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Patti Martinson
300 6th Street
Rapid City, SD 57701

February 18, 2009

Dear Ms. Martinson,

This letter is in response to your question regarding liability of municipalities for discrimination based upon “sexual orientation” or “gender identity” for employees of the City of Rapid City. As well, whether or not the inclusion of language prohibiting discrimination against these two classes would increase the liability of the city. It is the opinion of the American Civil Liberties Union that discriminatory conduct carried out against employees by a municipality because of sexual orientation or gender identity is prohibited by the 14th Amendment, Equal Protection Clause of the United States Constitution and 42 U.S.C. § 1983. Finally, the addition of language to the cities employee policy would actually *limit or lower liability* for the city, since discrimination against these two classes of individuals is already prohibited.

Regarding sexual orientation, when a municipality makes an employment decision based upon sexual orientation the decision must be “rationally related” to a legitimate governmental interest in order to the requirements of the Equal Protection Clause. Federal courts throughout the country have found that municipalities violate the Equal Protection Clause when they discriminate against individuals based upon their sexual orientation.

For example, harassment and discrimination against a city police officer because he was a homosexual lead to the city being liable under the 14th Amendment, Equal Protection Clause and the provisions of 42 U.S.C. § 1983. Quinn v. Nassau County Police Department 53 F. Supp.2d 347 (E.D.N.Y 1999). As well, the Federal District Court in Utah found that a School District’s decision not to allow a lesbian teacher to be a volleyball coach because of her sexual orientation ran afoul of the 14th Amendment Equal Protection Clause. The School’s decision was not rationally related to any legitimate governmental interest since sexual orientation had no relationship to the ability of the teacher to be a volleyball coach. Weaver v. Nebo School District 29 F.Supp.2d 1279 (D. Utah 1998).

Therefore, Rapid City as well as other municipalities and governmental bodies can be liable if they act in a discriminatory manner against people because of their sexual orientation under the Equal Protection Clause. Adding prohibitions against discrimination based upon sexual orientation will not open Rapid City to new liability or increase liability. Rather, adding such information will reduce liability because it puts city employees on notice that such discrimination is not tolerated.

Discrimination against individuals because of gender identity is also well on its way to becoming prohibited. Recently, the ACLU brought and won a lawsuit against the United States Library of Congress because of their discriminatory employment practices against a transgendered individual. The court found that discrimination against a person because of their gender identity is a form of sex discrimination that is already prohibited by the Equal Protection Clause and federal law.

Likewise, just as in the case of sexual orientation, adding a prohibition against discrimination based upon gender identity will thus not increase the liability but will actually decrease liability since discrimination based upon gender identity is prohibited under current federal law. Although litigation based upon gender identity is new it does rest upon well established principles that discrimination based upon a person's sex is not acceptable.

The addition of prohibitions against discrimination based upon sexual orientation and gender identity will not increase liability for Rapid City. As discussed above both classes of individuals are already covered by current law. Therefore, the addition of these two groups will limit liability by placing city employees on notice that such discrimination is not permissible.

If you have any additional questions please do not hesitate to contact me.

Regards,

A handwritten signature in cursive script, appearing to read "Robert J. Doody".

Robert J. Doody Esq.
Director