

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

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FILED FOR RECORD
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PROTECT FAYETTEVILLE, f/k/a
REPEAL 119; PAUL SAGAIN;
PETER TONNESSON; and
PAUL PHANEUF

WASHINGTON CO. AR
CIRCUIT CLERK
K. SYLVESTER

PLAINTIFFS

and

THE STATE OF ARKANSAS

INTERVENOR

VS.

NO. CV 2015-1510-1

THE CITY OF FAYETTEVILLE,
Washington County, Arkansas;
LIONELD JORDAN, in his official
capacity as Mayor of Fayetteville;
ADELLA GRAY, SARAH MARSH,
MARK KINION, MATTHEW PETTY,
JUSTIN TENANT, MARTIN W.
SCHOPPMAYER, JR., JOHN LATOUR
and ALAN LONG, in their official capacities
as Aldermen of the Fayetteville City Council

DEFENDANTS

**ORDER GRANTING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT IN PART AND DENYING IN PART
AND DENYING PLAINTIFFS' AND STATE'S CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

Now on this 1st day of March, 2016, comes on for decision the Motion for Summary Judgment filed by separate defendants the City of Fayetteville, Mayor Jordan and all Fayetteville City Aldermen ("Defendants"), and the Cross-Motions for Summary Judgment as to Count IV of the Amended Complaint filed by the plaintiffs and the State of Arkansas, and having reviewed the pleadings and hearing

arguments on January 26, 2016, the court finds that the defendants' motion should be granted in part and denied in part, and the plaintiffs' and State's cross-motions should be denied.

Standing

Defendants' motion is denied as it pertains to a lack of standing on the part of Protect Fayetteville based on the reasoning set out by the supreme court in the case of *Arkansas Hotels and Entertainment, Inc. v. Martin*, 2012 Ark. 335 (2012). Defendants' motion is denied as it pertains to a lack of standing of the individual plaintiffs because the individual plaintiffs are citizens, registered voters and taxpayers of Fayetteville who claim their constitutional rights have been violated and that they have been damaged by an illegal exaction. See *Jegley v. Picado*, 349 Ark. 600 (2002).

Count 1 of Amended Complaint - "Passage of Ordinance 5781 Violated Due Process of Law"

Plaintiffs allege that Ordinance 5781 is invalid because Mayor Jordan voted for a motion to suspend the rules and proceed with a third reading of the proposed ordinance in violation of Arkansas Code Annotated § 14-43-501, thus violating due process of the law.

Arkansas Code Annotated § 14-43-501(b)(1)(B) states "[the] mayor shall have a vote . . . when his vote is needed[,] to pass any . . . motion." This language is plain and unambiguous and describes precisely the situation complained of: the mayor's

vote was needed to pass a motion. Without the mayor's vote, the motion would not have passed. Arkansas Code Annotated §14-43-501 clearly allows the mayor to cast such a vote.

Summary judgment is granted as to Count I of the Amended Complaint.

Count II of the Amended Complaint - "Passage of Ordinance 5781 Violates the Constitutional Rights of the Voters who Repealed Ordinance 5703 in the Special Election on December 9, 2014."

Plaintiffs allege that the passage of Ordinance 5781 violated the constitutional rights of the voters who repealed Ordinance 5703 in a special election on December 9, 2014. This claim has no merit and summary judgment is granted as to Count II of the Amended Complaint.

Count III of the Amended Complaint - "Use of Taxpayer Funds for a Special Election for Ordinance 5781 Constitutes an Illegal Exaction and Should be Prohibited"

Plaintiffs allege that the use of taxpayer funds for the special election on Ordinance 5781 constitutes an illegal exaction. Summary judgment is granted as to Count III of the Amended Complaint for the reasons asserted by the defendants.

Count IV of the Amended Complaint - "Ordinance 5781 is Unlawful as it Directly Violates Arkansas Code Annotated § 14-1-403; Arkansas Code Annotated § 14-43-610; and Arkansas Code Annotated § 16-123-107."

The plaintiffs and the State allege that Ordinance 5781 is unlawful because it violates Arkansas Code Annotated § 14-1-403 ("Act 137"). Defendants argue that Ordinance 5781 does not violate Act 137 or, in the alternative, Act 137 is

unconstitutional because it violates the Equal Protection clauses of the United States Constitution and the Arkansas Constitution. All parties have moved for summary judgment on Count IV of the Amended Complaint.

Act 137 provides that counties, municipalities, and any other political subdivisions of the State of Arkansas “shall not adopt or enforce an ordinance . . . that creates a protected classification or prohibits discrimination on a basis not contained in state law.” Ark. Code Ann. § 14-1-403(a).

