EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Felix Ossia 1144 East Johnson Street Madison, WI 53703 Complainant vs. Mariann Rush 3106 Sunrise Court Middleton, WI 53562 Respondent	INTERIM RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 1377

BACKGROUND

A complaint was filed with the Equal Opportunities Commission on March 20, 1987, charging Respondent with discrimination on the basis of race and national origin with regard to the rental of housing and the terms and conditions of the rental of housing. An investigation was conducted and resulted in the issuance of an Initial Determination concluding that Respondent had discriminated against the Complainant. Conciliation was waived by Respondent and the case was certified to hearing. The hearing was held on February 15 and 16, 1988, in the Madison Municipal Building. Complainant appeared in person and was represented by Paul B. Higginbotham. The Respondent appeared without representative.

Based on the evidence presented by the parties at the hearing, I now make the following Interim Recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Complainant, Felix Ossia, is a black male of Nigerian origin.
2. The Respondent, Mariann Rush, is a white adult female who resides in Middleton, Wisconsin. At all times relevant hereto, the Respondent owned and rented out three properties located at 202 North Few Street, 311 North Few Street and 1144 East Johnson Street, all in the City of Madison.
3. From August 15, 1986 to August 14, 1987, Respondent leased the premises at 1144 East Johnson Street to the Complainant and Kelly Burns, James Topel, Dean Krueger and Nancy Schultz. All, except for Complainant, are white and not of Nigerian origin.
4. The tenants of Respondent's other two properties during the same period were all white; none were of Nigerian origin.
5. Complainant, Burns, Topel and Krueger moved into 1144 East Johnson Street on August 15, 1986. Schultz moved in later in the month of August.
6. The Complainant first contacted Respondent, to ask about renting one of her properties, in April of 1986. He was the first person to contact Respondent about housing in the spring of 1986. Complainant had learned that Respondent had rentals available from listings at the Campus Assistance Center. He contacted Respondent because he knew and liked the neighborhood in which Respondent's properties are located, and was particularly interested in 202 North Few Street because it is across the street from where a friend was residing at the time.
7. Complainant's initial contact with Respondent was by telephone. He called Respondent to express interest in renting at 202 North Few Street. During this initial telephone conversation, Respondent stated she was compiling a list of persons interested in renting her properties and that she would form groups of people to live in her properties. Respondent took Complainant's name and telephone number and told him she would contact him as soon as she had formed a group. In the course of this conversation, Respondent perceived Complainant to have a foreign accent and asked him where he is from. Complainant stated he is from Nigeria.
8. Between April and early August, Complainant called Respondent on numerous occasions to follow up on his initial inquiry. On each occasion Respondent stated she was still forming groups and that she would contact Complainant when she had formed a group. In May, Complainant called Respondent and gave her his new telephone number. Later in May, Respondent told Complainant she had rented 202 North Few Street to a group that had formed itself and come to her, but that other properties remained available. On a number of occasions,

Complainant asked to view the properties available and was told that Respondent would only show the properties to fully formed groups. During this period, Respondent did not contact Complainant.

9. In early August Complainant again telephoned Respondent and was told that Respondent was still attempting to form groups. Complainant asked again to see the available properties. As on prior occasions, Respondent stated she would show the properties only to fully formed groups.
10. On August 11, 1986, Complainant called Respondent. She stated she might have housing available for him and that she would get in touch with him.
11. On August 13, 1986, Complainant again called Respondent, who asked him to meet her in Middleton. Complainant asked to see the housing available and was refused.
12. Complainant met with Respondent in Middleton on August 13. He was given an application form, which he filled out and returned to Respondent that day.
13. Complainant telephoned Respondent on August 14 and at this time Respondent told Complainant she definitely had a place for him at 1144 East Johnson Street.
14. Kelly Burns, a white female, contacted Respondent in July to ask about renting from her. Within a few days of her call to Respondent, she received a call from Respondent, who stated Burns could have her choice of two houses. During July, Burns and two or three other persons were shown 1144 East Johnson Street. In early August, Burns was shown 202 North Few Street; at least one other person viewed 202 North Few Street with Burns. Burns was also shown 1144 East Johnson Street again. Respondent gave Burns an application on or before August 2, 1980, and called her on several occasions in early August. On or about August 12, 1986, during a telephone conversation, Respondent asked Burns whether she objected to living with a black man and offered Burns a great deal more information about Complainant than she did about the white males to whom Respondent had agreed to rent 1144 East Johnson Street.
15. James Topel telephoned Respondent on August 7, 1986. He was shown 1144 East Johnson Street and given an application form on August 9th. On August 10, Topel and Respondent orally agreed that Topel would rent 1144 East Johnson Street from Respondent. After this agreement was made, Respondent asked Topel whether it would be a problem for him to live with a black person.
16. The premises at 202 North Few Street were rented to a group which Respondent had a hand in forming.
17. Complainant's monthly rent at 1144 East Johnson Street was one hundred ninety-eight dollars ($198.00).
18. Under the terms of Complainant's lease with Respondent, rent was to be paid on the first of each month, and a late fee of five dollars ($5.00) per day was charged for each day beyond the fifth of the month.
19. Complainant found it necessary to pay his rent for September after the fifth of the month. He advised Respondent in advance that he would be paying his rent after the fifth. On September 11, 1986, Complainant paid his September rent, together with the applicable late fee.
20. In October, November and December of 1986, Complainant paid his rent on or before the fifth day of the month.
21. Prior to mid-December of 1986, Respondent called Complainant's household infrequently. During this period, she never expressed concern or displeasure with the manner in which Complainant was paying his rent.
22. In mid-December of 1986, Kelly Burns's check for rent was returned, unpaid, to Respondent, apparently because Burns did not have sufficient funds in her checking account to pay the check. Respondent contacted Burns by telephone on a few occasions to discuss this matter and Burns paid her rent and additional fees four days after Respondent contacted her about the returned check.
23. Respondent did not contact any other members of the household regarding Burns's returned check. She did not threaten to take adverse action against Burns or the household. She did not accuse Burns of being lazy or irresponsible.
24. Tim Prescott, who is white and not of Nigerian origin, rented one of Respondent's North Few Street properties. In January of 1987, Prescott's rent check was returned, unpaid, to Respondent. Respondent contacted another member of the household on one occasion and made a few calls to Prescott. She had no other contact with the members of Prescott's household regarding this matter and did not threaten to take adverse action against Prescott or his household. She did not accuse Prescott of being lazy or irresponsible.
25. In June, July and August of 1987, Prescott paid his rent after the fifth of the month. In June, he paid his rent on the 20th; he paid July rent on the 23rd; his August rent was paid on the 14th of the month. Prescott contacted Respondent in advance to inform her he would be unable to pay his rent until after the fifth because he did not have the money. During this period, Respondent called Prescott on four or five occasions regarding his rent payment. She did not contact the other members of his household, threaten to take adverse action against Prescott or the household, or call Prescott lazy or irresponsible.
26. In May of 1987, Dean Krueger informed the Respondent he would be paying his rent after the fifth of the month. Respondent did not contact any other members of the household regarding his late payment of rent.
27. In December of 1986, Complainant left for a two-week vacation in Florida. Before leaving, he told Burns if he found a good job, he might stay in Florida. Complainant left all of his belongings at 1144 East Johnson Street when he went on vacation. While in Florida, he telephoned the house on several occasions and spoke with Dean Krueger and Krueger's girlfriend.
28. Beginning in mid-December, Respondent repeatedly called the house to discuss Complainant's January rent. She called as frequently as three times each day and spoke with Burns or Topel on each occasion. Each time,

she expressed concern that Complainant would not pay his January rent. She also stated that the other members of the household would be responsible for paying Complainant's portion of the rent and that she would have no choice but to begin eviction proceedings if the rent was not paid. As a result of Respondent's telephone calls, Complainant's housemates became anxious and the atmosphere in the household became tense. Respondent continued to make frequent calls to Complainant's household in January.

29. By the time Complainant returned from his vacation on January 5, 1987, the entire household was quite tense. He arrived after 10:00 p.m. and was immediately instructed to call Respondent. Complainant did so and Respondent insisted that he deliver his rent to her in Middleton prior to midnight. Complainant did not do so.
30. When Complainant received his paycheck on January 6, 1987, he realized he would not have sufficient funds to pay his rent until later in the month. He made a telephone call to Respondent to explain this and asked to work out some arrangement for paying his January rent. He also advised Respondent he would be paid again in two weeks. He suggested that he could write Respondent a check which she could keep until later in the month when there were sufficient funds in his account to pay the rent. Respondent refused to make any arrangements and insisted Complainant pay the rent. She told him to write her a check, and Complainant did so. Both parties knew that Complainant's account did not contain sufficient funds to pay the check at the time it was written.
31. After January 6, Respondent continued to call the household frequently. She usually spoke with Burns or Topel and discussed with them her displeasure with Complainant. She did not contact the Complainant. She referred to Complainant as lazy and irresponsible while speaking to Burns and urged Burns to encourage Complainant to obtain another job. She also suggested to Burns that she and the other household members could take legal action against Complainant and that she would provide them with any documentation they might need to take such action.
32. On or about January 21, 1987, Respondent learned that Complainant's check for rent was returned unpaid. She called Burns to inform her of this, but did not contact the Complainant.
33. Complainant paid his January rent by money order on January 27, 1987.
34. As a result of Respondent's contacts with the household in December and January, the relationship between Complainant and his housemates deteriorated. Complainant's housemates were hostile towards him and the atmosphere remained tense. By the end of January, Complainant had confined himself to his bedroom and avoided using other areas of the house when the others were present. In late January, he removed his television and stereo from the living room to his bedroom. He felt isolated and uncomfortable in the house and avoided contact with his housemates. All of this upset and depressed him.
35. The Complainant was also unable to pay some of his other bills in January due to his financial problems. His failure to pay these bills also contributed, although to a lesser degree, to the difficulties he had with his housemates.
36. Prior to January, Complainant and his housemates enjoyed a good relationship. They spent a good deal of time together in the house and often went out together.
37. Complainant's check for February rent was returned unpaid. He paid his February rent by money order within three days. Respondent made numerous calls to the household regarding this matter. As in December and January, she spoke with Complainant's housemates but not with Complainant.
38. Complainant had not paid his late fee for January by the beginning of February and those fees were paid by the other members of the household. Complainant later reimbursed them.
39. Following the return of Complainant's February rent check, Respondent required that he pay his rent by money order but continued to accept Complainant's personal checks for late fees.
40. After January of 1987, Complainant remained anxious and depressed. He also continued to feel isolated and uncomfortable in the house. His use and enjoyment of the premises was severely limited. Complainant sought and obtained counseling from Catholic Social Services and paid the sum of approximately one hundred dollars ($100.00) for such counseling.

CONCLUSIONS OF LAW

1. Complainant is protected by the Equal Opportunities Ordinances, Sec. 3.23(4), M.G.O., from discrimination in housing on the basis of his race or national origin.
2. Respondent owned and managed housing subject to the Ordinance and is a person within the meaning of the Ordinance.
3. The Equal Opportunities Commission has jurisdiction over this matter.
4. The Respondent refused to rent the premises at 202 North Few Street to Complainant because of his race and national origin, in violation of Sec. 3.23(4)(a), Madison General Ordinances.
5. The Respondent made inquiries of the Complainant regarding his national origin, in violation of Sec. 3.23(4)(a), Madison General Ordinances.
6. The Respondent advertised rental housing in a manner that expressed limitations as to race and national origin, in violation of Sec. 3.23(4)(e), Madison General Ordinances.

7. The Respondent discriminated against Complainant with regard to the terms, conditions and privileges pertaining to the rental of housing on the basis of his race and national origin, in violation of Sec. 3.23(4)(a), Madison General Ordinances.

ORDER

1. The Respondent shall cease and desist from making inquiries of prospective tenants about their race or national origin and from asking prospective tenants whether they object to living with persons of any particular race or national origin.
2. The Respondent shall pay Complainant the sum of Three Hundred Seventy-Five dollars ($375.00) as restitution for rent overpaid by Complainant.
3. The Respondent shall pay Complainant damages in the sum of One Hundred dollars ($100.00), the amount of his out-of-pocket expenses for counseling.
4. The Respondent shall pay Complainant the sum of Fifteen Hundred dollars ($1,500.00) in damages for emotional distress and deprivation of rights.
5. The Respondent shall pay Complainant the sum of One Thousand dollars ($1,000.00) in punitive damages.
6. The Respondent shall pay pre-judgment interest at the rate of seven percent (7%) per annum on the damages awarded in paragraph three (3) of this order.
7. The Complainant shall be awarded his costs and reasonable attorneys fees. Complainant shall have thirty days from the date this order is issued in which to file an application for costs and attorneys fees, together with supporting affidavits and exhibits, and Respondent shall have an additional thirty days in which to file her response to any such application.

MEMORANDUM DECISION

Complainant Has Established By A Preponderance
Of The Evidence That Respondent Discriminated Against Him
On The Bases Of Race And National Origin.

There is no dispute that Complainant was treated in a different manner then white, non-Nigerian prospective tenants and tenants. He was the first to call Respondent to ask about renting one of her properties, yet was among the last to whom she rented.

Respondent called Burns and Topel, but did not call Complainant;[1] it was always he who called her. Although she refused to show the premises to Complainant and claimed it was her policy to show them only to fully formed groups, she showed 1144 East Johnson Street and 202 North Few Street to Kelly Burns before groups had been formed. She also showed 1144 East Johnson to James Topel before a group had been formed. She told Complainant that 202 North Few Street was rented out as of May, yet showed it to Burns in early August. All of this is undisputed. It is also undisputed that Respondent rented out 202 North Few Street to white non-Nigerians, and agreed to rent 1144 East Johnson Street to Topel and Burns (and possibly Dean Krueger) before agreeing to rent to Complainant just prior to the beginning of the lease term. Respondent admits that she reacted differently to Complainant's inability to pay his rent on time and to his bounced check than she did with respect to Kelly Burns and Tim Prescott. She also testified that she believed that in the case of Complainant, it was necessary to call his household frequently to discuss his rental payments with his housemates, and that she acted on this belief. It is equally clear that she employed different and harsher tactics in dealing with Complainant than she did in dealing with white, non-Nigerian tenants.

The prima facie case method, developed for employment discrimination claims in McDonnell-Douglas Corp. v. Green,[2] is applicable to individual claims of housing discrimination. Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976), reh'g. denied. Complainant has made out a prima facie case of discrimination by showing he was treated differently than white, non-Nigerians who were similarly situated.[3] Once a complainant has made out a prima facie case, the burden of proceeding shifts to the respondent, who must articulate legitimate, non-discriminatory reasons that justify differential treatment. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981).[4] In the event the respondent does articulate such reasons, the complainant must then show, by a preponderance of the evidence, that the reasons offered by the respondent are pretextual, either directly by showing that a discriminatory reason more likely motivated Respondent or indirectly by showing the Respondent's explanation is unworthy of credence. 450 U.S. 256.

Respondent has advanced arguably legitimate, non-discriminatory reasons for her actions. However, I am persuaded that, with respect to Respondent's failure to rent 202 North Few Street and her delay in agreeing to rent to Complainant at all, she was more likely acting as she did because of Complainant's race and national origin. I am also persuaded that Respondent's stated reasons for treating Complainant differently in attempting to collect rent are unworthy of

credence. I therefore conclude, based on the evidence, that Respondent discriminated against Complainant on the basis of his race and national origin.

Respondent does not deny that in May of 1986 she told Complainant that 202 North Few Street had been rented to a group which came to her as a whole. Yet in her own testimony at the hearing, she admitted that the group that came to her was too small for the house and that she supplied two more people to make the group whole. Furthermore, Burns testified she was shown the house in August, long after Respondent told Complainant it was already rented. Such evidence casts considerable doubt over Respondent's testimony. Even if I were to accept Respondent's explanation that she was seeking to form "compatible" groups, it does not explain why whites were called almost immediately while Complainant was made to wait, or why white prospective tenants were shown Respondent's properties individually or in small groups while Complainant was told only fully formed groups would be shown the properties. Most significant, however, is the evidence that Respondent agreed to rent to Topel and Burns before renting to Complainant and asked them whether they would be willing to live with a black person before she finally agreed to rent to Complainant. Although Respondent asserts that if either Topel or Burns expressed objections to living with a black person she would have asked them to seek other housing, the timing convinces me that Respondent's testimony on this point is not credible. She had already agreed to rent to Topel and Burns and did not commit herself to renting to Complainant until Topel and Burns told her they had no objections to living with a black man. Moreover, Respondent did not agree to rent to Complainant until she found herself two persons short of a full house the day before the rental year was to begin. In my view, the evidence is convincing and leads to but one conclusion-that Complainant's race and national origin motivated Respondent to deny him housing at 202 North Few Street and to delay renting to him at 1144 East Johnson Street until it became apparent that she needed him to fill out one of her units and the other tenants had agreed to live with a black Nigerian.

Respondent attributes her unwillingness to wait for Complainant's rent in January or to work out some arrangement with regard to January's rent, as well as her choice of tactics in seeking to secure the rent from Complainant, to his poor payment record and to her gradual loss of confidence in Complainant because of his evasiveness. These assertions are undermined by the evidence that on the one prior occasion he was late with his rent, Complainant acted in a reasonable, responsible manner and paid his rent and late fees within a few days after the fifth of the month and that, prior to January of 1987, Respondent and Complainant had little contact and there was no occasion for the Complainant to be evasive or unresponsive. In addition, although Complainant had paid his rent six days late on one occasion prior to January, by the time Tim Prescott asked to be allowed to. pay his rent late for three consecutive months he had already paid his rent with a check that bounced. Prescott's prior offense at the time he sought Respondent's agreement to accept late rental payments was much more serious than the one late payment Complainant had made prior to January. Nonetheless, Respondent holds fast to her contention that Prescott had a better payment record and that that is why she was willing to wait for his rent and did not find it necessary to call Prescott or his housemates with any frequency.

Respondent is entitled to her rent and may take reasonable action to enforce her rights under the lease. However, she may not accord differential treatment to similarly situated tenants. Khawaja v. Wyatt, 494 F.Supp. 302, 303 (W.D.N.Y. 1980). The evidence establishes that in attempting to collect rents, Respondent employed much harsher tactics with respect to Complainant than she did with respect to white, non-Nigerian tenants who, like Complainant, were delinquent in paying rent and had similar payment records, and that the reasons cited by Respondent to justify such differential treatment are nothing more than pretexts for discrimination.

Victims of Housing Discrimination are Entitled
to Such Relief as Will Make Them Whole and
Effectuate the Purposes of the Ordinance,
Including Compensatory and Punitive Damages.

The ordinance provides that in the event the Commission finds discrimination has occurred "it shall make written findings and order such action by the respondent as will redress the injury done to complainant in violation of the ordinance, bring respondent into compliance with its provisions and effectuate the purpose of this ordinance." Sec. 3.23 (9)(c)2.b., Mad. Gen. Ord. It makes no reference to compensatory or punitive damages, costs or attorneys fees, or interest.[5] Both the Wisconsin Fair Employment Act, Sec. 111.39(4)(c), stats., and the Open Housing Law, Sec. 101.22 (4)(d), contain similar provisions.

The Supreme Court has construed the WFEA's relief provision to empower DILHR to award pre-judgment interest, Anderson v. Labor and Industry Review Commission, 111 Wis. 2d 245, 330 N.W.2d 594 (1983), and attorneys fees, Watkins v. Labor and Industry Review Commission, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). In both Anderson and Watkins, the court held that although the WFEA was silent with respect to specific remedies, its intent is to afford discrimination victims remedies that will make them whole and it should therefore be construed as conferring DILHR with the authority to award "make whole" relief. In Watkins, the court also explained that, by shifting the costs of

vindicating the rights created by the WFEA, an award of attorneys fees furthered another of the Act's objectives by deterring discrimination. 117 Wis. 2d 764.

The OHL is virtually identical to the WFEA in language and intent. Compare, Secs. 101.22(1) and (4)(d), stats. with Secs. 111.31 and 111.39(4)(c), stats. See also, Davis v. Piechowski, No. 8451599, L.I.R.C., Oct. 24, 1986, slip op. at 7. Accordingly, L.I.R.C. has applied Anderson and Watkins in construing the OHL's relief provision and has held that, although such relief is not expressly authorized by its language, Sec. 101.22(4)(d) does allow DILHR to award out-of-pocket expenses, costs and attorneys fees and interest, and empowers DILHR to impose forfeitures. Davis v. Piechowski, supra. In Chomicki v. Wittekind, 128 Wis.2d 188,381 N.W.2d 561 (Wis. App. 1985), the Court of Appeals upheld an award of $7,500.00 in damages for emotional distress for housing discrimination, and recognized that a victim of housing discrimination suffers the loss of civil rights and human dignity and that such a loss is compensable. Restitution of moneys wrongfully received or withheld - such as rent overcharges - has also been recognized as an appropriate remedy for housing discrimination. See, Rogers v. Loether, 467 F.2d 1110, 1121-1122, aff'd. sub nom Curtis v. Loether, 415 U.S. 189 (1974).

In Hilgers v. Laboratory Consulting, Inc., Nos. 86-CV-6488 and 86-CV-6673, Dane Co. Circ. Ct., Hon. A. Bartell, Aug. 24, 1987, the court compared the ordinance and the WFEA and found them to be similar in language and intent. Accordingly, the circuit court found the Supreme Court's reasoning in Anderson v. LIRC, supra, applicable and held that, like DILHR, the Commission is authorized to award pre-judgment interest in order to meet the ordinance's objective of making complainants whole.[6] The Commission's authority to award monetary relief had been established earlier in State ex rel. Badger Produce v. Equal Opportunities Commission, 33 Emp. Prac. Dec. 34,171 (CCH), No. 79-CV-4405, Dane Co. Circ. Ct., Hon. G. Currie, Sept. 2, 1980, aff'd, 33 Emp. Prac. Dec. 34,172 (CCH), No. 80-1906, Wis. Ct. App., Dist. IV, July 16, 1981; aff'd. by equally divided court, 33 Emp. Prac. Dec. 34,173 (CCH), No. 8-1906, Wis. Sup. Ct., Apr. 6, 1982.[7]

The ordinance attacks discrimination in employment and housing with equal vigor. It contains but one relief provision, which requires that the relief ordered redress a complainant's injuries. In view of the policies and principles articulated in Anderson, Watkins and Chomicki and the holdings of Badger Produce and Hilgers, the ordinance's mandate that complainants be made whole must be satisfied by awarding them such relief as will compensate them for all the losses and expenses they incur as a result of respondents' discriminatory acts. I therefore conclude that the ordinance should be construed to authorize restitution, compensatory damages, out-of-pocket expenses, costs and attorneys fees, and interest. I also conclude that punitive damages serve the purposes of the ordinance and may also be awarded in these proceedings.

The Equal Opportunities Ordinance was enacted pursuant to the authority conferred on municipalities by sec. 62.11(5), stats. See, Badger Produce, supra. That authority may be circumscribed under the following circumstances: 1) by an express legislative declaration which restricts, revokes or withdraws authority; 2) if state legislation in a particular area is logically inconsistent with the municipality's exercise of power; or 3) if an ordinance can be said to offend the spirit of a state law or go against the general policy of the state. Wisconsin Association of Food Dealers v. City of Madison, 97 Wis. 2d. 426, 432-33, 293 N.W. 2d. 540 (1980); See also, Solheim, Conflicts Between State Statute and Local Ordinance in Wisconsin, 1975 Wis. L. Rev. 840, 848. It is therefore necessary to determine whether the City's authority to award relief to victims of discrimination is limited by any of the foregoing factors. I find no such impediment is present here. First, the ordinance advances the policy and spirit embodied in the state's Open Housing Law, sec. 101.22-101.222, stats. Next, I discern no logical inconsistency or conflict between the Open Housing Law and this or any other ordinance affording victims of discrimination the type of relief sought by Complainant in this case. Finally, rather than revoking, restricting or withdrawing municipal authority in the field, the legislature has invited localities to enact ordinances prohibiting housing discrimination. See, sec. 101.22(1), stats. I therefore conclude that Madison is acting well within its authority in enacting and enforcing an ordinance which authorizes a municipal agency - the Madison Equal Opportunities Commission - to award victims of housing discrimination relief in the form of restitution, compensatory and punitive damages, pre-judgment interest, costs and reasonable attorneys fees.

COMPLAINANT'S MAKE WHOLE REMEDY

Through his own testimony and that of Kelly Burns and Jim Topel, Complainant has proved that Respondent's frequent calls seriously disrupted the household and limited his use and enjoyment of the premises. There is undisputed testimony that Respondent's calls created a great deal of tension in the household and engendered hostility toward Complainant among the other members of the household. It is also undisputed that because of the severely strained relations which existed between Complainant and the others, he was virtually confined to his room when the others were at home. His use of the living room and other shared areas of the home was limited to those times when none of the others were present. This evidence establishes that Complainant was deprived of the full use and enjoyment of the premises to which he was entitled under the terms of his lease. To the extent his use and enjoyment of the premises were limited, he was relieved of his obligation to pay the lease rent and was obligated to pay only the reasonable rental

value of the premises. Cf. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The evidence convinces me that the reasonable rental value was not less than fifty dollars ($50.00) below the monthly lease rent. However, the evidence does not support Complainant's assertion that the circumstances warranted a reduction of almost twice that amount. Respondent is therefore required to pay restitution in the amount of three hundred seventy-five dollars ($375.00), the amount by which Complainant was overcharged for rent from January of 1987 through the end of the lease term in mid-August.

Victims of housing discrimination may also recover damages for emotional distress and need not prove the elements of the common law tort of intentional infliction of emotional distress in order to do so. Chomicki v. Wittekind, 128 Wis. 2d at 198-199. As noted above, the injury to a tenant's dignity and civil rights occasioned by a landlord's discrimination. is compensable. 128 Wis. 2d at 200. The victim's testimony alone is sufficient to establish emotional distress. id. at 201; Crawford v. Garnier, 719 F. 2d 1317, 1324 (7th Cir. 1983); humiliation may be inferred from the circumstances, Chomicki, supra at 201; Seaton v. Sky Realty Co., Inc., 491 F. 2d 634, 636 (7th Cir. 1974). In Chomicki, the plaintiff testified that she was "devastated" and "distraught" by the defendant's discriminatory acts; that she lived in fear of the defendant and had nightmares; that she had to relocate herself and her children during winter; and that she sought help from a psychologist. 128 Wis. 2d 202. Her testimony was found sufficient to justify an award of $7,500.00 for emotional distress id. In reviewing the evidence presented here, I find that it too supports an award of damages for emotional distress, although not in the same amount. There is undisputed evidence that Complainant became anxious and agitated; that he was depressed and unhappy; and that he was isolated and felt uncomfortable in his own home. It is also undisputed that the Complainant sought out counseling. The circumstances and events described by Complainant, Burns and Topel also demonstrate that Complainant was humiliated by Respondent's conduct. In awarding Complainant the sum of one thousand five hundred dollars for emotional distress, I have considered that there is a difference in degree between the emotional distress suffered by the tenant in Chomicki and that suffered by Complainant. I have also considered that Complainant's inability to pay other bills in January and his payment of February's rent with a bad check also affected - although to a much lesser extent than Respondent's actions - the household atmosphere which contributed to his emotional distress. Complainant testified that he paid about one hundred dollars to Catholic Social Services for counseling; his damage award is therefore increased by that amount in order to ensure that he is made whole.

Punitive damages may be awarded where a party's conduct is shown to have been outrageous. Brown v. Maxey, 124 Wis. 2d 426, 431, 369 N.W.2d 677 (1985). J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, cited with approval by the court in Brown, supra, at 434, describes the two types of conduct which may subject a party to punitive damages:

> The first type is that in which the defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow his conduct. With the second type of conduct the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences. Neither form of conduct, therefore, involves mere inadvertence or what, in the traditional tort sense, would be called ordinary negligence. J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 5, sec. 5.01.

I am satisfied that Respondent knew or had reason to know that her conduct would create an unreasonable risk of harm to Complainant and that she acted without regard for his rights. Respondent's refusal to rent 202 North Few Street to Complainant because of his race; her asking other renters whether they would live with Complainant, a black man; her refusal to even discuss matters with Complainant; her repeated calls to Complainant's housemates to discuss his problems; and her use of terms such as "lazy" and "irresponsible" in referring to Complainant violated his civil rights, were demeaning and stripped Complainant of his personal dignity. In my view such conduct was outrageous. At best, it shows total disregard of Complainant's civil rights, and it calls for an award of punitive damages. I have therefore ordered that Respondent pay Complainant the sum of one thousand dollars in punitive damages.

Complainant is also seeking the equivalent of pre-judgment interest. The Commission may award such interest. Hilgers, supra. However, an award of prejudgment interest is not appropriate with respect to sums that are not subject to ascertainment through the application of some reasonably certain standard. Wyandotte Chemicals Corp. v. Royal Electric Mfg. Co., 66 Wis. 2d 577, 582, 225 N.W.2d 648 (1975). With the exception of the one hundred dollars awarded to compensate Complainant for the expenses of counseling, none of the sums awarded in this case were subject to ascertainment. Although a reasonable rental value may frequently be subject to ascertainment, the particular factors which resulted in a reduction of the rental value of the premises in this case are not susceptible to easy measurement. Neither can emotional distress nor punitive damages be easily determined. Pre-judgment interest is therefore awarded only with respect to the one hundred dollars awarded for the cost of counseling. Since no evidence has been presented

with respect to the appropriate rate of interest, I award interest at the rate of 7% per annum, the rate awarded by the Supreme Court in Anderson v. Labor and Industry Review Commission, supra.

Complainant is also entitled to recover his costs and a reasonable attorneys fee. He shall be afforded thirty days from the date below to file a petition for costs and attorney's fees, together with any supporting documents, and shall serve copies of the same on Respondent. Respondent shall then have an additional thirty days in which to file and serve any written objections to Complainant's petition.

Dated at Madison this 7th day of June, 1988.

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

---

[1]Respondent claims she attempted to reach Complainant by telephone but was unable to. In view of the evidence showing that, when determined, she made telephone calls to excess, I am unconvinced that Respondent made any attempt to contact Complainant in an effort to rent to him.

[2]411 U.S. 792 (1973)

[3]Contrary to Complainant's assertion, an Initial Determination finding probable cause to believe discrimination has occurred does not suffice to make out a prima facie case at hearing. Hearings are de novo and a complainant must produce evidence at the hearing to make out a prima facie case of discrimination. Moreover, the standard of proof applicable at the investigative stage is less stringent than that which applies at a hearing on the merits. Compare, MEOC Rule 7.1 and Marshall v. Industrial Commission, 1 Emp. Prac. Dec. 9772 (CCH), No. 120-078, Dane Co. Circ. Ct. (Hon. C. J. Malony), Feb. 23, 1967, with Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thus, the factual findings made in the Initial Determination are not necessarily grounded on the quantum of evidence that is required to prove facts at a hearing and will not substitute for the production of evidence at the hearing.

[4]Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984), cited by Complainant to support his assertion that the burden of proof shifted to Respondent once Complainant made out a prima facie case, does not support such a proposition. Betsey involved a facially neutral policy shown to have an adverse impact on blacks. The Court of Appeals held that the landlord must show a business necessity to justify such a policy, but also recognized that the McDonnell Douglas formula is the proper one to apply in disparate treatment eases such as this. 736 F.2d at 988.

[5]The ordinance does expressly provide for back pay in cases of employment discrimination.

[6]See, Hilgers, slip op. at 12.

[7]Badger Produce, supra, and State ex rel. Michalek v. Le Grand, 77 Wis. 2d 520,253 N.W.2d 505 (1977), make it clear that a municipality may, in exercising its constitutional and statutory home rule authority, afford victims of ordinance violations remedies that redress the harm done by the violation, including monetary relief. The relief awarded may deprive the ordinance violator of a property interest, so long as the violator is afforded due process. 77 Wis. 2d at 533-536.