

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

Robert Schultz Box 142, 6116 Overlook Drive McFarland, WI 53558 Complainant vs. Rape Crisis Center-Chimera Self Defense 128 East Olin Avenue Madison, WI 53713 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 3200
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A public hearing in this matter was held on September 28, 1993 before Hearing Examiner Clifford E. Blackwell III, in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr., Boulevard, Madison, Wisconsin 53710. The Complainant, Robert Schultz, appeared in person, pro se. The Respondent, the Rape Crisis Center Chimera Self-Defense program appeared by the Director of the Rape Crisis Center, Rebecca Westerfeld, and by its attorneys, Foley and Lardner by Timothy Sweeney and Judith Neese. Based upon the record of these proceedings, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a male who, at the time of hearing, resided at 5104 Wallace Avenue Monona, Wisconsin 53716.
2. The Respondent is a corporation organized in the State of Wisconsin pursuant to Wis. Stats. Sec. 181. It was incorporated in 1974 and has received a letter of exemption from both state and federal income taxes. Its principal place of business is 128 E. Olin Avenue Madison, Wisconsin 53713 within the City of Madison. It has been the exclusive provider of Chimera Self-Defense training for women and girls in Madison since 1982.
3. The Respondent provides direct services to the victims and potential victims of sexual assault and indirect or educational services about sexual assault to the general public. The direct services include but are not necessarily limited to counseling, referral to other counseling sources and the Chimera Self-Defense Program for women and girls (hereinafter referred to as the Chimera Program). The educational services include but are not necessarily limited to workshops on sexual assault and workshops through the Chimera program.
4. The Chimera Program was developed in Chicago, Illinois in the 1970s to address the special needs of women with respect to self-defense training for the purposes of preventing sexual assault. The program recognizes that traditional self-defense or martial arts programs do not meet the needs of most women because of physical and cultural limitations faced by many women. The full Chimera Program lasts approximately 12 hours and is conducted over a two day period. There are shorter workshops that last from one-half hour to 3 hours.
5. The full workshop blends together assertiveness training, confidence building and physical techniques for preventing a sexual assault. It is not solely a martial arts oriented self-defense

class. Important to the overall effectiveness of Chimera training is fostering a feeling of unqualified safety during the training. This is accomplished through the sharing of experiences and successes. This unqualifiedly safe environment would not be possible if the classes included both women and men. The emotional and psychological components of the training are at least as important as the physical defense techniques are.

6. The Respondent has adopted the techniques and practices of the Chimera Program in its workshops including the exclusion of men from full workshops. Men may attend some of the short form workshops that are discussion and educationally oriented.
7. The Respondent's financial support comes from contracts with various sources for the provision of services such as telephone counseling and from some grants. The contract funds include some from the City of Madison. The funds received from the City of Madison are not used to support the Chimera Program.
8. The Chimera Program presents workshops for specific sponsors or from time to time to the general public. In the case of sponsored workshops, the sponsor pays the cost of the workshop. In the case of the workshops available to the general public, the participants are charged a fee to defray the cost of the workshop. The City of Madison Women's Issues Committee has sponsored shortened forms of the Chimera workshops.
9. The inclusion of males in a Chimera Program would destroy the effectiveness of the training and would discourage or prevent participation by some, possibly many, women. The presence of men in the class may represent a perceived threat of physical injury to some women participants. Because men represent the overwhelming number of attackers of women, women participants would likely be unwilling to share their experiences or fears of sexual assault in their presence. There may be some additional fear, founded or not, that a male class member might represent a threat as a potential sexual assailant of women class members.
10. In January of 1988, the Complainant saw an advertisement for a Chimera class in a local newspaper. The Complainant understood the advertisement to be for a martial arts oriented self-defense course. The charge for the class was held out to be approximately \$35 or \$45. This was less than that charged for actual similar martial arts programs in the Madison area at that time. The advertisement was apparently for one of the open, unsponsored Chimera Programs offered by the Respondent.
11. On or about January 15, 1988, the Complainant called the Respondent to inquire about signing up for the class. He was told by the person who took his call that the class was only for women. It is not clear whether the Complainant was given a referral to another self-defense program. It is clear that the Complainant was discouraged from attempting to sign up for the course and that he was denied access to the Chimera Program solely because he was a man.
12. The Complainant did not sign up for any martial arts or self-defense program subsequent to being denied admission to the Chimera Program.
13. The Complainant was angered as a result of being denied access to the Respondent's Chimera Program but suffered no cognisable emotional injury.

CONCLUSIONS OF LAW

14. The Complainant is a member of the protected class sex.
15. The Respondent's Chimera Program, when offered to the public, is a public place of accommodation or amusement within the meaning of MGO Sec. 3.23(2)(e).
16. The Respondent violated MGO Sec. 3.23(5)(a) by discouraging the Complainant from participating in or denying him admission to its Chimera Program because of his sex.
17. MGO Sec. 3.23(5)(a) is absolute in its prohibitions and states or implies no exception for bona fide qualification for participation on the basis of sex or for any other reason.

18. The Complainant has suffered no compensable out-of-pocket loss.
19. The Complainant has suffered no significant emotional injury other than having been angered by the Respondent's violation of the ordinance.
20. The Complainant is entitled to no damages for the Respondent's violation of the ordinance.

ORDER

21. The Respondent is ordered to cease and desist from discriminating against the Complainant on the basis of his sex in its publicly offered Chimera Programs.
22. The Respondent shall permit the Complainant to be admitted to, and to participate in, any publicly offered Chimera Program for which the Complainant applies and otherwise qualifies.

MEMORANDUM DECISION

The essential facts of this complaint are undisputed. The Complainant, a male, in response to a general advertisement of the Respondent's, inquired about a scheduled class of the Respondent's Chimera Self-Defense Program. When the Complainant made this inquiry, he was told that the class was intended for women and that men were not allowed to participate. The Complainant, after having been told that he could not participate in the Chimera class, would from time to time contact the Respondent's office again to inquire about availability of the program. In all cases, the Complainant was discouraged from applying or refused participation.

At the time that the Complainant initially inquired about the advertised Chimera class, the Complainant was interested in a low cost martial arts class. He did not understand and may still not understand that the Chimera Program is not strictly speaking a martial arts program though it incorporates some limited martial arts training into its program.

Instead of being a martial arts program, the Chimera Program is one intended to prevent sexual assault of women through training that consists of assertiveness and awareness training, overcoming social training and oppression and women's fears, and the use of some physical techniques including some martial arts. The physical training portion of the program is important but more important are those aspects of the training that allow victims and potential victims of sexual assault to share their feelings and experiences in order to overcome their fears and to instill a belief that they no longer need to be victims or potential victims of sexual assault. Many aspects of the Chimera Program would have their effectiveness limited or negated if men were present. This is because the success of those aspects relies on the participants feeling unqualifiedly safe and secure.

The Complainant at hearing did not contend that he had ever been a victim of sexual assault or that he feared sexual assault. The Complainant was interested in a low cost martial arts course. He realistically would not have been interested in the Chimera Program. However, once he was told that he could not participate because of his gender, he became determined to right the wrong that he believed had been done to him.

The Respondent does not assert that the Complainant did not inquire about the course or that he was not denied participation because of his sex. Instead, the Respondent contends that its refusal is either protected from application of the ordinance or falls outside of the coverage of the ordinance. It bases its claim on three general arguments. First, the Commission is without jurisdiction over the Respondent. Second, application of the ordinance to the Respondent's program would be unconstitutional. Third, public policy dictates that the Respondent not be subjected to the requirements of the ordinance.

During the processing of this complaint, the parties stipulated to the submission of the Respondent's arguments about jurisdiction to the Hearing Examiner for determination prior to hearing. The Hearing Examiner treated this stipulation as a motion to dismiss for lack of subject matter jurisdiction. On August 1, 1991, the Hearing Examiner issued a Decision and Order determining that the Commission has jurisdiction over the Respondent. The Respondent appealed the Hearing Examiner's decision to the Commission. The Commission issued a decision on January 9, 1992 adopting the Hearing Examiner's decision and finding that the Respondent is subject to the jurisdiction of the Commission. The Respondent appealed the Commission's action to the Dane County Circuit Court. Judge Robert Pekowsky issued a memorandum decision on August 19, 1992 upholding the Commission's jurisdiction over the Respondent.

The Hearing Examiner is bound by his earlier decision and by those of the Commission and Judge Pekowsky. The Hearing Examiner need not specifically address these contentions at this time. However, a brief summary may be of assistance to any forum that may review this decision.

The Respondent contends that because it qualifies for purposes of the Internal Revenue Code and the equivalent state statutes as a private, not-for-profit organization, it is exempt from the coverage of the ordinance. This position is premised upon the language of the ordinance effective at the time of the events giving rise to this complaint. As part of the definition of a public place of accommodation or amusement the ordinance adopted the language of Wis. Stats. 942.04. MGO 3.23(2)(e). This adopted provision exempts private, not-for-profit organizations from coverage of the statute. The statute does not define this term nor does state case law. The Respondent attempts to define the term by grafting identical language from tax law.

The Commission rejected this reading of the ordinance and the incorporated section because to accept it would lead to an extreme result that would deprive the Commission of jurisdiction over virtually all not-for-profit organizations. The Court agreed that such a reading could not have been intended by the City Council. Instead of defining the term "private, not-for-profit" by reference to tax law, the Commission adopted the analysis used by courts in determining whether private clubs or organizations were truly private or were really public places of accommodation or amusement.

Application of this test to the Respondent led the Hearing Examiner and Commission to the conclusion that the Respondent was not "private" within the meaning of the exemption. This conclusion was supported by the finding that the Respondent was not selective about who could participate in its Chimera classes. Additionally, the fact that the Respondent publishes advertisements to attract participants for its classes indicates that the Respondent intends its classes to be open to the public rather than a closed private experience.

It was for these reasons that the Hearing Examiner, Commission and the Circuit Court found that the Commission has jurisdiction over the Respondent. The Respondent provided no new argument in this regard but merely restated its earlier arguments. Since those issues have been determined against the Respondent, the Hearing Examiner is in no position to reconsider his earlier decision or that of the Commission or the Circuit Court. Even if he were in such a position, he would not because the earlier position is supported by law.

The Respondent also asserts a constitutional challenge to the Commission's application of the ordinance to its Chimera Program. Essentially, the Respondent contends that the constitutional rights of the participants to their freedom of speech and association would be contravened if the program was required to enroll men. The Hearing Examiner is unable to address this argument.

It has long been recognized that administrative agencies are creations of limited power and authority. Town of Holland v. Village of Cedar Grove, 230 Wis. 277, 282 N.W. 111 (1938) dissent. One of the earliest limitations identified by the courts is on administrative agencies' ability to decide constitutional matters. Jurisdiction to decide challenges to the constitutionality of the ordinance or its application to a given set of facts resides solely with the courts. Wendlandt v. Industrial Commission, 256 Wis. 62, 39 N.W.2d 684 (1949). The Hearing Examiner is without authority to determine the Respondent's constitutional challenges.

The Hearing Examiner will offer a non-binding opinion with respect to the Respondent's constitutional challenge. The Respondent correctly states that the United States Supreme Court has recognized certain zones of privacy with regard to associational interests that may not be the subject of governmental regulation. Roberts v. United States Jaycees, 468 U.S. 607, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987). The key to this analysis is the nature of the relationship to be regulated. The closer and more intimate, the less likely to be subject to regulation. Rotary, supra. Additionally, if the relationship involves a constitutionally protected interest such as the right of free expression or freedom of religion, the relationship is not likely to be the subject of governmental intrusion. Roberts supra. The current circumstances do not fall within either of these zones of protected activity.

The primary method for determining where on the spectrum of protected relationships a specific relationship rests is the degree of selectivity used in making decisions about who may participate. This spectrum of relationships runs from the most personal such as decisions about marriage and family including begetting and rearing of children to associations that are open to the public without limitation. Relationships such as the former are generally protected from governmental interference, while those at the latter end may be regulated. Impediments placed upon one's rights to make associational decisions may violate constitutional protections. Hishon v. King & Spalding, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

The Respondent's classes fall much more closely to the open end of the spectrum than to the closed end. The Respondent only limits membership in its classes on the basis of sex. It advertises in newspapers of general circulation to attract participants. It holds its classes in publicly open buildings such as schools or churches. While the purpose of the class as stated at the hearing is primarily to teach women how to prevent sexual assault, the classes are not limited to those who have expressed a fear of sexual assault. There are, of course, some self-limiting aspects in that it is primarily women who fear sexual assault that are likely to be interested in attending the Chimera classes. The Respondent does no screening of potential participants. Participants have no say over who will attend the class with them. It is merely a matter of who signs up at the same time. This openness to the public indicates that the type of relationship contemplated by the Respondent does not meet the test of a highly personal and individual relationship set forth by the Court.

The Respondent also contends that because of the highly personal and sensitive nature of the discussions that occur during the Chimera classes and the likely chilling effect the presence of a male might have on those discussions, the Respondent and its participants enjoy a right of freedom of speech along with their associational interest that should constitutionally exempt them from application of the ordinance. Application of the ordinance to the Respondent and its class participants in no way impinges on a cognisable free speech right of the Respondent or its participants. While it is conceded that the exchange of information and personal histories is critical to the effectiveness of the Respondent's class and that such exchanges are highly personal and often intimate, those facts do not create a protectable interest in that speech. There is nothing in the nature or content of the speech

engaged in by the participants that requires constitutional protection. It is not political or religious in nature. The sensitivity of the speech does not qualify it for protection.

Finally, the Respondent contends that it should not be subjected to the requirements of the ordinance because of various public policies that favor the Respondent's program and purpose. This argument has a significant amount of appeal because of the undeniably important and valuable work of the Respondent. However, regardless of the appeal of the argument, it inevitably diminishes the purposes and importance of the ordinance. It also ignores the legislative mandate to end discrimination that is embodied in the ordinance.

The Respondent wishes the Hearing Examiner to utilize the "Bone Fide Occupational Qualification" (BFOQ) exemption found in the employment section at MGO 3.23(7)(i) to find that the ordinance could be read to imply a similar exemption in the public place of accommodation or amusement section. While such an argument is tempting, it ignores standard doctrines of statutory construction. These doctrines exclude such a reading. The fact that the City Council adopted such an exemption in one section and not in any other section indicates a clear intent to limit application of that exemption to that particular section. It does not, as the Respondent contends, demonstrate an openness to a BFOQ exemption in other parts of the ordinance.

The Hearing Examiner is unable to extend to this case a BFOQ exemption. Such an exemption may be appropriate but the Hearing Examiner is constrained by the action of the City Council. If the City Council believes that such an exemption is warranted, it will have to adopt one.

The Respondent also argues that the Hearing Examiner's decision in Schultz v. Madison Senior Center, MEOC Case No. 3188 (Ex. Dec. September 15, 1989; Comm'n Dec. May 29, 1990) creates an exemption based upon City of Madison support for the Respondent and its programs. In that case, the Complainant argued that he had been discriminated against on the basis of his age when the Senior Center sought to charge him a price higher than that of older persons to attend an artistic performance. The Senior Center and many of its programs were established and are funded by the City of Madison.

The Hearing Examiner found that the ordinance contained an implied exemption of the Senior Center program because of the public support for the programs of the Senior Center by the City Council by among other things financial support in the City's budget. Essentially the Hearing Examiner found that there were two important public policies involved and determined that one required an exemption from the other in order to reconcile their different purposes.

The Commission disagreed with the approach taken by the Hearing Examiner but approved of the result. Instead of following the Hearing Examiner's logic, the Commission rested its decision on a different rationale. The Commission concluded that the differential pricing to which the Complainant objected was not a policy of the Senior Center but rather reflected a pricing requirement of another agency. Accordingly, the Commission found that there was no discrimination because the Senior Center was merely passing on a differential price established by a higher level of government and was not itself discriminating.

The Respondent contends that its programs receive broad support at all levels of government and that this support demonstrates a strong public policy favoring the Respondent's programs. The Respondent testified that it receives direct grants of financial support from the City of Madison as well as contracts for individual Chimera courses. The Respondent argues that this support demonstrating a public policy against sexual assault and in favor of programs to prevent sexual assault is at least as important as the policy against discrimination stated in the ordinance. The Respondent asserts that

because of a perceived conflict in the two public policies that in order to support both there must be an exemption implied in the ordinance exempting the Respondent's programs from coverage. The Respondent's argument falls short on two grounds. First, it is premised upon the Hearing Examiner's decision in Senior Center, supra, and fails to recognize that the Commission discarded the Hearing Examiner's rationale for one that did not involve the finding of an exemption to the ordinance. The Commission's decision relied upon a finding that the Senior Center did not itself discriminate but instead passed on a discriminatory pricing practice required by a different law or regulation. This indicates that the Commission was unwilling to create an exemption to the ordinance's coverage where there was not clear language creating the exemption.

Second, even if the Commission had found such an exemption to be supported in the law, the facts of the two cases are different. In the Senior Center case, the City's financial support was extensive and, in fact, the City established the Senior Center. In the current case, the City's support in the form of grants is limited to support of the crisis line. The Respondent's Executive Director testified that grant funds were not used to support or sponsor the Chimera Program. This demonstrates support for a finding that there is a public policy in favor of aiding victims of sexual assault but not necessarily one in favor of the particular methods of sexual assault avoidance embodied in the Chimera Programs. The fact that a particular agency or group within the City government may have sponsored an individual program or even several programs of Chimera training does not indicate that the City Council supports the training. At most, one can say that there is not a policy against such training or that the question has never arisen.

The Respondent's argument about contradictory City policies, as stated above, is not supported by the facts or the Senior Center case. The Respondent further contends that to enforce the ordinance against its Chimera programs would in all likelihood cripple the effectiveness of the programs and the ordinance could not have intended such an unjust result.

As the Hearing Examiner has stated before, the Chimera program is a clearly effective and important resource to the people of Madison. The testimony of the instructors and particularly that of Ms. Fleming, a participant in the program, was moving. However, despite the worthy nature of the Respondent's Chimera Program and the likely detriment to the program, the Hearing Examiner is charged with determining whether the actions of the Respondent violate the ordinance. The testimony on the importance of the training and the necessity to preserve the gender-exclusive nature of the training has a considerable emotional impact but bears little on the question of whether the Respondent has violated the ordinance. The ordinance states no exceptions for worthy or societally valuable programs. In adopting a strict ordinance, the City Council expressed its belief that discrimination cannot be tolerated wherever it occurs. It has set forth the limited number of exceptions that it is willing to recognize. There appears to be none which the Respondent may use to escape liability.

Having determined that the Respondent has violated the ordinance, the Hearing Examiner must determine what order will best effectuate the purposes of the ordinance and make the Complainant whole. The second of these considerations is easier to address. The Complainant's testimony clearly established that he suffered no out-of-pocket loss by virtue of his inability to take the Chimera class. He spent no money for a class that he would not have taken and he did not have to spend more money for a class than he would have spent at the Chimera class. The Complainant took no class at all.

The Commission has taken the position that it may award compensatory damages for the emotional consequences of discrimination. Ossia v. Rush, MEOC Case No. 1377 (Ex. Dec June 7, 1988); Nelson v. Weight Loss Clinic of America Inc. et al., MEOC Case No. 20684 (Ex. Dec. September 29,

1989); Sprague v. Rowe and Hackland Ready, MEOC Case No. 1462 (Ex. Dec. December 27, 1991, Comm'n Dec. on remand from Dane County Circuit Court February 10, 1994); Wilker v. Bermuda's Night Club, MEOC Case No. 3221 (Ex. Dec. July 10, 1989). The extent of these damages may be inferred from the circumstances and may be supported by the Complainant's testimony alone. Nelson, supra. The Complainant did not testify to any damage to him resulting from the Respondent's discrimination. His witness, Roy Shenk, testified that a male was capable of feeling the same hurt and emotional injury from an act of discrimination as a woman. Shenk's qualifications to make this observation are somewhat questionable on this record but the Hearing Examiner is willing to accept this statement as being true. However, the Complainant did not testify to his emotional state or injury. On this record, the Hearing Examiner is unable to find any evidence of a compensable emotional injury done to the Complainant by the Respondent's act of discrimination.

The Complainant was unrepresented and did not indicate that he had received consultation. There was no indication at the hearing that the Complainant had any attorney's fees or other costs in connection with his bringing this complaint. He represented himself at all times during the complaint process. There is no need for any additional orders for costs or fees in order to make the Complainant whole.

The Hearing Examiner is left with the issue of what remedy or order would best effectuate the purposes of the ordinance. On this record, the Hearing Examiner finds that a cease and desist order applying to the Complainant should suffice to fulfill the purposes of the ordinance. The Hearing Examiner does not believe that a general cease and desist order is necessary because of the testimony that the Complainant is the only person who has complained about the women-only nature of the Respondent's Chimera classes. The testimony was clear that once the purpose and intent of the classes is explained, other males who have inquired about the classes seem to understand and accept a referral to a provider of martial arts classes. The Respondent is on notice that its Chimera classes are subject to the requirements of the ordinance, and it can comply with the ordinance. It can do so either by admitting men to the classes or possibly by restructuring itself, or restructuring the form of its classes or its offerings to include men to the extent that there is a demand for such classes.

Dated this 6th day of October, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner