

**CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, C.C.B.
266-4511**

June 2, 2000

OPINION 2000-010

TO: Alderperson Gary Poulson

FROM: Eunice Gibson, City Attorney

RE: Transsexuals as a protected class under Madison's Equal Opportunities Ordinance

You have asked my opinion on the following question:

Does Madison' Equal Opportunities Ordinance prohibit discrimination based on the fact that an individual is a transsexual?

The short answer is that there may be some instances where discrimination against a transsexual would violate the ordinance. In most instances, there would be no violation. The following definition of "transsexualism" is found in the On-Line Medical Dictionary:

Transsexualism

Consistently strong desire to change one's anatomic sex and belong to the opposite sex, to change gender and do so by all available means (including surgery, hormonal treatment, dress, and lifestyle). Trans-is related to the Latin verb transire, meaning to pass or cross over, or pass beyond. In transsexualism, one crosses over or passes beyond ones sex to the opposite sex. Transsexualism is thus distinct from mere cross-dressing which is termed transvestism (from the Latin vestitus meaning clothed).

The Random House Dictionary of the English Language, Unabridged, contains this definition of "transsexual":

1. A person having a strong desire to assume the physical characteristics and gender role of the opposite sex.
2. A person who has undergone hormone treatment and surgery to attain the physical characteristics of the opposite sex...

The Boulder Colorado Human Rights Ordinance uses two definitions:

“Transitioning transsexual” means a person experiencing gender variance who is undergoing sex reassignment treatment.

“Transitioned transsexual” means a person who has completed genital reassignment surgery.

These terms are not defined in Madison’s Equal Opportunities ordinance, and discrimination on this basis is not prohibited. Madison’s ordinance does forbid discrimination based on sex and disability, but most courts in other states have held that these two terms do not include transsexualism. See Sommers v. Iowa Civil Rights Commission, 337 NW2d 470, 474, 476, 47 FEP Cases 1217, I A.D Cases 442 (Iowa S.Ct. 1983) (Transsexuals are not covered by a civil rights law which forbids discrimination based on sex and disability) Ulane v. Eastern Airlines, Inc. 742 F. 2d 1081, 1086, (7th Cir. 1984) (Transsexuals are not covered by Title VII’s prohibition against sex discrimination.).

Madison’s Equal Opportunities Ordinance also forbids discrimination based on sexual orientation, as does the State of Wisconsin Fair Employment Act.

Sec. 3.23 (2)(gg) MGO provides:

(gg) Sexual orientation includes homosexuality, heterosexuality, and bisexuality by preference or practice

This definition is very similar to the definition contained in the District of Columbia Human Rights Act. A federal court in the District of Columbia has held that, under this definition, discrimination based on transsexualism is not discrimination based on sexual orientation. Underwood v. Archer Management Services, Inc., 857 F. Supp. 96, 98 (D.C. D.C. 1994).

It is unlikely that a court would interpret the prohibition in Madison’s Equal Opportunities Ordinance against discrimination based on sex, disability, and sexual orientation to cover transsexualism and prohibit discrimination on that basis.

Madison’s Equal Opportunities Ordinance also forbids discrimination based on “physical appearance.” Sec. 3.23 (2)(aa) MGO, provides:

(aa) Physical appearance means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

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There are certain instances where discrimination against a transsexual could be specifically based on physical appearance. In those certain instances, unless one of the exceptions applied, the transsexual might be able to demonstrate an ordinance violation.

That is the only situation, however, in which Madison's Equal Opportunities Ordinance protects a transsexual from discrimination in housing, employment, or public accommodations.

Eunice Gibson
City Attorney

CAPTION: Madison's Equal Opportunities Ordinance does not protect transsexuals from discrimination except in certain limited instances.

EG/nje

cc: Mayor Bauman

City Clerk

Anthony Brown