ALASKA STATE COMMISSION FOR HUMAN RIGHTS
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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE DIRECTOR, ALASKA STATE COMMISSION FOR HUMAN RIGHTS *ex rel.* MELISSA ROSGA, on behalf of her minor sons, DAKOTA ROSGA, CHASE ROSGA, and TIMOTHY ROSGA,	
Complainant,	ASCHR Nos. J-11-264, J-11-265, J-11-266
v.	OAH Nos. 12-0053-HRC, 12-0054-HRC, 12-0055-HRC
WILSON WALKER, d/b/a WALKER PROPERTIES,	
Respondent.	

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, by a 2-1 vote adopt the Administrative Law Judge's Recommended Decision of March 11, 2013 and find that Respondent Wilson Walker d/b/a Walker Properties violated AS 18.80.240(2) by seeking to evict the Rosga family rather than to permit a reasonable accommodation of allowing the family to have cats live with them in order to alleviate the symptoms of the boys' mental disability. In accordance with the Recommended Decision and in order to remedy this discriminatory housing practice, the eviction notice is vacated; the Rosgas shall have a month-to-month tenancy with Respondent which was the status quo before the issuance of the eviction notice; and Respondent shall refrain from discriminatory housing practices.

Commissioners Luncford and Peters voted to adopt the Recommended Decision and to issue this determination.

Commissioner Merkes dissents from the Commission's decision. Commissioner Merkes could not find that unlawful discrimination occurred in this case. She does not believe that the evidence established that the boys' ADHD substantially interfered with their ability to learn and interact with others, or that permitting cats to reside with the family was a necessary accommodation for the family's use of the apartment.

IT IS SO ORDERED.

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-.570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

DATED: September 26, 2013

Lester C. Lunceford, Commissioner

DATED: September 26, 2013

Grace Merkes, Commissioner

DATED: September 26, 2013

Faith Peters, Commissioner

CERTIFICATE OF SERVICE

This is to certify that on September 26, 2013, a copy of the foregoing was mailed by first-class mail U.S. mail, postage prepaid, to:

Stephen Koteff, Human Rights Advocate (hand-delivered)
Alaska State Commission for Human Rights
800 A Street, Suite 204
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With a copy to:

Rebecca Pauli, Administrative Law Judge
Office of Administrative Hearings
State of Alaska
550 W. 7th Avenue, Suite 1940
Anchorage, AK 99501

By: Margaret Taylor
Margaret Taylor
Commission Secretary

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
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BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

Paula M. Haley, Executive Director, Alaska State Commission for Human Rights *ex rel.* MELLISSA ROSGA, on behalf of her minor sons, DAKOTA ROSGA, CHASE ROSGA, And TIMOTHY ROSGA Complainant v. WILSON WALKER, d/b/a WALKER PROPERTIES Respondent.	OAH Nos. 12-0053-HRC 12-0054-HRC 12-0055-HRC ASCHR Nos. J-11-264 J-11-265 J-11-266

RECOMMENDED DECISION AFTER OBJECTIONS

I. INTRODUCTION

The Executive Director accuses the respondent, Wilson Walker, d/b/a Walker Properties, of unlawful discrimination against Mellissa Rosga's sons when Mr. Walker sought to evict the Rosgas so he could remodel their apartment. The Executive Director contends that a motivating factor for the eviction is Mr. Walker's desire to remove from the apartment the boys' cats, which are used to alleviate the effects of their mental disability, Attention Deficit Hyperactivity Disorder (ADHD).

As a threshold matter, Mr. Walker argued that the mixed-motive analysis used in race discrimination claims should not be applied in a housing discrimination claim. This decision recommends the Commission conclude that a mixed-motive analysis is appropriate in a housing discrimination claim when there is direct evidence of housing discrimination. This decision also recommends the Commission find: 1) the boys' ADHD is a mental disability under the Alaska Human Rights Act; 2) allowing the cats to remain in the apartment is a reasonable accommodation to alleviate the effects of the disability, thereby affording the boys an equal opportunity to use and enjoy the apartment; and 3) when Mr. Walker sought to evict the Rosgas, a motivating factor was to remove the cats from his property. Finally, the decision recommends that the Commission conclude Mr. Walker unlawfully discriminated against the Rosgas. As a

remedy, the Commission should order Mr. Walker to refrain from engaging in unlawful discrimination, vacate his outstanding eviction notice, and restore the Rosga family to a month to month tenancy.

II. FACTS

The Rosga family, parents Bruce and Mellissa Rosga, and their four sons, Montgomery, Timothy, Chase, and Dakota, live in an apartment owned by Wilson Walker. Timothy, Chase, and Dakota have been diagnosed with ADHD.

Mr. and Ms. Rosga entered into a one-year lease with Mr. Walker. The term of the lease was October 1, 2009 through October 1, 2010.[1] The Rosgas understood they would have a month to month tenancy after the lease expired unless it was renewed.[2] They receive rental assistance from the Alaska Housing Finance Corporation (AHFC). Many of Mr. Walker's tenants receive AHFC rental assistance.

Mr. Walker has a no-pet policy, but permitted the Rosgas to have a cat and noted in the lease that they could have one cat.[3] When they moved in, the Rosgas had two cats and eventually obtained a third cat.[4] Mr. Walker knew the Rosgas had as many as three cats at any one time.[5]

Shortly after the Rosgas moved into their apartment, the apartment next door reported a bedbug infestation. No bedbugs were reported in the Rosga apartment until the summer of 2011.[6] Mr. Walker spent several thousand dollars to eradicate the bedbugs but he continued to have a large infestation in the Rosga apartment.[7] He came to find out later that there had been bedbugs in the Rosgas' prior apartment, and he began to suspect that he was fighting a losing battle as long as the cats remained.[8]

Other than the bedbugs, the Rosgas' tenancy was relatively uneventful until the fall of 2011. In September 2011, Mr. Walker issued the Rosgas a Notice of Violation of Rental Agreement for having unauthorized persons living in the house.[9] Mr. Walker had discussed the

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1 Exhibit 1.
2 *Id.*; Trial Transcript (Tr.) 223.
3 Exhibit 1, page 2.
4 Tr. 127 – 130, 280 – 281.
5 Tr. 483 – 492.
6 Tr. 130; 281.
7 Exhibit Y.
8 Tr. 493 – 96; Exhibit AA.
9 Exhibit W.

issue with the Rosgas in the past, but they ignored Mr. Walker's warnings. The notice informed the Rosgas that failure to correct the violation would result in eviction. Mr. Walker also informed the Alaska Housing Finance Corporation of the violation.

Around this same time, Mr. Walker spoke with the Rosgas regarding his concern about the cats interfering with his ability to end the bedbug infestation. He asked them to take the cats to their veterinarian and obtain written verification that the cats were pest free. Ms. Rosga recalls the request, but she and her husband never provided Mr. Walker with the verification.[10]

On September 26, 2011, ten days after the notice of rental agreement violation, the boys' treating psychiatrist, Howard Detwiler, provided Mr. Rosga with a letter regarding the boys' need for the cats.[11] Specifically, it informed the reader that the boys were diagnosed with ADHD and had issues with anxiety and stress. It was "his professional opinion these cats help these children cope better with life. They need these cats as companion animals to help with psychological stressors."[12]

The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders IV Text Revision (DSM-IV (TR)), 85 – 93 (4th Ed. 2000) describes ADHD as "a persistent pattern of inattention and/or hyperactivity-impulsivity that is . . . more severe than is typically observed in individuals at a comparable level of development. . . Inattention may be manifest in academic, occupational, or social situations."[13] With medication, the boys' ADHD is well controlled. They are able to participate in school activities and do well in the classroom.[14]

However, the medication wears off in the late afternoon or early evening and the boys' behavior can become increasingly difficult.[15] It is during this time when the ADHD symptoms begin to manifest and the boys use the cats to help them cope and transition from day to bed time. The cats have been observed to have a calming effect on the children by helping them slow down and relax. Dr. Detwiler testified that there was a connection between the cats' ability

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10 Tr. 495 – 499; 286 – 287, 331 – 332.
11 Exhibit 3 at 2.
12 *Id.*
13 Tr. 85.
14 Timothy takes part in ROTC and Dakota is involved in a gifted student program and will be taking advanced classes. Tr. 240 – 242; 297 – 298; EHTr. 16.
15 Tr. 30; 136 – 137, 273, 763.

to sooth or calm and enhance the ability to concentrate or focus.[16] Based on what the boys have told him, he believes that the cats have actually provided focus and stress relief.[17]

Dr. Detwiler has no written record of discussing the use of therapeutic animals for the boys prior to the September 26, 2011 letter which was written at the parents' request. He does not deny that he may have said something in passing to the parents but nothing formal.

On September 27, 2011, after having received a price quote for continuing to fight the bedbug infestation, and having received no further information from the Rosgas regarding the cats, Mr. Walker gave the Rosgas notice that they had until October 31, 2012 to either re-home the cats or vacate the premise.[18]

Mr. Walker continued to ask for written verification that the cats had been checked by a veterinarian. Ms. Rosga provided no verification but told Mr. Walker that she would wash the cats with a special shampoo and he agreed that the cats could stay.[19] After Mr. Walker told Ms. Rosga the cats could stay, Mr. Rosga presented him with a letter requesting the cats as a formal accommodation for the boys' disability.[20] Attached to the letter was a copy of Dr. Detwiler's September 27, 2011 letter identifying the children's condition and need for the cats.[21] This was the first time Mr. Walker had received a copy of Dr. Detwiler's letter.[22]

On October 19, 2011, Ms. Rosga filed complaints on behalf of her three sons with the Human Rights Commission alleging that Mr. Walker was discriminating against the boys by refusing to provide an accommodation for their disabilities by allowing them to keep the cats.[23] After the complaints were filed, Mr. Walker took no further action tied directly to the cats.

On December 22, 2011, Mr. Walker's counsel, with Mr. Walker's verified and notarized affirmation, made several representations on Mr. Walker's behalf to the federal Office of Fair Housing and Equal Opportunity.[24]

> Mr. Walker's intention was not to discriminate against the [Rosgas] . . . Professional pest control . . . has indicated that some pets, cats in particular, can facilitate the infestation of bed bugs . . .[the Rosgas] are subject to a month to

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16 Tr. 140.
17 Tr. 148.
18 Exhibit 2; Tr. 497 – 499.
19 Tr. 286 – 287; 331 – 332; 409 – 410; 430 – 433, 495 – 500; Exhibits 4, 7, and 9.
20 Exhibit 3. The letter is dated October 7, 2011. Tr. 503, 504.
21 The cats were identified by Dr. Detwiler as helping the boys with "psychological stressors."
22 Tr. 503 – 504.
23 Exhibits A, B, and C.
24 Exhibit 7.

> month tenancy . . . Mr. Walker is in the process of remodeling all the units in the building . . . A primary reason that this tenant is on a month to month tenancy is so that Mr. Walker can remodel the unit when its time came up on his schedule. The remodel requires the unit to be vacant.
>
> Mr. Walker is sympathetic to any medical issues of the tenant's child. He has forborne following up on their moving with the hope they would locate another residence for their family. However the facts remain that the unit is threatened by bed bugs and Mr. Walker has planned to remodel the unit. . .That time has come. He has a right to terminate the month to month tenancy for legitimate reasons.[25]

On January 27, 2012, in response to an inquiry from the Executive Director, Mr. Walker's counsel wrote that Mr. Walker was aware that the Rosgas "had service animals when they moved in. I don't think that is in dispute. His concern at this point is that the unit needs to be renovated so that he can enhance his ability to market the property."[26] Unlike the prior letter, Mr. Walker did not verify or notarize the contents.

A week later, on February 1, 2012, Mr. Walker was interviewed by an Alaska State Commission for Human Rights investigator, Andrew Sundboom.[27]

That same day, Mr. Walker's attorney sent a notice of termination of tenancy, dated February 1, 2012, to Ms. Rosga informing her that her month to month tenancy would be terminated as of March 31, 2012 and to vacate by that date.[28] The Rosgas did not vacate and the matter proceeded to civil court. The civil proceeding was resolved by stipulation pending the outcome of this proceeding; the Rosgas would be permitted to remain on the premises, as would their cats.

Mr. Walker has 21 rental units throughout Anchorage. Property management is what he does when he is not working his regular job. He takes pride in his buildings, remodeling and upgrading as time and money allows.

There are six units in the Rosgas' building. Four have had remodels ranging from simple (carpet, paint, and appliances) to a complete remodel, including a complete kitchen redesign.

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25 Exhibit 7.
26 Exhibit 8.
27 Exhibit 9.
28 Exhibit 4.

Sometimes the work could be done while the tenant was on site. One remodel occurred while the tenant was on vacation and another when the apartment was vacant.[29]

When it came to the Rosgas' apartment remodel, Mr. Walker was not sure what he was going to do. In his deposition on May 10, 2012, Mr. Walker was questioned regarding his plans for remodeling the Rosgas' apartment. He initially answered that he did not know, and later responded that it would be a total remodel, but gave no real details.[30] At the hearing he went into extensive detail, emphasizing that he would not know what he would find until he started, but at a minimum, Mr. Walker would be replacing the floor and doing extensive work in the bathroom.[31] He also suspected he would encounter structural issues.

Mr. Walker is allergic to cats. Because he does most of the work himself, he cannot work in the Rosgas' apartment for any extended period of time. Mr. Walker expressed his concern that he would suffer an allergy attack even if the cats were in another room.[32]

One third of Mr. Walker's tenants receive AHFC assistance. He has had AHFC tenants since 1993, but said he is not sure he is going to continue having AHFC tenants. Mr. Walker explained that this was the reason he would not agree to let the Rosgas vacate while he remodeled then have them move back in.[33] However, since the February 1, 2012 notice to vacate, Mr. Walker has rented to AHFC tenants.

III. DISCUSSION

A. *Applicable Law*

It is a violation of Alaska's Human Rights Law for the owner of rental property "to discriminate against a person because of . . . [a] mental disability . . . ."[34] The legislature did not identify specific conditions that it would consider to be a mental disability, but rather identified generic categories of mental impairments, such as "emotional or mental illness, and specific learning disabilities," that substantially limit major life actives such as learning.[35] Nor did the legislature define what it is to "discriminate." The Commission and Alaska Courts are not bound

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29 Tr. 437 – 440.

30 Tr. 426 – 427.

31 *See generally* Walker hearing testimony.

32 Tr. 415.

33 Tr. 632 – 633.

34 AS 18.80.240(2).

35 AS 18.80.300(14)(a) defines mental disability to mean a "mental impairment that substantially limits one or more major life activities . . . ." AS 18.80.300(10) identifies learning as a major life activity. AS 18.300(15)(B) defines mental impairment to include "specific learning disabilities . . . ."

by relevant federal laws, but consider them instructive if they do not hinder the Commission's obligation to construe AS 18.80 liberally. The Alaska Supreme Court has consistently held that the Alaska Human Rights Act "should be broadly construed to further the goal of eradication of discrimination."[36] For the Alaska Human Rights Act prohibition on discrimination in the sale or rental of property (AS 18.80.240) the analogous federal law is the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act of 1973.[37]

This is the first time that the Commission has been called upon to address an allegation of discrimination for failure to accommodate a mentally disabled person's assistance animal in the rental of real property. Therefore, the first issue to address is whether in this instance a failure to make a reasonable accommodation is discrimination for purposes of AS 18.80.240, Unlawful Practices in the Sale or Rental of Real Property.

1. Failure to provide a reasonable accommodation in housing is a form of discrimination under Alaska Human Rights Law.

The parties agree that a failure to provide a reasonable accommodation is a form of discrimination under the Alaska Human Rights Act and the Fair Housing Act.[38]

When proving a discriminatory failure to provide reasonable accommodation, the Executive Director must establish a *prima facie* case, which consists of four elements.[39] The parties agree that the Executive Director must prove that the Rosga boys are disabled as defined at AS 18.80.300; that Mr. Walker knew or reasonably should have known of the disability; and that he refused to reasonably accommodate the boys. They disagree as to whether the Executive Director must show that the need for an accommodation "*may be* necessary"[40] (Executive

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[36] *E.g., Moody-Herrera v. State, Department of Natural Resources*, 967 P.2d 79, 86 (Alaska 1998).

[37] 42 U.S.C. §§ 3601 – 3619; 29 U.S.C. § 794 *et seq.* The FHA uses the term "handicap" and "handicapped." The Alaska Human Rights Act uses the terms "disability" and "disabled." These terms are assigned identical meanings.

[38] 42 U.S.C. § 3604(f)(3)(B) ("discrimination" includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ."); *see also* Joint Statement ("One type of disability discrimination prohibited by the [Fair Housing Act] is the refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling").

[39] Mr. Walker's analysis contains, as a separate element, that the accommodation is reasonable. The Executive Director's analysis also requires the accommodation be reasonable, just not as a separate element. Complainant's Pre-Hearing Brief page 6; Respondent's Pre-Hearing Brief page 10.

[40] Complainant's Post-Hearing Brief at 12 quoting *Budnick v. Town of Carefree,* 518 F.3d 1109, 119 (9th Cir. 2008) (quoting *Giebeler v. M and B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2003)) (emphasis added).

Director) or "*is* necessary" [41] (Mr. Walker) to afford the boys an equal opportunity to use and enjoy the dwelling. The parties also disagree on whether the Executive Director may prove discrimination under a mixed-motive burden shifting analysis.

The question regarding application of the mixed-motive analysis will be addressed first, followed by the four elements of the *prima facie* case. When the third element is discussed, the issue of whether the Executive Director must prove that the accommodation "may be necessary" or "is necessary" will be addressed.

2. Proving unlawful housing discrimination – direct evidence and mixed-motive.

The Alaska Supreme Court and this Commission apply two distinct burden shifting tests when resolving accusations of discrimination: pretext and mixed-motive. Which test is applied depends upon whether the complainant can prove his or her case through direct or indirect evidence.

> 'Direct evidence,' it seems, is an unfortunate choice of terminology for the sort of proof needed to establish a 'mixed-motives' case. 'Direct' and 'indirect' describe not the quality of the evidence presented, but the manner in which the plaintiff proves his case.[42]

A person may present "direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof."[43] For example, a statement "that may be viewed as directly reflecting the discriminatory attitude" could be considered direct evidence, even though it is not an admission or expression of wrongful intent.[44] Direct evidence is not an antonym for circumstantial evidence, but instead refers to the quantum of proof required.[45] Most succinctly stated, "[i]n order to show direct evidence the plaintiff must 'at least offer either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof.'"[46]

Here, because the Executive Director has stated this is a mixed-motive case, she must present evidence of her *prima facie* case and then direct proof of discriminatory intent. Once the

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41 Respondent's Pre-Hearing Brief at 10 (citations omitted) (emphasis added); Respondent's Closing Brief at 5 (citations omitted) (emphasis added).

42 *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 434 (Alaska 2004) quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

43 *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 662 (Alaska 2006).

44 *Id.*

45 *Smith v. Anchorage School District* 240 P.3d 834, 840 (Alaska 2010).

46 *Id.*

Executive Director has shown direct proof, the ultimate burden of proof is somewhat relaxed: she can prevail by showing that the desire not to provide the Rosgas with a reasonable accommodation was simply a motivating factor, as opposed to the determinative factor. The mixed-motive analysis recognizes that discriminatory decisions may not be motivated solely by a prohibited characteristic, but may be based on a mixture of legitimate and illegitimate considerations. Once there is proof of an illegitimate motive, the burden shifts to Mr. Walker, who can avoid liability by showing he "would have made the same decision" absent considerations of the cats.[47] If the Commission finds no direct proof of discrimination, it must find Mr. Walker liable, if at all, under a pretext framework.[48]

Mr. Walker, in his pre-hearing brief at pages 14 – 17 and in his closing brief at page 16 footnote 4, argued that when presented with mixed-motive cases, the Commission should abandon its burden shifting analysis and the "a motivating factor" standard, and in its place adopt the "but for" standard adopted by the United States Supreme Court in its 2009 decision, *Gross v. FBL Fin. Serv's, Inc.*[49]

In *Gross,* the Supreme Court held that it would not apply the mixed-motive burden shifting analysis that applied in Title VII[50] racial discrimination claims, but rather it would apply a "but for" test to federal age discrimination claims under the Age Discrimination in Employment Act (ADEA).[51] The *Gross* Court applied rules of statutory construction and concluded that Congress, when it amended the ADEA, intended that a plaintiff should have the burden of proving by a preponderance of the evidence in mixed motive cases that age was a "but

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47 This principle was laid out in a federal Title VII case, *Price Waterhouse v. Hopkins.* 490 U.S. 228, 244-45 & n.10 (1989), which was later discussed with approval as a guide for Alaska Human Rights cases by the Alaska Supreme Court in *VECO, Inc. v. Rosebrock,* 970 P.2d 906, 920 - 921 (Alaska 1999).

48 When there is no direct evidence of discriminatory intent, the commission applies a three part burden shifting analysis known as the *McDonnell Douglas* test, named after the case in which it was first articulated. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Alaska adopted the *McDonnell Douglas* test in *Brown v. Wood,* 575 P.2d 760, 770 (Alaska 1978). Under this test the complainant has the burden of establishing a *prima facie* case of discrimination. Once this is established, the burden then shifts to the respondent to provide a legitimate, non-discriminatory reason for its actions. Finally, if that burden is met, the complainant has the burden of producing evidence to show that the reason offered by the respondent is pretextual.

49 557 U.S. 167, 173-180, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009) (rejecting the application of Title VII's analysis of whether discrimination was "a motivating factor" in determinations made under the ADEA and adopting a "but for" standard where the plaintiff must prove that the adverse action would not have occurred "but for" the improper discrimination).

50 42 U.S.C.§§ 2000e – 2000e-17.

51 29 U.S.C. §§ 621-34 (2006).

for" cause of the employment decision, instead of just a "motivating factor."[52] The *Gross* court emphasized that Title VII and the ADEA were not part of the same statutory scheme and, had congress intended a motivating factor burden, it could have done so when it recently amended applicable portions of the ADEA.[53]

In 2010, the Alaska Supreme Court, in an age discrimination case, *Smith v. Anchorage School District*, rejected the federal *Gross* "but for" standard explaining that:

> while we look to federal discrimination law jurisprudence generally, "AS 18.80.220 'is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination.'" The Supreme Court's holding in *Gross* substantially relied on the differences between the ADEA and Title VII-differences that do not exist in Alaska's anti-discrimination law. In addition, adopting the Court's holding in *Gross* would result in a different analytical framework for age discrimination claims than for other discrimination claims - yet all are prohibited by the same sentence in the same statute. We decline to follow *Gross* and we expressly hold that a plaintiff can bring a mixed-motive age discrimination claim under AS 18.80.220.[54]

In *Smith,* the court was considering employment discrimination claims. Here, the Commission is considering a housing discrimination claim. However, the rationale for why *Gross* was rejected in *Smith* is equally compelling here. While employment claims are brought under AS 18.80.220, and housing claims under AS 18.80.240, because they relate to the same subject matter, they were passed in the same legislative session and contain identical wording; terms used in those statutes are given identical construction under the doctrine of *in pari materia.*[55]

Accordingly, Mr. Walker's argument fails. If the Executive Director can provide direct evidence of discriminatory intent, she can prevail by showing that the failure to accommodate was a motivating factor as opposed to the determinative factor. Then, the burden shifts to Mr. Walker to prove that he would have made the same decision regardless of the cats.

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52 *Gross,* 129 S.Ct. at 2348 – 52 (in addition to the difference in the statutory language, the court looked at the separate statutory schemes and the problems encountered by the lower courts in applying the mixed-motive analysis).

53 *Id.*

54 240 P.3d 834, 842 (Alaska 2010) citing *VECO, Inc. v. Rosebrock,* 970 P.2d 906, 912-13 (Alaska 1999) (quoting *Wondzell v. Alaska Wood Prods., Inc.,* 601 P.2d 584, 585 (Alaska 1979)) (internal citations omitted).

55 *See Liddicoat v. State,* 268 P.3d 355, 360 n. 29 (Alaska App. 2011) citing Norman J. Singer and J.D. Shambie Singer, *2B Sutherland Statutory Construction* § 51:3, at 235–37, 275–77 (7th ed. 2008)

> [T]he rule that statutes in *pari materia* should be construed together has the greatest probative force in the case of statutes relating to the same subject matter and passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day, or in the case where the later of two or more statutes relating to the same subject matter refers to the earlier.

B. *The Prima Facie Case*

1. Timothy, Chase, and Dakota have a psychological impairment that substantially limits a major life activity.

The children have been diagnosed with severe ADHD.[56] ADHD is a psychological disorder with accepted diagnostic criteria as set forth in the American Psychiatric Association, DSM –IV (TR), 85 – 93 (4th Ed. 2000). As described by Dr. Detwiler and corroborated by Mr. and Ms. Rosga, the boys' ADHD, if left untreated, substantially interferes with the ability to learn and concentrate.

The list of statutory "major life activities" is not comprehensive, but rather demonstrative of what life activities the legislature considers major.[57] The activities identified are those that an average person can perform with little or no difficulty. Applying this standard, the ability to focus and concentrate are major life activities.[58]

Whether impairment substantially limits a major life activity is a fact specific inquiry. This inquiry requires the Executive Director establish that the boys' ability to focus and concentrate is substantially limited as compared to the average person. Dr. Detwiler's testimony establishes that without mitigation, the boys are unable to perform the cognitive functions of an average person. He testified regarding his observations of the boys when they were off their medication and what he considered to be their inability to focus when not medicated.[59] Dr. Detwiler was questioned regarding how the boys' behavior differed from other teenagers. He responded that it was the level and intensity of the behavior. Essentially, at some point a behavior grows to the level where it moves beyond ordinary and becomes substantial. Dr. Detwiler's testimony moves the boys' psychological impairment into the realm of substantially impaired as compared to the average child of similar age without ADHD.

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[56] Tr. 7:25 – 8:9; 134:10 – 16. Testimony of Howard Detwiler, M.D., Evidentiary Hearing Transcript (EHTr) 8 – 9; Respondents' exhibits FF, GG, and HH.

[57] It would be impossible for the legislature to adopt a comprehensive list of major life activities, as evidenced by the choice of the words "such as." AS 18.80.300(10).

[58] *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 861 (8th Cir. 2006); *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 616 (5th Cir. 2009); *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1061 (9th Cir. 2005).

[59] Tr. 135, 137. Tr. 14, 28.

2. Mr. Walker knew or reasonably should have known of the children's disability and their need for the cats when he sought to evict them.

There are two notices to vacate. The first was issued September 27, 2011 and was effective October 31, 2011. The first notice provided that the Rosgas could re-home the cats or vacate the apartment. The second notice, issued February 1, 2012, was unequivocal. It provided that effective March 31, 2012, Mr. Walker was evicting the Rosgas so he could begin to remodel that unit. The strength of the circumstantial evidence establishes that Mr. Walker knew or reasonably should have known that the cats were for the boys' disability when he issued the first notice (September 2011).

On January 27, 2012, Mr. Walker's attorney, Johnny Gibbons, wrote the Executive Director's investigator that "Mr. Walker was aware that the [Rosgas] had service animals when they moved in. I don't think that is in dispute."[60] The letter was received by the Executive Director on January 30, 2012.

On February 1, 2012 Mr. Walker was interviewed by the Commission's investigator in Mr. Gibbons' office. In the investigator's written Record of Interview it was alleged that Mr. Walker confirmed that when the Rosgas asked about renting the unit, they told him that the children had disabilities and the cats were therapeutic animals.[61] Mr. Walker testified that he made the statement but it was not an accurate statement as to what he knew when.[62]

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60 Exhibit 8.

61 Exhibit 9, page 2.

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Q Do you recall during that interview with Mr. Sundboom him asking you how you first became aware that the Rosgas had animals in their unit?
A Yes, I do.
Q Okay. And do you recall telling him that when they asked you to rent the unit that they told you that they had therapeutic animals?
A I remember agreeing to saying that I recall them telling me they had therapeutic animals and I had to correct myself because that wasn't the case. And that's -- that's on that paper that you're talking about right now.....
Q So.....
A .....that exhibit [Record of Interview, Exhibit 9].
Q .....where it says -- if it -- if he -- if Mr. Sundboom had written down your answer being when they asked me to rent the unit they told me they had therapeutic animals, that would not be correct?
A That would be not correct. I did make that statement, it was inaccurate what I said and I came back and said no, that's not correct. And that's -- that's in here.

TR at 584 – 585.

The Record of Interview does not reflect any attempt by Mr. Walker or his attorney to correct this statement.[63] Mr. Gibbons' letter and Mr. Walker's statement as reflected in the Record of Interview are consistent and corroborate the Rosgas' testimony that they told Mr. Walker the purpose of the cat or cats when they moved in. From Mr. Gibbons' letter and Mr. Walker's unconvincing attempts to explain away a statement he does not deny making, it can be inferred that Mr. Walker knew or reasonably should have known of the children's disability and the purpose of the cats when he gave the Rosgas the September 2011 eviction notice.

In addition, by the time of the February 2012 eviction notice, Mr. Walker had additional knowledge of the Rosgas' position regarding the cats. Ms. Rosga filed her complaints[64] in October 2011 with the Commission, alleging discrimination by failure to accommodate the cats. Mr. Walker was served with the complaints in December 2011. On December 22, 2011, Mr. Walker verified the contents of a letter from his counsel to the U.S. Housing and Urban Development addressing the complaint by the Rosgas in that arena. In the December 22, 2011 letter, Mr. Walker verified that he was sympathetic to the boys' medical issues. Mr. Gibbons' January 2012 letter states that Mr. Walker knew the boys were disabled and of their need for the cats when the Rosgas moved in, a sentiment expressed by Mr. Walker during his interview. These facts are sufficient to establish that at the time of the February 1, 2012 eviction notice Mr. Walker knew of the children's disability.

3. A reasonable accommodation is necessary to afford Timothy, Chase, and Dakota an equal opportunity to use and enjoy the apartment.

On this point, the Executive Director asserts that she is only required to prove that a reasonable accommodation *may be* necessary to afford the complainants an equal opportunity to use and enjoy the housing.[65] The FHA includes as discrimination "a refusal to make reasonable accommodations . . . when such accommodations *may be necessary* to afford such person equal opportunity to use and enjoy a dwelling."[66] Mr. Walker cited to several federal cases in support of his contention that the accommodation "is necessary to afford" an equal opportunity to use and enjoy the apartment.[67]

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63 The Executive Director does not video tape or make an audio recording of investigative interviews. A recording would easily resolve this type of challenge to the accuracy of the report.

64 A complaint on behalf of each son.

65 Complainant's Post hearing Brief at 12.

66 42 U.S.C. § 3604(f)(3)(B) (emphasis added).

67 *See e.g.*, Respondent's Closing Brief at 5.

The legislature has directed the Commission to adopt regulations to furnish "guidance concerning the circumstances under which *it is necessary* to make a reasonable accommodation for a mentally disabled person when providing . . . the sale or rental of real property . . . under this chapter."[68] In response, the Commission adopted 6 AAC 30.910, which contains three subsections. Only Subsection (a) of 6 AAC 30.910 is directly applicable to housing complaints. It speaks to the requirement that Commission staff determinations, adjudicatory recommendations and decisions be consistent. The remaining subsections speak to complaints of employment discrimination.[69]

The Executive Director emphasized a recent Commission decision, *Anderson v. Anchorage School District*[70] as support for her position that application of the more lenient "may be" standard would ensure consistency in Commission decisions. *Anderson* is distinguishable from the case at hand.

Anderson is an employment discrimination case where the employer argued that Ms. Anderson *could not* perform the essential functions of the position without an accommodation. The Commission, following 6 AAC 30.910 (b) exercised its discretion to look at relevant federal case law and required, at the *prima facie* stage in the analysis, that the Executive Director make a "facial showing that a reasonable accommodation is *possible* . . ."[71] rather than a more absolute showing.

Unlike the respondent in *Anderson*, here Mr. Walker contends that the Rosgas *could* enjoy their home without the accommodation. Thus, *Anderson* is distinguishable in the positions asserted – one in the negative and one in the affirmative.

It is unnecessary to resolve this issue here because Dr. Detwiler's statements establish that the cats are necessary.[72] Mr. Walker did not observe the children in their home in the evening. Regardless of whether the children used the cats to ease their symptoms in the past,

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[68] AS 18.80.050(b).

[69] Subsection (b) addresses complaints of "employment, state and local government services, or public accommodations because of physical or mental disability. . . ." Subsection (c) provides for a defense to complaints in employment cases brought under AS 18.80.220(a)(1).

[70] *Ex. rel. Anderson v. Anchorage School District*, OAH No. 09-0233-HRC pages 12, 13 (July 2010) *affirmed* 3AN-10-10122CI (October 2011).

[71] *Id.* at 16 - 18 citing *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 569 (8th Cir. 2007) (emphasis in original) citing *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 712 (8th Cir.2003) (alterations and emphasis in original) (quoting *Benson v. N.W. Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir.1995)).

[72] *See Generally* Detwiler Testimony from hearing and evidentiary hearing. *See also* Exhibit 3 page 2 and Exhibit O.

they do so now. The cats allow the boys an equal opportunity to use and enjoy the apartment by alleviating the effects of their ADHD in the evening when the medication is no longer effective.

4. Refusal to accommodate.

Mr. Walker testified that he initially wanted the cats removed from the premises because he believed they were perpetuating the bedbug infestation. In September 2011 Mr. Rosga told the Rosgas they had until October 31, 2011 to re-home the cats or vacate. At some point prior to October 31, 2012 Mr. Walker told Ms. Rosga the cats could stay. No eviction occurred and the Rosgas retained their month to month tenancy. Mr. Walker knew that the Rosgas considered the cats necessary for the boys' disability and made a formal request for an accommodation prior to February 1, 2012.

Regardless, Mr. Walker issued a second eviction notice on February 1, 2012. That notice did not give the Rosgas an option to remain in the apartment. Assuming Mr. Walker did not know of the boys' ADHD prior to Mr. Rosga's request for a reasonable accommodation, once Mr. Walker received Mr. Rosga's request, he had actual notice.

C. *Mixed-Motive*

1. There is direct proof of discrimination.

Mr. Walker has worked hard to obtain and improve his rental properties. The Rosgas may not have been the easiest tenants to work with. They ignored his initial request to have the extra people in the apartment move out, and it was only after he gave formal notice that the Rosgas took any action. He may have found them difficult and annoying. Mr. Walker was likely frustrated with the bedbug problem. He had learned that the Rosgas had a bedbug infestation in their prior apartment. The Rosgas had cats, and they were the only apartment with an infestation. He asked the Rosgas for documentation that the cats were not bedbug carriers and they never provided the information, yet Mr. Walker let the cats stay. While it may not have been the correct conclusion, it is easy to understand why Mr. Walker thought the cats were precipitating the infestation.

Mr. Walker had been remodeling his properties as time and money permitted. He did most of the work himself or with the help of friends in his spare time. Mr. Walker had plans to

remodel that the Rosgas' unit at some point.[73] It would be disingenuous for the Rosgas to claim surprise by Mr. Walker's desire to remodel their apartment after observing his systematic remodeling of the other apartments at this location. However, the remodels ranges from fairly simple to a complete kitchen remodel. These other remodels did not require the eviction of a tenant. For Mr. Walker to insist on their eviction prior to a remodel is not in keeping with his prior practices.

Regardless, a remodel, no matter how minor, necessarily requires Mr. Walker be in the Rosga's apartment working for extended periods of time, and he is allergic to cats. Working in the Rosga apartment would be challenging, but perhaps there were certain steps that could be taken to lessen the likelihood of an allergic reaction.

The Rosgas have offered, as an accommodation of Mr. Walker's allergy, to keep the cats in a back room while he is there working on the apartment. Mr. Walker provided a valid reason for why this was not a viable option.

There are other possible accommodations that would permit Mr. Walker to remodel the unit. If, as testified to by Mr. Walker, the Rosgas needed to vacate the apartment for him to remodel, then a reasonable accommodation would be to offer to let them move back in after the remodel.

The cats were an exception to Mr. Walker's no pet policy. Pets are hard on properties. Because the cats were emotional support animals, as long as Mr. Walker continued to rent to the Rosgas he would have three cats in one of his properties. To get rid of the cats he would need to have the Rosgas move. Mr. Walker's failure to offer a vacant property (Mr. Walker had vacancies in October and December 2011),[74] or offer to let the Rosgas move back in once the remodel was finished, is compelling evidence in support of his desire to have the Rosgas, and therefore the cats, out of his building. Mr. Walker's statement that he was not sure he wanted to continue to take AFHC vouchers is not credible given that during this same time period he entered into a yearlong lease with a tenant who is on the voucher program and had no intention to evict other "voucher" tenants who were on month to month tenancies.[75]

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[73] The dwelling inspection sheet for the Rosga's unit indicated that everything was in good condition except the floors which are designated as "used." Exhibit 1.

[74] Exhibit 12 and 16.

[75] If Mr. Walker had testified that he simply did not like the Rosgas and they were difficult individuals, that would be a more credible reason for the eviction.

Further evidence of Mr. Walker's motive is his lack of a plan with respect to the Rosgas' unit. Mr. Walker professed that he had been telling the Rosgas all along that he was going to remodel the unit. It was in December 2011 that he indicated he needed the unit vacant for the remodel; yet, at his deposition six months later, Mr. Walker stated that he did not know what improvements he planned to make other than a "total remodel." In the past, Mr. Walker's remodels have ranged from simple (paint, carpet, and new appliances) to a complete kitchen reconfiguration. Mr. Walker attempted to explain his lack of plan by saying he would not know what he was doing until he got into the apartment. While an appealing explanation, Mr. Walker had recently been in the apartment so he should have some idea of what he was going to do.

Mr. Walker is an experienced landlord with twenty-one rental units. An empty unit generates no cash flow. It is difficult to believe that Mr. Walker would not have some idea of his plan for the Rosgas' unit if he really was ready to start the remodel in the spring of 2012, and the remodel was going to be so extensive that he knew it would require the apartment be vacant.

The Executive Director has presented "direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof."[76] Mr. Walker's testimony and actions are direct proof of a prohibited motivation. I find that it is more likely than not that a motivating factor for Mr. Walker's actions were a desire to remove the cats from his property, and to accomplish that, he must remove the Rosgas.

2. Mr. Walker's motive.

Having found direct evidence of discriminatory motive, the burden now shifts to Mr. Walker to show that he would have made the same decision if the cats were not involved. He has attempted to provide evidence, primarily through his own testimony, that the cats played no role in his eventual decision. As discussed above, it is not so much the decision to remodel or even to ask the Rosgas to vacate during the remodel that is problematic for Mr. Walker. Rather, it is his failure to offer the Rosgas another apartment if one were available or offer to let them move back after the remodel is complete. Therefore, while the evidence supports a finding that Mr. Walker would, more likely than not, eventually remodel the Rosgas' apartment, Mr. Walker's own actions detract from the believability that he would have made the same decision

[76] *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 662 (Alaska 2006).

to evict absent considerations of the cats. Therefore, I find Mr. Walker engaged in a discriminatory practice when he sought to evict the Rosgas.

IV. Remedy

When there is a finding that a person has engaged in discriminatory practice, the Commission is required by statute to order the person to refrain from that practice.[77] Additional relief should be reasonably calculated to prevent future violations and to make whole the complainant.[78]

In cases involving a discriminatory housing practice, this includes ordering Mr. Walker continue to rent to the Rosgas their present apartment or a like accommodation.[79] Had the Rosgas vacated the apartment, Mr. Walker could have been liable for actual damages incurred as a result of the unlawful practice or violation.[80] No actual damages were incurred. The apartment is available, as demonstrated by the Rosgas' ongoing occupation of the apartment throughout this proceeding; therefore, Mr. Walker has the option of continuing to rent to the Rosgas their present unit or like accommodations.[81]

Furthermore, to make the Rosgas whole, the parties should be returned to the same position they were in prior to the unlawful action. This means that they have a month to month tenancy and Mr. Walker must not act unlawfully. Any more and the Rosgas would be made more than whole, they would benefit from Mr. Walker's action.

The Executive Director has advocated that Mr. Walker be required to "take no action that is detrimental to the Rosgas tenancy that is not *clearly* based on nondiscriminatory grounds."[82] This language places a greater burden on Mr. Walker than is otherwise directed under the law and for this reason should be rejected. Rather, the Commission should order Mr. Walker from

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77 AS 18.80.130(a).

78 The remedial authority of the commission under AS 18.80.130(a) includes the authority to order any legal or equitable relief that is reasonably calculated to prevent future violations of a similar nature or that reasonably compensates the complainant . . . for losses incurred as a result of the unlawful conduct, including out-of-pocket expenses. 6 AAC 30.480(b).

79 AS 18.80.130(a)(2) ("the commission may order the . . . rental of the housing accommodation to the aggrieved person if it is still available, or the . . . rental of the next vacancy in a like accommodation, owned by the person charged in the accusation . . .").

80 AS 18.80.130(a)(2) (In cases involving discriminatory housing practices "the commission may award actual damages . . .").

81 AS 18.80.130(a)(2).

82 Complainant's Post-Hearing Brief at 32 (emphasis added).

engaging in discriminatory housing practices.[83] There is no evidence in the record that would indicate Mr. Walker has any intent to ignore this Commission's order.

This decision does not alter the parties' respective rights as month to month tenants. An allegation of failure to accommodate is a factual inquiry to be resolved on a case by case basis. The facts that supported a finding that a discriminatory motive was a factor in Mr. Walker's treatment of the Rosgas may or may not be present in the future.

V. RECOMMENDATION

The cats are a reasonable accommodation to alleviate the symptoms of the boys' mental disability. A motivating factor in Mr. Walker's decision to evict the Rosgas was his desire to no longer accommodate the boys' cats. This is unlawful discrimination under AS 18.80.240(2). Because the eviction was unlawful discrimination, the eviction notice is vacated; the Rosgas have a month to month tenancy and Mr. Walker is ordered to refrain from discriminatory housing practices. The recommendations are effective only upon adoption by the Commission.

DATED this 11th day of March, 2013.

By: *Signed*
Rebecca L. Pauli
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

[83] AS 18.80.130(a).