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The Commonwealth of Massachusetts Commission Against Discrimination

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September 1, 2016

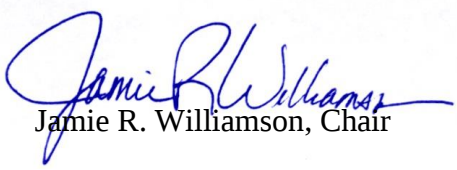
Dear Governor Baker, Lt. Governor Polito, Senate President Rosenberg, Speaker DeLeo, Members of the Massachusetts Legislature, and the People of the Commonwealth:

The Massachusetts Commission Against Discrimination (MCAD) is pleased to present its Guidance regarding Gender Identity, replacing the Commission's December 2015 Transgender Law Advisory. The Guidance articulates the protections afforded in employment, housing, credit, lending, mortgage services, and includes places of public accommodation, as charged in Senate Bill 2407: *An Act relative to transgender anti-discrimination*, signed into law on July 6, 2016 by Governor Charles D. Baker.

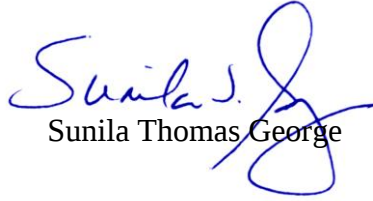
This legislation affirms the Commission's long-standing recognition of gender identity rights previously enforced through sex discrimination claims. We believe the Guidance will provide clarity to businesses, employers and landlords, and educate the general public as to how the MCAD will interpret and enforce the anti-discrimination laws concerning transgender individuals.

As Commissioners of the Commonwealth's chief anti-discrimination agency, we are proud of Massachusetts for passing this legislation, and we will continue our efforts to ensure the equal treatment of all people who live in, work in, and visit Massachusetts.

The Commissioners



Jamie R. Williamson, Chair



Sunila Thomas George



Charlotte Golar Richie



Gender Identity Guidance

Massachusetts Commission Against Discrimination

September 1, 2016



In recent years, the Massachusetts Legislature has enacted legislation which specifically codifies gender identity in the list of protected classes covered by Massachusetts anti-discrimination laws. On October 1, 2016, these amendments to Massachusetts General Laws Chapter 272 will take effect prohibiting discrimination in places of public accommodation based on an individual's gender identity. The Massachusetts Commission Against Discrimination (MCAD) enforces G.L. c. 151B, c.151C and G.L. c. 272, §§ 92, 98 and 98A. The MCAD has developed this Guidance to educate the public about discrimination based on gender identity, to describe what evidence may be submitted to support a claim of gender identity discrimination, to inform individuals of their rights, and to assist employers, providers of housing, mortgage services, and owners, managers and agents of places of public accommodation in understanding their obligations under Massachusetts law.

I. Introduction

Since 2001, the MCAD has held that discrimination against transgender individuals could constitute sex and disability discrimination. MCAD and Jackie Ravesi v. Naz Fitness Group, 37 Mass. Discrimination Law Rptr. 1 (2015) (finding employer liable for sex discrimination and gender-based disparate treatment of a transgender employee); Millett v. Lutco, 23 Mass. Discrimination Law Rptr. 231 (2001) (discrimination against a transgender individual constitutes illegal sex discrimination); Jette v. Honey Farms Mini Market, 23 Mass. Discrimination Law Rptr. 229 (2001) (transgender individuals with an underlying diagnosis of gender dysphoria may have a claim for disability discrimination under G.L. c. 151B). Pursuant to these decisions, the Commission routinely investigates and issues findings in discrimination cases filed by transgender individuals under the Fair Employment Practices Act, G.L. c. 151B and the Massachusetts Public Accommodation Act, G.L. c. 272. With the revision of G.L. c. 151B in 2012 and G.L. c.272 in 2016, the Legislature formally codified this prohibition of discrimination on the basis of gender identity in places of employment, housing, mortgage services and places of public accommodation.

On the federal side, the U.S. Equal Employment Opportunity Commission (EEOC) has taken steps to ensure that the rights of LGBT individuals are protected under Title VII—the federal law which prohibits employment discrimination. In 2012, the EEOC ruled that discrimination against a transgender individual is prohibited under Title VII's sex discrimination provision.¹ Similarly, in April 2015 the EEOC ruled that restricting a transgender employee from using a restroom facility consistent with the employee's gender identity and refusing to use the transgender employee's preferred name and gender pronoun constituted sex discrimination and sex-based harassment under Title VII.²

II. Massachusetts Law Coverage

On July 1, 2012, Massachusetts G. L. Chapter 151B was amended to prohibit discrimination in employment, housing, lending, credit and mortgage services based on an individual's gender identity. In addition to prohibiting discrimination based on gender identity, the Act expanded the definition of a hate crime to include criminal acts motivated by prejudice towards transgender individuals and prohibited discrimination based on

¹ Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012).

² Lusardi v. McHough, EEOC Appeal No. 0120133395 (April 1, 2015).

gender identity in public schools. G.L. c. 22C, § 32 (hate crimes); G.L. c. 71, § 89 (public schools); G.L. c. 76, §§ 5, 12B (public schools). These latter provisions of the Act are generally not enforced by the MCAD, but are enforced by other law enforcement agencies such as the Massachusetts Attorney General's Office.³

In 2016, G.L. c. 272 was amended to include gender identity as a specifically protected class in places of public accommodation. The primary areas in which gender identity discrimination is enforced by the MCAD⁴ are described below.

A. Employment

It is an unlawful discriminatory practice for an employer⁵, or an employee or agent thereof, to discriminate against any employee or applicant for employment based upon that individual's gender identity with regard to recruitment, hiring, firing, discipline, promotion, wages, job assignments, training, benefits, and other terms and conditions of employment. Discrimination may take the form of unwelcome verbal or physical conduct, including but not limited to, derogatory comments, jokes, drawings or photographs, touching or gestures. Examples of discrimination in employment include the following:

- An employee takes a leave of absence to obtain gender affirming surgery, and upon her return from leave, her employer reduces her hours, downsizes her office, and demotes her.
- A job applicant who identifies as a man is rejected solely because the employer learns, after checking his employment references that the applicant identified as a woman in previous employment.
- A man is constantly harassed or made fun of by his supervisors for mannerisms perceived to be feminine.
- A supervisor ridicules a transgender subordinate and refuses to respect the employee's request for gender appropriate pronouns.⁶
- A transgender employee is consistently excluded from office meetings, office parties, and work-related events to which all other employees are invited.
- A transgender employee notifies his employer that his co-workers persistently mock and deride him because of his gender-identity, and the employer fails to take prompt remedial action to stop the harassment.

³ In certain circumstances, the victim of a hate crime may bring an action at the MCAD. For example, if an employee is the victim of a gender identity based hate crime perpetrated by his/her supervisor in the context of employment, this could constitute discrimination and/or harassment.

⁴ The MCAD has limited jurisdiction over discrimination in education pursuant to G.L. c.151C.

⁵ An employer is generally defined under G.L. c. 151B as one that employs six or more persons. Public employers are included regardless of the number of people employed.

⁶ MCAD and Tinker v. Securitas Security Services USA, Inc. and Najeeb Hussain, ___ Mass. Discrimination Law Rptr. ___ (2016) (supervisor continued to refer to the Complainant as female and a "girl" in situations where the reference could no longer be deemed accidental or unintentional).

- An employer denies an employee access to the restroom that corresponds to the employee's gender identity.

In evaluating a claim of hostile work environment based on gender identity, the Commission considers the employer's evidence of its support for the employee. In a case where the company president met with all staff, communicated that the employer would not tolerate discrimination or harassment of a transgender employee and directed that the employee be treated with respect; disciplined an employee who sought not to interact with the transgender employee; changed company records to reflect the employee's name change; provided a leave of absence for surgeries; assisted the transgender employee in obtaining insurance coverage for the surgeries; arranged for the employee's use of a private bathroom prior to the completion of her gender affirming surgery and welcomed the employee's use of the women's restroom following surgery, the Commission found the Complainant was not subjected to a hostile work environment. Millett and MCAD v. Lutco, Inc., 30 Mass. Discrimination Law Rptr. 77, 85 (2008) (holding that "matters that might be egregious in isolation appear less so in the context of the supportive actions which the Company took on Complainant's behalf").⁷

B. Housing

With the exception of certain statutory exclusions⁸, G.L. c. 151B makes it an unlawful discriminatory practice for an owner, lessor, managing agent or other person having the right to sell, rent or lease or approve the sale, rental or lease of housing, to refuse to sell, rent, lease, approve the sale, rental or lease, or otherwise deny or withhold housing, or an interest therein, or otherwise discriminate against any person because of his or her gender identity. In addition, real estate brokers, real estate salespersons, and employees or agents thereof, may not discriminate on the basis of gender identity. Prohibited behavior includes all aspects of real property transactions, such as the refusal to show, rent or sell real property that is available for sale or lease, and the refusal to provide services or make repairs or improvements for any tenant or lessee based on gender identity. Examples of discrimination in housing include the following:

- A landlord, whose apartment does not fall within any of the statutory exclusions in G.L. c. 151B, refuses to show a transgender man an apartment for rent for reasons related to the prospective tenant's gender identity.
- A landlord adversely changes the terms and conditions of a transgender tenant undergoing gender reassignment therapy, resulting in the tenant's eviction.
- A realtor steers a transgender individual away from an apartment because he does not feel that the individual would "be a good fit for the neighborhood."
- The owner of a commercial property refuses to lease the property to a transgender rights group because of prejudice toward transgender individuals.

⁷ As referenced herein, no employee is required to have any specific gender affirming surgery or surgery of any kind to have the person's gender identity respected in the workplace.

⁸ For example, the lease of a single unit in a two-family dwelling, the other unit of which is occupied by the owner as his residence, is exempted from G.L. c. 151B. However, this exemption does not apply: (1) where the owner uses another person, such as (but not limited to) a realtor, to discriminate on his or her behalf, or (2) to discriminatory notices, advertisements, or statements.

C. Credit and Mortgage Services

Banks or other lending institutions may not discriminate against an applicant for credit on the basis of gender identity. Examples of discrimination in lending and credit include the following:

- A mortgage broker steers a transgender borrower, who is eligible for prime loans, into a sub-prime loan with high monthly payments and interest rate and excessive prepayment penalties.
- A credit card company refuses to issue a credit card to a transgender man because he previously identified as a woman.

D. Places of Public Accommodation

A place of public accommodation is defined as “any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public.” G.L. c. 272, § 92A. This definition includes a wide variety of private and public places, such as retail stores, restaurants, malls, public agencies, public parks, beaches and public roads. The statute includes businesses that provide services and is not restricted to a person's entrance into a physical structure. Businesses that provide services that have been found to be covered by the public accommodation law include loan companies⁹, cab services¹⁰, and insurance companies,¹¹ companies that provide long term disability benefits¹², and businesses that actively provide testing services. Currier v. National Board of Medical Examiners, 462 Mass. 1 (2012). The law also covers denying an individual access to a public place, benefit, process or proceeding. For example, a public agency that denies an individual the opportunity to apply for a taxi driver's license based on the person's protected class would be in violation of G.L. c. 272. MCAD & Adam Apache v. City of Springfield Police Department, 34 Mass. Discrimination Law Rptr. 59 (2012) (dismissed on other grounds).

Under G.L. c. 272, § 98, places of public accommodation may not discriminate against, or restrict a person from services because of that person's gender identity. For example, a hotel or motel may not refuse to book a room for a person because of the person's gender identity. Even a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public.¹³ All persons, regardless of gender identity, shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation.¹⁴ For example, if it is a supermarket's practice to bag the customers' groceries, the store may not refuse to bag a person's groceries because of the customer's gender identity. Moreover, it is a violation of the law for any individual to aid or incite another in making a distinction, discriminating against or restricting an individual from a place of public accommodation on the basis of gender identity.¹⁵

⁹ Local Finance Co. of Rockland v. Massachusetts Comm'n Against Discrimination, 355 Mass. 10, 15 (1968).

¹⁰ Lumley v. Flynn, 5 Mass. Discrimination Law Rptr. 1031 (1983).

¹¹ King v. Hanover Ins. Co., 2 Mass. Discrimination Law Rptr. 1429 (1981).

¹² See Samartin v. Metropolitan Life Ins. Co., 27 Mass. Discrimination Law. Rep. 210, 213-214 (2005);

¹³ All charges, including those involving religious institutions or religious exemptions, are reviewed on a case-by-case basis.

¹⁴ This right is subject to the lawful conditions and limitations applied to all persons.

¹⁵ Violation of the law shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both. G.L. c. 272, § 98. In addition, the violator shall be liable to the aggrieved person for damages.

Under G.L. c. 272, § 92A, any place of public accommodation that lawfully separates access to a place or portion thereof based on a person's sex, shall grant admission to that place, and the full enjoyment of that place or portion thereof, consistent with the person's gender identity. This means that a movie theater that has restrooms designated as "Men's Restroom" and "Women's Restroom" must allow its patrons to use the restroom which is consistent with their gender identity. A health club with locker rooms designated as male and female must grant all persons full enjoyment of the locker room consistent with their gender identity. A public swimming pool with changing rooms designated male and female must allow the public to use the changing room consistent with their gender identity.

Under G.L. c. 272, § 92A, the law provides that a place of public accommodation may not distribute, publish or display an advertisement, notice, or sign¹⁶ intended to discriminate against or actually discriminating against persons of any gender identity. For example, if a retailer distributes a policy requiring its customers to present a driver's license as the sole acceptable means of identification for purposes of paying by check and requires the gender on the license to match that of the customer's appearance, this could constitute a violation of G.L. c. 272, § 92A.¹⁷

Other examples of discrimination in a place of public accommodation include:

- A restaurant refuses to seat a group of transgender patrons on the grounds that "this is a quiet restaurant," and "you will draw too much attention from our other patrons."
- A hotel refuses to host a conference of transgender individuals.
- A bakery refuses to bake a wedding cake for a customer because of their gender identity.
- A stationary store refuses to print wedding invitations for a customer because of their gender identity.

E. Retaliation

It is unlawful to retaliate against an individual who has opposed a discriminatory practice or filed a charge of discrimination, or who has testified, assisted or participated in a Commission investigation, proceeding or hearing. It is also unlawful for an employer to issue a negative reference about an employee in retaliation for that employee's protected activity, such as formally or informally charging the employer with discrimination.

III. Definitions and Proof

A. Definition of Gender Identity

Massachusetts law defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." G.L. c. 4, § 7, Fifty-ninth.

¹⁶ This includes any advertisement, circular, folder, book, pamphlet, and written or painted or printed notice or sign. G.L. c. 272, § 92A.

¹⁷ The Commission recognizes that the federal government may impose its own requirements in certain circumstances, such as passports required for travel and entry into the United States.

Gender identity encompasses individuals who are transgender. Transgender individuals are people whose gender identity is different from the sex assigned to them at birth. Some individuals who fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity. Some individuals transition from living and working as one gender to another. Transition is the process by which a transgender person goes from presenting as one gender to another. For some, the process of transition may be lengthy. Some transgender individuals seek medical treatment such as counseling, hormone therapy, electrolysis, and gender affirming surgery. Some may not pursue medical treatment or surgery. The statutory definition of gender identity does not require the individual to have gender affirming surgery or intend to undergo surgery, nor does it require evidence of past medical care or treatment. Gender identity is distinguished from sexual orientation.¹⁸ Gender identity refers to a person's internal sense of their own gender and its expression.

