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

DECISION ON MOTION TO DISMISS

CASE NO. 20152033

EEOC CASE NO. 26b201500021

BACKGROUND

On March 9, 2015, the Complainant, Sandra Sandoval, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunities Division (EOD). The complaint charged that the Respondent, Capitoland Christian Center Church, Inc. (CCCCI) terminated her employment on the basis of her marital status in violation of the Equal Opportunities Ordinance Sec. 39.03(8)(a) Mad. Gen. Ord. The Respondent denied that it violated the Equal Opportunities Ordinance and indicated that the Complainant was terminated because she had violated the principles of the Respondent's religious beliefs with respect to cohabitation by unmarried individuals.

The complaint was assigned to an EOD Investigator/Conciliator for investigation and issuance of an Initial Determination of either probable cause or no probable cause to believe that the Respondent had discriminated against the Complainant in employment on the basis of the Complainant's marital status. On August 13, 2015, the Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred as alleged in the complaint. Efforts to conciliate the allegations of the complaint were unsuccessful. The complaint was transferred to the Hearing Examiner for further proceedings.

On September 28, 2015, the Hearing Examiner held a Pre-Hearing Conference to schedule further proceedings with respect to the complaint. The Respondent requested the opportunity to conduct discovery prior to filing a Motion to Dismiss the complaint for a lack of subject matter jurisdiction and for other reasons. On October 6, 2015, the Hearing Examiner issued a schedule for further proceedings.

The Hearing Examiner held another conference with the parties. Until this conference, the Complainant had been unrepresented by counsel. At that conference, the Complainant, by counsel, indicated that the Complainant intended to amend her complaint to add additional bases for her complaint of discrimination. The Hearing Examiner essentially stayed further

proceedings pending amendment of the complaint. On November 18, 2015, the Complainant filed her amended complaint and the matter was remanded to the Investigator/Conciliator for further investigation and issuance of an amended Initial Determination. The amended complaint added sex, race and national origin/ancestry as bases for the Complainant's allegations of discrimination.

On April 25, 2016, the Investigator/Conciliator issued an amended Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the bases of marital status, sex, race and national origin/ancestry when it terminated the Complainant's employment. Again efforts to conciliate the complaint were unsuccessful and the complaint was once again transferred to the Hearing Examiner for further proceedings.

On May 26, 2016, the Hearing Examiner held a Pre-Hearing Conference to schedule further proceedings with respect to the amended complaint. At that conference, the Respondent indicated that it wished to file a Motion to Dismiss the complaint for several reasons, but also indicated that it wished the opportunity to conduct discovery prior to the date for filing its motion. On June 1, 2016, the Hearing Examiner issued a Notice of Hearing and Scheduling Order encompassing a schedule agreed to by the parties for further proceedings with respect to this matter. On June 23, 2016, the Hearing Examiner issued a corrected Notice of Hearing and Scheduling Order to include all of the stated protected classes claimed by the Complainant.

On October 21, 2016, the Respondent filed its Motion to Dismiss and supporting documentation. On November 10, 2016, the Complainant filed a responsive brief and on November 21, the Respondent filed a brief in reply to that of the Complainant.

MEMORANDUM DECISION

The Respondent puts forth two arguments for dismissal of the complaint, as amended, in this matter. First, the Respondent asserts that with respect to the allegation that the Respondent terminated the Complainant's employment on the basis of the Complainant's marital status that claim is barred by the application of Wis. Stats. 111.337. That section establishes the prohibition against discrimination on the basis of creed and further sets forth exceptions to the prohibition against discrimination on the basis of creed. Most importantly, Wis. Stats. 111.337(3) preempts any local Ordinance which seeks to make illegal employment decisions that are protected by the application of Wis. Stats.111.337(2). The Respondent also contends that principles of separation of church and state bar the remainder of the Complainant's allegations of discrimination which include the bases of sex, race and national origin/ancestry.

The Complainant opposes the Respondent's motion asserting for a variety of reasons that the Department of Civil Rights can maintain jurisdiction over the complaint in this matter.

The Hearing Examiner believes that it is appropriate to begin analysis of these positions with some preliminary matters. Both parties argue their positions eloquently and rely on precedent from fora as diverse as the Equal Opportunities Commission, the State of Wisconsin, and the federal courts, including the Supreme Court. For the most part, the Hearing Examiner sees these citations as providing guidance to him in how he should interpret the provisions of the Equal Opportunities Ordinance. While the decisions cited by both parties may directly affect interpretation of state or federal statutes, the Hearing Examiner, as a quasi-judicial municipal official, is limited to interpretation and application of the Ordinance and its provisions. Of course,

the Hearing Examiner is bound by the decisions of higher courts on issues that directly affect the interpretation and the application of the Ordinance to a specific claim. However, unless the decision of a higher court bears directly on those duties of the Hearing Examiner, he may take the language of those courts as guidance rather than direction. At the end of the day, the Hearing Examiner's duty is to apply the requirements of the Ordinance to the given facts of an individual complaint. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988).

Having said that, the Hearing Examiner is not free to ignore higher courts' application of important constitutional principles as those may affect the application of the Ordinance.

One question that is raised by the application of the law to the arguments of the parties is whether the Hearing Examiner can rule upon such claims where constitutional principles are involved. As both parties recognize, it is well-established law in Wisconsin that administrative agencies may not rule upon the constitutionality of their own enabling legislation. The Hearing Examiner relied upon this principle in Potter v. Madison Gospel Tabernacle, MEOC Case No. 21269 (Ex. Dec. 2/14/94) when he declined to address the constitutional claims made in the Respondent's Motion to Dismiss the complaint for lack of jurisdiction. In retrospect, the Hearing Examiner's decision in Potter may have been too broadly applied.

The Respondent in the present matter asserts that it is not challenging the constitutionality of the Equal Opportunities Ordinance and agrees that the Hearing Examiner would not have the authority to make such a determination. However, the Respondent contends that it is asking the Hearing Examiner to apply principles of constitutional doctrine to the scope and coverage of the Ordinance. The Respondent sees this as a different and less restrictive endeavor. The Complainant cites only to that authority cited by the Hearing Examiner in the Potter case in arguing that the questions presented by the Respondent's motion are beyond the authority of the Hearing Examiner to address.

Since the Respondent's motion does not seek to invalidate the Ordinance through the application of a constitutional challenge, but only to apply constitutional principles of interpretation to the application of the Ordinance to a given set of facts, the Hearing Examiner finds that he has the authority to address the Respondent's motion. When the U.S. District Court faced a similar question it chose to exercise the doctrine of abstention and not exercise jurisdiction over a claim involving the application of constitutional principles to a complaint then pending before the Equal Opportunities Commission. The District Court found that the processes and procedures of the Commission were fair and appropriate for deciding such issues. Madison Newspapers, Inc. v. EOC, City of Madison, et al., No. 87-C-479-S (W.D. Wis. 1987). Given this finding by the District Court, the Hearing Examiner will address the Respondent's constitutional claims.

The Respondent's first argument is that the Complainant's claim of marital status discrimination should be dismissed because of the action of Wis. Stats. Sec. 111.337(2) and (3). Essentially, 111.337(2) permits a religious organization like the Respondent to give preference in employment to a member of their denomination or to a similar denomination that shares their beliefs. While the Equal Opportunities Ordinance has a similar provision, it is more limited in scope and only applies to employees in ministerial positions. See Sec. 39.03(8)(h)2. Wis. Stats. Sec. 111.337(3) indicates that municipalities or other local governments may not enforce Ordinance provisions that are less broad than the provisions of Sec. 111.337(2).

The Respondent contends that its decision to terminate the Complainant reflects its desire not to employ an individual who did not share in the beliefs of its religious outlook and is therefore protected by Sec. 111.337(2) against the Complainant's claim of marital status discrimination. Essentially, the Respondent reads Sec. 111.337(2) as granting it carte blanche to hire only those who believe as they do for any position, or fire anyone whom it finds does not follow its beliefs or religious principles as set forth in its Statement of Affirmation and Agreement.

The Complainant argues that Sec. 111.337(2) applies by its own terms only to claims of discrimination on the basis of "creed." Further, the Complainant asserts that the Hearing Examiner has already ruled on the preemptive effect of Sec. 111.337(3) in the case of Potter v. Madison Gospel Tabernacle, MEOC Case No. 21269 (Ex. Dec. 2/14/94).

The Respondent argues that to limit the application of Sec. 111.337(2) to only claims of discrimination on the basis of "creed" places form over substance. Essentially, the Respondent claims a broader or higher purpose for Sec. 111.337(2) as a general religious exception.

The Hearing Examiner has reviewed the briefs of the parties and read the authorities cited therein. Based upon this reading, the Hearing Examiner finds no support for the Respondent's first ground for dismissal of the complaint's allegation of discrimination on the basis of marital status.

The Respondent repeatedly refers in its briefs to a Wisconsin religious exception. The Hearing Examiner can find no statement of such a principle or establishing such a test or exception. That is not to say that Wisconsin case and statutory law is silent on the question of the protection of religious freedom. However, the Hearing Examiner finds that the Respondent has conflated several disparate theories into a single exception that does not withstand scrutiny. The Respondent takes broad statements in the form of dicta and wishes to cobble an overarching protection for churches and religious organizations from the laws prohibiting discrimination.

First, Sec. 111.337 of the statutes sets forth a prohibition against discrimination on the basis of creed. Then, in Sec. 111.337(2) it creates two exceptions to the coverage of Sec. 111.337. Those exceptions permit churches or organizations affiliated with churches or other religious organizations to maintain hiring preferences for members of the organization's own religion or religious beliefs. This hiring preference is broken down into two provisions. Sec. 111.337(2)a applies to the hiring of essentially ministerial employees. Sec. 111.337(2)am applies more broadly to applicants for any position outside of the ministerial exception. It is this latter category of employee that is not covered by the similar exception found in the Equal Opportunities Ordinance Sec. 39.03(8)(h)2. Sec. 111.337(3) makes the provision of state law applicable to the Ordinance.

Due to its belief in a broader religious exception, the Respondent reads these provisions as applying to all forms of discrimination. This position is untenable.

By its own terms, the exception found at Sec. 111.337(2) applies only to claims of discrimination on the basis of "creed." Had the legislature wished to make this exception broader, it could have done so at any time, but most particularly when it adopted the provisions of Sec. 111.337(2)am and Sec. 111.337((3). It did not. Presumably the legislature recognized that the state's antidiscrimination law played an important role in eliminating invidious

discrimination and wished to balance the State's desire to eliminate discrimination with the State's legitimate wish to protect religious organizations from infiltration by those outside of the bounds of its faith.

In addition to the clear language of the exception, it is also compelling that the exception is placed in the section of the Fair Employment Act that creates the protection against discrimination on the basis of creed. Sec. 111.337. Had the legislature wished to make the exception apply more broadly than to just claim of discrimination on the basis of creed, it would presumably have placed the exception in some other section of the Act with broader scope and coverage. Instead, it coupled the exception with the provision to which the exception applies.

The Respondent's argument for a much broader "religious exception," while interesting, relies on dicta and broad statements of policy rather than a specific statement of an exception in statutory or case law. The Respondent's invitation to read the provisions of Wis. Stats. Sec. 111.337(2) to apply to all claims of discrimination rather than simply to those of discrimination on the basis of creed asks the Hearing Examiner not only to exercise a legislative function that is beyond his authority, but to apply it to a statewide provision. The Hearing Examiner declines the Respondent's invitation to expand his authority and to interpret the exceptions of Sec. 111.337(2) to apply to all claims of discrimination and not only to those based upon creed.

The Respondent also contends that to read Wis. Stats. Sec 111.337(2) as applying only to claims of discrimination on the basis of creed places form over substance. This, again, is an argument to be taken up with the legislature. The Hearing Examiner can only apply the statute and the Ordinance as written and to interpret them when their meanings are not clearly stated. In the case of Wis. Stats. Sec. 111.337(2), the Hearing Examiner finds the legislature's limitation to be very clear and in no need of additional interpretation.

The Respondent further argues that not to extend the scope of Sec. 111.337(2) to all forms of discrimination permits individuals such as the Complainant to circumvent the intent of Sec. 111.337(2) by engaging in an exercise in creative pleading by specifying protected classes other than creed or religion. This argument misstates the intent of Sec. 111.337(2)'s clear language limiting its application to claims of discrimination based upon creed. Such a limited reading of Sec. 111.337(2) is consistent with a desire to protect both religious freedoms and to eliminate discrimination. The Complainant, in stating a claim for marital status discrimination, does not appear to be engaged in creative pleading, but rather is stating the claim that she believes best fits the circumstances that lead to her termination. The intent of the legislature to limit the application of Sec. 111.337(2) to cases of discrimination on the basis of creed is clear from the precise language of the section and to its placement in the section to which the legislature intended it to apply.

In short, while the Hearing Examiner understands the Respondent's desire for the Hearing Examiner to find that Sec. 111.337(2) preempts the application of the Equal Opportunities Ordinance Sec. 39.03(8)(h)(2) to the Complainant's claim of marital status discrimination, the Hearing Examiner finds that there is no preemption. The limited exception though broadly stated for all types of employment is narrowly focused upon claims of discrimination based upon creed.

The Hearing Examiner now turns to the Respondent's second argument. Essentially, the Respondent contends that to permit the Complainant to maintain her claims of discrimination for her termination on the bases of sex, race and national origin/ancestry would inevitably run afoul

of the Respondent's free expression of its religious principles which are protected by the First Amendment to the United States Constitution and Article 1 Section 18 of the Wisconsin Constitution. Though the Respondent does not explicitly extend this argument to the claim of marital status discrimination, the Hearing Examiner understands that the Respondent's arguments apply with equal force to that claim.

On one hand, the application of what is commonly referred to as the "ministerial exception" is fairly straightforward, and on the other, the facts specific to this case make it difficult to apply. The ministerial exception stems from the religious liberties recognized in the First Amendment to the U.S. Constitution. That provision, among other things, prevents entanglements of church and state, the establishment of a state religion and protects the free expression of one's religious beliefs. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. ___, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). As the federal government and various state governments began adopting laws to prevent and eliminate discrimination, it became obvious that there were some inherent conflicts of important societal principles if and when those laws against discrimination were applied to churches and other religious organizations. These conflicts lead to the development of the so-called ministerial exception.

The courts recognized a right protected by the Constitution for churches and other religious organizations to select those who were responsible for the teaching of religious values and the development of religious doctrine and for the governance of churches and religious organizations. In order to assure the free expression of these religious freedoms, the courts intervened to prevent the application of a variety of state and federal laws to churches and religious organizations. In doing so, the courts developed the ministerial exception. The Supreme Court in it decision in Hosanna-Tabor, supra, details the history and development of the ministerial exception.

While to some extent that exception is incorporated into the Wisconsin Fair Employment Act at Sec. 111.337(2)a and into the Equal Opportunities Ordinance at Sec. 39.03(8)(h)(2), it has a separate common law basis and existence. Hosanna-Tabor, supra, Coulee Catholic Schools v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

Not only do federal courts recognize the ministerial exception, but Wisconsin courts have applied its principles as well, Coulee Catholic Schools v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, DeBruin v. St. Patrick Congregation, 2012 WI 94, 343 Wis. 2d 83, 816 N.W. 2d 87.

Though the doctrine is called "the ministerial exception" it does not apply solely to ministers, nor does the title of minister, of itself, require application of the principle to a specific job or position. Hosanna-Tabor, supra. As the Wisconsin Supreme Court made clear in Coulee Catholic School, a different type of position might not trigger application of the ministerial exception: "Similarly, employment discrimination laws applying to employees who are not in positions that are important and closely linked to the religious mission of a religious organization also do not rise to the level of control or interference with the free exercise of religion."

As the Supreme Court indicated in Hosanna-Tabor, the application of the ministerial exception is a fact-intensive process. If the facts in question do not involve a position that triggers the ministerial exception, the church or religious organization is not shielded from liability. See Coulee Catholic Schools, supra.

The first step in this analysis is to see whether the Complainant's position is one to which the ministerial exception might apply. The record indicates that the Complainant was a Cook for the Respondent's day care/school. As such, her duties were to prepare food and to serve it to the children. From time to time, the Complainant was also required to observe children in the lunchroom for reasons of safety if the teacher on duty was called away for any number of reasons. While it is clear from the record that the Respondent places a great deal of importance on its Statement of Affirmation and Agreement, that statement does not place upon the Complainant's position any particular duties that affect the teaching of the Respondent's principles, the development of its religious principles or the governance of the church or its religious organization.

In order for the ministerial exception to apply, the Complainant's position must somehow involve the ecclesiastical life of the Respondent or the governance of its religious function. Given that the Hearing Examiner must view the record in the light most favorable to the nonmoving party, the Hearing Examiner cannot, on this limited record, conclude that the Complainant's position as a Cook is entitled to application of the ministerial exception.

The Complainant's duties all appear to be secular in nature. She was not required to teach or spread the tenets of the Respondent's faith beyond that required of any member of the Respondent. She simply prepared meals for schoolchildren, served that food and occasionally made sure they were physically safe in the absence of another adult. None of these duties involve the type of fundamental knowledge and teaching of the religious principles of the Respondent that are involved in the ministerial exception.

Proof of these elements do not necessarily require the Complainant to inquire into the application of the Churches principles nor involve questioning the basis of the Respondent's beliefs. If however, the Complainant wishes to question the beliefs or the principles of the Respondent, a motion to exclude such question or testimony would be appropriate.

Though the Hearing Examiner understands this draws a fine line for the Complainant to walk in presentation of her claims, the Hearing Examiner finds that presentation of the Complainant's claim does not necessarily require application of the ministerial exception due to the requirements of the Complainant's position.

In the McDonnell Douglas/Burdine, burden-shifting approach utilized in cases presented by indirect evidence, once the Complainant presents a *prima facie* claim, the burden shifts to the Respondent to set forth a legitimate, nondiscriminatory explanation for its actions. See McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). It is at this stage of the process that the Respondent's religious principles are likely to affect the process. Presuming that the Respondent provides testimony that its decision to terminate the Complainant was based upon its religious principles and beliefs, that sets in motion several issues. First, the Complainant must be prohibited, according to case law, from inquiring into the veracity of the Respondent's explanation or into the sufficiency of its beliefs.

Once the Respondent places into issue the basis for its decision to terminate the Complainant, the burden shifts back to the Complainant to demonstrate that the explanation presented by the Respondent is either pretextual or is simply not credible. It is at this stage that the process of presenting evidence that things become especially problematic. At this point, the

Hearing Examiner understands that the Complainant's primary comparator for demonstrating discrimination and pretext is Joshua Ladd.

Ladd applied for and was hired as the Director or Coordinator of the Respondent's After-School program. At the time of his interview with Pastor Samuel J. "Jake" Stauffacher, Ladd indicated that he and his fiancée wished to live together in a household with a married couple. The married couple would serve as chaperones to assure that Ladd and his fiancée would not engage in conduct prohibited by the Respondent's Statement of Affirmation or Agreement.

The record at this time is insufficient to determine whether Ladd's position was subject to the ministerial exception. However, it is clear to the Hearing Examiner that Pastor Stauffacher's considerations of Ladd's request fall into the area protected by the ministerial exception and must not be inquired into at hearing. There is no question that Stauffacher's position is one of minister as that term is used in the ministerial exception and that his considerations/decisions would inevitably involve the free exercise of religion.

In order to protect the Respondent's rights in this regard, the Hearing Examiner is prepared to enter a protective order prohibiting the Complainant from questioning Stauffacher about his decision to terminate the Complainant or his reasons for hiring Ladd or permitting Ladd's proposed living arrangement.

The Respondent's legitimate concern with the processing of this complaint is that, from the Respondent's perspective, the Complainant will inevitably want to question the appropriateness of the Respondent's rules relating to the conduct of its members. Clearly, in the context of a discrimination claim, even where the employee is not one who is subject to the ministerial exception, such an inquiry is fraught with constitutional peril. While questions relating to the basis or appropriateness of the Respondent's core beliefs as set forth in its Statement of Affirmation may be prohibited by the First Amendment's free exercise clause, it seems equally inappropriate for a religious association or organization to slap a "gag order" on all decisions or actions by asserting that as a religious association or organization one cannot inquire into the basis of the decision where there is some evidence that it is based upon a factor other than the association/organization's religious principles. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), Sacred Heart School Bd. v. Labor & Industry Review Com'n, 157 Wis.2d 638, 460 N.W.2d 430 (Ct. App. 1990).

Accordingly, the Hearing Examiner, based upon the Court of Appeals ruling in Sacred Heart, supra, believes that the hearing should proceed as scheduled. However, the Hearing Examiner directs both parties to submit proposed protective orders consistent with this opinion for the consideration of the Hearing Examiner on or before January 9, 2017. The purpose of the protective order is to provide for protection of the free exercise rights of the Respondent. The Complainant will be permitted to make some legitimate inquiry into whether any religious based explanation of the Respondent for the termination of the Complainant lacks credibility or represents a pretext for an otherwise discriminatory reason.

The Respondent also cites, without fully developing the argument, that the Wisconsin Supreme Court in County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993) and Federated Rural Electric Ins., Co. v. Kessler, 388 N.W.2d 553 (Wis. 1986) have already decided that a conduct-based explanation for a decision does not represent marital status discrimination. It is not clear that Norman has any bearing on the present matter. It was a claim of marital status discrimination brought by three unmarried, unrelated women who wished to rent a dwelling unit

from Norman. Norman denied their application on various grounds. The claim was based upon the Dane County Fair Housing Ordinance which has different goals and provisions from the portion of the Equal Opportunities Ordinance under which the present matter has been brought. The Respondent fails to explain how or why the circumstances of that case should apply in the present matter.

Federated Rural Electric Ins. was a decision involving application of the marital status provisions of the Ordinance in the context of an employment discrimination setting. However, the Supreme Court's decision is premised on the precise language of and the application of that language to a set of facts that may or may not be related to those in the present matter. The Respondent fails to explain how the Hearing Examiner should apply the ruling in Federated Rural Electric Ins. in the present matter. Should this matter proceed to hearing, the Hearing Examiner will listen closely to the arguments of the parties concerning the applicability of Federated Rural Ins.

For the foregoing reasons, the Hearing Examiner denies the Respondent's motion to dismiss for lack of subject matter jurisdiction is dismissed.

ORDER

The parties shall submit proposed protective orders for the consideration of the Hearing Examiner on or before January 9, 2017 and shall serve a copy upon each other.

Signed and dated this 19th day of December, 2016.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Attorney Mitch
Phillip Stamman

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