**IN THE COURT OF APPEALS OF IOWA**

No. 0-707 / 09-1905
Filed November 10, 2010

**STATE OF IOWA ex rel.**
**CAROL HENDERSON,**
Plaintiff-Appellant,

**vs.**

**DES MOINES MUNICIPAL HOUSING**
**AGENCY and CITY OF DES MOINES,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Don Nickerson, Judge.

The State of Iowa, on behalf of Carol Henderson, appeals the district court's directed verdict for defendants on the State's claim that the defendants failed to accommodate Henderson's disability by permitting her to keep a dog in her rental unit. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for appellant.

Gary D. Goudelock Jr., Assistant City Attorney, Des Moines, for appellees.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

**DANILSON, J.**

The State of Iowa, on behalf of Carol Henderson, appeals the district court's directed verdict for defendants Des Moines Municipal Housing Agency (Agency) and the City of Des Moines (City) on the State's claim that the defendants failed to accommodate Henderson's disability by permitting her to keep a service/companion dog in her rental unit. We conclude the district court erred in finding waiver as a matter of law and in finding the requested accommodation must alleviate the disability, rather than "afford the person equal opportunity to use and enjoy a dwelling." Iowa Code § 216.8A(3)(c)(2) (2005). We reverse and remand for a new trial.

**I. Background Facts and Proceedings.**

On May 8, 2002, Carol Henderson entered into a dwelling lease with the Agency for one unit of a duplex. Henderson lived with her daughter, Nicole, and was eligible for a two-bedroom unit. The lease provided:

> If you or any member of your household listed on this Lease Agreement are currently handicapped or disabled, we shall provide reasonable accommodation to the extent necessary to provide this individual with an opportunity to use and occupy the unit. You may request at any time during your tenancy that we provide reasonable accommodation, including reasonable accommodation so that you can meet Lease Agreement requirements or other requirements of tenancy.

The lease also provided that an attached pet policy was part of the lease. Tenants were permitted to have pets, but were required to first apply for a pet permit with the Agency. The weight of a pet could not exceed twenty pounds. Only one pet per household was permitted. However, the provisions concerning pets did not apply to service animals.

In late 2002 there were two attempted break-ins at Henderson's duplex. Henderson was in the dwelling at the time and hid awaiting the arrival of police. She testified at trial that the experiences triggered memories of traumatic incidents involving her abusive ex-husband when she cowered in a hallway, draped over her daughter. Henderson obtained a Doberman Pinscher she named "Sam." Nicole obtained a dog named "Otis." Each dog weighed more than ninety pounds. Henderson testified she became so fearful she was not able to go outside or to work and that she "needed the dog."

A housing inspector became aware of the dogs in January 2005. On January 11, 2005, Henderson was notified she was in violation of the pet policy and was given fourteen days to comply with the lease or the lease agreement could be terminated.

On January 24, 2005, Henderson requested the dogs be considered service animals, describing the fear she lived with and how Sam helped her cope with her feelings. She also filled out an application for Section 8 housing that day. Henderson was informed she needed to remove both dogs by February 7, 2005. She testified that she received a telephone message from LaVonne Miles, a senior housing case manager of the Agency, on Friday afternoon (February 4) stating that if Henderson provided a doctor's note to accompany her request by Monday, she could keep the dog. On February 5, 2005, Henderson obtained a letter from Dr. Ryan Coppola of Broadlawns Medical Center Emergency Services, which stated, "Please allow patient to keep dogs for safety reasons & protections secondary to PTSD."

On February 15, 2005, Miles sent Henderson a letter noting the Agency was in receipt of her request for reasonable accommodation and that the Agency was "unable to process" the request because "THESE PETS DO NOT MEET THE QUALIFICATIONS FOR A SERVICE ANIMAL." Henderson was further advised she had ten days to remove the dogs. However, the Agency provided no information about the qualifications for a service animal. Henderson asked Miles what qualifications were required, and Miles directed her to the Animal Rescue League, which in turn directed her to Jill Avery, an employee of the Iowa Division of Persons with Disabilities, who wrote a letter on her behalf to the Agency.

On March 29, 2005, the Agency served Henderson with a fourteen-day notice to cure in which the Agency asserted she was "harboring unauthorized pet dogs at her dwelling unit." Henderson was further warned that her failure to remedy the described breach of her lease would result in the termination of her lease in thirty days.

On March 31, 2005, Dr. Jerilyn Lundberg, authored a letter stating:

> Carol Henderson has been diagnosed with post-traumatic stress disorder and has been assaulted several times. She has self trained a service dog to assist her with tasks around the home such as turning on the lights when she enters a room and retrieving her light instrument as well as acknowledging suspicious persons on the property. She has had one circumstance already in which her service dog has chased away a potential offender.

