IN THE SUPREME COURT OF IOWA

No. 16-1534
Polk County No. CVCV051252

THERESA SEEBERGER,
Petitioner-Appellee/Cross-Appellant,

vs.

DAVENPORT CIVIL RIGHTS COMMISSION,
Respondent-Appellant/Cross-Appellee,

and

MICHELLE SCHREURS,
Intervenor-Appellant/Cross-Appellee.

RESPONDENT-APPELLANT/CROSS-APPELLEE'S RESISTANCE TO 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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A. Whether the Court of Appeals correctly ruled that Seeberger's statements were entirely commercial speech and thus properly regulated.

B. Whether Seeberger's argument survives the Central Hudson test.

II. Whether attorney's fees are permissible remedies under the Davenport Civil Rights Ordinance.

A. Whether the Court of Appeals correctly ruled that the Commission Has the Authority to Award Attorney Fees Under the Davenport Municipal Ordinance.

STATEMENT OF THE FACTS

Teresa Seeberger rented her home to tenants from 2012 until 2015. Michelle Schreurs, the Complainant and her daughter, Trinity Crews were Seeberger's tenants from September 2013 to mid-October 2014 when they were evicted due ti Crews' pregnancy. *App. P. 19 @ P. 28; Video-Audio Tape of Judicial Hearing, Schreur's Testimony, Disk 2 at Minute 36:46; App. P. 18 @. pp. 23-24; App. P. 51.* In the administrative proceeding below, the administrative law judge left the record open for the Commission's assessment of the costs of the hearing, and recommended that the Commission award Ms. Schreurs' attorney fees and costs of $23,881.80. *App. P. 146, 152, 153.* On January 7, 2016, the Commission adopted and affirmed the administrative law judge's decision on attorney fees. *App. 152.* On February 9, 2016, the Commission assessed administrative hearing costs in the amount of $8,280.22 to Ms. Seeberger. The District Court ruled that the Commission did not have authority to award attorney fees to Ms. Schreurs and vacated the award. *Dist. Ct. Op. 17.* The Court of Appeals affirmed the Commission and District Court's liability findings. *App. Op. 15.* The Court of Appeals found that the Davenport Municipal Ordinance is not an unconstitutional infringement upon Seeberger's freedom of speech

rights and reversed the District Court's decision that Schreurs was not entitled to attorney's fees in the administrative proceedings.

ARGUMENT

I. The Davenport Civil Rights Ordinance Prohibiting Discriminatory Statements Is Not Unconstitutional As Applied To Seeberger's Discriminatory Commercial Speech, Which Is Unprotected By The Federal Or State Constitution.

The Davenport Municipal Ordinance and the The Fair Housing Act explicitly states that it should be construed in accordance with the U.S. Constitution. To the extent that First Amendment problems would arise if § 305(C) were interpreted to apply in non-commercial situations, then the statute should be construed more narrowly and, contrary to Seeberger's contention, not be ruled unconstitutional. *See, e.g., United States v. Clark*, 445 U.S. 23, 27 (1980) (courts should "not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided"); *see also Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (normally courts "will not decide a constitutional question if there is some other ground upon which to dispose of the case"). This method of limiting § 305(C) to commercial settings avoids unnecessary First Amendment implications and is especially appropriate considering the limiting language contained with

the FHA. The FHA specifically announces in its introductory section that "[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States," 42 U.S.C. § 3601 (emphasis supplied), thereby conveyeing the Congressional intent for the statute to be applied with those constitutional constraints in mind. There is a great necessity for this provision to be a strong counterbalance for the important role of providing equal access to housing for all people.

A. All of Seeberger's Speech Was Commercial Speech and Thus Properly Regulated.

Seeberger claims that because the motivation behind her speech – a religious/political/philosophical commentary on Schreurs' parenting style – catapults the speech to that of fully protected speech, or at the very least, "commercial speech" that is "inextricably intertwined with otherwise fully protected speech." However, Seeberger's speech can be distinguished from the speech at issue in 44 Liquormart, Inc. v. Rhode Island, and Greater New Orleans Broadcasting Association, Inc. v. United States. In those cases there was objective information that was provided to the audience. Seeberger's speech, however, was pure subjective opinion.

Seeberger's speech was commercial speech and Davenport Civil Rights Ordinance ("Ordinance") section 305(c) satisfies the United States

Supreme Court's requirements for restrictions upon commercial speech under the First Amendment of the U.S. Constitution.[1] The relationship between Seeberger and Schreurs was that of landlord and tenant. That is entirely a commercial relationship. Common understanding of the nature of the relationship tells us that a landlord telling a tenant that her lease is terminated is commercial speech. See Fort Des Moines Church of Christ v. Jackson, 2016 U.S. Dist. LEXIS 143677, *45 (S.D. Iowa Oct. 14, 2016) (stating that "goods, services, and messages relating to them are often the subject matter of commercial speech"). Because Seeberger's statements were commercial speech, the First Amendment protections of that speech are substantially limited.[2] The court has found that commercial speech that violates § 804(c) of Fair Housing Act, 42 USCS § 3604(c) and by

[1] All references herein to the First Amendment of the U. S. Constitution also include Article I, Section 7 of the Iowa Constitution. As this court stated in *Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Kirlin*, "[o]ur state constitutional provisions regarding freedom of speech have generally been held to be coextensive with the federal constitution." *Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Kirlin*, 570 N.W.2d 643, 645 (Iowa 1997).

[2] Robert Schwemm, *Discriminatory Housing Statements And 3604(C): A New Look At The Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 270 "Note that statements covered by § 3604(c) and by the "commercial speech" doctrine generally are not limited to those made in connection with "for profit" ventures and would therefore include publicly assisted and other not-for-profit housing. Thus, although "commercial speech" is typically motivated by the speaker's desire to earn profits, *e.g.,* Post, *supra* note 376, at 6, the concept also extends to speech relating to the sale or rental of housing by those working on behalf of public housing authorities and other non-profit organizations and public bodies. *E.g.,* HUD v. Las Vegas Hous. Auth., Fair Hous.-Fair Lending Rptr. 25,116, at 26,002-05 (HUD ALJ 1996) (FHA claims based in part on biased statements considered in context of discrimination by public housing authority). Compare the FHA's § 3604(e), which prohibits "blockbusting" and which is, unlike all of the other prohibitions in the statute, explicitly limited to "[for profit" activity. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) ("commercial speech" defined as "expression related solely to the economic interests of the speaker and its audience")."

inference, § 305(C) of the Davenport Municipal Ordinance, is not protected by First Amendment. United States v. Space Hunters, Inc. 429 F.3d 416 (2005). The high level of judicial scrutiny that generally applies to content-based restrictions on speech is reduced substantially when the restriction applies only to commercial activities because it has been narrowly tailored to further a compelling government interest.

B. Seeberger's Argument Fails, The Davenport Municipal Ordinance Survives the Central Hudson Test.

Seeberger's argument fails to meet the standards of the Supreme Court's four part analysis for commercial speech in *Central Hudson*, or the more rigorous analysis for content- or speaker-based commercial speech promulgated in *Sorrell v. IMS Health, Inc.* *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980); *Sorrell v. IMS Health, Inc*., 564 U.S. 552 (2011). The Eighth Circuit has addressed the commercial speech issue post-*Sorrell*, and it appeared to have some trouble discerning the actual import of the Supreme Court's decision in *Sorrell*. *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. Minn. 2014). The Eighth Circuit explained that *Sorrell* held:

> "if a commercial speech restriction is content- or speaker-based, then it is subject to "heightened scrutiny." *Sorrell*, 131 S. Ct. at 2664.

> *Sorrell*, however, did not define what "heightened scrutiny" means. Instead, after concluding that the restrictions in the case were both content- and speaker-based, the Court proceeded to analyze them under the *Central Hudson* factors, noting the outcome would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell*, 131 S. Ct. at 2667. The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*." *Id*. at 1055.

As Davenport Civil Rights Ordinance section 305(c) is content- and speaker-based, the proper analysis is still *Central Hudson*.

Seeberger argues that because her speech concerned a lawful activity and was not misleading – which is the first part of the Central Hudson analysis – her speech was protected. (Seeberger's Application for Further Review, pp. 22) Seeberger's argument is an oversimplification of the issue and a misstatement of fact, though most commercial speech is different from discriminatory housing speech complicating the analysis, the activity engaged in by Seeberger was not a lawful activity. Typical commercial speech is capable of being classified as *either* about a lawful activity and not misleading, or the opposite. Seeberger has attempted to conflate the issue by arguing that discriminatory housing speech by an exempt landlord is about a lawful activity – discriminating because of a protected class, since the exemption allows these landlords to discriminate – however this is incorrect. Though some landlords, referred to as "Mrs. Murphy" landlords

are exempt from §2.58.305 except for §2.58.305(C) under the Ordinance, the conduct of making discriminatory statements in the sale or rental of real estate remains illegal. There is a specific carve out in the Ordinance making discriminatory statements unlawful, for all landlords. Therefore despite the landlord's exempt status, under the other portions of the Ordinance, discriminatory housing speech by an exempt landlord is not about a lawful activity because the speech itself is illegal.

Several cases involving exempt landlords have been decided by administrative law judges hearing cases filed with the U.S. Department of Housing and Urban Development ("HUD"). *HUD v. Dellipaoli*, Fair Hous.-Fair Lending Rptr. P 25,127 (HUD ALJ 1997), *HUD v. Gruzdaitis*, Fair Hous.-Fair Lending Rptr. P 25,137 (HUD ALJ 1998), *HUD v. Schmid*, Fair Hous.-Fair Lending Rptr. P 25,139 (HUD ALJ 1999), and *HUD v. Roberts*, Fair Hous.-Fair Lending Rptr. P 25,151 (HUD ALJ 2001). The judges hearing these cases have recognized that the statement *is* the harm, and found the housing providers – *providers who would otherwise be free to discriminate under Fair Housing Act §3603(b)* – liable for violating the Act. These judges recognize that discriminatory statements cause emotional distress and psychic injury. A person who hears that "their kind" is rejected because of their race, their national origin, their children – whatever the case

may be – is not somehow magically prevented from being harmed because the housing is exempt. The words still sting and still cause psychic injury. These cases discuss the emotional distress that hearing discriminatory statements cause. *HUD v. Dellipaoli*, Fair Hous.-Fair Lending Rptr. P 25,127 (HUD ALJ 1997)(stating that the discriminatory statement made Complainant feel hurt and humiliated); *HUD v. Gruzdaitis*, Fair Hous.-Fair Lending Rptr. P 25,137 (HUD ALJ 1998) (stating that the discriminatory statements made Complainant feel surprised, intimidated, humiliated, she had difficulty sleeping, concentrating, eating, and they caused her to exhibit 'bad temper' toward her children); *HUD v. Schmid*, Fair Hous.-Fair Lending Rptr. P 25,139 (HUD ALJ 1999) (stating that the discriminatory statement made Complainant feel upset, angered, humiliated, embarrassed and increased her anxiety); *HUD v. Roberts*, Fair Hous.-Fair Lending Rptr. P 25,151 (HUD ALJ 2001) (stating that the discriminatory statements made Complainants feel embarrassed, frustrated, hurt, humiliated, depressed, discouraged, "devastated" and withdrawn). *See also* Robert Schwemm, *Discriminatory Housing Statements and §3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 249-251 (2001)(discussing the psychic injury of discriminatory housing

statements, as well as other rationales for 3604(c), including preventing market-narrowing and promoting public education). (App. at 218-20).

Seeberger attempts to parse out her statements into a "commercial bucket" and a "fully protected bucket." She then attempts to bootstrap the commercial speech to the supposedly fully protected speech to make it all protected by the First Amendment. Both approaches fail. Her commercial speech remains commercial speech, capable of government restriction, and the supposedly "fully protected speech" is not. Seeberger cites *Riley v. Nat'l Fed'n of Blind* for the proposition that commercial speech loses its designation of "commercial speech" when it is "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781 (1988). The speech at issue in *Riley* pertained to that of professional fundraisers. *Id.* at 784-87. The intent of their speech was to communicate with clients, provide a service for the clients, and earn fees. *Id*. The commercial speech to which the *Riley* Court was applying the "inextricably intertwined" analysis was *compelled* speech. *Id*. at 796.

Seeberger's assertion that this speech was inextricably intertwined would mean that it would not have been possible to communicate the termination of tenancy without conveying her discriminatory preferences. It was certainly possible for Seeberger to tell Schreurs her tenancy was

terminated without going into colorful detail as to Seeberger's discriminatory rationale. It is clear that in determining whether the speech is in fact inextricably intertwined, we must examine the purpose and setting of that speech. Because §305(C) focuses solely on regulating housing transaction-related communications, this restriction in no way restricts Seeberger's ability to convey her non-commercial expression; disapproval of Schruer's parenting and her daughter's pregnancy, in another non-transactional setting, not relating to the rental of the subject property. The Supreme Court has rejected the "inextricably intertwined" analysis in a similar case, in which a public university had rules prohibiting commercial speech on campus. In that case, an agent of a company selling housewares had a demonstration in a student's dorm room, and was asked to leave because of the university's policy. *Bd. of Trs. v. Fox*, 492 U.S. 469, 471 (U.S. 1989). The Respondents argued that because statements about being financially responsible and running an efficient home were included with the commercial speech, the commercial speech was thus "inextricably intertwined" with fully protected speech and itself protected. *Id*. at 474. The Supreme Court rejected that argument. *Id*. The *Fox* Court stated:

> "the commercial speech [in *Riley*] (if it was that) *was* 'inextricably intertwined' because the state law *required* it to be included. By contrast, there is nothing whatever "inextricable" about the

> noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the [university's rule] prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." *Id*.

Thus, Seeberger's "inextricably intertwined" argument fails because it would be akin to quid pro quo requests for sexual favors in exchange for a housing benefit – this is completely unprotected as discriminatory and illegal conduct.

Seeberger also fails to demonstrate that her supposedly "fully protected speech" is indeed protected by the First Amendment. This attempt fails because those statements are not matters of public concern. Also, no part of a landlord's speech to a tenant would be protected due to the commercial nature of their relationship, certainly not speech concerning the termination of a tenancy, or the landlord/tenant relationship. The commercial speech doctrine focuses on the value of the speech to the listener, by informing their choices; the value to the speaker is not the relevant inquiry. Schruers had no interest in receiving Seeberger's inquiry into her or her daughter's pregnancy status, nor in hearing discriminatory statements and preferences. Seeberger's statements, terminating Schruers' tenancy because of her daughter's pregnancy thwarts the informative

functions that would normally justify First Amendment protection. Seeberger's comments are clearly discriminatory statements made in the course of selling or renting a home, and as such this speech by the sole decision maker is unprotected because it constitutes illegal conduct, housing discrimination on the basis of familial status.

There have been other examples in which speakers of spur-of-the moment speech have tried to cloak their speech in the protections of the First Amendment after the fact to avoid consequences. One such case is *Richardson v. Sugg*, in which the Eighth Circuit held that a state university's basketball coach's pointed statements about his employer, his community, and supposed "racial matters" at two press conferences were not protected speech. *Richardson v. Sugg*, 448 F.3d 1046, 1062-1063 (8th Cir. 2006). After Richardson had been fired by the university for his statements, he then filed a Title VII employment discrimination claim against the school alleging that he was discriminated against because of his race, and also that his First Amendment rights had been infringed. *Id*. at 1050-51. The Eighth Circuit held that the content and context of the coach's speech did not demonstrate that his speech amounted to matters of public concern. *Id*. Similarly, the Eighth Circuit reasoned in *United States v. Petrovic* that First Amendment protections are less rigorous when "matters of purely private

significance are at issue." *United States v. Petrovic*, 701 F.3d 849, 855-56 (8th Cir. 2012).[3]

As in *Richardson* and *Petrovic*, Seeberger's comments regarding Schreurs' parenting are not a matter of public concern. They were Seeberger's own diatribes wholly unrelated to the substantive situation at hand: a landlord and a tenant's business arrangements. The content of Seeberger's speech was solely about Schreurs' and her daughter's actions, her disapproval of those actions, and the termination of her tenancy. Seeberger made the statements in a commercial transaction, and terminated the tenancy in her role as the sole decision maker for Schruers' continued tenancy in the subject property. Seeberger is merely attempting to seek First Amendment protection because she spewed her opinion of Schreur's family's personal choices at her. The context of the speech here was an off-the-cuff indignant verbal strike against someone which indicated a discriminatory preference in a real estate transaction, an action that is clearly illegal under §305(C) of the Ordinance. Seeberger was not at a rally protesting unwed mothers' life choices, nor was she at a Davenport city

[3] The facts in *Petrovic* are different in that the defendant committed conduct in the course of his campaign of interstate stalking and threats of extortion. The defendant, however, claimed the First Amendment protected his communications regarding his ex-wife, her mental health and sexual behavior, among other things.

council meeting encouraging birth control for all young women, or even on the sidewalk in front of 2314 North Ripley Street warning passers-by about the dangers of unplanned pregnancies. She was simply uttering discriminatory statements *to* her tenant and *about* her tenant.

The second element of the *Central Hudson* analysis is whether Davenport Civil Rights Ordinance § 305(C) advances a substantial government interest in enforcing anti-discrimination laws and eliminating discriminatory housing practices. As discussed above, the cases examining these issues are clear that significant harm is caused by landlords uttering discriminatory housing statements. Congress‘ interest in passing the Fair Housing Act, and the Commission’s interest in similarly prohibiting discriminatory housing statements are indeed substantial.

The third element of the *Central Hudson* analysis is whether Davenport Civil Rights Ordinance § 305(C) directly advances the governmental interest at stake. Davenport Civil Rights Ordinance section 305(c) is as direct as possible: it prohibits discriminatory statements in housing transactions that cause the harm by eliminating or significantly restricting housing opportunity.

Finally, the last prong of the *Central Hudson* commercial speech analysis supports the constitutionality of Davenport Civil Rights Ordinance § 305(C). The restriction on speech is no more broad than necessary. All that is prohibited is commercial speech with respect to the sale or rental of housing that entails a preference for or a limitation against twelve personal characteristics under the Davenport Municipal Code – or seven personal characteristics under the Fair Housing Act.[4] No speech is compelled. No other speech is prohibited. Landlords remain free to discuss non-discriminatory rental criteria, lease violations, repair issues, housekeeping issues, payment of rent, etc. Further, outside of the transactional context, they are free to express political, religious, or other expressions. There is no possible way to make the prohibition against discriminatory speech any narrower: it is already at its narrowest. This proscription is narrowly tailored to address only those communications that have the purpose or effect of discriminating against or deterring applicants or tenants because of their protected class. Additionally, as can be discerned from the dearth of cases regarding allegations of discriminatory statements by exempt landlords, the

[4] The Davenport Municipal Code prohibits housing discrimination based on age, race, creed, color, sex, sexual orientation, marital status, national origin, religion, disability, familial status, and gender identity. The Fair Housing Act prohibits housing discrimination based on race, color, sex, national origin, religion, disability, and familial status.

breadth of the impact upon speech numerically speaking is quite limited.

This Court has addressed commercial speech in a civil rights case. In *Baker v. City of Iowa City*, the Respondent in an employment discrimination case asserted the City was violating their First Amendment rights by regulating their speech. *Baker v. City of Iowa City*, 867 N.W.2d 44, 53 (Iowa 2015). The *Baker* Court held that while the speech was a lawful and a non-misleading communication, the City's interest in preventing individuals from discrimination was substantial. *Id*. at 54. The court also held that the ordinance was no more extensive than necessary. *Id*. (stating that the ordinance did not tell employers "who they must hire or attempt to dictate how they employer must run his or her business.")

It is a well-established legal principle that the Fair Housing Act is a broad remedial statute that is to be construed generously, and to which exemptions from it are narrowly construed. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. Wash. 1994), citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Elliott v. Athens*, 960 F.2d 975, 978-79 (11th Cir.), *cert. denied*, 121 L. Ed. 2d 287, 113 S. Ct. 376 (1992) (construing FHAA); *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)(construing the Fair Labor Standards Act). Moreover, courts examine the text of the statute to determine Congressional

intent. The plain language will control, "unless (1) the statutory language is unclear, (2) the plain meaning of the words is at variance with the policy of the statute as a whole, or (3) a clearly expressed legislative intent exists contrary to the language of the statute." *City of Edmonds*, 18 F.3d 802, 804 (9th Cir. Wash. 1994) citing *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 280 n.4 (9th Cir. 1989). In the Fair Housing Act, and similarly in the Davenport Civil Rights Ordinance, it is plain on the face of both laws that the drafters intentionally carved out discriminatory housing statements from the Act's 3603(b) and the Ordinance's §310 exemptions.

Seeberger has also improperly placed the burden on the Commission to prove the constitutionality of the Ordinance. The Supreme Court reviews constitutional challenges to a statute de novo because statutes are cloaked with a presumption of constitutionality. *State v. Senn*, 882 N.W.2d 1, 6 (Iowa 2016). Seeberger ignores that she bears a heavy burden, because *she* must prove the unconstitutionality of 305(C) beyond a reasonable doubt. *Id.* This Court has found that "the challenger must refute every reasonable basis upon which the statute could be found to be constitutional." *Id.* The Court has found that if the statute is capable of being construed in more than one manner, and one of those is constitutional, we must adopt that

construction. *Id.* The Fair Housing Act explicitly states that it should be construed in accordance with the U.S. Constitution.

II. THE COMMISSION HAD AUTHORITY TO AWARD ATTORNEY FEES

Seeberger cites *Telegraph Herald, Inc. v. Dubuque*, 297 N.W.2d 529 to revive its contention that the Commission did not have authority to award attorney fees in the underlying administrative action. Seeberger's argument fails again for the same reasons. In her Application for Further Review, Seeberger seeks to misdirect this court by stating that Section 175 of the Davenport Municipal Code "expressly provides remedies for employment discrimination." *Seeberger's Application for Further Review*, p. 28. As the Commission has argued, and the Court of Appeals correctly held, the remedial action provision in division two applies to all areas of discrimination, including housing. There are references to housing complaints in several parts of the same division of the ordinance where the attorney fees provision is. For example, Davenport Municipal Code § 2.58.100 et seq. *2.58.140 Unfair Practices – Retaliation* provides that retaliation with respect to housing is a discriminatory practice. Davenport Mun. Code § 2.58.140(B) . Additionally, *2.58.150 Complaint Procedures* sets out the statute of limitations for <u>all</u> types of discrimination complaints

cognizable under the Davenport City Ordinance, including housing complaints. Davenport Mun. Code § 2.58.150, 2014. Finally, there is specific reference to remedies applicable to housing discrimination cases in *2.58.175 – Remedial Relief*, namely the "[s]ale, exchange, lease, rental, assignment or sublease of real property to an individual." *Id* at §175(A)(4). The references to remedial relief in Section 175 are applicable to discrimination complaints in all five areas that the Ordinance covers: employment, education, credit, public accommodations and housing. See § 2.58.175(A) (3)) (which provides for "Admission of individuals to public accommodation."); see also § 2.58.175(A) (5) (which provides for "Extension to all individuals of a full and equal enjoyment of the advantages, facilities, privileges and services of the respondent denied to the complainant because of the discriminatory practice.") Therefore, *2.58.175 – Remedial Action* clearly sets forth possible remedies for *all* types of civil rights complaints cognizable under the Davenport Municipal Code. Seeberger states that the Court was locating language in one part of Davenport's ordinance and applying it to a "different part" of the Davenport ordinance. However, what we have here are general provisions of the municipal code prohibiting discrimination, and another provision that provides an "overlay" of provisions which also apply to housing. Both

divisions are within the same chapter -- the municipal code prohibiting discrimination in Davenport. The Commission was not reaching to a provision of the Davenport Municipal Code pertaining to housing inspections or the building code applicable to construction of new multifamily housing. The *Telegraph Herald* court stated that there must be statutory authority for the award of attorney fees, and there are in 2.58(A)(8).

Seeberger's reliance on Botsko is still irrelevant as the Davenport Civil Rights Ordinance was amended in 2008 to allow for attorney's fees. Davenport Mun. Code § 2.58.175(A)(8), 2014. *Davenport Mun. Code §2.58.175*(A)(*8) Remedial Relief* clearly states that the commission may award reasonable attorney fees as part of damages caused by a discriminatory practice. This amendment was noted by the *Botsko* Court. "We note that the Davenport Municipal Code has since been amended to allow for an award of 'reasonable attorney fees.'" *Id.*; *Botsko v. Davenport Civ. Rights Comm'n.*, 774 N.W.2d 841, 845 (Iowa 2009).

The Davenport Civil Rights Ordinance provides for attorney's fees using substantially the same language as found in the Iowa Civil Rights Act, which clearly authorizes the award of attorney's fees by the Commission in housing cases. Iowa Code § 216.15(9)(a)(4)(2016). *Quigley v. Winter*, 598

F.3d 938, 959 (8th Cir. Iowa 2010)(awarding $ 78,044.33 in attorney fees in a case filed in court under the Fair Housing Act (FHA), 42 U.S.C.S. § 3601 et seq., and the Iowa Civil Rights Act, Iowa Code Ch. 216).

The Court's very stringent approach to statutory attorneys' fees is satisfied by the express language of the current Davenport Municipal Code § 2.58.175(A)(8) which provides that attorney fees can be awarded for the administrative proceeding.

CONCLUSION

For the reasons listed here, the Commission asks this Court to deny Ms. Seeberger's Application for Further Review.

Respectfully submitted this 14th day of May, 2018.

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