

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
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Rockville, Maryland 20850

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<sup>1</sup> Throughout the course of this litigation, Ms. Katzman has been identified as Claimant, Complainant, and Petitioner in various documents submitted to and issued by the HRC and OZAH.

## **I. STATEMENT OF THE CASE**

On August 27, 2019, Sheryl Katzman hereinafter referred to as Claimant or Katzman, filed a complaint with the Office of Human Rights (OHR) alleging Paul Eisenhaur, Chairman, Board of Directors and Leisure World Community Corp., hereinafter referred to as Respondent or LWCC, subjected her to unlawful discrimination based on her physical disability and that her insistence on a reasonable accommodation “has given management reason to retaliate against” her by ignoring her “rightful demand” and treating her “in a discriminatory manner.” Dkt. 70.

On August 26, 2021, OHR made a determination finding reasonable grounds to exist “to believe Respondent engaged in unlawful discriminatory actions in violation of the Americans with Disability Act (ADA) and Montgomery County Code, Chapter 27, Article 1, Section 27-12 when Respondent denied Claimant’s request for a reasonable accommodation based on her disability and Respondent further retaliated against her by prohibiting her from taking notes in its public meetings. Dkt. 2. By Order dated October 28, 2022, the Case Review Board of the Montgomery County Commission of Human Rights (MCCHR) referred the above-captioned complaint to OZAH for the purpose of conducting a public hearing under the provisions of Montgomery County law, and thereafter submitting a written Report and Recommendation to the Case Review Board. Dkt. 1.

On December 23, 2022, the Hearing Examiner issued a scheduling order instructing the parties to attend a virtual pre-hearing conference on Wednesday, January 18, 2023 at 1:00 pm. Dkt. 6. The parties, represented by their then respective counsel, appeared at the scheduled prehearing conference and jointly requested the proceedings in this matter be stayed to allow

time for discussions on the possibility of a settlement that would resolve the issues pending before this Hearing Examiner. An Order to Stay Proceedings was entered on January 23, 2023, to allow the parties to negotiate a settlement, submit a status report by May 5, 2023, and a follow-up prehearing conference was scheduled for Wednesday, May 17, 2023. Dkt. 9. Both parties confirmed in separate status reports that no settlement had been reached. Dkt. 10 and 11.

During the May 17, 2023, prehearing conference, the Hearing Examiner confirmed with Claimant that she was no longer represented by counsel. The Scheduling Order dated May 17, 2023, set the date of June 7, 2023, for the Hearing Examiner to rule on Respondent's Motion<sup>2</sup>. Dkt. 12. After further review of the documents, the Hearing Examiner determined she required oral argument on the issues presented. Oral argument was scheduled and took place on June 22, 2023. On July 17, 2023, the Hearing Examiner issued her decision on Claimant's Motion to Stay Proceedings and Respondent's Motion to Dismiss denying both Motions. Dkt. 23. Specifically, the Hearing Examiner found in denying Claimant's Motion to Stay that the Commission on Common Ownership Communities (CCOC) had no jurisdiction over a matter pending before OZAH and that LWCC could be represented by Mr. Webster. Dkt. 23. In denying Respondent's Motion to Dismiss the Hearing Examiner determined Claimant's complaint fell under Section 27-12(a)(5) which specifically prohibits discrimination in any "terms, conditions, privileges or tenure of occupancy of any person." *Id.* The Hearing Examiner left for another day the questions of "1) whether an individual's ability to take notes during a meeting is a protected right under the law and 2) if so, whether LWCC's offer to allow a note taker in LWCC meetings

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<sup>2</sup> Scheduling order identified Respondent's Motion as a "Motion to Dismiss", not as originally titled as "Motion for Decision."

versus Complainant’s request to record the meetings constitutes a reasonable accommodation.”

*Id.*

On June 6, 2023, the Hearing Examiner issued a revised scheduling order altering the dates in the original scheduling order. Dkt. 35. In July 2023, issues surrounding discovery responses, lack of responses and due dates arose. Dkt 24-34. The Hearing Examiner denied Claimant’s request to extend discovery. Dkt. 27. On September 8, 2023, the Hearing Examiner issued an order on procedure requesting the parties follow certain rules when filing documents and communicating with OZAH. Dkt. 37. The date of January 22, 2024 was set for a hearing on the merits. Dkt. 41. Respondent filed a Partial Motion for Summary Decision on September 28, 2023. Dkt. 40. Claimant responded in opposition and filed her own Motion for Summary Decision. Dkt. 42. On December 15, 2023, Sophia Jayanty entered her appearance on behalf of the Claimant and requested a continuance. Dkt. 46-47. The Hearing Examiner extended the deadline for prehearing statements to December 27, 2023, and held a virtual prehearing conference on December 28, 2023. Dkt. 62. Claimant submitted a supplemental brief on January 18, 2024 on the legal issues identified during the December 28, 2023 prehearing conference. Dkt. 56. The Hearing Examiner heard oral argument virtually on January 22, 2024 on the Motions for Summary Decision. The January 23, 2024 revised scheduling order established the dates of February 13, 2024 for a virtual prehearing conference to resolve party objections to specific evidence and/or testimony and set the dates of February 22-23, 2024 for the hearing on the merits. Dkt. 62.

During the prehearing conference on February 13, 2024, the Hearing Examiner indicated that her recommendation on the pending Dispositive Motions would be issued within a few days and that she would be finding for the Claimant on the reasonable accommodation issue. In her

decision on the Summary Disposition Motions, the Hearing Examiner found that 1) Claimant met her prima-facia burden that the requested accommodation was reasonable and that 2) Respondent failed to show the requested accommodation constituted an undue hardship. Leaving the only the retaliation issue remaining before the Hearing Examiner. Dkt. 69. During the prehearing conference, Claimant stated she wished to proceed with a hearing on the merits regarding her claims of retaliation on February 22-23, 2024.

The public hearing on the retaliation claim proceeded as per the revised scheduling order on February 22-23, 2024. Mr. Jack Dunn, Ms. Crystal Castillo and Claimant herself testified on behalf of Claimant. T.1, 41, 175, and 225. Ms. Collette Trohan and Dr. Patricia Hempstead testified on behalf of the Respondent. T.2, 7 and 96. At the conclusion of the public hearing on February 23, 2024, the Hearing Examiner held the record open for 10 days only for the transcript to be generated. T.2, 175.

On February 28, 2024, 5 days after the public hearing Ms. Jayanty, counsel for Claimant, emailed a request for a copy of the Zoom recording of February 23, 2024. Dkt. 75. The Hearing Examiner copied Respondent's counsel on her reply indicating per her announcement at the beginning of the public hearing, the Zoom recording was only for the benefit of the court reporter. *Id.* Ms. Jayanty informed the Hearing Examiner that a Zoom viewer requested a closed caption of the proceeding within Zoom and was able to download a transcript of the proceedings. *Id.* Upon review of the transcript, Ms. Jayanty expressed her concern over conversations captured by the Zoom recording off the record of one of Respondent's witnesses believing the witness may have perjured herself. *Id.* Mr. Webster, Respondent's counsel, objected to the request believing it to be a due process issue, pointing out the inaccuracies of Zoom transcripts and further requested that all transcripts be immediately destroyed. *Id.* The Hearing Examiner

responded denying the request to provide the Zoom recording, believing sharing the recording capturing a private conversation would create a due process violation and stated if Mr. Webster wished the transcript to be destroyed, he must do so via a Motion for Sanctions. *Id.* Further wishing to end the back and forth between counsel on the Zoom transcript issue, the Hearing Examiner stated Respondent may file a Motion for Sanctions and Claimant may respond but until then the Hearing Examiner stated the Zoom transcript would remain sealed. *Id.*

On March 6, 2024 Respondent filed a Motion for Sanctions seeking the following: 1) a declaration that any Zoom recording be deemed unofficial recordings, 2) the Zoom recording not be used for any purpose other than for the Court Reporter, 3) that the Zoom recordings not be shared with anyone, 4) that any transcript generated by the Zoom recording be destroyed, 5) preservation/use of the Zoom recording would constitute a violation, 6) the transcript generated by the court report be the only official transcript 7) Claimant be found to violate the Order on use and limitation of the Zoom recording and 8) Claimant pay Respondent's attorneys fees for preparing and bringing the Motion for Sanctions. Dkt. 71. Claimant responded on March 18, 2024 requesting that Respondent's Motion be denied and seeking a determination as to whether or not the audio recording should become part of the official record and seeking to preserve the audio recording for appeal purposes. Exhibit 74. On April 17, 2024, the Hearing Examiner reviewed both the Motion for Sanctions and the Response and ordered the following 1) that the transcript generated by the court report to be the only official transcript documenting the hearing on the merits, 2) that the transcript generated by the court reporter be included in the official record, 3) the Zoom recording captured was for the benefit of the court reporter only, 4) neither the Zoom transcript nor the Zoom recording would be part of the official record or reviewed by the Hearing Examiner, 5) only the documents and records considered part of the official record

would be transmitted to the HRC, 6) prohibited the sharing of any part of the Zoom recording, 7) destruction by any person in possession of any Zoom recording transcript, etc. and 8) the dissemination of any of the Zoom generated recording to be a violation of the Order and possibly subject to sanctions. Dkt. 77.

On April 17, 2024, the Hearing Examiner issued an order extending her time to complete her Report and Recommendation until May 20, 2024. Dkt. 76. On May 20, 2024, the Hearing Examiner further extended her time to issue her Report and Recommendation until May 28, 2024. Dkt. 78.

The Hearing Examiner finds that Claimant failed to prove by a preponderance of the evidence that the Respondent's actions in preventing her from recording meetings for note taking purposes were a pretext for retaliation based on protected activity.

## **II. ISSUE**

Only the issue of retaliation remains. Under County law, did LWCC actions amount to retaliation when it refused Ms. Katzman's request to make recordings of LWCC meetings due to her disability?

## **III. GOVERNING LAW**

Claimant's claims in this case are governed by Montgomery County's Human Rights and Civil Liberties Law (HRCL), codified in Chapter 27 of the Montgomery County Code. The law governing the retaliation claim is found in Section 27-12(g) and states as follows:

- (g) A person must not retaliate against a person for:
  - (1) lawfully opposing any discriminatory practice under this subdivision, or
  - (2) filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this subdivision.

Section 27-1(b) of the HRCL states that “[t]he prohibitions in this article are substantially similar, but not necessarily identical to prohibitions in federal and state law.” *Id.* §27-1(b).

The Fair Housing Act (FHA) makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed," rights protected by the FHA. *Hall v. Greystar Mgmt. Servs., L.P.*, 637 Fed. Appx. 93, 98 (2016), (*citing* 42 U.S.C. § 3617)<sup>34</sup>. To state a claim for retaliation Plaintiff must establish the following: “(1) she was engaged in protected activity; (2) GMS was aware of that activity; (3) GMS took adverse action against her; and (4) a causal connection existed between the protected activity and the asserted adverse action.” *Id.* Title VII and the FHA employ similar language and are considered part of a “coordinated scheme of federal civil rights laws enacted to end discrimination,” courts analyze claims brought pursuant to FHA under the same standards applied to retaliation claims under Title VII and other employment law statutes. *Id.*

“To prevail on a claim of retaliation, a plaintiff must either offer sufficient direct and indirect evidence of retaliation or proceed under a burden-shifting method.” *Smith v. CSRA*, 12 F.4th 396, 416 (2021), (*citing Jacobs v. N.C. Admin. Office of the Cts.*, 780 F.3d 562, 577 (4<sup>th</sup> Cir. 2015) (*quoting Rhoads v. FDIC*, 257 F.3d 373, 391 (4th Cir. 2001))). Under the *McDonnell Douglas* framework, a plaintiff must first show: (1) she engaged in a protected activity; (2) her employer acted adversely against her; and (3) her protected activity was causally connected to

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<sup>3</sup> “It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806 [42 USCS § 3603, 3604, 3605, or 3606].” 42 U.S.C.S. § 3617.

<sup>4</sup> 42 U.S.C. 3604 (f)(3)(b) states “For purposes of this subsection, discrimination includes- a refusal to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling;”



her employer's adverse action. *Rhoads v. FDIC*, 257 F.3d 373, 392 (2001). After a prima facie case is made, the burden shifts to the employer "to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions." *Id.* (quoting *Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997)). If the employer makes this showing, the plaintiff must demonstrate that the proffered reason is pretext for retaliation, but the ultimate burden to prove retaliation rests with the plaintiff. *Id.*

To prove an action is retaliatory the burden is on the Claimant to demonstrate the causal connection between the protected activity, i.e., her request for reasonable accommodation, and the adverse action. First, "[t]o establish a causal relationship between the protected activity and the [adverse action], a plaintiff must show that the decisionmaker was aware of the protected activity at the time the alleged retaliation occurred." *Smith*, at 419-420 (citations omitted). Further, "[s]ince, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case." *Id.* See *Roberts*, 998 F.3d at 124 (citing *Dowe*, 145 F.3d at 657)). The Hearing Examiner must consider what LWCC knew at the time of the adverse action.

The Maryland Supreme Court<sup>5</sup> affirmed the Court of Appeals holding that "Maryland law to be settled that a plaintiff's burden is to prove that the exercise of his or her protected activity was a "motivating" factor in the discharge, thereby creating burden-shifting to the defendant." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 611 (2009) (citing, *Gasper v. Ruffin Hotel Corp. of Md.*, 118 Md. App. 211, 219-22 (2008)). The court may infer a causal connection between the protected activity and adverse action "on temporal proximity alone" when the

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<sup>5</sup> Then known as the Maryland Court of Appeals.

adverse action occurred “very close to or shortly after” defendant became aware of the protected activity. *Hall*, 637 F. App’x at 99.

In 2013, the Supreme Court in *University of Texas Sw. Med. Center v. Nassar*, 570 U.S. 228, 360, 133 S. Ct. 2517, 2533, 186 L.Ed.2d 503 (2013) construed Title VII to alter the causation required under federal law. For cases involving direct evidence of discrimination, instead of requiring that the protected class be a “motivating factor” in the employer’s decision, the *Nassar* court interpreted 1991 amendments to Title VII to provide relief only when the employer’s retaliatory action would not have occurred “but for” the employee’s protected activity:

Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

*Nassar*, 570 U.S. at 36.

In 2015, the Hearing Examiner for Montgomery County was presented with the question of whether *Ruffin*’s “motivating factor” test was still applicable or did the “but for” test as set forth in *Nassar* apply. He found that in Maryland *Ruffin* still applied. *Hearing Examiner’s Report and Recommendation*, MCOHR Case No. E-5548, *Belfiore v. Merchant Link, LLC* pgs. 71-75 (August 17, 2015). In 2016, the Court of Appeals determined it “need not decide which standard applied”. *Belfiore v. Mercant Link, LLC*, 236 Md. App. 32, 52 n. 6 (2016).

#### **IV. SUMMARY OF TESTIMONY AND EVIDENCE**

In her Report and Recommendation, the Hearing Examiner established the following undisputed facts:

1. Ms. Katzman has been a resident and member of Leisure World of Maryland since 2012. Dkt 56.
2. Leisure World of Maryland is a private gated community for residents 55 years of age or older in Montgomery County, Maryland. Dkt. 40.
3. Leisure World of Maryland is governed by Leisure World Community Corporation (LWCC) a body of residents who serve as the Board of Directors. Dkt. 40.
4. Ms. Katzman produced medical documentation verifying the existence of her disability. T. 15-17 (1.22.24).
5. Ms. Katzman requested of LWCC that she be allowed to record LWCC meetings. T. 16 (1.22.24).
6. LWCC denied Ms. Katzman's request to record LWCC meetings. T. 17 (1.22.24).

Dkt 69, pg. 3.

### **A. Summary of Complainant's Evidence**

In 1980, Ms. Katzman suffered a devastating injury to her right wrist after a motorcycle accident. T. 1, 42. The accident left her with a permanent disability of her right wrist and hand making it difficult and painful for her to write for any length of time. T. 1, 48. Ms. Katzman moved into Leisure World in May of 2012. T. 1, 52. After moving to Leisure World, she founded "Just Us" an organization "advocating for the best interest of the residence [sic] in the community and Montgomery County at large and the state." T. 1, 55. Ms. Katzman testified to attending board, executive committee and committee meetings beginning around 2013 averaging approximately 5 meetings a week. T. 1, 56-60.

Ms. Katzman observed individuals taking handwritten notes, members of the board with laptops and smart phones, and an administrative assistant using a recording device during both board and committee meetings. T. 61-63. Ms. Katzman believed the recording to be for staff for purposes of notes being transcribed for minutes to be approved by the board at the next meeting". *Id.* Based on her recollection, Ms. Katzman observed from 2016 to 2019 a video

camera in the room and recalled “mumblings” about a recording working or not working and seeing a recording device in the middle of the table during various meetings. T. 1, 64-66.

### **2017 – Leisure World Foundation Incidents**

At a Foundation of Leisure World, Inc. meeting on March 8, 2017, Ms. Katzman attended with her laptop. T. 1, 71. She was told to close her laptop by Marian Altman and Phil Marks and Jim Olsen stating they wanted the laptop removed from the room. T.1, 71-73. Ms. Katzman stated she was shouted at and felt it “became a real confrontive assault of situation”, and that she felt demeaned, discriminated against and retaliated against. *Id.* In response to the events that occurred on March 8, 2017, Ms. Katzman sent an email on March 10, 2017 to various individuals including Marian Altman and James Olsen stating they violated her right to maintain possession of her laptop and she requested a reasonable accommodation for use of her laptop at any/all future Foundation meetings. Ex. 56(a)(i)<sup>6</sup>.

On April 12, 2017, Ms. Katzman attended another Leisure World Foundation meeting, was told she could not use her laptop, was told to leave, security was called, she spoke with the security officer, and she left. T.1, 76-79 and Ex. 56(a)(ii). Ms. Katzman stated she felt what she experienced “boarded on humiliation” the action was “obviously retaliatory for whatever reason she conjured” and that Ms. Katzman was only trying to defend herself because of her disability. T.1, 80.

### **2019 – Leisure World Incident**

Ms. Katzman testified to a 3 emails she sent in June and July of 2019 to Paul Eisenhour and others regarding the use of electronic devices during Leisure World meetings from which

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<sup>6</sup> References to “Dkt” and “Ex.” are made through this report and decision. The Ex. references refer to the exhibit list used during the hearing on the merits for the retaliation claim.

she received no response. T.1, 81-85 and Ex. 56(a)(iii). Ms. Katzman’s email forwarded a May 2017 email from Monica Tejada that contained the following language:

Just a reminder – if someone desires to use an electronic device to “take notes” during an open meeting, they should be allowed to do so. This has been the subject of a discrimination complaint and I believe our current organizations are complying with the policy and will continue to do so.

David Frager, Board Chair

Ms. Katzman interpreted Mr. Frager’s email to mean she had the ability to use an electronic device to record because of the quotation marks around “take notes”. T.1, 113-114. On August 27, 2019, Ms. Katzman filed a complaint with the OHR alleging discrimination by Paul Eisenhaur, Chairman, Leisure World Community Corp., Board of Directors for failure to “recognize the 2017 reasonable accommodation to record” because of her disability and that her insistence on having a reasonable accommodation has given “management reason to retaliate against”. T.1, 85-87 and Dkt. 70.

On September 18, 2019, Ms. Katzman attended a Leisure World Budget and Finance Advisory Committee meeting. T.1, 89-92 and Ex. 56(a)(iv). Ms. Katzman testified at the start of the meeting Phil Marks, on the board of directors and executive committee at the time, accused her of recording the meeting, told her to close her laptop or turn it off and shouted, “shut it off”. *Id.* Ms. Katzman said she would not and then he asked her to leave to which she responded no. *Id.* Ms. Katzman further testified that security was called, that she showed the security officer the 2017 email from David Frager and that the security officer thanked her and then he left. *Id.* Ms. Katzman testified she believed the exchange was “blatant retaliation for having filed the complaint” and further that it was a series of events that happened time and time again and she felt horrible. T.1, 92.

Claimant's counsel called Mr. John Dunn. T. 1, 179. Mr. Dunn has been a resident of Leisure World since 2010, is a member of the LWCC Board of Directors and the Vice President of Mutual 19B. *Id.* He became active with his mutual board in 2011. *Id.* The Hearing Examiner asked Mr. Dunn to explain the difference between the various boards at Leisure World and he responded as follows:

**MR. DUNN:** There are 29 corporations in Leisure World that are defined, you would call them cooperate. No condominiums.

**MR. DUNN:** One is the homeowner's association. One actually is a cooperative. Those 29 corporations are the entirety of Leisure World. The Leisure World Community Corporation manages the common facilities and provides common support services for the 29 mutuals. It's -- it's all -- all of it is directed by two land trusts. And in those two trusts, the board of Leisure World Community Corporation, community -- community corporation is the trustee for the -- for the Leisure World promise to the mutuals.

**MR. DUNN:** So they -- they are our trustees and we are the trustors.

T.1, 180.

The Hearing Examiner asked Mr. Dunn several more questions about the organization of Leisure World. The exchange was as follows:

**Q.** Could you explain what's the role of an executive committee member? What they do?

**A.** The executive committee is intended to facilitate the agenda for the -- for the board. It meets two weeks or 10 days before the board meeting, and it considers matters to come before the board, makes certain that the motions that are presented are written in English and comprehensive and comprehensible and generally speaking, facilitates the operation of the board. During the pandemic, it was delegated as the operating body of Leisure World Community Corporation because they could meet and meet the 10 person pandemic -- pandemonium requirement. They could have -- there's only seven people on the board, so you could have 10 of them spread out in the ballroom to have a meeting. And that operation existed for a couple years. Other than that, they -- they make the board work better.

**Q.** And how did you become a representative to the executive committee?

**A.** You get elected by the board to be on the executive committee. There's 34 members to the board. At the beginning of each year, the board has an organizational meeting and it

elects its officers. There are three of them, and then it elects four at large members to the executive committee, which makes a total of seven.

**Q.** And when you joined the board, did you review the board's bylaws?

**A.** Yes. I did not commit them to memory, but I read them. At the time we were given a handbook and they were contained in it.

**Q.** And what other policies did you review when you came on to the board?

**A.** Well, there's bylaws. There's also rules that the board operates under. And -- and I read the trusts. Eventually, I had to read all that documentation because governance at Leisure World is complicated. It's complex. I guess that's the answer.

**Q.** You mentioned that you also read up on the rules. What sorts of subjects did these rules touch on?

**A.** Well, for example, there's a rule that requires the general manager to bring a contract or an agreement or an extension or a modification of any agreement to the board for approval if it's going to cost more than \$50,000. That's a rule. It's not in our bylaws. So the rules are the way we operate. We have a rule that requires everyone on the board to have a valid certification from the CCOC that they pass the board member training to have signed a confidentiality agreement. I'm embarrassed. Colette, what's the other document that we have to sign? Oh, wait. Conflict of interest.

...

**Q.** And how are those new rules -- how do they come into being? Are they passed in some way?

**A.** Rules are presented to the board along with the rationale and the board votes -- votes on them. Bylaws have to be approved by the mutuals.

**JUDGE BYRNE:** So just to be clear, if a -- the board adopts a rule, it's a board function only?

**MR. DUNN:** I think the answer is yes to that, your Honor.

**JUDGE BYRNE:** Okay, but a change to a bylaw requires the --

**MR. DUNN:** Well, the approval is different because it's --

**JUDGE BYRNE:** The 29 mutuals for a change to the bylaw.

**MR. DUNN:** That's correct.

**JUDGE BYRNE:** But a rule is a function of the board of -- an addition or a change of the rule is a function of the board of directors?

**MR. DUNN:** Yes. Yes, your Honor.

T.1, 181-185.

Mr. Dunn further testified the frequency of the meetings as once month and that he has friends on the Board he interacts with regularly on various topics. T.1, pg. 186-187. Mr. Dunn testified to his relationship with Ms. Katzman identifying her as a friend, that he has had some arguments and differences with her over the years and that he sees her frequently. *Id.* He stated she never missing board meetings, attending by Zoom characterizing her behavior at these meetings as a rule follower and very polite. T.1, 188-191. Mr. Dunn further stated that he received training as a Board member and now that Board members are required to pass CCOC trainings and renew CCOC certificates every three years. T.1, 191-192. Mr. Dunn testified that he did not know of any policy that Leisure World had to address or process reasonable accommodation requests, but for his mutual they are handled on a case-by-case basis. T.1, pg. 196-197. Mr. Dunn also thought Mr. Frager's email allowed general residents permission to record and he thought that "resolved it." *Id.* Mr. Dunn testified that board meetings in 2017 were recorded and broadcast on CCTV and administrative assistants who ran committee meetings used recording devices to record minutes. T.1, 202. Mr. Dunn also affirmed Ms. Katzman's version of what occurred during the September 2019 meeting but clarified he did not know the words exchanged between security and Ms. Katzman. T.1, 203-206.

Ms. Castillo was called as a witness for the Claimant. Ms. Castillo testified that when she started the board and executive committee meetings were video and audiotaped for the purpose of the minutes and did not recall announcements around the 2017 time frame that



meetings were recorded. T.1, 232-234. Ms. Castillo testified to a COVID recording transition that with Zoom there was a function where people could acknowledge the recording. *Id.* She could not recall when but at some point, the fact that the meetings were being recorded for minute purposes, was put on the agenda and later at some point that a note was made that recordings were not allowed. *Id.*

### **B. Summary of Respondent’s Evidence**

LWCC called two witnesses, Ms. Colette Trohan and Dr. Patricia Hempstead. Ms. Trohan has lived at Leisure World since 2011 and currently serves on the Leisure World Board as its Secretary. T.2, 11-12. Ms. Trohan has been active in Leisure World governance since 2013. T.2, 13. Professionally, Ms. Trohan has a masters degree and holds several “professional credentials”, including a certification as a “parliamentarian from the National Association of Parliamentarians and is also a certified professional parliamentarian teacher from the American Institute of Parliamentarians.” T.2, 10. Ms. Trohan provided background on the development and governance of Leisure World. T.2, 13-15. Specifically, she stated the community is made up of a trust that governs the properties and the members of LWCC are the 29 separate “mutuals” and one homeowner’s association. *Id.* Each mutual owns and controls what is within the boundary of that mutual and each is self-governed, while LWCC acts as a “managing agent”. *Id.*

Ms. Trohan testified at length to the actions taken by LWCC to prepare for and conduct the various board and committee meetings for members of the community. T.2, 20-30. She detailed her responsibilities as secretary in preparation of agendas and minutes for Board meetings relying on the Robert’s Rules of Order and CCOC guidance and the use of recordings for meetings. T.2, 33-38. She also detailed the current hybrid meeting process and efforts regarding

security for the meetings. T.2, 40-48. Regarding how something gets on a LWCC Board agenda, Ms. Trohan explained that first it goes to the executive committee meeting held 10 days before the Board meeting, then the executive committee votes on whether to send it to the Board. T.2, 49. Ms. Trohan discussed Board meeting minutes dated January 31, 2023, Resolution #230105. T.2, 48-53 and Ex. 57(a)(xi). Specifically, Ms. Trohan explained that the resolution before executive committee sought amend the Board Rules by inserting “Meetings shall not be recorded by the board, staff, or participants. No prior meeting recordings shall be kept” and that the committee considered the resolution on advice of counsel, the CCOC and the “then current policy, as well, that said you couldn’t record meetings without everyone giving permission.”. T.2, 49-50, Ex. 57(a)(xi) and Dkt. 39b. In describing the vote on this resolution, Ms. Trohan explained in detail the “weights” of the vote, but in summary there are 34 directors, the resolution passed by a vote of 26 to 3 with the majority of number of units represented equaling “5,256 represented units in favor and 404 opposed.” T.2, 52-53. Ms. Trohan testified the issue first came up in October or November of 2022 and that she had no knowledge of Ms. Katzman’s action against LWCC, nor the date the OZAH action commenced and further stated she didn’t know about the pending claim during the deliberations for this resolution and that it never came up. T.2 54-55.

Ms. Trohan testified to how LWCC responds to books and records. T.2, 55-64. She detailed that prior to her time as Secretary, (before 2022) requests would come in in any number of ways and that responses during COVID were sent via PDF. *Id.* When staffing changes occurred, she helped implement a better way to track and respond to records requests by establishing a dedicated email. *Id.* Ms. Trohan spent a good deal of time testifying on what could be disclosed and what could not, how a record was made available to the requestor, the

fees charged for record reproduction and/or staff time. *Id.* Ms. Trohan testified that to her knowledge since she's been involved any request from Ms. Katzman has been responded to and when asked to her knowledge that a request by Ms. Katzman had been denied by LWCC she responded "[t]here have been personnel requests, but by and large, even when it was requested that we create a report, we've actually bent over backwards to comply and do it." T.2, 65.

Ms. Trohan testified to her observations of Ms. Katzman during meetings stating she can sometimes be combative, and she has seen Chairs "lose their patients" [sic] but no different than a Chair losing their patience with any other resident. T.2, 66-67. Ms. Trohan discussed her own interactions with Ms. Katzman and recalled a time, January 6, 2022 when during a meeting she said "I'm going to ask the dumb question" and within 24 hours Ms. Katzman posted on her blog a disparaging comment about Ms. Trohan saying, "what kind of secretary do we have? Why doesn't she know how to ask smart questions? And boy, maybe we need to have the old secretary that the board had before she was elected come back." T2. 68-69.

During the cross-examination of Ms. Trohan, she stated that the opinion by the LWCC's former counsel did not constitute a policy and that the only policy governing at that point was the "March 2011 policy that the board adopted specifically saying that if you wanted to record, it had to be – I believe that's the one that said everyone had to agree." T.2, 84-85 and (Ex. 57(a)(vii)). Further Ms. Trohan testified to her knowledge there is no policy regarding reasonable accommodations and that they are handled on a case-by-case basis. T2. 93.

Dr. Patricia Hempstead moved to Leisure World in 2015, became involved with her mutual board in 2016, became President of her mutual in 2019, served on many different committees from 2016 through 2022, was elected to the LWCC board in January 2020, and then became Chair of the LWCC Board in July of 2022. T.2, 97-103. Professionally, Dr. Hempstead was a

university professor for 20 years, an executive director of an association representing municipal governments in a Canadian province, and became a financial advisor, finally retiring in 2015.

T.2, 98.

Dr. Hempstead testified that the Chair of the LWCC board does not have much power at all but can determine the method of voting and gave an example of the option to hold a rollcall vote if an issue is particularly significant because “it adds gravity to particularly important motions.” T.2, 103-104. Further, Dr. Hempstead testified she had no ability to set policy and that only the Board can make decisions. T.2, 105. Regarding Ms. Katzman’s behavior at meetings, she observed that Ms. Katzman that “like everyone else, she follows the rules, and she’s not the only one that occasionally doesn’t, and I have to take control.” T.2, 106.

Dr. Hempstead testified that there were two LWCC Board chairs between herself and David Frager. T.2, 107. When questioned about David Frager’s 2017 email and the interpretations of Ms. Katzman and Mr. Dunn that the email permitted a recording of meetings, she disagreed with that interpretation stating, “I think the definition of notes excludes recording.” T.2, pg. 108. Dr. Hempstead stated she only learned of Ms. Katzman’s 2017 filing with the Maryland Commission on Civil Rights in the context of “this litigation” and she read from the Commission’s findings the following: “Mr. Frager indicated that Respondent had no issue with Complainant using her computer during meetings. However, it is a problem when she uses the computer to record or take unauthorized pictures for her private blog during meetings.” T.2, 109.

Dr. Hempstead further testified that she did not become aware of David Frager’s email until she was preparing the OZAH hearing, but that there was some confusion with others she spoke

regarding the recording meeting policy and it was not entirely clear as to how to implement it.<sup>7</sup>

Moving from in person to Zoom the recording feature in Zoom became a “gray area” and in October of 2022 “we realized we need to do something ... to clarify what the policy was and the board needed to approve it in clear, unambiguous terms.” *Id.* Dr. Hempstead stated as Chair she did not have the ability to set policy unilaterally. *Id.*

Regarding knowledge of Ms. Katzman’s claim she believed “we were completely unaware of it until the end of December in 2022” and did not learn of it herself personally until mid-January 2023. T.2, 114-115. However, by the January 31, 2023, meeting she knew of Ms. Katzman’s action, but it did not impact the decision to move forward with a vote on the resolution [#230105] because it was an issue that needed to be brought forward “as quickly as possible” and I called for a rollcall vote. T.2, 118-119.<sup>8</sup>

When asked about the Leisure World Foundation, Dr. Hempstead testified it is completely separate from the Leisure World Board and that some Board members may serve on the Foundation Board, but they are not on the Foundation Board as official representatives of the Leisure World Board. T.2, 122.

During the cross examination of Ms. Katzman, Ms. Katzman stated she recorded Leisure World’s meetings from 2017 forward because of David Frager’s email and felt no need to tell anyone she was recording the meetings. T.1, 149. LWCC’s counsel asked Ms. Katzman about specific incidents in which certain screenshots with commentary were uploaded to the Just Us

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<sup>7</sup> During cross-examination Dr. Hempstead clarified her testimony regarding the recording policy confusion that the “implementation and the – how you would handle it created some confusion. Not everybody was clear on exactly how it should be implemented in a specific environment at a specific meeting” and that committee chairs were concerned with how it should be implemented, and those concerns were brought to the Board. T.2 142-143.

<sup>8</sup> During cross-examination, Dr. Hempstead further clarified that in the Fall of 2022 the officers in conjunction with legal counsel began looking into the recording policy and the Board did not come to deal with it until the executive committee meeting in the middle of January. T.2, 144-145.

website and/or emailed to 500-person Just Us list. T.1, 150-171. Specifically referring to Exhibit 39(e) identifying an email from Ms. Katzman with a captured screenshot of a man eating, titled “BONZO Alonxo is gone – from LW Management – CFO Departure” and the text of the email reads “note the man laying on the bed in Bonzo’s home as he feeds his face”. *Id.* The second instance referred to by LWCC’s counsel was an August 17, 2018 executive committee meeting in which a video clip was taken of a woman standing with her rear end in front of the camera frame talking to someone at the table with the “I like big butts and I cannot lie” music playing. *Id.* Ms. Katzman indicated she did not know the woman who was captured or if that woman was embarrassed by the post but thought herself the video clip to be hilarious and that it was hilarious “in everybody’s opinion that was knowledgeable.” T.1, 196.

Counsel for LWCC asked Ms. Katzman “whatever it was that you think Leisure World did that was retaliatory or harmful to you, it didn’t dissuade you or stop you from taking some action you felt you were entitled to take, right?” to which Ms. Katzman responded “[t]hat’s correct.” T.1, 124.

During the cross examination of Mr. Dunn, Mr. Dunn testified in his role as a Board member he could not recall when he learned about Ms. Katzman’s complaint with the OHR. T.1, 217. Mr. Dunn testified he has no idea how often Board members attend foundation meetings, but that he personally never attended one. T.1, 221.

During the cross examination of Ms. Castillo, she noted that she had a lot of interactions with Ms. Katzman, but generally via email. T.1, 238. During redirect, Ms. Castillo was asked the following questions from Ms. Katzman’s counsel:

**Q.** How often did you receive books and records requests from Ms. Katzman?

**A.** It depended on the time of year. Sometimes if there would be, you know, a couple months with no request, and then other times during the year there would be multiple requests. Sometimes one request would have, like, four or five things included in it. So I guess the short answer is pretty frequently.

**Q.** Was there ever a time where you were sending documents to Ms. Katzman, and then at some point were told to stop?

**A.** No.

## **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The governance structure of Leisure World is wholly unique with 29 individual “mutuals” managing the areas within their own boundaries and operating under the umbrella of LWCC. What was clear from the testimony and evidence before the Hearing Examiner is that everyone involved cares deeply for this community. What also became clear, was that the parties disagree on what constitutes “note taking” and whether Ms. Katzman was ever granted the right to “record” meetings.

### **A. Burden Shifting**

Under the *McDonnell Douglas* framework, a plaintiff must first show: (1) she engaged in a protected activity; (2) her employer acted adversely against her; and (3) her protected activity was causally connected to her employer's adverse action. *Rhoads* at 392. After a prima facie case is made, the burden shifts to the employer "to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions." *Id.* If the Respondent can rebut that presumption, the Plaintiff bears the ultimate burden to prove retaliation. *Id.* As discussed below, Claimant made her prima facia showing that she was engaged in a “protected activity” in this instance her request for a reasonable accommodation.

The burden then shifts to Respondent to articulate a legitimate non-retaliatory reason for its actions. Respondent argues several non-retaliatory reasons for its actions including, Claimant using her laptop to capture recordings or unauthorized photos to post on a public website the actions of Board members or staff some of which could be considered embarrassing or derogatory. Respondent additionally argues the reasoning behind its policy of no recording stems from a 2011 policy, its reliance on guidance from counsel and the CCOC and that permitting recordings of its meetings without full consent of all participants is a violation of the Maryland wiretap law. The Hearing Examiner in her decision on dispositive motions determined LWCC's reliance on the Maryland wiretap law as a basis to deny Ms. Katzman a reasonable accommodation to be in error, but LWCC's belief that it was indeed following the law can be a legitimate non-retaliatory reason for its actions.<sup>9</sup> The Hearing Examiner finds the following evidence persuasive that LWCC had a legitimate non-retaliatory reason for its action:

1. The Bessel email of 2011 establishing a policy of no recording without everyone's consent. Ex. 57(a)(vii);
2. Altman email of 2011 asking Peter Drymalski, a County employee, about recording board meetings. Dkt. 57(a)(ii);
3. February 2018 CCOC guidance on meetings that boards could legally limit the audio and video tapings of meetings. Dkt. 39(b);
4. Email from Mr. Eisenhaur to Mr. Alvarez, specifically paragraph 2 regarding Ms. Katzman's history of recording and placing him on a public website as well as following Maryland law regarding private meetings. Dkt. 39(f);

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<sup>9</sup> The Hearing Examiner found particularly persuasive the June 20, 2023, AG Opinion that the Maryland wiretap act did not prevent the recording of an HOA meeting. Dkt. 56a.



5. Statements from Mr. Frager captured in the Maryland Commission on Civil Rights Report, pg 6 that Ms. Katzman can use her laptop, but has a problem when she records or takes unauthorized pictures. Dkt. 57(a);
6. Cross-examination of Ms. Katzman and her testimony regarding the “big butts” video. T.1, 166-168;
7. Email titled “Bonzo Alonzo”. (Dkt. 39); and
8. The testimony of Dr. Hempstead regarding the need to clarify LWCC’s policy on recording. T.2, 110-113, T.2, 144-145.

The burden now shifts back to Ms. Katzman to prove LWCC “proffered reason is a pretext for retaliation.” For the reasons stated below in subsection B. 4, LWCC’s actions are not causally connected Claimant’s protected activity.

## **B. Elements of Retaliation**

### **1. Was Claimant engaged in a protected activity?**

Requesting a reasonable accommodation for a disability is a protected activity. *Carter v. Montgomery Cty.*, No. TDC-18-2249, 2019 U.S. Dist. LEXIS 136933, at \*8 (D. Md. Aug. 13, 2019) (*See, Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 706 (4th Cir. 2001)). Ms. Katzman requested a reasonable accommodation to use her laptop during Foundation of Leisure World, Inc. meetings two emails in 2017. Ex. 56(a)(i) and 56(a)(ii) (emphasis added). In her email of March 10, 2017, Ms. Katzman requested a “‘reasonable accommodation’ for use of my laptop at while in attendance as a LW member/unit owner at an/all future Foundation meetings.” *Id.* Nothing in either email makes a request to record the meetings. Ms. Katzman filed a complaint with the Maryland Commission on Civil Rights. Ex. 57(a)(x). In its written findings, dated February 5, 2018, the Commission staff investigated and found Ms. Katzman was able to use her

computer during community meetings. Specifically, the Commission report documented Mr.

Frager as saying:

“the Complainant had been using her computer during community meetings. Mr. Frager indicated that Respondent had no issue with Complainant using her computer during meetings. However, it is a problem when she uses the computer to record or take unauthorized pictures for her private blog during meetings.

*Id.*

The Commission determined that Ms. Katzman failed to establish that the Complaint reported a discriminatory activity sufficient to satisfy the first requirement<sup>10</sup> and made a finding of no probable cause. *Id.*

On June 19, 2019, Ms. Katzman sent an email to Paul Eisenhaur using an email address of [Paule@lwm10.com](mailto:Paule@lwm10.com) forwarding a May 8, 2017 email from Monica Tejada on behalf of David Frager. Ex. 56(a)(iii). Neither Ms. Katzman’s email address nor her name is identified in the list of recipients of the Frager 2017 email. *Id.* The text of Mr. Frager’s email reads as follows:

Just a reminder – if someone desires to use an electronic device to “take notes” during an open meeting, they should be allowed to do so. **This has been the subject of a discrimination complaint** and I believe our current organizations are complying with this policy and will continue to do so.  
David Frager, Board Chair.

*Id.*

The text of the June 19, 2019 email from Ms. Katzman to Mr. Eisenhaur reads as follows: “re: Reasonable accommodation for use of recording device dating back to 2017 or would you prefer this be resubmitted? slk”. On June 22, 2019, Ms. Katzman sent an email to Mr. Eisenhaur this time to an email address of [p\\_eisenhaur@comcast.net](mailto:p_eisenhaur@comcast.net) and the text of the email reads as follows: “As previously informed – I am unable to write copious notes as a result of my right hand/wrist being permanently disabled in an accident. This is to reiterate the request that you acknowledge

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<sup>10</sup> (1) Complaint was involved in a protected activity, *See* pg. 6 of Exhibit 57(a)(x).

the reasonable accommodation previously approved for recording meetings. s.katzman MM”

*Id.* On July 8, 2019, Ms. Katzman sent an email to Paul Eisenhaur using the comcast.net email from the June 22, 2019 email and stated as follows: “On June 19, 2019 you were asked to confirm your understanding of this Reasonable Accommodation – to date, there has been no reply received. slkatzman.” *Id.*

On August 27, 2019 Ms. Katzman filed a complaint of alleged discrimination in Housing/Real Estate stating that she made several requests beginning in June 2019 for LWCC to “recognize the 2017 reasonable accommodation to record any/all Leisure World meetings due to the inability to write copious notes” and references a doctor’s note. (Dkt. 70). Ms. Katzman referenced doctor’s note is included as Docket 34(n). This doctor’s note is addressed and mailed to Ms. Katzman. (Dkt. 34(n). This note does not appear to be attached to the emails to Mr. Eisenhaur nor could the Hearing Examiner find any testimony as to how this doctor’s note was provided to LWCC prior to the complaint filed with the OHR.

The only request made by Ms. Katzman specifically for a “reasonable accommodation” was to use her laptop – not to record - per her email to Marian Altman dated March 10, 2017. (Ex. 56(a)(i). Ms. Katzman assumes that David Frager’s email of May 2017, which was not sent directly to her, granted her reasonable accommodation request to use her laptop to “take notes”. Ms. Katzman further assumes the “take notes” in quotes means she has the right to record. T.1 82. The linking together of Ms. Katzman’s March 2017 emails to Marian Altman and Mr. Frager’s May 2017 email leads her to assume that Mr. Eisenhaur must know she has a reasonable accommodation, and that reasonable accommodation includes the ability to record. Mr. Dunn also shares that opinion. Ms. Katzman never directly requested in any writing submitted to Ms. Altman or Mr. Eisenhaur for a reasonable accommodation to record meetings. Mr. Frager’s

communication to the Maryland Commission on Civil Rights has no issue with Ms. Katzman's use of her computer during meetings, but he does have a problem with her recording or taking unauthorized pictures.

Ms. Katzman clearly asked for a reasonable accommodation in March of 2017 and it appears she was granted that accommodation to use her computer. Even though, Ms. Katzman June 22, 2019 email is not a direct request for a reasonable accommodation, it contains enough language to communicate that she is seeking to confirm a reasonable accommodation was granted to her allowing her to record meetings due to a disability. The 2017 email to Ms. Altman and affirmation by Mr. Frager per the Maryland Commission on Civil Rights determination is enough to communicate to LWCC that Ms. Katzman was engaged in a protected activity, i.e. she requested a reasonable accommodation.

2. Was LWCC aware of that activity?

The reasonable accommodation request notice timeline presented is as follows:

- a. March 2017 Ms. Katzman emails to Ms. Altman to **use** her laptop at Foundation meetings. Ex. 56(a)(i) (**emphasis added**).
- b. May 2017, Frager sends an email permitting individuals to **use** their electronic devices to **"take notes"** during open meetings. Ex. 57(a)(iii) (**emphasis added**).
- c. February 2018, Maryland Commission on Civil Rights found Ms. Katzman was able to **use** her laptop at meetings, found Ms. Katzman's claim of discrimination based on incidents from 2017 and earlier lacked probable cause. Ex. 57(a)(x) (**emphasis added**).
- d. In response to questions about the 2017 incidents, Mr. Dunn testified to knowing that Ms. Katzman thought she was discriminated against and knew about an investigation done

and a report was issued and affirmed “that was discussed at board meetings that I attended”. T.1, 215-216.

- e. During June and July of 2019, Ms. Katzman sent 3 emails to Mr. Eisenhaur requesting affirmation that she had a reasonable accommodation to record. Ex. 56(a)(iii) and 56 (a)(iv).
- f. Ms. Katzman receives no response to her 3 emails from Mr. Eisenhaur. T.1, 85.
- g. August 27, 2019, Ms. Katzman filed the complaint with OHR on August 27, 2019. Dkt. 70.
- h. On October 1, 2019, Mr. Eisenhaur and Mr. Alvarez an investigator with the OHR exchanged emails regarding Ms. Katzman’s complaint. (Dkt. 39). Mr. Eisenhaur indicated that he “just received your certified letter” and that it was mailed to his office, a location where he doesn’t check the mail regularly. *Id.* Mr. Eisenhaur goes on to say he has never seen a doctor’s note for anyone, that Ms. Katzman recorded him and placed it on the website “so” he is “strictly following Maryland law regarding private meetings”, and a similar complaint filed by Ms. Katzman filed with the State had been denied. *Id.*

The protected activity in question is the request for a reasonable accommodation. From Mr. Eisenhaur’s email to Mr. Alvarez it appears that had 1) he no idea Ms. Katzman filed a complaint with the OHR in August of 2019; 2) he believed Ms. Katzman had no right to record, and 3) that LWCC’s actions prior to the 2018 Commission Report were not discriminatory. Clearly, Mr. Eisenhaur knew about the 2017 reasonable accommodation request because he referred to the Commission’s report and Mr. Dunn testified the 2017 claim was discussed at Board meetings. However, Ms. Katzman’s 2017 request while asking for a reasonable accommodation did not specifically include language that she be able to “record.”

Ms. Katzman sent at least one email in 2019 requesting an affirmation of her reasonable accommodation to record to Mr. Eisenhaur to his comcast.net email address. There has been no acknowledgement from LWCC that Mr. Eisenhaur received the 2019 emails, however, he did correspond with Mr. Alvarez using that same comcast.net email. Mr. Eisenhaur certainly knew Ms. Katzman had requested a reasonable accommodation to use her computer as far back to 2017 and affirmed becoming aware of her request for a reasonable accommodation after receiving Mr. Alvarez's letter. Viewing the facts in the light most favorable to Ms. Katzman, LWCC knew of her protected activity based Eisenhaur's knowledge of the 2017 emails and 2018 Maryland Commission for Civil Rights determination finding LWCC permitted Ms. Katzman to use her computer during meetings.

3. Did LWCC take adverse action against Claimant?

The incidents described by Ms. Katzman in 2017 centered around her request to use her laptop in Foundation meetings. Only the April 2017 occurred after her email to request to Marian Altman for use of her laptop in a Foundation meeting. The Foundation was not named in Ms. Katzman's 2019 complaint to the OHR. The Hearing Examiner heard extensive testimony about the governing structure of Leisure World from Mr. Dunn, Ms. Trohan and Dr. Hempstead. The Hearing Examiner found Dr. Hempstead's testimony persuasive that the Foundation is separate organization from LWCC. In addition, those incidents were addressed in Ms. Katzman's complaint to the Maryland Commission for Civil Rights. For these reasons, the Hearing Examiner finds that the 2017 incidents should not be considered adverse actions for purposes of this complaint.

Ms. Katzman also testified to failures to respond and denials of books and records from LWCC as being retaliatory. T.1, 117. The Hearing Examiner finds the testimony of Ms.

Castillo and Ms. Trohan persuasive that to the best of their ability LWCC responded to Ms. Katzman within the parameters established for making records available for members. LWCC did not take an adverse action against Ms. Katzman with how it responded to her books and records requests.

Ms. Katzman testified that the Board's 2023 Policy prohibiting recording and destruction of prior video and audio recordings to be an adverse action specifically to her. T.1, 93. LWCC presented extensive testimony and evidence that 2023 Policy prohibiting recording was to establish an unambiguous a recording policy pursuant guidance from the CCOC and the advice of counsel. T.2, 110-113. The Hearing Examiner finds the reasons presented by LWCC for adoption of the 2023 recording policy to be persuasive. The Hearing Examiner finds the adoption of this policy not to be an adverse action specific to Ms. Katzman's protected activity.

Ms. Katzman testified to and documented in an email an incident that occurred on September 18, 2019 during a Leisure World Budget and Finance Advisory Committee meeting where the committee chair Phillip Marks told her to turn off her computer, accused her of recording on it and asked her to leave. T.1, 90-92 and (Ex. 56(a)(iv)). Mr. Eisenhaur attended that meeting. *Id.* A portion of Ms. Katzman's specific testimony regarding that incident is as follows:

“...shouted out to me that I was to close my laptop and I – or turn it off and accused me falsely of recording on it. And I said, absolutely not... he was shouting in a room full of 30 plus people ...I tried to make him recognize what he knew and that was David Frager's email identifying to him and every other board member, et. cetera, that policy that Frager had published, documented. And he said but recordings are not, and so it was a false accusation because I was not using my laptop and never have to record and I let him know that I am not recording on that computer.”  
*Id.*

Ms. Katzman argues that Mr. Marks ordering her to close her laptop was in direct retaliation of her filing the complaint with the OHR. T.1, 92.

As discussed above, the record is clear that LWCC had no knowledge of Ms. Katzman's filing on August 27, 2019 a complaint with the OHR until after October 1, 2019.<sup>11</sup> While Mr. Marks asked her to leave the September 2019 meeting, security permitted her to stay in the meeting. The Hearing Examiner does find Ms. Katzman's testimony persuasive that she felt humiliated by Mr. Marks actions regarding her use of her laptop and finds that this action during the September 2019 meeting to be adverse to her.

4. Did a causal connection exist between the protected activity and the asserted adverse action?

The Hearing Examiner determined above that the only adverse action taken by LWCC against Ms. Katzman directly related to the use of her laptop was the September 18, 2019 incident that involved Mr. Marks when Ms. Katzman was told to stop and close her laptop because he believed she was using it to record the meeting. An inference of causal connection cannot be made on temporal proximity alone unless the adverse action occurred shortly thereafter. *Hall* at 99. Mr. Eisenhaur in his email to Mr. Alvarez indicated the first he learned of Ms. Katzman's complaint to the ORC was October 1, 2019, after the September 18, 2019 event. Mr. Eisenhaur knew of Ms. Katzman's request to use her laptop in 2017, however we do not know if he ever received her emails in 2019 requesting an affirmation that she be allowed to record meetings. The facts indicate no temporal proximity between LWCC's learning of Ms. Katzman's reasonable accommodation request in 2017 and Mr. Marks telling her to stop using her laptop to record the meeting in 2019.

As discussed above in Section A, the burden is on Claimant to prove Respondent's actions were a pretext for retaliation. Claimant cannot meet that burden. Respondent had a

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<sup>11</sup> Mr. Dunn had no specific recollection of when he learned of the 2019 complaint. T.1, 217. Also see Ex. 39(f).



legitimate non-retaliatory reason for its actions on September 18, 2019 including its misplaced reliance the Maryland wiretap law, advice from the CCOC, advice from counsel and a desire to prevent Ms. Katzman from posting unauthorized photos or videos of individuals during LWCC meetings which LWCC considered to be private and only for members of LWCC. LWCC's actions were neither motivated by or but for her protected activity. No causal connection exists between Ms. Katzman's protected activity and LWCC's actions September 18, 2019.

### **A. RECOMMENDATION**

For the foregoing reasons the Hearing Examiner hereby recommends that the Human Rights Commission find that LWCC did not retaliate against Ms. Katzman and has not violated Section 29-12(g) of the Montgomery County Code. The complaint was not frivolous, and each side should bear its own costs and attorneys fees.



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Kathleen Byrne  
Hearing Examiner

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