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

Annette Williams c/o King Street Alternative Law Office 111 King Street, Suite 24 Madison, WI 53703 Fernando Oden c/o King Street Alternative Law Office 111 King Street, Suite 24 Complainant vs. Nancy Sinha 2702 Monroe Street, Suite 15 Madison, WI 53711 Dayton-Pinckney Assoc. 2702 Monroe Street, Suite 15 Madison, WI 53711 CMI Management Co. 2702 Monroe Street, Suite 15 Madison, WI 53711 Cameron-Michael Group, Inc. 2702 Monroe Street, Suite 15 Madison, WI 53711 Respondent	DECISION AND ORDER Case No. 1605

BACKGROUND

On or about January 19,1993 or January 20,1993, the Complainants, Annette Williams and Fernando Oden, filed a complaint of discrimination with the Wisconsin Department of Industry, Labor and Human Relations, Equal Rights Division (ERD) against the Respondents, Nancy Sinha, Dayton-Pinckney Associates, CMI Management Company and Cameron-Michael Group, Inc. The complaint alleged that the Respondents had discriminated against the Complainants in the provision of housing on the basis of race. Because the allegations of the complaint could have also been filed with the City of Madison Equal Opportunities Commission (MEOC or Commission), the complaint was cross-filed, at the Complainants' request, with the Commission. Pursuant to a Memorandum of Agreement on Work Sharing and Cooperation between the ERD and the Commission, the ERD took responsibility for processing the complaint while the Commission deferred its processing of the complaint to the ERD.

On or about January 29, 1993, the Respondents received service of the complaint from ERD. Accompanying the complaint was a letter with the signature of the MEOC's Acting Executive Director, Bettye I. Latimer,

setting forth the Commission's position regarding its responsibilities with respect to the complaint under the Work Sharing agreement.

On or about April 15, 1993, the ERD issued an Initial Determination concluding that there is probable cause to believe that the Respondents had discriminated against the Complainants. On May 5, 1993, the Respondents exercised their option to remove the complaint from ERD jurisdiction. On May 6, 1993, the ERD issued a notice dismissing the complaint to be effective in 90 days. The dismissal was effective on or about August 4, 1993.

On August 30, 1993, the Complainant filed a new complaint with the Commission alleging the same facts as they alleged in the ERD complaint: On September 27, 1993, the Respondents answered the Commission's complaint and filed a Motion to Dismiss for lack of jurisdiction. The Hearing Examiner established a Briefing Schedule and both parties submitted briefs and arguments in accordance with that schedule.

MEMORANDUM DECISION

The Respondents contend that the Commission is without jurisdiction to proceed in this matter for primarily two reasons. First, the Respondents contend that Commission Rule 6.41 requires the Commission to honor the dismissal of the ERD complaint. Second, the Respondents assert that the ERD's dismissal is binding on the Commission as a matter of res judicata. The Complainants position is that the Commission has jurisdiction and the ERD action is not controlling.

The Commission has recognized the applicability of the doctrine of res judicata in several recent decisions. Jackson v. Hellenbrand, MEOC Case No. 1482 (Ex. Dec., May 24, 1993); Benedict v. Marc's Big Boy, MEOC Case No. 21570 (Ex. Dec., June 30, 1993); Carlson v. Tucson Trails Limited Partnership et al, MEOC Case No. 1560 (Ex. Dec., September 24, 1993) This recognition, however, does not necessarily result in the conclusion that res judicata is applicable in the current case. The ERD dismissal in this matter clearly states that it was without prejudice. The use of this language indicates that the ERD, while intending the dismissal to be a final disposition of the complaint for its own administrative purposes, did not intend to preclude the Complainants from pursuing their complaint in other forums. A dismissal "without prejudice" will generally not bar institution of an action in other forums. Brunswick Corp. v. Chrysler Corp., 287 F. Supp. 776 (D.C. Wis. 1968) The Respondents recognize that the Complainants could file a complaint pursuant to the Wisconsin Open Housing Law at any time without regard to the ERD's dismissal. Equally, it is clear that the ERD dismissal does nothing to preclude the Complainants from bringing a claim based upon the same facts under the Fair Housing Act Amendments of 1988, 42 U.S.C. § 3601 et seq., or an action pursuant to 42 U.S.C. 1982. In general, if res judicata applies to an action, its preclusive effects are universal. In other words, if res judicata is to preclude the Commission from proceeding in this matter, it must also preclude the Complainants from bringing other related actions that they clearly may still bring. If the ERD's dismissal is not preclusive to all it is not preclusive to one.

Another factor mitigating against the application of the doctrine of res judicata is the lack of an adjudication on the merits. Paytes v. Koste, 167 Wis. 2d 387, 482 N.W.2d 130 (Wis. App. 1992), Patzer v. Board of Regents of University of Wisconsin System, 763 F.2d 851 (7th Cir. 1985). Wisconsin applies the federal standards with regard to the requirements for application of res judicata. Leaf v. Supreme Court of State of Wis., 979 F.2d 589 (7th Cir. 1992).

While it is true that as in Jackson v. Hellenbrand, supra, actual adjudication is not required, a fair and reasonable opportunity to adjudicate the merits is necessary. In Jackson, the Complainant settled and agreed to dismiss with prejudice his claims pending in Dane County Circuit Court. When he sought to assert his claim under the Ordinance that had been held in abeyance pending the outcome of the Circuit Court action, the Hearing Examiner found that the Complainant had voluntarily given up his rights to a hearing on the merits and that such waiver triggered the doctrine of res judicata. This is different from the situation in the pending matter. The ERD's dismissal was brought about not with the consent of or at the request of the

Complainants. The Respondents put into motion as a matter of right a process that led to the dismissal of the Complainants' complaint. The Complainant could not object to, stop or appeal from the dismissal. The dismissal occurred before there was any adjudication of the merits of the complaint. The issuance of an Initial Determination of probable cause to believe discrimination has occurred does not constitute an adjudication because it lacks required formalities such as the taking of testimony under oath and the opportunity to cross-examine witnesses and lacks necessary findings. Warrington U.S.A., Inc. v. Allen, 631 F. Supp. 1456 (E.D. Wis. 1986).

The decision not to proceed immediately to Circuit Court does not represent a waiver of the Complainants' rights. The ERD dismissal explicitly protected the Complainants' rights to pursue relief in other forums. The exercise of discretion on the part of the Complainants about which forum they might wish to use may not be used against them because they had the right to file in any of them. The Complainants are still entitled to a hearing on the merits. Kutner v. Moore, 159 Wis. 2d 120, 464 N.W.2d 18 (Wis. App. 1990).

The Commission and ERD are parties to a Memorandum of Agreement on Work Sharing and Cooperation. The provisions of this memorandum are incorporated into Rule 6.41 of the Rules of the Commission. This rule and the memorandum provide that the Commission will not act upon a concurrently filed complaint during its pendency at ERD and will be bound by ERD's final disposition of such a complaint. The Complainants contend that these provisions require the dismissal of the complaint in this case. The Complainants give too broad a reading to the provisions and reach too broad a result.

In January of 1993, the Complainant filed a complaint of discrimination with the ERD and because there appeared to be concurrent jurisdiction, the complaint was cross-filed with the Commission. When the complaint was served, a letter from the Commission's Acting Executive Director accompanied the complaint. This letter basically stated that the Commission would defer any action pending the outcome of the ERD process and that the Commission would follow any final action of the ERD. The parties would have to pursue any appeal or relief with respect to the complaint with ERD.

After the issuance of the Initial Determination concluding that there was probable cause to believe that discrimination had occurred, the Respondents exercised their rights to remove the complaint from ERD jurisdiction. The ERD issued an order on May 6, 1993, to be effective 90 days later, dismissing the complaint. Why this time period was built into the ERD order is not clear from the record presented by the parties. The Complainants did not appeal the dismissal and instead filed a new complaint with the Commission.

Under the Work Sharing agreement, the Commission deferred any action on the Complainants' cross-filed complaint pending action by the ERD. Once the ERD dismissed the complaint before it, the Commission took no action with respect to that complaint and did not permit the Complainants to appeal the dismissal or to reinstate the complaint cross-filed with it in January of 1993. In this respect, the requirements of the Work Sharing agreement and Rule 6.41 have been fully complied with. These provisions deal specifically with the processing of a given complaint and its cross-filed complaint.

Instead of seeking to reactivate the cross-filed complaint, the Complainants filed a new complaint with the Commission. This action falls outside of the contemplation of the Work Sharing agreement and Rule 6.41 particularly in light of ERD's dismissal without prejudice. These provisions are intended to apply specifically to the processing of a complaint and are not intended to attach to the issues in the complaint.

At the time that the Work Sharing agreement and Rule 6.41 were adopted, the administrative dismissal option covered only instances of complainant "misconduct" such as failure to cooperate with the investigator, failure to provide requested information or failure to attend required conferences or hearings. There were no circumstances under which a Respondent could obtain an administrative dismissal. This remained the situation until the legislature granted a Respondent the ability to remove a complaint in Wis. Stats. Sec. 101.22(6)(m). This development was not contemplated or provided for in the adoption of the Work Sharing

agreement and its incorporation into the Rules of the Commission. To now assert that these provisions intend and require the dismissal of the current complaint for the reasons stated by the Respondents is not supported by the history and intent of these provisions.

The Respondents in their Reply Brief argue that if the Complainants had filed their complaint with the Commission during the 90 day period prior to the effective date of the ERD's dismissal, then there would be no grounds for objection. However, until the complaint was actually dismissed by the ERD, the Commission was bound by the provisions of the Work Sharing Agreement and Rule 6.41. If the Complainants had filed a new complaint or sought to activate their cross-filed complaint, they would have been unsuccessful because, technically speaking, the complaint was still pending before the ERD. It was only once the ERD complaint and its cross-filed equivalent were dismissed that the Complainants could act and not be barred by the Work Sharing Agreement and Rule 6.41. Since they acted in less than a month from the effective date of the dismissal, it cannot truly be said that they delayed unreasonably in filing their new complaint.

For the above reasons, the Commission has and shall retain jurisdiction over this matter. The complaint is remanded to the Investigator/Conciliator for completion of an investigation and issuance of an Initial Determination.

Signed and dated this 23rd day of December, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

Annette Williams c/o King Street Alternative Law Office 111 King Street, Suite 24 Madison, WI 53703 Fernando Oden c/o King Street Alternative Law Office 111 King Street, Suite 24 Complainant vs. Nancy Sinha 2702 Monroe Street, Suite 15 Madison, WI 53711 Dayton-Pinckney Assoc. 2702 Monroe Street, Suite 15 Madison, WI 53711	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 1605

CMI Management Co. 2702 Monroe Street, Suite 15 Madison, WI 53711 Cameron-Michael Group, Inc. 2702 Monroe Street, Suite 15 Madison, WI 53711 Respondent	

A public hearing on the allegations of the complaint in this matter was held before Hearing Examiner Clifford E. Blackwell, III, on November 15 and 16, 1994. The hearing was held in Room GR-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard in the City of Madison, Wisconsin. The Complainants, Annette Williams and Fernando Oden, appeared in person and by their attorney, David Sparer of the King Street Alternative Law Office. The Respondents appeared by Scott Lewis and by their attorney, Harry Sauthoff, Jr. of the law firm of LaRowe, Gerlach & Roy, S.C. Based upon the record of the proceedings in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. Complainant Annette Williams is an African American woman who in November of 1992 was unemployed. Her income consisted of $677 per month in Aid to Families with Dependent Children (AFDC) and Food Stamps in the amount of $397 per month.
2. Complainant Fernando Oden is an African American man who in November of 1992 was on a leave of absence from his employment as a dishwasher for a Denny's restaurant.
3. In November of 1992, the Complainants were not married but had been involved in a committed significant relationship of long standing. Their household included 5 children ranging in age from approximately 6 months to 13 years.
4. Respondent Nancy Sinha in November of 1992 was a White woman of approximately 59 years of age. She was employed by the other Respondents to show and manage rental properties.
5. Respondent Dayton Pinckney Associates is a business partnership comprised of Scott Lewis and CC Properties, a business operated by William Cominsky. It either owned or had owned a two flat apartment building located at 24 E. Dayton Street in the city of Madison.
6. Respondent Cameron-Michael Group is a corporation organized in the state of Wisconsin in early 1992. It was the umbrella entity responsible for management and rental of 24 E. Dayton Street.
7. Respondent CMI Management was the operational entity by which Cameron-Michael Group carried out its management and rental responsibilities for properties including 24 E. Dayton Street.
8. The Complainants moved to Madison from Milwaukee in 1991. In the summer of 1992 they lived with Complainant Annette Williams' mother and brother Jerry Williams. In September of 1992 the Complainants were evicted from their residence because Jerry Williams had chosen to move to Sheboygan, Wisconsin and Ms. Williams' mother chose not to pay any rent. At this time Complainant Annette Williams was receiving the above indicated AFDC and Food Stamp payments. Complainant Fernando Oden was employed full-time as a dishwasher at a Denny's restaurant. He was paid $5.50 per hour.
9. Because of their eviction and their economic status, the Complainants became homeless. For a short period of time, they stayed at the Capitol Motel as the result of a program of the Salvation Army. By the middle of September, 1992, they had moved to the homeless shelter located on one floor of the YWCA. This building is located just off the capitol square on Mifflin Street in the city of Madison.
10. Under the terms of the program that allowed the Complainants to stay at the YWCA homeless shelter, they were limited to a stay of no more than thirty days. This period could be extended for a very short additional period under funds provided by a different housing program. These extensions were granted

only on an occasional basis and only to participants who were making good faith efforts to find other housing and who were not disruptive to the other programs of the shelter.

11. The Complainants had not been able to find housing prior to the end of the usual thirty day period. They requested and were granted a short extension so that they could stay at the shelter until November 1, 1992.
12. The Complainants could not find housing by November 1, 1992 and had to leave the shelter. The Complainants used their admittedly meager resources to obtain housing at two different low cost motels in the Madison area. This was to be a very short term option for the Complainants because they only had sufficient funds to stay in these motels until approximately November 13, 1992.
13. The Complainants could not find housing before their funds were exhausted on November 13, 1992. They spent the night of November 13, 1992 driving around Madison with their children in the back seat. The next day, the Annette Williams' younger brother, Daniel and his girlfriend, Lisa Gilbertson, permitted the Complainants and their children to move into their apartment in Sun Prairie.
14. The apartment of Daniel Williams and Lisa Gilbertson was a three bedroom apartment already occupied by two adults and 4 children. The rent was subsidized and the occupancy was to be limited to those persons whose names appeared on the lease. Permitting additional persons to occupy the apartment could jeopardize the tenancy of Daniel Williams and Lisa Gilbertson.
15. The Complainants eventually secured their own housing as of January 1, 1993. They signed a lease for this apartment between Christmas and New Year's. Fernando Oden returned to his position at Denny's on approximately January 6, 1993. Though he only remained in that position for approximately two weeks, his subsequent employment paid him more.
16. On or about November 9, 1992, the Complainants saw an advertisement for 2 apartments in a rental booklet called "Start Renting." The advertisement indicated that there was one 4 bedroom unit and one 5 bedroom unit available. Both units were to rent for $675 per month and were to include all utilities except for electricity. The advertisement gave a telephone number that was for the Respondent CMI Management.
17. The Complainants discussed the advertisement and decided that either apartment would meet there size requirements and that they could afford the rent. Annette Williams called the listed telephone number and was told that the 4 bedroom apartment was available and the rent was $550 per month but that utilities were not included. The person with whom Annette Williams spoke did not know anything about a 5 bedroom apartment. Williams made an appointment to see the apartment the next day at 1:30 p.m.
18. Annette Williams and Fernando Oden appeared at the address of the apartment in question at approximately 1 p.m. The address was 24 E. Dayton Street. Williams and Oden waited in their car for the rental agent to appear. They noticed a woman waiting in another car not far from their car. As the time got closer to the appointed time, Williams left the car to wait on the apartment steps. Oden remained in the car because they had brought their 6 month old daughter along with them. After several minutes, the person who the Complainants saw in the other car got out and approached Williams. Oden got out of their car when he saw the person approach Williams.
19. Though the rental agent did not identify herself by name, it is agreed that the rental agent was Nancy Sinha. Sinha led the Complainants into the building and showed them the apartment on the first floor. Apparently, Sinha considered this to be a four bedroom apartment. She asked if the Complainants would like to see the 5 bedroom apartment upstairs. They said yes and Sinha showed them that apartment. Sinha did not indicate that either apartment was unavailable. She told the Complainants that the 4 bedroom apartment would rent for $650 per month without utilities. She stated that the 5 bedroom apartment would rent for $675 and would include all utilities except electricity.
20. 24 E. Dayton Street is a two flat building with one apartment downstairs and one upstairs. Each apartment can be used as either a 4 or 5 bedroom apartment. In the past each apartment has been rented as both a 4 and 5 bedroom apartment.
21. During the showing of the apartment, Sinha asked Williams if she worked. Williams stated that she did not but that she received AFDC and Food Stamps. Williams also indicated that Oden was employed but that he was on a leave of absence. Sinha did not inquire about the amount of Williams' grants or

Oden's monthly income. Sinha asked if Williams received funding from any low income assistance programs. Williams said that she was on the waiting list for Section 8 but that she was not yet receiving assistance under this program and would not likely receive benefits for another year. Sinha indicated that Williams should have her Section 8 counselor call Sinha. Williams attempted to explain that she did not yet have a counselor because she was only on the waiting list and not yet on Section 8. Sinha did not seem to accept what Williams told her.

22. Williams and Oden were very interested in renting either of the apartments shown to them by Sinha. Williams asked Sinha for an application or for information about how to apply to rent one of the apartments. Sinha instead of giving Williams an application told her to have her Section 8 counselor give her a call. Sinha did not tell Williams that she and Oden would have to go to the rental office on Monroe Street to complete an application before they could be considered. Sinha did not offer the Complainants an application or provide the Complainants any information about how to apply to rent an apartment.
23. The apartment showing ended outside the building when Sinha turned away from the Complainants without indicating to the Complainants either that she had another appointment or that she could provide no further information. Sinha went to assist a White couple who had come to view the apartment.
24. The Complainants were confused and dismayed by Sinha's treatment of them. They felt that Sinha had been rude and had not given them an opportunity to be considered for the apartment. They were upset because they believed that they could afford the apartment and the apartment met their needs. The Complainants discussed the incident for the remainder of the day. They were particularly concerned because of their dwindling resources and their immediate need for housing.
25. The next day, the Complainants contacted the office administering the Section 8 housing voucher program to ascertain whether the office would contact Sinha on their behalf. They were told that the office could not and would not work on their behalf until they had been accepted into the program. The Complainants called the Respondent's office to pass this information on to Sinha. Sinha was unavailable so the Complainants left their name and number for Sinha to call them back. Sinha did not return their call.
26. The Complainants continued to be upset and to believe that Sinha had treated them unfairly. They contacted the Fair Housing Council of Dane County (FHCDC) for information about their rights and options. The FHCDC is an independent organization promoting fair housing within its service area. The FHCDC counsels individuals about fair housing, and conducts case-oriented and pattern tests to identify discriminatory treatment with regard to housing. The FHCDC also provides training to individuals and groups about fair housing.
27. In addition to assisting the Complainants with preparation of a complaint of discrimination to be filed with the Wisconsin Equal Rights Division (ERD), the FHCDC advised the Complainants to conduct an informal "test" to see if the treatment received by the Complainants on the previous day might have been discriminatory.
28. The Complainants asked Danny Williams, Annette Williams' brother, and his partner, Lisa Gilbertson, to separately call for information about the apartments seen by the Complainants the day before. Danny Williams is an African American. Lisa Gilbertson is White. Danny Williams and Lisa Gilbertson agreed to call the Respondents' office. At the time in question herein, Gilbertson was in the hospital suffering from complications to a high risk pregnancy.
29. Though the record is not entirely clear, it appears that Danny Williams was given different and less favorable information about the availability of the apartments than was Gilbertson. Danny Williams speaks in a style that could be considered to be identifiably African American. There is no indication that either Danny Williams or Gilbertson spoke directly with Sinha.
30. The Complainants did not learn from Sinha or anyone else how to apply to rent either of the apartments they saw. They continued to seek housing. The subsidy that allowed them to stay in the motel referenced above, ran out. Before they were able to find new housing, the Complainants spent at least one night in their car with their children. As a stopgap measure Danny Williams and Lisa Gilbertson permitted the Complainants to move into their apartment. In addition to placing many more people in

an apartment than the apartment was intended to house, this arrangement placed Danny Williams and Lisa Gilbertson in danger of eviction. During this period of housing crisis, the Complainants worried about the possibility of losing custody of their children because of their lack of housing.

31. The Complainants, prior to meeting with Sinha, were very nervous and upset about their housing circumstances. They were concerned about finding housing before their grants ran out and finding housing for their family so that they could stay together. This condition continued after they met with Sinha and became convinced that they had been the victims of discrimination. In addition to the stress generated by their homeless condition, the Complainants suffered emotional distress and injury as a result of the Respondent's conduct in depriving them of the opportunity to apply for the two apartments that they had seen.
32. Annette Williams' emotional distress manifested itself through sleeplessness, worry and uncharacteristic conduct. Her distress was observed by others including Fernando Oden, Danny Williams and Deborah Percival.
33. Fernando Oden's emotional distress manifested itself through worry, sleeplessness and feelings of ill health. These conditions were observed by Annette Williams, Danny Williams and Deborah Percival.
34. As part of the services offered the Complainants by the FHCDC, it conducted testing to determine if the Complainants had been the victims of discrimination. Testing is a known method for attempting to verify differential treatment of prospective renters and the reasons for that treatment. Testing generally involves sending matched pairs of applicants to a rental site. The matched applicants are given identical characteristics except for the characteristic for which the test is being conducted. If race is the suspect characteristic, testers of different races would be sent in approximately the same time period but matched for other factors such as income, family or sex.
35. The FHCDC attempted to conduct two tests of the Complainant's allegations during the middle of November, 1992. The first test failed because one of the testers with the critical characteristic could not make the scheduled appointment. The second test was completed.
36. In the second test, tester Jeweline Wiggins, an African American, was paired with Ann Lehman, a White. The test was constructed for the characteristic of race. Wiggins contacted Sinha for an appointment. At the scheduled time Wiggins parked her car in the vicinity of the apartments and walked to the front of the building. Wiggins noted an older White woman who she later identified as Sinha observing her from a parked car and then pulling away. Wiggins waited but Sinha did not appear. Wiggins called Sinha for a second appointment. Again Sinha failed to appear. On a third occasion, Wiggins went to the offices of the Respondents and questioned Sinha about the previously missed appointments. Sinha presented no good excuse for missing the prior appointments. Sinha then showed Wiggins the apartment. On her test narrative completed after her portion of the test was ended, Wiggins indicated that she had not been given an application but that Sinha seemed moderately friendly. No information was offered about how to apply for an apartment.
37. Lehman, the White tester, experienced no difficulty with regard to her appointment. While she was not offered an application, she was provided information about how to apply for an apartment.
38. Sinha would often wait in her car and observe prospective tenants prior to a showing.
39. It was the Respondents' practice not to provide rental applications except through the office. In this manner, the Respondents could better identify the number of applications for a given unit.
40. The Complainants' race was a factor in Sinha's treatment of them and her failure or refusal to give them information about how to apply for an apartment with the Respondents. The record does not clearly indicate whether the Complainants would have been successful applicants had they been permitted to apply for either of the apartments shown to them. Sinha did not possess sufficient information at the time of her interview to exclude the Complainants as applicants. The Complainants' source of income does not appear to have been a factor in Sinha's decision.
41. Sinha's treatment of the Complainants was the proximate cause of emotional distress and injury beyond that which the Complainants had already suffered as a result of being homeless.
42. Annette Williams can be made whole for her emotional distress by the payment of $7,500.00.
43. Fernando Oden can be made whole for his emotional distress by the payment of $7,500.00.
44. The Complainants suffered no out-of-pocket loss as a result of Sinha's treatment.

45. The Respondent and its employees could benefit from training on issues related to fair housing and the requirements of the ordinance and other fair housing laws.
46. At all times relevant to this complaint, Sinha was an agent of the other Respondents and working under their supervision.
47. At all times relevant to this complaint, the Complainants were represented by attorney David Sparer. Sparer's customary hourly rate is $100.00 per hour.
48. Sparer reasonably expended 86.1 hours in the representation of the Complainants. This time was necessary and does not appear to represent any duplication of time or effort.
49. The Complainants or their attorney spent $433.46 in costs in order to pursue this complaint. These costs were necessary and are not duplicative.
50. In order to be made whole, the Complainants are entitled to receive reimbursement for their reasonable costs including attorney's fees necessarily expended in pursuing this complaint.

CONCLUSIONS OF LAW

51. Annette Williams is an African American person and as such is a member of the protected class "race."
52. Annette Williams at all times relevant to this complaint was a recipient of AFDC and food stamps and as such was a member of the protected class "lawful source of income."
53. Fernando Oden is an African American person and as such is a member of the protected class "race."
54. At all times relevant to this complaint Fernando Oden had no actual income and received no form of support from any governmental or other source. Under these circumstances, Oden was not a member of the protected class "lawful source of income."
55. At all times relevant to this complaint, Nancy Sinha was an agent for a person entitled to rent a housing unit covered by the ordinance, located at 24 E. Dayton Street, and was subject to the coverage of the Equal Opportunities Ordinance, Section 3.23 Madison General Ordinances (the ordinance).
56. At all times relevant to this complaint, Dayton Pinckney Associates owned or managed property subject to the coverage of the ordinance located at 24 E. Dayton Street and as such was subject to the requirements of the ordinance.
57. At all times relevant to this complaint, CMI managed or was an agent of the owner of a property covered by the ordinance located at 24 E. Dayton Street and as such was subject to the requirements of the ordinance.
58. At all times relevant to this complaint, Cameron-Michael Group managed or was an agent for the owner of property at 24 E. Dayton Street, a property covered by the ordinance, and as such was subject to the requirements of the ordinance.
59. The Respondents discriminated against the Complainants in violation of Section 3.23(4)(a) M.G.O. by making a rental unit unavailable to the Complainants, at least in part on the basis of their race.
60. The Respondents did not discriminate against the Complainants in violation of Section 3.23(4)(a) on the basis of their lawful source of income by making a rental unit unavailable to the Complainants.
61. In order to effectuate the purposes of the ordinance to make the Complainants whole, they are entitled to an award of damages for emotional distress.
62. In order to effectuate the purposes of the ordinance to make the Complainants whole, they are entitled to receive an award of their actual costs including a reasonable attorney's fee.
63. In order to effectuate the purposes of the ordinance to prevent discrimination, the Respondents may be required to attend at their own cost training related to fair housing and issues raised in this complaint.
64. The Respondents other than Sinha are liable for the actions of Sinha on the basis of respondeat superior.

ORDER

65. The Respondents shall cease and desist from discriminating against prospective tenants on the basis of race or any other basis protected by the ordinance.

66. The Respondents shall not retaliate against the Complainants or any person or entity for the exercise of rights protected by the ordinance in connection with the filing or processing of this complaint.
67. The Respondents shall pay to Annette Williams the sum of $7,500.00 no later than 30 days after this order becomes final or within such period of time to which Williams agrees in writing.
68. The Respondents shall pay to Fernando Oden the sum of $7,500.00 no later than thirty days after this order becomes final or within any period to which Oden agrees in writing.
69. The Respondents shall pay to the Complainants and David Sparer, jointly, the sum of $9,043.46 in costs and attorney's fees.
70. The Respondents shall pay for and receive training on the subject of fair housing and the requirements of the ordinance from the Fair Housing Council of Dane County or an equivalent agency. This training shall be completed within 120 days of the order in this matter becoming final. Training shall be required for all managers and any employee who regularly has contact with potential renters.

MEMORANDUM DECISION

During the summer of 1992, the Complainants, Annette Williams and Fernando Oden, experienced what has become an all too common crisis for the poor in the United States, homelessness. This crisis was exacerbated when the Complainants experienced the sting of discrimination just as they found housing for which they believed themselves to qualify.

The Complainants are African Americans who in November of 1992 had an extremely limited income. Williams did not work outside of the home but received Aid to Families with Dependant Children (AFDC) in the amount of $677 per month and food stamps in the amount of $397 per month. Her total grant amounted to approximately $1074 per month. Because of the crisis in their housing, Oden followed the advice of a housing counselor and took a leave of absence from his dishwashing job at a local Denny's restaurant. Oden's income was not replaced while he was on his leave of absence but his job was being held for him by his employer. He customarily received $5.50 per hour.

The Complainants were having difficulty finding housing because of the combination of a large family and a poor credit history. The Complainants had 5 children ranging from approximately 6 months old to 13 years. They had exhausted their period for staying at the YWCA family transitional housing shelter and were close to exhausting the funds that permitted them to stay at either of two low cost motels. They were frightened by the potential consequences of failing to find housing for their family. It is with this background that the Complainants responded to an advertisement for one or more apartments located at 24 E. Dayton Street.

24 E. Dayton Street on November 10, 1992 was a two flat building with both apartments available for rent. The building was apparently owned by Dayton Pinckney Associates. Cameron-Michael Group was engaged to manage the property and to act as rental agents. CMI Management performed the actual rental and management services for the Cameron-Michael Group. Sinha was a rental agent apparently employed by CMI Management.

The Complainants responded to an advertisement that they saw in a local rental booklet on November 9, 1992. They inquired about both apartments but were able to obtain information only about the 4 bedroom unit. The person to whom the Complainants spoke claimed to have no information about a 5 bedroom unit being available at the same address. The Complainants were quoted a price of $550 per month exclusive of utilities. They arranged for a showing of the property for the next day. Apparently Sinha was the rental agent with responsibility for the Dayton Street apartments. An appointment was set for one o'clock on November 10, 1992. It is unclear whether the Complainants or Sinha arrived first for the appointment. However, the Complainants were the first to reach the front of the building. Williams actually stood at the front while Oden waited in the car with their youngest child. Sinha had been observing them from her car and went to join Williams after a short wait. Oden had observed Sinha in her car and joined Williams and Sinha after Sinha approached Williams.

Sinha showed the Complainants the downstairs unit. This was considered to be a 4 bedroom apartment but had been rented as a 5 bedroom unit in the past. After some discussion, Sinha showed the Complainants the upstairs unit. Sinha quoted rental terms as follows: downstairs $600 per month rent plus all utilities, upstairs $675 per month including all utilities except electricity. Williams was excited about both of the units. They provided sufficient space for her large family at a rental rate that she believed the family could afford. Sinha was helpful and made suggestions about how space could be altered to accommodate the needs of the Complainants and their family.

Sinha asked Williams if she worked. Williams indicated that she did not but that she received Aid to Families with Dependent Children (AFDC) and food stamps. Sinha did not inquire about the amount of Williams grant. Sinha asked if Oden worked. Williams told her that Oden was on a leave of absence from his job until they could find housing. Sinha made no further inquiries about Oden's employment status or anticipated income.

Sinha next asked Williams if she received a housing grant from the Section 8 program or other low income housing assistance program. Williams indicated that they had applied for the Section 8 program but had not yet been accepted and were not likely to be eligible until the next year. Sinha requested that Williams have the Section 8 office call Sinha. Williams indicated that she could not do this because she had not yet been accepted into the Section 8 program. While this discussion was going on, Williams also indicated her interest in the units and asked Sinha how she and Oden could apply to rent either apartment. Instead of providing the information to Williams, Sinha again stated that Williams should have Section 8 call Sinha.

Sinha then abruptly terminated her conversation with Williams to assist other prospective tenants who had arrived at the building. These prospective tenants were White. Sinha does not contradict Williams' version of these events because Sinha has no recollection of the details of her meeting with Williams and Oden.

Williams and Oden left the area confused and frustrated about not knowing how to apply for the units. They believed that they could afford the unit and were anxious to be considered. They discussed their problems the remainder of the day. Williams contacted the Section 8 office to see if someone would contact Sinha as Sinha had requested. Williams' understanding that nothing could be done until she had been accepted into the program was confirmed. Williams tried to communicate this fact to Sinha. Williams called Sinha's office but Sinha was either not there or was otherwise unavailable. Williams left her name and number but did not receive a call back from Sinha.

The Complainants were very upset and talked about the missed opportunity with each other and with family and friends. In response to a suggestion, the Complainants contacted the Fair Housing Council of Dane County (FHCDC). They were advised to conduct an informal test to see if discrimination might have been involved. The Complainants sought the assistance of Williams' brother, Danny, and his partner, Lisa Gilbertson. Gilbertson was in the hospital as the result of complications to a high risk pregnancy. Danny Williams is an African American who speaks with a strong accent. Gilbertson is White and sounds White. Danny Williams and Lisa Gilbertson both called CMI Management's office and received different information from that given to the other.

The experience of Gilbertson and Danny Williams further upset the Complainants. They continued to worry about their housing predicament and their treatment by Sinha. They continued to work through the FHCDC to file a complaint of housing discrimination and gather evidence in support of their claim.

On November 13, 1992, their funds for staying at the motel were exhausted. They spent that night driving around Madison with their family in the car. They were extremely nervous and worried that their children might be taken from them because of their lack of housing. On November 14, 1992, Danny Williams and Lisa Gilbertson agreed to have the Complainants and their family live with them on a limited basis. Williams and Gilbertson's apartment was already crowded because of their family needs. Having the Complainants and

their family join them created a risk that Williams and Gilbertson could lose their apartment for violations of the lease. Conditions in the apartment were noisy and uncomfortable.

The Complainants stayed with Williams and Gilbertson until approximately the first of January, 1993. The Complainants signed a lease between Christmas and New Year's to begin on January 1, 1993. The week after the Complainants moved into their new apartment, Oden went back to work as a dishwasher at Denny's. After a short period he left that job for a higher paying one.

The primary allegations of the complaint are not that the Respondents refused to rent an apartment to the Complainants because of their race and lawful source of income. Rather, the Complainants allege that an apartment was made otherwise unavailable to the Complainants on the basis of their race and lawful source of income by denial of information about how to apply for either of the units at 24 E. Dayton Street. It is not clear on this record whether the Complainants would have qualified for the apartment or not but they were not given the opportunity to try for the apartment in the first place.

The Respondents defend against the allegations of the complaint with several arguments. Their primary contention is that the Complainants would not have met the Respondents' legitimate, nondiscriminatory rental standards and would not have received an apartment in any case. Second, the decision not to inform the Complainants about how to apply was Sinha's and represented her legitimate, nondiscriminatory estimate of the Complainants' rental chances. Third, there are various business factors that make it extremely unlikely for the Respondents to have wished to discriminate against the Complainants particularly on the basis of their race.

The first issue to be addressed by the Hearing Examiner is to what extent do Sinha's actions bind the remaining Respondents. It is clear from this record that the only contact between the Complainants and the Respondents was through Sinha. The Complainants never got to the stage in the process where anyone else involved with any of the Respondents had any knowledge of their situation. Sinha was an employee of CMI Management and possibly of the Cameron-Michael Group, though the latter fact is not certain. CMI Management was the operating entity that was responsible for the management and rental portion of the Cameron-Michael Group's business. At a minimum, there is a direct connection between Sinha and CMI Management and the Cameron-Michael Group. The Cameron-Michael Group is the management and rental agent for Dayton Pinckney Associates for two properties owned by that partnership, 18 E. Dayton Street and 24 E. Dayton Street. Scott Lewis is one of the partners in Dayton Pinckney Associates and is the principal manager in the Cameron-Michael Group. The contractual and management connection between the Cameron-Michael Group and Dayton Pinckney Associates extends liability based upon the actions of Sinha, CMI Management's employee, to Dayton Pinckney Associates. Such extension of liability is consistent with the broad remedial purposes of the ordinance to prevent and redress discrimination in housing. This extension of liability would take place even where those remote from the act of discrimination would not have approved the act and specifically opposed discrimination. Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985). While it may not have been within Sinha's authority to discriminate against applicants, she was acting within the scope of her authority to show apartments and to take steps to rent and manage properties for which CMI Management was responsible.

The parties have differing opinions over the elements necessary to prove a prima facie case for the allegations of this complaint. Essentially, the dispute arises from the Respondents' contention that the Complainants must show that they were otherwise qualified to rent the apartment. In the Respondents' view, failure of this element prevents a recovery on the part of the Complainants.

In support of its position, the Respondents cite Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976). This case falls short of the desired position because it states the elements for a refusal to rent case, not those for a case where the Respondent has not permitted the Complainant to even apply for an apartment. More applicable are the authorities cited by the Complainants. Havens Realty Corp. v. Coleman, 445 U.S.

363 (1982), Wheatley Heights Neighborhood Coalition v. Jenna Resales, 429 F. Supp. 486 (1977). These cases take a somewhat more flexible approach to the statement of the prima facie case.

It is the Hearing Examiner's opinion that it would make no sense to require the Complainants to demonstrate that they were otherwise qualified to rent one of the apartments at 24 E. Dayton Street because the Respondents had no idea of the Complainants' qualifications when through Sinha they determined that the Complainants were not suitable candidates. If to escape liability, one need only make decisions on scanty information, the protections of the ordinance would be illusory.

The intent of the ordinance is to open housing opportunity to all persons regardless of their status as a member of a protected class and to encourage landlords to make decisions on the basis of relevant information. To limit the prima facie case to only those who clearly meet certain guidelines eliminates protections for those who are at the fringes of the applicant pool. This would be contrary to the broad remedial scheme and intent of the ordinance.

In order to establish a prima facie case for the elements of this complaint, the Complainants must establish:

1. They are members of a protected class.
2. There was an available unit when the Complainants were looking.
3. The available unit was made unavailable to the Complainants.
4. The unavailability of the unit to the Complainants resulted, at least in part, from their membership in one or more protected classes.

There is no question that the Complainants are members of one or more protected classes. They are both African Americans. Sinha met them on November 10, 1992. She observed them and knew that they were African Americans. Sinha knew that Annette Williams did not work outside of the home and relied on AFDC and food stamps for her income. Sinha was aware of the Complainants' economic status because she asked Williams and Williams freely gave Sinha the information.

There was at least one unit available when the Complainants saw the apartment on November 10, 1992 and possibly two. The record contains a lease entered into between Lynn K. Pilla and Sandra L. Mainguth and CMI Management dated November 24, 1992 for unit 1 at 24 E. Dayton Street though a partial security deposit was taken on November 10, 1992. It seems likely that the unit had been spoken for prior to the Complainants' showing though that fact is not disclosed on the record. The other unit remained available until some time in early December.

The available unit or units were made unavailable to the Complainants. Sinha knew that the only procedure for applying for an apartment with CMI Management was to go to the office on Monroe street and complete an application there. Despite Williams asking for this specific information, Sinha did not provide it to Williams. Instead, Sinha stated that the Complainants should have someone from the Section 8 housing voucher program call Sinha. Sinha never provided the Complainants with any information about how to apply to rent an apartment.

The effect of Sinha's conduct was to assure that the Complainants could not rent an apartment. There was a procedure for applying and the Complainants were not given the necessary information about how to apply. This effectively made the apartment unavailable to the Complainants.

The final element, as is usually the case, is the most difficult to prove. Seldom does one who discriminates use racial epithets or make reference to one's race or other characteristics when refusing to afford them equal treatment. Today discrimination is generally demonstrated through reference to circumstantial evidence. This case is no different.

There are several facts that help to create an inference that the Complainants' adverse treatment resulted, at least in part, from their race. First, Sinha's conduct on November 10, 1992 demonstrated at least a certain degree of insensitivity. She was speaking with the Complainants about Section 8 programs when apparently the next prospective tenants appeared on the scene. The Complainants as previously noted are African American. The prospective tenants, newly arrived, were White. Second, both of the units at 24 E. Dayton Street were rented to Whites. Third, Sinha failed or refused to return the Complainants' telephone call the next day.

These facts taken individually are not dispositive of the issue of discrimination. However, when combined with the evidence relating to a housing test conducted by the FHCDC, the inference becomes much stronger. The Complainants had sought advice and assistance from the FHCDC when they first suspected that discrimination might have been behind their treatment on November 10, 1992. As part of the assistance provided the Complainants, the FHCDC arranged to attempt to demonstrate discriminatory conduct through testing.

Testing is a well recognized technique for comparing the treatment of different hypothetical applicants for housing. Volunteers are assigned similar characteristics except a single characteristic which is the subject of the test. If testing for multiple characteristics, a number of testing pairs may have to be used. If one is testing for race, the testers are chosen for and assigned similar background characteristics such as level of income, family composition and size, sex and age. In this way, the test attempts to isolate the characteristic in question. In this example, one tester sent out would be White and the other Black.

Testers are often given tape recorders to make a record of their interaction with the subject of the test. In this respect, all variables are kept as similar as possible. If one had met with a specific rental agent, all of the tested meetings should be with the same rental agent. Once the testers have conducted their field activities, they prepare a written narrative of their experience. The testers are not told of the reasons for the test or for what characteristic they are being used. After all the field tests have been performed and narratives submitted, a person in the role of a test coordinator reviews the materials to determine whether there has been a difference in the treatment afforded the different testers. If there has been a difference in treatment, the materials are reviewed to determine if the difference in treatment was as a result of the tested characteristic. The final results of the test are reported to the appropriate person. Who that person is will vary depending upon the purpose of the test. Given the subtleties of discrimination, testing is sometimes the only good measure of discrimination.

In the present case, two tests were attempted. The first test must be considered a nullity because one of the testers was unable to make a scheduled appointment. The other testers made their appointments but the test coordinator was left without a comparison of treatment. The second test was intended to test for the characteristic race. It was completed with some difficulty.

An African American tester, Jeweline Wiggins, and a White tester, Ann Lehmann, were assigned to meet with Sinha. Wiggins called the provided number and made an appointment to see the apartment. She arrived perhaps a few minutes late and went to the front door. She saw an older woman waiting in a car. This car pulled away shortly after Wiggins began waiting at the front door. Wiggins waited for a reasonable period of time before leaving. No one else appeared to show the apartment to Wiggins.

Wiggins called for a second appointment explaining the circumstances. No one appeared for the second appointment. Wiggins went directly to the Respondents office on Monroe street to complain and to gain an appointment for a showing. She met with a person who was later identified as Sinha. They went to see the remaining unit at 24 E. Dayton Street.

Wiggins reported in her narrative and testified at hearing that Sinha was generally helpful during her time with her.

The White tester, Ann Lehmann, experienced no problems obtaining a showing of the apartment. She, too, was treated favorably by Sinha.

In addition to the obvious problems actually getting an appointment, the test narratives demonstrate a difference in information provided by Sinha. Lehmann's form notes the process for obtaining an application. Wiggins application contains no such notation. It is true, as noted by the Respondents in their brief, that both Wiggins and Lehmann were treated similarly in that neither was given an application to fill out, this is not the important question for this case. The difference in information provided about the application process is the critical difference.

The record does not clearly indicate whether Wiggins asked about the process. Even if one assumes that she did not, Lehmann's experience is clearly different from that of the Complainants. They specifically asked for similar information but did not receive it.

Under the circumstances of the test and the surrounding circumstances, there is sufficient evidence in the record for a reasonable person to conclude that the Complainants' race was, at least in part, the reason for their treatment.

The Commission has used the in part test instead of the motivating factor or sole reason tests for many years. Federated Rural Electric Insurance Co. v. Kessler, et al., No. 84-552 (Wis. App. 1985). This test was derived from Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540, 151 N.W.2d 617 (1967). Under this theory, so long as discrimination is any significant part of a decision, the decision violates the ordinance even if joined with other legitimate, nondiscriminatory factors.

At hearing, Wiggins expanded upon her testing experience as reflected in her test narrative. Primarily this testimony related to her experience on her first visit to 24 E. Dayton Street. In that testimony, Wiggins stated that the woman she saw in the car made eye contact with her before driving away. Wiggins later identified the woman in the car as Sinha.

The Respondents strongly object to this testimony of Wiggins. The substance of this testimony is contained in a written statement dated approximately 1 and 1/3 years after the test. The Respondents contend that Wiggins testimony and memorandum reflect a bias on her part and are inherently unreliable due to the passage of time.

The Hearing Examiner is not particularly troubled by Wiggins' testimony. It is true that many times this type of latter day enhancement may come from a fresh view of circumstances in light of additional knowledge received after the fact. As such, one must examine the evidence, circumstance and testimony critically. Wiggins' testimony is generally consistent with her notes in her narrative and Sinha's own testimony. Wiggins noted in her narrative the presence of a person loosely fitting the description of Sinha. She also noted the departure of that person. Though Sinha did not drive away on November 10, 1992, she stayed in her car and observed Annette Williams before leaving her car to meet with Williams. Sinha herself testified that she would sit in her car and observe prospective tenants. The real new information in Wiggins testimony is her assertion that she made eye contact with Sinha before Sinha drove away. The clear implication of Wiggins' testimony is that Sinha knowingly snubbed her because of her race.

The problem with this particular assertion is that it is really not possible for the Hearing Examiner to know whether eye contact was made or not. That portion of Wiggins' testimony is inconsistent with the experience of the Complainants. Sinha may have sat in her car and observed Williams but she did not drive away. Because of this difference, the Hearing Examiner is not inclined to find that Sinha intentionally snubbed Wiggins. However, the practice of observing prospective tenants before meeting them is subject to question as a method of discriminating against individuals.

The record does not support a finding that Sinha was motivated by the Complainants' lawful source of income. One of the two renter's of unit 1 at 24 E. Dayton Street source of income is listed as Social Security Disability Income (SSDI). As with the Complainants AFDC, SSDI is a form of income that is subject to stigmatization. Given the fact that the Respondents rented a unit to a recipient of SSDI in the same building as the Complainants were interested in is an indication that the Respondents might not have been so concerned about AFDC.

The Complainants do not really argue in support of a finding on this ground. There are distinctions that could be made between the nature of SSDI and AFDC benefits that might support a finding of discrimination. However, the Complainants do not attempt to make them.

In response to the Complainants' prima facie case, the Respondents have the opportunity to put forth a legitimate, nondiscriminatory explanation of their conduct. The Respondents' statement of their legitimate, nondiscriminatory reason for not providing the Complainants with information about how to apply for an apartment is that Sinha determined at the site that the Complainants would not qualify for rental and decided not to send them to the office. Arguably, failure to meet minimum rental qualifications is a legitimate, nondiscriminatory reason for not allowing someone to proceed through the application process. The minimum standard apparently missing by the Complainants is sufficient income from whatever source to either pay the security deposit of one month's rent and the first month's rent or to meet the standard of income of three times the monthly rent.

Though the Hearing Examiner is willing to accept this position as a legitimate, nondiscriminatory explanation, he does so with reservation. It seems that where a landlord's income standard states a number of exceptions as does the Respondents' here, that a potential tenant should be given the opportunity to demonstrate that he or she can qualify for one of the exceptions if not for the rental standard overall. However, the Respondents' burden at this stage is one of presentation and not one of persuasion. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

In the McDonnell Douglas/Burdine paradigm used by the Commission in most claims of discrimination including those of housing discrimination, the Complainants may prevail even though the Respondents have met their burden of presentation by demonstrating that the reason offered by the Respondents is either not credible or is a pretext for other discriminatory motives. Burdine, supra. The ultimate burden of proving discrimination always remains on the Complainants however. St. Marys Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

In support of their rebuttal of the Respondents' proffered reason, the Complainants' make several points. First and foremost, they point out that Sinha did not possess sufficient information based upon her interview of the Complainants to determine their economic suitability for renting the apartment. Williams testified that she told Sinha that she was receiving AFDC and food stamps but that Sinha never asked the amount that she was receiving in support and Williams did not independently provide the information. Similarly, Sinha did not inquire into the amount of income that Oden would be making once his leave of absence ended. While a landlord might be rightly suspicious of a statement that one is on a leave of absence, Sinha did nothing to verify or refute Williams' statement.

The Hearing Examiner also notes that Sinha made almost no inquiry into the Complainants' ability to meet one of the exceptions to its income standard. Sinha did ask about Section 8 but did not ask about cosigners or guarantors.

Given the lack of information possessed by Sinha at the close of her discussion with Williams, it is not credible for Sinha's actions to have been premised only on the Complainants' meager income. Due to the passage of time, Sinha was not able to recall with any particular precision the events that occurred on November 10, 1992. For instance, she could not state that she had gathered the income information necessary to make an initial determination of the Complainants' suitability as tenants. If Sinha possessed only

rudimentary information about the Complainants' economic status, what motivated Sinha's treatment of the Complainants?

The evidence of the test demonstrates that race appears to be a logical factor. Whether the Complainants' race in combination with their sources of income was involved is not clearly established on this record. It is certainly a possible explanation but in that case race is still at least part of the explanation. The difference in Sinha's treatment of Lehmann and the Complainants and probably Wiggins points convincingly to race as being a motivating factor.

It is possible that Sinha's treatment of the Complainants was not motivated by the Complainants' race but reflects a busy schedule and confusion stemming from having too many showings at the same time. The record does not support this explanation and the Respondents did not specifically raise it. The Hearing Examiner could understand such an explanation though. The Respondents admit that office management was lacking as a result of a new employee at the time. However, this does not excuse Sinha's treatment of the Complainants and the fact that Wiggins was only able to gain an appointment to see the apartment by going in person to the office after two no shows. It is such an atmosphere of disorder that can hide acts of discrimination.

The Respondents make some additional arguments in support of themselves that do not fall easily into the typical McDonnell Douglas/Burdine analysis. The Hearing Examiner believes that these other statements deserve some discussion.

First, the Respondents point out that one of the partners in the Cameron-Michael Group is an African American and is not likely to endorse or tolerate discrimination in a business in which he is involved. The Hearing Examiner notes that the individual in question did not appear at the hearing to express this view himself. Even if he had, the fact of his opposition to discrimination does not save him from liability created by an employee or agent. Hamilton, supra. Nothing in the record indicates that this person had anything to do with the specific transaction in question here. As such, this person's feelings about discrimination are irrelevant to this complaint.

Second, the record contains information that Respondents Cameron-Michael Group and CMI Management have tenants at other properties that are members of racial minorities, most notably several Asian or Asian American tenants and some African American tenants. The Complainants point out that the record does not contain any information indicating that Sinha was involved in rental to these tenants. It is possible that she was since she assisted Scott Lewis in many activities, but that possibility is not sufficient absent direct testimony on this point. Similarly, the list of minority tenants does not reflect that there are any such tenants in properties owned by Dayton Pinckney Associates. This may be a mere coincidence or may reflect a policy passed on to the management office from one or more of the owners. It is impossible to tell on this record and it would be inappropriate for the Hearing Examiner to act upon sheer speculation.

Third, the Respondents provide anecdotal evidence that Sinha helped the White mother of mixed race children to obtain Section 8 funding and an apartment with the Respondents. While this demonstrates a certain degree of compassion on the part of Sinha it is not clear how this is relevant to this proceeding. The fact that African American children are involved does not seem to bear much weight because of the difference in the race of the parents.

The Hearing Examiner concludes that the Respondents discriminated against the Complainants on the basis of their race by making housing otherwise unavailable to them by not referring them to the office of CMI Management for the processing of an application. Having reached this conclusion, the Hearing Examiner turns to the issue of damages.

The ordinance requires the Commission, where discrimination has been found, to fashion a remedy that will effectuate the purposes of the ordinance and to make the Complainant whole. Sec. 3.23(9)(c)2.b. M.G.O.

Rule 17 of the Commission gives somewhat more guidance. This rule specifically recognizes the Commission's authority to make awards of out-of-pocket expenses and damages for emotional injuries. The Commission or its Hearing Examiners have made such awards beginning in 1988. Ossia v. Rush, MEOC Case No.1377 (Ex. Dec. 6/7/88). This authority has been upheld by the Dane County Circuit Court in the case of State of Wisconsin ex. rel. Caryl Sprague v. City of Madison et al., Dane County Circuit Court Case No. 93 CV 113 (September 30, 1994). In addition to monetary awards, the Commission has ordered other forms of relief necessary to effectuate the ordinance's purpose to eliminate discrimination. Harris v. Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (Comm'n Dec. 2/14/90, Ex. Dec. 6/28/89), Krasnick v. Solner, et al., MEOC Case No. 3190 (Ex. Dec. 7/25/89).

In this case, it is appropriate that the managers and rental staff be required to receive training in fair housing laws and methods for avoiding discrimination. While the Respondents' procedure requiring applicants to come to the office to complete applications may be reasonable, its application and the surrounding confusion in the office may well have led to many of the problems in this case. Additionally, Sinha's practice of observing prospective tenants from her car may lead to misunderstandings and distrust. The practice of making snap judgements about which applicants get what information about the application process is exactly the type of procedure that can result in discrimination stemming from the application of stereotypical impressions.

While the Respondents have a significant business reason for reviewing and updating such procedures, review of these items by an independent entity may well assist the Respondents in avoiding similar problems. Five hours of review and training should provide the training entity adequate time to convey necessary information and to assist the Respondents in reviewing their procedures. The Respondents are free to seek additional time if they deem it necessary or desirable.

The Complainants suffered no out-of-pocket losses. Without any evidence on the record, the Hearing Examiner will make no award for such losses.

As is often true, the emotional impact of discrimination represents the largest or most significant injury to the victim of discrimination. This case is no different. The record contains testimony of the Complainants and others about the impact of Sinha's treatment. While the descriptions of the effect on the Complainants is powerful, the impact cannot be viewed in a vacuum.

The Complainants were clearly under stress as a result of their homeless condition prior to meeting with Sinha. On this record, it is very difficult to tell where their distress over being homeless ended and their distress at being the victims of discrimination began. It is not so easy as to say that whatever they suffered after November 10, 1992 must have resulted from discrimination.

This record makes it somewhat doubtful that the Complainants would have been rented the apartment even if they had been permitted to apply. It is not entirely clear whether the Complainants would have qualified under the Respondents' rent standard of needing income in an amount that was three times the amount of rent. There are questions about the exact amount of rent that have not been fully answered on this record. Even if the Complainants had met the income standard or qualified for one of the exceptions to the income standard, the Complainants' past credit history may well have prevented the Complainants from being seriously considered. The Complainants' housing counselor, Lisa Radar, indicated that the Complainants had credit problems that had caused them problems in being able to obtain housing.

It seems likely to the Hearing Examiner that much of the Complainants' stress and emotional injury stemmed from their homelessness and was not so directly connected with their inability to apply for either of the units at 24 E. Dayton Street. For this reason, the Complainants' suggested figure of $50,000 for a damage award that would compensate the Complainants for their emotional injuries is too high. It is not supported by the record and would tend to act as a windfall to the Complainants.

Equally, the Respondents' suggested figure of $1,500 seems to trivialize the undoubted injury and damage done to the Complainants. Such an award would not act to make the Complainants whole.

The highest award for emotional damages issued by the Hearing Examiner was in Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (Comm'n Dec. 4/14/93, Ex. Dec. 1/5/93). In that case the Hearing Examiner awarded the Complainant $25,000 for her emotional injuries.

Key in the Hearing Examiner's award were the facts that the Complainant had been subjected to specific racial or ethnic slurs or epithets and her career advancement had been significantly limited. The Complainant had worked herself up from an entry level position to one which offered a real opportunity for other managerial positions when she was confronted by a higher manager who objected to her relationships with men not of her race or ethnic group.

At the opposite end of the scale, the Hearing Examiner awarded the Complainant in Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/10/93), the sum of $750 for emotional damages for an employer's failure to hire her as a waitress. The Hearing Examiner's award hinged upon the lack of overt racism and the Complainant's inability to testify about any significant form of damage.

The present case rests somewhere between the extremes of the Leatherberry and Chung cases. The Complainants experienced no explicitly racial language and had no prior contact with the Respondents and had no reasonable expectation of a continuing relationship. On the other hand, they were in an extremely vulnerable position and were treated cavalierly by Sinha. Deborah Percival's testimony described the emotional stress and injury that she observed as the intake worker at the FHCDC, She testified that Williams was barely under control as she told Percival of the meeting with Sinha. While some of this may be attributable to her disappointment about being homeless, some significant amount of Williams' distress can be assumed to have resulted from the discrimination. However, the continuing distress experienced by Williams and Oden appears to be more related to their homeless condition. As noted above, the Complainants had little reasonable expectation that their application, once accepted, would lead to an apartment.

Given the above, the Hearing Examiner believes that a damage award of $7,500 for each of the Complainants is reasonable and appropriate. Each Complainant is entitled to a separate award because the record indicates that both Williams and Oden suffered individually though from the same acts. $7,500 should make the Complainants whole and help to prevent discrimination in the future by this as well as other landlords.

The Complainants do not request any award for punitive damages. The record does not support such an award in any event.

Finally, the Complainants are entitled to an award covering their reasonable attorney's fees and costs in connection with pursuit of this complaint. David Sparer, the attorney for the Complainants, submitted a statement of expenses and hours along with his initial post-hearing brief and supplemented that statement with his rebuttal brief. He indicates that his usual and customary rate is $100 per hour. The Respondents do not contend that this is an unreasonable rate given Mr. Sparer's experience and abilities. Sparer accounted for 86.1 hours of work on this case. Again the Respondents do not object specifically to this level of expenditure of time. Based upon the Hearing Examiner's review of Sparer's statement and review of similar statements in other cases, the total number of hours expended is not unreasonable for a case that is fully litigated before the Commission. Nothing in the statement indicates that the time accounted for by Sparer was spent on unnecessary or duplicative work.

Sparer submitted a statement of costs in the amount of $433.46. All of these costs appear to be reasonably necessary and are not duplicative of other costs incurred by the Complainants. The Respondents do not object to this statement of costs.

The Commission has long followed the rule of Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). Essentially, Watkins indicates that a prevailing Complainant, in order to be made whole, is entitled to his or her reasonable costs including actual attorney's fees. In calculating the reasonableness of the hours spent, one must determine that the hours were reasonably necessary and were not duplicative of other work. If these requirements are met, the prevailing Complainant should receive his or her entire costs and attorney's fees. Not to make such an award would place an unreasonable burden on the Complainant to enforce rights secured by the ordinance.

The primary argument of the Respondents with respect to attorney's fees is that the Complainants were "aggressive" and placed a high value on their claims. The Respondents apparently felt that negotiation under such circumstances would not be in their best interests. In response, the Complainants assert that the Respondents placed too little on the table and then only very late in the game.

The Hearing Examiner is unwilling to examine the record with respect to the settlement positions and strategies of the parties. In general, settlement negotiations and the offers relating thereto are inadmissable for any purpose. Both parties were ably represented from the early stages of this complaint. To the extent that this case represents a miscalculation on the part of either or both parties, this is not the forum to address such an error. There is no indication that the complaint was pursued in bad faith. Absent such a showing, the Complainants are entitled to the costs and fees actually expended in pursuit of their rights under the ordinance.

Signed and dated this 23rd day of January, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner