

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN**

<p>David Bahr 931 Jenifer Street Madison, WI 53703</p> <p style="text-align: center;">Complainant A</p> <p>and</p> <p>Nathan Meyer 931 Jenifer Street Madison, WI 53703</p> <p style="text-align: center;">Complainant B</p> <p style="text-align: center;">vs.</p> <p>Jana Hinken Post Office Box 375 Madison, WI 53701</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED DECISION</p> <p>Case No. 1306 and 1307</p>
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A complaint was filed by David Bahr with the Madison Equal Opportunities Commission (MEOC) on June 4, 1984 alleging discrimination on the basis of sex and marital status in regard to housing. Bahr's complaint was assigned MEOC Case No. 1306. A complaint was also filed with the MEOC by Nathan Meyer on June 4, 1984 alleging discrimination on the basis of sex and marital status in regard to housing. Meyer's complaint was assigned MEOC Case No. 1307.

Each complaint was investigated by Mary Pierce of the MEOC staff, and a separate Initial Determination (each dated August 22, 1985) in each case was issued. Each Initial Determination concluded that probable cause existed to believe that discrimination had occurred, as alleged.

Each case advanced to the conciliation process, but conciliation failed (or was waived) in each instance.

Each case advanced to hearing, but prior to the hearing each Complainant was granted leave to and did amend his respective complaint to include an allegation of discrimination on the basis of the fact that he was a student in regard to housing. Ms. Pierce also investigated each amended complaint, and a separate Initial Determination (each dated May 29, 1985) was issued, each concluding that probable cause existed to believe (despite an apparent typographical omission¹ in each) that discrimination had occurred as alleged.

Conciliation again failed (or was waived), and each case was again certified to hearing.

A hearing was held commencing on August 6, 1985, both cases having been consolidated for the purpose of hearing. Complainant Bahr and Complainant Meyer each appeared in person, and both were assisted by law student advocate Bill Bendt. Respondent Hinken appeared, pro se. Based on the record of the hearing, including a consideration of the post-hearing briefs, the Examiner enters the following:

RECOMMENDED FINDINGS OF FACT

1. Complainant David Bahr is a single, adult male who was considered to be a student at the University of Wisconsin-Madison at least during all of 1984. Bahr was considered to be a student at the University throughout 1984 even though he attended only the spring and fall semesters but was not enrolled during the summer.
2. Complainant Nathan Meyer is a single, adult male who was considered to be a student at the University of Wisconsin-Madison at least during all of 1984. Complainant Meyer was enrolled in the spring, summer and fall semesters (sessions).
3. Respondent Jana Hinken, an adult female, is a person who had the right of rental and lease of housing at 1129 Jenifer Street on May 16, 1984 and at all times subsequent to that date.
4. On May 16, 1984, the Complainants met Hinken at the 1129 Jenifer Street property by appointment in order that she (Hinken) could show them an apartment which was to be available on September 1, 1984. One of the Complainants had telephoned Hinken on May 15, 1984 to arrange the appointment after obtaining her telephone number from a sign in front of the building indicating that an apartment was for rent. The Complainants had originally become aware of the vacancy through the Campus Assistance Center at the UW - Madison.
5. The apartment which Hinken showed to the Complainants contained two bedrooms, a living room, a dining area, a kitchen and a bath. It contained hardwood floors in the living room and bedroom areas, natural wood trim and windows. In the Complainants' view the apartment was also airy, spacious and open, and in very good condition. They did feel it could use some work, however, such as some painting and some refinishing of the window sills.
6. The Complainants indicated to Hinken, during the time they were viewing the apartment, that they were very interested in renting it from her. During the course of their discussion, Hinken told the Complainants that she definitely wanted to rent the apartment to persons who would keep it clean, that she had a "Felix Unger type of complex" and that she felt that couples (a male and a female) or women in general were cleaner than a group of two or more males.
7. Shortly thereafter, Hinken accompanied the Complainants next door to Bahr's apartment to view Bahr's apartment and his cat. Hinken had indicated to the Complainants that she would have no problem with the Complainants having a cat (if she were to rent them the apartment at 1129 Jenifer Street). Hinken made a positive comment(s) about the condition of Bahr's apartment and she talked to the Complainants for an additional fifteen to twenty minutes before she left. She indicated she would get back to the Complainants by Friday (May 18, 1984) or Monday (May 21, 1984) if she decided to let them fill out an application.
8. Not having heard from Respondent by Monday (May 21, 1984), Complainant Bahr telephoned her and she said she would decide by that evening about giving the Complainants an application.
9. On May 22, 1984 or May 23, 1984, Complainant Bahr contacted the Respondent by telephone again and gave her two previous landlord references. He also attempted to give her employment references, but she refused to accept them. She also indicated that she would decide by the end of the week whether to give the Complainants an application.
10. Complainant Meyer contacted the Respondent by telephone on or around May 23, 1984 (and prior to May 25, 1984) and attempted to give her references. She refused to accept any of his references.
11. Complainant Bahr again called the Respondent on May 25, 1984. A conversation ensued in which the Respondent said she had not checked Bahr's references and she had decided not to give the Complainants an application. Among other things, the Respondent also said that she didn't feel that she had to make a decision that early in the summer, that she was waiting for optimum tenants and that she was going to hold her options open.

Bahr told her that she was entitled to keep her options open, but that he felt she was foreclosing the Complainants because they were men and that he intended to file complaints with local, state and federal agencies.

The Respondent then offered to send the Complainants an application. Bahr said he didn't want to play games because he did not believe she would look at the application favorably.

The Respondent then renewed her offer to send an application.

Bahr responded that he did not think there would be any point (to filling out an application) because she had not been interested in checking the references he had already given her.

12. The Respondent had told the Complainants that the rent at the 1129 Jenifer Street unit would be \$340 per month plus utilities. The unit was later actually rented for \$350 plus utilities to a single female and her child.
13. Prior to renting the apartment at 1129 Jenifer Street, the Respondent showed it to a total of eight to twelve interested individuals or groups (including Complainants) with approximately two to four showings on each of the following days: May 16 of 1984, May 19 of 1984 and May 26 of 1984.
14. In addition to the Complainants, the Respondent received two other indications of interest:
 - a. from two women who lived in an apartment across the street from 1129 Jenifer;
 - b. from a woman who lived nearby and who wanted to move in with her son.
15. Around June 1, 1984, the Respondent attempted to arrange a second interview with the two women who lived in the apartment across the street. Because of the Respondent's busy schedule at that time, she was unsuccessful in arranging the second interview. Shortly thereafter, the two women notified the Respondent that they had found a different apartment and were no longer interested in the Respondent's vacancy. The two women from across the street were not asked to fill out a written application prior to being considered for a second interview.
16. Sometime toward the end of June, the woman who lived nearby contacted the Respondent and expressed interest in moving into the Respondent's apartment. The Respondent arranged for a further interview to meet the woman's son and to discuss other details.
17. Subsequently, the Respondent decided to rent the apartment to the woman and her son. The Respondent then drafted a lease and an application which she took over to the woman's house in mid-July of 1984 to formalize the rental agreement.
18. The Respondent, during at least the period between May 11 and July 31 of 1984, almost never required prospective tenants to fill out written application forms prior to considering them for second interview or rental. Also, during at least said time period the Respondent did not check the personal references of prospective tenants.
19. Complainant Bahr moved into an apartment at 931 Jenifer Street and lived there for the twelve-month period he would have rented the Respondent's apartment. Bahr paid \$185 per month in rent and approximately \$21.67 per month in utility costs (\$65 divided by three) at 931 Jenifer Street.
20. Because Complainant Bahr was unable to rent the Respondent's apartment at 1129 Jenifer Street, he endured the hassle and aggravation of looking for another apartment and lived with one more roommate than he cared to.
21. Complainant Meyer lived at three locations during the twelve-month period that he would have rented the Respondent's apartment:
 - a. The Red Pine Coop where he paid \$250 per month for rent, utilities and food;
 - b. 418 South Livingston Street until June 1, 1985 where he paid \$175 per month for rent and performed twelve hours per week of household chores which helped to offset his utility costs;
 - c. at 931 Jenifer Street after June 1, 1985 where he paid the same amounts for rent and utilities as Complainant Bahr.
22. Because Complainant Meyer was unable to rent the Respondent's apartment, he spent extra time looking for apartments, eventually moved into the Red Pine Coop which was affordable but not as nice as the Respondent's apartment and lived with a person(s) he did not want to.
23. The Respondent refused to rent to the Complainants on account of their sex.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant, David Bahr, is a member of each of the protected classes of sex, marital status, and (the fact that such person is a) student within the meaning of Sec. 3.23, Madison General Ordinances.

2. The Complainant, Nathan Meyer, is a member of each of the protected classes of sex, marital status and (the fact that such person is a) student within the meaning of Sec. 3.23, Madison General Ordinances.
3. The Respondent, Jana Hinken, is a person having the right of rental or lease of housing within the meaning of Sec. 3.23, Madison General Ordinances.
4. The Respondent did not discriminate, in violation of Sec. 3.23 of the Madison General Ordinances, against Complainant Bahr on the basis of his marital status and/or on the basis of the fact that he was a student in regard to the rental or lease of housing.
5. The Respondent did not discriminate, in violation of Sec. 3.23 of the Madison General Ordinances, against Complainant Meyer on the basis of his marital status and/or on the basis of the fact that he was a student in regard to the rental or lease of housing.
6. The Respondent unlawfully discriminated against Complainant Bahr on the basis of his sex in regard to the rental or lease of housing in violation of Sec. 3.23, Madison General Ordinances.
7. The Respondent unlawfully discriminated against Complainant Meyer on the basis of sex in regard to the rental or lease of housing in violation of Sec. 3.23, Madison General Ordinances.

RECOMMENDED ORDER

1. The Respondent shall cease and desist from discriminating against both Complainant Bahr and Complainant Meyer on the basis of sex.
2. The Respondent shall pay to Complainant Bahr the sum of One Hundred and Twenty Dollars (\$120) which reflects the difference in rent that Bahr had to pay as a result of the Respondent's discrimination.
3. The Respondent shall pay to Complainant Meyer the sum of Forty Dollars (\$40) which reflects the difference in rent that Meyer had to pay as a result of the Respondent's discrimination.
4. The Respondent shall also pay the sum of Fifty Dollars (\$50) to Complainant Bahr as compensatory damages and shall also reimburse him for any costs he incurred to administratively litigate this matter.
5. The Respondent shall also pay the sum of Fifty Dollars (\$50) to Complainant Meyer as compensatory damages and shall also reimburse him for any costs he incurred to administratively litigate this matter.
6. The Respondent shall pay to each Complainant twelve percent annual interest on all amounts due to each Complainant. Said interest shall begin to accrue as of the date of this Recommended Decision.
7. The Respondent must submit evidence of compliance to the Hearing Examiner within ten (10) days of the date this order becomes final.

OPINION

That the Respondent discriminated against the Complainants on the basis of their sex is obvious. She admitted on the record that she told the Complainants that cleanliness was important to her and that she felt that couples (a male and a female) or women in general were cleaner than a group two or more males (See Finding of Fact No. 6). She futilely attempted to explain away her remark at the hearing by testifying that she was at the time upset with the cleanliness of the three males that she shared living quarters with. It is specifically this type of discriminatory stereotyping (the Respondent's reasoning that because some males did not keep their living quarters as clean as she would have liked, a group of males generally would not keep an apartment as clean as she would like) that the ordinance is designed to prohibit.

The Respondent also claims that she cannot be liable for discrimination because she has rented units to two or more males on other occasions. While such evidence may in some cases be probative of the Respondent's motivation, the evidence in this case that the Respondent had rented to groups of males on other occasions has no weight in light of the direct evidence of her discriminatory intent. That the Respondent may not have discriminated against other males (or groups of males) in other rental situations does not by itself preclude a finding of discrimination in this particular instance. (Analogously, that a person did not hit a truck on Monday or Wednesday does not preclude the possibility that the person hit a truck on Tuesday).

The Respondent's other actions also reinforce that her motivations were discriminatory on the basis of sex. While her practice at the time was almost never to require prospective tenants to fill out written applications to be considered for rental, she attempted to discourage the Complainants by telling them she had to think about whether or not to give them an application. Ultimately, the Respondent told them she decided not to give them an application and only offered to give them one after Complainant Bahr threatened to file a discrimination complaint.

The treatment of the Complainants was significantly different than that afforded to the other interested prospective tenants. Neither the two women across the street or the woman who lived nearby were required to fill out applications prior to being considered for and/or granted second interviews. The Respondent told the Complainants that she was not intending to rent out the apartment until later in the summer, but (unsuccessfully) attempted to arrange a second interview with the two women across the street on or around June 1, 1984. Even if the purpose of the second interview at that time would have been only to get a better idea of whether she wanted to rent to the two women, it is clear that the Respondent treated the Complainants differently in that the Complainants would have had to fill out a written application to be considered further (with no guarantee of a second interview) while the two women did not.

Finally, the woman who was rented to (with her son) had to fill out a written application only after the Respondent had given her a second interview and only after the Respondent had decided to rent to her (and brought the written application over with the lease).

REMEDY

While the Complainants carried the obligation of establishing unlawful sex discrimination by a preponderance of the evidence, once that liability is established it is the Respondent's burden to show they are entitled to a less than make-whole remedy.

Section 3.23 (9)(c)2.b. requires that, "If, after hearing, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the Respondent as will redress the injury done to the Complainant in violation of this ordinance, bring Respondent into compliance with its provisions and generally effectuate the purpose of this ordinance . . ."

Complainant Bahr and Complainant Meyer each are clearly entitled to out of pocket costs under Section 3.23 (9)(c)2.b.

Complainant Bahr's rent at 931 Jenifer Street was \$185 per month or ten dollars more per month than he would have paid to rent the Respondent's apartment (half of \$350 equal \$175). While the Respondent had indicated to the Complainants that she intended to rent the apartment for \$340 per month, there is nothing under the circumstances of this case which would appear to have bound her to that figure and the fact that she actually rented the apartment for \$350 per month makes that the appropriate figure to use in this case. Bahr's utilities would have been approximately the same. Twelve months of a \$10 per month difference equals \$120 out of pocket rental expense that Bahr is entitled to.

Complainant Meyer's remedy is a bit more difficult to identify. He first lived at Red Pine Coop which cost him \$250 per month for rent, utilities and food. It is not clear on the record how long he lived at Red Pine or what part of the \$250 went for rent. He next moved to 418 S. Livingston where he paid \$175 per month and worked around the house which helped offset his utility costs.

The best this Examiner can do is to assume utility costs were comparable (in the absence of evidence to the contrary), and that the rent portion of Meyer's Red Pine payments were comparable to 418 S. Livingston (\$175 per month).

Consequently, this Examiner finds no out of pocket cost to Meyer for either rent or utilities until after June 1, 1985 when Meyer moved in at 931 Jenifer Street. There, Meyer had the same ten dollar additional out of pocket expense as Bahr, except Meyer's expense was for a four month period. Therefore, Meyer's out of pocket costs are forty dollars for having been discriminatorily refused rental by the Respondent.

In addition, I have awarded fifty dollars to each Complainant in compensatory damages for the inconvenience each suffered as a result of the Respondent's discriminatory actions, and I have also awarded each of them their costs for, administratively litigating this case.

MARITAL STATUS AND STUDENT DISCRIMINATION

The Complainants did not carry their respective burdens to show that either of them were discriminated against because of their marital status and/or because they were students. Unlike on the sex discrimination issue where direct and circumstantial evidence supported a finding of discriminatory animus on the part of Hinken despite the fact that she had rented to other groups of males, the evidence presented by the Complainants regarding marital status and student discrimination was much weaker. Consequently, the fact that she rented to other single individuals and students (as well as listed the apartment in question at the Campus Assistance Center) carries weight as to these two issues and the Complainants did not establish pretext.

Signed and dated this 8th day of November, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

¹The Investigator apparently intended to enter a probable cause finding on the issue of the fact that each Complainant was a student, but omitted explicitly stating as much in the Initial Determinations dated May 29, 1985 in Case No. 1306 and Case No. 1307 (each conclusion stated there was probable cause for sex and marital status discrimination).

However, it should be noted that probable cause conclusions already had been entered for sex and marital status discrimination in the August 22, 1984 Initial Determinations and that the investigations for the May 29, 1985 Initial Determinations were focused on the student issue which had been added by amendment to each complaint. Also, the Respondent, although unrepresented, did not object to the "Revised Notice of Hearing" dated June 27, 1985 which included the student issue, and she fully (and successfully) defended against the student issue at the hearing.

In any event, this Examiner finds that the Complainant was fully aware of and understood the intent of the May 29, 1985 Initial Determinations to include probable cause determinations on the student issue, and the regrettable typographical error caused her no harm anyway because she successfully defended against that issue. This Examiner notes, however, that had the Respondent lost on the student issue, a more careful scrutiny would have to be made of whether that issue would have to be reheard in light of the fact that the Respondent was at all times unrepresented.