

DISCRIMINATION

## Phoenix, Flagstaff extend employment protection to LGBT status

by Dinita L. James

*The largest city in the state and the largest city in northern Arizona now prohibit employers from discriminating on the basis of sexual orientation, gender identity, and gender expression. They join the second-largest city in the state, Tucson, which has provided those protections since 1999.*

### Split vote in Phoenix

On February 26, the Phoenix City Council voted to amend its human relations ordinance to include lesbian, gay, and transgender persons among the groups protected from employment discrimination. The 5-3 vote came after a five-hour public hearing before an estimated 500 people in the city's historic Orpheum Theatre. Phoenix Mayor Greg Stanton had fast-tracked the amendment, which was something of a sleeper. Opponents, including the Catholic Diocese of Phoenix, mobilized the week before the vote.

Opponents nicknamed the proposal the "Bathroom Bill," arguing that the law would allow transgender individuals to use restrooms designated for the opposite sex. The Phoenix ordinance applies to public accommodations as well as housing and city contracts. The law does not directly address bathrooms.

Mayor Stanton said in a column in the *Arizona Republic* on the day of the vote that amending the ordinance was important for Phoenix as a business-development tool. Councilman Sal DiCiccio, a leading opponent of the amendment, stated in a dueling column, "If this ordinance passes, as it is expected to do, businesses will be forced to hire more lawyers than employees."

The emotional public hearing dredged up 20-year-old skeletons from the last time Phoenix considered the issue. In 1992, a similar proposal failed to gain council support, and the city instead adopted a narrower ordinance that banned city contractors with at least 35 employees from discriminating on the basis of sexual orientation. Then-mayor Paul Johnson was the first member of the public to speak on behalf of the current amendment.

Councilwoman Thelda Williams, who didn't support broader protections in 1992, spoke strongly in support

of the current changes. She drew loud applause when she commented that she would be happy to share a restroom with some of the "gorgeous" transgender women who had spoken at the hearing.

A group of approximately 30 pastors reportedly tried to convince certain council members to change their votes. Councilman Daniel Valenzuela met with the group but declined to change his vote, stating it is "an equal-rights issue" and "that train moves in one direction."

### Flagstaff vote unanimous

On March 5, the Flagstaff City Council passed a civil rights ordinance that prohibits discrimination in employment and public accommodations on the basis of sexual orientation, gender identity, and veteran status. The Flagstaff ordinance also protects race, color, religion, sex, age, disability, and national origin.

The measure had been under consideration for many months, and the end result was a compromise that did not extend protections in the area of housing. Lesbian, gay, bisexual, and transgender (LGBT) activists have been pursuing a nondiscrimination ordinance in Flagstaff since 2007. In 2009, the city council adopted a "resolution of inclusion" that was not legally enforceable.

Only five speakers objected to the ordinance at the Flagstaff public hearing. Opponents obtained approximately 150 signatures on an online petition against the ordinance, but some of the "names" were signed "anonymous."

### National perspective

Federal laws against employment discrimination do not protect against discrimination based on real or

### New Phoenix ordinance also extends disability protections

When the Phoenix City Council amended its human rights ordinance on February 26, it also extended employment protections to employees with a disability. The disability-related amendments to the human relations ordinance mirror those of the federal Americans with Disabilities Act (ADA). What that means for small employers (those with 14 or fewer employees) within the Phoenix city limits is that they now are bound by essentially the same requirements as under the ADA. Phoenix already prohibited discrimination on the basis of disability in housing, but the new ordinance extends disability protections to public accommodations as well as employment.

The Phoenix Equal Opportunity Department (EOD) is the agency designated to investigate disability discrimination claims filed against small employers in the Phoenix city limits. Mediation will be the primary enforcement mechanism, although criminal prosecution is available if mediation is unsuccessful. Upon conviction, fines can total \$2,500.

perceived sexual orientation, gender identity, or gender expression. Despite the omission, the Equal Employment Opportunity Commission (EEOC) recently identified enforcement of sex discrimination under Title VII of the Civil Rights Act of 1964 against LGBT individuals as one of its strategic priorities. Twenty-one states and the District of Columbia have laws prohibiting discrimination based on sexual orientation, and 16 of those states and Washington, D.C., include gender identity as an additional protected status.

More than 160 U.S. cities have similar ordinances, as do a handful of counties around the country. Approximately 90 percent of Fortune 500 companies report having policies against discrimination on the basis of sexual orientation. State law in Arizona does not prohibit discrimination on the basis of sexual orientation, gender identity, or gender expression.

### ***Phoenix specifics***

The Phoenix ordinance will be enforced by the city's equal opportunity department, which has a staff of investigators to probe complaints. The primary enforcement mechanism is mediation, but if that fails, employers can be prosecuted criminally. The maximum penalty is a \$2,500 fine.

The Phoenix ordinance applies to all employers within the city limits, even those that have only one worker. The ordinance exempts (1) all state, federal, and tribal employers, (2) community college, high-school, and school districts, and (3) any bona fide private membership club other than a labor union. There is a separate exemption for bona fide religious organizations.

### ***Flagstaff specifics***

Flagstaff didn't have an ordinance prohibiting discrimination in employment before adopting the new chapter to its human relations ordinance in the March 5 vote. In general, the Flagstaff ordinance is designed to be consistent with federal law and protects all of the statuses that federal law protects. The Flagstaff ordinance includes sexual orientation, gender identity, and gender expression among the protected statuses, thus going beyond the protections afforded under federal law.

Flagstaff is consistent with state and federal law in exempting small employers (those with fewer than 15 employees) from the antidiscrimination provisions relating to employment. Unlike federal and Arizona law, however, the Flagstaff ordinance makes individuals liable for causing an employer to discriminate, thus making supervisors and managers potentially subject to prosecution.

The Flagstaff ordinance has exclusions for Native American preferences, private clubs, expressive associations, the United States, Arizona, and Indian tribes. The ordinance also contains a "religious employer" exemption, but it is narrower than the one provided in the Phoenix ordinance. Violation of the Flagstaff ordinance is a civil infraction. The maximum fine is \$500, escalating to \$2,500 for repeat offenses.

The city manager's office is designated to receive and investigate charges of discrimination. As with the Phoenix ordinance, mediation is the first dispute resolution mechanism to be used. The Flagstaff ordinance has a specific provision prohibiting individual lawsuits to enforce the protections it creates.

### ***Recommendations for action***

If you do business in Phoenix or Flagstaff, you should move quickly to amend your equal employment opportunity policies to include sexual orientation, gender identity, and gender expression if those statuses aren't already protected.

Given the EEOC's stated intention to treat discrimination on the basis of sexual orientation or gender identity as sex discrimination under Title VII, employers that do not do business in Phoenix or Flagstaff may want to consider amending their policies as well. Additionally, you should provide training to your workers on (1) any changes to your policies and (2) your expectations of employees in creating a respectful and positive working environment. Managers and supervisors will need additional training on how to (1) implement the new policies and (2) comply with the new requirements of the Phoenix and Flagstaff laws.

*Dinita L. James, the partner in charge of the Phoenix office of Gonzalez Saggio & Harlan LLP, is the editor of Arizona Employment Law Letter. You can reach her at [dinita\\_james@gshllp.com](mailto:dinita_james@gshllp.com) or 602-840-3301. ❖*