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

Thomas W. Omachinski 2410 Hoard Street Madison, WI 53704 Complainant vs. Shirley Seireg 219 DuRose Terrace Madison, WI 53705 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, AND MEMORANDUM DECISION Case No. 1395

BACKGROUND

On October 21, 1987, Thomas W. Omachinski (Complainant) filed a complaint of discrimination with the Madison Equal Opportunities Commission, alleging that the Respondent, Shirley Seireg (Respondent), discriminated against him with regard to the rental of housing on the basis of handicap. The complaint was investigated and an Initial Determination issued January 26, 1988 found probable cause to believe Respondent had discriminated against Complainant in violation of the Madison Equal Opportunities Ordinance, Sec. 3.23, Mad. Gen. Ord. (Ordinance). The Respondent waived conciliation and the complaint was certified for hearing.

The hearing was held on December 13 and 14, 1988 before MEOC Hearing Examiner Harold Menendez. The Complainant was not present but appeared by his attorney, Clifford E. Blackwell, III. Respondent appeared in person and by her attorney, Willie J. Nunnery.

On the basis of the hearing record and the briefs submitted by the parties, the hearing examiner now enters the following Recommended Findings of Fact, Conclusions of Law and Order, and Memorandum Decision.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Thomas W. Omachinski, has alleged discrimination with respect to housing on the basis of handicap.
2. The Respondent is Shirley Seireg. She owns a five-bedroom house located at 814 West Olin Avenue in the City of Madison. In 1987 and 1988, Seireg rented the house out to Complainant, Jerry Endrizzi and, at various times, two other individuals.
3. In August of 1987, Respondent and Jerry Endrizzi agreed that Endrizzi and Complainant would rent the house from Respondent beginning September 1, 1987. The Respondent had not met Complainant at this time and did not meet him until after he moved into the house.
4. When they first discussed the rental of the house, Endrizzi asked Respondent to allow him to have a dog in the house. The Respondent had not previously permitted tenants to have dogs, but asked Endrizzi to bring his dog over so that she could observe it. Endrizzi did so and, after observing the dog, Respondent agreed to allow Endrizzi to have the dog in the house.
5. On August 14, 1987, Endrizzi and Respondent signed a lease for the rental of the house. The lease listed Endrizzi and Complainant as tenants and stated "one Irish Setter type dog allowed - see lease addendum." Paragraph 14 of the lease addendum, which states that pets are not permitted, is stricken

and replaced with the following handwritten provision: "One dog o.k." This provision is initialed, "SS 8/14/87".

6. The Complainant moved into the house in early September. He did not sign the lease executed by Respondent and Endrizzi, or any other lease.
7. Bennans Gantt also moved into the house in September, and his name was added to the lease. The Complainant subsequently telephoned Respondent and told her he did not like Gantt because of the way he (Gantt) looked at Complainant. Respondent thought this was "a little unusual." Later during his tenancy, Respondent noticed that Complainant has a large scar. This led her to conclude that Complainant is not a very stable person.
8. At some point after Gantt moved into the house and Complainant made the telephone call described in par. 7, but before October 1, 1987, Complainant informed Respondent that he had a history of chemical dependency which prevented him from securing certain types of employment. He also informed Respondent that he, too, had a dog which he wanted to keep in the house. At the time, Complainant was keeping the dog at his mother's house.
9. Seireg asked to see Omachinski's dog so that, as with Endrizzi's dog, she could observe its behavior. She also proposed to modify the lease by adding provisions which would have permitted Omachinski to have his dog on a trial basis and would have required that Endrizzi and Omachinski each pay an additional twenty-five dollars per month for the right to have a pet. The proposed new lease terms also included grooming requirements for the dogs and would have required the tenants to pay for cleaning the carpeting at the end of their tenancy.
10. Neither Endrizzi nor Omachinski agreed to Seireg's proposals. Omachinski did not comply with Seireg's request that he allow her to observe his dog and simply began keeping his dog in the house. Neither he nor Endrizzi paid any additional rent.
11. Seireg later concluded she would not allow Omachinski to keep his dog in the house. She made this determination on the basis of the following considerations: (a) Omachinski had not complied with her request that she be allowed to observe the dog; (b) Seireg had decided it was unwise to have two large dogs in the house; and (c) on one occasion when Seireg tried to enter the house with an inspector, Complainant's dog was menacing and aggressive and did not allow them to enter the house.
12. On or about October 13, 1987, Seireg served a five day quit or cure notice on Omachinski, requiring that he permanently remove the dog from the house. Omachinski complied with the notice and removed his dog from the house within the period prescribed in the notice.
13. On about October 25, 1987, Seireg offered Omachinski a month-to-month lease. That lease provided that only Endrizzi's dog was allowed in the house and contained a provision prohibiting "phone calls or vile language." Seireg included the latter term because of Omachinski's previous telephone calls to her. Omachinski did not sign that lease.
14. In November of 1987, Seireg agreed to rent to Bill Faust at a monthly rental of $185.00.
15. Omachinski continued to reside in the house until April of 1988. His monthly rent was $200.00. Endrizzi's rent was also $200.00
16. The Respondent was not motivated in her actions by her knowledge of Omachinski's history of chemical dependency.

RECOMMENDED CONCLUSIONS OF LAW

17. The Madison Equal Opportunities Ordinance prohibits discrimination in the terms, conditions or privileges pertaining to the rental or leasing of housing on the basis of handicap.
18. The Commission has jurisdiction over the Respondent and the residential rental property, located at 814 West Olin Avenue, which she owns.
19. The Complainant is handicapped within the meaning of the Madison Equal Opportunities Ordinance.
20. The Ordinance imposed no duty on Respondent to reasonably accommodate Complainant's handicap by allowing him to have a dog.
21. The Respondent did not discriminate against Complainant with regard to housing on the basis of handicap.

