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

James J Perry 7206 Fortune Dr Middleton WI 53562 Complainant vs. Isthmus 101 King St Madison WI 53703 Respondent	HEARING EXAMINER'S INTERIM DECISION AND ORDER ON JURISDICTION Case No. 20013067

INTRODUCTION

James Perry alleges that Isthmus Publishing violated the Madison Equal Opportunities Ordinance by circulating newspapers containing announcements for the Rape Crisis Center (RCC) and Women's Transit Authority (WTA). The RCC was promoting self-defense training for women, while the WTA was recruiting volunteers for free transportation services. Perry argues that because these programs were discriminatory, the Respondent violated Section 3.23(5)(b) of the Madison General Ordinances, which prohibits the publication of any written communication indicating that certain persons will be unlawfully discriminated against within places of public accommodation or amusement. Isthmus Publishing believes the Madison Equal Opportunities Commission lacks jurisdiction because the complaint requires the Hearing Examiner to judge the constitutionality of MGO Section 3.23, which power resides solely with the courts. More generally, the Respondent denies violating the Equal Opportunities Ordinance, arguing that its WTA and RCC announcements constitute nonregulable speech.

Isthmus Publishing admits that RCC and WTA announcements have appeared in its weekly newspaper. Several examples follow:

> **Women's Transit Authority** seeks volunteers to work for its free rape-prevention ride service for women and their children, which operates 9 pm-2:30 am Fridays & Saturdays and 9 pm-1 am other days; and its daytime service to take people on Medical Assistance to health appointments and low-income people to food pantries. 256-3710.
>
> **Rape Crisis Center** invites registration for its "Chimera 1" self-defense course for adult women, set for 6-9 pm Tuesdays/Thursdays, 6/13-22, Midvale Community Lutheran Church, 4329 Tokay Blvd. $60 (scholarships available). 251-5126.

Perry claims that controversy surrounding the provision of these allegedly discriminatory services has been long-lived. He further claims that Isthmus Publishing caused him personal injury by circulating the announcements. Perry suggests the Respondent cannot credibly claim not to have known these services were blatantly discriminatory. Isthmus believes the announcements never explicitly indicated any preference for women, but Perry insists this preference is obvious. The Complainant speculates that Isthmus Publishing would never furnish announcement space to neo-nazi organizations, notwithstanding whether they explicitly stated that certain racial and ethnic groups were excluded from their events.

This matter presents several questions for consideration. The Hearing Examiner must first determine whether the Commission has jurisdiction to address the complaint, which allegedly raises constitutional questions reserved exclusively for the courts. If the Commission has jurisdiction, the Hearing Examiner must then determine whether the announcements are commercial speech. With certain limited exceptions, the First

Amendment prohibits laws regulating speech. Commercial speech is one such exception. 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). If the announcements are noncommercial, they fall outside the regulatory scope of MGO Section 3.23(5)(b) and the Commission loses jurisdiction. At this early stage, the Hearing Examiner addresses only jurisdictional questions.

DECISION

The jurisdictional power of the Madison Equal Opportunities Commission is limited. The Commission may neither determine the constitutionality of the Equal Opportunities Ordinance, State ex rel. Badger Produce v. MEOC, 106 Wis.2d 767 (1982), nor enforce the ordinance in any manner violating the laws of superior jurisdictions. Hafner v. Last Coast Producing Corp. et al., MEOC Case No. 20003184 (Ex. Dec. 1/14/02); Pagel v. Elder Care of Dane County, MEOC Case No. 22442 (Ex. Dec. 10/31/96); Anchor Savings and Loan v. MEOC, 120 Wis.2d 391 (1984). The Respondent believes this matter might require judging the constitutionality of the Equal Opportunities Ordinance—the very ordinance under which the Commission operates. However, the Commission may determine whether the ordinance would infringe upon constitutional rights without judging its constitutionality. See Madison Newspapers, Inc. v. MEOC, No. 87-C-479-S (W. D. Wis. 1987).

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 and Chimera self-defense instruction 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. Because neither Chimera nor the WTA exercise much selectivity in providing their services—aside from the exclusion of men—the Hearing Examiner has already found that both Chimera and the WTA fall within this definition. See Schultz v. Rape Crisis Center, MEOC Case No. 3200 (Ex. Dec. 10/6/1994) (Chimera was found public rather than private because participation was nonselective); Schenk v. Women's Transit Authority, MEOC Case No. 3377 (Comm. Dec. 8/9/01, 2nd Ex. Dec. 1/26/01) (WTA found public rather than private because services were held open to the public without significant limitation).

The main question is whether announcements for WTA transportation services and Chimera self-defense instruction are commercial 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 employment, housing, and places of public accommodation unquestionably qualify as compelling public interests. Discrimination endangers the rights and privileges of all. The denial of equal opportunity deprives the community of the fullest productive capacity of its members and unfairly subjects certain groups and individuals to embarrassment, financial hardship, and distress. One need look no further for evidence of our strong public commitment to civil rights than the 1964 Civil Rights Act (Title VII), the Wisconsin Fair Employment Act, and the Madison Equal Opportunities Ordinance. See 42 U.S.C.A. 2000e and Wis. Stat. 111.31 et seq.

The WTA announcement does not constitute commercial speech. The announcement seeks volunteers rather than paid employees, and thus neither proposes nor contemplates commercial activity. See Schenk v. Domestic Abuse Intervention Services, MEOC Case No. 03384 (Ex. Dec. 3/26/99) (volunteering may indeed benefit the volunteer, but these benefits are clearly distinct from monetary compensation). This announcement undoubtedly falls outside the scope of MGO Section 3.23(5)(b), and therefore allegations relating to the WTA are dismissed.

The RCC announcement regarding women-only self-defense training is another matter. The Chimera program excludes men, see Schultz v. Rape Crisis Center, MEOC Case No. 3200 (Ex. Dec. 10/6/1994), and registration costs sixty dollars. According to the Respondent, the RCC announcement—for which the Respondent charges nothing—merely informs women about self-defense training. The Respondent would distinguish between public service announcements and commercial speech. Because the RCC announcement resembles the former moreso than ordinary advertisements, the Respondent argues, and because publication costs nothing, the announcement allegedly constitutes noncommercial speech.

The Respondent misconstrues the meaning of commercial speech. Commercial speech simply proposes or encourages commercial activity. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 414 U.S. 881 (1973). The distinction between commercial and noncommercial does not turn upon whether one charges anything for publication, nor upon any distinction between public service announcements and ordinary advertisements.

The RCC announcement certainly looks like commercial speech, but the Respondent raises another question regarding economic interests. The self-defense course costs sixty dollars, but the Hearing Examiner cannot determine from the record whether this program profits the Rape Crisis Center. The organization may collect registration fees solely to cover costs associated with Chimera instruction, but this remains unclear.

When courts address commercial speech, they usually discuss solicitations and monetary gain. See Bolger v. Youngs Drug Products Corporation, 463 U.S. 60 (1983) (pamphlets distributed by condom manufacturers indirectly encouraged contraceptive sales); Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376 (1973) (help-wanted advertisements promoting possible employment are classic examples of commercial speech); Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999) (radio and television advertisements for private casino gambling were commercial speech); Rushman v. City of Milwaukee, 959 F.Supp. 1040 (E.D.Wis. 1997) (astrological prediction promoting curse-lifting service would have been commercial speech). The RCC undoubtedly solicits women for self-defense training, but this solicitation does not resemble advertisements encouraging contraceptive sales and casino gambling. Although the Hearing Examiner cannot determine from the record whether the Chimera program was intended for profit, the Rape Crisis Center clearly does not resemble ordinary for-profit organizations. Nevertheless, commercial speech has been defined broadly. Based upon this broad definition, the Hearing Examiner will presume for now that Chimera announcements constitute commercial speech. Regarding whether the program was intended for profit and truly represents commercial activity, the parties may supplement the record within thirty (30) days. The parties may submit any additional information relevant to this issue.

ORDER

The allegations of the complaint relating to the WTA are dismissed.

Within thirty (30) days, the parties may supplement the record with information relevant to whether the Chimera announcements represent commercial speech, i.e., whether the RCC does anything with Chimera fees other than recoup costs associated with this particular program.

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

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

James J Perry 7206 Fortune Dr Middleton WI 53562	HEARING EXAMINERS DECISION AND ORDER ON JURISDICTION

Complainant vs. Isthmus 101 King St Madison WI 53703 Respondent	Case No. 20013067

In his complaint, filed April 12th, 2001, James Perry alleged that Isthmus Publishing Company violated the Madison Equal Opportunities Ordinance by circulating newspapers containing announcements for the Rape Crisis Center (RCC) and Womens Transit Authority (WTA). The RCC was promoting its "Chimera" self-defense program for women, while the WTA was recruiting volunteers for free transportation services. Perry argued that because these programs blatantly discriminate against men, the Respondent cannot publicize them without violating Section 3.23(5)(b) of the Madison General Ordinances. Section 3.23(5)(b) prohibits the publication of any written communication indicating that certain persons will be unlawfully discriminated against within places of public accommodation or amusement.

On October 17th, 2003, Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell issued an Interim Decision and Order on Jurisdiction, dismissing certain allegations and requesting additional evidence regarding the remaining allegations. The Hearing Examiner determined that WTA transportation services and the Chimera self-defense program both constitute "public places of accommodation or amusement," within the meaning of MGO Section 3.23(2)(dd). This was the threshold question. Because neither program has been selective about admission/participation--aside from excluding men--the Hearing Examiner ruled that both programs represent "public places." See Schultz v. Rape Crisis Center, MEOC Case No. 3200 (Ex. Dec. 10/6/1994); Schenk v. Womens Transit Authority, MEOC Case No. 3377 (Comm. Dec. 8/9/01, 2nd Ex. Dec. 1/26/01).

After determining that both programs represent public places, the Hearing Examiner addressed the main question: whether promotional announcements for these services/programs represent commercial speech. With certain limited exceptions, the First Amendment prohibits laws regulating speech. Noncommercial speech like newspaper editorials and news reporting enjoys 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). But commercial speechC speech that proposes or encourages economic transactionC receives diminished 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).

Because the WTA was seeking volunteers rather than paid employees, and thus neither proposing nor encouraging economic transaction, the Hearing Examiner deemed the WTA announcements noncommercial and nonregulable. Consequently, allegations concerning the WTA announcements were dismissed. The Chimera program presented another, more complicated question about economic interests. Chimera participants pay sixty dollars apiece, unless the individual participant receives "tuition" assistance; money changes hands nearly every time someone registers for the program. Because Chimera participants pay for services, the Hearing Examiner could not immediately reject the argument that promotional announcements for this particular program indeed represent commercial speech.

Because the Hearing Examiner could not determine whether the RCC intended Chimera for profit, upon which fact turns the distinction between commercial and noncommercial activity, between commercial and noncommercial speech, the Hearing Examiner sought additional evidence for clarification. Specifically, the Hearing Examiner sought evidence regarding whether the RCC did anything with Chimera revenues other than defray administrative costs.

Courts have broadly defined commercial speech, citing numerous and varied examples. See Bolger v. Youngs Drug Products Corporation, 463 U.S. 60 (1983) (pamphlets distributed by condom manufacturers indirectly encouraged contraceptive sales); Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376 (1973) (help-wanted advertisements promoting possible employment are classic examples of commercial speech); Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999) (radio and television

advertisements for private casino gambling were commercial speech); Rushman v. City of Milwaukee, 959 F.Supp. 1040 (E.D.Wis. 1997) (astrological prediction promoting curse-lifting service would have been commercial speech). The RCC undoubtedly solicits women for the Chimera program, but the program itself hardly represents normal commercial activity. The Respondent has demonstrated that the RCC is officially nonprofit and tax exempt under Section 501(c)(3) of the Internal Revenue Code; that the RCC exists primarily for educational and charitable purposes; that Chimera-related expenditures greatly exceed total program revenues; and that the Chimera registration fee mainly discourages early withdrawal from the program. Specifically, the Respondent has shown, through the 2001 RCC Annual Report, that Chimera expenditures have exceeded $40,000 while total program revenues were only $16,340. The Hearing Examiner notes that the Complainant has not submitted any additional evidence regarding RCC activities and/or the Chimera program.

Although Chimera participants pay sixty dollars for admission into the program, this fact alone does not establish that promotional announcements for this particular program constitute commercial speech. Evidence recently submitted by the Respondent clearly demonstrates that this far-from-profitable program serves an educational purpose above all else. The Hearing Examiner is convinced that the program itself represents noncommercial activity, notwithstanding the sixty-dollar registration fee, and that advertisements promoting the program constitute noncommercial, nonregulable speech. As the Respondent has recently argued, with respect to noncommercial speech, the government may not choose the appropriate subjects for public discourse. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 538 (1980). Announcements promoting the Chimera program are not mere advertisements for ordinary products and services. Rather, they promote nonprofit educational services that clearly benefit the public interest. Section 3.23(5)(b) of the Madison General Ordinances cannot reach noncommercial speech. Consequently, the Equal Opportunities Commission may not regulate announcements promoting the Chimera program.

ORDER

The allegations of the Complaint relating to the RCC and its Chimera self-defense program are dismissed.

Signed and dated this 12th day of January, 2004.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner