

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

<p>James J Perry 7206 Fortune Drive Middleton, WI 53562</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Women's Transit Authority 1274 South Park Street 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. 20013068</p>
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INTRODUCTION

James Perry 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. Perry 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