First Prong of Act 137

The first prong of Act 137 prohibits the City of Fayetteville from adopting or enforcing an ordinance that creates a protected classification on a basis not contained in state law. Defendants argue that Ordinance 5781 does not create any such classification because gender identity and sexual orientation were classifications protected on bases contained in state law prior to the adoption of Ordinance 5781.

In support of this argument, the defendants first point to a statute titled “Antibullying policies” which ensures that students and public school employees are reasonably free from substantial intimidation, harassment, or harm of threat by students. *See* Ark. Code Ann. § 6-18-514(a). Protected classifications under the statute include gender identity and sexual orientation. *See* Ark. Code Ann. § 6-18-514I(b)(1) and (c).

Defendants also point to the Arkansas Domestic Peace Act, which requires that every shelter for victims of domestic violence 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. *See Ark. Code Ann. § 9-4-106.*

Finally, the defendants note that Arkansas law provides that the official state issued birth certificate shall be amended to show a transgender person's inherent gender as opposed to the sex assigned at birth upon proper and legal documentation. *See Ark. Code Ann. § 20-18-307(d).*

Thus, the defendants assert that gender identity and sexual orientation were already protected classifications on bases contained in state law prior to Ordinance 5781's adoption and, therefore, Ordinance 5781 did not create any protected classifications in violation of Act 137.

Plaintiffs and the State respond that the only protected classifications to be considered here are those in the Arkansas Civil Rights Act ("ACRA") and that gender identity and sexual orientation are not protected classifications under the ACRA. The ACRA, however, is not mentioned in Act 137.

Our supreme court has stated:

When reviewing issues of statutory interpretation, we keep in mind that the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually

accepted meaning in common language. When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. When a statute is clear, however, it is given its plain meaning, and this court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. This court is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent.

Farrell v. Farrell, 365 Ark. 465, 469-470 (2006) (internal citations omitted).

The language of this first prong of Act 137 is plain and unambiguous and the court must construe it just as it reads, giving the language used its plain meaning. Act 137 does not state that Arkansas's municipalities are prohibited from creating a protected classification on a basis not contained in the ACRA. Rather, Act 137 states that Arkansas prohibits its municipalities from creating a protected classification "on a basis not contained in state law." Ark. Code Ann. § 14-1-403(a). Clearly, the classifications of gender identity and sexual orientation were classifications of persons protected on bases contained in state law prior to the enactment of Ordinance 5781. As such, Ordinance 5781 does not create a protected classification on a basis not contained in state law and, therefore, the ordinance does not violate the plain meaning of the language used in the first prong of Act 137.

Second Prong of Act 137

The State argues that the word "basis" contained in the second prong of the

“Prohibited conduct” section of Act 137 (prohibiting discrimination on a basis not contained in state law) refers to the area of law in which a prohibition of discrimination is contained, such as, specifically, discrimination in the area of employment law. Defendants respond that the word “basis” contained in the second prong means the reason why a person is discriminated against, such as their gender identity or sexual orientation.

Construing Act 137 just as it reads, giving the words their ordinary and usually accepted meaning in common language, the court believes the defendants’ interpretation is most likely that intended by the legislature. No definition of the word “basis” is provided in the act, however, and the court does not find the State’s interpretation entirely unreasonable. As such, the court finds the second prong of the statute open to more than one construction and, thus, ambiguous. *See Simpson v. Cavalry SPV I, LLC*, 2014 Ark. 363 (2014).

When a statute is ambiguous, the court must interpret it according to legislative intent. *Id.* When interpreting legislative intent, our supreme court has instructed that courts should perform an examination of the whole act and reconcile provisions of the whole act to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Id.* In addition, the supreme court “must look at the legislative history, the language, and the subject matter involved.” *Id.*

Act 137 reads in its entirety as follows:

AN ACT TO AMEND THE LAW CONCERNING ORDINANCES OF CITIES AND COUNTIES BY CREATING THE INTRASTATE COMMERCE IMPROVEMENT ACT; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE LAW CONCERNING ORDINANCES OF CITIES AND COUNTIES BY CREATING THE INTRASTATE IMPROVEMENT ACT AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 14, Chapter 1, is amended to add an additional subchapter to read as follows:

Subchapter 4 – Intrastate Commerce Improvement Act

14-1-401. Title.

This subchapter shall be known and may be cited as the “Intrastate Commerce Improvement Act”.

14-1-402. Purpose – Finding.

(a) The purpose of this subchapter is to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, regardless of the counties, municipalities, or other political subdivisions in which the businesses, organizations, and employers are located or engage in business or commercial activity.

(b) The General Assembly finds that uniformity of law benefits the businesses, organizations, and employers seeking to do business in the state and attracts new businesses, organizations, and employers to the state.

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.

Ark. Code Ann. § 14-1-401-403 ("Act 137").

The State argues that taking into consideration the written purpose and legislative findings of Act 137, the basis referred to in the second prong of the act should be interpreted as referring to "employment discrimination, businesses and employers." *State's argument at January 26, 2016, hearing.* In response to the defendants' asserted meaning of the word "basis" in the second prong, the State argues, "[t]hat's not what the plain language means. [W]hat it really means is that you can't prohibit in a different way than state law already prohibits." *Id.*

While trying to reconcile provisions of the whole act to make them consistent, harmonious, and sensible in an effort to give effect to every part, the court must also look to the legislative history, the language, and the subject matter involved in making this determination. As to the language of Act 137, the written purpose by no means requires such a leap by this court as to insert language into the operative section of the act as the State suggests. The "Prohibited conduct" section does not state that a municipality shall not adopt or enforce an ordinance that prohibits discrimination "in the area of employment law," for example, and the legislature should have used such a phrase instead of the word "basis" if that is what the

legislature intended. The court must still consider the ordinary and usual meaning of the language, and to insert the language requested by the State into the statute where the plain language reads otherwise is beyond the scope of this court's authority. Although the court has acknowledged that the State's asserted interpretation is not entirely unreasonable, this court will not go so far as to insert language into a statute in place of other existing language.

Nor can any evidence be found in the legislative history to support the State's assertion of the meaning of the word "basis" in the second prong of Act 137's "Prohibited conduct" section. The legislative history available consists of floor debate and other statements made by the house and senate bills' sponsors of Act 137 and relates solely to the issue of discrimination against Arkansas citizens based on their sexual orientation or gender identity. Nothing relating to the written purpose of Act 137 is found anywhere in the legislative history, and certainly nothing is found to give credence to the State's assertion that the word "basis" should be replaced with language such as "the area of employment law discrimination."

As noted, our supreme court has stated, "This court is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent." *Farrell*, 365 Ark. at 470. Upon examination of Act 137 as a whole, including the legislative

intent, there is no indication that any drafting error or omission has circumvented the legislative intent.

The plain language of Act 137 is clear, even more so after an examination of the act as a whole. The term “basis” contained in the second prong of the “Prohibited conduct” section of the act means the same as it does in the first prong: the reason *why* a person is discriminated against, not the area of law in which such discrimination occurs. Thus, just as the first prong of the “Prohibited conduct” section of Act 137 fails to prohibit the City of Fayetteville from adopting and enforcing Ordinance 5781, so must the second. The ordinance prohibits discrimination on bases already contained in state law, in compliance with Act 137.

For these reasons, Ordinance 5781 does not violate Act 137. Because Ordinance 5781 is found not to violate Act 137, the court need not address the constitutionality of Act 137. Defendants are granted summary judgment as to Count IV of the Amended Complaint. Plaintiffs’ and the State’s cross-motions for summary judgment are denied.

Count V of the Amended Complaint - “Ordinance 5781 is Unlawful as it Directly Violates Article II, § 24 of the Arkansas Constitution.”

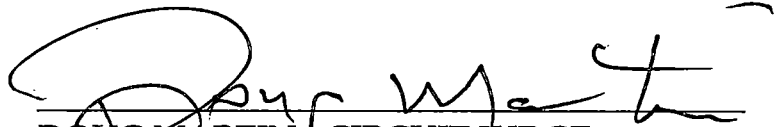
In Count V of the Amended Complaint, the plaintiffs claim that the defendants intentionally omitted “the protection of the right of conscience” when passing Ordinance 5781 and that such omission violates Article II, Section 24 of the

Arkansas Constitution. For the reasons asserted by the defendants, summary judgment is granted as to Count V of the Amended Complaint.

Count VI of the Amended Complaint - "Ordinance 5781 Violates 42 U.S.C. § 1983"

Count VI of the Amended Complaint alleges that Ordinance 5781 is intended to deprive citizens and other persons in the City of Fayetteville of their rights, privileges and immunities by denying them the protected classification of freedom of religion under Arkansas Code Annotated § 16-123-102(8) of the Arkansas Civil Rights Act of 1993, as well as the First and Fourteenth Amendments to the United States Constitution. For the reasons argued by the defendants, summary judgment is granted as to Count VI of the Amended Complaint.

IT IS SO ORDERED.


DOUG MARTIN, CIRCUIT JUDGE

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