IN THE SUPREME COURT OF IOWA

No. 16–1534

Filed February 15, 2019

Amended May 1, 2019

THERESA SEEBERGER,

Appellee,

vs.

DAVENPORT CIVIL RIGHTS COMMISSION,

Appellant,

and

MICHELLE SCHREURS,

Intervenor-Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Landlord seeks further review of court of appeals decision affirming damage award for housing discrimination and restoring attorney fee award. **DECISION OF COURT OF APPEALS AFFIRMED IN PART AND VACATED IN PART; DISTRICT COURT JUDGMENT AFFIRMED.**

Latrice L. Lacey of Davenport Civil Rights Commission, Davenport, for appellant.

Dorothy A. O'Brien of O'Brien & Marquard, P.L.C., Davenport, for intervenor-appellant.

Randall D. Armentrout, Katie L. Graham, and Ryan G. Koopmans (until withdrawal) of Nyemaster Goode, P.C., Des Moines, for appellee.

WATERMAN, Justice.

In this case, we must decide whether the court of appeals erred in awarding attorney fees incurred in agency proceedings under a fee-shifting provision in Division II of the Davenport Civil Rights Ordinance for a housing discrimination violation charged under Division III that lacks a corresponding fee-shifting remedy. The owner of a single-family home terminated the lease of a tenant whose daughter became pregnant, resulting in a complaint filed with the Davenport Civil Rights Commission (Commission) alleging discrimination based on familial status in violation of the Davenport Civil Rights Ordinance and the Federal Fair Housing Act (FHA). The landlord responded that her comments and actions were protected under the First Amendment. An administrative law judge (ALJ) found the landlord committed the Division III fair housing violation, awarded the tenant $35,000 in damages for emotional distress and $23,882 in attorney fees and costs, and imposed a $10,000 civil penalty. The Commission approved the ALJ's decision except that it reduced the emotional distress award to $17,500. On judicial review, the district court rejected the landlord's free speech defense but reversed the damages award and civil penalty based on a "small landlord"

exemption in the Ordinance and directed the Commission to recalculate those amounts. The district court vacated the fee award, ruling that the fee-shifting provision in Division II was inapplicable and that fees could not be awarded by the Commission under the FHA. All parties appealed, and we transferred the case to the court of appeals, which reinstated the fee award under Division II of the Ordinance. We granted the landlord's application for further review.

On our review, we elect to allow the court of appeals decision to stand on all issues except the award of fees incurred in the agency proceedings. For the reasons elaborated below, we hold the fee-shifting provision in Division II of the Ordinance is inapplicable to the fair housing violation in Division III. We also hold the Commission could not award fees under the FHA. Accordingly, we affirm the district court judgment.

I. Background Facts and Proceedings.

In 2011, Theresa Seeberger purchased a three-bedroom, single-family home on North Ripley Street in Davenport. Seeberger lived in the house with her four cats until she got married in 2012. Her spouse was allergic to cats. When Seeberger moved out of the North Ripley house, she left behind her cats, much of her clothing, and some furniture. Seeberger visited the house almost daily to feed her cats.

In December 2012, Seeberger began renting out bedrooms in the house. In August 2013, Michelle Schreurs and her fifteen-year-old daughter rented one

of the bedrooms. There was no written lease, but Schreurs agreed to pay $300 monthly in rent. Although two other tenants lived in the house when they moved in, by July 2014, Schreurs and her daughter were the only tenants.

On September 16, Seeberger visited the house and found prenatal vitamins on the kitchen counter. She took a photo of the vitamins with her cell phone and sent the photo to Schreurs with a text asking, "Something I should know about?"

The following day, Seeberger returned and was at the house when Schreurs arrived home from work. Seeberger asked if Schreurs had received the text message and again asked about the prenatal vitamins. Schreurs excitedly told Seeberger that her daughter was pregnant. Seeberger paused for a moment and then responded that Schreurs and her daughter would have to move out in thirty days. When asked why, Seeberger stated, "You don't even pay rent on time the way it is, and . . . [n]ow you're going to bring another person into the mix." Noting the prenatal vitamins, Seeberger continued, "[O]bviously you're going to keep the baby." The following day, Seeberger left a letter at the house informing Schreurs that her lease would expire on October 19. Schreurs and her daughter moved out October 5.

In November, Schreurs filed a complaint with the Davenport Civil Rights Commission. She amended her complaint twice, ultimately claiming that Seeberger discriminated against her based on familial status in

violation of Division III, section 2.58.305(C) of the Davenport Municipal Code (2014),[1] and § 804(c) of the FHA.[2] As a small landlord, Seeberger was only liable for the alleged discriminatory *statements* she made in violation of section 2.58.305(C). Seeberger was exempt from liability under the remaining subsections of section 2.58.305, including any liability for terminating Schreur's tenancy. *See* Davenport, Iowa, Mun. Code § 2.58.310 (exempting small landlords from liability for subsections 2.58.305(A), (B), (D), (E), and (F)).[3] The Commission conducted an investigation. In March

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[1] Davenport Municipal Code section 2.58.305(C) provides that the following is unlawful:

> To make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation or an intention to make any such preference, limitation or discrimination.

Davenport, Iowa, Mun. Code § 2.58.305(C).

[2] Codified at 42 U.S.C. § 3604(c) (2012).

[3] The Municipal Code exempts, subject to certain conditions, "[a]ny single-family house sold or rented by an owner" and rooms in a dwelling that have "living quarters occupied or intended to be occupied by no more than four (4) families living independently of each other, if the owner actually maintains and occupies one of such living quarters of his residence." Davenport, Iowa, Mun. Code § 2.58.310(A)(1)–(2). There are similar exemptions under the FHA. 42 U.S.C. § 3603(b)(1)–(2). The latter exemption is known "as the 'Mrs. Murphy' exemption on the theory then that the statute did not reach the metaphorical 'Mrs. Murphy's boardinghouse.'" *United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005).

2015, the director of the Commission issued a probable cause finding, concluding that there was probable cause to find Seeberger had discriminated against Schreurs based on familial status in violation of section 2.58.305(C) and the FHA, 42 U.S.C. § 3604(c).

The complaint was set for a public hearing before an ALJ. After the hearing, the ALJ issued a ruling finding that "[a]n ordinary listener listening to Seeberger's statements would find her statements discriminatory on the basis of familial status" and that "Seeberger engaged in a discriminatory housing practice by making the statements." The ALJ issued a cease and desist order, awarded Schreurs $35,000 in emotional distress damages, and assessed a $10,000 civil penalty against Seeberger. On December 23, Schreurs filed an application for attorney fees. Seeberger resisted. The ALJ found that Schreurs was entitled to attorney fees under Davenport Municipal Code section 2.58.350(G) and awarded Schreurs $23,200 in attorney fees and $681.80 in costs.

In January 2016, the Commission approved the ALJ's decision, except that it reduced the award of emotional distress damages to $17,500. The Commission also approved the ALJ's decision with regard to attorney fees and costs and determined Seeberger was responsible for the costs of the hearing.

Seeberger filed a petition for judicial review. Seeberger argued, among other things, that the Ordinance violated her right to free speech under the United States and Iowa Constitutions and did not

authorize an award of attorney fees incurred in the agency proceedings. Schreurs intervened in the judicial review proceedings. Schreurs and the Commission argued that Seeberger's statements were not protected speech and that Schreurs was entitled to attorney fees under Davenport Municipal Code section 2.58.175(A)(8) in Division II of the Ordinance and under the FHA, 42 U.S.C. § 3612(p).

The district court concluded that Seeberger's statements were not protected speech under the First Amendment of the United States Constitution or article I, section 7 of the Iowa Constitution. The court found that, contrary to the limitation of liability for small landlords, "the damages that were awarded were tied to the termination of the tenancy by [Seeberger], not just her discriminatory statements." The court reversed the damages award and civil penalty, concluding,

> Although the [Commission] reduced the ALJ's award by half, there is no analysis that would reflect whether they differentiated between damages properly related to the discriminatory statement and improperly related to the termination of the tenancy. As a result, the award of damages to [Schreurs] was improper and should be reversed. As it is unclear whether the [Commission's] calculation of an appropriate civil penalty may have relied upon such an improper causal connection, that penalty should also be reversed.

The district court also concluded that Davenport Municipal Code section 2.58.175(A)(8) "does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice." The district court vacated the attorney fees award.

Schreurs and the Commission moved for additional findings. They requested the court reconsider its ruling on attorney fees under section 2.58.175(A)(8) and expand its findings to address whether Schreurs was entitled to fees under the FHA. The Commission also asked the court to award attorney fees under section 2.58.350(G). Both Schreurs and Seeberger requested an award of fees incurred during the judicial review proceedings.

The district court denied all of the motions. The court declined to reconsider its ruling disallowing fees under section 2.58.175(A)(8). The court concluded that "the mere fact that the . . . complaint was cross-filed with the federal authorities does not expand the [Commission's] authority to award attorney fees beyond what is allowed under the city ordinance" and fees under the FHA "were unavailable to [Schreurs] in her state court proceeding." The court concluded that Schreurs waived her claim to attorney fees under Municipal Code section 2.58.350(G). Finally, the district court declined to award attorney fees to either Seeberger or Schreurs for fees incurred during judicial review.

All parties appealed. We transferred the case to the court of appeals. The court of appeals concluded

that the Davenport Municipal Code was not unconstitutional as applied to Seeberger and did not infringe upon her right to free speech. The court of appeals also concluded that Schreurs was entitled to attorney fees under Municipal Code section 2.58.175(A)(8) and reversed the district court's denial of fees. Finally, the court of appeals concluded the district court's denial of fees for the judicial review proceedings was not "clearly unreasonable or untenable," and affirmed the district court on that ground.

Seeberger filed an application for further review.[4] We granted her application.

II. Scope of Review.

On further review, we have the discretion to "review any or all of the issues raised on appeal." *Cote v. Derby Ins. Agency, Inc.*, 908 N.W.2d 861, 864 (Iowa 2018) (quoting *Papillon v. Jones*, 892 N.W.2d 763, 769 (Iowa 2017)). We choose to confine our review to the award of attorney fees incurred in the agency proceedings and let the court of appeals decision stand as the final decision on the remaining issues. *See id.* We review the district court's ruling construing the Ordinance for correction of errors at law. *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 455 (Iowa 2017).

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[4] Neither Schreurs nor the Commission applied for further review.

III. Analysis.

We must construe the Davenport Civil Rights Ordinance to determine whether the district court correctly ruled that the fee-shifting provision in Division II is inapplicable to a housing discrimination complaint prosecuted under Division III. We must also decide whether the district court correctly ruled that the Commission lacked authority to award fees under the FHA. We address each issue in turn. We begin with an overview of fee awards under local civil rights ordinances.

A. Attorney Fee Awards Under Municipal Civil Rights Ordinances.

> We reiterate the importance of fee awards in civil rights cases: "The reason a successful civil rights litigant is entitled to attorney fees 'is to ensure that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of civil rights acts.' "

Simon Seeding & Sod, Inc., 895 N.W.2d at 473 (quoting *Lynch v. City of Des Moines*, 464 N.W.2d 236, 239 (Iowa 1990)). But we require that the ordinance "contain[] an express provision clearly authorizing an award of attorneys' fees." *Id.* (quoting *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 846 (Iowa 2009)). This is "because attorneys' fee awards are a derogation of the common law, they 'are generally not recoverable as damages in the absence of a statute or a provision in a written contract.' " *Botsko*, 774 N.W.2d at 845

(quoting *Kent v. Emp't Appeal Bd.*, 498 N.W.2d 687, 689 (Iowa 1993)). "Our demanding approach is consistent with cases in other jurisdictions which reject awarding statutory attorneys' fees by implication and require express language." *Id.*

In *Botsko*, the issue was "whether the ordinance enacted by the City of Davenport at the time of this proceeding contained an express provision clearly authorizing an award of attorneys' fees." *Id.* at 846. We held the operative provision of the ordinance at the relevant time did not allow fees. *Id.* ("[W]e will not read into the ordinance a fee-shifting provision when the local legislative body did not approve one."). We rejected the argument that a fee-shifting provision should be implied because the ordinance was intended to execute the policies of the Iowa Civil Rights Act, which contains an express fee-shifting provision. *Id.* at 845–46.

The city subsequently amended Division II of its ordinance to add section 2.58.175(A)(8). *Id.* at 845 n.2. The fighting issue today is whether section 2.58.175(A)(8) applies to a fair-housing violation charged under Division III.

B. Attorney Fees for the Agency Proceedings. The Davenport Civil Rights Ordinance is organized into three divisions: Division I—General, Division II—Unfair Practices, and Division III—Fair Housing. It is undisputed that Seeberger was charged with a fair housing violation under Division III and was not charged with violating any provision under Division II. Notably, Division II expressly allows fee

awards for the agency proceedings while the corresponding remedy section in Division III does not. We conclude the terms of Division III control.

1. *Division III—fair housing.* Schreurs filed her discrimination complaint under, and Seeberger was found to have violated, Davenport Municipal Code section 2.58.305(C). This section is located under Division III, the fair housing provision of the civil rights ordinance. Division III expressly provides the relief an ALJ may order when the respondent has engaged in a discriminatory housing practice:

> If the administrative law judge finds that a respondent has engaged in or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent in an amount not to exceed those established by the Federal Fair Housing Act in 42 U.S.C. Section 3612.

Id. § 2.58.340(F)(3). This section does not provide for attorney fees. *Id.*

The housing discrimination division allows a discretionary attorney fee award in a different section governing judicial review. *Id.* § 2.58.350(G). Section 2.58.350 is titled "FAIR HOUSING—Judicial Review" and subsection (G) states,

> G. "Attorney Fees:" The administrative law judge or the court may at its discretion allow the prevailing party, other than the commission, reasonable attorney fees and costs resulting from any administrative proceeding brought under this section, any court proceeding arising therefrom, or any civil action.

Id. § 2.58.350(G).

Schreurs argues that she is entitled to an award of attorney fees under section 2.58.350(G). She made her request for fees under this provision at the agency level. The ALJ, relying on section 2.58.350(G), awarded Schreurs $23,200 in attorney fees. The Commission affirmed the ALJ's award of attorney fees.

On judicial review, however, Schreurs argued that she was entitled to fees under a different provision not in the fair housing section, section 2.58.175(A)(8). The district court rejected that argument, determining that the fee-shifting provision in Division II was inapplicable to the fair housing violation charged under Division III. We agree, but first address the on-and-off-again reliance by Schreurs on section 2.58.350(G).

In its ruling on the petition for judicial review, the district court found that the parties had conceded that section 2.58.350(G) governing judicial review did not apply to fees previously incurred in the agency proceedings. The Commission and Schreurs then invoked section 2.58.350(G) in a rule 1.904(2) motion, which the district court denied, stating the parties had waived that argument. On appeal, the Commission and

Schreurs relied on section 2.58.175(A)(8) and the FHA and argued section 2.58.350(G) as an alternative ground for reinstating the fee award. The court of appeals stated, "Schreurs and the Commission did not argue on judicial review that Schreurs was entitled to fees under the municipal code provision the ALJ actually awarded them, section 2.58.350(G)." The court of appeals reversed the district court based on section 2.58.175(A)(8) alone and concluded, "This disposition makes it unnecessary for us to decide whether Schreurs was entitled to attorney fees under 2.58.350(G) or, in the alternative, the FHA."[5]

We agree with the district court that Schreurs and the Commission waived any claim to fees under section 2.58.350(G) by not raising that ground in district court until after the court filed its decision on judicial review vacating the fee award. Having waived that ground in district court, those parties could not revive it in their appellate briefings. Accordingly, we confine our analysis to whether section 2.58.175(A)(8) of Division II applies to this Division III fair housing violation.

2. *Division II—Unfair practices.* Schreurs argues that she is entitled to an award of attorney fees under Division II—Unfair Practices. Division II lists discriminatory practices including employment, accommodation, retaliation, and education. *See* Davenport, Iowa, Mun. Code § 2.58.100 (employment); *id.* § 2.58.110 (accommodations or services); *id.* § 2.58.120 (credit); *id.*

[5] In resisting Seeberger's application for further review, Schreurs and the Commission rely solely on section 2.58.175(A)(8) and the FHA without mentioning section 2.58.350(G).

§ 2.58.125 (education); *id.* § 2.58.130 (aiding and abetting); *id.* § 2.58.140 (retaliation). Another section of Division II states that

> if the Commission determines the respondent has engaged in a discriminatory practice, the Commission shall issue an order requiring the respondent to cease from the discriminatory practice and to take necessary remedial action as in the judgment of the commission will carry out the purposes of this chapter.

Id. § 2.58.170(L). Section 2.58.175 in Division II is titled "Remedial Action," and subsection (A)(8) provides,

> A. The remedial action ordered by the Commission may include the following actions to be taken by respondent, in addition to any other remedy allowed by law:
>
> . . . .
>
> 8. Payment to the complainant of damages for an injury caused by the discriminatory practice which damages shall include but are not limited to back pay, front pay, all economic damages, emotional distress damages, *and reasonable attorney fees.*

Id. § 2.58.175(A)(8) (emphasis added).

Schreurs argues that section 2.58.175(A)(8) is a general remedial provision pertaining to all areas of discrimination, including housing discrimination under Division III. Schreurs points to section 2.58.175(A)(4), which enumerates "[s]ale, exchange, lease, rental, assignment or sublease of real property" as a possible

remedial action. Schreurs argues that because there is no language in Division II's remedy provision excluding housing discrimination, the agency was free to award attorney fees based on its plain language. The Commission notes the ambiguity of the city's civil rights ordinance, but argues that all of the divisions are to be read together.

The district court noted that section 2.58.175(A)(8) was listed in Division II under a section titled "Remedial Action," which appears after the part of the ordinance governing complaints of unfair practices in areas other than housing. The district court noted that the procedures in Division II differ from the procedures in Division III for discriminatory housing practices. The district court ruled that Schreurs was not entitled to an award of attorney fees under section 2.58.175(A)(8).

On appeal, the court of appeals noted the differences between Divisions II and III but stated, "[B]ased on the plain language and statutory scheme of the ordinance, we conclude the remedial action provision in division two, section 2.58.175, encompasses all areas of discrimination, including housing." The court of appeals reinstated the attorney fee award based on section 2.58.175(A)(8) alone. We disagree.

We decline to transport the remedy provision from Division II to Division III. To do so would render superfluous the remedies expressly allowed in Division III, section 2.58.340(F)(3) (providing for an award of actual damages, civil penalties, and equitable relief). *See*

Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186, 193 (Iowa 2011) (preferring interpretation that gives effect to all terms and avoids surplusage). Moreover, Division III specifically governs fair housing complaints. "To the extent 'there is a conflict or ambiguity between specific and general statutes, the provisions of the specific statutes control.'" *Id.* at 194 (quoting *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 815 (Iowa 2011)).

We find no language in either division indicating that a violation of Division III is governed by the remedy provision in Division II. Rather, each division provides its own specific remedies and exemptions. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 512–13 (Iowa 2014) (declining to find an implied private right to sue under Iowa Code chapter 216C when the legislature expressly provided a private right to sue in chapter 216E).

Tellingly, the city chose to include a fee-shifting provision for agency proceedings under Division II but not in the corresponding remedy provision in Division III. We assume that omission was intentional. *See Shumate*, 846 N.W.2d at 513 ("We find these omissions telling."); *Oyens*, 808 N.W.2d at 193 (noting legislative intent is expressed by omission as well as inclusion of terms and selective placement of term is presumed intentional). If the city wanted to allow fee-shifting for litigating fair housing complaints under Division III, presumably it would have said so in section 2.58.340(F)(3). *See Oyens*, 808 N.W.2d at 194. We will not expand the relief allowed in that provision in the

guise of interpretation. To do so would violate our mandate that fee-shifting provisions in ordinances must be clearly expressed within the terms of the ordinance, not implied. *Botsko*, 774 N.W.2d at 846.

3. *Fair Housing Act.* Finally, Schreurs argues she is entitled to an award of attorney fees under the FHA. The district court rejected that argument, and the court of appeals declined to reach it. The FHA allows a discretionary fee-shifting award:

> In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under this section, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

42 U.S.C. § 3612(p).

Seeberger argues that the Commission does not have the authority to award damages under the FHA. Schreurs and the Commission argue that the Commission may award fees under the FHA and that failing to award fees under the FHA ignores the long-standing file-sharing agreement between administrative agencies. The district court ruled the Commission could only award attorney fees authorized under the Municipal Code and Schreurs would have to pursue attorney fees under the FHA in a federal action.

In *Van Meter Industries v. Mason City Human Rights Commission*, we rejected the argument that a

local civil rights commission could award punitive damages under a federal statute. 675 N.W.2d 503, 516–17 (Iowa 2004).

> [The plaintiff's] argument ignores the limited jurisdiction of this local civil rights commission. Under Iowa Code section 216.5, the Iowa Civil Rights Commission is given the power to determine complaints alleging an unfair or discriminatory practice *under Iowa Code chapter 216*. In addition, a city may create a local civil rights commission to protect the rights of citizens secured by the Iowa Civil Rights Act. Thus, the Commission in this case acted under the authority and subject to the limitations of chapter 216, not federal law. Therefore, it correctly determined that it had no power to award punitive damages.

Id. (citations omitted).

The same reasoning applies with regard to an award of attorney fees by the Commission under federal law. *See also* Iowa Code § 216.19(1) (2015) ("All cities shall, to the extent possible, protect the rights of the citizens of this state *secured by the Iowa civil rights Act*." (Emphasis added.)).

Schreurs relies on *Dutcher v. Randall Foods*, 546 N.W.2d 889 (Iowa 1996), in support of her argument. Her reliance on *Dutcher* is misplaced. *Dutcher* involved a court declining to award attorney fees pursuant to the Fair Labor Standards Act after a jury rendered a verdict and awarded damages in favor of the plaintiff. *Id.* at 894–95. That case did not involve a municipal

civil rights commission awarding attorney fees under federal law. The Commission argues that the Iowa Civil Rights Act permits an award of attorney fees in fair housing cases. However, the Commission did not award, and Schreurs is not requesting, an award of attorney fees under the Iowa Civil Rights Act. We conclude the district court correctly denied an award of attorney fees under the FHA.

IV. Conclusion.

For the above reasons, we vacate the decision of the court of appeals awarding attorney fees for the agency proceedings, affirm the court of appeals decision on the remaining issues, and affirm the judgment of the district court.

DECISION OF THE COURT OF APPEALS AFFIRMED IN PART AND VACATED IN PART; DISTRICT COURT JUDGMENT AFFIRMED.

All justices concur except Appel and Wiggins, JJ., who concur in part and dissent in part.

APPEL, Justice (concurring in part and dissenting in part).

I concur in part and dissent in part.

I. Commission Authority to Award Attorney Fees for Proceedings Before the Commission.

We recently reiterated the importance of the availability of attorney fees in civil rights cases. *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 473 (Iowa 2017). Our cases have long explained that "[t]he reason a successful civil rights litigant is entitled to attorney fees 'is to ensure that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of civil rights acts.'" *Lynch v. City of Des Moines*, 464 N.W.2d 236, 239 (Iowa 1990) (quoting *Ayala v. Ctr. Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)). Federal courts have long given attorney fees provisions in civil rights statutes a broad construction because the statutes further policies favoring private enforcement of civil rights legislation. *See*, *e.g.*, *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401–02, 88 S. Ct. 964, 965–66 (1968) (per curiam); *Parker v. Califano*, 561 F.2d 320, 327–28 (D.C. Cir. 1977); *Smith v. La Cote Basque*, 519 F. Supp. 663, 666 (S.D.N.Y. 1981). That said, "we will not substitute 'generalized language' for language 'expressly authorizing the payment of attorneys' fees to the prevailing party.'" *Simon Seeding & Sod*, 895 N.W.2d at 473 (quoting *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 846 (Iowa 2009)). Yet, we should not seek to evade express attorney fees provisions in civil rights statutes through cramped and technical interpretation.

In this case, the plain language of the Davenport Civil Rights Ordinance expressly authorizes the Davenport Civil Rights Commission to award attorney fees related to the administrative proceedings that occurred in this case. The ordinance provides that the Commission may order payment of attorney fees caused by a discriminatory practice. Davenport, Iowa, Mun. Code § 2.58.175(A)(8). The term "discriminatory practice" is defined in the ordinance as "those practices specified as unlawful or discriminatory in this chapter." *Id.* § 2.58.030(R). Discriminatory housing practices are among those specified as unlawful in chapter 2.58. *Id.* § 2.58.300(B). Therefore, the Commission may order payment of attorney fees caused by a discriminatory housing practice. Since this case involved a discriminatory housing practice, the Commission was authorized to award attorney fees in this case. The district court erred in concluding otherwise, and I would reverse the district court ruling that Michelle Schreurs is not entitled to attorney fees before the Commission because they are not authorized by statute. That ruling is wrong.

But there is more. Pursuant to section 2.58.175(A)(8), the Commission "may" award attorney fees. *Id.* § 2.58.175(A)(8). Because of the term "may," the Commission has discretion under the Ordinance to award attorney fees when a complainant proves a discriminatory practice. The Commission determined that Schreurs proved a discriminatory practice, and the district court has upheld that determination. As a result,

the Commission clearly has the power to award Schreurs attorney fees in this case.

The district court, however, vacated the damages award. I agree for the reasons stated by the district court. But because we do not know if the Commission's discretionary decision to award Schreurs attorney fees was influenced by the size of the emotional distress award, I would also vacate the Commission's award of attorney fees and remand the question to the Commission. Once the Commission redetermines the damages issue, it should consider whether to exercise its discretion to award attorney fees.

In reconsidering the discretionary question of whether to award attorney fees incurred for proceedings before the Commission, it is important to note that, unlike section 2.58.350(G), there is no requirement under section 2.58.175(A)(8) that the complainant be a prevailing party. *Compare id.* § 2.58.350(G), *with id.* § 2.58.175(A)(8). All that is required under section 2.58.175(A)(8) to permit the Commission to exercise its discretion and award complainant attorney fees is a finding that the respondent engaged in a discriminatory practice. *See id.* § 2.58.175(A)(8). That predicate has already been established. Yet, the Commission must exercise its discretion anew in the event that it alters the damages award in this case.

II. District Court Authority to Award Attorney Fees.

Schreurs may also be entitled to attorney fees related to the judicial review proceedings before the district court. The ordinance provides that "the court may at its discretion allow the prevailing party, other than the commission, reasonable attorney fees and costs resulting from . . . any court proceeding arising" from an administrative proceeding brought under section 2.58.350 of the ordinance. *Id.* § 2.58.350(G).

Under that provision, Schreurs sought attorney fees for the proceedings before the district court in a posttrial motion. According to Schreurs, she was a "prevailing party" in the district court proceedings because the court affirmed the Commission on liability and remanded for a finding on damages. According to Schreurs, the district court's ruling on the merits of her claim "alter[ed] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S. Ct. 566, 573 (1992)).

The district court denied Schreurs's motion. The district court concluded, "[b]ased on the current status of the proceedings, [Schreurs] is not entitled to an award of fees as a prevailing party, since the outcome of this judicial review proceeding did not result in an enforceable judgment against the petitioner." The judicial review proceeding did not render a definitive

judgment on whether Schreurs is entitled to damages but only vacated the Commission's $17,500 damages award and remanded the matter to the Commission in order to allow the Commission to consider whether it gave inappropriate consideration of damages arising out of the termination of the tenancy when it calculated the damage award.

On remand, we do not know what the Commission will do. It is certainly possible the Commission will affirm the award on the ground that it already reduced the damages from $35,000 to $17,500 in order to eliminate any recovery based on the termination of the tenancy. Or, the Commission may reduce the $17,500 award to some other figure that is still substantial. We just do not know. At the end of the day, the Commission may affirm the award, and the district court may affirm the new award.

Suppose, for instance, on remand the Commission affirms the $17,500 emotional distress award and the respondent obtains no relief from the Commission. The respondent decides not to appeal. Schreurs has nothing to appeal as she would have prevailed on the key contested issue before the Commission. The matter does not return to district court. In this instance, even though Schreurs has prevailed, and the district court proceedings affirming the Commission's finding of a violation of the Ordinance against a vigorous assault played an essential part in her success, she would not have the opportunity to obtain attorney fees from the district court even though the district court's ruling rejected the respondent's claim on the merits of the civil

rights claim and merely remanded the damage award for clarification.

I believe we should reverse the district court's decision and remand the case to the district court with instructions for the district court to issue a limited remand to the Commission under Iowa Rule of Appellate Procedure 6.1004 for the sole purpose of determining the appropriate amount of damages. Once the Commission has made its determination, the district court should then consider the merits of any damages remedy afforded by the Commission. Once the district court has considered the merits of the revised damages, then the district court will be in a position to consider whether Schreurs is a prevailing party in this litigation under section 2.58.350(G) of the ordinance.

Wiggins, J., joins this concurrence in part and dissent in part.

IN THE COURT OF APPEALS OF IOWA

No. 16-1534
Filed April 18, 2018

THERESA SEEBERGER,
Petitioner-Appellee/Cross-Appellant,

vs.

DAVENPORT CIVIL RIGHTS COMMISSION,
Respondent-Appellant/Cross-Appellee,

and

MICHELLE SCHREURS,
Intervenor-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

The Davenport Civil Rights Commission and Michelle Schreurs appeal and Theresa Seeberger cross-appeals a district court ruling on Seeberger's petition for judicial review. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Latrice L. Lacey, Davenport, for appellant Davenport Civil Rights Commission.

Dorothy A. O'Brien of O'Brien and Marquard, P.L.C., Davenport, for appellant Michelle Schreurs.

Randall D. Armentrout and Katie L. Graham of Nyemaster Goode, P.C., Des Moines, for appellee.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, Judge.

The Davenport Civil Rights Commission (Commission) and Michelle Schreurs appeal a district court ruling on Theresa Seeberger's petition for judicial review following an agency determination of Schreurs's housing-discrimination complaint. The Commission contends the district court erred in concluding Schreurs's complaint was not filed under the federal Fair Housing Act (FHA) and the Davenport Municipal Code (2014) does not authorize an award of attorney fees in the context of discriminatory housing practices. Schreurs argues the district court erred in concluding the municipal code and FHA do not entitle her to an award of attorney fees incurred during administrative proceedings and abused its discretion in refusing to award her attorney fees in the judicial-review proceeding.

Theresa Seeberger cross-appeals the same ruling. She asserts that holding her liable for her discriminatory statements violates the First Amendment to the United States Constitution and article I, section 7 of the Iowa Constitution because the statements she made amount to protected speech.

I. Background Facts and Proceedings

Seeberger purchased a three-bedroom residential property in Davenport, Iowa in 2011. After living in the

residence for approximately one year, Seeberger married in October 2012 and moved into her spouse's home. Seeberger owned four cats at this time, but her spouse was allergic to them. Seeberger was not willing to give up her house or her cats, so she decided to retain ownership of the home and rent the rooms to tenants. After she began renting the property to tenants, she visited the property nearly every day to feed her cats. She also kept much of her clothing and many of her furnishings in the home. In or about August 2013, Schreurs and her daughter moved into the property as tenants; the tenancy was not memorialized in a written agreement. At that time, there were also two other tenants residing in the home. Also around that time, Seeberger separated from her spouse and moved to a nearby apartment, where she lived until the end of August 2014. By mid-2014, Schreurs and her daughter were the only tenants in the home. Seeberger testified that, overall, Schreurs and her daughter were good tenants.

On or about September 16, 2014, Seeberger visited the home and discovered a bottle of prenatal vitamins on the kitchen counter. Seeberger took a photograph of the bottle, text messaged it to Schreurs, and questioned, "Something I should know about?" The following day, Seeberger returned to the home and asked Schreurs if she had received the text message. When Schreurs responded in the negative, Seeberger showed her the photograph of the prenatal vitamins. Schreurs excitedly advised Seeberger her daughter, around fifteen years old at the time, was pregnant. Seeberger,

after contemplating the situation for "thirty seconds to a minute," angrily advised Schreurs, "You guys will have to be out in thirty days." Seeberger then stated, "You don't pay rent on time the way it is, now you're bringing another person into the mix." Seeberger also stated "she's taking prenatal vitamins,. . . . obviously you're going to keep the baby." Seeberger testified she was disappointed with Schreurs for her irresponsibility in allowing her young daughter to become pregnant. Seeberger also asserted she terminated the tenancy because she wanted her house back to herself. Seeberger testified she began drafting a notice to terminate Schreurs's tenancy on September 15, but she did not tender the notice to Schreurs until after her discovery of the prenatal vitamins. In her interview with the Commission, however, she stated she did not draft this notice until September 18. This notice advised Schreurs she needed to vacate the property by October 19. Seeberger subsequently advised Schreurs she would start staying at the home on September 26.

On October 1, Seeberger, via text message, asked Schreurs whether one of her ex-boyfriends was the father of her grandchild-to-be. Schreurs came to the home with her boyfriend. At this time, Seeberger, who was at the home, confronted Schreurs, repeating her inquiry. This exchange upset Schreurs. Schreurs and her daughter were completely moved out of the home by October 5. After Schreurs and her daughter's eviction, Seeberger allowed another tenant to live in the home.

In November 2014, Schreurs filed a housing-discrimination complaint with the Commission alleging Seeberger discriminated against her on the basis of her familial status by making discriminatory statements. The complaint was amended in February 2015 and again in March. Her complaint and amended complaints noted they were filed pursuant to Davenport Municipal Code section 2.58.305(C) and Section 804(c) of the FHA.[1] Following its investigation, the Commission issued a probable cause finding of discrimination.

The matter proceeded to a public hearing before an administrative law judge (ALJ) in November. The ALJ concluded, with regard to Seeberger's statements on September 16 and 17, that "[a]n ordinary listener listening to [her] statements would find her statements discriminatory on the basis of familial status" and "Seeberger engaged in a discriminatory housing practice by making the statements." The ALJ awarded Schreurs $35,000.00 in emotional-distress damages and imposed a civil penalty in the amount of $10,000.00. The ALJ subsequently awarded Schreurs $23,881.80 in costs and attorney fees pursuant to Davenport Municipal Code section 2.58.350(G).[2] The Commission approved the ALJ's decision in its entirety,

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[1] Codified at 42 U.S.C. § 3604(c).

[2] This section, entitled "Fair Housing – Judicial Review," provides: "The [ALJ] or the court may at its discretion allow the prevailing party, other than the commission, reasonable attorney fees and costs resulting from any administrative proceeding brought under this section, any court proceeding arising therefrom, or any civil action."

with the exception of the award of damages, which it reduced to $17,500.00.

In February 2016, Seeberger filed a petition for judicial review. In her subsequent brief in support of her petition, Seeberger argued, among other things, that the agency action was unconstitutional because it violated her freedom-of-speech rights and the Davenport Municipal Code does not provide for an award of attorney fees prior to judicial review. In their briefings, Schreurs and the Commission argued Seeberger's statements were not protected speech and Schreurs was entitled to attorney fees under municipal code section 2.58.175(A)(8)[3] or, in the alternative, the FHA.

The district court entered a written ruling in July 2016. The court concluded (1) Seeberger's discriminatory statements amounted to commercial speech, their utterance was illegal, and they were therefore not protected by the First Amendment and (2) Davenport Municipal Code section 2.58.175(A)(8) "does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice." The court therefore vacated the attorney fee award.

Schreurs moved for additional findings. In her motion, she requested the court to reconsider her entitlement to attorney fees under the municipal code and expand its ruling to consider her argument that she was also entitled to attorney fees under the FHA. The

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[3] Schreurs and the Commission did not argue on judicial review that Schreurs was entitled to fees under the municipal code provision the ALJ actually awarded them, section 2.58.350(G).

Commission also moved for additional findings and requested the court to consider Schreurs's entitlement to attorney fees under Davenport Municipal Code section 2.58.350(G) and the FHA. Thereafter, pursuant to Davenport Municipal Code sections 2.58.175(A)(8) and 2.58.350(G) and the FHA, Schreurs requested an award of attorney fees incurred in the judicial-review proceeding.

Following a hearing, the district court denied all pending motions. With regard to Schreurs's entitlement to attorney fees under the FHA, the court ruled "the mere fact that the . . . complaint was cross-filed with the federal authorities does not expand the [Commission's] authority to award attorney fees beyond what is allowed by the city ordinance" and fees under the FHA "were unavailable to [Schreurs] in her state court proceeding." The court further concluded that the issue of Schreurs's entitlement to fees under municipal code section 2.58.350(G) was waived because the parties "chose not to argue this statutory basis for any claim for fees, relying instead entirely on § 2.58.175[(A)](8)." The court declined to reconsider its determination as to Schreurs's entitlement to fees under section 2.58.175(A)(8). Finally, the court declined both Seeberger and Schreurs's requests for attorney fees on judicial review. As noted, all parties appeal.

II. Standards of Review

We review constitutional claims under the First Amendment de novo. *See Mitchell Cty. v. Zimmerman*,

810 N.W.2d 1, 6 (Iowa 2012). The sole question on appellate review of a district court's judicial review of an agency determination is whether the district court correctly applied the law. *See Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 164 (Iowa 1982). "To the extent we are asked to engage in statutory interpretation, our review is for correction of errors at law." *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017). Review of the district court's decision to not award attorney fees in the district court proceeding is for an abuse of discretion. *See Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 167 (Iowa 2006).

III. Freedom of Speech

Seeberger lodges an as-applied challenge to Davenport Municipal Code section 2.58.305(C), which provides it shall be unlawful to:

> Make, print, or publish, or cause to be made printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . or an intention to make any such preference, limitation or discrimination.

Seeberger argues her statements are not subject to the commercial-speech doctrine because they were inextricably intertwined with fully-protected speech or, in the alternative, if her statements amount to commercial speech, then the statements are still protected speech because they relate to a lawful activity.

The United States Supreme Court has recognized a "distinction between speech [involving] a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)). These other varieties of speech generally include communications concerning "politics, nationalism, religion, or other matters of opinion." *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed speech." *Cent. Hudson*, 447 U.S. at 563. However, where some commercial speech and some protected speech are "inextricably intertwined" as "component parts of a single speech," courts "cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988). Under such circumstances, the test for fully-protected speech is applicable. *Id.*

Seeberger does not contest that her statements were discriminatory and related to a commercial transaction. Instead, she contends her discriminatory, commercial statements to Schreurs were inextricably intertwined with fully-protected speech that she thought Schreurs was an irresponsible parent. Seeberger's first statement—by text message, and later in person—was, "Something I should know

about?" The obvious context of the question was based on Seeberger's status as a landlord and Schreurs's status as a tenant. The exchange between them that followed cements the conclusion that all of Seeberger's remarks were in the context of their relationship as landlord and tenant. Although Seeberger also made reference to a history of Schreurs paying rent late, the context makes clear Schreurs's changing familial status was the basis for the termination of the tenancy. While Seeberger may hold political, religious, or other beliefs the expression of which might be protected in some contexts, the statements made to Schreurs were plainly directed at telling Schreurs her tenancy was being terminated because of her familial status.

Seeberger testified she was disappointed with Schreurs for her irresponsibility in allowing her young daughter to become pregnant.[4] Seeberger's statements, on their face, do not indicate that her speech was non-commercial in nature or was otherwise based on a matter of religion, ideology, or philosophy, or on a position concerning responsible parenting. Rather, her September 17 statements purely amounted to her pronouncement to Schreurs that her familial status was the primary basis for terminating Schreurs's tenancy. We conclude Seeberger's statements were not inextricably intertwined with any form of fully-protected speech. Seeberger's concession that the statements terminating the tenancy were commercial in nature,

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[4] Our analysis is based on the words spoken to Schreurs in the course of Seeberger's termination of the tenancy, and not on Seeberger's later testimonial characterizations.

together with our conclusion that such statements were not inextricably intertwined with protected speech, necessitate the application of the commercial-speech analysis laid out in *Central Hudson.*

For commercial speech to be protected by the First Amendment, "it at least must concern lawful activity and not be misleading." *Cent. Hudson*, 447 U.S. at 566.[5] Our only concern in this case is whether the statement concerned a lawful activity. Seeberger concedes that her statements were in violation of Davenport Municipal Code section 2.58.305(C), which prohibits all landlords from making discriminatory statements in relation to the rental of a dwelling. She argues, however, because she owned fewer than four single-family homes, the actual termination of Schreurs's tenancy on the basis of her familial status was not illegal and, as such, the statement concerned a lawful activity. *See* Davenport, Iowa Mun. Code § 2.58.310(A)(1)(a) ("Nothing in subsection 2.58.305 of this Chapter *other than subsection 2.58.305(C)* shall apply to . . . [a]ny single-family house sold or rented by an owner provided that . . . [t]he private individual owner does not own more than three (3) such single-family houses at any one time." (emphasis added)). For the purposes of Seeberger's as-applied challenge, we will assume

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[5] "The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183–84 (1999).

without deciding that her statements concerned a lawful activity.

The next step in the *Central Hudson* test "asks whether the asserted governmental interest served by the speech restriction is substantial." *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 185. The Commission argues the interest in prohibiting discriminatory statements in housing is substantial. The Iowa Supreme Court has stated the government has a substantial interest in preventing discrimination in employment. *Baker v. City of Iowa City*, 867 N.W.2d 44, 54 (Iowa 2015). We conclude the government's interest in preventing discriminatory statements in housing is at least equally substantial to its interest in preventing discrimination in employment.

Finally, we are required to determine if the ordinance advances the objective of preventing discriminatory statements in housing and, if so, whether it is more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. The ordinance clearly advances the objective of preventing the making of discriminatory statements in housing. This is so even though the ordinance does not effectually prohibit discrete discrimination in all housing transactions. As applied in this case, the ordinance simply renders it unlawful to make any statement with respect to the "rental of a dwelling that indicates any preference, limitation, or discrimination based on" familial status "or an intention to make any such preference, limitation or discrimination." Davenport, Iowa Mun. Code § 2.58.305(C). As Seeberger correctly points out, landlords owning no more than three single-family

homes may legally discriminate in housing decisions on the basis of familial status, so long as they do not make a statement to that effect. *Id.* §§ 2.58.305(C), .310(A)(1)(a). The challenged ordinance merely prohibits landlords from subjecting prospective tenants to the stigmas associated with knowingly being discriminated against. For these reasons, we find the ordinance is not more extensive than necessary to serve the substantial interest of preventing discriminatory statements in housing transactions.

As such, we conclude the ordinance is not an unconstitutional infringement upon Seeberger's freedom-of-speech rights. We therefore affirm the district court's decision to uphold Seeberger's liability under the ordinance.

IV. Attorney Fees

A. Administrative Proceedings

Schreurs and the Commission contend Schreurs was entitled to attorney fees incurred in the administrative proceeding under Davenport Municipal Code sections 2.58.175(A)(8) and 2.58.350(G) or, in the alternative, the FHA. The district court considered the argument under section 2.58.350(G) waived and concluded fees under the FHA were unavailable. The court also concluded section 2.58.175(A)(8) "does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice." The court reasoned section 2.58.175, entitled "Remedial Action,"

only concerns unfair or discriminatory practices in areas other than housing.

Chapter 258 of the municipal code is set out in three divisions: (1) general provisions, (2) unfair practices, and (3) fair housing. We first focus on division two, unfair practices, which is comprised of sections 2.58.100 through 2.58.190. Section 2.58.175 falls within division two. The first four sections concern unfair practices in employment, accommodations or services, credit, education, and aiding or abetting. *See id.* §§ 2.58.100, .110, .120, .125, .130. The next section relates to retaliation, and specifically includes housing matters, as does the following section, which concerns complaint procedures. *Id.* §§ 2.58.140, .150. The next two sections govern conciliation and public hearing; neither section excludes housing complaints, and our review of the record indicates both sections applied in this case. *See id.* §§ 2.58.160, .170. The public hearing provision provides that, if

> the hearing officer determines that the respondent has engaged in a discriminatory or unfair practice, the hearing officer shall . . . issue an order in writing requiring the respondent . . . to take the necessary *remedial action* as in the judgment the hearing officer will effectuate the purposes of *this chapter*.

Id. § 2.58.170(J) (emphasis added). Thereafter, the Commission reviews the decision and, if in agreement with the hearing officer, "shall issue an order requiring the respondent . . . to take necessary *remedial action* as in the judgment of the commission will carry out the

purposes of *this chapter*." *Id.* § 2.58.170(L) (emphasis added).

Next is the remedial action provision, which provides, "The *remedial action* ordered by the Commission may include . . . [p]ayment to the complainant of . . . reasonable attorney fees [and] payment of costs of hearing." *Id.* § 2.58.175(A)(8)-(9). Another provision in the remedial action section allows the Commission to order, obviously in relation to housing cases, the "[s]ale, exchange, lease, rental, assignment or sublease of real property to an individual." *Id.* § 2.58.175(A)(4). The section also provides specific remedial actions in relation to employment, credit, education, and public accommodations. *Id.* § 2.58.175(A)(1), (2), (3), (5), (7). The final two sections of division two govern judicial review and court enforcement. *See id.* §§ 2.58.180, .190. Again, housing complaints are not specifically exempted from these provisions.

On the other hand, division three of chapter 258, governing fair housing, includes a provision that, "[i]f the administrative law judge finds that a respondent has engaged in or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, *which may include* actual damages and injunctive or other equitable relief." *Id.* § 2.58.340(F)(3) (emphasis added).

Despite these dual and differing modes for relief, based on the plain language and statutory scheme of the ordinance, we conclude the remedial action provision in division two, section 2.58.175, encompasses all

areas of discrimination, including housing. Because the section provides specific remedies for each of the differing areas, we conclude the overall remedies included in subsections 8 and 9 cover all of those differing areas. We therefore reverse the district court's determination that Schreurs was not entitled to the attorney fees incurred in the administrative proceeding. Because the district court noted its "disposition render[ed] moot [Seeberger's] alternative argument that the fee award was excessive," we remand the case to the district court to determine whether the attorney-fee award was excessive. *See De Stefano v. Apartments Downtown, Inc.*, 879 N.W.2d 155, 191 (Iowa 2016). This disposition makes it unnecessary for us to decide whether Schreurs was entitled to attorney fees under 2.58.350(G) or, in the alternative, the FHA.

B. Judicial-Review Proceeding

Finally, Schreurs argues the district court abused its discretion in refusing to award her attorney fees in the judicial-review proceeding. Pursuant to Davenport Municipal Code section 2.58.350(G), "the court *may* at its discretion allow the prevailing party . . . reasonable attorney fees and costs resulting from" a judicial-review proceeding. (Emphasis added.) "[F]ee provisions using the word 'may' place the decision about whether to award *any* attorney fees within the sound discretion of the district court." *Lee v. State*, 874 N.W.2d 631, 644 (Iowa 2016). Similar to the FHA, an award of attorney fees in a judicial-review proceeding under the Davenport Municipal code is not mandatory. *See id.* at

644–45 (noting that when a "fee provision employs the word 'shall' instead of the word 'may,' it *requires* the district court to award attorney fees"); *see also* 42 U.S.C. § 3612(p). Because the ordinance renders any award of attorney fees discretionary, "[r]eversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable." *GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 732 (Iowa 2005) (quoting *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000)).

In its ruling on attorney fees, the district court noted its prior affirmance of the determination concerning Seeberger's liability, but also its reversal of the Commission's award of damages and remand for reconsideration. With this dichotomy in mind, the district court determined neither party was the "prevailing party" in the judicial-review proceeding and therefore entitled to attorney fees. We do not find this ground for denying an award of attorney fees clearly unreasonable or untenable. We therefore affirm the district court's denial of Schreurs's request for attorney fees in the judicial-review proceeding.

V. Conclusion

In sum, we conclude the challenged ordinance is not an unconstitutional infringement upon Seeberger's freedom-of-speech rights and affirm the agency and district court's findings of liability. We reverse the district court's determination that Schreurs was not

entitled to the attorney fees incurred in the administrative proceeding and remand the matter to the district court to consider whether the attorney-fee award was excessive. We affirm the district court's denial of Schreurs's request for attorney fees in the judicial-review proceeding.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED ON APPEAL; AFFIRMED ON CROSS APPEAL.

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

THERESA SEEBERGER, **Petitioner,** **vs.** **DAVENPORT CIVIL RIGHTS COMMISSION,** **Respondent,** **MICHELLE SCHREURS,** **Intervenor.**	**CASE NO. CVCV 51252** **RULING ON PETITION FOR JUDICIAL REVIEW** (Filed Jul. 7, 2018)

This is a judicial review proceeding in which the petitioner seeks judicial review of a decision of the respondent dated January 7, 2016 in which it approved a decision of an administrative law judge that the petitioner had engaged in discriminatory conduct directed at the intervenor on the basis of familial status and which ordered emotional distress damages, the assessment of a civil penalty and assessed attorney fees and costs. The petitioner contends that the decision of the respondent should be reversed on the following grounds: 1) the decision was based in part upon an erroneous interpretation of the applicable language in the city ordinance at issue; 2) the ordinance in question violates the petitioner's rights to free speech, violates the home rule provisions of the Iowa Constitution and violates the petitioner's rights to substantive due process; 3) the award of emotional damages and attorney fees were both improper and excessive; 4) the decision

was not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy; 5) the decision was unreasonable arbitrary, capricious and an abuse of discretion; and 6) the decision was the product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose or were subject to disqualification. Iowa Code §17A.19(10)(a), (c), (e), (k), (n) (2015).

Background facts. The petitioner has not challenged the sufficiency of the findings of fact upon which the respondent's decision is based. Accordingly, this court assumes that these findings are so supported and is bound by them on judicial review. Palmer College of Chiropractic v. Davenport Civil Rights Comm'n, 850 N.W.2d 326, 332 (Iowa 2014); see also In re C.K., 2010 WL 1576850 *3 (Iowa Ct.App., Case No. 091367, filed April 21, 2010). From a review of the decision of the administrative law judge which was adopted by the respondent, the pertinent facts are as follows: The petitioner was the owner of a single family home located at 2314 North Ripley Street ("the property") in Davenport, Iowa, having purchased it in 2011. She lived in the property until November or December of 2012, when she moved into her spouse's residence. She decided to rent rooms at the property to tenants (the property has three bedrooms and is furnished). After

she rented out the property, she continued to visit on a daily basis to feed her four cats that remained there.[1]

One of the petitioner's tenants was Peter King, who was dating the intervenor. The intervenor approached the petitioner about renting a room in the property; the petitioner eventually agreed to rent a room to the intervenor for $300 per month. At the time of this agreement, there were two other tenants at the property—King and Roberta Hodge. These tenants also paid $300 per month in rent. The intervenor did not have a written lease. The intervenor and her daughter (Trinity Crews) moved into the property in August of 2013. While she lived at the property, the intervenor took care of the petitioner's cats. Sometime around the time the intervenor moved into the property, the petitioner's marriage ended and she moved into an apartment a few blocks away from the property; she did not want to move into the property with her tenants, as she had lived alone for many years previously. Hodges moved out of the property in November of 2013 after a dispute with the petitioner. After she moved out, the petitioner increased the intervenor's rent to $450 per month, payable in two installments. King moved out of the property in June or July of 2014.

On September 16, 2014, while the petitioner was at the property, she saw a bottle of prenatal vitamins on the kitchen counter. She took a photograph of the bottle and sent the intervenor a text message asking, "Something I should know about?" The message was

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[1] Petitioner's spouse is allergic to cats.

not received by the intervenor that day. The next evening, the petitioner, the intervenor and Crews were all at the property. The petitioner asked the intervenor if she had received the text message; the intervenor replied that she had not. When the petitioner showed the intervenor the picture of the bottle of vitamins, the intervenor advised the petitioner that Crews (who was 16 years old at the time) was pregnant. The petitioner responded by telling the intervenor, "You're going to have to leave." This was the first time the petitioner had told the intervenor she had to leave. When the intervenor asked why they would have to leave, the petitioner advised her, "You don't even pay rent on time the way it is, and . . . Now you're going to bring another person into the mix." The petitioner also made the comment to the intervenor that "she [Crews]'s taking prenatal vitamins, . . . obviously, you're going to keep the baby." The ALJ summarized the petitioner's testimony in this regard as follows:

> Seeberger testified she believes people should be responsible and that Schreurs should have been more responsible in preventing her teenage daughter from becoming pregnant. Seeberger reported she was disappointed with Schreurs and believes Schreurs took advantage of her because she was paying less rent than she would anywhere else.

At some point after the interaction on September 16-17, the petitioner provided the intervenor with a written notice (dated September 15, 2014) advising her that her lease expires on October 19, 2014 and that all

her possessions must be removed by 5:00 p.m. on that date. At the bottom of this notice, the petitioner added the following handwritten note: "No more rent. Save your $ to find a new home."

On September 23, 2014, the petitioner sent the intervenor a text message advising her as follows:

> Laura is moving everything out of her apartment Friday morning, so starting Friday night I will be staying at Ripley. I would like to set up my bed in one of the bigger rooms. I would appreciate if you could get one of them completely empty by Friday. Whichever is easier. Let me know if you [sic] that's possible. Thanks.

A follow-up text message was sent by the petitioner to the intervenor on Friday, September 26, 2014; the intervenor responded she would not be able to move her belongings that day. On October 1, 2014, the petitioner sent the intervenor a text message telling her that her rent was due in full. The intervenor responded, "Per our verbal agreement half is due the first week of the month on Friday when I get paid." The petitioner responded as follows:

> What verbal agreement? I recall no such thing. You guys are as bad as Roberta—amazing. First you want practically a free house. Now free lawyer. It's a shame you have to use everyone. I asked Peter if he was the father and he didn't deny it. . . .

The petitioner's comment about King being the father of Crews' child upset the intervenor because Crews had been sexually abused by her ex-husband, who was incarcerated.

Later that evening, the intervenor returned to the property with her boyfriend, Jason Alton. The petitioner was at the property when they arrived; in the ensuing altercation that eventually resulted in the police being called, the petitioner asked the intervenor once again, "Is Peter the father of the baby?" The intervenor ultimately moved out of the property on October 5, 2014. She lived with her parents for five months until she could secure housing of her own. She testified that she was very emotional and cried a lot after she moved out. She had previously taken medication for anxiety and depression; her prescription for anxiety medication was increased after she moved out. She also suffered from Crohn's disease, colitis, gastritis and psoriasis.

Underlying and related proceedings. The intervenor filed a complaint with the respondent on November 14, 2014, alleging that the petitioner made discriminatory statements against her related to the rental of a dwelling based on familial status. On March 13, 2015, the respondent determined that probable cause existed to show that the petitioner had made such statements as alleged. On June 22, 2015, the intervenor's complaint was set for hearing on August 24, 2015 before Administrative Law Judge Heather Palmer; that hearing was ultimately continued to November 4, 2015.

On October 16, 2015, the petitioner (through counsel[2]) filed a civil lawsuit against the City of Davenport and the respondent, challenging the validity of the proceedings resulting from the intervenor's complaint. On October 20, the petitioner sent a text message to Tim Hart, the chairperson of the respondent, which read as follows:

> Hi Tim—As you likely know I'm the subject of an upcoming hearing before the commission. I'm filing a lawsuit against the city and the commission. You are the person that needs to be served. Would you be willing to accept service or do you want me to have you served with the petition? Let me know—Thanks—Theresa Seeberger

The executive director for the respondent, Latrice Lacey, contacted the petitioner's counsel (with a copy to ALJ Palmer) on the evening of October 20, calling into question the propriety of the petitioner's contact with Hart. Both counsel and the petitioner responded the next day, pointing out that intervenor's counsel and the ALJ had been copied in on the message and that it only involved the issue of service. Lacey replied to these communications (again copying in Palmer) on the evening of October 21 as follows:

> Mr. Motto, your client's communication with the Chair of the Davenport Civil Rights Commission violates Rules 32:4.2(a) and 32:3.5 of

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[2] The petitioner is a practicing attorney with an office in West Branch, Iowa; in addition, she serves as a magistrate for Cedar County.

> the Iowa Rules of Professional Conduct. She should not be contacting members of the Commission directly as they are represented by the Director as their counsel. Further, her threats of litigation appear to be a bullying tactic employed to influence the Commissioner in his official capacity as a decision maker in this proceeding.
>
> If there is any further communication with any of the Commissioners regarding this proceeding, I will have no other choice but to report her conduct.

On October 23, ALJ Palmer filed a complaint form with the Iowa Supreme Court Disciplinary Board regarding the petitioner; in that complaint, she forwarded on the correspondence between the parties and counsel that she had been copied in on. In addition to this correspondence, Palmer noted:

> I do not have additional information concerning Seeberger's contact with a Commissioner of the Davenport Civil Rights Commission. The Commission will receive the appeal following the hearing scheduled for November 4-5, 2015 in Davenport.

The petitioner was notified on October 26 of the filing of the complaint by Palmer, and was provided with a copy. No effort was made prior to or at the November 4-5 hearing to seek the disqualification or recusal of ALJ Palmer as the presiding officer over that hearing.

ALJ Palmer issued her finding and conclusions on December 11, 2015. She concluded that the petitioner had violated Davenport City Ordinance §2.58.305(C)[3], which provides as follows:

> It shall be unlawful:
>
> . . . .
>
> C. To make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation or an intention to make any such preference, limitation or discrimination.

In reaching her conclusions, ALJ Palmer reasoned as follows:

> Seeberger's statements on September 16 and 17, 2014, related to Schreur's rental of the Subject Property. Seeberger immediately terminated Schreur's tenancy after finding out her teenage daughter was pregnant. Seeberger testified she was disappointed with Schreurs

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[3] Palmer initially concluded that the "small landlord" exemption under the ordinance were [sic] not applicable to the present dispute, as the city ordinance specifically excludes §2.58.305(C) from the exemption. Davenport City Ordinance §2.58.310(A) ("Nothing in subsection 2.58.305 of this Chapter other than subsection 2.58.305(C) shall apply to. . . .)

> and believed Schreurs had taken advantage of her. Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant. During the hearing Seeberger testified adding a third person to the family was no different than if Schreurs had purchased a new Cadillac. Seeberger testified she would not take a vacation she could not pay for in advance. An ordinary listener listening to Seeberger's statements would find her statements discriminatory on the basis of familial status. Seeberger engaged in a discriminatory housing practice by making the statements.

Earlier in her decision, ALJ Palmer rejected as not credible the petitioner's testimony that she had completely moved back into the property by the time of the discussion of the pregnancy and was sleeping on the sunporch; this credibility determination was based on conflicting testimony from other witnesses and the inconsistencies in the petitioner's own testimony. ALJ Palmer also rejected the petitioner's argument that she terminated the intervenor's tenancy because she wanted to have the house back just for herself, because the intervenor was "a little bit messy," that Crews had left the oven on twice and because the intervenor was routinely late in her rent.

ALJ Palmer awarded the intervenor $35,000 in emotional distress damages and the maximum civil penalty (for a first offense) of $10,000 based on the following reasoning:

> Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents. Schreurs has a history of anxiety, depression, psoriasis, Crohn's disease, colitis, and gastritis. Her conditions were aggravated by the termination of her tenancy.
>
> . . . .
>
> While this is Seeberger's first violation, this is not a typical case of discrimination. Seeberger intentionally discriminated against Schreurs based on her familial status by making discriminatory statements in housing. Seeberger's lack of candor during the investigation and hearing is disconcerting. Seeberger did not present any evidence of her current financial circumstances. Imposition of a $10,000 civil penalty is appropriate.

On December 23, 2015, the intervenor made application for attorney fees and costs pursuant to Davenport City Ordinance 2.58.350(G). In a ruling filed on December 31, 2015, ALJ Palmer awarded the intervenor $23,200 in attorney fees and $681.10 in costs. The respondent issued its final decision on January 7, 2016. In its decision, the respondent "approve[d] the Hearing Officer's decision in its entirety with exception to a reduction in the award of emotional distress damages to $17,500." No further explanation was provided for the reduction; in all other respects, the decision of the ALJ was summarily approved and adopted by the

respondent. A timely petition for judicial review was filed in the present proceedings on February 5, 2016.

ISSUES PRESENTED FOR REVIEW

Statutory interpretation. The petitioner argues that the respondent incorrectly interpreted a number of terms within the applicable ordinances, including "aggrieved person," "familial status," "statement" and "dwelling." Ordinarily, the standard of review for such an argument would depend on whether the respondent had been clearly vested with the discretion to interpret the authorities at issue. Eyecare v. Dep't of Human Services, 770 N.W.2d 832, 835 (Iowa 2009). If, after this review, the court has a "firm conviction" that the legislature intended or would have intended to delegate to the agency "interpretive power with the binding force of law over the elaboration of the provision in question," that power has been clearly vested with the agency. NextEra Energy Resources LLC v. Iowa Utilities Board, 815 N.W.2d 30, 37 (Iowa 2012) (citation omitted). If interpretative authority has been found to have been clearly vested with the agency, any such interpretations may be reversed only if found to have been irrational, illogical or wholly unjustifiable. Iowa Code §17A.19(10)(1) (2015). On the other hand, if this conclusion is not forthcoming, the court grants no deference to the agency and reviews for corrections of errors at law. NextEra, 815 N.W.2d at 38. In that instance, the court is free to substitute its judgment de novo for the agency's interpretation. Bearinger v. Iowa Dep't of Transp., 844 N.W.2d 104, 105 (Iowa 2014).

However, as the respondent and intervenor point out, the petitioner is making this argument for the first time on judicial review, which typically results in a failure to preserve error and waiver of the issue. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 382 (Iowa 1986). The petitioner conceded at hearing that this issue had not been raised before the agency, but argued that the ability to interpret the legal authorities in question goes to the subject matter jurisdiction of the agency, which can be raised at any time. See TMC Transp. v. Davidson, 2006 WL 334178 *1 (Iowa Ct.App. Case No. 04-1044, filed February 15, 2006); Heartland Express, Inc. v. Terry, 631 N.W.2d 260, 265 (Iowa 2001).

The petitioner's argument is misplaced. As applied in an administrative context, subject matter jurisdiction is the power of an agency to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the agency's attention. Klinge v. Bentien, 725 N.W.2d 13, 15 (Iowa 2006). Whether the respondent had subject matter jurisdiction over the matter at hand is dependent on whether the ordinances in question empowered it to hear and determine the kind of complaint filed against the petitioner by the intervenor. Alberhasky v. City of Iowa City, 433 N.W.2d 693, 695 (Iowa 1988); see also MC Holdings, LLC v. Davis County Bd. of Review, 830 N.W.2d 325, 329 (Iowa 2013) (subject matter jurisdiction of an administrative agency is authority conferred by statute).

On the other hand, when an agency interprets an ordinance in order to determine whether a particular dispute is or is not meritorious as measured against that statutory standard, it is merely exercising its authority to resolve that particular case as compared to the class of all such cases. Alliant Energy-Interstate Power and Light Co. v. Duckett, 732 N.W.2d 869, 874-75 (Iowa 2007); see also Comm'r of Political Preferences for State ex rel. Motl v. Barman, 380 Mont. 194, 196, 354 P.2d 601, 603 (2015) ("The District Court is not deprived of subject matter jurisdiction when asked to address issues of statutory interpretation and construction"); MHM & F, LLC v. Pryor, 168 Wash.App. 451, 460, 277 P.3d 62, 67 (2012). Any defect in this authority can be waived if not raised through a timely objection. Alliant, 732 N.W.2d at 875. Accordingly, the petitioner has failed to preserve error on this issue.

Constitutional issues. The petitioner raised three constitutional issues before the administrative law judge: 1) Davenport City Ordinance §2.58.305(C) as applied violated her constitutional rights to free speech; 2) Davenport City Ordinance §2.58.310 violates Article III, §38A of the Iowa Constitution as an exercise of municipal power that is irreconcilable with state law; and 3) application of the ordinance violated her substantive due process rights. ALJ Palmer and ultimately the respondent appropriately deferred on these constitutional issues, leaving them for this court to analyze on judicial review. Soo Line R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685, 688 (Iowa 1994); Shell Oil Co. v. Bair, 417 N.W.2d 425, 429 (Iowa 1987). Despite this lack of

authority, constitutional issues must be preserved with the agency for judicial review; a review of the record reveals that these issues have been so preserved. McCracken v. Iowa Dep't of Human Services, 595 N.W.2d 779, 785 (Iowa 1999).

In her first constitutional argument, the petitioner contends that §2.58.305(C) of the city ordinance violates her rights under the First Amendment[4] as a content-based restriction on speech. There appears to be no dispute between the issues on this preliminary issue, in that it is clear that the ordinance "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." State v. Musser, 721 N.W.2d 734, 743 (Iowa 2006) (citations omitted); see also Campbell v. Robb, 162 Fed.Appx. 460, 468 (6th Cir. 2006) (comparable version of Fair Housing Act [42 U.S.C. §3604(c)] "is clearly a content-based speech regulation in that it allows landlords to express certain preferences while outlawing others").

The petitioner goes on to argue that this restriction must be analyzed using the highest level of constitutional scrutiny (based on a compelling state interest); however, this argument misses the point. Such scrutiny is not required where, as here, commercial speech is being restricted. Her claim that her statements are non-commercial presupposes a factual scenario

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[4] While the petitioner argues a free speech violation under both the federal and Iowa constitutions, she concedes that there is no need to differentiate between them in terms of the constitutional analysis required. See State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009).

expressly rejected by the respondent—namely, that she lived in the house with the intervenor and was a roommate rather than a landlord. Her inquiries into and statements concerning the pregnancy of the intervenor's daughter and their ultimate impact on the continuation of the tenancy pertain directly to the commercial transaction between landlord and tenant, which has been held to clearly fall within the "core notion of commercial speech." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983); see also Campbell, 162 Fed.Appx. at 469 ("a statement made by a landlord to a prospective tenant describing the conditions of rental is part and parcel of a rental transaction").

As the petitioner's statements constitute commercial speech, they are subject to a lesser scrutiny test to pass constitutional muster:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). It is well-settled that discriminatory statements made in the context of housing are illegal and therefore cannot meet the first part of the Central Hudson four-part test. Campbell, 162 Fed.Appx. at 470 (discriminatory statements made to prospective tenant "akin to a want ad proposing a sale of narcotics or soliciting prostitutes") (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, 93 S.Ct. 2553,2560, 37 L.Ed.2d 669 (1973)); see also Ragin v. New York Times Co., 923 F.2d 995, 1002-03 (2nd Cir. 1991) (publishing advertisements that indicate a racial preference furthered illegal discrimination and were not protected commercial speech). The statements made by the petitioner to the intervenor which formed the basis for her liability under §2.58.305(C) are not protected under the First Amendment.

The petitioner's next constitutional argument is that Davenport City Ordinance §2.58.310 violates the home rule provisions of the Iowa Constitution, which provides that municipalities "are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government,. . . ." Iowa Const., art. III, §38A. Specifically, the petitioner argues that the exclusion from the exemption in §2.58.310 for liability under §2.58.305(C) is inconsistent with the scope of liability for unfair or discriminatory practices in housing under the Iowa Civil Rights Act, which does not extend to

"[t]he rental or leasing of less than four rooms within a single dwelling by the occupant or owner of the dwelling, if the occupant or owner resides in the dwelling." Iowa Code §216.12(1)(c) (2015). An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with that law; which in turn requires that the ordinance prohibits an act permitted by statute or permits an act prohibited by a statute. Baker v. Iowa City (Baker I), 750 N.W.2d 93, 99-100 (Iowa 2008).

The petitioner's argument fails on both factual and legal grounds. First, once again it presupposes the rejected argument that the petitioner lived at the property with the intervenor and her daughter. Thus, §216.12(1)(c) does not even come into play. However, even if it did, the Iowa Civil Rights Act specifically provides that a municipality may provide by ordinance for broader or different categories of unfair or discriminatory practices. Iowa Code §216.19(1)(c) (2015). As a result, the city of Davenport is within its rights to prohibit discriminatory statements based on familial status made by persons who might otherwise come within §216.12(1)(c). Accordingly, the petitioner has not established a violation of the home rule provisions of the Iowa Constitution.

The petitioner's final constitutional issue is that §2.58.305(C) violates her substantive due process rights under the federal constitution; specifically, that it impinges upon her constitutional rights of association. This argument has been summarized in petitioner's brief as follows:

> There is no indication that the City of Davenport intended to interfere with personal relationships where an individual is selecting someone who will reside with another individual sharing the same living space. Because Seeberger had personal belongings and her pets at the [property], and was free to come and go as she pleased, she is entitled to constitutional protection.

Once again, this argument assumes that the petitioner enjoys the status of a roommate of the intervenor rather than the status found by the respondent—her landlord. Just as the right to hire someone in violation of a city's anti-discrimination ordinance is not a fundamental right, see Baker v. Iowa City (Baker II), 867 N.W.2d 44, 55 (Iowa 2015), neither is the right to make statements to a tenant in violation of the ordinance in question. In the absence of a fundamental right, there need only be a rational basis between the ordinance and the furtherance of a legitimate state interest. Id. at 55-56 (citation omitted).

The city clearly has a legitimate interest in prohibiting discriminatory statements related to housing based on familial status. See Senior Civil Liberties Ass'n, Inc. v. Kemp, 761 F.Supp. 1528, 1557 (M.D.Fla. 1991) ("[T]he primary purpose and basis of the familial status provisions of the [Fair Housing] Act . . . is to provide a remedy for the widespread housing discrimination against families with children"); Rackow v. Illinois Human Rights Comm'n, 152 Ill.App.3d 1046, 1060, 504 N.E.2d 1344, 1354, 105 Ill.Dec. 826, 836 (1987)

("Plaintiffs, while raising a legitimate interest in the right to use their property as they see fit, are unable to demonstrate that their personal property rights outweigh the public need of assuring fair and equal housing opportunities and avoiding discrimination on the basis of family status") (statute upheld under rational basis test). As a result, §2.58.305(C) does not violate the petitioner's substantive due process rights.

Award of damages and attorney fees. It must be remembered that under the administrative scheme set out in the ordinances in question, the petitioner is exempt from liability for the termination of the tenancy between herself and the intervenor based on familial status, and that any liability can only extend to discriminatory statements made by the petitioner on such a basis. See Davenport City Ordinance §2.58.310 (exemption for liability under §2.58.305(A), (B), (D), (E) and (F) for small landlords); cf. id. at §2.58.305(A) (making denial of housing based on familial status unlawful). Accordingly, any damages awarded to the intervenor on a finding of liability under §2.58.305(C) can only causally relate to the discriminatory statements, not the termination of the tenancy. H.U.D. v. Denton, 1992 WL 406537 *9 (H.U.D.A.L.J., Case Nos. 05-90-0012-1 and 0590-0406-1, decided February 7, 1992); H.U.D. v. Dellipaioli, 1997 WL 8260 *9 (H.U.D.A.L.J., Case No. 02-94-0465-8, decided January 7, 1997) (damages discounted to reflect award limited to act of making discriminatory statement, not denial of housing).

It is clear from a review of the decision of the ALJ that was adopted by the respondent that the damages

that were awarded were tied to the termination of the tenancy by the petitioner, not just her discriminatory statements:

> Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents. . . . Her [physical and mental] conditions were aggravated by the termination of her tenancy.

Although the respondent reduced the ALJ's award by half, there is no analysis that would reflect whether they differentiated between damages properly related to the discriminatory statement and improperly related to the termination of the tenancy. As a result, the award of damages to the petitioner was improper and should be reversed. As it is unclear whether the respondent's calculation of an appropriate civil penalty may have relied upon such an improper causal connection, that penalty should also be reversed. See May v. Colorado Civil Rights Comm'n, 43 P.3d 750, 758-59 (Colo. 2002).

The petitioner also challenges the award of attorney fees on the basis that there is no authority for such an award within the city ordinance. The respondent and intervenor both rely upon a recent amendment to the ordinance that provides for such fees. Davenport City Ordinance §2.58.175(8)[5]; see

[5] The original request was pursuant to §2.58.350(G); it appears from the briefing that all parties concede that this section has no applicability to the issue of attorney fees in the present context.

also Bostko v. Davenport Civil Rights Comm'n, 774 N.W.2d 841, 845 n. 2 (Iowa 2009). The provision for attorney fees in §2.58.175(8) comes within that part of the ordinance titled, "Remedial Action," and comes immediately after that part of the ordinance laying out the procedure for dealing with complaints of unfair practices in areas other than housing. Davenport City Ordinance §2.58.170. That procedure is different than that set out when the complaint deals with allegations of unfair or discriminatory practices in housing. See id. at §2.58.340. The procedure followed in the present dispute on an allegation of discriminatory practices in housing does not afford the administrative law judge with the authority to assess attorney fees and expenses on a finding that such a practice has taken place; the relief available is limited to an award of actual damages, equitable or injunctive relief and the assessment of a civil penalty. Id. at §2.58.340(F)(3). As a result, the court agrees with the petitioner that the city ordinance does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice. Bostko, 774 N.W.2d at 845 (reference to the court's "stringent approach to attorney fees").[6] The

[6] Bostko dealt with allegations of a hostile work environment; accordingly, the reference to the amendment to the ordinance in the footnote quoted above was appropriate. See id. at 843. The reference should not be construed as an approval of such fees in a context not covered by the scope of the amended ordinance.

attorney fee award is therefore reversed.[7] The assessment of costs is not affected by this ruling.

Private rights versus public interest. An additional ground for reversal cited by the petitioner is where agency action is "[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from [the] action that it must necessarily be deemed to lack any foundation in rational agency policy." Iowa Code §17A.19(10)(k) (2015). As applied to the present dispute, the petitioner contends that a "full prosecution" of alleged discriminatory actions "should be saved for those most egregious examples of discrimination" and her private rights have been disproportionately impacted as a result of the present prosecution.

The starting point for an analysis under this statute is whether the challenged agency action is not required by law. See Zieckler v. Ampride, 743 N.W.2d 530, 533 (Iowa 2007). To the degree the petitioner challenges the ability of the respondent to proceed on a complaint alleging discriminatory practices in housing, one might wonder whether this argument even clears this preliminary hurdle. The respondent is required under the procedures set forth in the city ordinance governing housing complaints ("shall") to investigate such complaints and provide for a hearing before an administrative law judge once probable

[7] This disposition renders moot the petitioner's alternative argument that the fee award was excessive.

cause has been found (absent an election by the complainant to proceed in a civil proceeding). Davenport City Ordinance §2.58.325(4)(d), §2.58.340(B)-(D).

Even assuming that the actions of the respondent may not have been entirely required by law, the court cannot conclude that the impact on the petitioner's rights have been disproportionately affected in comparison to the public interest. First, the "private rights" asserted by the petitioner relate to the debunked theory that she was merely sharing her home in which she lived with the intervenor. Second, any disproportionality argument is now premature since the award of damages and assessment of a civil penalty have been reversed as set forth above. As a result, the court is not persuaded that the conclusions reached by the respondent regarding the petitioner's discriminatory housing statements should be otherwise reversed pursuant to Iowa Code §17A.19(10)(k).

Unreasonable, arbitrary, capricious and abuse of discretion. Agency action can be reversed if "[o]therwise unreasonable, arbitrary, capricious or an abuse of discretion." Iowa Code §17A.19(10)(n) (2015). Such action is "unreasonable" if it is against reason and evidence as to which there is no room for difference of opinion among reasonable minds. Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 912 (Iowa 1987). Such action is "arbitrary" or "capricious" when it is made without regard to the law or underlying facts. Id. "Abuse of discretion" has been similarly defined as whether "the agency action was unreasonable or lacked rationality. Hough v. Iowa Dep't of Personnel,

666 N.W.2d 168, 170 (Iowa 2003). For the reasons noted above, this court has concluded that the damages awarded, as well as the assessment of a civil penalty and attorney fees, were improper; they should also be reversed as otherwise unreasonable, arbitrary, capricious and an abuse of discretion.

Improper purpose/disqualification. The petitioner's final argument is that the conclusion of the respondent was the product of decision-making undertaken by persons who were motivated by an improper purpose or were subject to disqualification. Iowa Code §17A.19(10)(e) (2015). This argument is three-fold: 1) Lacey, as the executive director for the respondent, acted improperly in participating in the investigatory, prosecutorial and decision-making phases of the underlying proceeding; 2) Lacey improperly copied ALJ Palmer on correspondence between Lacey and the petitioner in which Lacey threatened to file an ethics complaint against the petitioner if she continued to contact individual members of the respondent; and 3) ALJ Palmer should have been disqualifying from presiding over the evidentiary hearing once she filed a grievance against the petitioner.

As to the first prong of this argument, it is well-settled under Iowa law that "there is no . . . violation[8] based solely upon the overlapping investigatory and adjudicatory roles of agency actors." Bostko, 774 N.W.2d

[8] Bostko and its progeny have addressed this issue in the context of a due process violation. Even though the issue has been brought to the court's attention in the present case as part of the analysis under §17A.19(10)(e), the due-process analysis appears to be appropriate.

at 849 (emphasis in original). In order to prove such a violation, "the challenging party must bear the difficult burden of persuasion to overcome the presumption of honesty and integrity in those serving as adjudicators." Id. The petitioner has offered no evidence in this regard, and has therefore failed to meet this heavy burden.

On the other hand, the combination of prosecutorial and adjudicative roles can be problematic:

> A different issue is presented however, where advocacy and decision-making roles are combined. By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.

Hewitt v. Superior Court, 3 Cal.App.4th 1575, 1585, 5 Cal.Rptr.2d 196, 202 (1992) (emphasis in original) (quoted in Bostko, 774 N.W.2d at 850)). Or in other words, "[W]hen an agency staffer functions as an advocate, experience teaches that the probability of actual bias is too high to allow the staffer to also participate in the adjudicative process." Bostko, 774 N.W.2d at 852.

This record is devoid, however, that Lacey every [sic] participated in the adjudicatory process that led to the final decision of the respondent, beyond transmitting that decision to the parties once it was issued. There is, therefore, no indication that any "will to win" that may have been created through Lacey's role as an adversary tainted the deliberative process resulting in the final decision. Cf. id. at 853 (director's presence

during deliberations "simply answering questions" after participating in hearing "as a second-chair advocate" for complainant created due process violation). Her absence from the adjudicatory process also eliminates her transmittal of the email to ALJ Palmer as a grounds for challenging the final decision of the respondent.

What remains in this regard is the impact of ALJ Palmer's decision to remain as the presiding officer after she in turn filed an ethics complaint against the petitioner. Preliminarily, it is clear to the court that this issue has not been preserved for judicial review.[9] Even though the petitioner was advised that ALJ Palmer had filed the complaint against her in advance of the evidentiary hearing, no effort was made to seek her recusal. Her failure to address this issue waives any error on this ground on judicial review. Berger v. Dep't of Transp., 679 N.W.2sd [sic] 636, 641 (Iowa 2004).

Summary and disposition. The court has addressed all of the issues presented by the petitioner on judicial review. As a result of that review, there is no basis for reversing the respondent's decision that the petitioner made discriminatory statements based

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[9] The issue of error preservation may be raised by the court despite a party's omission to raise it as part of these proceedings. Bontrager Auto Service, Inc. v. Iowa City Bd. of Adjustment, 748 N.W.2sd [sic] 483, 486-87 (Iowa 2008); Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000) (error preservation rules "are also designed to preserve judicial resources by avoiding proceedings that would have been rendered unnecessary had an earlier ruling on the issue been made. Consequently, there is more at stake than simply the interests of the opposing party").

on familial status to the intervenor in violation of §2.58.305(C). The court will reverse the respondent's damage award and assessment of a civil penalty for the reasons noted above. As the court is not in a position to resolve an appropriate damage award and civil penalty as a matter of law, this matter shall be remanded to the respondent on the record already made so that a proper determination can be made. IBP, Inc. v. Burress, 779 N.W.2d 210, 220 (Iowa 2010); Armstrong v. State of Iowa Bldgs. and Grounds, 382 N.W.2d 161, 165 (Iowa 1986). The attorney fee award is reversed and vacated for the reasons noted.

IT IS THEREFORE ORDERED that the final decision of the respondent dated January 7, 2016 is affirmed in part and reversed in part, and this matter is remanded to the respondent for further proceedings consistent with this ruling. The costs of this judicial review proceeding are assessed equally between the petitioner, respondent and the intervenor.

IN AND FOR THE DAVENPORT CIVIL RIGHTS COMMISSION FOR THE CITY OF DAVENPORT

MICHELLE SCHREURS, **Complainant,** **vs.** **THERESA SEEBERGER,** **Respondent.**	**DCRC No. H-0123-0026-14** **HUD No. 07-15-0233-8** **DAVENPORT CIVIL RIGHTS COMMISSION FINAL ORDER**

DAVENPORT CIVIL RIGHTS COMMISSION FINAL ORDER

The Davenport Civil Rights Commission (Commission) having considered the evidence presented, the applicable law, briefs and oral arguments of the parties, and the Proposed Order of the Hearing Officer, Heather Palmer submits through its Attorney, Latrice L. Lacey, the Commission's Final Order as follows:

The Commission concludes the Complainant has proven by a preponderance of the evidence that Respondent Theresa Seeberger discriminated against her on the basis of familial status.

The Commission approves the Hearing Officer's decision in its entirety with exception to a reduction in the award of emotional distress damages to $17,500.

The Commission concludes the Complainant is entitled to attorney's fees and litigation expenses from

Respondent as outlined in the Hearing Officer's decision on the award of attorney's fees.

The Respondent is assessed all hearing costs which were actually incurred in the processing of this public hearing. The precise calculation of costs shall be shown on the bill of costs which is to be issued under the executive director's signature.

The Commission retains jurisdiction to determine the costs for the public hearing, the record shall remain open pending the submission of a bill of costs for the public hearing costs incurred by the Commission.

WHEREFORE, the Davenport Civil Rights Commission orders Respondent Theresa Seeberger to pay damages, interest and injunctive relief as follows:

1. Damages and attorney fees to Michelle Schruers in the amount of $41,381.80. This amount includes $17,500.00 emotional distress damages, $23,200 in attorney's fees, and $681.80 in costs;
2. Civil penalty in the amount [sic] $10,000.00 to the Davenport Civil Rights Commission;
3. Public hearing costs to the Davenport Civil Rights Commission;
4. Interest at a rate of 2.48% beginning on the date the complaint was filed will accrue on the emotional distress damages.
5. Interest at a rate of 2.48% beginning on the date of judgment will accrue on Complainant's attorney's fees and costs, the civil penalty and the Commission's public hearing costs.

The foregoing correctly sets forth the findings of fact and conclusions of law of the Commission.

The foregoing correctly sets forth the conclusions of law of the Commission.

Dated this 7th day of January, 2016.

/s/ Timothy Hart
Tim Hart, Davenport Civil
Rights Chairperson

BEFORE THE DAVENPORT
CIVIL RIGHTS COMMISSION

MICHELLE SCHREURS, Complainant, v. THERESA SEEBERGER, Respondent.	)	Docket No. 15DCRC001 DCRC No. H-0123-0026-14 **FINDINGS, CONCLUSIONS, AND ORDER** (Filed Dec. 11, 2015)

The parties to this proceeding are Complainant Michelle Schreurs and Respondent Theresa Seeberger. A hearing was held in Davenport on November 4, 2015. Attorney Dorothy O'Brien represented Schreurs. Schreurs appeared and testified. Jason Alton and Trinity Crews testified on behalf of Schreurs. Attorney Raymond Tinnian represented Seeberger. Seeberger appeared and testified. Anjeanette Lindle, Laura Brouwer, and Nicholas Maybanks testified on behalf of Seeberger. Attorney Latrice Lacey represented the Davenport Civil Rights Commission. Exhibits A through III, an audio recording from October 1, 2014, and the depositions of Schreurs, Seeberger and Anjeanette Lindle were admitted into the record. The record was left open until November 20, 2015, for the receipt of post-hearing briefs.

FINDINGS OF FACT

Seeberger is a magistrate in Cedar County and a practicing attorney. In 2011 she purchased a single family home located at 2314 North Ripley Street, in Davenport, Iowa ("Subject Property"). The Subject Property contains three bedrooms. Seeberger also owns a building in West Branch, Iowa, with two residential apartments and commercial space.

Seeberger lived in the Subject Property for one year until she became involved in a relationship and married. In 2012, Seeberger owned four cats. Her spouse was allergic to the cats, so Seeberger moved in with her spouse and decided to rent rooms in the Subject Property to tenants. Seeberger began renting rooms in the Subject Property in November or December 2012. The Subject Property is furnished. After Seeberger began renting the Subject Property, she went to the Subject Property every day to feed her cats. Seeberger's visits ranged from ten to thirty minutes. Seeberger denies she fully moved out of the Subject Property and reports she kept all of her clothing at the Subject Property.

Schreurs was dating Peter King, Seeberger's tenant. Schreurs spoke with Seeberger about renting a room in the Subject Property. Seeberger agreed to rent a room to Schreurs for $300 per month. Seeberger had two other tenants, Roberta Hodge and King. Hodge and King also paid $300 per month in rent. Schreurs did not have a written lease.

In August 2013, Schreurs and her daughter, Trinity Crews, moved into the Subject Property. Schreurs continued her relationship with King. During the time Schreurs lived in the Subject Property, she took care of Seeberger's cats.

Seeberger's marriage ended. Seeberger had lived alone for many years and did not want to move into the Subject Property with her tenants. In August 2013, Seeberger moved into an apartment a few blocks away from the Subject Property.

In October 2013, Seeberger and Hodges became involved in a dispute. Seeberger testified Hodges was "crazy," had disrespected her, and took advantage of her. Seeberger terminated Hodges's tenancy. Hodges moved out of the Subject Property in November 2013. After Hodges moved out, Seeberger increased Schreurs's rent to $450 per month, payable in two installments.

King moved out of the Subject Property in June or July 2014.

On September 16, 2014, Seeberger visited the Subject Property and saw [sic] bottle of prenatal vitamins on the counter in the kitchen. Seeberger took a photograph of the bottle of prenatal vitamins with her telephone and sent Schreurs a text message asking, "Something I should know about?" (Exhibit N). Schreurs did not receive the text message that day.

The next evening when Schreurs came home from work Seeberger was at the Subject Property. Crews

was in the kitchen making dinner. Seeberger asked Schreurs if she had received her text message. Schreurs replied she had not. Seeberger showed Schreurs the photograph of the prenatal vitamins. Seeberger testified Schreurs became excited, was giggling, and stated Crews was pregnant as she pointed to the kitchen. During her deposition, Seeberger reported she did not say anything at first, "because I was trying to figure out how to give them notice, because I wanted my place back, so then I just said you guys are going to have to be out in 30 days." (Seeberger Depo. at 63-64). Seeberger acknowledged she had not told Schreurs she wanted her to move out before September 17, 2014. Seeberger testified that during the conversation she said, "You're going to have to leave." (Seeberger Depo. at 65). Schreurs was upset and inquired why she would have to leave. Seeberger responded, "You don't even pay rent on time the way it is, and . . . Now you're going to bring another person into the mix." (Seeberger Depo. at 65). Seeberger testified that during they [sic] encounter she also said "she's taking prenatal vitamins, . . . obviously, you're going to keep the baby." (Seeberger Depo. at 66-67).

Crews overhead the conversation and observed Seeberger was upset. Crews testified she was upset by Seeberger's reaction and cried for a few days because she felt it was her fault her family would not have a place to live.

Seeberger testified she believes people should be responsible and that Schreurs should have been more responsible in preventing her teenage daughter from

becoming pregnant. Seeberger reported she was disappointed with Schreurs and believes Schreurs took advantage of her because she was paying less rent than she would anywhere else. Seeberger provided the Commission with a typed message date [sic] September 15, 2015, stating, "You are hereby notified that your lease expires on October 19, 2014. All of your possessions must be removed by 5 pm on said date from the residence, garage and real property." (Exhibit L). At the bottom of the page, Seeberger handwrote, "No more rent. Save your $ to find a new place." (Exhibit L). During the hearing, Seeberger testified she started drafting the message on September 15, 2015, but she did not deliver it to Schreurs until after she sent Schreurs the photograph of the prenatal vitamins.

Schreurs contends the next day Seeberger delivered a letter to her stating her lease would expire on October 19, 2014.

After the incident on September 17, 2014, Schreurs and Crews slept at a friend's house, but returned to the Subject Property often.

Seeberger testified she had completely moved into the Subject Property at the time of the prenatal vitamin incident and was sleeping on the sunporch. Seeberger also testified that, in early September, she stayed at the Subject Property overnight a couple of nights. Seeberger reported she slept in the apartment during most of the month of September, but she did not have any clothes or furniture in the apartment. Schreurs denies Seeberger was living at the Subject

Property at the time of the incident. Based on the other evidence presented at hearing, Seeberger's statements are not credible.

On September 23, 2014, Seeberger sent a text message to Schreurs which contradicts her testimony:

> (1/3) Laura is moving everything out of her apartment Friday morning, so starting Friday night I will be staying at Ripley. I would like to set up my bed in on
>
> (2/3) e of the bigger rooms. I would appreciate if you could get one of them completely empty by Friday. Whichever is easier. Let me know if you [sic] that's
>
> (3/3) possible. Thanks.

(Exhibit N at 6). Seeberger sent Schreurs another text message on Friday, September 26, 2014, to follow up on her earlier text. Schreurs responded she would not be able to move her belongings that day.

On October 1, 2014, Seeberger sent Schreurs a text message stating her rent was due in full. Schreurs responded, "Per our verbal agreement half is due the first week of the month on Friday when I get paid." (Exhibit N at 10). Seeberger responded, "What verbal agreement? I recall no such thing. You guys are as bad as Roberta – amazing. First you want practically a free house. Now free lawyer. It's a shame you have to use everyone. I asked Peter if he was the father and he didn't deny it. . . ." (Exhibit N at 10-11). Schreurs was upset by the comment because her daughter had been

sexually abused by her ex-husband who is incarcerated.

Schreurs became concerned about her belongings and went to the police department. The police officer Schreurs spoke to advised Schreurs to take pictures of the Subject Property and pack a bag for the night.

The night of October 1, 2014, Schreurs returned to the Subject Property with her then boyfriend, Alton. Seeberger was on the telephone. Seeberger stated, "You won't even let me move back into my house, Michelle" and asked, "Is Peter the father of the baby?" (10/1/2014 Audio Recording). Alton responded, "There is no reason to make comments like that." (10/1/2014 Audio Recording). Alton informed Seeberger he was recording the conversation. Seeberger stated she did not know who he was. Schreurs replied, "[h]e's my guest." Seeberger replied, "I'm calling the cops."

A police officer arrived and investigated the incident. On the audio recording, the police officer stated Seeberger had reported a burglary was taking place. Schreurs explained the situation to the officer. The officer agreed Schreurs had a right to be at the Subject Property.

During the hearing, Seeberger testified she believed King might be the father of Crew's baby because she had seen them alone and on one occasion saw the two of them on the bed together playing a video.

Schreurs moved out of the Subject Property on October 5, 2014. At least one other tenant lived at the Subject Property after Schreurs moved out.

Schreurs did not have a place to stay. Schreurs moved in with her parents in Muscatine for five months until she could secure housing. Schreurs testified that after Seeberger terminated her tenancy she was very emotional and cried a lot. Schreurs has taken medication for anxiety and depression in the past and reported that her physician increased her anxiety medication after Seeberger terminated her tenancy. In addition to her mental health issues, Schreurs suffers from Crohn's disease, colitis, gastritis, and psoriasis. Schreurs described her psoriasis as "out of control" following the termination of her tenancy.

Schreurs filed a Complaint with the Commission alleging Seeberger made discriminatory statements against her in housing on the basis [sic] familial status. Seeberger denies Schreurs's contention and testified she loves babies and children. During her tenancy, Schreurs asked Seeberger if an infant could visit her at the Subject Property and Seeberger granted her request. Seeberger's testimony is not credible.

Seeberger has provided varying reasons why she terminated Schreurs's tenancy. During the hearing, Seeberger testified she terminated Schreurs's tenancy "primarily" because she wanted her house back to herself. During her deposition, Seeberger testified she terminated Schreurs's tenancy because, Schreurs was "a little bit messy," Crews left the oven on two times, and

Schreurs routinely paid her rent late. (Seeberger Depo. at 49-52). During the hearing, Seeberger admitted in her answers to interrogatories she stated she terminated Schreurs's tenancy because she wanted to live alone, Schreurs was not paying market rent, and paid her rent late.

During the hearing Seeberger testified that when she found out Schreurs was adding a third person to the family, she felt no different than if Schreurs had purchased a new Cadillac. Seeberger believes Schreurs has not been responsible. When asked about the Cadillac statement, Seeberger stated she would not go on vacation if she could not afford to pay for it up front.

CONCLUSIONS OF LAW

Schreurs contends Seeberger violated Davenport, Iowa, Ordinance section 2.58.305(C) by making a statement with respect to the rental of a dwelling indicating a preference, limitation, or discrimination based on familial status. Seeberger avers she is exempt from coverage under the Ordinance because she is a small landlord and she resided in the Subject Property during Schreurs's tenancy. She also denies she made a discriminatory statement in housing.

I. Ordinance Generally

Under the Ordinance, it is unlawful "[t]o make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with

respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . or an intention to make any such preference, limitation, or discrimination."[1] This language is a mirror image of the language in the Fair Housing Act ("FHA").[2]

The language in the Ordinance is similar to, but is not a mirror image of the language in the Iowa Civil Rights Act ("ICRA"), as follows:

> 1. It shall be an unfair or discriminatory practice for any person . . .
>
> *c.* To directly or indirectly advertise, or in any other manner indicate or publicize that the purchase, rental, lease, assignment, or sublease of any real property or housing accommodation or any part, portion, or interest therein, by persons of any particular race, color, creed, sex, sexual orientation, gender identity, religion, national origin, disability, or

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[1] Exhibit FFF, Davenport Municipal Code § 2.58.305(C).

[2] 42 U.S.C. § 3604(c) (stating, it is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status, . . . or an intention to make any such preference, limitation, or discrimination"). The Ordinance provides greater protection than the FHA, as it also prohibits discrimination on the basis of age, creed, gender identity, marital status, and sexual orientation. Davenport Municipal Ordinance § 2.58.305(C).

familial status is unwelcome, objectionable, not acceptable, or not solicited.[3]

II. Exemptions for Small Landlords, Home Rule, and Preemption

A. Applicability of the Exemptions for Small Landlords

The Ordinance contains exemptions for small landlords, but provides the exemptions do not apply to claims under Davenport Municipal Code section 2.58.305(C).[4] Schreurs's claim falls under Davenport Municipal Ordinance section 2.58.305(C). Seeberger is not exempt from coverage under the express wording of the Ordinance.

B. Home Rule and Preemption

Seeberger contends she is entitled to judgment as a matter of law because the Ordinance violates home rule. Schreurs counters the ICRA is preempted by the FHA, and thus, home rule has no applicability.

The Ordinance mirrors the language of the FHA. The Ordinance and the FHA contain exemptions for small landlords, but also provide the exemptions do not

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[3] Iowa Code § 216.8(1)*c* (2013).

[4] Exhibit FFF, Davenport Municipal Code § 2.58.310(A)(1)-(2).

apply to claims involving statements or advertisements indicating any preference, limitation, or discrimination based on familial status.[5]

Under Article III, section 38A of the Iowa Constitution, "[m]unicipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government." Iowa Code chapter 364 governs the powers and duties of cities. Consistent with the Iowa Constitution, under Iowa Code section 364.1,

> [a] city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include

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[5] *Compare* Davenport Municipal Code § 2.58.310(A)(1)-(2) (stating, the exemptions do not apply to claims under section 2.58.305(C), which provides it is unlawful "to make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status. . . .") *with* 42 U.S.C. § 3603(b) (stating, the exemptions do not apply to claims under 42 U.S.C. section 3604(c), which provides it is unlawful "[t]o make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status. . . .").

> the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent city power.

"An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law."[6] "A municipal ordinance is irreconcilable with a law of the General Assembly and, therefore, preempted by it, when the ordinance 'prohibits an act permitted by statute, or permits an act prohibited by a statute.' "[7]

Under the Ordinance, it is unlawful "[t]o make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status."[8] This language is similar to the language in the ICRA, which provides:

> 1. It shall be an unfair or discriminatory practice for any person . . .
>
> *c.* To directly or indirectly advertise, or in any other manner indicate or publicize that the purchase, rental, lease, assignment, or sublease of any real property or housing accommodation or any part, portion, or interest therein, by persons of any particular race, color, creed, sex, sexual orientation, gender identity, religion, national origin, disability, or

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[6] Iowa Code § 364.2(3).

[7] *Baker v. City of Iowa City*, 750 N.W.2d 93, 99-100 (Iowa 2008).

[8] Exhibit FFF, Davenport Municipal Ordinance § 2.58.305(C).

> familial status is unwelcome, objectionable, not acceptable, or not solicited.[9]

The ICRA excepts from coverage:

> *b.* The rental or leasing of a dwelling in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of the housing accommodations.
>
> *c.* The rental or leasing of less than four rooms within a single dwelling by the occupant or owner of the dwelling, if the occupant or owner resides in the dwelling.[10]

The Ordinance contains similar exemptions for small landlords, but also provides the exemptions do not apply to claims under section 2.58.305(C).[11] The Ordinance follows the FHA and prohibits all discriminatory statements or advertisements, covering a broader category of landlords than the ICRA.[12] Seeberger's home rule claim raises a constitutional issue. I do not have

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[9] Iowa Code § 216.8(1)*c*.

[10] Iowa Code § 216.12.

[11] Exhibit FFF, Davenport Municipal Code § 2.58.310(A)(1)-(2).

[12] 42 U.S.C. § 3603(b). The FHA further provides "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615.

authority to decided [sic] constitutional issues.[13] The issue is preserved for further review.

III. Due Process and First Amendment Claims

Seeberger alleges the Commission has violated due process by: (1) acting in concert with Schreurs and her attorney by meeting and discussing an outcome of the case; (2) speaking with counsel for Schreurs during Seeberger's deposition; (3) failing to follow procedures set forth in a letter dated November 25, 2014; and (4) amending the Complaint. Seeberger also claims the Commission has violated her rights to freedom of speech, privacy, and association. As noted above, I do not have jurisdiction over constitutional issues.[14] The issues are preserved for further review.

IV. Discriminatory Statements in Housing

Under the Ordinance, it is unlawful "[t]o make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . or an intention to make any such preference, limitation, or discrimination."[15] To prevail on her claim, Schreurs must establish: (1) Seeberger

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[13] *Brewbaker v. State Bd. of Regents*, 843 N.W.2d 466, 471 (Iowa Ct. App. 2013).

[14] *Id.*

[15] Exhibit FFF, Davenport Municipal Code § 2.58.305(C).

made a statement; (2) the statement was made with respect to the sale or rental of a dwelling; and (3) the statement indicated a preference, limitation, or discrimination against her on the basis of her familial status.[16] Schreurs contends Seeberger made discriminatory statements in housing on September 16, 2015 [sic], September 17, 2015 [sic], and October 1, 2014.

In determining whether a statement or advertisement is discriminatory, the courts apply the objective ordinary reader or listener standard.[17] "The 'ordinary reader' is nothing more, but nothing less, than the common law's 'reasonable man': that familiar creature by whose standards human conduct has been judged for centuries."[18] Thus, when determining whether a statement of publication is discriminatory, the courts look to the reader's or listener's perspective and whether an objective person would find the statement or publication discriminatory.[19] The subjective intent of the person making the statement or publication is not controlling.[20]

On September 16, 2015, Seeberger sent Schreurs a text message with a photograph of prenatal vitamins, stating, "Something I should know about?" (Exhibit N).

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[16] *White v. U.S. Dep't of Housing and Dev.*, 475 F.3d 898 (7th Cir. 2007).

[17] *State v. Keding*, 553 N.W.2d 305, 307 (Iowa 1996); *Rodriguez v. Village Green Realty, Inc.*, 788 F.3d 31, 52 (2d Cir. 2015).

[18] *Keding*, 553 N.W.2d at 307 (quoting *Ragin v. New York Times*, 923 F.2d 995, 1002 (2d Cir. 1991)).

[19] *Id.*

[20] *Id.*

Schreurs did not receive the text message that day. The next day when Schreurs arrived home from work, Seeberger asked Schreurs if she had received her text message. Schreurs replied she had not. Seeberger showed Schreurs the picture of the prenatal vitamins. Seeberger testified Schreurs became excited, giggled, and stated Crews was pregnant as she pointed to the kitchen. During her deposition Seeberger reported she did not say anything at first, "because I was trying to figure out how to give them notice, because I wanted my place back, so then I just said you guys are going to have to be out in 30 days." (Seeberger Depo. at 63-64). Seeberger acknowledged she had not told Schreurs she wanted her to move out before that point. Seeberger testified Schreurs inquired why Seeberger was terminating her tenancy, and Seeberger responded, "You don't even pay rent on time the way it is, and . . . Now you're going to bring another person into the mix." (Seeberger Depo. at 65). During the exchange, Seeberger also stated, "she's taking prenatal vitamins, . . . obviously, you're going to keep the baby." (Seeberger Depo. at 66-67).

On October 1, 2014, Seeberger demanded Schreurs pay her rent in full. Later that night Schreurs returned to the Subject Property with her then boyfriend, Alton. Seeberger was on the telephone. Seeberger stated, "You won't even let me move back into my house, Michelle" and asked, "Is Peter the father of the baby?" (10/1/2014 Audio Recording). Alton responded, "There is no reason to make comments like that." (10/1/2014 Audio Recording). Alton informed

Seeberger he was recording the conversation. Seeberger stated she did not know who he was. Schreurs replied, "[h]e's my guest." Seeberger replied, "I'm calling the cops."

Under the facts of this case, Seeberger's statements on October 1, 2014 are not discriminatory on the basis of familial status. Seeberger had already terminated Schreurs's tenancy. Nevertheless, the statements further support the conclusion her September statements were discriminatory.

Seeberger's statements on September 16 and 17, 2014, related to Schreurs's rental of the Subject Property. Seeberger immediately terminated Schreurs's tenancy after finding out her teenage daughter was pregnant. Seeberger testified she was disappointed with Schreurs and believed Schreurs had taken advantage of her. Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant. During the hearing Seeberger testified adding a third person to the family was no different than if Schreurs had purchased a new Cadillac. Seeberger testified she would not take a vacation she could not pay for in advance. An ordinary listener listening to Seeberger's statements would find her statements discriminatory on the basis of familial status. Seeberger engaged in a discriminatory housing practice by making the statements.

V. Damages

Schreurs seeks to recover $35,000 in emotional distress damages. If the administrative law judge concludes the respondent has engaged in a discriminatory housing practice, the administrative law judge may "order such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief."[21]

The Iowa Supreme Court has recognized that emotional distress damages are recoverable under the ICRA.[22] A complainant may recover emotional distress damages "without a showing of physical injury, severe distress, or outrageous conduct."[23] Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents. Schreurs has a history of anxiety, depression, psoriasis, Crohn's disease, colitis, and gastritis. Her conditions were aggravated by the termination of her tenancy.

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[21] Exhibit FFF, Davenport Municipal Code § 3.58.340(F)(3).

[22] *Chauffers, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 383 (Iowa 1986).

[23] *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996) (modifying $50,000 emotional distress award to $20,000 where complainant and her daughter testified about her emotional distress, but the case lacked any medical or psychiatric evidence to support it); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 526 (Iowa 1990) (affirming award of emotional distress damages where complainant alleged stress from not being promoted caused her to feel bad, have headaches, and caused her psoriasis to flare up).

Schreurs is entitled to $35,000 in emotional distress damages.

VI. Civil Penalty

The Commission seeks a civil penalty against Seeberger for violating the Ordinance. The Ordinance provides for the assessment of a civil penalty to vindicate the public interest in an amount not to exceed the penalties established in the FHA, 42 U.S.C. section 3612.[24]

Under the FHA,

> If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent—
>
> (A) in an amount not exceeding $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;
>
> (B) in an amount not exceeding $25,000 if the respondent has been adjudged to have committed one other discriminatory housing

[24] Exhibit FFF, Davenport Municipal Code § 3.58.340(F)(3).

> practice during the 5-year period ending on the date of the filing of this charge; and
>
> (C) in an amount not exceeding $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge; except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.[25]

The Commission avers HUD has increased the maximum penalty for a first time violation to $16,000, by regulation. The Ordinance does not expressly adopt the standards from the HUD regulations and it does not discuss inflation. The Ordinance states the penalties may not exceed the penalties set for [sic] in 42 U.S.C. section 3612. Thus, the maximum penalty is $10,000 for a first violation.

The legislative history of the FHA discusses certain factors to consider when imposing a civil penalty, including "the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstance of the respondent

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[25] 42 U.S.C. § 3612(g)(3).

and the goal of deterrence, and other matters as justice may require."[26]

While this is Seeberger's first violation, this is not a typical case of discrimination. Seeberger intentionally discriminated against Schreurs based on her familial status by making discriminatory statements in housing. Seeberger's lack of candor during the investigation and hearing is disconcerting. Seeberger did not present any evidence of her current financial circumstances. Imposition of a $10,000 civil penalty is appropriate.

ORDER

Seeberger engaged in a discriminatory housing practice under the Ordinance by making discriminatory statements in housing. Seeberger shall cease and desist from violating the Ordinance. Schreurs is awarded $35,000 in emotional distress damages. Seeberger shall pay a $10,000 civil penalty to the Commission. The Commission shall take any steps necessary to implement this decision.

Dated this 11th day of December, 2015.

/s/ Heather L. Palmer

Heather L. Palmer
Administrative Law Judge
515-281-7183

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[26] H.R. Rep. No. 711-100, at 37(1988).

cc: Dorothy O'Brien – Attorney for Complainant
(e-mail and first class mail)
Mike Motto – Attorney for Respondent
(e-mail and first class mail)
Latrice Lacey – Davenport Civil Rights Commission
(e-mail and first class mail)

Notice

The Commission may review the Findings, Conclusions and Order within thirty days.[27] If the Commission does not review the Findings, Conclusions and Order within thirty days, the Findings, Conclusions and Order will become final.[28] The judicial review provisions found in Davenport Municipal Code section 3.58.350 apply to any appeal.

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[27] Exhibit FFF, Davenport Municipal Code § 3.58.345(A).

[28] *Id.*