

Guidance Concerning Protections for Lesbian, Gay, Bisexual and Transgender
Individuals in the Pennsylvania Human Relations Act

Prepared by the Pennsylvania Human Relations Commission

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Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning Individuals in the Pennsylvania Human Relations Act

Introduction-The Pennsylvania Human Relations Commission (hereinafter PHRC or Commission), establishes the following Guidance in recognition of the fundamental guarantee found in the Pennsylvania Human Relations Act (hereinafter PHRA) that:

The opportunity for an individual to obtain employment for which [the individual] is 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 race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin, the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this act.¹

This guidance shall be used by the PHRC in interpreting the PHRA and for those responsible for providing employment, public accommodations, housing accommodations, or commercial property within the Commission's jurisdiction.

Those responsible for providing opportunities include, but are not limited to, those defined in Section 4 of the PHRA². The Commission, in proposing this Guidance, begins with the recognition that it is the expressed public policy of the Commonwealth to:

*[F]oster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights to public accommodation and to secure housing accommodation and commercial property regardless of race, color, familial status, religious creed, ancestry, age, **sex**, national origin, handicap or disability, use of guide or support animals because of blindness or deafness of the user or because the user is a handler or trainer of guide or support animals.³*

¹ Section 3 of the PHRA is entitled "The Right to Freedom from Discrimination in Employment, Housing and Public Accommodation" See 43 P.S. §953.

² Section 4 of the PHRA includes definitions for person, employer, labor organization, employment agency, housing accommodations, commercial property, and public accommodation; See, 43 P.S. §954 (a), (b),(c), (d), (e),(i),(j) and (l).

³ Section 2(b) of the PHRA, See 43 P.S. §952(b).

Parameters and Purpose of Policy Guidance

The PHRA grants the PHRC the authority to formulate policies to effectuate the purposes of the Act.⁴ In proposing this Guidance, the Commission has set forth factors that it considers to be important in determining whether, in any given case, a party has engaged in sex discrimination against an individual who is lesbian, bisexual, gay, transgender, or queer/questioning (LGBTQ). In so doing, 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. The Guidance is intended to provide both guidance and assistance to those who come under the jurisdiction of the Commission as it continues its effort to ensure that the right to equal opportunities, as set forth in the PHRA, is achieved. Nothing in this guidance shall affect statutory or regulatory requirements. The Guidance is neither an adjudication nor a regulation. There is no intent on the part of the PHRC to give the Guidance that type of binding force or effect. This guidance indicates that manner in which the Commission intends to exercise its administrative discretion, 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 PHRC believes that any statute or regulation requires it, or that it is otherwise appropriate to do so. The Guidance may not be cited as binding legal authority for any PHRC ruling, adjudication or other legally binding action. The legal rationales set forth in a policy may be cited as the basis for PHRC action to the extent that the Commission believes the rationale is valid in the context of the specific proceeding.

⁴ Section 7(e) of the PHRA, *See* 43 P.S. §957(e).

The Policy Guidance

Regarding **discrimination in employment**, the PHRA states it shall be a discriminatory practice:

*For any employer because of the sex, ...of any individual or independent contractor to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.*⁵

In another section, the PHRA contains **prohibitions against discriminatory practices** regarding hiring; including prohibiting inquiries or recordkeeping about the applicant's protected class status, including sex; prohibiting publications and notices that indicate a preference or limitation based on protected class status, including sex; prohibiting the use a quota system to deny or limit applicants of certain protected groups, including sex; or confining or limiting recruitment of individuals to agencies or referral sources which provide services to individuals who are predominantly one protected group, including limiting by sex.⁶

In addition, the PHRA contains prohibitions against discrimination by **labor unions**:

*For any labor organization because of the ... sex, ...of any individual to deny full and equal membership rights to any individual or otherwise to discriminate against such individuals with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly, related to employment.*⁷

Regarding **discrimination by employment agencies**, the PHRA states it shall be a discriminatory practice:

*For any employment agency to fail or refuse to classify properly, refer for employment or otherwise to discriminate against any individual because of ...sex.*⁸

In addition, with regard to **discrimination in housing and commercial property**, discrimination on the basis of **sex** is prohibited in terms of sale, leasing, financing, advertising, recordkeeping, and terms or conditions of the sale or lease of property.⁹

⁵ Section 5(a) of the PHRA; See 43 P.S. § 955(a); Note-section 5(a) also includes an exception, which states: "Notwithstanding any provision of this clause, it 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 bona fide occupational qualification because of the religious beliefs, practices, or observances of the corporation, or association."

⁶ Section 5(b) of the PHRA; See 43 P.S. §955(b)

⁷ Section 5(c) of the PHRA; See 43 P.S. §955(c)

⁸ Section 5(f) of the PHRA; See 43 P.S. §955(f)

⁹ Section 5(h) of the PHRA; See 43 P.S. §955(h)

The PHRA also prohibits discrimination on the basis of **sex** by any **public accommodation, resort or amusement**, which includes denying access based on sex either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation, resort or amusement. It prohibits any notice or advertisement or other written communication that infers or states that the advantages, privileges, or facilities of any public accommodation would be refused or withheld based on an individual's sex.¹⁰

Currently, the PHRA does not set forth specific protections against discrimination for people who are Lesbian Gay, Bisexual, Transgender, or Queer/Questioning (LGBTQ). However, the PHRA, as set forth above, does specifically prohibit discrimination based on sex.

Federal courts and federal administrative agencies have held that discrimination claims filed by LGBT individuals may be taken, investigated, and analyzed as sex discrimination claims.

The gist of these claims is that LGBTQ individuals do not comply with sexual stereotypes and that adverse action(s) against an LGBTQ individual due to that person's failure to comply with sexual stereotypes amounts to discrimination based on sex.

Accordingly, it is the position of the Pennsylvania Human Relations Commission that it will take and investigate sex stereotyping claims filed by LGBTQ individuals.

Note: The PHRC has not yet had an LGBTQ discrimination case that progressed to a public hearing and is decided by PHRC's commissioners. Also, currently there are no Pennsylvania appellate state court decisions applying the sex stereotyping analysis to a discrimination complaint under the PHRA filed by an LGBTQ individual.

Also note: As it has in the past¹¹, the PHRC continues to support legislation seeking to expand the PHRA to specifically cover claims filed by LGBTQ individuals.

¹⁰ Section 5(i) of the PHRA; See 43 P.S. §955(i)

¹¹ Most recently, on June 27, 2016, the Commission voted to support then Senate Bill 1307, which amended the PHRA to specifically cover claims by LGBTQ individuals.

