



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

August 4, 1977

ATTORNEY GENERAL OPINION NO. 77-247

Mr. John Dekker
Director of Law
Office of City Attorney
455 North Main Street
Wichita, Kansas 67202

Re: Cities--Human Relations--Discrimination

Synopsis: If the governing body of the City of Wichita determines that discrimination on the basis of either marital status or sexual or affectional preference, as defined in the proposed amendments, constitutes an arbitrary or artificial barrier to achievement of the city's declared policy of equal opportunity in employment, housing and access to public accommodations, it is within the police power of the city to prohibit discrimination on such grounds, and neither of the proposed ordinances is contrary to state law or to any declared public policy of the State of Kansas. The Kansas Commission on Civil Rights has no authority or jurisdiction to entertain referrals of complaints based upon any grounds other than those provided in the Kansas Act Against Discrimination, K.S.A. 44-1001 et seq., which does not include marital status or sexual or affectional preference.

* * *

Dear Mr. Dekker:

You inquire concerning a proposed amendment to the present ordinance of the City of Wichita, Ordinance No. 34-693, found at section 2.12.900 of the city code, adopting by reference the applicable provisions of the Kansas Act Against Discrimination, K.S.A. 1976 Supp. 44-1001 et seq., which now prohibits discrimination

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against individuals in employment relations, public accommodations, and housing on the basis of race, religion, color, sex, physical handicap, and national origin or ancestry. The proposed amendments to the ordinance prohibit discrimination in employment, public accommodations and housing on alternative bases, marital status, and sexual or affectional preference, which is defined by the ordinance as "having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment." You inquire concerning each of the proposed amendments, first, whether they are constitutional and secondly, whether they conflict with state law or declared public policy.

K.S.A. 44-1001 of the Kansas Act Against Discrimination declares the existing public policy of the state regarding discrimination:

"It [the Kansas Act Against Discrimination] shall be deemed an exercise of the police power of the state for the protection of the public welfare, safety, health and peace of the people of this state. The practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations or in housing by reason of race, religion, color, sex, national origin or ancestry is a matter of concern to the state, since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state."

This declaration of public policy continues in pertinent part thus:

"It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless of race, religion, color, sex, national origin or ancestry, in securing and holding, without discrimination, employment in any field of work or labor for which he is properly qualified, to assure equal opportunities to all persons within this state to full and equal public accommodations, and to assure equal

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opportunities in housing without distinction on account of race, religion, color, sex, national origin or ancestry."

The overriding thrust of this declared policy is equal opportunity. The Kansas legislature has expressly cited race, sex, religion, color, national origin or ancestry, and physical handicaps as bases of discrimination which particularly threaten this declared policy, and which therefore may not be utilized as grounds upon which to deny access to employment, housing or access to public accommodations.

The police power of the city is, of course, equally broad, to promote equal opportunity among its inhabitants in housing, public accommodations and employment, to determine and identify kinds of discrimination which jeopardize this policy, and to prohibit those which it deems contrary to the general welfare of the city. In Hutchinson Human Relations Commission v. Midland Credit Management, Inc., 213 Kan. 308, 517 P.2d 158 (1973), the court held that the Kansas Act Against Discrimination did not prevent the exercise of the municipal police power to act against discrimination:

"The [Hutchinson human relations] ordinance declares it to be the policy of the city in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the city's trade and commerce to eliminate and prevent discrimination, segregation or separation because of race, sex, religion, color, national origin or ancestry, and to assure equal opportunities and encouragement to every person in securing employment, equal public accommodations and equal housing opportunities.

We would be hard pressed to say at this point in time and history that legislation designed to eliminate the poison of discrimination from our midst is not a proper exercise of the police power. Recent experience has gone far to demonstrate, particularly in urban communities, that discrimination against minorities has a direct and detrimental impact on the orderly processes of government, the peace and tranquility of a community, and the health, safety and general well-being of its residents.

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Problems arising from racial and other forms of discrimination are especially common in population centers; the cancer of injustice toward members of minority groups is peculiarly virulent on the local scene; discrimination is essentially a people problem, and must eventually be dealt with and solved by people in the localities where they live." 213 Kan. at 311-312.

Given the manifest police power of the city to address problems of discrimination within its boundaries, the further question arises whether it is within the police power of the city to identify either marital status or sexual or affectional preference as a basis of discrimination which is contrary to the declared policy of the city of equal opportunity in matters of housing, employment and public accommodations. In recent years, a small but growing number of persons have come to regard individual sexual orientation as an essentially private and personal matter, but which has been used indiscriminately as a criterion for judging, and in many instances denying, access to employment, public accommodations and housing, without regard to the qualifications, fitness, suitability or demeanor of particular individuals with a homosexual orientation. These persons have come to believe that classification on the basis of sexual orientation or preference, without regard to individual qualifications, has become an arbitrary and artificial barrier to providing equal opportunity in important areas of day-to-day concern for all persons, housing, employment and public accommodations. As a result, there has been increased pressure to extend the benefits of other civil rights legislation to members of a class identified by sexual preference, and thus to afford the same protection to these individuals previously extended to other groups. One of the purposes of the public accommodation provisions of the Civil Rights Act of 1964 was to eliminate the unfairness, humiliation and insult in discriminatory denial of access to facilities available to the general public. Daniel v. Paul, 395 U.S. 298 at 307-308, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969). The equal employment provisions of the same legislation were intended and designed to eliminate artificial and arbitrary standards bearing no relationship to an individual's job performance, to eliminate subjective assumptions and traditional stereotyped conceptions which imposed artificial barriers to employment without regard to the fitness of particular individuals, and to eliminate

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what were regarded as arbitrary and prejudicial obstacles to employment which operated invidiously on the basis of impermissible classifications. See Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (Cal. 1971); Burns v. Ruhr Corp., 346 F. Supp. 994 (D.C. Cal. 1972).

More recently, homosexuality has been drawn into question as a basis for classification. The United States Civil Service Commission has acceded to a number of court decisions by rescinding homosexuality per se as a disqualification for federal employment. In an announcement dated July 3, 1975, the Commission stated thus:

"Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness." 44 Law Week 2032.

In Matlovitch v. Secretary of the Air Force, 45 Law Week 2074 (D.C. 1976), the court stated thus:

"We all recognize that by a gradual process there has come to be a much greater understanding of many aspects of homosexuality. Public attitudes are clearly changing. Some state legislatures have already acted to reflect these changing public attitudes, moving more in the direction of tolerance. Physicians, church leaders, educators and psychologists are able now to demonstrate that there is no standard, no preconceived stereotype of a homosexual"

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As of April, 1977, at least 36 municipalities have adopted measures proscribing sexual preference as a criterion determining eligibility for municipal employment, and a gubernatorial executive order in the Commonwealth of Pennsylvania applies likewise to state employment there. In the 94th Congress, 25 members of the House of Representatives joined in introducing a proposed amendment to the Civil Rights Act of 1964 to include "affectional or sexual preference" as a prohibited basis for discrimination.

These examples suffice to reflect a growing perception of homosexuals as the objects of discriminatory practices analogous to those prohibited by earlier civil rights legislation applicable to other classifications of persons. Obviously, whether this perception is to be implemented by responsive legislation is a decision to be made by each legislative body, state or municipal, when and as the question is presented to them. Whether such discrimination in fact exists, whether it substantially affects a significant minority of the community, and whether, if so, it is to be permitted or prohibited are decisions to be made through the political process, just as like decisions concerning minority groups defined in other terms have been made in the past. In Hutchinson Human Relations Commission v. Midland Credit Management, Inc., supra, the court recognized that discrimination in all forms is "essentially a people problem, and must eventually be dealt with and solved by people in the localities where they live." If the governing body of a city determines that discrimination on the basis of sexual preference poses a substantial barrier to equal employment, housing and access to public accommodations for a group of its citizens which it determines to be significantly affected thereby, I have no basis upon which to conclude as a matter of law that the city is simply powerless to enforce its declared policy of equal opportunity in these important areas of employment, housing and public accommodations by extending the protections of its human relations ordinance to this group.

It is suggested that many individuals hold religious beliefs against homosexuality and that to prohibit discrimination on that basis would compromise the First Amendment rights of these persons. Under the First Amendment, the state "shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." It has long been settled that while freedom of belief is absolute, the constitutional guarantee of free exercise is not, and does not insulate from state regulation personal conduct which the state may reasonably regulate. Cantwell v. Connecticut, 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). Freedom of religious exercise does not include the right to deny employment,

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housing or public accommodations to any person on the basis of race, sex, color, national origin or ancestry, or religion itself, and religious belief furnishes no more compelling justification for denial of equal treatment on any other ground which the state, or in this instance the city, may reasonably determine to impose impermissible, arbitrary or artificial barriers to its declared policy of equal opportunity.

Lastly, the question is raised whether the proposed ordinance conflicts with state law or declared public policy of the state. K.S.A. 21-3505 declares certain sex acts between persons of the same sex to be misdemeanor offenses. The public policy of the state regarding permissible sexual acts is clear. However, the state has no declared policy whatever regarding the grant or denial of equal access to employment, housing or public accommodations on the basis of sexual or affectional preference. The proposed amendment regarding sexual or affectional preference does not legalize any conduct which is prohibited by state law, and affords no immunity from prosecution therefor.

The alternative or additional proposed amendment to the city human relations ordinance prohibits discrimination on the basis of marital status, which is defined as "being a lawfully married person or being a single unmarried person." Our research discloses virtually no legislation or litigation involving claims of discrimination on this basis. Once again, however, if the city governing body determines that marital status constitutes an arbitrary and artificial barrier to achievement of the city's declared policy of equal employment opportunity, housing and access to public accommodations for all persons, and that a prohibition against such discrimination is necessary to alleviate resultant discrimination in these important areas, I cannot conclude as a matter of law that the city is powerless to respond by appropriate amendment of its human relations ordinance.

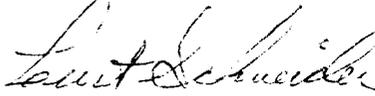
As a final matter, the question is raised whether the Kansas Commission on Civil Rights may entertain and act upon complaints of alleged discrimination on the basis of either marital status or sexual and affectional preference, as provided in both of the proposed amendments. The jurisdiction of the Kansas Commission on Civil Rights is fixed by statute, K.S.A. 44-1001 et seq., and the city has no authority to act by municipal ordinance to enlarge the statutory jurisdiction of the Commission. Thus, in my opinion the latter has no authority to entertain and act upon complaints of alleged discrimination based on these grounds.

To recapitulate, it is my opinion that if the governing body determines that discrimination on the basis of either marital status or sexual or affectional preference, as defined in the proposed

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amendments, constitutes an arbitrary and artificial barrier to achievement of the city's declared policy of equal opportunity in employment, housing and access to public accommodations, that it is within the police power of the city to prohibit discrimination on such bases, and that neither of the proposed ordinances is contrary to state law or to any declared public policy of the State of Kansas. Lastly, it is my opinion that the Kansas Commission on Civil Rights has no authority or jurisdiction to entertain referrals of complaints based upon any grounds other than those provided in the act, K.S.A. 44-1001 et seq.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj