# Memo

Date: May 12, 2008

To: Barb Lelli, Investigator

From: John Gause, Commission Counsel

Re: [redacted]

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At issue is whether discrimination based on sexual orientation in the enforcement activity of a municipal police department (issuing summons and citations) and a town code enforcement officer (issuing code violations) is covered by the Maine Human Rights Act. I think that the Act does provide coverage.

The Act makes it unlawful, in relevant part, for "any public accommodation or any person who is the . . . agent or employee of any place of public accommodation to . . . discriminate against . . . any person, on account of . . . sexual orientation. . . . or in any manner discriminate against any person in the . . . terms or conditions upon which access to . . . services . . . may depend." 5 M.R.S.A. § 4592(1).

The Act defines "public accommodation" as "a public or private entity that owns, leases, leases to or operates a place of public accommodation." 5 M.R.S.A. § 4553(8-B). A "place of public accommodation" is defined, in relevant part, as "a facility, operated by a public or private entity, whose operations fall within at least one of the following categories: . . . [a] municipal building, courthouse, town hall or other establishment of the State or a local government." 5 M.R.S.A. § 4553(8)(M).

A plain reading of these provisions supports coverage here. The Town of [redacted] is a "public entity" that operates "facilities"—the police department and the code enforcement office—that are "establishments" of a local government. *See* 5 M.R.S.A. § 4553(8)(M), (8-B). The "services" offered by both is to enforce the law. If they selectively enforce laws based on the sexual orientation of the accused, they are "discriminating" against people on the basis of sexual orientation in violation of section 4592(1). Similarly, if they refuse to enforce the law based on a victim's sexual orientation, they would be discriminating against him in the "terms or conditions upon which access to . . . services . . . may depend." 5 M.R.S.A. § 4592(1).

I found only a couple cases address the issue of the applicability of "public accommodations" anti-discrimination laws to police activity. In *Ptaszynski v. Uwaneme*, 853 A.2d 288 (N.J.Super.A.D. 2004), an appellate court in New Jersey held, in an unpublished portion of the opinion, that both a municipal police department and the officers who were involved in an allegedly discriminatory response to a domestic

violence call were a "place of public accommodation" under the New Jersey Law Against Discrimination. *Id.* at 297. In *Kansas Commission on Civil Rights v. Howard*, 544 P.2d 791 (Kan. 1975), the Kansas Supreme Court reached the opposite result under the Kansas Act Against Discrimination.

The Kansas decision was based on the court's conclusion that a police department is not open to the public. *Id.* at 795. The Kansas Act limits (at the time of the decision, anyway) "public accommodation" to a person "who caters or offers goods, services, facilities, and accommodations to the public," which the Kansas Court interpreted to mean the place must be "held out as open to the general public." *Id.* (quoting Kansas Act). On the other hand, the Vermont Supreme Court, interpreting a similar provision of the Vermont Fair Housing and Public Accommodations Act, has held that the Vermont Act applies to all government services, "which are created for the very purpose of serving the general public." *Department of Corrections v. Human Rights Com'n*, 917 A.2d 451, 459 - 460 (Vt. 2006) (holding that the Vermont Act's definition of "public accommodation" applies to state prisons).

On this issue, even if a Maine court were to find the Kansas decision more persuasive than the Vermont one, there are differences between the Maine Act and the Kansas/Vermont Acts that make the Maine Act have broader coverage. Although a provision of the Maine Act's definition does includes an establishment that "caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public," 5 M.R.S.A. § 4553(8)(N), the Maine definition also includes places that are not necessarily open to the general public such as, for example, a private "country club, gymnasium, health spa, shooting gallery, . . . swimming pool, seashore accommodation or boardwalk or other place of recreation, exercise or health," 5 M.R.S.A. § 4553(I), or a private "day-care center [or] senior citizen center." 5 M.R.S.A. § 4553(K).

This is the amended definition. Before the 1995 amendments, the Act defined "place of public accommodation" more consistently with Kansas and Vermont as "any establishment which in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public; and it includes, but is not limited to [a list of examples]." 5 M.R.S.A. § 4553(8) (1992). Under this former definition, the Law Court held that the services of a private establishment that are not offered to the general public are not covered by the Act. *See Maine Human Rights Com. v. Le Club Calumet*, 609 A.2d 285, 287 (Me. 1992). The 1995 amendments, however, restructured the definition so that the "general public" language appears at the end of the listed categories and is preceded by the conjunction "and," which does not support a limitation on the whole definition that the general public be served. *See* 5 M.R.S.A. § 4553(8)(M).

In sum, in light of the plain language in the Maine Act, I think it applies to the enforcement activity of both a municipal police department and a code enforcement office.

Cc: Patricia E. Ryan