IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-2173

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KAREN COHEN
Plaintiff- Appellant/Cross-Appellee,

Vs.

DAVID CLARK,
Defendant-Appellee/Cross Appellant

and

2800-1, LLC,
Defendant-Appellee

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

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THE DEFENDANT-APPELLEE/CROSS-APPELLANT'S PROOF BRIEF

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I. Standard of review

Appellee-Cross Appellant concurs with the Appellant's statement of the standard of review.

II. Causes of Action and Liability

The Appellant (hereinafter referred to as "Cohen") filed a small claims petition against her landlord (herein after referred to as "2800-1") and her cotenant, the Appellee-Cross Appellant (hereinafter referred to as "Clark"), under multiple alternate theories of recovery. Supplemental Petition, Apx 13-15. At trial, 2800-1 accepted liability for breach of the express no-pets covenant and stipulated that absent a reasonable accommodation permitting Cohen to have a dog on the premises, there was a

violation of the express covenant of the lease that no pets were permitted on the premises. 1/24/18 trial transcript, Apx 41-42. The parties then consented to add Clark as an indispensible party under Iowa R.Civ.P 1.234 because the question of whether or not Cohen's emotional support animal was a reasonable accommodation is central to the case and the outcome of this case ultimately affects Clark's right to have an emotional support animal on the premises. Clark Necessary Party Motion, Apx 118-119. 2800-1's stipulation narrowed the issues of the case to whether or not allowing Clark to have a dog on the premises was a reasonable accommodation.

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

A. State and Federal Disability Housing Discrimination

The Iowa Civil Rights Act (ICRA) and the Federal Fair Housing Act (FHA) provide protection against discrimination in housing for tenants who have physical and mental health disabilities and are in need of assistance animals in order to have an equal opportunity to use and enjoy their home. An assistance animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms

or effects of a person's disability. *Iowa Civil Rights Act, Iowa Code Chapter 216, Fair Housing Act, U.S.C. Chapter 45.*

An "emotional support animal (ESA)" is an assistance animal that provides a therapeutic benefit to a person with mental or psychiatric disability, requiring no specific training. The mere presence of this animal mitigates the effects of the emotional or mental disability. Any kind of animal can be designated an emotional support animal. *Iowa Civil Rights Fact Sheet Re: Service and Emotional Support Animals Under the Fair Housing Act and the Americans with Disabilities Act* (created June 2010).

A "service animal" is an assistance animal that is individually trained to work or perform tasks for the benefit of an individual with a physical, intellectual, and mental disability. (IE guiding individuals with impaired vision, providing protection or rescue work, pulling a wheel chair, or fetching dropped items). Service animals are limited to dogs and horses and require special training and licensing. *American With Disabilities Act.*

The Appellant's brief goes to great length to distinguish these two classifications of assistance animals. This distinction between an emotional support animal and a service animal is not relevant to the area of housing discrimination under either the Iowa Civil Rights Act or the Federal Fair Housing Act as both classifications of assistance animals are provided equal

protection with regard to housing discrimination. To insist on a distinction, is to insist that physical disabilities should be given more consideration than mental health disabilities, a gross unfairness to persons who suffer from mental health diseases.

The distinction between an emotional support animal and a service animal is relevant under the American With Disabilities Act (ADA) with regard to accommodations in public places (not private residence). Under the ADA, only protection is given to the service animals in public places (access to public services, programs, activities, and accommodations of government or private entities) and the protections affording by the ADA to service animals in public places do not apply to emotional support animals. *Americans With Disabilities Act, 42 U.S.C. Chapter 45*.

Section 216.8 of the Iowa Civil Rights Act prohibits discrimination in housing on the basis of a disability. §216.8A(3)(b) states:

> "A person shall not discriminate against another person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provisions of services or facilities in connection with the dwelling because of a disability of any of the following person:
>
> (1) That person.
> (2) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available.
> (3) A person associated with that person.

Under Iowa Code § 216.8A(3)(c)(2) discrimination in housing 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(3)(e) states:

> "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.

There is very little guidance in the case law in Iowa that address the issue of reasonable accommodations. The Court of Appeals, in an unpublished decision, in *Henderson v. Des Moines Mun. Hous. Agency*, (No. 0-707/09-1905 Iowa App., Nov. 20, 2010), stated that the provisions of the Iowa Civil Rights Act with regard to discrimination in housing contained in Iowa Code Section 216.8A(3)(b) are similar to the language in the Federal Fair Housing Act contained in 42 U.S.C §3604 (f)(3)(B) and held that the Iowa Courts may consider cases interpreting the provisions of the Federal Fair House Act in interpreting the provisions of the Iowa Act, citing, *Renda v. Iowa City Rights Comm'n,* 784 N.W.2d 8, 16-17 (Iowa 2010) (stating that interpretations of the FHA are instructive when interpreting the housing provisions of the ICRA, but they are not controlling); and *Bearshield v. Hohn Morrell & Co*, 570 N.W.2d 915, 918 (Iowa 1997)("Given the common purposes of the ADA and the ICRA's prohibition of disability

discrimination, as well as the similarity in the terminology of these statures, we will look to the ADA and the underlying federal regulations in developing standards under the ICRA for disability discrimination claims).

The Court of Appeals in *Henderson*, set forth the elements of a discrimination claim based on a landlord's failure to make a reasonable accommodation. The Plaintiff in this case is not asserting a discrimination claim in this case, but an analysis of the discrimination elements is useful in determining if the reasonable accommodation defense is a valid defense to a breach of contract claims against the Landlord. In *Henderson*, the court stated that Under the Iowa Act, it is the plaintiff's burden in a reasonable accommodation action to establish:

> (1) That the complainant is disabled with the meaning of the Act;
> (2) That the defendant knew or should reasonable 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 dwellings;
> (4) That the requested accommodation is reasonable; and
> (5) That the defendant refused the requested accommodation.

Id., at page 10-11.

The parties' stipulations eliminate the issues that have been the subject of the majority of the litigation involving disputes over ESA's between landlords and tenants in other jurisdictions, which focused on factual disputes over whether a person had a disability and whether the ESA

was necessary to afford the tenant an equal opportunity to use and enjoy the dwelling (elements 2-4). The parties have stipulated that Clark has a mental impairment and that the impairment substantially limited one or more major life activities and further that Clark's dog was an emotional support animal and necessary to afford him equal opportunity to use and enjoy his tenancy (citation). In *Henderson*, the court reversed the District Court's summary judgment for the Housing Agency, concluding that there it was a jury question to determine if the accommodation requested was reasonable, *Id.*, page 24. The *Henderson* case gave little guidance, however, as to what qualifies as "reasonable."

The Department of Housing and Urban Development issued the following regulations with regard to reasonable accommodations for emotional support animals:

> "Housing providers are to evaluate a request for a reasonable accommodation to possess an assistance animal in a dwelling using the general principles applicable to all reasonable accommodation requests. After receiving such a request, the housing provider must consider the following:
>
> > (I) Does the person seeking to use and live with the animal have a disability — i.e., a physical or mental impairment that substantially limits one or more major life activities?
> >
> > (2) Does the person making the request have a disability-related need for an assistance animal? In other words, does the animal work, provide assistance, perform tasks

> or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability."

Where the answers to questions (1) and (2) are "yes," the FHAct and Section 504 require the housing provider to modify or provide an exception to a "no pets" rule or policy to permit a person with a disability to live with and use an assistance animal(s) in all areas of the premises where persons are normally allowed to go, unless doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services.

The request may also be denied if: (1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. 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.

Conditions and restrictions that housing providers apply to pets may not be applied to assistance animals. For example, while housing providers may require applicants or residents to pay a pet deposit, they may not require applicants and residents to pay a deposit for an assistance animal.

U.S. Department of Housing and Urban Development FEHO-2013-01, Subject: *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* (issued April 25, 2013).

The HUD regulations provide a framework for landlords to use to evaluate if a reasonable accommodation must be granted under a "no pet" provision of a lease. The stipulations of the parties narrow the inquiry in this case to whether the landlord must agree to an accommodation for a tenant with an ESA when another tenant suffers from severe allergies to the ESA and relied on a "no pet" provision in the lease before entering into the lease. In other words, does Clark's emotional support animal pose a direct threat to Cohen that cannot be reduced or eliminated by another reasonable accommodation? Are there any other accommodations that could be made by the landlord to alleviate the effects on the tenant? If so, do these changes create an undue financial burden on the landlord? These issues and questions are of first impression for this Court. The parties look to the court for guidance on finding solutions that protect the rights of all disabled tenants.

B. Emotional Support Animals:

Social Scientist along with the legislature and the courts are beginning to recognize the therapeutic benefits that the use of emotional

support animals can provide to the treatment of mental heath diseases such as PTSD, depression, and anxiety. [See, *The Power of Support From Companion Animals For People Living With Mental Health Problems: A Systematic Review and Narrative Synthesis of the Evidence,* Brooks, Helen, et al. BMC Psychiatry, 2018. DOI 10.1186/s12888-018-1612-2 (concluding that despite some inadequacies in the data, this review suggests that pets provide benefits to those with mental health conditions though the intensity of connectivity with their owners and the contributions they make to emotional support in times of crises together with their ability to help manage symptoms when the arise) See also, *Potential Benefits of Canine Companionship For Military Veterans with Posttraumatic Stress Disorder (PTSD)*" Stern, Stephen L.; et al. Society and Animals, 2013. DOI: 10.1163/15685306-12341286 (test results suggest that living with a companion dog may help relieve some psychological distress associated with PTSD in some veterans)].

The Bazelon Center for Mental Health Law published a directive entitled, Right to Emotional Support Animals in "No Pet" Housing (last update June 16, 2017) that recognizes the increasing acceptance in the social sciences of the benefit of emotional support animals in treating people for psychiatric disabilities, stating:

> "Advocates and professionals have long recognized the benefits of assistive animals for people with physical disabilities, including seeing eye dogs or hearing dogs that are trained to perform simple tasks such as carrying notes and alerting their owners to oncoming traffic or to other environmental hazards. Recent research suggests that people with psychiatric disabilities can also benefit significantly from assistive animals. Emotional support animals provide therapeutic nurturing and support and have proven extremely effective at ameliorating the symptoms of psychiatric disabilities, including depression, anxiety, and post-traumatic stress disorder. "

C. Reasonable Accommodations

The Department of Housing and Urban Development (HUD) and several courts have explicitly stated that an exception to a "no pets" policy for a support animal generally qualifies as a "reasonable accommodation" in areas of housing and employment. See, e.g. Castellano v. Access Premier Realty, Inc. 181 F. Supp 3d 798 (E.D. Cal. 2016) (waiving a "no pet" policy to allow a resident's emotional support cat was a reasonable accommodation under FHA) *Auburn Woods I Homeowners Ass'n v. Fair Emp't and Hous. Comm'n*, 121 Cal. App. 4th 1578 (2004) (landlord's repeated denials of tenant's request for waiver allowing emotional service dog constituted unlawful discrimination); *United States v. University of Nebraska K*earny, 940 F. Supp2d 974 (D. Neb 2013) (holding university housing is considered a "dwelling" and subject to the provisions of the FHA); *Alejandro v. Palm Beach State Coll*ege, 843 F. Supp. 1263 (S. Fla 2012) (ruling in favor of a student's right to be accompanied on campus, in residence halls, and to

classes by a psychiatric service dog, which was trained to respond to the onset of anxiety attacks the student experiences as a result of PTSD finding the harm or disruption caused by the presence of the service dog was minimal in comparison to the benefit experience by the student, and therefore, its presence was considered a reasonable accommodation); *EEOC v. CRST International In. and CRST Expedited Inc., Case No. 1:17-cv-00129 in the Us District Court for the Northern District of Iowa*, in the settlement with the E.E.O.C, CRST was required to pay applicant back pay and compensatory damages for refusing to hire, and then retaliated against a truck driver, a Navy veteran, because he requested an accommodation to use a service dog while working to help with post-traumatic stress disorder).

As the benefits of the use of emotional support animals for non-pharmaceutical treatment of mental health disorders become more accepted by mental health providers, it stands to reason that more requests for accommodations for emotional support animals will be made to landlords for "no pet" policies in leases.

Jeffrey Clark (no relation to the Appellee) who manages the over 2000 rental units owned by 2800-1, testified at trial that he had seen the number of requests for emotional support animals go up substantially, with there being 9 requests in 2015; 26 in 2016; and over 30 in the first six

months of 2017-8 lease term. Trial Transcript, Apx 67. In an apparent attempt to show how easy it was to obtain a letter certifying that someone is disabled and needed an emotional support animal, Jeffry Clark testified that he applied to a website, ExpressPetsCertify.com for a letter from a licensed, authorized health care provider certifying that he had a disability and benefited from an emotional support animal. He testified that he was preapproved, but did not pay the $100.00 to obtain the certificate, Trial Transcript, Apx 75, Exhibit F, Apx 128-131. Cohen argues that this "explosion" in the number of person requesting emotional support animals is in part because these certificates are so easy to get for tenants who simply wants to avoid pet restrictions. See Appellant's brief, page 35. Cohen gave no consideration to the possibility of the increase in the number of requests being due to an increased awareness of the benefits of emotional support animals in the treatment of mental health issues.

One recent study evaluated the public perceptions of service dogs, emotional support dogs and therapy dogs and concluded that despite the media's focus on abuses and false representations of these dogs, although most of the participants in the study reported some concerns about the legitimacy and necessary access rights for emotional support animals, most

reported feeling the majority of the people are not taking advantage of the system" *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*" Schoenfeld-Tacher, Regina M. et al. International Journal of Environmental Research and Public Health, 2017. DOI. 10.2290/ijerph14060642. This study suggests that while people may question the validity of some emotional support animals, they recognize the benefits and advantages emotional support animals provide to persons who are truly disabled.

The potential for abuse of the process by some in obtaining fraudulent emotional support animals cannot be a blanket excuse for denying a reasonable accommodation to a person with a disability and should not dictate or factor into the analysis made by the landlord in evaluating a request for a reasonable accommodation or lesson the rights of persons with disabilities in any way. Perhaps measures need to be taken to crack down on the providers who are issuing fraudulent or unsubstantiated certifications of disability and/or on the persons obtaining the fraudulent certificates, but this cannot impose on the rights of disabled persons who truly benefit by having emotional support animals.

There are legal avenues in place for a landlord to weed out the tenants who are making fraudulent requests. Although a tenant is not required to

disclose the details of their disability, nor provide a detailed medical history, a housing provider is entitled to obtain information necessary to determine whether the requested accommodation is necessary because of a disability. A tenant must be able to substantiate their disability and establish that the support animal is necessary to use and enjoy the residence. See, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodations Under the Fair Housing Act* dated May 14, 2004, HUD and the DOJ, question and answer No. 18.

In this case, the parties stipulated that Clark had a mental impairment which substantially limits one or more major life activities and that his dog was a emotional support animal and necessary to afford him equal opportunity to use and enjoy his tenancy, and therefore, no analysis as to the validity of Clark's need for an emotional support animal was necessary. Clark testified that he suffers from severe ADHD and general anxiety disorder that was severely impacting his day-to-day functioning and enjoyment of life. Before obtaining an emotional support animal, he took several medications to manage his mental health that all had severe, and sometime debilitating side effects. After obtaining an emotional support animal, his mental health symptoms improved markedly and he was able to stop taking one of his medications and lower the dose of his other

medication due to the positive effects of his emotional support animal, Trial Transcript, Apx 94-98. He also testified as to the improvement it has had on his anxiety or as he describes "fear of the world" and how having to take his dog out every 8 hours a day to go to the bathroom caused him to get outside, "instead of hiding in his bed all day." Trial Transcript, Apx 103. Clark can function better in society and the quality of his life has improved tremendously because of his emotional support animal.

Although the law clearly establishes that an exception to a "no pets" policy generally qualifies as a "reasonable accommodation," for disabled persons requesting permission to have an emotional support animal reside with them, the case law is less clear on the what the landlord's responsibility is when the presence of an emotional support animal in a building effects the rights of other tenants in the building whose rights are also protected by the law, as is the present case, with a co-tenant who had life-threatening allergies.

Clearly under the ICRA and FHA, consideration of the right's of third parties is permitted and a landlord may deny an accommodation a request by a tenant for an accommodation for an emotional support animal if that person's tenancy would constitute a direst threat to the health or safety of other persons but only if the direct threat to health or safety of others

cannot be reduced or eliminated by another reasonable accommodation. A request for an emotional distress animal can also be denied when if allowing the accommodation would impose undue financial and administrative burden or would fundamentally alter the nature of the housing provider's services. The Iowa Civil Rights Act, U.S. Department of Housing and Urban Development FEHO-2013-01, Subject: *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* (issued April 25, 2013). It is clear the landlord must explore and make other reasonable accommodations to lesson the ill effects that emotional support animal may have on other tenants and take any measures that do not create an undue financial or administrative burden. Objections by third parties must be carefully scrutinized.

In this case, the 2800-1 did make attempts to mitigate the exposure of Clark's pet's dander had on Cohen by requiring that the two tenants to use different doors and hallways and the manager provided an air purifier to Cohen. Trial Transcripts, Apx 64. These attempts to mitigate seem very reasonable. Another option that was explored by 2800-1 was the installation of airtight doors that could be installed at the end of each floor. The cost of the four doors that would be needed in the building where Clark and Cohen

reside would be $82,000. Trial Transcript, Apx 65. This accommodation would undoubtedly constitute a financial burden. Unfortunately, the accommodations made in this case did not alleviate the effects on Cohen's allergies.

In a Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodations Under the Fair Housing Act dated May 14, 2004, HUD and the DOJ provided some guidance as to what a landlord must considered when determining if a requested accommodation poses an undue financial hardship and administrative burden by responding to the following response to the question, "What happens if providing a requested accommodation involves some costs on the part of the housing provider?

> "Courts have ruled that the Act may require a housing provider to grant a reasonable accommodation that involves costs, so long as the reasonable accommodation does not pose an undue financial and administrative burned and the requested accommodation does not constitute a fundamental alteration of the provider's operations. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effective meet the applicant or resident's disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative burden." See, question and answer No. 9.

One federal case did briefly discuss the issues of third party allergies as a side issue on cross motions for summary judgment in an unpublished decision in *Peklun v. Tierra Del Mar Condo. Ass'n, Inc.,* No. 15-CIV-80801, 2015 WL 8029840, at *1 (S.D. Fla. Dec. 7, 2015). The condo association filed a motion for summary judgment against plaintiffs' claims of violations of the Florida and Federal Fair Housing Acts, 42 U.S.C. § 3601, et seq. and Fla. Stat. § 760.20, et seq. In this case, one of the tenants in the building demanded that another tenant's EMS dog be removed from the premises claiming the dog's presence exacerbated his allergies, and threatened legal action if his request was not granted. The same person also filed injunctions to have the dog removed, followed by requests for contempt and sanctions when the dog was not - even after the condo association granted plaintiff's request to keep the dog. The motion for summary judgment was denied. Part of the reasoning was the presence of factual issues in dispute, which included the allergy claim. The court found:

> "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." Citing, *Warren v. Delvista Towers Condominium, Ass'n*, 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*.

In the *Warren v. Delvista Towers Condominium Ass'n*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014), cited above, the court found that an accommodation for an ESA is warranted even in circumstances where the granting of such request led to a violation of a county ordinance banning pit bulls, finding the federal law preempted the County ordinance. The court reasoned that the FHA established that it was the "clear and manifest purpose of Congress' to provide disabled individuals with equal use and enjoyment of their dwelling. Citing *Jones v. Rath Packing Co.*, 430 U.S. 519 at 523, 97 S.Ct. 1305, 51 L. Ed. 604 (1977). In denying summary judgment, the Court stated:

> "if the County ordinance were enforced it would violate the FHA by permitting a discriminatory housing practice. In failing to grant Plaintiff's request to live with his assistance animal because of the dog's alleged breed, Plaintiff is not afforded "an equal opportunity to use and enjoy [his] dwelling." 24 C.F.R. § 100.204(b). Thus, the breed ban "stands as an obstacle" to the objectives of Congress in enacting the FHA, by allowing a condominium complex to prevent equal opportunities in housing based on the breed of a dog. *Jones,* 430 U.S. 519 at 523, 97 S.Ct. 1305, 51 L. Ed. 604 (1977). Accordingly, as a matter of law, the Miami-Dade County ordinance is preempted by the FHA in this context."

The *Warren* case went so far as to say that HUD rulings and regulations demonstrated a "presumption in favor of reasonable

accommodation" as demonstrated by requiring the existence of a significant risk – not a remote or speculative risk and by requiring that the specific ESA in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or by requiring a showing that the specific EOS in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. The court concluded that the record concerning whether the effects of the dog on the tenant with allergies could have been ameliorated through adoption of other accommodations had not yet been demonstrated. *Id.*

The health and safety claims of a landlord must be specific to the ESA animal in question and cannot be based on generalities such as the type of animal or the size of the animal. In *Castellano v. Access Premier Realty, Inc.*, 181 F. Supp 3d 798, 807 (E.E. Cal. 2016), the landlord denied an accommodation for an ESA cat based on general safety and health concerns that cats can carry fleas. The court denied the Defendant's motion for summary judgment finding that the Defendants failed to contradict the Plaintiffs' assertions that Castellano's cat was neutered, vaccinated, and housebroken, or provide any evidence specifically related to Castellano's cat. Defendant only proffered general concerns about health and safety.

The court found that these general concerns did not rebut Plaintiff's claim that allowing Castellano to keep her cat was a reasonable accommodation.

The Court in the Eleventh Circuit in *Bhogaita v. Altamonte Heights Condominium*, 765 F. 3d 1277 (11th Cir., 2014(Nos. 13-12625; 13-13914 M.D. Fla 8/27/14) upheld a jury verdict in favor of the tenant after a landlord refused an accommodation of the EOS in question because the dog exceeded the 20 pound weight restriction policy of the association. The court failed to make a "highly fact-specific" reasonableness inquiry as to whether having a lighter-weight dog permitted by the Association's policy might similarly alleviate the tenant's symptoms, which would require a balancing of the parties' needs, because the court found it was not relevant to the "necessity determination" as to whether the specific dog would enhance the tenant's quality of life by ameliorating the effects of his disability, which was the issue appealed.

The issue of whether a specific animal posed a threat to the safety of other tenants was addressed in part in an unpublished decision in the Southern District of Florida in *Friedel v. Park Place Community LLC*, (Case No. 217-CV-14056 S.D. Florida 8/24/2017) where the court denied a Motion for Summary Judgment where there was evidence presented that there were multiple complaints that the specific ESA dog in question was showing

aggression toward other dogs in the community and had bit another dog, and where the Plaintiff showed that after the complaints were made, the Plaintiff consulted with a professional trainer and obtained a special collar to prevent the dog from pulling and allowing better control by the owner, and as a result, the dog was able to ignore other dogs barking at her and remain calm while walking in the community. The court found that the question of whether the dog indeed posed a direct threat such that the Defendant is relieved of any obligation under the Fair Housing Act to permit both the Plaintiff and the dog to stay in Plaintiff's home, was a question for the jury and summary judgment was, therefore, inappropriate.

A landlord is, however, able to deny an accommodation of a specific animal if that animal has been shown to be dangerous. In *Gill Terrae Retirement Apartment's, Inc. v. Johnson*, (2017 VT 88, 177 A.3d 1087 (Vt. 2017), 2017 WL 445007 (Vt. Oct. 6, 2017), the Vermont Supreme court found in favor of the landlord who evicted a tenant after refusing to remove her ESA dog that had been proven to exhibit aggressive behavior towards other dogs and people - including lunging, flaring up, rearing on her hind feet, and baring her teeth and other tenants expressed fear of the animal.

