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

Mary Jo Walters
13 Corry St
Madison WI 53704

Complainant

vs.

Tony Schmudlach
908 Lawrence St
Madison WI 53715

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON ORDER TO SHOW CAUSE

CASE NO. 20131144

BACKGROUND

On September 9, 2013, the Complainant, Mary Jo Walters, filed a complaint with the City of Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint alleged that the Respondent, Anthony "Tony" Schmudlach, denied her housing on the basis of her familial status and thereby discriminated against her in violation of the Madison Equal Opportunities Ordinance. Mad. Gen. Ord. 39.03(4)(a). The Respondent denied having discriminated against the Complainant and asserted that the Complainant's tenancy would have violated Madison's Occupancy Code.

Initially, the Respondent filed a motion to dismiss the complaint asserting that the EOD lacked jurisdiction over the complaint on the theory that the Occupancy Code superseded the provisions of the Equal Opportunities Ordinance, depriving the EOD of jurisdiction. After providing the parties with the opportunity to submit written arguments in support of their respective positions, on March 5, 2014, the Hearing Examiner issued a Decision and Order concluding that the EOD had jurisdiction over the complaint, but that the Occupancy Code might serve as a defense to the claim. The Hearing Examiner remanded the complaint to an Investigator/Conciliator for completion of an investigation and issuance of an Initial Determination of either probable cause or no probable cause to believe that discrimination had occurred.

On June 13, 2014, the Division's Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her familial status in the provision of housing in violation of the Equal Opportunities Ordinance. Efforts to conciliate the complaint were unsuccessful and the complaint was again transferred to the Hearing Examiner for further proceedings.

On July 29, 2014, the Hearing Examiner issued a Notice of Pre-Hearing Conference setting the Pre-Hearing Conference for 11:00 a.m. on August 21, 2014. Review of records from

the United States Post Office indicates that the Complainant received the Notice of Pre-Hearing Conference on July 30, 2014 at the address provided to the EOD by the Complainant.

At the time and date of the Pre-Hearing Conference, the Respondent appeared in person and with his lay representative. The Complainant did not appear at the scheduled time. Prior to the time set for the Pre-Hearing Conference, the Complainant had not requested rescheduling of this matter. The Hearing Examiner waited approximately 20 minutes for the Complainant to appear. She did not. The Hearing Examiner called the Pre-Hearing Conference to order and the Respondent's lay representative moved that the complaint be dismissed for the Complainant's failure to appear. The Hearing Examiner took the Respondent's motion to dismiss under advisement and indicated that he would issue an Order to Show Cause why the complaint should not be dismissed.

On August 26, 2014, the Hearing Examiner issued an Order to Show Cause why the complaint should not be dismissed for the Complainant's failure to appear. On September 4, 2014, the Complainant submitted a response to the Order to Show Cause. On September 9, 2014, the Respondent submitted a reply to the Complainant's submission.

## DECISION

Traditionally, the Equal Opportunities Commission, the body that hears appeals of dismissals and other decisions relating to complaints brought before the EOD, has been very strict with respect to Complainant's failing to appear at Pre-Hearing Conferences. Generally speaking, the Commission has taken the position that if the Notice of a Pre-Hearing Conference is received at the address provided by the Complainant, compliance with that Notice falls squarely upon the Complainant. Hohlstein v. Shopko, MEOC Case No. 22381 (ex. Dec. 11/26/96), Butler v. Russ Darrow, MEOC Case No. 3359 (Ex. Dec. 7/30/96), Ivy v. Belmont Nursing and Rehabilitation Center, MEOC Case No. 20032225 (Ex. Dec. 10/28/04). This is true even when there is evidence that the Complainant did not personally receive the Notice of the Pre-Hearing Conference, but where the Notice was received by another at the address provided by the Complainant. Francis v. Quarra Stone Company, MEOC Case No. 21764 (Comm. Dec. 11/14/93), Velazquez-Aguilu v. Abercrombie and Fitch, MEOC Case No.3398 (Comm. Dec. 7/20/99, Ex. Dec. 3/30/99), Murphy v. Woodman's and Kellahue, MEOC Case No. 21688 (Comm. Dec. 10/26/93). It is only in rare cases where it is clear that the Notice was intentionally kept from the Complainant or misdirected in some manner not due to the Complainant's actions that the Commission has excused a Complainant's failure to appear. Williams v. Foot Locker, MEOC Case No. 3375 (Comm. Dec. 8/29/97), Williams v. Millans Treasure Chest, MEOC Case No. 3374 (Comm. Dec. 8/29/97).

With this history of decisions as a background, the Commission in Norris vs. Cost Cutters of Madison, MEOC Case No. 20052134 (Comm. Dec. 3/12/14), sought to give new guidance in the context of a default judgment entered by the Hearing Examiner. In Norris, the Respondent failed to appear at the Pre-Hearing Conference. The Hearing Examiner issued an Order to Show Cause that the Respondent failed to timely answer. Subsequent to several additional proceedings, the Hearing Examiner determined that the Respondent had failed to reasonably explain its failure to appear at the Pre-Hearing Conference or to timely respond to the Order to Show Cause and entered a default judgment including damages in favor of the Complainant.

The Respondent appealed the Hearing Examiner's decision to the Appeals Committee. In a process that took two trips to the Commission/Appeals Committee and two remands to the Hearing Examiner, the Appeals Committee ultimately determined that the Hearing Examiner had applied the wrong standard to the Respondent's actions and concluded that the sanction of a default judgment was too strict for the Respondent's default and directed the Hearing Examiner to permit the Respondent to have a hearing on its proposed defense.

The Hearing Examiner will attempt to harmonize the apparent differences in result from the Commission's historical position and the position it took in the Norris case. Though the above cases apply primarily to Complainants, the Norris decision applied to a situation in which the Respondent was the party missing at the Pre-Hearing Conference. The Hearing Examiner does not believe that the Appeals Committee of the Commission intends to create different standards for Complainants and Respondents. Rather the Hearing Examiner believes that there must be some difference in the facts upon which the apparently differential treatment relies.

In response to the Order to Show Cause, the Complainant states that she received the Notice of Pre-Hearing Conference, but that she forgot the date of the conference because her paperwork was at a different address due to the difficulties she has had finding and maintaining housing. She attributes her difficulties to the Respondent's denial of housing to her. The Complainant asserts that she wishes to proceed with her complaint and that there will be no further issues concerning her attendance.

The Respondent, in responding to the Complainant's explanation, asserts that the Complainant's explanation falls short of demonstrating good cause for her failure to appear. Essentially, the Respondent states that he should not be made to bear additional expense due to the Complainant's inability to responsibly keep track of her obligations.

Until the Norris decision, the Hearing Examiner would have little difficulty in determining that the Complainant's explanation for her failure to appear was insufficient to excuse her failure to appear. It is clear that the Complainant received the Notice of Pre-Hearing Conference and that she knew of the time, date and location of the Pre-Hearing Conference. That she forgot the date and was not reminded of it because her paper files were not convenient to her is strikingly like the circumstances of the Velazquez-Aguilu and Murphy cases in which no excuse was recognized.

However, the Norris decision by the Appeals Committee seems to suggest that each party is entitled to his or her day in court and it is only in exceptional circumstances that a party should be denied that opportunity. While a broad reading of Norris might lead one to the conclusion that any explanation should be sufficient, the Hearing Examiner believes that to be too expansive a reading.

Pursuant to section 7.2 of the Rules of the Commission, the Hearing Examiner is granted broad authority to issue orders and to make appropriate rulings to expedite the processing of matters assigned to him. That Complainants are given a high burden of compliance with the notices and order of the Hearing Examiner and throughout the process is evidenced in section 3.41 of the Rules. Additionally, the Notice of Pre-Hearing Conference makes clear in bolded, capital letters that failure to appear may result in an order disposing of the complaint.

