

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

<p>Brian K. Jackson 161 East Gilman Street, #E5 Madison, WI 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Marvin Hellenbrand 5306 Schilling Lane, Route 1 Waunakee, WI 53597</p> <p style="text-align: center;">Respondent</p>	<p>DECISION AND ORDER</p> <p>Case No. 1482</p>
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This matter is before the Hearing Examiner on the Respondent's Motion to Dismiss the Complaint. The Complainant, Brian Jackson, filed, on March 2, 1990, a complaint alleging that the Respondent, Marvin Hellenbrand, discriminated against him in the terms and conditions of housing on the basis of his race. The Complainant is a black or African American. The Respondent is white. The Investigator/Conciliator assigned to this matter issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant. After conciliation was waived or failed, the complaint was transferred to the Hearing Examiner for further proceedings. A Pre-Hearing Conference was held on February 27, 1991. At that time, the Complainant was represented by attorney Tammy Baldwin. The Respondent was represented by attorney Bruce Huibregtse. At the Pre-hearing Conference, the Respondent disclosed that a complaint had been filed in Dane County Circuit Court and that a counterclaim alleging essentially the same facts as those in the complaint before the Commission but seeking liability under Wisconsin and Federal law, would be filed shortly. At the request of the parties, the Hearing Examiner stayed proceedings in this matter pending the outcome of the Circuit Court Action.

The Circuit Court case was scheduled for trial on August 30, 1991. At the time of trial, the Complainant was unrepresented. Attorney Baldwin withdrew from representation of the Complainant on August 19, 1991, shortly before the time of trial. The record does not disclose the reasons for Baldwin's withdrawal.

Immediately prior to trial of the Circuit Court complaint, the Complainant and the Respondent reached a settlement of the complaint and the counterclaim. The terms of the agreement provide:

1. The plaintiff (Respondent) will withdraw his request for a jury trial.
2. The defendant (Complainant) will stipulate to the entry of a judgment on the claim against him, that claim being battery.
3. The defendant (Complainant) agrees to the entry of a judgment against him on his counterclaims against the plaintiff, those counterclaims being for housing discrimination and for assault and battery.
4. The judgment against the defendant (Complainant) is for dismissal of the counterclaims with prejudice and without costs to either party contingent upon the plaintiff's (Respondent) depositing \$875 into an attorney's trust account against a later hearing on damages.
5. At the later hearing on damages, the parties stipulated to the entry of judgment against the defendant (Complainant) in the amount of \$10,000.

In an Order dated May 10, 1991, the Hearing Examiner required either the Complainant or his attorney to notify the Commission within 10 days of the resolution of the Circuit Court matter of that resolution. Neither

the Complainant nor any attorney on his behalf notified the Commission of the result of the August 30, and October 1 proceedings. On his own initiative, the Hearing Examiner scheduled a pre-hearing conference for February 7, 1992. After informing the Hearing Examiner of the resolution of the Circuit Court action, the Respondent orally moved the Hearing Examiner for an order dismissing the complaint. The Complainant opposed the motion without stating a reason. The Hearing Examiner denied the motion and set a briefing schedule for the submission of a written motion to dismiss and arguments in support of the parties' positions. The Respondent filed a motion to dismiss along with a written argument. The Complainant made no submittal.

The Respondent's position, though very sketchily briefed, seems to be that the complaint before the Commission must be dismissed as a matter of res judicata because of the Complainant's stipulated dismissal of the Circuit Court case. While it is not universally true that the resolution of a circuit court action between the same parties alleging substantially similar facts will result in a dismissal of a pending complaint before the Commission, in this case such a dismissal is appropriate.

One of the key elements in determining the preclusive effect of a judgment in a circuit court action on a Commission complaint is whether the operative facts are the same in both actions. In this instance the facts that would need to have been proven in both forums are virtually identical. The Commission complaint alleged racial harassment by the Respondent of the Complainant in his housing. The precise acts of harassment were not spelled out in the complaint. Similarly, the action brought as a counterclaim in Dane County Circuit Court alleged harassment in housing and cited as jurisdictional authority the Wisconsin Open Housing Act, Wis. Stats. Sec. 101.22 et seq. and 42 U.S.C. Sec. 1981. Harassment actions under all of these authorities require the same burdens of proof, the same basic elements and provide for the same remedies.

It is true that the Commission could find harassment based upon fewer incidents of harassment than would be required under state or federal authority. Though the facts have not been fully developed at this time, this does not seem to be an issue. The Complainant would not have asked to stay the Commission proceedings pending resolution of the Circuit Court action if he was going to have difficulty proving the required pattern of harassment in an action under state or federal law. Equally, if this had influenced the Complainant's decision to withdraw from the Circuit Court action, he could have stated that during his opportunity to submit a responsive brief. The Complainant submitted no brief or argument.

Another key element in assessing whether the dismissal of the Circuit Court action requires dismissal of the complaint before the Commission is whether the judgment was on the merits of the claim or not. To be on the merits does not require that there have actually been a trial or hearing. What is required is that the parties have had the opportunity for fair adjudication of the facts and issues and that the judgment reaches the issues pending before the body. 50 CJS Judgments sec. 627 In the current instance, the action in Circuit Court was set for trial at the time that the parties reached their agreement. The Complainant voluntarily compromised and settled his action instead of proceeding to trial. The judge took pains to make sure that the terms of the agreement were clear to both sides. The Complainant had the opportunity to object or to clarify or presumably reject the agreement under questioning by the judge. The judgment in the Circuit Court action was not reached as a result of some pre-trial motion such as a Motion for Summary Judgment that would deprive the Complainant of an opportunity to have his position aired in open court. The Complainant knowingly relinquished his opportunity for a trial of the issues. Such a settlement can have preclusive effects. 50 CJS Judgments sec. 630.

The judgment in the Circuit Court action reached the issues presented by the various actions. The agreement of the parties essentially entered a finding that the Complainant had assaulted and battered the Respondent, not that the Respondent had assaulted and battered the Complainant as part of a pattern of harassment. The Complainant agreed to the dismissal of his claim of harassment.. These actions effectively constitute rulings on the basic issues before the Court and the Commission.

The Complainant has presented no evidence, argument or statement that by dismissing the complaint before the Commission that he is somehow being deprived of some right or opportunity that he did not voluntarily give up before the Court. The Complainant has not indicated that at the time of the dismissal of the Circuit Court action that he believed he could continue to pursue his complaint before the Commission. Under these circumstances, it would be unjust not to dismiss the complaint.

There are several aspects of this case that are troubling to the Hearing Examiner. The record does not disclose why the Complainant's attorney, Tammy Baldwin, withdrew from his representation a mere 10 days before the hearing. Neither does it disclose what steps were taken to assist the Complainant to find substitute counsel. It seems that the Complainant's lack of representation may have had a significant impact on the outcome of this matter.

Another troubling aspect of this matter is the Complainant's almost total failure to act on his own behalf. The Complainant failed to notify the Hearing Examiner of the resolution of the Circuit Court action, despite the Hearing Examiner's specific order. The Complainant gave no reason or explanation for his wish to maintain the complaint before the Commission and when he was given the opportunity to support his request he failed to make any submittal.

The final aspect of this matter that causes concern on the part of the Hearing Examiner is the lack of precision in the statement of the agreement by the Respondent's attorney at the time of trial of the Circuit Court matter. Had there been a clear statement that the dismissal was to cover all pending matters these additional proceedings would not have been necessary.

On the record before the Hearing Examiner the above concerns by themselves do not require or compel a different outcome. However, if the record had been made clearer by either party with respect to any one of these concerns, the outcome could be significantly different.

For the foregoing reasons, the Hearing Examiner grants the Respondent's motion to dismiss the complaint in this matter for a lack of jurisdiction with the Commission.

Signed and dated this 24th day of May, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner