

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

Jeffery Brown  
5808 Anthony Place #5  
Monona WI 53716

Complainant

vs.

Five Star Senior Living  
7707 North Brookling Drive  
Madison WI 53719

Respondent

HEARING EXAMINER'S DECISION AND  
ORDER ON RESPONDENT'S MOTION TO  
DISMISS FOR LACK OF JURISDICTION

CASE NO. 20172199

EEOC CASE NO. 26B201800011

**BACKGROUND**

On November 30, 2017, the Complainant, Jeffrey Brown, filed a complaint of discrimination with Madison Department of Civil Rights Equal Opportunities Division (EOD). The Complainant charged that the Respondent, Five Star Senior Living, terminated his employment on the basis of his race, color and conviction record, in violation of the Madison Equal Opportunities Ordinance MGO 39.03 et seq. The Complainant asserts that though he does not have a conviction record, his brother does have a conviction record and has used the Complainant's name as an alias in the past. The Respondent denied having discriminated against the Complainant in any manner and further stated that it gave the Complainant information to clarify the situation with its source of background information concerning the Complainant's criminal history check.

Subsequent to an investigation, a Division Investigator/Conciliator issued an Initial Determination on May 11, 2018, concluding that there was no probable cause to believe that the Respondent discriminated against the Complainant on the bases of his race and/or color in employment. The Initial Determination did conclude that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of conviction record when it terminated his employment. The Complainant did not appeal the Initial Determination's findings of no probable cause.

The complaint was transferred to conciliation. No conciliation was possible at the time. The complaint was then transferred to the Hearing Examiner for further proceedings.

On July 5, 2018, the Hearing Examiner held a Pre-Hearing Conference for purposes of scheduling further proceedings in this matter. One of the dates established during the Pre-Hearing Conference was that for the filing of dispositive motions going to the jurisdiction of the department. On August 17, 2018, the Respondent filed a motion to dismiss the complaint for a lack of jurisdiction on the part of the department. On September 24, 2018, the Complainant filed

a brief in opposition to the Respondent's motion. On October 4, 2018, the Respondent replied to the Complainant's opposition.

### DECISION

The Respondent's motion to dismiss rests entirely on the Hearing Examiner's decision in Ezrow v PDQ, MEOC Case No. 21966 (Ex. Dec. 9/15/94). The Hearing Examiner in that case dismissed the Complainant's complaint for a lack of jurisdiction because the Complainant's allegation that she was discharged due to her boyfriend's conviction record was not supported in the Equal Opportunities Ordinance and that the conviction record basis for the complaint did not logically follow the "by association with" framework of other decisions. The Respondent's motion correctly states the circumstances and basis of the decision in Ezrow.

The Complainant, in opposing the Respondent's motion, contends that the Complainant's charge does not rely on the "by association with" framework and that the Respondent's actions directly relied on its belief that the Complaint had a conviction record. Whether this is factually true or whether it depends upon a claim of discrimination on the basis of the Respondent's perception of the Complainant's status as an individual with a conviction record is for purposes of the Decision and Order immaterial.

While at the time of the Ezrow decision, the Equal Opportunities Ordinance only contained "by association" protection in the ordinance's housing section, that condition changed in 1998 when the ordinance was amended to add Section 3.23(9)(c) which extended "by association" protection to the entire ordinance and to all protected classes. See MGO 3.23(9)(c): (c) For any person or entity subject to regulations under this ordinance to engage in any acts prohibited in Sec. 3.23 et seq of the Madison General Ordinances against any individual because of the sex, race, religion, color, national origin or ancestry, age, disability, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, or political beliefs of any person associated with that individual or the fact that any person associated with that individual is a student as defined herein. The action of the Common Council, in adopting this language, effectively overruled the decision in Ezrow and made it a historical oddity.

In 2010, the Common Council further amended the section as part of a recreation of the Equal Opportunities Ordinance. That recreation did not change the effect or the scope of the protections now embodied in Sec. 39.03(9)(c). See MGO 39.03(9)(c): (c) For any person or entity subject to regulations under this ordinance to engage in any acts prohibited in Sec. 39.03 et seq of the Madison General Ordinances against any individual because of the person's association with any member of any protected class membership.

Since the Respondent's motion to dismiss relies solely on the now defunct holding in Ezrow and it is clear that the ordinance extends "by association" protection to all protected classes, the Hearing Examiner must deny the Respondent's motion. The Hearing Examiner need not address the Complainant's theories of liability at this stage and does not do so.

### ORDER

The Respondent's Motion to Dismiss the complaint for a lack of jurisdiction is dismissed. The dates set forth in the Hearing Examiner's Scheduling Order and Notice of Hearing remain in effect.

Signed and dated this 5th day of October, 2018.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner

cc: Steven A. Porter