

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

JoCellie West
4713 Splint Road
Madison, Wisconsin 53718

Lisa West
4713 Splint Road
Madison, Wisconsin 53718

Complainant

vs.

Dutch Mill Homes
4702 Dutch Mill Road, Lot 44
Madison, Wisconsin 53716

Respondent

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

CASE NOS. 20201055 & 20201067

BACKGROUND

The present matter results from the consolidation of two complaints filed with the City of Madison Department of Civil Rights. The first complaint was filed by Gail West King on behalf of her mother, Jocellie West, on April 29, 2020. The complaint is designated as Case No. 20201055. This first complaint was amended on May 18, 2020 and a second amendment was filed on June 6, 2020. The second complaint was filed by Gail West King on behalf of her sister, Lisa West, on June 8, 2020. This complaint is designated as Case No 20201067. The Hearing Examiner will hereafter refer to the cases as the West cases unless the context of this decision requires a different designation.

Both complaints name Dutch Mill Homes as the Respondent. The Respondent appears to be a sole proprietorship operated principally by Patrick McGuire until his death in August 2021. Operation of the Respondent has transitioned to Joanne McGuire as the successor to McGuire.

Each complaint alleges that the Respondent discriminated against the Complainants on the bases of several different protected classes including disability and lawful source of income. Further, the complaints allege that the Respondent retaliated against each of the Complainants for their exercise of a right protected by the ordinance.

Gail West King apparently filed the complaints in these matters as a lay representative on behalf of her mother and sister. No formal documents appointing King as agent for her mother or sister or granting her a Power of Attorney have been filed in these matters. However, affidavits filed in these cases assert that Ms. King routinely acts on behalf of her family

members and tends to many of their daily functions and activities. Ms. King is not an attorney and has not held herself out to be one. Until July 26, 2021 when the Neighborhood Law Project filed a Notice of Conditional Appearance, Ms. King was the sole representative for the Complainants.

Subsequent to service of the complaints on the Respondent, efforts to mediate the dispute were unsuccessful and the complaints were transferred to a Department Investigator. The Investigator concluded her investigation by issuing an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainants in housing as alleged in their complaints. Efforts at conciliation of the complaints were unsuccessful. In addition to the findings of probable cause, the Initial Determination did conclude that there was no probable cause to believe discrimination had occurred with respect to some limited allegations of discrimination. Those findings of no probable cause were not appealed and do not play a part in the proceedings at this time. Following the unsuccessful conciliation efforts, the complaints were transferred to the Hearing Examiner for further proceedings.

On April 30, 2021 the Hearing Examiner held a Prehearing Conference to set the time and date for a hearing of the merits of the complaints and to set various interim dates such as for the disclosure of witnesses, completion of discovery and the filing of motions challenging the jurisdiction of the Department. On May 3, 2021 the Hearing Examiner issued a Notice of Hearing and Scheduling Order in the consolidated cases.

On July 26, 2021 the Neighborhood Law Project entered an appearance on behalf of both Complainants. The appearance was conditioned on the rescheduling of various dates and the hearing from those set forth in the Hearing Examiner's original Notice of Hearing and Scheduling Order. On August 4, 2021 the Hearing Examiner conducted a Status and Scheduling Conference at which time, various dates were extended to permit counsel for the Complainants additional time to comply with Respondent's discovery requests and to familiarize themselves with the facts of the complaints.

Since the date of that conference, the parties have engaged in discovery and a lengthy series of disputes over various procedural matters. Much of this activity has been accompanied by an unjustified vilification of opposing counsel and a distinctly unprofessional tone to the argument of counsel.

Despite the schedule set in the original Scheduling Order as extended by later agreement of the parties, the Respondent, on October 22, 2021, filed a Motion to Dismiss the complaints in these matters. On October 29, 2021, the Respondent filed a separate Motion to Dismiss or for a variety of sanctions and for a Protective Order relating to the deposition of Gail West King and to the Respondent. On November 1, 2021, the Complainant's replied to each of the Respondent's motions. On November 2, 2021, the Respondent replied to the Complainant's submission on its jurisdictional grounds for dismissal. On November 3, 2021, the Respondent replied to the Complainant's response to the Motion to Dismiss as a sanction for the failure of Gail West King to appear for her deposition on October 28, 2021.

It is with this complicated procedural history that the Hearing Examiner addresses the pending motions.

DECISION

In its initial and reply briefs the Respondent focuses its argument on the failure of the Complainants to verify their complaints. The Respondent's argument revolves around the requirement for verification found in the Equal Opportunities Ordinance, MGO 39.03(10)(c)(1). The Respondent also contends in a fractured and disjointed manner that the Complainant must sign the complaint themselves in order for a complaint to be properly filed.

Examining the requirements of 39.03(10)(c)(1), the Hearing Examiner finds no requirement that the Complainant sign the complaint. All the section requires is that the complaint be in writing and verified by the Complainant. In this context, verification might take a somewhat different form from that of signing the complaint.

In its reply brief, the Respondent refines its argument to contend that the verification requirement is not a matter of jurisdiction, either subject matter, procedural or personal, but one of competency for the Department to proceed with the complaint. The Respondent asserts that the requirement for verification in the ordinance represents a prerequisite for processing of the complaint by the Department. In this contention, the Hearing Examiner can find no fault.

While these complaints have an awkward procedural history, it is clear that the complaints were not verified by Ms. King or either of the Complainants. This represents a flaw that is fatal to the Department's continued processing of this complaint.

In response to the Respondent's main argument, the Complainants contend that the Hearing Examiner is limited in the types of circumstances for which he can dismiss a complaint. They further argue that the Respondent's definitions of "verified" or "verified complaint" are inapplicable to the present matters. Finally, the Complainants spend the bulk of their time demonstrating that Ms. King was authorized by and had the permission of the two Complainants to file the complaints on their behalf.

Despite the arguments of the Respondent to the contrary, the Hearing Examiner finds that there is no credible deficiency in Ms. King's authority to file these complaints on behalf of her mother and sister. Throughout the proceedings, the Respondent has cast doubts on the propriety of permitting a non-lawyer to act on behalf of another in proceedings before the Department. The Hearing Examiner sees no bar to such representation and while it may from time to time complicate proceedings, it is the experience of the Hearing Examiner that every once in a while, a lay representative represents the interests of a party better than a licensed attorney might.

As an administrative agency, the Department has broad discretion in determining how to carry out the goals and purposes set forth in its enabling legislation. Permitting lay representatives helps to further those goals and purposes by providing unrepresented individuals who may not be capable of their own representation the opportunity to air their complaints before the Department. It is much like the authority to award actual reasonable attorney fees to prevailing Complainants that encourages those to undertake representations that they might not be willing to undertake due to the often small financial outcomes.

However, the discussion of whether Ms. King had the authority to file complaints on behalf of her mother and sister are not truly germane to the question of whether the complaints

meet the fundamental requirements of a complaint as set forth in MGO 39.03(10)(c)(1). While the Hearing Examiner does not find the citations and quotations provided by the Respondent to be on point or even identifiable, the Complainants offer no helpful guidance to assist in application of the language of the section.

It is a basic tenet of statutory interpretation that one must first look to the language of the ordinance or statute and attempt to give meaning to the words and purposes of the provision. Of particular importance are the words "verified by the Complainant". The Hearing Examiner understands the word "verified" to mean confirmed or substantiated. In this context, it appears that the Common Council wished there to be some degree of authentication of the facts and allegations made in the complaint by the person making the allegations of wrongdoing.

This verification or authentication might be particularly desirable in the circumstance such as with these complaints where they were completed by someone who might have only been involved as a third party, and was not a party to the whole of the transaction giving rise to the complaint.

