

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

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| <p>Marc L. Pesselman 1138 Pauline Avenue Madison WI 53705</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Thomas Link d/b/a Bellevue Apartments 1111 Willow Lane Madison WI 53705</p> <p style="text-align:center">Respondent</p> | <p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p>Case No. 20021153</p> |
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BACKGROUND

On August 20, 2002, Marc Pesselman filed a complaint with the Madison Equal Opportunities Commission alleging that Thomas Link, d/b/a Bellevue Apartments, violated Section 3.23(4)(a), Madison General Ordinances, when Link refused to renew his lease, allegedly because the Complainant had been arrested for possession of controlled substances. Section 3.23(4)(a) prohibits landlords and others with any right of ownership, possession, transfer, sale or lease of any housing from refusing to lease, or otherwise making any such housing unavailable, based upon certain criteria, including arrest record and conviction record. The Respondent denies the alleged violation of the Equal Opportunities Ordinance and maintains that the Complainant was refused housing because he had substantial quantities of illegal drugs inside his apartment, not because he was *arrested* for possession. In other words, it was not his arrest record, which would include any information indicating that the Complainant had been questioned, investigated, arrested, detained or charged with criminal acts, but his conduct that resulted in the nonrenewal.

On January 25, 2005, the Respondent asserted that because the Complainant had, during eviction proceedings that took place in October, 2002, previously and unsuccessfully raised the issue of discrimination based upon his arrest record, his complaint should be dismissed

under the doctrine of collateral estoppel, a/k/a issue preclusion. Specifically, the Respondent argued that (i) because the eviction court found that the Respondent did not violate the Equal Opportunities Ordinance, and (ii) because the Complainant did not appeal that finding, the Complainant was precluded from relitigating the issue.

On February 8, 2005, an EOC Investigator/Conciliator referred this matter to the Hearing Examiner to determine whether the Complainant was procedurally barred from pursuing his discrimination claim before the Commission. Subsequently, the parties submitted written briefs addressing issue preclusion (collateral estoppel) and claim preclusion (res judicata). Presently, the Hearing Examiner faces only one, fairly straightforward question—was the issue of discrimination against the Complainant fully and fairly litigated in prior proceedings, or could the issue have been so litigated, such that the judgment resulting in the eviction of the Complainant would be conclusive for our purposes.

DECISION

For purposes of this decision alone, the Hearing Examiner finds the facts to be as follows. In March of 2002, after contacting the Respondent to seek its cooperation, local police and the Federal Bureau of Investigation began surveillance of the Complainant, including his apartment, based upon their suspicion that he was selling illegal drugs. The authorities initially contacted Samantha Crownover, who managed the building where the

Complainant lived. At the eviction hearing, Crownover testified that she and the building owner, Thomas Link, had jointly decided, after learning that the Complainant was under surveillance and that drugs and drug paraphernalia had been discovered inside his apartment, not to renew his lease. Crownover also said that she had personally spoken with law enforcement several times before the decision was made.

After concluding his examination of Samantha Crownover, counsel for the Complainant called Marc Pesselman, himself. Pesselman testified briefly about his conversations with Thomas Link and his discrimination complaint before the trial court sustained an objection effectively ending his direct examination:

QUESTION: Did you talk to Mr. Link about why he was not going to permit you to continue your tenancy?

ANSWER: Yes, I did.

...

QUESTION: And did Mr. Link tell you it was because of the arrest or investigation?

ANSWER: Yes. Yes, he did.

QUESTION: Have you ever, by the way, delivered or distributed controlled substances at Apartment 204?

ANSWER: No.

MR. CORCORAN: Objection. Relevance, your honor.

THE COURT: Sustained. The answer will be stricken.

...

QUESTION: Mr. Pesselman, have you ever filed a complaint of discrimination with the Madison Equal Opportunities Commission regarding Mr. Link's attempt to terminate your housing?

ANSWER: Yes.

MR. CORCORAN: Objection. Relevance, your honor.

THE COURT: The objection is sustained.

(Exhibit No. 4 is marked for identification.)

THE CLERK: Exhibit 4 is marked.

QUESTION: I show you what's been marked for identification as Exhibit 4. Is that a copy of the complaint of discrimination that you filed?

THE COURT: The objection is sustained. The answer will be stricken to the previous question, and no further inquiry on this is going to be permitted.

The Hearing Examiner reproduces this excerpt from the eviction hearing transcript because it forms the basis upon which the Respondent would dismiss the complaint presently under consideration. Again, the Respondent contends that because the circuit court heard arguments and testimony concerning the alleged violation of the Equal Opportunities Ordinance, and actually decided the issue against the Complainant, dismissal is appropriate under either issue preclusion or claim preclusion.

In *Amber J.F. vs. Richard B.*, 205 Wis.2d 510, 516–18, 557 N.W.2d 84, 84–87 (1996), the Wisconsin Court of Appeals defined the doctrines of issue preclusion and claim preclusion:

Claim preclusion establishes that a final judgment between the parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose. [citation omitted].

...

Issue preclusion has the dual purpose of protecting litigants from the burden of relitigating an identical issue, in certain circumstances, and of promoting judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). As a threshold matter, issue preclusion, unlike claim preclusion, requires more than a judgment on the merits. It requires actual litigation of an issue necessary to the outcome of the first action. Northern States Power, 189 Wis.2d at 550, 525 N.W.2d at 727. Therefore, judgments based on pleas of no contest, which pass directly to disposition and avoid adjudication of contested issues, do not prevent future litigation of those same issues in other lawsuits. Crowall v. Heritage Mut. Ins. Co., 118 Wis.2d 120, 122, 346 N.W.2d 327 (Ct. App. 1984) . . . Throughout the evolution of issue preclusion, the burden of establishing that it should be applied in a given instance is on the party seeking its benefit. State ex rel. Flowers v. DHHS, 81 Wis.2d 376, 389, 260 N.W.2d 727, 734–35 (1978).

In addition to Amber J.F. and Northern States Power, which Complainant cites for the proposition that issue preclusion does not apply unless the matter has been fully litigated, Complainant highlights Michelle T. v. Crozier, 173 Wis.2d 681, 688–89, 495 N.W.2d 327, 330–31 (1993), wherein the Wisconsin Supreme Court identified other specific circumstances under which issue preclusion does not apply: (1) the party against whom preclusion is sought could not have obtained review of the underlying judgment; (2) the question is one of law involving distinct claims or intervening shifts in the law; (3) significant differences in the quality and/or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) the burdens of persuasion have shifted, such that the party seeking preclusion had a lower burden of persuasion in the preceding action; or (5) matters of public policy and individual circumstances are involved that would render the application of collateral estoppel to be *fundamentally unfair*, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial proceeding. This five–part fundamental fairness test is rooted in guarantees of due process which require that the party against whom preclusion is sought must have had an opportunity—procedurally, substantively and evidentially—to fully pursue the underlying claim. Amber J.F. v. Richard B., 205 Wis.2d at 520, 557 N.W.2d at 88. Today, state and federal courts generally favor a looser, equities–based interpretation of the collateral estoppel doctrine. Michelle T. v. Crozier, 173 Wis.2d at 688, 495 N.W.2d at 330. In deciding whether to apply the doctrine, courts balance the competing goals of judicial efficiency and protection against harassing, repetitious litigation with the right to full and fair proceedings. Id.

Initially, on January 25th, 2005, the Respondent asserted that because the Complainant has already alleged discrimination based on his arrest record, and because the Complainant did not appeal the judgment that resulted in his eviction, which included findings that the Respondent did *not* discriminate against the Complainant and did *not* violate the Equal Opportunities Ordinance, the Complainant was precluded under the doctrine of collateral estoppel from relitigating the issue. Subsequently, because the eviction hearing and the EOC complaint involved not only the same issue, but the same parties, the Respondent asserted that the Complainant was precluded under the doctrine of res judicata, a/k/a claim preclusion, from revisiting the issue of discrimination.

Though the Respondent does make an argument for the application of res judicata, the Respondent essentially argues for the application of collateral estoppel, asserting that the Complainant has already litigated his discrimination claim, unsuccessfully. The Respondent likens its case to Jackson v. Hellenbrand, MEOC Case No. 1482 (Ex. Dec. 5/24/93), wherein the Hearing Examiner ruled that the Complainant, Brian Jackson, knowingly surrendered his right to pursue allegations of race and color discrimination before the Commission in voluntarily settling similar court claims against the Respondent. In that case, the Hearing Examiner noted:

Complainant voluntarily compromised and settled his action. . . . The judge took pains to make sure that the terms of the agreement were clear to both sides. The Complainant had the opportunity to object or clarify or presumably reject the agreement under questioning by the judge. The judgment in the Circuit Court action was not reached as a result of some pre–trial motion . . . that would deprive the Complainant of an opportunity to have his position aired in open court.

The Respondent contends that Mr. Pesselman went even further than Mr. Jackson, actually litigating the alleged violation of the Equal Opportunities Ordinance. Moreover, the Respondent argues, Pesselman was well represented during his eviction trial. In contrast, Jackson was unrepresented.

Finally, the Respondent addresses the “fundamental fairness” test from *Michelle T.* According to the Respondent, each factor should result in the application of issue preclusion against the Complainant: (1) the Complainant could have appealed the circuit court judgment that resulted in his eviction; (2) the court decided the same legal issue that forms the basis for this complaint—whether the Respondent discriminated against the Complainant based on his arrest record; (3) the eviction hearing afforded the Complainant the same opportunities to present evidence and question witnesses that are available before the Hearing Examiner; (4) the burdens of persuasion have not shifted significantly; and (5) any policy issues should be resolved against the Complainant.

The Complainant chiefly contends that the eviction hearing did not afford him an adequate opportunity to litigate his discrimination claim. He notes that when his testimony turned toward his EOC complaint, the Respondent immediately objected and the court immediately sustained the objection, preventing any further inquiry into the matter. Moreover, the Complainant asserts, the Respondent explicitly argued that the Complainant should have used the Equal Opportunities Commission to resolve claims stemming from alleged violations of the Equal Opportunities Ordinance. Finally, the Complainant observes that while the circuit court did make findings regarding the discrimination question—concluding that the Complainant was denied housing based solely on legitimate concerns about his behavior—the court had emphatically closed the door on “any further inquiry” when the Complainant attempted to introduce his EOC complaint. While the Hearing Examiner holds only the greatest respect for Judge Nowakowski, it is difficult to see how the judge could have reached his conclusion after precluding the Complainant from giving any testimony on the issue of discrimination.

After reviewing the relevant language from Amber J.F. and Michelle T. the Hearing Examiner finds that the Respondent has not carried its burden of showing that the discrimination issue was or could have been fully and fairly litigated in prior proceedings between the parties, such that the judgment resulting in the eviction of the Complainant would require the application of *res judicata* or collateral estoppel against the Complainant. First, the court clearly checked the Complainant when counsel attempted to elicit testimony from him regarding his EOC complaint. The Respondent insists that the court was merely sustaining an objection to the introduction of the complaint into evidence, but the court added, “no further inquiry into this is going to be permitted.” It is unclear from the transcript of the eviction hearing precisely what the court meant by this. However, insofar as the burden rests with the Respondent to show that the Complainant has already had sufficient opportunity to litigate his discrimination claim, the Hearing Examiner cannot assume, without more, that the circuit court was merely sustaining an objection to the introduction of the complaint into evidence, and was *not* foreclosing an entire line of questioning that would have been available to the Complainant in EOC proceedings.

This goes directly to certain elements of the “fundamental fairness” test under Michelle T. Specifically, the third factor, whether there are meaningful differences in the quality and/or extensiveness of the proceedings between the two venues, and the fifth factor, whether issues of public policy or individual circumstances warrant another hearing. The Hearing Examiner believes there are meaningful differences between the extensiveness of the proceedings that would occur under the Rules of the Equal Opportunities Ordinance and the eviction hearing that took place in October, 2002. While the Complainant clearly had some opportunity and some incentive to develop a factual record to support his affirmative defense, the eviction hearing provided the Complainant only with a very limited opportunity to introduce evidence pertaining to the issue of discrimination. The Complainant is also correct in pointing out that the Respondent has back-tracked from its previous stance on the appropriateness of bringing this particular complaint before the EOC. At the eviction hearing, the Respondent argued that the Complainant should bring his discrimination claim with the appropriate body—“he can bring that with the Madison Equal Opportunity [sic] Commission.” The Hearing Examiner has difficulty reconciling this argument with the Respondent’s current stance.

The Hearing Examiner also notes that this case is distinct from Jackson v. Hellenbrand in several ways. First, the Complainant did not voluntarily surrender his claim. Unlike Jackson, who settled with the Respondent and chose not fully litigate his claim, there was nothing voluntary about the Complainant ending his eviction testimony prematurely. Second, Jackson had every opportunity to voice his position in open court. Here, the Complainant was explicitly barred from eliciting testimony that the Hearing Examiner would certainly have permitted. As Jackson v. Hellenbrand correctly notes, what is required is that the parties have an opportunity

for full and fair adjudication. The Hearing Examiner believes that the opportunities available to the Complainant to fully litigate his discrimination claim under the Rules of the EOC are different and more extensive than those that were available to him previously. In this case, it would be unfair to dismiss his complaint.

ORDER

The Hearing Examiner dismisses the Respondent's Motion to Dismiss. The complaint is hereby remanded to the Investigator/Conciliator.

Signed and dated this 26th day of May, 2006.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner