

**CITY OF CHARLOTTE
OFFICE OF THE CITY ATTORNEY
Memorandum**

TO: Mayor and City Council

FROM: Robert E. Hagemann, City Attorney

DATE: February 3, 2015

RE: Non-Discrimination

At your November 24, 2014 meeting, Scott Bishop of the Human Rights Campaign gave a presentation in which he proposed adding marital status, familial status, sexual orientation, gender expression, and gender identity to the list of protected characteristics in several City non-discrimination ordinances. In response, Council asked me to prepare a briefing paper and to draft a proposed ordinance that would implement the request.

History of Protected Characteristics

The Civil Rights Act of 1964 provided, among other things, broad federal protections against discrimination in public accommodations based on race, color, religion, and national origin (Title II) and in employment based on race, color, religion, sex, and national origin (Title VII). Protections against employment discrimination based on age (1967) and disability (1990) were subsequently enacted.

There are no federal laws that expressly prohibit discrimination based on sexual orientation, gender expression, or gender identity. However beginning with an ordinance adopted by the City of Minneapolis in 1975, and according to the attached FAQ from the Human Rights Campaign, seventeen states (North Carolina is not one of them), the District of Columbia, and more than 225 cities and counties have passed laws prohibiting discrimination based on sexual orientation and gender identity.

City Ordinances

1. Public Accommodations

In 1968 the Charlotte City Council adopted an ordinance prohibiting discrimination in public accommodations. The ordinance was based on the 1964 federal law and covered race, color, religion, and national origin. In 1972, the Council amended the ordinance to include sex.

As part of the 1985 recodification of the entire City Code, the public accommodations ordinance was modified to treat sex differently than race, color, religion, and national origin, establishing protections only in restaurants, hotels, and motels, and even then

carving out restrooms, bathhouses and similar facilities which are in their nature distinctly private, as well as dormitory lodging facilities such as the YMCA and YWCA.

While we have been unable to find any documentation that clearly states the reasons for this change in approach, the City Attorney at the time believes it was recommended by the contractor for the recodification likely due to lingering concerns stemming from the debate over the Equal Rights Amendment which some argued would do away with single sex restrooms.

The public accommodations ordinance does not specify an enforcement mechanism, but pursuant to state law, a violation of the ordinance is enforceable as a misdemeanor (fine up to \$500, no active time unless three previous violations) or through equitable relief (*i.e.*, a court order directing a cessation of the violation). In practice, the Community Relations Committee typically seeks voluntary compliance through a conciliation process.

2. Community Relations Committee

At the same time the 1968 public accommodations ordinance was adopted, Council established the Community Relations Committee. Among the Committee's duties is a charge to provide an annual report that may include "recommendations of the committee for legislation or other actions to eliminate or reduce discrimination with respect to [the protected characteristics]". In addition, through the conciliation process, the Committee is authorized to "[a]pprove or disapprove plans to eliminate or reduce discrimination with respect to [the protected characteristics]".

3. Passenger Vehicles for Hire

The passenger vehicles for hire ordinance provides that "[n]o company operating certificate holder, vehicle operating permit holder, or driver shall refuse or neglect to transport any person on the basis of race, color, religion, sex or national origin". The ordinance is enforced through civil penalties and revocation of operating certificates and permits.

4. Commercial Non-Discrimination

The commercial non-discrimination ordinance was adopted in 2003 as part of the Council's response to the dismantling of the woman and minority business development program after the City was sued in federal court. The ordinance prohibits businesses that seek to contract with the City from "discriminating in the solicitation, selection, hiring or treatment of vendors, suppliers, subcontractors or commercial customers on the basis of race, gender, religion, national origin, ethnicity, age, or disability." The ordinance provides for enforcement through the rescission, suspension or termination of a current contract, and the disqualification from bidding and contract awards for a period of not more than two years.

Description of Proposed Amendments

The proposed amendments would simply add “marital status, familial status, sexual orientation, gender identity, and gender expression” to the list of protected characteristics in the passenger vehicles for hire and commercial non-discrimination ordinances as well as the list of protected characteristics that the Community Relations Committee is authorized to make recommendations for legislation or other actions to eliminate or reduce discrimination and to approve or disapprove plans to eliminate discrimination through the conciliation process.

With regards to the public accommodations ordinance, the proposed amendments would not only add these five characteristics to the general prohibition of discrimination, but would also add “sex” to the general prohibition and delete the separate section dealing with sex. This would bring the City’s ordinance in line with the trend across the country of not carving out “sex” in an attempt to preserve the right of businesses to provide separate restroom facilities (*i.e.*, it is not discriminatory to provide separate men’s and women’s restroom facilities).

Regarding the concerns expressed at the November 24 meeting, the Human Rights Campaign asked me to provide the attached document that provides some perspectives from twelve states.

enclosures

NON-DISCRIMINATION POLICIES AND ORDINANCES: FAQ

Beginning with an ordinance passed in Minneapolis in 1975, **17 states**, the District of Columbia, and **more than 200 cities and counties** have enacted laws prohibiting discrimination based on sexual orientation and gender identity. More than 500 private businesses across the United States, including 61% of Fortune 500 companies, have voluntarily adopted policies that prohibit discrimination based on sexual orientation and gender identity.

WHY ARE THESE LAWS AND POLICIES NEEDED?

- The motivation behind these protections is simple, but powerful: **the goal is to protect people from arbitrary discrimination** in employment, housing, public accommodations, and other areas. A person’s sexual orientation or gender identity has nothing to do with their job performance, or their qualifications as a good renter, or their right to receive service at a business open to the public. People should be judged on their merits and not be denied opportunities because of prejudice.
- In jurisdictions without protections against discrimination based on sexual orientation or gender identity, LGBT people simply have no legal protection against even the most outrageous forms of discrimination, unless they live in a city or county with applicable anti-discrimination protections.
- One reason why it is particularly urgent to prohibit discrimination based on gender identity is the reality that **transgender people experience unusually high rates of discrimination**: Forty-seven percent have experienced an adverse job outcome, such as being fired, not hired or denied a promotion.¹ Transgender people report having difficulty making ends meet because, although they possess valuable skills and experience, they often cannot find work because they face discrimination from employers.
- It’s important to note that **laws against discrimination do not prevent employers from firing incompetent employees and do not prevent landlords from turning down unqualified renters**. These laws simply make sure that all employees get a fair chance at working hard to get ahead without being singled out or judged based on factors irrelevant to their ability to work or pay their bills.

WHAT CAN CITIES DO?

- Nearly all cities have the ability to pass municipal non-discrimination ordinances that prohibit discrimination against lesbian, gay, bisexual and transgender (LGBT) people within the city’s jurisdiction. Cities often already have non-discrimination ordinances that prohibit discrimination against other protected classes (such as race, religion, national origin, age, etc.), and extending these protections to LGBT people is as simple as adding “sexual orientation, gender identity and expression” to the list of protected classes.
- Cities also have the ability to prohibit discrimination in the city workplace by adopting non-discrimination policies that protect city employees from discrimination on the basis of their sexual orientation and gender identity or expression.
- City contractors can also be required to have non-discrimination policies in order to make a contracting proposal to the city.

¹ National Center for Transgender Equality and the National Gay and Lesbian Task Force “National Transgender Discrimination Survey” http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf, November 2009.

NON-DISCRIMINATION POLICIES AND ORDINANCES: FAQ

RESPONDING TO COMMON COUNTERARGUMENTS

- **Special Rights.** Anti-discrimination laws do not create “special rights” for LGBT Americans. The right to work, rent a home, or shop for groceries is not a “special” right, and that is why we already have civil rights laws protecting against many forms of discrimination including race, religion, gender, disability and national origin. An inclusive law simply puts LGBT Americans on the same footing as everyone else.
- **Flood of Litigation.** An anti-discrimination law will not create a flood of litigation or harm small businesses. Experience with other state and local laws which protect LGBT workers has shown that LGBT people file discrimination claims at the same rate that people in other protected classes do; and, because the LGBT community is smaller than many of the other protected classes that there simply has not been a notable increase in litigation.
- **Redundant Protections.** The Employment Non-Discrimination Act would add discrimination on the basis of sexual orientation and gender identity into federal law, but even if ENDA becomes law it only deals with employment discrimination. A recent decision by the EEOC that forbids gender identity discrimination in federal employment is an important, but similarly limited, development. 29 states do not prohibit discrimination on the basis of sexual orientation and 33 do not prohibit discrimination on the basis of gender identity.
- **Bathroom Concerns.** Anti-discrimination laws forbidding discrimination on the basis of gender identity allow transgender people to use the bathroom in which they feel most comfortable and physically safe. The claim that these laws provide men access to women’s rooms in order to assault women and girls is fear-mongering, fundamentally untrue, and insulting. Assault is and continues to be illegal, no matter who is perpetrating it or where it occurs. Transgender people deserve the ability to be able to use bathrooms in peace and safety, and the truth is that they are far more likely to be the *victims* of harassment and violence in bathrooms than they are to be the perpetrators – particularly if they are forced to use a bathroom that is inconsistent with their gender identity or expression.
- **Religious Organizations.** Religious organizations can choose to hire members of their own faith and exclude applicants based on virtually any reason, so long as the work those people are hired to perform is related to the organization’s religious activities. Those rights are not affected by a non-discrimination ordinance that includes protections for LGBT people.
- **Religious Individuals.** Existing non-discrimination laws at the state and local level obligate business owners to serve people of all faiths and races even when doing so challenges the religious views of the business owner. For example, the Christian owner of a florist shop may not refuse to provide flowers for the wedding of an interfaith couple, nor would it for an inter-racial couple. Businesses engaged in public commerce should be held to this same standard in relation to LGBT people.

<http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533>

Experts in 12 states -- including law enforcement officials, government employees, and advocates for victims of sexual assault -- have debunked the right-wing myth that sexual predators will exploit transgender non-discrimination laws to sneak into women's restrooms, calling the myth baseless and "beyond specious."

Colorado

State Law Has Prohibited Discrimination In Public Accommodations Since 2008. In 2008, Colorado expanded its Anti-Discrimination Act, which prohibits discrimination in public accommodations, to include sexual orientation and gender identity as a protected class. [*The Denver Post*, 5/29/08]

Coalition Against Sexual Assault: Opponents Of Protections Are Creating "Unsubstantiated Fear." Alexa M. Priddy, director of training and communications at the Colorado Coalition Against Sexual Assault, reported no problems as a result of her state's non-discrimination law. In an email to *Media Matters*, she wrote:

Denying equal rights is yet another form of discrimination against transgender individuals, which is pervasive within our society and institutions. Such criticisms of this law and ads [that] invoke what we see as "trans panic," an attempt to create fear of transgender people and a false label of trans individuals as sexual predators.

CCASA would love to see the real focus be on the realities that transgender people are far too often targeted for sexual violence, and if they seek support through victim services or the criminal justice system in the aftermath, they often face continued discrimination from the very people who are there to help. Sexual assault is already an under-reported crime, and we see this increase with marginalized communities. We want to focus on creating safety for transgender survivors and not on creating unsubstantiated fear. [Email exchange, 3/8/14]

Connecticut

State Law Has Prohibited Discrimination In Public Accommodations Since 2011. In 2011, Connecticut Gov. Dannel Malloy signed into law legislation prohibiting discrimination in public accommodations based on gender identity or expression. [*Bay Windows*, 7/6/11]

State Commission On Human Rights: "Unaware Of Any Sexual Assault." In an email to *Media Matters*, Jim O'Neill, legislative liaison and spokesman for the Connecticut Commission on Human Rights in Opportunities, reported no problems as a result of the state's non-discrimination law:

I am unaware of any sexual assault as the result of the CT gender identity or expression law. I'm pretty sure it would have come to our attention. [Email exchange, 3/6/14]

Hawaii

State Law Has Prohibited Discrimination In Public Accommodations Since 2006. In 2006, Hawaii expanded its non-discrimination laws to prohibit discrimination in public accommodations on the basis of sexual orientation and gender identity. [Hawaii Civil Rights Commission, accessed 3/12/14]

State Civil Rights Commission: Non-Discrimination Law "Has Not Resulted In Increase[d] Sexual Assault Or Rape." William Hoshijo, executive director of the Hawaii Civil Rights Commission, told *Media Matters* in an email:

In Hawai'i, the protection against discrimination in public accommodations on the basis of sex, including gender identity or expression, has not resulted in increase sexual assault or rape in women's restrooms. The HCRC is not aware of any incidents of sexual assault or rape causally related or attributed to the prohibition against discrimination on the basis of gender identity or expression. (In contrast to anecdotal reports of transgender students being harassed and bullied in school restrooms when forced to use an assigned restroom inconsistent with their gender identity.) [Email exchange, 3/6/14]

Iowa

State Law Has Prohibited Discrimination In Public Accommodations Since 2007. In 2007, the Iowa Civil Rights Act was expanded to prohibit discrimination on the basis of sexual orientation and gender identity in public accommodations. [Iowa Civil Rights Commission, accessed 3/14/14]

Des Moines Police Department: "We Have Not Seen That." In an interview with *Media Matters*, Des Moines Police Department spokesman Jason Halifax stated that he hadn't seen cases of sexual assault related to the state's non-discrimination ordinance:

We have not seen that. I doubt that's gonna encourage the behavior. If the behavior's there, [sexual predators are] gonna behave as they're gonna behave no matter what the laws are. [Phone interview, 3/13/14]

Maine

State Law Has Prohibited Discrimination In Public Accommodations Since 2005. In 2005, Maine adopted legislation prohibiting discrimination in public accommodations on the basis of gender identity and sexual orientation. [GLAD, 2/25/14]

State Human Rights Commission: "No Factual Basis" For Sexual Assault Fears. In an email to *Media Matters*, Executive Director Amy Sneirson of the Maine Human Rights Commission said that the state's non-discrimination law hadn't led to increased sexual assault or rape:

I know that this concern persists but I personally have not seen any factual basis for it.

I am not aware of any increased sexual assault or rape in women's restrooms as a result of Maine's 2005 adoption of protections in the Maine Human Rights Act for sexual orientation (which, in Maine, includes "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression"). [Email exchange, 3/7/14]

Massachusetts

Cambridge Has Prohibited Discrimination In Public Accommodations Since 1997. In 1997, the city of Cambridge expanded its non-discrimination ordinance to prohibit discrimination against transgender people in public accommodations. [National Gay and Lesbian Task Force, July 2008]

Cambridge Police Superintendent: "No Incidents" Of Transgender Protections Being Abused. Police Superintendent Christopher Burke told *Media Matters* in an email:

Back in 1984 Cambridge enacted an ordinance that established the Human Rights Commission. The purpose of the ordinance was to protect the human rights of all citizens of the City. In 1997 this ordinance was amended to specifically include gender identity and expression. Much like the Transgender Equal Rights Bill proposal, the City of Cambridge sought to offer protection to transgender individuals from being harassed, fired from a job, denied access to a public place, or denied or evicted from housing. Since this 1997 amendment there have been no incidents or issues regarding persons abusing this ordinance or using them as a defense to commit crimes. **Specifically, as was raised as a concern if the bill were to be passed, there have been no incidents of men dressing up as women to commit crimes in female bathrooms and using the city ordinance as a defense.** [Email exchange, 3/7/14, emphasis added]

State Victims' Advocacy Group: Fears About Transgender Protections Are "Beyond Specious." Toni Troop, spokeswoman for the statewide sexual assault victims organization Jane Doe Inc., told *Media Matters* in an email:

The argument that providing transgender rights will result in an increase of sexual violence against women or men in public bathrooms is beyond specious. The only people at risk are the transgender men and women whose rights to self-determination, dignity and freedom of violence are too often denied. We have not heard of any problems since the passage of the law in Massachusetts in 2011, nor do we expect this to be a problem. While cases of stranger rape and sexual violence occur, sexual violence is most often perpetrated by someone known to the victim and not a stranger in the bush or the bathroom. [Email exchange, 3/7/14, emphasis added]

Minnesota

State Law Has Prohibited Discrimination In Public Accommodations Since 1993. In 1993, Minnesota amended its Human Rights Act to prohibit discrimination against transgender people in public accommodations. [OutFront Minnesota, accessed 3/13/14]

Minneapolis Police Department: Fears About Sexual Assault "Not Even Remotely" A Problem. Minneapolis police spokesman John Elder told *Media Matters* in an interview that sexual assaults stemming from Minnesota's 1993 transgender non-discrimination law have been "not even remotely" a problem. Based on his experience, the notion of men posing as transgender women to enter women's restrooms to commit sex crimes "sounds a little silly," Elder said. According to Elder, a police department inquiry found "nothing" in the way of such crimes in the city. [Phone interview, 3/11/14]

Nevada

State Law Has Prohibited Discrimination In Public Accommodations Since 2011. In 2011, Nevada enacted three transgender non-discrimination laws, including a law explicitly prohibiting discrimination in public accommodations. [National Gay and Lesbian Task Force, 6/2/11]

Las Vegas Police Department: No Problems Since Passage Of Non-Discrimination Law. Asked whether Nevada's 2011 gender identity law had fueled a rise in sex crimes, Las Vegas Police Department spokesman Jesse Roybal told *Media Matters*, "the answer would be no." After the department's lieutenant for sexual assault ran a check of crimes since 2011, Roybal told *Media Matters* that the department had not "had any incidents involving transgender suspects." [Phone interview, 3/6/14, 3/11/14]

New Mexico

State Law Has Prohibited Discrimination In Public Accommodations Since 2003. In 2003, New Mexico amended its Human Rights Act to prohibit discrimination on the basis of sexual orientation and gender identity in public accommodations. [The Williams Institute, **September 2009**]

Albuquerque Police Department: "Unaware Of Any Cases Of Assault" Due To Non-Discrimination Law. Officer Tasia Martinez, Public Information Officer for the Albuquerque Police Department, told *Media Matters* in an email:

We are unaware of any cases of assault in our city as a result of transgendered [sic] accommodations. [Email exchange, 3/13/14]

Oregon

State Law Has Prohibited Discrimination In Public Accommodations Since 2007. In 2007, Oregon enacted the Oregon Equality Act, which prohibits discrimination in public accommodations on the basis of sexual orientation and gender identity. [Lambda Legal, accessed **3/13/14**]

Bureau of Labor And Industries: "Zero Allegations" Of Assault Due To 2007 Law. Oregon Bureau of Labor and Industries spokesman Charlie Burr told *Media Matters* in an email:

The Oregon Equality Act protects the rights of LGBT Oregonians in employment, housing and public places and has done so without any incidents of LGBT assaults on women in public restrooms that we're aware of. Our agency has encountered zero allegations of LGBT assault related to this public accommodation protection. [Email exchange, 3/7/14]

Portland Police Department: "I Have Never Heard Of Any Issues Like This." Portland Police Department spokesman Peter Simpson wrote in an email to *Media Matters*:

I have never heard of any issues like this in Portland. We have a very low rate of sexual assault/rape crimes here overall. [Email exchange, 3/7/14]

Rhode Island

State Law Has Prohibited Discrimination In Public Accommodations Since 2001. In 2001, Rhode Island explicitly prohibited discrimination on the basis of gender identity or expression in public accommodations. [GLAD, 2/25/14]

State Commission for Human Rights: No Increase In Sex Crimes Due To Non-Discrimination Law. Rhode Island Commission for Human Rights Executive Director Michael D. Evora told *Media Matters* in an email:

The Commission for Human Rights has not taken in any cases alleging gender identity discrimination in respect to bathroom usage in public facilities since the law was amended to prohibit such discrimination. In addition, we are not aware of any affect the passage of the law has had on incidents of assault in public restrooms. [Email exchange, 3/7/14]

Vermont

State Law Has Prohibited Discrimination In Public Accommodations Since 2007. In 2007, Vermont explicitly prohibited discrimination on the basis of gender identity in public accommodations. [GLAD, 3/4/14]

State Human Rights Commission: "We Are Not Aware" Of Any Problems From Non-Discrimination Law. In an email to *Media Matters*, the Vermont Human Rights Commission's Karen Richards said:

I have only been here a short time so was checking with my staff to find out if they were aware of any issues. ... We are not aware of any other issues or problems similar to this caused by prohibiting discrimination against those who are transgendered. [Email exchange, 3/7/14]

Montpelier Police Department: No Complaints. Montpelier Police Chief Tony Facos responded to an email inquiry about whether the state's non-discrimination law had led to incidents of rape or sexual assault in women's restrooms, stating, "We do not have any complaints related to this issue." [Email exchange, 3/10/14]