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COMMISSION ON HUMAN RELATIONS
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IN THE MATTER OF:
G. KEITH RICHARDSON

Complainant,

-v- No. 92-E-80

CHICAGO AREA COUNCIL OF
BOY SCOUTS OF AMERICA
and NELSON L. CARTER,
SCOUT EXECUTIVE,

Respondents.

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ORDER

I. INTRODUCTION

The Complainant, G. Keith Richardson, has been involved with the Boy Scouts of America since age 9. He achieved the rank of Eagle Scout and has served as a volunteer in many different capacities. (Richardson Aff., Ex. A). According to his Complaint in this case, in May of 1992, Mr. Richardson contacted the Chicago Area Council of Boy Scouts of America[1] seeking a job as a Professional Scouter. He alleges that he asked the Council whether it would consider hiring a gay man and was told "No way is the Boy Scouts of America about to give a job to a homosexual." (Complaint ¶2). Complainant wanted to apply to be an employee of the Boy Scouts, a professional scouter, not a scout master. He states that he would have filed an application if the no-homosexual policy had not been in place, but chose not to file one feeling it would have been a futile gesture. (Complaint, ¶3). Complainant filed the instant Complaint on May 21, 1992.

The Respondents filed a Motion to Dismiss which raises several potentially dispositive issues. For the purpose of deciding this Motion, we treat as true all properly plead facts contained within the Complaint. Richardson v. Boy Scouts of America, CCHR No. 92-E-80 (10-30-92).[2]

The Respondents raise three arguments. First, they allege that BSA is a "religious organization" and therefore its hiring decision is exempt from coverage pursuant to Section 2-160-080 of the Chicago Human Rights Ordinance ("CHRO"). Next, they claim that as a matter of law, heterosexuality is a Bona Fide Occupational Qualification ("BFOQ") to be a Professional Scouter. Finally, they claim that enforcement of the CHRO in this case would violate their First Amendment right to associational expression.

As a preliminary matter, the Commission finds that the parties incorrectly framed the third argument as a constitutional one. The CHRO provides at least as much protection as the Constitution does. In particular, the Ordinance contains an exemption for religiously motivated decisions of an employer, and permits employers to impose bona fide occupational qualifications. Together, these provisions are broad enough to encompass all of the Boy Scouts' defenses. In particular, the Commission will address the third argument -- concerning free association -- in that light. See Part III below.

For the reasons set forth in this opinion, the Respondents' Motion to Dismiss is DENIED on all three grounds.

II. RELIGIOUS EXEMPTION

Section 2-160-080 of the CHRO states:

Nothing in this chapter shall apply to decisions of a religious society, association, organization or institution affecting the definition, promulgating or advancement of the mission, practices or beliefs of the society, association, organization or institution.

§2-160-080 Chicago Municipal Code. The Motion to Dismiss asserts, inter alia, that as a matter of law, the BSA's hiring policies regarding homosexual employees fall under the above religious exemption.

Our inquiry here is twofold. Is the Boy Scouts a "religious organization" within the meaning of the Ordinance? And, if so, does the alleged policy of refusing to hire homosexual individuals as "Professional Scouters" affect the definition, promulgation or advancement of its mission, practices or beliefs?

The arguments of the parties can be summarized as follows:

A. The Respondents:

Respondents argue that the Boy Scouts is a religious institution because all members of Scouting are required to adhere to the three principles of "duty to God, duty to others and duty to self." *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1277 (7th Cir.), cert. denied, 114 S.Ct. 602 (1993). Various Scouting publications emphasize that Scouts be "reverent" toward God. This doctrine is embodied in the Scout Oath which is recited at all troop meetings. Applicants for professional positions within Scouting must subscribe to the Declaration of Religious Principles as well as the Scout Oath and Scout Law.

In addition, Scouting has close ties to churches, synagogues and groups affiliated with organized religions. In the Chicago area, 239 churches, synagogues and other religious institutions sponsor almost two-thirds of all Scout packs. (Affidavit of Michael Askew at ¶18). And, according to the Respondents, these religious institutions believe that homosexuality is sinful. Therefore, the decision not to hire homosexual individuals is in furtherance of the religious mission of Scouting.

B. The Complainant:

The Complainant rejoins that while the Boy Scouts may require that its members believe in God, many people within Scouting would be shocked to find out that it defines itself as a "religious organization." Neither Scouting's Charter, nor its Articles of Incorporation, nor its by-laws, nor its Mission Statement make any reference to religion or religious principles. It is not registered as a religious organization under the Illinois Charitable Trust Act. There is only a marginal financial relationship between the Scouts and any church or synagogue. And, he claims, the daily activities of Scouting are far removed from the religious arena.

Additionally, the Complainant argues that even if the Boy Scouts of America is considered a "religious organization," there are as many religious organizations represented in Scouting which believe that homosexuality is moral as those who believe it is immoral. Therefore, the policy of refusing to hire homosexual applicants cannot possibly advance the promulgation of the Boy Scouts' nonsectarian religious mission.

C) Legal Discussion

Both Complainant and Respondents have attached to their memoranda a plethora of Affidavits and Exhibits supporting their respective positions. What is abundantly clear from the submissions of the parties is that nothing is abundantly clear. The issue of whether the Boy Scouts of America is a "religious organization" and whether this particular hiring decision is exempt from scrutiny under the CHRO depends upon the resolution of questions of fact. Therefore, the Respondents' Motion to Dismiss on this ground is DENIED.

We deem it important, however, to give the parties some guidance with regard to the issues

which will need to be explored concerning the application of the religious organization exemption if this case proceeds to an Administrative Hearing. As a general rule, given the liberal construction which we are required to give to our Ordinance to effectuate its remedial purposes, see, e.g., *Wilkins v. Little Village Mall*, CCHR No. 91-E-82 (9-10-92), we concomitantly interpret all exemptions available under the Ordinance narrowly. *Ghoston v. Mercy Hospital*, CCHR No. 91-E-219 (12-30-92). See also, *E.E.O.C. v. Kamehameha Schools*, 990 F.2d 458, 460 (9th Cir.), cert. denied, ___ U.S. ___ (U.S. S.Ct. 93-171, 11/8/93) ("We construe the [Title VII] statutory exemptions narrowly ... and the Schools bear the burden of proving they are exempt.") Therefore, to be found exempt from the CHRO, the Boy Scouts bear the burden of proving both that it is a religious organization and that its decision not to hire Complainant affects the "definition, promulgating or advancement of the mission, practices or beliefs" of the Boy Scouts. These two prongs are addressed separately below.[3]

1. Burden of Proof

In examining the application of a religious exemption to a Respondents' employment decision and to comport with the First Amendment's dictates regarding excessive entanglement in religion, we will employ a variant of the shifting burden analysis that is traditionally employed to analyze the merits of a discrimination case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The burden of establishing that an entity is a "religious organization" within the meaning of our Ordinance will be on the party asserting the exemption. This will generally be the respondent. The respondent will have to establish by a preponderance of the evidence that one of its primary purposes is religious or that it is closely tied to a religious organization. Then, to satisfy the second prong of our exemption, we will merely require that the religious organization articulate a sincerely held belief that the challenged policy or practice affects the "definition, promulgating or advancement of [the organization's] mission, practices or beliefs." Whether any further inquiry into the bona fide nature of this belief will be allowed depends upon the level of entanglement which the inquiry would engender. Compare *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) and *Young v. Northern Illinois Conference of United Methodist Church*, 818 F. Supp. 1206 (N.D. IL 1993) with *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993) and *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir 1990), cert. denied, 111 S. Ct. 131, 112 L.Ed.2d 99 (1990). The Commission need not decide this issue now and so defers a decision about it until it is before the Commission.

2. Determination of Religious Organization

An organization is a "religious organization" within the meaning of our Ordinance if one of its "primary purposes" is religious or if it is "closely tied" to a religious organization. *Ghoston v. Mercy Hospital*, CCHR No. 91-E-219 (12-30-92) and cases cited therein; see *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610, 618 (9th Cir. 1988) ("All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption"); see also *NLRB v. Hanna Boys Center*, 940 F.2d 1295

(9th Cir. 1992); *Speer v. Presbyterian Children's Home*, 824 S.W. 2d 589 (Tex.App. Dallas 1991).

The fact that an organization may legally require as a condition of membership that its members believe in God does not transform that organization, without more, into an exempt religious organization. Neither *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (1993), cert. denied, 114 S. Ct. 602 (1993), nor *Sherman v. Community Consolidated School District No. 21*, 1993 U.S.App. LEXIS 27718 (7th Cir. October 25, 1993) hold otherwise.[4]

Many organizations whose missions appear unquestionably secular attempt to nurture a belief in God in its members. Thus, prayers are read from the floor of Congress, the Pledge of Allegiance is recited in public schools and airports and hospitals maintain chapels on their premises. Yet, none could argue that the primary purpose of these institutions is religious.

Nevertheless, Respondents are correct when they argue that the nondenominational nature of an organization does not render it "nonreligious." See *Lee v. Weisman*, 112 S.Ct. 2649, 2656 (1992); and *Engle v. Vitale*, 370 U.S. 421 (1962). Thus, the Boy Scouts may show that it is a "religious organization" if one of its primary purposes is "religious" in nature, though nondenominational in affiliation. However, none of the cases cited by Respondents require that we accept an organization's self-designation as "religious" without further inquiry.[5]

The case cited by Respondents most relevant to our inquiry is *E.E.O.C. v. Kamehameha Schools*, 990 F.2d 458 (9th Cir.), cert. denied, 114 U.S. 439 (1993).[6] The focus of inquiry in *Kamehameha* was whether the general picture of the Schools reflected a primarily secular or a primarily religious orientation. Only if the latter was true did Title VII's religious exemption apply. The Court looked at the following factors in making its determination:

1. Whether a religious organization has ever controlled or supported the school;
2. Whether the school was affiliated with any denomination;
3. Whether its advertised purpose was essentially religious;
4. The extent to which it required its faculty to be religiously affiliated;
5. The extent to which it required its members [students] to be religiously affiliated;
6. The extent to which its activities had religious overtones; and
7. Whether the curriculum was taught from a secular perspective or a religious one.

The *Kamehameha* court stated that the Schools were not exempt under Title VII because the religious characteristics of the Schools consisted of "minimal, largely comparative religious studies, scheduled prayers and services, quotations of Bible verses in school publications and the employment of nominally Protestant teachers for secular purposes." *Kamehameha*, 990 F.2d at 461. It thus concluded that the Schools were essentially secular institutions operating within an historical tradition that includes Protestantism and that the Schools' purpose and character was primarily secular, not primarily religious.

Similarly, in *Ghoston* the Commission ruled that *Mercy Hospital* was not a religious organization because its primary purpose was secular -- the provision of health services. CCHR No. 91-E-219 (12-30-92). This, despite the fact that *Mercy* referred to itself as a "healing community of Jesus Christ" and held Mass twice per day for those who wanted to attend. *Id.*

We must make the same inquiry here as was made in *Ghoston* and *Kamehameha* to determine whether the Boy Scouts of America is a religious organization exempt under our Ordinance. We expect that the parties will present evidence regarding each of the above areas.

Specifically, we will look at the employer's statements of its religious principles and its adherence to a primarily religious mission. We will look at the role that religion plays in the employer's daily activities. We will look to see whether the organization has held itself out to its members and to the public at large as a religious organization. And we will examine whether the particular functions sought to be regulated have taken on a primarily religious mission or a nonreligious mission. See *Ghoston* and cases cited therein.

In evaluating whether a particular organization is "closely tied" to a religious organization, we will consider the funding sources of the organization, the degree of affiliation with a particular church, synagogue, mosque or other entity and the degree to which religious organizations exercise control over the policies and practices of the employer.

3. Effect on Definition, Promulgating or Advancement of Mission, Practices or Beliefs

If BSA shows that it is a religious organization, the second element of our inquiry will be whether the decision to reject the Complainant as an employee because of his sexual orientation "affects the definition, promulgating or advancement of [the organization's] mission, practices or beliefs."

Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (Brennan, J., concurring) (1987). Thus, inquiry into a religious organization's mission must be done with deference to the religious organization.

Accordingly, in order for the Boy Scouts to meet this second prong of the exemption, it must only articulate some sincerely held belief which will be adversely affected by the hiring of Complainant. If such a showing is made, the Complainant will have the opportunity to rebut that showing only if further inquiry would not unnecessarily entangle the Commission in religious doctrine. See Section C.1 above.

III. THE BFOQ DEFENSES

Section 2-160-030(b) of the Chicago Human Rights Ordinance provides that the prohibitions contained in the CHRO shall not apply to the "hiring or selecting between individuals for bona fide occupational qualifications." Our regulations make it clear that "the person asserting the exemption shall bear the burden of establishing that it is appropriate in a particular circumstance." Rules and Regulations §305.100. The standard to be used is whether the BFOQ is "necessary for safe and efficient job performance." *Id.* (emphasis added).[7]

Caselaw under Title VII makes it clear that the BFOQ doctrine was "meant to be an extremely narrow exception to the general prohibition of discrimination . . ." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). With regard to gender discrimination, for example, the Supreme Court stated: "Gender discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." *Id.*

An employer can rely on the BFOQ exception only by proving that "he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved". *Id.* This determination must be made, not based upon "myths, assumptions or culturally induced proclivities," see *Torres v.*

Wisconsin Dept. of Health & Social Services, 859 F.2d 1523, 1527 (7th Cir. 1988), but rather must be limited to those limited circumstances where "the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily." *Id.*

A. BFOQ/Role Model Defense

The Respondents contend that "accepting the moral values of Boy Scouts of America is a bona fide occupational qualification for Professional Scouters and other positions in which employment would tend to interfere with Scouting's mission of teaching its values." (Respondents' Brief in Support of Motion to Dismiss at p. 10). We read Respondents' briefs as making the argument set forth below:

Scouting professionals are required by the Scout Oath and Scout Law to be "morally straight" and "clean." Scouting conveys to its members the belief that a person with a homosexual lifestyle is, by definition, neither "morally straight" nor "clean." Homosexual individuals, then, are not proper role models and so cannot perform the job of a Professional Scouter. Therefore, it is a BFOQ to require the Boy Scouts employees to be heterosexuals.

The Commission disagrees with this conclusion. The Respondents' attempt to expand the doctrine of Bona Fide Occupational Qualifications to cover the instant situation flies in the face of the stated purpose of the Chicago Human Rights Ordinance. The City Council has declared:

It is the policy of the City of Chicago to assure that all persons within its jurisdiction shall have equal access to public services and shall be protected in the enjoyment of civil rights, and to promote mutual understand and respect among all who live and work within this city.

That prejudice, intolerance, bigotry and discrimination occasioned thereby threaten the rights and proper privileges of the city's inhabitants and menace the institutions and foundations of a free and democratic society; and that behavior which denies equal treatment to any individual because of his or her ... sexual orientation... undermines civil order and deprives persons of the benefits of a free and open society.

CHRO §2-160-010.

Thus, mere prejudice against homosexual individuals does not leave an employer free to condition employment upon generalizations about a protected class. They cannot bar gay people from employment due to "assumptions as to characteristics" about them.

Further, the distinction which Respondents attempt to make between being a "homosexual" or being a "known and avowed" homosexual is illusory. An employer could not defend a religious

discrimination case by arguing that it only refuses to hire people who tell us they are Jewish. The right to be free from discrimination carries with it the right to publicly announce the

fact that you are gay, you are a lesbian, you have a disability, you are Catholic or you are Bulgarian. When one suppresses a person's ability to proudly and honestly proclaim his or her sexual orientation, you negate the very protections provided by our Ordinance.[8]

Most BFOQ determinations in the area of sex discrimination generally involve privacy issues. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), it was determined that the presence of women penal guards among male sexual offenders would pose a real risk of assault because of the guard's sex, thus justifying a "male only" policy for those positions. In like manner, the need to have female registered nurses care for obstetrical patients has been found to be a BFOQ. See *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark 1981), vacated because of mootness, 671 F.2d 1100 (8th Cir. 1982). See also *St. Johns Home for Children v. West Virginia Human Rights Comm.*, 375 S.E.2d 769 (1988), in which it was determined that male sex was a BFOQ for the position of "Cottage supervisor" in a home for disturbed adolescent boys where the position required the supervision of lavatories, hallways and sleeping quarters where children undressed.

In the area of religious discrimination, Court's have held that a Jesuit university may condition employment on being a Jesuit where "the maintenance of a Jesuit presence was important to the successful operation of the university ..." and where it was "significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus." *Pime v. Loyola University*, 803 F.2d 351, 353-54 (7th Cir. 1986).

With regard to sexual orientation, however, what characteristic is possessed by every gay or lesbian which might prevent them from safely and efficiently performing a particular job? With the narrow exception of privacy concerns, we cannot consider the unwillingness of coworkers or customers to associate with a person who is in a protected class. Indeed, "customer preference" is exactly what civil rights laws are meant to overcome. See, e.g., *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388, cert. denied, 404 U.S. 950 (5th Cir. 1971) (rejecting the contention that sex was a BFOQ for airline flight attendants because they (the women) created a "pleasing environment" for the airline's customers). See also *Pearson v. NJW Personnel*, CCHR No. 91-E-126 (Sept. 16, 1992) (holding customer preference not to be an acceptable defense to sexual orientation discrimination).

In the absence of any fundamental privacy issues, there is no reason to believe that an employee's sexual orientation could render him or her unable to safely and efficiently perform his/her job -- regardless of what that job might be. Indeed, unlike gender differences, without an intrusive (and arguably illegal) inquiry into a job applicant's sexual orientation, most employers will have no idea what the sexual orientation of its job applicants might be. The cases advanced by Respondents to support their BFOQ defense as a matter of law offer little support to their argument. These cases raise the issue of when being a "role model" can be a BFOQ. In *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), an unmarried staff member of a private social club for girls was terminated under the club's "negative role model" policy when she became pregnant out of wedlock. After trial, the district court found that there was a manifest relationship between the Club's fundamental purpose (of creating safe and stable environments and maximizing personal options for mostly young black girls) and the role model defense which the Club used to justify firing the plaintiff. The testimony convinced the Court that the Club's policy was just one prong of a comprehensive attack on the problems of teenage pregnancy.[9] *Chambers*, 629 F. Supp. 925, 950 (8th Cir. 1986).

On appeal, the Eighth Circuit, in a split decision, ruled that it could not find the district court's finding of business necessity clearly erroneous. In finding that adherence to the role model rule was a BFOQ, it also ruled that the lower court had not erred in determining that less restrictive alternatives were unavailable. *Chambers*, 834 F.2d at 703.

The differences between *Chambers* and the instant case are apparent. First, the BSA's decision not to hire Complainant because he was gay was made in the face of an ordinance which prohibits sexual orientation discrimination. Had there been a statute which made it illegal to discriminate on the basis of "unwed teenage pregnancy" status, then the *Chambers* case would be more analogous to the Complainant's case. Second, the parties in *Chambers* were agreed that the organization was trying to address a specific social problem. The Boy Scouts have not alleged a specific "social problem" that they are trying to address by their policy of refusing to hire homosexual individuals into certain positions.

Further, Circuit Judge McMillan, dissenting in *Chambers*, articulated the need for the organization's decision to be clearly linked to its goal:

Neither an employer's sincere belief, without more (nor a district court's belief) that a discriminatory employment practice is related and necessary to the accomplishment of the employer's goal is sufficient to establish a BFOQ or business necessity defense. The fact that the goals are laudable and the beliefs sincerely held does not substitute for data which demonstrate a relationship between the discriminatory practice and the goals.

Chambers, 834 F.2d at 708. Obviously, a link between the specific goal and the role model defense must be clearly made.

A different approach was taken in *Vigars v. Valley Christian Center*, 805 F. Supp. 802 (D.C. Cal. 1992) in which a librarian in a religious school was terminated due to her "pregnant out-of-

wedlock status." In denying a motion for summary judgment based upon the BFOQ defense, the Vigars court stated:

In order to assert the defense, the person's job must depend upon the discriminatory characteristic. In the present case, plaintiff acknowledges that she was required to work closely with the students and to practice a lifestyle which modeled the mission of the church to the students and that she understood that the school stressed the importance of modeling moral values and religious doctrine to the students. However, there is serious disagreement about how central her moral life was to her job as librarian, whether she was truly expected to act as a role model in the Chambers sense what impact her pregnancy truly had on her ability to perform

Vigars, 805 F. Supp. at 808-809. This court, then, required a link not only to the organization's specific goals, but also to the person's position within that organization.

We find the cases rejecting the "role model" defense cited by the dissent in Chambers more persuasive. See also *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975) (school district's policy of refusing to hire teachers who were unwed parents struck down); and *Avery v. Homewood Board of Education*, 674 F.2d 337 (5th Cir. 1987). In *Avery*, the court held:

[W]e rejected all three rationales offered in support of ... the rule ... (1) that unwed parenthood is prima facie proof of immorality; (2) that unwed parents are unfit role models, and (3) that employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.

Id. See also *Ponton v. Newport News School Board*, 632 F. Supp. 1056 (E.D. Va. 1986).

Harvey v. YWCA, 533 F. Supp. 949, 955 (W.D.N.C. 1982) presented different facts from the cases cited above. In *Harvey*, a woman whose job included working with teenage girls was terminated from her employment after she became pregnant out of wedlock. The court, in upholding the termination, found that the woman wished to offer herself as an "alternative lifestyle" role model to the girls. This, the court held, was contrary to the YWCA's purpose in counseling these girls. The court stated:

As established by the evidence at trial, the motivating factor behind the discharge of the plaintiff was not that she was female, nor that she was pregnant, nor that she was black, but rather was due to plaintiff's expressed intent to represent to her youth group a philosophy and social concept contrary to those of her employer and in violation of her agreement to espouse the purpose and philosophy of the YWCA.

Harvey, 533 F. Supp. at 954. The difference between *Harvey* and the other cases is that of behavior versus status. That is, the *Harvey* court upheld the termination where the plaintiff's conduct was contrary to a goal of the employer. However, *Andrews*, *Avery*, *Vigars* and the

dissent in Chambers all demonstrate that the status of the plaintiff (as an unwed mother) is not a sufficient basis to justify her termination.

The Respondents have suggested that Mr. Richardson's goal in obtaining employment with the Boy Scouts is to pursue a social agenda which is contrary to the views of Scouting. See Respondents' Reply Brief in Support of Motion to Dismiss at p. 12. Mr. Richardson denies this allegation. See Richardson Affidavit, Ex. A. If the facts at an Administrative Hearing establish that the Complainant wishes to pursue an on-the-job social agenda which conflicts with the legitimate duties of the position he has applied for, then he may not be qualified for the position. If, however, such facts are not established, Respondents will not prevail by arguing their failure to hire Complainant was due to his status alone. See Part III.B *infra*.

More importantly, we have previously dealt with an attempt by a respondent to assert heterosexuality as a BFOQ. See *Pearson v. NJW Office Personnel*, CCHR No. 91-E-126 (Sept. 21, 1992). In *Pearson*, we ruled that:

The language of the Chicago Human Rights Ordinance prohibiting discrimination against homosexuals is plain and broad. Discrimination in employment against homosexuals, or against persons believed to be homosexuals, is flatly prohibited. No exceptions are found in the Ordinance. There is no suggestion in the Ordinance that there are some types of employment for which heterosexuality is so clearly demanded that discrimination against homosexuals would be allowed. (That is, in legal terms, the Ordinance does not provide that in some cases heterosexuality may be a bona fide occupational qualification.) There is no suggestion in the Ordinance that an employer may discriminate against homosexuals to suit the tastes of the employer's customers, or to satisfy the demands of other employees.

Pearson at p. 3. We reaffirm the above holding.[10]

Civil rights statutes have always been intended to regulate conduct which has been based upon irrational fears, myths and stereotypes. While the law makes no attempt to compel abandonment of the moral views which embody these fears, it is hoped that enforcement of our laws will ultimately encourage tolerance and acceptance of our divergent views and lifestyles.[11]

The Respondents' Motion to Dismiss the instant complaint based upon the BFOQ/role model defense is DENIED.

B. BFOQ/Association Defense

There is, however, another sense in which Respondents advance a defense that could fall within the BFOQ provision of our Ordinance. The Respondents argue that the application of the Chicago Human Rights Ordinance to the Boy Scouts' policy against hiring homosexual persons into certain positions would violate the Respondents' First Amendment right of associational expression because hiring homosexual persons would fatally undermine expressive activities central to the organization's mission. As noted above, the Commission does not believe it must construe the U.S. Constitution. Rather, we need interpret only the CHRO given that it provides

at least as much protection of Respondents' free association rights as does the First Amendment.

Because we believe that there are contested issues of fact which may have an impact upon the resolution of this issue, the Respondents' Motion to Dismiss on this basis is DENIED. Accordingly, our discussion below sets forth the factual issues which the Boy Scouts must address in order for the Commission to determine whether the Ordinance may apply in this situation.

As an initial matter, the Commission hereby concludes that the BFOQ doctrine under the CHRO includes the employer's right to condition employment in a way that preserves an organization's expressive activities. There is no doubt that an employer is entitled to engage in such activities. Courts have recognized that "the right to engage in activities protected by the First Amendment implies a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); see *Dallas v. Stanglin*, 490 U.S. 19 (1989) and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1986). This fundamental right may not be infringed upon by the State (or in this case the City) unless the infringement serves a compelling state interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts*, 468 U.S. at 623. With that background, the Commission turns to a review of how the free association defense operates under the CHRO.

1. The Parties' Positions

The Respondents argue that because the CHRO would permit the formation of all white, all black, all Catholic, all Jewish or all homosexual clubs, citing *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), so too must it permit the formation of a private organization whose leadership believes that homosexuality is incompatible with the commitment of being "morally straight." To require the Chicago Area Council of the Boy Scouts of America to hire an admitted homosexual as a Professional Scouter would, the argument goes, pose an "obstacle" to the Boy Scouts' desire to exclude individuals who do not share the views that the organization wishes to promote. See Respondents' Memorandum in Support of Motion to Dismiss at p. 11.

The Respondents have also asserted that the recent California Court of Appeals decision *Curran v. Mount Diablo Council of the Boy Scouts of America*, No. B0601869 (2nd Dist. Mar. 29, 1994) ("*Curran II*") establishes as a matter of law that forcing the Boy Scouts to hire a homosexual would infringe upon their First Amendment rights as protected by the CHRO.

The Complainant responds that the "expressive association" defense is inapplicable in the employment context when raised by an employer alleged to be violating anti-discrimination laws. He argues that the opposition to homosexuality is not a significant expressive goal of the Boy Scouts; that complying with the employment provisions of our Ordinance would not impose a serious burden on the Respondents' mission and that even if there was some infringement upon the Boy Scouts' associational rights, that infringement is necessary to further a compelling state interest unrelated to the expression of ideas. Finally, and persuasively, he argues that, as *Curran II* demonstrates, these issues cannot be resolved in the absence of an evidentiary hearing.

2. Standard to Determine When CHRO's Protection of Free Association

Rights Is Violated.

We believe that an organization's ability to associate for expressive purposes is protected by the BFOQ exemption. If hiring a homosexual individual would fatally undermine these protected activities, then heterosexuality is a BFOQ. Accordingly, the CHRO's protection of free association is coterminous with the United States Constitution's and, because this issue is one of first impression for the Commission, we look to Supreme Court precedent for guidance in outlining the standards to be applied. The Supreme Court made it clear in *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) that the freedom to associate plainly presupposes a freedom not to associate. *Roberts*, 468 U.S. at 623. In the "membership" context, laws which intrude into the internal affairs of an organization forcing it to accept members it does not desire most clearly implicate protected associational interests. These protections, however, are not absolute. Nor is it clear that the same associational interests are equally implicated when the intrusion into the affairs of the organization involves the hiring of an employee rather than the inclusion of a member.

In *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), the defendant law firm argued that the application of Title VII of the Civil Rights Act to the firm's refusal to admit a woman as a partner would violate the firm's constitutional right of expression or association. In summarily rejecting this argument, the Court held that:

Respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits. Moreover, as we have held in another context invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.

Hishon, 467 U.S. at 78 (citations omitted).

An analysis of *Roberts* and its progeny reveals that the Boy Scouts should be given the opportunity to establish that the invalidating its policies regarding homosexuals would infringe upon its right to associational expression. If so, those policies are protected under the BFOQ defense. The resolution of this issue turns upon questions of fact. In *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D.Ill. 1990), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993), the court held that "[w]hether an organization engages in expressive association is a question of fact, and questions of fact are not appropriately considered in connection with a motion to dismiss." *Id.* at 1431.

In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), the Court identified two distinct types of associational freedoms which are protected by the First Amendment, and so, the CHRO. One involves the freedom of intimate association and the other involves the right to form associations to engage in protected activities. *Id.* There has been no assertion that this case implicates the freedom of intimate association and so it shall not be addressed.[12]

The type of relationship which implicates the CHRO's associational protection asserted in this case involves an individual's right to form collective associations for the express purpose of engaging in activities long understood to be protected by the First Amendment. This includes the right to speak, worship and petition the government for redress of grievances. In *Roberts*, the Court held that an individual's right to engage in activities protected from governmental interference implies the right of that individual to associate with other like-minded persons for the same purpose. *Roberts*, 468 U.S. at 622.

While recognizing that the Jaycees' rights to associational expression were implicated by its decision to exclude women from full membership, the Court made it clear that:

The right to associate for expressive purpose is not, however, absolute. Infringement on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts, 468 U.S. at 623. The *Roberts* Court held that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of its Human Rights Act may have on the male members' associational freedoms. The factors relied upon by the Court in reaching this conclusion were:

1. The statute did not aim to suppress speech, nor did it distinguish between prohibited activity and permitted activity on the basis of viewpoint;
2. The statute was not being applied for the purpose of hampering the organization's ability to express its views;
3. The public accommodations statute was enacted to protect the state's citizens from social and personal harms caused by gender discrimination and to vindicate the deprivation of personal dignity and the stigmatizing injuries that accompany denials of equal access to public establishments.

Roberts, 468 U.S. at 625. The Commission shall review evidence presented about those same factors to determine whether the BFOQ defense should be sustained here.

In *Roberts*, Minnesota's decision to extend the protection of its statutes to programs which offer such benefits as "leadership skills, business contacts and employment promotions" were held to further the state's compelling interests. Because there was no basis in the record for the Court to conclude that admission of women as full voting members would impede the organization's ability to engage in protected activities or to disseminate its preferred views, the Court found that the Jaycees had not demonstrated any serious burden on its members' freedom of expressive association. Indeed, the application of the Act did not require the Jaycees to change its creed of promoting the interests of young men, nor did it impose restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members. Finally, the Jaycees' claim that women, as a class, would have different attitudes about issues supported by the Jaycees, were found to be based upon "unsupported generalizations about the relative interests and perspectives of men and women." *Roberts*, 468

U.S. at 628. The Court suggested that it would take a showing "far more substantial" than that attempted by the Jaycees to demonstrate that the admission of women would change the content or impact upon the organization's speech. *Id.*

In *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1986), the Court again rejected an "associational expression" defense asserted by the Rotary Clubs against the application of California's Unruh Civil Rights Act, Cal. Civ. Code Ann. § 51 (West 1982), towards the Rotary's "men only" membership policy. As in *Roberts*, the *Duarte* court held that the evidence presented below had failed to demonstrate that admitting women to Rotary Clubs would affect in any significant way the existing members' ability to carry out their various purposes. *Duarte*, 481 U.S. at 548.

The Court in *Duarte* first looked at the role that the Rotary Clubs played in the expression of ideas, both political, international and/or social. Since the Rotary Clubs were engaged primarily in a variety of service activities, the Court looked to see whether the application of the Unruh Act would require them to abandon or alter their basic humanitarian goals. It did not. Next, the Court examined the Act itself to see whether it was designed or applied in order to suppress the expression of ideas or philosophies. It was not. Finally, the Court examined whether the State had a compelling interest in extending the guarantees of equal access to organizations which develop leadership skills, business contacts, as well as the distribution of tangible goods and services. The answer, as in *Roberts*, was in the affirmative. *Duarte*, 481 U.S. at 549.

Accordingly, the Commission shall look to the standards first set forth in *Roberts* and reiterated in *Duarte* in determining whether the BSA's BFOQ defense should be sustained. Below, the Commission discusses how those standards apply in the employment context.

3. Application of CHRO's Protection of Free Association to the Employment Context

The Complainant and Respondents approach the free association question presented in this case from opposite poles. The Complainant asserts that a decision refusing to employ an individual in facial violation of an anti-discrimination statute cannot, as a matter of law, be afforded any affirmative protection. Compare *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (application of Title VII to law firm's refusal to hire female partner does not infringe constitutional right of expression or association) with *Runyon v. McCrary*, 427 U.S. 160 (1976) and *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94 (1945) ("there is no constitutional right to discriminate in the selection of who may attend a private school or join a labor union").

The Respondents argue that an organization has a right to exclude individuals (whether as members or employees) who do not share the views that the club's members wish to promote. See, e.g., *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 13 (1988) and *Curran v. Mount Diablo Council of the Boy Scouts*, No. B0601869 (2nd Dist., Mar. 29, 1994). The

Court's analysis in *Roberts, Duarte and Hishon* holds out the possibility that a respondent may be able to demonstrate through credible evidence both that the application of a governmental anti-discrimination statute to its employment practices would significantly impede, alter or undermine the expression of the organization's philosophies, goals or functions and that the State does not have an interest, sufficiently compelling, to justify its infringement. It is for this reason that the Commission will not deny this defense as a matter of law.

Nevertheless, the fact that it is employment which is at issue here rather than membership may be relevant to this analysis. Intrusion into an organization's employment practices may, in a given setting, be substantially less disruptive to an organization than regulation of its members. Employment can be conditioned upon conformance to a preset code of conduct. Employees, other than those in policy-making positions, unlike members, are generally not in a position to unilaterally express views which are contrary to the formal views of the organization.

A degree of heightened scrutiny of an employment decision was recognized in *Guesby v. Kennedy*, 580 F. Supp. 1280 (D. Kans. 1984). There, an African-American woman dismissed from employment at a private club alleged race was a factor in her dismissal. In holding that the club had discriminated, the court pointed out:

We believe that, in the context of an employment relationship, the scope of the right of association is much more limited than in the context of membership. ... The same associational freedom is not involved when employment rather than membership is at issue.

Id. at 1284. Accord *Bohemian Club v. Fair Employment & Housing Commission*, 187 Cal.App.2d

[1] Throughout this opinion we will refer to the Respondents Chicago Area Council of the Boy Scouts of America and Nelson L. Carter, Scout Executive collectively as the "Boy Scouts," "BSA" or "Respondents."

[2] Both parties have attached numerous affidavits and exhibits in support and in opposition to the Respondents' Motion to Dismiss. These affidavits present factual matters outside the four corners of the Complaint. In essence, the Respondents are asking us to treat this motion in the manner of a summary judgment rather than as a motion to dismiss. The dilemma we find ourselves in is that there is no specific provision in the Rules and Regulations of the Chicago Commission on Human Relations which provides for summary judgment motions. In fact, §240.110(g) of the Regulations governing the Commission, specifically prohibits motions for summary judgment.

The Respondents' Motion to Dismiss goes to the heart of our jurisdiction to entertain Mr. Richardson's Complaint. In that situation we believe that the Rules and Regulations grant us sufficient leeway to consider uncontested facts by way of affidavit

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which concern the application of an exemption or which concern constitutional challenges to our jurisdiction. We do so in this Order.

[3] The cases which Respondents cite to support their claim that the Boy Scouts are entitled to a religious organization exemption blur the distinction between the two elements necessary to

establish that exemption. *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991) and *E.E.O.C. v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992) all deal with the employment practices of admittedly religious organizations and are therefore inapposite to determine whether the Boy Scouts is a religious organization.

[4] We do not believe that Welsh dealt in any meaningful way with the issue of whether the Boy Scouts could be considered a "religious organization." The Welsh decision found that the Boy Scouts were not a place of public accommodation under Title II of the federal civil rights act. The issue of whether the Boy Scouts are a religious organization was not decided by the Seventh Circuit. *Welsh*, 993 F.2d at 1284.

The Complainant's citation to *Randall* is of no help. The fact that one court has found that "religious activity is never a purposeful part of any Den meeting," *Randall v. Boy Scouts of America, Orange County Council Inc.*, Superior Court of California No. 65 03 94 (Statement of Decision dated June 30, 1992), is of little consequence other than to reinforce our decision to hold an Administrative Hearing on this question.

[5] Respondents cite Chief Justice Burger's concurrence in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) for the proposition that the "condemnation of [homosexuality] is firmly rooted in Judaeo-Christian moral and ethical standards." Presumably, Respondents wish us to rule that any organization which condemns homosexuality is a religious organization. This we will not do.

[6] Respondents' memorandum cited the District Court decision in *E.E.O.C. v. Kamehameha Schools*, 780 F. Supp. 1317 (D. Haw. 1991). The Ninth Circuit Court of Appeals subsequently reversed the District Court. 990 F.2d 458 (9th Cir. 1993). It is this opinion which we find instructive.

[7] § 305.110 of the Regulations sets forth several examples of when criteria or policies will not be deemed to be a BFOQ:

(a) the refusal to select an individual for a position based on assumptions as to characteristics of members of the protected classes, e.g. the assumption that the turnover rate among women is higher than among men, or that women are less willing to work overtime;

Cont'd (b) the refusal to select an individual for a position based on a characterization attributed generally to members of any of the protected classes;

(c) the refusal to select an individual based on the preferences of co-workers, clients or customers or customs or traditions which discriminate against persons from a particular protected class;

(d) the refusal to select an individual because the employer may have to provide separate facilities for a person of the opposite sex, unless the expense would be an undue hardship, taking into consideration, among other factors, the cost involved, the nature of the employer's

operation and the employer's ability to pay;

(e) the refusal to select a woman for a position based on the belief that women with children should not work or are less reliable employees; and

(f) the refusal to select a woman for a position based on the fear that pregnancy may in the future render her unable to work.

[8] We recognize that there may be a difference between revealing one's sexual orientation to an employer or coworkers and inappropriately discussing one's sexual behavior, whether homosexual or heterosexual, within the context of a job where private details about an employee's life might be irrelevant. Thus, in a given situation an employer might legally instruct its employees that there should be no discussion about sex or sexual

Cont'd orientation on the job as long as this rule equally applied to all workers. For the same reason, an employer could enforce a prohibition on sexual harassment or solicitation by homosexual and heterosexuals.

[9] Expert testimony had been presented to the effect that the Club's role model policy could be helpful in preventing teenage pregnancy. *Chambers*, 834 F.2d at 702.

[10] This ruling does not foreclose the possibility that a legitimately held religious tenet may be exempt from the CHRO or that the Respondents may be able to prove that its free association rights would be violated by application of our Ordinance. See Section II *supra* and III.B *infra*.

[11] The CHRO is protective of divergent lifestyles by its very terms: "Nothing in this ordinance shall be construed as supporting or advocating any particular lifestyle or religious view." CHRO _2-160-010. Further, recent cases dealing with the government's policy of banning gays in the military have served to debunk some of the fears and myths which resulted in those long-standing policies. See, e.g., *Meinhold v. Dept. of Defense*, ___ F. Supp. ___, 61 FEP Cases 136, 138 (C.D. Cal. 1993):

Gays and lesbians have served and continue to serve the United States military with honor, pride, dignity and loyalty. The Department of Defense's justifications for its policy banning gays and lesbians from military service are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's.

[12] That doctrine involves the concept that a person's choice to enter into and maintain certain intimate human relationships must be safe from undue intrusion by the state. The types of relationships which have been afforded this type of protection include marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978); childbirth, *Carey v. Population Services Internat'l*, 431 U.S. 678 (1977); raising and educating children, *Smith v. Organization of Foster Families*, 431 U.S. 246 (1978) and cohabitation with relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977).