Henderson delivered this letter to the Agency. The Agency again rejected her request for accommodation. In the meantime, Otis was removed from the home,

Nicole moved out, and effective April 1, 2005, Nicole was removed from Henderson's lease.

On May 2, 2005, Henderson filed a housing discrimination complaint with the Iowa Civil Rights Commission (Commission). She claimed the Agency had discriminated against her by failing to permit her to keep a service animal and by failing to accommodate her disability by waiving the pet policy requirements.

On May 25, 2005, Dr. Lundberg wrote another letter, which was delivered to the Agency and reads:

> Carol Henderson is under my care. She is the victim of a violent crime and has psychiatric diagnoses related to that. She is presently also in the process of evaluation and treatment of these psychiatric disorders. She has a self-trained service companion that lives with her. This animal plays an important part in her recovery and in her psychological well being at this time. In my opinion, removal of the animal would impede the process of recovery.

Sherry Williams was assigned to investigate Henderson's complaint before the Commission. Williams learned that the City was questioning what disability Henderson claimed to have. At Henderson's urging, Williams wrote to Larry Koch, a psychotherapist working with Henderson, asking for additional information. Koch responded on June 24, 2005:

> As you may recall, Carol was diagnosed with Post Traumatic Stress Disorder–(309.81) by Dr. Lundberg. Carol underwent Psychiatric review with Dr. Margaret Shin/MD on April 7, 2005. Carol was diagnosed with Adjustment Disorder with Depressed Mood–309.00. Carol has completed some psychotherapy sessions with this clinician in the past few weeks and she will remain in services.
>
> Carol has essentially just begun treatment. She is prone to emotional outbursts and is often overwhelmed by the events at hand. She cannot fully care for herself, in terms of full-time employment, primarily due to her tendency to isolate and suffer with

> migraines. Her lack of self-care has led to a mental health commitment by family members as recent as 2003.
>
> Carol displays characteristics of one who has been traumatized. Her former husband beat her face against a pile of rocks/concrete causing a good deal of damage to the facial region. To this day, Carol has a lack of interest or desire to participate in important social activities. She remains apart from others and is estranged from her parents. Additionally, she is cautious and has not developed trust in others.
>
> Carol has been advised to apply for disability and is proceeding with that effort. It is my feeling that her depression will eventually be seen as more serious, as she continues with the treatment process.
>
> Dr. Lundberg has urged Carol to continue with a service animal and has advised that it is essential to Carol's emotional health.
>
> Please consider her status carefully in regards to future housing options.

Williams transmitted Koch's letter to the Agency. The City and Agency made no further inquiry of Williams about Henderson's complaint before the Commission.

The City filed a forcible entry and detainer action (FED). Henderson obtained a Legal Aid attorney, Dennis Kirkwood. On July 6, 2005, Kirkwood wrote a letter to the Agency again requesting a reasonable accommodation of Henderson's emotional health needs, allowing her to have an emotional support animal, with supporting medical verification (most of which had already been submitted). The FED action was settled on July 22, 2005. Henderson agreed to remove the dog from the premises by July 24, 2005, and the City agreed to expedite Henderson's Section 8 housing application.[1] Henderson thereby avoided the potential of an eviction on her record, which not only would render her currently homeless, but would have prevented her from availing herself of public housing or Section 8 housing in the future.

[1] Henderson was then living in publicly owned and managed housing; Section 8 housing is privately owned, but publicly subsidized.

On September 6, 2005, the State filed the present action for declaratory judgment, permanent injunctive relief, and damages on behalf of Henderson in district court.[2] The State alleged the Agency and the City had engaged in discrimination in housing, in violation of the Iowa Civil Rights Act of 1965 (Iowa Code chapter 216). *See* Iowa Code § 216.8A(3) (2005). Henderson stated she was a person with a disability who needed the assistance of a psychiatric companion animal and asserted the defendants failed to make reasonable accommodation for her.

Defendants filed a motion for summary judgment, arguing Henderson was otherwise unqualified for her housing unit and thus not entitled to relief. The State resisted the motion for summary judgment, claiming the provisions of the pet policy should not apply to Henderson because she was seeking to keep an animal as an accommodation for her disability. The district court granted the motion for summary judgment.

The State appealed and we reversed. We determined the district court improperly considered whether Henderson met the requirements of the pet policy given that she was requesting a waiver of that pet policy as a reasonable accommodation for her disability. *State ex rel. Henderson v. Des Moines Mun. Housing Agency*, No. 06-1144 (Iowa Ct. App. Dec. 28, 2007) (*Henderson I*). We

[2] On July 21, 2005, an administrative law judge determined probable cause existed to support the Henderson's allegations of discrimination based on disability. On August 9, 2005, the Agency and City elected to proceed in a civil action, and the attorney general filed the action on behalf of Henderson. *See* Iowa Code §§ 216.16A(1), .17A(1) (providing that after a housing discrimination complaint has been filed with the Iowa Civil Rights Commission, the complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed may elect to proceed in a civil action; if such an election is made, the attorney general must file a civil action in district court on behalf of the aggrieved person).

also concluded reasonable minds could differ as to whether Henderson's requested accommodation of a service animal was reasonable in light of her claimed mental illness. *Id.*

The case was remanded and a jury trial was held September 21-23, 2009. The State's case included the testimony of Henderson, Dr. Lundberg, Williams, Koch, and Kirkwood, as well as deposition testimony of Dr. Coppola. The defendants introduced several exhibits and the testimony of Jacqueline Lloyd, the Agency's assistant director. Lloyd testified it was her understanding that the Agency awaited, but did not receive an "acceptable verification of a person with a disability," or "the proper verification to show the connection between the disability and the requested accommodation." Lloyd also testified that it was her understanding the settlement of the FED action resolved Henderson's claim for a service dog. The "Public Housing Occupancy Guidebook," which Lloyd testified contained the applicable policies and regulations related to disabilities and reasonable accommodations, was also introduced.

At the close of all the evidence, the district court directed a verdict in favor of defendants. After reviewing the content of the March 31 and May 25, 2005 letters from Lundberg, and noting the letter from Koch, the district court wrote:

> Accordingly, even when considering the evidence in a light most favorable to the Plaintiff, the evidence is insufficient as a matter of law to notify the Defendant how Sam would address or alleviate the Plaintiff's disability.
>
> Further, Ms. Henderson's claim required her to establish she needed an accommodation because of a disability in order to afford her an equal opportunity to use and enjoy her dwelling, . . . . Henderson effectively waived her request for an accommodation to an equal opportunity to use and enjoy her dwelling when prior to Forcible Entry and Detainer proceedings, when she chose to

> voluntarily remove Sam from her duplex and move into the Section 8 program as soon as she would [be] approved.
>
> Accordingly, . . . Henderson's claim that she was not afforded a reasonable accommodation that would have afforded her an equal opportunity to use and enjoy her dwelling is denied as a matter of law.

The State appeals, contending it presented evidence supporting a finding on each element of the disability discrimination claim, and the court erred in concluding Henderson waived her request for reasonable accommodation in settling the FED action.

**II. Scope and Standard of Review.**

Our supreme court has recently summarized the applicable scope and standard of review in stating:

> We review a trial court's ruling on a motion for directed verdict for correction of errors of law. A directed verdict is required only if there was no substantial evidence to support the elements of the plaintiff's claim. Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same findings. Where reasonable minds could differ on an issue, directed verdict is improper and the case must go to the jury.

*Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009) (internal quotations and citations omitted).

**III. Discussion.**

***A. Elements of claim.*** Section 216.8A(3)(b) of the Iowa Civil Rights Act makes it unlawful to "discriminate against another person in the terms, conditions, or privileges of . . . rental of a dwelling . . . because of a disability of" that person or any person associated with that person. Unlawful 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(3)(c)(2). This provision is similar to 42 U.S.C. § 3604(f)(3)(B) of the Fair Housing Act (FHA).[3] Given the similarities between the two pieces of legislation, we may consider cases interpreting the federal Fair Housing Act in interpreting the provisions of the Iowa Act. *See State v. Keding*, 553 N.W.2d 305, 307 (Iowa 1996) (interpreting discriminatory advertising under the Iowa Act); *see also Renda v. Iowa Civil 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); *cf. Bearshield v. John 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 statutes, we will look to the ADA and underlying federal regulations in developing standards under the ICRA for disability discrimination claims.").

Under the Iowa Act, it is the plaintiff's burden in a reasonable accommodation action to establish:

> (1) That the complainant is disabled within the meaning of the Act;
> (2) That the defendant 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]

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[3] Pursuant to 42 U.S.C. § 3604(f)(3)(B), discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when the accommodations may be necessary to afford the person equal opportunity to use and enjoy a dwelling."

[4] The federal statute, 42 U.S.C. § 3604(f)(3)(B), 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 equal

> (4) That the requested accommodation is reasonable; and
> (5) That the defendant refused the requested accommodation.

*See DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006), *cert. denied*, 549 U.S. 1216, 127 S. Ct. 1267, 167 L. Ed.2d 92 (2007) (noting that to prevail on a FHA claim, a plaintiff must prove all of the following: (1) that the plaintiff or his associate is handicapped within the meaning of the Act; (2) that the defendant knew or should reasonably be expected to know of the handicap; (3) that the accommodation of the handicap may be necessary to afford the handicapped person an equal opportunity to use and enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that defendant refused to make the requested accommodation); *see also Lucas v. Riverside Park Condos. Unit Owners Ass'n*, 776 N.W.2d 801, 808 (N.D. 2009) (noting federal case law); *cf. Oconomoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782-83 (7th Cir. 2002) (noting the Fair Housing Amendments Act "requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling").

***1. Disability.*** The threshold question in any disability discrimination case is whether a plaintiff is "disabled" within the meaning of the Act. *See Hansen v. Seabee Corp.*, 688 N.W.2d 234, 238 (Iowa 2004). The meaning of "disability" under the Act is a question of law. *See Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n*, 366 N.W.2d 522, 526 (Iowa 1985).

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opportunity to use and enjoy a dwelling." (Emphasis added.) However, Iowa Code section 216.8A(3)(c)(2) substitutes "may be" for "when the accommodations *are* necessary." (Emphasis added.)

Iowa Code section 216.2(5) defines "disability" broadly as meaning "the physical and mental condition of a person which constitutes a substantial disability." The parties both cite to Iowa Administrative Code rule 161-8.26 for further refinement of the definition. Rule 161-8.26(1) provides a definition of a "substantially handicapped person" for purposes of discrimination in employment as "[1] any person who has a physical or mental impairment which substantially limits one or more major life activities, [2] has a record of such an impairment, or [3] is regarded as having such an impairment." This tri-part definition is consistent with the definition of "handicap" under the federal FHA,[5] and "disability" under the ADA.[6] Moreover, this is the definition of disability found in the "Public Housing Occupancy Guidebook," which is one of the resources upon which the Agency relies. "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 statutes," *Bearshield*, 570 N.W.2d at 918, we believe it is an appropriate definition for purposes of this housing discrimination case. *See Oconomoc Residential Programs*, 300 F.3d at 782 (noting the definitions of "disability" in ADA and "handicap" in Fair Housing Amendments Act are "substantially identical").

[5] The FHA defines a "handicap" as (1) "a physical or mental impairment which substantially limits one or more of such person's major life activities," or (2) "a record of having such an impairment," or (3) "being regarded as having such an impairment." 42 U.S.C. § 3602(h).

[6] The ADA defines a "disability" as (1) "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; (2) having "a record of such an impairment"; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2).

"The issue of whether an individual has a disability is a factual question to be decided on a case-by-case basis." *Bearshield*, 570 N.W.2d at 918; *see also Vincent v. Four M Paper Corp*., 589 N.W.2d 55, 60 (Iowa 1999) ("Whether a person has a disability is determined on a case-by-case basis."). The State argues that it has provided substantial evidence that Henderson has a disability. Both parties focus on the first alternative of a person with a disability—"any person who has a physical or mental impairment which substantially limits one or more major life activities"—and thus so will we.

We agree with the State that there exists a jury question on whether Henderson is a "person who has a physical or mental impairment which substantially limits one or more major life activities" and is therefore disabled within the meaning of the ICRA. Rule 161-8.26(2)(b) defines the term "physical or mental impairment" as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." The "Public Housing Occupancy Guidebook" states the same; additionally, it provides that "the term 'physical or mental impairment' includes, but is not limited to . . . emotional illness." Henderson submitted evidence that she had been diagnosed with psychological disorders including post-traumatic stress disorder and adjustment disorder with depressed mood, and provided that information to the Agency.

She also presented evidence from which a reasonable jury could find that her mental impairment "substantially limits one or more major life activities," which under rule 161-8.26(3) and the federal regulations "means functions such

as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Koch testified that because of her posttraumatic stress disorder, Henderson was not able to fully care for herself, was hyper vigilant, and was not wanting to engage in "normal, human activities." Henderson testified she was unable to go to work or sleep. Koch testified sleep disruptions, hyper vigilance, and fear were all clinical features of posttraumatic stress disorder. We conclude that "reasonable minds could accept the evidence as adequate" to determine Henderson was disabled and thus the question was for the jury to determine. *Deboom*, 772 N.W.2d at 5; *see also Overlook Mut. Homes, Inc. v. Spencer*, 666 F.Supp.2d 850, 852, 856 (S.D. Ohio 2009) (denying summary judgment in FHA discrimination claim where housing corporation was informed resident was receiving psychological counseling for an anxiety disorder and neurological and emotional conditions and her psychologist recommended she have a companion dog to facility her treatment and corporation did not take advantage of opportunity to ask psychologist about person's disability and need for companion dog).

This case is not one in which the information provided by the resident is so lacking in detail as to be insufficient as a matter of law. *See Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F.Supp.2d 1245, 1254 (D. Hawaii 2003) (noting difference in type of information provided by two plaintiffs: no evidence to show Dubois was "handicapped within meaning of § 3602(h)"; but noting there was evidence that would "enable a reasonable jury to conclude Prindable is handicapped"), *aff'd sub nom. DuBois v. Ass'n of Apartment Owners*

*of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006); *Lucas v. Riverside Park Condo. Unit Owners Ass'n,* 776 N.W.2d 801, 811 (N.D. 2009) (noting "conclusory and ambiguous nature" of claimant's documents requesting accommodation—two identical statements from two physicians asking the Association "to permit A. William to keep, maintain, and raise an assistive therapeutic companion service animal (dog). It is also my opinion that there has been a significant change in Mr. Lucas' health (disability status) since the last time he was examined by me"—justified Association's seeking additional information to enable it to make a meaningful review of and an informed decision on the request).

***2. The defendant knew or should reasonably be expected to know of the disability.*** The ICRA prohibits discrimination "because of a disability." Iowa Code § 216.8A(3)(b) (making it unlawful to "discriminate against another person in the terms, conditions, or privileges of . . . rental of a dwelling . . . *because of* a disability of" that person or any person associated with that person (emphasis added)). Thus, in order to prove a disability claim, a plaintiff must prove the defendant knew or reasonably should have known of the plaintiff's disability when the adverse decision was made. *Cf. Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 234-35 (Iowa 1995) (discussing framework of disability discrimination in employment claims and stating plaintiff's prima facie case includes threshold inquiry of whether the plaintiff proved she was disabled, and if so, whether plaintiff made her disability known); *see also Lawrence v. Nat'l Westminster Bank*, 98 F.3d 61, 69 (3rd Cir. 1996) (stating that an employer is not expected to accommodate disabilities of which it is not aware); *Brundage v. Hahn*, 66 Cal.

Rptr. 2d 830, 836 (Cal. Ct. App. 1997) (noting an adverse employment decision cannot be made "because of" a disability if the disability is not known to the employer). *But see Walsted v. Woodbury County*, 113 F.Supp. 2d 1318, 1336 (N.D. Iowa 2000) (noting that employee need not expressly request reasonable accommodation if the "disability and the need to accommodate it are obvious"). The State presented evidence from which a reasonable jury could find that the Agency knew or reasonably should have been expected to know of Henderson's disability.

***3. The requested accommodation is necessary.*** The district court ruled that "the evidence was insufficient as a matter of law to notify the Defendant how Sam would address or alleviate the Plaintiff's disability." We acknowledge that at least one court in the past has made a statement suggesting such a showing is required in a housing accommodation case. *See Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (stating "the concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by *ameliorating the effects of the disability*" (emphasis added)). However, the Iowa statutory language and the majority of courts facing the issue do not require such a showing. *See*, *e.g.*, *Giebler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (stating "equal opportunity is a key component of the necessity analysis; an accommodation must be possibly necessary to afford the plaintiff equal opportunity to use and enjoy a dwelling"); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995) ("Pursuant to 42 U.S.C. section 3604(f)(3)(B),

Cadman Towers is required to make reasonable accommodations in its rules and practices so as to enable Shapiro to "use and enjoy [her] dwelling."); *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Comm'n*, 18 Cal. Rptr. 3d 669, 679 (Cal. Ct. App. 2004), and cases cited therein (noting companion animal may assist one with mental disabilities in the use and enjoyment of their home); *see generally* Christopher C. Ligatti, *No Training Required: the Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act*, 35 T. Marshall L. Rev. 139, 141-42 (Spring 2010) (noting "[e]motional support animals in particular have been shown to alleviate the symptoms of psychiatric disorders in some individuals and allow tenants the equal opportunity to use and enjoy their dwelling" ) ["Ligatti"].

Pursuant to Iowa Code section 216.8A(3)(c)(2), the plaintiff must show by a preponderance of the evidence that the requested accommodation is "necessary to afford the person equal opportunity to use and enjoy a dwelling." We view the issue with an eye to the Act's purposes, which are to promote freedom of choice in housing and prohibit discrimination. *See Renda*, 784 N.W.2d at 16-17 (noting both the ICRA and the FHA were "[e]ach . . . intended to promote freedom of choice in housing and prohibit discrimination" and considering whether those purposes were furthered in defining "dwelling" and "employee"). The plaintiff is not required to show the accommodation alleviates the disability itself; rather, the accommodation must be necessary to "'show[] that the desired accommodation will affirmatively enhance a disabled plaintiff's quality

of life by ameliorating *the effects* of the disability.'" *Oconomowoc Residential Programs*, 300 F.3d at 784 (citation omitted) (emphasis added).

