IN THE COURT OF APPEALS OF IOWA

No. 7-272 / 06-1144
Filed December 28, 2007

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

vs.

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

Appeal from the Iowa District Court for Polk County, D. J. Stovall, Judge.

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

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

Mark Godwin, Deputy City Attorney, for appellees.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

The State of Iowa, on behalf of Carol Henderson, appeals the district court's grant of summary judgment to 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 large dog in her rental unit. We reverse the judgment of the district court and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

The summary judgment record reveals the following undisputed facts. On May 8, 2002, Carol Henderson entered into a dwelling lease with the Agency. 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. The provisions concerning pets did not apply to service animals.

After entering into the lease, Henderson obtained a doberman pinscher dog, which she named "Sam." Nicole had a presso canario dog named "Otis."

Each dog weighed more than ninety pounds. Henderson and Nicole obtained the dogs after they experienced two attempted break-ins at their apartment in early 2003. A housing inspector discovered the dogs in January 2005. On January 11, 2005, Henderson was notified she was in violation of the pet policy. She was given fourteen days to comply with the lease or the lease agreement could be terminated.

Henderson requested that the dogs be considered service animals. She also filed an application for a pet permit. Her application was denied because the pet policy only permitted one pet per household, and the pet could not exceed twenty pounds. The Agency also stated Henderson's pets did not meet the qualifications for service animals. Henderson was informed she needed to remove both dogs by February 7, 2005.

Henderson presented a letter from Dr. R. Coppola, which asked that she be allowed to keep her dog for safety reasons, secondary to post-traumatic stress disorder. Henderson also presented a letter from Jill Fulitanto-Avery, an employee of the Iowa Division of Persons with Disabilities, which stated she understood Henderson's dog was a psychiatric service dog and pointed out that regular pet policies did not apply to service animals. Dr. Jerilyn Lundberg reported Henderson had been diagnosed with post-traumatic stress disorder. Dr. Lundberg stated:

> [Henderson] 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.

In the meantime, Otis was removed from the home. Nicole became upset about this and moved out. 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. 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. An administrative law judge determined probable cause existed to support the allegations of discrimination based on disability.

On behalf of Henderson, the State filed a petition in district court for declaratory judgment, permanent injunctive relief, and damages.[1] 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. Henderson stated she was a person with a disability who needed the assistance of a psychiatric companion animal. The State alleged defendants failed to make reasonable accommodation for her disability in contravention of Iowa Code section 216.8A(3)(c)(2) (2005).

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

[1] 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. Iowa Code § 216.16A(1). If such an election is made, the attorney general must file a civil action in district court on behalf of the aggrieved person. Iowa Code § 216.17A(1). The Agency and City elected a civil action, and the attorney general filed the action on behalf of Henderson.

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, finding there was no genuine issue as to the material fact that at the time Henderson filed her request for a service dog accommodation she was not qualified to reside in her unit.

The State appeals, claiming the district court erred in granting summary judgment in favor of the defendants. The State argues the district court improperly determined that based on undisputed facts Henderson was not otherwise qualified to rent her housing unit.

II. SCOPE AND STANDARDS OF REVIEW.

Appellate review of a grant of a motion for summary judgment is for correction of errors at law. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). Summary judgment is appropriate when there "is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005). The party moving for summary judgment has the burden to prove the facts are undisputed. *Estate of Harris*, 679 N.W.2d at 677. However, when a motion for summary judgment is made and properly supported the opposing party may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing the existence of a genuine issue for trial. Iowa R. Civ. P. 1.981(5); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996). The court views the facts in a light most favorable to the nonmoving party. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998).

III. MERITS.

Section 216.8A(3)(b) of the Iowa Civil Rights Act of 1965 makes it unlawful to "discriminate against another person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability 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).[2]

The State claims the defendants violated section 216.8A(3)(c)(2) by failing to waive the pet policy requirements in order to accommodate Henderson's disability. The district court rejected this argument and found summary judgment was appropriate because Henderson was not "qualified for the housing unit . . . in question."

The phrase "otherwise qualified handicapped individual" is based on the federal Rehabilitation Act of 1973, 29 U.S.C. § 794.[3] In applying the Fair Housing Act, courts often rely on the Rehabilitation Act to explore what accommodations are reasonable. *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1122 n.22 (D.C. 2005); *see also Oconomowoc Residential Programs, Inc. v. City*

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[2] This provision is similar to 42 U.S.C. section 3604(f)(3) of the Fair Housing Act. We may consider cases interpreting the federal Fair Housing Act in interpreting the housing discrimination provisions of the Iowa Civil Rights Act. *See State v. Keding*, 553 N.W.2d 305, 307 (Iowa 1996).

