



OFFICE OF THE  
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



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TO: Mayor

CC: City Council

FROM: Kit Williams, City Attorney

DATE: December 12, 2014

RE: Calls for new Anti-discrimination ordinance

**The Need For A Fayetteville Civil Rights  
Protection Ordinance**

I was surprised that potential revisions of the Chapter 119 **Civil Rights Administration** ordinance were presented so soon after the voters repealed it in a close, hard fought campaign. I think an attempted revision of Chapter 119 is ill-advised and presents legal concerns about whether a super majority of Aldermen would be needed to pass a modified version. However, the City Attorney's Office will continue to assist the Mayor and any Alderman in drafting any Ordinance or Resolution that they desire.

On the other hand, I am elected directly by the Fayetteville citizens and my primary duty must be our citizens first. Fayetteville voters were closely divided on the **Civil Rights Administration** ordinance and a rehash of that ordinance would not likely end the divisiveness and bring consensus. I believe the City and its citizens will best be served by an ordinance that is accepted and endorsed not by a slim majority of citizens, but by a large consensus. Therefore, I will present a brand new anti-discrimination ordinance that would be much shorter, more focused and clearer than the version revised down from the draft provided by the Human Rights Campaign. I believe that Fayetteville should draft its own

anti-discrimination ordinance and incorporate a lot of the definitions and wording from the **Arkansas Civil Rights Act of 1993**. This Civil Rights Act was designed, debated and approved by the Arkansas Senate, the Arkansas House of Representatives and the Governor in 1993, and its definitions and provisions have stood the test of time for over 20 years.

My recommendation as City Attorney has always been that ordinances should be closely directed at whatever actual problem that the City Council believes needs remedying. **An ordinance should be "laser focused" on the real problem** rather than too broadly applicable which is comparable to firing a shotgun into the cloud of issues which can create confusion, conflicting laws and unintended consequences.

It cannot be disputed that federal laws including the Civil Rights Act provide many minority or discriminated against groups protection from much discrimination. The **Arkansas Civil Rights Act of 1993** also provides anti-discrimination protections. Fayetteville citizens are protected against discrimination on the basis of race, ethnicity, national origin, age, sex, religion, and disability. Active duty military and veterans not only have protection, but in some cases preference to honor their service.

Transgender persons have been accorded protection from discrimination pursuant to Title VII of the Federal Civil Rights Act of 1964 or the Equal Protection of the Laws clause.

*"In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination....Six members of the Supreme Court agreed that such comments were indicative of gender discrimination and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping--failing to act and appear according to expectations defined by gender....A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes....Accordingly, discrimination against a*

transgender individual because of her gender-nonconformity is sex discrimination...." *Glenn v. Brumby*, 663 F.3d 1312, 1316-1317 (11<sup>th</sup> Cir. 2011) (some citations omitted; emphasis added); *Accord, Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1<sup>st</sup> Cir. 2000); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6<sup>th</sup> Cir. 2005); See, *Lewis v. Heartland Inns of America*, 591 F.3d 1033 (8<sup>th</sup> Cir. 2009).

Thus, only gay and lesbian Fayetteville citizens can face discrimination that no other citizen would be subjected to without any legal protections. Accordingly, my draft of an anti-discrimination ordinance is focused to protect Fayetteville's only unprotected citizens and does not include any reference to discrimination already addressed by other Civil Rights laws.

### **The Source For Definitions And Language To Protect Against Discrimination**

As I stated earlier, rather than relying upon a "model ordinance" from a national group with little knowledge or understanding of Arkansas law and Fayetteville history, I believe we should apply the existing applicable definitions and provisions of the **Arkansas Civil Rights Act of 1993** for the protection of our gay and lesbian friends, neighbors and co-workers. In place for over 20 years, the definitions and provisions of the **Arkansas Civil Rights Act** should now be well known, accepted and understood and some have already received judicial scrutiny and interpretation. At 21 years of age, the **Arkansas Civil Rights Act** is now an "adult", well-seasoned and tested law. I believe it is a preferable model than one received from a Washington, D.C. special interest group.

I incorporated exactly the definitions of "*Employee*", "*Employer*", "*Religion*" and "*Place of public resort, accommodation, assemblage or amusement*" from the **Arkansas Civil Rights Act**. I added a single sentence to the last definition of public accommodation: "Furthermore, this shall not mean any religious facility including churches and similar facilities and including their owned and operated schools and day care facilities."

I then included the fairly long A.C.A. § 16-123-103 **Applicability** statute which limits the reach of the **Arkansas Civil Rights Act** and also limits this proposed Fayetteville Civil Rights Protection ordinance. Churches are basically exempted from employment regulations and this statute also provides other protections for businesses.

I took most of the wording from A.C.A. § 16-123-107 **Discrimination offenses** which would now apply in Fayetteville for discrimination against a gay or lesbian citizen. I also used much of the language in A.C.A. § 16-123-108 **Retaliation** to protect persons from retaliation or threats for good faith reports of discrimination.

I ended the ordinance with a requirement for mediation and conciliation with a referral for a possible revocation of a person's business license for a person who will not refrain from continuing illegal discrimination. No new position of Civil Rights Administrator would be created. No new committee or commission is created by this ordinance. Like most non development ordinances, its enforcement is statutorily left to the Mayor. "The mayor of the city shall be its chief executive officer and...(i)t shall be his or her special duty to cause the ordinances and regulations of the city to be faithfully and constantly obeyed." A.C.A. § 14-43-504 **Powers and duties of mayor generally**. The mayor can assign this task to any employee.

### **Conclusion**

As a heterosexual who does not discriminate against homosexuals, I assumed there really was not a problem with discrimination against gay or lesbian people in Fayetteville before the marathon City Council meeting opened my eyes. Fayetteville is a wonderfully tolerant and accepting City, but for the rare occasions when the sting of discrimination lashes out against our gay and lesbian friends, neighbors, and co-workers, we should have a simple and straightforward ordinance that places Fayetteville on the side of equality, justice, love and inclusion. I hope the ordinance attached to this memo will unite Fayetteville in freedom and fairness.

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE TO PROVIDE CIVIL RIGHTS PROTECTION TO  
FAYETTEVILLE CITIZENS AND WORKERS WHO ARE NOT ALREADY  
PROTECTED BY FEDERAL OR STATE CIVIL RIGHTS LAWS**

**WHEREAS**, federal laws including the Civil Rights Act (42 U.S.C. § 1983, et seq.) and the Arkansas Civil Rights Act of 1993 (A.C.A. § 16-123-101 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 several Federal Circuit Courts of Appeals have affirmed that Title VII of the Civil Rights Act or the Equal Protection of the laws clause bars discrimination against transgender persons. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11<sup>th</sup> Cir. 2011), *Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1<sup>st</sup> Cir. 2000); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6<sup>th</sup> Cir. 2005); See *Lewis v. Heartland Inns of America*, 591 F.3d 1033 (8<sup>th</sup> Cir. 2009); and

**WHEREAS**, our gay and lesbian friends, neighbors and co-workers lack the same civil rights protections that all other Fayetteville citizens enjoy; and

**WHEREAS**, Fayetteville is a fair, tolerant and welcoming community with little discrimination against our gay and lesbian citizens; and

**WHEREAS**, Fayetteville should adopt reasonable regulations to prohibit those rare circumstances when some person or business might intentionally discriminate against our gay and lesbian citizens.

**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 enacts Article III **Civil Rights Protection** in Chapter 39 **City Policies** of the Fayetteville Code as shown below:

## “Article III Civil Rights Protection

### § 39.20 Purpose

Fayetteville is a welcoming, fair and tolerant city which endeavors to ensure that all of its citizens, including its gay and lesbian citizens, will be free from unfair discrimination. Since federal and state law already protect citizens from most discrimination, the **Civil Rights Protection** Article shall fill in the protection from discrimination gap by equally protecting gay and lesbian citizens from discrimination in Fayetteville.

### § 39.21 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) “*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 including churches and similar facilities and including their owned and operated schools and daycare facilities.
- (D) “*Religion*”. This definition means all aspects of religious belief, observance and practice.

### § 39.32 Applicability

The **Civil Rights Protection** Article is only applicable to discriminatory actions occurring within the Fayetteville city limits. Furthermore, this Article adopts and incorporates herein the entirety of A.C.A. § 16-123-103 **Applicability** of the Arkansas Civil Rights Act.

### § 39.33 Discrimination Offenses

- (A) The right of an otherwise qualified person to be free from discrimination because he or she is gay or lesbian 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 **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) No person 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 Article III **Civil Rights Protection**.

§ 39.34 **Conciliation and mediation**

(A) Any claim of discrimination brought pursuant to this Article III **Civil Rights Protection** must be presented to the City no more than one month after the most recent alleged discrimination offense occurred.

(B) Mediation between the alleged discriminator and victim shall be attempted before any other enforcement measures can begin.

(C) If mediation is unsuccessful and it appears the person has a Fayetteville Business License and will not refrain from illegal discrimination, the case will be forwarded to the Director of Development Services for potential revocation of the person’s Fayetteville Business License pursuant to § 118.03 (A)(4) of the Fayetteville Code.

**PASSED** and **APPROVED** this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**SONDRA E. SMITH**, City Clerk/Treasurer

**16-123-101. Title.**

This subchapter shall be referred to as the "Arkansas Civil Rights Act of 1993".

**§ 16-123-102. Definitions.**

For the purposes of this subchapter:

(1) "Because of gender" means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions;

(2) "Compensatory damages" means damages for mental anguish, loss of dignity, and other intangible injuries, but "compensatory damages" does not include punitive damages;

(3) "Disability" means a physical or mental impairment that substantially limits a major life function, but "disability" does not include:

(A) Compulsive gambling, kleptomania, or pyromania;

(B) Current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs; or

(C) Alcoholism;

(4) "Employee" does not include:

(A) Any individual employed by his or her parents, spouse, or child;

(B) An individual participating in a specialized employment training program conducted by a nonprofit sheltered workshop or rehabilitation facility; or

(C) An individual employed outside the State of Arkansas;

(5) "Employer" means a person who employs nine (9) or more employees in the State of Arkansas in each of twenty (20) or more

calendar weeks in the current or preceding calendar year, or any agent of such person;

(6) "National origin" includes ancestry;

(7) "Place of public resort, accommodation, assemblage, or amusement" means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, but "place of public resort, accommodation, assemblage, or amusement" does not include:

(A) Any lodging establishment which contains not more than five (5) rooms for rent and which is actually occupied by the proprietor of such establishment as a residence; or

(B) Any private club or other establishment not in fact open to the public; and

(8) "Religion" means all aspects of religious belief, observance, and practice.

**§ 16-123-103. Applicability.**

(a) The provisions of this subchapter relating to employment shall not be applicable with respect to employment by a religious corporation, association, society, or other religious entity.

(b) It shall not constitute employment discrimination under this subchapter for an employer to refuse to accommodate the religious observance or practice of an employee or prospective employee if the employer demonstrates that he is unable to reasonably make such accommodation without undue hardship on the conduct of the employer's business.

(c) A defendant may avoid liability under this subchapter by showing that his or her actions



were based on legitimate, nondiscriminatory factors and not on unjustified reasons.

(d) Provided the conduct at issue is based on a bona fide business judgment and is not a pretext for prohibited discrimination, nothing in this subchapter shall be construed to prohibit or restrict:

(1) An insurer, hospital, medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or any bank, savings and loan, or other lender from underwriting insurance or lending risks or administering such risks that are based on or are not inconsistent with federal or state law;

(2) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or are not inconsistent with federal or state law; or

(3) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that is not subject to federal or state laws that regulate insurance.

(e) This subchapter shall not apply to matters regulated by the Arkansas Insurance Code or the Trade Practices Act of the Arkansas Insurance Code, § 23-66-201 et seq.

#### **§ 16-123-107. Discrimination offenses.**

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

a civil right. This right shall include, but not be limited to:

(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 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.

(b) Any person who is injured by an intentional act of discrimination in violation of subdivisions (a)(2)-(5) of this section shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover compensatory and punitive damages, and, in the discretion of the court, to recover the cost of litigation and a reasonable attorney's fee.

(c) (1) (A) Any individual who is injured by employment discrimination by an employer in violation of subdivision (a)(1) of this section shall have a civil action in a court of competent jurisdiction, which may issue an order prohibiting the discriminatory practices and provide affirmative relief from the effects of the practices, and award back pay, interest on back pay, and, in the discretion of the court, the cost of litigation and a reasonable attorney's fee.

(B) No liability for back pay shall accrue from a date more than two (2) years prior to the filing of an action.

**(2) (A)** In addition to the remedies under subdivision (c)(1)(A) of this section, any individual who is injured by intentional discrimination by an employer in violation of subdivision (a)(1) of this section shall be entitled to recover compensatory damages and punitive damages. The total compensatory and punitive damages awarded under this subdivision (c)(2)(A) shall not exceed:

**(i)** The sum of fifteen thousand dollars (\$15,000) in the case of an employer who employs fewer than fifteen (15) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

**(ii)** The sum of fifty thousand dollars (\$50,000) in the case of an employer who employs more than fourteen (14) and fewer than one hundred one (101) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

**(iii)** The sum of one hundred thousand dollars (\$100,000) in the case of an employer who employs more than one hundred (100) and fewer than two hundred one (201) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

**(iv)** The sum of two hundred thousand dollars (\$200,000) in the case of an employer who employs more than two hundred (200) and fewer than five hundred one (501) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year; and

**(v)** The sum of three hundred thousand dollars (\$300,000) in the case of an employer who employs more than five hundred (500) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year.

**(3)** Any action based on employment discrimination in violation of subdivision (a)(1) of this section shall be brought within one (1) year after the alleged employment discrimination occurred, or within ninety (90) days of receipt of a "Right to Sue" letter or a notice of "Determination" from the United States Equal Employment Opportunity Commission concerning the alleged unlawful employment practice, whichever is later.

**§ 16-123-108. Retaliation -- Interference - Remedies.**

**(a) Retaliation.** No person shall discriminate against any individual because such individual in good faith has opposed any act or practice made unlawful by this subchapter or because such individual in good faith made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

**(b) Interference, Coercion, or Intimidation.** It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this subchapter.

**(c) Remedies and Procedures.** The remedies and procedures available in § 16-123-107(b) shall be available to aggrieved persons for violations of subsections (a) and (b) of this section.