Likewise, a landlord can get rid of a tenant with an ESA dog for that tenant's failure to follow the landlord's policies regarding care and cleanup

of the animal. In, *Woodside Village v. Hertzmark*, 1993 WL 268293 (Coon 1993) the court found that a landlord who had previously approved an accommodation for an ESA dog for a tenant suffering from a mental health disability was able to evict the tenant after the tenant repeatedly refused to walk his dog in designated areas or "pooper scoop" to clean up behind the dog).

Cohen argues that there are no limits on the size, breed, type or even number of animals that can be emotional support animals and this raises safety concerns. While these may be valid concerns, they cannot be used to temper the requirement that the landlord must provide accommodation for emotional support animals for tenants meeting the criteria and law is clear theses considerations cannot be used to deny any specific animal that does not pose a safety risk no matter what the breed or size. U.S. Department of Housing and Urban Development FEHO-2013-01, Subject: *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* (issued April 25, 2013). See also, *Castellano* and *Bhogaita Friedel* cited above.

Cohen also raises the concern of the increased costs to landlords when animals are permitted in a dwelling. Jeffrey Clark testified about the increased costs to 2800-1 for cleaning up apartments vacated by tenants who

had animals in their units and the increased need to pest control due to an increase in infestations of apartments with fleas. Trial Transcript, Apx 68-71. The manager did acknowledge, however, that he can deduct the extra costs for damage that animals cause from security deposits, Trial Transcript, Apx 79. These general concerns cannot be a basis for denying accommodations for emotional support animals and should not figure into the landlord's analysis of whether a specific accommodation is reasonable. While the law prohibits charging extra rent in order to keep an emotional support animal, it does allow the landlord to charge the tenant or deduct from a security deposit for the costs of repairs for any damage the animal may have caused and a landlord can evict a tenant who does not properly care for their animal. See, *Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodations Under the Fair Housing Act* dated May 14, 2004, HUD and the DOJ, Answer and Question No. 11, Example 2; *Woodside Village v. Hertzmark*, 1993 WL 268293 (Coon 1993).

D. Balancing Tests for Reasonable Accommodations

The magistrate's ruling dismissing Cohen's claims was due, in part, on an incorrect finding of fact that 2800-1 was unaware that its attempts to minimize Cohen's exposure to Clark's dog dander (by designating separate

entrances and exits, and providing Plaintiff an air purifier) were not adequate. Magistrate Judgment Order 07/01/2018, Apx 167-178. The District Court amended the magistrate's finding of fact, holding instead that the landlord was aware the attempts to accommodated Cohen had failed. The magistrate opined, however that found 2800-1 had been aware its attempts to mitigate the exposure had failed and knew Cohen was continuing to suffer severe allergies, then 2800-1 could have found a different apartment for Clark in a different building. The magistrate found that since Cohen had moved into her apartment prior to Clark obtaining permission to have his emotional support dog, then Clark should be the one that would have to move to a different building. Magistrate Judgment Order 07/01/2018, Apx 167-178.

Cohen advocates that this Court adopt the "priority in time" analysis made by the Magistrate when resolving conflicts of interests between two disabled tenants, similar to the nuisance laws in Iowa. In this case, Cohen argues that she relied on the no pet policy in her lease when entering into the lease and that because she moved in before Clark made his request for an accommodation, her rights should prevail.

2800-1 similarly advocated in its appeal to the District Court for a kind of bright-line rule similar to the idea of "coming to the nuisance,"

wherein the landlord may deny a request for an emotional support animal if another tenant objects, and appears to have a credible reason to do so.

