

AGENDA REQUEST FORM

FOR: Council Meeting of June 16, 2015

FROM:

City Council Member Adella Gray

ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

AN ORDINANCE TO ENSURE UNIFORM NONDISCRIMINATION PROTECTIONS WITHIN THE CITY OF FAYETTEVILLE FOR GROUPS ALREADY PROTECTED TO VARYING DEGREES THROUGHOUT STATE LAW

APPROVED FOR AGENDA:



City Council Member Adella Gray

6-3-15
Date

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**City Council Member Adella Gray
City Council Member Matthew Petty**

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OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Patti Mulford
Paralegal

TO: Mayor Jordan
City Council

FROM: Kit Williams, City Attorney

DATE: June 3, 2015

RE: Legality of enacting an ordinance to prohibit some types of discrimination based upon a person's gender identity or sexual orientation

Act 137 of 2015 codified as A.C.A. § 14-1-401 "Intrastate Commerce Improvement Act" states that a "municipality . . . shall not adopt or enforce an ordinance . . . that creates a protected classification or prohibits discrimination on a basis not contained in state law." (emphasis added).

Little Rock City Attorney Tom Carpenter wrote a detailed analysis in his **City Attorney Opinion No. 2015-001** concerning whether Little Rock could pass a non-discrimination ordinance that would provide some protection against discrimination for some persons if such discrimination was based upon their sexual orientation or gender identification. His short answer is that Little Rock could pass such an ordinance because

"the proposed ordinance does not create any protected class, nor does it list any prohibited discrimination not already protected by state law." (emphasis in original).

Although reasonable legal arguments may be advanced by opponents of such ordinances, I believe that Little Rock City Attorney Tom Carpenter has the better argument that ordinances such as Little Rock's

and the one now offered by Aldermen Gray and Petty are legal and not prohibited by A.C.A. § 14-1-401, et seq. I certainly would be prepared to defend the legality of the Gray/Petty ordinance in Court if opponents file suit (which is likely).

I have attached Mr. Carpenter's ten page **City Attorney Opinion** for your review.

I have not had time yet to prepare an additional legal analysis in which I will discuss other reasons and factors to support the City Council's legal authority to enact a non-discrimination ordinance. You should know that Little Rock's ordinance was very limited in its scope and only covered its own employees and contractors seeking to do business with the City. The one now proposed by Aldermen Gray and Petty would cover most employees, tenants, and business customers in Fayetteville as did the initial non-discrimination ordinance.

Therefore, I believe it is likely that once the Intrastate Commerce Improvement Act goes into legal effect in July, an opponent will sue Fayetteville if you have passed the Gray/Petty ordinance.

OFFICE OF THE CITY ATTORNEY

500 West Markham, Ste. 310
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Thomas M. Carpenter
City Attorney

Telephone (501) 371-4527
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April 19 , 2015

Honorable Joan Adcock
Director-at -Large, Position 10
6808 Mablevale Pike
Little Rock, Arkansas 72209

CITY ATTORNEY OPINION NO. 2015-001

Re: WHETHER PROPOSED ORDINANCE ON CITY ANTI-DISCRIMINATION POLICIES WILL BE VALID AFTER ACT 137 TAKES EFFECT IN JULY, 2015.

Dear Director Adcock:

This letter contains the opinion of this office to the question you posed about a proposed anti-discrimination ordinance which will be considered by the Little Rock Board of Directors on Tuesday, April 21, 2015.

QUESTION PRESENTED

Whether a proposed ordinance to codify City anti-discrimination practices will be valid after the effective date of Act 137 of 2015 on July 22, 2015.¹

SHORT ANSWER

Yes. As to intrastate commerce, the proposed ordinance does not create any protected class, nor does it list any prohibited discrimination not already protected by state law. As to discrimination on activities in interstate commerce, Act 137 by its express terms does not apply.

¹ Amendment VII to the Arkansas Constitution provides that no law is effective until 90 days after final adjournment of the General Assembly. The General Assembly is scheduled to adjourn *sine die* on April 22, 2015, so the effective date of Act 137 will be July 22, 2015.

FACTUAL BACKGROUND

On Tuesday, April 21, 2015, the Board of Directors will consider a proposed ordinance entitled “An ordinance to declare the policy of the City of Little Rock on issues not to be considered in hiring; to declare the policy on companies with which the City contract; to declare an emergency; and, for other purposes.” The ordinance has three basic sections:

1. The first section declares that the City will not discriminate against City vendors “...because of the race, color, creed, religion, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information, political opinions or affiliation of the vendors’ owners.” It also requires that all City departments, divisions, and commissions, comply with this policy;
2. The second section of the ordinance declares that in the delivery of City services, the City will not discriminate “because of race, color, creed, religion, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information, political opinions or affiliation.” It contains a similar requirement for compliance throughout all City departments, division, and commissions; and,
3. The third section notes that the City will not contract with any entity that discriminates “on the basis of race, color, creed, religion, sex, national origin, age, disability, marital status, sexual orientation, gender identity, genetic information.” The section also notes that City bid documents will note this requirement, and will also require that all contracts with the City note the vendor’s agreement to adhere to such a policy.²

The first two sections apply to the City. The third section applies only to vendors who wish to do business with the City and be considered for contracts with the City.

