COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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KEVIN DORAN AND
MASSACHUSETTS COMMISSSION
AGAINST DISCRIMINATION
Complainants Docket No. 09-BPA-00597

v.

THE ROSE FUND, INC.,
Respondent

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Appearances: Wayne Thomas, Esq., Bennett Klein, Esq. and Jennifer Levi, Esq. for Complainants;
Margaret Coughlin LePage, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 4, 2009, the Complainant Kevin Doran filed a complaint with the Massachusetts Commission Against Discrimination alleging discrimination in a place of public accommodation on the basis of sex and sexual orientation in violation of M.G.L. c.272, sections 92A and 98. A motion to amend the complaint was filed on June 9, 2009 and granted on January 11, 2011, adding a charge of discrimination in the provision of services on the basis of sex and sexual orientation in violation of M.G.L. c. 151B, section 4(14). On August 31, 2011, the charge of discrimination on the basis of sexual orientation in violation of M.G.L. c. 272, sections 92A and 98 was dismissed for lack of probable cause and the charge of sex discrimination in violation of M.G.L. c. 272,

sections 92A and 98 was dismissed for lack of jurisdiction. The charge of sex and sexual orientation discrimination in the provision of services in violation of M.G.L. c. 151B, section 4(14) was not addressed. Complainant appealed both dismissals and by order dated July 10, 2012, the Investigating Commissioner reversed the lack of jurisdiction finding with respect to the claim of sex discrimination in a place of public accommodation and upheld the lack of probable cause finding with respect to sexual orientation discrimination. The Investigating Commissioner also amended the complaint to allow a determination of whether M.G.L. c. 151B, section 4(14) applies to this case. The Investigating Commissioner certified the issues to public hearing by an order dated January 8, 2013.

On May 10, 2013, the parties filed a Joint Stipulation of Facts and five joint exhibits. The facts set forth below are a composite of the relevant portions of the Joint Stipulation and exhibits.

II. STATEMENT OF FACTS

1. Complainant Kevin Doran is a male survivor of domestic violence who resides in Massachusetts.
2. Respondent "The R.O.S.E. Fund, Inc." (hereafter, "the Rose Fund") is a 501(c)(3) non-profit corporation domiciled in Massachusetts. Its principal place of business is 200 Harvard Mill Square, Suite 310, Wakefield, MA 01880.
3. The Rose Fund was formed to operate exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code to assist women who are confronted with survival needs that result from sexual assault, molestation, eating disorders, or abuse. Joint Exhibit 1.

4. The Rose Fund was not "created" by federal law nor was it "chartered" by federal law pursuant to Title 36 of the United States Code.
5. The Rose Fund operates a referral program designed to provide free or low-cost plastic and reconstructive surgeries and other medical services associated with the head, neck, ears, nose, throat, teeth, and jaw to survivors of domestic violence. The program is known as The Rose Medical Network and Reconstructive Surgery Program. The Rose Fund partners with hospitals and physicians such as the Massachusetts Eye and Ear Infirmary. It refers women to such providers at a substantially-reduced or no fee.
6. Patients who seek access to medical services through the Medical Network and Reconstructive Surgery Program submit applications to the Rose Fund which then matches individuals to participating medical providers. Candidate eligibility is determined at the sole discretion of the Rose Fund and its medical partners.
7. On or about November 4, 2008, the Rose Fund, through its agent John Brisbin, advertised via e-mail that it was offering free facial reconstruction surgery to survivors of domestic violence. Joint Exhibit 3. The e-mail was sent to the "listserv" of the Massachusetts Office of Victim Assistance and stated that recipients should feel free to forward the e-mail to others. Mr. Brisbin indicated in the e-mail that surgery slots for facially-disfigured victims of domestic violence were available at The Massachusetts Eye and Ear Infirmary and needed to be quickly filled. The e-mail specified that qualified survivors had to be: 1) free of abuse for at least a year; 2) a victim of an injury to head, face, neck area; 3) in economic need; and 4) a US legal resident or citizen.
8. In early November of 2008, Stacie Nichols, a domestic violence advocate at New Hope, Inc., contacted the Rose Fund on behalf of her client, Complainant Kevin Doran.

Complainant Doran was seeking facial reconstructive surgery as a result of having been severely injured by his male partner.

9. Ms. Nichols was informed by Mr. Brisbin that the Rose Fund, in accordance with its mission statement, was only for female survivors of domestic violence.

10. Given Mr. Brisbin's statement that the Rose Fund does not provide services to men, Complainant Doran did not apply for facial reconstructive surgery.

11. On June 16, 2009, Respondent's Executive Director and Chairman Daniel Walsh sent an e-mail to Curt Rogers, Director of the Gay Men's Domestic Violence Project. The e-mail was titled "Free Medical Services Available to Women Survivors of DV." It states that "[a]lthough the economic climate has been challenging and most of our 2009 scholarship dollars have dried up, the Rose Medical Network and Reconstruction Surgery Program has expanded dramatically in 2009. The range of medical services we provide include: a full range of facial plastic and reconstructive surgeries. …" Joint Exhibit 5.

12. To date, Complainant Doran has not received facial reconstructive surgery.

III. CONCLUSIONS OF LAW

M. G. L. c. 272, sec. 98 provides, *inter alia*, that whoever makes any distinction, discrimination or restriction on account of sex relative to the admission of any person to, or his treatment in, any place of public accommodation, resort or amusement, as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one

hundred and fifty-one B. Pursuant to sec. 5 of G. L. c. 151B, the MCAD has jurisdiction to accept, investigate, and adjudicate complaints brought pursuant to G. L. c. 272, sec. 98.

In order to establish a prima facie claim of discrimination in a place of public accommodation, Complainant must prove that: 1) he is a member of a protected class; 2) he was denied access to or restricted in the use or enjoyment of an area or facility; and 3) the area or facility was a place of public accommodation. See Fiasconaro v. Aria Bridal and Formal, Inc., 35 MDLR 128 (2013); Stropnicky v. Nathanson, 19 MDLR 39, 41 (1997): Bachner v. Charlton's Lounge and Restaurant, 9 MDLR 1274, 1287 (1987). Once these elements are established, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its conduct. If Respondent meets this burden, the burden shifts back to the Complainant to show, by a preponderance of evidence, that Respondent's articulated reason(s) are pretextual. See Wheelock College v. MCAD, 371Mass. 130, 136 (1976).

Complainant, without dispute, satisfies the first two elements of a prima facie case of public accommodation discrimination. He is male and was denied access to the Rose Fund on the basis of his sex. The question, then, is whether the Rose Fund is a place of public accommodation.

In order to constitute a place of public accommodation, an entity must be one which is "open to and accepts or solicits the patronage of the general public." M.G.L. c. 272, sec. 92A. The Supreme Judicial Court has interpreted the definition of "place" broadly to achieve the remedial goal of eliminating and preventing discrimination. See Currier v. National Board of Medical Examiners, 462 Mass. 1, 18 (2012) *quoting* Local Fin. Co. v. MCAD, 355 Mass. 10, 14 (1968). In Currier, the Supreme Judicial Court affirmed a definition of "place" under the statute to include any entity that provides services to the public whether or not it maintains a physical presence in the state. See Currier, 462 Mass. at 18-19 (deeming National Board of

Medical Examiners to be a "place" in Massachusetts because it is responsible for administering the medical board examination even though it has no physical presence in the state); see also Samartin v. Metropolitan Life Ins. Co., 27 MDLR 210, 213-214 (2005) (recognizing that a place of public accommodation encompasses services that do not require a person to enter a physical structure). The Rose Fund, as well, maintains a presence in Massachusetts insofar as it connects female survivors of domestic violence with medical institutions willing to provide them free or low cost medical care. In order to do so, the Rose Fund uses telephonic and e-mail communications, contacts domestic violence agencies, maintains a website, and uses the state's "listserve." It is irrelevant that the Rose Fund conducts its business primarily over the phone or by internet rather than out of a physical office space.[1]

Although the Rose Fund's limited physical operation does not undermine its status as a place of public accommodation, I conclude that its limited target audience renders it a private rather than public entity. The Fund's Medical Network and Reconstructive Surgery Program limits recipients of its services to survivors of domestic violence who are female, who have sustained facial injuries, and who have been free of violence for a year. Such a cohort does not represent the public at large. The Commission has held that a "limited applicant pool" is a relevant consideration along with other factors in determining "indicia of publicness." See Schknolnick v. The Fly Club, 12 MDLR 1185, 1192 (1990) (Investigating Commissioner dismissed claim against undergraduate club for lack of jurisdiction, holding club was not a place of public accommodation).

There are, to be sure, some organizations deemed places of public accommodation notwithstanding the fact that they provide services to a subset of the general population. See Currier v. National Board of Medical Examiners, 462 Mass. 1, 18 (2012) (National Board of

[1] Unlike the testing bureau and insurance company described in Currier and Samartin, supra, the Rose Fund maintains a physical place of business in Massachusetts at 200 Harvard Mill Square, Suite 310, Wakefield, MA 01880.

Medical Examiners which hosts medical licensure exam for medical students deemed to be a place of public accommodation); Concord Rod & Gun Club, Inc. v MCAD, 402 Mass. 716 (1988) (sports club deemed to be a place of public accommodation despite nominal membership criteria); Stropnicky v. Nathanson, 19 MDLR 39 (1997) (office of lawyer who solicits clients by way of advertising and distribution of business cards deemed to be a place of public accommodation), *affirmed* 21 MDLR 149 (Full Comm'n, 1999) and 2003 WL22480688 (Mass. Super, Sept. 16, 2003) *sub nom* Nathanson v. MCAD.

The cases cited above demonstrate that some limitations on a target audience do not impact an entity's public status where the organization's initial outreach efforts are generic rather than restrictive in nature. For instance, the National Board of Medical Examiners in Currier did not prescreen individuals for eligibility to take the medical licensure exam even though unqualified applicants were thereafter rejected; the executive board in Concord Rod & Gun accepted all but three interviewed candidates during a fifteen-year period despite purported membership requirements pertaining to age, residency, sponsorship, and licensure; and the attorney in Stropnicky solicited clients from the public at large even though she later sought to limit her divorce clients to females. The Respondent entities in all three cases were characterized as places of public accommodations notwithstanding the imposition of restrictions based on gender.

Private organizations, by contrast, are deemed to exercise "genuine selectivity" in their policies. Concord Rod & Gun Club, Inc. v MCAD, 402 Mass. 716, 721 (1988). In my judgment, the Rose Fund conforms to the "genuine selectivity" approach because it adheres to an array of eligibility criteria involving economic status, type of injury, a period of recovery, and residency restrictions. It does not solicit applications from the general public.

In light of the foregoing, Complainant has failed to set forth a prima facie case that the Rose Fund's referral service for female survivors of domestic violence constitutes discrimination based on sex. I arrive at this conclusion despite the fact that the Massachusetts General Court has carved out specific exemptions for same-sex exercise facilities and same-sex room rentals in M.G.L. c. 272, section 92A. As Complainant notes, these exemptions demonstrate the Legislature's ability to identify specific entities which it seeks to exclude from the definition of public accommodations. Such ability does not mean, however, that the Legislature must specify each and every exemption for single-sex charities in order for those charities to maintain private status. There are innumerable private charities and philanthropic organizations that limit their mission and benefits to specifically-designated groups. The mere fact that they solicit applications does not render them public entities for purposes of G.L. c. 272.

Even if Complainant were to set forth a prima facie case of discrimination under the standards set forth above, Respondent argues that single sex organizations such as the Rose Fund are excluded from the definition of a place of public accommodation pursuant to the exemption set forth in M.G.L. c. 272, section 92A for a "corporation or entity *authorized*, created or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex …" (emphasis supplied). According to Respondent, the Rose Fund is "authorized" by virtue of its tax-exempt status under the Internal Revenue Code, 26 U.S.C section 501(c)(3).[2] Respondent equates the Rose Fund's tax-exempt status to federal "authorization" for the "express purpose of promoting the health, social, education vocational, and character development of a single

[2] The Internal Revenue Code provides that corporations which are organized and operated exclusively for religious, charitable, scientific, public safety testing educational, and other specified purposes are exempt from the payment of federal income tax.

sex" as specified in M.G.L. c. 272, section 92A.

Past rulings of the Commission have interpreted the "authorized" exemption of section 92A in a narrow fashion, focusing on organizations with federal charters limiting their membership to same-sex individuals. See U.S. Jaycees v. MCAD, 391 Mass. 594, 601 n. 4 (1984) (noting the MCAD's observation that the exemption is limited to federally-chartered organizations such as Boys Clubs and Boy Scouts of America); Fletcher v. U.S. Jaycees, 3 MDLR 1036, 1058 (1981) (noting that the section 92A exemption was narrowly drawn to cover only specific organizations); see also Concord Rod & Gun Club, Inc. v. MCAD, 402 Mass. 716, 720-721 (1988) (observing that the MCAD has applied the section 92A exemption to organizations "such as" Boy Scouts and Girl Scouts). In light of Complainant's failure to make out a prima facie case under the three-part burden shifting analysis previously discussed, it is not necessary to resolve this issue.

Based on the above analysis, I conclude that the Rose Fund is not a place of public accommodation which discriminated on the basis of sex when it denied facial reconstruction services to Complainant in violation of M.G.L. c. 272, sections 92A and 98.[3] Accordingly, the case is dismissed.

IV. ORDER

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

[3] I decline to address the issue of whether G.L. c. 151B, section 4(14) applies solely to the provision of credit-related services because the Investigating Commissioner did not find probable cause that this section of the statute was violated and because a discussion of this issue is unnecessary in light of the foregoing analysis.

So ordered this 31st day of January, 2014.

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Betty E. Waxman