IN THE SUPREME COURT OF IOWA

No. 18–2173

KAREN COHEN,
Plaintiff-Appellant/Cross-Appellee,

vs.

DAVID CLARK.
Defendant-Appellee/Cross-Appellant

and

2800-1 LLC,
Defendant-Appellee.

APPEAL FROM THE JOHNSON COUNTY DISTRICT COURT
THE HONORABLE CHAD KEPROS DISTRICT JUDGE

APPELLANT/CROSS APPELLEE'S FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was Clark's dog a reasonable accommodation for his disability when the emotional support animal caused Cohen to suffer repeated "severe and at times life threatening" allergy attacks and thus was a direct threat to Cohen's health?

Iowa Code §216.8A(3)(e)

Hollis v. Chestnut Bend Homeowners' Association, 760 F.3d 531 (6th Cir. 2014)
Maubach v. City of Fairfax, No. 1:17-cv-921 (E.D. Virginia, Alexandria Division, 2018)
Scoggins v. Lee's Crossing Homeowners Assoc., 718 F.3d 262 (4th Cir. 2013)
Woodside Village-Stratford v. Hertzmark, 1993 WL 268293 (Conn Sup. Ct.. 1993)

II. Should the benefits and burdens to all affected parties, including the disabled person, landlord and affected co-tenants, be considered when deciding if an accommodation is reasonable?

Groner v. Golden Gate Garden Apts, 250 F.3d 1039 (6th Cir. 2001)
Temple v. Gunsalus, 97 F.3rd 1452 (6th Cir. 1996)
Eckles v. Consolidated Rail, 94 F.3d 1041 (7th Cir. 1996)

III. Should the district court have dismissed Cohen's claims due to the uncertain state of the law?

ROUTING STATEMENT

Appellant believes this case should be retained by the Supreme Court as it presents substantial issues of first impression under Iowa R. App. P. 6.1101(2)(c) and presents substantial questions enunciating legal principles under Iowa R. App. P. 6.1101(2)(c). This court has never made a ruling with regard to the accommodation of disabilities with emotional support animals and, as the district court held, there is no controlling precedent with regard to how to balance the conflicting rights of disabled tenants, co-tenants and landlords with regard to emotional support animals.

STATEMENT OF THE CASE

Plaintiff-Appellant/Cross Appellee Karen Cohen ("Cohen") filed her petition against Defendant Appellee/Cross Appellant David Clark ("Clark") and Defendant-Appellee 2800-1 LLC ("2800-1") in the small claims division of Johnson County district court on September 27, 2017 seeking one month's rent as damages from Clark and 2800-1 due to 2800-1 allowing Clark to have an emotional support animal and causing her allergic attacks. Docket, Apx 1; Supplemental Petition, Apx 16-18.

The case was tried before Magistrate Lynn Rose on January 24, 2018.

Docket, Apx 4. The magistrate dismissed the case in a Judgment Order dated July 1, 2018 finding that 2800-1 was not aware that its attempts to accommodate Cohen had failed. Magistrate Judgment Order, Apx 167-78. Plaintiff/Appellant timely filed her Notice of Appeal on July 4, 2018. Small Claims Notice of Appeal, Apx 185-6.

District Court Judge Chad Kepros issued a Ruling on Appeal on December 10, 2018 amending the magistrate's fact finding, holding instead that 2800-1 was aware that its attempts at accommodating Cohen had failed. The district court ruled that 2800-1 could have refused to accommodate Mr. Clark's dog due to Ms. Cohen's allergies, but dismissed Ms. Cohen's claims against 2800-1 because of the uncertain state of the law. District Court Ruling on Appeal, Apx 179-84. Notice of Appeal was filed December 12, 2018 but on December 20, 2018 this Court instead ordered Cohen and Clark to file a statement of why discretionary review should be granted.

Cohen filed an Application for Discretionary Review on December 20, 2018. 2800-1 filed a consent to discretionary review on January 3, 2019. Clark filed an Application for Discretionary Review on January 8, 2019. This Court granted discretionary review on February 6, 2019.

STATEMENT OF FACTS

I. Stipulated Facts

The parties jointly stipulated to the following facts:

1. Karen Cohen was a co-tenant of David Clark and their landlord was 2800-1 LLC. Joint Stipulation, Apx 23.

2. Cohen was a tenant at 511 S Gilbert St, , a multi-unit apartment building owned by 2800-1 in unit 2824 at a rent of $1464 per month. Joint Stipulation, Apx 23.

3. Cohen signed 2800-1's standard lease on November 11, 2015 and was a tenant for the term of July 21, 2016 to July 12, 2017. Cohen Lease, Apx 26-8, Joint Stipulation, Apx 24. Section 53 of Cohen's lease provides that no pets are allowed in the building or on the premises. Joint Stipulation, Apx 24.

4. Cohen is allergic to dogs and cats. Joint Stipulation, Apx 24.

5. Clark was a tenant of 511 S. Gilbert, unit 2821 which is down the hall from Tenant Cohen's unit. Clark signed 2800-1's standard lease on January 18, 2016 and was a tenant for the term of July 21, 2016 to July 12, 2017. Clark Lease, Apx 29-31; Joint Stipulation, Apx 24. Section 53 of Tenant Clark's lease provides that no pets are allowed in the building or on

the premises. Joint Stipulation, Apx 24.

6. Clark has a mental impairment which substantially limits one or more major life activities and 2800-1 was aware that Clark had a mental impairment and that the impairment substantially limited one or more major life activities due to the August 18, 2016 letter of his psychiatrist, Psychiatrist's Letter, Apx 32; Joint Stipulation, Apx 24. Clark's dog was an emotional support animal and necessary to afford him equal opportunity to use and enjoy his tenancy at 511 S. Gilbert, unit 2821. Joint Stipulation, Apx 24.

7. On or about August 23, 2016 pursuant to Iowa Code §216.8A(3)(c)(2) Clark requested that 2800-1 waive its lease provisions that prohibited pets as accommodation for his dog as an emotional support animal. Joint Stipulation, Apx 24; 2800-1 agreed to waive the prohibition on pets for Clark. Joint Stipulation, Apx 24.

8. After Clark brought his dog onto the premises Cohen suffered allergic attacks due to the presence of Clark's dog down the hall. Joint Stipulation, Apx 24.

II. Facts Established at Trial

1. Carpet cleaning and allergen removal, which must take place for

every tenant with an emotional support animal, costs on average $350 while full restoration when there is damage due to animal waste and urine costs on average $2200 to $2500 depending on whether or not the carpet is cleaned or replaced with the average per month rent being $750. Defendant 2800-1 Exhibit B, Apx 33.

2. Accommodating both Mr. Clark and his dog and Ms. Cohen's allergies in their original units by adding a series of hermetically sealed doors on all floors of the building was estimated to cost $81,715.92. Magistrate Judgment Order, 5, Apx, 171; 2800-1 Exhibit D, Apx 34.

3. Jeffrey Clark, the leasing manager for 2800-1, testified for their approximately 2,000 tenants they had 9 requests to accommodate emotional support animals in 2015, 26 in 2016 and over 30 requests in the first six months of the 2016-17 lease term. Trial Transcript, 32, Apx 67.

III. Magistrate's Findings of Fact

The magistrate found as follows in the July 1, 2018 Judgment Order:

1. Cohen’s allergy to pet dander is severe and in some circumstances life-threatening.

2. Cohen executed the lease with 2800-1 L.L.C. in reliance on provision 53 of the lease that prohibited pets from the building.

3. Cohen executed her lease with 2800-1 L.L.C. on November 11, 2015. David Clark executed his lease with 2800-1 L.L.C. on January 18, 2016. Both lease terms commenced on July 21, 2016.

4. Clark requested a reasonable accommodation to have his emotional support animal, Cali, with him on the premises on or about August 23, 2016, after David Clark had registered Cali with the National Service Animal Registry.

5. Cohen requested that no animals be allowed in the building when she was made aware of Clark's request for a reasonable accommodation due to her severe allergies to pet dander.

6. 2800-1 gave Clark permission to have the dog on the premises as a reasonable accommodation and the dog joined Clark at his apartment some time in late August 2016.

Magistrate Judgment Order, Apx 169.

IV. District Court Findings of Fact

The district court found that, " [2800-1] did know that Ms. Cohen continued to experience allergy related problems after the accommodations that the landlord provided." District Court Ruling on Appeal, Apx 182.

ARGUMENT

I. Introduction and Summary of Argument

The heart of this case is quite simple and compelling. The Plaintiff-Appellant/Cross Appellee Karen Cohen ("Cohen") has severe and at times life threatening allergies to animals. Because of this she rented a unit from Defendant-Appellee 2800-1 LLC ("2800-1") with a lease in which 2800-1 contractually agreed to keep the building pet free. Defendant-Appellee/Cross Appellant David Clark ("Clark") who has a mental disability, signed the same lease but a month after moving in requested that 2800-1 waive the no-pet requirement of his and of all co-tenants' leases in order to accommodate his dog as an emotional support animal. 2800-1 felt it had no choice but to agree and Cohen suffered allergy attacks due to the dog throughout her lease term. The right of Clark to his emotional support animal and right of Cohen to not suffer allergy attacks are in conflict. How are these rights to be reconciled?

The law is clear, a disability accommodation is not reasonable if it presents a direct health threat to others. Here Cohen had, "severe and in

some circumstances life-threatening" allergies to animals[1] and Clark's dog caused Cohen repeated allergy attacks, and thus was a direct health threat.

While the right of the disabled to have emotional support animals is important, the rights of co-tenants and landlords should also be considered. No one's pain or suffering should be ignored and the benefits and burdens to all affected parties, including the disabled, landlords and co-tenants, should be considered in determining what is a reasonable accommodation.

II. Standard of Review

"In a discretionary review of a small claims decision, the nature of the case determines the standard of review." *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009). Review of small claims actions tried at law is for correction of errors at law. *Midwest Check Cashing, Inc. v. Richey*, 728 N.W.2d 396, 399 (Iowa 2007). "A review of statutory construction is at law." *GE Money Bank*, 773 N.W.2d at 536. The district court's factual findings, however, are binding upon the appellate court if supported by substantial evidence. *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 272 (Iowa 2009).

[1] Magistrate Judgment Order, Apx 169.

III. Cause of Action and Liability

Generally issues of reasonable accommodation arise in a housing context in cases between a landlord and a disabled person. Here Cohen is a co-tenant of Clark who is disabled and both are tenants of 2800-1. Cohen's petition presented a number of alternative causes of action including violation of an express no pets covenant. Supplemental Petition, Apx 14-5. 2800-1 stipulated at trial that, absent a reasonable accommodation, permitting Clark's dog was a violation of the express covenant in the lease that no pets were permitted on the premises. 1/24/18 Trial Transcript, Apx 41-2. Cohen moved, with the consent of all parties, to add Clark as an indispensable party under Iowa R. Civ. P. 1.234 because the question of whether or not his emotional support animal was a reasonable accommodation is central to the case. Clark Necessary Party Motion, Apx 118-9 . The trial court granted this motion at trial. 1/24/18 Trial Transcript, Apx, 38-9.

Since 2800-1 accepted liability for breach of the express no-pets covenant and Clark is an indispensable party, the issue for this Court is whether or not Clark's dog was a reasonable accommodation.

IV. Was Clark's Emotional Support Animal a Reasonable Accommodation?

Both the federal Fair Housing Act, U.S.C. Chapter 45 ("FHA") and the Iowa Civil Rights Act, Iowa Code Chapter 216, ("ICRA") prohibit discrimination in housing against the disabled and require reasonable accommodation on a fact specific basis for disabilities. Emotional support animals, which are not specially trained, but provide emotional and psychological benefits, have gained precedential acceptance as a reasonable accommodation under the FHA.

This case, where the accommodation of an emotional support animal for one tenant caused repeated allergy attacks to a co-tenant, raises important issues of first impression with regard to reasonable accommodation under the ICRA. First, under the FHA and ICRA an accommodation cannot be a direct threat to the health of others yet Clark's dog caused Cohen's allergic attacks and the trial court found her allergies to be severe and at times, life threatening. Clark's dog was a direct threat to Cohen's health and thus not a reasonable accommodation.

Secondly, while it is clear that the benefits and burdens to the disabled tenant and landlord must be considered, what about the effects of the accommodation on co-tenants? Shouldn't the fact specific balancing

required to determine reasonable accommodation include the benefits and burdens to all affected parties, including the disabled tenant, landlord and co-tenants?[2]

A. Iowa Disability Housing Discrimination

Under Iowa Code §216.8A of the ICRA, "[a] person shall not discriminate against another person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability…" Iowa Code §216.8A(b). Under this subsection discrimination includes, "[a] refusal to make reasonable accommodations in rules, policies, practices, or services, when the accommodations are necessary to afford the person equal opportunity to use and enjoy a dwelling." Iowa Code §216.8A(c)(2).

This ICRA provision, Iowa Code §216.8A, is similar to 42 U.S.C. §3604(f)(3)(B) of the FHA which provides that discrimination includes, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when the accommodations may be necessary to afford the person

[2]The issue of reasonable accommodation, including both the sub-issues of direct health threat and the balancing of the interests of disabled tenants, co-tenants and landlords was briefed by the parties and ruled on by the district court in its Ruling on Appeal, Apx 179-83

equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Iowa courts look to federal precedent for guidance with regard to the ICRA. *Henderson v. City of Des Moines*, 791 N.W.2d 710, page 10 (Iowa App. 2010) ("*Henderson* II") citing *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 16-17 (Iowa 2010) (interpretations of the FHA are instructive when interpreting the housing provisions of the ICRA, but they are not controlling).

The instant case is not a direct housing discrimination claim, but instead reasonable accommodation under Iowa Code §216.8A(c)(2) is being asserted as a defense to breach of contract. Cohen asserted, Clark and 2800-1 assented and the magistrate and district court accepted that the elements that must be established for the defense are almost identical to a direct claim of discrimination:

> (1) That [Clark] is disabled within the meaning of the [ICRA];
> (2) That the [2800-1] knew or should reasonably have been expected to know of the disability;
> (3) That the accommodation is necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling;
> (4) That the requested accommodation is reasonable.[3]

Henderson II, 791 N.W.2d 710. Of these factors the parties have stipulated

[3]*Henderson* II follows federal precedent adding a fifth factor, that the defendant refused the accommodation, not applicable in the instant case.

to (1)-(3), Joint Stipulation, Apx 24, and the only remaining issue under §216.8A(c)(2) is whether or not, under the circumstances, Clark's dog was a reasonable accommodation as an emotional support animal.

B. Emotional Support Animals

While most people are familiar with seeing eye dogs, emotional support animals are both novel and somewhat enigmatic. What are emotional support animals and what problems have developed in practice due to their increasing popularity? What is the current state of Iowa precedent with regard to emotional support animals and federal precedent with regard to emotional support animals and allergic third parties?

1. What are Emotional Support Animals?

Under both the FHA and the ICRA a variety of different classifications of animals have been permitted as reasonable accommodation for the disabled, including both service animals and emotional support animals. Despite significant differences between service animals and emotional support animals they are sometimes lumped together as "assistance animals". See, e.g. HUD FHEO Notice: FHEO-2013-01, Apx, 122. Clark's dog is an emotional support animal, rather than a service animal. Joint Stipulation, Apx 24.

Service animals are separately recognized under Iowa Code §216C.11, "For purposes of this section, 'service dog' means a dog *specially trained* to assist a person with a disability, whether described as a service dog, a support dog, an independence dog, or otherwise. " Iowa Code §216C.11(1) (emphasis added).

Similarly, under federal law, as the US District Court for Hawaii held in *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 304 F.Supp.2d 1245 (D. Hawaii, 2003),

> The term "service animal" is not defined by the FHA or the accompanying regulations, but it is understood for purposes of the Americans with Disabilities Act of 1990 ("ADA") to include "any guide dog, or other animal *individually trained to do work or perform tasks* for the benefit of an individual with a disability ••••" 28 C.F.R. § 36.104 (2002). This description comports with the example of a reasonable accommodation for a blind rental applicant provided by the agency regulations to the FHA, see 24 C.F.R. § 100.204(b) (2002), and with case law. See Bronk, 54 F.3d at 429; *Green v. Housing Auth. of Clackamas*, 994 F.Supp. 1253.

Prindable, 304 F.Supp.2d 1245. (emphasis added).

Thus a service animal is an animal that has received special training in physically assisting a disabled person. By contrast, "…an emotional support animal need not be specifically trained because the symptoms the animal ameliorates are mental and emotional, rather than physical." *Warren*

v. Del Vista Towers, 49 F.Supp.3d 1082 (S.D. Florida 2014).

Rather than service animals, which use their specialized training, for example, in aiding a blind person in crossing the street or alerting a epileptic to an oncoming seizure, the assistance and therapeutic use of an emotional support animal is that their presence and daily interactions makes the disabled happier and otherwise ameliorate their psychological disabilities.[4,5]

The blurring of the distinction between untrained emotional support animals and trained service animals has accompanied the development of

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[4]See, e.g. *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Comm'n*, 18 Cal. Rptr. 3d 669, 679 (Cal. Ct. App. 2004) (plaintiff "no longer sat around the house brooding but instead paid attention to the dog's needs."); *Crossroads Apartments Associates v. LeBoo,* (1991) 152 Misc.2d 830, 578 N.Y.S.2d 1004, ("tenant received therapeutic benefits from caring for his cat"); *HUD v. Riverbay Corporation*, supra, HUDALJ 02-93-0320-1, (tenant "relates to the dog in a way she cannot relate to people, and that through this relationship she has become stronger and more outgoing."); *Castellano v. Access Premier Realty, Inc*. 181 F.Supp.3d 798 (E.D. Cal. 2016) ("[tenant] asserts that interacting with and feeding the cat gave her emotional support and companionship. The cat helped her to feel calmer and less anxious. [Tenant] asserts that the cat made her feel better, both mentally and physically, and helped her to get through the day.")

[5] The therapeutic value of emotional support animals is still controversial. "Despite widespread practice, the field of [animal therapy] currently lacks a unified, widely accepted or empirically supported theoretical framework for explaining how and why [animal therapy] is potentially therapeutic." "Introduction to a thematic series on animal assisted interventions in special populations" McCune, Esposito, Griffin, *Applied Developmental Science* 2017, Vol. 21, No. 2, 136–138, http://dx.doi.org/10.1080/10888691.2016.1252263

emotional support animal precedent. A leading case with regard to the reasonableness of animals as an accommodation under the FHA is *Bronk v. Ineichen*, 54 F. 3d 425 (7th Cir 1995) where the United States Court of Appeals for the Seventh Circuit held,

> [b]alanced against a landlord's economic or aesthetic concerns as expressed in a no-pets policy, a deaf individual's need for the accommodation afforded by a hearing dog is, we think, per se reasonable within the meaning of the statute.

Bronk, 54 F.3d at 429.[6] This passage in *Bronk* is frequently cited as support for the *per se* reasonableness of any type of animal as an accommodations, see e.g. *Chavez v Aber*, 122 F.Supp.3d 581, 597 (W.D.Tex. 2015) (pit bull

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[6]Despite finding it per se reasonable, no evidence was presented in *Bronk* as to the cost or burden of the requested animal accommodation. *Bronk*, 54 F. 3d at 429. In fact, Counsel has been unable to locate a single case in which a landlord offered evidence as to the costs or burden presented by an animal accommodation. This has generally been taken as an admission that the costs are minimal or the burden non-existent. For example, in *Majors v. Housing Authority*, 652 F.2d 454 (5th Cir. 1981) a key emotional support animal case relied on by the Iowa Court of Appeals in *Henderson* II, no evidence was presented by the landlord as to the cost or other burdens of the requested emotional support animal. See e.g. *Revock v. Cowpet Bay West*, Nos. 14-4776, 14-4777 (3rd Cir 2017) (no evidence presented by landlord with regard to reasonableness of accommodation); *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Comm'n*, 18 Cal. Rptr. 3d 669, 679 (Cal. Ct. App. 2004) (landlord had no dog policy, presented no evidence with regard to cost or burden of requested accommodation). As the evidence in the instant case shows the damage by and expense to landlords from emotional support animals can be costly.

appropriate emotional support animal citing *Bronk*.)

However, in *Bronk*, while the Seventh Circuit held that a hearing dog would be a reasonable accommodation it also stated that if the dog at issue was a "simple house pet" and if it, "…was not necessary as a hearing dog, then his presence in the townhouse was not necessarily a reasonable accommodation." *Bronk*, 54 F. 3d at 429.

Thus we should not lose sight of the fact that there are significant differences between a trained service animal like a seeing eye dog and an untrained emotional support animal.

2. The Court of Appeals & Emotional Support Animals: *Henderson* I & II

The Court of Appeals has issued two decisions with regard to emotional support animals, *Henderson v. Des Moines Mun. Housing*, 745 N.W.2d 95 (Iowa Ct. App. 2007) ("*Henderson* I") and *Henderson v. City of Des Moines*, 791 N.W.2d 710 (Iowa Ct. App. 2010) ("*Henderson* II"). Both decisions involved the same underlying case and both were unreported.

In *Henderson* I, the Court of Appeals reversed the district court's grant of summary judgment and ruling under the ICRA used FHA precedent to establish that a tenant could request an emotional support animal as a reasonable accommodation to their disability. However the Court of

Appeals held that, " …reasonable minds could differ as to whether her requested accommodation of a service animal was reasonable in light of her claimed mental illness," and remanded for further proceedings. *Henderson* I, 745 N.W.2d 95.

On remand, the district court granted a directed verdict to the defendants and on the second appeal the Court of Appeals in *Henderson* II overruled the directed verdict, finding that there was a jury question with regard to the plaintiff's disability, as to whether the defendants knew of the disability and as to whether an emotional support animal could be a reasonable accommodation. The Court of Appeals cited numerous federal cases supporting the use of emotional support animals and held that, "Companion animals may be necessary accommodations." *Henderson* II, 791 N.W.2d 710.

Both of these cases follow the standard federal precedent, previously outlined, requiring the plaintiff to be disabled, that the defendant know of the disability, that the requested accommodation is necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling and that the requested accommodation is reasonable.

While *Henderson I* or *Henderson II* are not binding, but only

persuasive precedent, a ruling in favor of Appellant in the instant case does not require overruling these cases or upending the standard precedential framework that has developed around emotional support animals. Neither *Henderson* I or II dealt with the issues presented in the instant case: a direct health threat to a co-tenant due to allergies and balancing the benefits and burdens to the disabled tenant, landlord and co-tenants.

3. Emotional Support Animals and Allergy Precedent

While *Henderson* I and II are the only Iowa cases dealing with emotional support animals, these cases do not directly address the problem of how to deal with emotional support animals and allergic third parties. No appellate court has ruled on the issue of emotional support animals and allergies. Three recent federal district court cases deal with various aspects of this issue, but none is directly on point.

In *Peklun v. Tierra Del Mar Condo. Ass'n, Inc*., No. 15-CIV-80801, 2015 WL 8029840 (S.D. Fla. Dec. 7, 2015), the landlord argued that the request for accommodating an emotional support animal was not reasonable because a co-tenant was allergic to animals. The district court refused to rule on this issue in summary judgment holding that,

> [FHA] Section 3604(9) states that "[n]othing in this subsection requires that a dwelling be made available to an individual whose

> tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(9). Consideration of the competing interests of the accommodation and the health and safety of others should include an examination of, among other things, whether the threat to the health and safety of others "cannot be reduced or eliminated by another reasonable accommodation." *Warren*, 49 F. Supp. 3d at 1087 (citing U.S. Dep't of Hous. and Urban Dev., Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs). However, "determining whether [an animal] poses a direct threat that cannot be mitigated by another reasonable accommodation is not a question of law, it is distinctly a question of fact." Id. The record concerning Speciale's allergies and the effect on Julia is contentious and the Court declines to grant judgment based on a hotly debated factual dispute. Whether Julia's effect on Speciale could have been ameliorated through the adoption of other accommodations has yet to be demonstrated.

Peklun at 32.

In *Entine v. Lissner*, No. 2:17-cv-946 (S.D. Ohio, Eastern Division, 2017) the plaintiff, a student at Ohio State University, suffered from depression, anxiety and panic attacks and requested her dog as a service animal as an accommodation to her disability at the sorority where she lived under the Americans with Disabilities Act.[7] Another resident of the sorority claimed to be allergic to the dog. The district court granted a preliminary injunction requiring that University permit the plaintiff to have her dog as a

[7]The district court indentified this as an ADA case but cited to regulations, without identifying the applicable US Code section.

service animal. The district court found that the University had failed to determine whether or not the plaintiff's dog had actually caused the allergic resident's allergy attacks.[8]

In *Maubach v. City of Fairfax*, No. 1:17-cv-921 (E.D. Virginia, Alexandria Division, 2018) an emergency dispatcher for the City of Fairfax, Virginia, sought to have her dog as an emotional support animal as a reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) ("ADA"), but the dog caused fellow employees to have allergic attacks. The district court held,

> Here, the undisputed material facts demonstrate that Mr. B's [the dog] presence in the EOC imposed an undue hardship. To begin with, Mr. B was causing several individuals, including a day shift dispatcher and plaintiff's supervisor, to suffer from allergies. The allergic reactions these individuals suffered included significant discomfort and there is no record evidence that shows that plaintiff could have taken steps to alleviate or minimize the allergies…Furthermore, because plaintiff and her coworkers needed to be stationed in the EOC to answer 911 calls and to dispatch emergency assistance, there was no way to allow Mr. B in the EOC while also eliminating the risk of allergic reactions to employees. Although another workplace might be able to give

[8] The training that the dog received that qualified it as a service animal was that, "Entine has trained Cory to perform the specific task of climbing on her torso when she has a panic attack…When Entine feels Cory's weight on her torso, that tactile sensation restores her ability to breathe and move. *Entine*, No. 2:17-cv-946 (S.D. Ohio, Eastern Division, 2017).

> plaintiff or allergic employees a different work space, that is not an option here because it would be prohibitively expensive for defendant to provide a new EOC solely for plaintiff or solely for allergic employees. Thus on this record, it is clear that plaintiff's insistence on Mr. B's presence imposed an undue hardship on defendant, as it required other employees to suffer from allergies. Accordingly, plaintiff's demand to have Mr. B in the EOC with her was not a reasonable accommodation.

Maubach, No. 1:17-cv-921

As noted none of these cases was decided at the appellate level and none is directly on point. *Peklun* appears to accept that under the FHA that causing a co-tenant to have allergy attacks could be a direct health threat and bar an emotional support animal, but the factual record was contentious and evidence as to whether or not an additional accommodation would have solved the allergy problem was lacking. *Entine* involved co-tenants and allegations of allergies but with regard to a service animal under the ADA and the district court found that the allergic co-tenant failed to prove that her attacks were the result of the plaintiff's dog. Finally *Maubach* involved an emotional support animal, but also under the ADA and in an employment, rather than tenancy situation. The district court found that the dog caused allergy attacks to co-employees and that accommodating the disabled employee and her dog as well as the allergic employees would be prohibitively expensive, thus the emotional support animal was not a

reasonable accommodation.

Here the parties stipulated that the emotional support animal caused Cohen's allergy attacks and the magistrate found that these attacks were severe and at times life threatening. *Maubach* seems the most on point, particularly when we note that the cost of accommodating both Clark and Cohen was over $80,000.[9]

4. Problems in Practice with Emotional Support Animals

While the motivation of assisting the disabled is laudable, in practice emotional support animals have proved to be subject to widespread abuse. This abuse threatens their use for the truly disabled.

First, in finding that emotional support animals are a reasonable accommodation courts proceeded on the assumption that only a small number of requests would be made. For example, in *Majors v. Housing Authority*, 652 F.2d 454 (5th Cir. 1981), a key emotional support animal case relied on by the Court of Appeals in *Henderson* II, the Fifth Circuit held, "the [landlord] could easily make a limited exception for that narrow group of persons who are handicapped and whose handicap requires (as has

[9] Magistrate Judgment Order, 5, Apx 171; Defendant 2800-1 Exhibit D, Apx 34.

been stipulated) the companionship of a dog." *Majors*, 652 F.2d at 458.

In fact the number of emotional support animals has exploded. As Jeffrey Clark, the leasing manager for 2800-1, testified for their approximately 2,000 tenants they had 9 requests to accommodate emotional support animals in 2015, 26 in 2016 and over 30 requests in the first six months of the 2016-17 lease term. Trial Transcript, Apx, 67.

Part of the reason for this rapid increase is that the legal standards that govern disabilities appear in practice to have been significantly watered down. The ICRA defines a "disability" as, "the physical or mental condition of a person which constitutes a substantial disability." Iowa Code § 216.2(5). Administrative regulations of the Iowa Human Rights Commission state,

> The term 'substantially handicapped person' shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Iowa Admin. Code r. 161--8.26. See *Goodpaster v. Schwan's Home Service*, 849 N.W.2d 1, 7 (Iowa 2014).

This tracks the FHA which uses the term "handicap" instead of disability, but is otherwise identical,

> "Handicap" means, with respect to a person—
> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or
(3) being regarded as having such an impairment,

42 U.S. Code §3602(h).

While these appear to be fairly rigorous standards, nevertheless, in practice it appears that almost anyone can qualify as disabled in order to get an emotional support animal. As Jeffrey Clark, the leasing manager for 2800-1 testified,

> Jeffrey Clark: We run into situations where we will come across a pet in an apartment. We will give them notice that this is a no-pet building, to remove it. We'll end up, within a couple days or even sooner, with a certification or a note that claims now it's an assistance animal.

Trial Transcript, Apx 74.

Jeffrey Clark further testified,

> Counsel for Cohen: And you mentioned that when you catch people with animals -- so tell me of all the times -- How many times have you caught someone this year with a pet or an animal?
> Jeffrey Clark: If I was to take a -- pull a number I think is correct, probably maybe ten times this year.
> Counsel for Cohen: And have all of them sought emotional support animal certification after they got caught?
> Jeffrey Clark: I believe every one of them has, yes.
> Counsel for Cohen: What effect has this had on your ability to enforce the no-pets policy?
> Jeffrey Clark: You really have no ability. You can enforce the no-pets policy, but they're just going to go out and get a certification

> or a letter from a physician to make it an emotional support animal. So we really can't enforce pets at this point.[10]

Trial Transcript, Apx 89-90.

Further problems have developed with emotional support animals.

HUD guidelines state that,

> Breed, size and weight limitations may not be applied to an assistance animal. A determination that an assistance animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence about the specific animal's actual conduct — not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused.

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[10] Jeffrey Clark further testified that after receiving a request for accommodation with a disability certification for an emotional support animal from an online website, ExpressPetsCertify.com, he was curious about the site, applied himself and was preapproved, but did not pay the $100 required for final certification as disabled. Trial Transcript, Apx 74-5. The preapproval certificate and e-mail from ExpressPetsCertify.com are Exhibit F, Apx 128-31. The e-mail states as follows, "Making your pet an Emotional Support Animal will have a positive impact on both your lives: No longer will you be restricted by no pet policies or restrictions. Unfair pet security deposits are now a thing of the past as well as higher rent for living with a pet. Traveling with your pet will suddenly become convenient instead of a chore. They can sit with you on the plane - no pet carriers, cargo storage or fuss, just your trusty companion by your side wherever you go. That's right - all you need to get your pet access to air travel as well as pet restricted housing is a medical ESA letter from a licensed, authorized health care provider (we can take care of that for you too). Choose the type of letter you need now and a licensed therapist will do the rest. Visit ExpressPetCertify.com to get your letter today."

HUD FHEO Notice: FHEO-2013-01, page 2, Apx 123.[11]

In particular these requirements mean that landlords must accept large and dangerous breeds of dogs like pit bulls or even wild animals as emotional support animals. For example, in *Warren v. Delvista Towers Condo. Ass'n, Inc*., 49 F.Supp.3d 1082, 1088 (S.D. Fla. 2014) which involved a pit bull as emotional support animal the district court cited these specific HUD guidelines and not only required the landlord to accept the pit bull but invalidated a local statute banning pit bulls.[12] Jeffrey Clark testified

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[11] The Iowa Human Rights Commission guidelines are identical, "Breed, size, and weight limitations may not be applied to assistance animal… Decision must be based on individualized assessment relying on objective evidence about the specific animal's actual conduct--not based on mere speculation that the animal may cause harm or on evidence of harm or damage caused by other animals" ICRC Factsheet, Assistance Animals and the Fair Housing Act https://icrc.iowa.gov/publications

[12] These guidelines impose a presumption of non-violence and lack of danger for all emotional support animals. This partially violates Iowa law which establishes strict liability due to dangerousness for dogs and wild animals. See Iowa Code §351.28 for dogs and for wild animals see, e.g. *Franken v. City of Sioux City*, 272 N.W.2d 422, 424 (Iowa 1978) which cites comment (c) of the Restatement (Second) of Torts § 507(1),

> One who keeps a wild animal is required to know the dangerous propensities normal to the class to which it belongs. It is therefore not necessary in order for the rule stated in this section to be applicable that its possessor should have reason to know that the particular animal possesses a dangerous propensity. He may reasonably believe that it has been so tamed as to have lost all of

that several tenants had pits bulls as emotional support animals and that, "some of the bigger dogs can be aggressive and they can scare other people." Trial Transcript, Apx 86-7.

Further, while most emotional support animals are dogs and cats, landlords are not permitted to restrict the type of animal sought as an emotional support animal. "While dogs are the most common type of assistance animal, other animals can also be assistance animals."[13] HUD FHEO Notice: FHEO-2013-01, Apx 122. As Jeffrey Clark testified, while most requests for accommodation were for dogs and cats, "We've had a micro-pig request, we've had a rabbit request, and we've had snake requests." Trial Transcript, Apx 67.[14]

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these propensities; nonetheless he takes the risk that at any moment the animal may revert to and exhibit them.

Franken, 272 N.W.2d at 424.

[13] Again the Iowa Civil Rights Commission guidelines are identical, "Animals other than dogs can be assistance animals." ICRC Factsheet, Assistance Animals and the Fair Housing Act https://icrc.iowa.gov/publications

[14] Jeffrey Clark also testified that his understanding was that landlords could not restrict the number of emotional support animals that a tenant had. "I believe they can have as many as they can receive a letter from or a note saying they're needed." Trial Transcript, Apx 75-6. Neither the HUD nor IHRC guidelines indicate any limits on the number of animals.

So under current practice, it appears almost anyone can obtain documentation of their need for an emotional support animal. In practice there is no limit on the size, breed, type or even number of animals that can be emotional support animals. This has resulted in an explosion of requests for accommodation of emotional support and unfortunate abuses by non-disabled tenants who simply wish to avoid no pet restrictions. These abuses threaten the availability of emotional support animals for the truly disabled.

C. Clark's Emotional Support Animal Posed a Direct Threat to Cohen 's Health

With a better understanding of the applicable statutes and precedent with regard to emotional support animals and what has actually happened in practice, we can turn to the specific issues in this case. We begin with issue of whether or not Clark's dog posed a direct health threat to Cohen. Under the ICRA an accommodation is not reasonable if it causes a direct threat to the health of others,

> Nothing in this subsection requires that a dwelling be made available to a person whose tenancy would constitute a direct threat to the health or safety of other persons or whose tenancy would result in substantial physical damage to the property of others.

Iowa Code §216.8A(3)(e). Similarly the FHA provides, "Nothing in this subsection requires that a dwelling be made available to an individual whose

tenancy would constitute a direct threat to the health or safety of other individuals." 42 U.S.C. § 3604(f)(9).

In ruling under this subsection of the FHA, in *Scoggins v. Lee's Crossing Homeowners Assoc*., 718 F.3d 262 (4th Cir. 2013), the United States Court of Appeals for the Fourth Circuit held that in enacting this subsection, "Congress made clear that the health and safety of other persons are relevant factors in determining whether a person or entity violated the [FHA]." *Scoggins*, 718 F.3d 262 at ¶ 50. The *Scoggins* Court went on to hold,

> We join other courts that have recognized this principle, and hold that the potential for personal injury is a relevant consideration in examining whether a modification or accommodation request was reasonable. See *Dadian v. Village of Wilmette*, 269 F.3d 831, 840-41 (7th Cir. 2001) (analyzing 42 U.S.C. § 3604(f)(9) and observing that a defendant may, in certain circumstances, deny a plaintiff's accommodation request if that request poses a direct threat to safety of others); *Howard v. City of Beaver-creek*, 108 F. Supp. 2d 866, 875 (S.D. Ohio 2000) (holding that defendant was not required by the FHAA to grant plaintiff permission to construct a six foot fence to alleviate the effects of post traumatic stress disorder, because the fence posed a threat to pedestrian and vehicular traffic), aff'd on other grounds, 276 F.3d 802 (6th Cir. 2002); *Bangerter v. Orem City Corp*., 46 F.3d 1491, 1503-04 (10th Cir. 1995) (observing that the FHAA permits "reasonable restrictions on the terms or conditions of housing [to disabled individuals] when justified by public safety concerns," so long as those concerns are not based on "blanket stereotypes" about persons with disabilities).

Scoggins, 718 F.3d 262 at ¶ 50.

In the instant case, the parties have stipulated, based on her allergist's report, that Cohen suffers from allergies to animals and that Clark's dog caused her to have allergic attacks. Joint Stipulation, Apx 24. Cohen also testified as to the deleterious effects of the allergic attacks on a daily basis, as well as the cumulative negative health effects over time and the ever present threat that she would suffer deadly anaphylactic shock, for which she was prescribed an emergency Epi-pen by her allergist. Cohen Deposition, Apx, 143-8; Affidavit of Allergist, Apx 166. The magistrate found that her allergies were severe and, "in some circumstances life-threatening." Magistrate Judgment Order, Apx 169.

In the instant case, the district court first set forth the general framework for reasonable accommodation,

> The landlord should attempt to make a reasonable accommodation, both to allow the requested accommodation itself and to protect the interest of any third party. However, having made such an effort with respect to the third party, the landlord may deny the accommodation request if there is no way to make it co-existent with the health and safety interests of the third party.

District Court Ruling on Appeal, Apx 182.

The district court then held,

> The Court would find that the efforts made by Landlord were

> sufficient to justify denying Mr. Clark's request for reasonable accommodation or moving to the imperfect solution of asking him to move to another apartment building. That conclusion is based on the good faith effort to make a reasonable accommodation and the inability to identify a solution to mitigate the harm to the health and safety of Ms. Cohen. In essence, having attempted to accommodate the request and being unable to do so, the Landlord could and should have denied Mr. Clark's request at that point.

District Court Ruling on Appeal, Apx 183.

The district court properly ruled Clark's dog caused a direct threat to Cohen 's health and thus Clark's dog was not a reasonable accommodation under Iowa Code §216.8A(b).[15]

D. Given the Burdens on Cohen, Clark's Emotional Support Animal Was Not a Reasonable Accommodation

If Clark's dog was not a direct threat to Cohen's health, under Iowa Code §216.8A(b), then the reasonableness of the requested accommodation is determined by a case specific balancing test. The standard application of the balancing test in FHA cases has been to measure the benefits and burdens to the landlord and disabled tenant, but it is clear that the burdens to third parties directly affected, like Cohen, should also be considered.

[15]Appellant agrees with the district court's substantive ruling, but does not believe that her claims should have been dismissed due to the uncertain state of the law. See §V below.

1. Balancing Test for Reasonable Accommodation

Determining reasonableness of an accommodation under the FHA and ICRA is a fact question decided on a case by case basis. In *Colleen and John Austin, v. Town of Farmington*, 826 F.3d 622 (2016) (2nd Cir. 2016) the United States Court of Appeals for the Second Circuit held that the determination of whether requested accommodations,

> ….are reasonable in light of appellants' needs requires a complex balancing of factors. Reasonableness analysis is "highly fact-specific, requiring a case-by-case determination." *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) (quoting *United States v. Cal. Mobile Home Park Mgmt. Co*., 29 F.3d 1413, 1418 (9th Cir. 1994)). The reasonableness issue here cannot be determined on the pleadings because the relevant factors are numerous and balancing them requires a full evidentiary record. A requested accommodation is reasonable where the cost is modest and it does not pose an undue hardship or substantial burden on the rule maker. See *Olson v. Stark Homes, Inc*., 759 F.3d 140, 156 (2d Cir. 2014).

Colleen and John Austin, v. Town of Farmington, 826 F.3d at 630.

The basic test for reasonableness is set forth in *Hollis v. Chestnut Bend Homeowners' Association*, 760 F.3d 531 (6th Cir. 2014) where, in ruling on a claim of discrimination under the FHA, the United States Court of Appeals for the Sixth Circuit held,

> But the crux of a reasonable-accommodation or reasonable-modification claim typically will be the question of reasonableness. To determine the reasonableness of the requested

> modification, the burden that the requested modification would impose on the defendant (*and perhaps on persons or interests whom the defendant represents*) must be weighed against the benefits that would accrue to the plaintiff. See *Groner*, 250 F.3d at 1044. This is a "highly fact-specific inquiry." *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002). A modification should be deemed reasonable if it "imposes no 'fundamental alteration in the nature of a program' or 'undue financial and administrative burdens.'" *Groner*, 250 F.3d at 1044 (quoting *Smith & Lee Assocs*., 102 F.3d at 795); see also *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003) ("A defendant must incur reasonable costs and take modest, affirmative steps to accommodate the handicapped as long as the accommodations sought do not pose an undue hardship or a substantial burden.").

Hollis, 760 F.3d at 541-2. See also *Shapiro v. Cadman Towers, Inc*., 51 F. 3d 328, 335 (2nd Cir. 1995) (Under FHA, "[defendant] can be required to incur reasonable costs to accommodate [plaintiff's] handicap, provided such accommodations do not pose an undue hardship or a substantial burden."); *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, at ¶54 (7th Cir. 2006) ("An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it."); *Castellano v. Access Premier Realty, Inc*., 181 F. Supp 3d 798, 807 (E.E. Cal. 2016) (where cat requested as emotional support animal, "landlords may have to shoulder certain costs, so long as they are not unduly burdensome.")

2. The Effects on Third Parties Should be Considered

While normally the question of reasonable accommodation in the housing discrimination context requires a balancing of the benefits and burdens to the disabled tenant and to the landlord, the burden to third parties, in particular co-tenants, should also be considered. As noted, the ICRA specifically considers the effects on third parties of an accommodation stating that,

> Nothing in this subsection requires that a dwelling be made available to a person whose tenancy would constitute a direct threat to the health or safety of other persons or whose tenancy would result in substantial physical damage to the property of others.

Iowa Code §216.8A(3)(e).

Precedent also establishes that the impact on third parties, in particular co-tenants, needs to be taken into consideration when determining reasonable accommodation. For example, in *Woodside Village-Stratford v. Hertzmark*, 1993 WL 268293 (Conn Sup. Ct.. 1993) the court found that the landlord had not denied a reasonable accommodation under FHA when it evicted disabled tenant who could not manage his dog that defecated and urinated in his unit and common areas,

> The record discloses that the defendant's dog causes noises and odors that are disruptive and offensive to other residents of the

> apartment complex. Because of the dog's toileting habits and the defendant's inability to adequately control him, the residents' health, safety and comfort is at risk. This then, is not a case in which there are "no collateral consequences"; *Whittier Terrace Associates v. Hampshire*, [532 N.E.2d 712 (Mass. 1989)]; to a modification of plaintiff's pet policy; or in which the plaintiff "could readily accommodate" the defendant; *Majors v. Housing Authority of DeKalb*, supra, 458; without reference to the effect such accommodations would have on the other residents.

Woodside, 1993 WL 268293; see also *Hollis v. Chestnut Bend Homeowners' Association*, 760 F.3d 531, 542 (6th Cir. 2014) (determine reasonableness of accommodation by comparing burden on defendant *and persons represented by defendant* to benefits to plaintiff);

That the interests of third parties and co-tenants in particular affected by the accommodation need to be considered is clear from cases like *Groner v. Golden Gate Garden Apts*, 250 F.3d 1039 (6th Cir. 2001) which involved a claim of housing discrimination under the FHA, "[t]he dispute arose when [the landlord] threatened to evict Groner, a tenant with a known mental disability, following numerous complaints from another tenant about Groner's excessive noisemaking at all hours of the day and night." *Groner*, 250 F.3d 1039 at ¶ 1. One accommodation sought by Groner was that landlord should move a neighboring co-tenant who was disturbed by the noise he made. The *Groner* Court held that,

> [Landlord] had given [the co-tenant] the option of moving, and she had refused to do so. [Landlord] could not lawfully force [the co-tenant] to vacate her apartment during her lease. "[A]s a matter of law, the [neighbor's] rights did not have to be sacrificed on the altar of reasonable accommodation." *Temple v. Gunsalus*, No. 95-3175, 1996 WL 536710, at *2 (6th Cir. Sept.20, 1996).

Groner, 250 F.3d 1039 at ¶25. The *Groner* Court further held,

> Because [landlord] has a legitimate interest in ensuring the quiet enjoyment of all its tenants, and because there has been no showing of a reasonable accommodation that would have enabled Groner to remain in his apartment without significantly disturbing another tenant, Groner has failed to raise a genuine issue of material fact as to a violation of his rights under either the Fair Housing Act or the equivalent laws of Ohio.

Groner, 250 F.3d 1039 at ¶25.

Temple v. Gunsalus, 97 F.3rd 1452 (6th Cir. 1996) cited in *Groner*, also involved a case of housing discrimination against the disabled under the FHA. The disabled tenant, who suffered from multiple chemical sensitivities, sought as a reasonable accommodation that a co-tenant be evicted for using Pinesol and Lysol cleaners. The United States Court of Appeals for the Sixth Circuit affirmed the district court's refusal to require the eviction of the co-tenant citing *Eckles v. Consolidated Rail*, 94 F.3d 1041 (7th Cir. 1996),

> …where a plaintiff who suffered from epilepsy claimed that his employer had violated the "reasonable accommodations" provision of the Americans With Disabilities Act, 42 U.S.C. §§

> 12101 et seq., by refusing to let him "bump" a more senior employee out of a job that the plaintiff would have been able to handle notwithstanding his handicap. The court of appeals affirmed a summary judgment for the defendant employer. Pointing out that the conflict was one between the rights of the handicapped employee and the rights of his co-workers, the district court held that as a matter of law the co-workers' rights did not have to be sacrificed on the altar of "reasonable accommodation."

Temple, 97 F.3rd 1452 at ¶ 12.

The *Temple* Court noted that unlike *Eckles*, where the co-workers were protected by a collective bargaining agreement, here the co-tenant did not have a long term lease. Nevertheless,

> [the co-tenant] was not shown to have been an undesirable tenant, however, and she clearly had an interest in not being evicted to accommodate a newer tenant, just as Mr. Eckles' co-workers had an interest in not being bumped out of desirable jobs to accommodate a man with less seniority. The respect for third-party interests manifested in Eckles cuts in favor of affirmance in the case before us. "The requirement of reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person," see *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir.1995), and in the case at bar we are not persuaded that the requirement could be found to have entailed an obligation to deprive [co-tenant] and her children of their accommodations.

Temple, 97 F.3rd 1452 at ¶ 14. The instant case is even stronger than *Temple* as Cohen is indeed protected by a long term lease that specifically prohibits pets.

The citation of *Eckles* by the *Temple* Court in the context of housing discrimination is very significant because *Eckles* is part of a well established line of precedent protecting the rights of third parties under collective bargaining agreements from being violated by requests for reasonable accommodation. A leading case is *TWA v. Hardison*, 432 U.S. 63 (1977) which involved a request for reasonable accommodation of religious beliefs under 42 U.S.C. § 2000e-2(a)(i) by an employee where the accommodation would have required violating the seniority system embodied in the employer's collective bargaining agreement. The *TWA* Court noted the importance of collective bargaining agreements and held,

> Hardison and the EEOC insist that the statutory obligation to accommodate religious needs takes precedence over both the collective bargaining contract and the seniority rights of TWA's other employees. We agree that neither a collective bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement

TWA v. Hardison, 432 U. S. at 80.

The *TWA* Court went on to hold that,

> It would be anomalous to conclude that, by "reasonable accommodation," Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does

not require an employer to go that far.

TWA v. Hardison, 432 U. S. at 80. See also *US Airways v. Barnett*, 535 U.S. 391 (2002) (seniority system would prevail over requested accommodation under Americans with Disabilities Act, 42 U. S. C. §12101 et seq.. absent special circumstances).

This precedent also applies under Iowa law. In *Frank v. American Freight Systems*, 398 N.W.2d 797 (Iowa 1987), involving a complaint of disability discrimination under Iowa Code §601A.6, the Supreme Court held,

> In the analogous area of religious discrimination, we have held that reasonable accommodation must be made by an employer only if it does not substantially impinge on the rights of other employees or incur more than a de minimus cost to the employer. *King,* 334 N.W.2d at 334 (citing *TransWorld Airlines*, *Inc. v. Hardison*, 432 U.S. 63, 83-84, 97 S.Ct. 2264, 2276-77, 53 L.Ed.2d 113, 130-31 (1977)).

Frank, 398 N.W.2d at 803.

3. Balancing the Parties' Benefits and Burdens

Using this precedent let us now consider the benefits and burdens of Clark's dog to the parties in this case. The landlord, 2800-1, presented evidence that carpet cleaning and allergen removal, which must take place for every tenant with an emotional support animal, costs on average $350

while full restoration when there is damage due to animal waste and urine costs on average $2200 to $2500 depending on whether or not the carpet is cleaned or replaced with the average per month rent being $750. Defendant 2800-1 Exhibit B, Apx 33. 2800-1 also presented evidence that accommodating both Mr. Clark and his dog and Ms. Cohen's allergies in their original units by adding a series of hermetically sealed doors on all floors of the building would cost $81,715.92. Magistrate Judgment Order, Apx 171; Defendant 2800-1 Exhibit D, Apx 34.

The parties stipulated that Clark had a mental impairment, was thus disabled and that the emotional support dog was necessary for him to use and enjoy his tenancy. Joint Stipulation, Apx 24. Clark testified that after getting his dog that his mental health improved markedly, he was able to stop taking some of his medication and lower the dosage of others. 1/24/18 Trial Transcript, Apx 95-8. Overall he states that he can function better in society and that he believes, "…his quality of life has improved tremendously." Defendant Clark's Dist Ct Argument on Appeal, page 5.

Cohen testified and presented evidence of her life long acute allergies to dogs and the daily suffering caused by allergic attacks which the parties stipulated were due to Clark's dog. Allergist Affidavit, Apx 164-6;

Deposition of Karen Cohen, Apx, 143-8; Joint Stipulation, Apx 24. Cohen testified about her well founded fear of deadly anaphylactic shock from an allergic attack. Allergist Affidavit, Apx 169; Deposition of Karen Cohen, Apx 147-8. The magistrate found that Cohen's allergies were severe and at times life threatening. Magistrate Judgment Order, Apx 169.

The test for reasonable accommodation is whether or not the request causes an undue hardship or substantial burden. While 2800-1 might disagree, $350 for allergen removal is probably not an undue hardship.[16] On the other hand, over $80,000 for hermetically sealing the building to accommodate both tenants was clearly an undue hardship and a substantial burden on 2800-1 and not thus a reasonable accommodation.

The parties stipulated that Clark has a mental disability and requires the emotional support animal. Clark notes the ameliorative and positive effects of the emotional support animal, which are clearly significant benefits to him. However, his dog, the source of these benefits, caused Cohen considerable day to day suffering and the ever present potential for

[16] Though it may soon become unduly burdensome. As 2800-1's leasing manager testified, they had 30 requests in the first 6 months of the 2016-17 lease term, which is $10,500 for allergen removal. 5% of tenants, 100 tenants, with emotional support animals would be $35,000 a year just for allergen removal, not considering other animal damage.

deadly anaphylactic shock. Under the facts of this case, the dog caused an undue burden and substantial hardship to Cohen making it clear that it was not a reasonable accommodation.

4. Priority in Time & Alternative Accommodations

Cohen argued to the magistrate and to the district court on appeal that priority in time by analogy to nuisance cases should be considered with regard to an allergic co-tenant and a disabled tenant.[17] In nuisance cases if the offending activity was already present and the plaintiff moved to the nuisance, this weights heavily against the plaintiff, but as the Supreme Court held in *Weinhold v. Wolff*, 555 N.W.2d 454 (Iowa 1996),

> In *Kriener v. Turkey Valley Community School District*, 212 N.W.2d 526, 530 (Iowa 1973), the landowners acquired their farm and located on it before an offending sewage lagoon was constructed. We found this fact weighed heavily in favor of the landowner on the nuisance issue. Here the Weinholds acquired their farm before the Wolffs started their hog feeding and confinement operation. The Weinholds therefore clearly enjoyed priority of possession.

Weinhold, 555 N.W.2d 460. See *also Schlotfelt v. Vinton Farmers' Supply Co*., 109 N.W.2d 695, 699 (1961) ("One has a considerably greater right to protest against the conduct of a business in a residential area where the

[17] District Court Ruling on Appeal, 2, Apx 180.

objector has established his home with no knowledge that such an invasion is contemplated or may be attempted in the future.")

Cohen testified that she looked for and relied upon the express no pet provision in the lease and that the building was advertised as a no pet building. Deposition of Karen Cohen, Apx 136-7. Cohen's tenancy began on July 21, 2016. Joint Stipulation, Apx 3. On the other hand Clark signed his lease, which also contained an explicit no pets provision, on January 18, 2016, began his tenancy on July 21, 2016 and only after moving into the building requested an accommodation on or about August 23, 2016. Joint Stipulation, Apx 24.

Priority in time should be a key consideration in resolving the conflict of interests between Clark and Cohen. Clark knew the building prohibited pets, signed a lease agreeing to no pets, and lived in the building for a month before requesting accommodation for an emotional support animal. Cohen specifically relied on the prohibition of pets and clearly had priority in time. On the other hand, if their positions were reversed and Clark was already living in a pets allowed building, a tenant with an allergy to animals should not be able to move into the building and force him or his dog out. Because the dog caused substantial harm through her allergies to Cohen and because

she had priority of location, Clark's emotional support animal was not a reasonable accommodation.

Relocation was raised as an alternative accommodation below with the magistrate stating that 2800-1 could have offered Clark a unit in another building. Magistrate Judgment Order, Apx 176. Clark argued on district court appeal that 2800-1 could have offered either Clark or Cohen a unit in another building. Defendant Clark's Dist Ct Argument on Appeal, page 5. However, no evidence was presented that either voluntary or involuntary relocation of either Clark or Cohen was ever discussed with them or that such an alternative was even feasible. The only mention of relocation at trial appears to be the testimony of Jeff Clark, leasing manager for 2800-1, who stated that the Iowa Civil Rights Commission informally expressed reservations about forcing tenants to relocate as part of a reasonable accommodation. 1/24/18 Trial Transcript, Apx 80-1.

However, Appellant does believe that if 2800-1 denied Clark an emotional support animal in his original unit, it would be an appropriate alternative accommodation, if vacant units were available elsewhere, to offer Clark a unit in a building where animals were allowed, if he voluntarily wished to relocate.

On the other hand, forced relocation is problematic because both tenants have the statutory and contractual right to occupy their units and 2800-1 has the statutory and contractual right to receive rent for the units leased to the tenants. Similarly it is difficult to see how a tenant, suffering from serious or even life threatening allergies could only be relieved of that threat by having their lease broken and being forced to move into another building, blatantly violating their contractual and statutory rights. This is particularly true when, with the proliferation of emotional support animals, the allergic tenant might well end up moving repeatedly in search of the elusive animal free building. This is also not a solution that is open to a landlord without available vacant units since evicting existing tenants simply to move either a disabled or allergic tenant in would violate the existing tenant's contractual and statutory rights and would not be a reasonable accommodation due to the substantial hardship to the evicted tenant.[18]

[18]Appellant believes that in many cases, the presence of an allergic tenant in a building will necessitate the denial of requests for accommodating emotional support that are made after the allergic tenant begins their tenancy.

V. The District Court Should Not Have Dismissed the Instant Action Due to the Uncertain State of the Law

Despite finding that 2800-1, "could and should have" denied Clark's request for an emotional support animal, the district court denied Cohen's requested relief of $1464, one month's rent in damages, and held,

> [T]his Court acknowledges that was not clear law at the time these developments took place. The Landlord did consult with the Iowa Civil Rights Commission and acted on their advice. He took significant steps to accommodate both parties to the best of his ability and resources. Therefore, the need for a new and clearer test may remain outstanding in the Iowa courts, but under the law as it was, Landlord did not believe he had the option to decline the request and he made every effort to mitigate the effect of that result on Ms. Cohen. The claims against both Defendants should be dismissed.

District Court Ruling on Appeal, Apx 183.

The district court cites no precedent to support its ruling that if the law is uncertain that a plaintiff should be denied relief, even if the court rules in its favor. This is not a situation where the plaintiff is attempting to assert that a ruling in another case should be applied retroactively, but instead, despite the fact that the plaintiff's legal and factual arguments prevailed in the instant case and established her claim, she was still denied relief.

While, if successful, the plaintiff will be establishing new law, this is not the most extreme situation, where pre-existing law is being overruled.

Even in that situation, if the plaintiff prevails, they are entitled to relief. For example, in *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981), the Supreme Court overruled *Hankins v. Derby*, 211 N.W.2d 581, 582 (Iowa 1973) and established that a child has an independent right of action to recover for the loss of society and companionship of a parent who has been tortiously injured by a third party. The Supreme Court did not rule in the plaintiff's favor and then dismiss their claims, but instead the district court's dismissal of the plaintiff's claims for loss of consortium was reversed and the case remanded for remanded for further proceedings consistent with the opinion. *Weitl v. Moes*, 311 N.W.2d at 267.

If the district court was correct, then any litigant who is successful in establishing new law or overturning a previous ruling, despite their effort, energy and determination and despite being found to have a right to relief, would be denied any recovery, based simply on the fact that their case made new law. Cohen's request for one month's rent as damages is not excessive or unreasonable and denying her relief would be require overturning long accepted precedent on dubious grounds.

VI. Conclusion

This case raises many significant issues of first impression for landlords and tenants, the disabled and their co-tenants. It does appear that there are genuinely disabled persons, like Clark, who do benefit from having an emotional support animal as an accommodation to their disability. But while there can be genuine benefit to the disabled, the burdens to co-tenants and landlords have been ignored.

As helpful as Clark's dog was in ameliorating his disability, that assistance was purchased at a high price to Cohen, constant allergy attacks that were severe and life threatening. As the facts of this case show under current practice there is nothing that Cohen could do to protect herself from allergic attacks from other tenants' emotional support animals.

In addition, it appears that in practice there is wide spread abuse of the right to emotional support animals, as large numbers of non-disabled tenants seek to have their household pets reclassified as emotional support animals so they can evade non-pet restrictions and avoid additional pet rent or security deposits. Unless this Court acts the truly disabled with legitimate emotional support animals and even those with service animals, will likely suffer from the backlash caused by widespread abuse and misuse.

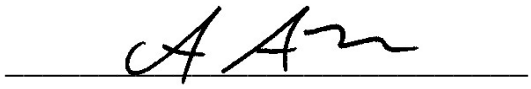
Appellant hopes that the Supreme Court will retain this case, provide guidance to landlords and tenants throughout Iowa and establish precedent balancing the benefits and burdens of emotional support animals among all affected parties.

WHEREFORE, district court's dismissal of the instant action should be overruled.

REQUEST FOR ORAL SUBMISSION

Appellant requests oral argument.

Respectfully submitted,



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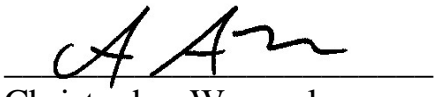

Christopher Warnock

June 1, 2019