

THURSDAY, APRIL 18, 1985

LAW & LEGISLATIVE COMMITTEE

2:00 P.M.

City Council Chambers
915 I Street
Sacramento, CA

SUBJECT: 1. Ord. relating to prohibition of discrimination on the basis of
sexual orientation

COMMITTEE MEMBERS: Douglas Pope (Chair), David Shore, Bill Smallman, Lynn
Robie



CITY OF SACRAMENTO

DEPARTMENT OF LAW

812 TENTH STREET
SUITE 201

SACRAMENTO, CA 95814
TELEPHONE (916) 449-5346

March 21, 1985

JAMES P. JACKSON
City Attorney
THEODORE H. KOBAY, JR.
Assistant City Attorney
SAMUEL L. JACKSON
WILLIAM P. CARNAZZO
LAWRENCE M. LUNARDINI
DIANE B. BALTER
RICHARD F. ANTOINE
Deputy City Attorneys

City Council
Law and Legislation Committee
Sacramento, California 95814

Re: Ordinance Relating to Discrimination on
the Basis of Sexual Orientation

Honorable Members in Session:

Summary

On March 5, 1985, the attached ordinance was presented to the City Council by the Sacramentans for Justice and was referred to this committee for hearing.

This ordinance prohibits discrimination on the basis of sexual orientation (sometimes referred to herein simply as "discrimination") in the following areas: employment, businesses, real estate transactions, City facilities and services, and educational institutions. The ordinance is discussed in more detail below.

Discussion

The ordinance's salient points are:

1. Employment (§14.101)

(a) Persons covered by the ordinance: All employers with more than five employees (including the owner and any management and supervisory employees), all employment agencies, and all labor organizations.

(b) Conduct prohibited: Discrimination in hiring and termination decisions on the basis of sexual orientation. It also prohibits discrimination with respect to compensation, terms, conditions, or privileges of employment, including promotion; or to 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.

Employment agencies cannot discriminate based on sexual orientation in referring for employment any individual. Labor organizations are prohibited from discriminating in granting

membership, and may not limit, segregate or classify their memberships in any way which would deprive homosexual individuals of employment opportunities. Nor may the labor organizations limit the employment opportunities of their members or otherwise affect the status of those members as employees or as applicants for employment.

Finally, no employer, employment agency or labor organization may discriminate against individuals in providing training programs, nor may they advertise that their training programs will discriminate against persons based on sexual orientation.

The ordinance provides that it shall not be an unlawful discriminatory practice for an employer to observe the conditions of a bona fide employee seniority or benefit system, provided such systems or plans are not a subterfuge to evade the provisions of the ordinance.

(c) Required Conduct: The ordinance requires that every employer with fifteen (15) or more employees, every labor organization with fifteen (15) or more members, and every employment agency must post and keep posted in every place upon its premises where notices to employees, applicants for employment, and members are customarily posted, a notice to the effect that discrimination on the basis of sexual orientation is prohibited by law. It is further required that such notice must cite that this prohibition comes from Chapter 14 of the Sacramento City Code.

As an alternative to that requirement, the affected employers, labor organizations, and employment agencies may simply add the words "sexual orientation" to all notices required by federal or state law.

2. Business Establishment (§14.102)

(a) Persons bound by the ordinance: "Any person" is bound by the provisions of this part of the ordinance.

(b) Prohibited conduct: In general, the ordinance prohibits discrimination in the provision of goods, services, facilities, privileges, advantages and accommodations of any business establishment on the basis of a client's sexual orientation. It further provides that persons covered by the provisions of this ordinance may not deny credit to any person on the basis of such person's sexual orientation. Finally, the ordinance provides that no business establishment may advertise that it engages in or will engage in any discrimination against persons based on sexual orientation.

3. Real Estate (§14.103)

(a) Persons covered by the ordinance: The ordinance generally covers "any person". However, the ordinance does not apply to the rental or leasing of any housing unit in which the

owner or lessor, or any member of his or her family, occupies one of the living units, and it is necessary for the owner or lessor to use either a bathroom or kitchen facility in common with the prospective tenant.

(b) Prohibited conduct: The ordinance provides that it shall be an unlawful real estate practice for any person to engage in any of a listed set of acts wholly or partially based on sexual orientation. The list includes the following:

- °The termination, failure, or refusal to initiate or conduct any transaction in real property, including but not limited to rental;
- °To include in the terms or conditions of a transaction any clause, condition or restriction;
- °To falsely represent that an interest in real property is not available for a transaction;
- °To refuse to lend money, guarantee a loan, accept a deed of trust or mortgage, or otherwise refuse to make available funds for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of real property;
- °The imposition of different conditions on financing than would be present otherwise;
- °The refusal to provide title or other insurance relating to the ownership or use of any interest in real property;
- °The refusal or restricting of facilities, services, repairs or improvements for any tenant or lessee;
- °The making, printing, publishing, advertising, or dissemination in any way, any notice, statement or advertisement with respect to financing related to any such transaction which states that any unlawful real estate practice as listed above will be engaged in.

4. City Facilities and Services (\$14.104)

(a) Persons covered by the ordinance: The ordinance covers "any person".

(b) Conduct prohibited: The ordinance prohibits discrimination on the basis of sexual orientation in making available City services and facilities and City-supported services and facilities. It further prevents any City services and facilities and City-supported services and facilities from advertising that the service or facility will discriminate on the basis of sexual orientation.

5. Educational Institutions (§14.105)

(a) Persons covered by the ordinance: The ordinance covers "any person".

(b) Prohibited conduct: Discrimination with respect to admission, the provision of services or programs offered by educational institutions, and access to facilities owned or operated by an educational institution. It further provides that it is unlawful for educational institutions to advertise that they engage in or will engage in educational practices which discriminate on the basis of sexual orientation. Finally, the ordinance provides that it shall not be an unlawful discriminatory practice for a religious or denominational institution to limit admission or give other preferences to applicants of the same religion. The ordinance would not apply to public schools, colleges and universities.

6. Retaliation (§14.106): Retaliation against a person because that person seeks enforcement of the ordinance is prohibited.

7. Enforcement (§14.107, 14.108): Any person who violates any provision of the ordinance shall be liable for actual damages and costs to the individual or individuals whose rights are violated, and may, in the court's discretion, be responsible for attorney's fees for the other party. Injunctions against violations may also be sought. Criminal liability exists only for violation of the notice posting requirement of §14.101(c)(1).

8. Limitations on the Actions: The statute of limitations is one year and six months from the date which plaintiff knew or should have known of defendant's decision or action.

9. Non-Waiverability: the ordinance includes a provision which prohibits the contractual waiver or modification of any provision of the ordinance.

The ordinance prohibits discrimination based on sexual orientation in private employment, which is not currently prohibited by State law. AB1 (Agnes) of 1984 would have prohibited this, but this was vetoed by the Governor. The ordinance does cover certain areas already covered either by State law, principles of constitutional law, or existing City policy. In summary:

1. City Employment: Discrimination is prohibited under principles of constitutional law. Gay Law Students Association v. Pacific Telephone and Telegraph Co. (1979) 24 C. 3d 458, 4657. In addition, the City's existing policy on equal employment opportunity prohibits discrimination based on sexual orientation.

2. Business Establishments and Real Estate Transactions: Discrimination is prohibited by the Unruh Civil Rights Act ("Act"), California Civil Code §§51, et seq.). The Act does not define a

business establishment, but courts have given a very broad construction to the term. Curran v. Mt. Diablo Council of Boy Scouts (1983) 147 C.A. 3d 712, 729-30, which held that Boy Scouts was a "business establishment" within the Act's prohibition against discrimination and that the prohibition included discrimination based on homosexuality (Id., at pp 733-34). Discrimination in the rental of housing is also prohibited by the Act. Hubert v. Williams (1982) 133 C.A. 3d, Supp. 1. The Act allows for suits for actual and punitive damages, injunctions, and attorney's fees. There is no criminal liability for violating the Act.

The ordinance allows for attorney's fees (discussed below) and does provide that failure to post notices that discrimination is prohibited is an infraction.

The ordinance provision allowing attorney's fees causes us concern. While it is not entirely clear, we believe it is preempted by State law. Section 1021 of the California Civil Code provides:

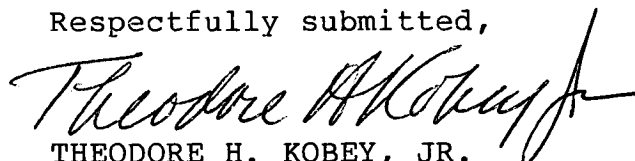
1021. Attorney's fees, determination by agreement; right to costs and disbursements

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided. (emphasis supplied)

The above language, when coupled with the fact that there are nearly 150 State statutes which allow attorney's fees (CEB California Attorney's Fees Awards Practice, 1982 and supplement 1984) evidences a legislative intent to preempt the field of providing for attorney's fees. A holding that the attorney's fees provision is invalid because it is preempted by State law could have an unanticipated serious financial effect of a successful plaintiff or his or her attorney.

San Francisco, Los Angeles, Berkeley and Laguna Beach have adopted ordinances very similar to this ordinance. Oakland has also adopted an ordinance which is somewhat similar.

Respectfully submitted,



THEODORE H. KOBAY, JR.
Assistant City Attorney

THK/jmv

AT 3-5-85

CITY COUNCIL MEETING

ORDINANCE ADDING CHAPTER 14 TO THE
SACRAMENTO CITY CODE RELATING TO THE
PROHIBITION OF DISCRIMINATION ON
THE BASIS OF SEXUAL ORIENTATION

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1. Chapter 14 is hereby added to the Sacramento City Code to read as follows:

CHAPTER 14. DISCRIMINATION ON THE
BASIS OF SEXUAL ORIENTATION

Sec. 14.100. Definitions. As used in this chapter, the following words and phrases shall have the meaning given them in this section, unless the context clearly requires otherwise:

- (a) Business establishment: Any entity, however organized, which furnishes goods, services or accommodations to the general public.
- (b) Educational Institution: Any entity which provides instruction to individuals.
- (c) Individual: A natural person.
- (d) Person: As used in this chapter, the term "person" shall mean any natural person, firm, corporation, partnership, or other organization, association or group of persons however organized.
- (e) Sexual Orientation. As used in this chapter, the term "sexual orientation" means actual or supposed heterosexuality, homosexuality, or bisexuality.

Sec. 14.101. Employment.

- (a) Unlawful Employment Practices. It shall be an unlawful employment practice for any person to do any of the following acts

wholly or partially based on sexual orientation of an employee or applicant for employment, unless based on a bona fide occupational qualification:

(1) No employer shall fail or refuse to hire, or discharge any individual; discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, including promotion; or to 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.

(2) No employment agency shall fail or refuse to refer for employment any individual; or otherwise to discriminate against any individual;

(3) No labor organization shall exclude or expel from the membership or otherwise discriminate against any individual; or limit, segregate or classify its membership or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise affect his or her status as an employee or as an applicant for employment;

(4) No employer, employment agency or labor organization shall:

(i) discriminate against any individual in admission to, or employment in, any program established to provide apprenticeship or other training or retraining, including any on-the-job training program; or

(ii) print, publish, advertise or disseminate in any way, or cause to be printed, published, advertised or disseminated in any way, any notice or advertisement with respect to employment, membership in, or any classification or referral for employment or training by any such organization which states that an unlawful discriminatory practice will be engaged in.

(b) Exceptions.

(1) It shall not be an unlawful discriminatory practice for an employer to observe the conditions of a bona fide seniority system or a bona fide employee benefit system, provided such systems or plans are not a subterfuge to evade the provisions of this Chapter.

(2) Nothing in this section shall be construed to apply to employment by any business which employs five or fewer employees including the owner and any management and supervisory employees.

(c) Notices.

(1) Requirements: Every employer with fifteen or more employees, every labor organization with fifteen or more members, and every employment agency shall post and keep posted in every place upon its premises where notices to employees, applicants for employment, and members are customarily posted, the following notice:

"Discrimination on the basis of sexual orientation is prohibited by law. Chapter 14 of the Sacramento City Code."

(2) Alternate Compliance. Notwithstanding the above, the provisions of this subsection (c) may be complied with by adding

SECRET

the words "sexual orientation" to all notices required by Federal or State law, and indicating on the notice that discrimination on the basis of sexual orientation is prohibited by Chapter _____ of the Sacramento City Code.

(3) The failure to post or keep posted the notice pursuant to subdivision (c)(1) or (c)(2) of this section shall not operate to toll the running of the limitation period provided in Section 14.109.

Sec. 14.102. Business Establishments.

(a) Unlawful Business Practice.

(1) In General: It shall be an unlawful business practice for any person to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment on the basis (in whole or in part) of such person's sexual orientation.

(2) Credit: It shall be an unlawful business practice for any person to deny credit to any person on the basis (in whole or in part) of such person's sexual orientation.

(3) Advertising: It shall be an unlawful business practice for any person to make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with respect to any business establishment which states that such establishment engages or will engage in any unlawful business practice as defined in this Section.

Sec. 14.103. Real Estate Transactions.

(a) Unlawful Real Estate Practices: It shall be an unlawful real estate practice for any person to do any of the following acts wholly or partially based on sexual orientation:

DELETED

(1) To terminate, or fail or refuse to initiate or conduct any transaction in real property, including but not limited to the rental thereof; to include in the terms or conditions of a transaction in real property any clause, condition or restriction; or falsely to represent that an interest in real property is not available for a transaction in connection therewith, including but not limited to rental or leasing thereof.

(2) To refuse to lend money, guarantee the loan, accept the deed of trust or mortgage, or otherwise refuse to make available funds for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of real property; or impose different conditions on such financing; or refuse to provide title or other insurance relating to the ownership or use of any interest in real property.

(3) To refuse or restrict facilities, services, repairs or improvements for any tenant or lessee.

(4) To make, print, publish, advertise or disseminate, in any way, any notice, statement or advertisement with respect to financing related to any such transaction which states that any unlawful real estate practice as defined in this Section will be engaged in.

(b) Exceptions.

(1) Owner Occupied Dwellings: Nothing in this chapter shall be construed to apply to the rental or leasing of any housing unit in which the owner or lessor or any member of his or her family occupies one of the living units and it is necessary for the owner or lessor or any member of his or her family to use

either a bathroom or kitchen facility in common with the prospective tenant.

Sec. 14.104. City Facilities and Services.

(a) Unlawful Service Practices.

(1) City Facilities: It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, any service program or facility wholly or partially funded or otherwise supported by the City on the basis, in whole or in part, of the individual's sexual orientation.

(2) City Services: It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms or conditions on the availability of, any City service on the basis, in whole or in part, of such individual's sexual orientation.

(3) Supported Facilities and Services: It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, any service, program or facility wholly or partially funded or otherwise supported by the City on the basis, in whole or in part, of the individual's sexual orientation. This subsection shall not apply to any facility, service or program which does not receive any financial assistance from the City which is not provided in the public generally.

(4) Advertising:

(a) It shall be an unlawful service practice for the City or any person employed by the City to make, print, publish, advertise or disseminate in any way any notice,

statement, or advertisement with respect to any service or facility provided by the City which states that the City or any person employed by the City engages or will engage in an unlawful service practice.

(b) It shall be an unlawful service practice for any organization described in subsection (a)(3) of this section to make, print, publish, advertise or disseminate in any way any notice, statement, or advertisement with respect to any service or facility provided by such organization which states that such organization engages in or will engage in unlawful service practices as defined in this Section.

Sec. 14.105. Educational Institutions.

(a) Unlawful Educational Practices.

(1) Admission: It shall be an unlawful educational practice for any person to deny admission to an educational institution, or to impose different terms or conditions on admission, on the basis, in whole or in part, of such individual's sexual orientation.

(2) Services: It shall be an unlawful educational practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms or conditions upon the availability of, any service or program offered by an educational institution on the basis, in whole or in part, of such individual's sexual orientation.

(3) Facilities: It shall be an unlawful educational practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms or conditions upon the availability of, any facility owned or operated by an educational

institution on the basis, in whole or in part, of such individual's sexual orientation.

(4) Advertising: It shall be an unlawful educational practice for an educational institution or any person employed by an educational institution to make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with respect to that educational institution which states that such institution engages in, or will engage in, unlawful educational practices.

(b) Exceptions:

(1) It shall not be an unlawful discriminatory practice for a religious or denominational institution to limit admission to or give other preference to applicants of the same religion.

(2) Nothing in this chapter shall be construed to apply to any educational institution owned or operated by any federal, state, or local government agency.

Sec.14.106. Retaliation Prohibited

No person shall retaliate against any individual because such individual seeks the enforcement of the provisions of this chapter.

Sec. 14.107. Enforcement.

(a) Civil Action.

(1) Any aggrieved person may enforce the provisions of this Chapter by means of a civil action in which the court may award actual damages and costs;

(2) Any person who commits, or proposes to commit, an action in violation of any provision of this chapter may be enjoined therefrom by any court of competent jurisdiction;

DRAFT

(3) In any action to enforce the provisions of this chapter, the court may allow the prevailing party a reasonable attorney's fees.

Sec. 14.108. Criminal Liability.

(a) It shall be unlawful for any person to violate the provisions of Section 14.101(c)(1). Such violation shall be deemed an infraction, the fine for which shall be levied in the amounts prescribed by Section 36900 of the Government Code as that Section may hereinafter be amended or renumbered.

(b) Notwithstanding any other provision of this Code to the contrary, violation of any provision of this chapter other than as provided in subsection (a) of this section shall not be deemed a crime.

Sec. 14.109. Limitation on Action.

Judicial actions under this ordinance must be filed within one year and six months of the time which plaintiff knew or should have known of:

(a) the defendant's decision or action which plaintiff alleges is based on plaintiff's sexual orientation, or

(b) the defendant's act of retaliation against plaintiff in violation of Section 14.106.

Sec. 14.110. Severability.

If any part or provision of this ordinance, or the application thereof to any person or circumstance, is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable and are intended to have independent validity.

DRAFT

Sec. 14.111. Nonwaiverability.

Any written or oral agreement whereby any provision of this chapter is waived or modified, is against public policy and void.