

RESOLUTION 6-06-2003

DIGEST

Civil Rights: Allow Greater City and County Protections

Amends Government Code section 12993 to provide that local entities may enact ordinances that provide greater protection against discrimination than that afforded by FEHA.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Government Code section 12993 to provide that local entities may enact ordinances that provide greater protection against discrimination than that afforded by FEHA. This resolution should be disapproved because it is ambiguous, confusing and unnecessary.

The Fair Employment and Housing Act (FEHA) (Gov. Code, § 12100 et seq.) occupies the field of regulation of discrimination in housing and employment. (See *Mahdavi v. Fair Emp. Practice Comm.* (1977) 67 Cal.App.3d 326.) This field is of sufficiently vital statewide concern that it should be governed by one set of consistent laws for employers and housing providers statewide. This resolution would disrupt that consistency by, for instance, allowing different local entities to create different discrimination rules. This would require employers doing business in more than one community to have different and potentially inconsistent and contradictory employment agreements with employees in different local jurisdictions. Moreover, FEHA does not prevent local entities from enacting ordinances protecting against discrimination in areas other than housing and employment. (See, e.g., *Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468 [local ordinance forbidding discrimination by business establishments against HIV-positive people].) Finally, enactments and programs which may be seen by some groups as protecting against or remedying discrimination may well be seen by others as discriminatory. (See, e.g., *Bakke v. Regents of the Univ. of California* (1976) 18 Cal.3d 34 [minority admissions program held to be discrimination against members of the majority].) This potential for confusion should be kept out of areas as vital as housing and employment.

Assembly Bill No. 18, 2002-2003 Regular Session, was substantially similar to this resolution. On February 25, 2003, it was amended to remove any reference to Government Code section 12993, and as of June, 2003 it focuses entirely on discrimination by public employees under Government Code sections 19572 and 19702.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12993 to read as follows:

- 1 § 12993
- 2 (a) The provisions of this part shall be construed liberally for the accomplishment of the
- 3 purposes of this part. Nothing ~~contained~~ in this part shall be deemed to repeal any of the provisions
- 4 of the Unruh Civil Rights Law Act (Section 51 of the Civil Code) or any other law of this state
- 5 relating to discrimination because of race, religious creed, color, national origin, ancestry, physical
- 6 disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, unless
- 7 those provisions provide less protection to the enumerated classes of persons covered under this part.

8 (b) Nothing ~~contained~~ in this part relating to discrimination in employment on account of sex
9 or medical condition shall be deemed to affect the operation of the terms or conditions of any bona
10 fide retirement, pension, employee benefit, or insurance plan, provided the terms or conditions are in
11 accordance with customary and reasonable or actuarially sound underwriting practices.

12 (c) ~~While it is the intention of the Legislature to occupy the field of regulation of~~
13 ~~discrimination in employment and housing encompassed by the provisions of this part, exclusive of~~
14 ~~all other laws banning discrimination in employment and housing by any city, city and county,~~
15 ~~county, or other political subdivision of the state, nothing contained.~~ Nothing in this part shall be
16 construed to prohibit a city, city and county, county, or other political subdivision of this state from
17 providing or maintaining greater protections against discrimination than those provided by this part,
18 but any law of a city, city and county, county, or other political subdivision of the state that purports
19 to require or permit any action that would be a discriminatory practice under this part shall, to that
20 extent, be invalid. Nothing in this part shall be construed, in any manner or way, to limit or restrict
21 the application of Section 51 of the Civil Code.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

Existing Law: The Fair Employment and Housing Act occupies the field of regulation of discrimination in employment and housing, exclusive of all laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state.

This Resolution: Changes the Act such that nothing in the Act would be construed to prohibit a city, city and county, county, or other political subdivision of the state from providing or maintaining greater protections against discrimination than those provided by the Act. As of February 7, 2003, a bill substantially the same as this resolution is currently pending in the State Assembly.

The Problem: The Fair Housing and Employment Act provides minimal levels of protection from discrimination throughout the state. State statutes are often interpreted by the courts to have occupied the field unless the statute explicitly allows for local jurisdictions to provide greater protections to their citizens as may be appropriate due to the needs of certain communities. It is important that the Conference of Delegates be on record as supporting this resolution to allow cities, cities and counties, counties or other political subdivisions to extend greater protections from discrimination than that provided by the state. Given that local jurisdictions are closer to the communities they serve than the state can be, the local authority should be allowed to provide greater protections in the area of discrimination law as deemed appropriate. Historically, movements to grant protections for individuals from discrimination based on their race, gender, sex, and sexual orientation were enacted first at the local level, thereby generating political momentum for such protections on a broader scale, as well as a record by which to gauge the impact such legislation would have on business and governmental entities.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

There needs to be some uniformity and consistency in this area of the law. Allowing each city or county to pass its own discrimination laws will add confusion to an already complex area of the law. If additional protections are needed they should be adopted by the state legislature.

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution seeks to allow any city, county or other political subdivision to enact greater protections against discrimination than those provided by state law. The resulting inconsistent regulation and enforcement would prevent any uniform attempts at education and compliance.

California law already differs from federal discrimination laws. California prohibits discrimination in housing based on age, ancestry, medical condition, sexual orientation and source of income. Federal law does not. California also bars “arbitrary” discrimination, a concept unknown in federal law. Federal law defining a handicap requires a “substantial” limitation on a major life activity. California considers an insubstantial limitation on a major life activity, even one that can be corrected, as a handicap.

To add to this confusion by allowing each village and hamlet to set its own rules would make effective compliance and enforcement impossible. Where the county and city are the same, as in San Francisco, the result would be bad enough. In places like Santa Clara County, which contains many cities, different laws could apply to identical buildings or businesses located across the street from each other. No one would know the rules. No one could comply.