

WORKING DRAFT: NOT FOR CIRCULATION

TO: Montana University System Board of Regents
FROM: Policy 703 Working Group
RE: Proposed Revision to Montana University System Non-Discrimination Policy
DATE: _____

I. INTRODUCTION

In the fall of 2012, ASMSU and ASUM submitted a joint resolution seeking a revision to the Board of Regents' non-discrimination policy (Policy 703) that would add sexual orientation and gender identity as protected classes. The current Policy 703 includes all classes protected by state law (race, creed, religion, national origin, age, physical or mental disability, marital status, and sex), as well as two additional classes that are not currently protected under state law (ancestry and political ideas).

A working group was formed to consider the feasibility and effects of making the requested changes to our non-discrimination policy. This memorandum represents the findings and recommendations of the group.

II. DISCUSSION

A. Legal Landscape

UM-Missoula, MSU-Bozeman, MSU-Billings, MSU-Northern, Helena College, UM-Western, and Montana Tech already have policies in place which expressly prohibit discrimination on the basis of sexual orientation, and UM-Missoula also prohibits discrimination on the basis of gender identity. According to the Transgender Law and Policy Institute, 623 colleges and universities currently have non-discrimination policies that include gender identity/expression (including Carroll College). We have not been able to locate reliable statistics regarding the number of colleges and universities that have non-discrimination policies that protect sexual orientation, but it's a reasonable assumption that there are at least as many as those that protect gender identity/expression.

In terms of state laws, 27 states plus D.C. offer some kind of legal protection against discrimination on the basis of sexual orientation and 16 states plus D.C. offer some kind of legal protection against discrimination on the basis of gender identity/expression.

Although there are currently no prohibitions under Montana law for discrimination on the basis of sexual orientation and gender identity/expression, both the State of Montana and the MUS provide benefits to same sex partners of their employees.

Federal law is unsettled. However, there is support in federal law for prohibiting discrimination on the basis of both sexual orientation and gender identity/expression:

WORKING DRAFT: NOT FOR CIRCULATION

- *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), protects against sex stereotyping in employment actions under Title VII of the Civil Rights Act. In this case, the U.S. Supreme Court held that discriminatory conduct directed toward the plaintiff (a non-transsexual woman) based on sexual stereotyping, such as conclusions that the plaintiff's mannerisms and dress were "macho" and not sufficiently "feminine" constituted discrimination on the basis of her sex and therefore violated Title VII. This reasoning has been extended to gender identity/expression in the 9th circuit and there are numerous decisions in the 9th circuit that have resulted in favorable rulings for transgender plaintiffs.
- In a recent decision, the EEOC held that the term "sex" includes both biological sex and gender for Title VII purpose. (*Macy v. Holder*, April 20, 2012). Although this decision does not bind federal courts, the ruling will strengthen a transgender plaintiff's ability to successfully state a claim under Title VII, and likely will increase EEOC enforcement of such discrimination claims. The EEOC has stated that a strategic enforcement priority for 2012-2016 will be targeting discrimination against transgender individuals under applicable federal laws.
- The Department of Education has interpreted Title IX to include protections for sexual orientation as well as gender identity. The Department has recently stated that protection against sex discrimination under Title IX extends to "gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature." The Department also previously stated that "Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target." (OCR Dear Colleague Letter, October 26, 2010).
- Recent amendments to the Clery Act, which requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses, have added the category of "gender identity" to the categories of hate crimes that must be reported. Reporting of hate crimes based on sexual orientation has been required since 2008.

In addition, the State of Montana Human Rights Bureau has indicated its intention to begin investigating claims of discrimination based on sexual orientation and gender identity/expression.

While federal and state law is unsettled, the trend is clearly moving towards greater protection for individuals on the basis of their sexual orientation and gender identity.

//

WORKING DRAFT: NOT FOR CIRCULATION

B. Campus Programs and Processes that may be Affected:

1. Registrar
2. Admissions
3. Financial Aid
4. Student Affairs
5. Human Resources
6. Facilities
7. Student Housing
8. Athletics
9. Recreation
10. Health Insurance
11. Miscellaneous

C. Implementation Recommendations

Consistent with its current operation, the revised Policy 703 will not address implementation issues. The consensus of the Working Group is that although there should be some consistent level of minimum change on the campuses (i.e., updating campus non-discrimination policies) and a shared set of long-term goals (i.e., adding gender neutral bathrooms during times of new construction or major renovation), each campus needs the flexibility to implement this policy change in a manner that aligns with its current resources and infrastructure, and unique organizational structure.

III. CONCLUSION