


City of Alexandria, Virginia

MEMORANDUM

DATE: MARCH 16, 2010

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: JAMES K. HARTMANN, CITY MANAGER 

SUBJECT: CONSIDERATION OF RESOLUTION ON CITY OF ALEXANDRIA
POSITION ON PROTECTION OF PUBLIC EMPLOYEES FROM
WORKPLACE DISCRIMINATION

ISSUE: Resolution on City of Alexandria position on protection of public employees from workplace discrimination

RECOMMENDATION: That City Council adopt the resolution submitted by the Human Rights Commission, and send it to Governor Robert McDonnell (Attachment 1).

DISCUSSION: On March 4 Attorney General Ken Cuccinelli issued a directive to public colleges and universities to rescind their anti-discrimination policies that protect employees on the basis of sexual orientation, citing the Dillon Rule principle that only the General Assembly can create "legislatively protected classes" for the purposes of nondiscrimination. That opinion touched off extensive debate and attracted media attention nationwide. City Council discussed the matter during its legislative meeting on March 9 and asked the Human Rights Commission to draft a resolution opposing the Attorney General's opinion and reaffirming the City's commitment to inclusiveness and diversity. That same evening the Governor issued Executive Directive 1: "Standard of Conduct for Cabinet members, Executive Branch Agency Heads, Managers, Supervisors and Employers Concerning Employment Discrimination" (Attachment 2) to state employees which states that "Employment discrimination of any kind will not be tolerated by this Administration." Several bills introduced in the 2010 General Assembly to codify the protection of employee rights did not pass.

The Alexandria Human Rights Commission, which was created by law in 1975 to administer the provisions of the Alexandria Human Rights Ordinance, believes the Attorney General's directive represents a denial of protection that has existed for years at institutions of higher learning in Alexandria and across the Commonwealth, and places in jeopardy those institutions' accreditations and grants, and their ability to attract and retain students and faculty.

The City of Alexandria has supported legislation introduced in the General Assembly that would protect public employees from workplace discrimination on a comprehensive list of bases, but it has failed to pass. An increasing number of employers have voluntarily included sexual orientation in their nondiscrimination policies. The demonstrated lack of support for such policies by the Commonwealth of Virginia is disappointing and can create a negative business climate for existing and potential business enterprises.

ATTACHMENTS:

Attachment 1. Resolution passed by the Human Rights Commission on March 16, 2010

Attachment 2. Executive Directive 1

STAFF:

Jean Kelleher Niebauer, Director, Office of Human Rights

Michele Evans, Deputy City Manager

**RESOLUTION ON PROTECTION OF PUBLIC EMPLOYEES FROM
WORKPLACE DISCRIMINATION**

WHEREAS, Alexandria strives to be a community that welcomes and values all of its residents, treating everybody with human dignity and respect; and

WHEREAS, people of diverse culture, race, color, nationality, gender, age and sexual orientation and persons with disabilities live and work together within Alexandria and bring pride to the community; and

WHEREAS, Alexandria strives to create a positive business climate where representatives of diverse populations are welcome, and such a climate promotes prosperity; and

WHEREAS, the City of Alexandria affirms its responsibility to ensure that all people within our City limits are accorded equal protection under the law; and

WHEREAS, the Attorney General of the Commonwealth of Virginia has asked public institutions of higher learning, including those in Alexandria, to rescind policies protecting employees on the basis of sexual orientation, thereby denying protection that has existed for years, and jeopardizing those institutions' accreditations, grants and ability to attract and retain students and faculty; and

WHEREAS, educational institutions in Alexandria and across the Commonwealth have independently and voluntarily added sexual orientation to their nondiscrimination policies, and, therefore, any directive to remove such protections is a reversal of human rights in these communities, and

WHEREAS, an increasing number of employers have voluntarily included sexual orientation in their nondiscrimination policies, and a demonstrated lack of support for such policies by the Commonwealth of Virginia creates a negative business climate for existing and potential business enterprises, and

WHEREAS, the City of Alexandria has supported legislation introduced in the Virginia General Assembly that would protect public employees from workplace discrimination, but it has failed to pass, and

WHEREAS, Governor McDonnell failed to include sexual orientation as a protected basis in his initial Executive Order on nondiscrimination of public employees, then on March 9 issued an Executive Directive to state employees, purporting to protect all from workplace discrimination on any basis, including sexual orientation, but without the force of law; and

WHEREAS, the Governor's actions of rescinding prior Executive Orders, which protected state employees from discrimination on the basis of sexual orientation, and replacing those prior Orders with an Executive Directive have the effect that state employees no longer have legal protection and a right to relief for such discrimination; and

WHEREAS, the City of Alexandria seeks to celebrate the inclusiveness and diversity that contribute to the strength, safety and quality of life of all Alexandrians;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF ALEXANDRIA THAT THE CITY OF ALEXANDRIA WILL CONTINUE TO:

1. Foster an atmosphere of inclusiveness that respects the dignity and worth of every person without regard to race, color, sex, religion, ancestry, national origin, marital status, age, disability, sexual orientation, or familial status; and
2. Support at all levels of government the introduction of legislation and the promulgation of regulations and policies ensuring equal protection of public employees from workplace discrimination; and
3. Reaffirm the protection of human rights in the City and the enforcement of its Human Rights Code.

Adopted:

William D. Euille, Mayor

ATTEST:

Jackie M. Henderson, CMC City Clerk



COMMONWEALTH of VIRGINIA
Office of the Governor

Executive Directive 1 (2010)

STANDARD OF CONDUCT FOR CABINET MEMBERS, EXECUTIVE BRANCH AGENCY HEADS, MANAGERS, SUPERVISORS AND EMPLOYEES CONCERNING EMPLOYMENT DISCRIMINATION

As the chief executive officer for the Commonwealth of Virginia, I hereby establish a standard of conduct to ensure that all cabinet members, Executive Branch agency heads, managers, supervisors and employees understand and enforce state and federal law prohibiting employment discrimination.

Employment discrimination of any kind will not be tolerated by this Administration. The Virginia Human Rights Act recognizes the unlawfulness of conduct that violates any Virginia or federal statute or regulation governing discrimination against certain enumerated classes of persons. The Equal Protection Clause of the United States Constitution prohibits discrimination without a rational basis against any class of persons. Discrimination based on factors such as one's sexual orientation or parental status violates the Equal Protection Clause of the United States Constitution. Therefore, discrimination against enumerated classes of persons set forth in the Virginia Human Rights Act or discrimination against any class of persons without a rational basis is prohibited.

Consistent with state and federal law, and the Virginia and United States Constitutions, I hereby direct that the hiring, promotion, compensation, treatment, discipline, and termination of state employees shall be based on an individual's job qualifications, merit and performance. No employee of the Executive Branch shall engage in any discriminatory conduct against another employee.

Executive Directive 1 (2010)

Page 2

Allegations of any violation of the law or this standard of conduct shall be brought promptly to the attention of the Director of the Department of Human Resource Management for review and corrective action. Any cabinet member, agency head, manager, supervisor or employee who discriminates against a state employee or prospective employee in violation of the law or this standard of conduct shall be subject to appropriate disciplinary action, ranging from reprimand to termination.

I further direct agency heads to ensure that every manager and supervisor in their respective agency is aware of and enforces this standard of conduct. Civility, fair treatment, and mutual respect shall be the standard of conduct expected in state employment.

/s/ Robert F. McDonnell, Governor

RESOLUTION 2392

WHEREAS, Alexandria strives to be a community that welcomes and values all of its residents, treating everybody with human dignity and respect; and

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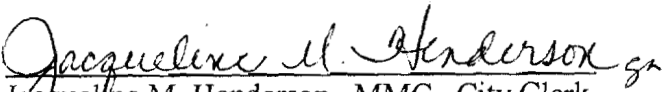
1. Foster an atmosphere of inclusiveness that respects the dignity and worth of every person without regard to race, color, sex, religion, ancestry, national origin, marital status, age, disability, sexual orientation, or familial status; and
2. Support at all levels of government the introduction of legislation and the promulgation of regulations and policies ensuring equal protection of public employees from workplace discrimination; and

3. Reaffirm the protection of human rights in the City and the enforcement of its Human Rights Code.

Adopted: March 23, 2010


WILLIAM D. EULLE MAYOR

ATTEST:


Jacqueline M. Henderson, MMC City Clerk

ACLU of Virginia

530 East Main Street, Suite 310 Richmond, Virginia 23219 (804) 644-8022

March 5, 2010

Via Facsimile (703-838-6433)

The Honorable William D. Eulle, Mayor, and
Members of City Council
City of Alexandria
301 King St., Room 2000
Alexandria, Virginia 22314

Dear Mayor Eulle and City Council members:

I write to express the ACLU of Virginia's support of the Alexandria Human Rights Commission's Resolution on Protection of Public Employees from Workplace Discrimination, and to suggest the addition of the following language: "Federal courts have repeatedly held that public employers may not discriminate on the basis of sexual orientation."

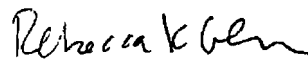
In *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court held that discriminatory laws based on sheer animus toward lesbian and gay persons violate the Equal Protection Clause of the Fourteenth Amendment. Later, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court ruled that consensual, adult sexual relationships are protected by the Fourteenth Amendment, notwithstanding societal views regarding the morality of such relationships.

Consistent with these principles, courts have repeatedly held that public employers may not discriminate on the basis of sexual orientation. *Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (harassment of police officer because of his sexual orientation violated equal protection clause); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Ut. 1998) (violated equal protection clause to terminate high school teacher's position as volleyball coach because of her sexual orientation); *Miguel v. Davis*, 51 P.3d 89 (Wash. Ct. App. 2002) (state employer's differential treatment of employees because of sexual orientation it violates right to equal protection); *Glover v. Williamsburg Local School Dist. Bd. Of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (firing teacher because of his sexual orientation violates equal protection clause).

We therefore suggest that the resolution be amended to demonstrate not only the City of Alexandria's support of diversity and equality, but its commitment to the Equal Protection Clause of the United States Constitution. In any case, we fully support the resolution's passage by the City Council.

Thank you for your attention to this matter.

Sincerely,



Rebecca K. Glenberg
Legal Director



COA Contact Us: Non-discrimination in public employment

David Drachsler to: william.euille, frank.fannon, kerry.donley,
alicia.hughes, council, delpepper, paulcsmedberg,
rose.boyd, jackie.henderson, elaine.scott,
rob.krupicka

03/17/2010 08:37 PM

Please respond to David Drachsler

28
3-23-10

Time: [Wed Mar 17, 2010 20:37:50] Message ID: [20133]

Issue Type: Mayor, Vice Mayor, and Council Members

First Name: David

Last Name: Drachsler

Street Address: 3313 Carolina Place

City: Alexandria

State: VA

Zip: 22305

Phone: 703 549-5670

Email Address: ddrachsler@comcast.net

Subject: Non-discrimination in public employment

Dear Mr. Mayor and members of Council:

I am pleased that Council will

take up a Resolution drafted by the Alexandria Human Rights Commission on

PROTECTION OF PUBLIC EMPLOYEES FROM WORKPLACE DISCRIMINATION on
March 23.

The Resolution is good as far
as it goes, but I would like to suggest

additional paragraphs for the Whereas clauses and for the Resolved
clauses.

In *Romer v. Evans*, the United States Supreme Court held that

discriminatory laws based on sheer animus toward
lesbian and gay persons

violate the Equal Protection Clause of the Fourteenth Amendment. Later, in

Lawrence v. Texas,
539 U.S. 558 (2003), the Court ruled that consensual,

adult sexual relationships are protected by the Fourteenth Amendment,

notwithstanding societal views regarding the morality of such

relationships.

Consistent with these principles, courts have repeatedly

held that public employers may not discriminate on the basis of sexual

orientation. *Quinn v. Nassau County Police Dept.*, (harassment of police

officer because of his sexual orientation
violated equal protection

clause); *Weaver v. Nebo School Dist* (violated equal protection clause to

Comments: terminate high school
teacher's position as volleyball coach because of

her sexual orientation); *Miguel v. Davis*, (state employer's differential

treatment of employees because of sexual orientation it violates right to

equal protection); *Glover v. Williamsburg Local
School Dist. Bd. Of*

Educ., (firing teacher because of his sexual orientation violates equal
protection clause).

New clauses should be added

stating

"WHEREAS, the United States Supreme Court, as well as lower

federal courts and many state courts have held that
discrimination by a

public employer on the basis of sexual orientation violates the Equal

Protection Clause of the United
States Constitution;

RESOLVED, that

discrimination against public employees in Alexandria on the basis of

sexual orientation is against the law
and will not be

tolerated."

Thank you.

David A. Drachsler
Vice Chair, Virginia

Council on Human Rights
Past Chair, Alexandria Humans Right Commission



COA Contact Us: Council Resolution: Protection of Public Employees from Discrimination

Mark; Maureen and Clare Williams to: william.euille, frank.fannon,
kerry.donley, alicia.hughes,
council, delpepper,
paulcsmedberg, rose.boyd,
jackie.henderson,
elaine.scott, rob.krupicka

04/03/2010 04:47 PM

Please respond to Mark, Maureen and Clare Williams

28
3-23-10

Time: [Sat Apr 03, 2010 16:46:54] Message ID: [20539]

Issue Type: Mayor, Vice Mayor, and Council Members
First Name: Mark, Maureen and Clare
Last Name: Williams
Street Address: 100 Cameron Station Blvd
City: Alexandria
State: VA
Zip: 22304-7737
Phone: 202 531 5125
Email Address: markcwilliams@yahoo.com
Subject: Council Resolution: Protection of Public Employees from Discrimination
We very much appreciate Council adopting the attached resolution (3-23-10
Docket Item 28, HRC resolution) at the 3-23 meeting.
The Attorney
General's non-public (but subsequently released) opinion regarding the
allegedly invalidating absence of legislative authorization for State,
local, and public-educational directives against discrimination based on
sexual orientation was patently unlawful. It is appropriate and gratifying
that Council adopted the Human Rights Commission's draft resolution.

The Attorney General's opinion exhibits numerous legal deficiencies,
and ultimately would be unlikely to withstand Federal appellate or
administrative-law review.
First, the Attorney General's opinion

ignores numerous provisions of Federal law that bind Virginia public entities as direct and/or indirect recipients of Federal funds. Second, the Attorney General's opinion ignores numerous provisions of Federal law that bind some Virginia publicly-sponsored and/or funded activities that are in interstate commerce. Third, the Attorney General's opinion ignores the fact that state law permits numerous Virginia public educational entities to seek and obtain regional and/or national accreditation, which accreditation is often subject to anti-discrimination requirements. Fourth, the Attorney General's opinion relies so heavily on a strict Dillon Rule interpretation that it facially ignores the express and implied Federal pre-emption issues that apply to essentially every public educational institution in Virginia. Fifth, the Attorney General's opinion ignores several decades of Federal and Virginia case-law permitting students in Virginia public education institutions to exercise First Amendment "free association" rights, including the organization and operation of gay/lesbian student organizations, which the Attorney General's opinion implicitly would prohibit. Finally, the Attorney General's opinion misleadingly implies that a public official who complies with the Attorney General's opinion is validly carrying out law; in fact, a public official who executes upon the Attorney General's improvident and inaccurate opinion is merely creating an unfunded legal liability for the applicable Virginia governmental or public-educational entity, and exposing himself to the risk of civil Bivens remedies.

Comments:

We very much appreciate Council's actions. We note that several other Virginia localities and several Virginia public educational institutions and numerous individual Virginia public officials have joined in Council's position.

With best
wishes -

Mark, Maureen and Clare Williams
100 Cameron Station Blvd.

Alexandria, VA 22304-7737