

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

Harvey Thompson 721 Bewick Dr Madison WI 53714 <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> Burlington Coat Factory 2025 Zeier Rd Madison WI 53704 <p style="text-align:center">Respondent</p>	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS Case No. 20053210
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BACKGROUND

On December 22, 2005, the Complainant, Harvey Thompson, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Burlington Coat Factory, violated Section 3.23(5) of the Madison Equal Opportunities Ordinance as a result of the Complainant's treatment on December 21, 2005, at its store in Madison, Wisconsin. The Respondent denies that it violated the Complainant's rights under the ordinance in any manner.

Essentially, the Complainant alleges that the Respondent treated him, an African American male, less favorably than other customers when a check-out clerk made reference to the Complainant's payment for his items in cash. The clerk is alleged to have indicated that the Complainant was a "drug dealer" and that the clerk knew of drug dealers' use of cash. After an altercation surrounding these statements, the Complainant was stopped at the exit when the security alarm sounded. Apparently, the anti-theft device attached to the Complainant's purchases had not been removed. The Complainant alleges that his treatment by the clerk resulted from the Complainant's race and color, Black, and the perception that his income came from drug dealing. The Complainant also alleged that his being stopped at the exit resulted from his race and color.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the bases of race and color with respect to his treatment by the clerk, but there was no probable cause to believe that the clerk's treatment of the Complainant was premised on the clerk's perception of the Complainant's lawful source of income. Additionally the Investigator/Conciliator concluded that there was no probable cause to believe that the Respondent had discriminated against the Complainant in any manner with respect to the Complainant's being stopped when the security alarm sounded. The Complainant did not appeal any of the findings of no probable cause.

Efforts at conciliation of the complaint failed. The complaint was transferred to the Hearing Examiner for a hearing on the merits of those issues for which there was a finding of probable cause.

Subsequent to a Pre-Hearing Conference and in accordance with the Scheduling Order issued in this complaint, the Respondent filed, on June 26, 2006, a motion to dismiss the complaint for a lack of subject matter jurisdiction.

DECISION

The Respondent's motion is premised on a narrow reading of the requirements of Section 5 of the Equal Opportunities Ordinance. That provision indicates that every person is entitled to the full and equal enjoyment

of a public place of accommodation or amusement. In Subsection (b), it also prohibits stating or publishing a preference in service. Subsection (a) is really the provision in question in the present matter.

The Respondent contends that Subsection (a) only prohibits the complete denial of service at a public place of accommodation or amusement or the charging of a different amount for the benefits or services of a public place of accommodation or amusement. While the Hearing Examiner understands how the Respondent might reach such a conclusion, it is not the conclusion reached by the Hearing Examiner or compelled by a reading of the section as a whole.

The declaration of policy set forth at the beginning of Section 5 clearly contemplates a wider range of protections than argued for by the Respondent. The first item in the list of protections is to that of full and equal enjoyment of the services of a public place of accommodation or amusement. In a society where the adverse consequences of overt discrimination are readily known, one sees a greater prevalence of more subtle types of discrimination such as steering or profiling members of protected classes. Coverage of the ordinance reflects these contemporary realities.

Given the ordinance's status as social legislation, it must be accorded the broadest interpretation necessary to fully effectuate the ordinance's broad social purposes. In the context of this motion, this principle dictates an interpretation of Subsection (a) to extend beyond only prohibiting an absolute denial of services or benefits to include the denial of the full and equal enjoyment of the benefits or services of a public place of accommodation or amusement.

Applying this scope of coverage to the present matter and giving the non-moving party the benefit of each and every inference to be drawn, the Hearing Examiner is compelled to find that the issues established for hearing in this matter fall within the subject matter jurisdiction of the Commission. The Complainant alleges that the Respondent's clerk inferred that as an African American male paying for a purchase in excess of \$200 in cash was conduct associated with that of drug dealers. From the Complainant's perspective, this diminished his enjoyment of the services and benefits of the Respondent's store. The comments resulted in a confrontation to which the police were called. The Hearing Examiner can accept the Complainant's allegation that this treatment was less favorable than that afforded other customers.

The Respondent contends that the clerk made no reference to the race of any drug dealers observed by the clerk and the clerk made no reference to the race or color of the Complainant. Such an allegation is not the proper subject of determination in a motion to dismiss. It is the more appropriately the subject of determination at hearing. The Hearing Examiner notes that the Respondent did not submit an affidavit of the clerk to bolster its factual claims with respect to this motion.

While the fact that the Complainant is a Black, African American male is sufficient to create an inference of discrimination for purposes of this motion, the parties are reminded that it may not be sufficient when balanced against the record as a whole to establish the fact of discrimination at hearing. However, given the record as it currently stands, it would be inappropriate to dismiss the complaint at the present stage.

ORDER

The Respondent's Motion to dismiss the complaint for a lack of subject matter jurisdiction is hereby dismissed. The hearing will proceed as scheduled at 9:00 a.m. on September 19, 2006 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin.

Signed and dated this 11th day of September, 2006.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner