowing somewhat, with the Supreme Court becoming more and more skeptical of restrictions on so-called commercial speech.[3]

[3] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (applying "heightened scrutiny" to law that restricts commercial speech "because of the disagreement with the message it conveys" (internal quotation omitted)).

When the Supreme Court laid out its commercial-speech test in *Central Hudson*, Justice Stevens wrote a concurring opinion (joined by Justice Brennan) to express his belief that "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Central Hudson*, 447 U.S. at 579. It is often the case, Justice Stevens wrote, that expression motivated by economic interests also "encompasses speech that is entitled to the maximum protection afforded by the First Amendment." *Id.*

Eight years later, the Supreme Court confronted Justice Stevens's concern, and it sided with him. Writing for the Court in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), Justice Brennan stated that even if "speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796. Where the "component parts of a single speech are inextricably intertwined," Justice Brennan explained, courts

cannot "parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* "Such an endeavor would be both artificial and impractical," and therefore the entire expression is fully protected. *Id.*

Unfortunately, that is exactly what the Court of Appeals did in this case. The Court of Appeals parceled out the political, religious, and philosophical messages in Seeberger's speech and disregarded them because the words also contained the message that Seeberger was terminating Schreurs' tenancy. The Court of Appeals cited no authority for its conclusion and ignored a long line of United States Supreme Court cases finding value in speech that was being used for commercial purposes. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding Rhode Island law prohibiting ads for liquor prices unconstitutional because the information in the commercial speech has separate value); *Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173 (1999) (holding federal law prohibiting broadcasting ads for private casino gambling unconstitutional

because it stifled the value of the information also contained with the commercial speech).

The Court of Appeals stated: "[H]er September 17 statements purely amounted to her pronouncements to Schruers that her familial status was the primary basis for terminating Schreurs's tenancy." Attachment at 9. That is the kind of oversimplification that Justice Stevens warned about in *Central Hudson* and that the Supreme Court guarded against in *Riley*.

The ALJ found Seeberger liable under the Davenport Civil Rights Ordinance because "Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant," and she thought she was irresponsible for "adding a third person to the family" when they could not afford it. App. 145. That sentiment—which expresses notions of parental responsibly and family planning—is the type of political or philosophical expression that is fully protected under the First Amendment. It doesn't matter that Seeberger expressed her opinion in the context of a landlord/tenant issue, because the commercial aspect of the speech ("Your tenancy is

terminated.") was inextricably intertwined with the fully protected speech ("You're an irresponsible parent for allowing your daughter to become pregnant and to bring a child into this home when you can't afford it.").

The Davenport Ordinance is therefore subject to strict scrutiny, which means that it cannot withstand a constitutional challenge.[4] The DCRC has not tried to justify its censorship under that standard—nor could it. In some ways, it's remarkable that this case has gotten this far. It seems obvious that the government cannot punish Seeberger for expressing the kinds of opinions she expressed here. But this is a "discrimination" case, so the DCRC and the Court of Appeals seem to believe that Seeberger's rights under the First Amendment are entitled to lesser protection.

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[4] *See Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997) (applying strict scrutiny to prohibition on speech that inextricably intertwined commercial and noncommercial expression); *Gaudiya Vaishnava Soc'y v. City & Cty. of S.F.*, 952 F.2d 1059, 1064–65 (9th Cir. 1990) (same).

Remember: Seeberger isn't being punished for the act of terminating the tenancy *or* for her motivation for doing so; she's being punished only because she spoke that reason aloud. That should be the beginning and the end of the matter. Seeberger's statements and opinions are given the fullest protection under the First Amendment of the U.S. Constitution and Article I, section 7 of the Iowa Constitution. The DCRC's decision should be reversed and the case against Seeberger thrown out.

B. Even if the commercial-speed doctrine applied, Seeberger's speech would be constitutionally protected because the Ordinance is more extensive than necessary to prevent any substantial government interests.

Seeberger's speech is constitutionally protected, even if it were purely commercial. In *Central Hudson*, the Supreme Court laid out the four-part test for the government to meet to sustain a ban on commercial speech: (1) whether the speech concerns lawful activity and is not misleading; (2) whether there is a substantial governmental interest; (3) whether the ban directly advances the governmental interest; and (4) whether the ban is more extensive than necessary. *Central Hudson*, 447 U.S. at 566.

Under *Central Hudson*, a content-based restriction on commercial speech is subject to heightened scrutiny if the speech concerns lawful activity and is not misleading. *Central Hudson*, 447 U.S. at 566. Both are true here. Seeberger expressed her truthful opinion that Schreurs was irresponsible, and the activity—terminating the tenancy based on family status—was lawful. Under the Davenport Civil Rights Ordinance, a landlord who owns no more than three single-family houses cannot be held liable for discriminating against anyone for any reason. *See* Davenport Municipal Code 2.58.310(A)(1)(a). Although courts have upheld First Amendment challenges to the Fair Housing Act's speech ban (which is virtually identical to Davenport's), all those cases involved acts of illegal discrimination that accompanied the alleged discriminatory statements or advertisements. *See* Dist. Ct. Op. 13 (citing cases). This one does not.

The Seventh Circuit is the only court that has addressed the situation we have here—where the landlord is not prohibited from discriminating, but is prohibited from talking about it. In *Chicago*

Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008), a public-interest group sued Craigslist for posting rental advertisements that expressed race, sex, religion, and family status preferences (e.g., "No children"). Some of those ads were published by people who had less than four single-family houses, which means that (like Seeberger) they were legally entitled to discriminate under the Fair Housing Act but (also like Seeberger) forbidden from making any advertisements or statements to that effect. *Id.* The Seventh Circuit, Judge Easterbrook writing, warned that applying the discriminatory-speech ban to these Craigslist posts (the posts of those who could legally discriminate) would "encounter[] serious problems under the first amendment." *Id.* (citing the body of Supreme Court's precedent on the issue).

In the present case, with regard to the remaining *Central Hudson* factors, the City of Davenport did not meet its burden in showing a substantial governmental interest. The City may have an interest in prohibiting discrimination based upon familial

status,[5] but it cannot rely on that interest here because the Davenport Municipal Ordinance expressly *allows* landlords like Seeberger to refuse to rent to anyone, for any reason—familial status included. If Davenport wants to regulate a small landlord's ability to discriminate based upon familial status (or any other class), then it needs to do so directly. Under *44 Liquormart* and *Greater New Orleans Broadcast Association*, it cannot do so by regulating speech alone.

Because the City allows landlords to discriminate if they own fewer than four houses, the only interest it has in suppressing those landlords' speech is to protect tenants from *hearing* that they are being discriminated against. Indeed, that is the interest seized upon by the Court of Appeals. That interest is not a substantial one that justifies the deprivation of the right to free speech, however. Imagine if it were; the government could

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[5] This is questionable. One of the original goals of the Fair Housing Act was *racial* integration. *See* Robert G. Schwemm, *Discriminatory Housing Statements and S 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 279-80 (2001). "Familial status" was added later as a protected category. However, "integration is not so clearly a goal in sex, familial status, or handicap discrimination cases. *Id.* n. 417.

ban every statement that it deems insensitive. As the Supreme Court stated in its most recent commercial-speech case: "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell*, 564 U.S. at 575.

But even if one were to assume that the government can ban expression of opinions that cause emotional distress, the Davenport speech ordinance would still violate the First Amendment. Here, the DCRC did not meet its burden is demonstrating its ordinance is not more extensive than necessary.

In *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 380 (1992) the Supreme Court struck down a statute that banned fighting words (which fall outside the protection of the First Amendment) because the ban did not apply to all fighting words, meaning that it did not apply to all face-to-face statements that would objectively incite violence. Instead, the ordinance banned only those fighting words that cause "resentment in others on the basis of race, color, creed, religion or gender." *Id.* "Those who wish[ed] to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation,

union membership, or homosexuality"—were free to do so. *Id*. At 391. By doing that—by identifying some fighting words as illegal and based upon their content—the city had violated the First Amendment. *Id*. at 386. "The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." *Id*. at 386.

But that is what Davenport has done. Even assuming that the city could ban all speech that causes emotional distress or injury, section 2.58.305 does not do that. It only prohibits landlords from making statements "that indicate any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation." Davenport Municipal Ordinance section 2.58.305(c). If, for example, a landlord tells a tenant that he won't rent to her because she is "too fat," the landlord will not face liability under the ordinance—even if his statements caused emotional distress.

