

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

<p>Richard Rathmann 333 W Dayton St Madison WI 53703-2551</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Women's Transit Authority 1274 S Park St Madison WI 53715</p> <p style="text-align:center">Respondent</p>	<p style="text-align:center">HEARING EXAMINER'S DECISION AND ORDER ON MOTION TO DISMISS</p> <p style="text-align:center">Case No. 20013061</p>
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INTRODUCTION

Richard Rathmann alleges that the Women's Transit Authority (WTA) violated MGO Section 3.23(5)(b), which prohibits the circulation of any written communication indicating that certain persons will be unlawfully discriminated against within places of public accommodation. The WTA periodically circulates public service announcements concerning its free transportation services for women and young children. Rathmann argues that because these announcements openly discriminate against men—indicating that men are unwelcome and their presence unacceptable—they unlawfully communicate that men cannot access certain public facilities. The WTA denies violating Section 3.23(5)(b). According to the Respondent, the WTA neither discriminates against men nor publishes announcements for women-only services. Nothing expressly indicates that men are forbidden from using WTA services, the Respondent argues. The announcements merely reflect the fact that women and children are more vulnerable to sexual assault. Additionally, the Respondent believes its announcements constitute protected speech under the First Amendment. Finally, without abandoning its First Amendment argument, the Respondent has proposed certain changes that would remove from its promotional materials any hint of gender discrimination.

This matter raises several questions, but the dispositive question is whether announcements promoting free transportation services represent commercial speech. With certain limited exceptions—including commercial speech—the First Amendment prohibits laws regulating speech. See American Booksellers Association, Inc. v. Hudnut, 475 U.S. 1001 (1986); Central Hudson Gas & Electric Co. v. Public Service Commission of New York, 447 U.S. 557, 561 (1980). Unless the commercial speech exception applies, the announcements fall outside Section 3.23(5)(b) and the Commission loses jurisdiction.

DECISION

MGO Section 3.23(5)(b) specifically prohibits anyone from publishing, circulating, displaying, mailing, or disseminating any written communication which that person knows is to the effect that facilities within any public place of accommodation or amusement will be denied based upon certain factors, including gender. Section 3.23(5)(b) does not allow the Commission to regulate speech outside this limited context.

The threshold question is whether WTA transportation services constitute "public places of accommodation or amusement." See MGO Section 3.23(2)(dd). Such places include accommodations and services held open for general public use, participation, and enjoyment. The Hearing Examiner has found that where participation was nonselective—aside from the exclusion of men—particular accommodations and/or services were public rather than private. See Schultz v. Rape Crisis Center, MEOC Case No. 3200 (Ex. Dec. 10/6/1994) (self-defense course was public accommodation because membership/participations was nonselective). WTA transportation services are likewise nonselective, and the Hearing Examiner has similarly found that WTA services represent public accommodations. See Schenk v. Women's Transit Authority, MEOC Case No. 3377 (Comm. Dec. 8/9/01, 2nd Ex. Dec. 1/26/01).

Having determined that WTA services are indeed public accommodations, the question remains whether announcements promoting those services are subject to MGO Section 3.23(5)(b). Essentially, this question asks whether the announcements represent commercial or noncommercial speech.

The First Amendment provides different protection levels for different kinds of speech. See Bigelow v. Virginia, 421 U.S. 809, 818 (1975). News reporting and newspaper editorials enjoy the full protection of the First Amendment. The government generally may not infringe upon these areas of expression. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). Commercial speech—speech that proposes or encourages economic transaction—receives diminished First Amendment protection. See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 414 U.S. 881 (1973); Rushman v. City of Milwaukee, 959 F.Supp. 1040, 1043 (E.D. Wis. 1997). Commercial speech loses that protection only when some compelling public interest outweighs freedom of expression. Bigelow v. Virginia, 421 U.S. at 826.

Protecting against discrimination and ensuring equal access to public accommodations, employment, and housing unquestionably qualify as compelling public interests. Unlawful discrimination unfairly targets certain individuals, creating financial hardship and undue distress. The 1964 Civil Rights Act (Title VII), the Wisconsin Fair Employment Act, and the Madison Equal Opportunities Ordinance reflect our strong commitment to civil rights. See 42 U.S.C.A. 2000e and Wis. Stat. 111.31 et seq.

The WTA announcements are not commercial speech. In promoting free transport services, they neither propose nor contemplate commercial activity. The Complainant may find the announcements unwelcoming, but because the commercial speech exception does not apply, they undoubtedly fall outside Section 3.23(5)(b).

ORDER

The motion is granted. This matter is dismissed.

Signed and dated this 17th day of October, 2003.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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BACKGROUND

On April 13, 2001, the Complainant, Richard Rathmann, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, the Women's Transit Authority (WTA) caused to be published, circulated or otherwise disseminated an announcement that was discriminatory in

nature and violated the ordinance's prohibitions against such advertising or announcements. Essentially, the Complainant felt that the Respondent's request for volunteers and its general statements about its services either stated that his patronage as a male was unwelcome or that the Respondent discriminated against him and others on the basis of his sex in providing ride services. The Respondent denied that its announcements or advertisements violated the ordinance in any manner.

The complaint was transferred to a Commission Investigator/Conciliator for investigation of the complaint. During his investigation, the Investigator/Conciliator became concerned that the complaint might not fall within the jurisdiction of the Commission. Accordingly, he transferred the complaint to the Hearing Examiner for resolution of the jurisdictional issue.

The Hearing Examiner provided the parties with the opportunity to submit briefs and additional information either in support of or in opposition to the Commission's jurisdiction. Subsequent to these submissions and after his own independent research, the Hearing Examiner, on October 17, 2003, issued a Decision and Order on Motion to Dismiss for Lack of Jurisdiction concluding that the Commission was without jurisdiction to hear the complaint.

The Complainant appealed the Hearing Examiner's determination to the Commission. After the parties had the opportunity to submit written arguments in support of their respective positions, the Commission met on February 12, 2004 to deliberate the Complainant's appeal. Participating in the Commission's deliberations were Commissioners Bayrd, Enemuoh-Trammell, Hicks, Marunich, Natera, Ross, Smith, Vaj and Zipperer. Commissioners Howe and Morrison recused themselves from the deliberations.

DECISION

The Commission adopts and incorporates by reference, as if fully set forth herein, the Hearing Examiner's Decision and Order on Motion to Dismiss for Lack of Jurisdiction dated October 17, 2003. The Commission finds no error in the analysis and conclusion of the Hearing Examiner.

ORDER

The complaint is hereby dismissed for lack of jurisdiction.

Joining in the Commission's decision are Commissioners Enemuoh-Trammell, Hicks, Marunich, Natera, Ross and Zipperer. There were no Commissioners in opposition of the Commission's decision. Commissioners Bayrd, Smith and Vaj abstained from the Commission's decision. Commissioners Howe and Morrison took no part in the Commission's deliberations or decision.

Signed and dated this 26th day of February, 2004.

EQUAL OPPORTUNITIES COMMISSION

Ramona L. Natera
President