

Testimony of
Illinois Attorney General Lisa Madigan

Testimony before the
U.S. Senate Committee on
Health, Education, Labor & Pensions

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Hearing on
“EMPLOYMENT NON-DISCRIMINATION ACT:
ENSURING OPPORTUNITY FOR ALL AMERICANS”

**Testimony of Illinois Attorney General Lisa Madigan
Regarding the Illinois Human Rights Act**

I. INTRODUCTION

Senator Harkin and members of the Committee, thank you for inviting me to testify at today's hearing on the proposed Employment Non-Discrimination Act. As the chief legal officer for a state that has been a leader in protecting the civil rights of all of its citizens, I am pleased to share Illinois' experience in expanding the protections of the Illinois Human Rights Act to cover sexual orientation and gender identity.

Illinois is one of 21 states in the country with an anti-discrimination statute that includes sexual orientation as a protected class, and one of 13 states that includes gender identity. Since the implementation of these protections in January 2006, Illinois has seen a reasonable number of charges being filed, with a recent increase in the last year. At the same time, we have seen a positive reaction in the public and private sector with a move toward tolerance, acceptance and inclusion of all individuals.

My testimony today is divided into two parts. First, I will review the Illinois Human Rights Act, with a specific emphasis on the definition of sexual orientation and gender identity. In the second part, I will discuss Illinois' experience since the implementation of the amendments to the Human Rights Act in January of 2006, including a discussion of the number and types of complaints filed regarding sexual orientation and gender identity.

II. THE ILLINOIS HUMAN RIGHTS ACT

The Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. ("IHRA"), was originally passed and implemented in 1980. IHRA protects an individual from discrimination based upon race, color, citizenship status, national origin, ancestry, age, handicap, marital status, gender, religion, military service, or unfavorable military discharge status, as well as sexual harassment and retaliation, in connection with four areas: employment, real estate transactions, access to financial credit, and the availability of public accommodations. 775 ILCS 5/1-102(A). In 2005, IHRA was amended to include sexual orientation as a protected class. 775 ILCS 5/1-102(A). These amendments became effective January 1, 2006 ("the 2006 Amendments").

IHRA defines "sexual orientation" as:

actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. 775 ILCS 5/1-102(O-1).

IHRA covers not only cases where a complainant is discriminated against because of his or her actual sexual orientation, but also those cases where a complainant is discriminated against because someone *assumes* his or her sexual orientation based upon the

complainant's behavior, dress, or associations. The definitions of "sexual orientation" and "gender identity" in the proposed Employment Non-Discrimination Act are similar to the definitions under IHRA. *See*, S. 1584, Section 3(a)(6, 9).

IHRA applies to employers with 15 or more employees within Illinois. 775 ILCS 5/2-101(B)(1)(a). The State, as well as any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees, are also covered. 775 ILCS 5/2-101(B)(1)(c).

Relief available to a complainant under IHRA is similar to relief available under Title VII of the federal Civil Rights Act of 1964: actual damages; back pay; front pay; lost benefits; emotional damages; injunctive relief including reinstatement; and attorneys' fees and costs. 775 ILCS 5/8A-104(A-J). However, unlike Title VII, punitive damages are not available under IHRA.

When a complainant believes he or she has been discriminated against because of his or her sexual orientation, the complainant may file charges with the Illinois Department of Human Rights ("IDHR"). 775 ILCS 5/7A-102(A). IDHR forwards a copy of the charge to the respondent and the parties may enter into a voluntary mediation. 775 ILCS 5/7A-102(B, B-1). If the mediation does not resolve the matter, or the parties choose not to mediate at that time, the respondent must answer the charges and IDHR begins an investigation. 775 ILCS 5/7A-102(C). Once IDHR completes the investigation, the Department issues an investigation report. 775 ILCS 5/7A-102(D). If after a review of the investigation report, the Director of IDHR determines that there is substantial evidence of discrimination, the complainant may request that IDHR file a complaint with the Illinois Human Rights Commission ("Commission") on his or her behalf, or he or she may file a civil action in the state circuit court. 775 ILCS 5/7A-102(D)(4). If the Director determines that there is no substantial evidence of discrimination, the charges are dismissed and the complainant may appeal the finding by filing a Request for Review with the Commission, or filing an action in the state circuit court. 775 ILCS 5/7A-102(D)(3).

III. ILLINOIS' EXPERIENCE UNDER THE 2006 AMENDMENTS TO THE ILLINOIS HUMAN RIGHTS ACT

A. Charges Filed with the Illinois Department of Human Rights

Prior to the enactment of the 2006 Amendments to IHRA, which added sexual orientation and gender identity, IDHR anticipated that after the 2006 Amendments went into effect, roughly 10 percent of all charges filed with the Department would involve sexual orientation discrimination. After three and a half years under the 2006 Amendments, the percentage of sexual orientation cases has been less than originally anticipated: since FY2006, between 2.06 and 3.79 percent of all charges filed with IDHR have alleged sexual orientation discrimination.¹

¹ See Exhibit A, Analysis of Sexual Orientation (including Gender Identity) Charges filed with the Illinois Department of Human Rights, FY2006-2010.

With regard to employment discrimination charges, while charges based upon sexual orientation have increased over time, they still make up a relatively small percentage of the total charges. For example, in FY2006, only 34 employment discrimination charges based on sexual orientation were filed with IDHR, which was only two percent of all employment discrimination charges filed that fiscal year.² In FY2009, 147 employment discrimination charges based on sexual orientation were filed with IDHR, totaling only four percent of all employment discrimination charges filed that fiscal year. IDHR attributes the increase in sexual orientation employment discrimination charges to the downturn in the economy, as well as to educational outreach by IDHR regarding the law to the lesbian and gay community, other agencies, and employers throughout the state.

Discrimination charges based on sexual orientation have a similar settlement rate as discrimination charges based on other protective classes. Approximately one-third of all discrimination charges based on sexual orientation filed with IDHR are settled, which is comparable to the settlement rate for other charges.

Since 2006, there have been 140 charges filed against public entities based upon sexual orientation discrimination under IHRA. Those 140 charges include not only employment discrimination claims, but claims based upon real estate transactions, access to financial credit, and the availability of public accommodations. During that same time period, 273 charges were filed against private entities, six charges were filed against unions, and 35 were filed against other entities.

B. Results of the 2006 Amendments to the Illinois Human Rights Act

While there has not been an overwhelming number of discrimination charges based upon sexual orientation filed since IHRA was amended in 2006, that does not mean that the amendments were not necessary or that the law has not been effective. There have been several benefits to the citizens of Illinois because of this improvement to the law, while at the same time businesses have become more inclusive and the rights of religious institutions have been protected.

1. Effect upon the Business Sector in Illinois

The 2006 Amendments to IHRA created a statewide standard for employers and businesses throughout Illinois. Prior to the 2006 Amendments, 16 different municipalities and local governments, ranging from large urban centers and suburban areas to downstate communities, had local ordinances that prohibited discrimination based upon sexual orientation.³ This created a patchwork of protections throughout the

² The data for FY2006 reflect only the last six months of the fiscal year, since the amendments to IHRA did not go into effect until January 1, 2006. The fiscal year in Illinois is July 1 – June 30.

³ The Illinois municipalities with anti-discrimination ordinances that include sexual orientation as a protected class are Bloomington, Carbondale, Chicago, Champaign, Decatur, DeKalb, Evanston, LaGrange, Moline, Naperville, Normal, Oak Park, Peoria, Springfield and Urbana. The County of Cook,

state, which led to inconsistent policies for employers who conducted business in multiple parts of the state. With a statewide act, all employers are now working under the same rules and standards.

Since the implementation of the 2006 Amendments, there has not been evidence of a backlash by employers. In fact, the business community showed significant support for the passage of the 2006 Amendments. Over 115 major employers in Illinois publicly supported the 2006 amendments, and business associations, such as the Chicagoland Chamber of Commerce, supported the amendments, as well.

The 2006 Amendments also have not led to frivolous lawsuits. Of the 13,723 employment discrimination charges filed with IDHR since 2006, only 399, or 2.9 percent, were based upon sexual orientation. Studies have also shown that companies that have instituted inclusive anti-discrimination policies and programs are less likely to experience discrimination lawsuits and have spent less on legal fees since the implementation of those policies.⁴

Publicity on the 2006 Amendments has led employers and businesses to revise their non-discrimination policies as well as their internal trainings. This publicity has led to increased awareness as well as prevention. Since the implementation of the 2006 Amendments to IHRA, 208 employers who are headquartered in Illinois have added sexual orientation to their internal anti-discrimination policies, and 67 of these companies have added gender identity to those internal policies, as well.⁵ These changes in policies reflect changes in employee attitudes toward lesbian and gay co-workers and colleagues. A national survey by Harris Interactive, Inc. in 2008 shows that 79 percent of heterosexual employees agree that how an employee does his or her job should be the standard for judging an employee, not his or her sexual orientation.⁶

2. Effect upon Religious Institutions in Illinois

The 2006 Amendments to IHRA do not supersede a religious institution's First Amendment right to hire and fire according to the tenets of its religion. Federal courts have held that religious institutions are exempt from all liability under Title VII, regardless of the basis of the alleged discrimination, if the job position involved in the employment discrimination claim was a ministerial position. See, e.g., *Alicea-Hernandez v. The Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Employee could not bring a claim of discrimination based on gender and national origin because her position of communications manager was ministerial in nature); and *E.E.O.C. v. The Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000) (Employee

where Chicago is located, also has an anti-discrimination ordinance that includes sexual orientation as a protected class.

⁴ Wentlin, R.M., Palm-Rivas, N., "Current status and future trends in diversity initiatives in the workplace: Diversity experts' perspective," Diversity in the Workplace Series, Report No. 2; MDS-1082, Berkeley: National Center for Research in Vocational Education, University of California (1997).

⁵ Human Rights Campaign Foundation, www.hrg.org/employersearch.

⁶ "Out & Equal Workplace Culture Report, Survey of Workplace Attitudes, 2002-2008," Harris Interactive, Inc. on behalf of Out & Equal Workplace Advocates (2008).

could not bring a claim of discrimination based on gender and retaliation because her position of music director was ministerial in nature). The Illinois Human Rights Commission has made similar holdings under IHRA. See, e.g., *Hopkins and Urbana Assembly of God*, 39 Ill.HRC Rep. 394 (March 30, 1988); *McBride and Trinity Lutheran Church*, Charge No. 1992SF0074 (1997 WL 683117)(September 17, 1997). The 2006 Amendments to IHRA have not superseded this precedent.

Charges filed with IDHR also show that religious institutions have not been impacted by the 2006 Amendments to IHRA. Since the effective date of the 2006 Amendments, only a handful of charges based on sexual orientation have been filed against religious institutions. In FY2009 and so far in FY2010, not a single charge based upon sexual orientation was filed against a religious institution.

Most importantly, a significant number of religious institutions were in support of the 2006 Amendments to IHDA. At the time of the passage of the 2006 Amendments, approximately 87 religious institution, organizations and leaders pledged their public support for the amendments.⁷

3. Success Stories under the 2006 Amendments to the Illinois Human Rights Act

While the Illinois experience has been that the number of charges of employment discrimination based upon sexual orientation has been relatively small, the 2006 Amendments to IHRA have had a positive effect on individual lives. The statistics are helpful, but it is the stories of real people who have been helped by the 2006 Amendments that demonstrate the importance of these protections.

The first example I would like to share with you is the case of a woman I will call Ellen. Ellen is an African-American lesbian who was employed as a maintenance worker at a large retailer. One of Ellen's co-workers learned that Ellen was a lesbian and had a girlfriend. He began to call Ellen derogatory names on an almost daily basis, sometimes spitting the words in her face. Then the harassment began to spread. Managers and co-workers asked her graphic sexual questions and flashed at her pornographic pictures almost every other day on the job. On several occasions when Ellen was cleaning the men's restroom, male co-workers purposely entered the restroom, exposed their genitals to her, and made threatening sexual comments to her. When Ellen reported this harassment to her supervisor, management, and eventually the corporate office, it was ignored. Ellen filed charges against her employer through IDHR. Ellen's goal is to return to her job free of harassment and continue as a productive employee.

The second example is the case of a woman I will call Sherry. Sherry was the Chief Naturalist of a suburban nature center in Illinois. Sherry worked for the nature center for over 16 years, creating programs for children and families, running volunteer programs, and she thoroughly loved her profession. Sherry had never had a negative job

⁷ See Exhibit B, Religious organizations, institutions and leaders who publicly supported the 2006 Amendments to IHRA.

performance review. But then a co-worker saw Sherry at a restaurant where Sherry was attending a support group for transgendered individuals. When the new Executive Director of the nature center learned that Sherry was going to transition from a man to a woman, the Executive Director demoted Sherry, and eventually terminated her employment. Sherry filed a charge against the Executive Director and the nature center through IDHR. While Sherry did not gain her position back, the case was resolved and Sherry was able to continue with her life. Without the 2006 Amendments to IHRA, Sherry would have had no recourse at all.

The real-life cases of Ellen and Sherry demonstrate why the inclusion of sexual orientation and gender identity in employment anti-discrimination laws is so important. Neither Ellen nor Sherry wants special rights or privileges. Instead, they want to be able to come to work, have the opportunity to work free of harassment, and be judged on the quality of their performance, not on their sexual orientation, gender identity or the perception of their sexual orientation or gender identity.

IV. CONCLUSION

Since the enactment of the 2006 Amendments to the Illinois Human Rights Act, which added sexual orientation, including gender identity, as a protected class, the state has provided individuals who face unfair workplace discrimination with a useful and necessary tool. The state has not been overwhelmed with the number of charges based upon sexual orientation filed with the Illinois Department of Human Rights. We have also not seen a backlash from the business community, nor harm to the religious institutions in the state. Instead, Illinois has seen an increase in the number of employers with inclusive anti-discrimination policies. But just as important, the existence of a statewide statute prohibiting discrimination based upon sexual orientation promotes tolerance, fundamental equality and common humanity of all individuals in our state. The benefits of such a message to the citizens of our state cannot be underestimated.

I would like to recognize that here with me today is the Director of the Illinois Department of Human Rights, Rocco Claps. Mr. Claps and the Department were extremely helpful in providing the data cited in my testimony today.

Thank you for the opportunity to testify before the committee today.