STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#78CV1129 FEDERATED RURAL ELECTRIC INSURANCE CORPORATION, Plaintiff, vs. MADISON EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON, and WILLIAM D. KESSLER, Defendants.	MEMORANDUM DECISION

This is a declaratory judgment action which seeks to find sec. 3.23 Madison General Ordinances (M.G.O.) unconstitutional and illegal, and seeks temporary and permanent injunctive relief against enforcement of the ordinance by defendants against plaintiff. Defendants seek dismissal of the action. Both plaintiff and defendants have moved for summary judgment in the form of the relief each requests.

The facts are not in dispute. An employee of the plaintiff, hired in September, 1975, was fired in December, 1976. In February, 1977, he filed a complaint with Madison Equal Opportunities Commission (MEOC) claiming that his discharge was a result of his physical appearance (less than conservatively dressed) and his marital status (separated).

MEOC, in its Initial Determination, found probable cause to believe plaintiff had discriminated against the employee. The matter is currently awaiting public hearing.

This action was commenced in October, 1978. The Attorney General was served but has declined to participate. Extensive briefs were filed by the parties and oral arguments were heard on December 26, 1978. The matter is presently ripe for determination.

Sec. 3.23, M.G.O., provides, in pertinent part, as follows:

> "3.23 EQUAL OPPORTUNITIES ORDINANCE.
>
> (1) Declaration of Policy. The practice of providing equal opportunities in housing, employment, public accommodations and City facilities and credit to persons without regard to sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs, or the fact that such person is a student as defined herein as a desirable goal of the City of Madison and a matter of legitimate concern to its government. Discrimination against any of Madison's citizens or visitors endangers the rights and privileges of all. The denial of equal opportunity intensifies group conflict, undermines the foundations of your democratic society, and adversely affects the general welfare of the community.

(2) Definitions.

. . .

(k) 'Physical appearance' means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

(l) 'Marital status' shall include being married, separated, divorced, widowed, or single.

. . .

(7) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:

(a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or the fact that such person is a student as defined herein. Provided, that an employer who is discriminating with respect to compensation in violation of this subsection, shall not, in order to comply with this subsection, reduce the wage rate of any employee."

The thrust of plaintiff's claim of unconstitutionality is twofold: (1) the State pursuant to Ch. 111, Subchapter II, Fair Employment, has preempted the field of employment discrimination, thereby abrogating a municipality's right to legislate in that field; and (2) even if a municipality has the right to adopt a local ordinance in this field, sec. 3.23 M.G.O. exceeds the parameters of the state statute and creates a conflict therewith.

(1) State Preemption.

State preemption is another way of expressing the concepts of "statewide concern" as that concept relates to the Home Rule Amendment [Art. XI, sec. 3, Wisconsin Constitution]. "In an area solely or paramountly of statewide concern, the legislature may either delegate to local units of government ' . . . a limited authority or responsibility to further proper public interests, '13 or may preempt the field by expressly banning local legislative action as to such matter of statewide concern." State ex rel. Michalek v. LeGrand (1976), 77 Wis. 2d 520, 529. [Footnote omitted].

Plaintiff concedes that fair employment is not a matter "exclusively of statewide concern," Muench v. Public Service Comm. (1952), 261 Wis. 492, 515f. It is in that zone referred to by Chief Justice Cardozo ". . . where state and city concerns overlap and intermingle." Adler v. Dugan, 251 NY 467, 167 NE 705,

713 (1929).

Plaintiff argues that fair employment is primarily or paramountly of statewide concern, as evidenced by Ch. 111, Subchapter II. Therefore, it argues, ". . . the legislature would not have the power to delegate legislative authority to either cities or villages under the Home Rule Amendment." [Br. p. 14, citing Fond du Lac v. Empire (1955), 273 Wis. 333].

Plaintiff's argument is persuasive, and might be dispositive, if it were not for the home rule authority delegated by sec. 62.11(5) Stats. Sec. 62.11(5) Stats. provides:

> "POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highway, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

The Supreme Court held in Johnston v. Sheboygan (1965), 30 Wis. 2d 179, 185-186, that:

> "In our opinion, sec. 62.11(5) constitutes a broad grant of home-rule authority and vests the city with the authority to enact legislation to promote and protect 'the health, safety and welfare of the public.'"

The police power authority delegated by the legislature under sec. 62.11(5) permits cities to legislate in the "mixed bag" category to "further proper public interests," Menzer v. Elkhart Lake (1971), 51 Wis. 2d 70, 78, unless the State has expressly banned local legislative action. Michalek, supra, at 529.

There is no express ban contained in Ch. 111, Subchapter II. In fact, a fair reading of the Act's Declaration of Policy indicates the opposite conclusion. The Declaration of Policy reads as follows:

> "111.31 Declaration of Policy. (1) The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their age, race, creed, color, handicap, sex, national origin or ancestry, is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers, licensing agencies and labor unions of employment opportunities to such persons solely because of their age, race, creed, color, handicap, sex, national origin or ancestry, and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.
>
> (2) It is believed by many students of the problem that protection by law of the rights of all people to obtain gainful employment, and other privileges free from discrimination because of age, race, creed, color, handicap, sex, national origin or ancestry, would remove certain recognized sources of strife and unrest, and encourage the full utilization of the productive resources of the state to the benefit of the state, the family and to all the people of the state.
>
> (3) In the interpretation and application of this subchapter, and otherwise, it is declared to

> be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose."

This broad language, in my opinion, encourages, rather than bans, local legislative action in this field. This opinion is buttressed by the legislature's passage of sec. 66.433 Stats. in 1963 recommending and encouraging local community relations commissions to study areas of discrimination and to recommend ordinances that will, inter alia, ensure to municipal residents "equal employment opportunities." [See, also, sec. 66.433(3) Stats. (1975)].

The State, therefore, has not preempted the field and has not expressly banned local legislative action.

(2) Conflict between Ch. 111, Subchapter II and 3.23 M.G.O.

Sec. 111.32(5)(a) Stats. defines discrimination in employment as follows:

> "111.32(5)(a) 'Discrimination' means discrimination because of age, race, color, handicap, sex, creed, national origin or ancestry, by an employer or licensing agency individually or in concert with others, against any employe or any applicant for employment or licensing, in regard to his hire, tenure or term, condition or privilege of employment or licensing and by any labor organization against any member or applicant for membership, and also includes discrimination on any of said grounds in the fields of housing, recreation, education, health and social welfare as related to a condition or privilege of employment."

Sec. 3.23 M.G.O. extends that definition to include several other categories including physical appearance and marital status, the two categories under which plaintiff is being investigated.

Plaintiff argues that the additional categories create a conflict with sec. 111.32(5)(a) Stats. I disagree. Sec. 3.23 M.G.O. does not "forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." Fox v. Racine (1937), 225 Wis. 542, 545. Madison has clearly gone farther than the State, but in the same direction. 3.23 M.G.O. and sec. 111.31-37 are not "locomotives on a collision course." Michalek, supra, at 530.

Discrimination in employment is an area of concern to local municipalities. 3.23 M.G.O. is not designed to block the statewide interest in the same field or to infringe on that interest. 3.23 M.G.O. extends but complements the state legislation. State ex rel. Hammermill Paper Co. v. La Plante (1972), 58 Wis. 2d 32; Johnston v. Sheboygan, supra; Fox v. Racine, supra.

(3) Vagueness and Overbreadth.

Plaintiff also raises the constitutional issue that portions of sec. 3.23 M.G.O. are vague and overbroad. Specifically, plaintiff points to the following categories: source of income, physical appearance, political beliefs and marital status. Each of those categories is defined by the ordinance in clear, concise language. None are so vague as to permit the toppling of the entire ordinance as unconstitutionally vague on its face. Equally, none of the categories are so broad as to apply to situations that cannot be regulated.

Plaintiff will have its opportunity in the administrative process to challenge the two categories that have been alleged to apply in that case. Plaintiff can make that challenge on the facts of that case, after a full

and complete hearing.

I cannot find those two categories or the others questioned by plaintiff to be unconstitutionally vague or overbroad on their face. If they are applied to plaintiff, plaintiff can seek review through the administrative process.

Summary judgment is, therefore, granted to defendants.

Counsel for defendants may prepare a Judgment for my signature. Plaintiff's counsel shall approve it as to form.

So ordered.

Dated: March 12, 1979.

BY THE COURT:
P. CHARLES JONES, CIRCUIT JUDGE
DANE COUNTY CIRCUIT COURT III

No. 79-538

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT IV

FEDERATED RURAL ELECTRIC INSURANCE CORPORATION,

Plaintiff-Appellant,

v.

MADISON EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON, and WILLIAM D. KESSLER,

Defendants-Respondents.

APPEAL from a judgment of the Dane county circuit court: P. CHARLES JONES, Judge. Affirmed.

Before, Gartzke, P.J., Bablitch, J. and Dykman, J.

BABLITCH, J. The plaintiff Federated Rural Electric Insurance Company (company) appeals from a summary judgment granting the defendants' motion to dismiss a complaint for declaratory and injunctive relief. The complaint sought a declaration that an employment discrimination ordinance adopted by the

City of Madison (city) was beyond the power of the city to enact, and that it is void under the federal constitution. It also sought an injunction prohibiting the Madison Equal Opportunities Commission (commission) and William Kessler, a company employee allegedly discharged in violation of the ordinance, from enforcing the same. We affirm.

The Wisconsin Fair Employment Act (WFEA), sec. 111.31-111.37, Stats., prohibits discrimination in employment based on factors of age, race, color, handicap, sex, creed, national origin, ancestry, arrest record or conviction record. Madison General Ordinance sec. 3.23 prohibits employment discrimination on the same grounds as WFEA and on the additional grounds of marital status, source of income, less than honorable discharge, physical appearance, sexual orientation, political beliefs, or the fact that an applicant or employee is a student as defined in the ordinance.

William Kessler filed a complaint with the commission alleging that he had been fired because of his marital status (separated) and his physical appearance (less than conservative dress) in violation of the ordinance. The commission found probable cause to believe those allegations to be true and scheduled a public hearing. Further administrative proceedings were stayed after this action was commenced.

The following issues[1] are presented on appeal:

(1) Whether the city is empowered by sec. 62.11, Stats., to prohibit employment discrimination based on factors other than those specified in WFEA:

(2) Whether the portion of the ordinance defining the additional factors is void for vagueness and overbreadth.

Statutory Authority

The city concedes that the subject of employment discrimination is a matter of mixed statewide and local concern, and that the statewide interest reflected in WFEA is paramount to the local interest. It nonetheless claims authority to enact the ordinance in question under sec. 62.11(5), Stats., which provides in pertinent part:

> Except as elsewhere in the statutes specifically provided, the council shall . . . have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

In Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 271 N.W.2d 69 (1978), the supreme court discussed the difference between powers conferred on municipalities under this section, which is a part of the general charter law, and powers conferred by the "home rule amendment" to the Wisconsin Constitution, sec. 3, art. XI. The court pointed out that the constitutional provision confers power to regulate "matters which primarily affect the people of the locality, in contrast to matters of 'statewide concern' which affect all the people of the state." 85 Wis.2d at 530, 271 N.W.2d at 74. It construed the general charter statutes as providing a separate source of power to regulate locally in areas of statewide concern, stating:

> [A]n otherwise legitimate exercise of this "general charter" power by the city is not rendered invalid and constitutionally defective merely because it deals with a matter of

> state-wide concern. Indeed, sec. 62.11(5), Stats., would be a nullity if it were construed to confer on municipalities only that authority which related to "local affairs" since that power is already constitutionally guaranteed by the home-rule amendment. 85 Wis.2d at 533, 271 N.W.2d at 76. [Footnote omitted.]

Wis. Environmental Decade recognized two kinds of limitations on the power of municipalities to exercise the police power conferred upon them by section 62.11(5), Stats. They may not regulate in areas of statewide concern where the legislature has expressly restricted or revoked their power to do so, or where the local regulation would ' " ' infringe the spirit of a state law or . . . [the] general policy of the state.' " ' 85 Wis. 2d at 534, 271 N.W.2d at 76, citing Fox v. Racine, 225 Wis. 542, 545, 275 N.W.513, 514 (1937). The court approved the following rule:

> "If a municipality acts within the legislative grant of power but not within the constitutional initiative, the state may withdraw the power to act; or if there is logically conflicting legislation, or an express withdrawal of power, the local ordinance falls. Furthermore, if the state legislation does not logically conflict, or does not expressly withdraw power, it is possible that the local ordinance must fall if an intent that such an ordinance not be made can be inferred from the fact that it defeats the purpose or goes against the spirit of the state legislation." 85 Wis.2d at 534-35, 271 N.W.2d at 76, quoting Solheim, Conflicts Between State Statutes and Local Ordinance in Wisconsin, 1975 Wis. L. Rev. 840, 848.

The company concedes that there is no express language in WFEA restricting the power of municipalities to regulate in the area of employment discrimination. It contends, however, that the ordinance in question violates the spirit of WFEA by expanding the factors upon which the discrimination is prohibited, and thus expanding the classes of persons protected by local regulation. We disagree with this assertion.

The declaration of legislative policy underlying WFEA is set forth in sec. 111.31, Stats. That section recognizes that employment discrimination based upon the factors prohibited by the act "is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production." Such discrimination also "tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them." Section 111.31(3) requires a liberal construction of the act in order to "encourage and foster to the fullest extent practicable the employment of all properly qualified persons."

The declaration of policy set forth in the ordinance similarly provides:

> The denial of equal opportunity intensifies group conflict, undermines the foundations of our democratic society, and adversely affects the general welfare of the community. Denial of equal opportunity in employment deprives the community of the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents. . . . Madison General Ordinance, sec. 3.23(1).

The ordinance declares that it is the public policy of the city "to foster and enforce to the fullest extent the protection by law of the rights of all of its inhabitants to equal opportunity to gainful employment, housing, credit and the use of City facilities and public accommodations without regard to" the factors it enumerates.

The ordinance and the act have a common purpose. They are intended to protect the general public and

individual citizens from the harmful effects of discrimination based upon factors legislatively presumed to bear no reasonable relationship to job performance. The ordinance goes farther than the act. It extends the prohibition against discrimination into the fields of housing and credit, as well as expanding the factors upon which discrimination is prohibited. We find no inconsistency with the letter or spirit of WFEA arising out of the extension.

In Fox v. Racine, 225 Wis. 542, 275 N.W. 513 (1937), the supreme court upheld a city ordinance prohibiting marathon endurance contests against the claim that it was inconsistent with a state statute limiting the duration of such contests to sixteen hours per day. The court noted that sec. 62.11, Stats., conferred on cities "all the powers that the legislature could by any possibility confer upon them" subject to the qualification that " 'a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden.' " 225 Wis. at 545, 275 N.W. at 514, quoting 19 R.C.L. pp. 803-04, sec. 110. The court held:

> The statute, as well as the ordinance, . . . is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition, but not counter to the prohibition under the statute. The city does not attempt to authorize by this ordinance what the legislature has forbidden; nor does it forbid what the legislature has expressly licensed, authorized, or required. Under those circumstances there is nothing contradictory between the provisions of the statute and of the ordinance because of which they cannot co-exist and be effective. Unless legislative provisions are contradictory in the sense that they cannot co-exist, they are not to be deemed inconsistent because of mere lack of uniformity in detail. 225 Wis. at 546-47, 275 N.W. at 515. [Citations omitted.]

A similar result was reached in Caeredes v. Platteville, 213 Wis. 344, 251 N.W. 245, 91 A.L.R. 308 (1933) with respect to a municipal ordinance licensing movie theaters which was stricter than the state building code. The court held:

> [T]he safety requirements of the [state industrial] commission are to be considered as minimum requirements. The building code is to be accepted as a foundation on which to build other safety regulations by local authorities when reasonably necessary in situations in which a city may act. There is no conflict between any of the "general orders" or requirements of the building code and the ordinances in question. City ordinances go more into detail and may include severer regulations when reasonably necessary, than those of the state code. . . . [T]he city having required more in the way of protection against fire than was required by the rule of the commission, and the requirement being within the power of the city, the appellant cannot conduct his theater except in a building in which the construction meets the demands of the ordinances. The safety requirements fixed by the commission have been increased [by the ordinance], but the increased requirements have in no sense of the word run counter to the state requirements. The city moved in the same direction the commission did; it has gone farther but not counter to the building code. 213 Wis. at 350, 251 N.W. at 248. [Emphasis supplied.]

See also, State ex rel Michalek v. LeGrand, 77 Wis.2d 520, 253 N.W.2d 505 (1976) [city ordinance governing landlord-tenant relations not in conflict with correlative state statutes]; Johnston v. Sheboygan, 30 Wis.2d 179, 140 N.W.2d 247 (1966) [ordinance licensing bakeries not in conflict with statute licensing sales of food]; La Crosse Rendering Works v. La Crosse, 231 Wis. 438, 285 N.W. 393, (1939) [ordinance licensing state board of health to inspect and supervise same as to location, construction and operation]; Brittingham & Hixon L. Co. v. Sparta, 157 Wis. 345, 147 N.W. 635 (1914) [local ordinance regulating weighing and sale of coal not in conflict with statutes governing identical subject].

The company insists that these cases must be distinguished from this case because the ordinances they approved had a strictly local impact. It urges that the ordinance in question thwarts the discrimination policies set forth in WFEA, which the legislature intended to apply with uniformity throughout the state. It suggests that if municipalities are free to adopt additional local discrimination policies, perhaps at variance with one another, employers doing business in multiple locations will either withdraw from municipalities having stricter standards than WFEA, thereby creating pockets of unemployment, or suffer an impossible burden in monitoring compliance with differing local requirements applicable to the employer's various branch offices. We find these arguments unpersuasive.

The legislature's recognition that different communities in this state may have differing problems arising out of discriminatory practices, and its determination that these should be addressed at the local level, are reflected in sec. 66.433, Stats., The Wisconsin Bill of Human Rights. In that bill, which was created by ch. 543, Laws of 1963, the legislature expressly "authorized and urged" every municipality to establish or participate in a "community relations-social development commission," sec. 66.433(3), whose functions it defined in sec. 66.433(3) as follows:

> (a) The purpose of the commission is to study, analyze and recommend solutions for the major social, economic and cultural problems which affect people residing or working within the municipality including, without restriction because of enumeration, problems of the family, youth, education, the aging, juvenile delinquency, health and zoning standards, and discrimination in housing, employment and public accommodations and facilities on the basis of sex, class, race, religion or ethnic or minority status.
>
> (b) The commission may:
>
> 1. Include within its studies problems related to . . . industrial strife and the inciting or fomenting of class, race or religious hatred and prejudice.
>
> . . . .
>
> (c) The commission shall:
>
> 1. Recommend to the municipal governing body . . . the enactment of such ordinances or other action as they deem necessary:
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> . . . .
>
> (b) To ensure to all municipal residents, regardless of sex, race or color, the rights to possess equal housing accommodations and to enjoy equal employment opportunities. [Emphasis supplied.]

The legislative declaration of purpose is set forth in sec. 66.433(9) as follows:

> It is the intent of this section to promote fair and friendly relations among all the people in this state, and to that end race, creed or color ought not to be made tests in the matter of the right of any person to sell, lease, occupy or use real estate or to earn his livelihood or to enjoy the equal use of public accommodations and facilities.

Section 66.433, Stats., does not purport to confer power or delegate authority to municipalities to regulate on the subject of discrimination. Rather, it assumes the existence of the police powers conferred

by the general charter laws and issues a broad invitation to municipalities to direct these powers towards ameliorating a broad variety of problems caused by discrimination at the local level.

It is irrelevant that neither sec. 66.433, Stats., nor WFEA contain an express declaration, comparable to those contained in statutes concerning housing discrimination[2], that municipalities are not preempted from enacting employment discrimination ordinances. The legislature has urged local study and action to prevent industrial strife, among other effects of discrimination, and to ensure equal employment opportunities. That a diversity of local enactments was likely to result was doubtless contemplated by the legislature. Contrary to the company's assertion, there is no suggestion in the statute that the legislature intended to decree uniformity of municipal regulation, to preempt the field of employment discrimination, or to limit municipalities to enacting mere echoes of the WFEA provisions.

Absent an express limitation on the city's power under sec. 62.11(5), Stats., the expansion of the prohibited factors of employment discrimination was within its authority to enact. Like the power to prohibit chemical treatment of lakes at issue in Wis. Environmental Decade, 85 Wis.2d at 534, 271 N.W.2d at 76, the power to prohibit employment discrimination based upon factors other than those prohibited by WFEA "is one which the legislature could confer on Madison and, therefore, is one which the city now possesses under sec. 62.11(5), Stats." These provisions do not violate the spirit of WFEA nor impede its purposes. They complement the act's provisions by addressing employment discrimination practices determined by the city council to present problems for residents of Madison. The fact that employers doing business in multiple municipalities may be subject to differing regulations in this area is no more onerous than the fact that they are subject to different regulations with respect to building permits, sales permits, zoning, and a host of other local laws. Compliance is a legitimate cost of doing business in a given community. Cf. Brittingham & Hixon, L. Co. v. Sparta, 157 Wis. 345, 353-54, 147 N.W. 635, 638-39 (1914).

The brief of amicus curiae, Wisconsin Telephone Company, contends that those provisions of the ordinance which prohibit discrimination based on factors of age, sex, and conviction record are in direct conflict with corresponding provisions of WFEA because the prohibitions do not contain certain exemptions found in the act. It also contends that the city has no authority under sec. 62.11(5), Stats., to provide by ordinance for back pay remedies for employment discrimination. These arguments are not properly before us. The defendant company is not alleged to have violated the ordinance by discriminating because of age, sex, or conviction record. Back pay has not been imposed. We decline to reach issues which are not properly framed by the facts of record. See Loy v. Bunderson, No. 79-1657, slip op. (Ct.App. February 13, 1981).

Vagueness and Overbreadth

The company maintains that it is entitled to challenge all categories of discrimination prohibited by the ordinance, including political beliefs and source of income, despite the fact that the employee has made no claim that he was discriminated against on these grounds. We reject the contention.

A court's authority to grant declaratory relief under sec. 806.04, Stats., is subject to conditions precedent "intended primarily to insure that a bona fide controversy exists and that [the] court in resolving the question raised will not be acting in a merely advisory capacity." Tooley v. O'Connell, 77 Wis.2d 422, 434, 253 N.W.2d 335, 340 (1977). Among these conditions is the requirement that there be a justiciable controversy and that it be ripe for judicial determination. Tooley, 77 Wis.2d at 433, 253 N.W.2d 340; State ex rel. La Follette v. Dammann, 220 Wis. 17, 22, 264 N.W. 627, 629 (1936); Borchard, Declaratoroy Judgments, at 61-67 (2d ed. 1941). As we stated in Loy, slip op. at p. 7:

> A justiciable controversy is a claim of present and fixed rights, as opposed to hypothetical or future rights, asserted by one party against another party who has an interest in contesting the claim. Tooley, 77 Wis.2d at 434, 253 N.W. 2d at 340; Pension Management, Inc. v. DuRose, 58 Wis.2d 122, 128, 205 N.W.2d 553, 555-56 (1973), and cases cited. Rights must therefore be declared "upon an existing state of facts, not . . . upon a state of facts that may or may not arise in the future." Heller v. Shapiro, 208 Wis. 310, 313, 242 N.W. 174-175 (1932). Courts should not declare rights in anticipation of an event but "should wait until the event giving rise to rights has happened." Skowron v. Skowron, 259 Wis. 17, 20, 326 N.W.2d 326, 327 (1951); Rose Manor Realty Company v. City of Milwaukee, 272 Wis. 339, 345, 75 N.W.2d 274, 277 (1956). [Footnote omitted.]

The company's contention that it may be charged at some future time with violating other portions of the ordinance is a speculation in which we are not free to indulge under these familiar principles of judicial restraint.

In material part, the ordinance makes it unlawful for any employer "to discharge any individual . . . because of such individual's marital status . . . [or] physical appearance." Those two categories are defined as follows:

> "Physical appearance" means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose. Madison General Ordinance, 3.23 (2) (k).
>
> "Marital status" shall include being married, separated, divorced, widowed, or single. Madison General Ordinance, 3.23 (2) (1).

A regulation is unconstitutionally vague if it is "so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. State v. Tronca, 84 Wis.2d 68, 86, 267 N.W.2d 216, 224 (1978). To survive constitutional scrutiny a regulation "need not meet impossible standards of specificity," but must only attain "a fair degree of definiteness." Tronca, 84 Wis.2d at 86, 267 N.W.2d at 224, citing State v. Courtney, 74 Wis.2d 705, 710, 247 N.W.2d 714, 718 (1976); State v. Zwicker, 41 Wis. 2d 497, 508, 164 N.W.2d 512, 517, cert. den. 396 U.S. 26 (1969).

We find nothing vague about either provision of the ordinance. An employee may not be discharged because he or she is married, separated, divorced, widowed or single. An employee may not be discharged because of his or her manner of dress unless an employer's dress requirement has a reasonable business purpose. Although there may be disputes over what constitutes a "reasonable business purpose," which must be resolved on a case-by-case basis, that fact does not render the statute unconstitutionally vague. As the Supreme Court stated in Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973):

> Words inevitably contain germs of uncertainty . . . "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." [Quoting CSC v. Letter Carriers, 413 U.S. 548, 578-79; footnote omitted.]

In this case, as in Broadrick, the company's conduct is alleged to have fallen squarely within the prohibitions of the ordinance. In such circumstances it will not be heard to speculate as to imprecisions in the outermost boundaries of the ordinance. Broadrick, 413 U.S. at 608-09; Tronca, 84 Wis.2d at 86, 267 N.W.2d at 224; State v. Driscoll, 53 Wis.2d 699, 701-02, 193 N.W.2d 851, 854 (1972).

A regulation is unconstitutionally overbroad if its language, "given its normal meaning, is so broad that the sanctions of the statute may apply to conduct which the state is not entitled to regulate." Tronca, 84 Wis.2d at 89, 267 N.W.2d at 225; State v. Starks, 51 Wis.2d 256, 263, 186 N.W.2d 245, 249 (1971). The overbreadth doctrine is based on the requirement of substantive due process and has the effect of preventing the limiting, by indirection, of constitutional rights. Tronca, 84 Wis.2d at 89, 267 N.W.2d at 225; State v. Driscoll, 53 Wis.2d at 703, 193 N.W.2d at 855.

The only right upon which the ordinance conceivably intrudes is the right of employers to terminate employment contracts at will. " [L]egislation which is grounded on important considerations of public policy may constitutionally circumscribe the right to contract." Smazal v. Estate of Dassow, 23 Wis.2d 336, 341, 127 N.W.2d 234, 237 (1964). The company's overbreadth claim is without merit.

The company also asserts, without citation of relevant authority, that the ordinance violates the equal protection clause of the United States Constitution because it allows for the possibility of arbitrary enforcement. This theory was not presented to the trial court and is not developed on appeal. We view it as an attempt to reargue issues previously addressed in this opinion and decline to address it further.

By the Court:--Judgment affirmed.

Inclusion in the official reports is not recommended.

COURT OF APPEALS DECISION DATED AND RELEASED APR. 27, 1981

FOOTNOTES

[1]The city's brief concedes that its authority to enact the ordinance does not lie in the home rule amendment to the Wisconsin Constitution. We therefore do not address the company's arguments on this point.

[2]See sec. 66.432(1). Stats., and sec. 101.22(1), Stats.

NOTICE

No. 79-538

STATE OF WISCONSIN : IN SUPREME COURT

FEDERATED RURAL ELECTRIC
INSURANCE CORPORATION,

Plaintiff-Appellant-Petitioner,

v.

MADISON EQUAL OPPORTUNITIES
COMMISSION, CITY OF MADISON,
and WILLIAM D. KESSLER,

Defendants-Respondents.

REVIEW of a decision of the Court of Appeals. Affirmed.

PER CURIAM. The court is equally divided on the question of whether the decision of the court of appeals should be affirmed or reversed, Justice Day, Justice Coffey and Justice Steinmetz being of the opinion that the decision should be reversed; Chief Justice Beilfuss, Justice Heffernan and Justice Callow being of the opinion that the decision should be affirmed; and Justice Abrahamson not having participated in this review. The decision is therefore affirmed.

The decision of the court of appeals is affirmed.

Filed March 20, 1982

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

William Donald Kessler 4401 Woods End Madison, WI 53711 Complainant vs. Federated Rural Electric Insurance Co. 5709 Odana Road Madison, WI 53709 Respondent	RECOMMENDED DECISION Case No. 2337

A complaint of discrimination was filed February 2, 1977 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of marital status and physical appearance in regard to employment. Said complaint was investigated by (then) MEOC Human Relations Investigator Yvonne Thomas and an Initial Determination dated March 23, 1978 was issued concluding that probable cause existed to believe that discrimination had occurred as alleged.

Conciliation was waived or failed, and the matter was certified to public hearing. Prior to a hearing being held, the Respondent initiated court proceedings challenging the constitutionality of Madison General Ordinance Sec. 3.23 (The Equal Opportunities Ordinance). The administrative proceedings were stayed by court order during the pendency of the Respondent's challenge in both the Dane County Circuit Court and the Wisconsin Court of Appeals. The constitutionality of the ordinance was upheld at both the circuit and appellate levels (the latter decision being issued on April 27, 1981), and the stay on administrative proceedings was lifted although the Respondent filed a further appeal with the Wisconsin Supreme Court. The Wisconsin Supreme Court, in a split decision, affirmed the lower court decision in an opinion filed March 26, 1982.

In the meantime, a public administrative hearing was held commencing on November 19, 1981 and concluding on December 18, 1981. Attorney Paul Soglin (presently of SCHULTZ AND SOGLIN) appeared on behalf of the Complainant who also appeared in person. Attorney Gerald C. Nichol (presently of LEE, JOHNSON, KILKELLY AND NICHOL) appeared on behalf of the Respondent who also appeared by employee-representative John Bockoven, the company President. Based upon a review of the record, and after consideration of the written arguments submitted by the parties, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, William Kessler, is an adult male who resides in the City of Madison, State of Wisconsin.
2. The Respondent, Federated Rural Electric Insurance Company, is an insurance company employing persons within the City of Madison, State of Wisconsin at an office located at 5709 Odana Road.
3. The Complainant was employed as a Claims Manager by the Respondent sometime in September, 1975 after having been interviewed by Dr. John Wrage, a private personnel consultant hired by the Respondent, and by John Bockoven, the Respondent's company president. The Complainant was legally married at the time of his initial hire by the Respondent.
4. When the Complainant first came to Madison from Boston, Massachusetts in September of 1975, Bockoven assumed he was happily married based on his (Bockoven's) own impressions as well as on conversations he (Bockoven) had with Wrage.
5. The Complainant moved to Madison in September of 1975 without his wife and children, all of whom he expected to join him in December, 1975.
6. In October of 1975, the Complainant first became aware that his wife might not join him in Madison, a belief that he (the Complainant) conveyed to Bockoven at that time.
7. Around October of 1975, unbeknownst to Bockoven, Bockoven's secretary - Nancy Farin - stopped living together with her husband.
8. Farin and the Complainant first met on a social basis in November of 1975.
9. In December of 1975, the Complainant went to Boston to move his family to Madison. At that time he learned with certainty that his wife would not be joining him.
10. At Farin's request, her husband (with whom she had stopped living together in October of 1975) appeared with her at an office "Christmas" party in February of 1976 at which Bockoven was also present.
11. The Complainant and Farin developed a "serious" relationship sometime in February or March, 1976. This relationship continued until such time as each was divorced from their spouses and became married to one another sometime in mid-1977 or after.
12. Farin was dismissed by Bockoven in April of 1976 for problems with her work in relation to preparing an annual report.
13. The Respondent had an unwritten work rule in effect during the term of Kessler's employment with Respondent that prohibited employees from associating with married employees of the

opposite sex outside of work-related matters.

14. Bockoven first became aware of the Complainant's marital problems no later than sometime in December, 1975. Bockoven first became aware of Farin's marital problems around April of 1975, sometime just prior to or concurrent with her termination. Bockoven had observed Kessler and Farin return from lunch together on more than one occasion prior to his (Bockoven's) having become aware of Farin's marital problems, and Bockoven believed the Complainant violated the Respondent's work rule as recited in Finding of Fact 13 above. Further, Bockoven also believed that the Complainant misrepresented to him the seriousness of the Complainant's relationship with Farin.
15. The Complainant was terminated by the Respondent on December 9, 1976. A determining factor in Respondent's decision to terminate the Complainant was Bockoven's distrust of the Complainant based on Bockoven's belief that the Complainant refused to or failed to follow his (Bockoven's) instructions. The determining factors contributing to Bockoven's distrust of the Complainant were Bockoven's beliefs that:
    (a) The Complainant had violated the work rule recited in Finding of Fact 13, above (regarding the association of any employees of one sex with married employees of the opposite sex);
    (b) The Complainant purposefully set reserves too low on some insurance claims so that he (the Complainant) would not have to discuss them with Bockoven;
    (c) The Complainant issued letters with strikeovers contrary to Bockoven's instructions;
    (d) The Complainant drank alcohol on his lunch hour and encouraged other employees to drink alcohol on their lunch hours;
    (e) The Complainant did not come to work wearing the manner of dress Bockoven requested he should.
16. The Complainant came to work in casual clothing, particularly in the early stages of his employment. He was verbally made aware by Bockoven in December of 1975 that he was to wear to work a suit and tie and/or sportcoat and tie. While the Complainant usually had no public contact in his day to day job duties as a Claims Manager, he on at least one occasion attended a conference on behalf of the Respondent at which persons from other insurance companies attended. Other male employees in managerial positions comparable to the Complainant's wore suits and ties or sportcoats and ties to work, without exception. There was no dress code for female employees. Bockoven, at the time of the Complainant's termination, told the Complainant that his dress had improved but it was "too little, too late."
17. In 1976, the Complainant earned $20,728.92 in annual compensation from the Respondent.
18. In 1977, the Complainant earned $7,309: $4,077 in employee compensation and $3,832 in business income less $300 in a partnership loss.
19. In 1978, the Complainant earned $33,437 including $31,717 in employee compensation and $1,720 in partnership income,
20. In 1979, the Complainant earned $11,671: $10,306 in employee compensation, $1,231 in business-related capital gains and $517 in partnership income less $483 in business loss.
21. Had the Complainant not been terminated by the Respondent and had he received 8% annual raises in his salary, he would have earned the following amounts:
    1977 - $22,387.23
    1978 - $24,178.21
    1979 - $26,112.46
22. Subsequent to his termination in 1976, the Complainant sought and/or obtained employment as follows:
    (a) He checked with every insurance company in Dane County for jobs, left a resume at all Madison employment agencies, and contacted a company in Sheboygan where he had interviewed prior to having taken a job with the Respondent.
    (b) The Complainant did not receive any job offers, but did receive three to five interview offers from insurance companies. He interviewed for one position with the Heritage Insurance Company,

but was not offered a job because he would not agree to move to Sheboygan. He did not interview for another job because it involved traveling. He did not interview for a second job because it involved partial travel and relocation, and he did not remember why he refused still another interview.
(c) Unable to obtain employment in the insurance industry, he performed the jobs of delivering telephone directories, preparing tax returns at H&R Block, and working for Retail Credit (now Equifax) subsequent to his termination by Respondent.
(d) After obtaining his real estate license in June, 1977 and selling his first property in August, 1977, he formed A-K Realty on November 21, 1977 and devoted full time to the real estate business beginning in April of 1978.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of marital status within the meaning of Section 3.23, Madison General Ordinances.
2. The Complainant is a member of the protected class of physical appearance within the meaning of Section 3.23, Madison General Ordinances.
3. The Respondent is an employer doing business in the City of Madison, within the meaning of Sec. 3.23, Madison General Ordinances.
4. The Complainant was discriminated against by the Respondent on the basis of his physical appearance in regard to employment within the meaning of See. 3.23, Madison General Ordinances, specifically in regard to discharge.
5. The Complainant was discriminated against by the Respondent on the basis of his marital status in regard to employment within the meaning of Sec. 3.23, Madison General Ordinances, specifically in regard to discharge.
6. The Complainant used reasonable diligence in mitigating and attempting to mitigate his losses subsequent to his termination by Respondent.

RECOMMENDED ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of his marital status and physical appearance.
2. The Respondent pay to the Complainant $15,078.23, representing the difference between the amount that the Complainant would have earned in 1977 had he not been terminated by the Respondent (see Finding of Fact 21) less the amounts he actually earned (see Finding of Fact 18) in 1977, plus 7% annual interest on said amount ($15,078.23) from January 1, 1978 until the date the Respondent complies with this Order.

MEMORANDUM OPINION

There is testimony in the record from Dr. Hyde that in regard to Kessler's termination, his dating of (then) Nancy Farin during the course of his employment until her termination in April of 1976 was at best a residual factor in Bockoven's decision to terminate Kessler. The residual effect Hyde referred to was his (Bockoven's) distrust of Kessler as a result of his (Bockoven's) perception that the Complainant failed to follow an unwritten work rule established by Bockoven proscribing any employees of one sex from associating on a social basis with married employees of the opposite sex, as well as his (Bockoven's) belief that the Complainant had purposely deceived him (Bockoven) by initially representing himself to be happily married.[1]

As discussed in Finding of Fact 15, other factors also contributed to Bockoven's feeling of distrust

toward Kessler which in turn led to Kessler's termination. Even assuming, arguendo, that all of the Respondent's other misgivings about Kessler were true - that Kessler intentionally set low reserves, that Kessler issued letters with strikeovers contrary to Bockoven's direction, that Kessler drank on his lunch hour and encouraged other employees to drink on their lunch hours, and that Kessler disobeyed the Respondent's dress policy (see discussion later) - the Respondent is not shielded from liability for its discriminatory motive in terminating Kessler. The Complainant must prove that his marital status was a determining factor in his discharge, but he need not prove that marital status was the determining factor in his discharge.[2]

If Kessler's violation of the Respondent's work rule (re: association of employees of one sex and married employees of the opposite sex), which on its face discriminates against persons on the basis of marital status, were a determining factor in Kessler's discharge, it would be clear that discrimination occurred in this case. That the work rule violation became a "residual" factor did not transform the seriousness of its effect on the termination decision, and the Respondent's reliance on the residual effect of a discriminatory policy is in actuality no different and no less discriminatory than relying on the policy itself.

For example, if the Respondent's work rule were that White male employees were not to associate with Black employees of the opposite sex, clearly such a policy would be discriminatory. If an employee were later terminated even in part for having failed to follow instructions by not observing the discriminatory policy while it was in force (a "residual effect"), such termination would be discriminatory as the employee is not obligated to nor can be made to suffer any adverse consequences from the failure to follow a discriminatory policy.

To permit an employer in making termination decisions to rely on "residual factors" arising out of an employee's violation of a discriminatory work rule is equivalent to giving sanction to the discriminatory policy itself.

Similarly, any residual consideration by Bockoven of whether the Complainant was happily married or not was also discriminatory, absent a showing that being happily married was some kind of bona fide occupational qualification.

II. PHYSICAL APPEARANCE

As discussed in the previous section, the Respondent's contention that Bockoven's consideration of the Complainant's physical appearance was only a residual factor in his termination decision does not shield the Respondent from liability for discrimination on that basis.

In this case, the evidence shows that the Complainant was at some point made aware of the type of clothing Bockoven expected him to wear, and that the Complainant conformed somewhat to Bockoven's requirements, but "too little, too late." It was further shown that the Complainant had no public contact, did not lose the respect of the employees he supervised due to his manner of dress, and that the Complainant's manner of dress in no way affected his job performance. Also, there existed no dress code as such for female employees, although there existed an unwritten dress code for managerial employees (presumably all male).

Under these facts and circumstances, there was no reasonable business purpose for the requirements placed on the Complainant, and this case is distinguished from previous decisions (as discussed in the footnote below).[3]

III. REMEDY

The Complainant asserts that he is entitled to back pay January 1, 1977 through December 31, 1979 on the grounds that the Complainant's real estate business did not become, on the average, more lucrative until after December 31, 1979.

The Respondent asserts that if the Complainant is entitled to any backpay, it should toll when the Complainant became a partner in A-K Realty (presumably in November of 1977).

My view is that both positions are incorrect, and that the Complainant is entitled to backpay from January 1, 1977 through, at the latest, sometime in April of 1978 when he began devoting full time to A-K Realty. In no case is the Complainant entitled to backpay beyond April of 1978 (when he began devoting full time to A-K Realty).[4]

In the interest of measurability, I have entered an order calculating the back pay for the calendar year 1977, as no evidence was presented to show that the Complainant earned less than what he would have made with the Respondent for the first three-plus months of 1978.

Signed and dated the 12th day of October, 1982.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

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[1]Bockoven testified that ". . .We had two basic ground rules . . . The other is that we have no fooling around with married people in our office." (See Transcript, p. 9)

Bockoven further testified regarding a conversation that he had with the Complainant in December, 1975;

> "Well, he came in and told me that Ann was not going to be coming to Madison, and I told him, well, that was unfortunate. I felt sorry for him, and I reminded him that because he would be single or separated from his wife, all the more reason that he followed the rules of not fooling around with any married women in the office." (See Transcript, pp. 10-11)

Further, as an illustration of Bockoven's preoccupation with the state of Kessler's marriage, the Respondent writes on page 6 of its own brief that "Bockoven felt that Kessler purposely deceived and further contributed to Bockoven's distrust of Kessler when Kessler in his pre-employment interview with Dr. Wrage represented himself to be happily married."

[2]As held by the Hon. George R. Currie in Wisconsin Department of Agriculture v. Wisconsin Labor and Industry Review Commission, 17 EPD 8607 (1978) - as paraphrased from Muskego - Norway C.S.J.S.C. v. W.E.R.B., 35 Wis 2d. at p. 562 - an employer's conduct is not insulated from a finding of illegality when one of the motivating factors is legally protected no matter how many other valid reasons might exist for the action complained of.

[3]It is not per se improper for an employer to have different dress standards for managerial and non-managerial employees, so long as there is a reasonable business purpose for the dress standards used. In this case, there was no dress code for women employees (presumably all of whom were non-managerial), but an unwritten dress standard existed for managerial employees (presumably all males).

However, Bockoven's own testimony indicates that the Respondent had no reasonable business purpose for the dress standard as it applied to Kessler's job, which distinguishes this case from my holding in Quinn-Gruber v. Wisconsin Physician's

Service (September 27, 1982) that ". . . as a matter of law, it is not improper for any employer for purposes of business image to proscribe, in a uniform manner, the wearing of tennis shoes or blue jeans in an office setting where there is even minimal public contact, regardless of whether or not the wearing of those items of clothing physically interferes with a person's ability to do their job." (Emphasis added)

In this case, Bockoven testified that Kessler's manner of dress did not affect his working relationship with the Respondent's clientele or customers: "He wasn't out with them, so that (his appearance) wouldn't have an effect." The key here is that Kessler did not even have minimal public contact; the inference from Bockoven's own testimony is that Kessler had no public contact in his job, thus distinguishing this case from my holding in Quinn-Gruber. Further, Bockoven testified that Kessler did not suffer from a lack of respect from co-employees because of his appearance.

Below, I relate Bockoven's testimony on adverse direct examination by the Complainant's attorney (Attorney Soglin):

Q: What was wrong with Mr. Kessler's appearance, in your judgment?
A: It didn't meet the standards that a department manager of an insurance company normally would wear.
Q: What did Mr. Kessler wear?
A: Sport shirts with his elbow coming out of the sleeves sometimes, shirts and pants that had been washed and not ironed, sometimes they were clean and sometimes they weren't, boots unshined.
Q: Did it affect Mr. Kessler's working relationship with your clientele, your customers?
A: He wasn't out with them, so that wouldn't have an effect. (See Transcript, p.28)

Q: Do you recall ever having said that Mr. Kessler's personal appearance did not meet the usual management standards?
A: I'm sure I did.
Q: And what would those management standards be?
A: Neat, shoes shined, wear a tie, a suit or sport coat and slacks, neat appearing.
Q: How did this neat appearance of part of the management's standards relate to Mr. Kessler's work?
A: Only that as a supervisor of other people, I think they get more respect if they dress more neatly.
Q: Do you have any knowledge as to whether or not the individuals that Mr. Kessler supervised had little or no respect for him?
A: On, no, I have no such notion. That is a principle on dress, not specific as to Mr. Kessler. (See Transcript, pp. 36-37)

[4]It is clear from the record that the Complainant's real estate business became more financially lucrative in 1973 than his job with the Respondent would have been. Merely because the Complainant's real estate business suffered in 1979 does not expose the Respondent to further liability on some sort of an averaging scheme. The key in this matter is intent, and the Complainant's full-time devotion to what was then a more financially lucrative occupation in April, 1978 tolled the backpay liability of the Respondent, as the Complainant's intent may be inferred to be at that time having elected a new occupation.

However, up until the time that any of the Complainant's ventures became more financially lucrative than his previous occupation, his intent may be inferred to be that he would have still been interested in being employed at his previous occupation. Consequently, I reject the Respondent's position that the Complainant's back pay should toll at the start of his venture (when he became a partner in A-K Realty), because this was just one of several part-time endeavors engaged in by the complainant to make money and the realty venture had only speculative future prospects.

Further, regarding mitigation of damages, the Complainant clearly used reasonable (or due) diligence in seeking other work, and it was not unreasonable for him to refuse interviews for insurance jobs where it was known to him that the job would be outside Dane County or would involve more travel than his previous job with the Respondent. It is not unreasonable for a Complainant to reject possible future employment on the basis of geographical considerations (in his case, wanting to remain in Dane County) or working condition considerations (in his case, not wanting to travel much, as the job he had held with the Respondent would appear to have involved minimal or no travel).

William Donald Kessler 4401 Woods End Madison, WI 53711 Complainant vs. Federated Rural Electric Ins. Company 5709 Odana Road Madison, WI 53719 Respondent	FINAL ORDER Case No. 2337

The Examiner issued his Recommended Decision (including the Recommended Findings of Fact, Conclusions of Law and Order) on October 12, 1982. Timely exceptions were filed by both parties, written arguments were submitted and oral arguments were presented by Attorney Soglin (for Complainant) and Attorney Nichol (for Respondent) before eleven members of the Madison Equal Opportunities Commission (MEOC).

Based upon a review of the record in its entirety, the MEOC issues the following:

FINAL ORDER

1. That Recommended Conclusion of Law #4 (concerning physical appearance) of the attached Recommended Decision is hereby reversed and deleted;
2. That Recommended Order #2 of the attached Recommended Decision is modified as follows: The figure of "7%" is hereby deleted and the figure "12%" is substituted therefore; otherwise said Recommended Order #2 shall stand in its entirety;
3. That the Examiner's Recommended findings of Fact, Conclusions of Law and Order as contained in the attached Recommended Decision are affirmed in their entirety, except as modified by #1 and #2 above.

Commissioners Abrahamson, Amata, Cobb, Cox, Galanter, Goldstein, Hisgen, Kifle, Swamp and Ware all participated in entering the above FINAL ORDER. The respective positions of the Commissioners on various issues are discussed in the Commission Opinion below. Commissioner Feitlinger, although present at the oral arguments, did not participate in the entering of the Commission's Final Order.

COMMISSION OPINION

I. Reversal of Recommended Conclusion of Law #4

Commissioners Abrahamson, Amato, Cobb, Galanter, Hisgen and Kifle all joined in reversing and deleting Recommended Conclusion of Law #4. Commissioners Cox, Goldstein, Swamp and Ware, all dissented and could have affirmed Recommended Conclusion of Law #4. The six-member majority on this issue determined, based on the facts in the record, that the Complainant's physical appearance (manner of dress) was not a substantial (or determining) factor surrounding the Complainant's discharge. Although the record shows that problems existed earlier in the Complainant's employment, the majority finds that the Respondent was not dissatisfied with the Complainant's manner of dress at the time of his discharge.

II. Affirmance of the Examiner's Recommended Conclusion of Law #5 Finding the Respondent Liable for Discrimination on the Basis of the Complainant's Marital Status

The Commission affirmed the Examiner's Recommended Conclusion of Law #5 finding the Respondent liable for marital status discrimination by a 6-4 margin. Commissioners Amato, Cox, Goldstein, Kifle, Swamp and Ware all joined in affirming said Recommended Conclusion of Law #5. Commissioners Abrahamson, Cobb, Galanter and Hisgen dissented.

The six-Commissioner majority agreed with the Examiner's reasoning as detailed in the Memorandum Opinion on pages 7 and 8 of his Recommended Decision.

III. Interest Modification: Raising Complainant's Entitlement to 12%

The present statutory figure for interest to be awarded with a judgment in civil cases is generally twelve (12) percent.[2] While the statutory requirements do not necessarily apply to a municipal administrative order, the Madison Equal Opportunities Commission agrees with those court decisions which have awarded interest in fair employment cases and finds the statutory rate for civil cases to be the appropriate and reasonable rate.

Commissioners Abrahamson, Amato, Cobb, Cox, Galanter, Goldstein, Kisgen, Kifle, Swamp and Ware all joined in modifying the Examiner's interest award to the Complainant.

IV. Other Aspects of Remedy

Except for the modification of the interest figure, all ten Commissioners who participated in entering the Final Order approve the Examiner's Recommended Order (#1 and #2).[3] While the Complainant did not specifically prove that he would have received an 8% salary increase (see Recommended Finding Fact #21) in 1977, the Commission finds the Complainant's assertion reasonable for that year.

While the Complainant carries a heavy burden in proving liability, once that liability is established, the burden shifts to the Respondent to show that the Complainant is <u>not</u> entitled to a full (make-whole) remedy.[4] In a situation such as this, where the salary increase (if any) was discretionary with the Respondent (i.e., it could have been more or less than the Complainant's asserted figure), the Commission finds it proper to accept a reasonable assertion[5] by the Complainant (8% increase), as there is an absence of persuasive proof by the Respondent, by at least a preponderance of the evidence (if not clear and convincing evidence), that the Complainant would have received less than an 8% increase.

V. Other Aspects of the Recommended Decision

For clarity of the record, it is further noted that the ten Commissioners unanimously affirm all of the Recommended Findings of Fact as well as unanimously affirm Recommended Conclusions of Law #1, #2 and #3. The other aspects of the Recommended Decision have been discussed above.

Signed and dated this 10th day of March, 1983.

EQUAL OPPORTUNITIES COMMISSION

Betsy Abrahamson
EOC President

[1]The majority finds Bockoven's statement that the Complainant's improved appearance was "too little, too late" not to mean that Bockoven was still dissatisfied with the Complainant's appearance. Rather, the majority finds the statement to mean that in Bockeven's opinion, even the Complainant's improved dress was insufficient to save him from termination.

[2]The Commission acknowledges the recent Wisconsin Supreme Court ruling in Anderson vs. LIRC, No. 81-1911 (Filed March 1, 1983) holding that prejudgment interest is awardable under the Wisconsin Fair Employment Act. We find the high court's reasoning equally applicable to the Madison Equal Opportunity Ordinance (Section 3.23, Madison General Ordinances).

[3]Although four Commissioners dissented from the majority's finding of marital status discrimination (liability), given that the majority did find liability, those four Commissioners joined with the other six in the modification of the interest award and affirmance of the other aspects of the Examiner's Recommended Order.

[4]See Anderson v. LIRC (refer to Footnote 2) as well as State ex rel Schilling and Klingler v. Baird 65 Wis. 2d 394 (1974), the latter being a Wisconsin Supreme Court ruling in an employment matter (but not a discrimination case) discussing the allocation of the burden of proof (placing it heavily on the Respondent) on the issue of mitigation of "damages". See also EEOC v. Kallir, Phillips, Ross, Inc., 13 FEP Cases 1508, 1512 (1976) for a discussion of burden of proof in a discrimination matter, (in a federal court).

[5]Factors which may be relevant to a determination of whether or not a Complainant's assertion as to a projected salary increase is reasonable (in the context of determining a remedy) include, but are not limited to, a consideration of the Complainant's past salary history with the Respondent, the economic position of the Respondent at the time, the salary increases (if any) given to other (similarly situated) employees, industry-wide standards (if any), express or implied promises made to the Complainant by the Respondent or its agents, and so on. Where a Complainant is discharged, it is insufficient for the Respondent to merely assert (without further substantiation) that the Complainant would not have received an annual increase or that the Complainant's replacement was hired at a lesser salary.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Federated Rural Electric Insurance Co., Plaintiff, vs. William Kessler and Madison Equal Opportunities Commission and City of Madison, Defendants.	MEMORANDUM DECISION Case No. 83 CV 1755

NATURE OF PROCEEDINGS

This action is a review, on certiorari, of a decision of the Madison Equal Opportunities Commission, dated March 10, 1983, which ruled that plaintiff Federated Rural Electric Insurance Co. had discriminated against defendant William Kessler on the basis of his marital status in discharging him from employment, contrary to Madison General Ordinance 3.23, and awarded Mr. Kessler the sum of $15,078.23, plus 12% interest from January 1, 1978.

On April 6. 1983, plaintiff commenced the instant review of the Commission's decision by filing a complaint, pursuant to sec. 801.02(5), Stats. Plaintiff contends that the decision of the Commission should be reversed because the Commission's conclusion of law that the plaintiff discriminated against Mr. Kessler on the basis of marital status is not supported by substantial or credible evidence in the record, and because the Commission's finding that a legitimate business reason was a determining factor in the plaintiff's decision to dismiss Mr. Kessler should, as a matter of law, have required the Commission to dismiss Mr. Kessler's complaint of discrimination. Plaintiff also disputes the calculation of the award and the interest rate.

DECISION

In reviewing on certiorari the determination of the Commission, this court is limited to the questions of:

> (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on the correct theory of 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 it might reasonably make the order or determination in question. State ex rel. De Luca v. Common Council, 72 Wis. 2d 672, 676, 242 N.W.2d 689 (1976), quoting from State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 199, 94 N.W.2d 711 (1959).

Madison General Ordinance 3.23(7)(a) reads, in relevant part:

> (7) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
> (a) For any person or employer . . . to discharge any individual . . . because of such individual's . . . marital status . . .

In order to determine whether the conduct of plaintiff constituted prohibited discrimination, the initial task is to determine the meaning of the above ordinance. The term "marital status" is defined in Mad. Gen. Ord. 3.23(2)(1) as follows: "Marital status" shall include being married, separated, divorced, widowed, or single." "Because of" refers, in common usage, to the process of causation, and means that something happens or exists due to something else happening or existing. Thus, the ordinance in question, Mad. Gen. Ord. 3.23(7)(a), prohibits an employer from discharging an employee due to the employee's state of being married, separated, divorced, widowed, or single.

At issue in this case, therefore, is whether the plaintiff discharged Mr. Kessler because of Mr. Kessler's state of being married, separated, divorced, widowed, or single. The Commission decided this issue in the affirmative, and adopted the hearing examiner's fifth conclusion of law, which states:

> 5. The Complainant was discriminated against by the Respondent on the basis of his marital status in regard to employment within the meaning of Sec. 3.23, Madison General Ordinances, specifically in regard to discharge. (Rec., p. 408).

The questions which must be answered by this court on review are whether the findings of fact of the Commission are supported by substantial and credible evidence in the record, and whether the fifth conclusion of law of the Commission is supported by the found facts.

In reviewing findings of fact by certiorari, the standard is identical to that employed in judicial review of administrative agency decisions under Chap. 227, Stats. State ex rel. Harris v. Annuity and Pension Board, 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979). Sec. 227.20(6), Stats., states:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Bucyrus-Erie Co. v. ILHR Dept., 90 Wis. 2d 408, 280 N.W.2d 142 (1979). Substantial evidence does not mean preponderance of the evidence; if an agency's factual finding is supported by substantial evidence it must be upheld by the reviewing court, even if the factual finding is against the great weight and clear preponderance of the evidence. Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 98 Wis. 2d 682, 298 N.W.2d 205 (Ct. of App., 1980); Omernick v. Department of Natural Resources, 94 Wis. 2d 309, 287 N.W.2d 841 (Ct. of App., 1979), aff'd, 100 Wis. 2d 234, 301 N.W.2d 437 (1981). This standard is required because s. 227.20, Stats., does not permit a reviewing court to weigh conflicting evidence or to pass on the credibility of witnesses. Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, 85 Wis. 2d 518, 271 N.W.2d 69 (1978).

This court has reviewed all of the Commission's findings of fact, and is of the opinion that all of them are supported by substantial evidence in the record, with the exception of the second sentence of Finding No. 14, in which there is no substantial evidence for the date "April of 1975." This is apparently a typographical error, for there is substantial evidence for the date April of 1976. With this amendment, the findings of fact of the Commission are found to be supported by substantial evidence in the record.

The next question which must be answered is whether the Commission's fifth conclusion of law is supported by the facts. The application of a legal standard to the facts is a legal question. The court is not bound by the Commission's determination of a question of law, and may properly substitute its judgment for that of the Commission. Bucyrus-Erie Co. v. ILHR Dept., supra.

The following findings of fact, found by the hearing examiner and adopted by the Commission, bear on the fifth conclusion of law:

> 3. The Complainant was employed as a Claims Manager by the Respondent sometime in September, 1975 after having been interviewed by Dr. John Wrage, a private personnel consultant hired by the Respondent, and by John Bockoven, the Respondent's company president. The Complainant was legally married at the time of his initial hire by the Respondent.
>
> 4. When the Complainant first came to Madison from Boston, Massachusetts in September of 1975, Bockoven assumed he was happily married based on his (Bockoven's) own impressions as well as on conversations he (Bockoven) had with Wrage.

7. Around October of 1975, unbeknownst to Bockoven, Bockoven's secretary - Nancy Farin - stopped living together with her husband.

11. The Complainant and Farin developed a "serious" relationship sometime in February or March, 1976. This relationship continued until such time as each was divorced from their spouses and became married to one another sometime in mid-1977 or after.

13. The Respondent had an unwritten work rule in effect during the term of Kessler's employment with Respondent that prohibited employees from associating with married employees of the opposite sex outside of work-related matters.

14. Bockoven first became aware of the Complainant's marital problems no later than sometime in December, 1975. Bockoven first became aware of Farin's marital problems around April of 1975 (1976), sometime just prior to or concurrent with her termination. Bockoven had observed Kessler and Farin return from lunch together on more than one occasion prior to his (Bockoven's) having become aware of Farin's marital problems, and Bockoven believed the Complainant had violated the Respondent's work rule as recited in Finding of Fact 13 above. Further, Bockoven also believed that the complainant misrepresented to him the seriousness of the Complainant's relationship with Farin.

15. The Complainant was terminated by the Respondent on December 9, 1976. A determining factor in Respondent's decision to terminate the Complainant was Bockoven's distrust of the Complainant based on Bockoven's belief that the Complainant refused to or failed to follow his (Bockoven's) instructions. The determining factors contributing to Bockoven's distrust of the Complainant were Bockoven's beliefs that:
(a) The Complainant had violated the work rule recited in Finding of Fact 13, above (regarding the association of any employees of one sex with married employees of the opposite sex);
(b) The Complainant purposefully set reserves too low on some insurance claims so that he (the Complainant) would not have to discuss them with Bockoven;
(c) The Complainant issued letters with strikeovers contrary to Bockoven's instructions;
(d) The Complainant drank alcohol on his lunch hour and encouraged other employees to drink alcohol on their lunch hours;
(e) The Complainant did not come to work wearing the manner of dress Bockoven requested he should. (Rec., pp. 404-406).

It is clear that none of these facts support the conclusion that Mr. Kessler was discharged because of his marital status. These facts would support the conclusion that Mr. Kessler was discharged, in part, because he had violated the employer's work rule which discouraged employees from associating with other employees who are married outside of work-related matters, but that conclusion is quite a different matter.

The work rule, as stated in Finding No. 13, was not discriminatory as applied to Mr. Kessler. The rule applied to all employees, regardless of their marital status. Whether Mr. Kessler had been married, separated, divorced, widowed, or single, he would have been equally prohibited by the rule from developing a romantic relationship with a fellow employee who was married. The work rule was thus a regulation of Mr. Kessler's conduct, rather than a discrimination based on his marital status. The only conclusion possible from these facts is that Mr. Kessler's marital status was irrelevant to his discharge. Thus, the employer did not violate Mad. Gen. Ord. 3.23(7)(a).

There is one other aspect of the facts of this case which bears on Mr. Kessler's marital status. There is

testimony in the record to the effect that Mr. Kessler, in his initial interview with Dr. Wrage, represented himself as being happily married, and that Mr. Bockoven later felt some distrust toward Mr. Kessler when he learned that Mr. Kessler had misrepresented his situation. It is somewhat difficult for the court to deal with this issue, because the Commission made no finding of fact as to its causative effect on Mr. Kessler's discharge. The Commission should be aware that it has an obligation to make written findings of any facts which are the basis for its decisions. Edmonds v. Board of Fire & Police Commissioners, 66 Wis. 2d 337, 348, 224 N.W.2d 575 (1975). In any event, the court can find no substantial evidence in the record supporting the position that the employer required, as a condition of employment, that Mr. Kessler be married, happily or otherwise. There is evidence that Mr. Bockoven lost some trust in Mr. Kessler because of Mr. Kessler's deception about his marital status. Indeed, both Mr. Kessler (Rec., p. 164) and Mr. Bockoven (Rec., p. 258) testified that Mr. Kessler's deception about his marital situation was the relevant point; not his marital status as such. Once again, then, the situation is that Mr. Kessler's conduct, rather than his marital status, led to his discharge. It is clear that honesty was a bona fide occupational qualification for the position of trust held by Mr. Kessler's, and that the employer was justified in having a negative reaction upon learning of Mr. Kessler's deception.

In summary, there is no support in the record for the Commission's conclusion that Mr. Kessler was discharged because of his marital status. Therefore, the Commission's order must be set aside, and this action must be remanded to the Commission for a new decision and order, based on the existing record, consistent with this opinion.

Since this case is controlled by the considerations stated above, it is unnecessary to consider the other arguments made by counsel.

The allowance of attorney fees and other costs to plaintiff is, in this action, discretionary with the court pursuant to sec. 814.036, Stats. The court finds that it is manifestly fair to allow plaintiff its costs of this action, since plaintiff was required to bring this action only because of the failure of the Commission to properly apply the ordinance which it is charged with enforcing. The allowance of attorney fees is limited to a maximum of $100 by sec. 814.04(1), Stats. Since it is apparent from the record that plaintiff's actual attorney fees for this action have been greater than $100, it is appropriate to allow plaintiff the maximum of $100 for its attorney fee in this action. In addition, plaintiff is allowed its actual disbursements of costs, pursuant to sec. 814.04(2). Plaintiff shall submit verification of its costs and disbursements pursuant to sec. 814.10, Stats., and the same shall be paid to plaintiff by defendants Madison Equal Opportunities Commission and City of Madison.

Although the disposition of this action is controlled by the considerations above, it may be useful to the Commission to discuss in some detail the errors of law made in its initial decision of this case.

The major error made by the Commission in attempting to apply the ordinance to the facts of this case is contained in the following sentence from the memorandum opinion of the hearing examiner, which was adopted by the Commission:

> If Kessler's violation of the Respondent's work rule (re: association of employees of one sex and married employees of the opposite sex), which on its face discriminates against persons on the basis of marital status, were a determining factor in Kessler's discharge, it would be clear that discrimination occurred in this case. (Rec., p. 410).

One error in this reasoning lies in the Commission looking at what it perceives as a general discriminatory policy, rather than focusing on specific discrimination against the complainant, Mr. Kessler, based on his marital status. As stated above, Mr. Kessler's marital status was irrelevant to the operation of the rule; all employees, regardless of their marital status were prohibited from engaging in

the conduct which Mr. Kessler engaged in. The Commission should be aware that, in a contested case such as this, it is not empowered to find in favor of a complainant unless the complainant shows that he or she was the victim of discrimination against him or her.

Another error in the Commission's reasoning is that the Commission's conclusion that the work rule in question is, by itself, illegally discriminatory is incorrect. The Commission apparently failed to realize that not every policy which categorizes employees based on their status or membership in a group is illegally discriminatory. Rather, illegal discrimination is a categorization which results, because of the categorization, in the loss by an individual of a legally protected right or privilege. See Mad. Gen. Ord. 3.23(1). In the instant case of employment practices and marital status, illegal discrimination consists of an employer basing hiring or discharge decisions on an individual's marital status (Mad. Gen. Ord. 3.23 (7)(a)), or of an employer classifying employees by marital status in a way "which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee . . ." (Mad. Gen. Ord. 3.23(7)(b)).

Using this standard, it is apparent that the work rule in question is not illegally discriminatory. The rule, in essence, prevents all employees from pursuing romances with fellow employees who are married, while not preventing any employees from pursuing romances with unmarried coworkers. It should be obvious that the ability to pursue a romantic relationship with a married coworker is not a legally protected right or privilege, and that the denial of that ability is not a denial of equal opportunity in employment. Prohibiting an employee from pursuing romances with married coworkers would not deprive that employee, because of his or her marital status, of employment opportunities, nor would it adversely affect the employment status of that employee because of his or her marital status. Thus, from the point of view of those whose conduct is restrained, the rule does not violate the ordinance.

The rule can also be examined as to its impact on the employees who are categorized. The rule, by preventing all employees from being involved in romances with married coworkers, thereby prevents all married employees from having romances with any coworkers, while it does not prevent unmarried employees from having romances with any coworkers. The rule thus creates two groups, married and unmarried employees, and the two groups have different abilities with regard to romances with coworkers. Although the rule does not, as such, have an effect on the conduct of the occupants of the two groups, the enforcement of the rule would cut off the access of the married employees to romances with coworkers.

The question then becomes whether the rule illegally discriminates against either of the two groups. The group of unmarried employees is not discriminated against, since the access of its members to romances with coworkers is unaffected by the rule. The group of married employees is also not discriminated against. Preventing the members of this group from access to romances with coworkers does not act to deprive them of "employment opportunities" or to affect their "status as an employee." Preventing married employees from having romances with coworkers does not tend to stigmatize them or to make them second class employees. It should be remembered that one of the socially recognized purposes of marriage is to establish an exclusive sexual bond with one's spouse. Thus, a married person is not stigmatized by an expectation that he or she will maintain a monogamous relationship with his or her spouse for as long as he or she chooses to remain in the marital state. The ability of a married employee to pursue a romantic relationship with a coworker who is not his or her spouse is thus not a legally protected right or privilege, and the denial of that ability is not a denial of equal opportunity in employment. Thus, once again, the rule does not violate the ordinance.

Not only does the work rule in question not violate the ordinance, it is clearly consistent with public policy, as expressed in the Wisconsin Statutes and the Madison General Ordinances. For example, sec. 765.001(2), Stats., states:

> It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. . . . The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.

The work rule in question is in harmony with the public policy goals set forth in this section of the Wisconsin Statutes, in that it attempts to prohibit conduct, i.e., extramarital romantic affairs, which would generally tend to advance the impairment or dissolution of existing marital relationships.

Further, it should be noted that sec. 944.16, Stats., defines adultery, inter alia, as having "sexual intercourse with a person who is married to another," and categorizes this conduct as a Class E felony. It is not illegally discriminatory for an employer to recognize a distinction, based on marital status, which is set forth in the Wisconsin Statutes, nor is it discriminatory for an employer to attempt to prohibit conduct which, in the nature of things, is likely to lead to the commission of a felony.

Finally, it should be noted that Mad. Gen. Ord. 3.23(7)(j) requires that "employers shall ensure that all of their employees work in an environment free of sexual harassment." The same ordinance section holds employers presumptively responsible for all acts of sexual harassment committed by their agents and supervisory personnel. Thus, employers are required by this section to institute procedures and policies designed to prevent incidents of sexual harassment. As noted above, persons who choose to enter the marital state are generally considered to be expressing a preference for a sexually monogamous relationship with their spouse. Thus, the work rule is consistent with the sexual harassment ordinance, because it is not unreasonable for an employer to believe that married persons are generally not desirous of being subjected to romantic advances from persons other than their spouse, and it is not unreasonable for an employer to believe that such advances, sanctioned by the employer, could be presumptively considered to be sexual harassment.

THEREFORE, IT IS ORDERED:

1. That the decision of the Madison Equal Opportunities Commission of March 10, 1983, be set aside for failure to correctly apply the law to the found facts, and

2. That the cause be remanded to the Madison Equal Opportunities Commission for a new decision and order consistent with this opinion, and

3. That defendants Madison Equal Opportunities Commission and City of Madison pay to plaintiff its costs of the action.

Dated: January 31, 1984.

By the court:

James C. Boll, Judge
Dane County Circuit Court
Branch 6

No. 84-552

STATE OF WISCONSIN : IN COURT OF APPEALS - DISTRICT IV

Federated Rural Electric Insurance Co.,

Plaintiff-Respondent,

v.

William Kessler,

Defendant-Appellant,

Madison Equal Opportunities Commission,

Defendant-Co-Appellant,

City of Madison,

Defendant.

APPEAL from a judgment of the circuit court for Dane county: JAMES C. BOLL, Judge. Reversed.

Before Cane, P.J., Dean and LaRocque, JJ.

DEAN, J. William Kessler and Madison Equal Opportunities Commission appeal a judgment reversing a commission order. The commission found that Federated Rural Electric Insurance Co. had discriminated against Kessler on the basis of his marital status, in violation of a city ordinance.[1] Kessler argues that the commission correctly concluded that he had been discriminated against because of his marital status. Because we conclude that the commission reasonably held that the work rule used in part to discharge Kessler did discriminate against him, we reverse.

The commission found that Federated had an unwritten work rule prohibiting its employees from associating with married employees of the opposite sex outside of work-related matters. Kessler became involved with another married employee while working for Federated. In December, 1976, Federated discharged Kessler for several reasons, including his violation of this work rule.[2] The trial court reversed the commission's conclusion that Federated discriminated against Kessler based on his marital status and held that, as a matter of law, the work rule was nondiscriminatory.

On certiorari review, an appellate court's scope of review is limited to the records of the administrative proceedings, and includes whether the agency kept within its jurisdiction, whether it proceeded on a correct theory of law, whether its action was arbitrary, oppressive or unreasonable, and whether the evidence reasonably supports its determination. See, e.g., State ex rel. Harris v. Annuity and Pension Board, 87 Wis.2d 646, 651-52, 275 N.W.2d 668, 671 (1979). At issue is the commission's conclusion that Federated discriminated against Kessler. The commission's conclusion raises a question of law that will be sustained if reasonable. Jenks v. DILHR, 107 Wis.2d 714, 720, 321 N.W.2d 347, 351 (Ct. App. 1982).

The commission's conclusion that Federated discriminated against Kessler on the basis of his marital status was reasonable. Federated's rule discriminated against Kessler because it was one-sided. The rule failed to restrict social associations both by and with married employees. As phrased by the employer, the rule prohibits a single employee from associations with a married employee. In other words, if any married employee associated with a single employee, the married employee would not be violating the rule while the single employee would. It is this arbitrary distinction that invalidates the rule. The trial court erroneously stated that the rule applied to all employees regardless of marital status. If the rule applied equally to all employees, we would reach a different conclusion.

Federated argues that even if the rule is discriminatory, it is reasonably necessary to the normal operation of the business enterprise. The Madison ordinance does make specific exceptions to otherwise illegal discrimination. See, e.g., Madison, Wis., General Ordinances § 3.23(7)(i). In general, the ordinance allows certain kinds of discrimination when it is necessary to the business' normal operation. The ordinance, however, makes no exception for instances of marital status discrimination.

Next, Federated argues that it discharged Kessler for several legitimate reasons and that these reasons should negate any discriminatory motive for Kessler's discharge. We disagree. In State Department of Employment Relations v. WERC, 122 Wis.2d 132, 138-43, 361 N.W.2d 660, 663-65 (1985), our supreme court held that an employee may not be fined when one of the motivating factors is the individual's union activities, regardless of the legitimacy of the other factors. The court reasoned that this "in part" rule recognizes the practical difficulty that a discharged employee may have in proving anti-union hostility and refuting an allegation of misconduct.

We conclude that the "in part" test is applicable equally to this discrimination situation. The discharged employee and the employer do not stand on equal footing in cases alleging discrimination because of the employer's advantage of being able to monitor the employee's work performance and document any "legitimate" basis for discipline.[3] We therefore reject Federated's dual purpose argument and conclude that the commission correctly decided that Federated had discriminated against Kessler because of his marital status.

By the Court.--Judgment reversed.

Not recommended for publication in the official reports.

APPENDIX

[1]Madison, Wis., General Ordinances § 3.23(7)(a) provides in relevant part:

> (7) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> > (a) For any person or employer . . . to discharge any individual . . . because of such individual's . . . marital status.

[2]Kessler argues that he could not have violated the work rule because, at the time of his discharge, the employee with whom he became romantically involved had already been discharged. The substantial evidence supports the commission's finding that one reason for Kessler's discharge was this relationship, which began while both were employed by Federated.

[3]WERC reaffirmed the supreme court's holding in Muskego-Norway Consol. Sch. Jt. Sch. Dist. No. 9 v.

WERB, 35 Wis.2d 540, 151 N.W.2d 617 (1967).

Court of Appeals Decision Dated and Released September 10, 1985

No. 84-552

STATE OF WISCONSIN : IN SUPREME COURT

Federated Rural Electric Insurance Co.,

Plaintiff-Respondent-Petitioner,

v.

William Kessler,

Defendant-Appellant,

Madison Equal Opportunities Commission,

Defendant-Co-Appellant,

City of Madison,

Defendant.

REVIEW of a decision of the Court of Appeals. Reversed.

STEINMETZ, J. The issues in this case are: (1) whether Federated Rural Electric Insurance Company's (Federated) rule prohibiting the romantic association of any employee of one sex with a married employee of the opposite sex impermissibly discriminates on the basis of marital status. The Madison Equal Opportunities Commission concluded that the rule violated Madison's equal opportunities ordinance, and that Federated discharged Kessler "in part" because he violated the rule.

(2) If the employer's rule does impermissibly discriminate on the basis of marital status, then the issue is whether to apply the "in part" test of Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 151 N.W. 2d 617 (1967), to mixed motive discharges not involving anti-union animus. Also see Employment Relations Dept. v. WERC, 122 Wis. 2d 132, 361 N.W. 2d 660 (1985). Federated urges the court to apply a different test to cases not involving anti-union animus, whereby the employer has an opportunity to prove that the employee would have been fired even without the discriminatory motive.

We conclude that Federated's rule does not discriminate on the basis of marital status, and, therefore, Kessler's termination did not violate the Madison equal opportunities ordinance even if the employer was motivated in part by Kessler's violation of the work rule. This decision is in agreement with the decision of the Dane County circuit court, Judge James C. Boll. Because our resolution of this issue is dispositive, it is unnecessary to determine whether the "in part" test should be applied to alleged employer discrimination which does not involve anti-union animus.

On February 2, 1977, William Kessler filed a complaint with the Madison Equal Opportunities Commission. He alleged that he had been discharged by his employer, Federated, because of his marital status and physical appearance, in violation of sec. 3.23(7)(a), Madison General Ordinances.[1] As required by the ordinance, an employee of the commission investigated the complaint.

The investigator issued an initial determination on March 23, 1978, finding probable cause to believe that the ordinance had been violated. Conciliation was waived and the case was set for hearing.

Before the date set for the hearing, Federated filed a complaint for a declaratory judgment in Dane County circuit court alleging that the Madison equal opportunities ordinance was unconstitutional and requesting that the commission be enjoined from holding the hearing on Kessler's claim.

On March 12, 1979, Judge P. Charles Jones denied the requested relief, but stayed his decision pending appeal to the court of appeals. Federated appealed Judge Jones' decision to the court of appeals and that court on April 27, 1981, affirmed.

The hearing examiner for the commission then held a hearing on the merits of the complaint on November 19, 1981. In the meantime, Federated had filed a petition for review of the court of appeals decision, which this court granted. On March 26, 1982, this court affirmed the court of appeals decision, without opinion, by an equally divided court. (Justice Abrahamson took no part.) See 106 Wis. 2d 767 (1982).

On October 12, 1982, the hearing examiner issued recommended findings of fact, conclusions of law determining that Federated violated the ordinance, and a recommended order for relief. Both parties filed written exceptions to the examiner's findings and conclusions. After a review hearing, the commission on March 10, 1983, modified and affirmed the recommended findings and order.

Federated then commenced this action by filing a complaint seeking certiorari review on April 5, 1983, in Dane County circuit court. The Equal Opportunities Commission filed a return on June 9, 1983. Judge Boll issued a decision and order reversing the decision of the commission and remanding the complaint to the commission for issuance of an order consistent with the court's opinion and ordering the commission to pay to Federated its costs of the action.

The commission filed an appeal and on September 10, 1985, the court of appeals, in an unpublished opinion, reversed the judgment of the trial court and reinstated the commission's decision. Federated subsequently filed a petition for review requesting this court to determine whether the "in part" test should be applied to alleged employer discrimination which does not involve anti-union animus. The court of appeals held that the "in part" test applied to this case arising under Madison's equal opportunities ordinance.

The parties essentially only disagree as to whether the facts support an inference that Federated was motivated to discharge Kessler because he violated the employer's work rule. The historical facts are largely undisputed. In the late summer of 1975, John Bockoven, the president of Federated, contacted an employment agency for help in hiring a new claims manager. Federated is a Madison insurance company which employed about ten people in 1975. The employment agency referred William Kessler as an applicant. Bockoven interviewed Kessler and also had an industrial psychologist, Dr. John Wrage, interview him.

Bockoven hired Kessler in September, 1975. Bockoven believed that Kessler was "happily married" when he was hired. Bockoven told Kessler that "two basic ground rules" applied to his employment.

Bockoven expected managers to support his decisions and "we have no fooling around with married people in our office."

Sometime in December, 1975, Bockoven learned that Kessler and his wife had separated. He immediately reminded Kessler that "because he would be single or separated from his wife, all the more reason he followed the rules of not fooling around with any married women in the office."

Around October, 1975, Bockoven's secretary, Nancy Farin, separated from her husband. Bockoven was unaware of Farin's separation until some time later; in fact, Farin and her husband attended an office party together in February, 1976. In January or February, 1976, Bockoven noticed that Kessler had lunched with Farin on two consecutive days. He immediately talked to Kessler about his concern, believing Kessler was violating the ground rule prohibiting relationships between married co-employees. Kessler denied that any relationship existed with Farin. He said that he and Farin were friends, and that "I assure you that I'll cool it immediately."

In March or April, 1976, Bockoven discharged Farin after Farin failed to follow his instructions to prepare an annual report. At that time, Bockoven learned that Farin and her husband had separated.

In the meantime, the relationship between Kessler and Farin continued and became serious around February, 1976. Ultimately, they both became divorced and the two were married sometime in mid-1977 or thereafter.

Bockoven became concerned in August, 1976, that Kessler was setting reserves too low on open files in order to avoid discussing such files with Bockoven. Bockoven required Kessler to discuss files with reserves set above $10,000. The Wisconsin Insurance Commission prohibits setting reserves too low.

Bockoven then consulted Dr. John Hyde, another industrial psychologist, after the perceived problem with the reserves arose. Bockoven discussed with Dr. Hyde a number of complaints he had with Kessler. The purpose of the consultation was to determine whether Kessler could be "salvaged" as an employee of Federated. Dr. Hyde concluded that Bockoven's concerns focused on his lack of trust that Kessler would follow company rules. Bockoven's distrust stemmed from his perception that Kessler artificially set reserves too low; drank alcohol at lunch in violation of a company rule; misrepresented his relationship with Farin; sent out form letters and letters with strikeovers contrary to directions; and wore improper attire to work. Dr. Hyde advised Bockoven that unless he could persuade himself to trust Kessler again, Kessler could not be "salvaged."

Shortly after consulting Dr. Hyde, Bockoven began to search for a replacement for Kessler. Bockoven discharged Kessler on December 9, 1976. Kessler then filed a complaint with the Madison Equal Opportunities Commission claiming that Bockoven impermissibly discriminated against him on the basis of physical appearance and marital status.

The commission hearing examiner concluded that Federated did violate Madison's equal opportunities ordinance. The examiner concluded that Federated discharged Kessler, in part, because of his physical appearance and marital status. The commission reviewed the examiner's factual findings, legal conclusions, and remedy, and reversed the legal conclusion that Federated discriminated on the basis of physical appearance. The commission agreed with the examiner that Federated violated the city ordinance by discharging Kessler on the basis of marital status. Kessler has not challenged in this certiorari review the commission's conclusion that Federated did not discriminate on the basis of physical appearance. Thus, the only issue in this case concerns the finding of marital status discrimination.

The examiner found as a matter of fact that Federated "had an unwritten work rule in effect during the term of Kessler's employment with Respondent that prohibited employees from associating with married employees of the opposite sex outside of work-related matters." The examiner apparently based this characterization of the rule on Bockoven's express testimony describing the rule as follows:

> "I reminded him that because he would be single or separated from his wife, all the more reason that he followed the rules of not fooling around with any married women in the office . . . and . . . I reminded him that--of the ground rules that we had, that you don't fool with married women in the office . . . "

Bockoven further indicated that the rule applied equally to prohibit married employees from having affairs with other married or single employees. Thus, in another instance Bockoven indicated that Kessler would violate the work rule by having an affair because he was technically married, although separated:

> "Well, I was sorry that they were having difficulties, but reminded him again that our policy was one of married people don't fool with other married people in our office and as far as he was concerned, since he was still married I expected him to stay away from the clerical employees as well."

The rule quite apparently applied equally to prohibit both parties to an extramarital affair from engaging in such conduct. A single or married person could not have an affair with another married employee, and a married employee was prohibited from having an affair with another employee, whether single or married. Bockoven further amplified the purpose of the rule by stating:

> "I think people generally know that, we don't want to have marital problems in the office developing from the association of the employees at the office. There is always the opportunity of people working together to develop an emotional relationship, if they pursue that, they start seeing each other away from the office on a one-on-one basis, those things do develop, and we just say we don't want that here. It's bad for morale of the employees, it's bad for the morale of other employees, and it affects the working relationship of everyone in the office."

The examiner found that Bockoven partially relied on his perception that Kessler violated the work rule when deciding to discharge him. The examiner made the following finding:

> "15. The Complainant was terminated by the Respondent on December 9, 1976. A determining factor in Respondent's decision to terminate the Complainant was Bockoven's distrust of the Complainant based on Bockoven's belief that the Complainant refused to or failed to follow his (Bockoven's) instructions. The determining factors contributing to Bockoven's distrust of the Complainant were Bockoven's beliefs that:
>
> "(a) The Complainant had violated the work rule recited in Finding of Fact 13, above (regarding the association of any employees of one sex with married employees of the opposite sex);
>
> "(b) The Complainant purposefully set reserves too low on some insurance claims so that he (the Complainant) would not have to discuss them with Bockoven;
>
> "(c) The Complainant issued letters with strikeovers contrary to Bockoven's instructions;

> "(d) The Complainant drank alcohol on his lunch hour and encouraged other employees to drink alcohol on their lunch hours;
>
> "(c) The Complainant did not come to work wearing the manner of dress Bockoven requested he should."

The examiner concluded from the above finding that Federated discriminated on the basis of marital status. The examiner explained this conclusion in his memorandum opinion. He stated without discussion that the work rule discriminated on its face on the basis of marital status. Furthermore, violation of the rule was a "residual" factor in the discharge decision because it affected the employer's trust in Kessler. The examiner considered dismissal based on distrust which is caused by violation of a discriminatory policy to be "in actuality no different and no less discriminatory than relying on the policy itself." The examiner analogized this work rule to a rule prohibiting white employees from associating with black employees of the opposite sex, a policy which the examiner stated would be clearly discriminatory.

Finally, the examiner concluded that an employer violates the ordinance when it discharges in part on the basis of a discriminatory motive. He concluded the discriminatory motive does not have to be the determining factor in a discharge. Based on his analysis that Federated was motivated in part by the perception that Kessler violated the discriminatory marital status rule, the examiner concluded that Federated violated the equal opportunities ordinance.

The Madison Equal Opportunities Commission affirmed the examiner's conclusion that Federated discriminated on the basis of marital status. The commission agreed, without discussion, with the examiner's reasoning on the marital status issue. Federated then commenced certiorari review of the commission's final decision and order in the circuit court.

The circuit court reversed the commission's decision. The court concluded that Federated's work rule did not discriminate on the basis of marital status because the rule applied evenly to both married and single persons involved in extramarital affairs with co-employees. The court specifically stated:

> "The work rule, as stated in Finding No. 13, was not discriminatory as applied to Mr. Kessler. The rule applied to all employees, regardless of their marital status. Whether Mr. Kessler had been married, separated, divorced, widowed, or single, he would have been equally prohibited by the rule from developing a romantic relationship with a fellow employee who was married. The work rule was thus a regulation of Mr. Kessler's conduct, rather than a discrimination based on his marital status. The only conclusion possible from these facts is that Mr. Kessler's marital status was irrelevant to his discharge. Thus, the employer did not violate Mad. Gen. Ord. 3.23(7)(a)."

The court agreed, however, that the rule does establish different standards of permissible conduct for married and unmarried employees. The court stated that:

> "The rule, in essence, prevents all employees from pursuing romances with fellow employees who are married, while not preventing any employees from pursuing romances with unmarried coworkers . . . The rule, by preventing all employees from being involved in romances with married coworkers, thereby prevents all married employees from having romances with any coworkers, while it does not prevent unmarried employees from having romances with any coworkers. The rule thus creates two groups, married and unmarried employees, and the two groups have different abilities with regard to romances with coworkers. Although the rule does not, as such, have an effect on the conduct of the

> occupants of the two groups, the enforcement of the rule would cut off the access of the married employees to romances with coworkers."

The court thus recognized that the impact of the work rule affects married and single persons differently: married persons cannot have any relationships with co-employees married or single, but single persons can have relationships with other single employees. Nonetheless, the court concluded that the rule did not violate the Madison equal opportunities ordinance because:

> "The commission apparently failed to realize that not every policy which categorizes employees based on their status or membership in a group is illegally discriminatory. Rather, illegal discrimination is a categorization which results, because of the categorization, in the loss by an individual of a legally protected right or privilege. See Mad. Gen. Ord. 3.23(1). In the instant case of employment practices and marital status, illegal discrimination consists of an employer basing hiring or discharge decisions on an individual's marital status (Mad. Gen. Ord. 3.23(7)(a)), or of an employer classifying employees by marital status in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee . . .' (Mad. Gen. Ord. 3.23(7)(b))."

The court concluded that the rule does not "adversely affect . . . status as an employee" because the right to engage in an extramarital affair is not a legally protected right, and because prohibiting married employees from having affairs does not socially stigmatize or create a class of second class employees. The court stated:

> "Preventing married employees from having romances with coworkers does not tend to stigmatize them or to make them second class employees. It should be remembered that one of the socially recognized purposes of marriage is to establish an exclusive sexual bond with one's spouse. Thus, a married person is not stigmatized by an expectation that he or she will maintain a monogamous relationship with his or her spouse for as long as he or she chooses to remain in the marital state. The ability of a married employee to pursue a romantic relationship with a coworker who is not his or her spouse is thus not a legally protected right or privilege, and the denial of that ability is not a denial of equal opportunity in employment."

The circuit court further noted that Federated's rule is clearly consistent with public policy. The rule promotes the institution of marriage by prohibiting extramarital affairs, consistent with sec. 765.001(2), Stats., which states that marriage is "the institution that is the foundation of the family and of society."

Finally, the court considered that the rule helps enforce Madison's anti-sexual harassment ordinance, Madison General Ordinances 3.23(7)(k). The court stated:

> "Finally, it should be noted that Mad. Gen. Ord. 3.23(7)(k) requires that 'employers shall ensure that all of their employees work in an environment free of sexual harassment.' The same ordinance section holds employers presumptively responsible for all acts of sexual harassment committed by their agents and supervisory personnel. Thus, employers are required by this section to institute procedures and policies designed to prevent incidents of sexual harassment. As noted above, persons who choose to enter the marital state are generally considered to be expressing a preference for a sexually monogamous relationship with their spouse. Thus, the work rule is consistent with the sexual harassment ordinance, because it is not unreasonable for an employer to believe that married persons are generally not desirous of being subjected to romantic advances from persons other than their spouse,

> and it is not unreasonable for an employer to believe that such advances, sanctioned by the employer, could be presumptively, considered to be sexual harassment."

Kessler appealed the circuit court's decision to the court of appeals. The court of appeals concluded that Federated did base its decision to discharge Kessler, in part, on his violation of the work rule. The court held that such "in part" motivation was sufficient to violate the equal opportunities ordinance. Finally, the court ruled that the work rule discriminated on the basis of marital status because it only prohibited single employees from having relationships with married persons and did not prohibit married persons from being involved in extramarital affairs. The court apparently relied on a misperception of the rule in reaching its conclusion that the rule only applied to single employees. The court specifically stated:

> "The commission's conclusion that Federated discriminated against Kessler on the basis of his marital status was reasonable. Federated's rule discriminated against Kessler because it was one-sided. The rule failed to restrict social associations both by and with married employees. As phrased by the employer, the rule prohibits a single employee from associations with a married employee. In other words, if any married employee associated with a single employee, the married employee would not be violating the rule while the single employee would. It is this arbitrary distinction that invalidates the rule. The trial court erroneously stated that the rule applied to all employees regardless of marital status. If the rule applied equally to all employees, we would reach a different conclusion."

The case therefore reaches this court after decisions by three levels of decisionmakers. None of the decisions uses the same analysis to determine the legality of Federated's work rule. Moreover, marital status discrimination presents an issue which this court has never substantively addressed. However, Federated only petitioned for review of the applicability of the "in part" test to cases not involving anti-union animus. Nonetheless, this court acquired jurisdiction of the entire appeal by Federated's timely petition for review, and we did not expressly limit the issues when we granted the petition. See State v. Rhone, 94 Wis. 2d 682, 288 N.W. 2d 862 (1980). Thus, we may, at our discretion, review all aspects of the case. Here, the parties have argued the validity of Federated's rule throughout the proceedings, and they have briefed the issue before this court. Because the validity of the rule ultimately affects whether Federated discriminated against Kessler, we consider it necessary and appropriate to decide this issue.

We review this case by applying the certiorari standard of review. The scope of an appellate court's review of a certiorari decision is the same as the trial court's. State ex rel. Harris v. Annuity & Pension Board, 87 Wis. 2d 646, 651-52, 275 N.W. 2d 668 (1979). In certiorari review, the reviewing court is limited to determining: (1) whether the commission kept within its jurisdiction; (2) whether it acted according to law; (3) whether its actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. State ex rel. Palleon v. Musolf, 120 Wis. 2d 545, 356 N.W. 2d 487 (1984).

Whether the commission acted according to law requires us to construe the Madison equal opportunities ordinance and apply the ordinance to the facts. The question of whether the facts in a particular case fulfill a particular legal standard is a question of law. Department of Revenue v. Exxon Corp. , 90 Wis. 2d 700, 713, 281 N.W. 2d 94 (1979); Hennekens v. River Falls Pol. & Fire Comm., 124 Wis. 2d 413, 424, 369 N.W. 2d 670 (1985). The court also must determine whether the evidence was such that the commission might reasonably make its determination and whether that determination is supported by substantial evidence in the record. Stacy v. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595, 602, 159 N.W. 2d 630, 634 (1968); Palleon, 120 Wis. 2d at 549.

We begin our analysis by summarily rejecting the analysis of the court of appeals. That court concluded that Federated's rule only operated to punish single persons involved with married person's and that the

rule could not be invoked to sanction a married person for being involved with a single person. Under this analysis, the court of appeals concluded that the rule clearly discriminated on the basis of marital status because only single persons were subject to the rule's mandate. The court, however, noted that its conclusion would be different if the rule applied equally to prohibit all persons, regardless of marital status, from being parties to an extramarital affair. In fact, Federated's rule did apply equally to prohibit all persons, whether married or single, from being involved with a married co-employee, and the rule also applied to prohibit all married persons from having such affairs with other co-employees, whether married or single. The commission's finding was that the rule "prohibited employees from associating with married employees of the opposite sex outside of work-related matters." Thus, the rule did not simply prohibit, single employees from being a party to an extramarital affair. Because the premise on which the court of appeals relied is false, that court's analysis of the issue in this case also is faulty.

We therefore are confronted with the competing analysis of the circuit court and the commission. The commission concluded without discussion that the rule was facially discriminatory. The circuit court reasoned that the rule was not facially discriminatory because it prohibited all employees, regardless of marital status, from being party to an extramarital affair. The court stated that the prohibition of the rule applied to the conduct of being involved in such an affair, rather than to the status of being married or single. Single persons were as much within the prohibition of the rule as married persons. Thus, according to the circuit court, the sanction of the rule did not discriminate on the basis of marital status.

We agree with the analysis of the circuit court. In this case, Federated's rule proscribed certain conduct among employees which all employees were required to honor. The sanction of the rule is not triggered by the offending employee's marital status. The rule does not require the offending person to be married for its application because a person can be a party to an extramarital association regardless of their own marital status. In this case, for instance, Kessler would have been prohibited from associating with Farin, a married person, whether he had been married, separated, divorced, widowed or single. His marital status was irrelevant to his discharge because Farin was married. Thus, Federated's rule prohibited a course of conduct rather than a status. The rule simply, does not condition employment on having a specific marital status.

The commission and Kessler both propose hypothetical situations which allegedly are analogous to this case, and which they argue compel the conclusion of discrimination. We conclude that the proposed analogies are inapposite.

The commission's hearing examiner analogized Federated's rule to one which prohibited white male employees from associating with black employees of the opposite sex. The examiner concluded that such a policy would be discriminatory and an "employee is not obligated to nor can be made to suffer any adverse consequences from the failure to follow a discriminatory policy."

The examiner incorrectly compares the instant case to his hypothetical. In the hypothetical, each person's race is a basis of classification. Specified racial characteristics, in association with other specified racial characteristics, inevitably are decisive in applying the rule. Federal courts have recognized that such rules provide affected whites, as well as blacks, standing to raise claims of racial discrimination. For example, this type of claim was permitted in Whitney v. Greater N.Y. Corp. of Seventh-Day, Adv., 401 F. Supp. 1363, 1366 (S.D. N.Y. 1975), wherein the court stated:

> "Adventists contends that the complaint is defective because it does not allege that Whitney was discharged because of her race but, rather, because of the race of her friend, Samuel Johnson, and that the law is settled that white plaintiffs cannot maintain a Title VII action because of alleged discrimination against a minority group member. It is argued that the plaintiff therefore 'lacks standing' to assert a claim under Title VII and fails to state a claim

upon which relief can be granted.

> "The argument is unpersuasive. Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was 'discharge[d] . . . because of [her] race.'"

Also see Holiday v. Belle's Restaurant, 409 F. Supp. 904 (W.D. Pa. 1976). Here, however, Kessler's marital status was not decisive in order to violate Federated's rule because the rule can be violated by any person, regardless of marital status, who associates with a married co-employee.

Kessler argues that a better example is a work rule that prohibits all employees, whether black or white, from associating with black employees after work. Such a hypothetical rule, however, is distinguishable from Federated's rule and does not have any persuasive quality in this case. The difference in the rules concerns the obvious adverse impact on blacks in the hypothesized case and the lack of a legally recognizable adverse impact on married persons prohibited from having extramarital affairs. Kessler's hypothetical case is distinguishable from this case, therefore, because a discharge based on an employee's refusal to comply with a work rule which discriminates on the basis of race would violate the limited public policy exception to the employment at will doctrine. See Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 572-74, 335 N.W. 2d 834 (1983), holding that an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law.

In order for this case to be analogous to Kessler's hypothesized case, we would have to conclude that Federated's work rule is discriminatory as applied to at least some employees. We have already concluded that the rule is not facially discriminatory because it applies to all employees regardless of marital status. The only other possible basis for concluding that the work rule is discriminatory relies on the disparate impact analysis derived from civil rights adjudication. We invoked this analysis in Ray-O-Vac v. ILHR Department, 70 Wis. 2d 919, 930, 236 N.W. 2d 209 (1975), to define the test for prohibited employer discrimination. That case involved alleged sex based discrimination and we stated: "Whether arising under the fourteenth amendment or under the statute, however, the threshold question remains the same: is there 'discrimination?' That is, is there disparate treatment for persons similarly circumstanced?" Similarly, in Wisconsin Telephone Co. v. ILHR Dept., 68 Wis. 2d 345, 368, 228 N.W. 2d 649 (1975), we stated that the "broad purpose of the Fair Employment Act is to eliminate practices that have a discriminatory impact as well as practices which on their face amount to invidious discrimination." Kessler's hypothesized case has an obvious disparate impact on black employees. In this case, however, we must carefully analyze the effect of Federated's rule in relationship to the purpose of the legislative prohibition against marital status discrimination to determine whether the rule is impermissibly discriminatory.

The circuit court noted that Federated's rule, prohibiting work place romances, has the effect of prohibiting all married employees from having any associations with co-employees. By contrast, unmarried employees can have relationships with other unmarried employees. The rule, therefore, is more restrictive of the conduct of married employees than it is of unmarried employees.

The circuit court concluded that classifications which do not "adversely affect . . . status as an employee" do not violate the Madison equal opportunities ordinance. The court further concluded that prohibiting married employees from having extramarital associations does not adversely affect an employee's status because such a limitation is fully consistent with public policy. The court reasoned

that a work rule which compels conformity with fundamental public policy cannot be considered an "adverse" condition of employment. We agree. We also expand upon the court's reasoning, however, by specifically discussing the meaning of the term "marital status" as used in the Madison equal opportunities ordinance.

Protection against marital status discrimination is a relatively recent innovation in legislative enactments which prohibit various forms of discrimination. Notably, the intended scope of protection of these enactments is not clearly stated. The Madison ordinance at issue in this case simply prohibits employment discrimination on the basis of marital status. Madison General ordinances 3.23(2)(1) states that the term marital status "shall include being married, separated, divorced, widowed, or single."

The Wisconsin Fair Employment Act similarly prohibits employment discrimination on the basis of marital status and defines that term identical to the Madison ordinance. See sec. 111.32(12), Stats. The Fair Employment Act provides somewhat more guidance in defining prohibited practices by recognizing an exception to the general rule. Section 111.345 provides that it is not employment discrimination because of marital status to prohibit an individual from directly supervising or being, directly supervised by his or her spouse.

Our analysis leads us to conclude that the ordinance is not intended to protect an employee's right to engage in an extramarital affair. We construe the protection against marital status discrimination to fully encompass the very personal decision of an employee to marry, to remain single, or to divorce. An employer's rule which pressures a person to make a particular choice about marriage intrudes into an area where the Madison ordinance prohibits employer interference.

A person who has voluntarily made a decision to become married, however, can be compelled to honor the commitment of that decision while he remains married. Under such an employment rule, the employee constantly controls his options regarding marriage or divorce. The employee can make whatever choices regarding his marital status that he wishes without compulsion from the employer. He can marry. He can remain single. He can divorce.

Discrimination is the label society gives to employer decisions that contravene public policy. We conclude that the public policy of the Madison equal opportunities ordinance forbids intrusion into the decision of an employee to marry, divorce or remain single. It does not violate public policy, however, to limit extramarital affairs among co-employees because married employees are not similarly circumstanced to single employees in respect to the right to associate with other employees while married.

Kessler argues that the rule does not prohibit associations outside of work between single employees and, therefore, the rule allegedly is more restrictive of the conduct of married employees than single employees. Rather than being impermissibly restrictive as to married persons, however, the rule embodies a recognition of accepted public policy as stated in the Wisconsin Statutes and Madison General Ordinances. Kessler, therefore, incorrectly analogizes Federated's rule to a hypothetical rule prohibiting all employees, whether white or black, from associating after work with black employees.

The work rule is consistent with public policy as stated in the Wisconsin Statutes and the Madison General Ordinances. Section 765.001(2), Stats., states:

> "(2) INTENT. It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of

> society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always . . . . The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned."

Federated's work rule is consistent with the public policy goals set forth in sec. 765.001(2), Stats., in that it attempts to prohibit extramarital affairs, which can lead to the impairment or dissolution of existing marital relationships.

We conclude, therefore, that Federated's rule prohibiting any person from associating with a married co-employee does not impermissibly discriminate against the class of married employees. Reliance on the rule by Federated in the termination of Kessler was a permissible action in the employment at will relationship, which did not violate Madison's anti-discrimination ordinance or any "fundamental and well-defined public policy as evidenced by existing law." Brockmeyer, 113 Wis. 2d at 573.

By the Court: The decision of the court of appeals is reversed.

Filed June 20, 1986

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[1]Madison General Ordinances sec. 3.23(7)(a) provides in relevant part:
"(7) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
"(a) For any person or employer . . . to discharge any individual . . . because of such individual's . . . marital status."

No. 84-552

STATE OF WISCONSIN : IN SUPREME COURT

Federated Rural Electric Insurance Co.,

Plaintiff-Respondent-Petitioner,

v.

William Kessler,

Defendant-Appellant,

Madison Equal Opportunities Commission,

Defendant-Co-Appellant,

City of Madison,

Defendant.

Shirley S. Abrahamson, J. (dissenting). I dissent on two grounds. First, the court is acting contrary to its own rules (sec. 809.62(6), Stats. 1983-84) in deciding this case on an issue that was not raised in the petition for review. Second, I disagree with the court's decision that the Federated rule does not violate the Madison ordinance.

I.

Federated's petition sought this court's review on only one issue: "Should the 'in-part' test of Muskego-Norway be applied to discharges not involving union activity outlined in MERA or SELRA?" (Petition for Review, p. 5) The majority poses but does not answer this question. Slip op. p. 2.

Sec. 809.62(2)(a), Stats. 1983-84, provides that a petition for review "must contain a statement of the issues presented for review." Sec. 809.62 (6), adopted in 1982 (104 Wis. 2d xi, xxi), provides that "if the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court." This court's order granting the petition to review did not permit or require additional issues to be raised. The Rhone case, on which the majority relies (slip op. p. 14) to decide an issue not set forth in the petition to review, preceded the rule change.

The majority should decide the important legal issue posed in the petition to review, not a different issue.

II.

If the court is going to determine whether Federated's rule violates the Madison ordinance, the first step is to state what the Federated rule is. Federated's rule was unwritten, and Bockoven described the rule in somewhat different ways as he testified. The determination of what the Federated rule is and what conduct the Federated rule proscribes is, in this case, a question of fact. The Commission's findings of fact state the rule as follows:

> Federated "prohibited employees from associating with married employees of the opposite sex outside of work-related matters."

The rule prohibits a married or single employee from associating with a married employee of the opposite sex outside of work-related matters. The only employees of opposite sexes who may associate with each other outside of work-related matters are single employees.

The rule prohibits any kind of "associating"--including casual social relations and contacts, such as sharing mealtime--because, as Bockoven testified, one-thing-can-lead-to-another. (See Bockoven's testimony quoted three times at slip op. p. 8; circuit court decision at slip op. p. 12) The Federated rule is thus not limited to prohibiting adultery between employees. The majority opinion blithely equates the terms "associate," "romance," and "extramarital affair."[1]

The majority opinion holds that the Federated rule does not discriminate on the basis of marital status: under the rule married and single employees are treated the same--both are prohibited from associating with a married employee. Thus whether Kessler was married or single is irrelevant, the majority says; he would have been fired regardless of his marital status. According to the majority, he was fired because of his conduct, namely, associating with a married employee of the opposite sex.

It is clear that the Federated rule classifies people into two groups. One group is off-limits; the other is not. Membership in each group is based on marital status. Thus, the Federated rule clearly creates a

classification based on marital status. Imposing penalties on those who violate rules based on marital classification is the kind of discrimination that the ordinance prohibits.

The distinction between conduct and status upon which the majority relies is unpersuasive. The error in the majority's reasoning is clear if we restate the Federated rule as a work rule with respect to black and white employees. Suppose, for example, a work rule provides that all employees--black as well as white--are "prohibited from associating with black employees outside of work-related matters." Under this rule, the only employees who could associate outside of work-related activities are white employees. Then suppose that a white employee has three meals with a black employee and the white employee is fired for violating the work rule. Borrowing from the majority opinion in this case, the employer argues that the rule does not discriminate on the basis of race because the fired employee would have been treated the same way whether he was black or white. All employees, white and black, are treated the same--none can associate with a black employee. The rule, argues the employer, does not discriminate on the basis of race; it merely regulates conduct.

While the court here concludes that "the [Federated] rule is not facially discriminatory because it applies to all employees regardless of marital status," the majority finds the same kind of reasoning in the racial example unpersuasive. The majority concedes that the racial work rule is clearly discriminatory on the basis of race. Slip op. p. 18.

The point is that the Federated rule (like the racial rule) is based on a prohibited classification. Whether the Federated rule is viewed as regulating conduct or status, a rule which classifies people and treats them differently with respect to a proscribed characteristic is not acceptable under the ordinance. The majority's characterizing the Federated rule as regulating conduct, not status, ignores the substance of the rule.

The majority's basic distinction between the racial example posed and the Federated rule is that the racial rule has no legitimate basis and the Federated rule does. In upholding the Federated rule this court's opinion rests heavily on the idea that the rule is valid because it furthers public policy. The majority reasons that the Federated rule is acceptable because it prevents adultery and stabilizes the institution of marriage. (See trial court quoted at slip op. pp. 10-12; see majority's reasoning at slip op. pp. 20-23)

If the Federated rule were limited to prohibiting extramarital sexual relations between employees of the opposite sex then this public policy argument may be made. But the rule prohibits even casual social contacts with married employees of the opposite sex.

I do not believe that prohibiting all single and married employees from associating with married employees of the opposite sex is necessary to protect marital stability. Indeed, such a rule might even discourage employees from getting married. Instead, I think an argument might be made that the Federated rule contravenes public policy by interfering with an employee's legitimate expectation of associating socially with whomever he or she pleases. A rule that seeks to preclude adultery by prohibiting a non-work-related social association with married employees of the opposite sex is too broad and too restrictive to be justified as good public policy which outweighs the discriminatory effect of the rule.

I conclude that the Federated rule violates the Madison ordinance, and I would apply the rule adopted in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540, 151 N.W.2d 617 (1967). Accordingly, I would affirm the decision of the court of appeals.

For the reasons set forth, I dissent.

Filed June 20, 1986

[1]It reminds me of the cartoon in which a couple meets and has this exchange: "Hello there!" "Enough of this romantic chitchat-take off your clothes!"