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 REPLY BRIEF

CHRISTOPHER WARNOCK
IOWA BAR 9679
The Tenants' Project
532 Center Street, Iowa City, IA 52245
(319) 358-9213
chriswarnock@gmail.com
COUNSEL FOR APPELLANT/CROSS APPELLEE

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I. Introduction: Balancing the Rights of All Parties

After reviewing their briefs it is clear that the parties are in agreement on many issues. All parties agree that the fundamental issue before this Court is whether or not Clark's dog was a reasonable accommodation under the Iowa Civil Rights Act ("ICRA"). All parties agree that an emotional support animal, however denominated, can be a reasonable accommodation under the ICRA. All parties agree that if the animal causes a direct health threat that it is not a reasonable accommodation. The parties agree that there must be a balancing of the competing rights of the landlord, disabled tenant and co-tenants.

The parties disagree, however, as to how to balance these rights. Clark argues for a case by case balancing test and suggests relocation as an alternative accommodation. Clark Brief at 30-5. Cohen argues for a case by case balancing test with priority in time as one potential guideline. Cohen Brief at 39, 51-2. 2800-1 argues for a bright line test where the presence of an allergic tenant in the building generally requires the landlord deny requests for emotional support animals throughout the building. 2800-1 Brief at 30-1.

With regard to relocation Appellant believes if a landlord has a vacant unit in a building without an allergic co-tenant, then it would be reasonable to offer voluntary relocation to a disabled tenant with an emotional support animal. But as detailed in Appellant's Brief §IV.D.4 at pages 51-2, neither the disabled tenant nor allergic co-tenants should be forced to relocate, nor should co-tenants be forcibly relocated to accommodate either an allergic tenant or disabled tenant.

2800-1 argues that once there is an allergic tenant in a building, then a landlord should deny requests for emotional support animals in the building. Whatever the merits of this argument, a bright line test has particular force given that the Legislature has now made interfering with the rights of the disabled to assistance animals a criminal offense. Landlords and tenants now definitely require clear and specific rules with regard to reasonable accommodation of assistance/emotional support animals. Landlords should not be forced to make fine distinctions or use guesswork when balancing the rights of the disabled and affected co-tenants since the cost of a mistake could be criminal conviction and incarceration.

Whether or not 2800-1's bright line test is adopted, Appellant believes that in any situation where an accommodation is at issue, a tenant asserting

that they are allergic to animals should provide the same type of documentation required of a disabled tenant seeking an emotional support animal. Thus the allergic tenant should provide documentation from a health care professional that they are allergic to animals and that the presence of an animal nearby or in the building as a whole would pose a direct health threat. If the allergic tenant provides this documentation then the landlord should deny the request for reasonable accommodation of an assistance/emotional support animal. Just as with a initial request for accommodation, the landlord should not be required to delve any further into the nature of the allergy.

Appellant believe that if an accommodation is denied, and disabled tenant believes that an alternative accommodation would allow for them to have their assistance/emotional support animal in the building, they should make that request to the landlord. An allergic tenant, once they are informed of the disabled tenant's initial or subsequent requests for accommodation, may make their own request for accommodation or respond to the disabled tenant's request for alternative accommodation, all of which should be supported by documentation from a health care professional. If the alternative accommodation does not present a substantial burden or undue

hardship to the landlord, disabled tenant and affected co-tenants, and the allergic tenant's health professional agrees that the alternative accommodation will remove the direct health threat, then the alternative accommodation should be granted.

II. A General Allergy to Animals Presents a Direct Health Threat

2800-1 asserts that because Cohen is allergic to all dogs that Clark's dog was not a direct threat to her health. 2800-1 Brief at 18, 24.

The Iowa Civil Rights Act, ("ICRA") provides,

> 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). Cohen argues in §VI.C of her brief at pages 35-38 that her allergic attacks, which the parties stipulated were caused by Mr. Clark's dog and found by the court to be severe and, "in some circumstances life-threatening,"[1] were a direct threat to her health and thus not a reasonable accommodation.

Citing HUD Guidelines, Apx 123, 2800-1 argues that,

When assessing the threat an animal poses, the Landlord may

[1]Magistrate Judgment Order, Apx 169.

> consider only documented incidences of behavior by the specific animal, and may not consider generalized threats such as allergies to the species involved.

2800-1 Brief at 18. Again citing the same HUD Guidelines, 2800-1 asserts, "The Landlord was unable to take any action. It couldn't remove the dog because nothing about the individual dog's conduct was concerning." 2800-1 Brief at 24. Thus 2800-1 argues that under federal HUD guidelines that only individualized evidence of a direct health threat by an emotional support animal can be used to deny an request for accommodation while Cohen's allergy to all dogs could not be used to deny an accommodation.

The HUD Guidelines cited by 2800-1 state,

> The request [for an accommodation] 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.

HUD FHEO Notice: FHEO-2013-01, Apx 123.

2800-1's argument is mistaken as these guidelines were developed in response to the use of pit bulls and other large and potentially dangerous dogs as emotional support animals. For example in *Chavez v Aber*, 122 F.Supp.3d 581, 2015.WTX.0001071 (W.D.Tex. 2015) the court citing these HUD guidelines held,

> Plaintiffs have pleaded that a veterinarian found that Chato "did not show signs of aggression." Compl. 8. Further, Plaintiffs claim that "a canine behaviorist" concluded that Chato exhibited a "calm manner that is indicative of a dog with no aggression, fear or lack of socialization issues." Id. at 9. Accordingly, the Court finds that Plaintiffs have alleged sufficient facts that Chato did not pose a direct threat, and, therefore, allowing Chato to remain on the premises was a potentially reasonable accommodation. See *Petty*, 702 F.Supp.2d at 731 n.8; *Prindable*, 304 F.Supp.2d at 1257; *Bronk*, 54 F.3d at 429; HUD Notice 3.

Chavez v Aber, 122 F.Supp.3d 581 (W.D.Tex. 2015. Similarly 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 Court cited the HUD guidelines at issue and invalidated a local statute banning pit bulls.

With regard to pit bulls and other potentially dangerous animals the direct threat is to the safety of others through being bitten or otherwise attacked by a violent and aggressive animal. In this context an individualized assessment of the danger of the animal is more reasonable because dogs differ in their level of aggression and violent or non-violent

nature. But, as the evidence in this case shows, Cohen was allergic to all dogs. Affidavit of Allergist, Apx 164-6; Joint Stipulation, Apx 24. The threat was not to her safety thorough being bitten by Clark's dog, but rather the threat was to her health caused by the allergens present in all dogs. And indeed Cohen did suffer what the trial court characterized as severe and life threatening allergic attacks which the parties stipulated were caused by Mr. Clark's dog.

The HUD Guidelines were clearly meant to apply to violent and aggressive dogs and in that context it is reasonable to assess the proclivities of individual dogs. But when allergies are involved rather than looking to the dog, an individualized assessment needs to be made of the allergic co-tenant. Here Cohen was allergic to dogs, had a history of severe allergic reactions to dogs and Clark's dog in fact caused her to have severe and life threatening allergic attacks, clearly establishing that the dog was a direct threat to her health and not a reasonable accommodation.

If 2800-1 interpretation of the HUD Guidelines is correct, then if Cohen was only allergic to Clark's dog, then the accommodation should be denied, but if she is allergic to Clark's dog and all other dogs, it would be granted. Instead it is obvious that the HUD Guidelines were meant only to

apply to aggressive behavior by individual dogs.[2] Clark's dog clearly presented a direct health threat to Cohen and the accommodation was therefore not reasonable.

III. SF 341 Codifies Some Current Practices But is Not Dispositive of the Issues Presented in this Appeal

During the pendency of this case on May 2, 2019, after being passed by the Legislature, Senate File 341 was signed by the Governor.[3] As we will see SF 341 codifies some current practices with regard to emotional support animals and makes clear the Legislature's view of their importance, but is not dispositive of the issues present in this case.

SF 341 begins by adding a new section, §216.8B, to Iowa Code §216.8 which deals with housing discrimination,

> 1. For purposes of this section, unless the context otherwise requires:
> a. ""Assistance animal" means an animal that qualifies as a reasonable accommodation under the federal Fair Housing Act, 42 u.s.c. §3601 et seq., as amended, or section 504 of the federal Rehabilitation Act of 1973, 29 u.s.c. §794, as amended.
> b. ""Service animal" means a dog or miniature horse as set

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[2]If hypothetically 2800-1 was correct and under the HUD Guidelines allergies to all animals despite the direct health threat posed were not grounds for denying an accommodation, then the HUD Guidelines should be disavowed by this Court as violative of the clear mandate of Iowa Code §216.8A(3)(e) to protect third parties from health threats.

[3]https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%20341

> forth in the implementing regulations of Tit. II and Tit. III of the federal Americans with Disabilities Act of 1990, 42 u.s.c. §12101 et seq.
> 2. A landlord shall waive lease restrictions and additional payments normally required for pets on the keeping of animals for the assistance animal or service animal of a person with a disability.
> 3. A renter is liable for damage done to any dwelling by an assistance animal or service animal.
> 4. A person who knowingly denies or interferes with the right of a person with a disability under this section is, upon conviction, guilty of a simple misdemeanor.

Iowa Code §216.8B, Senate File 341, pages 1-2. Section 216B is added to the list of unfair or discriminatory practices as defined in §216.2(15). Senate File 341, page 1.

Then §216.8B(1)(a) defines an assistance animal as an animal that qualifies as a reasonable accommodation under 42 U.S.C. §3601 et seq., the federal Fair Housing Act, ("FHA").[4] As Appellant has noted in her Brief at IV. B.1, pages 19-23, the term assistance animal has been used as a blanket term that encompasses both service animals, which are trained to do

[4]SF 341 is not the model of clarity in referencing reasonable accommodation under the FHA, as the FHA does not provide statutory standards for assistance animals or emotional support animals. Instead these standards are precedential, from a sometimes inconsistent mix of federal district and appellate courts. The US Supreme Court has not ruled on the use of assistance or emotional support animals under the FHA, but see *Fry v. Napoleon Community Schools*, 580 US 743 (2017) (right to reasonable accommodation of service animal under ADA).

specific tasks and emotional support animals, whose mere presence and daily interactions provides amelioration. Section 216.8B(1)(a) does not use the term "emotional support animal" but as we can see from precedent, the Legislature has therefore found that both trained service animals and untrained emotional support animals are now appropriate as reasonable accommodations.

Section 216.8B(2) requires that landlords waive lease restrictions and additional payments normally required for pets for assistance animals and §216.8(B)(3) makes tenants responsible for any damage done by an assistance animal. These sections simply codify current practice, see HUD FHEO Notice: FHEO-2013-01, Apx 122-3. Finally, §216.8B(4) makes it a simple misdemeanor to knowingly deny or interfere with the rights of a disabled person to an assistance or service animal. This section makes clear the importance that the Legislature places on assistance and service animals, but does not make any substantive changes in how they are defined or in the accommodation process.

SF 341 adds a new section, 216.8C, which regulates how Iowa licensed health professionals will make disability findings for accommodating assistance and service animals. Under this section the

health care professional must meet the disabled person, must be familiar with the person and their disability and must be qualified to make the finding. Iowa Code §216.8C(2); Senate File 341, page 2. The Iowa Human Rights Commission is directed to create forms to document disability and that the requests for an assistance or service animal is related to the disability and once created these forms must be used by Iowa health care professionals. Iowa Code §§ 216.8C(3),(4); Senate File 341, page 2-3. If a landlord does not receive documentation for a disability that is not readily apparent or known to the landlord, they can deny the accommodation. Iowa Code §216.8C(5); Senate File 341, page 3. Disabled person are not required to document their disability or need for an assistance or service animal using the form set forth in §216.8C. Iowa Code §216.8C(6); Senate File 341, page 3.

While §216.8C provides for a specific procedure and form for Iowa health care professionals to use to document disability and the need for an emotional support animal as a reasonable accommodation, it does not otherwise alter current practice. See FHEO Notice: FHEO-2013-01, Apx. 123-4. The remaining provisions of SF 341 do not apply in a housing context or to emotional support animals.

As we have seen SF 341 simply codifies some of the current practices with regard to assistance/emotional support animals. It does not decide the issues presented in this case, in particular because it does not alter Iowa Code §216.8A(3)(e) which requires that a reasonable accommodation not be a direct threat to health and safety or result in substantial physical damage. SF 341 also does not shed any light on the issue of balancing the benefits and burdens presented by the accommodation and whether or not the rights of affected third parties, like co-tenants, should be considered in addition to the rights of the landlord and disabled.

While in some respects SF 341 is confusingly drafted and fails to address significant issues, it does eliminate any uncertainty that emotional support/assistance animals are indeed appropriate in general as a reasonable accommodation under the Iowa Civil Rights Act. And there can be no doubt that the Legislature, by making the denial of or interference with an emotional support/assistance animal a crime, takes the rights of the disabled seriously. However SF 341 fails to provide clear a clear definition of an assistance animal and sheds no light on how to balance the rights of landlords, disabled tenants and co-tenants.

IV. This Case Should be Retained by the Supreme Court

This Court has never issued a ruling with regard to the accommodation of emotional support animals. In addition, this case involves numerous issues of first impression. As the district court held, "the Court notes that there is presently no law in Iowa from any controlling jurisdiction that would set forth a test for the Court to apply. It is also not the role of this Court to create new law." District Court Ruling on Appeal, Apx 182. Not only is there no Iowa precedent, but counsel for all parties have been unable to locate any federal or state precedent that directly addresses the issue of how to balance the rights of landlords, disabled tenants and allergic co-tenants. Thousands of Iowa landlords and tenants are affected, as the numbers of emotional support animals are increasing rapidly. Furthermore, as is clear from the evidence presented in this case, there is widespread abuse where non-disabled tenants manipulate the uncertainties of the current system to misclassify their pets as emotional support animals, thereby threatening the rights of legitimately disabled tenants like Clark.

Finally, the passage SF 341 has made it imperative that the Supreme Court step in and provide guidance. Senate File 341 fails to provide a clear definition of an assistance animal, but then makes interfering with an

assistance animal a criminal offense. Landlords are now exposed to criminal liability, but lack controlling precedent to guide their decisions with regard to the reasonable accommodation of emotional support animals and other assistance animals. This case should be retained by the Supreme Court.

V. Conclusion

In the past, the needs and rights of disabled tenants were often given short shrift by landlords and the courts. That landlords make reasonable accommodations for their disabled tenants is appropriate, commendable and a clear requirement of applicable law. What is inexplicable is how current practice seemingly makes it impossible for Cohen, herself disabled, to protect herself from constant allergy attacks that directly threaten her health.

All parties agree that the rights of all affected parties, landlords, disabled tenants and co-tenants must be taken into consideration and treated fairly and equally. All parties look to this Court to do what it does best: balance rights, clearly explicate the law and to render equal justice to all, whether landlords, disabled tenants or co-tenants.

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

Respectfully submitted,

CHRISTOPHER WARNOCK
IOWA BAR 9679
The Tenants' Project
532 Center Street Iowa City, IA 52245
(319) 358-9213
chriswarnock@gmail.com

COUNSEL FOR APPELLANT/CROSS APPELLEE KAREN COHEN

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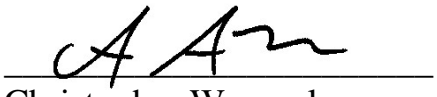

Christopher Warnock

June 1, 2019