

Assuring Non-Discrimination in Healthcare:

Washington's Law Against Discrimination and the American Medical Association's Rules of Ethics

A Washington State Legal Briefing

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Lambda Legal provides this briefing to healthcare professionals in Washington State to clarify the non-discrimination requirements of Washington's anti-discrimination law and the national guidance of the American Medical Association's Code of Ethics. The State of Washington took an important step toward ensuring that all Washingtonians are treated with dignity and respect by enacting a law prohibiting discrimination based on sexual orientation and gender identity. From the calls for legal assistance that we receive through our Help Desk and our representation of patients who have experienced discrimination in medical settings, Lambda Legal understands the critical need for effective anti-discrimination protections in the health care field. Healthcare providers have a significant professional responsibility to ensure that they treat all patients equally, which not only improves patient care but also limits medical provider liability. An important first step is to understand one's legal and ethical duties and then to act affirmatively to conform one's conduct to these civil rights rules.

Lambda Legal is the oldest and largest nonprofit legal organization advocating nationally for full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those with HIV through groundbreaking litigation, education and public policy work. Since 1973, Lambda Legal has appeared as counsel or *amicus curiae* in hundreds of cases in state and federal courts on behalf of LGBT people who have suffered discrimination because of their sexual orientation or gender identity, including many cases involving discrimination in public accommodations generally and health care settings specifically.¹

¹ Currently, Lambda Legal represents Guadalupe Benitez in a case before the California Supreme Court against physicians who refused on religious grounds to provide Ms. Benitez with the same infertility services they provide other patients, due to their religious objections to treating a lesbian patient in a same-sex relationship. *North Coast Women's Care Medical Group v. Superior Court (Benitez)*, 46 Cal. Rptr. 3d 605 (2006). Lambda Legal's work in this case already has established that a claim against physicians who deny treatment based on a patient's sexual orientation is not preempted by the Employee Retirement Income Security Act ("ERISA").

Washington's Law Against Discrimination ("WLAD") was amended effective June 8, 2006 to prohibit discrimination based on sexual orientation and gender identity.² Because discrimination threatens "not only the rights and proper privileges" of Washington's citizens, but also "menaces the institutions and foundation of a free democratic state,"³ WLAD's proscription against discrimination extends broadly to many of the areas that affect Washingtonians' daily life and fundamental well-being. WLAD prohibits sexual orientation and gender identity discrimination in employment,⁴ credit transactions,⁵ insurance transactions,⁶ real estate transactions,⁷ and public accommodations.⁸ WLAD's prohibition of sexual orientation and gender identity discrimination in public accommodations expressly governs medical service providers⁹ – and very appropriately so. There is perhaps no greater area of personal vulnerability than patients' relationships their doctors, in whom they entrust their physical well-being and private medical information.

WLAD's proscription against sexual orientation and gender identity discrimination is fully consistent with the American Medical Association's ("AMA") ethical standards. The AMA has at least two dozen rules and policy statements prohibiting sexual orientation discrimination and calling for culturally appropriate care for lesbian and gay patients. *See, e.g.*, AMA ethical rule E-9.12, "Patient-Physician Relationship: Respect for Law and Human Rights" ("Physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, or any other basis that would constitute invidious discrimination"); AMA ethical rule H-295.878 (encouraging the elimination of health disparities for lesbians, gay men, bisexuals and transgender people through the inclusion of a "cultural competency curriculum for medical education").¹⁰

Benitez v. North Coast Women's Care Medical Group, Inc., 106 Cal. App. 4th 978, 990-991 (2003). Now, in California's high court, Lambda Legal is defending the trial court's ruling that physicians' anti-gay religious beliefs do not permit them to violate the state civil rights law.

² 2006 Wa. HB 2661, c 4 § 13.

³ Wash. Rev. Code § 49.60.010.

⁴ Wash. Rev. Code § 49.60.180.

⁵ Wash. Rev. Code § 49.60.175; Wash. Rev. Code § 49.60.176.

⁶ Wash. Rev. Code § 49.60.178.

⁷ Wash. Rev. Code § 49.60.222.

⁸ Wash. Rev. Code § 49.60.215.

⁹ WLAD defines public accommodations to include "any place, licensed or unlicensed, kept for gain, hire, or reward ... where medical service or care is made available..." R.C.W. § 49.60.040(10); *see also Negron v. Snoqualmie Valley Hospital*, 86 Wn. App. 579, 581 (1997) ("the hospital is a place of public accommodation").

¹⁰ American Medical Association, LGBT Advisory Committee, *GLBT Policy Compendium*, available at <http://www.ama-assn.org/ama1/pub/upload/mm/42/glbt_policy0905.pdf> (hereafter, "*GLBT Policy Compendium*").

Nevertheless, confusion persists among medical care providers about whether individual religious beliefs may play a role in decisions about medical treatment for LGBT patients. For example, Jonathan Shuffield, a resident of Eastern Washington, had been under the care of his treating physician for more than a year when a complication of his diabetes and high blood pressure medications prompted him to have a conversation with his doctor in which he revealed that he is gay. Upon learning of Mr. Shuffield's sexual orientation, the physician refused on religious grounds to provide Mr. Shuffield with the prescription he needed. The physician attempted to excuse the discriminatory conduct by invoking his religious philosophy. In negotiating a successful settlement for Mr. Shuffield, Lambda Legal educated both the physician and the medical institution where he practiced that WLAD and the AMA's ethical rules unequivocally prohibit discriminatory refusals to treat LGBT patients, regardless of a physician's personal religious views about those patients.

For example, AMA ethical rule E-10.05, "Potential Patients," makes clear that a doctor's right of religious refusal is limited to particular *treatments*, does not include a right to refuse to treat particular groups of *people*, and is subordinated to the primary duty not to discriminate against patients.¹¹ Similarly, R.C.W. § 9.02.150 permits medical facilities to refuse to participate in the specific *procedure* of abortion, but does not permit that decision to be made selectively and discriminatorily based on the identity of the patient or fetus. A doctor can no more choose to treat heterosexual patients and not gay patients based on sexual orientation, than he or she can choose to terminate some pregnancies and not others based on the race of the patient or fetus (such as in the case of a physician with a religious objection to interracial couples and biracial children).

This does not require physicians who object to a particular treatment to offer that treatment to the public. It does mean that physicians who choose to offer a treatment to *some*, must offer the treatment to *all* – withholding medical treatment only on the basis of legitimate medical or business concerns, and not unlawful, discriminatory distinctions.

Medical care providers' proactive implementation of measures to comply with WLAD is a vital part of ensuring quality patient care, and limits potential liability. Lambda Legal worked with Mr. Shuffield's medical provider to implement the steps below to foster the provider's compliance with the law. Lambda Legal offers these measures as a model of some steps that medical providers should consider taking to ensure that all of their patients, including LGBT patients, are treated with respect and care:

¹¹ AMA ethical rule E-10.05 provides that "[p]hysicians cannot refuse to care for patients based on race, gender, *sexual orientation*, or any other criteria that would constitute *invidious discrimination*," although "it may be ethically permissible for physicians to decline a potential patient when ... [a] specific *treatment* sought by an individual is incompatible with the physician's personal, religious or moral beliefs." *GLBT Policy Compendium* (emphasis added).

- The medical provider should update its anti-discrimination policies to state expressly that the provider prohibits discrimination based upon sexual orientation and gender identity.
- The medical provider should obligate its physicians contractually to comply with Washington State law, including WLAD, and the AMA Code of Ethics.
- The medical provider should provide yearly training for its physicians about WLAD's requirements and culturally competent care for LGBT people. Each physician should be required to participate in these annual trainings and attest in writing to having done so.
- The medical provider should provide training about WLAD's requirements and culturally competent care for LGBT patients to all its non-physician employees, and should include similar training in the orientation provided to all new employees.
- The medical provider, in its role as an employer, should use the "Self-Assessment Checklist for Compliance and Suggested Best Practices" for employer compliance with WLAD, published by the Washington State Human Rights Commission.¹²

Lambda Legal invites healthcare professionals to call its Legal Help Desk with inquiries about their obligations under Washington's new civil rights law. Ensuring that healthcare professionals know their legal obligations promotes the integrity of the medical profession and serves the patients who benefit from improved standards of care, while also limiting individual and institutional liability.

Please contact Lambda Legal's Help Desk at 213-382-7600 ext. 330 or toll free at (866) 542-8336, or by email to LegalHelpDesk@lambdalegal.org.

¹² The Washington State Human Rights Commission's "Self-Assessment Checklist for Compliance and Suggested Best Practices" is published on their website at <http://www.hum.wa.gov>.