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To: Greg Doyon, City Manager

From: Sara Sexe, Great Falls City Attorney *SS*

Date: July 20, 2020

Re: *Non-Discrimination Ordinance.*

The City Commission and you requested an evaluation of a proposed Non-Discrimination Ordinance (NDO) which was proposed to the City Commission on July 7, 2020. It is my opinion that such an NDO is not necessary to provide sexual orientation and gender identity protections, in light of a recent decision by the United States Supreme Court.

Summary of Opinion

Other cities in Montana, including Bozeman, Helena, Missoula, Butte and Whitefish, have enacted Non-Discrimination Ordinances (NDOs). These NDOs provide remedies where in the past no protections existed for individuals who were subjected to housing, employment and public accommodation discrimination based upon their sexual orientation or gender identity. Now, since the United States Supreme Court has conclusively recognized that sexual orientation and gender identity are within the definition of the protected class of sex, it is my opinion that City Commission need not enact an NDO, as this protection is available under current state and federal law. Simply, in the wake of the *Bostock* decision, the legal protections that NDOs provide to citizens already exist.

Even if Great Falls were to consider enacting an NDO, the NDO could be subject to challenge for exceeding the statutory powers granted to it by the legislature and for attempting to create separate substantive law in areas generally reserved to the concept of statewide or federal uniformity. Further, any relief under Municipal Court claims would not provide significant relief beyond that which exists under a well-established and robust body of federal and state statutory and case law regarding discrimination. Individuals who experience discrimination based upon their sexual orientation or gender identity can appropriately claim protections under state and federal law and obtain relief in excess of that which would be available under an NDO process through Municipal Court.

**The U.S. Supreme Court Has Recognized That
The Title VII Protected Class Of Sex
Includes Sexual Orientation and Gender Identity
("Homosexual And Transgender" Persons).**

The United States Supreme Court recently decided a landmark decision that recognized the protections of Title VII of The Civil Rights Act of 1964 exist for those protections sought in the proposed draft NDO that was presented to the City Commission. In *Bostock v. Clayton County, Georgia*, No. 17-1618, 2020 U.S. LEXIS 3252, 2020 WL 3146686 (U.S. June 15, 2020), the Supreme Court held that an employer who fires an individual merely for being gay or transgender violates Title VII, which makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(a)(1). The Supreme Court has ruled that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. . . ." While the case dealt with employment discrimination, it is clear that the language of the decision applies to housing and public accommodation as well, as it clarified the definition of the statutorily protected trait of sex. Under federal law, sexual orientation and sexual identity are sex-based traits, and are thus protected from discrimination.

The Supreme Court limited its ruling, specifically excluding discussions of bathrooms, locker rooms, or anything similar, for determination under appropriate fact-based cases in the future. It also indicated that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.* prohibits the government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. §2000bb-1. Justice Gorsuch stated, "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See §2000bb-3." *Bostock* at p. 32.

This recognition of sexual orientation rights was not the first from the Supreme Court. In an earlier decision on other grounds, *Obergefell et al. v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609, 2015 US LEXIS 4250 (2015), the Supreme Court recognized that the Fourteenth Amendment protections of the United States Constitution extend to personal choices including same-sex marriage.

Because the *Bostock* decision is such a recent decision, it has not been addressed yet under Montana law. However, a number of circuits have already agreed that *Bostock* is a landmark decision declaring that discrimination "on the basis of sex" encompasses discrimination because of sexual orientation or gender identity. See generally *Horton v. Midwest Geriatric Mgmt., LLC*, No. 18-1104, 2020 U.S. App. LEXIS 20935, at *6-7 (8th Cir. July 6, 2020); *Hannah v. Westrock Servs.*, No. 19-1396, 2020 U.S. App. LEXIS 20678, at *1 (4th Cir. July 1, 2020); *Thomas v. Reeves*, No. 19-60133, 2020 U.S. App. LEXIS 19150, at *49-50 (5th Cir. June 18, 2020), concurring opinion; *Tolle v. Rockwell Collins Control Techs., Inc.*, No. 1:20-cv-174 (LMB/JFA), 2020 U.S. Dist. LEXIS 107449, at *13 (E.D. Va. June 18, 2020); and *Riley v. Hardee's*, No. 3:18-2447-CMC-PJG, 2020 U.S. Dist. LEXIS 105451, at *1 (D.S.C. June 16, 2020).

**Montana Law Prohibits Discrimination Based Upon Sex,
and Thus Protects Sexual Orientation or Gender Identity.**

Montana anti-discrimination law also specifically identifies sex as a protected class:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mt. Constitution, Article II, Section 4.

The Montana Supreme Court has recognized this Constitutional provision as guaranteeing equal protection to same-sex couples regarding health benefits:

In [***452] truth, unmarried opposite-sex couples are able to avail themselves of health benefits under the University System's policy while unmarried same-sex couples are denied the health benefits. These two groups, although similarly situated in all respects other than sexual orientation, are not treated equally and fairly. The principal purpose of the Equal Protection Clause, Article II, Section 4, of the Montana Constitution, is to ensure citizens are not subject to arbitrary and discriminatory state action. Therefore, we conclude there is no justification for treating the two groups differently, nor is the University System's policy rationally related to a legitimate governmental interest. Once the illusory marital status is removed from the analysis, there is no legitimate governmental interest in treating the two groups differently. As former Chief Justice Turnage recognized in his concurrence [****20] in *Gryczan v. State* (1997), 283 Mont. 433, 456, 942 P.2d 112, 126, *HN7* when the State criminalizes sexual acts between persons of the same-sex and decriminalizes the same sexual conduct engaged in by opposite-sex couples, it is [****19] "clearly . . . a denial of the constitutional guarantee of equal protection of the law in violation of . . . Article II, Section 4 of the Montana Constitution." Similarly, the University System's policy of denying health benefits to unmarried same-sex couples while granting the benefits to unmarried opposite-sex couples results in a denial of equal protection.

Snetsinger v. Mont. Univ. Sys., 2004 MT 390, ¶ 27, 325 Mont. 148, 157, 104 P.3d 445, 451-52.

Montana statute further provides:

(1) The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a **civil right**. This right must include but not be limited to:

- (a) the right to obtain and hold employment without discrimination; and
- (b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.

(2) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in subsection (1). Consideration of

religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section.

Mont. Code Ann. § 49-1-102 (emphasis supplied). Also, Mont. Code Ann. § 49-2-303 prohibits sex discrimination in employment and Mont. Code Ann. § 49-2-308 states, in part, that governmental units cannot discriminate on the basis of sex.

Of note, Montana also has more broad application of its anti-discrimination laws than does federal law. Under federal law, for employment discrimination claims, an employer must have fifteen or more employees. 42 U.S.C. § 2000e(b). Montana law is applicable to more employers as there is no such limitation:

“Employer” means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis.

Mont. Code Ann. § 49-2-101(11).

Montana References Federal Law For Guidance Regarding Discrimination.

Under well-established and long-standing Montana law, the Montana Supreme Court relies on federal law and regulation:

We have relied on federal case law as well as the federal Equal Employment Opportunity Commission (EEOC) regulations and interpretive guidelines in construing Montana's discrimination laws. *Butterfield v. Sidney Pub. Schs.*, 2001 MT 177, ¶¶ 21, 23, 306 Mont. 179, 32 P.3d 1243; *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶¶ 23-25, 287 Mont. 196, 953 P.2d 703; *Hafner v. Conoco, Inc.*, 268 Mont. 396, 402, 886 P.2d 947, 950-51 (1994). *HN4* An interpretation of federal law by the federal agency that administers [****7] it is afforded great deference. *Sleath v. West Mont Home Health Servs.*, 2000 MT 381, ¶ 37, 304 Mont. 1, 16 P.3d 1042 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984)).

BNSF Ry. Co. v. Feit, 2012 MT 147, ¶ 9, 365 Mont. 359, 362, 281 P.3d 225, 228.

Even before the United States Supreme Court decision in *Obergefell*, the Montana Supreme Court applied federal law in the context of same-sex marriage:

The court concluded that these recent decisions of the Supreme Court had produced sufficient doctrinal developments to determine that same-sex marriage now presents a substantial federal question. *Latta*, 2014 U.S. App. LEXIS 19152, [WL] at *3.

...

if the Court disagreed with the analysis in *Latta*, that analysis represents "binding authority" that "must be followed unless and until overruled." *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). The Court thus must consider Plaintiffs' equal protection challenge to the Montana laws that prohibit same-sex marriage.

Rolando v. Fox, 23 F. Supp. 3d 1227, 1231-32 (D. Mont. 2014).

A.R.M. 24.9.1407 states that:

(1) The human rights commission hereby affirms its adoption of the Guidelines on Sex Discrimination promulgated by the United States equal employment opportunity commission, as last revised as of July 1, 1998. The guidelines are codified as Title 29 CFR, chapter XIV, part 1604, including the appendix. A copy of the guidelines may be obtained from the human rights bureau, department of labor and industry.

Additionally, the Montana Human Rights Commission looks to federal law for guidance when outside guidance is needed. *Auchenbach v. Community Nursing, Inc.*, 1996 MT Labor Indus. LEXIS 4, *8, 1996 ML 20.

Finally, Montana's Governor Steve Bullock in 2016, issued Executive Order No. 04-2016, which prohibits discrimination in state employment and contracts. A copy of this Executive Order is attached.

Montana applies federal laws and decisions in evaluating rights of same-sex couples and in discrimination claims and protects individuals from employment, housing and public accommodation discrimination on the basis of sex. Now that the United States Supreme Court has conclusively recognized that sexual orientation or gender identity are sex-based traits protected from discrimination, it is my opinion that individuals who experience sex discrimination on those bases, in the areas of employment, housing and public accommodation have existing recourse under both Montana and federal law.

Statutory Limitations to The City's Self-Governing Powers May Subject Any Non-Discrimination Ordinance to Legal Challenge.

Even if the City Commission were to not rely on this opinion, and pass an NDO, that ordinance may be subject to a legal challenge. After the City of Bozeman enacted its NDO, a group of citizens challenged the NDO on statutory and Constitutional bases. While the plaintiffs were ultimately found not to have standing to bring the lawsuit, they brought forth several statutory and constitutional arguments to the NDO. If these challenges were successful against a later-enacted NDO, the time and effort dedicated to creating that NDO would be for naught.

Challenges to NDO include limitations to self-governing powers. A City with self-governing powers has limitations. Mont. Code Ann. § 7-1-111-113 provide various limitations to the City's self-governing powers. § 7-1-111(1) prohibits the City from exercising power that affects any private or civil relationship. Housing and employment are private civil relationships. Mont. Code Ann. § 7-1-111(13) also prohibits cities from exercising power that tends to regulate landlords for issues covered in Title 70, chapters 24 and 25 (Landlord-Tenant Act). (Mont. Code Ann. § 49-2-305 prohibits sex discrimination in housing.) § 7-1-112 provides geographic and judicial limitations. There are, however in Montana, exceptions to these limitations, where the action is "incident to the exercise of an independent self-government power." There are no cases in Montana dealing with the extent or definition of this exception, or for that matter, the limitations themselves, thus subjecting the issue to judicial interpretation.

Further, Mont. Code Ann. § 7-1-113 states:

- (1) A local government with self government powers is prohibited the exercise of . . . administrative regulation in any area affirmatively subjected by law to state regulation or control. . .
- (3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

The prohibition of illegal discrimination is specifically regulated and controlled by Montana statute, Title 49, Part 2, the Montana Human Rights Act (MHRA). The Montana Human Rights Commission has been directed by the Montana legislature to establish administrative and procedural rules in implement the act, MCA § 49-2-204.

Montana statute also provides:

- (1) The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

Mont. Code Ann. §49-2-512.

Other cities attempts to ban sexual orientation discrimination have been found to be effectively preempted by state law in other jurisdictions. *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, at 35-37 (Cal. App. 1993). See also *Yellow Freight Systems v. Mayor's Comm 'n*, 791 S.W. 2d 382 (en banc) (Mo. 1990), where that court invalidated a city's attempt to create a new private cause of action as an ordinance-based remedy for discrimination. Courts have resisted the notion that municipalities should be able to create separate substantive law in areas generally reserved to the concept of statewide or federal uniformity.

As stated previously, a Great Falls NDO is not necessary, as the protections from sexual orientation and gender identity discrimination now clearly exist under multiple areas of federal and state law, rendering the an NDO unnecessary. If the Commission enacts one, this statutory and case law may provide the bases for successful challenges to any NDO that the Commission may enact.

Ample Federal and State Remedies Exist for Individuals Who Experience Discrimination.

The freedom from discrimination is a civil right (Mont. Code Ann. § 49-1-102(1)), remediable by civil action. Under existing Montana regulation, if an individual is discriminated against, that person may file a complaint of discrimination with the Montana Human Rights Bureau, which will investigate the claim. (Mont. Code Ann. §49-2-501.) The Montana Human Rights Bureau

also simultaneously investigates claims on behalf of the United States Equal Opportunity Commission under federal anti-discrimination laws. 42 U.S.C. § 2000e-5 (employment).

If the investigation determines that there is a reasonable basis to believe that discrimination has occurred, then a contested case (trial-type) hearing is set before the Hearings Unit of the Montana Department of Labor and Industry. (Mont. Code Ann. §49-2-505). Potential available damages for a successful discrimination claim include any reasonable corrective measure, such as, emotional distress damages, lost back and front pay, employment reinstatement on employment claims, equitable relief, and other damages. Attorney's fees and costs can also be obtained for successful claims. Mont. Code Ann. § 49-2-506(1)(b) and 42 U.S.C. § 2000e

If after investigation, a discrimination complaint is determined not to have a reasonable basis, the claimant will obtain a "Right to Sue" letter, and still have potential options for recourse. A.R.M. 24.8.220(1)(b) states:

If none of the allegations of discrimination in the complaint are supported by a preponderance of the evidence, if the Human Rights Bureau determines that the complaint is untimely, or if the Human Rights Bureau determines that it lacks jurisdiction over the complaint, the department will issue a finding of no reasonable cause. A finding of no reasonable cause will be accompanied by a notice of dismissal and right to sue in accordance with ARM 24.8.403. After a receipt of a notice of dismissal and right to sue, a charging party may continue the administrative process by filing objections with the commission or discontinue the administrative process and commence proceedings in district court as provided in 49-2-511, MCA.

See also A.R.M. 24.8.103(12). If the claims involve federal rights, as would here, a filing could be made in United States Federal District Court.

Moreover, with a civil municipal infraction created by an NDO, any Municipal Court determination would be limited to \$9,500. Mont. Code Ann. §§ 7-1-4152 and 3-11-103. State and Federal claims do not have such a cap. Finally, if a Municipal Court award were made on a civil matter, the plaintiff would likely be precluded from obtaining an award of damages in a district court or federal determination, as duplication of damages is disallowed. The 9th Circuit Court of Appeals, of which Montana is a part, has held:

a plaintiff may pursue an action against an identical defendant in several courts at the same time, even though inconsistent remedies are sought. But . . . there can be only one recovery.

Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67, 69-70 (9th Cir. 1956).

The Montana Human Rights Commission has recently considered sexual identity and gender orientation. In *Lowery v. Sarens USA, Inc.*, HRB Case No. 0180086, (February 13, 2020), Lowery, who identifies as a gay female, claimed discrimination based on her sexual orientation. The HRC stated, "The Hearing Officer held that Lowery's claim of discrimination was based on her sex (female), and the Hearing Officer did not rule on whether sexual orientation is included under the protected class of "sex" under the MHRA. Mont. Code Ann. § 49-1-102(1); Mont.

Const. art II, § 4. HOD, p. 20.” *Id.* p. 1 at footnote. While not deciding whether sexual orientation is sex-based discrimination, the Hearings Officer held, in the underlying decision:

Sexual orientation is not explicitly enumerated in the classes protected by the MHRA. Neither party pointed to a case in which the Montana Supreme Court declared sexual orientation to be a protected class under the MHRA. Turning to federal law, the federal district court has considered the fact that a split exists amongst the circuits as to whether discrimination on the basis of sexual orientation is inherently sex-based discrimination and therefore prohibited under Title VII of the Civil Rights Act of 1964.

...

While the general trend suggests sexual orientation is inherently a sex-based consideration, thereby invoking the protections of Title VII and presumably the MHRA, it is not necessary to reach that particular issue in this matter

Lowery v. Sarens USA, Inc., Case No. 70-2019, *Hearing Officer Decision*, p. 19. On appeal, the HRC affirmed the decision in its entirety. The *Bostock* ruling came about four months after this affirmation.

Adding an additional NDO-based administrative process to that which currently exists would further complicate an already well-established process. This process, on both the federal and state levels, has an extensive body of administrative and other case law, where there is full and complete compensation available to successful claimants, including the award of attorney’s fees and costs to successful litigants.

The Proposed Draft NDO Presented to the City Commission Would Require Revision.

If, despite the opinions set forth above, the City Commission requests Staff to consider an NDO for consideration, further work on an NDO would be required. The City Commission was presented with a proposed draft NDO at a Commission meeting on July 7, 2020, a copy of which is attached. For multiple reasons, this proposed draft does not appear appropriate for the City of Great Falls - the most obvious of which are the references to Helena code and Helena Municipal Court in the proposed draft.

Moreover, any NDO must allow for the accommodation of sincere religious beliefs, which is not included in the proposed draft NDO. These considerations are referenced in the Supreme Court decisions of *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, and most recently in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 2020 U.S. LEXIS 3546.

Moreover, as cited above, Justice Gorsuch stated in the *Bostock* case:

Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107Stat. 1488, codified at 42 U. S. C. §2000bb *et seq.* That statute prohibits the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. §2000bb-1. **Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.** See §2000bb-3.

Bostock p. 32 (emphasis added).

Because the proposed draft would need revision, if required to do so by the City Commission, Legal staff would be required to re-write an NDO for Commission consideration.

Further, I preliminarily inquired with the Great Falls Municipal Court Judge Steve Bolstad as to the Court's ability to handle potential civil municipal infractions resulting from an NDO if one were enacted. Judge Bolstad stated concerns about being equipped to handle additional litigation from claims that may result from an NDO, with the Court's current staffing and workload. (Notwithstanding, Missoula, Butte, Helena and Kalispell, which who have NDOs, have advised that there have been no claims filed under their NDOs. Bozeman has not had a claim under its NDO, but has had it subject to challenge, as noted previously.)

These concerns are supported by considerations that the Municipal Court processes over 11,000 to 13,000 citations on a yearly basis and is already stretched thin in its staffing. Additional docket backlog may cause issues with criminal defendants' statutory rights to speedy trial (six months in Municipal Court), or abilities for civil opponents to obtain timely determinations on the issues. Additionally, complicated civil rights and discrimination issues and exceptions are not routinely the usual workload of a Municipal Court. Further, as noted previously, in other jurisdictions there have been judicial concerns of having cities create a separate body of substantive law, where there exists well-established federal and state law.

Conclusion

In the American system of jurisprudence, there is no higher court than the United States Supreme Court. In *Bostock*, the U.S. Supreme Court has now clarified that the protected class of sex includes LGBTQ+ persons. This inclusion has already been recognized and cited by a number of federal circuit courts. This decision is consistent with other Supreme Court cases recognizing other equal protections under the law for same-sex partners.

Montana provides protections from sex discrimination in the areas of employment, housing and public accommodation. Montana law relies on federal discrimination law to evaluate protections for discrimination. Thus, by Supreme Court definition, Montana's protections from sex discrimination include sexual orientation and gender identity. It is my opinion that relief from discrimination is now clearly existing under current law and the adoption of an NDO in Great Falls is not necessary to protect against sexual orientation and gender discrimination. Even if the City Commission were inclined to adopt an NDO, there are potential legal challenges to such adoption.

Recognizing that the City Commission may want to affirmatively take a position on discrimination, I recommend it consider making a proclamation or a resolution as alternatives to enacting a formal NDO. These alternatives could include, if the Commission deems it appropriate, its position on inclusion and opposition to discrimination, or consider references to or adoption of language similar to Governor Bullock's attached Executive Order 04-2016.

**STATE OF MONTANA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER NO. 04-2016**

**EXECUTIVE ORDER PROHIBITING DISCRIMINATION IN STATE EMPLOYMENT
AND CONTRACTS**

WHEREAS, Montana is a place that welcomes all people and recognizes the value of diversity;

WHEREAS, Montana's Constitution affirms Montanans' basic human rights, declaring that "the dignity of the human being is inviolable";

WHEREAS, in *Obgerfell et al. v. Hodges*, the United States Supreme Court recognized that "[t]he fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs" and laws burdening this liberty interest also "abridge central concepts of equality";

WHEREAS, four in ten lesbian, gay, and bisexual people report experiencing some form of employment discrimination based on their sexual orientation, and 90 percent of transgender people report harassment, mistreatment or discrimination on the job;

WHEREAS, four of Montana's largest communities have taken steps to expand workplace, housing, and public accommodation protections for LGBT residents and visitors;

WHEREAS, 91 percent of Fortune 500 companies prohibit discrimination based on sexual orientation, and 61 percent prohibit discrimination based on gender identity;

WHEREAS, a 2013 Equal Employment Opportunity Commission study found that pregnancy-related discrimination complaints have increased significantly since an earlier study conducted in 1997;

WHEREAS, our military service members, veterans, and their families have made and continue to make tremendous sacrifices for our country, and their diverse backgrounds, experience, discipline, specialized training, and leadership skills make them well-suited for public service;

WHEREAS, nearly 100,000 veterans and their families call Montana their home;

WHEREAS, federal and state laws prohibit employment discrimination against our nation's service members and veterans;

WHEREAS, Montana is likely to face a worker shortage over the next decade, and this shortage will be exacerbated by discrimination that drives away talented and trained workers who want to live in a place where they are free from discrimination and harassment;

WHEREAS, workplace protections are linked to greater job commitment, improved workplace relationships, increased job satisfaction, and improved health outcomes of employees;

WHEREAS, denial of equal opportunity, discrimination, and harassment based on race, color, sex, pregnancy, childbirth or medical conditions related to pregnancy or childbirth, political or religious affiliation or ideas, culture, creed, social origin or condition, genetic information, sexual orientation, gender identity or expression, national origin, ancestry, age, disability, military service or veteran status, or marital status is prohibited by state, federal, and local law, rule, policy, or executive order; and

WHEREAS, January 18, 2016, is the day our country honors civil rights leader Martin Luther King Jr. On this day, I am guided by words he wrote while jailed in Birmingham during our country's fight for racial equality "[i]njustice anywhere is a threat to justice everywhere." Letter from Birmingham Jail, Alabama, 16 April 1963, in *Atlantic Monthly*, August 1963.

NOW, THEREFORE, I, STEVE BULLOCK, Governor of the State of Montana, by virtue of the authority vested in me under the Constitution and the laws of the State of Montana, do hereby order and direct the Department of Administration, which is charged with the administration of state personnel and procurement policies, and all agencies, managers, supervisors, and employees under the jurisdiction of the Governor, to take the following actions:

1. Develop and implement policies necessary to ensure that all persons employed or served by state government are afforded equal opportunity, without discrimination, based upon any of the above classes.
2. Take steps necessary to prevent and stop discrimination, sexual harassment, or harassment based on membership of any of the above classes.
3. Include provisions in state contracts or subcontracts for construction of public buildings or for other public work or for goods or services, in accordance with federal, state, local law, rule, policy, or executive order that all hiring must be on the basis of merit and qualifications and that there may not be discrimination based on any of the above classes by the persons performing the contract or subcontract.
4. The Department of Administration is directed to prepare a nondiscrimination policy applicable to all agencies under the jurisdiction of the Governor, which includes specific language prohibiting discrimination, sexual harassment, and harassment based on membership in any of the above classes and an internal complaint procedure that remains continuously in effect. The policy shall make it clear that discrimination based on any of the above-named classes and sexual harassment or harassment based on membership in any of the above classes is a form of misconduct and anyone who is found to have violated the policy of non-discrimination and non-harassment will be subject to discipline, up to and including termination of employment. The policy statement must be distributed to all department directors and heads of agencies that are subject to policies promulgated by the Department of Administration for further distribution to state employees.
5. The Department of Administration shall continue to assist state agencies in implementing and maintaining an Equal Employment Opportunity Program in state government. The program shall include non-discrimination and harassment awareness programs that

emphasize harassment prevention and cultural diversity awareness with emphasis on Montana Indian Tribes.

6. Each agency head and its managers are responsible for compliance with and implementation of this Executive Order.
7. This Executive Order supersedes and rescinds Executive Order No. 41-2008, issued by Governor Brian Schweitzer on November 14, 2008.

This Order is effective immediately and shall remain in effect until amended or rescinded by future Executive Order of the Governor.



GIVEN under my hand and the GREAT SEAL of
the State of Montana this 18th day of
January, 2016.


STEVE BULLOCK, Governor

ATTEST:


LINDA MCCULLOCH, Secretary of State

Great Falls Nondiscrimination Ordinance DRAFT

1-8-1: INTENT AND PURPOSE:

State and/or federal law prohibits the denial of civil rights or discrimination on the basis of age, race, color, national origin, ancestry, religion, creed, sex, pregnancy, marital status, familial status (solely for housing), and physical or mental disability. In addition to these protections, it is the intent of the city of Helena that no person shall be denied his or her civil rights or be discriminated against based upon his or her sexual orientation or gender identity or expression.

The city commission declares that such discrimination prohibitions are necessary and desirable because existing state and federal laws regarding discrimination do not expressly or clearly address all discriminatory acts reported by the city's diverse residents. Therefore, the city deems it necessary to adopt local regulations adapted to the needs of its citizens. Nothing in this chapter is intended, however, to conflict with such state and federal laws, or to alter or abridge other rights, protections, or privileges secured by state or federal law, including state and federal constitutional protections of freedom of speech and exercise of religion. (Ord. 3162, 12-17-2012)

1-8-2: DEFINITIONS:

As used in this chapter, unless the context requires otherwise, the following definitions apply:

DISCRIMINATION: "Discrimination", "discriminate" or "discriminatory" means any act, policy, or practice that has the effect of unfavorably subjecting any person to different or separate treatment on the basis of their sexual orientation or gender identity or expression, or because of their association with a person or group of people so identified. "Discrimination", "discriminate" or "discriminatory" also means any act, policy, or practice that has the effect of unfavorably subjecting any person to different or separate treatment on the belief that a person has a particular sexual orientation or gender identity or expression, even if that belief is incorrect.

EMPLOYEE: An individual employed by an employer.

EMPLOYER: An employer of one or more persons or an agent of the employer, but not including a fraternal, charitable, or religious association or corporation unless the association or corporation is organized either for private profit or to provide accommodations or services that are available on a nonmembership basis.

EMPLOYMENT AGENCY: A person undertaking to procure employees or opportunities to work.

GENDER IDENTITY OR EXPRESSION: A gender related identity, expression, or behavior, regardless of the individual's sex at birth.

HOUSING ACCOMMODATION: A building or portion of a building, whether constructed or to be constructed, that is or will be used as the home, domicile, residence, or sleeping quarters of its occupants.

LABOR ORGANIZATION: An organization or an agent of an organization organized for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances or terms or conditions of employment, or of other mutual aid and protection of employees.

PERSON: One or more individuals, labor unions, partnerships, associations, corporations, legal

representatives, mutual companies, joint stock companies, trusts, unincorporated employees' associations, employers, employment agencies, organizations, or labor organizations.

PUBLIC ACCOMMODATION: A place that caters or offers its services, goods, or facilities to the general public, subject only to the conditions and limitations established by law and applicable to all persons. It includes, without limitation, a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, cosmetology, electrology, aesthetics, or manicuring salon or shop, bathroom, rest house, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, hospital, and all other public amusement and business establishments.

Public accommodation does not include an institution, club, or place of accommodation that proves that it is, by its nature, distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than one hundred (100) members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. For the purposes of this definition, any lodge of a recognized national fraternal organization is considered by its nature distinctly private.

SEXUAL ORIENTATION: Heterosexuality, bisexuality, or homosexuality. (Ord. 3162, 12-17-2012)

1-8-3: EMPLOYMENT DISCRIMINATION PROHIBITED:

- A. No employer shall discriminate in the employment, failure to hire, refusal to hire, compensation, work classification, terms, conditions, or privileges of employment, including promotion, demotion, or termination of employment.
- B. No employer shall fail or refuse to refer for employment, or give negative information to a potential employer of an individual, in such a manner that would deprive or limit an individual's employment opportunities or that would otherwise adversely affect an individual's status as an applicant or prospective employee, for a discriminatory reason.
- C. No labor organization shall discriminate in limiting membership, conditions of membership, or termination of membership of any person in any labor union or apprenticeship program.
- D. No employment agency shall discriminate in the procurement or recruitment of any person for possible employment with an employer. (Ord. 3162, 12-17-2012)

1-8-4: DISCRIMINATION IN PUBLIC ACCOMMODATIONS PROHIBITED:

It shall be unlawful for a place of public accommodation to deny, directly or indirectly, any person full and equal access or enjoyment of the goods, services, activities, facilities, privileges, advantages, and accommodations for a discriminatory reason. (Ord. 3224, 1-9-2017)

1-8-5: HOUSING DISCRIMINATION PROHIBITED:

It is unlawful for any person, owner, manager, employee, or any entity whose business includes engaging in any residential real estate related transactions to discriminate in the sale, lease or rental of any housing facility, or to otherwise discriminate in the terms, conditions, maintenance, improvement, or repair of any housing facility. The rental of sleeping rooms in a private residence

designed as a single dwelling unit in which the owner also resides is excluded from this section provided that the owner rents no more than three (3) sleeping rooms within the residence. (Ord. 3162, 12-17-2012)

1-8-6: RETALIATION PROHIBITED:

No person shall coerce, threaten, discharge, expel, blacklist, or otherwise retaliate against another person for opposing any practices prohibited by this chapter, making a complaint, or assisting in an investigation or proceeding regarding an alleged violation of this chapter; nor shall any person require, request, conspire with, assist, or coerce another person to retaliate against a person for making a complaint or assisting in an investigation or proceeding. (Ord. 3162, 12-17-2012)

1-8-7: VIOLATION; CIVIL REMEDY; EXHAUSTION OF HUMAN RIGHTS BUREAU REMEDY:

Any illegal discrimination specifically addressed by Montana state law shall be submitted to the Montana department of labor and industry, human rights bureau, pursuant to title 49, chapters 2 and 3, Montana Code Annotated (MCA), for processing by the state of Montana.

Any person claiming a violation of this chapter may seek civil remedies, injunctive relief, attorney fees or other equitable relief by petitioning the Helena municipal court. Prior to the filing of any petition in Helena municipal court under this chapter, a person must have:

- A. Filed or sought to file a timely complaint with the Montana human rights bureau alleging discrimination in employment, public accommodations or housing, or retaliation; and
- B. Received a written disposition of the complaint from the Montana human rights bureau, Montana department of labor and industry hearings bureau, Montana human rights commission, or any Montana court indicating that the acts of alleged discrimination or retaliation underlying the complaint do not fall within the scope of the Montana human rights act.

For purposes of this section, the term "timely" shall mean filed with the Montana human rights bureau within the time frames set forth in section 49-2-501, Montana Code Annotated.

Any person claiming a violation of this chapter must file a petition with the Helena municipal court within ninety (90) days of receipt of the written disposition referenced in subsection B of this section.

The initiation of or the granting of relief under a grievance procedure shall not preclude or limit any other claims or remedies available under this chapter. (Ord. 3162, 12-17-2012)

1-8-8: SEVERABILITY:

If any section, subsection, sentence, clause, phrase, or word of this chapter is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter. The city commission hereby declares that it would have passed this chapter and each section, subsection, sentence, clause, phrase, and words thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or words have been declared invalid or unconstitutional, and if for any reason this chapter should be declared invalid or unconstitutional, then the remaining ordinance provisions will remain in full force and effect. (Ord. 3162, 12-17-2012)