

CITY OF OAKLAND
AGENDA REPORT

To: Chairperson Danny Wan and
Members of the Finance Committee
From: City Council Legislative Analyst
Date: October 14, 2003

Re: **AN ORDINANCE UPDATING LANGUAGE IN THE CITY OF OAKLAND'S MUNICIPAL CODE CHAPTER 9.44 DISCRIMINATION BASED ON SEXUAL ORIENTATION AND AMENDING SECTION 9.44.010 DEFINITIONS TO INCLUDE DISCRIMINATION BASED ON GENDER IDENTITY OR EXPRESSION AND SECTION 9.44.020 UNLAWFUL PRACTICES TO ALLOW THE USE OF RESTROOM FACILITIES CONSISTENT WITH A PERSON'S GENDER IDENTITY**

BACKGROUND

Oakland's existing anti-discrimination ordinance provides basic protection in the areas of employment, real estate, business establishments, city services and facilities, and city supported services and facilities. The amendment proposes language that specifically prohibits discrimination against transgender people and allows access to restrooms and dressing rooms consistent with the person's gender identity.

KEY ISSUES AND IMPACTS

The proposed amendment adds the term "gender identity or expression" to the definition of sexual orientation. The term "gender identity" or "gender expression" means having or being perceived as having a gender-related identity or expression whether or not it is stereotypically associated with a person's actual or perceived sex. Inclusion of the term insures that transgender persons are also protected under our current anti-discrimination policy.

The proposed policy additionally addresses the right of an individual to utilize restrooms or dressing facilities consistent with their perceived gender identity when patronizing business establishments or using city facilities. The restroom facility provision has been included to eliminate any vagueness about the intent of the policy and its application.

Similar language and policies are being adopted all across the country to prohibit discrimination against transgender people. At the local level, 59 cities and counties have enacted non-discrimination ordinances protecting transgender people, including Boston, Dallas, Los Angeles, Louisville, New York City, Pittsburgh, and San Jose, among others.

7

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OCT 14 2003

Upon adoption of the ordinance, the City Manager should amend the City's Administrative Instruction 70 outlining the City's internal Equal Employment Opportunity/Anti-Harassment Policy and Complaint Procedure to mirror the provisions adopted in the amendment.

Although budget cutbacks have severely affected the city's training resources, it is critical that city staff receive the appropriate sensitivity training to work with and deliver services to transgender persons, particularly in the Police Department.

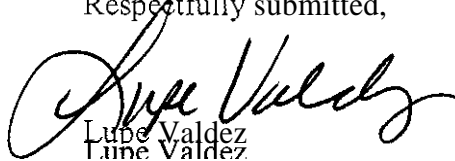
FISCAL IMPACT

This policy presents no fiscal impact to the City however; the City Council should consider allocating resources during the next budget cycle for Police and staff sensitivity training.

RECOMMENDATION

Adopt the ordinance amendment and direct the City Manager to amend AI 70 to reflect similar language.

Respectfully submitted,



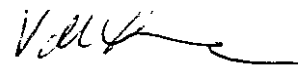
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City Council Legislative Analyst

7

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OCT 14 2003



APPROVED AS TO FORM AND
LEGALITY

INTRODUCED BY COUNCILMEMBERS:
DANNY WAN, JEANE QUAN. VICE MAYOR NANCY NAOEL

CITY ATTORNEY

Ordinance No. _____ C.M.S.

AN ORDINANCE UPDATING LANGUAGE IN THE CITY OF OAKLAND'S MUNICIPAL CODE CHAPTER **9.44** DISCRIMINATION BASED ON SEXUAL ORIENTATION AND AMENDING SECTION **9.44.010** DEFINITIONS TO INCLUDE DISCRIMINATION BASED ON GENDER IDENTITY OR EXPRESSION AND SECTION **9.44.020** UNLAWFUL PRACTICES TO ALLOW THE USE OF RESTROOM FACILITIES CONSISTENT WITH A PERSON'S GENDER IDENTITY

WHEREAS, Oakland's Municipal Code Chapter 9.44 Sections 9.44.01 – 9.44.070 provides anti-discrimination protection based on sexual orientation in the areas of employment, real estate, business establishments, city services and facilities and city supported services and facilities; and

WHEREAS, it is the desire of the City Council to update and amend Sections 9.44.010 and 9.44.020 to include the term "gender identity or expression" amongst the other characteristics defining "sexual orientation" so as to provide comprehensive anti-discrimination protection for transgender and other gender non conforming residents in Oakland and

WHEREAS, the Oakland City Council wishes to clearly articulate its policy in relation to the use of restroom facilities in conformance with a person's gender identity;

NOW, THEREFORE, BE IT ORDAINED THAT CHAPTER **9.44** SECTIONS **9.44.010** AND **9.44.020** ARE AMENDED TO **READ** AS FOLLOWS:

9.44.010 Definitions.

"Business establishment" means any entity, however organized, which furnishes goods, services or accommodations to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements: (1) consist only of payment of fees; (2) consist of requirements under which a substantial portion of

7
FINANCE & MANAGEMENT CMTE.

OCT 14 2003

the residents of this city could qualify; or (3) consist of an otherwise unlawful business practice.

"Discrimination" means any act, policy or practice which, regardless of intent: has the effect of subjecting any person to differential treatment as a result of that person's sexual orientation. The phrase "differential treatment" includes any limitation on a person's full, unsegregated and equal access to, or enjoyment of, employment, real estate transactions, ~~and~~ business establishments, and municipal services.

"Person" means any natural person, ~~firm~~, corporation, partnership or other organization, association or group of persons however organized.

"Real estate transactions" means and includes the sale, repair, improvement, lease, rental, or occupancy of any interest or portion of any interest in real property and shall also include the extension of credit, financing, insurance or services in connection with the sale, repair, improvement, lease, rental, or occupancy of any such interest in real property.

"Sexual orientation" means actual or ~~supposed~~ perceived homosexuality, heterosexuality, or bisexuality, ~~by preference or practice, including, but not limited to, an orientation that may be imputed on the basis of mannerisms, physical characteristics or manner of dress. (Prior code § 3-20.01)~~

"Gender identity or expression" means having or being perceived as having a gender-related identity or expression whether or not stereotypically associated with a person's actual or perceived sex.

9.44.020 Unlawful practices.

A. In General. It is unlawful for any person to do anything which has the effect of discriminating against any person as a result of that person's sexual orientation, with respect to any of the following activities:

1. Employment. Any aspect of employment, opportunities for employment, or union membership;
2. Real Estate. Any real estate transaction;
3. Business Establishments. The availability of goods or services from any business establishment including access to restrooms or dressing rooms consistent with the person's gender identity;
4. City Services and Facilities. The use or availability of any municipal service or facility;
5. City Supported Services and Facilities. the use or availability of any service or facility, wholly or partially funded, or otherwise supported by the city.
6. It shall be an unlawful practice to prohibit a person from using the restroom consistent with the person's gender identity.

B. Exceptions.

1. Employment.
 - a. ~~Contractual~~ Bona fide Occupational Qualifications.

1. ~~Contractual~~ Bona fide Occupational Qualifications. Nothing contained in subsection (A)(1) of this section shall be deemed to prohibit selection or rejection based upon a ~~contractual~~ bona fide occupational qualification.

ii. Burden of Proof. In any action brought under Section 9.44.040 or 9.44.050 if a party asserts that an otherwise unlawful act of discrimination is justified as a ~~contractual~~ bona fide occupational qualification, that party shall have the burden of proving: (1) that the discrimination is in fact a necessary result of a ~~contractual~~ bona fide occupational qualification; and (2) that there exists no less discriminatory means of satisfying the occupational qualification.

b. Seniority Systems. It shall not be an unlawful discriminatory practice under subsection (A)(1) of this section for an employer to observe the conditions of a contractual seniority system provided such system is not a subterfuge to evade the purposes of this chapter; provided further that no such system shall provide an excuse for failure to hire any individual.

2. Real Estate Transactions.

a. Owner Occupied Dwellings. Nothing in subsection (A)(2) of this section shall be construed to apply to the rental or leasing of any housing unit in which the owner or lessor or any member of his or her family occupies one of the living units and it is necessary for the owner, lessor or family member to use either a bathroom facility or a kitchen facility in common with the prospective tenant.

b. Effect on Other Laws. Nothing in subsection (A)(2) of this section shall be deemed to permit any rental or occupancy of any dwelling unit or commercial space otherwise prohibited by law.

3. City Supported Services and Facilities. Subsection (A)(5) of this section does not apply to facilities or services which only receive assistance from the city which is provided to the public generally.

C. Notices.

1. Requirements. Every employer with fifteen (15) or more employees, every labor organization with fifteen (15) or more members, and every employment agency shall post and keep posted in conspicuous place upon its premises where notices to employees, applicants for employment and members are customarily posted, the following notice:

Discrimination on the basis of sexual orientation and/or gender identity or expression is prohibited by law. Chapter 9.44 of the Oakland Municipal Code.

2. Alternate Compliance. Notwithstanding the above, the provisions of this subsection may be complied with by adding the words "sexual orientation and/or gender identity or expression" to all notices required by federal or state law, and indicating on the notice that discrimination on the basis of sexual orientation is prohibited by Chapter 9.44 of the Oakland Municipal Code.

D. Advertising. It is unlawful for any person to make, publish or disseminate any notice or statement which indicates that such person engages in or will engage in any practice prohibited by this chapter. (Prior code § 3-20.02)

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 20____

PASSED BY THE FOLLOWING VOTE:

AYES – BROOKS, BRUNNER, CHANG, DE LA FUENTE, NADEL, REID, QUAN, WAN

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
CEDA FLOYD
City Clerk and Clerk of the Council
Of the City of Oakland, California

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7
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OCT 14 2003