

RESOLUTION 6-09-2003

DIGEST

Civil Rights: Extension of FEHA to Include Gender Identity

Amends Government Code section 12926 and adds Government Code section 12949 (a) to add “gender” to the definition of “sex” as a prohibited basis for discrimination; and (b) to require employers to permit employees to dress consistent with their gender identities.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Government Code section 12926 and adds Government Code section 12949 (a) to add “gender” to the definition of “sex” as a prohibited basis for discrimination; and (b) to require employers to permit employees to dress consistent with their gender identities. This resolution should be disapproved because the protections it proposes already exist in section 12926.

Section 12926, subdivision (j), already prohibits discrimination based on sexual orientation. Section 12926, at subdivision (m), already prohibits discrimination based on perception of sex or sexual orientation. The proponent does not set forth any reason as to why including the word “gender” in the definition of “sex” would add anything to the express protections already provided. In addition, the proposed “gender” definition does not belong in subsection (p), which addresses pregnancy and childbirth.

This resolution is similar to Assembly Bill No. 196, introduced on January 27, 2003, which as of this writing has passed in the Assembly and is before the Senate.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12926 and add Government Code section 12949 to read as follows:

- 1 §12926
- 2 As used in this part in connection with unlawful practices, unless a different meaning clearly
- 3 appears from the context:
- 4 (a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement
- 5 of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers,
- 6 reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of
- 7 personnel, testing, expunging of records, reporting of records, and any other similar relief that is
- 8 intended to correct unlawful practices under this part.
- 9 (b) "Age" refers to the chronological age of any individual who has reached his or her 40th
- 10 birthday.
- 11 (c) "Employee" does not include any individual employed by his or her parents, spouse, or
- 12 child, or any individual employed under a special license in a nonprofit sheltered workshop or
- 13 rehabilitation facility.

14 (d) "Employer" includes any person regularly employing five or more persons, or any person
15 acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision
16 of the state, and cities, except as follows:

17 "Employer" does not include a religious association or corporation not organized for private
18 profit.

19 (e) "Employment agency" includes any person undertaking for compensation to procure
20 employees or opportunities to work.

21 (f) "Essential functions" means the fundamental job duties of the employment position the
22 individual with a disability holds or desires. "Essential functions" does not include the marginal
23 functions of the position.

24 (1) A job function may be considered essential for any of several reasons, including, but not
25 limited to, any one or more of the following:

26 (A) The function may be essential because the reason the position exists is to perform that
27 function.

28 (B) The function may be essential because of the limited number of employees available
29 among whom the performance of that job function can be distributed.

30 (C) The function may be highly specialized, so that the incumbent in the position is hired for
31 his or her expertise or ability to perform the particular function.

32 (2) Evidence of whether a particular function is essential includes, but is not limited to, the
33 following:

34 (A) The employer's judgment as to which functions are essential..

35 (B) Written job descriptions prepared before advertising or interviewing applicants for the
36 job.

37 (C) The amount of time spent on the job performing the function.

38 (D) The consequences of not requiring the incumbent to perform the function.

39 (E) The terms of a collective bargaining agreement.

40 (F) The work experiences of past incumbents in the job.

41 (G) The current work experience of incumbents in similar jobs.

42 (g) "Labor organization" includes any organization that exists and is constituted for the
43 purpose, in whole or in part, of collective bargaining or of dealing with employers concerning
44 grievances, terms or conditions of employment, or of other mutual aid or protection.

45 (h) "Medical condition" means either of the following:

46 (1) Any health impairment related to or associated with a diagnosis of cancer or a record or
47 history of cancer.

48 (2) Genetic characteristics. For purposes of this section, "genetic characteristics" means
49 either of the following:

50 (A) Any scientifically or medically identifiable gene or chromosome, or combination or
51 alteration thereof, that is known to be a cause of a disease or disorder in a person or his her offspring,
52 or that is determined to be associated with a statistically increased risk of development of a disease
53 or disorder, and that is presently not associated with any symptoms of any disease or disorder.

54 (B) Inherited characteristics that may derive from the individual or family member, that are
55 known to be a cause of a disease or disorder in a person or his or her offspring, or that are
56 determined to be associated with a statistically increased risk of development of a disease or
57 disorder, and that are presently not associated with any symptoms of any disease or disorder.

58 (i) "Mental disability" includes, but is not limited to, all of the following:

59 (l) Having any mental or psychological disorder or condition, such as mental retardation,
60 organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a
61 major life activity. For purposes of this section:

62 (A) "Limits" shall be determined without regard to mitigating measures, such as medication,
63 assistive devices or reasonable accommodations, unless the mitigating measure itself limits a major
64 life activity.

65 (B) A mental or psychological disorder or condition limits a major life activity if it makes
66 the achievement of the major life activity difficult.

67 (C) "Major life activities" shall be broadly construed and shall include physical, mental, and
68 social activities and working.

69 (2) Any other mental or psychological disorder or condition not described in paragraph (1)
70 that requires special education or related services.

71 (3) Having a record or history of a mental or psychological disorder or condition described
72 in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

73 (4) Being regarded or treated by the employer or other entity covered by this part as having,
74 or having had, any mental condition that makes achievement of a major life activity difficult.

75 (5) Being regarded or treated by the employer or other entity covered by this part as having,
76 or having had, a mental or psychological disorder or condition that has no present disabling effect,
77 but that may become a mental disability as described in paragraph (1) or (2).

78 "Mental disability" does not include sexual behavior disorders, compulsive gambling
79 kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful
80 use of controlled substances or other drugs.

81 (j) "On the bases enumerated in this part" means or refers to discrimination on the basis of
82 one or more of the following: race, religious creed, color, national origin, ancestry, physical
83 disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

84 (k) "Physical disability" includes, but is not limited to, all of the following:

85 (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or
86 anatomical loss that does both of the following:

87 (A) Affects one or more of the following body systems: neurological, immunological
88 musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular,
89 reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

90 (B) Limits a major life activity. For purposes of this section:

91 (i) "Limits" shall be determined without regard to mitigating measure such as medications,
92 assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself
93 limits a major life activity.

94 (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss
95 limits a major life activity if it makes the achievement of the major life activity difficult.

96 (iii) "Major life activities" shall be broadly construed and includes physical, mental, and
97 social activities and working.

98 (2) Any other health impairment not described in paragraph (1) that requires special
99 education or related services.

100 (3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement,
101 anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the
102 employer or other entity covered by this part.

103 (4) Being regarded or treated by the employer or other entity covered by this part as having,
104 or having had, any physical condition that makes achievement of a major life activity difficult.

105 (5) Being regarded or treated by the employer or other entity covered by this part as having,
106 or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health
107 impairment that has no present disabling effect but may become a physical disability as described in
108 paragraph (1) or (2).

109 (6) "Physical disability" does not include sexual behavior disorders, compulsive gambling,
110 kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful
111 use of controlled substances or other drugs.

112 (l) Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the
113 Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of
114 the civil rights of individuals with a mental disability or physical disability, as defined in subdivision
115 (i) or (k), or would include any medical condition not included within those definitions then that

116 broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over
117 conflicting provisions of the definitions in subdivisions (i) and (k).

118 (m) "Race, religious creed, color, national origin, ancestry, physical disability, mental
119 disability, medical condition, marital status, sex, age, or sexual orientation" includes perception that
120 the person has any of those characteristics or that the person is associated with a person who has, or
121 is perceived to have, any of those characteristics.

122 (n) "Reasonable accommodation" may include either of the following:

123 (1) Making existing facilities used by employees readily accessible to, and usable by,
124 individuals with disabilities.

125 (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant
126 position, acquisition or modification of equipment or devices, adjustment or modifications of
127 examinations, training materials or policies, the provision of qualified readers or interpreters, and
128 other similar accommodation for individuals with disabilities.

129 (o) "Religious creed," "religion," "religious observance," "religious belief," and "creed"
130 include all aspects of religious belief, observance, and practice.

131 (p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related
132 to pregnancy or childbirth, and also includes, but is not limited to, a person's gender, which is
133 defined as the employee or applicant's actual sex or the employer's or other covered person's
134 perception of the employee or applicant's sex, and includes the employer's or other covered person's
135 perception of the employee or applicant's identity, appearance, or behavior, whether or not that
136 identity, appearance, or behavior is different from that traditionally associated with the employee's
137 or applicant's sex at birth.

138 (q) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

139 (r) "Supervisor" means any individual having the authority, in the interest of the employer, to
140 hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other
141 employees, or the responsibility to direct them, or to adjust their grievances, or effectively to
142 recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a
143 merely routine or clerical nature, but requires the use of independent judgment.

144 (s) "Undue hardship" means an action requiring significant difficulty or expense, when
145 considered in light of the following factors: (1) the nature and cost of the accommodation needed,
146 (2) the overall financial resources of the facilities involved in the provision of the reasonable
147 accommodations, the number of persons employed at the facility, and the effect on expenses and
148 resources or the impact otherwise of these accommodations upon the operation of the facility, (3) the
149 overall financial resources of the covered entity, the overall size of the business of a covered entity
150 with respect to the number of employees, and the number, type, and location of its facilities, (4) the
151 type of operations, including the composition, structure, and functions of the workforce of the entity,
152 and (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

153
154 § 12949

155 Nothing in this part relating to gender-based discrimination affects the ability of an employer
156 to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards
157 not precluded by other provisions of state or federal law, provided that an employer shall allow an
158 employee to appear or dress consistently with the employee's gender identity.

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

PROPOSERS: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

Existing Law: Prevents discrimination in employment and housing based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

This Resolution: Amends the Fair Employment and Housing Act to clarify that employment and housing discrimination against transgender persons is prohibited. As of February 7, 2003, a bill substantially the same as this resolution is pending in the State Assembly.

The Problem: Transgender people often face discrimination in the workplace and in housing. Such discrimination is not based on objective criteria of work performance or suitability for home purchase. Rather, it is based on irrational fears and historical stereotypes which should not be sanctioned by continued omission from the laws enacted to protect individuals from unreasonable actions. The not-so-distant past is replete with arguments which were used to bar individuals from the workplace or housing market due to irrational stereotypes based on an individual's race, religion, gender, sex, or sexual orientation. The Fair Employment and Housing Act currently provides protection based on a variety of life conditions. To be free from discrimination in employment and in housing are basic civil rights which should be afforded to all people. The Conference of Delegates should take a stand on this basic issue of human rights and dignity, and encourage state government to do the same by expanding coverage to include transgender individuals.

IMPACT STATEMENT

This resolution may affect laws, statutes or rules interpreting and/or implementing the Fair Housing and Employment Act. To our knowledge, it will not affect the language of such laws, statutes or rules.

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RESPONSIBLE FLOOR DELEGATE: Jody Hoenninger

COUNTERARGUMENT

LOS ANGELES COUNTY BAR ASSOCIATION

We oppose this resolution for a variety of reasons:

First, California's Fair Employment and Housing Act (as well as Title VII) already applies to a person's gender, otherwise termed the person's "sex." So, to the extent the resolution adds the term "gender," it is unnecessary.

Second, FEHA already applies to an individual's sexual orientation, so, to the extent the resolution is intended to address this issue, it is unnecessary. One's perception of another is entirely subjective. And, to the extent that this aspect of the resolution is subjective, it is, more importantly, inappropriate.

Third, FEHA already precludes discrimination on the basis of a "perception that the person has any" of the already delineated categories within FEHA (i.e., perception regarding a person's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation). Government Code section 12926(m).

How would this situation arise? If, for example, the concern is that a female employment applicant who is "perceived" as being male will be denied the position because she is a female or because the employer thinks she is a male--that concern is already covered by FEHA.

AB 196 (Assembly Member Mark Leno) was passed by the Assembly on April 22, 2003. This bill would make it illegal for landlords and employers to discriminate against people who have changed their gender or whose gender is not exclusively male or female. The author should review the pending legislation and consider to what extent this Act, if passed, would impact the resolution.