PENNSYLVANIA HUMAN RELATIONS COMMISSION GUIDANCE ON DISCRIMINATION ON THE BASIS OF SEX UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT

1. AUTHORITY

This Guidance is an exercise of the authority granted to the Pennsylvania Human Relations Commission ("Commission") to formulate policies to effectuate the purposes of the Pennsylvania Human Relations Act ("PHRA").[1] Further, it is an exercise of the Commission's legislative mandate to construe the provisions of the PHRA liberally for the accomplishment of the purposes thereof.[2]

2. SCOPE

This Guidance shall apply to the PHRA which covers discrimination based on sex in the context of employment, public accommodation, housing, and commercial property. For discrimination based on sex in the context of post-secondary education, please see the **GUIDANCE ON DISCRIMINATION ON THE BASIS OF SEX UNDER THE PENNSYLVANIA FAIR EDUCATIONAL OPPORTUNITIES ACT**.

In issuing this Guidance the Commission reiterates its longstanding position that this Guidance is not intended to impose hard and fast rules that must be absolutely applied without regard to the specific facts involved. Nothing in this Guidance shall affect statutory or other regulatory requirements. This Guidance is neither an adjudication nor a regulation. There is no intent on the part of the Commission to give this Guidance that type of binding force or effect.

This Guidance simply indicates the manner in which the Commission intends to exercise its administrative discretion in accepting complaints, conducting investigations, and adjudicating cases, unless it is convinced otherwise during the course of a specific proceeding. The Commission, as in the past, remains committed to ensuring that its adjudicative determinations are made on a case-by-case basis after consideration of all evidence of record in the given matter. To this end, the Guidance may be deviated from when the Commission believes that any statute or regulation requires it, or that it is otherwise appropriate to do so.

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[1] The Commission has the power and the duty "[t]o formulate policies to effectuate the purposes of [the Pennsylvania Human Relations Act] and make recommendations to agencies and officers of the Commonwealth or political subdivisions of government of or board, department, commission or school district thereof to effectuate such policies." 43 P.S. § 957(e).

[2] "The provisions of [the Pennsylvania Human Relations Act] shall be construed liberally for the accomplishment of the purposes thereof . . . ." 43 P.S. § 962(a).

The Guidance may not be cited as binding legal authority for any Commission ruling, adjudication, or other legally binding action. The rationales set forth in this Guidance may be cited as the basis for Commission action only to the extent the Commission believes the rationale is valid in the context of the specific proceeding.

3. PURPOSE

The purpose of this Guidance is to provide clarity to all Pennsylvanians regarding their civil right "to obtain employment for which [they are] qualified, and to obtain all the accommodations, advantages, facilities, and privileges of any public accommodation and of any housing accommodation and commercial property without discrimination because of . . . sex" as declared in the PHRA.[3]

4. NECESSITY

"Sex" as a protected class is undefined under the PHRA. The question has arisen over whether sex discrimination under the PHRA includes discrimination based on sexual orientation, transgender identity, gender transition, gender identity, and gender expression. Pennsylvania courts have consistently held that the PHRA is to be interpreted consistently with federal anti-discrimination law.[4] Accordingly, upon review of the evolving case law of interpretations of discrimination "because of . . . sex" under Title VII and the Fair Housing Act, the Commission has set forth the following Guidance to clarify, for purposes of persons filing complaints alleging discrimination, how the Commission will interpret "sex" as one of the protected classes under the PHRA.

5. DEFINITIONS

The following words and terms, when used in this Guidance, have the following meanings, unless the context clearly indicates otherwise:

(a) Sex assigned at birth – The assignment and classification of individuals at birth, including but not limited to male, female, or intersex and the related physical differences between the sexes, such as pregnancy.[5]

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[3] 43 P.S. § 953.

[4] Chmill v. City of Pittsburgh, 412 A.2d 860 (Pa. 1980). Imler v. Hollidays burg Am. Legion Ambulance Serv., 731 A2d 173 (Pa. Super. Ct. 1999). Fogelman v. Mercy Hosp., Inc., 283 F.3d 561 (3d Cir. 2002). Taylor v. Pheonixville School District, 184 F3d 296 (3d Cir. 1999).

[5] 16 Pa. Code §§ 41.1 – 51.61.

(b) Sexual Orientation – An inherent or immutable enduring emotional, romantic, or sexual attraction to other people, including but not limited to: heterosexual, homosexual, and bisexual.

(c) Gender Identity – One's innermost concept of self as male, female, a blend of both or neither. How individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.

(d) Gender Expression – External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

(e) Gender transition – The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

(f) Transgender – An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.

6. GUIDANCE

The term "sex" under the PHRA may refer to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and/or gender expression depending on the individual facts of the case.

The prohibitions contained in the PHRA and related case law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected class, prohibit discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.

The Commission will accept for filing sex discrimination complaints arising out of the complainant's sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression using any and all legal theories available depending on the facts of the individual case.

Discrimination complaints identifying "sex" as the protected class and specifying allegations related to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression will be evaluated on a case by case basis throughout the Commission's filing, investigation, and adjudication processes.

Accepting a sex discrimination complaint arising out of complainant's sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, or gender expression for filing does not constitute a finding on the part of the Commission that the alleged actions of the respondent were unlawfully discriminatory and motivated by the complainant's sex. Accepting a complaint simply means that for the purposes of filing, the Commission has accepted the complainant's claim that given the specific facts of their case the respondent may have engaged in unlawful discrimination because of sex. Accordingly, under the PHRA an investigation to uncover whether there is probable cause to support complainant's allegations is required.

All defenses to discrimination complaints based on sex contained in the PHRA[6] and related case law in all areas of jurisdiction where sex is a protected class, are also defenses to complaints of discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression. Further, respondents who believe that enforcement of the PHRA against

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[6] Including, but not limited to:

- The term 'EMPLOYER' . . . does not include religious, fraternal, charitable, or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations." 43 P.S. § 954(b).

- The term 'PUBLIC ACCOMMODATION, RESORT OR AMUSEMENT' . . . shall not include any accommodations which are in their nature distinctly private." 43 P.S. § 954 (l).

- "[I]t shall not be an unlawful employment practice for a religious corporation or association to hire or employ on the basis of sex in those certain instances where sex is a bon fide occupational qualification because of the religious beliefs, practices, or observances of the corporation, or association." 43 P.S. § 955(a).

- With regard to the unlawful housing discrimination provisions found at 43 P.S. § 955(h):

> Nothing in this clause shall bar any religious or denominational institution or organization or any charitable or educational organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal organization or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained. Nor shall it apply to the rental of rooms in a landlord-occupied rooming house with a common entrance, nor with respect to discrimination based on sex, the advertising, rental or leasing of housing accommodations in a single-sex dormitory or rooms in one's personal residence in which common living areas are shared.

43 P.S. § 955(h)(10).

them would violate their free exercise of religion, they are free to avail themselves of the protections found within the Religious Freedom Protection Act ("RFPA").[7]

The RFPA states that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability."[8] Respondents may assert a violation of the RFPA against the Commission "as a claim or defense in any judicial or administrative proceeding."[9] If the respondent is able to prove "by clear and convincing evidence, that [their] free exercise of religion has been burdened or likely will be burdened in violation of [the RFPA], a court may award the person such declaratory or injunctive relief as may be appropriate."[10]

To seek relief under the RFPA at Commonwealth Court,[11] a respondent must provide written notice to the Commission by certified mail, return receipt requested, at least 30 days prior to bringing the action.[12] This notice must inform the Commission that:

> (1) The person's free exercise of religion has been or is about to be substantially burdened by an exercise of the agency's governmental authority.
> (2) A description of the act or refusal to act which has burdened or will burden the person's free exercise of religion.
> (3) The manner in which the exercise of the governmental authority burdens the person's free exercise of religion.[13]

Notice is not required in any of the following scenarios:

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[7] 71 P.S. §§ 2401-2407.

[8] 71 P.S. § 2404(a). The RFPA does provide an exception to this general rule, specifically "An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following: (1) In furtherance of a compelling interest of the agency. (2) The least restrictive means of furthering the compelling interest." 71 P.S. § 2404(b).

[9] 71 P.S. § 2405(a).

[10] 71 P.S. § 2405(f).

[11] "A person alleging a violation of section 4 by a Commonwealth agency may bring an action in Commonwealth Court in accordance with this section and the applicable rules of court." 71 P.S. § 2405(e).

[12] 71 P.S. § 2405(b).

[13] *Id*.

(1) The exercise of governmental authority which threatens to substantially burden the person's free exercise of religion is imminent.
(2) The person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide notice.
(3) The provision of the notice would delay an action to the extent that the action would be dismissed as untimely.
(4) The claim or defense is asserted as a counterclaim in a pending proceeding.[14]

If, upon receipt of this notice, the Commission determines that continued enforcement of the PHRA in that case would violate the RFPA, the Commission will dismiss the case and notify the parties as such.[15] If respondent does not receive a response from the Commission it means the Commission is prepared to defend its enforcement of the PHRA in this case at Commonwealth Court.

[14] 71 P.S. § 2405(c).

[15] The Commission considers dismissal of the case to constitute a full remedy under 71 P.S. § 2405(d) thus limiting the Respondents ability to proceed with their RFPA claim at Commonwealth Court.