

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

Josh Trost
146 Langdon Street
Madison, WI 53703

Complainant

v.

Nottingham Cooperative
146 Langdon Street
Madison, WI 53703

Respondent

HEARING EXAMINER'S DECISION AND
ORDER ON RESPONDENT'S MOTION TO
DISMISS FOR LACK OF JURISDICTION

CASE NO. 20201100

BACKGROUND

On October 21, 2020, the Complainant, Josh Trost, filed a complaint of discrimination with the Department of Civil Rights Equal Opportunities Division. The complaint charged that the Respondent, Nottingham Cooperative, discriminated against him on the basis of his status as a victim of domestic abuse and retaliated against him for his exercise of a right protected by the ordinance in violation of the Madison Equal Opportunities Ordinance MGO 39.03(4) and (9). The Respondent denied that it discriminated against the Complainant and asserts that the Equal Opportunities Division is without jurisdiction over this complaint as a result of the application of the principle of *res judicata*.

The Respondent, prior to the Complainant's filing of his complaint with the Equal Opportunities Division, filed and tried to the Dane County Circuit Court an eviction action when the Complainant refused to leave the premises after the end of his lease term. The court, after a trial to the bench, Honorable Sarah O'Brien presiding, issued a writ of restitution to the Respondent evicting the Complainant.

The Respondent asserts that the Complainant should have and could have defended against his eviction by interposing his discrimination claim. The Complainant's failure to do so, from the Respondent's perspective, means that the Circuit Court's judgement acts as a bar against the allegations set forth in the current complaint.

The Complainant contends that since the administrative complaint process is the exclusive method for pursuing rights protected by the ordinance, the Circuit Court could not have exercised jurisdiction over his Equal Opportunities Ordinance claim.

DECISION

The issues presented by this complaint are not entirely original. The Hearing Examiner and Commission have addressed claims of both fact and issue preclusion on several different

occasions. Pesselman v. Thomas Link, d/b/a Bellevue Apartments, MEOC Case No. 20021153 (Ex. Dec. 5/26/2005), Blizzard v. Auto Glass Specialists, MEOC Case No. 20022147 (Ex. Dec. 7/18/2005). While the general topic of preclusion is not new to the Hearing Examiner, there are twists and differences in application of that principle presented in this complaint.

In seeking to have the complaint dismissed on grounds of *res judicata*, the Respondent cites both federal and Commission precedents for support. The Hearing Examiner's decision in the Pesselman case indicates that the Equal Opportunities Commission accepts that the principle of *res judicata* is applicable to cases brought before the Commission. In holding that, the Hearing Examiner makes clear that preclusion is not limited to facts and claims actually litigated, but applies to those claims that could have been litigated but were not.

The Hearing Examiner in Pesselman states that he would have applied the principle of *res judicata* to the outcome of the eviction action except for the fact that the judge in the Circuit Court action, Honorable Michael Nowakowski, precluded the defendant from litigating as a defense his previously filed complaint pending before the Equal Opportunities Division. Judge Nowakowski's rulings meant that there was no actual litigation of the defense based upon discrimination and accordingly, the Hearing Examiner permitted the complaint before the Equal Opportunities Commission to proceed.

The Respondent in the current matter relies on the Hearing Examiner's statement that *res judicata* would have applied to bar the complaint before the Commission absent Judge Nowakowski's bar of testimony with respect to that claim. The Respondent asserts that the Complainant could have raised a defense based upon his claim of discrimination, but his failure to do so or to appeal the Circuit Court's ruling now deprives him of his right to file the instant complaint.

In response, the Complainant contends that he had no ability to raise, as a defense, his claim under the Equal Opportunities Ordinance because the Commission's administrative process represents the exclusive process for complaints filed under the Equal Opportunities Ordinance. The Complainant now wishes to pursue two claims under the Equal Opportunities Ordinance. Both parties appear to limit their briefing to the issue of the Complainant's claim of discrimination on the basis of his protected class, victim of domestic abuse. Neither party addresses the Complainant's claim of retaliation for exercise of a right protected by the ordinance. The Hearing Examiner will address this latter issue first.

As the ordinance's protection against retaliation is limited to acts of discrimination protected specifically by the ordinance, it seems unlikely that the court would have entertained the Complainant's claim even if he had raised it. Presumably, the court would have pointed out that the Equal Opportunities Ordinance is the exclusive process for addressing such claims. It is conceivable that the court might have stayed the eviction proceeding pending resolution of a retaliation claim having been filed with the EOD, however, the Complainant had not yet filed this claim at the time of the eviction proceedings.

While the Wisconsin Open Housing Law Wis. Stats. 106.50 does also protect Complainants from retaliation, it is similarly limited to protecting actions exercised under that statute. Under the circumstances as presented in the record to this point, the Hearing Examiner concludes that the Complainant must be permitted to pursue his retaliation claim before the Equal Opportunities Division, as there would have been no ability for the Complainant to bring that claim before the Circuit Court.

As to the Complainant's claim for discrimination based upon his status as a victim of domestic abuse, the Hearing Examiner concludes that the Complainant abandoned that claim by not bringing a general claim of discrimination as a defense in the eviction trial. The record before the Hearing Examiner does not include any of the transcripts of the eviction hearing, but it appears that the parties agree that the Complainant did not raise the defense of discriminatory animus as part of his defense to the eviction. Such a defense would certainly be permissible under the Wisconsin Open Housing Law Wis. Stats. 106.50 and likely under the Federal Fair Housing Act Amendments of 1988, 42 USC §§ 3601. The protection for victims of domestic abuse stems from protections in the federal law.

The Complainant's failure to even raise the issue now precludes him from seeking a "second bite of the apple" by bringing his claim under this ordinance. In Pesselman, *supra*, the Hearing Examiner was persuaded by the fact that the Complainant had already filed a complaint with the Equal Opportunities Division and Judge Nowakowski refused to permit testimony about that complaint. Unfortunately, the record in that case is sparse and does not reveal the reasons for Judge Nowakowski's ruling. Perhaps he understood that the Circuit Court was without jurisdiction to entertain a defense based upon the complaint pending before the EOD. Perhaps, he had other reasons for refusing to accept testimony about that pending complaint, but the judge's rulings made it impossible for the Complainant to pursue a ground of defense that he had raised.

In the present matter, there is no indication that the Complainant attempted to raise a potential violation of the ordinance as a defense. As a result, we cannot know if the court might have entertained that defense or not. The Complainant's decision, be it informed or not, not to raise the issue of discrimination bars his attempt to raise it in the context of this proceeding.

As a very general matter, it is the understanding of the Hearing Examiner that efforts to bring a subsequent claim in a forum that is more restrictive than the more general forum used initially prove not to be successful. This is usually due to more restrictive requirements and elements of proof that are subsumed in the claims in a more general forum. Of course, this is a generalization and determinations must be made on a case-by-case basis. However, the present matter would appear to be one of those circumstances that had the Complainant raised the claim of discrimination at the time of the more general eviction proceeding, the findings in that forum would have had a clearly preclusive effect on a claim brought under the ordinance. In the case of Blizzard v. Auto Glass Specialists, *supra*, the Hearing Examiner was presented with the situation in which the Respondent in a discrimination claim before the EOD wished to give preclusive effect to a finding of no probable cause before the Department of Workforce Development Equal Rights Division in a case involving the State's FMLA. In permitting the Complainant to pursue the claim before the EOD, the Hearing Examiner found that the two different proceedings would rely on different facts and apply those facts to different schemes of proof. That is not the case presented on this record. First, there is an absence of proof resulting from the Complainant's failure to raise the defense of eviction. Second, the facts and elements of the defense would likely be identical to those needed to demonstrate discrimination before the EOD.

In the Blizzard case, the Hearing Examiner took note of the Wisconsin Supreme Court's finding in Michelle T. by Sumpter v. Crozier, 173 Wis.2d 681, to the effect that courts were moving away from a strict application of preclusion doctrine especially in the case of issue preclusion towards a more prejudice based analysis around the issue of fundamental fairness. In that

case, the Supreme Court set forth five factors that a body should consider in determining whether preclusion should apply.

"Today, federal and state courts balance competing goals of judicial efficiency and finality, protection against repetitious or harassing litigation, and the right to litigate one's claims before a jury when deciding whether to permit parties to collaterally estop one another. Courts may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the action: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant re-litigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances 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 action?"

While some of the above factors might arguably be in play in the current circumstance, the record before the Hearing Examiner is insufficient for the Hearing Examiner to meaningfully exercise his discretion to apply those factors. It is the Hearing Examiner's judgment that to permit the Complainant to pursue his discrimination claim after failing to raise it at the time of the eviction hearing would tend to render the eviction judgment a nullity. Whether, as an unrepresented litigant, the Complainant had the ability to meaningfully assess the potential impact of a failure to raise the defense of discrimination is an open question; however, that is an issue that the Hearing Examiner is unable to resolve or address in this forum.

Accordingly, the Hearing Examiner denies the Respondent's Motion to Dismiss the Complainant's claim of retaliation for the exercise of a right protected by the ordinance, but grants the Respondent's Motion as to the Complainant's claim of discrimination based upon his status as a victim of domestic abuse. The complaint is remanded for further proceedings.

Signed and dated this 8th day of December, 2021.

EQUAL OPPORTUNITIES COMMISSION

A handwritten signature in black ink, appearing to read "Clifford E. Blackwell, III", written over a horizontal line.

Clifford E. Blackwell, III
Hearing Examiner