The law also protects persons whose gender identity is consistent with their assigned sex at birth, but who do not adopt or express traditional gender roles, stereotypes or cultural norms. Courts and the MCAD recognized that discrimination on the basis of gender stereotypes is unlawful bias prior to the legislative changes in Massachusetts.¹⁹ For example, discrimination against a person designated as female at birth and who identifies as a woman but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes, is unlawful discrimination based on sex and gender identity.

B. Proof Requirements

In most situations arising in employment, housing, mortgage services and places of public accommodation, it will not be appropriate to request documentation of an individual's gender identity. In the limited circumstances where it is necessary, an individual's gender identity may be demonstrated by any evidence that the gender identity is sincerely held as a part of the person's core identity. The evidence that the Commission will review in cases alleging gender identity discrimination includes, but is not limited to, medical history, medical/psychiatric care or treatment of the gender-related identity; consistent and uniform assertion of the gender-related identity or any other evidence that one's gender-related identity is sincerely held as part of one's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose. G.L. c. 4, § 7; Fifty-ninth see infra Section III C. Examples of the type of evidence which will assist the Commission in investigating claims of gender-identity discrimination are:

¹⁸ Lie v. Sky Publishing Corp., 2002 WL 31492397 (Mass. Super. Ct. 2002). Sexual orientation is based on the direction of one's physical and romantic attractions, which may include, but is not limited to heterosexual, homosexual, lesbian and bisexual.

¹⁹ Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (gender-based remarks reflecting view that a woman manager was not sufficiently feminine are evidence of gender discrimination); Higgins v. New Balance Athletic Shoe, Inc., 194 F. 3d 252, 259 (1st Cir. 1999) (Court stated, in dicta, that just as a woman may claim gender discrimination for being viewed as failing to meet stereotypical expectations of femininity, a man may base a claim of gender discrimination on evidence that he was viewed as not conforming to stereotypical expectations of masculinity); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (an employer who makes employment decisions based on stereotypes about sexual roles or allows the creation of a hostile or abusive work environment based on sexual stereotypes, may be liable under Title VII's prohibition of discrimination on the basis of sex); Ianetta v. Putnam Investments, Inc., 142 F. Supp. 2d 131 (D. Mass. 2002) (discrimination against a man for failing to conform to gender stereotypes); Connor v. Hub Folding Box Co., 15 Mass. Discrimination Law Rptr. 1494 (1993), *aff'd*, Hub Folding Box Co., Inc. v. Mass. Comm'n Against Discrimination, 52 Mass. App. Ct. 1104 (Rule 1:28 decision, July 12, 2001) (gender stereotype that a woman with a tattoo was a prostitute, on drugs, or from a "broken home" reflects gender bias).

- Sworn statements by a Complainant and/or witnesses relating to the Complainant’s sincerely held core gender-related identity;
- Sworn statements from the Complainant and/or witnesses relating to the Complainant’s routine activities and conduct, such as dress, grooming, actions and use of gender pronouns;
- Sworn statements and/or medical records from medical or other professionals involved in the treatment of or transition of the individual seeking, in the process of, or who has completed gender transition;
- Evidence of hormone use, gender affirming surgeries, and/or other procedures that are for the purpose of affirming gender identity;
- Evidence of an effort to effectuate a legal name change, revision of birth certificate, passport, or Social Security card, re-designation of gender on a Massachusetts Department of Transportation Registry of Motor Vehicles form, or other legal documents reflecting gender identity.

C. Meaning of “Sincerely Held and Part of a Person’s Core Identity”/Improper Purpose

The courts have yet to give significant guidance on how to interpret the requirement that gender identity be “sincerely held and part of a person’s core identity.” The considerations bearing on this requirement will necessarily be developed as the case law evolves; however, evidence of consistent conduct over a period of time is likely to support a claim of sincerely held core gender identity.

The law excludes from its coverage a gender-related identity that is “asserted for any improper purpose,” such as an unlawful purpose. For instance, a fraudulent representation to obtain an otherwise unavailable employment-related benefit or a fraudulent effort to evade a legal obligation or an effort to commit a crime could constitute an improper purpose.

D. Restrooms and Sex-Segregated Facilities

No provision of G.L. c. 151B or G.L. c. 272 prohibits restrooms from being designated by gender. Prohibiting an individual from using a restroom or other sex-segregated facility consistent with their gender identity is a violation of G.L. c. 272, § 92A. Requiring an employee to provide identification or proof of any particular medical procedure (including gender affirming surgery) in order to access gender designated facilities, may be evidence of discriminatory bias.

IV. Transgender Protection under the Massachusetts Fair Educational Practices Law

While there has been legislative activity in Massachusetts amending G.L. c.151B and the Public Accommodations Act, G.L. c. 272, § 98, the Legislature did not amend the Fair Educational Practices Act, G.L. c. 151C. MCAD investigates and adjudicates claims brought pursuant to this statute, where there is evidence of discrimination in limited educational situations based on gender, disability and/or perceived sexual orientation.²⁰ As described in Section I, the Commission has held that discrimination against transgender

²⁰The Massachusetts Department of Elementary and Secondary Education (“DESE”) enforces G.L. c. 76, §5, which prohibits discrimination on the basis of gender identity in Massachusetts public schools. The Attorney General’s Office also enforces Massachusetts laws prohibiting hate crimes on the basis of gender identity in public schools, G.L. c. 22C,

individuals may be prohibited under the proscriptions against gender and disability discrimination. MCAD and Jackie Ravesi v. Naz Fitness Group, *supra*; Millett v. Lutco, *supra*; Jette v. Honey Farms Mini Market, *supra*. The facts of a particular case may also support a claim of discrimination based on sexual orientation. Id.

Examples of discrimination in an educational institution include:

- A graduate school refuses to admit a transgender man who applies when it learns from the applicant's educational records that he previously identified as a woman.²¹
- A graduate school refuses to allow a transgender woman graduate student to serve as a resident assistant in a woman's dormitory because she previously identified as a man.

V. Best Practices

The Commission encourages employers, housing providers, places of public accommodation and all entities subject to the law to foster an inclusive and welcoming environment by following best practices recommended by the American Bar Association²² which may include the following:

- Revise non-discrimination, equal opportunity, non-harassment, and other employment-related policies to include a statement that discrimination and harassment on the basis of gender identity is prohibited;
- Update personnel records, payroll records, email systems, and other documents to reflect employee's stated name and gender identity, and ensure confidentiality of any prior documentation of an employee's pre-transition name or gender marker;
- Prohibit derogatory comments or jokes about transgender persons from employees, clients, vendors and any others, and promptly investigate and discipline persons who engage in discriminatory conduct;
- Use names, pronouns, and gender-related terms appropriate to employee's stated gender identity in communications with employee and with others;
- Avoid gender-specific dress codes and permit employees to dress in a manner consistent with their gender identity;

§32; discrimination in public and charter schools. G.L. c. 22C, §32; G.L. c. 71, §89; G.L. c. 76, §§5, 2B. See <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>. In May, 2016, the U.S. Department of Education, Office of Civil Rights, announced that it would treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations, and that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.

²¹ The Fair Educational Practices Act prohibits discrimination against any person seeking admission to a vocational training institution or to a program or course of study leading to a degree, beyond a bachelor's degree, because of sex or to discriminate against any student on the basis of gender, sexual orientation, admitted to a vocational training institution in providing benefits, privileges, and placement services.

²² American Bar Association's Commission on Sexual Orientation and Gender Identity, "Best Practices for Promoting LGBT Diversity" published 2011.

- Provide the public and employees access to any sex-segregated facility, i.e. bathrooms, locker room facilities, based on the employee's stated gender identity;
- Incorporate in diversity, anti-discrimination, and anti-harassment trainings information about transgender individuals and employees, whether or not there are currently transgender employees, or employees who have self-identified as transgender, at the workplace or in the place of public accommodation;
- Employers should investigate and take appropriate remedial action when on notice of harassing or discriminatory conduct in the workplace;
- Landlords or property owners should take appropriate remedial action to ensure cessation of harassment by other tenants based on gender identity.