[3] The relevant portion of 29 U.S.C. section 794 provides, "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance. . . ."

of Milwaukee, 300 F.3d 775, 783 (7th Cir. 2002) (noting the requirements for reasonable accommodation under the Americans with Disabilities Act and Rehabilitation Act are the same as those under the Federal Housing Act).

Under section 216.8A(3)(c)(2) and its federal Fair Housing Act counterpart, a landlord must reasonably accommodate a qualified individual with a disability by making changes in rules, policies, practices, or services when needed. *Oconomowoc Residential Programs*, 300 F.3d at 782. Accommodation is required if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a disabled person the equal opportunity to use and enjoy a dwelling. *Id.* at 783 (citing 42 U.S.C. § 3604(f)(3)(B)). The burden is on the plaintiff to show the accommodation is reasonable on its face. *Id.* at 784; *accord U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401, 122 S. Ct. 1516, 1523, 152 L. Ed. 2d 589, 602 (2002). Once the plaintiff has made this prima facie showing, the defendant must come forward to demonstrate unreasonableness or undue hardship in the particular circumstances. *Oconomowoc Residential Programs*, 300 F.3d at 784.

There is an overlap between the "otherwise qualified individual" requirement and the reasonableness of the accommodation when the discrimination claimed is the failure to make reasonable accommodations. *Peebles v. Potter*, 354 F.3d 761, 768 n.6 (8th Cir. 2004). If a requested accommodation is unreasonable, then the plaintiff has not shown "discrimination" or established the "otherwise qualified individual" element. *Id.*

"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," *Oras v. Hous. Auth.*, 861 A.2d 194, 202 (N.J. Super. Ct. App. Div. 2004), which "will infrequently be appropriate for resolution on summary judgment." *Janush v. Charities Hous. Dev. Corp.*, 169 F. Supp. 2d 1133, 1136 (N.D. Cal. 2000). "[U]nder the right circumstances, allowing a pet despite a no-pets policy may constitute a reasonable accommodation." *Auburn Woods I Homeowners Ass'n v. Fair Employ. & Hous. Comm'n*, 121 Cal. App. 4th 1578, 1593 (Cal. Ct. App. 2004). Summary judgment is not appropriate if genuine issues of fact exist as to whether a pet is necessary for a tenant to use and enjoy an apartment. *Crossroads Apts. Assoc. v. LeBoo*, 578 N.Y.S.2d 1004, 1007 (N.Y. City Ct. 1991).

The district court determined summary judgment was appropriate in this case because Henderson was not otherwise qualified for the housing unit in question. The court reasoned:

> There exists no genuine issues of material fact that at the time Plaintiff filed her request for the service dog accommodation, she was not eligible to reside in the unit as she was in violation of the Pet Policy Agreement for several reasons: first, she had not obtained prior permission from [the Agency] for the dogs to reside in the unit; secondly, she had not one but two dogs residing in the unit; and thirdly, each of the dogs exceeded the maximum allowable weight limit. Therefore, since Plaintiff cannot show a prima facie case of discrimination by being eligible for the housing benefit, Defendants are entitled to prevail on their motion.

The State argues 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. We agree.

We initially note the reasons supporting the district court's conclusion that Henderson was in violation of the pet policy and not eligible for her housing unit

were erroneous. Although the parties' lease prohibited "pets of any kind on the premises, without first obtaining written permission by the Owner," the lease further provided Henderson could "request at *any time* during [her] tenancy that we provide reasonable accommodation. . . ." (Emphasis added.) Thus, pursuant to the language of the lease, Henderson did not need "prior permission" from the Agency for her requested accommodation of a service animal. Henderson requested accommodation and provided evidence of a disability while her lease remained in effect and she was still residing in the apartment. Her request was thus timely.[4] Furthermore, by the time she requested accommodation for her disability, the second dog had been gone from her apartment for some time.

The district court's analysis as to whether Henderson met the requirements of the pet policy did not "give consideration to [her] needs. 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 (citation omitted). An agency is required to provide some services and accommodations to disabled persons who could not participate without accommodation. *Majors v. Hous. Auth.*, 652 F.2d 454, 457 (5th Cir. 1981); *see also Edwards v. U.S. Envtl. Protection Agency*, 456 F. Supp. 2d 72, 100 n.7 (D.D.C. 2006) (stating "an individual with handicaps" is "qualified" in the employment context if the individual can perform the essential functions of the position *with* reasonable

[4] We additionally note that under the federal Fair Housing Act, a landlord illegally discriminates against a disabled renter if the landlord takes prohibited adverse action at any time after learning of the renter's disability. *See Radecki v. Joura*, 114 F.3d 115, 116 (8th Cir. 1997) (noting that it was necessary only that the landlord knew of the renter's disability at any time before the eviction).

accommodation) (citation omitted) (emphasis added). *But see Se. Cmty. College v. Davis*, 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980, 988 (1979) ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."). We must therefore consider "whether reasonable accommodations will permit the handicapped person to realize the principal benefits of the program." *Majors*, 652 F.2d at 457; *see also Oras*, 861 A.2d at 204 (stating tenant "must prove that the requested accommodation was necessary to afford him an equal opportunity to use and enjoy his dwelling").

A factual scenario similar to the present case is found in *Majors* 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. *Majors*, 652 F.2d at 455. The tenant met the financial qualifications for housing but was served notice of termination because she did not follow the no-pets policy. *Id.* 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." *Id.* at 457-58. The appellate court noted "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.* 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 similarly conclude the district court in this case erred in concluding that undisputed facts show Henderson is not an "otherwise qualified handicapped individual" and in granting summary judgment. There are genuine issues of material fact as to whether Henderson's requested accommodation is reasonable given her mental health diagnosis and the statements of her mental health professions regarding her concomitant need for her "self-trained service companion" dog.

In determining the reasonableness of the requested service animal accommodation, the court should consider the individual's need for the service animal and the effectiveness of the animal in resolving disability-based problems. *Edwards*, 456 F. Supp. 2d at 101. Service animals may be necessary accommodations in certain circumstances. *Prindable v. Ass'n of Apt. Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256 (D. Hawaii 2003), *aff'd sub nom*. *DuBois v. Ass'n of Apt. Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006). However, most animals are not equipped "to do work or perform tasks for the benefit of an individual with a disability." *Prindable*, 304 F. Supp. 2d at 1256; *see also Bronk v. Ineichen*, 54 F.3d 425, 429 n.6 (7th Cir. 1995). Thus, there must be

some evidence of "individual training" to set the service animal apart from the ordinary pet. *Prindable*, 304 F. Supp. 2d at 1256.

The disability in this case is mental and emotional rather than physical in nature. "It therefore follows that the animal at issue must be peculiarly suited to ameliorate the unique problems of the mentally disabled." *Id.* According to mental health professionals she has seen, Henderson suffers from post-traumatic stress disorder. Henderson attributes her condition to domestic violence she allegedly suffered more than ten years earlier. In an affidavit in support of the State's resistance to the defendants' motion for summary judgment, Henderson stated she is in a "persistent state of fear" and is "frequently overwhelmed by events, tend[s] to isolate [herself] from others and social activities, unable to place trust in others and [has] become unable to maintain full-time employment." Her affidavit stated her dog helps to alleviate her "constant state of fear" because she trained him to "precede me into rooms to help reduce my fears that someone will be lurking there; he has been trained to switch on lights in darkened rooms; he has been trained to bring me my cell phone."

Viewing these facts in the light most favorable to Henderson, we conclude reasonable minds could differ as to whether her requested accommodation of a service animal was reasonable in light of her claimed mental illness. *See, e.g., Janush*, 169 F. Supp. 2d at 1136 (finding triable issues of fact remained as to whether allowing a tenant to keep two birds and two cats in the apartment despite a no-pet policy was a reasonable accommodation for his mental illness);

Auburn Woods I Homeowners Ass'n, 121 Cal. App. 4th at 1596 (stating the question of whether a "companion dog" is an appropriate and reasonable accommodation for tenants' mental disabilities is a question of fact, not a matter of law); *Oras*, 861 A.2d at 204 (holding a genuine issue of material fact existed as to whether tenant's dog was a reasonable accommodation for his mental illness); *Crossroads Apts. Assoc.*, 578 N.Y.S.2d at 1007 (finding genuine issues of material fact existed as to whether tenant's cat was necessary for him to use and enjoy his apartment given his mental illness). We therefore reverse the judgment of the district court and remand for further proceedings.

REVERSED AND REMANDED.

Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurs in part and dissents in part)

I concur in part and dissent in part. I would affirm the trial court in all respects.