STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 21 AP 563
Dane County Case No. 20 CV 837

SANDRA SANDOVAL,

Plaintiff-Appellant,

v.

MADISON EQUAL OPPORTUNITIES COMMISSION and CAPITOLAND CHRISTIAN CENTER CHURCH, Inc.,

Defendants-Respondents.

On Appeal from the Circuit Court for Dane County,
Honorable Valerie Bailey-Rihn, Presiding

BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES

1. Under a municipal antidiscrimination ordinance, which protects individuals from marital status discrimination, does "marital status" discrimination include discriminating against a single employee for living with their partner, when married employees are permitted to live with their partner?

   Trial Court: No.

2. When an employer adversely treated and terminated a single employee for living with their partner, does the municipal commission err as a matter of law in concluding these acts are not prohibited discrimination?

   Trial Court: No.

3. Does a Hearing Examiner materially impair a party's right to procedural due process when they exclude relevant, material evidence with highly probative value without stating the reasoning for their decision?

   Trial Court: No / Unanswered.

4. Does a municipal commission violate a party's right to procedural due process by failing to issue a ruling on claims when actual notice, a full hearing, and no prejudice occurred?

   Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As of the filing of this brief, there is no question that oral argument is required because none of the factors in Rule 809.22(2)(a) are present. Sandoval's arguments are not contrary to law; rather, they are supported by substantial authority cited below, and this appeal does not solely involve factual questions; rather, it involves questions of law. Rule 809.22(2)(a)1-3. While Sandoval believes *her* brief might allow the Court to forego oral argument under Rule 809.22(2)(b), it is premature at the time this brief is filed for her to speculate on the applicability of Rule 809.22(2)(b) because doing so would require assessing all the briefs, including those not yet filed. Nevertheless, the issues in this case are significant, and the costs of holding an oral argument are outweighed by the benefits of fully understanding the arguments and getting the decision right.

Publication of the opinion is appropriate pursuant to Rule 809.23(1)(a) because it will contribute to the legal literature by adopting the recent guidance from the Supreme Court of the United States in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741–42 (2020). Publication will also serve a substantial and continuing public interest, as the state legislature recognized: "unfair discrimination in employment against properly qualified individuals by reason of their…marital status…substantially and adversely affects the general welfare of the state." Wis. Stat. § 111.31(1). And the City of Madison created the law at issue because, "The denial of equal opportunity intensifies group conflict, undermines the foundations of our democratic society, and adversely affects the general welfare of the community. Denial of equal opportunity in employment deprives the community of

the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents." MGO 39.03(1).

STATEMENT OF CASE

Sandra Sandoval was a hardworking and diligent employee—a cook—at Capitoland Christian Center. Sandoval also lived with her longtime male partner. Sandoval performed well at work and enjoyed her job until she asked Capitoland if she could bring her partner to the company Christmas party. Capitoland refused because she was not married to her partner, and it issued an ultimatum: marry your partner, dissolve your household, or lose your job. Capitoland denied Sandoval benefits and terminated her employment because she was single while enjoying the same lifestyle as a married employee.

Throughout Sandoval's employment at Capitoland, she lived with her daughter and her longtime male partner. R. 65-3:1-3. Sandoval and her partner were not married. R. 65-28:11-14. At the time of the municipal hearing in this case, Sandoval and her partner had been together for five years. R. 65-3:5-11. Sandoval considered him part of her family, and he helped their family afford the rent. R. 65-3:13-23.

Sandoval is a working mother raising a young daughter, as well as a Hispanic woman of Mexican origin. R. 61-7; R. 65-3:3; R. 65-4:17-19. From August 2014 until February 16, 2015, Sandoval worked as a cook at Capitoland. R. 65-5:18-20; R. 65-42:22-43:1; R. 67-21:17-21. She applied for the cook position at Capitoland because the work schedule

allowed her to spend time with her third-grade daughter after her school day. R. 65-73:21-23; R. 66-31:1-9.

Capitoland is a corporation that operates a daycare facility in Madison with about 42 employees on payroll. R. 68-6:22-23; R. 68-10:13-11:17; R. 68-4:14; R. 68-17:18-19.

Publishing a Notice that Expresses a Preference for or against a Protected Class

Capitoland prints and circulates a form called the Statement of Affirmation ("Statement") to every prospective employee, even those whose jobs are unrelated to the corporation's religious mission. R. 62-7; R. 62-14; R. 66-10:2-14; R. 67-8:22-9:2; R. 68-21:3-22:12; R. 68-30:1-6; R. 68-45:21-46:6. It states:

> I agree to refrain from: ... co-habitation with members of the opposite gender outside of marriage ... I understand that I may be discharged from employment or appointment due to: ... Violations of any terms of this affirmation and agreement statement.

R. 61-15.

Adverse Treatment in the Conditions and Benefits of Employment based on Protected Class

Capitoland required that Sandoval sign the Statement as a condition of her employment; she did so and started her job as a cook in August 2014. R. 61-3; R. 61-6; R. 65-5:18-20; R. 65-42:22-43:1; R. 66-10:2-14; R. 67-8:22-9:2; R. 68-30:1-6; R. 68-45:21-46:6. Her job duties were preparing breakfast, lunch, and an occasional snack for the children in daycare. R. 65-6:7-9. Her supervisors were Brenda Van Rossum,

Capitoland's Daycare Coordinator, and Jake Stauffacher, an executive. R. 66-2:11-13; R. 66-61:22-62:1; R. 68-4:5-8.

Sandoval's performance review on December 17, 2014, noted: "Overall Sandra is doing well. The Kitchen is kept clean and she has a great attitude. We are happy to have her on our team." R. 61-40. Sandoval never received a disciplinary warning while employed at Capitoland. R. 67-16:18-17:4. Capitoland never witnessed Sandoval engaging in any objectionable acts or conduct. R. 68-50:1-4. Capitoland had "no complaints at all" about Sandoval; "only good things were always said about her." R. 68-32:14-22. Despite such glowing reviews, Capitoland terminated Sandoval a few weeks after her review because she was single (and had the same lifestyle married employees had).

In January 2015, Capitoland hosted its annual Christmas party. R. 65-10:1-4. At the party, Capitoland provided attendees an expensive steak and lobster dinner and valuable gifts including gas cards for married employees' partners. R. 68-65:1-66:17. Capitoland invited "all employees and any of their family, their spouses, or their children." R. 68-65:3-4. Capitoland prohibited its single employees from attending with their partners; but married employees could attend with theirs. R. 68-34:7-21.

Sandoval asked Van Rossum if she could bring her partner to the party. R. 66-32:20-33:2; R. 67-20:1-12. In response, Van Rossum asked Sandoval whether she and her partner were married. R. 66-32:14-18. Sandoval replied that she and her partner were living together and they were "pretty much" married. *Id.* Van Rossum then told Sandoval "she couldn't bring her boyfriend to the party because it's for spouses." R. 67-21:1-3. In this way, Sandoval was treated adversely—she was not

allowed to attend the party with her partner solely because her marital status was: "single."

Termination of Employment based on Protected Class

Van Rossum told Stauffacher that Sandoval was living with her partner. R. 67-20:14-21:7. On February 16, 2015, Van Rossum asked to meet with Sandoval. R. 66-38:22-39:9; R. 67-21:14-18. In that meeting, Van Rossum laid down an ultimatum: "[i]f you get married, you can continue here. You can continue working. Otherwise, you can't be here anymore." R. 65-75:19-23.

Van Rossum reiterated Capitoland's policy, telling Sandoval, "we can't have employees living with someone of the opposite sex outside of marriage." R. 67-22:1-3. The result of Van Rossum's ultimatum was clear to Sandoval: she "was already fired" and "couldn't go back to work" because she was living with someone of the opposite sex outside of marriage. R. 65-44:13-46:17; R. 65-75:19-76:10. Sandoval felt that forcing someone to get married "is not something that somebody should require me to do for me to be able to get [or keep] a job." R. 65-21:8-17.

Van Rossum admitted that during the conversation she "got the feeling that [Sandoval] wouldn't budge," i.e., Sandoval would not change her single marital status. R. 66-52:22-53:17. Van Rossum ended the conversation by telling Sandoval, "I'll make sure to talk to [Stauffacher]… then we can discuss this a little bit more." R. 66-40:12-14. Sandoval believed this meant Van Rossum would talk to Stauffacher to see *if he would allow Sandoval to return to work* at Capitoland. R. 65-45:12-47:5. Indeed, Van Rossum followed up this meeting—a meeting she initiated at the end of Sandoval's shift—with an email requesting a

different employee replace Sandoval on the schedule, validating that Sandoval was not welcome to return. R. 62-5; R. 66-41:8-43:5.

After hearing about Sandoval's meeting with Van Rossum, Stauffacher did not explore any options to keep a good employee; "[he] was on to dealing with other issues" and he *never* reached out to Sandoval. R. 68-36:11-40:12; R. 68-60:11-63:6.

Four days later, on February 20, 2015, Sandoval returned to Capitoland to drop off her key card. R. 67-24:19-25:8. Sandoval asked Van Rossum if she had spoken to Stauffacher—hoping maybe he reconsidered Capitoland's position that she could not return to work while single. R. 65-19:20-22:6. Van Rossum reiterated the company policy: as a single person enjoying the same lifestyle as a married employee, Sandoval could not return to work. *Id*. Van Rossum "stressed to [Sandoval] that [Capitoland] cannot have employees working there if they're living with someone outside of marriage of the opposite sex." R. 67-26:12-13. Sandoval recorded this conversation. Later at the municipal hearing, the Hearing Examiner repeatedly refused to listen to the recording, and refused to admit either the recording or a transcript of the recording as evidence to support Sandoval's claim and credibility. R. 65-18:17-19:3; R. 65-19:5-16; R. 65-19:20-21:6; R. 67-27:16-29:1.

Having been forced to leave, Sandoval maintains two jobs with different schedules just to make ends meet. R. 65-24:9-26. Worse, she loses most of the time she had previously been able to spend with her daughter. R. 65-26:3-7. As a result, Sandoval has sought therapy with her daughter to help with the stress caused by Capitoland's discrimination. R. 65-27.

PROCEDURAL HISTORY
Initial Determination

Sandoval filed a fill-in-the-blank discrimination complaint form with the Madison Equal Opportunities Commission ("MEOC") on March 9, 2015. R. 62-2-4; A-App. 3-5. She alleged Capitoland discriminated against her based on her marital status and retaliated against her for opposing a required practice. *Id*. After investigating, the MEOC issued a report concluding there was probable cause that Capitoland violated the Madison Equal Opportunities Ordinance ("MEOO") by treating Sandoval adversely and terminating her because of her marital status, and in retaliation for opposing Capitoland's policy or practice. R. 91-3, 6, 9; R. 95-3; A-App. 7, 10, 13; A-App. 6. Notably, the complaint, the investigation,[1] and the written determination of probable cause each provided Capitoland with formal, written notice of the actions Sandoval alleged were discriminatory. *Id*. A Notice of Hearing identified one of the issues this way: "Did the Respondent discriminate against the Complainant in her terms and conditions of employment on the basis of her marital status by requiring her to sign a Statement of Affirmation with respect to cohabitation?" R. 45-2. During the pre-hearing conference in June 2016, the Hearing Examiner formally stated that one issue to be tried was: "[D]id the Respondent discriminate against the Complainant on the basis of her...race, sex, national origin/ancestry in the terms and conditions of employment...by **applying** [the Statement of Affirmation]?" R. 38-10:18-11:2 (emphasis added).

[1] The investigation provided formal written notice because the municipal investigator sent written questions to Sandoval, and a copy of her written responses, noting that she was excluded from the Christmas party, were provided to Capitoland.

Trial with Hearing Examiner

In January 2017, Sandoval's case was tried; Sandoval, Van Rossum, and Stauffacher all testified and were cross-examined regarding the Statement, the Christmas party, and the termination. R. 65-1-68-68. Sandoval and Van Rossum specifically testified to the recorded conversation that occurred on February 20, 2015. R. 65-19:5-20:3; R. 67-27:13-29:22. Prior to trial, the parties *exchanged all potential exhibits*, and could have filed motions to exclude any that were objectionable. Sandoval's counsel attempted to admit the recording of the conversation and the transcript of the recording on four separate occasions. R. 65-18:17-19:3; R. 65-19:5-16; R. 65-19:20-21:6; R. 67-27:16-29:1. Capitoland objected to admission of the recording in any form. *Id.* Without explanation, the Hearing Examiner excluded the recording of Van Rossum and Sandoval discussing that she could not return to work for Capitoland unless she got married. *Id.* When he wrote his decision two years later—without the benefit of the recording—the Hearing Examiner concluded that Van Rossum's version of the termination conversation was more credible. R. 78-10-17; A-App. 23-30.

Sandoval filed a post-trial brief and proposed findings presenting her arguments, and Capitoland responded. R. 73-1-17; R. 74-1-30; R. 75-1-5; R. 76-1-23; R. 77-1-27. After briefing, the Hearing Examiner issued a decision on May 13, 2019. R. 78-1-17; A-App. 14-30. He dismissed three of Sandoval's arguments without reaching the merits, having erroneously concluded that Capitoland lacked notice. R. 78-7-10; A-App. 20-23. On the remaining issues, the Hearing Examiner concluded that Capitoland did not discriminate or retaliate against Sandoval in violation of the MEOO. R. 78-10-17; A-App. 23-30.

Final Determination by the MEOC

Sandoval requested the full MEOC to review the decision. R. 80-1-5. Again, Sandoval filed detailed arguments. R. 86-1-31. Capitoland had another opportunity to respond. R. 87-2-28. Without any additional explanation of how it applied the law to the facts, the MEOC summarily affirmed the Hearing Examiner's decisions. R. 89-1-2; A-App. 31-32. Sandoval filed a petition to the Circuit Court for a writ of certiorari.

Circuit Court Proceedings and Decision

Sandoval, Capitoland, and the MEOC all filed briefs with the court, detailing their respective arguments. R. 92-1-25; R. 93-1-23; R. 94-1-16. Sandoval laid out errors in the Hearing Examiner's decision, while Capitoland had another opportunity to respond to her arguments. R. 92-13-24; R. 93-11-23. The parties gave oral arguments, and the court orally affirmed the Hearing Examiner's ruling. R. 97-1; R. 102-1-47; A-App. 33-79. While the Circuit Court gave some explanation for its ruling—more than the MEOC—it failed to engage with several of Sandoval's arguments, affirmed the Hearing Examiner's evidentiary exclusion without explanation, and erroneously conflated several different arguments. R. 102-43:3-11. Sandoval now brings this appeal and asks this Court to reverse the MEOC's decision.

ARGUMENT

I. This Court reviews questions of law independently.

The purpose of certiorari review of municipal and administrative hearings and decisions is to ensure such hearings and decisions, which involve an individual's constitutionally protected rights to due process under the Fourteenth Amendment to the U. S. Constitution, are constitutionally sufficient. *Guerrero v. City of Kenosha Hous. Auth.*, 2011 WI App 138, ¶ 8, 337 Wis. 2d 484, 805 N.W.2d 127; Wis. Stats. §§ 68.001, 68.13(1). On certiorari review, this Court examines (1) whether the municipality kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable; and (4) whether the evidence of record substantiates its decision. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 796 N.W.2d 411. This Court reviews the factual findings and legal conclusions of the underlying municipality, not the circuit court. *Id.*

The first two prongs of review are questions of law that this Court reviews independently from determinations rendered by the municipality or circuit court. *Id,* ¶ 54. Though the municipality's decision is accorded a presumption of correctness under the second two prongs, this presumption does not eviscerate meaningful review. *Id.,* ¶ 29. A municipality's decision will be affirmed on review only if supported by substantial evidence. *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶ 41, 362 Wis. 2d 290, 865 N.W.2d 162. Under this standard, this Court takes into account all evidence in the record and determines whether it is of such convincing power that reasonable persons could reach the same decision as the municipality. *Id.,* ¶ 90. In

its evaluation, this Court considers whether the evidence, viewed in context, supports the municipality's decision. *Id.,* ¶ 45. A court cannot determine that the municipality's decision was supported by the evidence if, based on the record as a whole, the municipality uses statements taken out of context, which are completely explained by other testimony, to support its decision. *Id.,* ¶ 47. Thus, this Court is not relieved from the responsibility of determining whether the agency's ultimate decision is based on, and reasoned from, the facts. *Id*.

This Court may affirm, reverse, or remand for further proceedings consistent with the court's decision. *Guerrero*, 2011 WI App 138, ¶ 8; Wis. Stat. § 68.13(1). If a reviewing court finds a municipality failed to act according to law by violating a complainant's due process rights, it can reverse the municipality's decision and remand it to the agency for a new hearing. *Guerrero*, 2011 WI App 138, ¶ 9. However, outright reversal is appropriate when the due process violation cannot be cured on remand, such as when the evidence failed to support the municipality's decision. *Hartland Sportsmen's Club, Inc. v. City of Delafield*, 2020 WI App 44, ¶ 20, 393 Wis. 2d 496, 947 N.W.2d 214; *Guerrero*, 2011 WI App 138, ¶ 12 n.5.

Reversal is appropriate in this case for three reasons: (1) the MEOC failed to act according to law when it misinterpreted and misapplied the law; (2) the record does not substantiate the MEOC's decision; and (3) the MEOC violated Sandoval's due process rights.

II. The MEOC erred as a matter of law in finding that Capitoland did not discriminate against Sandoval when it discharged her due to her marital status.

To determine whether the MEOC acted according to law requires a two-step analysis. First, this Court must construe the extent and purpose of the MEOO. Second, it must apply the ordinance to the facts. *Federated Rural Elec. Ins. Co. v. Kessler*, 131 Wis. 2d 189, 206, 388 N.W.2d 553 (1986). This Court resolves any questions of law independently from the municipality's determinations. *Id.*; *Ottman*, 2011 WI 18, ¶ 54. Moreover, the question of whether the facts in a particular case fulfill a particular legal standard is a question of law. *Kessler,* 131 Wis. 2d at 206 citing *Department of Revenue v. Exxon Corp.*, 90 Wis.2d 700, 713, 281 N.W.2d 94 (1979); *Hennekens v. River Falls Pol. Fire Comm.*, 124 Wis.2d 413, 424, 369 N.W.2d 670 (1985).

As detailed in this brief and the record, Capitoland pressured Sandoval to marry, telling her that if she was married she could attend a Christmas party with her partner, and if she got married she could continue working for Capitoland. The MEOC failed to act according to law when it disregarded controlling Wisconsin Supreme Court precedent which interpreted the MEOO and explicitly held that it prohibits employers from pressuring an employee to marry. *Kessler,* 131 Wis. 2d at 212-3.

A. The MEOO protects single persons from being pressured to marry by their employers.

The Wisconsin Supreme Court interpreted the extent and purpose of the MEOO's marital status protection and held that it fully

encompasses the "very personal decision to marry, to remain single, or to divorce." *Kessler*, 131 Wis. 2d at 212. The first step in evaluating whether the MEOC erred is to interpret the applicable ordinance; here, that is the MEOO. MGO 39.03.[2] Ordinarily, this Court would need to analyze whether the MEOC's interpretation of the ordinance is entitled to any deference. However, that analysis is unnecessary since the MEOO's marital status protection has already been interpreted by the Wisconsin Supreme Court, and its interpretation is binding.[3] The high court's interpretation could not be more apt:

"An employer's rule that pressures a person to make a specific choice about marriage intrudes into an area where the Madison Ordinance prohibits employer interference." *Kessler*, 131 Wis. 2d at 212. "The employee can make whatever choices regarding his marital status that he wishes without compulsion from the employer. … He can remain single." *Id.* at 213. "We conclude that the public policy of the Madison equal opportunities ordinance forbids intrusion into the decision of an employee to marry, divorce or remain single." *Id.* The Wisconsin Supreme Court's interpretation of the MEOO—that an employer cannot have a rule that pressures a person to make a specific choice about marriage—is binding and the MEOC erred when it ruled otherwise.

An employer violates the MEOO by discharging or terminating any individual because of their protected class membership. MGO 39.03(8)(a). One protected class is marital status, which includes being married, separated, divorced, widowed, or single. MGO 39.03(2)(y). The

[2] Specifically, MGO 39.03(8)(a) and MGO 39.03(2)(y).

[3] If the Wisconsin Supreme Court's interpretation of the MEOO was not binding , it would be contrary to *stare decisis*, defeat the purpose of judicial review, and allow the MEOC to disregard the high court.

MEOC's decision should be reversed because Capitoland discriminated against Sandoval when it discharged her because her marital status was single.

B. Under the MEOO, being single is a protected marital status; the MEOO prohibits treating a single employee adversely for living with their partner when married employees are permitted to live with theirs.

Even if the Wisconsin Supreme Court's interpretation of the MEOO in *Kessler* is not binding, the MEOO's text and purpose independently show that the MEOC did not act according to law when it allowed Capitoland to pressure Sandoval to marry, when it denied her request to bring her partner to the company party, and when it terminated her because she refused to marry. Capitoland's rule allows married employees to live with their partners but forbids single employees from doing the same. Capitoland's rule allowed married employees to bring a partner to the company Christmas party, but it denied the same benefit to single employees. The text of the MEOO reveals that a person's marital status is a protected class that prohibits employers from treating single employees adversely when they engage in the same conduct as married employees.

The first step in interpreting a law is to give the text its plain and ordinary meaning. *Baldwin v. Milwaukee Cty.,* 2018 WI App 29, ¶ 18, 382 Wis. 2d 145, 913 N.W.2d 194. The MEOO lists "single" in its definition of "marital status." MGO 39.03(2)(y). "Single" in its ordinary sense is widely understood to include being unmarried. The MEOO thus

protects an individual from discrimination based on their marital status, whether they are, or choose to remain, single.

The text reveals that the list of what "marital status" protects is expansive, not exhaustive. "Includes" is a term of expansion, indicating the following list is instructive, not exhaustive. *In re Chezron M.,* 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95. Under the MEOO, "marital status *includes* being married, separated, divorced, widowed, or single." MGO 39.03(2)(y) (emphasis added).

The MEOO contains no exceptions to its prohibition against marital status discrimination. When legislators *specifically list* exceptions to a law, they intend to exclude any other exceptions. *Benson v. City of Madison*, 2017 WI 65, ¶ 32, 376 Wis. 2d 35, 897 N.W.2d 16. The MEOO specifically lists several exceptions to its prohibitions on discrimination, but none related to marital status. MGO 39.03(8). Because inclusion of one thing implies exclusion of another, the drafters of the MEOO intended to exclude exceptions to the prohibition on marital status discrimination. Nothing in the text suggests the MEOO permits an employer to discriminate against a single person for living with their partner, when married persons are permitted to do so.

Next, the ordinance states both a purpose and intent to provide broad protections. Civil rights protections are remedial and must be construed broadly. *City of Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364, 373, 243 N.W.2d 422 (1976). The MEOO's purpose is "to foster and enforce to the fullest extent" the legal protections that ensure equal opportunities in employment. MGO 39.03(1). Such a policy *mandates* a liberal construction. It would contradict the MEOO's explicit policy purpose, and directly contravene the requirement to construe civil rights

protections broadly, if this Court interpreted the law in a way that would allow an employer to exclude and terminate an employee because she is single and living exactly as a married employee. *See Braatz v. Lab. & Indus. Rev. Comm'n*, 174 Wis. 2d 286, 295, 496 N.W.2d 597 (1993) (holding that limiting the reach of a prohibition on marital status discrimination is *not* a liberal construction).

Further, nothing in prior Wisconsin Supreme Court case law precludes this Court from interpreting the MEOO to protect a single employee from discrimination for living with their partner, when married partners are permitted to live together. Three prior Wisconsin Supreme Court cases address "marital status" discrimination as it relates to conduct. *Kessler*, 131 Wis. 2d 189; *Cty. of Dane v. Norman*, 174 Wis. 2d 683, 497 N.W.2d 714 (1993); *Braatz*, 174 Wis. 2d 286. In *Kessler*, the Court determined that an employer's rule prohibiting an employee from engaging in extramarital affairs was not discriminatory because "marital status was irrelevant," since that rule applied, "whether [the employee] had been **married**, separated, divorced, widowed **or single**." *Kessler*, 131 Wis. 2d at 208 (emphasis added). In *Norman*, the Court held that a lessor's policy to not rent to unrelated single people seeking to live together was triggered by "conduct," not their "marital status," and thus, was not marital status discrimination. *Norman*, 174 Wis. 2d at 688. However, *Norman* is inapplicable here because the MEOO was later amended, in 1998, to expand protection to individuals from discrimination due to their association. MGO 39.03(9)(c). That is, under the current version of the MEOO, discriminating against a person for the conduct of associating with—e.g. living with—a person based on their "marital status" is unlawful. *Id*. Lastly, in *Braatz*, the Court determined

that a school district's insurance policy discriminated based on marital status. *Braatz*, 174 Wis. 2d at 292. The Court reasoned that only married employees who engaged in the conduct of acquiring duplicate insurance coverage were forced to choose between the district's policy and their spouse's policy. *Id*. Conversely, single employees who engaged in such conduct were not forced to make such a choice. *Id*. Because the employees' status determined the permissibility of the conduct, the Court found the discrimination to be based on status, not conduct. *Id*. Thus, Wisconsin case law supports the interpretation that the MEOO's "marital status" protections encompass protecting a single employee from discrimination for living with their partner, when married partners are permitted to live with theirs.

The United States Supreme Court has similarly held that when the permissibility of the individual's conduct relates to that individual's protected status, that *is* status discrimination. *Loving v. Virginia,* 388 U.S. 1, 11 (1967) (holding that Virginia's statutes prohibiting interracial marriage proscribed generally accepted conduct only when engaged in by members of different races and was thus race discrimination); *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250 (1989) (superseded on other grounds) (finding that employer action based on the belief that conduct considered acceptable in a man was unacceptable in a woman was sex discrimination); *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270 (1993) ("a tax on yarmulkes is a tax on Jews"); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (finding that once a law proscribes conduct closely correlated with a status, the law is targeted at more than conduct; it is directed toward an individual's status); *Christian Legal Soc'y v. Martinez,* 561 U.S. 661, 689 (2010)

(upholding that where conduct relates to status, conduct and status cannot be disentangled); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that prohibiting same-sex couples from engaging in the same conduct, marriage, as opposite-sex couples, prevents those individuals from enjoying equal protection under the law because of their status); *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741–42 (2020) (determining that if an employer fires a male employee for being attracted to other males, it discriminates against the employee for conduct it tolerates in a female employee, which is sex discrimination). Similarly, in this case, a rule against single people living with their partners that does not apply to married people, *is,* marital status discrimination.

In sum, interpreting "marital status" discrimination under the MEOO to encompass discriminating against a single employee for living with their partner, when married partners are permitted to live together, is not only proper, but also compelled by case law. The MEOC failed to act according to law by concluding otherwise.

C. Sandoval established a *prima facie* case of discrimination on the basis of her marital status.

Sandoval established a *prima facie* case of discrimination based on her marital status. However, contrary to the record and his own findings of fact, the Hearing Examiner determined that Capitoland "did not discriminate against [Sandoval] on any basis protected by [Madison General Ordinance Sec. 39.03]." R. 78-5; A-App. 18. The Hearing Examiner failed to act according to law when making this determination. Not only did the Hearing Examiner incorrectly apply the law to the facts

of Sandoval's case, but the Examiner also used testimony taken out of context to support his position. Thus, the record fails to substantiate the Hearing Examiner's decision. *See Oneida Seven Generations Corp.*, 2015 WI 50, ¶ 47. As such, this Court should reverse the MEOC's ruling and find for Sandoval on her discrimination claims.

In order to meet the *prima facie* standard for a case of discrimination based on marital status, Sandoval must establish that she is "1) a member of the protected class as defined by the Madison General Ordinance Sec. 39.03, 2) that she was performing her job satisfactorily, 3) that she suffered an adverse employment action and 4) that there is a causal connection between [her] protected class and the adverse action suffered." *Syverud v. Journey Mental Health Center*, MEOC Case No. 20142170 at 4 (Ex. Dec. 8/23/2018). Sandoval established all those elements. And, because Capitoland failed to provide legitimate, nondiscriminatory reasons for its conduct, the Hearing Examiner erred in ruling against Sandoval. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

1. Sandoval is a member of the protected class.

Sandoval is a member of the protected class at issue. The MEOO lists marital status as a protected class. MGO 39.03(2)(mm). Marital status "includes being married, separated, divorced, widowed, or single." MGO 39.03(2)(y). Sandoval is single. R. 65-28:11-14. Therefore, Sandoval is a member of the protected class.

2. Sandoval was performing her job satisfactorily.

Sandoval was performing her cooking job satisfactorily. Her performance review noted: "Overall Sandra is doing well. The Kitchen is kept clean and she has a great attitude. We are happy to have her on our team." R. 61-40. Sandoval never received a disciplinary warning while employed at Capitoland. R. 67-16:18-17:4. Nor did Capitoland ever see Sandoval engage in any acts or conduct it would consider immoral. R. 68-50:1-4. In fact, Capitoland had "no complaints at all" about Sandoval; "only good things were always said about her." R. 68-32:14-16. Clearly, Sandoval was performing her job satisfactorily.

3. Capitoland treated Sandoval adversely: she could not bring her partner to the company Christmas party, and she was terminated or constructively discharged.

Sandoval suffered adverse employment actions when Capitoland excluded her partner from the Christmas party,[4] and when it terminated or constructively discharged her. Capitoland treated Sandoval adversely because she was single.

Capitoland terminated Sandoval's employment due to her insistence that Capitoland treat her the same as it treats married employees. Van Rossum told Sandoval, "If you get married, you can continue here. You can continue working. Otherwise, you can't be here anymore." R. 65-75:19-23. Van Rossum reiterated, "[W]e can't have employees living with someone of the opposite sex outside of marriage."

[4] See Section IV.A.1.

R. 67-22:1-3. The result was clear to Sandoval: she "was already fired" and "couldn't go back to work" because she was doing what Capitoland allowed married employees to do: living with someone of the opposite sex. R. 65-44:18-46:17; R. 65-75:19-76:5. Sandoval reasonably felt pressured to marry and, since she had chosen not to marry, concluded that she had already been terminated.

If this Court concludes Sandoval was not terminated outright due to her single marital status, then it should find that she was constructively discharged. To establish constructive discharge, an employee must prove: (1) The "employee's working conditions [were] so intolerable that a reasonable person in the employee's position would have been compelled to resign;" (2) the intolerable conditions caused the employee's resignation; and (3) "the employer must have either deliberately created the intolerable working conditions…or, at a minimum, must have 'knowingly permitted [such] working conditions.'" *Tennyson v. School Dist. of Menomonie Area*, 2000 WI App 21, ¶ 22, 232 Wis. 2d 267, 606 N.W.2d 594. When Wisconsin courts analyze a claim of constructive discharge, they turn to federal case law. *Strozinsky v. Sch. Dist.,* 2000 WI 97, ¶ 75, 237 Wis. 2d 19, 614 N.W.2d 443.

In assessing a constructive discharge claim, "it is necessary to examine the conditions imposed on the employee, *not* the employer's state of mind." *Tennyson*, 2000 WI App 21, ¶ 23. **An employee need not prove that the employer intended to compel the employee to resign**. *Id.* An employee must only prove the employer's actions were deliberate. *Id.*

Ultimatums which impose intolerable conditions on employees can constitute constructive discharges. An employee being told they must

"quit or be fired" is a common example. *Perret v. Nationwide Mut. Ins. Co.*, 770 F.3d 336, 338-39 (5th Cir. 2014). An employee can also be constructively discharged if they are told to "resign or be arrested." *Ruggles v. Greco*, No. 14-1021, 2015 U.S. Dist. LEXIS 45333 at 21-22 (E.D. La. Apr. 7, 2015). Even an ultimatum that requires an employee to miss a regularly scheduled physical therapy appointment can constitute a constructive discharge. *McGregor v. United Healthcare Servs.*, No. CIVIL ACTION H-09-2340. 2010 U.S. Dist. LEXIS 79521 at 9-10 (S.D. Tex. Aug. 6, 2010).

Capitoland made an intolerable demand. It gave Sandoval an ultimatum: to keep her job, she had to either (a) cease living with her partner, or (b) get married. The Hearing Examiner ignored the impact of Capitoland's ultimatum, and erroneously focused on Sandoval's job satisfaction prior to the intolerable demand. R. 78-11; A-App. 24.

By relying on Sandoval's working conditions prior to the ultimatum to support a finding that Sandoval did not face intolerable conditions, the Hearing Examiner took testimony out of context to support his decision. *Id.* Testimony about Sandoval's positive job satisfaction *prior to the ultimatum* is irrelevant to the intolerability of her working conditions after the fact. For example, the fact that an employee enjoyed their job—until they were abused by their boss—does not make that abuse any less intolerable.

The Hearing Examiner's limited analysis of constructive discharge was severely deficient. His failure to apply the law on intolerable conditions is particularly perplexing given his finding that during her February 16 meeting with Sandoval, "Van Rossum indicated that if [Sandoval] wished to continue to work for [Capitoland], [Sandoval] would

either need to get married or find some other way to adhere to the Statement of Affirmation." R. 78-3; A-App. 16. This finding of fact is a clear articulation of the intolerable working conditions imposed on Sandoval.

The Hearing Examiner misapplied the law and took testimony out of context to reject Sandoval's constructive discharge argument. He mischaracterized Sandoval's claim, wrongly suggesting that it relied on a *retroactive* argument that "it would have been futile" for the parties to try to work out a resolution to Sandoval's non-compliance with the Statement. R. 78-13; A-App. 26. The Examiner incorrectly opined that Sandoval's argument would require him to find that "Van Rossum and Stauffacher were testifying less than truthfully" that "they wished the opportunity to explore possible solutions to the issue." *Id.* However, Sandoval's argument in no way relies on the truthfulness of Van Rossum's or Stauffacher's testimony about their thoughts regarding hypothetical subsequent discussions. Indeed, such thoughts (the "employer's state of mind") are irrelevant to the elements of constructive discharge. *Tennyson*, 2000 WI App 21, ¶ 23. The Hearing Examiner's conclusion is thus not supported by the record and must be reversed.

Constructive discharge analysis turns on how a reasonable person would respond to certain working conditions. *Id*. What matters is that Capitoland's deliberate actions imposed intolerable conditions on Sandoval. Such conditions must be analyzed objectively, without considering Van Rossum's and Stauffacher's internal mindsets. *See Id*.

An objective analysis of the record reveals that a reasonable person in Sandoval's place would have understood that their employment was conditioned on strict compliance with the Statement's language. Van

Rossum presented Sandoval with the policy, told Sandoval that she was violating the policy by living with her partner, and said that to keep her job, Sandoval had to start adhering to it. R. 51-43:11-14; R. 78-3; R. 78-14; A-App. 16; A-App. 27. Sandoval reasonably understood that her employment was conditioned on such compliance.

The record shows that Sandoval's understanding was reasonable and accurate. Van Rossum conceded that Sandoval's only options were "get married or move out." R. 51-44:5-8. And, the Hearing Examiner found that it was clear that Capitoland "at a minimum...would have expected [Sandoval] and her unmarried partner to either marry or...seek separate abodes." R. 78-14; A-App. 27.

Sandoval thus correctly understood that to comply with Capitoland's policy she had to either get married or dissolve her household. The Statement's language explicitly prohibited "co-habitation with members of the opposite gender outside of marriage." R. 61-15. Faced with Capitoland's **application** of the Statement's language, and her supervisor repeatedly telling her that her employment was conditioned on compliance with it, Sandoval reasonably understood that she faced an ultimatum. To keep her job, she either had to get married, or dissolve her familial household. Capitoland's application of its Statement made that choice a *condition of her employment*. Because both the ultimatum's options were intolerable, the conditions imposed by the ultimatum as a whole were therefore also intolerable.

The first option—cease living with her partner—required Sandoval to dissolve her familial household in order to keep her job. Such a demand is clearly intolerable. The United States Supreme Court has long recognized that "the institution of the family is deeply rooted in this

Nation's history and tradition." *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-4 (1977). In such a society, it is hard to imagine a condition more intolerable than being forced to separate from one's own family. Such a demand not only offends fundamental American values, but it also runs counter to the innate human need for love and social belonging.

Cohabitation is a particularly central characteristic of familial bonds. *See* David Kertzer, *Household History and Sociological Theory*, 17 Annual Review of Sociology, 155 (1991). And, while cohabitation based on blood relation or marriage historically enjoyed elevated respect over other forms of cohabitation, such preferences have wisely been abandoned over time. The United States Supreme Court has recognized this evolution, finding that our respect for familial cohabitation "is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family…Especially in times of adversity...the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore*, 431 U.S. at 504-505. "Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State." *Id.* at 505-06. This respect for familial bonds that do not conform exactly to the traditional nuclear family has continued to evolve in step with how people choose to relate to those they love. The "Modern Family" is not limited to married partners and their children. Whether to seek mutual sustenance, maintain a secure home life, or serve other needs, unmarried parents today are cohabitating in significant numbers. In 1997, the first year the Census Bureau collected cohabitation data, 20 percent of unmarried parents were cohabitating. Gretchen Livingston, *The Changing Profile*

of Unmarried Parents, Pew Research Center (2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents. That share increased to **35 percent** as of 2017. *Id.*

Embodying this evolution, Sandoval chose to live with her partner, considering him part of her family. R. 65-3:3-23. Considering the familial nature of Sandoval's relationship with her partner, and the social context wherein unmarried households are treasured just as those based on marriage, it is clear that pressuring Sandoval to cease living with her partner is an intolerable demand.

Against a national historical backdrop in which personal choice in family life matters is recognized as sacrosanct, amidst a decades-long shift in cohabitation rates, and in the face of Sandoval, simply trying to live her family life as she desired, Capitoland's demand that Sandoval dissolve her family and stop living with her partner to keep her job was quite clearly intolerable. Any reasonable employee faced with the dissolution of their family or the loss of their job would be compelled to resign.

The second option—forced marriage—required Sandoval to give up control over one of the most deeply personal aspects of her life. To be forced unwillingly into marriage is plainly intolerable.

Marriage, like many close relationships, derives much of its value from the mutual trust that spouses have in one another—a trust that is rooted in the belief that each partner has *freely chosen* to commit themselves to the other on their own terms. The Wisconsin Supreme Court explicitly held that an employee's decision to marry should be made by the employee, not their employer: "We conclude...the Madison equal opportunities ordinance forbids intrusion into the decision of an

employee to marry, divorce or remain single." *Kessler,* 131 Wis. 2d at 213. "An employer's rule that pressures a person to make a specific choice about marriage intrudes into an area where the Madison Ordinance prohibits employer interference." *Id*. at 212. Such a recognition underscores the centrality of *free choice* to the institution of marriage. This freedom, and thus so much of what makes marriage a valued institution, is robbed by an employer who forces an employee to marry on the employer's terms. To be forced to sacrifice one's free will in making one of life's most impactful personal choices is intolerable.

In addition to robbing one of Sandoval's most fundamental freedoms, marriage at Capitoland's behest could put Sandoval at a higher risk of isolation, domestic violence, and sexual assault. *See* Bushra Rauf et al., *Forced Marriage: Implications for Mental Health and Intellectual Disability Services*, 19 Advances in Psychiatric Treatment, 135 (2013). To be forced to incur such risks is intolerable. Indeed, any reasonable employee faced with the intolerable prospect of forced marriage would be compelled to resign.

In sum, Capitoland's ultimatum—to retain your job, either cease living with your partner, or get married—created intolerable working conditions that would have caused a reasonable person in Sandoval's position to feel compelled to resign. There is ample evidence from the record to support such a finding. Sandoval concluded from Capitoland's ultimatum that she "was already fired" and "couldn't go back to work" because she was living with someone of the opposite sex outside of marriage. R. 65-44:18-46:17; R. 65-75:19-76:5. The Hearing Examiner found that this ultimatum came directly from her supervisor, and arose from the application of Capitoland's Statement of Affirmation. R. 78-3;

A-App. 16. Thus, Capitoland created intolerable work conditions through deliberate actions. Therefore, if Sandoval was not terminated outright, she was constructively discharged.

4. A causal connection exists between Sandoval's protected class and the adverse action she suffered.

A causal connection exists between Sandoval's marital status and the adverse employment treatment she suffered. A causal connection exists when an employer imposes any adverse action on an employee based **in part** on their protected status. *Cronk v. Reynolds Transfer & Storage*, MEOC Case No. 20022063 at 4 (Comm. Dec. 3/5/2007; Ex. Dec. 8/29/2006; Comm. Dec. 2/28/2005; Ex. Dec. 9/13/2004); *Bostock*, 140 S. Ct. at 1741. The guidance from recent federal decisions is clear: if changing the employee's protected status would yield a different result by the employer, then a causal connection exists and the employer violated the law.[5] *Id*. This holds true even when multiple causes for the action exist, so long as the employee's protected status played a role in the decision. *Id.* at 1741-42.

Consider Justice Gorsuch's elucidating explanation: an employer has two employees, both attracted to men, and both materially identical in all respects except for the fact that one employee is a man, and the other, a woman. *Id.* at 1741–42, 1747. If the employer terminates the male employee for being attracted to men, the employer discriminates

[5] Wisconsin courts look to federal decisions for guidance in applying antidiscrimination laws. *E.g., Syverud v. Journey Mental Health Center*, MEOC Case No. 20142170 at 4 (Ex. Dec. 8/23/2018); *Puetz Motor Sales, Inc. v. Lab. & Indus. Rev. Comm'n*, 126 Wis. 2d 168, 172, 376 N.W.2d 372 (Ct. App. 1985).

against the employee for *conduct* it tolerates in its female employee. *Id*. Even though the employer fired the employee for engaging in certain conduct, the male employee's sex—his protected status—played an impermissible, and unmistakable, role in the decision to terminate, thus establishing a causal connection. *Id*.

Changing Sandoval's protected status would have yielded a different result by Capitoland. Sandoval was treated adversely for being single and living with her partner. Capitoland conceded that if Sandoval was married and living with her partner, making her materially identical in all respects to another employee except for her marital status, it would not have treated her adversely. R. 51-61:2-6. Hence, like the employee in *Bostock*, Capitoland discharged Sandoval for engaging in certain conduct—living *with her partner*—that it tolerates in its married employees. As such, her marital status—her protected status—played a prohibited role in Capitoland's decision, just like the employee in *Bostock*. R. 65-19:20-22:6; R. 65-75:19-23; R. 67-26:12-13. For Sandoval, it is solely her (and her partner's) status as single that explains the disparity in treatment. Thus, it is undeniable that a causal connection exists between Sandoval's marital status and the adverse employment actions Capitoland imposed.

D. Capitoland had no legitimate, nondiscriminatory reasons for its actions.

The burden now shifts to Capitoland to show a legitimate, nondiscriminatory explanation for its actions because Sandoval established a *prima facie* case of discrimination as detailed above. *See McDonnell Douglas Corp.*, 411 U.S. at 802. Even if Capitoland meets its

burden, Sandoval would still prevail by pointing to evidence that the proffered explanation is either not credible or pretextual for an otherwise discriminatory motive. *See Id.* at 804.

Capitoland's explanations for its actions are pretextual, not legitimate, non-discriminatory reasons. Religious corporations are required to comply with antidiscrimination laws unless one of two limited exemptions applies: the ministerial exemptions established by the Wisconsin and United States Supreme Courts, and the creed exemption established by Wis. Stat. § 111.337(2). Neither of those exemptions applies to Sandoval's situation.

The ministerial exemption does not apply because Sandoval's job was not ministerial. She was a cook. Religious corporations can discriminate against—and only against—*ministerial* employees because if they were not allowed to discriminate, the state could interfere with the "selection of spiritual leaders of a religious organization." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 2009 WI 88, ¶63, 320 Wis. 2d 275, 768 N.W.2d 868; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). To determine whether an employee has a ministerial role, courts examine how closely tied the employee's work is to the organization's religious mission. *Coulee Catholic Sch*, 2009 WI 88, ¶49. Courts look for evidence of the employee engaging in any "teaching, evangelizing, church governance, supervision of a religious order, [or] overseeing, leading, or participating in religious rituals, worship, and/or worship services." *Id.*

Sandoval was not a ministerial employee. Her role was confined to cooking and serving food. R. 78-2; A-App. 15. She was not responsible for teaching, evangelizing, supervision of rituals, or worship services. *Id.*

Cooking was in no way central to Capitoland's religious mission. Therefore, Sandoval does not fall under the ministerial exemption.

The creed exemption also does not apply to Sandoval. Her claim is for discrimination based on marital status—not on creed. While religious organizations are allowed to "give preference to an applicant or employee who adheres to the religious association's creed," this ability is limited and does not justify Capitoland's discrimination. Wis. Stat. § 111.337(2)(am). This "very limited exemption" allows religious employers to give "preference in employment to members of their own religion." *Sacred Heart Sch. Bd. v. Labor & Indus. Review Comm'n*, 157 Wis. 2d 638, 643, 460 N.W.2d 430 (Ct. App. 1990). "[T]he exemption **does not permit** religious employers to practice **prohibited forms of discrimination**." *Id.*(emphasis added). One such prohibited form of discrimination is "[a]n employer's rule that pressures a person to make a specific choice about marriage." *Kessler*, 131 Wis. 2d at 212. Moreover, like the ministerial exemption, the creed exemption only applies to jobs that are "clearly related to the religious teachings and beliefs of the religious association." Wis. Stat. § 111.337(2)(am). Thus, any argument that the creed exemption is a legitimate reason for Capitoland's actions fails for the same reasons as the ministerial exemption.

Capitoland can discriminate against ministers and teachers, but not against cooks and janitors. Sandoval was a cook. Sandoval established a *prima facie* case of discrimination, and the burden shifted to Capitoland. It failed to establish any legitimate, nondiscriminatory explanation for pressuring Sandoval to marry, and for denying her the same benefits it provided to married employees. Because Capitoland

failed to meet its burden, this Court must conclude that Capitoland discriminated against Sandoval, and reverse the MEOC's decision.

Ultimately, this Court need not resolve this issue, because it must reverse the lower decision due to the erroneous exclusion of relevant evidence detailed below.

III. The Hearing Examiner violated Sandoval's due process rights by excluding relevant evidence.

The Hearing Examiner failed to act according to law when he excluded relevant evidence: the recording of the February 20, 2015 conversation between Sandoval and Van Rossum. By failing to admit this relevant evidence, as required to ensure the fundamental fairness of administrative proceedings, the Hearing Examiner exceeded his authority and violated Sandoval's due process right to be fully heard.

MEOC hearings are governed by the rules of evidence in Wis. Stat. Ch. 227. EOC Rules 9.221[6]. Such proceedings are not "bound by common law or statutory rules of evidence." Wis. Stat. § 227.45(1). Instead, "very relaxed rules" *require* a Hearing Examiner to admit all evidence with "reasonable probative value." *Rutherford v. Labor & Indus. Review Comm'n*, 2008 WI App 66, ¶ 21, 309 Wis. 2d 498, 752 N.W.2d 897. Excluding relevant evidence is a material error in procedure that impairs the fairness of an administrative hearing, violates due process, and requires reversal. *Id*., ¶¶ 24, 25, 29.

[6] Available at https://www.cityofmadison.com/civil-rights/documents/Rules%20of%20the%20EOC.pdf.

When "the fairness of the proceedings...has been impaired by a material error in procedure" the decision must be reversed. Wis. Stat. § 227.57(4). Decisions cannot be made fairly unless "all relevant and material evidence is considered." *Rutherford*, 2008 WI App 66, ¶ 25.

In *Rutherford*, the administrative law judge ("ALJ") in a disability discrimination case excluded relevant records from evidence—evidence that went to the parties' credibility. *Id.* As the court explained:

> In excluding the uncertified copies, the ALJ made no analysis of the factors governing admissibility of evidence in these hearings which are provided by statute. Consequently, the ALJ did not exercise the discretion authorized and as such acted beyond the authority given by the legislature.
>
> We do not express any view on which of the competing opinions may have been the more credible. That is the task of the ALJ. However, that decision can only be made fairly if, as WIS. STAT. § 227.45 requires, *all* relevant and material evidence is considered and evaluated in view of all of the surrounding facts and circumstances.

Id., ¶¶ 24-25 (emphasis original).

Reversal, not remand, is appropriate when due process violations cannot be cured without the admission of new evidence. *See Hartland Sportsmen's Club, Inc.*, 2020 WI App 44, ¶ 14. Thus, this Court must reverse the Hearing Examiner's decision if it concludes that he improperly excluded relevant evidence.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01.

The recording of Sandoval and Van Rossum was directly relevant to Sandoval's claims and credibility. She claimed she was terminated or constructively discharged by Capitoland due to her marital status.

Capitoland claimed she quit. R. 93-8. As explained above in section II.C.3, whether a constructive discharge occurred turns on how a reasonable person would respond to certain working conditions. *Tennyson*, 2000 WI App 21, ¶ 23. Because the recording captured Capitoland reiterating its intolerable ultimatum and how sincerely Sandoval wanted to continue working, it could show that Capitoland prohibited Sandoval from continuing to work because she was single and engaging in the same conduct as married employees. Therefore, it was relevant evidence. Wis. Stat. § 904.01.

Sandoval's purpose in recording the conversation was to "verify that [her] employment was being terminated due to marital status." R. 78-4; A-App. 17. Thus, there was a sufficient foundation that the recording related *directly* to Sandoval's claim she was terminated for being single.

Years after the trial and *without* the benefit of the recording, the Hearing Examiner made a credibility judgement between Sandoval and Van Rossum to determine whether Sandoval was terminated due to her marital status. R. 78-14; A-App. 27. The recording would have corroborated Sandoval's testimony that Capitoland conditioned her continued employment on getting married. R. 65-75:19-23.

The recording is also relevant to determining the merit of Capitoland's claim that Sandoval not returning to work for two days was the cause of her termination. If admitted, the recording would have further demonstrated that Sandoval's marital status—not the allegation that she refused to return to work—was the reason she no longer worked at Capitoland. The tone and manner in which Sandoval and Van Rossum spoke with one another would have helped determine whether

Sandoval's understanding that she had been fired was reasonable. Any statements that Van Rossum made to Sandoval about the state or conditions of her employment would have been relevant in determining whether Sandoval had experienced an adverse employment action *and why*. While both Sandoval and Van Rossum later testified about the conversation, their testimony was two years after the fateful day. The recording would have shed much needed light on the exact state of Sandoval's employment. By excluding the recording which was undeniably relevant to the parties' claims, the Hearing Examiner made an error that requires reversal. *Rutherford*, 2008 WI App 66, ¶¶ 25, 29.

IV. The MEOC violated Sandoval's due process rights by failing to issue a ruling on her claims.

The MEOC failed to act according to law when it failed to issue a ruling on Sandoval's claims that were fully litigated. The MEOC is a forum established to resolve discrimination claims by applying the law to the facts. MGO 39.03(1). By failing to comply with this obligation, the MEOC failed to act according to law. Instead of resolving discrimination claims by applying the law to the facts, the MEOC incorrectly concluded as a matter of law, that it could not apply the law to the facts because notice was not formal enough.

The MEOC must apply the law to the claims made whenever the parties have actual notice, a full hearing, and no prejudice. *Maxson v. Means Servs.*, MEOC Case No. 2783 at 13 (Com. Dec. 11/18/1982). In such cases, the MEOC must issue written findings detailing that (1) the respondent engaged in discrimination and award damages or other remedies for the harm; or that (2) the respondent did not engage in

discrimination and dismiss the Complaint. MGO 39.03(10)(c)(2)(b); MGO 39.03(10)(c)(2)(d). Here, the MEOC did not issue written findings on the merits of three of Sandoval's claims. Rather, the MEOC violated Sandoval's due process right to have her claims decided when it refused to issue written findings on the issues which were actually noticed, fully tried, and fully briefed. Wis. Stat. §§ 68.001, 68.11, 68.12; *Ottman*, 2011 WI 18, ¶16.

A. Actual notice, a full hearing, and no prejudice occurred on the claim that Capitoland discriminatorily prohibited Sandoval from bringing her partner to the corporation's Christmas party.

The MEOC erroneously concluded that it could not apply the law to the facts regarding Sandoval's claim that Capitoland discriminated against her when it prohibited her from bringing her partner to the Christmas party. R. 78-7; A-App. 20. However, actual notice, a full hearing, and no prejudice occurred on this claim.

1. Both parties had actual notice that the issue would be tried.

First, Sandoval filed a complaint alleging Capitoland discriminated against her based on her marital status. R. 62-2-4; A-App. 3-5. Second, the MEOC investigated the facts of Sandoval's general allegations, and in doing so it specifically addressed the Christmas party, and found probable cause that discrimination had occurred. R. 91-3, 6, 9; A-App. 7, 10, 13. Sandoval repeatedly claimed that Capitoland discriminated against her "in the terms and conditions of her

employment" R. 45-2. "Terms and conditions of employment" include the **benefits**, responsibilities, and expectations that define an employment relationship. *See Condition of Employment, Black's Law Dictionary* (11th ed. 2019).

Some employers provide Christmas bonuses, others provide generous paid vacation. Capitoland throws an expensive party where it provides monetary gifts, a surf and turf dinner, and a valuable opportunity to socialize with fellow co-workers. R. 68-65:1-66:17. Capitoland's Christmas party is a **benefit** of employment—employees and their partners receive valuable benefits at the expensive festivities. *Id.* Capitoland spends thousands of dollars each year to provide attendees with a steak and lobster dinner and to provide employees and married partners with gift cards and gas cards. R. 68-34:14-16; R. 68-65:1-66:17. Furthermore, Capitoland employees and their married partners benefit from socializing with their coworkers, which boosts workplace morale. Thus, as a benefit offered to Capitoland employees, the Christmas party is part of Sandoval's "terms and conditions of employment." The issue was formally written in the investigation more than a year before trial, and in the finding of probable cause. R. 95-3; A-App. 6; R. 91-6; A-App. 10.

During the pre-hearing conference in June 2016, the Hearing Examiner formulated the discrimination issues as follows: "[D]id the Respondent discriminate against the Complainant on the basis of her...race, sex, national origin/ancestry in the terms and conditions of employment...**by applying** [the Statement of Affirmation]?" R. 38-10:18-11:2 (emphasis added). Capitoland **applied** its Statement when it told her she could not attend the party with her partner. Sandoval was put

in that position because of her and her partner's marital status. Capitoland excluded Sandoval from bringing her partner to the Christmas party while permitting married employees to bring theirs, thereby discriminating against her in the terms and conditions of her employment. R. 67-21:1-3.

2. The issue was fully heard without prejudice.

The issue was fully heard without prejudice because both parties introduced evidence on the issue at the hearing and briefed the issue after the hearing. Both parties introduced evidence on the issue of whether Capitoland discriminated against Sandoval in the terms and conditions of employment when it prohibited her from attending the annual Christmas party with her partner. Sandoval's opening statement framed Capitoland's refusal to allow Sandoval to attend the Christmas party with her partner as related to the terms and conditions of Sandoval's employment. R. 64-7:22-8:3. Then, the parties elicited testimony from every witness on this issue. R. 65-10:1-11:17; R. 67-20:9-21:3; R. 68-34:7-35:9; R. 68-65:1-66:17. Stauffacher downplayed the benefits that the employees and their partners received from attending the Christmas party together. R. 68-65:1-66:17. He sought to defend Capitoland against Sandoval's claim that Capitoland discriminatorily withheld benefits from employees based on marital status.

Sandoval detailed her argument in her post-trial brief under the section heading "Capitoland violated the EOO when it refused to allow Sandoval to bring her partner to the holiday party." R. 73-13. She also offered proposed findings of fact on the issue. R. 73-4-5 (Facts 23-30). Capitoland responded to Sandoval's argument in its brief under the

section heading "Capitoland treated Complainant the same as every other employee, and was not legally required to invite her boyfriend to the annual Christmas party." R. 76-5-6. Thus, the issue of whether Capitoland discriminated against Sandoval in the terms and conditions of employment when it prohibited her from attending the annual Christmas party with her partner was fully tried.

Capitoland was not prejudiced on this issue. Far from being surprised by this claim or deprived of any opportunity to defend against the Christmas party issue, Capitoland had written notice of it more than a year before the hearing, prepared for it, and responded to it with hearing testimony and post-hearing briefs.

The MEOC should have issued a decision on its merits because actual notice, full hearing, and no prejudice occurred. Wis. Stat. § 68.12; MGO 39.03(10)(c)(2)(b); MGO 39.03(10)(c)(2)(d). Instead, the MEOC violated Sandoval's due process rights by failing to issue a decision applying the law to the fully litigated facts. R. 78-7; A-App. 20. This Court must reverse the MEOC's decision.

B. Actual notice, a full hearing, and no prejudice occurred on the issue of whether Capitoland's Statement of Affirmation is an illegal condition of employment and an illegal notice of employment.

The MEOC dismissed Sandoval's claim that Capitoland's Statement of Affirmation is an illegal condition of employment and an illegal notice of employment. R. 78-7-9; A-App. 20-22. However, actual notice, full hearing, and no prejudice occurred on this issue.

1. Both parties had actual notice that the issue would be tried.

Both parties had actual notice that the issue would be tried because the issue was incorporated in the pre-hearing Amended Notice of Hearing. Issue Nine states: "Did the Respondent discriminate against the Complainant in her terms and conditions of employment on the basis of her marital status by requiring her to sign a Statement of Affirmation with respect to cohabitation?" R. 45-2. When an employer conditions employment on a limitation or specification, the MEOO has made clear that such a condition cannot be based on a protected class. MGO 39.03(8)(a). A "condition of employment" is any qualification or circumstance required to obtain or keep a job. *Condition of Employment, Black's Law Dictionary* (11th ed. 2019). Capitoland refuses to hire any employee unless they first sign the Statement. R. 66-10:2-14; R. 67-8:22-9:2; R. 68-21:3-22:7; R. 68-30:4-6; R. 68-45:21-46:1. Therefore, as a requirement to obtain employment at Capitoland, the Statement *is* a condition of employment.

The MEOO also prohibits employers from printing and publishing notices related to employment that indicate any limitation, specification, or discrimination based on protected class membership. MGO 39.03(8)(e). The finding of probable cause provided written notice: "The Complainant states the [Statement] policy is facially discriminatory." R. 91-6; A-App. 10. The Statement violates the MEOO because an employment policy prohibiting conduct (cohabitation) between single partners of the opposite-sex, but permitting such conduct between married partners, facially discriminates based on marital status. *Braatz*, 174 Wis. 2d at 292. The Statement indicates that Capitoland refuses to

hire unmarried individuals who live with their partners, but will hire married individuals who do the same. R. 61-15; R. 62-14. The Statement further declares that Capitoland will employ unmarried individuals who live with individuals of the *same sex,* but not with individuals of the opposite sex. *Id.* The Statement of Affirmation is thus a discriminatory notice of employment in violation of MGO 39.03(8)(e) that Capitoland imposes as a condition of employment in violation of MGO 39.03(8)(a).

The complaint, findings of probable cause, and Amended Notice of Hearing put Capitoland on actual notice that Sandoval alleged the Statement was a condition of employment, and that its circulation and application was discriminatory. Thus, the parties had actual notice that the issues being tried included whether Capitoland could circulate and condition employment upon the application of its Statement.

2. The issue was fully heard without prejudice.

The issue was fully heard without prejudice because both parties introduced evidence on the issue at the hearing and briefed the issue after the hearing. During the hearing, both parties elicited testimony that left uncontested the fact that the Statement of Affirmation is a condition of employment. R. 66-10:2-14; R. 67-8:22-9:2; R. 68-21:3-22:7; R. 68-30:4-6; R. 68-45:21-46:1. With that fact established, only a question of law remained: whether the Statement is a facially discriminatory condition of employment. This was left for the post-hearing briefing stage.

Both parties fully briefed the issue of whether Capitoland is legally permitted to condition employment on the signing of an illegal notice that indicates any limitation, specification, or discrimination based on

protected class membership. Sandoval detailed her argument in her post-trial brief under the section headings "The Statement of Affirmation Violates the EOO based on Marital Status and Retaliation" and "The Statement of Affirmation Violates the EOO based on Gender and Retaliation." R. 73-11-12. She also offered proposed findings of fact on the issue. R. 73-2-3. Capitoland defended against Sandoval's argument in its reply brief under the section heading "The Statement of Affirmation applies to all employees regardless of marital status and sex and thus is not facially discriminatory." R. 76-2-5.

The issues of whether Capitoland's Statement was an illegal condition of employment and an illegal notice of employment were fully tried. Capitoland was not prejudiced on this issue. Capitoland had written notice of the issues early on; and, Capitoland prepared for it, offering testimony and post-hearing briefs to defend against Sandoval's claims related to the Statement.

The MEOC violated Sandoval's due process rights by failing to issue a decision applying the law to the fully litigated facts. R. 78-7-9; A-App. 20-22. This Court must reverse the MEOC's decision.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the MEOC with directions to enter a judgment against Capitoland for discriminating against Sandoval based upon her marital status and determine appropriate damages.

Respectfully submitted,

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CERTIFICATIONS BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 10,585 words.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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