MAINE HUMAN RIGHTS COMMISSION

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BASIS STATEMENT AND RESPONSE TO COMMENTS

Changes to Employment and Housing Rules Addressing Sexual Orientation
May 21, 2007

BASIS STATEMENT

Pursuant to 5 M.R.S.A. § 4566(7), and the requirements of the Administrative Procedures Act, 5 M.R.S.A. § 8001 et. seq., the Maine Human Rights Commission (the Commission) has adopted amendments to its employment and housing rules to implement Chapter 10 of the Public Laws of 2005, *An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation* (Chapter 10), effective December 28, 2005. Chapter 10 added "sexual orientation" to the protected classifications under the Maine Human Rights Act, 5 M.R.S.A. § 4551, et. seq. (the Act), in the areas of employment, housing, places of public accommodation, credit extension, and educational opportunity. These adopted rules apply to Chapter 3: *Employment Regulations of the Maine Human Rights Commission* and Chapter 8: *Housing Regulations of the Maine Human Rights Commission*.[1] The rules define the term "sexual orientation" and add provisions that correspond to the Commission's regulations addressing discrimination on the bases of other protected classifications.

The Commission has considered all relevant information available to it, including, but not limited to, the statements and arguments filed. A public hearing was held on Wednesday, March 21, 2007 and comments were received for ten days thereafter.

COMMENTS AND RESPONSES

The following individuals and organizations submitted comments:

- Mary L Bonauto, Esq., commented on behalf of Gay & Lesbian Advocates & Defenders (GLAD).
- David Webbert, Esq., commented on behalf of the Maine Employment Lawyers Association (MELA).
- Philip J. Moss, Esq.

The following is a summary of the comments received and the Commission's responses.

Comment

GLAD commented that the definitions of the terms "gender identity" and "gender expression" in the proposed rule are consistent with the legal framework of Maine law

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[1] Rules addressing sexual orientation discrimination in education and places of public accommodation will be implemented at a later time.

and the better thinking in social sciences. GLAD commented that the phrase "gender identity" refers to one's self-identification as a man or a woman, as opposed to one's anatomical sex at birth. The phrase "gender expression" refers to how society views and interprets one's gender identity, that is, recognizing someone as a man or a woman.

Response

The Commission agrees with the commenter's characterization of the definitions of "gender identity" and "gender expression." Moreover, the Commission intends that the definition of "gender expression" be limited to the manner in which an individual's "gender identity" is expressed. Although not raised by the commenter, the Commission is concerned that the proposed definition of "gender expression" should be changed slightly to reflect this intent. The proposed rule defined "gender expression," in part, as "the consistent manner in which an individual expresses gender-related traits. . . ." The adopted definition of "gender expression" will be changed as follows:

> The term "gender expression" means <u>the manner in which an individual's gender identity is expressed</u>, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual's assigned sex at birth.

Comment

MELA commented in opposition to the addition of § 3.12(E)(3), which appears in Section 5 of the proposed rule. Proposed § 3.12(E)(3) provides as follows:

> Except as otherwise provided in state or federal law, it is an unlawful employment practice for an employer to award unequal fringe benefits to an otherwise similarly situated married employee and an employee with a domestic partner when the domestic partnership is based on the employee's homosexual sexual orientation. As used herein, the term "domestic partner" means one of two unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

MELA commented that although it is in favor of affording same-sex couples in committed relationships the same recognition, privileges, and supports as heterosexual married couples, the rule attempts to create a de facto right of marriage for same-sex couples in conflict with the spirit and letter of Chapter 10, which includes a provision that it does not create a right to marry for same-sex couples. MELA also commented that §

3.12(E)(3) would require employers to discriminate against protected heterosexual employees who choose not to marry their domestic partners and would deny them the benefits granted to similarly situated homosexual employees. MELA also commented that the determination of whether a particular employee has a "domestic partner" would be challenging for employers and would subject employees to invasive questioning.

GLAD commented in favor of § 3.12(E)(3). In light of the fact that same-sex couples cannot marry in Maine, GLAD commented that using marriage as an eligibility criterion for family benefits is unlawful discrimination against gay and lesbian employees under both a disparate treatment and a disparate impact legal analysis. GLAD commented that while some case law provides that no discrimination occurs when all unmarried couples are treated alike, the better reasoned cases reject that argument and compare same-sex couples with opposite sex couples. GLAD commented that conditioning family benefits on marriage prevents 100% of gay and lesbian employees from accessing those benefits while opposite sex couples can access the benefits by marrying.

Response

The Commission believes that using marriage as an eligibility criterion for the receipt of fringe benefits discriminates against gay and lesbian employees who are in committed, long-term relationships that are comparable to marriage. Because gay and lesbian employees cannot marry in Maine, *see* 19-A M.R.S.A. § 701(5), employment policies that make the receipt of benefits contingent on marriage disparately impact gay and lesbian couples, all of whom are denied the benefits. *See Bedford v. New Hampshire Community Technical College System*, 2006 WL 1217283, *11 (N.H. Super. 2006); *Tanner v. Oregon Health Sciences Univ.*, 157 Ore. App. 502, 516 (Or. Ct. App. 1998). *Cf. Alaska Civil Liberties Union v. State*, 122 P.3d 781, 789 (Alaska 2005) (restricting benefits to spouses is "facially discriminatory" under equal protection analysis because homosexual employees "can never become eligible for benefits").

The Commission recognizes, however, that in disparate impact cases employers must be afforded an opportunity to justify their policies that have a disparate impact, *Maine Human Rights Com. v. Auburn*, 408 A.2d 1253, 1265 (Me. 1979), although the Commission notes the difficulty of making such a showing in this context. *See Bedford*, 2006 WL 1217283 at *11. In addition, in light of federal preemption issues, the Commission recognizes that § 3.12(E)(3) may cause confusion concerning which employer policies are covered. *Cf. Catholic Charities of Maine, Inc. v. City of Portland*, 304 F.Supp.2d 77 (D.Me. 2004) (upholding Portland domestic partnership law to the extent it does not apply to ERISA plans). Accordingly, the Commission has removed § 3.12(E)(3) from the proposed rule, allowing each case to be addressed individually.

The Commission believes that employers can correct otherwise unlawful policies tying fringe benefits to marital status by offering the same benefits to the domestic

partners of gay and lesbian employees. The Commission acknowledges, however, the potential of such a limited correction causing disparate treatment against some similarly situated employees in domestic partnerships based on heterosexual sexual orientation. Accordingly, employers may be best served by offering domestic partnership benefits that are equivalent to marital benefits to both homosexual and heterosexual employees. The Commission does not believe that an appropriate domestic partnership policy would be difficult to enforce or overly invasive.

Section 3.12(E)(2) will remain in the rule, which states that "[i]t is an unlawful employment practice for an employer, employment agency, or labor organization to discriminate on the basis of sexual orientation with regard to fringe benefits." This provision gives adequate notice of the risk of using marriage as an eligibility criterion for fringe benefits when doing so adversely impacts gay and lesbian employees. Moreover, the Commission will issue guidance setting forth its interpretation of this provision.

The Commission notes that it does not believe that Chapter 10 precludes its interpretation that marriage as an eligibility criterion may unlawfully discriminate on the basis of sexual orientation. Section 23 of Chapter 10 provides as follows: "Construction. This Act may not be construed to create, add, alter, or abolish any right to marry that may exist under the Constitution of the United States, the Constitution of Maine or the laws of this State." Nothing in the Commission's interpretation would "create, add, alter, or abolish" the right to marry in Maine.

Comment

Mr. Moss commented in opposition to the addition of § 3.12(F), which appears in Section 5 of the proposed rule. Section 3.12(F) would impose an obligation on employers, employment agencies, or labor organizations to make "reasonable accommodations" in rules, policies, practices, or services for the gender identity or gender expression of applicants or employees, unless doing so would cause an "undue hardship." Mr. Moss commented that the absence of such a statutory requirement is significant in light of the fact that there is one for people with disabilities. Mr. Moss questioned the Commission's reliance on the Maine Supreme Judicial Court's decision in *Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, in which the Court upheld the validity of a Commission regulation requiring reasonable accommodation of an employee's religious beliefs. Mr. Moss commented that the continued validity of that ruling may be questioned in light of the Court's decision in *Whitney v. Wal-Mart Stores, Inc.*, which invalidated a different rule of the Commission. Mr. Moss also commented that *United Paperworkers* rested substantially on the fact that the Commission's religious accommodation rule was modeled on an analogous federal rule and statutory provision, yet there are no such federal counterparts for gender identity or gender expression.

Mr. Moss commented that it is unclear what would constitute a reasonable accommodation for gender identity or gender expression, or even what kind of requests

might be made and under what circumstances. He questioned whether a biologically male employee with a female gender identity must be allowed to use the women's rest room, even over the objection of female employees. He commented that the cost to remodel restrooms to accommodate such a request would be substantial.

GLAD commented in favor of § 3.12(F). GLAD commented that the concept of "reasonable accommodation" as well as "undue hardship" for an employer are well-established in Maine law. GLAD commented that the Commission's definitions implicitly suggest that people should be allowed to use the bathroom that matches their gender identity. GLAD commented that it would be unreasonable to require a female-to-male transsexual to use the women's bathroom and that doing so would actually cause more disruption than allowing him to use the men's bathroom. During a "real life" test period in which a person is ascertaining his or her certitude about a different gender identity, reasonable accommodations might include use of single stall bathrooms, which are commonly available, as well as curtains in dressing rooms. GLAD commented that there is a great deal of room in negotiating over what is reasonable in the transition period with the touchstone being that the employee should not be required to use facilities that are inconsistent with the gender to which the person is transitioning.

Response

The Commission believes that § 3.12(F) is a valid construction of the Act. The language adopted is very similar to the Commission's rule concerning reasonable accommodation of religious beliefs that was upheld by the Law Court in *Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d 369 (Me. 1978). *Compare* Me. Hum. Rights Comm'n Reg. § 3.10(C) (religious accommodation regulation). In addressing that regulation, the Court reasoned as follows:

> The Union complains that there is no statutory indication that the Legislature intended an employer or labor organization to accommodate an individual's religious beliefs to the point of hardship. On the contrary, in the absence of a bona fide occupational qualification, any discharge based upon religion would be a violation of the Act. One of the purposes of [the Commission's regulation] is to breathe flexibility into an otherwise airtight prohibition against religious discrimination, by providing that a reasonable accommodation need not be made if it would amount to undue hardship. We find nothing unreasonable in such an interpretation.

United Paperworkers, 383 A.2d at 378. Although the Law Court discussed the treatment of the federal equivalent of the Commission's religious accommodation regulation, its holding was based on its interpretation of the Maine Act. *Id.* The language defining

"unlawful employment discrimination" in the Act applicable to religion is identical to the language applicable to sexual orientation. *See* 5 M.R.S.A. § 4572. The Court's decision in *Whitney v. Wal-Mart Stores, Inc.*, 895 A.2d 309 (Me. 2006), which concerned the Commission's prior regulatory definition of "physical or mental disability," does not alter the continued applicability of *United Paperworkers*.

With respect to the scope of the reasonable accommodation obligation in § 3.12(F), each case will depend on its individual circumstances. Rather than create hard and fast requirements, the rule contemplates an interactive process between the employee and the employer to identify reasonable accommodations that are appropriate under the circumstances. Other provisions in the Act and the Commission's regulations utilize similar standards that can be relied on for guidance. *See, e.g.*, Me. Hum. Rights Comm'n Reg. § 3.10(C) (discussed supra); 5 M.R.S.A. § 4553(9-B) (defining "undue hardship"). The Commission will also issue written guidance addressing this topic.

In response to the commenter's concern about the cost of remodeling bathrooms, the Commission does not interpret the obligation in § 3.12(F) to require an employer to make structural modifications to a building. Rather the obligation extends to "rules, policies, practices, or services." *Compare* 5 M.R.S.A. § 4582-A(2) (utilizing similar language).