



**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

PARENTS AND FRIENDS OF EX-GAYS, INC.

Vs.

C.A. No. 2008 CA 003662 P(MPA)

DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS

**INITIAL ORDER AND ADDENDUM**

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure (“SCR Civ”) 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge’s name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the Summons, the Complaint, and this Initial Order. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in SCR Civ 4(m).

(3) Within 20 days of service as described above, except as otherwise noted in SCR Civ 12, each defendant must respond to the Complaint by filing an Answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in SCR Civ 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an Initial Scheduling and Settlement Conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than six business days before the scheduling conference date. No other continuance of the conference will be granted except upon motion for good cause shown.

Chief Judge Rufus G. King, III

Case Assigned to: Judge MAURICE ROSS

Date: May 15, 2008

Initial Conference: 9:00 am, Friday, September 05, 2008

Location: Courtroom 415

500 Indiana Avenue N.W.

WASHINGTON, DC 20001

## **ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES**

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

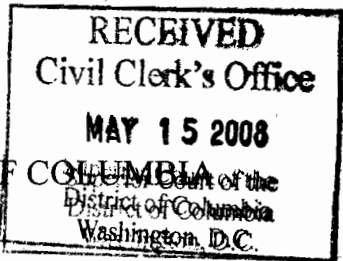
To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at <https://www.dccourts.gov/pa/>. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. Two separate Early Mediation Forms are available. Both forms may be obtained at [www.dccourts.gov/medmalmediation](http://www.dccourts.gov/medmalmediation). One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 105, 515 5th Street, N.W. (enter at Police Memorial Plaza entrance). Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to [earlymedmal@dcsc.gov](mailto:earlymedmal@dcsc.gov). *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at [www.dccourts.gov/medmalmediation/mediatorprofiles](http://www.dccourts.gov/medmalmediation/mediatorprofiles). All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code § 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Clerk's Office. The forms to be used for early mediation reports are available at [www.dccourts.gov/medmalmediation](http://www.dccourts.gov/medmalmediation).

Chief Judge Rufus G. King, III



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
Civil Division

PARENTS AND FRIENDS OF  
EX-GAYS, INC. ("PFOX")  
Box 561  
Fort Belvoir, VA 22060  
Petitioner,  
  
v.  
  
DISTRICT OF COLUMBIA  
OFFICE OF HUMAN RIGHTS  
441 Fourth Street, N.W.  
Washington, D.C. 20001,  
Respondent Agency.

0003662-08

Civil Action No. \_\_\_\_\_  
OHR Docket No. 03-208-PA

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that the Petitioner Parents and Friends of Ex-Gays, Inc. ("PFOX") appeals to the Superior Court of the District of Columbia from the November 1, 2005, *Determination on Respondent's Request for Reconsideration* issued by the District of Columbia Office of Human Rights ("OHR") in PFOX v. National Education Association, OHR Docket No. 03-208-PA, which affirmed the May 24, 2005, *Letter of Determination* finding "no probable cause" with respect to the Petitioner's complaint that the National Education Association and discriminated against it on the basis of sexual orientation.

The Petitioner respectfully prays this Court to (i) reverse the OHR's "no probable cause" determination with respect to the aforesaid complaint of discrimination and (ii) remand this matter to the OHR with instructions that it include ex-gays under the protected category of heterosexuals for sexual

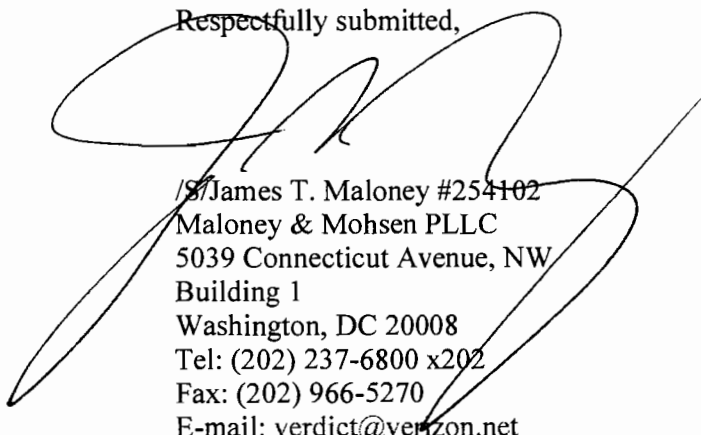
orientation discrimination determinations pursuant to the District of Columbia Human Rights Act of 1977 and provide such other relief which is just and proper.

- B. The name and address of the Respondent Agency is: District of Columbia Office of Human Rights, 441 Fourth Street, N.W., Suite 570N, Washington, D.C. 20001.
- C. The names and addresses of all parties or attorneys to be served are:

<u>Name</u>	<u>Address</u>
Office of the Attorney General Attn: Frank J. McDougald, Esq. Assistant Attorney General	441 Fourth Street, N.W. Suite 1060N Washington, D.C. 20001
D.C. Office of Human Rights Attn: Kenneth L. Saunders, Esq. Director	441 Fourth Street, N.W. Suite 570N Washington, D.C. 20001

- E The OHR's November 1, 2005, *Determination on Respondent's Request for Reconsideration* and its underlying May 24, 2005 *Letter of Determination* are attached hereto as, respectively, as **EXHIBIT 1** and **EXHIBIT 2**.

Respectfully submitted,



/s/ James T. Maloney #254102  
Maloney & Mohsen PLLC  
5039 Connecticut Avenue, NW  
Building 1  
Washington, DC 20008  
Tel: (202) 237-6800 x202  
Fax: (202) 966-5270  
E-mail: [verdict@verizon.net](mailto:verdict@verizon.net)

*Counsel For Petitioner*

# EXHIBIT

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Office of Human Rights



Judiciary Square Office  
441 4th Street, NW, Suite 570N  
Washington, DC 20001  
Phone: (202) 727-4559 Fax: (202) 727-9589

Penn Branch Office  
3220 Pennsylvania Avenue, SE, 1st Fl.  
Washington, DC 20020  
Phone: (202) 727-4559 Fax: (202) 645-6390

**DETERMINATION ON RESPONDENT'S  
REQUEST FOR RECONSIDERATION**

November 1, 2005

PFOX, Inc.  
Box 561  
Fort Belvoir, VA 22060

Reference: *PFOX v. National Education Association*  
Docket No.: 03-208-PA

On July 6, 2005, the Office of Human Rights (hereinafter "the OHR") received your request for reconsideration of its "no probable cause" determination on Complainant's complaint of discrimination, dated May 24, 2005. PFOX is referred to as "**COMPLAINANT.**" National Education Association is referred to as "**RESPONDENT.**"

Pursuant to the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* (2001 Edition) ("DCHRA"), and 4 DCMR § 114.4, the OHR has reviewed your Request for Reconsideration of its "no probable cause" finding issued on May 24, 2005. The following determination is issued on behalf of the OHR.

**I. JURISDICTION**

The OHR is empowered to investigate complaints of discrimination on the basis of 16 protected categories in the areas of employment, housing, education and public accommodations. However, any complaint of discrimination filed pursuant to the DCHRA shall be filed with the OHR within one year of the occurrence of the unlawful discriminatory practice, or the discovery thereof, except for cases filed against the District of Columbia government. D.C. Official Code § 2-1403.04 (2001 Edition). Complainants who file discrimination complaints against the District of Columbia must

first file the discrimination complaint with the District of Columbia agency within 180 days of the occurrence of the unlawful discriminatory practice or discovery thereof. Within 15 days of receipt of the District of Columbia agency's response to the complaint of discrimination, Complainant may file a discrimination complaint with the OHR. 4 DCMR §§ 105.1 and 106.1. The aforementioned requirements are jurisdictional; therefore, if Complainant fails to meet the requirements, the OHR does not have jurisdiction over the claim.

## **II. STANDARD FOR RECONSIDERATION**

A Complainant who files a complaint of discrimination against a private entity, and who receives a "No Probable Cause" determination, must file a request for reconsideration within thirty (30) days of receipt of the OHR's Letter of Determination in order for the request to be timely. Requests for reconsideration in complaints filed against the District of Columbia must be filed within fifteen (15) days of receipt of the Letter of Determination. The Complainant may request reconsideration of the determination based upon new evidence, misapplication of the law or misstatement of the facts. Newly discovered evidence is evidence that: (1) is competent, relevant, and material; (2) was not reasonably discoverable prior to issuance of the final decision by the Director; and (3) would alter the ultimate outcome in the case, if credited. If the request for reconsideration is untimely or is not based on one or more of the aforementioned grounds, the request for reconsideration shall be denied. 4 DCMR §§ 719.1 and 719.2.

## **III. ANALYSIS**

On May 24, 2005, the OHR issued a "No Probable Cause" determination on Complainant's complaint. The OHR received a request for an extension of time in which to file a reconsideration of the OHR's determination on June 16, 2005. Complainant filed a timely reconsideration request on July 6, 2005 after being granted an extension of time in which to file.

Complainant states as a basis for reconsideration the misapplication of law and misstatement of material facts during the determination process. More specifically, Complainant contends that the OHR misapplied the law when it improperly excluded Ex-Gays from the protected category of sexual orientation and that Respondent misstated the facts when it stated that the proposed content of Complainant's exhibit was contrary to Respondent's policy of promoting acceptance of gays and lesbians.

### **Misapplication of the Law**

Complainant contends that an Ex-Gay is a man or woman who has left homosexuality and is now a heterosexual by preference or practice and, thus, falls under the DCHRA's protected category of sexual orientation. In response to Complainant's contention that the DCHRA must be generously construed, the *Lively* case refers to the construction of the principles of the statute and not to the construction of what defines a protected

category.<sup>1</sup> Title VII and the United States Constitution define the characteristics of the categories that are protected from discrimination as immutable characteristics, i.e. those characteristics that are not subject to change as race, national origin, and gender.<sup>2</sup> Therefore, the OHR's determination that Complainant, as an Ex-Gay, is not a member of a protected category is supported by Complainant's own definition of itself as "a man or woman who has left homosexuality and is now a heterosexual by preference or practice." Complainant's definition of an Ex-Gay clearly does not assume an immutable characteristic since an Ex-Gay is someone who was once a homosexual, but has reverted to a heterosexual. Immutable characteristics are those characteristics that a person is born with and/or has no control over and, therefore, the law prohibits discrimination based on those characteristics. Ex-Gays, as defined by Complainant, appear to have control over their sexual orientation and, therefore, the OHR correctly determined that they do not belong to a protected category.

In recognition of the fact that Complainant represents Gays as well as Ex-Gays and that Gays are a protected category under the DCHRA, the OHR states that Complainant still cannot establish a *prima facie* case for discrimination. In order to establish discrimination in a public accommodation setting, Complainant must show (1) it is a member of a protected class; (2) it made itself available to receive services ordinarily provided by Respondent to all members of the public in the manner in which they are ordinarily provided; and (3) it did not enjoy the privileges and benefits of the contracted for experience under factual circumstances that rationally support an inference of unlawful discrimination in that (a) it was deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) it received services in a markedly hostile manner and in a manner that a reasonable person would find objectively unreasonable.<sup>3</sup> Information submitted to the OHR by Respondent and also contained in documents submitted by Complainant reveals that Respondent's Gay and Lesbian Caucus was not denied services. Based on that information, it is apparent that Respondent provided services to other Gay individuals although services were denied to Complainant's Gay and Ex-Gay components. As such, Complainant cannot establish a *prima facie* case for discrimination because other individuals of the same protected class were not denied services.

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<sup>1</sup> *Lively v. Flexible Packaging Association*, 830 A.2d 874 (D.C. 2003) holding that the trial court should have been more liberal in construing the time frames in Complainant's allegations.

<sup>2</sup> *Batson v. Powell*, 912 F. Supp. 565 (D.D.C. 1996), explaining that Title VII protects classes defined by certain immutable traits identified by statute and possessed by certain individuals and stating also that traits or factors specifically within an individual's control are not necessarily protected.

*Arnold v. U.S. Postal Service*, 274 U.S. App. D.C. 305 (1988), stating that Title VII is designed to protect against discrimination based on an individual's race, color, religion, sex, or national origin, categories that share the distinctive feature of being a facet of human existence with which a person is born and which is largely beyond his or her control.

*Dean v. D.C.*, 653 A.2d 307 (D.C. 1995), stating in dicta that immutability is a critical factor in the equal protection analysis for good reason, otherwise all kinds of groups with all sorts of preferences would demand special protection for behaviors that run counter to legitimate mores of the public-at-large and adding that the Constitution does not afford special treatment for whims.

<sup>3</sup> *Callwood v. Dave & Buster's, Inc.*, 98 F. Supp.2d 694 (D. Md. 2000).



**Misstatement of Facts**

Complainant contends that Respondent misstated the facts when it stated that Complainant's mission was inconsistent with Respondent's mission because it promoted alternatives to homosexuality rather than acceptance of homosexuality. Further recitations by Complainant continue to dispute the OHR's factual findings and generally argue that Respondent subjected it to discriminatory treatment. Complainant's exhortations are moot at this point because: 1) they consist of the same information already provided during the investigation of the complaint; 2) they fail to proffer new evidence that was not discoverable during the investigation of the complaint; and 3) the OHR has no jurisdictional basis on which to act since Complainant's basis is not a protected category for discrimination determinations.

Complainant has failed to establish that it is entitled to a reversal of the OHR's "no probable cause" decision. Complainant's request for reconsideration of the OHR's "no probable cause" determination has been **GRANTED**. Accordingly, the OHR's "no probable cause" determination is **AFFIRMED**.

**IT IS SO ORDERED.**

This letter concludes the review process of the OHR. You may file a petition for review of the letter of determination with the Superior Court of the District of Columbia in accordance with D.C. Code § 12-301(8)(2001 ed.), as cited in *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392 (D.C. 1991). Pursuant to D.C. Code § 12-301(8), you have three (3) years from the date of issuance of the Letter of Determination to file such a petition for review.

Sincerely,



Kenneth L. Saunders  
Director

cc: Richard Nuanes  
Director of Conference and Facilities Management  
National Education Association  
1201 16<sup>th</sup> Street, N.W.  
Washington, DC 20036-3290

# EXHIBIT

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Office of Human Rights

Judiciary Square Office  
441 4<sup>th</sup> Street, NW Suite 570N  
Washington, DC 20001  
Phone: (202) 727-4559 • Fax: (202) 727-9589



Penn Branch Office  
3220 Pennsylvania Avenue, SE, 1st Fl.  
Washington, DC 20020  
Phone: (202) 727-4559 • Fax: (202) 645-6

Kenneth L. Saunders  
Director

**LETTER OF DETERMINATION**

May 24, 2005

Ms. Regina Griggs, Executive Director  
PFOX  
P.O. Box 561  
Fort Belvoir, Virginia 22060

Reference: **PFOX v. National Education Association**  
**Docket No.: 03-208-PA**

Dear Ms. Griggs:

The Office of Human Rights (OHR) has completed the investigation of the above referenced complaint. You are referred to as "COMPLAINANT." The National Education Association is referred to as "RESPONDENT."

**ISSUE(S) PRESENTED**

Whether Respondent discriminated against Complainant on the basis of Complainant's sexual orientation (ex-gay) when Respondent allegedly denied public accommodation services to Complainant by refusing to provide Complainant with exhibit space at Respondent's 2002 Annual Convention.

**JURISDICTION**

Respondent is a nationwide employee organization, headquartered in the District of Columbia, operating through a network of affiliated organizations located in each state to advance the cause of education for all individuals. The acts complained of occurred within the District of Columbia. Therefore, the OHR has jurisdiction over Respondent in the subject matter of this complaint.

**FINDINGS OF FACT**

The OHR's investigation of this matter included the Complainant's sworn statement, Complainant's attached documents, Respondent's reply to the OHR's Interrogatories and

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*PFOX v. National Education Association*

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Request for Information, and Complainant's rebuttal. Based on the investigation, the OHR makes the following findings of fact:

Complainant states that it is a non-profit organization incorporated in the District of Columbia. The acronym PFOX stands for Parents and Friends of Ex-Gays, and Complainant asserts that it is a membership organization with chapters throughout the United States established for the purpose of educating the public on the ex-gay community. Complainant claims an interest in protecting the identity of its individual members, and therefore refrains from providing a membership list for the OHR's record.

Complainant states that this Complaint was filed on behalf of its Local Chapter and alleges that its members were harmed by Respondent's act of denying Complainant an exhibit booth at Respondent's Convention entitled EXPO 2002. Complainant states that it promotes its message through participation in conferences and seminars where it provides information to the public in an effort to promote tolerance and equal access for the ex-gay community.

In furtherance of its purpose, Complainant applied in March 2002 to lease an exhibit booth at Respondent's EXPO 2002 being held in Dallas, Texas from June 30, 2002 to July 2, 2002. As instructed by Respondent on the application form, Complainant states that it submitted a check for payment of the deposit to Conventions, Exhibits, Promotions, Inc. (CEPI) in Clearwater, Florida. Complainant states that Respondent cashed the deposit check submitted with the application on April 4, 2002.

On June 7, 2002, Complainant states that Respondent's Executive Officer called to get more information about its organization. Complainant alleges that Respondent claimed not to have much information about its organization, although the application was completely filled out, including the answering of questions on the description of handout materials. Following the receipt of information, Respondent's Executive Officer advised Complainant that the exhibit booth space was limited and priority was given to organizations that had participated in the past.

After the call on June 7, 2002 with Respondent's Executive Officer, Complainant states that it immediately made a call to Respondent's exhibit booth contractor to determine if any booths were left. Complainant claims that according to the contractor, there were two booths left. Also, Complainant states that Respondent's website was still promoting applications for exhibit booths. Furthermore, Complainant states that nowhere on the application or the website did it state that booth acceptance was based on prior participation. On the contrary, the website stated that the best booth spaces, not booth acceptance, was assigned by prior participation and the date on which the application was received by Respondent.

Nevertheless, in a letter dated June 10, 2002 from Respondent's Conference Coordinator, Complainant was notified that its application for a booth had been rejected. The reason given for the rejection was that booth space was completely sold out. Complainant alleges that the rejection of its application was on the basis of sexual orientation.

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Docket No.: 03-208-PA  
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discrimination. Complainant filed a complaint of discrimination with the OHR on July 3, 2002.

Respondent maintains that the OHR lacks jurisdiction over Complainant's charge. In support of its position, Respondent states that Respondent is not a place of public accommodation within the meaning of the District of Columbia Human Rights Act (DCHRA)<sup>1</sup> and adds that Complainant is not part of the class of persons protected by the Act. Respondent claims that Complainant's self-classification as an "ex-gay" is not a type of sexual orientation category that is protected by the anti-discrimination provisions of the DCHRA.

Notwithstanding its position, Respondent responds to Complainant's charge, stating that according to its standard procedure, an Outside Contractor was hired to coordinate the leasing of exhibit space for Respondent's EXPO 2002. Applicants were advised to send their applications and deposit payments to the Outside Contractor who would deposit the payment upon its receipt and forward the application to Respondent for approval. In accordance with its procedure, Respondent explains that the Outside Contractor was permitted to approve the applications of returning exhibitors and only the new exhibitors' applications were sent to Respondent for approval.

Respondent states that it retained complete control over the decision whether to approve or reject an application based on its "Policy for Exhibit Rules and Regulations" as set forth in its General Purpose Statement on the front of each application, and in accordance with the restrictions on the back of the application form. Respondent further explains that the information presented by exhibitors on social issues was examined to insure that it was "in accordance with Respondent's policy."

Respondent notes that exhibitors were routinely rejected if their products or services competed with those of vendors that had exclusive contractual relationships with Respondent, or if they took positions that were unacceptable to Respondent. Respondent claims that it examined Complainant's application with particular care as it did with all first time exhibitors. As a result, Respondent states that it found the information proposed to be exhibited by Complainant to be contrary to Respondent's policy, which, *inter alia*, promotes acceptance of gays and lesbians, supports educational initiatives designed to eliminate misconceptions about gays and lesbians, and seeks to improve conditions and opportunities for gay and lesbian students and teachers. Respondent explains that it found Complainant's mission to be one of advocating the promotion of

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<sup>1</sup> Section 2-1401.02(24) of the DCHRA provides in pertinent part that "a place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

- (A) has 350 or more members;
- (B) serves meals on a regular basis; and
- (C) regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business."

Based on the above analysis, the OHR has determined that Respondent is a public accommodation.

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alternatives to homosexuality so that more gays and lesbians "can have the opportunity to make the choice to leave homosexuality."

Similarly, Respondent adds that Complainant's proposed exhibit was determined to have the potential for disruption since Respondent's gay and lesbian caucus was opposed to "conversion" groups such as Complainant. Respondent states that its Department of Conference and Facilities Management believed that Complainant's exhibit could result in protests or other demonstrations, which might be disruptive to business proceedings.

Finally, Respondent contends that the Outside Contractor advised that all the exhibit spaces were sold out in early June of 2002. Therefore, Respondent states that at the time it made the decision to deny Complainant's application, the denial letter reflected that exhibit space had been completely sold out. Respondent claims that subsequent cancellations and expansion of exhibit space permitted the acceptance of additional applications after Complainant's application was denied.

Complainant rebuts Respondent's position by stating that the content of its exhibit booth was not contrary to Respondent's policy. Complainant contends that it is an ex-gay and gay organization supporting Respondent's policy for both gays and ex-gays, and that its mission is in accordance with Respondent's resolutions that urge sexual orientation diversity, inclusion, and tolerance. Complainant alleges further that Respondent's denial of its application demonstrated discriminatory behavior by the fact that the denial was based on the opposition of Respondent's gay and lesbian caucus to its ex-gay organization. Complainant states that its mission is to promote support for ex-gays as well as gays. Complainant explains that Respondent discriminated against it and showed preference for the other group. Moreover, Complainant states that Respondent's claim that the ex-gay exhibit could have resulted in disruptive protests is false, as evidenced by an affidavit from a member of Respondent's ex-gay caucus that exhibited at Expo 2004 with no disruptions.

Finally, Complainant states that Respondent's explanation that the exhibit space was sold out at the time the decision was made to deny its application does not excuse Respondent's discriminatory behavior, and is not a credible explanation for denial of its application. Complainant alleges that Respondent delayed processing its application in order to create an "all sold out" scenario. Complainant supports its allegation with the fact that Respondent failed to refund its deposit funds until December 2002 and, during that time, Respondent never advised it of cancellations or expansion of exhibit booth space but permitted the acceptance of applications by other exhibitors. Complainant and Respondent both submitted documents to the OHR in support of their positions.<sup>2</sup>

<sup>2</sup> Submissions to the OHR include a copy of the contract terms of the lease of the premises at EXPO 2002, a copy of the application for a booth contract, a copy of the rejection letter sent to Complainant, a copy of Complainant's Certificate of Incorporation issued by the District of Columbia, a partial list of Complainant's members, a list of the applicants who were granted exhibit space at Respondent's EXPO 2002 including dates of application, a copy of Respondent's Resolutions, and an affidavit from a staff member of Respondent's Ex-Gay Educators Caucus.

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Docket No.: 03-208-PA  
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**STANDARD OF REVIEW**

In this forum, in order for Complainant to prevail, the OHR's record must contain credible, probative and substantial evidence from which a reasonable person could conclude that Complainant met the *prima facie* elements of discriminatory or retaliatory behavior, and that a legitimate, nondiscriminatory explanation for the behavior does not exist. 4 DCMR § 715.1; 4 DCMR § 499.1.

**LEGAL ANALYSIS**

**DENIAL OF A PUBLIC ACCOMMODATION**

The DCHRA makes it unlawful to "...discriminate against any individual for any reason other than that of individual merit because of such individual's age, race, color, religion, sex, matriculation or national origin," among other protected categories. D.C. Official Code § 2-1402.11(a) (1) (2001 Edition). Effective in September 2002, the amendments to the DCHRA provided that the protections against discrimination in places of public accommodation extend to all persons based on their actual or perceived membership in a protected class. See *D.C. Code § 2-1402.31(a)(1)(2003)*.

Although the DCHRA is very broad and seeks to provide maximum protection to persons in 16 protected categories, the OHR is bound by the Act's jurisdictional limit in that it applies only to those categories specifically enumerated in the statute. See *D.C. Code § 2-1402.11(2003)*. Following the foregoing analysis, the OHR finds that Complainant's Complaint is within the jurisdictional limit of the DCHRA.

Similarly, the OHR is bound by the jurisdictional limit of the DCHRA that requires application of the Act's plain meaning or the legislative intent when defining places of public accommodation. Where, as here, the United States Supreme Court in *Board of Directors of Rotary International, et al v. Rotary Club of Duarte, et al* has identified the parameters of a business establishment and, thus, a public accommodation, the DCHRA is obliged to adopt the Court's definition. See *Board of Directors of Rotary International, et al, 481 U.S. 537, (1987)*. Consequently, the OHR finds that Respondent is a public accommodation within the meaning of the DCHRA where Respondent has 350 or more members; Respondent serves meals on a regular basis; and Respondent regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. See *Id.; D.C. Code § 2-1401.02(24)(2003)*.

The District of Columbia Human Rights Act (DCHRA) prohibits providers of public accommodations from denying any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation based on that person's membership in 16 protected categories, including national origin and race. *D.C. Official Code § 1402.31 (2001 Edition)*. Under the DCHRA, "place of public accommodation" includes those entities or facilities that

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provide goods such as food or beverages, or services for entertainment, health, recreation, banking, travel, or insurance to the public. *D.C. Code § 2-1401.02(24) (2001 Edition)*.

In order to establish a *prima facie* case of discrimination in the area of public accommodations, a Complainant must show: "(1) that they are a member of a protected class; (2) that they made themselves available to receive services ordinarily provided by Respondent to all members of the public in the manner in which they are ordinarily provided; and (3) they did not enjoy the privileges and benefits of the contracted for experience under factual circumstances that rationally support an inference of unlawful discrimination in that (a) they were deprived of services while similarly situated persons outside the protected class were not deprived of those services, and /or (b) they received services in a markedly hostile manner and in a manner that a reasonable person would find objectively unreasonable." *A. Kathryn Callwood, et al. v. Dave & Buster's, Inc., et al.*, 98 F. Supp. 2d 694 (D. Md. 2000).

Following the establishment of a *prima facie* case, the burden of production rests upon the Respondent to produce evidence of a legitimate non-discriminatory reason for its adverse treatment of the Complainant. Complainant must then produce sufficient evidence to establish that the Respondent's reason is a pretext for discrimination by a showing that the Respondent's reason is false and that racially motivated discrimination is the actual reason for the adverse treatment. *Id.* This burden is satisfied if the OHR's record contains such evidence even though it was not produced by the Complainant. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

**Respondent Did Not Discriminate Against Complainant On The Basis Of Sexual Orientation ("Ex-Gay") When Respondent Denied Complainant's Application For An Exhibit Booth At Respondent's EXPO 2002.**

Complainant alleges that Respondent discriminated against it on the basis of sexual orientation ("ex-gay") when Respondent rejected its application for an exhibit booth at Respondent's Convention entitled EXPO 2002.

Complainant represents its members who are "ex-gays." The Human Rights Amendment Act of 2002 amended the District of Columbia Human Rights Act of 1977 to provide, *inter alia*, that "discriminatory practices engaged against a person based on his or her actual or perceived membership in a protected class is unlawful". The DCHRA defines "sexual orientation" to mean "male or female homosexuality, heterosexuality and bisexuality, by preference or by practice. Complainant is an organization that supports "the right of homosexuals and lesbians to choose change." The OHR has determined that discrimination against Complainant on the basis of its self-classification as an ex-gay is not discrimination based on a membership in a sexual orientation category.

If Complainant had established the first element, it would have satisfied the second. Complainant published the procedure for receiving Respondent's services, which consisted of applying and making a deposit for a leased exhibit booth at Respondent's Convention. Complainant does not establish the third element of its case by showing that



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it did not enjoy the contracted for privileges and benefits because Respondent denied its application while the applications of similarly situated applicants outside Complainant's protected class were not denied. Complainant is not within a protected class recognized under the DCHRA. As such, Complainant fails to successfully establish a *prima facie* case for discrimination in the area of public accommodations.

Even if Complainant had established a *prima facie* case, Respondent articulates a legitimate nondiscriminatory reason for its actions. Respondent maintains that it reserves the right to deny applications on the basis of the proposed exhibit content, as set forth in the General Purpose Statement on the front of the application form. Respondent explains that the proposed content of Complainant's exhibit was deemed contrary to Respondent's policy of promoting acceptance of gays and lesbians, supporting educational initiatives designed to eliminate misconceptions about gays and lesbians, and seeking to improve conditions and opportunities for gay and lesbian students and teachers. In addition, Respondent asserts that Complainant's mission was determined to be inconsistent because of its advocacy in promoting alternatives to homosexuality so that more gays and lesbians could make the choice to leave homosexuality.

Furthermore, Respondent states that it reserves the right to deny an application if the applicant's booth activities would be disruptive and/or interfere with the business proceedings. Because of the opposition of Respondent's gay and lesbian caucus to missions such as Complainant's, Respondent contends that its Department of Conference and Facilities Management believed that demonstrations and protests could result from Complainant's exhibit.

Additionally, at the time the decision was made to deny Complainant's application, Respondent claims that the Outside Contractor had informed it that exhibit space was sold out. Therefore, Respondent states that the denial letter sent to Complainant reflected that information. Respondent adds that subsequent to that time, cancellations and expansion of exhibit space permitted the acceptance of additional applications after the denial of Complainant's application.

Complainant provides information contradicting Respondent's concern that Complainant's exhibit might be disruptive because of protests or demonstrations. Complainant submits to the OHR an affidavit from a staff member of an Ex-Gay Caucus that had an exhibit booth at the 2004 Expo and contends that there were no disruptions. Also, Complainant contends that Respondent's claim that exhibit space was sold out is not a credible excuse for denying its application because there were subsequent cancellations and expansion of exhibit space.

The information provided by Complainant fails to substantiate a claim that Respondent's reasons for its actions were pretext for discrimination. Evidence in the OHR record indicates that Respondent made a decision to deny Complainant's application based on a restriction that identified the possibility of a protest or demonstration. The fact that a subsequent exhibit two years later at the 2004 Expo did not result in a protest or demonstration did not remove the possibility of such occurring at the 2002 Expo.

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Furthermore, once Respondent made the decision to deny Complainant's application on the basis of a restriction, the fact that space was sold out and that there were subsequent cancellations and expansion of space did not negate the initial reason for the denial. Complainant fails to establish that Respondent's legitimate reasons for its actions is not credible and is a pretext for discrimination, and therefore fails to sustain a charge of discrimination.

#### **NO CAUSE DETERMINATION**

For the foregoing reasons:

The OHR finds **NO PROBABLE CAUSE** to believe that Respondent discriminated against Complainant on the basis of Complainant's sexual orientation (ex-gay) when Respondent allegedly denied public accommodation services to Complainant by refusing to provide Complainant with exhibit space at Respondent's 2002 Annual Convention.

**IT IS SO ORDERED.**

#### **RIGHT TO APPLY FOR RECONSIDERATION**

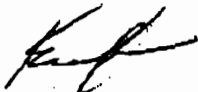
Complainant may apply for reconsideration pursuant to 4 DCMR § 719. Such application along with all supporting documentation must be submitted to the Director of the Office of Human Rights in writing **within thirty (30) days from the following date**

May 25, 2004.

The grounds for reconsideration are limited to: new evidence, misapplication of laws, or misstatement of material facts. The request must, therefore, be based on one or more of these grounds. If the request is not based on one of these grounds, or not timely filed, it will be subjected to dismissal. **COMPLAINANT MUST INCLUDE ALL SUPPORTING DOCUMENTATION AND REASONS FOR THE APPEAL IN THE ORIGINAL REQUEST FOR RECONSIDERATION.** This Office may forward a copy of any request for reconsideration along with all supporting documentation to the other party for a response.

Complainant has three (3) years from the date of service of this decision to file a petition for review with the Superior Court of the District of Columbia.

Sincerely,



Kenneth L. Saunders  
Director

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cc: Mr. Richard Nuanes  
Director of Conference and Facilities Management  
National Education Association  
1201 16<sup>th</sup> Street, N.W.  
Washington, DC 20036-3290