RECOMMENDED ORDER

22. IT IS HEREBY ORDERED that the complaint herein is, dismissed.

MEMORANDUM DECISION

The Complainant claims that the Respondent discriminated against him on the basis of handicap in denying him permission to keep a dog in the house he rented from Respondent; offering him a month-to-month lease rather than a lease for a fixed term; and charging him a different rent than that charged other tenants. The evidence, which consists of a number of exhibits and the uncontroverted testimony of the Respondent, Shirley Seireg, does establish that Complainant was treated differently, in some respects than Respondent's other tenants, and that Respondent perceived him to be handicapped. However, the evidence fails to prove that the differential treatment Omachinski complained of amounts to discrimination on the basis of handicap.

This Commission has previously held that an individual is handicapped for purposes of the Ordinance if he or she is regarded as having a handicapping condition or has a record of having had a handicapping condition. Stanton v. Dairy Equipment Co., MEOC Case No. 2540 (Ex. Dec., Jun. 9, 1982), Mem. Dec. n.l. See also, Siebert v. Backey and Associates Engineering, MEOC Case No. 2694 (Ex. Dec., July 8, 1981). In this case, the Complainant has established, through Respondent's testimony that Respondent believed he had a record of having had a handicapping condition and also regarded him as having a handicapping condition. Seireg testified that Complainant told her he had a history of alcohol and chemical dependence. She also testified that as a result of her own observations, she concluded that the Complainant is "a little unusual", and that he was not a stable person. Such evidence is sufficient to prove that Omachinski is handicapped within the meaning of the Ordinance.

Seireg's explanation for refusing to allow Omachinski to keep his dog is credible and constitutes a legitimate, non-discriminatory basis for her decision. She was concerned that two large dogs ought not be in the house and became alarmed by the behavior of Omachinski's dog on one occasion.[1] Omachinski has failed to prove her explanation is unworthy of credence or that Seireg was more likely motivated by other, discriminatory reasons, or to otherwise establish that the explanation offered by Seireg was a pretext for discrimination. He has therefore failed to satisfy the burden of proof imposed on complainants under the prima facie case analysis.[2]

As for any differential in the rent Omachinski paid and that paid by Endrizzi, the evidence is that both paid $200.00 each month and that the rent was set at the time Endrizzi and Seireg reached an agreement and signed a lease. This was weeks before Seireg met Omachinski or had reason to believe he is handicapped. The terms of Bennans Gantt's tenancy were also established before Seireg met Omachinski or had reason to believe Omachinski is handicapped. The other differential treatment on which Omachinski relies to prove his claim involves the amount of Bill Faust's rent and the length of the lease. Here, again, Seireg has presented credible testimony of legitimate reasons for the differences in treatment and Omachinski has failed to prove those reasons are pretexts for discrimination. Omachinski refused to sign a one year lease offered by Seireg after she had learned of his history of alcohol and chemical dependence. Seireg did not present Omachinski with a month-to-month lease until after he had refused to sign the year's lease she had previously offered. Finally, Seireg presented uncontroverted, credible testimony that she rented to Bill Faust in November for a lower rent because it was more difficult to find tenants at that time of year due to the nature of the rental season.

Under the prima facie case analysis, the Complainant bears the burden of proof. Where, as here, the prima facie case has been rebutted, the Complainant must prove, by a preponderance of the evidence, that the explanations offered by the Respondent are pretextual. He has failed to carry that burden and therefore cannot prevail on his claim.[3]

Dated at Madison this 2 day of May, 1989.

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

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[1]Under the prima facie case analysis, which is applicable to claims of housing discrimination, see, Smith v. Anchor Building Corp., 536 F.2d 231, 233 (8th Cir. 1976); see also, Phillips v. Hunter Trails Ass'n., 685 F.2d 184, 190 (7th Cir. 1982), once the complainant has made out a prima facie case of discrimination, the respondent must rebut that case by articulating a legitimate, non-discriminatory explanation for its actions. See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). The respondent "need not persuade the [hearing examiner] that [she] was actually motivated by the proferred reasons," id. at 254 (citation omitted), but merely set forth, through the introduction of admissible evidence, an explanation that is legally sufficient to justify a determination in favor of respondent. id. at 255.

[2]Texas Department of Community Affairs v. Burdine, 450 U.S. at 255-56.

[3]To the extent the Complainant is also claiming that the Respondent is required to and failed to reasonably accommodate his handicap, that claim is without merit. The Ordinance expressly imposes a duty to reasonably accommodate handicaps and religious beliefs in the area of employment, sec. 3.23(7)(g),(h), Mad. Gen. Ord. In the area of housing, it expressly requires accommodation of guide or service dogs owned by eyesight impaired, hearing impaired or mobility impaired individuals. sec. 3.23(4)(f), Mad. Gen. Ord. The express imposition of a duty of reasonable accommodation in these areas constitutes strong evidence of an intent not to impose a duty of reasonable accommodation in areas where the ordinance is silent as to accommodation. See, Sutherland Stat. Const. sec. 47.23 (4th Ed.) ("expressio unius est exclusio alterius"); Gottfried, Inc. v. Department of Revenue, 145 Wis. 2d 715, 721, 429 N.W.2d 508 (Wis. App. 1988); Maxson v. MEOC, No. 84 CV 4150, Dane Co. Circ. Ct., Hon. A. Bartell, Jul. 18, 1985, Mem. Dec. at 7. I therefore conclude that, except for the provisions of sec. 3.23(4)(f), Mad. Gen. Ord., which are inapplicable here, the Ordinance imposes no duty of reasonable accommodation of handicaps in housing.