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City of Fayetteville, Arkansas

Text File

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UNIFORM CIVIL RIGHTS PROTECTION

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

WHEREAS, federal laws including the Civil Rights Act (42 U.S.C § 2000e, et seq.), the Arkansas Civil Rights Act of 1993 (A.C.A. § 16-123-101 et seq.) and the Arkansas Fair Housing Act (A.C.A. § 16-123-201 et seq.) provide Fayetteville citizens with protections against discrimination on the basis of race, ethnicity, national origin, age, sex, religion and disability; and

WHEREAS, the General Assembly has determined that attributes such as "gender identity" and "sexual orientation" require protection {A.C.A. § 6-18-514 (b)(1)}; and

WHEREAS, Fayetteville citizens deserve fair, equal and dignified treatment under the law; and

WHEREAS, Fayetteville seeks to attract a diverse and creative workforce by promoting itself to prospective businesses and employees as a fair, tolerant and welcoming community; and

WHEREAS, the protected classifications in A.C.A. § 6-18-514 (b)(l) for persons on the basis of gender identity and sexual orientation should also be protected by the City of Fayetteville to prohibit those isolated but improper circumstances when some person or business might intentionally discriminate against our gay, lesbian, bisexual and transgender citizens; and

WHEREAS, in response to the concerns recently expressed by the citizens of Fayetteville on a similar issue, the Fayetteville City Council recognizes their interest in participating in the democratic process and invites the citizens to decide whether gender identity and sexual orientation should also be protected by the City of Fayetteville.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1. That the City Council of the City of Fayetteville, Arkansas hereby refers this ordinance to the Fayetteville voters for their enactment or rejection in a Special Election to be held on September 8, 2015. The operative provisions that will be enacted by Fayetteville citizens into the Fayetteville Code if approved by a majority of Fayetteville citizens voting in the election shall be as follows:

"**Uniform Civil Rights Protection**

Purpose

Fayetteville is a welcoming, fair and tolerant city which endeavors to ensure that all of its citizens and visitors will be free from unfair discrimination. Since Federal and State law already protect citizens from most discrimination, the **Uniform Civil Rights Protection** Article shall extend existing protections to lesbian, gay, bisexual, and transgender citizens and visitors as recognized elsewhere in state law.

Definitions

(A) *"Employee"*. This definition adopts and incorporates herein the definition of "Employee" as stated in the Arkansas Civil Rights Act of 1993, A.C.A. § 16-123-102 (4).

(B) *"Employer"*. This definition adopts and incorporates herein the definition of "Employer" as stated in the Arkansas Civil Rights Act of 1993, A.C.A. § 16-123-102 (5).

(C) *"Gender Identity"* means an individual's own, bona fide sense of being male or female, and the related external characteristics and behaviors that are socially defined as either masculine or feminine. Gender identity may or may not correspond to the sex assigned to the individual at birth.

(D) *"Housing accommodation"*. This definition adopts and incorporates herein the definition of "Housing accommodation" as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (1).

(E) *"Place of public resort, accommodation, assemblage or amusement"*. This definition adopts and incorporates herein the definition of "Place of public resort, accommodation, assemblage or amusement" as stated in the Arkansas Civil Rights Act of 1993, A.C.A. § 16-123-102 (7). Furthermore, this shall not mean any religious facility or other religious institution including their owned and operated schools and daycare facilities.

(F) *"Real estate broker or salesman"*. This definition adopts and incorporates herein the definition of "Real estate broker or salesman" as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (2).

(G) *"Real estate transaction"*. This definition adopts and incorporates herein the definition of "Real estate transaction" as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (3).

(H) *"Real property"*. This definition adopts and incorporates herein the definition of "Real property" as stated in the Arkansas Fair Housing Act of 1993, A.C.A. § 16-123-202 (4).

(I) *"Sexual Orientation"* means heterosexuality, homosexuality or bisexuality by practice, identity or expression.

Applicability and Exemptions

(A) The **Uniform Civil Rights Protection Article** is only applicable to discriminatory actions occurring within the Fayetteville city limits.

(B) This Article adopts and incorporates herein the entirety of AC.A. § 16-123-103 **Applicability** of the Arkansas Civil Rights Act.

(C) Churches, religious schools and daycare facilities, and religious organizations of any kind shall be exempt from this Article.

Discrimination Offense

(A) The right of an otherwise qualified person to be free from discrimination because of sexual orientation and gender identity is the same right of every citizen to be free from discrimination because of race, religion, national origin, gender and disability as recognized and protected by the Arkansas Civil Rights Act of 1993.

(B) The **Uniform Civil Rights Protection Article** adopts and incorporates herein these rights as quoted below:

(1) The right to obtain and hold employment without discrimination;

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(3) The right to engage in property transactions (including sales and leases) without discrimination;

(4) The right to engage in credit and other contractual transactions without discrimination; and

(5) The right to vote and participate fully in the political process.

(C) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of sexual orientation or gender identity engage in any conduct likewise prohibited by A.C.A. § 16-123-204 **Prohibited Acts** of the Arkansas Fair Housing Act on the basis of other enumerated attributes.

(D) No employer shall discriminate against nor threaten any individual because such individual in good faith has opposed any act or practice made unlawful by this section or because such person in good faith made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing related to the **Uniform Civil Rights Protection** Article.

Establishment and Duties of a Civil Rights Commission

There is hereby established the Civil Rights Commission. The Civil Rights Commission shall review and decide complaints of alleged discrimination in violation of the **Uniform Civil Rights Protection** Article. The Commission will provide to the City Council an annual accounting of the number of complaints received and the outcomes.

Composition

(A) The Civil Rights Commission shall consist of seven members composed of the following:

(1) Two (2) representatives of the business community;

(2) Two (2) owners or managers of rental property;

(3) One (1) representative with experience in Human Resources or employment law;

(4) Two (2) citizens at large, at least one of whom identifies as gay, lesbian, bisexual, or transgender.

(B) Members will be appointed by the City Council, each for a term of three years. Appointments shall be staggered so that each year either two or three members' terms shall be available for appointment by the Nominating Committee.

(C) Members of the Civil Rights Commission may be removed from office by the City Council for cause upon written charges and after a public hearing.

Meetings

(A) The Civil Rights Commission shall meet for an organizational meeting within 60 days after the citizens enact this ordinance and every year thereafter following the appointment of new members.

(B) Meetings shall be held at the call of the chairperson.

(C) A majority of the membership of the Civil Rights Commission shall constitute a quorum.

(D) All meetings shall be open to the public.

(E) The Civil Rights Commission shall adopt rules necessary to the conduct for its affairs, and in keeping with the provisions of the City's **Uniform Civil Rights Protection** Article.

Staff Support

The City Attorney's office shall receive complaints on behalf of the Civil Rights Commission and assist the Commission in performing its duties and carrying out its responsibilities.

Complaint Procedure and Enforcement

(A) A person asserting a claim of discrimination, herein referred to as the “Complainant”, pursuant to this **Uniform Civil Rights Protection** Article must present such claim in writing to the City Attorney's office no more than ninety (90) days after the person has knowledge of the facts giving rise to the claim of discrimination. The City Attorney's office will, within two (2) business days, notify the Civil Rights Commission that a complaint was received.

(B) Informal mediation or conciliation between the alleged discriminator, herein referred to as the “Respondent”, and Complainant shall be attempted by the City within four business days and before any

other enforcement measures can begin. Such mediation or conciliation measures shall be pursued in accordance with the confidentiality protections provided by A.C.A § 16-7-2-6. Mediation and conciliation should be concluded within two weeks after the complaint is received unless both parties agree to further efforts.

(C) If conciliation efforts are successful in resolving the complaint, the Civil Rights Commission will be notified of resolution and take no further action.

(D) If conciliation efforts fail to resolve the complaint, the Civil Rights Commission shall notify both parties that a hearing will be conducted at a specified place and time not more than fourteen (14) business days after the conclusion of conciliation efforts but not less than five (5) business days after issuance of notice of the hearing.

(E) Conduct of the Hearing:

(1) The Civil Rights Commission shall review the initial complaint and may receive any additional evidence from the Complainant.

(2) The Respondent shall have an opportunity to explain or provide evidence to rebut any allegations of illegal discriminatory acts. No person shall be compelled to be a witness against himself in any formal or informal hearing.

(3) After considering all the evidence presented, if the Civil Rights Commission determines that the Respondent has violated this Article, the Commission shall forward the original claim and their findings to the City Prosecutor.

(F) Penalty:

(1) A person's first violation of this ordinance shall carry a penalty of up to a $100.00 fine. Fayetteville City Code § 10.99 **General Penalty** shall apply to any subsequent violations.

(2) No violation of this Article shall be construed to be a misdemeanor or felony.

Severability

If any part, provision or section of this ordinance is held invalid or unconstitutional it shall be severed from the remainder which shall remain valid and enforceable."

Section 2. That the City Council for the City of Fayetteville, Arkansas hereby determines that if the Fayetteville voters fail to approve the referred ordinance, the ordinance will not go into effect; but if the voters approve the ordinance, the ordinance quoted in Section 1 will be enacted into the Fayetteville Code and become effective sixty (60) days after the approving election.

Legistar ID No.: 2015-0274

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:

Adella Gray
City Council Member Adella Gray

6-3-15
Date

Legistar ID No.: 2015-0274

AGENDA REQUEST FORM

FOR: Council Meeting of June 16, 2015

FROM:
City Council Member Adella Gray
City Council Member Matthew Petty

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 — Date

City Council Member Matthew Petty — Date 6-3-2015

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
Little Rock, Arkansas 72201

Thomas M. Carpenter
City Attorney

Telephone (501) 371-4527
Telefacsimile (501) 371-4675

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.

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[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

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[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;

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[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.

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[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.*

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[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

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[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 th 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

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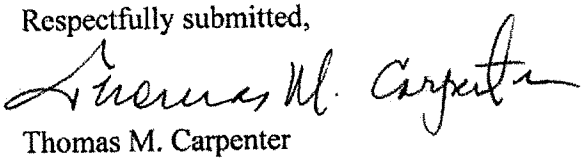
[9] These changes included the amendment to Title VII of the Civil Rights Act to Prohibit Sex Discrimination on the Basis of Pregnancy; the Lily Ledbetter Fair Pay Act of 2009; the Family Medical Leave Act of 1993; and cases that identify sexual harassment such as City of Los Angeles v. Manhart, 435 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.

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)
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