

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD, ERIC ZUPKA & IEVA
MATULIONYTE,
Complainants

v.

DOCKET NO. 08BPR01770

HILARIAN FERNANDEZ,
Respondent

Appearances: Nicole M. Procida, Esquire for the Zupka
John W. Collier, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 19, 2008, Eric Zupka filed a complaint with this Commission charging Respondent Hilarian Fernandez with discrimination in housing on the basis of family status and lead paint. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified to public hearing. A public hearing was held before me on December 10, 2009. After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Hilarian Fernandez is the owner of a five-unit residential property located at 52 Mount Vernon Street, Somerville, Massachusetts, that he purchased from his uncle in 1993.

2. Eric Zupka moved into a second-floor, one bedroom apartment at the property in question on September 1, 2006 and signed a one-year lease that ran from September 1, 2006 through August 31, 2007. The monthly rent was \$1,100.00. (Ex. C-1). Zupka most recently worked as a business analyst, and in the past had worked as a property manager.

3. Tenant mailboxes are located in the main vestibule of the premises at 52 Mt. Vernon Street outside the locked inner door. Beyond the inner door are lock boxes where tenants leave their rent or other correspondence for Respondent. There is a driveway on the side of the building.

4. Respondent's usual practice when a vacancy exists is to conduct an open house for prospective tenants. He provides applications to individuals who express interest, requires a copy of their last paystub and runs a credit report. He requires that tenants sign a one year lease, and pay a one month deposit and the first month's rent. His leases usually run from September 1 until the following August 31. He complied with his usual practices when Eric Zupka became a tenant in September 2006. The parties agree that Respondent informed Zupka up front that there would be an increase in rent in the third year of his tenancy.

5. Laura Clisbee has resided at the property for over ten years, in two different apartments. She has lived with various roommates in each apartment. Clisbee testified that Respondent contacts her around May of each year to discuss the next year's lease at which time she and her roommates inform Respondent if any roommates are leaving at the end of the lease or if new roommates intend to move in for the new lease term. Clisbee testified that she signs a new lease annually, and all occupants are always listed

as tenants on the lease. Respondent has raised the rent for Clisbee's units three or four times over the years she has lived in the building. I credit her testimony.

6. Shortly after moving in, Zupka complained to Respondent of inadequate heat in the apartment. Over the course of the next two years Respondent made several attempts to resolve the heating situation.

7. Zupka testified that in May or June of 2007, Respondent called him and asked if he intended to renew his lease for the term beginning September 1, 2007. Zupka placed a hand-written note, dated July 1, 2007, in Respondent's drop box: "Dear Fernandez, I hope your summer is going well. I am interested in renewing my lease for next year. Please call me to discuss." (Ex. C-3)

8. Zupka stated that he forgot to discuss his concerns about the heating system in his telephone conversation with Respondent and on July 20, 2007, he wrote a letter to Respondent that he placed in Respondent's drop box along with his signed lease for the period September 1, 2007 to August 31, 2008. The letter stated in part:

Enclosed, please find the signed lease for next year. I am happy to renew, thank you for all of your prompt and helpful responses, during the first term. As I had mentioned, the only issue I have is with the heating system...my apartment was often below 60 degrees and I had to supplement the heat with an electric heater...I would appreciate it if we could alleviate this problem and have a fully functional heating system in place, before the heating season begins.
(Ex. C-4)

Zupka's letter did not mention that anyone was moving in with him.

9. Zupka testified that in June or July 2007, he called Respondent and told him that his girlfriend, Ieva Matulionyte was planning to move in with him on September 1, 2007. Zupka allegedly told Respondent that he would continue to be responsible for the rent and offered to provide him with Matulionyte's Social Security number and to add her

name to his lease. According to Zupka, Respondent told him that he trusted Zupka and as long as Zupka would be responsible for the rent, they did not need to add Matulionyte's name to the lease. I do not credit this testimony. According to Zupka, he was not sure how long Matulionyte would live with him.

10. Respondent denied that Zupka told him Matulionyte would be moving in and testified that had he known about this, he would have performed a credit check on her and added her name to the lease, as was his usual business practice. I credit Respondent's testimony that Zupka did not tell him Matulionyte was moving in. I do not credit Zupka's testimony that Respondent turned down his offer to place Matulionyte's name on the lease. I do not find it credible that Respondent would have declined to place a tenant's name on a lease, since this was contrary to his long-standing practice, and protected his interests.

11. Zupka testified that Matulionyte moved into the apartment on or about August 25, 2007 and immediately added her name to Zupka's mail box. Zupka testified that he introduced Matulionyte to Respondent and his wife at the premises in September, 2007. Matulionyte testified that she met Respondent and his wife in September or October, 2007 just weeks after she moved in.

12. Zupka and Matulionyte testified that they saw Respondent several times during the year. Matulionyte's work hours were from 1:00 p.m. to 9:00 p.m. and she often saw Respondent at the premises. Zupka and Matulionyte stated they were both present in the apartment in late January of 2008 when Respondent brought them an electric heater in an effort to resolve the heating issue. Respondent denied going to the

apartment in January and stated that his son brought a heater to Zupka's apartment. I credit Respondent's version of events.

13. Clisbee testified that she knew Matulionyte was Zupka's girlfriend and at some point during the second year of Zupka's tenancy she realized Matulionyte was living at the premises with him. She believed that Matulionyte's name appeared on Zupka's mailbox but she did not remember when that occurred. I credit her testimony.

14. Respondent and his wife Mary Mercy denied meeting Matulionyte in the fall of 2007. On Aug 30, 2007, Respondent and Mercy left for India to attend her sister's funeral and after they returned home on Sept 28, Mercy did not leave her house for another month. She stated that she never met Matulionyte prior to the public hearing in this matter. I credit Respondent's and Mercy's testimony that they did not meet Matulionyte in September of 2007.

15. While I do not credit the testimony of Zupka that he informed Respondent that Matulionyte would live with him prior to her moving in, the evidence suggests that at some point between September 2007 and April 2008, Respondent became aware she was likely living in the apartment, as her name was on the mailbox and Respondent had to pass the mailboxes each time he entered the building. I find that at some point during Zupka's tenancy it became obvious to all and should have been obvious to Respondent that Matulionyte was living with Zupka.

16. Zupka testified that on April 29, 2008 he enclosed a letter with his rent check, informing Respondent that his girlfriend, Ieva, was expecting a baby in early June. In the letter Zupka complained about the inadequacy of the heating system and storm windows and further stated that they were also concerned about the possibility of lead, in the

apartment and inquired if the apartment had ever been deeded or if the Respondent had a letter of compliance to indicate so. Zupka testified that he was “pretty sure” he put the letter and his rent check into Respondent’s drop box on April 29. (Ex. C-6).

17. Zupka testified that Respondent called him on the evening of Thursday, May 1, 2008 to say that he would be at the property on Saturday May 3 and wished to discuss the renewal of Zupka’s lease at that time. Zupka told Respondent that he planned to leave early Saturday morning to visit his parents in Connecticut and suggested Respondent speak instead with Matulionyte about the matter, but Respondent insisted on talking to Zupka. Matulionyte testified that she was present when Respondent called the apartment on May 1 and confirmed Zupka’s story that Respondent was adamant about meeting with him on May 3. Respondent denied calling Zupka on May 1 and I credit his testimony. I find that Zupka fabricated the phone call in order to bolster his claim that Respondent received his April 29 letter before May 3. I credit Respondent’s testimony that he and Zupka met by chance in the driveway on May 3 when Respondent came to take in the barrels and pick up the tenants’ rent.

18. Zupka testified that he decided not to travel to Connecticut because Matulionyte was in the late stages of pregnancy and he wanted to be near home. He stated that on May 3 at approximately 12:30 p.m. he and Matulionyte were rushing out to pick up a crib mattress at a Wilmington FedEx facility before it closed and Respondent’s van was parked in the driveway blocking Zupka’s exit. Zupka called Respondent’s cell phone and asked him to move his van.

19. Respondent testified that on May 3, 2008 he went to the premises in order to collect the rent as he does on the first Saturday of every month. He also moved trash

barrels to the back of the building. According to Respondent, Zupka came from the back of the building and initiated a conversation by asking, "Did you get my letter?" Respondent said he had not received a letter, and he asked Zupka whether he wanted to renew his lease and reminded him that they had agreed there would be a small increase in the rent, because this would be his third year at the premises. Respondent testified that Zupka responded, "You must be nuts. No one increases rent in this market. You must be stupid." Zupka then began yelling about the ongoing heating issue and lack of storm windows and stated that he would not pay a rent increase. Respondent explained that the new windows did not require storms and told Zupka to contact a plumber to address the heating problem and Respondent would pay the bill. According to Respondent, Zupka started screaming and raised his fist, which frightened Respondent because Zupka was a "big fellow." Respondent said he was going to leave and Zupka kicked a nearby fence. Respondent testified that he had never before had such a disturbing interaction with a tenant. I credit Respondent's version of this incident.

20. According to Zupka, when the encounter began, Respondent dispensed with the usual pleasantries and said to him in a firm and businesslike tone, "Remember two years ago, we spoke about raising your rent?" Zupka testified that he knew there would be a small rent increase in the next lease that he did not oppose; however, he did not understand why Respondent was making an issue of it and was caught off guard. Zupka testified that during the conversation he might have remarked to Respondent that a rent increase was not fair in this market, but he testified that he told Respondent that they could discuss a rent increase. He also told Respondent that a plumber had found the heating system inadequate. According to Zupka, Respondent responded, "What do

plumbers know?” He stated that Respondent smiled smugly and remarked three times during the conversation, “I guess you don’t want to renew your lease.” Zupka asked if Respondent had seen his August 29 letter and Respondent said he had not. Zupka suggested they meet at another time to discuss the rent increase as well as the issues contained in his letter. Zupka acknowledged raising his voice out of frustration and saying “This is ridiculous,” but denied telling Respondent he was “nuts” or “ridiculous.” He denied kicking the fence or shaking his fist at Respondent before they walked away from each other. I do not credit Zupka’s testimony that Respondent dispensed with pleasantries and goaded him about renewing the lease. I find that Zupka lost his temper, refused to pay a rent increase and acted in a manner that Respondent considered threatening.

21. Matulionyte waited in the car and did not observe the exchange between Zupka and Respondent. She heard Respondent say: “Years ago we talked about a rent increase” and “I guess you don’t want to renew the lease,” and heard Zupka state that they needed to set up an appointment to discuss all of the issues, but she did not hear the rest of the conversation. She acknowledged that Zupka raised his voice. I credit her testimony.

22. Respondent’s wife Mary Mercy accompanied her husband to the premises on May 3 and remained in the van parked in the driveway waiting while Respondent moved the trash barrels. She saw Respondent and Zupka talking and then observed Zupka yelling and shouting at Respondent and approaching him while angrily raising his fist. After five or ten minutes, Mercy became anxious and concerned for Respondent’s safety,

exited the van, and called Respondent in their native language to return to the van. I credit her testimony.

23. Tenant Laura Clisbee testified that on May 3, 2008, she was in her bedroom overlooking the parking lot, and after hearing someone speaking loudly to Respondent, she looked out her open window and observed Zupka and Respondent in the driveway. She continued to look out the window intermittently and said that Zupka's voice got louder and louder until he was yelling and screaming and waving his arms. She could not hear their words, but she was so concerned for Respondent's safety that she considered calling the police. However, she did not do so when she saw Respondent's wife call him away and observed Zupka and Respondent turning and walking away from each other. I credit her testimony.

24. Respondent testified that he did not see Zupka's April 29 letter regarding his girlfriend's pregnancy until after the altercation with Zupka and did not know Matulionyte was living in the apartment until he saw the letter. Respondent deposited Zupka's May rent check in his bank on Monday May 5, 2008 and could not recall whether he received the May rent and the letter at the same time. I find that because the April 29 letter was received with Zupka's May rent check, Respondent did not read the letter until after his confrontation with Zupka.

25. After the May 3 altercation, Clisbee telephoned Respondent to find out what had transpired with Zupka and to inquire about Respondent's health. She was aware that Respondent had heart problems and she was concerned that Zupka's threatening conduct might have impacted Respondent's health. She also informed Respondent that one of her

roommates had heard Zupka screaming and yelling in his apartment on another occasion. I credit her testimony.

26. After the altercation with Zupka, Respondent called attorney John Higgins, who occasionally performed real estate work for him. Higgins testified that Respondent left him a voice mail message on May 3 stating he was very disturbed about a confrontation with a tenant and was seeking legal advice. I credit his testimony.

27. Higgins testified that he later met with Respondent, who told him that Zupka had “jumped up and down and screamed at him” in an intimidating and threatening manner and he did not wish to renew Zupka’s lease. At the meeting, Respondent showed Higgins the lease which Zupka’s name only on it. He did not tell Higgins that Zupka claimed his pregnant girlfriend was living in the apartment, nor did he tell Higgins about the dispute over the heat or Zupka’s inquiry about lead paint. I credit his testimony.

28. On May 28, 2008, Higgins wrote a letter to Zupka informing him that his lease would not be renewed and asking Zupka to let him know when he planned to move out. (Ex. C-7). Respondent testified that his reasons for not renewing the lease were Zupka’s stated refusal to pay a rent increase and his threatening behavior on May 3 which frightened Respondent. I credit Respondent’s testimony that Zupka’s tirade and his refusal to pay a rent increase were his primary reasons for not renewing Zupka’s rent. While Respondent denied that he would not renew the lease because he did not want to de-lead the apartment, I do not entirely credit Respondent’s testimony in this regard. I believe that the issue of deleading the apartment may have been a factor in his decision not to renew the lease, but was not the primary or “but for” reason.

29. Zupka testified that he believed Higgins' letter was an eviction notice, which concerned him because he and Matulionyte were preparing for either a C-section or induced labor on June 8th due to complications from her high blood pressure.

30. Zupka filed his MCAD complaint on June 19, 2008. On June 30, 2008 Zupka wrote a letter to Respondent stating that he had not received a response to the April 29 letter indicating that he would like to renew his lease and asking to schedule a meeting with Respondent to discuss the matter. Along with this letter, Complainant enclosed a check for his June rent. (Ex.C-13)

31. Zupka continued to pay the rent on time, however, when Respondent did not cash his rent check for August, Zupka set up an escrow account in Respondent's name. He placed subsequent rental payments in the escrow account and deducted funds from this account to obtain a report from a lead inspector. He turned over the escrow account to Respondent on November 13, 2008. (Ex. C-8)

32. Zupka and Matulionyte were married on September 6, 2008. That same month, Zupka hired a certified lead inspector to inspect the apartment. The inspector issued a report stating that the apartment contained lead paint. (Ex. C-11; C-12) In October 2008, Respondent had the apartment de-lead while Zupka and Matulionyte were on a trip to Lithuania.

33. Respondent testified that he knew the first floor apartment had been de-lead because he was told this by his uncle from whom he purchased the building. He testified that because of the apartment's proximity to MIT and Harvard, his tenants are usually students without families and for this reason there had been no reason to inspect other areas of the building for lead paint.

34. While Complainants testified that they felt uncomfortable living at the apartment after Respondent refused to enter into a new lease with them, I find their testimony in this regard disingenuous. At the time of the public hearing, Complainants continued to live in the same apartment with their son Yacubus Zupka and have never paid an increase in rent. They continue to pay rent of \$1,100.00 on a month to month basis, the same rent that Zupka paid when he first rented the apartment from Respondent in September 2006.

III. CONCLUSIONS OF LAW

A. Motion to Add Ieva Matulionyte as a Complainant

Complainant has moved to add Ieva Matulionyte as a Complainant in this matter on the basis that she was a tenant and resident of the apartment notwithstanding that her name never appeared on the lease. Respondent opposes the motion on the grounds that Matulionyte was never a tenant and therefore has no standing or privity of contract with Respondent in this matter. After hearing all of the evidence at the public hearing, I conclude that Matulionyte should properly be added as a Complainant. Prior to the time for signing a new lease with Zupka, Respondent became aware of Zupka's intention to have Matulionyte reside with him in the apartment. Once Respondent had notice that Matulionyte was seeking to become a tenant, she had standing to file a claim as a prospective tenant who was denied the opportunity to rent. In a refusal to rent claim, the Complainant need not be an existing tenant to have standing to file a complaint of denial of housing. Thus I conclude that, as a prospective tenant seeking to rent from Respondent, Matulionyte has standing in this matter to allege that Respondent refused to rent her an apartment because of concerns that it contained lead paint. Therefore,

Complainant's motion to amend the complaint to add Matulionyte as a Complainant is hereby granted.

B. Discrimination on the Basis of Lead Paint and Children

The Massachusetts lead paint law states, in relevant part, that it shall be an unlawful practice under M.G.L. c.151B for an owner of any premises to refuse to rent such premises because they do or may contain lead paint. See M.G.L. c. 111, section 199A (a)(b)(c). Under this law, the eviction of families with children "shall not constitute compliance with the lead law and regulations." M.G.L. c. 111, section 199A(c). Pursuant to this provision, it is a violation of law to refuse to renew a rental agreement where the professed reason for the refusal to rent is a pretext for a landlord's noncompliance with the Massachusetts lead paint law.

In order to prove a case of lead paint housing discrimination, Complainants must show that: 1) they were members of a protected class at the time of the alleged discriminatory act; 2) they sought to rent housing; 3) they were objectively qualified to rent the housing; and 4) they were deterred from renting and/or refused tenancy because of the membership in a protected class. See Wheelock College v. MCAD, [371 Mass. 130](#) (1976) (setting out general requirements for a prima facie case of discrimination), Smith v. Cao, 29 MDLR 179 (2007) (setting out prima facie elements of lead paint discrimination case); Garay v. Soumas, 13 MDLR 1065, 1081-81 (1991) (setting out prima facie elements of housing discrimination case).

Complainants have met their burden of establishing a prima facie case of unlawful housing discrimination relative to Respondent's alleged refusal to comply with the Massachusetts lead paint law. In May 2006, Complainants informed Respondent that

they were expecting a child and they sought documentation from Respondent that the apartment did not contain lead paint. Within weeks after seeking assurances that the apartment did not contain lead, Respondent notified Zupka that his lease would not be renewed. These factors establish a prima facie case of housing discrimination based on the lead paint law.

A prima facie case, once established, "creates a presumption of discrimination." Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000). This presumption may be rebutted if the landlord can articulate "a legitimate, nondiscriminatory reason for its decision backed by credible evidence that the reason or reasons advanced were the real reasons." Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass 437, 441-442 (1995), quoting Wheelock College v. Massachusetts Comm'n Against Discrimination, supra at 138.

Respondent denied that Matulionyte's pregnancy and concern about lead paint were factors in his decision not to enter into a lease with Complainants in 2008. Respondent credibly testified that prior to learning about Matulionyte's pregnancy, when he attempted to discuss a rent increase with Zupka, Zupka responded by refusing to pay a rent increase and acted in an angry and threatening manner frightening Respondent and his wife. Another tenant of the building confirmed that Zupka was yelling so loudly and aggressively that she considered calling the police. Respondent's wife was so worried about him that she called Respondent to return to their car in order to diffuse the situation. I found the Respondent's version of this Zupka's behavior to be credible and I believe that he determined after Zupka's disturbing behavior that he would not renew Zupka's lease, even before he read the letter informing him of Matulionyte's pregnancy.

I conclude that Respondents' articulated non-discriminatory reasons for not renewing Zupka's lease were credible. I believe he was frightened and felt threatened by Zupka's behavior.

While Respondent's decision not to enter into a new lease with Complainants may have resulted in part from concerns about the presence of lead paint, I find that Zupka's conduct and refusal to pay a rent increase were the primary reasons for Respondent's actions. I conclude that Respondents had "mixed-motives" for not entering into a new lease with Complainants. Under the mixed-motive framework, Complainants must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainants carry their initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" even without the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299.

While Matulionyte's pregnancy and concerns about lead paint may have been a factor in Respondent's decision, I conclude that the "but for" reason was Zupka's angry and threatening reaction to Respondent's inquiry about a rental increase. Respondent has persuaded me that the "but for" reason for Respondent's decision not to enter into a new lease was Zupka's angry reaction to Respondent's reminder that a rental increase was coming up in the next lease. Respondent had never had such an experience with a tenant

and Zupka's conduct, yelling and screaming and waving his arms, and telling Respondent he was "crazy" to expect a rent increase in the current real estate market, was so disturbing and out of the ordinary that it brought tenant Clisbee to her window and caused her to consider calling the police out of concern for Respondent's health. Thus I conclude that Respondent's actions were motivated primarily by lawful considerations as he contends and I further conclude that the Respondent did not engage in unlawful housing discrimination and hereby dismiss this claim.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this the 13th day of April 2010.

JUDITH E. KAPLAN
Hearing Officer