

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MONONA AVENUE  
MADISON, WISCONSIN**

<p>Alix Olson and Martha Popp 1317 Jenifer Street Madison, WI 53703</p> <p style="text-align: center;">Complainants</p> <p style="text-align: center;">vs.</p> <p>YMCA of Metropolitan Madison, Inc. 207 West Washington Avenue Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p><b>NOTICE OF RIGHT TO APPEAL</b></p> <p>Case No. 3110</p>
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Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EFOC provide for appeal of this decision in the following terms:

10.1 Either party may appeal the Recommended Findings of Fact, Conclusions of Law, and Order of the Commission's designee by filing written exceptions to such findings, conclusions, or Order in the EOC offices no later than ten (10) days after receipt of said findings, except that where the tenth day falls on a Federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.

10.2 If neither party appeals the Recommended Findings of Fact, Conclusions of Law, or Order within ten (10) days, they become final Findings, Conclusions and Order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the Recommended Findings, Conclusions and Order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission and served upon the opposing party at least ten (10) days prior to the scheduled review hearing. Any party requesting a written transcript of the proceeding shall pay the actual cost of preparing said transcript including copying costs. The Commission shall affirm, reverse or modify the Recommended Findings and Order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final Findings of Fact, Conclusions of Law and Order of the Commission.

This Notice, Findings, Conclusions of Law, and Order have been sent to both parties by certified mail, with a dated receipt. Any appeal from these Findings, Conclusions and Order must be postmarked or delivered at the offices of the EOC within ten (10) days of the date of receipt.

Signed and dated this 23rd day of April, 1985.

EQUAL OPPORTUNITIES COMMISSION

J. C. Wright  
Executive Director

cc: State Equal Rights Division

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**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON**

**210 MONONA AVENUE, ROOM 500  
MADISON, WISCONSIN**

<p>Alix Olson and Martha Popp 1317 Jenifer Street Madison, WI 53703</p> <p style="text-align: center;">Complainants</p> <p style="text-align: center;">vs.</p> <p>YMCA of Metropolitan Madison, Inc. 207 West Washington Avenue Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED DECISION</p> <p>Case No. 3110 ERD No. 8300709</p>
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**FINDINGS AND ORDER**

On April 23, 1985, the parties appeared before Hearing Examiner Bruce G. Cameron for the start of the scheduled hearing in this case. At that time, Attorney Kathryn L. Norton, appearing for the Complainants, submitted the attached Withdrawal of Complaint.

Based on this Withdrawal, I ORDER that all portions of this complaint<sup>1</sup> not dealing with the disparate impact based on marital status and sexual orientation of the Respondent's membership policies are dismissed with prejudice and without costs or attorney fees to either party.

I further incorporate as my RECOMMENDED ORDER the attached Prehearing Order of March 21, 1985 dismissing the Complainant's disparate impact portion of their complaint as described above.

Signed and dated this 23rd day of April, 1985.

EQUAL OPPORTUNITIES COMMISSION

Bruce G. Cameron  
Hearing Examiner

<sup>1</sup>Aside from their disparate: treatment and disparate impact claims, the Complainants had withdrawn all other possible aspects of their complaint at the prehearing conference. See Prehearing Conference Report, Item No. 3.

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The Complainants hereby withdraw that portion of the Complaint dated April 21, 1983, alleging discrimination by disparate treatment by Respondent, which issue was not the subject of the Prehearing Order dated March 21, 1985, previously entered herein.

Said withdrawal is with prejudice and without attorney fees as to that portion only.

The Complainants specifically do not withdraw that portion of the Complaint alleging discrimination on the basis of marital status and sexual orientation by disparate impact which was covered by the March 21, 1985 Prehearing Order and hereby respectfully move that said Order be made a final order and entered forthwith.

Dated this 22nd day of April, 1985.

Martha Popp, Complainant  
Alix Olson, Complainant

GAYLORD, SCHUETT & NORTON

By: Kathryn L. Norton  
302 E. Washington Avenue  
Madison, WI 53703  
Attorneys for Complainants

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**PRE-HEARING ORDER**

On April 21, 1983, Complainants in this case filed a complaint of public accommodations discrimination alleging that Respondent's definition of "family" for membership purposes discriminated against them on the basis of their sex (female), marital status (single) and sexual orientation (lesbian).

On February 18, 1985, a prehearing conference on this complaint was held. There, Complainants specifically stated that their complaint against Respondent was twofold: that Respondent administered its definition of "family" in a manner which discriminated against them on the basis of their sex and sexual orientation; and that the definition itself discriminates against single people and gays. It is this latter allegation which this Order addresses.

Respondent has set forth its "Membership Definition" of "family" in Article V.B.2. of its Membership Policy:

Family membership shall include a principal member and all members of the immediate household who are eligible to be claimed as dependents on the federal/state income tax return. Individuals listed as dependents who are 19 years of age and over may be required to verify dependent status.

Complainants are a lesbian couple who live together with Complainant Popp's two minor children in a home that both own. In February, 1983, they applied for a "family" membership at Respondent's Central and East

branches. While the specifics of what occurred thereafter at both branches is in dispute, it is clear that Complainants did not meet the definition of "family" for Respondent's membership purposes. Complainant Olson then applied for and received an "individual" membership, and Complainant Popp a "family" membership for herself and her two minor children. The purchase of the separate memberships was more costly to the Complainants than a joint "family" membership would have been.

As the foregoing makes clear, Respondent's purpose in adopting the definitions for its various membership categories was not to bar either single or gay persons from membership. Complainant Olson, like thousands of other single applicants, was given an "individual" membership. Complainant Popp was given a "family" membership even though the Respondent had full knowledge that both she and Complainant Olson were lesbians.

Instead, Complainants argue that Respondent's definition of "family" for membership purposes violates Madison's Equal Opportunity Ordinance, S. 3.23 (hereinafter referred to as "Ordinance"), because it has the effect of discriminating against them. As two single people living together, Complainants contend that they are less likely to qualify for "dependent" status than a married couple; as a gay couple, they cannot be recognized by law as married and therefore similarly contend that they are less likely to be "dependent" under the tax codes. For the following reasons, I find that, even if such impact were shown<sup>1</sup>, it would not constitute discrimination under the Ordinance.

First, any disadvantage to Complainants that follows from their inability to obtain "dependent" status is not placed on them by the Respondent<sup>2</sup>, but by federal/state tax and marital law. In Espinoza v. Farah Mfg., 414 U.S. 86 (1973), the United States Supreme Court recognized the validity of a similar defense where an employer's citizenship requirement was asserted to have the effect of discriminating on the basis of national origin. In upholding such a requirement, the Court found that the burdens of naturalization came from Congress and not from the employer (at footnote 6).

Second, there is evidence that the City of Madison did not intend for such a situation as is raised by the Complainants to be covered under the present Ordinance. At no time has the City itself extended such benefits as employee health insurance to unmarried heterosexual couples or to gay couples to the same extent as are offered to legally recognized married couples.<sup>3</sup>

Third, there is strong evidence that the Madison Equal Opportunities Commission itself does not believe<sup>4</sup> that the present Ordinance covers those arguments of the Complainants that are addressed in this Order. On August 11, 1983, the Commission adopted a resolution authorizing the study of the "feasibility/desirability of an alternative family ordinance" (see Attachment "A"). The Commission took this action based on a review of suggestions from the Madison Institute for Social Legislation (MISL). MISL had made these suggestions so that the protection of the Ordinance could be extended to include "domestic partners" for purposes of obtaining "family" membership at health clubs" (see Attachment "B"). Finally, in soliciting members for this study group, LeAnna Ware, President of the Commission, wrote that "an alternative family ordinance . . . would provide benefits to individuals in committed, non-traditional relationships . . . including family memberships at health and fitness organizations" (see Attachment "C").

From these actions, it is clear that the Madison Equal Opportunities Commission intended to study the possibility of extending the protections of the current Ordinance to situations like the instant case. For this reason, and the other reasons previously stated, it is equally clear that the Ordinance as presently written does not cover such situations.<sup>5</sup>

Therefore, that part of the complaint dealing with the effects of the Respondent's "family" membership policy is hereby dismissed.<sup>6</sup>

Signed and dated this 21st day of March, 1985.

EQUAL OPPORTUNITIES COMMISSION

Bruce G. Cameron  
Hearing Examiner

<sup>1</sup>In the Pre-hearing Conference Report, the parties were directed not to produce their statistical proofs until after this Order is issued. Based on this Order, production of such proof is moot.

<sup>2</sup>Respondent does not have a different membership policy for married people or heterosexual couples. It requires all of them to meet the tax law's definition of "dependent" status.

<sup>3</sup>Similarly, in Espinoza, supra, the Court found additional support for its ruling from the federal government's own restrictions against hiring persons who were not citizens of the United States (at p. 89).

<sup>4</sup>The interpretation of the Ordinance by the administrative agency responsible for its enforcement is entitled to great deference. Espinoza, supra at p. 34.

<sup>5</sup>Respondent, citing to Hornick v. Noyes, 708 F. 2d 321 (7th Cir. 1983), argues that the Title VII theory of disparate impact is inapplicable to public accommodation cases because such cases require evidence of intent to discriminate. Because the holding in this Order is premised on the coverage of the Ordinance, it is not necessary to rule on this argument. However, I find that Hornick is not support for the Respondent's positions since it clearly proceeded under a disparate treatment theory (where a showing of intent is required) without any mention of the alternate theory of disparate impact which Complainants in this case have raised. If the Commission reverses my holding on the coverage issue, I strongly recommend that they also address the appropriateness of the disparate impact model for public accommodations complaints.

<sup>6</sup>This dismissal will become a final order at the time of disposition of the remainder of this complaint.

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## ATTACHMENT A

Adopted by the Madison Equal Opportunities Commission 08/11/83.

DATE: July 27, 1983

TO: Madison Equal Opportunities Commission

FROM: Barbara Cox, Convenor, Committee on Alternative Family Rights

SUBJECT: RECOMMENDATIONS FOR DUTIES AND GOALS OF THE EOC AD HOC COMMITTEE ON ALTERNATIVE FAMILY RIGHTS

After reviewing suggestions from the Madison Institute for Social Legislation (MISL), we submit the following for your consideration:

1. Study the broad range of issues involved in alternative family rights:

a. through solicitation of input from:

1. other municipalities where such ordinances have been considered; and
2. businesses and corporations where such rights have been extended; and
3. local organizations and individuals with an interest in alternative family rights

b. through compilation and discussion of the above data

2. Provide information and outreach to, and secure the testimony and participation of Madison citizens, through a series of EOC-sponsored forums for groups and individuals likely to be affected by the alternative family issue, such as the business community, the elderly, insurance and other benefit providers, family membership organizations, lesbians and gay men, single parents and stepparents, with these forums to be well publicized and sponsored in conjunction with interested community groups where appropriate

3. Investigate through City officials and agencies the likely impact of different sorts of alternative family ordinances with consideration given to employee relations, enforcement, legal issues, positive and negative economic effects, provision of health and social services, staff needs, and other appropriate issues
4. Maintain contact with the EOC
5. Prepare a detailed and well documented recommendation to the EOC for possible presentation to the Madison Common Council addressing the feasibility/desirability of an alternative family ordinance, with consideration of what form or forms such an ordinance might take if recommended to the Common Council
6. In the event that such a recommendation should reach the Common Council, provide testimony and documentation on behalf of the alternative family ordinance

In addition, please find attached information on individuals applying for membership on the Ad Hoc Committee.

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## ATTACHMENT B

April 25, 1983

Commissioners  
Equal Opportunities Commission  
210 Monona Avenue  
Madison, Wisconsin 53709

Dear Commissioners:

As a broad-based coalition of Madison residents, we of the Madison Institute for Social Legislation (MISL) request that the Equal Opportunities Commission establish an ad hoc committee to study the feasibility of introducing a "Domestic Partners" bill to the Madison Common Council. We envision a bill that would be based on other cities' similar legislation (e.g., Quebec and San Francisco) and on corporate models (e.g., General Electric and Intra-Community Cooperative). This issue is of serious concern to numerous Madison residents and merits study and consideration by the E.O.C. and the Common Council. A "Domestic Partners" bill would lead to fuller protection of rights guaranteed under the Equal Opportunities Ordinance.

"Domestic: Partners" legislation recognizes the many diverse relationships between all individuals. It is designed to ensure equal rights for single as well as married individuals. Any two individuals, regardless of sex, age, sexual orientation, or blood relationship could be included within the bounds of the bills. Anticipated benefits could include allowing one's "domestic partner" to be covered under employee health insurance; "family" memberships at health clubs; use of bereavement leave by an employee for a death in his or her "domestic partner's" family; visitation in Madison hospitals and clinic; and authorization of emergency medical care. In order to facilitate implementation of the ordinance, the filing of some type of "certification" with the City clerk would be required.

Such an ordinance is necessary in order to remedy the discriminatory effects of present laws. In a time when people find themselves increasingly isolated and in economic hardship, this bill could extend much needed benefits to many people without significant cost to employers or other organizations.

We at MISL believe that an E.O.C. ad hoc committee on this issue could reasonably expect to complete its report to the Commission by the end of 1983. Some of our members, representing a broad range of community interests, have expressed an interest in serving on such a committee, and we will be happy to submit a list of their names to the E.O.C. upon request.

Respectfully,

Duane Kolterman  
Sandra K. Finn  
MISL Representatives

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## ATTACHMENT C

July 26, 1983

(PR,TITLE:Mr./Ms.) (PR, FIRST NAME:.) (PR, LAST NAME:.) (PR, ADDRESS:.) (PR,CITY:), (PR,STATE:.)  
(PR,ZIP:.)

Dear (TITLE) (LAST NAME):

The Madison Equal Opportunities Commission is establishing a committee to study the feasibility of presenting an alternative family ordinance to the Madison Common Council. Such an ordinance would provide benefits to individuals in committed, nontraditional relationships similar to those accorded to married couples and families related by blood or adoption. Possible benefits will include family health insurance, family memberships at health and fitness organizations, bereavement leave, visitation in hospital intensive care units, and authorization of emergency medical care. These benefits would be provided to individuals in committed, nontraditional relationships such as an adult child living with a parent, unmarried couples, lesbians and gay men, single parents, elderly individuals, disabled persons with attendants and students.

We are interested in having a representative from your organization on the study committee. If you know of anyone who would be interested in serving on this committee, we would like to receive a letter stating this interest and a brief resume. We will be appointing individuals to the committee in the near future and would appreciate a prompt reply.

Sincerely,

Le Anna Ware  
President

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An Examiner's Recommended Decision dated April 23, 1985 was issued in the above-entitled matter. The Complainants timely appealed to the Madison Equal Opportunities Commission (MEOC). Oral arguments were held and written briefs were submitted by both parties regarding the appeal. Based on a review of the record in its entirety, the MEOC enters the following:

**ORDER**

**That the (attached) Recommended Decision of the Examiner (dated April 23, 1985) is hereby affirmed insofar as it dismisses all claims and this case is hereby dismissed.**

Commissioners Anderson, Bauman, Hernandez, Kaliska and Pasdo all join in entering the above Order. Commissioner Cox dissents; she would have reversed the Recommended Decision in so far as it dismissed the sexual orientation claim and would have remanded the matter back to the Examiner for a hearing on the merits.

The majority also enters the following Opinion.

### OPINION

As the case has evolved, the only issues which the Complainants appeal and which remain for the Commission to consider are the marital status and the sexual orientation discrimination claims. In the posture of this appeal, the Commission is called on to determine whether (as the Complainants contend) either or both remaining issues ought to be remanded to the Examiner for further proceedings, or whether (as the Respondent contends) the Examiner's dismissal of the claims ought to be upheld on the grounds that the ordinance was not intended to cover the type of discrimination alleged here.

The Complainants specifically allege that they are two lesbians living together as a family with two children. The Complainants further allege that they were denied a family membership (which would have included Olson, Popp and the two children all on the same membership) at the "East YMCA" and the "Central YMCA," both facilities of the Respondent.

It is important to note that the Complainants do not challenge the YMCA's use of separate rate structures for individuals and for families. Rather, the dispute centers around who is eligible for the benefits of family membership.

The definition of "family" used by the YMCA at the time relevant to this complaint was as follows:

Family membership shall include a principal member and all members of the immediate household who are eligible to be claimed as dependents on the federal/state income tax return. Individuals listed as dependents who are 19 years of age and over may be required to verify dependent status.<sup>1</sup>

The Respondent contends that, at the time of their applications, Olson (not married) was eligible for an individual membership and Popp (not married) and her two dependent children were eligible for a family membership. The annual cost savings, had they been allowed to purchase one family membership (for Olson, Popp and the children) versus two memberships (an individual membership for Olson and a family membership for Popp and the children) would have been approximately two hundred dollars (\$200).<sup>2</sup>

The Complainants contend they each should have an opportunity to prove whether the Respondent's seemingly neutral policy nevertheless had a discriminatory effect on either or both of them because, as lesbian adults, they cannot legally be married under present law.

The "tax code" definition of "family" used by the Respondent is a definition that applies to a broad range of persons, regardless of their marital status or sexual orientation, and their dependents (under tax laws). At the same time, the Respondent's definition excludes a variety of persons who are involved in arguably analogous relationships.

Given that there is no dispute in this case that the YMCA may have separate rate structures for individuals and for families, however, the Commission does not find the present version of the ordinance was intended to require a public place of accommodation such as the YMCA to extend eligibility for "family" membership beyond otherwise legally recognized relationships (such as the "tax code" definition).

We do, however, encourage further study into whether persons in living situations such as the Complainants and others ought to be eligible for family benefits.<sup>3</sup>

EQUAL OPPORTUNITIES COMMISSION



A. J. (Nino) Amato  
EOC President

<sup>1</sup> See YMCA of Metropolitan Madison "Membership Policy" document, p. 3, V.B.2.

<sup>2</sup> It appears that the annual cost of one family membership would have been \$252 at the East YMCA and \$288 at the Central YMCA. If Olson had a separate single membership while Popp and the children had a family membership, the cost would have been \$192 for the single membership at the East YMCA and \$222 for the single membership at the Central YMCA. Consequently, if all four persons had been allowed to be on one family membership, the savings would have been \$192, or \$222.

<sup>3</sup> The fact that we are presently studying an issue, however, does not always by itself necessarily imply that the issue is not covered by the ordinance. In this case, however, we agree with the Examiner.

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By affirming the Hearing Examiner's dismissal of Olson and Popp v. YMCA, the Madison Equal Opportunities Commission has dealt a serious blow to the Equal Opportunities Ordinance. The purpose of the Ordinance is to grant equal opportunities to members of protected classes so that they are not deprived of rights and benefits available to others simply because of their protected status.

Martha Popp and Alix Olson brought a complaint against the YMCA because they were under the impression that the Ordinance protected lesbians from discrimination based on sexual preference and marital status. The YMCA's policy required them to pay more for their memberships than similarly situated married couples pay. The YMCA's rules only grant family memberships to married couples or those able to show economic dependency. Popp and Olson, as lesbians, and therefore unable to marry, could never obtain a family membership due to their sexual preference and the YMCA's choice to tie family memberships to marital status. They perceived the unequal impact of this rule on lesbians and unmarried couples like themselves to be discrimination. Unfortunately, the Commission did not agree.

The Commission held that Popp and Olson's situation is not covered by the Ordinance. It says that even though Popp and Olson had to pay more to get YMCA memberships than a similarly situated married couple would have to pay, this is not the "type" of discrimination that the Ordinance was designed to cover.

I strongly disagree. The Ordinance was passed to ensure equal opportunities for protected class members. It does not list situations that "count" as discrimination and situations that "do not count" as discrimination. The Common Council left the Ordinance's language unrestricted as to what discrimination is to allow protection under the Ordinance as "new and different" types of discrimination became understood by society. The Commission's interpretation of the Ordinance, however, says that the Common Council by passing the Ordinance did not intend to eliminate the curse of discrimination from Madison. Rather, it only intended to

eliminate some discrimination and leave the rest to fester. I do not believe that was the Common Council's intent and the Commission does a disservice to the Ordinance by interpreting it in this way.

The most disturbing part of the Commission's decision is that it was the Commission itself that so narrowly construed the Ordinance. The Commission, based on its long and successful history of fighting discrimination, should have a broader view and more sensitive understanding of the fact that discrimination comes in many forms, shapes and situations. We were established to protect people from discrimination and instead in this decision we are the ones who have refused to recognize discrimination.

I believe the Commission was acting in good faith in that it honestly believes that the Ordinance was not designed to cover "this" type of discrimination. But I fear that it is a short sighted vision. In order to ever hope to rid society of discrimination, we must take a strong, expansive view of discrimination and work to strike it down wherever it occurs regardless of form or type.

The Ordinance was designed to prohibit discrimination. Discrimination has occurred. We must recognize that discrimination and move to end it. I can only hope that the next time the Commission will take a more expansive view of the Ordinance and use its authority to prohibit discrimination.

Signed this 14th day of October, 1985.

EQUAL OPPORTUNITIES COMMISSION

Barbara J. Cox  
Commissioner

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Attached is the Final Order of the Madison Equal Opportunities Commission (MEOC). If discrimination was found, the Respondent must comply with the Order or the Commission may seek judicial enforcement of the Order as prescribed by Section 3.23(9)(c)3., Madison General Ordinances and/or Respondent may be subject to the penalty described in Section 3.23(12), Madison General Ordinances. If no discrimination was found, the allegations has been dismissed. A Final Order may find discrimination regarding some allegations and no discrimination regarding other allegations.

Either or both parties may seek judicial review of the attached Final Order as provided by Section 68.13 of the Wisconsin Statutes, by common law or by any other available legal remedy.

Signed and dated this 14th day of October, 1985.

EQUAL OPPORTUNITIES COMMISSION

J.C. Wright  
Executive Director