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

Heather Ezrow 525 Spaight Street, #18 Madison, WI 53703 Complainant vs. PDQ 4426 Buckeye Road Madison, WI 53716 Respondent	NOTICE OF RIGHT TO APPEAL ORDER FROM EXAMINER'S DECISION ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 21966

BACKGROUND

The attached Order From Examiner's Decision on Respondent's Motion to Dismiss for Lack of Jurisdiction may be appealed within ten (10) days of receipt. Said appeal must be made in writing and must be filed at the Commission offices. The enclosed order will become final without further notice to the parties unless it is timely appealed.

Signed and dated this 15th day of September, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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Heather Ezrow 525 Spaight Street, #18 Madison, WI 53703 Complainant vs. PDQ 4426 Buckeye Road Madison, WI 53716 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS Case No. 21966

BACKGROUND

On September 16, 1993, the Complainant, Heather Ezrow, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that her employer, PDQ Food Stores, Inc., the Respondent, discriminated against her on the basis of her association with a person who had been arrested when it terminated her employment on September 10, 1993. The Respondent denied the allegations of the complaint indicating, among other reasons, that the Commission did not have jurisdiction to accept a complaint based upon arrest record by association. In the alternative, the Respondent asserted that because it had allegedly reached its termination decision on the basis of its own investigation that it could not have discriminated on the basis of arrest record. The investigator did not resolve these issues and issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred on November 21, 1993.

Efforts to conciliate the allegations of the complaint failed and the complaint was certified to hearing. The Hearing Examiner held a Pre-Hearing Conference on April 7, 1994. The Hearing Examiner issued a Notice of Hearing and Scheduling Order in this matter on April 11, 1994. Pursuant to the provisions of the Scheduling Order, the Respondent filed, on April 19, 1994, a motion to dismiss the complaint for the reasons that it stated in its answer to the original complaint. The Complainant filed no materials in response to this motion.

DECISION

The Respondent puts forth two reasons why the complaint should be dismissed short of hearing. First, it contends that the Commission is without jurisdiction to consider a complaint based upon a person's association with another person who has an arrest record, because the ordinance arguably does not contemplate such a cause of action. Second, even if there is standing for the Commission to take such a complaint, the Respondent asserts that because the termination decision was allegedly made on the basis of an investigation conducted by the Respondent, it could not be found to have violated the ordinance. The more important of these arguments is that relating to claims of discrimination by association.

The Respondent acknowledges that courts have interpreted Title VII to cover claims of discrimination by Whites who claim to have been discriminated against on the basis of their associations with persons of a different race. Respondent's brief at pp. 5-7. The Respondent also admits that this theory of standing has been recently extended to cover men who claim to have been discriminated against based upon their associations with their pregnant wives. Respondent's brief, pp. 5-7. The Respondent claims that the only legislative enactment specifically recognizing such a cause of action is the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

The Respondent contends that the above cited precedents are inapplicable to this action because in essence the complaints in those cases were sustained because of the race or sex of the complaining party in connection with the person with whom they were associating. The Respondent further argues that the provision of the ADA recognizing this type of action demonstrates that if legislative bodies wished to adopt such forms of action, they could and would. The absence of any comparable provision, according to the Respondent, shows an intent not to provide for associational based claims. The Respondent additionally claims that the City Council by the language used in the ordinance specifically excluded the possibility of associationally based claims and that to find such jurisdiction would open the doors to a whole new universe of potential complainants.

On September 2,1994, the Hearing Examiner issued a decision in Schulz v. Ultratec, Inc., MEOC Case No. 21584 (Ex. Dec., September 2, 1994), In that case, the Hearing Examiner accepted the Complainant's assertion that the Commission had jurisdiction to process a case of alleged discrimination based upon the White Complainant's association with a Black co-worker. In that case, the Respondent did not contest the Commissions jurisdiction to proceed. In reaching his conclusion about jurisdiction, the Hearing Examiner relied on the same line of cases cited by the Respondent in the present case. The Hearing Examiner agrees with the analysis of the Respondent.

The courts, in finding jurisdiction for associationally based claims, have endeavored to use the language of Title VII to extend jurisdiction to cases that do not actually fit within the specific statutory language. To do this the courts, rather than inventing a new category of covered individuals, has sought to bring the plaintiffs within the actual language of the statute. In cases of discrimination because of the plaintiffs race by association with a person of

another race, the courts have concluded that there is jurisdiction because the race of the plaintiff is actually the basis of the discriminatory action. Parr v. Woodmen of the World Life Insurance, 791 F.2d 888, 41 FEP Cases 22 (11th Cir. 1986); Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 13 FEP Cases 1194 (S.D. N.Y. 1975); Reiter v. Center Consolidated School Districts, 618 F. Supp. 1458, 39 FEP Cases 833 (D.C. Colo. 1985).

This analysis stems from the observation that Whites who are involved in an inter-racial relationship are often subjected to discrimination as much as the person of another race with whom the plaintiff is having the relationship. Similarly, the courts that have found an associationally based claim in sex discrimination cases rely upon the fact that the plaintiff, usually a male, is of necessity of the sex opposite to that of a pregnant spouse. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 32 FEP Cases 1 (1983); Nicol vs. Imagematrix, Inc., 767 F.2d 744, 56 FEP Cases 1533 (E.D. Va. 1991). In this way, the sex of the plaintiff is actually at the heart of the complaint.

This analysis does not support a finding of jurisdiction in this case. Under the circumstances of the complaint before the Hearing Examiner, the Complainant alleges that her employment was terminated because of the arrest record of her boyfriend/roommate. It is clear that the Complainant has no arrest record that might be in question here. If the customary analysis were to be applied here, there would have to be a finding that the Complainant's arrest record was actually a factor in the Complainant's termination. Since she has no arrest record, it could not be a factor in her termination. The portion of the analysis that requires the characteristics of the Complainant to support jurisdiction independent of that of her boyfriend/roommate is not present in this case.

The case law does not support an extension of jurisdiction on a pure associational basis. The case of Chacon v. Ochs, 780 F. Supp. 680, 57 FEP Cases 1271 (C.D. Cal. 1991), recognizes that there are some policies of Title VII that would be furthered by such a finding but it does not rely on these policies to find jurisdiction. The same is generally true with respect to the Ordinance. It seems inherently unfair that one might be placed at a disadvantage because of a protected characteristic of a friend or acquaintance. However, the question remains, did the City Council, in adopting the Ordinance, intend to protect these relationships. As with Title VII, the language of the Ordinance does not specifically address the issue of associationally based claims except in the section dealing with housing. MGO 3.23 (4)(1). This provision was adopted in contemplation of the City's application for substantial equivalent status with the U.S. Department of Housing and Urban Development pursuant to the provisions of the Fair Housing Act Amendments of 1988, 42 USC 3601 et seq. This provision of the Ordinance was adopted on December 15, 1992. At the time that the City Council adopted this provision, it could have made these protections applicable to all of the regulated areas such as employment. The City Council did not make these protections available across the board. One must interpret this action as being intentional by virtue of the limited application of the Council's action. Since the Council did not adopt the provision to be applicable to all sections of the Ordinance, it is inappropriate to imply jurisdiction of associationally based claims except where specifically authorized. This would not limit the Commission from accepting so called race by association or sex by association complaints because of the above analysis.

Given the action of the City Council in adopting MGO 3.23(4)(1), the Council will have to act again if it intends to extend the protection of associational claims to other areas of the Commission's jurisdiction. The complaint is dismissed for lack of jurisdiction.

Signed and dated this 15th day of September, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner