

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

<p>Alisha Lions 1288 Columbus Ave #154 San Francisco CA 94133-1302</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Capital Fitness 302 E Washington Ave Madison WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION</p> <p>Case No. 20003060</p>
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BACKGROUND

On April 11, 2000, the Complainant, Alisha Lions, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Capital Fitness, retaliated against her for her exercise of rights protected by the ordinance by failing or refusing to renew her membership. The Respondent denies any retaliation and states that it felt that the Complainant might be better served by a different health club.

After investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that retaliation had occurred. Efforts at conciliation proved unsuccessful and the complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

Processing of the complaint was delayed for a variety of reasons including a family leave on the part of the Hearing Examiner. Once this matter was set for a Pre-Hearing Conference, the Respondent filed its motion to dismiss for a lack of subject matter jurisdiction.

DECISION

The complaint alleges that the Complainant, a member of the Respondent's health club, believed that she was being sexually harassed by employees of the club. She took her complaints about sexual harassment to the club's management. The Complainant asserts that because of her complaints about sexual harassment, the Respondent decided not to renew her membership when it expired. The Complainant contends that this failure to renew her membership represents retaliation for her exercise of rights protected by the ordinance, i.e. the right to oppose a discriminatory practice that of sexual harassment.

The Respondent, by way of its motion, contends that the Complainant's complaint falls outside of the subject matter jurisdiction of the Commission. The Respondent founds its claim on the position that the ordinance, as written, does not make sexual harassment illegal in a public place of accommodation or amusement. The Respondent premises its argument on the fact that Subsection 5 of the ordinance, MGO Sec. 3.23(5), does not specifically mention sexual harassment. The Respondent points to Section 8's specific provision found in Paragraph (k). The Respondent contends that Section 8(k) prohibiting sexual harassment in the employment context represents a legislative statement limiting the ordinance's coverage of sexual harassment to the employment setting.

If the Respondent is correct about the Common Council's intention not to make sexual harassment in the provision of a place of public accommodation or amusement illegal, then it follows that opposition of such a practice is not a right protected by the ordinance's anti-retaliation section. It is the exercise of only those rights which are protected by the ordinance that are protected from retaliation.

The Respondent's reliance on Section 8(k) of the ordinance is misplaced. That section represents a limitation on other protections. As such, it represents a narrowing of a more expansive protection rather than as the statement of a protection by itself.

In general, the protection against sexual harassment is not found in explicit language, but rather is inferred from the requirement not to discriminate in the terms and conditions of employment, housing or in the enjoyment of a public place of accommodation or amusement. It is noteworthy that on the federal level, the protection against sexual harassment in Title VII is inferred from that law's provision against discrimination in the terms and conditions of employment, not because of a specific prohibition. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57(1986). In interpreting the provisions of the Wisconsin Open Housing law, the Court of Appeals has taken a similar approach. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Ct. App. 1985). The Commission has utilized the same theory in finding a cause of action for racial harassment Guyton v. Rolfsmeyer, MEOC Case No. 20424 (Comm'n Dec. 07/18/86, Ex. Dec. 04/28/85), Vance v. Eastex Packaging, Co. MEOC Case No. 20107 (Comm'n Dec. 08/29/85, Ex. Dec. 05/21/85), Stinson v. Bell Laboratory, MEOC Case No. 20762 (Comm'n Dec. 12/14/89, Ex. Dec. 03/17/89)y. The Commission's position in the racial harassment cases is particularly relevant since there is no specific provision in the ordinance prohibiting racial harassment.

The plain language of MGO 3.23(5) expresses the intention that all individuals be permitted to enjoy the benefits and services of a public place of accommodation or amusement without regard to an individual's membership in any protected class. An environment free of all forms of harassment is generally provided as part of any public place of accommodation or amusement. It is inconceivable that a member of a health club could be subjected to racially explicit name calling, but that is what could occur given the Respondent's reading of the ordinance given the absence of a specific provision prohibiting it. Such a result cannot have been the intent of the Common Council.

The Hearing Examiner concludes that the ordinance does provide a prohibition against sexual harassment in provision of benefits or services at a public place of accommodation or amusement. Accordingly, expressions of opposition to sexual harassment at a public place of accommodation or amusement is an activity protected by Subsection 9 of the ordinance. The Hearing Examiner finds that the Commission has jurisdiction over the allegations of this complaint. The Hearing Examiner in reaching this result makes no finding of fact that will carry beyond this decision.

ORDER

The Respondent's motion to dismiss the complaint for lack of subject matter jurisdiction is denied. The Hearing Examiner will schedule further proceedings in this matter.

Signed and dated this 22nd day of May, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner