CITY OF MILWAUKEE

JAMES B. BRENNAN
City Attorney

DAVID A. FELGER
THOMAS E. HAYES
Deputy City Attorneys

RICHARD F. MARUSZEWSKI
WALTER J. SCHUTZ
MAURICE L. MARKEY
WILLIAM J. LUKACEVICH
NICHOLAS M. SIGEL
THEOPHILUS C. CROCKETT
JOSEPH H. McGINN
DAVID R. MOGILKA
JOHN F. KITZKE
HERBERT F. SONNENBERG
CHARLES R. THEIS
GRANT F. LANGLEY
PATRICK B. McDONNELL
RUDOLPH M. KONRAD
JOSEPH N. MISANY
MARY ELLEN POULOS
BEVERLY A. TEMPLE
SCOTT RITTER
SANDRA S. RUFFALO
JEFFREY A. WAGNER
MICHAEL A. I. WHITCOMB
JEFFREY L. BASSIN
GREGG J. GUNTA
THOMAS O. GARTNER
LINDA ULISS BURKE
Assistant City Attorneys

OFFICE OF CITY ATTORNEY

800 CITY HALL
MILWAUKEE, WISCONSIN 53202
278-2601

June 2, 1980

Ald. John R. Kalwitz
2nd Aldermanic District
205 City Hall

Dear Ald. Kalwitz: RE: C.C. File No. 80-222-a

Your letter of May 21, 1980, requests our legal opinion with respect to the currently existing City ordinance relating to discrimination in employment. You have also submitted for our review and opinion a proposed ordinance which would amend the existing ordinance by including a provision that prohibits discrimination on the basis of a person's sexual orientation.

The existing ordinance prohibits discrimination because of sex and does not extend to or include what the proposed ordinance describes as "sex orientation." We approach the questions that you have asked by observing that a threshold distinction must be made between what is prejudice and what is discrimination.

Human experience has taught us that there are people and classes of people who have, by reason of their race, creed, religion, color, sex, national origin, ancestry, customs, idiosyncracies, mannerisms and unlimited other reasons, engendered reactions in others that appropriately can be described as prejudice. Such prejudice invariably is the root cause of discriminatory practices observable and manifested in housing discrimination, public accommodations and employment practices both as to hiring and discharge.

Prejudice in and of itself is a psychological phenomenon and although a detriment to society as a whole, when not prohibited by law is permitted. We, therefore, in defining our terms must recognize that it is only those prejudices that are prohibited by law that constitute discrimination within the context of our review that follows.

Our analysis of the question you have presented relates to another point of difference--that between the definition of "sex" as it is used in various federal and state prohibitory statutes and words or phrases that identify a physiological or psychological status of a person such as homosexuality, bisexuality and transsexuality.[1] The federal and state statutes that have application here prohibit discrimination between the male sex and the female sex and the word "sex" in such statutes has been consistently interpreted by the courts to mean only the male or female there being absent any prohibition of discrimination because of homosexuality, bisexuality, transsexuality or any other variation.

Homosexuality, bisexuality or any other of the variations above referred to have been held by the courts not to be grounds for exclusion or dismissal from public employment.[2] *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Berg v. Clayton*, 436 F.Supp. 76 (D.C. Cir. 1977), on appeal, 591 F.2d 849 (1978); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (1978).

While homosexuality in and of itself is not a ground for exclusion or dismissal from public employment theremay exist other grounds or reasons which would justify rejection of a homosexual applicant or for dismissal. For example, a homosexual could conceivably be more vulnerable to blackmail and there could be serious security implications where such an employe is a member of the armed forces or even a police department. The flaunting of one's homosexuality

---

[1] Title VII of the Civil Rights Act of 1964 does not apply to homosexuality, *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975); the same applies to transsexuals, *Voyles v. Ralph K. Davis Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975); state fair employment practice laws similarly do not cover either, *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 65 Cal. App.3d 608, 135 Cal. Rptr. 465 (1977).

[2] For purposes of this opinion, any reference to homosexuality includes bisexuality, transvestity, transsexuality and other variations that are sexually oriented.

in the midst of other employes could be disruptive within an employment context and makes such an employe unsuitable for particular types of employment. A homosexual could be involved with a coemploye or employes and such involvement could adversely affect efficiency by preventing effective performance of such an employe himself or his or her coemployes.

We observe that on eight separate occasions bills were introduced in the 95th Congress to add the words "affectional or sexual preference" to Title VII. None passed. We are not aware of any fair employment practice law in any of the several states that has added an affectional, sexual preference or sexual orientation provision to the list of prohibited categories enumerated in such statutes. A number of municipalities have adopted local ordinances, some of them specifically mentioning employment and others prohibiting discrimination in more general terms.

We, therefore, advise that if the existing ordinance is amended so as to include sexual orientation within its ambit, it should also contain a provision which provides for denial of employment or discharge of employment when the facts clearly demonstrate that the individual involved may reasonably be expected to interfere with or prevent effective performance in the position applied for or from which he is being removed or would seriously affect the efficiency of the service applied for or from which discharge occurs.

We also observe that the proposed ordinance contains a penalty clause providing for a fine rather than a forfeiture and as the word "fine" in City ordinances is vestigial it should be deleted, and should not appear in any City ordinance.

Your letter also requests our opinion as to whether state or federal law would supersede the provisions of the existing ordinance and the proposed amended version. A review of the various statutes which relate to the powers of the City and those that relate to employment discrimination disclose a broad thrust of power to deal with sexual discrimination and discrimination with respect to sex variables including affections, preferences and orientations that are sex related.

Wis. Stat. § 62.11(5) provides as follows:

> "Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language." (emphasis supplied)

This "home rule" statute confers very broad powers. The Wisconsin statutes do not contain any language expressly limiting a City's power to enforce regulations against employment discrimination.

The federal prohibition of employment discrimination, the Civil Rights Act of 1964, contains specific language encouraging state and local regulation of employment discrimination. 42 U.S.C. § 2000e-5(c) provides:

> "(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a state or local law prohibiting the unlawful employment practice alleged and establishing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . ." (emphasis added)

Federal complainants are required to give state or local agencies a chance to rectify or conciliate employment discrimination complaints before a federal agency takes action.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974), the United States Supreme Court commented on the legislative intent behind employment discrimination laws:

> ". . .legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination."

Wisconsin's Fair Employment Act was passed before the Federal Civil Rights Act. Chap. 490, Wis. Laws 1945, Wis. Stat. § 111.31-111.37. The Wisconsin statute contains the following Declaration of Policy:

> "111.31(1) The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their age, race, creed, color, handicap, sex, national origin or ancestry, is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers, licensing agencies and labor unions of employment opportunities to such persons solely because of their age, race, creed, color, handicap, sex, national origin or ancestry, and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.
>
> "(2) It is believed by many students of the problem that protection by law of the rights of all people to obtain gainful employment, and other privileges free from discrimination because of age, race, creed, color, handicap, sex, national origin or ancestry, would remove certain recognized sources of strife and unrest, and encourage the full utilization of the productive resources of the state to the benefit of the state, the family and to all the people of the state.

"(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose." (emphasis added)

While the statute speaks of sex and not sex orientation, the language does not limit the power of municipalities to legislate upon a matter which the Legislature has declared "adversely affects the general welfare."

The draft of the proposed ordinance that you have submitted to us places the enforcement of its provisions in the Commission on Community Relations. That Commission was created by sec. 1, Charter Ordinance 343, approved on October 29, 1968. (Sec. 16.11, Milwaukee City Charter, 1977) The authority of the Commission is restricted to attempt, by means of education and conciliation, to foster mutual self-respect and understanding among all national, religious and ethnic groups in the City and to prevent discriminatory practices and generally to recommend to the Mayor and Common Council the enactment of ordinances that fall within the general ambit of its responsibilities.

The provisions of the charter do not grant to the Commission any power to receive or investigage complaints or to take any enforcement action with respect to such complaints. We, therefore, respectfully advise that sub. (5) of the proposed ordinance would be invalid and unenforceable as being beyond the powers of the Commission as limited by the charter provision. If the Commission is to be granted any enforcement prerogatives, it would be necessary to amend the City charter.

We observe that under the charter the Commission has the duty to cooperate with state and federal agencies and nongovernmental organizations having like or kindred functions. There exists within Milwaukee County a "Community Relations--Social Development Commission" that has the duty and power to investigate and evaluate complaints to the end that all residents enjoy equal employment opportunities. The City participates on an intergovernmental basis with the County in supporting the activities of the "Community Relations--Social Development Commission." The Commission's powers are prescribed in Wis.Stat. § 66.433. It has the staff and authority to investigate and conduct public hearings on complaints of sex discrimination.

Subs. (5) and (6) of the proposed ordinance should be deleted and replaced by the following language:

> "(5) ENFORCEMENT. The Commission on Community Relations may refer any complaint charging a violation of this section to the Community Relations--Social Development Commission for such action as that Commission may deem appropriate or necessary."

We advise that the existing ordinance is valid. If the proposed ordinance is amended to comply with the foregoing, such an ordinance would be valid.

Very truly yours,

James B. Brennan

JAMES B. BRENNAN
City Attorney

MLM:n

cc: Council Members:
Roy B. Nabors
Sandra Hoeh
Kevin D. O'Connor
Steven Cullen
Marlene E. Johnson
Robert M. Weber
Wayne P. Frank
James Kondziella
Betty Voss
Joan Soucie
Clifford A. Draeger
Robert A. Anderson
Daniel J. Ziolkowski
Richard L. Spaulding
Gregory G. Gorak

MAURICE L. MARKEY
Assistant City Attorney