Companion animals may be necessary accommodations. In *Overlook Mutual Homes*, 666 F. Supp. 2d at 859, the court cites *Pet Ownership for the Elderly and Persons with Disabilities*, 73 Fed. Reg. 63834-38 (October 27, 2008), which notes that "animals that are used to assist, support or provide service to persons with disabilities" as defined in 24 C.F.R. § 5.303 include service, support, and therapy animals because such animals are defined by the regulations implementing the ADA as "providing emotional support to persons who have a disability related need for such support." One commentator writes, "Increasingly, emotional support animals have been shown to be beneficial to persons with mental disabilities, such as depression." Beth A. Danon, *Emotional Support Animal or Service Animal for ADA and Vermont's Public Accommodations Law Purposes: Does it Make a Difference?*, 32 Vt. Bar J. 21, 21 (Summer 2006).

There are several federal cases that deal with whether an animal constitutes a reasonable accommodation under the FHA. In *Bronk,* two profoundly deaf women sued their former landlord under the FHA for refusing to allow them to keep a dog in their rented townhouse. 54 F.3d at 427. The jury found against the plaintiffs. *Id.* at 428. The United States Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. The court found "ample evidence to support the determination of no liability," but was "concerned that the tendered jury instructions may have confused jury members by

unnecessarily conflating local, state, and federal law." *Id.* at 427. Specifically, the *Bronk* court explained:

> Were it acknowledged by the parties in this case that Pierre [the dog at issue] was a hearing dog providing needed assistance to the plaintiffs, this case might be susceptible to determination as a matter of law. Balanced 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. Pierre's skill level, however, was hotly contested, and there was ample evidence to support a jury determination in favor of the defendant. Other than their own protestations and self-serving affidavits which were undermined at trial, plaintiffs offered no evidence that Pierre had ever had any discernible skills. The defendant, on the other hand, introduced evidence that Pierre was not a hearing dog—the testimony of plaintiffs' former roommate and the defense expert—and impeached plaintiffs on a number of aspects of their testimony including the claim that Pierre had been certified at a training center. Given this level of uncertainty and conflicting evidence about Pierre's training level, it was well within the province of a rational jury to conclude that Pierre's utility to plaintiffs was as simple house pet and weapon against cranky landlord, not necessarily in that order. If Pierre was not necessary as a hearing dog, then his presence in the townhouse was not necessarily a reasonable accommodation.

*Id.* at 429 (footnote omitted).[7]

In *Green v. Housing Authority of Clackamas County,* 994 F.Supp. 1253, 1255 (D. Or. 1998), the United States District Court for the District of Oregon granted summary judgment on behalf of a deaf plaintiff in his FHA claim against

[7] The court's difficulty with the jury instructions was that the trial court combined requirements of local, state, and federal law which may have lead the jury to erroneously infer that without school training a dog cannot be a reasonable accommodation. The court explained that professional credentials may be a part of the sum in determining whether a dog is a reasonable accommodation, but "they are not its *sine qua non." Bronk,* 54 F.3d at 431. Ligatti argues that there is no training requirement under the Fair Housing Act and that the cases should be evaluated under the analytical framework for reasonable accommodations: requiring a showing of disability, the reasonableness of the request, and the necessity of the animal for the tenant to have an equal opportunity to use and enjoy the housing. 35 T. Marshall L. Rev. at 159.

his landlord for refusing to allow him to have a service dog. The dispute was whether plaintiff's hearing assistance dog was, in fact, a hearing assistance dog or simply a household pet. *Green,* 994 F. Supp. at 1255. The landlord argued that the dog was not an appropriate accommodation for the plaintiff's disability because the plaintiff was unable to produce any "verification" that the dog was a "certified" hearing assistance trained animal. *Id*. The district court rejected this argument, and explained,

> there is no federal or Oregon certification process or requirement for hearing dogs, guide dogs, companion animals, or any type of service animal. There is no federal or Oregon certification of hearing dog trainers or any other type of service animal. The only requirements to be classified as a service animal under federal regulations are that the animal be (1) individually trained, and (2) work for the benefit of a disabled individual. There is no requirement as to the amount or type of training a service animal must undergo. Further, there is no requirement as to the amount or type of work a service animal must provide for the benefit of the disabled person. 28 C.F.R. § 36.104 [(defining "service animal" under the ADA)]. The regulations establish minimum requirements for service animals.
>
> Plaintiffs claim that the dog underwent individual training at home and was also trained by a professional trainer. Plaintiffs state that the dog alerted [plaintiff] to several sounds, including knocks at the door, the sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. [The landlord's] requirement that an assistance animal be trained by a certified trainer of assistance animals, or at least by a highly skilled individual, *has no basis in law or fact*. There is no requirement in any statute that an assistance animal be trained by a certified trainer.

*Id.* at 1255-56 (emphasis added).

In *Janush v. Charities Housing Development Corp.*, 169 F.Supp.2d 1133, 1134 (N.D. Cal. 2000), the plaintiff, who suffered from a severe mental health disability, was denied permission to have two birds and two cats. She brought

suit under the FFHA and alleged that the animals lessened the effects of her disability by providing her with companionship and were necessary to her mental health. The court denied the defendant's motions to dismiss and for summary judgment, and reasoned:

> The legal basis for defendants' motion appears to be the assertion that California's definition of a "service dog" should be read into the federal statute to create a bright-line rule that accommodation of animals other than service dogs is per se unreasonable. Although the federal regulations specifically refer to accommodation of seeing-eye dogs, there is no indication that accommodation of other animals is per se unreasonable under the statute. In fact, the federal regulations provide a broad definition of service animals. "Service animal means any guide dog, signal 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.

*Janush,* 169 F.Supp.2d at 1135-36 (footnote omitted).

> In sum, the question of whether a companion animal is an appropriate and reasonable accommodation for a disability is a question of fact, not a matter of law. Here, the Elebiaris presented evidence that their disabilities substantially limited their use and enjoyment of their condominium, and having a companion dog improved that situation. The fact that Jayne [Elebiari] was capable of working and was sometimes able to function well at home does not mean that her disabilities did not interfere with the use and enjoyment of her home. A substantial limitation on use and enjoyment does not require an individual to be incapable of any use and enjoyment of her home.

*Auburn Woods I,* 18 Cal. Rptr.3d at 681; *see also Oras v. Hous. Auth.*, 861 A.2d 194, 202 (N.J. Super. Ct. App. Div. 2004) ("Whether a pet is of sufficient assistance to a tenant to require a landlord to relax its pet policy so as to reasonably accommodate the tenant's disability requires a fact-sensitive examination.")

The State produced evidence that some of the effects of Henderson's posttraumatic stress disorder and depression include Henderson being very fearful and hyper vigilant, and being unable to sleep, all of which interfered with her use and enjoyment of the dwelling. Henderson testified she had trained Sam to turn on lights for her, to fetch her keys and phone, and to alert her when strangers come to the apartment. These tasks allowed Henderson to feel secure about her surroundings and "not be afraid." Koch testified Henderson "gained a sense of being protected, a sense of emotional strength from the animal being near her." Dr. Lundberg sent a letter stating the "animal plays an important part in her recovery and in her psychological well being at this time." Thus the State presented evidence from which a reasonable jury could find that the requested accommodation (Sam) was "necessary to afford [Henderson] equal opportunity to use and enjoy [her] dwelling." The trial court erred in directing a verdict in defendants' favor where a factual question existed.

***4. The requested accommodation is reasonable.*** "A reasonable accommodation 'means changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual.'" *Oras*, 861 A.2d at 203-04 (quoting *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D. N.J. 1992)). "[U]nder the right circumstances, allowing a pet despite a no-pets policy may constitute a reasonable accommodation." *Auburn Woods I*, 18 Cal. Rptr. 3d at 679.

As we noted in *Henderson I*, a factual scenario similar to the present case is found in *Majors v. Housing Authority*, 652 F.2d 454, 455 (5th Cir. 1981), where

a tenant had a history of psychological problems and provided evidence to show she had a psychological and emotional dependence upon her pet dog. The tenant met the financial qualifications for housing but was served notice of termination because she did not follow the no-pets policy. *Majors*, 652 F.2d at 455. The district court granted summary judgment to the housing authority based on a determination the tenant was not an "otherwise qualified handicapped individual" because she was unable to comply with the ban against pets. *Id.*

The Court of Appeals for the Fifth Circuit reversed the district court's conclusion that the tenant was not an "otherwise qualified handicapped individual," noting "it is possible for Ms. Majors to enjoy the full benefit of the covered program provided that some accommodation is made for her alleged disability." *Id.* at 457-58. The court stated:

> [W]e must recognize as reasonable the inference that the Housing Authority could readily accommodate Ms. Majors. Even if the "no pet" rule is itself imminently reasonable, nothing in the record rebuts the reasonable inference that the Authority could easily make a limited exception for that narrow group of persons who are handicapped and whose handicap requires (as has been stipulated) the companionship of a dog.

*Id.* at 458. The court concluded summary judgment was inappropriate because there were genuine issues of material fact as to whether the tenant was handicapped, whether the handicap required the companionship of a dog, and what reasonable accommodations could be made. *Id.*

We conclude that here, the State has presented substantial evidence, and it was for the jury to determine, whether the accommodation requested was reasonable.

***5. The Agency refused the requested accommodation.*** There is no dispute the Agency refused to acknowledge Sam as a reasonable accommodation and allow Henderson to keep Sam in the duplex.

As the State presented substantial evidence on each element of this claim, the claim should have been submitted to the jury and the district court erred in directing a verdict for defendants.

**B. Waiver.**

Waiver is the voluntary or intentional relinquishment of a known right. *Sheetz v. IMT Ins. Co*., 324 N.W.2d 302, 304 (Iowa 1982). Where a party relies upon acts and conduct as the basis for waiver, the issue of waiver is generally one of fact for the jury. *Id*.

The district court concluded that Henderson waived her request for accommodation when she "chose to voluntarily remove Sam from her duplex and move into the Section 8 program." The State argues this was error for several reasons, which we paraphrase as follows: Henderson did not voluntarily remove the dog, but was compelled to do so to avoid eviction and the consequent ineligibility for further housing assistance. Henderson's persistent pursuit for accommodation evinces no voluntary relinquishment. The FED proceeding was also a violation of the ICRA and an amplification of the defendants' wrong-doing. There are questions of fact raised by the evidence as to the reasonable

inferences to be drawn from the conduct of the parties. The settlement makes no mention of Henderson's civil rights claim and, in fact, the attorney for the Agency specifically disavowed that the FED proceeding had any broader significance.[8] Moreover, the State, which is the plaintiff in this action, was not a party to the FED.

The defendants, citing *Board of Supervisors v. Iowa Civil Rights Commission*, 584 N.W.2d 252, 257 (Iowa 1998) (finding administrator could not be allowed to settle one civil rights claim in consideration of county's payment of an agreed salary, and then immediately claim that the salary was discriminatory), contend Henderson waived her request for accommodation because she had the right and opportunity to raise and litigate the issue of whether Sam was a service dog in the FED action and chose not to.[9] Noting Lloyd's testimony, the defendants assert that the Agency "understood [the FED] to be a full settlement of each party's claims against the other."

We believe Henderson has established at least a factual dispute on the issue of waiver and that a directed verdict was in error. *Sheetz*, 324 N.W.2d at 304. She applied for Section 8 housing the same day she requested the accommodation of having Sam considered a service animal. Henderson steadfastly pursued her request for accommodation for months and testified that

[8] In the FED proceeding, when Kirkwood began to describe the controversy as arising from the interpretation of whether a dog was a service dog or a pet, counsel for the Agency interrupted and stated, "This is in fact an FED eviction action for a lease violation of having an unauthorized dog in the unit and I would urge counsel not to go into further description . . . ."

[9] This argument is probably more appropriately characterized as one of issue preclusion than waiver. *See generally Hunter v. City of Des Moines Mun. Housing Auth.*, 742 N.W.2d 578, 584 (Iowa 2007).

she settled the FED action to avoid homelessness. Lloyd's asserted opinion flies in the face of the settlement record made in the FED action, which makes no mention of the civil rights case.[10] Additionally, the FED was settled on July 22, 2005, and on August 9, 2005, the defendants consented to have the civil rights case tried as a civil action. Only when the evidence is undisputed is the issue one of law for the court. *Id.* The trial court erred in determining waiver as a matter of law.

**IV. Conclusion.**

The district court erred in concluding waiver and lack of sufficient nexus as a matter of law. This case must be remanded for a new trial.

**REVERSED AND REMANDED.**

[10] In any event, we do not believe the State is precluded from litigating its claim that the City and Agency discriminated in housing by failing to accommodate a disability. *See id.* at 584. ("Even when the requirements of the general issue preclusion rule are present, courts are required to consider if special circumstances exist that make it inequitable or inappropriate to prevent relitigation of the issue previously determined in the prior action."). The State was not a party to the FED action. The Agency's attorney specifically declined to address the issue of status of Sam as a service dog in the FED action. The defendants consented to having the civil rights claim tried as a civil action *after* settling the FED action. Under these circumstances, we will not find that Henderson's settlement in the FED action waived her request for accommodation.