COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA PA HUMAN RELATIONS COMMISSION, Complainant	:	
v.	:	Docket Nos. E-30106
LIVING WELL (NORTH) INC., and FOUR CORNERS HEALTH CLUBS (PENN-DEL), INC. Respondents	:	P-2099

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FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION, Complainant	:	DOCKET NOS. E-30106 P-2099
v.	:	
LIVING WELL, (NORTH) INC. and FOUR CORNERS HEALTH CLUBS (PENN/DEL), INC. Respondents	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case, for purposes of this case only, and no further proof thereof shall be required:

1. The Complainant herein is the Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission (hereinafter "Commission" or "Complainant").

2. On July 27, 1984, the Commission initiated a Commission complaint against Elaine Powers Figure Salons (hereinafter "Elaine Powers") at Commission docket numbers E-30106 and P-2099.

3. On or about August 6, 1984, the Commission served a copy of the complaint on Elaine Powers by mailing a copy of same to Rock Carter, Esquire, corporate counsel for Elaine Powers, c/o Elaine Powers Figure Salons, Inc., 105 W. Michigan Street, Milwaukee, Wisconsin 53203-0967.

4. In correspondence, dated December 4, 1984, the Commission notified Elaine Powers that its investigation had resulted in a finding that Probable Cause existed to credit the allegations contained in the above referenced complaint.

5. Subsequent to the determination of Probable Cause, the Commission attempted to resolve the matter in dispute between the Commission and Elaine Powers through conference, conciliation and persuasion but was unable to do so.

6. In correspondence, dated May 3, 1985, the Commission notified the Elaine Powers that a Public Hearing had been approved in this matter.

7. Elaine Powers, at the time the Commission initiated its complaint and all times subsequent thereto up to and including at least until the probable cause finding was issued, was a foreign corporation engaged in business for profit within the Commonwealth of Pennsylvania that employed four or more employees with the Commonwealth.

8. Elaine Powers was never organized as nor licensed to do business as a fraternal corporation or association nor as a religious, charitable or sectarian corporation or association within the Commonwealth of Pennsylvania.

9. As of September, 1984 Elaine Powers owned, operated and/or controlled the operation of some 26 physical fitness clubs at various locations within the Commonwealth.

10. All physical fitness programs operated by Elaine Powers within the Commonwealth were conducted at fixed site commercial facilities.

11. Elaine Powers, at all times that it owned, operated and/or controlled the operation of fitness clubs within the Commonwealth of Pennsylvania limited access to its fitness clubs to individuals who purchased membership either by payment of a fee in exchange for enrollment in a specific exercise program of a fixed duration and/or by payment of a specific membership fee that covered a specific period of time.

12. Elaine Powers, at all times that it owned, operated and/or controlled the operation of fitness clubs within the Commonwealth of Pennsylvania until it was purchased on March 29, 1985, restricted membership in its fitness clubs to females. Males were not permitted to purchase memberships nor were they provided access to the facilities.

13. Elaine Powers, at all times that it owned, operated and/or controlled the operation of fitness clubs within the Commonwealth of Pennsylvania, openly solicited the patronage of the general female population through a variety of means including: word of mouth advertising; advertisements in the newspapers of general circulation; and advertisements appearing on commercial television channels.

14. Elaine Powers, at all times that it owned, operated and/or controlled the operation of fitness clubs

within the Commonwealth of Pennsylvania, imposed only three criteria for membership. The first was the requirement that the member be a female; the second was that the requisite membership fee be paid; and the third was that the member agreed to comply with facility rules.

15. Elaine Powers, at least as of October, 1984, had an enrolled membership of over forty thousand females.

16. Elaine Powers, at least as of October, 1984, employed over four hundred employees at its various clubs in the following categories of positions: managers; assistant managers; management trainees; fitness consultants; senior consultants; powercise instructors; and powercise professionals.

17. Elaine Powers, at all times that it owned, operated and/or controlled the operation of fitness clubs within the Commonwealth of Pennsylvania, maintained a policy of refusing to consider for employment or to employ males for any of the aforementioned categories of employment.

18. LivingWell, Inc. is the parent company of LivingWell (North), Inc. LivingWell, Inc. does not conduct business in the Commonwealth of Pennsylvania. LivingWell, Inc. was created when Houstonian, Inc. changed its name to LivingWell, Inc.

19. LivingWell (North), Inc. ("LivingWell") is a subsidiary of LivingWell, Inc. LivingWell conducted business

in the Commonwealth of Pennsylvania through the operation of health clubs, certain of which are the subject of this litigation.

20. Four Corners Health Clubs (Penn/Del), Inc., ("Four Corners"), a Delaware corporation, is an indirect wholly owned subsidiary of LivingWell, Inc. Pursuant to a reorganization that was effective October 11, 1989, the fitness clubs formerly owned by LivingWell are now owned by Four Corners.

21. On October 27, 1989, LivingWell, Inc. and LivingWell filed petitions under Chapter 11 of the federal bankruptcy laws in the Federal District Court for the Southern District of Texas.

22. LivingWell of Delaware, Inc. is a Delaware corporation. It does not own any health clubs in the Commonwealth of Pennsylvania or anywhere else. LivingWell of Delaware Inc. was formerly Elaine Powers Figure Salon, Inc.

23. LivingWell Lady is the trade name under which LivingWell operated generally its ladies only clubs.

24. LivingWell Fitness Center is the trade name under which LivingWell operated generally its clubs which admit male members.

25. Elaine Powers Figure Salon was the trade name under which Elaine Powers Figure Salons, Inc. operated its health clubs prior to the acquisition. Elaine Powers did not permit males to become members of its health clubs.

26. Houstonian, Inc. ("Houstonian") did not own any health clubs in Pennsylvania until it acquired Elaine Powers Figure Salons, Inc. on March 29, 1985 ("the acquisition"). Upon consummating the acquisition, Houstonian commenced conducting business at the following locations which had previously been Elaine Powers facilities:

1135 Ivyland Road, Warminster 18974
Street Road and Knight Road, Bensalem 19020
121 City Line Avenue, Bala Cynwyd 19151
563 Adams Avenue, Philadelphia 19120
Cathedral Road and Henry Avenue 19128
Huntingdon Pike and Rockledge, Philadelphia 19111
1650 Limekiln Pike, Dresher 19025
2439 South Broad Street, Philadelphia 19148
7912 Roosevelt Boulevard, Philadelphia 19152
2700 DeKalb Pike, East Norristown 19401
1149 West Lancaster Avenue, Rosemont 19010
1500 Garrett Road, Upper Darby 19082
4793 Tilgham Street, Allentown 18104
2441 Butler Street, Easton 18042
1101 Woodland Road, Wyomissing 19610
U.S. Rt. 1 State Road 320, Springfield 19064
274 Yost Boulevard, Pittsburgh 15221
Rt. 30 West, Greengate East, Greensburg 15601
5824 Forbes Avenue, Pittsburgh 15217
Room #2331-A East State Street, Hermitage 16148
Baptist Road and Grove Road, Pittsburgh 15236
176 Town Center Road, King of Prussia 19406
Oxford Valley and Hood Blvd., Fairless Hills 19030

The health clubs located in Hermitage and Fairless Hills were owned by franchisees and have continued as such.

27. Also on March 29, 1985, Houstonian acquired the following health clubs previously doing business under the names: "Spa Lady", "Spa Fitness", and "21st Century Health Club," and commenced doing business at the following locations:

4089 William Penn Highway, Monroeville 15146
Rt. 51 Southland Shop. Ctr., Pleasant Hills 15236
510 Pine Hollow Road, McKees Rock 15136
4721 McKnight Road, Pittsburgh 15237
Great Southern Shop. Ctr., Bridgeville 15017
Olympia Shopping Ctr., McKeesport 15132
1339 Freeport Road, Pittsburgh 15238
Exton Square Mall, Exton 19341
147 State Road, Springfield 19064
1103 West Chester Pike, West Chester 19380
English Village Shop. Ctr., North Wales 19454
Rt. 6, Scranton-Carbondale, Dickson City 18519
Wyoming Valley Mall, Wilkes-Barre 18702

28. The following facilities were opened by LivingWell since the acquisitions on March 29, 1985:

1924 McCague, Swissvale 15218
East Pittsburgh, Greensburgh Shopping Center
Greensburgh 15601
Airport Rural Plaza, Allentown 18103

29. The purpose of health clubs formerly owned by LivingWell and now owned by Four Corners includes facilitating the members to exercise, reduce weight and improve their physical conditioning and appearance.

30. LivingWell and Four Corners do not maintain records from which the number and sex of club members immediately prior and subsequent to admitting male members can be derived.

31. As of March of 1989, a total of 28 facilities remained open.

32. In late November/early December of 1989 a total of 12 facilities were closed. As of January 9, 1990, 16 facilities remain open.

33. As of January 9, 1990, only the following 16 clubs remain open, and are owned and operated by Four Corners:

(a) 817 Old York Road, Jenkintown 19046
(b) Street Road and Knight Road, Bensalem 19020
(c) 121 City Line Avenue, Bala Cynwyd 19151
(d) 563 Adams Avenue, Philadelphia 19120
(e) Cathedral Road and Henry Avenue 19128
(f) 1619-24 South Broad Street, Philadelphia 19148
(g) 7912 Roosevelt Boulevard, Philadelphia 19152
(h) 1149 West Lancaster Avenue, Rosemont 19010
(i) 1500 Garrett Road, Upper Darby 19082
(j) 4793 Tilgham Street, Allentown 18104
(k) 25th Street Shopping Center, No. 5, Easton 18042
(l) Route 1 Lincoln Plaza, Langhorne 19046
(m) 147 State Road, Springfield 19064
(n) 1103 West Chester Pike, West Chester 19380
(o) Jamesway Shopping Center, Taylor
(p) Airport Rural Plaza, Allentown 18103

34. The majority of health clubs operated by Four Corners in Pennsylvania admit female members only. Male members are not permitted to use the equipment or participate in any of the programs at these facilities. As of March, 1989, 17 of 28 facilities operated by LivingWell admitted female members only. As of January 9, 1990, 10 of 16 facilities operated by Four Corners admit female members only.

35. LivingWell operated a number of health clubs on an "alternate" basis. These "alternate" health clubs were open to women members only on certain days of the week and/or at certain times and are open to male members only on other certain days of the week and/or at other certain times. As of March, 1989, four of the 28 facilities operated on an alternate basis. As of January 9, 1990, none of the 16 Four Corners facilities operated solely on an alternate basis.

36. LivingWell operates a number of health clubs on a "dual" basis outside of Pennsylvania. At these "dual" health

clubs, dividers are utilized to separate the areas in which women are permitted from the areas in which men are permitted. As of March, 1989, none of the 28 facilities operated on a "dual" basis. As of January 9, 1990, none of the 16 Four Corners facilities operated solely on a "dual" basis.

37. LivingWell also operated a number of health clubs on a co-ed basis. As of March, 1989, LivingWell operated 2 of 28 facilities on strictly a "co-ed" basis, in which men and women were permitted to use all areas of the facility at all times, except for the washrooms and lockerrooms. As of January 9, 1990, 2 of the 16 Four Corners facilities operated on a "co-ed" basis.

38. It is not unusual for health clubs operated by LivingWell to be operated on a combination of the foregoing methods. For example, a club might operate on an alternate basis during the week and on a co-ed basis during the weekend. Similarly, a dual club may have some physical areas or programs which are run on a co-ed basis. As of March, 1989, six of the 28 LivingWell facilities operated on a combination of the foregoing methods. As of January 9, 1990, Four Corners operated 4 of 16 facilities on a combination of the foregoing methods.

39. The health spa located at 4089 William Penn Highway, Monroeville 15146 had been an all female club, but closed in late 1989.

40. The health spa located at Route 51 South Land Shopping Center, Pleasant Hills, had been an all female club, but closed in late 1989.

41. The health club located at 510 Pine Hollow Road, McKees Rock 15136, had been an alternate club, but closed in late 1989. As of March, 1989, the club was open to women only on Monday, Wednesday, Friday and Sunday afternoon. It was open to men only on Tuesday, Thursday, Saturday and Sunday morning.

42. The health club located at 4721 McKnight Road, Pittsburgh, 15237, had been an all female club, but closed in late 1989.

43. The health club located at the Great Southern Shopping Center, Bridgeville 15017, had been an all female club, but closed in late 1989.

44. The club located at Olympia Shopping Center, McKeesport 15132, was an all female club. It operated as an alternate club in March of 1989. As an alternate club, women only were admitted on Monday, Wednesday, Friday and Sunday afternoon. Men only were admitted on Tuesday, Thursday, Saturday and Sunday morning. The facility closed in late 1989.

45. The health club located at 1339 Freeport Road, Pittsburgh 15238, has been an all female club, but closed in late 1989.

46. The health club located at Exton Square Mall, Exton 19341, had been an all female club. This facility closed prior to March 1989.

47. The health club located at 147 State Road, Springfield 19064, was initially an alternate club. It is currently run on both an alternate and co-ed basis. The club is open to female members only on Monday, Tuesday and Wednesday from 8:30 A.M. to 8:00 P.M. It is open to male members only on Thursday from 8:30 A.M. to 9:00 P.M. It is operated on an co-ed basis on Tuesday and Wednesday from 8:00 P.M. to 10:00 P.M., as well as on Friday, Saturday and Sunday.

There are two separate locker rooms for changing clothes, but only one shower area. Consequently, shower usage is divided; women only on Monday, Wednesday, Friday and Sunday from 1:00 P.M. to 4:00 P.M. and men only on Tuesday, Thursday, Saturday and Sunday from 10:00 A.M. to 1:00 P.M.

48. The club located at 1103 West Chester Pike, West Chester 19380, has been an alternate club and is now operated on both an alternate and co-ed basis. It is open to women members only on Monday and Wednesday from 9:00 A.M. to 3:00 P.M. and on Friday from 9:00 A.M. to 12:00 P.M. It is open to male members only on Monday from 3:00 P.M. to 9:30 P.M. and on Tuesday and Thursday from 9:00 A.M. to 3:00 P.M. It is operated on a co-ed basis on Tuesday, Wednesday and Thursday from 3:00 P.M. to 9:30 P.M., on Friday from 12:00 noon to 9:00 P.M. and on Saturday and Sunday.

There are separate locker rooms, but the same whirlpool and swimming pool are used by both men and women.

49. The health club located at the English Village Shopping Center, North Wales 19454, was closed prior to March 1989.

50. The health club located at Route 6, Scranton, Carbondale, Dixon City 18519, was an alternate club. It relocated on July 31, 1986 to Jamesway Shopping Center, Taylor 18517. The facility is now operating on a co-ed basis.

51. The facility located at Wyoming Valley Mall, Wilkes-Barre 18702, was an alternate club. Women only were admitted on Monday, Wednesday and Friday. Men only were admitted on Tuesday, Thursday and Saturday. On Sundays, each sex had three hours of usage. This facility was in the process of being closed in March of 1989 and remains closed as of January 9, 1990.

52. The health club located at 1135 Ivyland Road, Warminster 18974, was and is an all female club. It relocated on January, 1988 to 817 Old York Road, Jenkintown 19046.

53. The health club located at Street Road and Knight Road, Bensalem 19020, was and is an all female club.

54. The health club located at 121 City Line Avenue, Bala Cynwyd 19151, was and is an all female club.

55. The health club located at 563 Adams Avenue, Philadelphia 19120, was and is an all female club.

56. The club located at Cathedral Road and Henry Road, Philadelphia 19128, was and is an all female club.

57. The club located at Huntingdon Pike and I-Rock Ledge, Philadelphia 19111, was an all female club and was closed prior to March 1989.

58. The club located at 1650 Limekiln Pike, Dresher 19025, was and is an all female facility. It relocated to 817 Old York Road, Jenkintown 19046, in January of 1988.

59. The health club located at 2439 South Broad Street, Philadelphia 19148, was and is an all female location. It relocated in March of 1987 to 1619-24 South Broad Street, Philadelphia 19148.

60. The health club located at 7912 Roosevelt Boulevard, Philadelphia 19152, was and is an all female club.

61. The health club located at 2700 DeKalb Pike, East Norristown 19401, was an all female club and was closed prior to March 1989.

62. The club located at 1149 West Lancaster Avenue, Rosemont 19010, was and is an all female club.

63. The club located at 1500 Garrett Road, Upper Darby 19082, was and is an all female club.

64. The health club located at 4793 Tilgham Street, Allentown 18104, was initially an all female facility. It is now operated on a combination dual and co-ed basis. All aerobic classes are conducted on the women's side of the facility, but men are permitted are participate in those classes. All of the facility's life cycles (a particular brand

of aerobic stationary cycle) are on the women's side, but men are permitted access to use them. Most of the free weights are on the men's side, and women are permitted on that side to use them.

65. The facility located at 2441 Butler Street, Easton 18042, was an all women's facility. It was relocated in March of 1987 to the 25th Street Shopping Center No. 5, Easton 18042, as an alternate club. It is now being operated on a co-ed basis with the only gender-based restriction for locker room use.

66. The health club at 1101 Woodland Road, Wyomissing 19610, was an all female facility which was closed prior to March 1989.

67. The health club located at U.S. Route 1, State Road 320, Springfield 19064, was an all female club which was closed prior to March 1989.

68. The club located at 274 Yost Boulevard, Pittsburgh 15221, was an all female club which was closed prior to March 1989.