From the Hearing Examiner's perspective, this authentication of the facts and allegations underlying the complaint need not necessarily take the form of a notarization or other statement under oath or affirmation, but does require some level of attestation as to ones belief in the correctness of the facts and allegations set forth in the complaint.

Review of the record fails to demonstrate any writing or other indication that the Complainants read or were aware of the particular allegations in the complaints or amended complaints. The only indication of Jocellie and Lisa West's participation in the filing of the complaints is their names having been typed into the signature blocks on the complaint forms. This falls short of the requirement for some level of review and belief in the truth and accuracy of the facts and allegations of the complaints.

The Hearing Examiner cannot ignore the specific inclusion of the word verified in the ordinance and the indication that it is the Complainant who is the individual who must make this verification. The Common Council included this specific language in the ordinance and the Hearing Examiner must attempt to give the Council's choice of language meaning and effect.

The Complainants provide no guidance on how or to what extent the complaints and amended complaints in these matters comply with the requirements of MGO 39.03.(10)(c)(1). The citations to the depositions of Jocellie and Lisa only demonstrate that authority was given to Ms. King, but do nothing to support that either had any knowledge of the facts or allegations as laid out in the complaints filed in their names. Without some understanding of the complaints filed on their behalf, it is not possible for the Complainants to verify or confirm the facts and allegations of the complaints.

The Department may bear some degree of responsibility for creation of this issue resulting from a failure to examine the complaints and requiring something more than a typed signature before processing these complaints. However, given the level of the Respondent's expressions of dismay and disappointment arising from the processing of these cases, the Hearing Examiner cannot understand why the Respondent waited until approximately three weeks before hearing to raise this issue. The fact that the Hearing Examiner specifically included a date for the filing of dispositive motions in the original Scheduling Order or inquired

about the inclusion of such a date should have triggered action on the part of the Respondent at a much earlier date. A request for some determination of the propriety of the continued processing of these complaints could have been made at any step earlier in the processing of these complaints even well before the cases were transferred to the Hearing Examiner. The Respondent's failure to raise this issue at an earlier date might represent an effort to demonstrate good faith during the pendency of these complaints, but it would seem that the Respondent could have resolved this issue at a much earlier stage and minimized the impact upon itself.

While the Hearing Examiner believes this issue should have been resolved at a much earlier stage of the process, the Respondent's failure to do so clearly does not waive the Respondent's ability to raise the issue at this stage. While the Department's rules and procedures are silent on this question, it seems clear to the Hearing Examiner that except in very limited circumstances, issues of jurisdiction be it substantive, procedural or personal, or the competency of the Department to proceed are not waived by the passage of time and may be brought at any stage of the process. Although Wis. Stats. 802.6(8) does not specifically apply to these proceedings, the exceptions listed there do not raise any concerns for the Hearing Examiner's ability to take and address this issue at this time.

Dismissal of the complaints on what seems to be a technical ground may well work a hardship on the Complainants as well as the Respondent. That is an unfortunate consequence of how this matter proceeded and the relative positions of the parties. There is nothing that the Hearing Examiner can do to limit those effects. While the dismissal of these complaints will be without prejudice, the Complainants may not have a viable remedy before the Department or elsewhere.

In summary, the Hearing Examiner hereby dismisses the complaints in the above captioned matters for failure to demonstrate verification of the complaints by the Complainants pursuant to MGO 39.03(10)(c)(1). Since resolution of this issue obviates the issues raised in the Respondent's other motion relating to Ms. King's failure to appear at a scheduled deposition, the Hearing Examiner need not address that motion and it is deemed denied.

ORDER

The complaints are dismissed without prejudice subject to the appeal rights specified in the accompanying Notice of Right to Appeal. Further proceedings in this matter are stayed pending possible appeal. The parties shall bear their own costs and fees.

Signed and dated, this 5th day of November, 2021.

A handwritten signature in black ink, appearing to read "Clifford E. Blackwell, III". To the left of the signature is a circular stamp containing the number "10".

Clifford E. Blackwell, III
Hearing Examiner

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Complainants

vs.

Dutch Mill Homes
4702 Dutch Mill Road, Lot 44
Madison, Wisconsin 53716

Respondent

COMMISSION'S DECISION AND ORDER
REMAND FOR FURTHER PROCESSING
ON APPEAL OF HEARING EXAMINER'S
DECISION AND ORDER

CASE NOS. 20201055 & 20201067

BACKGROUND

This matter is a consolidation of two complaints. Case No. 20201055 was filed by Gail West King on behalf of her mother JoCellie West on April 29, 2020. Ms. West amended this complaint of May 18, 2020, and again on June 6, 2020. Case No. 20201067 was filed by Gail West King on behalf of her sister Lisa West on June 8, 2020. Both complaints allege that the Respondent, Dutch Mill Homes, discriminated against JoCellie and Lisa West (collectively "the Wests") in housing on several different basis including disability and lawful source of income and retaliated against the Wests for the lawful exercise of their rights under the ordinance.

Madison General Ordinance 39.03(10)(c)(1) states that "[t]he commission shall not investigate any complaint unless it is in writing and verified by the complainant, and a copy of the complaint is sent to the person or persons complained of, hereinafter referred to as respondent." The operative phrase for purposes of this case is the phrase "verified by the complainant." The Hearing Examiner found that the issue of whether Gail West King had the authority to file the complaints on behalf of her mother and sister was not germane to the question of whether the allegations in the complaint were confirmed, substantiated, or understood by the Wests (e.g., verified) at the time the complaints were submitted and/or amended. The Hearing Examiner found:

The citations to the depositions of Jocellie and Lisa only demonstrate that authority was given to Ms. King but do nothing to support that either had any knowledge of the facts or allegations as laid out in the complaints filed in their names. Without some understanding of the complaints filed on their behalf, it is not possible for the Complainants to verify or confirm the facts and allegations of the complaints. The Department may bear some degree of responsibility for creation of this issue resulting from a failure to examine the complaints and requiring something more than a typed signature before processing these complaints. *Hearing Examiner Decision and Order, page 4.*

The Hearing Examiner's November 5, 2021, Order dismissed the Wests' complaints without prejudice subject to appeal and stayed the matter pending a possible appeal. The Wests appealed. The parties were given the opportunity to present additional written argument on appeal. On June 16, 2022, the Appeals Committee of the Equal Opportunities Commission met to consider Complainant's appeal and hear oral argument in support of the parties' respective positions. Participating in the Committee's deliberations were Commissioners Ramey, Andrae, and Wallace.

DECISION AND ORDER

After a review of the record, including the Hearing Examiner's Decision and Order on Respondent's Motions to Dismiss, the parties' written submission on appeal and after hearing the parties' oral argument, the Appeal's Committee orders the case remanded back to the Hearing Examiner for further factual findings to determine from EOC staff investigating this case:

1. Whether JoCellie and Lisa West personally spoke to EOC staff during the investigation of the complaint.
2. When either JoCellie or Lisa West spoke to EOC staff.
3. What personal knowledge did either JoCellie or Lisa West have regarding the allegations in their complaint.

Once the additional fact finding is completed, the Hearing Examiner will issue a new decision.

Joining in the Committee's action are Commissioners Ramey, Andrae, and Wallace. No Commissioner opposed this action.

Signed and dated this 29th day of June, 2022.

On behalf of the Equal Opportunities Commission and the Appeals Committee,



Melanie Ramey
Appeals Committee Chair

cc: Attorney Mitch, Complainant's Counsel
Tessa Henson, Complainant's Counsel
Forrest Stewart, Complainant's Counsel
Attorney Jack Hoag, Respondent's Counsel