So even if speech that caused emotional distress fell outside the First Amendment, this ordinance would still be violate the

First Amendment because it discriminates based upon content. But, in any event, there is no exception to the First Amendment for hurt feelings. If there were, the First Amendment would be a meaningless one.

II. Even if it were constitutional to punish Seeberger for her speech, Schreurs would not be entitled to attorney fees.

This Court has been here before. In *Botsko v. Davenport Civil Rights Commission*, 774 N.W.2d 841, 845 (Iowa 2009), the Davenport Civil Rights Commission argued that it had the authority, under the Davenport Municipal Code, to award attorney fees in an employment discrimination case. This Court disagreed. "[B]ecause attorneys' fee awards are a derogation of the common law," this Court held that they "are generally not recoverable as damages in the absence of a statute or a provision in a written contract." *Id.* Because the Davenport Municipal Code did not contain such a clear authorization for attorney's fees, the Commission's award was improper. The Court held that an attorney fee provision "must come clearly within the terms of the statute." *Id.* (citation omitted). The Court announced that it

takes a "stringent approach" to construing statutes purporting to award attorney fees to the prevailing party. *Id.*

Since that case, and actually during the pendency of it, the City of Davenport amended its municipal code to allow for reasonable attorney fees for cases involving a discriminatory practice, which is every kind of discriminatory practice *other* than a "discriminatory *housing* practice," which has its own definition and its own section of the Davenport Municipal Code. For whatever reason—be it intentional or not—Davenport did *not* add attorney's fees to the list of potential remedies for a discriminatory *housing* practice. *See* Davenport Mun. Code § 2.58.340(F)(3). App. 132. Thus, the district court was right to reverse the attorney fee award.

In reversing the district court, the Court of Appeals pieced together a rationale that an earlier Davenport ordinance section, 2.28.175(A)(8) (division two), which expressly provides the remedies for employment discrimination, can be transplanted into the fair housing code (division three), to justify an award of attorney fees for housing claims. App. at 11-14. The Court

acknowledged that the different divisions of the Davenport ordinances provide "dual and differing modes for relief, based on the plain language and statutory scheme of the ordinance." App. at 13. Nevertheless, the Court deviated from the actual language of the ordinance sections to engraft the attorney provision of the employment division onto the fair housing division. In doing so, the Court did not cite *Botsko* or any other case law.

The Court of Appeals's approach to analyzing whether the Davenport fair housing ordinances provide for attorney fees cannot be said to be "stringent." *Botsko*, 774 N.W.2d at 845. In *Botsko*, the Supreme Court reiterated its prior holding in *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 536-37 (Iowa 1980) that a court may not simply locate language in a part of a city's ordinance and apply it to a different part. In *City of Dubuque*, the Court held that "a statutory provision authorizing an award of attorneys' fees related to district court proceedings did not imply that attorneys' fees on appeal could also be recovered." *City of Dubuque*, 297 N.W.2d at 536-37. The Court concluded in *Botsko*: "Our demanding approach is consistent with

cases in other jurisdictions which reject awarding statutory attorneys' fees by implication and require express language." *Botsko*, 774 N.W.2d at 845.

In its decision, the Court of Appeals has clearly departed from *Botsko*. The Court of Appeals decided that the Davenport fair housing division provides for attorney's fees by implication of an attorney fee provision in the Davenport employment discrimination division. This despite that fact that the fair house division already has a section explaining the remedies for violations, and they do not include attorney fees. 2.58.340(F)(3). App. 132. If the City of Davenport wants to include attorney fees as a remedy for fair housing violations, it must do so by passing an ordinance that provides for attorney fees. Based on *Botsko*, the Court of Appeals decision reversing the district court and reinstating the award of attorney fees should be reversed.

CONCLUSION

The First Amendment states that the government shall make no law "abridging the freedom of speech." U.S. Const. amend. I. There is no set of regulations to tell us what that

means, so we rely on dozens and dozens of cases that create multi-factor tests, exceptions, and exceptions to the exceptions. For that reason, it can be easy to lose the forest for the trees—to get bogged down in one test or another, and to dissect sentences of Supreme Court opinions as if they were discrete statutory commands. To get perspective, sometimes it's best to take a step back from those cases. To think: Why is the government banning this speech? And should it be able to?

Of all the complicated First Amendment issues, this should not be one of them. Seeberger lawfully terminated Schreurs lease, Schreurs asked "Why?" and Seeberger told her. Schreurs didn't like the answer; and that's understandable. But does the government really have an interest in preventing her from hearing it? Is that permissible under the First Amendment? Should the government be able punish a landlord because she truthfully answered her tenant's question?

If the answer is yes, then where is the line? How far can the government go to prevent hurt feelings? Pretty far, according to the Court of Appeals.

For these reasons, Appellee/Cross-Appellant Theresa Seeberger respectfully requests the Court accept further review of the Court of Appeals decision and issue a decision reversing the Court of Appeals.

Respectfully submitted,

/s/Randall D. Armentrout

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This Application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because*:*

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May 4, 2018
Date

/s/ Randall D. Armentrout

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on May 4, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel of record.

/s/ Randall D. Armentrout

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MICHELLE SCHREURS,
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Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

The Davenport Civil Rights Commission and Michelle Schreurs appeal and Theresa Seeberger cross-appeals a district court ruling on Seeberger's petition for judicial review. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Latrice L. Lacey, Davenport, for appellant Davenport Civil Rights Commission.

Dorothy A. O'Brien of O'Brien and Marquard, P.L.C., Davenport, for appellant Michelle Schreurs.

Randall D. Armentrout and Katie L. Graham of Nyemaster Goode, P.C., Des Moines, for appellee.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, Judge.

The Davenport Civil Rights Commission (Commission) and Michelle Schreurs appeal a district court ruling on Theresa Seeberger's petition for judicial review following an agency determination of Schreurs's housing-discrimination complaint. The Commission contends the district court erred in concluding Schreurs's complaint was not filed under the federal Fair Housing Act (FHA) and the Davenport Municipal Code (2014) does not authorize an award of attorney fees in the context of discriminatory housing practices. Schreurs argues the district court erred in concluding the municipal code and FHA do not entitle her to an award of attorney fees incurred during administrative proceedings and abused its discretion in refusing to award her attorney fees in the judicial-review proceeding.

Theresa Seeberger cross-appeals the same ruling. She asserts that holding her liable for her discriminatory statements violates the First Amendment to the United States Constitution and article I, section 7 of the Iowa Constitution because the statements she made amount to protected speech.

I. Background Facts and Proceedings

Seeberger purchased a three-bedroom residential property in Davenport, Iowa in 2011. After living in the residence for approximately one year, Seeberger married in October 2012 and moved into her spouse's home. Seeberger owned four cats at this time, but her spouse was allergic to them. Seeberger was not willing to give up her house or her cats, so she decided to retain ownership of the home and rent the rooms to tenants. After she began renting the property to tenants, she visited the property nearly every day to feed her cats. She also kept

much of her clothing and many of her furnishings in the home. In or about August 2013, Schreurs and her daughter moved into the property as tenants; the tenancy was not memorialized in a written agreement. At that time, there were also two other tenants residing in the home. Also around that time, Seeberger separated from her spouse and moved to a nearby apartment, where she lived until the end of August 2014. By mid-2014, Schreurs and her daughter were the only tenants in the home. Seeberger testified that, overall, Schreurs and her daughter were good tenants.

On or about September 16, 2014, Seeberger visited the home and discovered a bottle of prenatal vitamins on the kitchen counter. Seeberger took a photograph of the bottle, text messaged it to Schreurs, and questioned, "Something I should know about?" The following day, Seeberger returned to the home and asked Schreurs if she had received the text message. When Schreurs responded in the negative, Seeberger showed her the photograph of the prenatal vitamins. Schreurs excitedly advised Seeberger her daughter, around fifteen years old at the time, was pregnant. Seeberger, after contemplating the situation for "thirty seconds to a minute," angrily advised Schreurs, "You guys will have to be out in thirty days." Seeberger then stated, "You don't pay rent on time the way it is, now you're bringing another person into the mix." Seeberger also stated "she's taking prenatal vitamins, ... obviously you're going to keep the baby." Seeberger testified she was disappointed with Schreurs for her irresponsibility in allowing her young daughter to become pregnant. Seeberger also asserted she terminated the tenancy because she wanted her house back to herself. Seeberger testified she began drafting a notice to terminate Schreurs's

tenancy on September 15, but she did not tender the notice to Schreurs until after her discovery of the prenatal vitamins. In her interview with the Commission, however, she stated she did not draft this notice until September 18. This notice advised Schreurs she needed to vacate the property by October 19. Seeberger subsequently advised Schreurs she would start staying at the home on September 26.

On October 1, Seeberger, via text message, asked Schreurs whether one of her ex-boyfriends was the father of her grandchild-to-be. Schreurs came to the home with her boyfriend. At this time, Seeberger, who was at the home, confronted Schreurs, repeating her inquiry. This exchange upset Schreurs. Schreurs and her daughter were completely moved out of the home by October 5. After Schreurs and her daughter's eviction, Seeberger allowed another tenant to live in the home.

In November 2014, Schreurs filed a housing-discrimination complaint with the Commission alleging Seeberger discriminated against her on the basis of her familial status by making discriminatory statements. The complaint was amended in February 2015 and again in March. Her complaint and amended complaints noted they were filed pursuant to Davenport Municipal Code section 2.58.305(C) and Section 804(c) of the FHA.[1] Following its investigation, the Commission issued a probable cause finding of discrimination.

The matter proceeded to a public hearing before an administrative law judge (ALJ) in November. The ALJ concluded, with regard to Seeberger's statements on September 16 and 17, that "[a]n ordinary listener listening to [her]

[1] Codified at 42 U.S.C. § 3604(c).

statements would find her statements discriminatory on the basis of familial status" and "Seeberger engaged in a discriminatory housing practice by making the statements." The ALJ awarded Schreurs $35,000.00 in emotional-distress damages and imposed a civil penalty in the amount of $10,000.00. The ALJ subsequently awarded Schreurs $23,881.80 in costs and attorney fees pursuant to Davenport Municipal Code section 2.58.350(G).[2] The Commission approved the ALJ's decision in its entirety, with the exception of the award of damages, which it reduced to $17,500.00.

In February 2016, Seeberger filed a petition for judicial review. In her subsequent brief in support of her petition, Seeberger argued, among other things, that the agency action was unconstitutional because it violated her freedom-of-speech rights and the Davenport Municipal Code does not provide for an award of attorney fees prior to judicial review. In their briefings, Schreurs and the Commission argued Seeberger's statements were not protected speech and Schreurs was entitled to attorney fees under municipal code section 2.58.175(A)(8)[3] or, in the alternative, the FHA.

The district court entered a written ruling in July 2016. The court concluded (1) Seeberger's discriminatory statements amounted to commercial speech, their utterance was illegal, and they were therefore not protected by the First Amendment and (2) Davenport Municipal Code section 2.58.175(A)(8)

[2] This section, entitled "Fair Housing – Judicial Review," provides: "The [ALJ] or the court may at its discretion allow the prevailing party, other than the commission, reasonable attorney fees and costs resulting from any administrative proceeding brought under this section, any court proceeding arising therefrom, or any civil action."

[3] Schreurs and the Commission did not argue on judicial review that Schreurs was entitled to fees under the municipal code provision the ALJ actually awarded them, section 2.58.350(G).

"does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice." The court therefore vacated the attorney fee award.

Schreurs moved for additional findings. In her motion, she requested the court to reconsider her entitlement to attorney fees under the municipal code and expand its ruling to consider her argument that she was also entitled to attorney fees under the FHA. The Commission also moved for additional findings and requested the court to consider Schreurs's entitlement to attorney fees under Davenport Municipal Code section 2.58.350(G) and the FHA. Thereafter, pursuant to Davenport Municipal Code sections 2.58.175(A)(8) and 2.58.350(G) and the FHA, Schreurs requested an award of attorney fees incurred in the judicial-review proceeding.

Following a hearing, the district court denied all pending motions. With regard to Schreurs's entitlement to attorney fees under the FHA, the court ruled "the mere fact that the . . . complaint was cross-filed with the federal authorities does not expand the [Commission's] authority to award attorney fees beyond what is allowed by the city ordinance" and fees under the FHA "were unavailable to [Schreurs] in her state court proceeding." The court further concluded that the issue of Schreurs's entitlement to fees under municipal code section 2.58.350(G) was waived because the parties "chose not to argue this statutory basis for any claim for fees, relying instead entirely on § 2.58.175[(A)](8)." The court declined to reconsider its determination as to Schreurs's entitlement to fees under section 2.58.175(A)(8). Finally, the court declined both Seeberger and Schreurs's requests for attorney fees on judicial review. As noted, all parties appeal.

II. Standards of Review

We review constitutional claims under the First Amendment de novo. *See Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 6 (Iowa 2012). The sole question on appellate review of a district court's judicial review of an agency determination is whether the district court correctly applied the law. *See Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 164 (Iowa 1982). "To the extent we are asked to engage in statutory interpretation, our review is for correction of errors at law." *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017). Review of the district court's decision to not award attorney fees in the district court proceeding is for an abuse of discretion. *See Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 167 (Iowa 2006).

III. Freedom of Speech

Seeberger lodges an as-applied challenge to Davenport Municipal Code section 2.58.305(C), which provides it shall be unlawful to:

> Make, print, or publish, or cause to be made printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . or an intention to make any such preference, limitation or discrimination.

Seeberger argues her statements are not subject to the commercial-speech doctrine because they were inextricably intertwined with fully-protected speech or, in the alternative, if her statements amount to commercial speech, then the statements are still protected speech because they relate to a lawful activity.

The United States Supreme Court has recognized a "distinction between speech [involving] a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Cent. Hudson*

Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)). These other varieties of speech generally include communications concerning "politics, nationalism, religion, or other matters of opinion." *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed speech." *Cent. Hudson*, 447 U.S. at 563. However, where some commercial speech and some protected speech are "inextricably intertwined" as "component parts of a single speech," courts "cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988). Under such circumstances, the test for fully-protected speech is applicable. *Id.*

Seeberger does not contest that her statements were discriminatory and related to a commercial transaction. Instead, she contends her discriminatory, commercial statements to Schreurs were inextricably intertwined with fully-protected speech that she thought Schreurs was an irresponsible parent. Seeberger's first statement—by text message, and later in person—was, "Something I should know about?" The obvious context of the question was based on Seeberger's status as a landlord and Schreurs's status as a tenant. The exchange between them that followed cements the conclusion that all of Seeberger's remarks were in the context of their relationship as landlord and tenant. Although Seeberger also made reference to a history of Schreurs paying rent late, the context makes clear Schreurs's changing familial status was the

basis for the termination of the tenancy. While Seeberger may hold political, religious, or other beliefs the expression of which might be protected in some contexts, the statements made to Schreurs were plainly directed at telling Schreurs her tenancy was being terminated because of her familial status.

Seeberger testified she was disappointed with Schreurs for her irresponsibility in allowing her young daughter to become pregnant.[4] Seeberger's statements, on their face, do not indicate that her speech was non-commercial in nature or was otherwise based on a matter of religion, ideology, or philosophy, or on a position concerning responsible parenting. Rather, her September 17 statements purely amounted to her pronouncement to Schreurs that her familial status was the primary basis for terminating Schreurs's tenancy. We conclude Seeberger's statements were not inextricably intertwined with any form of fully-protected speech. Seeberger's concession that the statements terminating the tenancy were commercial in nature, together with our conclusion that such statements were not inextricably intertwined with protected speech, necessitate the application of the commercial-speech analysis laid out in *Central Hudson*.

For commercial speech to be protected by the First Amendment, "it at least must concern lawful activity and not be misleading." *Cent. Hudson*, 447 U.S. at 566.[5] Our only concern in this case is whether the statement concerned

[4] Our analysis is based on the words spoken to Schreurs in the course of Seeberger's termination of the tenancy, and not on Seeberger's later testimonial characterizations.

[5] "The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183–84 (1999).

a lawful activity. Seeberger concedes that her statements were in violation of Davenport Municipal Code section 2.58.305(C), which prohibits all landlords from making discriminatory statements in relation to the rental of a dwelling. She argues, however, because she owned fewer than four single-family homes, the actual termination of Schreurs's tenancy on the basis of her familial status was not illegal and, as such, the statement concerned a lawful activity. *See* Davenport, Iowa Mun. Code § 2.58.310(A)(1)(a) ("Nothing in subsection 2.58.305 of this Chapter *other than subsection 2.58.305(C)* shall apply to . . . [a]ny single-family house sold or rented by an owner provided that . . . [t]he private individual owner does not own more than three (3) such single-family houses at any one time." (emphasis added)). For the purposes of Seeberger's as-applied challenge, we will assume without deciding that her statements concerned a lawful activity.

The next step in the *Central Hudson* test "asks whether the asserted governmental interest served by the speech restriction is substantial." *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 185. The Commission argues the interest in prohibiting discriminatory statements in housing is substantial. The Iowa Supreme Court has stated the government has a substantial interest in preventing discrimination in employment. *Baker v. City of Iowa City*, 867 N.W.2d 44, 54 (Iowa 2015). We conclude the government's interest in preventing discriminatory statements in housing is at least equally substantial to its interest in preventing discrimination in employment.

Finally, we are required to determine if the ordinance advances the objective of preventing discriminatory statements in housing and, if so, whether it

is more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. The ordinance clearly advances the objective of preventing the making of discriminatory statements in housing. This is so even though the ordinance does not effectually prohibit discrete discrimination in all housing transactions. As applied in this case, the ordinance simply renders it unlawful to make any statement with respect to the "rental of a dwelling that indicates any preference, limitation, or discrimination based on" familial status "or an intention to make any such preference, limitation or discrimination." Davenport, Iowa Mun. Code § 2.58.305(C). As Seeberger correctly points out, landlords owning no more than three single-family homes may legally discriminate in housing decisions on the basis of familial status, so long as they do not make a statement to that effect. *Id.* §§ 2.58.305(C), .310(A)(1)(a). The challenged ordinance merely prohibits landlords from subjecting prospective tenants to the stigmas associated with knowingly being discriminated against. For these reasons, we find the ordinance is not more extensive than necessary to serve the substantial interest of preventing discriminatory statements in housing transactions.

As such, we conclude the ordinance is not an unconstitutional infringement upon Seeberger's freedom-of-speech rights. We therefore affirm the district court's decision to uphold Seeberger's liability under the ordinance.

IV. Attorney Fees

A. Administrative Proceedings

Schreurs and the Commission contend Schreurs was entitled to attorney fees incurred in the administrative proceeding under Davenport Municipal Code sections 2.58.175(A)(8) and 2.58.350(G) or, in the alternative, the FHA. The

district court considered the argument under section 2.58.350(G) waived and concluded fees under the FHA were unavailable. The court also concluded section 2.58.175(A)(8) "does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice." The court reasoned section 2.58.175, entitled "Remedial Action," only concerns unfair or discriminatory practices in areas other than housing.

Chapter 258 of the municipal code is set out in three divisions: (1) general provisions, (2) unfair practices, and (3) fair housing. We first focus on division two, unfair practices, which is comprised of sections 2.58.100 through 2.58.190. Section 2.58.175 falls within division two. The first four sections concern unfair practices in employment, accommodations or services, credit, education, and aiding or abetting. *See id.* §§ 2.58.100, .110, .120, .125, .130. The next section relates to retaliation, and specifically includes housing matters, as does the following section, which concerns complaint procedures. *Id.* §§ 2.58.140, .150. The next two sections govern conciliation and public hearing; neither section excludes housing complaints, and our review of the record indicates both sections applied in this case. *See id.* §§ 2.58.160, .170. The public hearing provision provides that, if

> the hearing officer determines that the respondent has engaged in a discriminatory or unfair practice, the hearing officer shall . . . issue an order in writing requiring the respondent . . . to take the necessary *remedial action* as in the judgment the hearing officer will effectuate the purposes of *this chapter*.

Id. § 2.58.170(J) (emphasis added). Thereafter, the Commission reviews the decision and, if in agreement with the hearing officer, "shall issue an order requiring the respondent . . . to take necessary *remedial action* as in the

judgment of the commission will carry out the purposes of *this chapter*." *Id.* § 2.58.170(L) (emphasis added).

Next is the remedial action provision, which provides, "The *remedial action* ordered by the Commission may include . . . [p]ayment to the complainant of . . . reasonable attorney fees [and] payment of costs of hearing." *Id.* § 2.58.175(A)(8)–(9). Another provision in the remedial action section allows the Commission to order, obviously in relation to housing cases, the "[s]ale, exchange, lease, rental, assignment or sublease of real property to an individual." *Id.* § 2.58.175(A)(4). The section also provides specific remedial actions in relation to employment, credit, education, and public accommodations. *Id.* § 2.58.175(A)(1), (2), (3), (5), (7). The final two sections of division two govern judicial review and court enforcement. *See id.* §§ 2.58.180, .190. Again, housing complaints are not specifically exempted from these provisions.

On the other hand, division three of chapter 258, governing fair housing, includes a provision that, "[i]f the administrative law judge finds that a respondent has engaged in or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, *which may include* actual damages and injunctive or other equitable relief." *Id.* § 2.58.340(F)(3) (emphasis added).

Despite these dual and differing modes for relief, based on the plain language and statutory scheme of the ordinance, we conclude the remedial action provision in division two, section 2.58.175, encompasses all areas of discrimination, including housing. Because the section provides specific remedies for each of the differing areas, we conclude the overall remedies

included in subsections 8 and 9 cover all of those differing areas. We therefore reverse the district court's determination that Schreurs was not entitled to the attorney fees incurred in the administrative proceeding. Because the district court noted its "disposition render[ed] moot [Seeberger's] alternative argument that the fee award was excessive," we remand the case to the district court to determine whether the attorney-fee award was excessive. *See De Stefano v. Apartments Downtown, Inc.*, 879 N.W.2d 155, 191 (Iowa 2016). This disposition makes it unnecessary for us to decide whether Schreurs was entitled to attorney fees under 2.58.350(G) or, in the alternative, the FHA.

B. Judicial-Review Proceeding

Finally, Schreurs argues the district court abused its discretion in refusing to award her attorney fees in the judicial-review proceeding. Pursuant to Davenport Municipal Code section 2.58.350(G), "the court *may* at its discretion allow the prevailing party . . . reasonable attorney fees and costs resulting from" a judicial-review proceeding. (Emphasis added.) "[F]ee provisions using the word 'may' place the decision about whether to award *any* attorney fees within the sound discretion of the district court." *Lee v. State*, 874 N.W.2d 631, 644 (Iowa 2016). Similar to the FHA, an award of attorney fees in a judicial-review proceeding under the Davenport Municipal code is not mandatory. *See id.* at 644–45 (noting that when a "fee provision employs the word 'shall' instead of the word 'may,' it *requires* the district court to award attorney fees"); *see also* 42 U.S.C. § 3612(p). Because the ordinance renders any award of attorney fees discretionary, "[r]eversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable." *GreatAmerica*

Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc., 691 N.W.2d 730, 732 (Iowa 2005) (quoting *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000)).

In its ruling on attorney fees, the district court noted its prior affirmance of the determination concerning Seeberger's liability, but also its reversal of the Commission's award of damages and remand for reconsideration. With this dichotomy in mind, the district court determined neither party was the "prevailing party" in the judicial-review proceeding and therefore entitled to attorney fees. We do not find this ground for denying an award of attorney fees clearly unreasonable or untenable. We therefore affirm the district court's denial of Schreurs's request for attorney fees in the judicial-review proceeding.

V. Conclusion

In sum, we conclude the challenged ordinance is not an unconstitutional infringement upon Seeberger's freedom-of-speech rights and affirm the agency and district court's findings of liability. We reverse the district court's determination that Schreurs was not entitled to the attorney fees incurred in the administrative proceeding and remand the matter to the district court to consider whether the attorney-fee award was excessive. We affirm the district court's denial of Schreurs's request for attorney fees in the judicial-review proceeding.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED ON APPEAL; AFFIRMED ON CROSS APPEAL.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1534	Seeberger v. Davenport Civil Rights Commission

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

THERESA SEEBERGER, **Petitioner,** **vs.** **DAVENPORT CIVIL RIGHTS COMMISSION,** **Respondent,** **MICHELLE SCHREURS,** **Intervenor.**	**CASE NO. CVCV 51252** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a judicial review proceeding in which the petitioner seeks judicial review of a decision of the respondent dated January 7, 2016 in which it approved a decision of an administrative law judge that the petitioner had engaged in discriminatory conduct directed at the intervenor on the basis of familial status and which ordered emotional distress damages, the assessment of a civil penalty and assessed attorney fees and costs. The petitioner contends that the decision of the respondent should be reversed on the following grounds: 1) the decision was based in part upon an erroneous interpretation of the applicable language in the city ordinance at issue; 2) the ordinance in question violates the petitioner's rights to free speech, violates the home rule provisions of the Iowa Constitution and violates the petitioner's rights to substantive due process; 3) the award of emotional damages and attorney fees were both improper and excessive; 4) the decision was not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy; 5) the

decision was unreasonable arbitrary, capricious and an abuse of discretion; and 6) the decision was the product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose or were subject to disqualification. Iowa Code §17A.19(10)(a), (c), (e), (k), (n) (2015).

Background facts. The petitioner has not challenged the sufficiency of the findings of fact upon which the respondent's decision is based. Accordingly, this court assumes that these findings are so supported and is bound by them on judicial review. Palmer College of Chiropractic v. Davenport Civil Rights Comm'n, 850 N.W.2d 326, 332 (Iowa 2014); see also In re C.K., 2010 WL 1576850 *3 (Iowa Ct.App., Case No. 09-1367, filed April 21, 2010). From a review of the decision of the administrative law judge which was adopted by the respondent, the pertinent facts are as follows: The petitioner was the owner of a single family home located at 2314 North Ripley Street ("the property") in Davenport, Iowa, having purchased it in 2011. She lived in the property until November or December of 2012, when she moved into her spouse's residence. She decided to rent rooms at the property to tenants (the property has three bedrooms and is furnished). After she rented out the property, she continued to visit on a daily basis to feed her four cats that remained there.[1]

One of the petitioner's tenants was Peter King, who was dating the intervenor. The intervenor approached the petitioner about renting a room in the property; the petitioner eventually agreed to rent a room to the intervenor for $300 per month. At the time of this agreement, there were two other tenants at the property—King and Roberta Hodge. These tenants also paid $300 per month in rent. The intervenor did not have a written lease. The intervenor and her daughter (Trinity Crews) moved into the property

[1] Petitioner's spouse is allergic to cats.

in August of 2013. While she lived at the property, the intervenor took care of the petitioner's cats. Sometime around the time the intervenor moved into the property, the petitioner's marriage ended and she moved into an apartment a few blocks away from the property; she did not want to move into the property with her tenants, as she had lived alone for many years previously. Hodges moved out of the property in November of 2013 after a dispute with the petitioner. After she moved out, the petitioner increased the intervenor's rent to $450 per month, payable in two installments. King moved out of the property in June or July of 2014.

On September 16, 2014, while the petitioner was at the property, she saw a bottle of prenatal vitamins on the kitchen counter. She took a photograph of the bottle and sent the intervenor a text message asking, "Something I should know about?" The message was not received by the intervenor that day. The next evening, the petitioner, the intervenor and Crews were all at the property. The petitioner asked the intervenor if she had received the text message; the intervenor replied that she had not. When the petitioner showed the intervenor the picture of the bottle of vitamins, the intervenor advised the petitioner that Crews (who was 16 years old at the time) was pregnant. The petitioner responded by telling the intervenor, "You're going to have to leave." This was the first time the petitioner had told the intervenor she had to leave. When the intervenor asked why they would have to leave, the petitioner advised her, "You don't even pay rent on time the way it is, and…Now you're going to bring another person into the mix." The petitioner also made the comment to the intervenor that "she [Crews]'s taking prenatal vitamins,…obviously, you're going to keep the baby." The ALJ summarized the petitioner's testimony in this regard as follows:

> Seeberger testified she believes people should be responsible and that Schreurs should have been more responsible in preventing her teenage daughter from becoming pregnant. Seeberger reported she was disappointed with Schreurs and believes Schreurs took advantage of her because she was paying less rent than she would anywhere else.

At some point after the interaction on September 16-17, the petitioner provided the intervenor with a written notice (dated September 15, 2014) advising her that her lease expires on October 19, 2014 and that all her possessions must be removed by 5:00 p.m. on that date. At the bottom of this notice, the petitioner added the following handwritten note: "No more rent. Save your $ to find a new home."

On September 23, 2014, the petitioner sent the intervenor a text message advising her as follows:

> Laura is moving everything out of her apartment Friday morning, so starting Friday night I will be staying at Ripley. I would like to set up my bed in one of the bigger rooms. I would appreciate if you could get one of them completely empty by Friday. Whichever is easier. Let me know if you that's possible. Thanks.

A follow-up text message was sent by the petitioner to the intervenor on Friday, September 26, 2014; the intervenor responded she would not be able to move her belongings that day. On October 1, 2014, the petitioner sent the intervenor a text message telling her that her rent was due in full. The intervenor responded, "Per our verbal agreement half is due the first week of the month on Friday when I get paid." The petitioner responded as follows:

> What verbal agreement? I recall no such thing. You guys are as bad as Roberta—amazing. First you want practically a free house. Now free lawyer. It's a shame you have to

> use everyone. I asked Peter if he was the father and he didn't deny it….

The petitioner's comment about King being the father of Crews' child upset the intervenor because Crews had been sexually abused by her ex-husband, who was incarcerated.

Later that evening, the intervenor returned to the property with her boyfriend, Jason Alton. The petitioner was at the property when they arrived; in the ensuing altercation that eventually resulted in the police being called, the petitioner asked the intervenor once again, "Is Peter the father of the baby?" The intervenor ultimately moved out of the property on October 5, 2014. She lived with her parents for five months until she could secure housing of her own. She testified that she was very emotional and cried a lot after she moved out. She had previously taken medication for anxiety and depression; her prescription for anxiety medication was increased after she moved out. She also suffered from Crohn's disease, colitis, gastritis and psoriasis.

Underlying and related proceedings. The intervenor filed a complaint with the respondent on November 14, 2014, alleging that the petitioner made discriminatory statements against her related to the rental of a dwelling based on familial status. On March 13, 2015, the respondent determined that probable cause existed to show that the petitioner had made such statements as alleged. On June 22, 2015, the intervenor's complaint was set for hearing on August 24, 2015 before Administrative Law Judge Heather Palmer; that hearing was ultimately continued to November 4, 2015.

On October 16, 2015, the petitioner (through counsel[2]) filed a civil lawsuit against the City of Davenport and the respondent, challenging the validity of the proceedings resulting from the intervenor's complaint. On October 20, the petitioner sent a text message to Tim Hart, the chairperson of the respondent, which read as follows:

> Hi Tim—As you likely know I'm the subject of an upcoming hearing before the commission. I'm filing a lawsuit against the city and the commission. You are the person that needs to be served. Would you be willing to accept service or do you want me to have you served with the petition? Let me know—Thanks—Theresa Seeberger

The executive director for the respondent, Latrice Lacey, contacted the petitioner's counsel (with a copy to ALJ Palmer) on the evening of October 20, calling into question the propriety of the petitioner's contact with Hart. Both counsel and the petitioner responded the next day, pointing out that intervenor's counsel and the ALJ had been copied in on the message and that it only involved the issue of service. Lacey replied to these communications (again copying in Palmer) on the evening of October 21 as follows:

> Mr. Motto, your client's communication with the Chair of the Davenport Civil Rights Commission violates Rules 32:4.2(a) and 32:3.5 of the Iowa Rules of Professional Conduct. She should not be contacting members of the Commission directly as they are represented by the Director as their counsel. Further, her threats of litigation appear to be a bullying tactic employed to influence the Commissioner in his official capacity as a decision maker in this proceeding.
>
> If there is any further communication with any of the Commissioners regarding this proceeding, I will have no other choice but to report her conduct.

[2] The petitioner is a practicing attorney with an office in West Branch, Iowa; in addition, she serves as a magistrate for Cedar County.

On October 23, ALJ Palmer filed a complaint form with the Iowa Supreme Court Disciplinary Board regarding the petitioner; in that complaint, she forwarded on the correspondence between the parties and counsel that she had been copied in on. In addition to this correspondence, Palmer noted:

> I do not have additional information concerning Seeberger's contact with a Commissioner of the Davenport Civil Rights Commission. The Commission will receive the appeal following the hearing scheduled for November 4-5, 2015 in Davenport.

The petitioner was notified on October 26 of the filing of the complaint by Palmer, and was provided with a copy. No effort was made prior to or at the November 4-5 hearing to seek the disqualification or recusal of ALJ Palmer as the presiding officer over that hearing.

ALJ Palmer issued her finding and conclusions on December 11, 2015. She concluded that the petitioner had violated Davenport City Ordinance §2.58.305(C)[3], which provides as follows:

> It shall be unlawful:
> ….
> C. To make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation or an intention to make any such preference, limitation or discrimination.

In reaching her conclusions, ALJ Palmer reasoned as follows:

[3] Palmer initially concluded that the "small landlord" exemption under the ordinance were not applicable to the present dispute, as the city ordinance specifically excludes §2.58.305(C) from the exemption. Davenport City Ordinance §2.58.310(A) ("Nothing in subsection 2.58.305 of this Chapter other than subsection 2.58.305(C) shall apply to….)

> Seeberger's statements on September 16 and 17, 2014, related to Schreur's rental of the Subject Property. Seeberger immediately terminated Schreur's tenancy after finding out her teenage daughter was pregnant. Seeberger testified she was disappointed with Schreurs and believed Schreurs had taken advantage of her. Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant. During the hearing Seeberger testified adding a third person to the family was no different than if Schreurs had purchased a new Cadillac. Seeberger testified she would not take a vacation she could not pay for in advance. An ordinary listener listening to Seeberger's statements would find her statements discriminatory on the basis of familial status. Seeberger engaged in a discriminatory housing practice by making the statements.

Earlier in her decision, ALJ Palmer rejected as not credible the petitioner's testimony that she had completely moved back into the property by the time of the discussion of the pregnancy and was sleeping on the sunporch; this credibility determination was based on conflicting testimony from other witnesses and the inconsistencies in the petitioner's own testimony. ALJ Palmer also rejected the petitioner's argument that she terminated the intervenor's tenancy because she wanted to have the house back just for herself, because the intervenor was "a little bit messy," that Crews had left the oven on twice and because the intervenor was routinely late in her rent.

ALJ Palmer awarded the intervenor $35,000 in emotional distress damages and the maximum civil penalty (for a first offense) of $10,000 based on the following reasoning:

> Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents. Schreurs has a history of anxiety, depression, psoriasis, Crohn's disease, colitis, and gastritis. Her

> conditions were aggravated by the termination of her tenancy.
> ….
> While this is Seeberger's first violation, this is not a typical case of discrimination. Seeberger intentionally discriminated against Schreurs based on her familial status by making discriminatory statements in housing. Seeberger's lack of candor during the investigation and hearing is disconcerting. Seeberger did not present any evidence of her current financial circumstances. Imposition of a $10,000 civil penalty is appropriate.

On December 23, 2015, the intervenor made application for attorney fees and costs pursuant to Davenport City Ordinance 2.58.350(G). In a ruling filed on December 31, 2015, ALJ Palmer awarded the intervenor $23,200 in attorney fees and $681.10 in costs. The respondent issued its final decision on January 7, 2016. In its decision, the respondent "approve[d] the Hearing Officer's decision in its entirety with exception to a reduction in the award of emotional distress damages to $17,500." No further explanation was provided for the reduction; in all other respects, the decision of the ALJ was summarily approved and adopted by the respondent. A timely petition for judicial review was filed in the present proceedings on February 5, 2016.

ISSUES PRESENTED FOR REVIEW

Statutory interpretation. The petitioner argues that the respondent incorrectly interpreted a number of terms within the applicable ordinances, including "aggrieved person," "familial status," "statement" and "dwelling." Ordinarily, the standard of review for such an argument would depend on whether the respondent had been clearly vested with the discretion to interpret the authorities at issue. Eyecare v. Dep't of Human Services, 770 N.W.2d 832, 835 (Iowa 2009). If, after this review, the court has a "firm conviction" that the legislature intended or would have intended to delegate to the agency

"interpretive power with the binding force of law over the elaboration of the provision in question," that power has been clearly vested with the agency. NextEra Energy Resources LLC v. Iowa Utilities Board, 815 N.W.2d 30, 37 (Iowa 2012) (citation omitted). If interpretative authority has been found to have been clearly vested with the agency, any such interpretations may be reversed only if found to have been irrational, illogical or wholly unjustifiable. Iowa Code §17A.19(10)(l) (2015). On the other hand, if this conclusion is not forthcoming, the court grants no deference to the agency and reviews for corrections of errors at law. NextEra, 815 N.W.2d at 38. In that instance, the court is free to substitute its judgment de novo for the agency's interpretation. Bearinger v. Iowa Dep't of Transp., 844 N.W.2d 104, 105 (Iowa 2014).

However, as the respondent and intervenor point out, the petitioner is making this argument for the first time on judicial review, which typically results in a failure to preserve error and waiver of the issue. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 382 (Iowa 1986). The petitioner conceded at hearing that this issue had not been raised before the agency, but argued that the ability to interpret the legal authorities in question goes to the subject matter jurisdiction of the agency, which can be raised at any time. See TMC Transp. v. Davidson, 2006 WL 334178 *1 (Iowa Ct.App. Case No. 04-1044, filed February 15, 2006); Heartland Express, Inc. v. Terry, 631 N.W.2d 260, 265 (Iowa 2001).

The petitioner's argument is misplaced. As applied in an administrative context, subject matter jurisdiction is the power of an agency to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the agency's attention. Klinge v. Bentien, 725 N.W.2d 13, 15 (Iowa

2006). Whether the respondent had subject matter jurisdiction over the matter at hand is dependent on whether the ordinances in question empowered it to hear and determine the kind of complaint filed against the petitioner by the intervenor. Alberhasky v. City of Iowa City, 433 N.W.2d 693, 695 (Iowa 1988); see also MC Holdings, LLC v. Davis County Bd. of Review, 830 N.W.2d 325, 329 (Iowa 2013) (subject matter jurisdiction of an administrative agency is authority conferred by statute).

On the other hand, when an agency interprets an ordinance in order to determine whether a particular dispute is or is not meritorious as measured against that statutory standard, it is merely exercising its authority to resolve that particular case as compared to the class of all such cases. Alliant Energy-Interstate Power and Light Co. v. Duckett, 732 N.W.2d 869, 874-75 (Iowa 2007); see also Comm'r of Political Preferences for State ex rel. Motl v. Bannan, 380 Mont. 194, 196, 354 P.2d 601, 603 (2015) ("The District Court is not deprived of subject matter jurisdiction when asked to address issues of statutory interpretation and construction"); MHM & F, LLC v. Pryor, 168 Wash.App. 451, 460, 277 P.3d 62, 67 (2012). Any defect in this authority can be waived if not raised through a timely objection. Alliant, 732 N.W.2d at 875. Accordingly, the petitioner has failed to preserve error on this issue.

Constitutional issues. The petitioner raised three constitutional issues before the administrative law judge: 1) Davenport City Ordinance §2.58.305(C) as applied violated her constitutional rights to free speech; 2) Davenport City Ordinance §2.58.310 violates Article III, §38A of the Iowa Constitution as an exercise of municipal power that is irreconcilable with state law; and 3) application of the ordinance violated her substantive due process rights. ALJ Palmer and ultimately the respondent appropriately deferred on

these constitutional issues, leaving them for this court to analyze on judicial review. Soo Line R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685, 688 (Iowa 1994); Shell Oil Co. v. Bair, 417 N.W.2d 425, 429 (Iowa 1987). Despite this lack of authority, constitutional issues must be preserved with the agency for judicial review; a review of the record reveals that these issues have been so preserved. McCracken v, Iowa Dep't of Human Services, 595 N.W.2d 779, 785 (Iowa 1999).

In her first constitutional argument, the petitioner contends that §2.58.305(C) of the city ordinance violates her rights under the First Amendment[4] as a content-based restriction on speech. There appears to be no dispute between the issues on this preliminary issue, in that it is clear that the ordinance "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." State v. Musser, 721 N.W.2d 734, 743 (Iowa 2006) (citations omitted); see also Campbell v, Robb, 162 Fed.Appx. 460, 468 (6th Cir. 2006) (comparable version of Fair Housing Act [42 U.S.C. §3604(c)] "is clearly a content-based speech regulation in that it allows landlords to express certain preferences while outlawing others").

The petitioner goes on to argue that this restriction must be analyzed using the highest level of constitutional scrutiny (based on a compelling state interest); however, this argument misses the point. Such scrutiny is not required where, as here, commercial speech is being restricted. Her claim that her statements are non-commercial presupposes a factual scenario expressly rejected by the respondent—namely, that she lived in the house with the intervenor and was a roommate rather than a landlord. Her inquiries into and statements concerning the pregnancy of the intervenor's daughter and their ultimate

[4] While the petitioner argues a free speech violation under both the federal and Iowa constitutions, she concedes that there is no need to differentiate between them in terms of the constitutional analysis required. See State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009).

impact on the continuation of the tenancy pertain directly to the commercial transaction between landlord and tenant, which has been held to clearly fall within the "core notion of commercial speech." Bolger v, Youngs Drug Products Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983); see also Campbell, 162 Fed.Appx. at 469 ("a statement made by a landlord to a prospective tenant describing the conditions of rental is part and parcel of a rental transaction").

As the petitioner's statements constitute commercial speech, they are subject to a lesser scrutiny test to pass constitutional muster:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). It is well-settled that discriminatory statements made in the context of housing are illegal and therefore cannot meet the first part of the Central Hudson four-part test. Campbell, 162 Fed.Appx. at 470 (discriminatory statements made to prospective tenant "akin to a want ad proposing a sale of narcotics or soliciting prostitutes") (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, 93 S.Ct. 2553,2560, 37 L.Ed.2d 669 (1973)); see also Ragin v. New York Times Co., 923 F.2d 995, 1002-03 (2nd Cir. 1991) (publishing advertisements that indicate a racial preference furthered illegal discrimination and were not protected commercial speech). The statements made by the

petitioner to the intervenor which formed the basis for her liability under §2.58.305(C) are not protected under the First Amendment.

The petitioner's next constitutional argument is that Davenport City Ordinance §2.58.310 violates the home rule provisions of the Iowa Constitution, which provides that municipalities "are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government,…." Iowa Const., art. III, §38A. Specifically, the petitioner argues that the exclusion from the exemption in §2.58.310 for liability under §2.58.305(C) is inconsistent with the scope of liability for unfair or discriminatory practices in housing under the Iowa Civil Rights Act, which does not extend to "[t]he rental or leasing of less than four rooms within a single dwelling by the occupant or owner of the dwelling, if the occupant or owner resides in the dwelling." Iowa Code §216.12(1)(c) (2015). An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with that law; which in turn requires that the ordinance prohibits an act permitted by statute or permits an act prohibited by a statute. Baker v. Iowa City (Baker I), 750 N.W.2d 93, 99-100 (Iowa 2008).

The petitioner's argument fails on both factual and legal grounds. First, once again it presupposes the rejected argument that the petitioner lived at the property with the intervenor and her daughter. Thus, §216.12(1)(c) does not even come into play. However, even if it did, the Iowa Civil Rights Act specifically provides that a municipality may provide by ordinance for broader or different categories of unfair or discriminatory practices. Iowa Code §216.19(1)(c) (2015). As a result, the city of Davenport is within its rights to prohibit discriminatory statements based on familial

status made by persons who might otherwise come within §216.12(1)(c). Accordingly, the petitioner has not established a violation of the home rule provisions of the Iowa Constitution.

The petitioner's final constitutional issue is that §2.58.305(C) violates her substantive due process rights under the federal constitution; specifically, that it impinges upon her constitutional rights of association. This argument has been summarized in petitioner's brief as follows:

> There is no indication that the City of Davenport intended to interfere with personal relationships where an individual is selecting someone who will reside with another individual sharing the same living space. Because Seeberger had personal belongings and her pets at the [property], and was free to come and go as she pleased, she is entitled to constitutional protection.

Once again, this argument assumes that the petitioner enjoys the status of a roommate of the intervenor rather than the status found by the respondent—her landlord. Just as the right to hire someone in violation of a city's anti-discrimination ordinance is not a fundamental right, see Baker v. Iowa City (Baker II), 867 N.W.2d 44, 55 (Iowa 2015), neither is the right to make statements to a tenant in violation of the ordinance in question. In the absence of a fundamental right, there need only be a rational basis between the ordinance and the furtherance of a legitimate state interest. Id. at 55-56 (citation omitted).

The city clearly has a legitimate interest in prohibiting discriminatory statements related to housing based on familial status. See Senior Civil Liberties Ass'n, Inc. v. Kemp, 761 F.Supp. 1528, 1557 (M.D.Fla. 1991) ("[T]he primary purpose and basis of the familial status provisions of the [Fair Housing] Act…is to provide a remedy for the

widespread housing discrimination against families with children"); Rackow v. Illinois Human Rights Comm'n, 152 Ill.App.3d 1046, 1060, 504 N.E.2d 1344, 1354, 105 Ill.Dec. 826, 836 (1987) ("Plaintiffs, while raising a legitimate interest in the right to use their property as they see fit, are unable to demonstrate that their personal property rights outweigh the public need of assuring fair and equal housing opportunities and avoiding discrimination on the basis of family status") (statute upheld under rational basis test). As a result, §2.58.305(C) does not violate the petitioner's substantive due process rights.

Award of damages and attorney fees. It must be remembered that under the administrative scheme set out in the ordinances in question, the petitioner is exempt from liability for the termination of the tenancy between herself and the intervenor based on familial status, and that any liability can only extend to discriminatory statements made by the petitioner on such a basis. See Davenport City Ordinance §2.58.310 (exemption for liability under §2.58.305(A), (B), (D), (E) and (F) for small landlords); cf. id. at §2.58.305(A) (making denial of housing based on familial status unlawful). Accordingly, any damages awarded to the intervenor on a finding of liability under §2.58.305(C) can only causally relate to the discriminatory statements, not the termination of the tenancy. H.U.D. v. Denton, 1992 WL 406537 *9 (H.U.D.A.L.J., Case Nos. 05-90-0012-1 and 05-90-0406-1, decided February 7, 1992); H.U.D. v. Dellipaioli, 1997 WL 8260 *9 (H.U.D.A.L.J., Case No. 02-94-0465-8, decided January 7, 1997) (damages discounted to reflect award limited to act of making discriminatory statement, not denial of housing).

It is clear from a review of the decision of the ALJ that was adopted by the respondent that the damages that were awarded were tied to the termination of the tenancy by the petitioner, not just her discriminatory statements:

> Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents….Her [physical and mental] conditions were aggravated by the termination of her tenancy.

Although the respondent reduced the ALJ's award by half, there is no analysis that would reflect whether they differentiated between damages properly related to the discriminatory statement and improperly related to the termination of the tenancy. As a result, the award of damages to the petitioner was improper and should be reversed. As it is unclear whether the respondent's calculation of an appropriate civil penalty may have relied upon such an improper causal connection, that penalty should also be reversed. See May v. Colorado Civil Rights Comm'n, 43 P.3d 750, 758-59 (Colo. 2002).

The petitioner also challenges the award of attorney fees on the basis that there is no authority for such an award within the city ordinance. The respondent and intervenor both rely upon a recent amendment to the ordinance that provides for such fees. Davenport City Ordinance §2.58.175(8) [5]; see also Bostko v. Davenport Civil Rights Comm'n, 774 N.W.2d 841, 845 n. 2 (Iowa 2009). The provision for attorney fees in §2.58.175(8) comes within that part of the ordinance titled, "Remedial Action," and comes immediately after that part of the ordinance laying out the procedure for dealing with complaints of unfair practices in areas other than housing. Davenport City Ordinance §2.58.170. That procedure is different than that set out when the complaint deals with allegations of unfair or discriminatory practices in housing. See id. at §2.58.340. The procedure followed in the present dispute on an allegation of discriminatory practices in housing does not afford the administrative law judge with the

[5] The original request was pursuant to §2.58.350(G); it appears from the briefing that all parties concede that this section has no applicability to the issue of attorney fees in the present context.

authority to assess attorney fees and expenses on a finding that such a practice has taken place; the relief available is limited to an award of actual damages, equitable or injunctive relief and the assessment of a civil penalty. Id. at §2.58.340(F)(3). As a result, the court agrees with the petitioner that the city ordinance does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice. Bostko, 774 N.W.2d at 845 (reference to the court's "stringent approach to attorney fees").[6] The attorney fee award is therefore reversed.[7] The assessment of costs is not affected by this ruling.