69. The health club located at Route 30 West, Green Gate East, Greensburgh 15601, was an all female facility which was closed prior to March 1989.

70. The health club located at 5824 Forbes Avenue, Pittsburgh, 15217, was an all female club, but was closed in late 1989.

71. The health club located at Room No. 2331-A East State Street, Hermitage 16148, was an all female club which was closed prior to March 1989.

72. The club located at Baptist Road and Grove Road, Pittsburgh 15236, was a female club but was closed prior to March 1989.

73. The club located at 176 Town Center Road, King of Prussia 19406 was a female club which was closed prior to March 1989.

74. The health club located at Oxford Valley and Hood Boulevard, Fairless Hills 19030 was and is an all female club. It relocated in September of 1987 to Route 1, Lincoln Plaza, Langhorne 19046.

75. Since the acquisitions on March 29, 1985, a dual health club was opened at 1924 McCague, Swissvale 15218. At this facility, dividers were used to separate workout areas. Aerobic classes were conducted on a co-ed basis and the swimming pool was open to both men and women. There were separate showers, saunas and whirlpools for men and women. On weekends, the dividers were opened and the workout areas were operated on a co-ed basis. This facility was closed in late 1989.

76. A new facility was opened after the acquisition in East Pittsburgh, Greensburgh Shopping Center, Greensburg 15601. This facility was operated on a dual basis. However, a swimming pool was opened to both men and women as are aerobics

classes. Additionally, from Friday at 6:00 P.M. through closing on Sunday, the facility was operated on a co-ed basis. During those times, the only gender based restrictions were the locker rooms. The facility was closed in late 1989.

77. After the acquisition, a new facility was opened at Airport Road Plaza, Allentown 18103. The facility is operated on a dual basis. However, aerobics classes are opened to both men and women. Moreover, men are permitted to use the life cycles (a particular brand of aerobic stationary cycle) which are on the women's side of the club. Additionally, women are permitted to use the free weights located on the men's side.

78. After the acquisition, a new facility was opened at 1984 Greentree, Pittsburgh 15217. This club operated on an alternate basis. The facility was open to women only on Monday, Wednesday, Friday and Sunday from 3:00 P.M. to 6:30 P.M. It was open to men only on Tuesday, Thursday and Saturday from 9:00 A.M. to 6:00 P.M. and Sunday from 11:00 A.M. to 2:30 P.M. There was only one locker room, the use of which alternated. The facility closed in late 1989.

79. Males and females pay the same membership fees, regardless of their gender.

80. A copy of the current form of member contract used in Pennsylvania is attached as Exhibit "A".

81. A schedule of facilities indicating square footage and expiration date of lease is attached as Exhibit "B". There are no gender-based restrictions in any of the leases.

82. LivingWell routinely used print media in advertising, both in major newspapers as well as local neighborhood or specialty newspapers. Radio and/or television advertising was employed on a periodic basis. Direct mail was also used from time to time. LivingWell utilized club "guest passes" in support of their "buddy referral" system. This involved cultivating the good will of satisfied members to recommend their friends. The only specific "targeting" employed by LivingWell is specifying in advertising for ladies only clubs that they are in fact, open to women only. This is implied by the name "LivingWell Lady". A sample advertisement is attached as Exhibit "C". Advertising changes by Four Corners are not presently anticipated.

83. Membership is open to the general public. LivingWell did not and Four Corners does not exclude males or females from being employed in any capacity at any of its facilities, regardless of gender.

84. Attached as Exhibit "D" are facility by facility lists of individuals employed by LivingWell. Each list indicates the name, gender and position held for each individual employed on or about December of 1988.

85. The only job restrictions for males involve taking the measurements of female members. Measurements (including busts and hips) are taken when starting a customer on a fitness program and in periodically checking a member's progress. Male employees take measurements of female members only upon their consent. Additionally, male employees are excluded from the women's locker room.

86. The following positions are management positions: General Manager, Manager, Assistant Manager, Management, Floor Manager and Weekend Manager. The Assistant Manager Trainee is a management training position.

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FINDINGS OF FACT

1. The Respondents have, in the past and continue presently, to refuse, withhold from and deny accommodations, advantages, facilities and privileges generally available to their members to certain members based solely on the gender of the particular member. (N.T. 219)

2. Male members, because of their gender, are denied access to the equipment and programs offered at its "female only" facilities while being provided access to the equipment and programs at "alternate" and "dual" facilities. (N.T. 219)

3. Female members, because of their gender, are permitted access to the equipment and programs offered at all "female only" facilities while being provided access to the equipment and programs offered at "alternate" and "dual" facilities. (N.T. 219)

4. Male and female members are provided access to the equipment and programs offered at "co-ed" facilities irrespective of their gender unless the "co-ed" facility is also a "combination" facility in which case gender based restrictions are enforced during such "combination" use periods. (N.T. 218-219)

*Abbreviations
J.E. - Joint Exhibit
S.F. - Stipulations of Fact
N.T. - Notes of Testimony

5. As a result of Respondents' gender based restrictions, male members are entitled to fully utilize only two of the sixteen facilities presently in operation; are totally excluded from ten of the sixteen facilities presently in operation; and are able to gain access to the remaining four facilities at certain times and/or on particular days during which female members may or may not also be able to obtain access. (J.E. #1 at S.F. #33-#39)

6. As a result of Respondents' gender based restrictions, female members are entitled to fully utilize twelve of the sixteen facilities presently in operation (ten of which are open only to female members); and are able to gain access to the remaining four facilities at certain times and/or on particular days during which male members may or may not also be able to obtain access. (J.E. #1 at S.F. #33-#39)

7. The Respondents, organized as "for profit" corporations under applicable statutes, exist to make a profit. (N.T. 220)

8. The essence of the business in which Respondents seek to make a profit is the facilitation of the opportunity of its members to exercise, reduce weight and improve physical conditioning and appearance. (J.E. #1 at S.F. #29)

9. The decision by the Respondent to impose gender based restrictions, at least as it relates to excluding males, is based upon the perception that it would be profitable to market the product to a segment of the female population that they believe would prefer to belong to a "female only" facility. (N.T. 219-220)

10. The Respondents' decision to use gender to determine who to exclude from and/or to admit to its facilities is based upon its perception of its potential customer's preferences. (N.T. 230-232)

11. The Respondents do not include a psychological evaluation as a part of the membership application process. (N.T. 221)

12. The Respondents do not limit membership only to those individuals who have demonstrated the existence of psychological need to exercise without members of the opposite gender being present. (N.T. 221)

13. The Respondents, as a matter of fact, have failed to demonstrate that the policy of using gender to determine access to their facilities is based upon a perceived need of their customers to maintain psychological privacy.

14. The Respondents have failed to demonstrate, as a matter of fact, that exercise, when conducted outside the home and in the presence of others, is an activity so inherently intimate or private in nature that society in general would find it offensive if engaged in an environment in which both males and females were present.

15. The Respondents' gender based exclusionary policies substituted the existence of an immutable characteristic - gender - for an observable characteristic - inappropriate behavior - thereby excluding all members of one sex because of the perceived possibility of misconduct by some members of that sex. (N.T. 166-167)

16. The Respondents, although having authority to do so, have not adopted any specific rules that would prohibit its members from engaging in conduct that is sexually offensive. (N.T. 224, 225)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the complaint and Respondents and the subject matter of the complaint under the Pennsylvania Human Relations Act. ("Act").

2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter.

3. The Respondents are a "public accommodation, resort or amusement" as that term is defined under the Act. see 43 P.S. §954(l).

4. The Commission, under the Act, has express statutory authority to initiate a complaint alleging the occurrence of unlawful discriminatory conduct. see P.S. §959(a).

5. The complaint, as amended, filed by the Commission, in the case at hand complies with the filing requirements found in Section 9 of the Act. see 43 P.S. §959(a).

6. The complaint, as amended, filed by the Commission in the case at hand was filed within the applicable statutory time limit.

7. Under the Act it is an unlawful discriminatory practice for any person being the owner, lessee, proprietor, manager, superintendent agent or employee of any place of public accommodation, resort or amusement, inter alia, to refuse, withhold from, or deny to any person because of his/her sex, either directly or indirectly, any of the accommodations, advantages, facilities or privileges that it offers. see 43 P.S. §955(i)(l).

8. The Respondents have, in the past and continue presently to refuse, withhold from, and deny accommodations, advantages, facilities and privileges that they offer based upon the sex of the person seeking to use same.

9. The Respondents' reliance on gender specific criteria in determining whether particular individuals can utilize particular facilities that the Respondents own and/or operate in the Commonwealth of Pennsylvania, on its face, is an act of unlawful sex discrimination in violation of Section 5(i)(1) of the Act.

10. The Act, as it relates to the prohibition against unlawful sex discrimination in public accommodations, does not contain any express exceptions based upon a perceived customer preference, whether rooted in an interpreted need for psychological privacy or not.

11. The Respondents, as a matter of law, have failed to demonstrate by a preponderance of the evidence that the Act contains, or should be read to contain, an implied exception to the general prohibition against sex discrimination in public accommodations based upon a perceived customer preference that in some cases could be related to an interpreted need for psychological privacy.

12. The Respondents' use - gender - as the basis for determining access to its facilities is contrary to the Commonwealth's stated policy of conditioning access to public accommodations upon individual characteristics rather than group stereotypes.

13. The Respondents, as a matter of law, have failed to demonstrate that the activity of exercising, when conducted outside the home and in the

presence of others, is an activity either so inherently intimate or so fundamentally private that society in general would find it offensive if conducted in an environment in which both males and females were present.

14. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order and it may order such affirmative action as in its judgment will effectuate the purposes of the Act. 43 P.S. §959(f).

OPINION

The Pennsylvania Human Relations Commission (hereinafter "Commission") initiated the instant complaint against Elaine Powers at Docket Nos. E-30106 and P-2900. The Commission, by virtue of 43 P.S. §959(A), has the authority to initiate complaints whenever the Commission believes an unlawful discriminatory practice has occurred. The Commission alleged that Elaine Powers unlawfully discriminated against males by refusing to employ them in both management and non-management positions and by refusing to permit males to become members of the facilities that Elaine Powers operated.

In December of 1984, after an investigation of the allegations, probable cause was found to credit the allegations. Subsequent to the finding of probable cause, the Commission attempted to resolve the matter through conference, conciliation and persuasion but was unable to do so. In May of 1985, the Commission formally notified Elaine Powers that a public hearing has been approved.

Subsequent to the approval for a public hearing, several changes occurred with the Elaine Powers organization. In March, 1985, Houstonian, Inc. acquired Elaine Powers and began operating a number of facilities previously owned and/or operated by Elaine Powers. Houstonian, Inc. at or about the same time changed its name to Living Well, Inc. Living Well, Inc. is the parent company of Living Well (North), Inc. Living Well (North), Inc. (hereinafter Respondent), until October 11, 1989, was the corporate entity that owned and operated fitness facilities previously acquired by Houstonian, Inc. from Elaine Powers. On or about October 11, 1989, pursuant

to another corporate reorganization, Four Corners Health Clubs (Penn/Del), Inc. (hereinafter "Four Corners" or "Respondent") an indirect, wholly owned subsidiary of Living Well, Inc. became the owner and operator of the fitness facilities previously owned and operated by Living Well. Four Corners has continued as the owner of the facilities previously owned by Living Well. Living Well and Four Corners are the Respondents named in the complaint at the time of public hearing.

On January 10, 1990, the Commission convened a public hearing in this matter with Commissioner Alvin E. Echols, Jr. Esquire, presiding. The other two Commissioners in the hearing panel were Elizabeth Umstattd and Carl E. Denson. Phillip A. Ayers, Esquire was the legal advisor for the hearing panel. The hearing was adjourned on January 10, 1990 and the parties were given the opportunity to file post hearing briefs.

As noted by both counsel, the facts in this case are largely not in dispute. In fact, the parties have submitted a very detailed list of stipulated facts which are part of the record in this matter. Generally, the Respondents are organized as for profit organizations doing business in Pennsylvania. Both Respondents have, both in the past and presently, owned and operated a number of fitness facilities in the Commonwealth which have certain gender based access restrictions. Both parties agree that the purpose of these facilities is to assist patrons in their efforts to exercise, reduce weight and improve their physical conditioning and appearance. Access is determined by membership which is open to the public. The memberships are open to the public and conditioned only upon the payment of the fee and the agreement to abide by the rules of the facility. The parties have stipulated that, even though general membership is available to

both males and females, the majority of the facilities in the Commonwealth do exclude male members because of their gender. This is the real issue before the Commission. At the "female only" facilities, males are not permitted to use the equipment or participate in any programs. Other facilities have limited access to the facilities by use of dividers while other facilities have alternative days or time periods. The gender limitations were first utilized by Elaine Powers which did not allow male members at all, and also did not allow male employees. Living Well, after acquiring Elaine Powers, began to change the policy of excluding male members and female-only hiring. Currently, males are hired at all facilities in all capacities. Because of this change, PHRC Regional Counsel the on behalf of the complaint, has advised the Commission that the employment related allegations will not be pursued.

The legal issues in the instant case are fairly clear, given a reading of the Pennsylvania Human Relations Act (hereinafter the "Act"). Those issues are:

1) Are the Respondents a place of public accommodation, resort or amusement within the Act?
2) Do the Respondents refuse, withhold from or deny to any person because of said person's sex any of the accommodations, advantages, facilities, or privileges that it otherwise offers?
3) Does the Act recognize an exception to the general prohibition against sex discrimination in public accommodations?

Under the Act, it is an unlawful discriminatory practice:

(i) For any person being the owner, lessee, proprietor, manager superintendent, agent or employee of any place of public accommodation, resort or amusement to:

(1) Refuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such place of public accommodation, resort or amusement.

43 P.S. §955(i)(1).

The definition of "public" accommodation, resort or amusement is as follows:

(1) The term "public accommodation, resort or amusement" means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, barrooms or any store, park or enclosure where spirituous or malt liquors are sold, ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for

consumption on the premises, drug stores, dispensaries, clinics, hospitals, bathhouses, swimming pools, barber shops, beauty parlors, retail stores and establishments, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth, nonsectarian cemeteries, garages and all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof, financial institutions and all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof, but shall not include any accommodations which are in their nature distinctly private.

43 P.S. §954(l)

There is essentially no dispute as to the issue of whether the Respondent is a place of public accommodation since they have not disputed the issue. In addition, the Respondent has stipulated to facts that would establish it as a place of public accommodation. In the instant case, the evidence at hearing showed, and the stipulations of fact verified, that:

1) the business conducted in the operation of physical fitness facilities (for profit), in exchange for the payment of a fee, or the purpose of assisting members in exercising, reduction of weight and improving physical conditioning and appearance and

2) though use of facilities is predicated on membership, the membership is open to the general public and the general public as a whole is solicited to become members and

3) the only criteria of membership is the payment of the fee and an agreement to abide by the rules of the facility.

Therefore, it is abundantly clear that Respondents' physical fitness facilities would fit within the meaning of public accommodation even though the definition does not specifically mention physical fitness facility. As counsel for the complaint notes, in Pa. Human Relations Commission v. Alto-Reste Park Cemetery Association, 453 Pa. 124, 306 A.2d 881 (1973), the Pa. Supreme Court reasoned that the places listed in the definition were only illustrations of places but not intended to be an exclusive list. Therefore Respondents are places of public accommodation and subject to the Act.

The second important issue is whether the Respondents have refused, withheld from or denied the accommodations, advantages, facilities and privileges that it otherwise offers based on the sex of the person. On the issue, as with the first, there is little dispute. The Respondents admit both in the testimony and the detailed stipulations of fact, that use in fourteen of the facilities in operation in Pennsylvania is limited by gender. The distinction operates in a number of ways. Even though males and females pay the same membership fees supposedly entitling that member to use of any of the facilities in operation, ten of the sixteen facilities are open only to females. In reviewing the Stipulations of Fact, (#39), four facilities are sometimes open to females with restrictions as to the use of the facilities; and sometimes open to both males and females with no

restriction at all. The last two facilities are open to both males and females with no restriction other than locker rooms and washrooms. It is therefore clear that the Respondents' policies operate to deny, withhold from or refuse to allow males to use the majority of Respondent facilities in the Commonwealth. The effect of these policies is to restrict access to the facilities and to violate the prohibition against using gender as a basis "for refusing, withholding from or denying any of the accommodations, advantages, facilities or privileges otherwise offered." 43 P.S. §955(i)(1)

The next step in this analysis is whether there are any exceptions to the general prohibition against sex discrimination. Firstly, a reading of the Act shows there is no express exception to the general rule that a public accommodation may not, because of the gender of the person involved, refuse, withhold from or deny, either directly or indirectly, any of the accommodations, advantages, facilities or privileges that it otherwise offers. There are situations where the Legislature has exempted organizations from coverages. In Commonwealth of Pennsylvania, Pa. Human Relations Commission v. Loyal Order of Moose, the Court held that fraternal organizations have the right to discriminate where the action is based on membership and activity is distinctly private as to the members of the organization. Also the Act expressed that it was unlawful to discriminate on the basis of race, color, religious creed, sex, etc. unless the practice was based on a bona fide occupational qualification. It is clear that when the Legislature wanted to make an exception it did so in an definitive fashion.

In the matter of Cmwlth., PA Liquor Control Board v. Dobrinoff, 80 Pa. Cmwlth. 453, 471 A.2d 941 (1984), the Commonwealth Court reviewed the

issue of gender based distinction in treatment by a public accommodation. The facts in Dobrinoff revolved around a Liquor Control Board decision to suspend the bar's liquor license because the bar had unlawfully discriminated against males by charging a $1.00 cover charge while not charging females the same charge. This was done on nights when the bar had "go-go girls". The bar then appealed to the Court of Common Pleas which vacated the suspension because the violations were "de minimis and committed without intent to violate." Id at 471 A.2d 942-943. Commonwealth Court reversed the Common Pleas Order and held:

> "However when a place of public accommodation has in fact based the collection or exemption of an admission charge solely upon a difference in gender, having no legitimate relevance in the circumstances, then as a matter of law there is a violation of the Human Relations Acts prohibition against discrimination on the basis of sex."

Clearly the legislative intent and Court decisions indicate a desire to eliminate any sex based distinction in the treatment of individuals.

The Respondents in this matter argue that there is a right to exercise in an all-female environment. The Respondents also assert that the "right to privacy" argument is consistent with the Act's recognition that discriminatory conduct otherwise illegal is permissible to the point that membership within a particular class of individuals (race, color, religious creed, sex) constitutes a bona fide occupational qualification. (N.T. 47) In analyzing this argument, we must first review the Commission regulation regarding bona fide occupational qualifications.

16 Pa. Code §41.71 provides:

a) It is anticipated that Section 5 of the Pennsylvania Human Relations Act (43 P.S. §955) which allows employment practices otherwise prohibited if based upon a bona fide occupation qualification will have limited scope and application.

b) Discrimination in employment based upon race, color, religious creed, ancestry, age, sex, or national origin is valid as a bona fide occupational qualification only when it is reasonably necessary to the essence of the normal operation of a particular business or enterprise.

c) A bona fide occupational qualification allowing discrimination in employment is permissible only when the employer can prove a factual basis for believing that all or substantially all members of a class covered by the act would be unable to perform safely and efficiently the duties of the job involved. Absent such a showing, an applicant for a job in issue may be excluded only upon a demonstration of individual.

d) The employer, employment agency or union has the burden of establishing the race, color, religious creed, ancestry, age, sex, or national origin qualifies as a bona fide occupational qualification.

e) The application of the exception is not warranted if based upon reasons such as but not limited to:

(1) assumptions of the comparative general employment characteristics of persons of a particular race, color,

religious creed, ancestry, age, sex, or national origin, such as their turnover rate:

(2) stereotyped characteristics of the aforementioned classes, such as their mechanical ability or aggressiveness;

(3) customer, client, co-worker or employer preference, or historical usage, tradition or custom, or

(4) the necessity of providing separate facilities of a personal nature, such as restrooms or dressing rooms.

f) An employer may exclude persons from positions on the basis of sex only when the sexual characteristics of the employee are crucial to the successful performance of the job.

First of all, a reading of the above regulation clearly indicates that the bona fide occupational qualification is an exception that applies only to employment matters. Subsection (A) clearly provides that this regulation will have limited scope and application, and only when necessary for the normal operation of a particular business or enterprise.

Furthermore, it is clear that the use of bona fide occupational qualification is not normally warranted in a situation involving customer preference. However there are some cases which have recognized a limited exception where the basis of the customer preference is associated with recognized privacy rights. One of the more important cases in this area in Pennsylvania is City of Philadelphia v. Pennsylvania Human Relations Commission, 7 Pa. Cmwlth. 500, 300 A.2d 97 (1973). This case involved the restriction of juveniles in Youth Study Centers to those of the same sex as those juveniles housed in a particular ward at a particular center. The

City had reguested a bona fide occupational qualification entitlement from PHRC which was denied. There was a subsequent appeal to Commonwealth Court and the Commission was ordered to grant the City's request. The essence of the Court's decision was:

> "Therefore, it is paramount that these children be afforded every feasible individual right, including the right of privacy, which very well may be invaded if members of the opposite sex are permitted to inspect nude children housed at the center."

There have been several recent cases in that vein where the courts have recognized that a customer preference, if connected with certain privacy rights, may involve a bona fide occupational qualification exception. A case such as Jones v. Hinds Gen. Hospital, 666 F.Supp 933 (S.D. Miss. 1987) illustrates this point. The Jones case involved a orderly position where responsibilities included catheterization of male patients. Another case, which was cited by Commission counsel, was Fesel v. Masonic Home, 447 Supp. 1346 (D. Del. 1978) aff'd mem., 591 F.2d 1334 (3rd. Cir. 1979) Fesel centered on customer preference and privacy rights involving dressing, bathing, toileting, geriatic pad changes and catheter care. In reviewing these cases, it is clear that the precise activity and/or job involved the exposure of private body parts.

There is a salient distinction between those cases and other situations where the privacy is less infringed upon. A major case in that area is Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Circuit 1971). This case involved the employment of males as flight attendants. The defense of Pan American in Diaz was that the customer preference for females

was rooted in the special psychological needs of its passengers given the "unique environment" of the airline cabin. Diaz at p387. The Court clearly rejected this argument when it explained:

> "Indeed, while we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, those very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."

The Court clearly established that the general rule still is that bona fide occupational qualifications should not be granted when the basis is customer preference. The only exception are those cases, previously discussed, which involve the exposure of intimate body parts.

In reviewing the facts of the case presently before the Commission it is important to discern what the nature of the "privacy right" is, and whether there is justification for said right. Firstly the activity involved is that of exercising. This exercising, whether on the floor or on machines, is done both individually and in group settings. While the members are exercising, they can be observed in any number of ways. As indicated in testimony others in the facility may observe them, other male or female employees may observe them exercising, and members of the public may see them. It was testified that at the Langhorne facility which is

located in a shopping mall, anyone who is walking through the mall will see the exercise area.

The privacy interest that the Respondent is asserting is the right of female members to exercise without being observed by male members. The Respondents then contend that there is a "psychological need" to exercise without men present because of the behavior that men are likely to engage in. (N.T. 166-167) This behavior apparently would consist of catcalls and other kinds of insensitive comments. There is scant evidence in the record indicating that this "psychological need" must be protected as the Respondent asserts. The Respondent certainly can take steps to eliminate any offensive conduct which might take place in its facility.

On the contrary, the Respondent contended that there would be an adverse economical impact if they had to abandon the sex segregated facilities. The Respondents have failed to understand that the argument of economic self interest cannot be the basis of discrimination which conflicts with public policy. The Commission clearly cannot allow the "well meaning" motive of rational self interest to justify discrimination which the Commission is sworn to combat.

The Pennsylvania Human Relations Act is very clear in regard to the facts presented in this case. The Respondents are places of public accommodation under the Act, which have discriminated on the basis of gender. The facts of this case do not merit an exception to the Pennsylvania Human Relations Act.

Accordingly, an appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA PA HUMAN RELATIONS COMMISSION, Complainant	:	
v.	:	Docket Nos. E-30106
LIVING WELL (NORTH) INC., and FOUR CORNERS HEALTH CLUBS (PENN-DEL), INC. Respondents	:	P-2099

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above captioned matter, the Hearing Panel concludes that the Respondent did violate the Pennsylvania Human Relations Act. It is therefore the Hearing Panel's recommendation that attached Stipulations of Fact, Findings of Fact, Conclusion of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Hearing Panel recommends issuance of the attached Final Order.

By: _____
Alvin E. Echols, Jr.
Hearing Panel Chairperson

By: _____
Carl E. Denson
Panel Member

By: _____
Elizabeth Umstattd
Panel Member

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA PA HUMAN RELATIONS COMMISSION, Complainant	:	
v.	:	Docket Nos. E-30106
LIVING WELL (NORTH) INC., and FOUR CORNERS HEALTH CLUBS (PENN-DEL), INC. Respondents	:	P-2099

FINAL ORDER

AND NOW, this 21st day of November , 1990, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel. Further, the Commission adopts said Stipulations, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Stipulations, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

1. That the Respondents cease and desist discriminating on the basis of sex with respect to the accommodations, advantages, facilities and privileges that it otherwise offers within the Commonwealth of Pennsylvania.

2. That the Respondents advise all employees that the accommodations, advantages, facilities and privileges generally offered to its members shall be offered irrespective of the gender of the member involved and that no individual, because of gender, shall be refused, have withheld from or denied any of the accommodations, advantages, facilities or privileges that are otherwise offered.

3. That the Respondents post notices, prominently displayed at each of its facilities in any area accessible both to members and potential members, that inform, members and prospective members of the non-discriminatory policies outlined above.

4. That the Respondent for a period of one year subsequent to the filing of its report of compliance with this Order include in any and all advertising materials language substantially equivalent to the following:

> "Living Well (or whatever name is used in the advertisement) does not discriminate on the basis of gender with respect to any of the accommodations, advantages, facilities or privileges that it offers."

5. That the Respondent provide satisfactory written proof of compliance with the terms of this Order to the Commission, by forwarding same to the Commission's attorney of record in this matter, within thirty (30) days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Rita Clark Acting Chairperson
Rita Clark
Acting Chairperson

ATTEST:

Raquel Otero de Yiengst
Secretary

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LIVINGWELL (NORTH) INC. and FOUR CORNERS HEALTH CLUBS (PENN/DEL), INC., Petitioners	:	
v.	:	NO. 2676 C.D. 1990
	:	ARGUED: September 11, 1991
PENNSYLVANIA HUMAN RELATIONS COMMISSION, Respondent	:	

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

OPINION BY JUDGE PELLEGRINI FILED: April 7, 1992

LivingWell (North), Inc. and Four Corners Health Clubs (Penn/Del), Inc. (collectively referred to as LivingWell) appeal from a decision and final order of the Pennsylvania Human Relations Commission (Commission), which determined that LivingWell had violated and continued to violate Section 5 of the Pennsylvania Human Relations Act (Act),[1] by refusing to admit men to their all-women health club facilities, and ordered LivingWell to cease and desist discrimination on the basis of sex with respect to those facilities.

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[1]Section 5 of the Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(i)(1).

On July 27, 1984, the Commission filed a complaint against Elaine Powers Figure Salons (Elaine Powers) alleging that Elaine Powers violated the Act by excluding men from membership in its fitness clubs and by failing to consider men for employment in certain positions.[2] The Commission filed this complaint, even though they had not received any complaints from men alleging discrimination by Elaine Powers. After an investigation of the allegations in December of 1984 and finding probable cause, the Commission attempted to resolve the matter through conference, conciliation and persuasion, but was unable to do so. In May of 1985, the Commission notified Elaine Powers that a public hearing had been approved.

Prior to the hearing, in March of 1985, Elaine Powers was acquired by Houstonian, Inc., which changed its name to LivingWell, Inc. LivingWell, Inc. is the parent company of LivingWell (North), Inc., which owned and operated the fitness facilities acquired by Houstonian until October 11, 1989. At that time, Four Corners Health Clubs (Penn/Del), Inc., a subsidiary of LivingWell, Inc., became the owner and operator of the facilities.[3] Both LivingWell and Four Corners were named as

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[2]Because LivingWell changed Elaine Powers' policy at the Commission's behest of only hiring female employees, the Commission did not pursue the employment related allegations in its complaint.

[3]Of the sixteen facilities owned by Four Corners Health Clubs, ten are available for use by females only, four are available for use by both males and females on an alternating basis, and two are strictly coed. None of the facilities provide a snack bar, juice bar or restaurant area where networking takes place between

Continued on following page

parties in the complaint at the time of the hearing before the Commission.

At the Commission hearing, LivingWell argued that women have a right to exercise in an all-female environment, and that a woman's right to privacy is consistent with the Act's recognition that discriminatory conduct otherwise illegal is permissible to the extent that membership within a particular class of individuals constitutes a bona fide occupational qualification (bfoq). The Commission, however, determined that the bona fide occupation qualification is an exception that applies only to employment matters, and is not normally warranted in a situation involving customer preference unless associated with recognized privacy rights. The Commission further determined that there was no recognized privacy right regarding exercising, and LivingWell was discriminating based on gender in violation of the Act. The Commission then ordered LivingWell to cease and desist discrimination on the basis of sex regarding its membership. LivingWell filed the present appeal from that order.

The issue now before us is whether a privacy right exists as an exception to Section 5 of the Pennsylvania Human Relations Act, which would permit the exclusion of all men from an all-women's exercise facility.

Continued from previous page

members.

Section 5 of the Act, 43 P.S. §955, provides the following:

> It shall be unlawful discriminatory practice, unless based upon a bona fide occupational qualification. . . .
>
> > (i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any place of public accommodation, resort or amusement to:
> >
> > > (1) Refuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability .... any of the accommodations, advantages, facilities or privileges of such place of public accommodation, resort or amusement.[4] (Emphasis added).

One of the bfoq's the courts have recognized is that there are certain situations involving the individual sexes that warrant the exclusion of the opposite sex for privacy reasons. The courts have referred to these cases as "customer preference" cases because the desires of the customers and not the employees or employers are at issue. Because the relationship between the customer and the charged party are so intertwined, that

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[4]Section 4 of the Act, 43 P.S. §954(l), provides in part that the term "public accommodation, resort or amusement" means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public. In this case, because the parties have stipulated that membership for use of the facilities is open to the general public, there is no question that the LivingWell facilities are places of public accommodation for purposes of the Act.

relationship entitles the charged party to raise the privacy defense. Griswold v. Connecticut, 381 U.S. 479 (1971); Backus v. Baptist Medical Ctr., 510 F. Supp. 1191 (1981).

However, while the term "customer preference" describes the defense as it relates to the reason a business is advancing it as a defense to gender-based discrimination, it is misleading in that it seems to imply that this defense can be advanced against a charge of discrimination involving some other protected class when it cannot. Rather than being denominated "customer preference" defense, a more accurate description is "customer gender privacy" to reflect the basis for the defense and its availability to only a charge of gender discrimination and no others. This defense recognizes a pervasive public policy that certain conduct that relates to and between genders is inappropriate. For example, it is a misdemeanor to commit open lewdness because those who observe it "would be affronted or alarmed." See 18 Pa. C.S. §5901. Similarly, sexual harassment prohibits the creation of a hostile environment as a result of pervasive sexually based words and conduct, making working difficult because of the uncomfortableness a person experiences as a result of such conduct. See Section 703 of Title VII of the Civil Rights Act of July 2, 1964, 42 U.S.C. §2000e-2.

To establish a "customer gender privacy" defense in an employment situation, the federal courts have developed a three-prong test that a charged party must satisfy. A business must

establish a factual basis for believing that not excluding members of one sex would undermine its business operation; that its customers' privacy interests are entitled to protection under the law; and that no reasonable alternative exists to protect the customers' privacy interests. U.S. E.E.O.C. v. Sepita, 755 F. Supp. 808 (1991).

Because this privacy defense legitimizes certain gender-based discrimination, it is an extremely narrow one and is not based upon the consideration of whether customers desire that either gender perform certain preconceived roles. Rejecting a claim by an airline that male customers preferred the employment of female flight attendants, the Fifth Circuit in Diaz v. Pan American World Airways,Inc., 442 F. 2d 385, (5th Cir. 1971) held:

> While we recognize that the public's expectation of one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid. Indeed it was, to a large extent, these very prejudices the [1964 Civil Rights] Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Unlike the "customer preference" advanced in Diaz, those cases which have recognized customer gender privacy as a defense are based on the customer's expression of a legitimate privacy interest. The privacy interest expressed involves situations where the customers, due to modesty, find it uncomfortable to have

the opposite sex present because of the physical condition in which they find themselves or the physical activity in which they are engaged as customers at the business entity. These customers would be embarrassed or humiliated if cared for or observed by members of the opposite sex.

Typical of the cases upholding such a defense to gender discrimination is City of Philadelphia v. Pa. Human Relations Commission, 7 Pa. Commonwealth Ct. 500, 300 A.2d 1971 (1973). In that case, we found that customer gender privacy was a valid defense to not hiring staff members of the opposite sex to act as counselors in a male or female juvenile facility. We recognized that a juvenile's "privacy interest" would be violated if required to submit to a body search, disrobe and shower in front of a staff member of the opposite sex, and that juveniles would be better able to discuss emotional problems with someone of the same sex.

Cases brought under the substantially similar provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. have also recognized that there is a customer preference privacy right defense to gender-based discrimination. See, e.g., Fesel v. Masonic Home, 447 F. Supp. 1346 (D. Del. 1978) aff'd mem., 591 F.2d 1334 (3rd Cir. 1979) (customer preference related to intimate privacy rights including dressing, bathing, toileting, geriatric pad changes and catheter care may justify a BFOQ); Hodgson v. Zoberthall Clothes, Inc., 326 F. Supp. 1264, 1269 (D. Del 1971), aff'd in relevant part, 473 F.2d 589 (3d Cir.) cert.

denied, 414 U.S. 866 (1973) (male gender is BFOQ for sales position in men's clothing store); EEOC v. Mercy Hospital, 28 EPD ¶32, 603 (W.D. Okla. 1982) (desire for sexual privacy may give rise to BFOQ in delivery room nurse position where duties include undressing patient, examining vaginal area, inserting catheter, performing episiotomy); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933 (S.D. Miss. 1987) (male gender is BFOQ for position of orderly where duties include catherization of male patients and a significant number of men objected to being exposed to female nurse assistants); Brooks v. ACF Indus., 537 F. Supp. 1122 (S.D. W. Va. 1982) (male employees' rights would be infringed upon by female janitors entering and performing duties in male bathhouse while men were using facility); Backus v. Baptist Medical Ctr., 510 F. Supp. 1191 (D.C. Ark. 1981) (need for personal privacy in labor room where intimate contact with constantly exposed genitalia justified BFOQ); Norwood v. Dale Maintenance Systems, Inc., 590 F. Supp. 1410 (N.D. Ill. 1984) (male gender is BFOQ for position of washroom attendant for men's washroom in office building).

Unique to this case is that the defense is not being advanced in an employment discrimination case, but rather in a public accommodation discrimination case. While all of these cases involve employment discrimination, the Commission concedes that where there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise

illegal sex discrimination. Otherwise, as the Commission notes, such sex segregated accommodations such as bathrooms, showers and locker rooms, would have to be open to the public. Consequently, because the rationale and the policy reasons are the same, we will apply the same considerations to determine if a valid customer preference privacy right defense exists in response to charges of discrimination at a place of public accommodation.

A.

In order to show a factual basis for excluding males from its all-female facilities, it was incumbent on LivingWell to establish before the Commission that admitting men would undermine its business operation. This factor is a type of market-place check on the validity of the claimed privacy interest. In cases involving employment discrimination, by showing that customers would not frequent the establishment if the opposite sex attended to them, it evidences that the customers' need for gender privacy is based on a sincere and honest belief that the right to privacy is so fundamental that they would not patronize that establishment, and not merely a preference they have to see a certain gender perform a certain role. Similarly, in a public accommodation situation, the adverse effect of customer preference on the business operation verifies that justification for discrimination is based upon a strongly held belief rather than a preference of seeing one sex perform a certain role, but not so strongly that the customer would no longer frequent the establishment if members of the opposite sex were admitted.

Here, LivingWell offered uncontraverted testimony from customers and employees regarding the adverse effect that opening LivingWell's all-female facilities to men would have on its business. The customers all testified that the primary reason they chose LivingWell was that its facilities were for women only, and that they would cease coming to the particular facility if the club became coed. LivingWell employees testified that many women, upon joining the club, informed them that their primary reason for exercising at LivingWell, rather than other facilities, was because it was only open to women. Moreover, the President of LivingWell testified as well that there would be a substantial loss of membership if LivingWell was required to accept male customers.

Confirming these observations was the expert testimony of Dr. Robert Tanenbaum, a psychologist specializing in "appearance matters." Based upon interviews of LivingWell members, Dr. Tanenbaum testified that 50% of the members interviewed stated that exercising in an all-female environment was the decisive and primary reason for choosing LivingWell. Moreover, he testified that 82% of the members interviewed indicated that exercising in an all-female environment was an important factor, but not the only reason for choosing to join LivingWell.

Because no countervailing evidence was presented, the Commission was obligated to find that LivingWell's business would be undermined if it was required to accept male customers, and that maintaining all-female facilities was fundamental to its business.

B.

In addition to proving that its business would be undermined by accepting male customers, LivingWell had to also establish that their female customers have a legitimate privacy interest in need of protection. In examining whether the customer's privacy interest deserves protection, criteria similar to those used in determining whether a right to privacy exists are considered. Generally, those cases that have dealt with whether a customer has a protected gender privacy interest have taken into consideration:

- the nature of the privacy interest involved;
- the nature of the activity being engaged in;
- the sincerity with which it is being advanced;
- the harm that will be caused to the person who will be affected by the application of a customer based preference defense;
- whether there is an overriding public policy reason not to recognize the privacy interest being advanced.[5]

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[5]The Commission, at pages 32 and 33 of its brief, have listed some of the identical factors used to determine whether a gender privacy interest exists.

LivingWell contends that their customers have a legitimate privacy interest in exercising in a single sex club because exercising focuses upon aspects of their figures which they wish to improve. While doing the exercises to reshape their figures, they expose parts of the body about which they are most sensitive, assume awkward and compromising positions, and move themselves in a way which would embarrass them if men were present.

The Commission contends, however, that the nature of the privacy interest advanced here is not entitled to protection because no matter how awkward or compromising the position a person finds her or himself in while exercising, there is no protected privacy issue unless an "intimate area" of the body is actually exposed. The Commission argues that customer "modesty" preferences not commonly held by society are irrelevant to justify a gender-based discrimination.

Simply because all the cases until now have discussed the exposure of or touching of "intimate areas" of the body does not mean that each gender lacks a privacy interest in all other situations. The problem in determining what is "protected" is that societal conduct in this area is not consistent or rational. What we believe is private, humiliates us or makes us uncomfortable comes from societal norms and standards of conduct. What is "acceptable" in that context is based on time, place and circumstances. For example, individuals who would wear generally

acceptable revealing attire at the beach or pool would likely be totally humiliated to be seen walking down a public street in their much less revealing nightwear. What this indicates is that in relation to one's body, there are societal norms, i.e., a spectrum of modesty, which one either follows or respects, and if one is required to breach a modesty value, one becomes humiliated or mortified.

Privacy interests are especially protected involving a person's "body," clothed or unclothed. As this court stated in City of Philadelphia, 7 Pa. Commonwealth Ct. at 512, 300 A.2d at 103, n. 8:

> Griswold v. Connecticut recognizes certain individual rights not specifically enumerated within the Bill of Rights. Having one's body inspected by members of the opposite sex may invade the individual's most fundamental privacy right, the right of privacy of one's own body.

LivingWell's customers testified that they were sensitive about having men observe their bodies while exercising. If men saw them perform their exercises, they testified that they would feel self-conscious and uncomfortable about themselves and would not continue to be members of LivingWell. In uncontradicted testimony, Dr. Tanenbaum testified that it would be detrimental to these women to exercise in front of men:

> Psychologically it would be a very unhealthy experience because it would generate anxiety, shame, and embarrassment, and a painful level of self-awareness which is likened to the experience of feeling disfigured or disabled

> in the sense that one is exposed and vulnerable and there isn't a whole lot that can be done to alter the perception of the observer. It is a very difficult and stressful experience to be on the spot in that way.

(Reproduced Record at 182a-183a.)

Just because "intimate areas" of these women's bodies are not exposed does not mean that they do not have a privacy interest worthy of recognition.[6] The uncontroverted evidence is that if men were admitted, these women would suffer from extreme embarrassment, anxiety or stress and would not continue to exercise at LivingWell. The standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of an "intimate area," but such a right may also be recognized where one has a reasonable basis to be protected against embarrassment or suffer a loss of dignity because of the activity taking place.

The Commission believes that the privacy interest is not justifiable and these women have no reasonable basis to feel embarrassed because society as a whole would not find it objectionable to exercise with the opposite sex. Privacy interests are not determined by the lowest common denominator of modesty that society considers appropriate. What is determinative

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[6]To hold otherwise would mean that separate changing rooms in factories, mines and construction sites where workers change from street clothes to work clothes and back and where "intimate areas" are not exposed, would not be permitted.

is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held. Nothing in the record supports nor does the Commission seriously challenge that these women do not sincerely hold these beliefs or that a reasonable person would not find these beliefs legitimate.

Even if a privacy right exists, whether that privacy interest is worthy of protection is determined by balancing that interest against any harm caused to the excluded men. The only harm the Commission advances is that the men will not be allowed to exercise at certain LivingWell locations. However, the Commission admits that there are other facilities just as convenient where men can exercise in a coed environment. Unlike gender discrimination that would result in the non-hiring of males, or where an exercise establishment has other facilities where business or "networking" is conducted, no harm exists to any male by being excluded from LivingWell's facilities.

Although a privacy interest may exist, whether it is protected is determined by whether there is an overriding public policy that would outweigh that privacy interest. The exclusion of males from LivingWell's all-female facilities would result in no harm to men if a public policy existed in the Act requiring the inclusion of men, and that public policy would not overrule any "privacy interest," no matter how legitimate or sincere. While the Commission has not advanced any public policy reason for

inclusion of males, other than "because males are excluded, per se, it is against public policy," this court has previously articulated the public policy behind laws outlawing gender-based discrimination in City of Philadelphia:

> Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. These laws recognize that there are jobs for which one sex is inherently and biologically more qualified than those of the opposite sex. The biological difference between men and women which in turn produce psychological differences are the facts that justify limiting personal contact under intimate circumstances to those of the same sex.

7 Pa. Commonwealth Ct. at 510, n.7, 300 A.2d at 103, n.7.

The argument recognizing that a privacy interest to exercise in a single sex facility somehow patronizes women by impermissibly protecting them is both illogical and demeaning. It is illogical because at the base of that view is an ossified and stereotypical view that men do not share similar privacy interests -- a view not warranted. It is also demeaning to those women who desire to exercise separately because they are somehow "weak" because they have developed a different sense of modesty than held by others. It infers that there is only one acceptable standard of behavior and any variation should not be tolerated or respected. That individuals can have different senses of modesty as to their bodies than others should be acknowledged if sincerely and reasonably held and where there are no countervailing

interests.[7] No one is being protected in this case by recognizing this privacy interest because those who want to exercise in a unisex environment are free to do so. The only protection being afforded is the freedom to make that choice and for one to have a different sense of modesty than the Commission would like to impose.

Moreover, as the federal district court in Backus, quoting from A. Larsen, Employment Discrimination-Sex, §1430 (3d Ed. 1980), stated:

> It is necessary at this point to stress that the purpose of the sex provisions of the Civil Rights Act is to eliminate sex discrimination in employment, not to make over the accepted mores and personal sensitivities of the American people in the more uninhibited image favored by any particular commission or court or commentator. (Emphasis added.)

510 F. Supp. at 1195.

Because a legitimate privacy interest has been raised and there are no overriding considerations, LivingWell has

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[7]Just because LivingWell acceded to the Commission by employing men, admittedly with some limitation on their duties, the Commission contends that because men are now present, LivingWell can no longer argue that male customers should not be permitted based upon customer gender privacy. This contention ignores that an employee has a different relationship to the member than a male customer would have. An employee occupies a position of trust, can be monitored and is subject to termination. More importantly, privacy rights are not interconnected, but each claimed right is examined in a separate balancing test based upon the countervailing rights of the parties involved.

established that a protected privacy interest exists for women who want to exercise at an all-female facility.

C.

Finally, in employment discrimination cases, even if a legitimate privacy interest exists, if the job duties can be modified to accommodate the privacy interest and still employ the gender claiming discrimination, then a bfoq does not exist. Because it is impossible to allow men to be present while these women are exercising, and, at the same time protect their right to privacy, no reasonable alternative exists to protect LivingWell's customer's privacy interests while at the same time accommodating male members.

Accordingly, because LivingWell has established that a legitimate privacy interest exists and if disallowed would undermine its business operations and there would be no practical way to ameliorate its impact, the decision of the Commission is reversed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LIVINGWELL (NORTH) INC. and FOUR CORNERS HEALTH CLUBS (PENN/DEL), INC., Petitioners	:	
v.	:	NO. 2676 C.D. 1990
PENNSYLVANIA HUMAN RELATIONS COMMISSION, Respondent	:	

O R D E R

AND NOW, this 7th day of April, 1992, the order of the Pennsylvania Human Relations Commission dated November 21, 1990, Nos. E-30106 and P-2099, is reversed.

Dan Pellegrini

DAN PELLEGRINI, JUDGE

CERTIFIED FROM THE RECORD

AND ORDER EXIT

APR 7 1992

Deputy Prothonotary Chief Clerk

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LIVINGWELL (NORTH) INC. and FOUR CORNERS HEALTH CLUBS (PENN/DEL), INC., Petitioners	:	
v.	:	
PENNSYLVANIA HUMAN RELATIONS COMMISSION, Respondent	:	No. 2676 C.D. 1990
	:	Argued: September 11, 1991

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

DISSENTING OPINION
BY JUDGE PALLADINO FILED: April 7, 1992

I respectfully dissent.

The majority concludes that there is a customer preference defense which justifies the unquestioned gender-based discrimination in this case. I respectfully note that the cases relied upon by the majority which uphold a customer preference defense to gender-based discrimination all involve an employment problem. Without a doubt, this case is a public accommodation problem, not an employment problem. This case concerns the participation by members of the public in an exercise program at a business establishment, not the hiring or firing of employees, or anything else associated with employment.

In recognition of the fact that the customer preference defense has only been applied to employment problems, the majority proposes to extend the customer preference defense to public accommodation problems upon a bona fide public accommodation qualification theory. This qualification "may justify otherwise illegal sex discrimination" and exists in places of public accommodation "where there is a distinctly private activity involving the exposure of intimate body parts. . . ." Majority Opinion at 8. However, this case does not involve the exposure of intimate body parts. Rather, this case involves an activity, exercise, which is performed outside the home, in a group setting, and in full exercise attire. This activity, therefore, cannot be so "distinctly private" so as to justify the exclusion of all men from a public exercise facility based upon customer preference.

As the validity of the bona fide public accommodation qualification hinges upon the exposure of intimate body parts, so, too, does the customer preference defense. In all of the cases cited by the majority which uphold the customer preference defense, the exposure of intimate body parts creates a legitimate privacy interest. This legitimate privacy interest is what justifies the discrimination. Thus, to justify the discrimination in the present case, the majority attempts to create a legitimate privacy interest in exercise even though this activity does not involve the exposure of intimate body parts.

The majority attempts to legitimize exercise as a privacy interest through the testimony of several female Livingwell members and the testimony of Dr. Tanenbaum. The

female members testified that they would no longer patronize the Livingwell facilities if the facilities became coed because they would be embarrassed to exercise in the presence of males. Dr. Tanenbaum testified that it would be psychologically detrimental for these women to exercise in front of men. The majority, based on this testimony, concludes that even though this interest in exercising in an all-female environment may not be commonly held, the interest is nevertheless a legitimate privacy interest because it is sincerely held.

However, this privacy interest can neither be legitimate, nor the testimony relied on credible because males are in fact present at the facilities where these women exercise. At two out of the three facilities which the females who testified patronize,[1] men are employed in positions ranging from manager and service personnel to aerobics instructor. Stipulations of Fact, Exhibit D. In addition, Dr. Tanenbaum's testimony was based on the interview of eighteen female members from three different Livingwell facilities. At all three of these facilities, men are employed in positions such as manager, trainer, aerobics instructor and lifeguard. Stipulations of Fact, Exhibit D. The only job restrictions for these male employees involve the taking of measurements of the female members, unless consented to, and exclusion from the women's locker room. Stipulations of Fact, No. 85. Therefore, the majority's

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[1] Although there was no actual testimony from the Bala Cynwyd facility member, counsel stipulated that she would offer the same testimony as the other three members who testified.

conclusion that gender-based discrimination is justified in this case because "it is impossible to allow men to be present while these women are exercising, and, at the same time protect their right to privacy" is totally at odds with the testimony in the record. Majority Opinion at 16.

As the above quote illustrates, the majority is striving to "protect" the supposed privacy interest of the female Livingwell members by perpetuating gender-based discrimination at these Livingwell facilities. However, what the majority is in reality perpetuating is an antiquated notion regarding the status of women in society. That antiquated notion was best articulated by President Judge Ludlow of the Court of Common Pleas of Philadelphia County in an 1884 case involving a motion for admission of a woman into the practicing bar. He stated in denying the motion:

> [T]he Creator of the universe, for a reason which any reasonable being ought to consider self-evident, made a distinction between the sexes, and saw fit in the propagation of the species to protect the physically weaker sex by laws as inflexible as other and general laws governing the universe, and to place under the protection of the male sex the female, simply because as a general and universal law applicable to all created living organisms the female requires protection.

In re Application of Mrs. C.B. Kilgore, 14 Wkly. Notes Cas. 255, 256 (1884).

Although we are now almost a century away in time from Judge Ludlow's statement, we are obviously not as far away in thought. Women have, over the past century, managed to cast off

this "shield of protection" and have assumed roles in society equal to that of men's. But women cannot continue to maintain that equality when decisions such as this purport to "protect" women by keeping them separate, for separation is inherently unequal.

Madaline Palladino

MADALINE PALLADINO, JUDGE

CERTIFIED FROM THE RECORD
AND ORDER EXIT
APR 7 1992

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LIVINGWELL (NORTH) INC. and FOUR CORNERS HEALTH CLUBS (PENN/DEL), INC., Petitioners	:	
v.	:	NO. 2676 C.D. 1990 ARGUED: September 11, 1991
PENNSYLVANIA HUMAN RELATIONS COMMISSION, Respondent	:	

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

DISSENTING OPINION
BY JUDGE SMITH

FILED: April 7, 1992

If the extraordinary views espoused by the Majority and its creation of the "customer gender privacy" theory were permitted to represent the law of this Commonwealth, the compelling interest in combatting discrimination would be severely compromised which may once again rear its invidious head in places of public accommodation throughout the Commonwealth.

The legislature of this Commonwealth has declared in Section 2 of the Pennsylvania Human Relations Act, 43 P.S. §952, that it shall be the public policy of this Commonwealth to eradicate wherever possible discrimination against persons or groups of persons which "undermines the foundations of a free

democratic state"; and pursuant to Section 5 of the Act, 43 P.S. §955, it shall be unlawful to discriminate under the circumstances in this case. Absolutely nothing in the language or intent of the Act or in any of the employment-related cases relied upon by the Majority can legitimately support the exception to the Act's prohibition which the Majority has carved out to justify discrimination in places of public accommodation. To extend a "privacy right" to a woman's purely voluntary and personal choice to exercise at Livingwell to reshape her figure is unquestionably outside the ambit of one of the most basic and fundamental principles of law.

DORIS A. SMITH, Judge