COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2983

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN ex rel. Caryl Sprague,

Petitioner-Respondent,

v.

CITY OF MADISON and
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION,

Respondents-Respondents,

ANN HACKLANDER-READY,

Respondent-Appellant,

MAUREEN ROWE,

Respondent.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed in part; reversed in part.*

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

SUNDBY, J. Ann Hacklander-Ready and Maureen Rowe appeal from a decision affirming the Madison Equal Opportunity Commission's (MEOC) Decision and Order which found that they refused to rent housing to Carol Sprague as their housemate because of her sexual orientation, in violation of § 3.23(4)(a) of the Madison General Ordinances (MGO). MEOC awarded Sprague $3,000 in damages for emotional distress, and $300 for the loss of a security deposit on another apartment. We conclude that the trial court correctly found that § 3.23, MGO, unambiguously applied to housemates at the time this action arose. We therefore affirm MEOC's award of damages for Sprague's loss of her security deposit. However, we reverse the award for emotional distress because we conclude that MEOC had no power to award such damages. We further affirm MEOC's award of costs and reasonable attorney's fees to Sprague. Although Sprague is not entitled to damages for emotional distress, she is the prevailing party because she established that appellants discriminated against her.

BACKGROUND

At all times relevant to this action Hacklander-Ready leased a four-bedroom house. She had the owner's permission to allow others to live with her and share in the payment of rent. In the fall of 1988, Maureen Rowe began living with Hacklander-Ready and paying rent. In April 1989 they advertised for housemates to replace two women who were moving out. They chose Sprague from among numerous applicants. They knew her sexual orientation when they extended their offer to her. Sprague accepted their offer and made a rent deposit on May 4, 1989. However, the following day Hacklander-Ready informed Sprague that they were withdrawing their offer because they were not comfortable living with a person of her sexual orientation.

Sprague filed a complaint with MEOC alleging that appellants discriminated against her on the basis of sexual orientation, contrary to § 3.23(4)(a), MGO. The administrative law judge agreed and awarded Sprague $2,000 for emotional distress, $1,000 punitive damages, and $300 for the security deposit she lost trying to secure another apartment, together with costs and reasonable attorney's fees. Appellants appealed to MEOC. On July 10, 1992, MEOC vacated the hearing examiner's Findings of Fact and Conclusions of Law and Order on the grounds that the Madison City Council (City Council) intended to exempt roommate arrangements from the ordinance. MEOC did not state its reasons for this conclusion, nor did it address the legal arguments the parties raised.

Sprague petitioned the circuit court for a writ of certiorari to review MEOC's decision. She argued that the ordinance unambiguously applied to housemate arrangements. On August 19, 1993, the trial court reversed MEOC's order. The court found that the language of the ordinance was "crystal clear" and that MEOC had jurisdiction to provide Sprague with relief. The trial court retained jurisdiction and remanded the matter to MEOC. On February 10, 1994, MEOC issued a Decision and Order on Remand which affirmed, in part, the decision of the hearing examiner. MEOC reversed the hearing examiner's award of punitive damages but increased the award of damages for Sprague's emotional distress to $3,000. The total award remained $3,300. MEOC awarded Sprague costs and reasonable attorney's fees.

APPLICABLE ORDINANCES

At the time of the events in issue, § 3.23, MGO, provided:

> (1) Declaration of Policy. The practice of providing equal opportunities in housing ... without regard to ... sexual orientation ... is a desirable goal of the City of Madison and a matter of legitimate concern to its government ... In order that the peace, freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all its inhabitants to equal opportunity to ... housing....

> (2)(b) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a residence, home or place of habitation of one or more human beings, including a mobile home as defined in Section 66.058 of the Wisconsin Statutes and a trailer as defined in Section 9.23 of the Madison General Ordinances.... Such definition of "housing" is qualified by the exceptions contained in Section 3.23(4)(a).
>
> (4) It shall be an unfair discrimination practice and unlawful and hereby prohibited: (a) For any person having the right of ownership or possession or the right of transfer, sale, rental or lease of any housing, or the agent of any such person, to refuse to transfer, sell, rent or lease, or otherwise to deny or withhold from any person such housing because of ... sexual orientation.... (b) Nothing in this ordinance shall prevent any person from renting or leasing housing, or any part thereof, to solely male or female persons if such housing or part thereof is rented with the understanding that toilet and bath facilities must be shared with the landlord or with other tenants.

DECISION

On certiorari we review the decision of the administrative agency. ***State ex rel. Thompson v. Nash***, 27 Wis.2d 183, 194, 133 N.W.2d 769, 775 (1965). Our review is limited to (1) whether MEOC kept within its jurisdiction, (2) whether it acted according to the law, (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that MEOC might reasonably have made the order or determination in question. ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 24, 498 N.W.2d 842, 846 (1993).

Sprague claims that § 3.23, MGO, was intended to apply to housemate arrangements.[1] The interpretation of a statute or ordinance is a question of law which we decide without deference to the trial court. *Id.* at 32, 498 N.W.2d at 850. Where a statute is unambiguous there is no need to go beyond the clear language of the statute. ***County of Sauk v. Trager***, 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983), *aff'd* 118 Wis.2d 204, 346 N.W.2d 756 (1984).

Section 3.23(4), MGO, unambiguously prohibits any person having right of rental to refuse to rent to any person because of the person's sexual orientation. Hacklander-Ready concedes that she held the lease to the house and that she had the right to rent the property to others. Further, she and Rowe admit that the sole reason they withdrew their offer was Sprague's sexual orientation. Finally, the room that appellants sought to rent falls within the definition of housing under § 3.23(2)(b), MGO, as a part of a building intended as a place of habitation for one or more human beings.

While appellants correctly argue that a statute is ambiguous if it may be construed in different ways by reasonably well-informed persons, we fail to see any reasonable interpretation that would make § 3.23, MGO, inapplicable in this case. *See* ***La Crosse Footwear v. LIRC***, 147 Wis.2d 419, 423, 434 N.W.2d 392, 394 (Ct. App.

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[1] In September 1989, subsequent to the commencement of this action, the Madison City Council amended the Equal Opportunities Ordinance by adding § 3.23(c), MGO, which states, "Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons."

1988). Appellants also correctly note that a court may resort to construction if the literal meaning of a statute produces an absurd or unreasonable result. ***NCR Corp. v. Department of Revenue***, 112 Wis.2d 406, 411, 332 N.W.2d 865, 868 (Ct. App. 1983). However, applying § 3.23(4) to the rental of a room within a house with shared common areas is not unreasonable or absurd. Because we find that the ordinance clearly and unambiguously applies to the subleasing of housing by a person having the right of rental, our inquiry in this respect is at an end.

Appellants argue that to apply the ordinance to the lease of housing by a tenant to a housemate makes § 3.24(4)(a), MGO, unconstitutional in its application. The trial court properly declined to consider this argument because appellants failed to notify the attorney general of their challenge, as required by § 806.04(11), STATS.[2] However, appellants notified the attorney general subsequent to the trial court's decision.[3] This notice cured the defect. ***See In re Estate of Fessler***, 100 Wis.2d 437, 444, 302 N.W.2d 414, 418 (1981).

Appellants cite many cases which they argue support their constitutional challenge: ***NAACP v. Alabama***, 357 U.S. 449 (1958): ***Griswold v. Connecticut***, 381 U.S. 479 (1965); ***City of Ladue v. Gilleo***, 512 U.S. 43 (1994); ***Payton v. New York***,

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[2] Section 806.04(11), STATS., provides: "In any proceeding which involves the validity of a municipal ordinance or franchise ... if any ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard."

[3] The attorney general declined to appear in this matter.

445 U.S. 573 (1980); ***Moore v. City of East Cleveland***, 431 U.S. 494 (1977); ***City of Wauwatosa v. King***, 49 Wis.2d 398, 182 N.W.2d 530 (1971). However, those cases deal either with the right to privacy in the home or family or the right to engage in first amendment activity free of unwarranted governmental intrusion. Appellants gave up their unqualified right to such constitutional protection when they rented housing for profit. The restrictions placed by the Madison City Council on persons who rent housing for profit are not unreasonable and do not encroach upon appellant's constitutional protections. We therefore reject appellants' challenge to the constitutionality of § 3.24, MGO, as applied.

Appellants next argue that MEOC exceeded its jurisdiction when it awarded Sprague damages for emotional distress. MEOC relies on § 3.23(9)(c)2.b, MGO, as the source of its authority to make such an award. At the time this action arose, § 3.23(9)(c)2.b, MGO, stated that when MEOC determines that discrimination has occurred "it shall order such action by the Respondent as will redress the injury done to the Complainant in violation of this ordinance ... and generally effectuate the purpose of this ordinance." Whether this language empowered MEOC to award damages is again a question of law which we decide without deference to the trial court's decision. ***Marris***, 176 Wis.2d at 24, 498 N.W.2d at 846. In construing a statute or ordinance, we seek the intent of the legislative body. ***Watkins v. LIRC***, 117 Wis.2d 753, 761, 345 N.W.2d 482, 486 (1984).

As remedial legislation, § 3.24, MGO, must be liberally construed to accomplish its purpose. MEOC has awarded damages for emotional distress in two previous cases;[4] however, this brief history is not sufficient to persuade us to defer to the agency's interpretation without our own careful examination. We need not give deference to an administrative agency's interpretation of a statue or ordinance unless the agency's interpretation has been long-continued, substantially uniform and without challenge by governmental authorities and courts. ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 83, 452 N.W.2d 368, 372 (1990).

Section 3.23, MGO, as it read when this dispute arose, did not explicitly authorize MEOC to award compensatory or punitive damages. Moreover, when this action arose not even the State's Fair Housing Law allowed the administrative agency to award damages in an administrative proceeding. Such damages could be awarded only in a civil action. Section 101.22(7), STATS.[5] Further, when this action arose, § 66.432(2), STATS., which enables municipalities to enact ordinances prohibiting discrimination in the rental of housing, only authorized them to impose forfeitures.[6]

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[4] ***Nelson v. Weight Loss Clinic of America***, case No. 20684 (9/29/89), and ***Ossia v. Rush***, case No. 1377 (6/7/88).

[5] Section 101.22, STATS., was amended in 1993 to permit a hearing examiner to award economic and non-economic damages, and was renumbered to § 106.04 by 1995 Act 27, § 3687.

[6] Even the present version of § 66.432(2), STATS., does not specifically authorize a municipal agency to award damages to redress housing discrimination. Rather it provides for either party to elect to remove the action to the circuit court after a finding has been made that there is reasonable cause to believe that a violation has occurred.

Without such statutory authority, it is extremely unlikely that the City Council intended to empower MEOC to award compensatory damages. Finally, the plain language of § 3.23, MGO, that the agency "shall order such action by the Respondent as will redress the injury done to the Complainant ... and generally effectuate the purpose of this ordinance," is far more consistent with the imposition of forfeitures and equitable relief. We also note that the City Council has now amended § 3.23, MGO, to explicitly grant MEOC authority to award economic and non-economic damages. Section 3.23(9)(c)5b, MGO. That the City Council added this language after this action was begun is strong evidence that the Council did not consider that the former language of § 3.23(4) empowered MEOC to award compensatory damages. *See* Sutherland, STAT. CONSTR. § 48.01 (5th Ed.). We therefore hold that MEOC exceeded its jurisdiction and acted contrary to law when it awarded Sprague damages for emotional distress.[7]

Appellants also argue that the $300 award for the lost security deposit should be vacated because it reflects MEOC's will and not its judgment. However, we find that MEOC's determination that appellants' illegal refusal to rent to Sprague was the proximate cause of the lost security deposit is reasonably supported by the evidence and is an appropriate restitutionary remedy.

[7] Sprague does not contest MEOC's decision which deleted the examiner's proposed award of punitive damages.

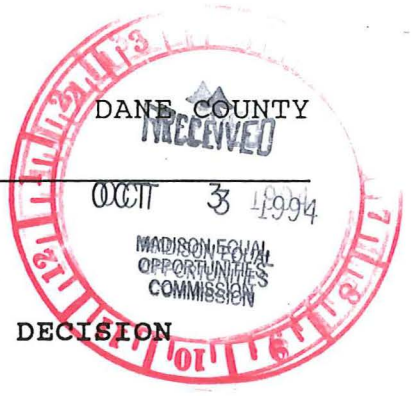
Finally, appellants contend that Sprague's inquiries as to whether the household would respect her sexual orientation constituted a waiver of her rights under § 3.23, MGO. To hold that a prudent inquiry about the environment in which one will live waived the protections afforded by § 3.23, MGO, would be an unreasonable construction of the ordinance. We therefore hold that by her inquiries Sprague did not waive her rights under the ordinance.

Because we hold that in enacting § 3.23(9)(c)2.b, MGO, the Common Council did not authorize MEOC to award damages for emotional distress, we do not decide whether the award violated appellants' right to a jury trial. Further, we need not consider the broader question whether municipalities generally have the power to authorize administrative agencies to award compensatory damages.

By the Court.—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 16



STATE OF WISCONSIN
ex. rel. CARYL SPRAGUE,

Plaintiff,

vs.

CITY OF MADISON AND
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION

Defendants.

DECISION

Case No. 93 CV 113

Respondents Ann Hacklander-Ready and Maureen Rowe bring this action for Writ of Certiorari to review a decision of the City of Madison Equal Opportunities Commission (MEOC) on remand from an Order of this Court.

This case first came before this court on an issue of statutory construction. Initially a hearing examiner for the MEOC concluded that "Respondents discriminated against the Complainant in rental housing when they withdrew their offer to rent a room to her in a rented house because of her sexual orientation in violation of §3.23(4)(a), MGO." The recommended order included provisions for payment of a total of $3,300 damages to the Complainant, together with costs and reasonable attorney's fees. Of the total $3,300 damages awarded, $300.00 was awarded for the loss of Complainant's security deposit, $2,000 was awarded for emotional distress, and $1,000 was awarded as punitive damages. The Respondents appealed to the Equal Opportunities Commission. On July 10, 1992, the Commission

vacated the hearing examiner's recommended Findings of Fact, Conclusions of Law, and Order by finding that the ordinance in effect at the time in question was inapplicable because "roommate transactions were intended to be exempted from coverage under the Ordinance." In response to this ruling, Petitioner filed an action for certiorari before this court.

In a decision dated August 19, 1993, this court held that Madison General Ordinance §3.23 was not ambiguous and that its terms clearly encompassed the rental arrangement which is the central focus of this action. In the Order, this court remanded the case to the Commission to further consider Respondents' remaining exceptions to the order of the hearing examiner which had not been reached by the Commission.

In a Decision and Order on Remand dated February 10, 1994, the Commission considered Respondents' exceptions and affirmed, in part, the decision of the hearing examiner. However, the Commission reversed the hearing examiner's award of punitive damages and increased the award of damages for emotional distress to $3,000. The total award to Petitioner for compensatory damages remained at $3,300.

Respondents Hacklander-Ready and Rowe now seek judicial review of the Commission's Decision and Order on Remand.

STANDARD OF REVIEW

On certiorari, the reviewing court is limited to determining: (1) Whether the agency kept within its jurisdiction; (2) Whether the agency acted according to law; (3) Whether the

agency's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) Whether the evidence presented was such that the agency might reasonably make the order or determination in question. State ex rel. Whiting v. Kolb, 158 Wis. 2d 226, 233 (Ct. App. 1990).

On review by certiorari, the court must uphold an agency decision if it is supported by "any reasonable view of the evidence." Nufer v. Village Bd. of Village of Palmyra, 92 Wis. 2d 289, 301 (1979). Thus, the court will not review the weight and credibility of the evidence but must affirm if any reasonable view of the evidence supports the agency's decision. State ex rel. Beierle v. CSC , 41 Wis. 2d 213 (1969).

DISCUSSION

Respondent presents several exceptions to the Commission's Decision and Order on Remand.

I. Constitutionality of §3.23(4)(a), MGO

Respondents contend that §3.23(4)(a), MGO raises constitutional concerns regarding the right to privacy and the right of association. This argument goes directly to the validity of that section of the ordinance.

§806.04(11), Stats. provides in relevant part that, "In any proceeding which involves the validity of a municipal ordinance or franchise. . .if the. . .ordinance is alleged to be unconstitutional, the attorney general shall be so served with a copy of the proceeding and be entitled to be heard." §806.04(11), Stats. This requirement is not only mandatory but

is fatal to the jurisdiction of the court to consider the constitutional issue raised. Matter of Fessler's Estate, 100 Wis. 2d 437 (1981).

There is no record in this case that Respondents have notified the attorney general of their constitutional challenge to this ordinance. Respondents raised this same argument in 1991 before the Commission in their Answer and Brief and still failed to notify the attorney general of their constitutional challenge. Respondents contend that this requirement is not applicable since this is not an action for declaratory relief. Contrary to Respondents assertion, case law clearly indicates that even when the action is not one for declaratory judgment and the constitutionality of a statute is raised by way of a defendant's demurrer, the requirement of §806.04(11), Stats. for service on the attorney general is applicable. Absent such service, the trial court cannot properly consider the constitutional issue because failure to give notice is fatal to the jurisdiction of the court. Kurtz v. City of Waukesha, 91 Wis. 2d 103, 116-17 (1979).

While this court recognizes that failure to notify the attorney general is a curable defect (See W.W.W. v. M.C.S., 161 Wis. 2d 1015 (1991)), this court declines to allow Respondents the opportunity to do so based on the history of this case. The complaint to the EOC in this case was filed nearly 5 1/2 years ago on 5/25/89. The ordinance being challenged is no longer on

the books, having been modified by City Council action after the complaint in this action was filed. The decision of this court, therefore, would have applicability to only the parties to this action. This matter has been under litigation for over 5 years and must be finally determined. Further delay would not serve the interests of justice or the interests of the parties to this action. Respondents have raised this constitutional argument since 1991 and still have failed to notify the attorney general. The requirements of the statute are clear and the case law requiring notice even in non-declaratory judgment actions is not new. The decisions on this issue date from the Kurtz decision in 1981. Respondent has had ample opportunity to comply with the statute. This court's refusal to allow Respondent time to give notice at this date is supported by case law. See Midwest Mut. Ins. Co. v. Nicolazzi, 138 Wis. 2d 192, 202 (Ct. App. 1987) where the Court of Appeals declined to allow notification of the attorney general on appeal "under the history of this case."

Because Respondents have failed to comply with the requirements of §806.04(11), Stats., this court lacks jurisdiction to consider Respondents' constitutional challenges.

II. Waiver of Violation of Ordinance

Respondents maintain that Complainant waived any claim of violation of the ordinance by virtue of the fact that she "repeatedly said that she did not want to live in the house if anyone was uncomfortable." (Respondent's Brief, p.2). According to Respondents, this expression amounted to an invitation to

Respondents to reject her if they were not comfortable with her sexual orientation. Respondents contend that Complainant should not be allowed to sue Respondents once she had made such an invitation.

Complainant denies that she told Respondents that she would not live in the home if they felt uncomfortable living with a lesbian. Complainant maintains that she asked generally whether a person's sexual orientation would be respected within the house.

In her proposed Findings of Fact, the Hearing Examiner states, "The Complainant mentioned to the Respondents that she would not wish to live in a house in which a person's sexual orientation is not respected." The Hearing Examiner did not specifically address in her conclusions of law whether this finding of fact constituted a waiver or abandonment of any claim of discrimination. However, the Hearing Examiner did find that considering all of the evidence before her Respondents did, in fact, discriminate against Petitioner based on her sexual orientation. The Commission, on remand, stated that, "The Hearing Examiner has the discretion to articulate those parts of the record she deems relevant as she renders her findings, conclusions, and order."

This court must uphold the agency's decision if it is supported by any reasonable view of the evidence. Nufer v. Village Bd. of Village of Palmyra, 92 Wis. 2d 289, 301 (1979). When the record reveals conflicting views which may each be

sustained by the evidence, the court is not to substitute its judgment for the judgment of the Commission. It is for the agency to decide which view of the evidence it wishes to accept. Sanitary Transfer & Landfill, Inc. v. Department of Natural Resources, 85 Wis. 2d 1 (1978). An agency's findings on disputed evidence are conclusive even if a court might have ruled differently. It is only when the agency's findings are incredible as a matter of law that a reviewing court will reverse the agency findings. Advance Die Casting Co. v. Labor and Industry Review Com'n., 154 Wis. 2d 239, review denied 454 N.W.2d 806 (Ct. App. 1989).

The agency, in the case before this court, has weighed the testimony and stated in its Findings of Fact that Sprague did mention she would not want to live in the apartment if the other roommates would be uncomfortable. However, even considering this finding, the agency determined that Respondents discriminated against Complainant on the basis of her sexual orientation. This court finds there was more than sufficient evidence presented to support the agency's determination. In finding that Respondents discriminated against Complainant based on her sexual orientation, the agency must have concluded that Complainant did not waive her claim. Respondents have cited no authority for the proposition that a claim for discrimination may be waived by a victim by articulating concerns about respect for her sexual orientation. Such a view would be contrary to the spirit and purpose of housing discrimination laws.

For all of the reasons stated above, this court finds that the evidence was such that the Commission might reasonably reach its conclusion that Ms. Sprague did not waive her right to be free from discrimination in housing.

III. Damages for Emotional Distress

Respondents also take exception to the Commission's award of damages for emotional distress and punitive damages. Respondents maintain that the ordinance does not authorize the Commission to award damages either for emotional distress or punitive damages. Respondent further maintains that if the ordinance is construed to provide for such damages it then violates Respondents' right to a jury trial.

As a preliminary matter, because the Commission on remand denied the award of punitive damages the question as to MEOC's authority to award punitive damages is now moot.

The MEOC bases its authority to award damages for emotional distress on the broad powers granted to the Commission when it finds that discrimination has occurred. Under §3.23(9)(c)2.b. the Commission "shall order such action by the Respondent as will redress the injury done to the Complainant in violation of the ordinance..." The Commission is also empowered to "adopt such rules and regulations as may be necessary to carry out the purpose and provisions of this ordinance." §3.23(9)(b)6., MGO. EOC Rule 17, adopted by the Commission, expressly authorizes compensatory damages for discrimination:

Compensatory losses, reasonable attorney fees and costs may be ordered along with any other appropriate remedies where the

Commission finds that a Respondent has engaged in discrimination.

> This rule does not-by express reference to compensatory losses, attorney fees and costs-limit in any way the Commission's authority to order any other remedies permitted or required under sec. 3.23, Madison General Ordinances.

The Commission has interpreted this language to permit awards for emotional distress in previous MEOC decisions - Nelson v. Weight Loss Clinic, No. 20684 (Sept. 29, 1989) and Ossia v. Rush, No. 1377 (June 7, 1988). Both of these decisions base their reasoning on: (1) the City's authority under its home rule powers to authorize relief which would make a complainant whole for all losses and expenses including compensatory damages and, (2) a similarity in purpose and objective to the Wisconsin Open Housing Law, §101.22, Stats under which case law has approved awards of damages for emotional distress.

Respondents contend that a comparison of §3.23,MGO to §101.22, Stats. is inappropriate because the State Open Housing Law contains remedy language which is significantly more specific and expressly allows for damages while the Madison General Ordinance does not. Respondents conclude that because there is no specific remedy language as in the State Open Housing Law, the ordinance must be intended only to provide a make-whole remedy.

This court is unpersuaded by Respondents' arguments. The City Council clearly granted the Commission broad powers to remedy incidents of housing discrimination and to promulgate rules to enforce that power. The Declaration of Policy in §3.23(1), MGO expresses the important and serious public policy

concerns of the City Council in providing citizens with fair and equal opportunity in housing. This Declaration of Policy emphasizes that it is the policy of the City to enforce equal housing opportunity for all Madison residents to the fullest extent of the law. As remedial legislation, this ordinance must be liberally construed to effectuate this purpose.

The crucial language is found in §3.23(9)(c)2.b., MGO which provides that the Commission shall order such action as will "redress the injury done to the Complainant." When read in conjunction with the liberal construction of the Declaration of Policy to enforce equal housing opportunity to the fullest extent of the law it is reasonable to conclude that the Commission could interpret its authority to allow for not only compensatory losses but also any other remedy permitted or required under the ordinance (EOC Rule 17). Furthermore, the ordinance can reasonably be interpreted to allow for remedies which address not only the practices of discrimination in housing but also the effects of discrimination in housing.

This conclusion is further supported by the fact that Wisconsin courts have long recognized that emotional distress may be the direct, proximate and natural result of an infringement of a legal right - especially the right to not be discriminated against in housing matters. In Chomicki v. Wittekind, 128 Wis. 2d 188 (Ct. App. 1985) the court awarded damages for emotional distress under Wisconsin's Open Housing Law, §101.22, Stats. and found that the intent of the legislature in rendering housing

discrimination unlawful was to protect human dignity and human rights. Where the intent of the Madison General Ordinance is to enforce equal housing opportunity to the fullest extent of the law and to redress the injury done to Complainants, the award of damages to compensate for a victim's humiliation is an act reasonably calculated to eliminate the effects of discrimination.

Furthermore, the City Council was not limiting in specifying the types of injuries the Commission can redress in enforcing violations of the ordinance. Wisconsin courts recognize the emotional damage incurred by those subjected to discrimination in housing. It is black letter law that compensatory damages awards are intended to make injured parties whole when the injury consists of emotional distress. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307 (1986). Also, it is widely recognized that in many housing cases, "out-of-pocket expenses are de minimis." Walnut Creek Manor v. FEHC, 814 P. 2d 704,726 (Cal. 1991) citing Private Enforcement and Fair Housing, supra, 6 Yale L. & Pol'y Rev. 375, 380. To deny the Commission the authority to award compensatory damages for emotional distress would essentially end in a result in which the complainant would not be made whole. The complainant might only be compensated for minor economic losses yet incur significant noneconomic injury. The case before this court is an example of such a dilemma where the award of compensatory damages for emotional harm may be the only significant remedy available to a victim of discrimination. While here, the Complainant did lose a $300 security deposit,

other victims of housing discrimination might find alternative housing with cheaper rent and consequently have no economic loss. An interpretation of the ordinance allowing no recovery in such cases cannot possibly serve the strong public policy goals of the ordinance.

Finally, an interpretation of the ordinance which deprives the Commission of the authority to award damages for emotional distress destroys the effectiveness of the Commission as an aggressive enforcement mechanism for remedying acts of unlawful housing discrimination. If the Commission is denied the ability to offer meaningful compensation to a claimant, there is little incentive to pursue a claim of discrimination and victims would be influenced to forego their claims. This weakens the enforcement scheme devised by the City Council. The ability to compensate victims for emotional distress supports and reinforces the City's goal of providing equal access to available housing in the City.

For all of these reasons, this court concludes that the Commission did not act beyond its authority or contrary to law in awarding damages for emotional distress.

IV. Right to Jury Trial

Respondents further maintain that if the Commission is authorized to award damages this violates their right to a jury trial pursuant to the Wisconsin Constitution, Article I, §5 and pursuant to the Seventh Amendment of the United States Constitution.

The right to a jury trial under the Seventh Amendment applies to actions in federal court. It does not apply to state proceedings since the Seventh Amendment has not been incorporated by the Fourteenth Amendment to become binding on the states. State v. Ameritech Corp., Case No. 93-1750 (Ct. App. June 28, 1994). Thus, the analysis stops here and there is no need to address further arguments.

The right to a jury trial pursuant to Article I, §5 of the Wisconsin Constitution extends to "all cases at law." The long-standing interpretation of this language is that "at law" applies only to rights which existed under common law at the time the Wisconsin Constitution was enacted. The Wisconsin Constitution was enacted in 1848. Ameritech, supra. and N.E. v. DHSS, 122 Wis. 2d 198, 203 (1985). Here, protection of individuals from the effects of discrimination on the basis of sexual orientation is a relatively new function of government. Discrimination of all types was generally not prohibited at the time the Wisconsin Constitution was enacted. Nor can complainant's claim be characterized as a common law tort claim for personal injury as this argument was expressly rejected in Chomicki v. Wittekind, 128 Wis. 2d 188, 199 (Ct. App. 1985).

This interpretation of the right to a jury trial under the Wisconsin Constitution has been supported in another case involving a money award by an "antidiscrimination" commission. In General Drivers & Helpers Union v. WERB, 21 Wis. 2d 242 (1963) the court determined that the right to obtain redress for unfair

labor practices did not exist at the time the Wisconsin Constitution was enacted and, therefore no right to a jury trial existed in an unfair labor practice case.

Finally, the City of Madison correctly points out that a constitutional right to a jury trial does not apply to violations of municipal ordinances except where there is a statutory provision for jury trial. Village of Menomonee Falls v. Michelson, 104 Wis. 2d 137, 146 (Ct. App. 1981). There is no state statute granting the right to a jury trial for violations of §3.23, MGO.

For all of these reasons, this court concludes that the Commission did act according to law and within its jurisdiction in awarding compensatory damages for emotional distress without a jury trial.

V. Damage Award Supported by the Evidence

Respondents challenge the sufficiency of the evidence in support of the Commission's findings on damages.

This court's review of this challenge is limited. We accept findings of fact made by an administrative agency if they are supported by the record. Nelson Bros. Furn. Corp. v. Department of Revenue, 152 Wis. 2d 746, 753 (Ct. App. 1989). In the case before this court, the Commission awarded Complainant $300.00 for the loss of a security deposit on another apartment. The Commission affirmed the award noting that the record was well established to support the conclusion that but for the

discrimination by Respondents, Complainant would not have had to seek out other living arrangements. This court agrees that there is ample evidence in the record to support the Commission's conclusion that the loss of the security deposit was a direct result of Respondents' discrimination. In addition, this was the one expense incurred which was documented by records. Therefore, this court concludes that the Commission's conclusion was reasonable and did not represent its will and not its judgment.

The Commission affirmed the hearing officer's award of $2,000 in damages for emotional distress. In addition, the Commission denied the award of $1,000 for punitive damages but stated: "The Commission finds that the record is replete with evidence of emotional harm and awards an additional $1,000 for emotional distress. . ."

The law is very clear that Complainant need not present evidence of medical or psychological treatment. Humiliation can be inferred from the circumstances as well as established by the testimony. Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974). A plaintiff's testimony regarding personal distress and emotional pain is sufficient proof of injury. Crawford v. Garnier, 719 F. 2d 1317 (7th Cir. 1983). Also, the testimony supporting a claim of humiliation or embarrassment need not be greatly detailed. United States v. Balistrieri, 981 F. 2d 916, 932 (7th Cir. 1992). However, the record in this case contains substantial evidence of the humiliation and mental anguish suffered by Complainant. In her testimony, Complainant described

the physical symptoms she experienced and she testified that as a result of feeling victimized other aspects of her life became dysfunctional-specifically, her attempts to find employment.

Under §68.09(5), Stats., the municipal authority, in this case the MEOC, may affirm, reverse or modify the initial determination. In this case, the Commission both affirmed the initial award of $2,000 for emotional distress and then modified the award by increasing it another $1,000. In doing so, the Commission reviewed the evidence in the record as a whole and determined that Complainant's injury merited an increase in the award. This court concludes that based on the record the conclusion of the Commission was not unreasonable and represented its considered judgment of the evidence and did not represent its will.

VI. Bias

Respondent argues that they did not receive a hearing before and impartial decision maker. This argument is based on the hearing officer's handling of a motion in limine and on certain of the hearing officer's findings of fact. The Commission upheld the hearing officer on both issues.

The motion in limine concerned the admission of testimony of an alderperson as to the intent of the City Council in creating the housing discrimination ordinance. Individual legislators are incompetent to testify as to the intent of the body as a whole. Ball v. District No. 4, 117 Wis. 2d 529, 544 (1984). Whether testimony was hearsay or not and whether the hearing officer was

inconsistent in making hearsay rulings is irrelevant. The hearing officer included this holding in her reasoning for denying admission of this testimony. The record indicates she also afforded Respondents the opportunity to state their objections to the motion in limine. The Commission affirmed for these same reasons. There is no evidence that the Commission's decision to affirm was arbitrary or unreasonable.

Finally, this court finds there is sufficient evidence in the record to support the Commission's affirmance of the findings of fact to which Respondent takes exception. The commission's decision must be upheld if "reasonable minds could arrive at the same conclusion." Palleon v. Musolf, 117 Wis. 2d 469, 473 (Ct. App. 1984). The findings of fact made by the hearing officer and affirmed by the Commission are supported by credible evidence and are conclusive.

Therefore, the court finds that the Commission's determination that the Respondents received a fair and impartial hearing before the hearing officer is reasonable.

ORDER

For all of the reasons state above, the court AFFIRMS the Decision and Order on Remand of the MEOC.

DATED: September 30, 1994

BY ORDER OF THE COURT:

Sarah B. O'Brien, Judge
Circuit Court, Branch 16

cc: Attorney Bruce Davey
Attorney T. Christopher Kelly
Assistant City Attorney Carolyn Hogg

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 16 | DANE COUNTY

STATE OF WISCONSIN
ex rel. CARYL SPRAGUE

Plaintiffs,

vs.

DECISION AND ORDER
Case No. 93CV113

CITY OF MADISON, et al,

Defendants.

Petitioner Caryl Sprague brings this action for writ of certiorari to review a decision of the City of Madison Equal Opportunities Commission on her claim of discrimination on the basis of sexual orientation. Respondents include the City of Madison and the Madison Equal Opportunities Commission, and intervening respondents Ann Hacklander-Ready and Maureen Rowe who were the respondents in the original discrimination action from which this review is brought.

The relevant facts are simple and uncontested. Hacklander-Ready rented a four bedroom house from the owner, who was living abroad. She had the owner's permission to allow others to live there with her and to share in the payment of rent. At the time in question Rowe lived there with Hacklander-Ready. They decided to attempt to find one or two more housemates and advertised in the paper for others to share the house with them. From numerous applicants they chose the petitioner, Caryl Sprague, as the person to whom they wanted to rent. They told Sprague of their offer and Sprague accepted the offer and on May 4, 1989, left a rent deposit with them. Before and after agreeing to move into the home, Sprague had conversations with Hacklander-Ready and Rowe, including a frank discussion

about the fact that she is a lesbian and whether this would impact on the joint living situation. On May 5, 1989, Hacklander-Ready informed Sprague that they were withdrawing their offer to rent to her because they did not want to live with a lesbian. After renting to another woman, they returned Sprague's rent deposit.

Sprague filed a complaint with the Madison Equal Opportunities Commission (MEOC) against Rowe and Hacklander-Ready, alleging that they violated section 3.23(4)(a) of the Madison General Ordinances by discriminating against her in the provision of housing on the basis of her sexual orientation. The MEOC issued an initial determination finding probable cause to believe that the claimed discrimination occurred. Following a contested hearing an administrative law judge made recommended Findings of Fact, Conclusions of Law and Order concluding that "Respondents discriminated against the Complainant in rental housing when they withdrew their offer to rent a room to her in a rented house because of her sexual orientation in violation of Sec. 3.23(4)(a), M.G.O." The recommended order included provisions for payment of a total of $3300 damages to the complainant by the respondents, together with costs and reasonable attorney's fees. The Respondents appealed to the Equal Opportunities Commission and on July 10, 1992, the Commission vacated the hearing examiner's recommended Findings of Fact, Conclusions of Law and Order. The Commission based its order on its finding that the ordinance in effect at the time in question was inapplicable because "'roommate' transactions were intended to be exempted from coverage under the Ordinance." This action for certiorari followed.

APPLICABLE ORDINANCES

At the time of the events in question, relevant portions of the Madison General

Ordinances read as follows:

> 3.23(1) Declaration of Policy. The practice of providing equal opportunities in housing ... without regard to ... sexual orientation ... is a desirable goal of the City of Madison and a matter of legitimate concern to its government. ... In order that the peace, freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all of its inhabitants to equal opportunity to ... housing ... .
>
> 3.23(2)(b) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a residence, home or place of habitation of one or more human beings, including a mobile home as defined in Section 66.058 of the Wisconsin Statutes and a trailer as defined in Section 9.23 of the Madison General Ordinances... Such definition of "housing" is qualified by the exceptions contained in Section 3.23(4)(a).
>
> 3.23(4) It shall be an unfair discrimination practice and unlawful and hereby prohibited: (a) For any person having the right of ownership or possession or the right of transfer, sale, rental or lease of any housing, or the agent of any such person, to refuse to transfer, sell, rent or lease, or otherwise to deny or withhold from any person such housing because of ... sexual orientation ... .
>
> (b) Nothing in this ordinance shall prevent any person from renting or leasing housing, or any part thereof, to solely male or female persons if such housing or part thereof is rented with the understanding that toilet and bath facilities must be shared with the landlord or with other tenants.

In September, 1989, after the actions occurred which petitioner alleges were discriminatory, the Madison City Council amended the Equal Opportunities Ordinance by adding the following section:

> 3.23(c) Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons. For purposes of this subdivision, the terms lodging room, apartment, and dwelling unit have the meaning contained in Sec. 27.03 of these ordinances.