In *Entine v. Lissner*, No. 2:17-cv-946 (S.D. Ohio, Eastern Division 2017), two students at the Ohio State University Chi Omega Sorority applied for accommodation in their sorority housing. One student, who suffered from depression, anxiety, and panic attacks was granted accommodations for permission to have her service animal live with her at the sorority. Another resident in sorority claimed to be allergic to the dog and that the allergic reactions exacerbated her Crohn's disease and asked that the dog be removed. The ADA director for the University determined that the student who signed the lease first should be accommodated. Lissner, the student with the service dog, was forced to either live in the sorority without her service dog or move. Lissner filed for an injunction against the University's ADA director from removing her from the Chi Omega Sorority or taking adverse action against her if she remained in the house with her dog. The University claimed their determination that the first to sign the lease would be accommodated was "disability-neutral," Id. The court determined that nowhere in the University's written policies or procedures was there legal authority supporting its position and that it appeared to be, "completely arbitrary and may not even be consistent with the University's policies,

practices and procedures." The Court granted the injunction finding that the record was unclear as to whether the other student had requested an accommodation, the severity of her condition was in question, and the veracity of her assertions at the hearing were questioned, *Id*. Unfortunately, the court failed to provide any resolution to the question of tenants with competing interests, but it is instructive that the court did not appear to support the University's resolution based solely on who signed the least first.

The priority in time test allowing the tenant who moved into the apartment first the priority in staying in the building is fraught with potential abuses. Landlords, hoping to keep their buildings animal free, could easily find a tenant who objected to an animal in the building and frame it as "credible reason" for denying another tenant's emotional support animal or as an excuse not to search for other accommodations to lesson the effects on other tenants. A flat line rule or priority in time analysis would likely decrease any real attempts by the landlord to find other reasonable accommodations that might lesson the effects on third parties and protect the rights of both tenants.

The "no pet" section contained in paragraph 53 of Tenant Cohen's lease specifically states, "Reasonable accommodations accepted." Lease, Apx 26-28. Tenant Cohen was on notice prior to signing her lease that pets

may be allowed if a reasonable accommodation request was accepted and she should not have had the expectation that no animals would ever be allowed in her building. This provision in the lease, which is akin to to notice, lessons the validity of any priority in time arguments by removing the expectation of a pet free environment.

Priority in time should not be the sole consideration in determining what should be done in cases with conflicted interests of tenants nor should there be a bright-line rule allowing landlords to deny any requests for emotional support animals if another tenant has a reasonable objection. Hard-line rules or first-in-line approaches have potential shortfalls and could be used as a way to exclude persons in need of an emotional support animal The fact that Tenant Clark made a request for an accommodation after Plaintiff had moved onto the premises in no way diminishes his need for an emotional support animal nor should it eliminate his right to have one.

IV. Conclusion:

We as a society need to embrace the use of emotional support animals as a valid and effective way to treat mental illness. An independent analysis must be made in each case to better weigh the competing needs of the tenants and to explore all available options and to recognize everyone's rights. The statues, regulations and case law put a heavy burden on the

landlord to approve accommodations and/or to find other reasonable accommodations that may alleviate the ill effects of animal on other tenants. The reason the burden is high is because the rights of the mentally disabled deserve protection and they should be afforded an equal opportunity to use an enjoy their dwelling. Blanket concerns about fraudulent requests for accommodations for emotional support animal or the potential increase in costs to the landlord in general should not be considerations to find ways to deny requests for accommodations for emotional support animals. Landlords need to work with tenants to find ways to accommodate the use of emotional support animals for tenants in need of them. Certainly in doing so we should not undermine the equally compelling interests of the Plaintiff or any other tenants who suffer from life-threatening allergies. Plaintiff Cohen's rights must be given equal consideration in arriving at a solution that can accommodate both tenants. Perhaps in this case, the only solution was to offer a different apartment to one of the tenants, as this particular landlord had other properties. In other scenarios, perhaps a different approach would resolve the conflict. Careful consideration, including a balancing of the benefits and burdens on all affected parties, must be given in all cases where there is a conflict between tenants. No fast or hard rules should apply.

Tenant Clark asks that the court find that his request for an emotional support animal was a reasonable accommodation and the Plaintiff's claims should be dismissed.

REQUEST FOR ORAL SUBMISSION

Appellee/Cross-Appellant requests oral argument.

/s/ *Amy L. Evenson*
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Amy L. Evenson April 29, 2019
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