Private rights versus public interest. An additional ground for reversal cited by the petitioner is where agency action is "[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from [the] action that it must necessarily be deemed to lack any foundation in rational agency policy." Iowa Code §17A.19(10)(k) (2015). As applied to the present dispute, the petitioner contends that a "full prosecution" of alleged discriminatory actions "should be saved for those most egregious examples of discrimination" and her private rights have been disproportionately impacted as a result of the present prosecution.

The starting point for an analysis under this statute is whether the challenged agency action is not required by law. See Zieckler v. Ampride, 743 N.W.2d 530, 533 (Iowa 2007). To the degree the petitioner challenges the ability of the respondent to proceed on a complaint alleging discriminatory practices in housing, one might wonder whether this argument even clears this preliminary hurdle. The respondent is required under the procedures set forth in the city ordinance governing housing complaints

[6] Bostko dealt with allegations of a hostile work environment; accordingly, the reference to the amendment to the ordinance in the footnote quoted above was appropriate. See id. at 843. The reference should not be construed as an approval of such fees in a context not covered by the scope of the amended ordinance.
[7] This disposition renders moot the petitioner's alternative argument that the fee award was excessive.

("shall") to investigate such complaints and provide for a hearing before an administrative law judge once probable cause has been found (absent an election by the complainant to proceed in a civil proceeding). Davenport City Ordinance §2.58.325(4)(d), §2.58.340(B)-(D).

Even assuming that the actions of the respondent may not have been entirely required by law, the court cannot conclude that the impact on the petitioner's rights have been disproportionately affected in comparison to the public interest. First, the "private rights" asserted by the petitioner relate to the debunked theory that she was merely sharing her home in which she lived with the intervenor. Second, any disproportionality argument is now premature since the award of damages and assessment of a civil penalty have been reversed as set forth above. As a result, the court is not persuaded that the conclusions reached by the respondent regarding the petitioner's discriminatory housing statements should be otherwise reversed pursuant to Iowa Code §17A.19(10)(k).

Unreasonable, arbitrary, capricious and abuse of discretion. Agency action can be reversed if "[o]therwise unreasonable, arbitrary, capricious or an abuse of discretion." Iowa Code §17A.19(10)(n) (2015). Such action is "unreasonable" if it is against reason and evidence as to which there is no room for difference of opinion among reasonable minds. Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 912 (Iowa 1987). Such action is "arbitrary" or "capricious" when it is made without regard to the law or underlying facts. Id. "Abuse of discretion" has been similarly defined as whether "the agency action was unreasonable or lacked rationality. Hough v, Iowa Dep't of Personnel, 666 N.W.2d 168, 170 (Iowa 2003). For the reasons noted above, this court has concluded that the damages awarded, as well as the assessment of a civil penalty and

attorney fees, were improper; they should also be reversed as otherwise unreasonable, arbitrary, capricious and an abuse of discretion.

Improper purpose/disqualification. The petitioner's final argument is that the conclusion of the respondent was the product of decision-making undertaken by persons who were motivated by an improper purpose or were subject to disqualification. Iowa Code §17A.19(10)(e) (2015). This argument is three-fold: 1) Lacey, as the executive director for the respondent, acted improperly in participating in the investigatory, prosecutorial and decision-making phases of the underlying proceeding; 2) Lacey improperly copied ALJ Palmer on correspondence between Lacey and the petitioner in which Lacey threatened to file an ethics complaint against the petitioner if she continued to contact individual members of the respondent; and 3) ALJ Palmer should have been disqualifying from presiding over the evidentiary hearing once she filed a grievance against the petitioner.

As to the first prong of this argument, it is well-settled under Iowa law that "there is no…violation[8] based solely upon the overlapping investigatory and adjudicatory roles of agency actors." Bostko, 774 N.W.2d at 849 (emphasis in original). In order to prove such a violation, "the challenging party must bear the difficult burden of persuasion to overcome the presumption of honesty and integrity in those serving as adjudicators." Id. The petitioner has offered no evidence in this regard, and has therefore failed to meet this heavy burden.

On the other hand, the combination of prosecutorial and adjudicative roles can be problematic:

[8] Bostko and its progeny have addressed this issue in the context of a due process violation. Even though the issue has been brought to the court's attention in the present case as part of the analysis under §17A.19(10)(e), the due-process analysis appears to be appropriate.

> A different issue is presented however, where advocacy and decision-making roles are combined. By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.

Hewitt v. Superior Court, 3 Cal.App.4th 1575, 1585, 5 Cal.Rptr.2d 196, 202 (1992) (emphasis in original) (quoted in Bostko, 774 N.W.2d at 850)). Or in other words, "[W]hen an agency staffer functions as an advocate, experience teaches that the probability of actual bias is too high to allow the staffer to also participate in the adjudicative process." Bostko, 774 N.W.2d at 852.

This record is devoid, however, that Lacey every participated in the adjudicatory process that led to the final decision of the respondent, beyond transmitting that decision to the parties once it was issued. There is, therefore, no indication that any "will to win" that may have been created through Lacey's role as an adversary tainted the deliberative process resulting in the final decision. Cf. id. at 853 (director's presence during deliberations "simply answering questions" after participating in hearing "as a second-chair advocate" for complainant created due process violation). Her absence from the adjudicatory process also eliminates her transmittal of the email to ALJ Palmer as a grounds for challenging the final decision of the respondent.

What remains in this regard is the impact of ALJ Palmer's decision to remain as the presiding officer after she in turn filed an ethics complaint against the petitioner. Preliminarily, it is clear to the court that this issue has not been preserved for judicial review.[9] Even though the petitioner was advised that ALJ Palmer had filed the complaint

[9] The issue of error preservation may be raised by the court despite a party's omission to raise it as part of these proceedings. Bontrager Auto Service, Inc. v. Iowa City Bd. of Adjustment, 748 N.W.2sd 483, 486-87 (Iowa 2008); Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000) (error preservation rules "are also designed to preserve judicial resources by avoiding proceedings that would have been

against her in advance of the evidentiary hearing, no effort was made to seek her recusal. Her failure to address this issue waives any error on this ground on judicial review. Berger v. Dep't of Transp., 679 N.W.2sd 636, 641 (Iowa 2004).

Summary and disposition. The court has addressed all of the issues presented by the petitioner on judicial review. As a result of that review, there is no basis for reversing the respondent's decision that the petitioner made discriminatory statements based on familial status to the intervenor in violation of §2.58.305(C). The court will reverse the respondent's damage award and assessment of a civil penalty for the reasons noted above. As the court is not in a position to resolve an appropriate damage award and civil penalty as a matter of law, this matter shall be remanded to the respondent on the record already made so that a proper determination can be made. IBP, Inc. v. Burress, 779 N.W.2d 210, 220 (Iowa 2010); Armstrong v. State of Iowa Bldgs. and Grounds, 382 N.W.2d 161, 165 (Iowa 1986). The attorney fee award is reversed and vacated for the reasons noted.

IT IS THEREFORE ORDERED that the final decision of the respondent dated January 7, 2016 is affirmed in part and reversed in part, and this matter is remanded to the respondent for further proceedings consistent with this ruling. The costs of this judicial review proceeding are assessed equally between the petitioner, respondent and the intervenor.

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rendered unnecessary had an earlier ruling on the issue been made. Consequently, there is more at stake than simply the interests of the opposing party").

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV051252	THERESA SEEBERGER VS DAVENPORT CIVIL RIGHTS COMM

So Ordered

Michael D. Huppert, District Court Judge,
Fifth Judicial District of Iowa