The question of whether the ordinance is contrary to state law arises from the fact that Act 137 of the 90th Regular Session of the Arkansas General Assembly states “A...municipality...shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or

² The provision applies to all contracts. So, whether a bid is decided on the lowest responsible and responsive price bid (RFP), or on the basis of the most qualified firm to do the work (RFQ), or even in a sole source bid where it is impractical and unfeasible to bid for a particular good or service, this provision applies.

prohibits discrimination on a basis not contained in state law.” 2015 ARK. ACTS 137 § 1 (2015). The title of the Act is the “Intrastate Commerce Improvement Act.” *Id.* By its express terms, it applies only to contracts that in no way involve interstate commerce.³

DISCUSSION

1. Arkansas law already lists the types of discrimination identified in the proposed ordinance.

The specific question is whether the proposed ordinance, if passed, would at any time violate Arkansas law as set forth in Act 137 of 2015 (“the Act”). The Act prohibits two actions: (1) The creation of a protected classification; and, (2) A prohibition against discrimination that is not otherwise present in “state law.” The language reads:

14-1-403. Prohibited conduct.

(a) A county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification *or prohibits discrimination on a basis not contained in state law.*

(b) *This section does not apply to a rule or policy that pertains only to the employees of a county, municipality, or other political subdivision.*

2015 Ark. Acts 137 § 1 (emphasis added).

Nothing in the proposed ordinance creates a protected classification of individuals. The issue is whether state law already prohibits discrimination for the reasons listed in the proposed ordinance. It does. Because state law already prohibits each kind of discrimination contained in the proposed ordinance, then the proposed ordinances does not violate the plain words of the Act.

The kinds of discrimination the proposed ordinance would prohibit are:

1. Race;
2. Color;

³ Because the Act applies only to intrastate commerce, any interstate commerce aspect of the ordinance is not under question. Still, as demonstrated in the opinion, provisions of Article II of the Arkansas Constitution, as well as various Arkansas statutes in existence, and the 14th Amendment to the U.S. Constitution clearly establish that the City’s ordinance would not violate the provisions of the Act.

3. Creed;
4. Religion;
5. Sex;
6. National origin;
7. Age;
8. Disability;
9. Marital status;
10. Sexual orientation;
11. Gender Identity; and,
12. Genetic information.⁴

Race and color are expressly protected in the 1874 Arkansas Constitution:

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of *race, color* or previous conditions.

Article II, § 3, ARK. CONST. In addition to race, religion, national origin, gender, and disability are expressly protected in the Arkansas Civil Rights Act.

The right of an otherwise qualified person to be free from discrimination because of *race, religion, national origin, gender*⁵, or the presence of any sensory, mental, or physical *disability* is recognized as and declared to be a civil right.

Ark. Code Ann. § 16-123-107 (a) (West 2013). Marital status, as part of the broader term “familial status” is referenced in the Arkansas Fair Housing Act.

The opportunity to obtain housing, and other real estate, without discrimination because of *religion, race, color, national origin, sex, disability*, or familial status, as prohibited by this chapter, is recognized and declared to be a civil right.

⁴ In the quotations from state law that follows this list, the words contained in the list are in italics.

⁵ For purposes of this provision, “[b]ecause of gender,” means, *but is not limited to*, on account of pregnancy, childbirth, or related medical conditions.” Ark. Code Ann. § 16-123-102 (1) (West 2013) (emphasis added).

Ark. Code Ann. § 16-123-203 (a) (West 2013). Age discrimination is prohibited in the state Age Discrimination Act.

It shall be unlawful for a public employer to:

(1) Fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his her or compensation, terms, conditions, or privileges of employment because of the individual's *age*;

(2) Limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee because of the individual's *age*....;

Ark. Code Ann. § 21-2-203 (a) (1) (2) (West 2008). Discrimination by public agencies based upon a person's creed is expressly prohibited by state law:

(a) Every state agency shall include in its personnel manual a statement that discrimination by any officer or employee based upon *race, creed, religion, national origin, age, sex, or gender* shall constitute grounds for dismissal.

Ark. Code Ann. § 21-12-103 (West 2008). An employer's discrimination against a potential employee because of genetic information is prohibited. In fact, it is illegal under state law to even seek genetic information from a potential employee:

(a) An employer shall not seek to obtain or use a genetic test or *genetic information* of the employee or the prospective employee for the purposes of distinguishing between or discriminating against or restricting any right or benefit otherwise due or available to an employee or prospective employee.

(b) An employer shall not require a genetic test of or require *genetic information* from the employee or prospective employee for the purpose of distinguishing between or discriminating against or restricting any right or benefit otherwise available to an employee or prospective employee.

Ark. Code Ann. §11-5-403 (West 2014). State law already has specific provisions to prohibit discrimination based upon gender identity and sexual orientation.

(b) (1) "Attribute" means an actual or perceived personal characteristic including without limitation *race, color, religion, ancestry, national origin, socioeconomic status, academic status, disability, gender, gender identity, physical appearance, health condition, or sexual orientation.*

(2) "Bullying" means the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student or public school employee by a written, verbal, electronic, or physical act that may address an attribute of the other student, public school employee, or person with whom the other student or public school employee is associated and that causes or creates actual or reasonably foreseeable:

(A) Physical harm to a public school employee or student or damages to the public school employee's or student's property; or ...

(C) A hostile educational environment for one (1) or more students or public school employees due to the severity, persistence, or pervasiveness of the act....

Ark. Code Ann. § 6-18-514 (West Supp. 2015). As to sexual orientation, and marital status, state law again has a statute in place to prohibit such discrimination:

Every shelter shall: (1) Develop and implement a written nondiscrimination policy to provide services without regard to *race, religion, color, age, marital status, national origin, ancestry, or sexual preference;*

Ark. Code Ann. § 9-4-106 (1) (West 2009).

In addition, Arkansas law expressly permits the change of official birth records for transgender individuals:

(d) Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the individual's name has been changed, the certificate of birth of the individual shall be amended accordingly.

Ark. Code Ann. § 20-18-307(d) (West Supp. 2015). While this statute does not mention discrimination, it is clear that Arkansas does not limit sexual identity to that found at birth.⁶

In short, the proposed ordinance, which only lists types of discrimination that are already prohibited for one reason or another by state law,⁷ does not violate the Act. Since the state statutory or constitutional provisions quoted above are already in place, the argument that anything in the proposed ordinance violates state law, and therefore violates the Act, is easily dispatched. After all, “[t]o give the same words a different meaning for each category would be to invent a statute rather than interpret one.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2769 (2014), quoting with approval, *Clark v. Martinez*, 543 U.S. 371, 378 (2005). The City does not create any new form of discrimination in the proposed ordinance.

2. *The proposed ordinance complies with the Arkansas Constitution Equal Protection Clause.*

As already shown, the proposed ordinance does not list any type of discrimination that is not already a part of Arkansas law. A secondary question is whether the ordinance somehow violates the Equal Protection provision of the Arkansas Constitution. The general provision, more fully cited above, is that “[t]he equality of all persons before the law is recognized, and shall ever remain inviolate....” Article II, § 3, ARK. CONST. In terms of a local governmental interest to prohibit discrimination, what does this mean?

‘[I]f the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare . . . desire to harm a political unpopular group cannot constitute a *legitimate* governmental interest’ . . . *Government cannot avoid the strictures of equal protection simply be deferring to the wishes or objections of some fraction of the body politic.*

⁶ *Accord, Radtke v. Miscellaneous Drivers & Helpers Union*, 867 F.Supp.2d 1023, 1033 (D. Minn. 2012).

⁷ Sections 1 and 2 of the ordinance mandate that the City not discriminate on the basis of “political opinions and affiliation.” This particular requirement is not passed on to private businesses since it is clear that businesses, including corporations, are entitled to First Amendment rights:

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

Citizens United v. Federal Election Comm’n, 558 U.S. 310, 340 (2009).

Jegley v. Picado, 349 Ark. 600, 635, 80 S.W.3d 332, 352 (2002) (citations omitted)(first emphasis supplied)(second emphasis added). The general question in *Jegley* was whether it was proper to criminalize same sex consensual behavior. The Arkansas Supreme Court held that it was not, particularly when the same activities by heterosexual couples were not also criminalized.

The key to the equal protection argument is that the Court's statement effectively provides there is no governmental interest in using taxpayer revenues to fund entities or persons which wish to deny equal protection to some group. The desire to assure that the City revenues do not directly or indirectly support the denial of constitutional rights to the listed groups is the thrust of the proposed ordinance. A legislative body "cannot act, under the cloak of police power or public morality, arbitrarily to invade personal liberties of the individual citizen." *See Jegley*, 349 Ark. at 638, 80 S.W.3d at 353. Since a government cannot act in such a manner, the fact that the proposed ordinance merely states that the City will not act in such a manner, directly or indirectly, is certainly consistent with the Arkansas Constitution, i.e. state law.

3. *The proposed ordinance is consistent with federal interpretations on certain issues.*

Of the twelve practices prohibited in the proposed ordinance by entities that wish to contract with the City, only two – sexual orientation, gender identity – can even be said to raise a question about prohibited discrimination. Race, color, creed, religion, and national origin, have been standard prohibitions since the 13th, 14th, and 15th Amendments to the U.S. Constitution were ratified. The Equal Protection provision of the 1874 Arkansas Constitution, as demonstrated, contained similar protections.⁸

Sex discrimination became prohibited under federal law through Title VII of the Civil Rights Act of 1964.42 U.S.C. § 2000e. Age discrimination became prohibited through the Age Discrimination in Employment Act in 1967. 29 U.S.C. § 621, *et seq*; additional protections were offered in the Civil Rights Act of 1991. *See, e.g.*, 29 U.S.C. § 626(e). Disability discrimination was prohibited for projects that received federal funds with the Rehabilitation Act of 1973, and for state and local government projects in the Americans with Disabilities Act of 1991. 29 U.S.C. § 701, *et seq*; 42 U.S.C. § 12101, *et seq*. Genetic information became protected at the federal level by the Genetic Information Non-Discrimination Act of 2008. 42 U.S.C. § 2000ff, *et seq*.

In terms of sex discrimination, this prohibition does not apply merely to the fact that a person is male or female. For example, the U.S. Supreme Court has expressly held that sexual stereotyping

⁸ Indeed, Arkansas was one of the first formerly Confederate states to ratify the 13th Amendment after the close of the Civil War. JAMES MCPHERSON, *Battle Cry of Freedom* at 840 (Oxford, 1988).

is prohibited under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). “Such stereotypical attitudes violate Title VII if they lead to an adverse employment decision.” *Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033, 1038 (2010). The Eighth Circuit has cited with approval a federal case from the Sixth Circuit that found sex discrimination under Title VII when a firefighter, who wished to identify as female, was targeted for termination because he wished “to express a more feminine appearance.” *Id.*, quoting *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568 (6th Cir. 2004). Adverse employment decisions “based on ‘gender non-conforming behavior and appearance’ [are] impermissible under *Price Waterhouse*.” *Lewis*, 591 F.3d at 1039.

At present, the U.S. Department of Labor is seeking comments on proposed rule changes for the Office of Federal Compact Compliance Programs to assure that Executive Order 13672 (July 21, 2014), is properly implemented. The Executive Order specifically prohibits discrimination on the basis of sexual orientation in federal contracting, which means for contracts that involve the expenditure of federal funds. The Notice of Proposed Rulemaking (NPRM) was issued earlier this year. 80 Fed. Reg. 5246-5279 (January 30, 2015). Not only was the NPRM issued because of the Executive Order, but also because current federal guidelines were woefully out of date and did not take account of changes in federal law, or federal court decisions.⁹

4. *The proposed ordinance does not require action by any business in Arkansas.*

The proposed ordinance does not require any business, or individual, in Arkansas to take any affirmative act. There is no requirement that any business within the City adopt any personnel policy because of this ordinance. Instead, the ordinance states that discrimination for certain reasons is not allowed, and that if a company wishes to vie for a contract with the City, it must follow the very policies the City follows. In short, the proposed ordinance would define an aspect of a “responsive” bidder in a price bid, and a “qualified” bidder in a services bid, as one that adhered to the City’s requirements against discrimination, and were willing to execute a document to that effect.

CONCLUSION

The proposed ordinance does not violate Arkansas law, specifically Act 137 of 2015, because every prohibition against discrimination named is already named somewhere in state law. Further, the proposed ordinance is consistent with interpretation by the Arkansas

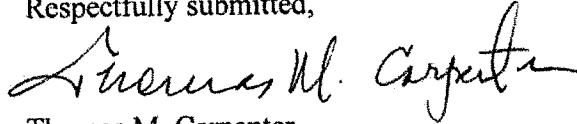
⁹ These changes included the amendment to Title VII of the Civil Rights Act to Prohibit Sex Discrimination on the Basis of Pregnancy; the Lily Ledbetter Fair Pay Act of 2009; the Family Medical Leave Act of 1993; and cases that identify sexual harassment such as *City of Los Angeles v. Manhart*, 435 U.S. 702 (1976); and same sex harassment such as *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998). See 80 Fed. Reg. 5246, 5249 and nn. 18-23.

OFFICE OF THE CITY ATTORNEY

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Supreme Court of the Equal Protection clause of the Arkansas Constitution. Finally, the proposed ordinance is also in conformity with federal law and regulations that bar discrimination.

Respectfully submitted,



Thomas M. Carpenter
City Attorney

TMC:ct

- cc. Mayor Stodola and Members of the Board of Directors (via email)
- Bruce T. Moore, City Manager (via email)
- James E. Jones, Assistant City Manager (via email)
- William C. Mann, III, Chief Deputy City Attorney (via email)
- Bonnie Engster, Law Office Coordinator