


Memorandum

Date: July 20, 2010

To: Council Member Oliver Davis
Council Member Ann Puzzello
Council Member Al "Buddy" Kirsits

From: Kathleen Cekanski-Farrand, Council Attorney 

Re: **Substitute Bill No. 30-10 Addressing Employment Fairness
Questions or Concerns**

As you are all aware, the area of human rights legislation is very complex in light of the many constitutional issues involved. In preparation for today's meeting at 1 pm, I have summarized several of the concerns which I have regarding Substitute Bill No. 30-10. As sponsors of this Bill, I wanted each of you to have this information. Some of the preliminary concerns include the following:

1. "Employment Fairness" is used in the title of Substitute Bill No. 30-10, but does not appear anywhere in the actual ordinance. Why?
2. In the "Statement of Purpose and Intent" there is broad language regarding the potential scope of the ordinance where it is stated in ¶ 1 that "...it has been determined that the current South Bend Human Rights Ordinance should be amended to prohibit employment discrimination based on sexual orientation or gender identity...", yet the body of the ordinance contains several limitations such as:
 - The ordinance would not apply to any employer who has less than six (6) employees [it does not indicate full-time or part-time]
 - The ordinance appears to address "sexual orientation or gender identity in employment" or "sexual orientation or gender identity in the matter of employment" only.
 - The ordinance appears to exempt "decisions of an employer which is a religious society or order, association, organization, institution or related entity..." however there is no definition of such terms contained in the ordinance.
3. The phrase "employment discrimination" is used in the "Statement of Purpose and Intent" but is not defined in the body of the ordinance. Why?
4. How are the phrases "in employment" and "in the matter of employment" defined?
What are the differences between the two phrases?
Are both phrases required?

See: Sec. 2-127 Purpose, ¶ (a) "in employment"

Sec. 2-127 Purpose, ¶ (b) "in the matter of employment" used twice

Sec. 2-127.1 Prohibited Conduct ¶ (a) "in the matter of employment" used twice

Sec. 2-127.1 Prohibited Conduct ¶ (f) "in employment"

Sec. 2-128 Definitions, ¶ (i) "in the matter of employment"

Sec. 2-131.1 Powers and Duties of Commission ¶ (f) "in the matter of employment"

5. The "Statement of Purpose and Intent" also uses the phrase "nondiscrimination in employment". Is that phrase different than "employment discrimination" and if so, how is it defined?
6. Is there any supporting documentation for the definition of "Gender identity" proposed in Sec. 2-128 Definition (w)? I note that it contains less specificity than other communities such as in Bloomington, Indiana's definition, when it was proposed, there were four (4) pages of explanation provided as background information for their definition. Bloomington's definition reads as follows:

"Gender identity means a person's **actual or perceived gender-related attributes, self-image, appearance, expression or behavior, whether or not such characteristics differ from those traditionally associated with the person's assigned sex at birth**"

For example, has the issue of protecting the "gender identity" with regard to the use of bathrooms and accommodation been discussed as to whether such areas will be shared? Bloomington addressed this topic in their supporting documentation so that they would "find a solution respectful of one's gender identity".

7. Is there any supporting documentation for the proposed definition of "sexual orientation"? Definitions vary considerable as evidenced by the following:

"Sexual orientation means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. "Sexual orientation" does not include a physical or sexual attachment to children by an adult" (*Minnesota Statutes* § 363A.03 Definitions"

"Sexual orientation means "homosexuality, bisexuality or heterosexuality whether the orientation is real or perceived" (Bloomington, Indiana document of October 28, 2002)

Since there are no governing Indiana statutes which define "sexual orientation", we do not have that source to rely upon for our discussion.

Questions like these are germane to the discussion and review of Substitute Bill No. 30-10, in light of the 3-prong standard which I outlined in 2005 and used throughout 2006 when public hearings and discussions took place on the then proposed ordinance. I believe that that same test applies today, with the 2nd prong being:

(2) *Are there*
~~There must be~~ compelling governmental interests to show that the
"narrowly tailored" ordinance is need^{so} that it would not violate
the Equal Protection Clause of the Fourteenth Amendment (*Emphasis added*)

The lack of specificity of the proposed language and the inconsistent phrases proposed in Substitute Bill No. 30-10 raise legal concerns as to whether the above-test has been satisfied.

The other prongs of this 3-prong test include:

- (1) Is there a rational basis for the proposed legislation?
- (2) Is there a compelling governmental interest which supports the need for the proposed legislation which would remedy the identified discrimination?

As of this date, there is no data or record on file which address and define what "compelling governmental interests" standard(s) would be addressed by the proposed ordinance.

Additionally, the minutes from the June 17, 2010 Human Rights Commission have not been made available. Those minutes need to be shared along with that meeting's agenda on the discussions which took place prior to the adoption of the Board's Resolution which supports Bill No. 30-10. Is the Human Rights Commission aware of Substitute Bill No. 30-10 which has further expanded the exemptions to the ordinance?

Is there any data related to the implementation of the Mayor's Executive Order No. 1-2009 which he signed on June 24, 2009? That Executive Order prohibits discrimination on the basis of sexual orientation or gender identity in city employment.

In the 2009 Administration and Finance Annual Report which was filed with the Office of the City Clerk on April 22, 2010, on pages 3-5 the South Bend Human Rights Commission activities are reviewed. There is no mention of concerns regarding GLBT in that document.

With regard to the "mandated exemptions" addressed by Assistant City Attorney Aladean DeRose, it is clear that IU South Bend, Ivy Tech, Workforce Development, the South Bend License Branches, the Juvenile Correction Facility, and the Work Release Center are just some of the other entities which would be excluded from the proposed ordinance pursuant to provisions of Title 22 of the *Indiana Code*. In light of the governing state law in this area and the due diligence requirements relative to the review of proposed legislation, I believe requires the disclosure of these "mandated exemptions" by the sponsors of the ordinance. This could be done in a public setting or in a public document which would be made available to the public.

As you are all aware, since GLBT individuals are not protected under current federal law, EEOC and HUD funds cannot be used for implementation or enforcement of the proposed ordinance.

As you are further aware, the Employment Non-Discrimination Act (ENDA) was introduced in Congress on June 24, 2009. If it is enacted, it is my understanding that "...it will protect employees from gender

July 20, 2010

Page 4

identity discrimination in the workplace..." Was that proposed federal legislation reviewed in the preparation of Substitute Bill No. 30-10, especially with regard to definitions, phrases and terminology?

As pointed out in earlier memorandums, there is a 7th Circuit Court of Appeals case which held that a person "...could maintain equal protection claims of discrimination based on both gender and sexual orientation..." In light of that legal decision which would be controlling in Indiana, there is an avenue available for GLBT members who believe that they have suffered an injustice.

Last October, President Obama signed a federal law which makes it a federal crime to assault an individual because of his or her sexual orientation or gender identity. Was that law reviewed in the preparation of Substitute Bill No. 30-10, especially with regard to definitions for "sexual orientation" or "gender identity".

Thank you for the opportunity to share these legal concerns with you.

cc: City Attorney Charles Leone
Assistant City Attorney Aladean DeRose