COURT OF APPEALS DECISION DATED AND FILED

February 24, 2022

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2021AP563 **Cir. Ct. No. 2020CV837**

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

SANDRA SANDOVAL,

PLAINTIFF-APPELLANT,

V.

MADISON EQUAL OPPORTUNITIES COMMISSION AND CAPITOLAND CHRISTIAN CENTER CHURCH, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: VALERIE BAILEY-RIHN, Judge. *Affirmed.*

Before Kloppenburg, Graham, and Nashold, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Sandra Sandoval appeals a circuit court order that affirmed a decision of the Madison Equal Opportunities Commission. Sandoval asserts that the Commission erroneously denied her employment discrimination claims against Capitoland Christian Center Church, Inc. We disagree and affirm.

BACKGROUND

¶2 Sandoval was employed as a cook by Capitoland, a nondenominational church that operates a daycare and an early elementary school. At the time she applied for the position, Sandoval was required to sign a "Statement of Affirmation and Agreement," which we refer to as "the Agreement." The Agreement provided that, among other things, Sandoval would refrain from "co-habitation with members of the opposite gender outside of marriage" as a condition of her employment.

¶3 Several months later, the director of the daycare learned that Sandoval was in fact cohabitating with her male partner, to whom she was not married. Following a discussion between Sandoval and the director, Sandoval ceased to be employed by Capitoland. The parties dispute whether Sandoval voluntarily resigned, or whether Capitoland terminated her employment.

¶4 Sandoval filed a complaint with the Commission, which is charged with enforcing the City of Madison Equal Opportunities Ordinance (hereinafter, the "Equal Opportunities Ordinance"). MADISON, WIS., CODE OF ORDINANCES § 39.03(10)(b)4. (through January 2022).[1] She alleged that Capitoland terminated

[1] All references to the MADISON, WIS., CODE OF ORDINANCES are to the online version (last updated January 12, 2022), available at https://library.municode.com/wi/madison/codes/code_of_ordinances.

her employment based on her marital status, among other things, and that the termination and the terms and conditions of employment violated the Equal Opportunities Ordinance.[2] As discussed below, marital status is a protected class under § 39.03 of the Equal Opportunities Ordinance.

¶5 The Commission investigated the complaint and issued an initial determination. In its initial determination, the Commission found probable cause to believe that Capitoland unlawfully terminated Sandoval's employment due to her membership in a protected class and that the terms and conditions of Sandoval's employment violate the Equal Opportunities Ordinance.

¶6 A hearing examiner for the Commission held an evidentiary hearing on Sandoval's claims in January 2017. Sandoval, Brenda Van Rossum (the daycare's director), and Samuel Jake Stauffacher (the pastor who oversees the daycare's operations) testified at the hearing. The following facts are taken from the hearing transcript and exhibits and are undisputed unless otherwise noted.

¶7 Sandoval originally applied for the open position as a cook at Capitoland's daycare in August 2014. Capitoland offered Sandoval the position, which she accepted. As with all of Capitoland's employees and volunteers, she was required to and did sign the Agreement during the application process.

[2] During the proceedings before the Commission, Sandoval also alleged that Capitoland discriminated against her based on her sex, ethnicity, and national origin. She further alleged that Capitoland unlawfully retaliated against her when it asserted in her personnel file that she had resigned, and "through [its] unwillingness to settle" and make her "whole." Sandoval does not make any arguments on appeal regarding the Commission's decision to deny these claims, and we address them no further.

¶8 At the time Sandoval was hired, Capitoland knew that Sandoval was unmarried and had a daughter. Sandoval did not tell Capitoland about the details of her living situation, and Capitoland did not ask her any questions about it. At all times pertinent to this matter, Sandoval lived with her longtime male partner, as well as her daughter, her uncle, and her brother.

¶9 Sandoval worked for Capitoland for the following months without any performance or disciplinary issues. Capitoland had "no complaints at all" about Sandoval, and "only good things were always said about her."

¶10 Capitoland holds a Christmas party each winter for the benefit of its employees and their families. On January 15, 2015, the day before the party, Sandoval spoke with Van Rossum about bringing her partner. Van Rossum stated that employees could only bring their spouses and children. According to Van Rossum, Sandoval responded to the effect that she and her partner had been living together long enough that they were "pretty much married." Sandoval ultimately attended the party without her partner.

¶11 On the day of the Christmas party, January 16, 2015, Van Rossum informed Stauffacher of her discussion with Sandoval. Stauffacher said that the situation would have to be addressed, and he instructed Van Rossum to look into the situation and report back to him. Van Rossum testified that, during this discussion with Stauffacher, the possibility of terminating Sandoval "wasn't even discussed."

¶12 On Monday, February 16, 2015, Van Rossum had a follow-up conversation with Sandoval about her living situation. Van Rossum's and Sandoval's accounts of the February 16 conversation largely align, although Van Rossum's account was more detailed than Sandoval's account and, as we

recount in the following paragraphs, they disagreed about whether Capitoland terminated Sandoval's employment on that date.

¶13 Van Rossum provided the following testimony about the February 16 conversation. She met with Sandoval at the end of her shift and said that Capitoland could not have its "employees living with each other outside of marriage." According to Van Rossum, the first thing Sandoval said was, "it's okay, I'll be done then." Van Rossum told Sandoval that she did not want Sandoval to make a decision at that time, and that she would "touch base" with Stauffacher and they would "go from there." Van Rossum "encouraged [Sandoval] to come back the next day and to not just resign on the spot like that." Van Rossum testified that, because Sandoval was a good employee, she "was hopeful for answers" about "exactly what [Sandoval's] arrangement was" and whether it conflicted with the Agreement. However, they "didn't get around to discussing that" because Sandoval "kept saying" something to the effect of "'no, that's okay, I'll be done.' And it didn't seem like she wanted to discuss it." Van Rossum did not tell Sandoval that she was fired. Sandoval said she would come back the next day, which would be her last day. However, the following morning, Sandoval called and said that she would not be coming in to work.

¶14 Sandoval provided the following testimony about the February 16 conversation. Van Rossum informed Sandoval that she was in violation of the Agreement and that Van Rossum would have to talk to Stauffacher further about the situation. Sandoval acknowledged that Van Rossum asked her to return to Capitoland the following day. Sandoval testified: "[Van Rossum] told me that I was needed to help her, but how was I going to go back to work? I was already fired."

¶15 It is undisputed that Sandoval called Capitoland the morning of Tuesday, February 17, 2015, indicating that she would not be coming in to work. Sandoval was also scheduled to work on February 18, 19, and 20, but she did not come to work those mornings, either, nor did she call in to say that she would not be coming in. According to Van Rossum, if Sandoval had not resigned, her employment would have been terminated for being a "no show" at work on February 18, 19, and 20.[3]

¶16 On Friday, February 20, 2015, Sandoval returned to Capitoland to hand in her key card and other items to Van Rossum. As discussed below, the parties generally agree on the contents of the conversation that took place that day.[4] Sandoval testified that Van Rossum "told me that I could not return to work unless I got married, and if I didn't, I could not return to work." Sandoval testified that, although Van Rossum did not specifically tell Sandoval on February 20 that changing her "living situation" would also "address Capitoland's concerns," Sandoval understood that to be the case.

¶17 Following the January 2017 evidentiary hearing, the parties filed post-trial briefing and proposed findings of fact, and the hearing examiner issued a written decision in May 2019.

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[3] The hearing examiner found that Sandoval was also a "no show" on February 17, 2015, but this finding is contradicted by the record. Specifically, Van Rossum testified that, under Capitoland's policy, Sandoval would not be considered a "no call, no show" on February 17 because she called in to work that morning. The parties do not mention this discrepancy in their briefing, and it does not affect our analysis.

[4] Sandoval recorded her February 20, 2015 interaction with Van Rossum on her cell phone but, as discussed below, the examiner did not admit the recording or a transcript of the recording into evidence.

¶18 In his decision, the hearing examiner determined that Sandoval voluntarily resigned her employment "by not returning to work after February 16, 2015." As the hearing examiner explained, "[Sandoval's] employment was not terminated by [Capitoland] on or after February 16, 2015, though it might have been in the future." We discuss the basis of this finding, and its significance to the issues on appeal, at greater length in the discussion section below.

¶19 Additionally, the hearing examiner concluded that the no cohabitation clause in the Agreement is not a discriminatory term or condition of employment and does not violate the Equal Opportunities Ordinance. We recount the reasons the hearing examiner provided as needed below.

¶20 Finally, the hearing examiner declined to address several additional claims that Sandoval advanced in her post-trial briefing, having concluded that Capitoland lacked notice of these additional claims.

¶21 Sandoval appealed to the Commission, which affirmed the hearing examiner's decision and adopted it as its own. Sandoval then sought certiorari review in the circuit court pursuant to WIS. STAT. § 68.13 (2019-20).[5] The circuit court affirmed the Commission's decision, and Sandoval appeals.

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[5] *See* MADISON, WIS., ORDINANCES § 39.03(10)(c)4 (providing that final orders of the Commission are subject to certiorari review pursuant to WIS. STAT. § 68.13). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

DISCUSSION

¶22 On certiorari review, we review the decision made by the Commission, not the decision of the circuit court.[6] ***State ex rel. Bruskewitz v. City of Madison***, 2001 WI App 233, ¶11, 248 Wis. 2d 297, 635 N.W.2d 797. Our review is limited to: (1) whether the Commission was within its jurisdiction; (2) whether the Commission acted according to law; (3) whether the Commission's actions were arbitrary, oppressive, or unreasonable; and (4) whether the evidence was such that the Commission might reasonably make the order or determination in question. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411.

¶23 We will sustain the Commission's findings of fact if they are supported by any reasonable view of the evidence. ***Id.***, ¶53; *see also* ***Koenig v. Pierce Cnty. Dep't of Human Services***, 2016 WI App 23, ¶13 n.5, 367 Wis. 2d 633, 877 N.W.2d 632 (referring to this test as the "substantial evidence test"). Whether the facts in a particular case fulfill a particular legal standard is a question of law, which we review de novo. ***Ottman***, 332 Wis. 2d 3, ¶54.

¶24 In this case, Sandoval argues that: (1) the Commission's determination that Sandoval voluntarily resigned her employment with Capitoland was erroneous; (2) the hearing examiner should have admitted into evidence an audio recording of the February 20, 2015 conversation; (3) the Commission

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[6] Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality (among other tribunals). ***Acevedo v. City of Kenosha***, 2011 WI App 10, 331 Wis. 2d 218, ¶8, 793 N.W.2d 500 (Ct. App. 2010). Here, because the Commission adopted the hearing examiner's written decision as its own, we refer to that written decision as the Commission's decision.

erroneously determined that the no cohabitation provision of the Agreement does not violate the Equal Opportunities Ordinance; and (4) the Commission should not have dismissed her claim about Capitoland's Christmas attendance policy. We address each argument in turn.

I. The Discriminatory Termination Claim

¶25 The parties agree that, to establish her employment discrimination claim, Sandoval must prove that: (1) she is a member of a protected class; (2) her job performance was satisfactory; (3) she suffered an adverse employment action; and (4) the adverse action was causally related to her membership in the protected class. *See, e.g.*, ***Puetz Motor Sales, Inc. v. LIRC***, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985); ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802-03 (1973).

¶26 In this case, there is no dispute that the first two elements are met. As the Commission explained, marital status is a protected class pursuant to § 39.03 of the Equal Opportunities Ordinance, and Sandoval is a member of a protected class by virtue of being unmarried. It is also undisputed that Sandoval's job performance was satisfactory. The disputed issue is whether Sandoval has established that she was subject to an "adverse employment action."

¶27 Termination of employment is an adverse employment action. By contrast, if an employee was not terminated and instead resigned, there is no adverse employment action unless the circumstances are such that the resignation amounts to a constructive discharge. *See* ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶¶66, 68, 237 Wis. 2d 19, 614 N.W.2d 443. Whether an employee resigned, was terminated, or was constructively discharged is a question of fact for the factfinder—here, the Commission. ***Id.***, ¶78. The issue we must

determine is whether there is substantial evidence to support the Commission's findings that Sandoval voluntarily resigned and that her employment was not terminated or constructively discharged.

¶28 We first conclude that substantial evidence supports the Commission's finding that Capitoland did not terminate Sandoval's employment on February 16, 2015. Indeed, there is no support in the record for a contrary conclusion. Sandoval did not testify that Van Rossum explicitly told her she was fired. On the other hand, Van Rossum specifically testified that she did not tell Sandoval that she was fired, and Van Rossum and Sandoval both testified that Van Rossum specifically asked Sandoval to come back the following day. Van Rossum testified that she did not want to terminate Sandoval's employment because she liked Sandoval and believed that she was a good employee, and Van Rossum hoped that after learning more about Sandoval's living arrangement, they could work something out. Consistent with this evidence, Pastor Stauffacher testified that Van Rossum did not have authority to fire anyone without his prior approval, and that he did not give Van Rossum authority to fire Sandoval.

¶29 Sandoval disputes the Commission's finding, and she argues that, consistent with her testimony at the hearing, the result of the February 16 conversation with Van Rossum was clear to her—she "was already fired" and "couldn't go back to work" because she was living with someone of the opposite sex. The Commission reasonably concluded that Sandoval's "beliefs and perceptions" about the effect of "the conversation that occurred on February 16, 2015, are not evidence" about what actually transpired during that conversation. Substantial evidence, including the testimony of Van Rossum, Stauffacher, and Sandoval herself support the Commission's finding that Capitoland did not terminate Sandoval's employment on February 16, 2015.

¶30 We next conclude that substantial evidence supports the Commission's finding that Sandoval resigned from her position. Van Rossum testified (and Sandoval does not dispute) that, on February 16, after Van Rossum informed Sandoval of the violation and indicated she wanted to talk about it, Sandoval responded to the effect of, "That's okay, I'll be done." Van Rossum further testified that Sandoval stated that the next day would be her last day at Capitoland. And, although the parties agreed that Sandoval would return to work on February 17, she called in that morning to say she would not be coming to work; she did not call in or come to work on February 18, 19, and 20; and she only returned to the building on February 20 to drop off her key card. The Commission reasonably credited Van Rossum's assessment of these undisputed facts and her conclusion that Sandoval had resigned.

¶31 We further conclude that substantial evidence supports the Commission's finding that Sandoval's resignation did not amount to a constructive discharge. The doctrine of constructive discharge recognizes that "some resignations are, in fact, involuntary," and as such they are "tantamount to a termination." ***Strozinsky***, 237 Wis. 2d 19, ¶¶6, 68. A constructive discharge occurs when an employer "'purposefully creates working conditions that are so intolerable that the employee has no option but to resign.'" ***Id.***, ¶70 (quoted source omitted). To prove a constructive discharge, the employee must satisfy a "stringent" burden to prove that, under an "objective standard," working conditions were "so intolerable that a reasonable person confronted with the same circumstances would have been compelled to resign." ***Id.***, ¶83.

¶32 We agree with the Commission that Sandoval did not satisfy her burden with regard to any of her working conditions prior to February 16, 2015.

The parties agree that by all accounts, Sandoval enjoyed working at Capitoland and Capitoland enjoyed having her as an employee.

¶33 Sandoval's theory of constructive discharge focuses exclusively on the events of February 16, 2015. She characterizes her conversation with Van Rossum as being presented with an "intolerable ultimatum"—that is, "marry your partner, dissolve your household, or lose your job." Essentially, Sandoval's argument is that, because she believed the ultimate consequence of her living condition would lead to termination from Capitoland, she was constructively discharged.

¶34 To be sure, there are circumstances in which an ultimatum might result in a constructive discharge. In ***Stewart v. Gates***, 786 F. Supp. 2d 155, 168 (D.D.C. 2011), for example, a discriminatory ultimatum requiring a civilian employee to either resign or be transferred into an active war zone could constitute a constructive discharge. To provide another example, "[a] person who is told repeatedly that he is not wanted, has no future, and can't count on ever getting another raise would not be acting unreasonably if he decided that to remain with this employer would necessarily be inconsistent with even a minimal sense of self-respect, and therefore intolerable." ***Hunt v. City of Markham, Ill.***, 219 F.3d 649, 655 (7th Cir. 2000). *See also* **Marten Transport, Ltd. v. DILHR**, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

¶35 Here, however, the Commission found that the discussion about Sandoval's noncompliance with the Agreement was ongoing, that Capitoland had not yet imposed any ultimatum on Sandoval, and that the "conversation that occurred between [Sandoval] and Van Rossum [on February 16] does not equate to a constructive discharge." As mentioned above, Van Rossum testified that she

told Sandoval, "I don't want you to just make a decision now. It's something I'd like to talk about, and then I can touch base with Pastor Jake [Stauffacher], and we can go from there." And Stauffacher testified that an employee is not immediately terminated when found to be in violation of the Agreement, but rather, Capitoland attempts to work with the employee to find a solution.[7] As the Commission explained, it was "not at all clear … that the parties would have been able to find a mutually acceptable resolution to the conflict between [the Agreement] and [Sandoval's] belief that her living arrangement was not a matter of concern to [Capitoland]." However, "[Sandoval's] action in not returning to work in the days after the [February 16] meeting with Van Rossum truncated any opportunity for compromise."

¶36 Under our standard of review, we will sustain the Commission's findings if they are supported by substantial evidence in the record. For the reasons stated above, we affirm the Commission's finding that Sandoval voluntarily resigned her employment with Capitoland.

II. Exclusion of the Recording

¶37 Sandoval next argues that the hearing examiner erred when it did not allow her to admit the audio recording of the conversation between Van Rossum and Sandoval that occurred on February 20, 2015, when Sandoval returned to Capitoland to turn in her key card. Sandoval frames this issue as a question of whether her due process rights were violated; however, the underlying question is

[7] Indeed, there was evidence introduced at the hearing that Capitoland had been able to come to a mutually agreeable solution with another employee who shared living quarters with his significant other (to whom he was not married) and other family members.

whether the hearing examiner properly excluded evidence from the hearing. The decision to admit or exclude evidence is typically a matter within the administrative agency's discretion. ***Board of Regents of the Univ. of Wis. Sys. v. State of Wis. Pers. Comm'n***, 2002 WI 79, ¶26, 254 Wis. 2d 148, 646 N.W.2d 759. We conclude that the hearing examiner did not erroneously exercise his discretion.

¶38 We begin with some additional background on this issue. As stated above, Sandoval testified that, during the February 20, 2015 conversation, Van Rossum "told me that I could not return to work unless I got married, and if I didn't, I could not return to work." Van Rossum did not dispute Sandoval's account of the conversation in any meaningful way. Sandoval testified that she recorded her conversation with Van Rossum so that she could get a "sound bite" that would support a claim that she had been terminated based on her marital status, and that she "intentionally focused [the conversation] on the issue of marriage" when she spoke with Van Rossum on that date.

¶39 Sandoval's attorney asked to play the recording at two different points during the hearing. He first asked to play the recording right before Sandoval was about to testify about the February 20 conversation on the grounds that the recording would "jog" Sandoval's memory. After the hearing examiner sustained an objection and Sandoval testified about her memory of the event in her "own words," her attorney again sought to admit the recording as "proof" of the accuracy of Sandoval's testimony. The hearing examiner did not specifically weigh in on that request, and the parties moved on.

¶40 We are not persuaded that the hearing examiner erroneously exercised his discretion when he did not allow Sandoval's attorney to play the recording during the hearing. *See* WIS. STAT. § 227.45(1) (providing that a

hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony).[8] Sandoval's attorney suggested that he wanted to refresh Sandoval's memory, but there was no need to do so because Sandoval did not appear to have any trouble recalling the contents of her conversation with Van Rossum. Nor was the recording needed as "proof" of the contents of the conversation—as stated above, Van Rossum did not dispute Sandoval's testimony about what she said that day.

¶41 Sandoval's attorney did not ask to play the recording for any purpose other than to refresh Sandoval's memory or as proof of the accuracy of her testimony. If Sandoval now contends that it would have been admissible for some other purpose, Sandoval has forfeited that argument. We generally do not address issues that an appellant raises for the first time on appeal. ***Greene v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657.[9]

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[8] *See* Rules of the Equal Opportunities Commission § 9.221 (dated September 9, 2021), available at https://www.cityofmadison.com/civil-rights/documents/RulesoftheEOC.pdf (providing that "[t]he rules of evidence governing hearings under this subsection shall be the same as those prescribed for hearings in contested cases under Chapter 227 of the Wisconsin Statutes").

[9] Despite our conclusion on forfeiture, we observe that Sandoval has not shown that the result of the proceeding would have been any different had the hearing examiner allowed Sandoval's counsel to play the recording. This is the case for two reasons. First, it appears that the Commission credited Sandoval's undisputed testimony about what was said on February 20, 2015. Sandoval does not contend that Van Rossum said that Capitoland terminated Sandoval's employment, and Sandoval's account of the contents of the conversation on February 20 was not otherwise material to the Commission's ultimate determination that Sandoval resigned her employment several days prior to that date. Second, there is no basis in the record to conclude that the recording would have undermined that ultimate determination. Sandoval's attorney did not ask to make an offer of proof about what the recording would have shown. Although the recording was not admitted during the hearing, we have reviewed a transcript of the recording that was submitted as a potential exhibit prior to the hearing and see nothing that would have altered the Commission's determination about Sandoval's resignation.

III. Alleged Illegality of the Agreement's No Cohabitation Clause

¶42 Sandoval argues that, whether or not Capitoland terminated her employment, the Agreement's no cohabitation clause violates two subsections of the Equal Opportunities Ordinance. Specifically, she argues that the no cohabitation clause is a "term or condition" of employment that violates § 39.03(8)(a)[10] and a "statement of preference" that violates § 39.03(8)(e).[11] For reasons we now explain, Sandoval does not persuade us that it was legally erroneous for the Commission to reject these arguments.

¶43 First, as to the argument that the provision violates WIS. STAT. § 39.03(8)(e) of the Equal Opportunities Ordinance, we agree with the Commission that Capitoland did not receive pre-hearing notice that Sandoval was making an argument under that subsection. Prior to the hearing, the hearing examiner held a pre-hearing conference and issued a notice of hearing. As the Commission explained, "[o]ne of the purposes" of that process "is for the parties to come to an agreement and understanding of the issues to be tried." The notice of hearing indicated that Sandoval was challenging the Agreement's no cohabitation clause as an illegal term and condition of employment, but it did not

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[10] Section 39.03(8)(a) of the Equal Opportunities Ordinance provides that it is unlawful 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 her/his compensation, terms, conditions, or privileges of employment, because of such individual's protected class membership [or other enumerated reasons]." MADISON, WIS., ORDINANCES § 39.03(8)(a).

[11] Section 39.03(8)(e) of the Equal Opportunities Ordinance provides that, subject to an exception not applicable here, it is unlawful for "any person or employer … to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer …, or relating to any classification …, indicating any preference, limitation, specification, or discrimination, based on any protected class membership [or other enumerated reasons]." MADISON, WIS., ORDINANCES § 39.03(8)(e).

mention that Sandoval was challenging the clause as an illegal statement of preference. As the Commission explained, "[a] claim of 'terms and conditions' discrimination is substantially different from the type of per se prohibition found in" § 39.03(8)(e).

¶44 Second, regardless of the merits of Sandoval's argument that the Agreement's cohabitation clause violates the Equal Opportunities Ordinance, Sandoval does not argue that she is entitled to relief if she voluntarily resigned her employment. During the proceedings before the Commission, Sandoval sought back pay, front pay, and an unspecified amount of damages for emotional distress, but it appears that some if not all of the damages sought by Sandoval may be dependent on proof that she was subjected to an adverse employment action. *See, e.g.*, ***Marten Transport, Ltd.***, 176 Wis. 2d at 1018-20, 1025-26 (providing that an employee who had been subjected to illegal discrimination but who resigned his employment without being constructively discharged was not entitled to back pay and reinstatement). Regardless, Sandoval does not develop any argument explaining why she would be entitled to any of the damages she seeks if, as we have concluded, Capitoland did not terminate or constructively discharge her employment.[12]

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[12] We observe that, even if Sandoval could overcome these barriers, she would face an additional significant barrier based on our supreme court's interpretation of an earlier version of the Equal Opportunities Ordinance. *See* ***Federated Rural Elec. Ins. Co. v. Kessler***, 131 Wis. 2d 189, 388 N.W.2d 553 (1986). In ***Kessler***, an employee challenged a work policy prohibiting employees from "fooling around" with any coworkers who were married. ***Id.*** at 195. Our supreme court determined that the policy regulated conduct not status, and that it was not discriminatory because it applied to married and unmarried employees alike. ***Id.*** at 208-09. Likewise, here, the Commission determined that the Capitoland policy prohibits all employees from engaging in the conduct of living with an individual of the opposite sex outside of marriage, and that the policy applies to married and unmarried individuals alike. Sandoval cites ***Kessler*** as if that case supports her position, but on its face, ***Kessler*** appears to support the Commission's decision.

IV. The Christmas Party Claim

¶45 Finally, Sandoval argues that Capitoland unlawfully discriminated against her on the basis of marital status when it prevented her partner from attending the Christmas party. As with Sandoval's argument that the Agreement is an illegal statement of preference, the Commission found that Sandoval did not provide pre-hearing notice that she was challenging the legality of its Christmas party attendance policy. The Commission acknowledged that the statement of issues in the notice of hearing was "broad," but it noted that there was a "total absence of a claim regarding attendance at the Christmas party in January of 2015." Therefore, it determined that Capitoland had no notice of "any potential liability connected to that claim."

¶46 Sandoval asserts that the Commission violated her due process rights when it declined to address the merits of this claim. However, Sandoval cites no authority for the proposition that the Commission's decision implicates her due process rights. As the Commission explained, "[o]ne of the fundamental underpinnings of due process is notice," and it is "imperative that a Respondent have notice of the claims against which it will be expected to defend itself." We agree with the Commission that the due process issue here is whether Capitoland had sufficient notice of the claim.[13]

[13] Neither party clearly informs us about the applicable standard of review for this issue. Through our own independent research, we have identified cases that address the concepts of actual notice and prejudice in other contexts. In ***E-Z Roll Off, LLC v. County of Oneida***, 2011 WI 71, ¶52, 335 Wis. 2d 720, 800 N.W.2d 421, for example, our supreme court has stated that actual notice and lack of prejudice are "intensive factual inquiries." Therefore, we proceed by giving deference to the Commission's factual findings regarding notice and review de novo its determination of whether there is any due process violation.

¶47 Sandoval argues that the answer to this question is yes. She contends that Capitoland had actual notice of the claim, that Capitoland suffered no prejudice, and that the issue was fully briefed and there was a full hearing on the merits. Therefore, according to Sandoval, the Commission did not act according to law when it declined to issue a ruling on claims for which Capitoland had actual notice and that were "fully litigated."

¶48 We conclude that the Commission did not err when it determined that Capitoland did not have pre-hearing notice of any claim regarding its Christmas party attendance policy. Neither the complaint nor the amended complaint challenged this policy and, as stated above, the claim was not included in the notice of hearing. Although there was evidence introduced about the Christmas party during the hearing, this evidence appeared to have been introduced to provide background facts for how Capitoland learned that Sandoval was living with her partner in violation of its no cohabitation policy. Capitoland may have been able to hypothesize that Sandoval *might* challenge the legality of the Christmas party attendance policy, but she did not expressly do so until her post-hearing brief, at a time when evidence was closed. We agree with the Commission that, under the circumstances, Capitoland did not have a full and fair opportunity to develop the record to defend against that claim.

CONCLUSION

¶49 For the reasons stated above, we conclude that the Commission did not erroneously deny Sandoval's employment discrimination claims.[14]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[14] Capitoland and Sandoval both make arguments about a potential conflict between Sandoval's right to be free from discrimination in her employment and Capitoland's First Amendment rights. Based on our analysis above, we need not address these issues. *See* ***Barland v. Eau Claire Cnty.***, 216 Wis. 2d 560, 566 n. 2, 575 N.W.2d 691 (1998) (providing the general rule that the court of appeals decides cases on the narrowest grounds available).

Sandoval v. Capitoland Christian Center, Inc.

Case No. 20152033
EEOC Case No. 26b201500021

COMMISSION's DECISION and FINAL ORDER on
Appeal of Hearing Examiner's Decision and Order

BACKGROUND

On March 5, 2015, the Complainant, Sandra Sandoval, filed a complaint of discrimination with the Madison Department of Civil Rights Equal Opportunities Division. Sandoval charged that the Respondent, Capitoland Christian Center Church, Inc, discriminated against her in employment on the basis of her marital status by informing her that she could not remain employed by the Respondent unless she got married to her unmarried partner she cohabitated with – in violation of 39.03(8) Mad.Gen. Ord. and then retaliated against her – in violation of 39.03(9) for her exercise of a right protected by the Ordinance, when it adjusted her personnel file to reflect that she had resigned.

The Respondent denied having discriminated against the Complainant. A Division Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in regard to her discharge on the basis of her marital status, sex, race, national origin/ancestry, and in retaliation.

The Hearing Examiner held a public hearing on the matter on January 18, 2017 and based on the record of the proceedings, issued his Recommended Findings of Fact, Conclusions of Law and Order on May 13, 2019 finding that the Respondent did not discriminate against the Complainant on any basis protected by the Equal Opportunities Ordinance. The Hearing Examiner found that the Complainant terminated her own employment by not returning to work after February 16, 2015, and was not in fact, terminated by the Respondent. The Hearing Examiner also found the Respondent did not violate the Equal Opportunities Ordinance by requiring the Complainant to sign its Statement of Affirmation or Agreement. The Hearing Examiner also found that the Complainant is not a person who exercised a right protected by the Equal Opportunities Ordinance and the Respondent did not terminate the Complainants employment for her exercise of a right protected by said Ordinance. The Hearing Examiner Ordered the complaint be dismissed, and that the parties bear their own costs.

The Complainant appealed the Hearing Examiner's Decision and Order to the Equal Opportunities Commission. The appeal was assigned to the Appeals Committee.

The parties were given the opportunity to submit additional written argument in support of their respective positions.

On January 16, 2020, the Appeals Committee of the Equal Opportunities Commission met to consider the Complainant's appeal. Participating in the Committee's deliberations were Commissioners Madden, Ramey, and Andrae.

DECISION

After review of the record and the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order finding the Respondent did not discriminate against the Complainant, the Appeals Committee finds that the Hearing examiner's decision issued on May 13, 2019 is fully supported by the record. The Committee adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order.

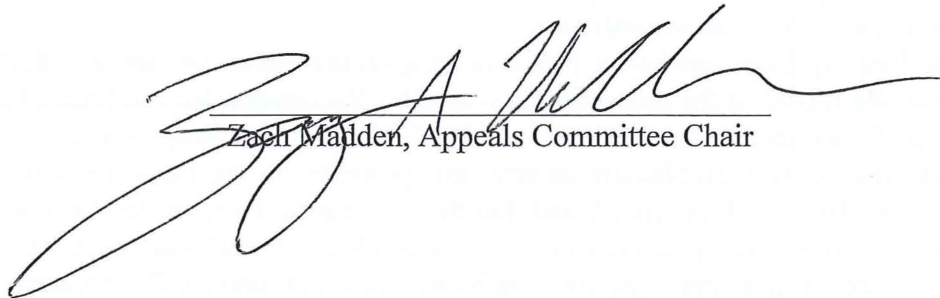
ORDER

The Hearing Examiner's Decision is Affirmed.

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

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

Signed and dated, this 2nd day of March, 2020.



Zach Madden, Appeals Committee Chair

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

Sandra Sandoval 5663 King James Court #205 Madison WI 53719 Complainant vs. Capitoland Christian Center Church Inc 3651 Maple Grove Dr Madison WI 53719 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CASE NO. 20152033 EEOC CASE NO. 26b201500021

On January 18, 2017, Commission Hearing Examiner Clifford E. Blackwell, III, held a public hearing on the merits of the complaint in the above captioned matter. The Complainant, Sandra Sandoval, appeared in person and by her attorney, Mitch, of the Neighborhood Law Clinic. Attorney Mitch was assisted by clinic students, Gillian Bradbury and Andrew Burdick. The Respondent, Capitoland Christian Center Church, Inc., appeared by its representative Pastor Samuel Jake Stauffacher, and by its attorneys Jeramiah Galus and Christiana Holcom of the Alliance Defending Freedom and by Phillip Stamman of Southworth & Stamman Law Office.

Based upon the record of the proceedings in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an unmarried Hispanic woman. Her national origin/ancestry is Mexican.

2. While the Complainant speaks English, Spanish is her first language.

3. The Respondent is a 501(C)(3) nonprofit religious corporation that employs 42 individuals in and around the Madison area. The purpose of the corporation is to establish a church and various programs and supporting services. Its principle place of business is located at 3651 Maple Grove Drive, Madison, Wisconsin.

4. One of the Respondent's supporting services is a day care and early elementary school. The school and its supporting services, which includes a kitchen and cafeteria, are located at 3651 Maple Grove Drive Madison, Wisconsin.

5. Brenda Van Rossum is the Director of the Respondent's day care and early elementary school. As Director, Van Rossum is responsible for the hiring, firing, and supervision of all staff involved with the operation of the school. There are approximately 35 people involved in

operation of the school. Van Rossum is not permitted to hire or fire without consultation with Pastor Jake Stauffacher, the Respondent's Executive Pastor. Each applicant is required to meet with Pastor Stauffacher for a final interview prior to employment. In addition to Pastor Stauffacher having an opportunity to meet with an applicant, it is an opportunity for the applicant to have any questions answered by the Respondent's ultimate authority.

6. As part of the Respondent's hiring process for all employees and volunteers, an applicant must sign a Statement of Affirmation and Agreement. The Respondent requires all employees and volunteers, regardless of their position or job duties, to sign and abide by its Statement of Affirmation. This document embodies the Respondent's core beliefs and principles which are derived from its religious beliefs and faith. No applicant may be hired without signing this document. Individuals who have declined to sign the Statement of Affirmation and Agreement have not been hired. Employees who have been found to be in violation of the Statement of Affirmation and Agreement are terminated from employment unless some agreement can be reached to bring the employee back into adherence with the Statement of Affirmation and Agreement.

7. The first enumerated item in the Statement of Affirmation and Agreement lists various activities or actions from which the applicant/employees agrees to refrain from doing. Among the activities in which an applicant/employee may not engage are fornication, adultery, and cohabitation with an individual of the opposite sex outside of marriage. Cohabitation is prohibited because it creates the potential of having sex outside of marriage and gives the "appearance of evil." Each item is accompanied by a reference to a particular Bible passage.

8. The Statement of Affirmation expressly states that employees may be discharged from employment due to violations of any terms of the affirmation and agreement statement.

9. If an applicant or an employee has questions about a requirement found in the Statement of Affirmation or Agreement, he or she is encouraged to speak with Pastor Stauffacher for an explanation and, if appropriate, spiritual counseling.

10. In August of 2014, the Respondent had a vacancy in the day care for a cook. The cook was responsible for preparation of breakfast, snacks, and lunch for the children in the day care Monday through Friday. In addition, the cook would clean the kitchen and make preparation for the next day's duties by menu planning and food preparation. The cook had very little direct interaction with the children or other staff.

11. Van Rossum asked several of the other pastors associated with the Respondent if they knew of anyone who might fit the bill as a cook. One pastor passed on the name of the Complainant as a possible candidate. Van Rossum contacted the Complainant and an interview was arranged.

12. At the interview, the Complainant completed the Respondent's application including signing the Statement of Affirmation and Agreement on August 20, 2014. The Respondent considered the Statement of Affirmation when making hiring decisions.

13. The Complainant completed the interview process which included a meeting with Pastor Jake Stauffacher. The Complainant did not question the contents of the Statement of Affirmation and Agreement nor did she object to its contents or provisions.

14. At the time of her application, the Complainant, a single mother, lived with her unmarried male partner, her brother, and an uncle. According to the Respondent, this living arrangement was in violation of the Statement of Affirmation and Agreement signed by the Complainant. The Complainant did not inform Van Rossum nor Stauffacher of her living arrangement. Neither Van Rossum nor Stauffacher inquired as to the Complainant's living arrangements, though they understood the Complainant to be an unmarried mother.

15. As a result of the interview, the Complainant was offered and accepted the cook position with the Respondent. The Complainant began work in the end of August, 2014.

16. On or about January 12, 2015, the Complainant received a positive performance review.

17. The Complainant worked without a problem until January 15, 2015. During this period of employment, the Complainant worked 40 hours per week at a rate of $12.00 per hour. After 90 days of employment, the Complainant became eligible for health insurance. The Complainant elected not to take the insurance option. Had the Complainant continued to work for the Respondent, she would have been eligible for vacation leave after one year and could have received a discount for attendance at the school for her child.

18. The Respondent holds a Christmas party each winter for the benefit of its employees and their immediate families including children and spouses. The Christmas party for the 2014/2015 season was scheduled to occur on January 16, 2015. On January 15, 2015, the Complainant asked Van Rossum if her unmarried partner could attend the Christmas party. Van Rossum stated that employees could only bring their spouses and children. The Complainant responded to the effect that she and her unmarried partner had been living together for long enough that they were as good as married. Van Rossum was troubled by the Complainant's statement and indicated that they would need to discuss the situation as it violated the Statement of Affirmation and Agreement to be living with her unmarried partner.

19. The Complainant attended the Christmas party without her unmarried partner. It is not clear whether the Complainant's child attended the party or not.

20. On or about January 16, 2015, Van Rossum informed Pastor Jake Stauffacher of her discussion with the Complainant. Stauffacher told Van Rossum that the situation would have to be addressed and instructed Van Rossum to look into the situation and to report back to him.

21. Van Rossum had only recently returned from maternity leave and due to her workload, Van Rossum did not again speak to the Complainant about her living situation until approximately February 16, 2015. Van Rossum confirmed with the Complainant that she was "cohabitating" with her unmarried partner and indicated that was a violation of the Statement of Affirmation and Agreement. Van Rossum indicated that if the Complainant wished to continue to work for the Respondent, the Complainant would either need to get married or find some other way to adhere to the Statement of Affirmation and Agreement.

22. The Complainant ended the meeting with Van Rossum by acknowledging Van Rossum's statement and indicating that the she (the Complainant) would leave employment. It appeared that the Complainant and Van Rossum agreed that the Complainant would return to work the next day.

23. The Complainant did not return to work the next day, February 17, 2015, nor did she return the following two days, nor did she call to indicate that she would not be coming in to work.

24. On February 20, 2015, the Complainant showed up at Capitoland to return her key card and other items to Van Rossum. The Complainant also wished to record her conversation with Van Rossum in order to verify that the Complainant's employment was being terminated due to her marital status.

25. After Van Rossum did not hear from the Complainant in the days following their meeting on February 16, 2015, Van Rossum took steps to replace the Complainant as the cook for the school. Van Rossum called Alex Leon, a former cook for the Respondent and a Hispanic male, for possible referrals. Leon helped the Respondent by assuming some of the Complainant's cooking duties on an interim basis.

26. In September of 2015, Joshua Ladd was hired as the Respondent's school program director. Ladd, at the time, was an unmarried male who lived with his unmarried female partner. Ladd is denoted as White and was presumably born in the United States.

27. Ladd disclosed his living arrangement to Pastor Jake Stauffacher during the process of his application and interview. Though Ladd was living with his unmarried partner, they were living with another married couple in order to avoid the appearance of cohabitation and to be "accountable" for their actions.

28. Pastor Jake Stauffacher, after consultation with other pastors, determined that Ladd's living arrangement did not violate the Respondent's Statement of Affirmation and Agreement and that Ladd could be hired.

29. Subsequent to the events of February 16 and 20, 2015, the Complainant began to look for work to replace her income. Shortly after leaving employment with the Respondent, the Complainant found part-time employment at a Mexican-style restaurant. She received a base wage and tips. She supplemented her employment with additional part-time employment at Quivy's Grove also working as a waitress.

30. The Complainant's exact current pay is difficult to calculate as it is comprised of a base wage and tips. She works fewer hours than she did with the Respondent. Given her current wage level, the Complainant estimates that she would need to work an additional 10 to 15 hours per week to fully replace her lost income.

31. The Complainant states that the ongoing proceedings have caused her much distress due to needing to schedule activities that have taken her away from time with her daughter or from work. The Complainant stated that the lost income also causes stress due to having to meet her financial obligations with less income.

32. The Complainant has sought treatment for her stress through attendance at free community counseling sessions.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes, marital status, sex, race and national origin/ancestry. As a member of these protected classes, she is a person entitled to the protection of the Equal Opportunities Ordinance Mad. Gen. Ord. 39.03 et seq.

2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance Mad. Gen. Ord, 39.03 et seq. and with certain constitutional exceptions is subject to the jurisdiction of the Ordinance and the Department of Civil Rights.

3. The Respondent did not discriminate against the Complainant on any basis protected by the Ordinance.

4. The Complainant terminated her employment by not returning to work after February 16, 2015. The Complainant's employment was not terminated by the Respondent on or after February 16, 2015, though it might have been in the future.

5. The Respondent did not violate the Ordinance by requiring the Complainant to sign its Statement of Affirmation or Agreement.

6. The Complainant is not a person who exercised a right protected by the ordinance as contemplated by MGO § 39.03(9)(a)(b) or (c).

7. The Respondent did not terminate the Complainant's employment for her exercise of a right protected by the ordinance.

ORDER

The complaint is dismissed. The parties shall bear their own costs.

MEMORANDUM DECISION

On first blush, the present matter appears to put into conflict the rights of an individual to protection from unreasonable discrimination and on the other hand, the right of a church and its associated programs to be free from unwarranted governmental intrusion. Both sides have important rights that they seek protected. Resolution may require some care in addressing various constitutional rights of the parties. However, the Hearing Examiner believes that most issues can be resolved without reference to the higher levels of constitutional juris prudence.

In her complaint filed on March 5, 2015, MEOD Case No. 20152033, the Complainant alleged that the Respondent discriminated against her—in violation of MGO § 39.03(8)—on the basis of her marital status when the Respondent told her she could not remain employed unless she got married to her unmarried partner. Secondly, the Complainant alleged that the Respondent retaliated against her—in violation of MGO § 39.03(9)—for her exercise of a right protected by the Ordinance, when it adjusted her personnel file to reflect that she had resigned. The Complainant amended her initial complaint on November 18, 2015, to include that the Respondent discriminated against her on the bases of her sex, race, and/or national origin/ancestry when the Respondent required her to sign its Statement of Affirmation and Agreement. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination occurred in regard to discharge

(Termination) because of the Complainant's marital status, sex, race, national origin/ancestry, and in retaliation. The Initial Determination also found that there was probable cause to believe that discrimination occurred in regard to terms and conditions of employment (Policies, Procedures, and Rules: Statement of Affirmation and Agreement) because of the Complainant's sex, race, and national origin/ancestry.

Cases of discrimination can be proven by either the direct or indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct, to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

There was limited testimony and evidence offered at the hearing in this matter, and the Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine for each allegation of discrimination if the Complainant has established a prima facie claim of discrimination. A complaint for discrimination on the basis of employment must meet the prima facie standard; that is, the Complainant must establish that (1) she is a member of a protected classes as defined by MGO § 39.03; (2) her job performance was satisfactory; (3) she suffered an adverse employment action; and (4) the adverse action suffered was causally related to the Complainant's membership in the protected classes. The Complainant must prove each element of the prima facie claim by the greater weight of the credible evidence.

Presuming the Complainant meets this burden of proof, the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if she can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible, or represents a pretext for an otherwise discriminatory motive.

The Complainant as reflected in the Notice of Hearing in this matter sets forth three general claims of discrimination. First, the Notice of Hearing indicates a claim for discrimination in the terms and conditions of employment on the bases of marital status, sex, race and national origin/ancestry for the Respondent's requirement that the Complainant (and all other employees) sign the Respondent's Statement of Affirmation and Agreement. Second, the Notice of Hearing sets forth a claim of discrimination on the same bases, marital status, sex, race and national origin/ancestry for the termination of the Complainant's employment. Finally, the Notice of Hearing states a cause of action for retaliation for the exercise of a right protected by the Ordinance for the termination of the Complainant's employment.

While these causes of action are those that are enumerated in the Notice of Hearing, the Complainant in her post-hearing brief and her reply brief set forth additional claims beyond those that are the subject of this hearing as outlined in the Notice of Hearing.

In her post-hearing arguments, the Complainant states four overarching claims of discrimination. First, the Complainant asserts that the Statement of Affirmation and Agreement which the Respondent requires all applicants and employees to sign represents an illegal statement of preference that violates the Equal Opportunities Ordinance. Second, the Complainant asserts that the Respondent discriminated against her, on the basis of her marital status, by denying permission for the Complainant's unmarried partner to whom she was not married to attend the Respondent's annual Christmas party on January 16, 2015. Third, the Complainant contends that she was either actually terminated or, at least was constructively discharged, from her employment on February 16, 2015, in violation of the provisions of the Equal Opportunities Ordinance. Fourth, the Complainant asserts that the Respondent discriminated against her on the bases of her sex, race, and/or national origin/ancestry by affording a White male employee of American origin employment conditions that were more favorable than those afforded the Complainant.

The Respondent asserts that it did not discriminate against the Complainant or violate any requirement of the Ordinance. The Respondent contends that its religious beliefs are a legitimate and nondiscriminatory reason for its actions. Namely, that the Statement of Affirmation and Agreement represents its core beliefs and principles and is constitutionally protected. The Respondent asserts that its decision to limit attendance at its Christmas party to its employees and their married spouses also represents an exercise of their constitutionally protected beliefs and principles. The Respondent asserts that it did not treat the Complainant less favorably than a White male employee of American origin because the Complainant and the other employee were not similarly situated. Finally, the Respondent contends that it did not terminate the employment of the Complainant, but that she voluntarily quit her employment.

First, the Hearing Examiner will address the Complainant's claim of discrimination that the denial of attendance to the Complainant's unmarried partner at the Christmas party on January 16, 2015, violates the Equal Opportunities Ordinance. The Hearing Examiner finds that he cannot address this claim and that he will strike it from consideration. The Notice of Hearing issued on June 1, 2016, after a Pre-Hearing Conference does not contain a statement of this issue. Without this issue appearing in the Notice of Hearing's statement of issues, the Hearing Examiner find that he is without jurisdiction to consider this claim.

One of the fundamental underpinnings of due process is notice. It is imperative that a Respondent have notice of the claims against which it will be expected to defend itself. One of the purposes of the Pre-Hearing Conference and the Notice of Hearing which is issued based upon that proceeding is for the parties to come to an agreement and understanding of the issues to be tried. While the statement of issues in the Notice of Hearing is admittedly broad, the total absence of a claim regarding attendance at the Christmas party in January of 2015 fails to alert the Respondent of any potential liability connected to that claim.

This lack of notice is sufficiently problematic that the Hearing Examiner has no alternative but to dismiss the claim or to find that it is not properly before the Hearing Examiner and will not be considered.

The Hearing Examiner will next address the Complainant's claim of discrimination that the Respondent's Statement of Affirmation and Agreement is an illegal statement of preference that violates the Equal Opportunities Ordinance. The Complainant asserts that the Respondent's requirement that she read and sign the Statement of Affirmation and Agreement violated the Ordinance in two ways. The Complainant contends that, as a statement of a

preference, the Statement of Affirmation and Agreement violates MGO § 39.03(8)(e). The Complainant also argues that signing the statement deprives her of her rights to live in a domestic partnership in violation of § 39.03(9)(c). The Complainant argues that requiring her to sign the Statement of Affirmation and Agreement adversely classified her and intimidated, threatened, and interfered with her enjoyment of her right to be single.

As with the Complainant's claim that the Respondent's refusal to allow her unmarried partner to attend the Christmas party in 2015, the Complainant's argument that the Statement of Affirmation and Agreement violates MGO § 39.03(8)(e) falls outside of the scope of the issues presented in the Notice of Hearing as amended. Section 8(e) of the Ordinance prohibits the publication or dissemination of any document expressing a preference or limitation in access to employment. While this provision is part of the general employment provision of the Ordinance, its zone of regulation is substantially different from that of the issues stated for hearing in the Notice of Hearing as amended. In the Notice of Hearing, the parties agreed to the formulation of the issues proposed by the Hearing Examiner. Those issues included the question of whether the Respondent discriminated against the Complainant on a number of bases in the Complainant's terms and conditions of employment resulting from the requirement that the Complainant sign the Statement of Affirmation or Agreement specifically concerning cohabitation.

A claim of "terms and conditions" discrimination is substantially different from the type of per se prohibition found in Section 8(e). As is the case with the Complainant's raising of the allegation of discrimination relating to attendance at the Christmas party, this claim comes at a time too late in the process to permit the Respondent to reasonably prepare a defense or set forth a meaningful rebuttal of the allegation. Had the Complainant wished to present this allegation, she should have requested a statement of that issue during the Pre-Hearing Conference while the issues for hearing were being hammered out and agreed to by the parties. This would enable the Respondent sufficient time to prepare a position with respect to this particular claim.

Even if this claim were not presented too late for consideration on the part of the Hearing Examiner, the record does not support the Complainant's proposed outcome.

First, Section 8(e)'s protection is intended to prevent the chilling effect that the statement of such a preference or limitation might have on one's seeking employment from an employer who states such a preference or limitation. In the present matter, the Complainant was not at all deterred from applying for or accepting employment from the Respondent even after reading and reviewing the Statement of Affirmation and Agreement. If the Complainant had any qualms about the requirements stated in the Statement of Affirmation and Agreement, the record does not disclose that she hesitated in signing the Statement in the least. When she had the opportunity to express any concerns or doubts about the Statement to either Van Rossum or Pastor Stauffacher, she did not take the opportunity to raise those concerns.

The primary purpose of Section 8(e) would not appear to be served by allowing one to later raise concerns about an express preference or limitation after they've accepted the benefits of employment that is arguably the target of such preference or limitation.

The Respondent's Statement of Affirmation and Agreement does not clearly indicate a preference or limitation based upon any of the protected classes covered by the ordinance. Rather, the Statement of Affirmation and Agreement sets forth a code of conduct to which all

employees and volunteers are subject. That this code of conduct may fall more heavily on some than others does not alter its nature and change it into an expression of preference or limitation intended to be regulated by the ordinance.

By recognizing the Statement of Affirmation and Agreement as the enumeration of a code of conduct does not mean that the Hearing Examiner or any given individual may agree with the principles set forth in the document. However, those personal feelings are irrelevant to the applicability of that code to the employees or volunteers of the Respondent.

The Complainant's Section 8(e) argument simply comes too late in the process to be considered by the Hearing Examiner. Even if it were not too late, the Hearing Examiner does not find support for the Complainant's position in the record as a whole.

The Complainant also contends that requiring the Complainant to sign the Statement of Affirmation and Agreement impinges upon the Complainant's rights to engage in a domestic partnership or to live with another as a single individual. In support of this position, the Complainant points the Hearing Examiner to the retaliation provisions of the Ordinance found in Section 9 (MGO § 39.03(9)). The Complainant's argument is two-fold. First, that requiring the signing of the Statement of Affirmation or Agreement otherwise discriminates against the Complainant for her exercise of a right to be part of a domestic partnership or to live as a single person in a manner determined by herself. Second, it discourages the Complainant from the rights of association with another based upon that individual's protected status, MGO § 39.03(9)(c).

This attempt to "shoe horn" the present matter into the ordinance's protections against retaliation fails for several reasons.

First, returning to the Notice of Hearing, the only issue for hearing that relates to retaliation is limited to the claim of discharge from employment. That issue will be separately addressed later in this memorandum. However, the Complainant's attempt to tie the ordinances provision against retaliation to a claim for requiring signing the Statement of Affirmation and Agreement simply is not contemplated as an issue for hearing. Again, had the Complainant wished to present this argument, she should have raised it during the discussion of the issues for hearing at the Pre-Hearing Conference. While admittedly a creative and original analysis, this theory of liability is too far afield to fall into the scope of the issues for hearing as set forth in the Notice of Hearing.

Second, the argument that requiring the Complainant to sign the Statement of Affirmation and Agreement represents retaliation for the Complainant's exercise of any right damages the concept of retaliation. It is inconceivable to the Hearing Examiner that the signing of a statement at the beginning of employment can be considered retaliation for conduct that occurred prior to employment and which the Respondent lacked any knowledge. The record is clear that at the time the Complainant entered into her employment, she did not disclose her living arrangement to the Respondent. In fact, it appears that the first time the Respondent knew of the Complainant status as a domestic partner was when the Complainant asked if she could bring her unmarried partner to the Christmas party in January of 2014.

In order for there to be retaliation, it is fundamental that the person charged with retaliation be aware of the conduct which is the basis for the claim. This could not have been implicated in the Respondent's requirement that the Complainant sign the Statement of

Affirmation and Agreement as the Respondent lacked any knowledge of the Complainant's living arrangements.

Similarly, the theory that the requirement to sign the Statement of Affirmation and Agreement violated the Complainant's associational rights as set forth in MGO § 39.03(9)(c) fails because of a lack of knowledge on the part of the Respondent of the Complainant's association with her unmarried partner. This claim might have more relevance to the discharge claim, however, as will be seen later, it fails in that area for other reasons.

As far as the general proof of the Complainant's claims relating to the signing of the Statement of Affirmation and Agreement, the Hearing Examiner cannot find proof of the adverse action element. The testimony is clear that all employees and volunteers must sign the Statement to be employed by the Respondent. The Complainant signed the Statement of Affirmation and Agreement and she was employed. She remained employed reasonably happily until mid-January of 2015. While the Complainant may have experienced some internal distress over the contents of the Statement of Affirmation and Agreement, she did not testify to that or explain how that distress might be different from that caused by knowledge that she had signed a document with which she fundamentally disagreed. While the Complainant may have strongly disagreed with the principles set forth in the Statement of Affirmation and Agreement, her access to employment was not adversely affected nor were the terms and conditions of her employment adversely affected by the act of signing the Statement of Affirmation and Agreement.

The Complainant makes several different claims that she attempts to draw into the framework of the issues as stated in the Notice of Hearing. As previously indicated, such an approach deprives the Respondent of meaningful notice of the theories of liability and recovery that it must defend. As a neutral fact finder and applier of the law, the Hearing Examiner must exercise his judgment to protect the rights of both Complainant and Respondent. The Pre-Hearing Conference and the documents that flow from that opportunity to set the issues is a critical step in the process. It allows the Complainant to set forth her claims in as broad or as narrow a manner in which the Complainant wishes. It gives the Respondent the opportunity to identify the claims and theories against which it may need to defend itself. In the present matter, there seems to have been some misunderstanding of this process or perhaps a lack of appreciation for the consequences of being more rigorous in setting forth the issues that the parties wanted to litigate at the time of hearing. The Hearing Examiner's ability to recognize theories and allegations of discrimination that differ substantially from those set forth in the Notice of Hearing is limited by concepts of due process.

The Hearing Examiner will now turn to the Complainant's claim that she was terminated from employment, either actually or constructively, due to her marital status, by Van Rossum on February 16, 2015. In order to establish a prima facie case of discriminatory termination due to marital status, the Complainant must establish that she is a member of the protected class, that she experienced and adverse action, and that there is a causal connection between the protected class and the adverse action. In a constructive discharge claim, the burden is on the Complainant to prove that the working conditions were so difficult or unpleasant that a reasonable person in the employee's position would have been compelled to resign.

The Complainant is a member of the protected class marital status (single). It is not clear that the Complainant suffered an adverse action on February 16, 2015. There are four reasons for the Hearing Examiner to reach such a conclusion. (1) Being married was not a condition of

hire at Capitoland; (2) The Complainant was happily employed with the Respondent for approximately five months before the alleged termination; (3) The Complainant terminated her own employment on February 16, 2015 when she did not return to work; and (4) The Respondent was willing to have an interactive dialogue with the Complainant. The Hearing Examiner will expand on each of these reasons separately.

First, marriage was not a condition of employment at Capitoland. Both single and married individuals are allowed to work at Capitoland, and married applicants are not given preference over single applicants. Van Rossum stated that she knew the Complainant was single when Van Rossum hired her, and that the Complainant's marital status was not a consideration of hire. In her testimony, Van Rossum stated that she never considered the Complainant's marital status, sex, race, or national origin in her decision to hire the Complainant, but that she hired her because the Complainant "had the right attitude and that she was perfectly capable of doing the job." (TR. 90 ll 21-22). Ultimately, the Complainant's marital status was not being called into question per se but rather her conduct of cohabitating with her unmarried partner which violated the Respondent's religious beliefs. The Complainant did not need to get married to remain employed at Capitoland. Pastor Stauffacher stated in testimony that there were multiple solutions that could have brought the Complainant into compliance with its Statement of Affirmation and Agreement. The Complainant could have changed her living situation. The Respondent also stated that—if it had known that the Complainant was living with an uncle and her brother—her living situation might have been in compliance with Capitoland's Statement of agreement because the Complainant had "accountability."

Second, for approximately five months, the Complainant was employed with the Respondent without any problems. In order to meet the elements of a constructive discharge claim, the Complainant must show that the working conditions were so difficult or unpleasant that a reasonable person in the employee's position would have been compelled to resign. The Complainant did not provide evidence during the hearing that would support such a claim. In her testimony, the Complainant stated she enjoyed working at Capitoland, that she had no problems with coworkers, and that she had no problems with her supervisors Van Rossum or Pastor Stauffacher. The Complainant received a positive performance review on January 12, 2015. During the performance review, the Complainant had an opportunity to meet with her supervisor Van Rossum. In testimony, Van Rossum stated that the Complainant did not raise any concerns to her about either the job or about how the Complainant was being treated. Van Rossum stated that the Complainant was a good employee and that she enjoyed working with her.

Third, viewing the testimony as a whole, it is evident to the Hearing Examiner that the Complainant voluntarily terminated her employment by not returning to work after February 16, 2015. In testimony, the Complainant stated that, based upon her conversation with Van Rossum on February 16, 2015, she believed if she got married, she could go back to work, and if she did not get married, she could not go back to work. In cross examination by Attorney Galus, the Complainant was asked whether she understood that changing her living situation would address Capitoland's concerns, to which the Complainant responded, "Yes." It is the Complainant's position that Van Rossum terminated the Complainant's employment on February 16, 2015, when Van Rossum told the Complainant, "We can't have employees living with each other outside of marriage" (TR. 103 ll 10-11). The Complainant's beliefs and perceptions about the conversation that occurred on February 16, 2015, are not evidence that discrimination on the basis of her marital status occurred. Based on the totality of evidence

provided at hearing, the conversation that occurred between the Complainant and Van Rossum does not equate to a constructive discharge.

After Van Rossum informed the Complainant that she was in violation of the Statement of Affirmation and Agreement, Van Rossum encouraged the Complainant to come back to work the next day. Van Rossum told the Complainant, "I don't want you to just make a decision now. It's something I'd like to talk about, and then I can touch base with Pastor Jake [Stauffacher], and we can go from there" (TR. 103 ll 12-15). In her testimony, Van Rossum stated that she wanted to keep the Complainant employed because she liked the Complainant and believed that she was a good employee. Van Rossum hoped to learn more about the Complainant's living arrangement and to discuss it with her.

In response, the Complainant told Van Rossum, "That's okay. I'll be done" (TR. 104 l 3). The Complainant then told Van Rossum that she would come back tomorrow, but that it would be her last day (TR 104 ll 10-11). From the testimony provided by Van Rossum, Van Rossum had assumed that the Complainant would return for work the next day.

Van Rossum stated that she did not give the Complainant options on how the Complainant could be in compliance with the Statement of Agreement at that time because she did not feel that the Complainant would be receptive to them based on the Complainant saying, "I'll be done." Van Rossum indicated that the Complainant seemed like she was done with her employment and did not want to discuss the situation further. Van Rossum testified that, by the end of their conversation, it seemed to Van Rossum that the Complainant wanted to voluntarily leave her employment rather than find a way to be in compliance with the Statement of Affirmation and Agreement.

The Complainant did not return to work the next day, February 17, 2015. Nor did the Complainant call to say that she was not coming in to work. The Complainant also did not show up to work or call on the days of February 18 and 19, 2015. Van Rossum stated in testimony that she had assumed that the Complainant had voluntarily resigned. On February 20, 2015, the Complainant showed up at Capitoland to return her keycard. In testimony, Van Rossum stated she was "95-99% sure" that the Complainant was voluntarily resigning on February 20, 2015 (TR. 113 l 10).

Pastor Stauffacher stated that he is the ultimate authority on whether to terminate someone's employment at Capitoland, and in his testimony, he stated that he never gave Van Rossum the authority to terminate the Complainant's employment, nor did he speak to Van Rossum about terminating the Complainant's employment. During cross testimony, Pastor Stauffacher stated that if an employee violates Capitoland's Statement of Affirmation, Pastor Stauffacher engages in a "fact-finding mission" to find out if "there is a way to help fix the situation" (TR. 192 22-23). In testimony, Pastor Stauffacher stated that when an employee is found to be in violation of the Statement of Affirmation, the employee is not immediately terminated, but rather, Capitoland attempts to find a solution: "It's never immediately to say, hey, we don't want them here. It's more like, how can we work together and how can we find a solution that's good for both of us." (TR. 191 l 24 – TR. 192 l 2). It is also important to note that the Respondent would be willing to rehire the Complainant so long as she is in compliance with its Statement of Affirmation. Pastor Stauffacher stated, "[Capitoland] is about forgiveness…[The Complainant] was a good worker, and if there's any way that we could ever be help to her, we would want to be" (TR. 191 ll 10-13).

This brings the Hearing Examiner to the fourth consideration: the Respondent was willing to have an interactive dialogue with the Complainant to find a solution so that the Complainant could be in compliance with the Statement of Affirmation and Agreement. In his testimony, Pastor Stauffacher stated he assumed that a conversation between himself and the Complainant would occur to address the issue. Pastor Stauffacher stated, "I felt the final conversation would happen between Van Rossum, myself, and Ms. Sandoval, so we can actually try to come up with a conclusion [sic]." Pastor Stauffacher stated that the Complainant could have requested an in-person meeting with him, or stopped by his office, to discuss the issue. During their final interviews before employment, Pastor Stauffacher lets applicants know that he has an "open-door policy" and that he is willing to talk to employees should they need to meet with him for any reason. His office is easily accessible to the employees.

Pastor Stauffacher did not have any expectation that the Complainant would return to work at Capitoland because Van Rossum told him that it seemed as though the Complainant had quit. However, he testified that he would have talked with the Complainant if she had returned: "If she wanted to, I would be willing to talk with her at that time. If she would have came back and talked [sic], we'd be more than willing to" (TR. 187 ll 13-15).

Viewing the evidence from the record as a whole, it is clear to the Hearing Examiner that the Respondent did not terminate the Complainant's employment during the conversation that occurred between the Complainant and Van Rossum on February 16, 2015. Rather, the Complainant voluntarily resigned from employment when she failed to show up for work, or call into work, on the days of February 17, 18, and 19, 2015, and subsequently handed in her keycard on February 20, 2015.

Even if the Complainant had suffered an adverse action on February 16, 2015, the Complainant failed to meet her burden of proof with respect to a prima facie case of discrimination because she did not provide a causal connection between her marital status and the adverse action she claimed to experience. The Respondent asserted that its religious beliefs about cohabitation are legitimate and nondiscriminatory reasons for its actions. The Complainant failed to provide evidence to the hearing that would show these reasons are either not credible or pretext for an otherwise discriminatory motives.

The Complainant's theory of constructive discharge, though not fully expressed, may be that given the nature of the Respondent's Statement of Affirmation and Agreement, it would have been futile for the Complainant to return to attempt to work out a resolution. This "futility" argument fails based upon the testimony in the record. Both Van Rossum and Stauffacher testified that they wished the opportunity to explore possible solutions to the issue of the Complainant's living arrangement. That the Complainant apparently did not see that such discussion could be fruitful requires the Hearing Examiner to find that Van Rossum and Stauffacher were testifying less than truthfully. There is nothing in the record to lead the Hearing Examiner to this conclusion. Given the record as a whole, the Hearing Examiner finds that though further discussion with the Respondent may not have lead to a mutually satisfactory resolution of the issues surrounding the Complainant's living arrangements, it would be impermissible speculation on the part of the Hearing Examiner to find that no resolution was possible.

The issue of retaliation on this record is extremely confused. In the Notice of Hearing, the issue is posed as whether the Respondent retaliated against the Complainant for her

exercise of a right protected by the ordinance when it terminated her employment. The Complainant proposes some novel arguments with respect to this framing of the issue.

What confuses the record is the Complainant's expression of entirely different allegations of retaliation in her original complaint and her amended complaint. In those earlier documents, the Complainant rests her claim of retaliation on the Respondent's refusal to reach a settlement and an alleged change in her personnel file to indicate that the Complainant quit her employment instead of being terminated from employment. While the second of these claims might state a basis for retaliation, the first, refusal to reach a settlement, simply fails to provide any basis for a claim of retaliation.

These earlier bases for the Complainant's claim of retaliation now appear moot as the Notice of Hearing rests on the Respondent's alleged termination of the Complainant as the basis for her claim of retaliation. It is in this context that the Hearing Examiner will address the issue of retaliation.

The Complainant's claim of retaliation fails for the same reasons as indicated above in the discussion of the Complainant's termination claim. The Record demonstrates to the satisfaction of the Hearing Examiner that the Complainant voluntarily quit her employment. The Hearing Examiner does not find any basis for the proposition that the Respondent terminated the Complainant's employment. While both the Complainant and the Respondent's primary witness, Van Rossum, testified credibly about what happened during the February 16, 2015 conversation, the Hearing Examiner finds that Van Rossum's version of events is more credible given the surrounding circumstances.

To briefly summarize the events as the Hearing Examiner understands them, Van Rossum asked the Complainant to come to discuss the Complainant's living arrangements. On or about January 15, 2015, the Complainant indicated to Van Rossum that the Complainant and her unmarried partner were living together. At that time, Van Rossum indicated to the Complainant that living arrangement was contrary to the Statement of Affirmation and Agreement that the Complainant had signed, and that Van Rossum would need to speak with Pastor Stauffacher about the situation. Van Rossum spoke with Stauffacher the next day and was told that she and Stauffacher would need to look into the situation.

Due to a number of events including Van Rossum's return from maternity leave, Van Rossum did not speak with the Complainant until a month later. At that meeting in February, 2015, Van Rossum indicated that from the Respondent's perspective, it was not possible for the Complainant to remain in her present living arrangement, i.e., living with her unmarried partner outside of marriage. It is not entirely clear on this record what different arrangements the Respondent might find acceptable, but at a minimum, it would have expected the Complainant and her unmarried partner to either marry or for them to seek separate abodes. The Hearing Examiner does infer from Stauffacher's testimony that there may have been other possible living arrangements that might have been acceptable though those were not spelled out on the record.

Whether due to a barrier presented by language or simply the Complainant's unwillingness to consider anything but the current circumstances, the Complainant indicated that she would leave the Respondent's employment. Van Rossum, though believing that the Complainant would not consider returning to employment, urged the Complainant to return the next day so that they might discuss options for the Complainant's continued employment. The

Complainant again indicated that she would leave. The record demonstrates that the Complainant did not return until February 20, 2015, and then only to return her key card and other employment indicators and to attempt to record Van Rossum's reason for the end of the Complainant's employment.

It is clear from the record that Van Rossum did not have sole authority to terminate the Complainant's employment and that could only occur after discussion with Stauffacher. Equally, it is clear that Van Rossum did not have that discussion with Stauffacher until after the Complainant left on February 16, 2015. At that time, Van Rossum reported to Stauffacher that the Complainant appeared to have quit her position and would not return.

The Complainant testified that she believed she'd been terminated from her employment as of the February 16, 2015 meeting. To the extent that this belief on the part of the Complainant was due to her feelings that she was being offered no alternative other than marriage or separate abodes, the Hearing Examiner finds that her understanding was, at best, incomplete. While the Complainant's understanding may have ultimately proven to be true, as of February 16, 2015, the Respondent indicated that it wished the Complainant to remain employed and to return the next day for further discussions. The Complainant's failure to return and especially not to call in is a clear indication to the Hearing Examiner that the Complainant voluntarily quit her employment.

It is not at all clear to the Hearing Examiner that the parties would have been able to find a mutually acceptable resolution to the conflict between the Respondent's Statement of Affirmation and the Complainant's belief that her living arrangement was not a matter of concern to the Respondent, but the Complainant's action in not returning to work in the days after the meeting with Van Rossum truncated any opportunity for compromise.

As with the discussion relating to the other bases of discrimination and the issue of termination, the Respondent cannot have terminated the Complainant for the exercise of a right protected by the ordinance if the Complainant quit her employment. Because the Hearing Examiner finds that the Complainant voluntarily quit her employment, the Hearing Examiner is compelled to conclude that the Respondent did not terminate the Complainant's employment in retaliation for her exercise of a right protected by the ordinance.

Whether the Complainant's decision not to return after the February 16, 2015 meeting resulted from some barrier of language or due to the Complainant's honest belief that the Respondent and she would not be able to work out an acceptable living arrangement, the fact is that the Respondent wished the Complainant to return and it was the action of the Complainant that ended the employment relationship. The Hearing Examiner must conclude that the claim that the Respondent retaliated against the Complainant for the Complainant's exercise of a right protected by the ordinance is dismissed. The Hearing Examiner has previously discussed the Complainant's other claims based upon retaliation and will not repeat them now.

In her post-hearing brief, the Complainant alleged that the Respondent afforded the Complainant terms and conditions of employment less favorable than another employee because of her status as a Hispanic woman of Mexican origin by offering a White man of American origin a prompt investigation and the ability to continue working after he disclosed he was living with his unmarried partner. Again, it is not clear how these particular allegations fit into the framework of the issues as set forth in the Notice of Hearing. It is clear that the comparator identified by the Complainant had to sign the Statement of Affirmation and

Agreement as did the Complainant. It is remotely possible that the Complainant's contention relates to the termination claims in that the comparator was not terminated, although, the Hearing Examiner has already found that the Complainant was not terminated either. The Hearing Examiner will address the claims as set forth by the Complainant given the importance to which she attaches this presentation.

Joshua Ladd (hereinafter "Ladd") is the employee who the Complainant claims was treated more favorably than her. The Respondent hired Ladd in September of 2015 for the role of Director/Coordinator at its elementary school. Ladd signed the Statement of Affirmation in his initial interview. In his final interview with Pastor Stauffacher, Ladd voluntarily disclosed that he was cohabitating with his unmarried partner. Ladd stated that he and his unmarried partner were living with another family to be held "accountable" for their actions. Pastor Stauffacher put Ladd's interview on hold and met with Van Rossum and Pastor Steve Stauffacher (hereinafter "Pastor Steve Stauffacher"). Pastor Stauffacher determined that Ladd's living situation was therefore consistent with Capitoland's Statement of Affirmation and religious beliefs because "[Ladd] was avoiding the appearance of sex before marriage [and]… having accountability" (TR. 191 ll 3-4). Pastor Stauffacher therefore decided that Ladd's living arrangement was consistent with the Capitoland's Statement of Affirmation and offered Ladd the position.

It is unclear to the Hearing Examiner how the Complainant suffered an adverse action related to the terms and conditions of employment. The Complainant states that because the Respondent did not properly investigate the Complainant's living situation, it treated Ladd more favorably. The Hearing Examiner finds that, given the differences in Ladd and the Complainant's situations, that the Respondent's actions were nondiscriminatory. Based on testimony of Pastor Stauffacher and Van Rossum, Ladd voluntarily disclosed his living situation to Pastor Stauffacher in the interview process. Whereas the Complainant did not disclose her living arrangement at the time of her interview. Also, the Complainant had worked for Capitoland for five months before the Respondent became aware that she was cohabitating with her unmarried partner. The fact that Ladd voluntarily disclosed his living arrangements in the interview allowed the Respondent to have a constructive dialogue with Ladd—which lead the Respondent to determine that he had "accountability" in his living situation.

In testimony, Pastor Stauffacher stated that Capitoland trusts its employees on their word that they are in compliance with the Statement of Affirmation and Agreement when they sign it. The Respondent does not conduct unprompted investigations into the living situations of its employees. It is only if the Respondent learns that an employee is in violation of the Statement that the Respondent will then take action by finding out more information from the employee. Because the Complainant signed the Statement at her initial interview, the Respondent had no reason to believe that she was not in compliance.

Based on the testimony of Pastor Stauffacher, the Respondent was willing to have an interactive dialogue with the Complainant to help her find a solution that would work for both parties. The Complainant's brother and uncle were sharing the same apartment as the Complainant and her unmarried partner when she was employed with Capitoland. However, the Respondent was not fully aware of her living situation, and only found out that she was also living with her brother and uncle after the Complainant had left employment. Had the Complainant had an interactive dialogue with the respondent, the Respondent might have learned more about her living situation and been able to offer her the same solution of "accountability" that was given to Ladd.

Even if the Complainant had suffered an adverse action in terms of employment conditions, she was unable to draw a causal connection between the adverse action and her protected classes (sex, race, and/or national origin). In its post hearing brief, the Respondent cites that Ladd and the Complainant were not similarly situated and therefore the Respondent did not discriminate against the Complainant. The Hearing Examiner agrees that the situations of the Complainant and Ladd were so dissimilar that the Respondent was justified in handling their situations differently. It cannot be determined whether the Respondent would have offered the Complainant the same solution of "accountability" as it afforded Ladd. However, because the Complainant terminated her employment on February 16, 2015, before a dialogue could occur, the Hearing Examiner cannot find reason to fault the Respondent for not further investigating her living situation. The Hearing Examiner concludes that the Complainant's situation, due primarily to her own actions, is not sufficiently similar to that of Ladd to provide a reasonable comparison of their treatment or situations.

The record and arguments of the parties in this matter are extensive. To the extent that the Hearing Examiner has not addressed each and every argument of either party reflects a determination on the part of the Hearing Examiner that such an argument does not compel or defeat the Hearing Examiner's conclusions set forth above. A failure to address specific claims of the parties should not be seen as failure to consider their points, but rather that they are not persuasive or relevant to the ultimate decision.

This complaint has caused much distress in the lives of both parties. The Hearing Examiner in concluding that the Complainant has failed to demonstrate that the Respondent illegally discriminated or retaliated against her does not minimize the distress that she has experienced. Equally, the Respondent has undergone a significant challenge to its beliefs. The Hearing Examiner wishes that some compromise between the parties had been possible that would have permitted the Complainant to go forward with her life and for the Respondent to have had its convictions and beliefs affirmed. That was apparently not possible and as a result, perhaps neither party will be satisfied with the outcome of this process. That is unfortunate as the Department of Civil Rights seeks to do justice for all those who come before it.

Signed and dated this 13th day of May, 2019.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Attorney Mitch
Phillip Stamman