

ORDINANCE NO. 2013-08

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FLAGSTAFF, ARIZONA, AMENDING FLAGSTAFF CITY CODE TITLE 14, HUMAN RELATIONS, BY ADDING CHAPTER 2, CIVIL RIGHTS

RECITALS:

WHEREAS, its residents are the City of Flagstaff's most important asset; and

WHEREAS, the City of Flagstaff is committed to nondiscrimination and fair treatment of its residents, visitors, and employees; and

WHEREAS, the City Council ("Council") supports and values diversity and inclusiveness; and

WHEREAS, the City of Flagstaff ("City") is comprised of diverse and varied groups, communities, and individuals, and the practice of discrimination against these groups, communities, or individuals on the grounds of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, and gender identity or expression, in places of public accommodation and in employment, adversely affects the general welfare of the City and the vitality of its neighborhoods; and

WHEREAS, discriminatory practices are detrimental because they impede the social and economic progress of the City by preventing all people from contributing to or fully participating in the cultural, spiritual, social, and commercial life of the community, essential to the growth and vitality of its neighborhoods and businesses; and

WHEREAS, in developing this chapter, the Flagstaff City Council has investigated other urban centers throughout the nation and studied the effectiveness of ordinances enacted to prevent discriminatory practices; and

WHEREAS, every individual in the City has the right to work and earn wages through gainful employment; and

WHEREAS, the City has found that discrimination in employment and places of public accommodation on the basis of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation and gender identity or expression must be addressed, and the denial or deprivation of employment rights based on these factors is detrimental to the health, safety, and welfare of the City's citizens and damages the City's economic well being; and

WHEREAS, the purpose of this chapter is to provide a clear and comprehensive mandate for the prevention and elimination of discrimination in employment and in places of public accommodation, and this chapter shall be liberally construed to achieve that purpose.

ENACTMENTS:

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FLAGSTAFF
AS FOLLOWS:**

SECTION 1: That Flagstaff City Code Title 14, Human Relations, is hereby amended as follows:

Sections:

14-02-001-0001	Policy Declaration
14-02-001-0002	Definitions
14-02-001-0003	Prohibited Acts
14-02-001-0004	Exclusion
14-02-001-0005	Violation a Civil Infraction; Procedure; Penalties
14-02-001-0006	Complaint Procedures
14-02-001-0007	No Private Right of Action; Effect of Federal and State Laws
14-02-001-0008	Severability
14-02-001-0009	Unlawful Intimidation, Retaliation, and Coercion
14-02-001-0010	Record-keeping; Posting Requirement; Powers

Section 14-02-001-0001 Policy Declaration.

It is the policy of the City of Flagstaff to eliminate prejudice and discrimination due to race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, and gender identity or expression, in places of public accommodation and in employment.

Section 14-02-001-0002 Definitions.

In this chapter, unless the context otherwise requires:

- A. **Age** means at least eighteen years of age except:
1. Where state law provides for a greater minimum or maximum legal age.
 2. In section 14-02-001-003(B), which shall be deemed to protect any person who is at least forty (40) years of age.
- B. **Discriminate or discrimination** means to make, directly or indirectly, any distinction with respect to any person or persons based on race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression.
- C. **Disability**, with respect to an individual, means:
1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 2. A record of such an impairment; or
 3. Being regarded as having such an impairment; but disability does not include the current illegal use of or addiction to a controlled substance (as defined in the Controlled Substances Act, 21 U.S.C. § 801 et seq.) or the current use of alcohol that prevents such individual from performing the duties of the job in question or

whose employment, by reason of such current alcohol abuse, would constitute a direct threat to the property or the safety of others.

Discrimination on the basis of disability shall be interpreted in a manner consistent with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., the federal regulations promulgated thereunder, and judicial decisions construing them.

- D. *Educational institution* means any private educational institution located or operating in the City of Flagstaff which provides educational services including an academy, college, university, elementary or secondary school, kindergarten, extension course, nursery school system, and a business, nursing, professional, secretarial, technical or vocational school.
- E. *Employer*, except as otherwise provided, means any person employing fifteen (15) or more employees in the City of Flagstaff for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and includes any agent of such person.
- F. *Employment agency* means and includes both public and private employment agencies and any person having an office regularly undertaking, with or without compensation, to procure, recruit, refer or place employees.
- G. *Gender expression* means the ways in which a person manifests masculinity or femininity or “expresses” external characteristics and behaviors associated with gender.
- H. *Gender identity* means an individual's various attributes as they are understood to be masculine and/or feminine and shall be broadly interpreted to include pre- and post-operative transsexuals, as well as other persons who are, or are perceived to be, transgender.
- I. *Investigator* means an individual selected by the City Manager whose role shall be to determine the facts relevant to a charge filed pursuant to this chapter. The Investigator shall be selected by the City Manager, following established rules and procedures.
- J. *Labor organization* means and includes any organization or labor union, craft union, or such organization, conducting a hiring hall which engages in the hiring of employees, or any voluntary unincorporated association designed to further the cause of the rights of union labor, which is constituted for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or apprenticeships or applications for apprenticeships, or for other mutual aid or protection in connection with employment, including apprentice jobs or application for apprenticeship.
- K. *Mediator* means an individual selected by the City Manager whose role shall be to attempt to assist the Complainant and Respondent in reaching settlement of a charge filed under this chapter. The Mediator shall be selected by the City Manager, following established rules and procedures. The Mediator shall not be an employee of the City of Flagstaff. The Mediator may not be required to serve as a witness in any legal proceeding concerning matters related to the Mediator's involvement in carrying out his or her functions pursuant to this chapter.

- L. *Person* means and includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, receivers, or other organized groups of persons.
- M. *Place of public accommodation* means facilities, establishments, accommodations, services, commodities or use offered to or enjoyed by the general public, including but not limited to:
1. Hotels, motels, trailer courts and boardinghouses, which shall include any establishments offering lodging to transient guests for compensation.
 2. Restaurants, which shall include lunch counters, coffee shops, lunchrooms, luncheonettes, cafes, cafeterias, tearooms, snack bars or stands, mobile food service facilities, grills, sandwich shops, supper clubs, soft drink fountains, ice cream parlors or stands, and other places which offer food, ice cream or soft drink beverages for purchase and consumption on or off the premises.
 3. Taverns, which shall include bars, barrooms, saloons, roadhouses and like establishments, wherein spirituous or malt liquors or wines are offered for sale for consumption on or off the premises.
 4. Theaters, which shall include places, whether indoors or out-of-doors, at which any theatrical performance, moving picture show, musical concert or recital, dramatic reading or monologue, circus, carnival or other like entertainment or amusement is offered.
 5. Retail establishments, which shall include retail stores, garages, automobile and gasoline service stations, and other like establishments serving the public.
 6. Places of public amusement and recreation, which shall include bowling alleys, billiard halls and poolrooms, dance halls, race courses, shooting galleries, sports arenas or fields, gymnasiums, exhibitions, skating rinks and other like establishments.
 7. Educational facilities, which shall include institutions defined in paragraph (E) of this section.
 8. Public conveyances, which shall include all transportation facilities operated on land, air or water as well as the stations and terminals thereof.
 9. Funeral parlors and places of burial, including any cemetery, mausoleum, crypt, or any establishment for the embalming, processing or interment of corpses.
- N. *Protected class* means each classification for which discrimination is prohibited in this chapter: race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, and gender identity or expression.
- O. *Religion* includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he/she is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

- P. *Religious organization* means a religious corporation, association or society; or a school, college, university, or other educational institution or institution of learning if the institution is in whole or substantial part controlled, managed, owned, or supported by a religious corporation, association or society; or the curriculum of the institution is directed toward the propagation of a religion.
- Q. Sex shall include, but is not limited to, discrimination because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.
- R. *Sexual orientation* means an individual's heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived.
- S. *Veteran's Status* means an individual who served in the armed forces of the United States, including the Army, Navy, Air Force, Marine Corps, and Coast Guard, and who was separated from the armed forces under honorable conditions.

Section 14-02-001-0003 Prohibited Acts.

It is a violation of this article:

- A. For any owner, operator, lessee, manager, agent or employee of any place of public accommodation to discriminate against any person, or directly or indirectly display, circulate, publicize or mail any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted because of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression, or that any person, because of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression, would be unwelcome, objectionable, unacceptable, undesirable or not solicited.
- B. For an employer, because of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression to refuse to hire or employ any person or to bar or to discharge from employment such person, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.
- C. For a labor organization, because of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression to exclude, expel, limit or restrict from its membership such person, or to provide only second class or segregated membership, or to discriminate in any manner against any of its members or against any employer or any person employed by an employer.
- D. For any employer or employment agency to print or circulate, or cause to be printed or circulated, any publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or

expression, or expresses any intent to make any such limitation, specification or discrimination.

- E. For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he/she has opposed in a lawful manner any practices forbidden under this chapter, or because he/she has filed a complaint, testified or assisted in any proceeding under this chapter.
- F. For any person to cause or attempt to cause an employer to discriminate against an individual in violation of this chapter.
- G. For any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.
- H. For any person to discriminate in places of public accommodation or employment against any person, because that person has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this chapter.

Section 14-02-001-0004 Exclusion.

- A. This chapter shall not be applicable to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he/she is a Native American living on or near a reservation.
- B. This chapter shall not be applicable to any establishment operated by a bona fide private club not conducted for the purpose of evading this article, when the accommodations, advantages, facilities and services are restricted to members of such club and their guests; nor to any bona fide social, fraternal, public educational, civic or religious organization or such private club when the profits of the accommodations, advantages, facilities and services, above reasonable and necessary expenses, are solely for the benefit of such organization or club.
- C. This chapter shall not be applicable to an expressive association whose employment of a person protected by this chapter would significantly burden the association's rights of expressive association under Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
- D. This chapter shall not apply to the United States government, any of its departments or agencies, or any corporation wholly owned by it; an Indian tribe; or the state of Arizona or any of its departments, agencies, or political subdivisions.
- E. Any person under the influence of alcohol or other drugs, or who is guilty of boisterous conduct, or who violates any regulation of any place of public accommodation that applies to all persons, regardless of race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression may be excluded without penalty under this article from any such place of public accommodation; and nothing in this article shall be considered to limit the right of such exclusion.
- F. Except as provided in subsection (G) below, this chapter shall not be applicable to a religious organization.

- G. This chapter shall apply to employment or an employment opportunity with a religious organization, wherein the duties of the position pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under section 511 (a) of the Internal Revenue Code of 1986.
- H. Notwithstanding section 14-02-001-003, it shall not be a violation of this chapter:
1. For an employer, labor organization, or employment agency to prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
 2. For an employer, labor organization, or employment agency to require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
 3. For an employer, labor organization, or employment agency to require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.) or under the drug testing provisions of state law (A.R.S. § 23-493 et seq);
 4. For an employer, labor organization, or employment agency to hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;
 5. For a place of public accommodation to afford beneficial pricing or policies to senior citizens, students, or individuals with disabilities;
 6. For a place of public accommodation to operate solely as a male-only or a female-only fitness center/gymnasium, as long as the fitness center/gymnasium does not include any of the facilities other than gymnasium listed in Section 14-02-001-0002(M), and does not discriminate against any other protected group identified in Section 14-02-001-0001;
 7. For an employer to establish a legitimate dress code that is applied uniformly to all employees within certain job categories and is reasonably related to the employer's business needs.

Section 14-02-001-0005 Violation a Civil Infraction; Procedure; Penalties.

- A. It is a civil infraction for any person to violate any of the provisions of this chapter. Complaints of violations of this chapter shall proceed as prescribed in Section 14-02-001-0006.
- B. The following penalties shall be imposed by the City Court for civil infractions under this chapter:
1. A person found responsible for a civil infraction for the first time shall be fined not more than five hundred dollars (\$500.00) per civil infraction. A person found

responsible for the same civil infraction for a second time shall be fined not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000.00). A person found responsible for the same civil infraction for a third or subsequent time shall be fined not less than nine hundred dollars (\$900.00) nor more than twenty-five hundred dollars (\$2,500.00). The imposition of a fine for a civil infraction under this section shall not be suspended.

2. Failure of a respondent to comply with any order contained in a judgment for a civil infraction shall result in an additional fine as established by the Flagstaff Municipal Court.

Section 14-02-001-0006 Complaint Procedures.

- A. Any person claiming to be aggrieved by an alleged violation of this chapter (hereinafter the "Complainant") may file with the City Manager's Office ("CMO") a verified charge, in writing, within ninety (90) calendar days after the alleged violation occurred. The charge shall set forth the facts upon which it is based, shall identify the person charged (hereinafter the "Respondent"), and shall be signed by the Complainant.
- B. The CMO shall furnish the Respondent with a copy of the charge via first class United States mail. The Respondent may file, not later than twenty (20) days following the CMO's mailing of the charge to the Respondent, a written verified answer to the charge.
- C. Within forty-five (45) days following receipt of the charge from the Complainant, the CMO shall conduct an initial screening of the charge to determine whether the City has jurisdiction over the charge, whether the charge was timely filed, and whether the allegations, if true, would constitute a violation of this chapter.
- D. If the CMO determines, based on a review of the charge, that the City does not have jurisdiction, that the charge is untimely, or that the allegations would be insufficient to show a violation of this chapter, the CMO shall dismiss the charge. The decision of the CMO to dismiss the charge, after conducting the initial screening, is final. The CMO shall provide the Complainant, the Respondent, and the City Attorney with written findings concerning the CMO's determination to dismiss the charge and the charge will be considered closed.
- E. If the CMO issues an initial determination that the City has jurisdiction over the charge, the charge was timely filed, and the allegations, if true, would constitute a violation of this chapter, the CMO shall refer the matter to a Mediator.
- F. The Mediator shall review the matter. The Mediator may attempt to assist the Complainant and Respondent in reaching settlement of the charge in a cooperative manner using mediation, conference, conciliation and persuasion. If the Mediator deems that such an attempt is not practicable, the Mediator shall refer the matter to an Investigator. The Investigator shall follow the process described in Section I below.
- G. If the mediation is successful, the Mediator shall facilitate the drafting of an agreement with the Complainant and the Respondent for the purpose of eliminating the alleged discriminatory practice. The terms of the agreement may require the Respondent to refrain in the future from committing discriminatory practices of the type stated in the

agreement and to take such affirmative steps as the Mediator may require to carry out the purposes of this chapter. If an agreement is entered into, the Mediator shall furnish copies to the CMO, the City Attorney, the Complainant, and the Respondent. If an agreement is entered into, the charge will be considered closed.

- H. To the extent permitted by law, except for the terms of the agreement, neither the Mediator nor the City Manager, nor any employee thereof, shall make public, without the written consent of the Complainant and Respondent, information concerning efforts in a particular case to eliminate a discriminatory practice through mediation or by conference, conciliation, or persuasion, whether or not there is an agreement. In addition, as stated under Rule 408 of the Arizona Rules of Evidence, such information may not be used as evidence in any judicial proceeding.
- I. If the Mediator, the Complainant, and the Respondent cannot reach an agreement, the Mediator shall refer the matter to an Investigator, who shall attempt to determine the facts relevant to the charge filed under this chapter. The Investigator shall conduct an investigation of the charge to determine whether the facts support a finding that a violation of this chapter has occurred. If the Investigator determines that a violation of this chapter did not occur, the Complainant's charge will be dismissed and the matter will be considered closed. If the Investigator determines that a violation of this chapter did occur, the Investigator shall request the City Attorney file a complaint against the Respondent in the Flagstaff Municipal Court.
- J. In situations involving repeat offenses, the CMO shall refer the matter to an Investigator, who shall follow the process described in Section I. If, at the conclusion of the investigation process, the City Attorney does not file a complaint in Court then the City Attorney may refer the charge back to the Mediator. The Mediator, in his or her discretion may attempt to assist in resolution of the charge or may close the matter.

Section 14-02-001-0007 No Private Right of Action; Effect of Federal and State Laws.

This chapter does not create a private cause of action, nor does it create any right or remedy that is the same or substantially equivalent to the remedies provided under federal or state law. Nothing in this chapter shall supersede federal or Arizona law.

Section 14-02-001-0008 Severability.

If any section, sentence, paragraph, term, definition or provision of this chapter is for any reason determined to be illegal, invalid, superseded by other authority or unconstitutional by any court of competent jurisdiction or by any state or federal regulatory authority having jurisdiction thereof, such portion shall be deemed a separate, distinct, and independent provision and such determination shall have no effect on the validity of any other section, sentence, paragraph, term, definition or provision of this chapter, all of which will remain in full force and effect.

Section 14-02-001-0009 Unlawful Intimidation, Retaliation, and Coercion.

It is unlawful for any person to discriminate against, harass, threaten, harm, damage, or otherwise penalize another person for opposing an unlawful practice, for filing a complaint, or for testifying, assisting, or participating in any manner in an investigation under this chapter.

Section 14-02-001-00010 Record-keeping; Posting Requirement; Powers.

- A. The Investigator may request a Respondent against whom a charge has been filed to file a statement or report in writing, as to all the facts and circumstances concerning the alleged act of discrimination set forth in the charge. Additionally, in connection with any investigation of a charge filed under this chapter, the Investigator and the City Attorney (or designee) shall seek the voluntary cooperation of any person to obtain access to premises, records, documents, individuals, and any other possible source of information.
- B. Every employer, employment agency, and labor organization subject to this article, shall post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of Section 14-02-001-0003, Prohibited Acts.
- C. No employee of the City of Flagstaff shall make public with respect to a particular person, without his/her consent, information obtained by them pursuant to their authority under this article, except as required by law or as necessary to the conduct of a proceeding under this chapter.
- D. Any person being investigated under this chapter shall have the right to be represented by counsel.
- E. The City Attorney is empowered to seek fines as described in Section 14-02-001-0005 for civil infractions arising under this chapter.

SECTION 2. That the City Clerk be authorized to correct typographical and grammatical errors, as well as errors of wording and punctuation, as necessary; and that the City Clerk be authorized to make formatting changes needed for purposes of clarity and form, if required, to be consistent with the Flagstaff City Code.

PASSED AND ADOPTED by the City Council and approved by the Mayor of the City of Flagstaff this _____ day of _____, 2013.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY