

The following is a response from the city of South Bend's legal department to a memo sent by Kathy Cekanski-Farrand to members of the South Bend Common Council regarding substitute bill 30-10. It was authored by Aladean DeRose, a city attorney who has represented the Human Rights Commission for 20 years.

I believe that the substitute ordinance 30-10 is legally valid... More often than not, lawyers have respectfully differing views on the same subject matter. Only courts can resolve differences of legal opinion between lawyers, and different courts often view the same issue differently. The U.S. Supreme Court has the final word, not because it's better, but because it's last.

Please note that the Employment Fairness ordinance involved minimal new drafting; it simply adds a few changes to the pre-existing South Bend Human Rights ordinance. That ordinance was adopted by the Common Council in 1973 and has served nearly 40 years without creating any unresolvable problems of interpretation. From time to time questions of interpretation arise, but the Commission draws on a substantial body of well developed federal law on the topic of discrimination to aid in its interpretations. The Seventh Circuit Federal Court of Appeals which governs Indiana decides 20-30 discrimination cases a year which guide the Commission as it handles its caseload.

The Employment Fairness Ordinance (Substitute) makes only five changes to the 1973 ordinance:

1. It adds sexual orientation and gender identity as protected classes in "employment matters" only, as distinct from fair housing and public accommodation for which no protection is extended on the basis of sexual orientation and gender identity.
2. It defines the terms sexual orientation and gender identity.
3. It creates an exception for certain organizations and entities based on the Supreme

Court case Boy Scouts of American and Monmouth Council, et al v. Dale, (2-127.1(e)).

4. It clarifies that the ordinance is not intended to require benefit coverage for domestic partners of employees. (2-127.1(f)).

5. It provides remedies "to the extent consistent with state law." (2-128(i)(1)(B))

Of all the above changes to South Bend's 1973 Human Rights ordinance, only above item #4 is totally new. Everything else was part of the 2006 version of the ordinance. The only other difference between the 2006 and 2010 ordinance is as noted in #1 above, protection on the basis of sexual orientation or gender identity is limited to "the matter of employment."

Anything in Ordinance 30-10 that does not change the 1973 version of the ordinance means that the pre-existing language still applies including:

1. Inapplicability of the ordinance to an employer with fewer than six employees (Note – The Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e does not indicate whether "employers" means full or part time although it does indicate that an employee must have worked at least 20 weeks of a calendar year (42 U.S.C. § 2000e-b); and

2. The apparent lack of a definition of "employment discrimination" within the ordinance because the ordinance is patterned on the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e, which, too, does not contain a definition of employment discrimination. Both the Civil Rights Act of 1964 and the South Bend ordinance contain prohibitions against discrimination in employment. Like the EEOC, of which the South Bend Human Rights Commission is a locally designated agency, the Human Rights Commission relies on common law court interpretations to analyze what is or is not "employment discrimination" as that concept evolves. By the way, workplace harassment is a common law expansion of "employment discrimination."

Matters of Concern in the Amended Language

It appears there is no dispute about the newly added clarification language of 2-127.1(f) regarding non-application of employment benefits to domestic partners. Therefore, only the definitions of sexual orientation and gender identity and the Boy Scouts case exception under 2-127.1(e) could possibly be subject of any "vagueness" or similar concerns. I will respond to these separately:

1. Definition of "sexual orientation." As noted previously, the definition of "sexual orientation" contained in Ordinance 30-10 was part of South Bend's 2006 ordinance. It is not new in 2010. I have attached the "sexual orientation" definition contained within all Indiana communities adopting similar ordinances. South Bend's ordinance is identical to that of Indianapolis, and frankly, I think it's the best of all the definitions used throughout the state.

We now have the benefit of many years of experience by other Indiana communities, none of which have indicated that their definition is a problem or that the definition has been challenged for vagueness.

2. Definition of "gender identity." Another attachment is enclosed indicating that "gender identity" is defined only in the ordinances of Indianapolis and Bloomington. Again South Bend's ordinance uses the Indianapolis definition verbatim. The Indianapolis/Marion County ordinance has not been challenged in any way since its adoption in 2006.

The attachment hereto also includes definitions of "gender identity" used in local ordinances adopted in some other communities, i.e., San Francisco, California, Columbus, Ohio, Ann Arbor, Michigan, Madison, Wisconsin, and Lansing, Michigan. You will see that all are fairly similar. The Indianapolis/Marion County version which Bill 30-10 uses seems to encapsulate well the major components of "gender identity": (1) that it concerns an individual's actual or perceived (2) self-

identity, self-image, appearance, expression or behavior; (3) which may be different from the person's assigned sex at birth.

The proposed federal legislation (Employment Non-Discrimination Act (ENDA) is not a certainty and is unlikely to be passed in an election year. It is also subject to modification before passage. Therefore, consistency with a definition used by Indianapolis/Marion County for the past four years makes sense for South Bend.

3. Boy Scouts case exception. (2-127(e)) The case of Boy Scouts of America v. Dale, was decided by the U.S. Supreme Court in 2000 and is authored by then Chief Justice Rehnquist (530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554). It involved a challenge by the Boy Scouts of America to New Jersey's law prohibiting discrimination on the basis of sexual orientation in places of public accommodation. The Boy Scouts of America excluded members because of sexual orientation based on its mission statement. Mr. Dale, the plaintiff and a gay man, sought but was refused a position as an assistant scout master. The court ruled 5/4 for the Boy Scouts, albeit with vigorous dissenting opinions.

Justice Rehnquist first noted that a "public accommodation" is generally a place where the public is invited such as "taverns, restaurants, retail shops and public library." The court noted that an entity such as Boy Scouts of America is not a "place," and that when public accommodation laws are used to extend beyond a "place" to a group or organization, the First Amendment speech and association rights of the group or organization must be respected.

The Boy Scouts case applies to organizations or groups in the context of public accommodation. Technically, because the 2010 South Bend ordinance does not afford protection from discrimination in public accommodation, § 2-127.1(e) could be deleted entirely. This would certainly eliminate any vagueness challenge, and the other Indiana ordinances similar to Bill 30-10 do not contain this exception.

However, this exception (§ 2-127.1(e)) was requested and drafted in 2006 by an attorney of the local Boy Scouts organization working with City Attorney Charles S. Leone. The Boy Scout case involves a quasi-employment relationship, i.e., Mr. Dale's participation as a voluntary assistant scout master, so there is some rational basis for inclusion of this exception in Bill 30-10 which is limited to protection from employment discrimination on the basis of sexual orientation or gender identity.

I suspect that many Common Council constituents would prefer to retain the exception as is rather than delete it in the interest of avoiding challenges of interpretation or vagueness. The reference in § 2-127.1(e) to the Boy Scouts of America case means that the exception of 2-127.1(e) should be interpreted in light of a narrow, limited, exclusion for religious societies, orders, associations or institutions whose mission, practice, or belief would be impaired by hiring a person who is gay, lesbian, bi-sexual or transgender. Most employers in South Bend would not fall within this exception. (Note: The University of Notre Dame and Saint Mary's College internally prohibit harassment due to sexual orientation.) Other employers which might assert this exception, may have fewer than six employees.

As a matter of state law, the Human Rights Commission has no authority over state agencies anyway, so claims under Bill 30-10 against IUSB, Ivy Tech, Workforce Development, the license branches, etc., could not be brought to the South Bend Human Rights Commission.

4. Enforcement. The Employment Fairness ordinance (Bill 30-10) is enforceable "to the extent consistent with state law." (Section 2-131(i)(1)(B). The Commission would, therefore, investigate cases, make assessments of probable cause, and offer its conciliation services at no charge, (By the way, a great percentage of all Human Rights Commission probable cause cases are resolved in this manner.) The experience of Bloomington, Indiana (with a purely voluntary ordinance), is that all probable cause claims since ordinance enactment in 1993 have been resolved satisfactorily through conciliation.

Miscellaneous Matters in Kathy's Memo

1. Use of "Employment Fairness" in Bill Title but not within Ordinance. As mentioned previously, Bill 30-10 is simply an amendment to existing Article 9 of the South Bend Municipal Code known as the "Human Rights Ordinance." Inclusion of fairness in employment without regard to gender identity or sexual orientation is part of the broader category of "Human Rights."

2. Limitations. As previously noted, certain limitations to the Human Rights Commission's jurisdiction are mandated by state law and are included in the 1973 ordinance which are not repealed by Bill 30-10. The only other new limitation is the Boy Scout exception previously noted, and the clarification about employment benefits.

3. Definition of Employment Discrimination. I have covered this previously. The 1973 ordinance did not define "employment discrimination" per se, consistent with the format of the Civil Rights Act of 1964. The Human Rights Commission applies the common law interpretation of employment discrimination as it has been doing in its work for nearly 40 years.

4. "In Employment" and "In the Matter of Employment" Distinguished. I explained this previously. The phrase "in the matter of employment" is used throughout the ordinance whenever needed to make clear that sexual orientation and gender identity are protected only "in the matter of employment" and not in the matters of housing or public accommodation.

5. Statement of Purpose and Intent. The statement of purpose and intent is used only to explain the Bill. It is not necessary to repeat language from this portion of the Bill in the Bill itself.

6. Definition of "Gender Identity". I covered this already.

7. Definition of "Sexual Orientation". I covered this already.

8. 3 Prong Standard. I believe Buddy Kirsits covered all of this quite well in his power point presentation, supplemented by Lonnie Douglas's statement about requests for assistance turned down by the Commission.

9. Human Rights Resolution. The Human Rights Resolution approving Bill 30-10 was properly passed in compliance with Open Door law requirements and is not subject to challenge on that basis after 30 days from passage.

10. Funding. The Human Rights Commission is aware that its General Fund financing will be used for investigation of Bill 30-10 cases and Mr. Douglas indicated that existent funds should be adequate to cover these cases.

11. Protection Under Existing Law. It is true as Kathy Cekanski-Farrand notes that some discrimination against persons because of their sexual orientation or gender identity can be remedied under existing sexual discrimination law, but this is extremely limited. It applies only to discrimination when a person of the male or female sex who exhibits stereotypical behavior or characteristics of the opposite sex is persecuted in the workplace because of this. Most gay and lesbian persons would not qualify for this exception.

Conclusion

...The similar ordinances enacted throughout Indiana, and even in improbable locations such as Salt Lake City, Utah, Charleston, West Virginia, and Tucson, Arizona show that this protection is no longer novel or unusual. I believe that this, as well as a commitment to eliminating prejudice, is what led the South Bend Human Rights Commission to unanimously endorse the protections of Bill 30-10 by the eight members present and voting at their meeting on June 16, 2010.