DISCUSSION

The court's review on certiorari is limited to the following four questions:

(1) Whether the Commission kept within its jurisdiction;
(2) Whether it acted according to law;
(3) Whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and
(4) Whether the evidence was such that the Commission might reasonably make the determination in question.

State v. Goulette, 65 Wis. 2d 207, 215, 222 N.W. 2d 622 (1974).

This action is determined based on my conclusion that the Commission failed to act according to law in its decision. The Commission's decision is extremely brief. After a condensed recitation of the facts the order opines that the rejection of petitioner as a roommate based on her sexual orientation was morally objectionable, but that it was not legally wrong because roommate transactions were intended to be exempted under the ordinance. The decision provides no basis for its conclusion, nor any discussion of the legal arguments raised by both parties. It constitutes a faulty interpretation of the law.

The commission may go behind the language of the law and attempt to discern the intent of the adopters of the law only if it first concludes that the ordinance in question is ambiguous. State v Martin, 162 Wis. 2d 883, 470 N.W. 2d 900 (1991). The Commission made no such finding that the ordinance is ambiguous, nor could it. Its conclusion based on the alleged intent of the ordinance's creators is therefore invalid.

The language of the ordinance is crystal clear. At the time of the events herein, discrimination was prohibited in the transfer, sale, rental or leasing of any housing, by a person with right of ownership or possession or the agent of such person. Housing was defined as including any building, structure or part thereof to be occupied as a residence by

one or more human beings. There was only one exception: that contained in Sec. 3.23 (4)(b) allowing rentals to only one sex if the tenants used a shared bathroom.

The language of the ordinance is very inclusive. Not only does it say it applies to any type of transfer, it also applies to any type of housing. The words chosen in drafting the ordinance are those which apply to the widest possible circumstances. And the Declaration of Policy set forth in sec. 3.23(1) M.G.O. emphasizes that the policy of the City was to enforce equal housing opportunity for all Madison residents to the fullest extent of the law. There is nothing unclear or confusing, nothing ambiguous, about the ordinance.

And so, by law, the analysis stops there. It is improper to attempt to determine what the intent of the city council might have been in adopting the ordinance. This court declines the invitations of respondents to do so. The purpose of the courts is not to sit as super-legislatures, second-guessing the acts of our elected officials, unless the acts are clearly illegal.

There can be no genuine question raised about whether the unambiguous language of the ordinance applied to the intervening respondents here. They had rented the house with the understanding they could sublease to additional housemates. Thus they clearly were persons with the rights of possession and transfer, and were acting as agents of the owner at the time they offered to sublease to petitioner. The fact that their shared home constitutes "housing" under the Madison ordinance is similarly clear. Housing includes all or any part of any building occupied as a residence by one or more persons. It cannot seriously be contended that sharing use of a house does not come within this broad definition. The sole exception to the fair housing code, that rental of facilities with shared bathrooms can be

restricted to one sex, allowed respondents to refuse to rent to men, but not to refuse to rent to individuals in any of the other protected classifications.

Respondents contend that weight should be given to the decision of the Commission, pointing out that Wisconsin courts generally defer to the reasonable interpretations of agencies charged with administration of ambiguous legislation.

Weight to be given to the decision of an administrative agency is determined by principles set forth in Local No. 695 v LIRC, 152 Wis. 2d 75 82-84, 452 N.W. 2d 368 371-2 (Wis. 1990) and Consol. Freightways v Department of Revenue, 157 Wis. 2d 65,458 N.W. 2d 550, (Wis. App. 1990). In the absence of evidence that the agency's interpretation of a particular law is long-standing, substantially uniform and without challenge by governmental authorities and courts, the weight to be given an agency interpretation is no weight at all. The conclusion of the Commission in this matter is not long-standing as it is apparently conceded that this is a case of first impression for the MEOC. Nor is the Commission's decision without challenge in the courts. The decision is contrary to the conclusion of Judge John W. Reynolds in a federal civil rights action which required interpretation of a shared housing/sublease situation virtually identical to the one here. Koehler v Koepke, Civil Action No. 87-C-130 (E.D.WI 1987). In that case Judge Reynolds concluded that where the renter of an apartment enters into an agreement with another to share the living space in exchange for payment of rent, the original tenant becomes the new tenant's landlord as well as roommate, and fair rental laws apply. I give no weight to the clearly erroneous conclusion of the Commission.

CONCLUSION

The Commission's decision is reversed. The ordinance which was in effect at the time that petitioner was denied housing was applicable to shared housing situations. (It has since been amended by the City Council to exclude shared housing situations.)

Respondents Rowe and Hacklander-Ready ask that the matter be remanded to the Commission for consideration of several exceptions they had made to the terms of the recommended order which were not reached by the Commission because of its conclusion that the ordinance was inapplicable in this situation. It is appropriate to remand in order to give the Commission the opportunity to review those issues prior to any court review. Omernick v DNR, 100 Wis. 2d 234, 301 N.W. 2d 437 (1981), Kuechmann v LaCrosse School District, 170 Wis. 2d 218, 487 N.W. 2d 639 (1992) Ct. App. This court will retain jurisdiction to complete the certiorari review if a timely request is made following issuance of the Commission's decision.

DATED: August 19, 1993

BY ORDER OF THE COURT:

Sarah B. O'Brien

Sarah B. O'Brien, Judge
Circuit Court, Branch 16

cc: Atty. Bruce Davey, PO Box 2965, Madison WI 53701-2965
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