

Heads Up

Transgender Equal Rights In Massachusetts: Likely Broader Than You Think

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On November 23, 2011, Governor Patrick signed into law legislation designed to protect transgender persons. [Chapter 199 of the Acts of 2011](#), “An Act Relative to Gender Identity,” adds the words “gender identity” to the list of protected classes in a broad array of Massachusetts anti-discrimination laws, including laws that prohibit discrimination in employment, housing, education, lending, and credit. Yet, there was at least one general anti-discrimination law that was not amended — M.G.L. c. 272, §98 — which prohibits discrimination by places of public accommodation. Does this mean that restaurants, grocery stores, museums, and other places of public accommodation are free to tell transgender persons, “you aren’t welcome here”? If past is prologue, the answer to that question is “No.” Advocates will be using existing laws and precedent, unaffected by the recent legislation, to protect transgender persons from discrimination by public accommodations.

Some Definitions

The new law, effective July 1, 2012, defines gender identity as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or



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behavior is different from that traditionally associated with the person's physiology or assigned sex at birth" and goes on to explain some of the evidence that could prove a person's gender-related identity. Although the law does not actually use the term transgender, one of its primary purposes was to protect transgender persons. Transgender is an umbrella term that includes people who transition from one gender to another and/or people who defy social expectations of how they should look, act, or identify, based on their sex assigned at birth. An example of a famous transgender person is Chaz Bono. Mr. Bono's assigned sex at birth was female, but he now lives his life as a man; he went through a gender transition, in other words, a process by which he went from living and working as one gender to another. Chaz Bono would be protected under the new law as a person who expresses a masculine identity, appearance, and behavior even though his assigned sex at birth was female. The new law also protects people who do not undergo a gender transition or do not identify with a gender different than the one traditionally associated with their sex assigned at birth, but who do not fit traditional gender roles, such as the female employee in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), who was told that, if she wanted to make partner, she should walk, talk, and dress in more feminine manner.

Debate Over the Law

Proponents of the bill focused their advocacy on telling the stories of the many transgender persons whose lives were impacted by discrimination and violence. [In the largest national survey of transgender persons regarding discrimination against them](#), 76% of Massachusetts respondents reported experiencing harassment or mistreatment on the job, 20% had lost a job because they were transgender, and 22% were denied equal treatment by a government agency or official. The Judiciary Committee hearings went late into the night, with long lines of individuals and organizations testifying in support of the bill.

Opponents of the bill were also present, vocal, and passionate. Of particular concern was the use of restrooms. Among other things, opponents argued that the law would allow men posing as women to gain access to women's restrooms for improper purposes. At the Judiciary Committee hearings,

some women testified about their fear of being assaulted in a public restroom, even though there was no evidence that such incidents had increased with the passage of transgender rights laws in Boston, Cambridge, and other municipalities and nearby states, and even though the national survey indicated that transgender women were frequently the victims of such crimes, not the perpetrators.

Largely as a result of this debate, the law that was passed did not address public accommodations. Gender identity was added to the list of protected classes in the laws prohibiting discrimination in employment, housing, credit, and public education, but the law regarding public accommodations, M.G.L. c. 272, §98, was not so amended. By not addressing public accommodations, the Legislature left the law of public accommodations unchanged and presumably free for further development by the courts.

Public Accommodations and Transgender Persons

Public accommodations cover a great deal more than restrooms. M.G.L. c. 272, §98 prohibits discrimination by places that are open to and accept or solicit the patronage of the general public, including hotels, transportation carriers, retail stores, restaurants, libraries, hospitals, and more. Under this statute, public accommodations may not discriminate on the basis of race, color, religious creed, national origin, sex, sexual orientation, deafness, blindness or any physical or mental disability, or ancestry.

The Legislature's failure to add the term "gender identity" to the list of protected classes in the public accommodations law, while adding it to so many other non-discrimination statutes, appears at first blush to create the potential for incongruous results. A restaurant is now prohibited from terminating an employee because the employee transitions from female to male, but can that same restaurant lawfully refuse to sell food to that employee after he clocks out? A hospital is legally required to permit a transgender female nurse to use the ladies' room, but can it lawfully refuse similar access to a transgender female patient?

Lawyers representing transgender individuals in such public accommodations situations have a number of options for resolving this seeming incongruity. One place to start is the public accommodations law itself. While the term "gender identity" may not have been added, the terms "sex" and "disability" were not removed. Depending on the circumstances, discrimination against a transgender person

by a place of public accommodation could be deemed discrimination on the basis of sex or disability. Well before the new law was passed, there were numerous court and agency cases in which discrimination against transgender persons was deemed to constitute unlawful sex/gender and/or disability discrimination. For example, in *Doe v. Yunits*, 15 Mass. L. Rptr. 278 (Mass. Super. Ct. 2001), Judge Gants, now an Associate Justice of the Supreme Judicial Court, held that a transgender girl who had been diagnosed with gender identity disorder could proceed on a claim of disability discrimination when her school refused to permit her to wear clothing typically worn by girls. See also, *Jette v. Honey Farms Mini Market*, 2001 WL 1602799 (MCAD) (where employer was on notice of complainant's diagnosis and treatment for transsexuality, yet failed to provide her with the reasonable accommodation of allowing her to identify by name and otherwise as female, complainant could proceed on a claim of disability discrimination); *Lie v. Sky Publishing*, 2002 WL 31492397 (Mass. Super.) (male to female transsexual who is denied permission to wear female clothing at work can proceed with claims for both disability and gender-based discrimination); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (discrimination against a transgender individual constitutes sex discrimination in violation of federal law). If transgender persons are denied access to public accommodations, they could, and still can, file complaints with the Massachusetts Commission Against Discrimination (MCAD).

Transgender persons facing discrimination in public accommodations can also look to local law. A number of cities, including Boston, Cambridge, and Northampton, have enacted ordinances prohibiting discrimination on the basis of gender identity by public accommodations.

Another source of protection is Executive Order 526, issued by Governor Patrick in February 2011. Executive Order 526 provides that “all programs, activities, and services provided, performed, licensed, chartered, funded, regulated, or contracted for by the state shall be conducted without unlawful discrimination” based on, among other things, “gender identity or expression.” Many public accommodations, including homeless shelters, hospitals, and other human service organizations, are regulated and funded by the Commonwealth and thus could well be subject to the Governor's order.

There is also “An Act Relative to Gender Identity” itself. To the extent a place of public accommodation is also an employer — and most are — it will be required to refrain from discrimination in

employment on the basis of gender identity. A public accommodation's practice of discriminating against transgender patrons could increase its chances of being held liable for employment discrimination, since such practice could be deemed admissible as evidence of gender identity bias. Similarly, banks, credit unions, credit card companies, and other public accommodations that provide loans and/or credit are prohibited under the new law from discrimination in credit and lending on the basis of gender identity. If such an entity were to refuse to open an account for a transgender patron, even if that person did not specifically request a loan, it could well constitute a violation of the law, since credit and loans are usually among the services offered to account-holders. Further, to the extent such entities adopt non-discrimination policies aimed at compliance with the new law, the failure to follow such policies could give rise to a claim for breach of an express or implied contract.

Conclusion

While "An Act Relative to Gender Identity" may not expressly include places of public accommodation, many such entities are covered in their capacity as employers, lenders, creditors, and/or state contractors. Discrimination on the basis of gender identity may also violate existing discrimination laws and ordinances, either expressly or as interpreted in precedent. In short, advocates for transgender rights in Massachusetts may well confirm that those rights are broader than you may think from a quick read of the new act. ■