In the present matter, the circumstances can be distinguished from those in the Norris case. In Norris, the Appeals Committee was persuaded that the Respondent was genuinely confused about the nature of the Pre-Hearing Conference and was relying on its understanding of prior communications from the Investigator/Conciliator as to its obligation to appear at the Pre-Hearing Conference. In the present matter, the Complainant does not rely upon any confusion about the importance of the Pre-Hearing conference nor does she rely upon some misunderstanding of advice provided to her by Department staff.

For the Hearing Examiner, the primary difference between the history of decisions reached by the Commission in earlier cases and the Norris case is not that every party gets to have a hearing despite not appearing for scheduled conferences, but rather that when a party fails to appear, the Hearing Examiner should examine closely the circumstances to make sure that excusable neglect is present and where there is a showing of excusable neglect that the defaulting party be given the benefit of the doubt and the opportunity to be heard.

In the present matter, the Complainant fails to demonstrate excusable neglect. Excusable neglect requires something more than mere inadvertence or common mistake. That her living circumstances are difficult and require some additional efforts to keep appointments or to maintain schedules does not rise to the level required to demonstrate excusable neglect.

It is unfortunate that after bringing her complaint to the point of scheduling for a hearing that the Complainant failed to appear. However, the Complainant's duties and the possible consequences of failing to appear are clearly delineated in the Notice of Pre-Hearing Conference and the materials provided the Complainant.

ORDER

The Hearing Examiner orders the complaint dismissed for the Complainant's failure to appear at the Pre-Hearing Conference and for her failure to demonstrate excusable neglect for her failure to appear. The Complainant may seek review of this decision by submitting a written request for review to the Department of Civil Rights at its offices no later than twenty (20) days from the undersigned date.

Signed and dated this 28th day of October, 2014.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Maureen McGlynn Flanagan

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HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

CASE NO. 20131144

## BACKGROUND

This is a Decision and Order resolving the Respondent's Motion to Dismiss the complaint for a failure to state a claim upon which relief can be granted. On September 9, 2013, the Complainant, Mary Jo Walters, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint charged that the Respondent, Maynard G. "Tony" Schmudlach, denied her housing on the basis of her familial status in violation of the Madison Equal Opportunities Ordinance Sec. 39.03(4) Mad. Gen. Ord.

Once the complaint had been served upon the Respondent, on September 26, 2013, the Respondent filed a Motion to Dismiss the complaint for failure to state a claim upon which relief could be granted. Based upon the Respondent's challenge to the jurisdiction of the EOD, the complaint, on October 1, 2013, was transferred to the Hearing Examiner for resolution of the jurisdictional question. On October 11, 2013, the Hearing Examiner issued a briefing schedule giving the parties the opportunity to submit written arguments in support of their respective positions along with any additional documentary evidence the parties might wish the Hearing Examiner to consider.

Based upon the submissions of the parties and the record as a whole, the Hearing Examiner now enters the following order: The Respondent's Motion to Dismiss is denied. The complaint is remanded for investigation.

## DECISION

This matter presents several interesting issues of process and procedure for the Hearing Examiner. This is, at least in part, due to the failure of the parties to deny the opposing party's allegations. Rather, both resort to arguments that are not directly related to the allegations of the complaint.

At this stage and under the circumstances of the motion filed by the Respondent, the Hearing Examiner must look at the available facts in the light most favorable to the nonmoving party, the Complainant. In this regard, it appears the basic outline of the transaction in question is as follows.

On or about September 6, 2013, the Complainant submitted to the Respondent an application to rent an apartment identified as unit 4 at 3014 Atwood Avenue in the city of Madison. This is a one bedroom apartment in an 8-unit building. The building is owned pursuant to a life estate by the Respondent, Maynard G. Schmudlach.

The Respondent showed the apartment to the Complainant at some unidentified point prior to the Complainant's submission of an application on September 6, 2013. The Complainant was enthusiastic about the possible rental. The apartment would be occupied by the Complainant and her three minor children. The Complainant and the Respondent spoke for approximately an hour after the Respondent showed the apartment to the Complainant.

The Complainant did not hear immediately from the Respondent about her application. After a day or so, the Complainant contacted the Respondent to check on the status of her application. The Respondent indicated that he would not rent to her.

The Complainant states that the reason given by the Respondent for his refusal to rent to the Complainant was that she had three young children and that they would be noisy. The Complainant says that the Respondent further stated that it was a quiet building primarily rented to older tenants.

It is the above allegations that form the gravamen of the Complainant's charge. Rather than addressing the allegations made by the Complainant, the Respondent contends that even if the Complainant's allegations are true, the claim is barred by the operation of another ordinance provision limiting the occupancy of a residential unit for four people to a unit with a minimum of 450 square feet. See Sec. 27.06(2)(b)(1). The Respondent's unit that is the subject of this dispute has a square footage of approximately 420 square feet. Essentially, the Respondent asserts that whether or not, he might have wanted to rent to the Complainant or any four other people, he was prohibited from doing so and that provides an absolute defense to the claim of housing discrimination.

In the EOD process, there is generally first an investigation. During that investigation, the Investigator/Conciliator determines whether the Complainant can point to facts or evidence, which in their own right, are sufficient to establish a *prima facie* claim of discrimination. For purposes of most claims of discrimination, the EOD applies a basic three element *prima facie* structure. The Complainant must demonstrate that he or she is a member of a protected class, that he or she has experienced an adverse action and that there is reason to believe that the adverse action is causally linked with the Complainant's membership in one or more protected classes.

Assuming that the record contains facts or evidence sufficient to meet this minimal standard, the Investigator/Conciliator must determine if the Respondent can state a legitimate, nondiscriminatory explanation for its action. Presuming that a Respondent states such an explanation, the Investigator/Conciliator looks to see if there are facts or evidence that would lead a reasonable person to doubt the credibility of the Respondent's explanation or to find that the proffered explanation represents a pretext for an otherwise discriminatory explanation.

The Respondent seeks to short-circuit this analysis by pointing to the requirements of the Madison Building Code that limit occupancy of residential buildings based upon the number of occupants and the size of the residential unit.

While the Hearing Examiner understands that the application of the Building Code provisions may well preclude certain types of relief or damages, he does not believe that the provisions necessarily create a bar to investigation of this complaint.

At its heart, discrimination is an action premised on intent and knowledge. In the present matter, the initial question really comes down to, "Did the Respondent deny the housing to the Complainant because of her familial status or because of the application of the occupancy code?" The Equal Opportunities Ordinance in its housing provision clearly contemplates an inquiry into the intent of the Respondent at the time when the decision to refuse housing was made. See Sec. 39.03(4)(a).

Adopting the position urged by the Respondent could result in a landlord's discriminatory decision being protected due to the application of the zoning laws. This would be contrary to the intent of the Ordinance. The Ordinance attempts to prevent discriminatory action by removing discriminatory animus from the decision-making process. What the Respondent proposes would allow the discriminatory decision, but then insulate a landlord from the results of that decision.

Given the intent of the Equal Opportunities Ordinance to prevent discrimination and to remedy it when or where it occurs, the Hearing Examiner finds that this matter should proceed through investigation and permit both sides the opportunity to present their respective positions. Ultimately, the Respondent can utilize the Occupancy Code to either defend against the claim of discrimination or limit potential damages in the same manner as an "after acquired evidence" defense would dictate. See McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879 (1995). Following the general principle of McKennon, relief, if warranted, could not include an order for possession of the property or a similarly situated apartment. Also, the Complainant's damages would be limited to the period of time prior to the Respondent's becoming aware of the intersession of the occupancy limits. Of course, should it become clear that the Respondent acted upon his independent knowledge of the occupancy limits, the Complainant may not be able to sustain her burden of proof.

For the foregoing reasons, the Hearing Examiner denies the Respondent's Motion to Dismiss the complaint and remands the complaint to the Investigator/Conciliator for investigation and issuance of an Initial Determination of either probable or no probable cause to believe that discrimination may have occurred as the record dictates.

Signed and dated this 3rd day of March, 2014.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Maureen McGlynn Flanagan