

TESTIMONY IN SUPPORT OF SB 1306 BY STEPHEN A GLASSMAN, FORMER CHAIRMAN OF THE PENNSYLVANIA HUMAN RELATIONS COMMISSION, 2002-2011. AUGUST 30, 2016

Senator Browne (Prime Sponsor of SB 1306), Senator Baker (Chair of the Labor and Industry Committee), and distinguished members of the Pennsylvania State Senate:

Please allow me to share some important information with you today related to the amendment of the Pennsylvania Human Relations Act (PHRA), designed to include 'sexual orientation and gender identity or expression' in addition to all of the other protected classes currently included in the Commonwealth's civil rights statute. Because we have not yet been able to amend this law at the state level, we have focused our efforts in recent years on passing similar ordinances at the municipal level throughout the state of Pennsylvania. These laws offer considerable guidance and experience to the legislature, indicating that communities have adjusted relatively easily to their passage and that local commissions have not been overwhelmed with cases or complaints on the basis of 'sexual orientation and/or gender identity or expression'. On the other hand, nearly all local commissions in the Commonwealth (Philadelphia and Pittsburgh being notable exceptions) are functioning without professional staff and are unable to adequately process and resolve complaints as effectively as the state agency should be able to if given adequate funding and staff to complete its legislative mandate.

All local ordinances are designed to serve every protected class equally without singling out any individual class for different or special protections. We have repeatedly made the case throughout PHRC's history that, although a comprehensive state statute is the most important legislative tool to attack and redress discrimination and bias, local human relations commissions and the laws which create them are valuable for the citizens of the Commonwealth because they can accomplish their work at the local level, often more rapidly and less expensively than the PHRC, with a sensitivity to the local culture which exists in each jurisdiction, and with an awareness of the local employers, landlords, service providers, and educational institutions (K-12 and post secondary including technical and vocational schools, colleges, and universities, both public and private) which are served by a local commission. With a limited staff at PHRC that has been significantly reduced in recent years it is increasingly difficult to monitor and serve the needs of 67 counties with more than 2800 municipalities as well as 500 school districts and 1217 police forces in this state.

The PA Human Relations Commission (PHRC) is overseen by 11 Commissioners who have voted repeatedly since 2004 to amend the PHRA to support the inclusion of "sexual orientation and gender identity or expression" as protected classes. The Commission has supported such legislative changes because of its belief that such discrimination is fundamentally at odds with the basic notions of equal opportunity, which ought to be based upon an individual's

qualifications rather than their personal characteristics.

In the *Hartman v. City of Allentown* case (880 A.2d 737 Pa. Commonwealth Court, 2005), the central ruling finds that the police power granted to municipalities to legislate for the general welfare of their residents encompasses the power to enact anti-discrimination laws, and that the PHRC does not limit the exercise of those police powers. In *Hartman*, several residents of Allentown brought suit to invalidate Allentown's expansion of its local non-discrimination ordinance to prohibit discrimination on the basis of "sexual orientation and gender identity".

The plaintiffs argued that the PHRA only permits municipalities to adopt ordinances that exactly mirror the state statute, and that it does not permit them to expand beyond the provisions of that Act. They argued that the Allentown ordinance was preempted by state law. The Court of Common Pleas rejected the preemption argument and agreed that additional protected classes can be added to local ordinances at the discretion of local elected officials. On appeal, the Commonwealth Court upheld that argument. This is settled case law and provides an important precedent for the state legislature to follow in amending the state Human Relations statute. It is also the foundation for local municipalities including protected classes in their non-discrimination ordinances that are not yet included in the PA Human Relations Act, despite the PHRC's repeated recommendation to the legislature to do so. I have consistently supported state legislation, which mandates the addition of the protected classes

to the PHRA of “marital status, familial status in employment and public accommodations, and genetic testing, as well as sexual orientation and gender identity or expression”.

Among the specific powers granted to the Commission is the power to “formulate policies to effectuate the purposes of the Act and to make recommendations to agencies and officers of the Commonwealth or its political subdivisions....to effectuate such policies”. (section 7 (e)). The PHRA also specifically authorizes the creation of local human relations commissions (section 12.1 of the PHRA).

The PHRA envisions that the Commission will carry out its legislative mandate through investigation, prosecution, adjudication, and education. One of the critical roles with respect to education is the responsibility to educate the public regarding the Commonwealth’s interest in eradicating unlawful discrimination throughout the state. Commissioners play a vital role in this effort. It is the responsibility of the Chairperson and Commissioners as well as appropriate staff members to articulate the policies and positions taken by the Commission and to offer advice when it is requested by the state legislature and political subdivisions of the Commonwealth on a wide variety of issues.

The Commission, in supporting local ordinances as envisioned by the PHRA, has, since 2004, based its support of such ordinances on the inclusion of “sexual orientation and gender identity or expression” as protected classes which it does not find to be

incompatible with its legislative mission. From its perspective, the more protection offered to all those who live in or visit the Commonwealth the better. Everyone should be free from bias, prejudice and discrimination, which will make it more likely that an equal opportunity will be provided to every individual in employment, housing, and public accommodations. No one should be denied a job or a promotion, a home, an education, or service in a public accommodation on this or any other basis.

Currently there are approximately 30 local jurisdictions in the Commonwealth covering about 30% of the state's population which have established human relations commissions and which have passed non-discrimination ordinances at the city, county, township, or borough level. All of these include the protected classes delineated in the PHRA as well as "sexual orientation and gender identity or expression". More importantly, none of these local commissions has been inundated with cases related to discrimination on the basis of "sexual orientation and/or gender identity or expression" (neither have any of the states which have already passed these laws). On the contrary, the existence of these protections and seeing that they are well publicized through outreach and education, serves as notice to employers that this type of bias in the workplace is no longer permitted. Many acts of discrimination are unintentional and result from a lack of cultural competency and awareness or an unfamiliarity with the law. These cases are often easier to resolve through negotiation and settlements. There is, however, a significant amount of intentional discrimination and bias against LGBT people based

upon learned behavior and actively reinforced prejudice which needs to be addressed and combatted through the use of a comprehensive state civil rights law that includes protections on the basis of “sexual orientation and gender identity or expression”. You have an opportunity to rectify this longstanding void in protections today, and I trust that you will do so with alacrity and a commitment to justice, fairness, and equality.

A state law is needed to expand these protections to all Pennsylvanians because the areas of the state which currently remain unprotected are unlikely to ever pass this kind of legislation at the local level. Although it has taken far too long to solve this problem, I am pleased to participate in this hearing of the Labor and Industry committee today to discuss equal employment opportunities and protections for lesbian, gay, bisexual, and transgender individuals who reside in or are temporary residents of the Commonwealth of Pennsylvania. Hopefully, with the conclusion of this hearing, this committee and both houses of the state legislature will add these amendments to the PHRA and send a bill to the Governor’s desk for his signature.

Proposed legislation has been repeatedly introduced in the PA House and Senate since 2004, but none of these bills have ever been allowed to receive a vote on the floor of the legislature. Throughout the United States nearly half of the states have already passed similar non-discrimination legislation including protections on the basis of “sexual orientation” and gender identity or expression”. Among these are all of

the states in the northeast including those which surround Pennsylvania, New York, New Jersey, Delaware, and Maryland, all of which compete with us for residents, businesses, academic research, technological investment, and creative talent.

Regarding any claim of a violation of religious freedom under the Religious Freedom Protection Act (RFPA) of 2002, the government may enforce the law if it has a compelling reason to do so, and preventing discrimination has been held in other contexts to be a compelling reason for upholding a law that requires universal compliance with its provisions for equal opportunity. Religious objections to non-discrimination laws have been very narrowly applied over the years since this law was passed in PA. (see addendum on Religious Expression below). Additionally, neither the state nor any municipality can face any liability for passing a non-discrimination law because the RFPA only allows a claim for injunctive relief—no damages—for that person and bars any claim for attorney's fees.

As a matter of interest, bipartisan polling of likely voters which has been done in recent years here in Pennsylvania as well as nationally indicates between 65% to 85% of the public supports protections for lesbian, gay, bisexual, and transgender individuals in employment, housing, and public accommodations, depending upon the region of the state being polled. Susquehanna Polling and Research and national results received by ABC, CNN, NBC, Gallop, and others indicate even higher levels of support in all of these issue areas. Now that marriage equality for same

sex couples has been achieved in 2013 and 2015 through decisions of the U S Supreme Court, it ought to be a decidedly less controversial issue to pass non-discrimination legislation which will provide equal opportunity in employment, housing, and public accommodations here in Pennsylvania.

## **THE RIGHT TO RELIGIOUS EXPRESSION AND THE PENNSYLVANIA HUMAN RELATIONS ACT**

### **FACT SHEET ON SENATE BILL 1306**

**The Pennsylvania Human Relations Act provides adequate protection for the First Amendment right to religious expression. The PHRA has been tested in court cases repeatedly over its 60 + year history with regard to religious freedom and the language of the statute has proved more than adequate in resolving the constitutional balance between freedom of speech and the right to practice one's faith.**

**The PHRA provides religious expression protection in employment through "Bona Fide Occupational Qualifications."** If a religious institution holds as a tenet of its faith that only certain types of people can hold certain positions, e.g. only men can be priests, then the institution has a right to that religious expression and will be allowed to discriminate in its



hiring practices so long as there is a legitimate and verifiable reason to do so.

**State case law provides additional protection for parochial schools.**

In 1988, the Commonwealth Court ruled that parochial schools are not “public accommodations” and, thus, do not fall under the jurisdiction of the PHRA. The Roman Catholic Archdiocese of Philadelphia was accused of racial discrimination, but the court ruled in favor of the archdiocese in *Roman Catholic Archdiocese of Philadelphia and St. Stephen’s Parish vs. the Pennsylvania Human Relations Commission*, 119 Pa. Commw. 445; 548 A.2d 328 (1988). This decision allows parochial schools, unfortunately, to continue the practice of discrimination on any basis without being subject to the provisions of the state Human Relations Act.

**Federal case law provides protection for the First Amendment right to religious expression.**

Numerous federal courts, including the Third Circuit Court of Appeals, have ruled on a “ministerial exception” to civil rights laws. This exception allows religious institutions to ignore non-discrimination laws when hiring for positions that relate to teaching and expressing the faith. It first occurred in 1972 in *McClure v. The Salvation Army* 460 F.2d 553 (5<sup>th</sup> Cir. 1972). This exception does not apply just to clergy. Lawsuits by music directors, parochial school principals, parochial school teachers, a Hispanic Communications Manager, an Associate in Pastoral Care, a hospital chaplain, a kosher food supervisor and a university administrator have all

been successful. Once again, there are protections in place in the PHRA for those who have legitimate religious interests which allow them to discriminate in their employment practices.

**Faith-based social services, e.g. adoption agencies, will not be impacted by the passage of SB**

**1306.** 30+ municipalities in Pennsylvania have non-discrimination ordinances that include protections for “sexual orientation” and “gender identity or expression,” similar to HB 300. In those municipalities, faith-based social services have not been hindered in their operations nor have they been threatened with lawsuits forcing them to hire individuals or engage in other practices, e.g. placing foster children with same sex couples, that do not adhere to their beliefs.