Massachusetts Family Institute

Dedicated to Strengthening the Family

November 12, 2015

Dear Legislator,

As you move into the final week of the 2015 legislative session, you need to know the following about about HB 1577, "An act relative to gender identity and nondiscrimination."

1. This bill is NOT necessary for transgendered individuals to successfully seek protection against alleged discrimination in places of public accommodation.
2. This bill specifically ELIMINATES PROTECTIONS for women and children in bathrooms and locker rooms.

HB 1577 creates bewildering and highly impractical burdens on parents, families, and small business owners by wiping out essential privacy protections. The principal impact of this bill will be to penalize small, family-owned businesses which are unable to accommodate the demands of transgendered activists. In her recent letter to you, Attorney General Maura Healey attempted to gloss over the legal problems with this bill. She stated, "Over the past few days, some have suggested that our current laws already protect transgender people from discrimination in places of public accommodation. Let us be very clear: Massachusetts law does not adequately protect transgender people from discrimination in places of public accommodation."

However, what *is* very clear is that the Massachusetts Commission Against Discrimination (MCAD) has **consistently applied existing state law to cover allegations of gender identity discrimination**. As early as 2001, a ruling of the full Commission declared, "**We… hold that 'sex' discrimination, as prohibited by chapter 151B, includes a prohibition against discrimination against transsexual individuals**." *Millet v. Lutco*, 23 MDLR 231, 2001. MCAD cited the MA Supreme Judicial Court in *Dahill vs. City of Boston*, SJC-08324, (May, 2001), that:

> "The public policies underlying M.G. L c. 151B ... are clear..to protect individuals from deprivations based on prejudice, stereotypes, or unfounded fear.. (The) Legislature has directed that the provisions of G.L. c. 151B 'shall be construed liberally" for the accomplishment of the remedial purposes of the statute. M.G. L c. 151B, § 9.'."

That liberal interpretation of the Commonwealth's anti-discrimination laws is what currently allows for MCAD to aggressively adjudicate claims of gender identity discrimination in public accommodations. This has included even such novel claims as when a hospital declined to artificially inseminate a transgender male, citing a lack of expertise in this area. The Investigating Commissioner in that case made a finding of probable cause against BayState Health a hospital and public accommodation under M.G.L. c. 272 § 92A) for "discrimination on the basis of gender." The Commissioner also stated that this determination was made "pursuant to section 5 of M.G.L. c. 151B…."

Given the state of the law as applied by MCAD, why is there such a demand for the passage of HB 1577? Ms. Healey's careful choice of words in her letter should not go unnoticed. She argues that current Massachusetts law does not "adequately protect" transgender people from discrimination in public accommodations. What is it then, that advocates of HB 1577 see as *inadequate* in MCAD's application

of existing law? In a word, bathrooms. MCAD, taking its cues from the Supreme Judicial Court and the MA Legislature, has liberally construed the existing nondiscrimination laws regarding sex to include gender identity and transgenderism. However, the Commonwealth's public accommodation laws include a specific exemption for claims of discrimination based on sex when bathrooms and single sex fitness facilities are involved.

> "A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public… ***except such rest room***, bathhouse or seashore facility **as may be segregated on the basis of sex**; … [and] with regard to the prohibition on sex discrimination, ***this section shall not apply to a place of exercise for the exclusive use of persons of the same sex***…" M.G.L. c. 272 § 92a (emphasis added.)

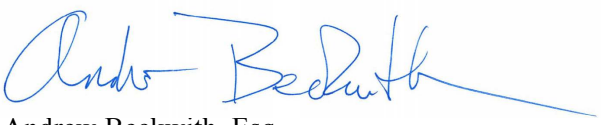
Therefore, even though MCAD has consistently ruled that gender identity is covered by the term "sex" in existing nondiscrimination laws, the proponents of HB 1577 do not view this as "adequate protection" because they still have not gained access to cross-gender bathroom use.

This is confirmed by a *prima facie* reading of the full text of HB 1577, which demonstrates clearly that bathroom access is the main intent of the bill. Section Two of HB 1577 would amend the existing definition of public accommodations (and the above-quoted exemption for bathrooms and fitness centers from sex discrimination claims) by adding the following:

> "Any public accommodation including without limitation any entity that offers the provision of goods, services, or access to the public that lawfully segregates or separates access to such public accommodation or other entity based on a person's sex shall grant all persons admission to and the full enjoyment of such public accommodation or other entity consistent with the person's gender identity."

MCAD cannot "liberally construe" existing law to punish public accommodations that maintain the gender integrity of their bathrooms and locker rooms because the relevant statute is clear that those are appropriate exceptions to the application of nondiscrimination laws. Neither can MCAD claim legislative intent when it comes to bathrooms, because it was very clear that the legislature intentionally withheld bathrooms from the 2011 law when it passed. **Therefore, the only practical impact of HB 1577 would be to grant MCAD the ability to penalize businesses and individuals who object to cross-gendered bathroom or locker room use.**

Sincerely,



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