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12.009

SUBJECT: Protected Classes Under The State Civil Rights Statutes; Do Cities And Counties Have Statutory Authority To Create Protected Classes Not Listed In State Statute?

REQUESTED BY: Senator Beau McCoy
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
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You introduced LB 912 during the 2012 legislative session. Among other things, that bill would have prohibited political subdivisions, including municipalities, from adopting or enforcing any local laws or ordinances which created protected classifications beyond those contained in the state's civil rights statutes such as the Age Discrimination In Employment Act or the Fair Employment Practices Act. LB 912 did not progress out of committee.

In your opinion request correspondence, you indicate that you are now considering reintroducing LB 912. However, to determine if that step is necessary, you have asked us if, under current Nebraska law, "cities and counties have the authority to create protected classes not listed in state statute." For the reasons set out below, it is our opinion that while political subdivisions may pass ordinances or other laws on the

same subject matter which are not inconsistent with the state's civil rights classifications, political subdivisions are not authorized to expand protected classes beyond the scope of the civil rights provided for in state statute.

As a preliminary matter, it is worth noting that this issue has been considered previously by a Nebraska municipality. In the early 1980s, the people of Lincoln voted to reject a proposal to amend the City Charter to include protections for classes beyond those which are currently defined by state statute. At that time, Lincoln's City Attorney, William F. Austin, a highly respected lawyer whose public career includes nearly thirty years of service to Lincoln, issued an opinion to the City's leaders that the proper mechanism for making such a change would require a vote of the people to amend the City Charter. Following the issuance of that opinion, the question was properly submitted to the people of Lincoln and summarily rejected.

We are aware of no changes with regard to that aspect of municipal corporation law in the intervening years since Mr. Austin's opinion, and he recently reaffirmed his views in a letter published in the *Lincoln Journal Star*. Notwithstanding what Nebraska cities may or may not do with regard to the expansion of protected classes beyond that provided by statute, and even if one discounts the analysis that follows in *this* opinion, it remains the case that such an expansion at the city level *must* be pursuant to an amendment to a city's charter. Such an amendment indisputably requires a vote of the people. Lincoln's government recognized the soundness of Mr. Austin's opinion in 1982, and the foundation of that opinion remains fully applicable today.

Apart from home rule charter revisions, there are two Nebraska statutes which pertain to the authority of certain political subdivisions, including municipalities, to create and enforce legislation pertaining to civil rights – Neb. Rev. Stat. § 18-1724 (2007) and Neb. Rev. Stat. § 20-113 (2007). We will discuss each of those statutes in turn.

In *Midwest Employers Council, Inc. v. Omaha*, 177 Neb. 877, 131 N.W.2d 609 (1964), two Omaha corporations challenged Omaha Ordinance No. 22026, entitled "Fair Employment Practices," which would have prohibited "an employer of three or more persons . . . from discriminating on the basis of race, religious creed, color, national origin, or ancestry." *Id.* at 881, 131 N.W.2d at 612. In striking down the ordinance, the Court stated "the state by its Legislature has extensively entered the field of labor" and "it is obvious that the Department of Labor . . . is vested with the power and responsibility of enforcing employment regulations within the state." *Id.* at 886-87, 131 N.W.2d at 615. The Court held that ordinance No. 22026:

[Is] unconstitutional in its entirety for the reason that the state, through the Legislature, did not delegate to the city of Omaha the power to permit its city council to legislate on fair employment practices and civil rights by passing ordinance No. 22026; and for the further reason that the power relating to labor relations and practices, and civil rights, lies in the state, and such matters are of statewide concern and not of local concern nor municipal government concern.

Id. at 888. 131 N.W.2d at 616. Clearly the Court was concerned with municipal corporations expanding upon existing state fair employment practices and exercising enforcement in an area in which the state had been vested with power and responsibility.

In an apparent response to the Court's ruling in *Midwest Employers*, the Legislature specifically gave municipal corporations the power to enact civil rights laws by ordinance in 1971. 1971 Neb. Laws LB 161 (codified as amended at Neb. Rev. Stat. § 18-1724 (2007)). Section 18-1724 addressed the situation in *Midwest Employers* by allowing municipal corporations to establish ordinances on the classifications specifically outlined in the bill, and provided for local control and enforcement. However, the power of municipalities under § 18-1724 is limited. That statute currently states:

Notwithstanding any other law or laws heretofore enacted, all cities and villages in this state shall have the power by ordinance to define, regulate, suppress, and prevent discrimination on the basis of race, color, creed, religion, ancestry, sex, marital status, national origin, familial status as defined in section 20-311, handicap as defined in section 20-313, age, or disability in employment, public accommodation, and housing and may provide for the enforcement of such ordinances by providing appropriate penalties for the violation thereof. It shall not be an unlawful employment practice to refuse employment based on a policy of not employing both husband and wife if such policy is equally applied to both sexes.

Neb. Rev. Stat. § 18-1724 (Reissue 2007) (Emphasis added). Thus, municipal corporations have the power, under § 18-1724, to define, regulate and enforce existing classifications as defined by statute.

Neb. Rev. Stat. § 20-113 (2007) also pertains to civil rights legislation by political subdivisions. Section 20-113 specifically states:

Any incorporated city may enact ordinances and any county may adopt resolutions which are substantially equivalent to the Age Discrimination in Employment Act, the Nebraska Fair Employment Practice Act, the Nebraska Fair Housing Act, and sections 20-126 to 20-143 and 48-1219 to 48-1227 or which are more comprehensive than such acts and sections in the protection of civil rights. No such ordinance or resolution shall place a duty or liability on any person, other than an employer, employment agency, or labor organization, for acts similar to those prohibited by section 48-1115. Such ordinance or resolution may include authority for a local agency to seek an award of damages or other equitable relief on behalf of the complainant by the filing of a petition in the district court in the county with appropriate jurisdiction. The local agency shall have within its authority jurisdiction substantially equivalent to or more comprehensive than the Equal Opportunity Commission or other enforcement agencies

provided under such acts and sections and shall have authority to order backpay and other equitable relief or to enforce such orders or relief in the district court with appropriate jurisdiction. Certified copies of such ordinances or resolutions shall be transmitted to the commission. When the commission determines that any such city or county has enacted an ordinance or adopted a resolution that is substantially equivalent to such acts and sections or is more comprehensive than such acts and sections in the protection of civil rights and has established a local agency to administer such ordinance or resolution, the commission may thereafter refer all complaints arising in such city or county to the appropriate local agency. All complaints arising within a city shall be referred to the appropriate agency in such city when both the city and the county in which the city is located have established agencies pursuant to this section. When the commission refers a complaint to a local agency, it shall take no further action on such complaint if the local agency proceeds promptly to handle such complaint pursuant to the local ordinance or resolution. If the commission determines that a local agency is not handling a complaint with reasonable promptness or that the protection of the rights of the parties or the interests of justice require such action, the commission may regain jurisdiction of the complaint and proceed to handle it in the same manner as other complaints which are not referred to local agencies. In cases of conflict between this section and section 20-332, for complaints subject to the Nebraska Fair Housing Act, section 20-332 shall control.

Any club which has been issued a license by the Nebraska Liquor Control Commission to sell, serve, or dispense alcoholic liquor shall have that license revoked if the club discriminates because of race, color, religion, sex, familial status as defined in section 20-311, handicap as defined in section 20-313, or national origin in the sale, serving, or dispensing of alcoholic liquor to any person who is a guest of a member of such club. The procedure for revocation shall be as prescribed in sections 53-134.04, 53-1,115, and 53-1,116.

Neb. Rev. Stat. § 20-113 (2007) (Emphasis added).

We have considered the parameters of § 20-113 previously in our Op. Att'y Gen. No. 160 (December 14, 1981). In that instance, Sen. Landis asked us whether “the state civil rights’ enabling statutes [provide] sufficient legislative authority for a home rule charter city to enact anti-discrimination protections for classifications not specifically mentioned in state law.” In response, we first concluded that a determination regarding the scope of the authority set out in § 20-113 required an “interpretation of the language ‘more comprehensive than.’” *Id.* at 3. To assist in that interpretation, we considered the legislative history of two amendments to §20-113 contained in 1974 Neb. Laws LB 681, where the language at issue was added to the statute, and 1979 Neb. Laws LB 438, which added intent language to the statute. Ultimately, we opined that “although the ‘more comprehensive than’ language could provide incorporated cities and counties

with the authority to enact ordinances or resolutions protecting classifications of persons not specifically set out in the state anti-discrimination statutes, a contrary interpretation also is feasible.” For that reason, we stated that “[i]n order to eliminate any doubts in this matter, one might wish to introduce clarifying legislation.”

While we continue to believe, as we did in 1981, that the legislative history of § 20-113 does not provide an entirely clear answer to your question, it also seems to us that other aspects of the relevant statutes, which we did not discuss in 1981, indicate that the authority of political subdivisions to legislate in the area of civil rights is limited to the civil rights enumerated in state statute, absent changes in a home rule charter. However, before we turn to those additional considerations, we will discuss the portions of the legislative history of § 20-113 which support our conclusion that political subdivisions do not have statutory authority to enlarge the protected classes created by state statute.

The words “or which are more comprehensive than such acts and sections in the protection of civil rights,” were added to § 20-113 in 1974 by LB 681. James Faimon, Assistant City Attorney for the City of Lincoln, who participated in the drafting of LB 681 and testified in support of the change, explained the purpose of the bill, in part, as an attempt to facilitate enforcement of civil rights provisions by cities:

The substantially equivalent language [in § 20-113] I think may, in some instances, create problems in reference to technical objections to passage of ordinances that may be otherwise legal, but because of the substantially equivalent requirement if the ordinance is not exactly the same language as the statute, there’s always that possibly (sic) that enforcement of that ordinance could be delayed because of litigation to determine whether that ordinance is substantially equivalent to state statutes. So, I would like to change that, so we don’t have that possibility arising.

Committee Records on LB 681, 83rd Neb. Leg., 2nd Sess. 11 (February 13, 1974)(Statement of James Faimon). In addition, the introducer of LB 681, Senator Hal Simpson, stated that LB 681 adds language to § 20-113 so “that the locals may, within these sections, be more comprehensive and then so would be able to enforce them at the local level.” Committee Records on LB 681, 83rd Neb. Leg., 2nd Sess. 28 (February 13, 1974)(Statement of Senator Hal Simpson) (Emphasis added). Moreover, Senator Simpson asserted to the legislative committee that there was likely no opposition to the bill from the public because:

We’re not adding something, that isn’t already a fact of law. We’re only asking where the enforcement is going to be.

Id. at 27.

Therefore, it appears to us that portions of the legislative history of LB 681 strongly indicate that the purpose of that amendment was not to allow political subdivisions to expand those existing civil rights classifications specifically enumerated in state statute, but only to provide for local enforcement as well as more comprehensive protections within existing state classifications. This is underscored by the fact that the second section of LB 681, relating to the Nebraska Liquor Control Commission, specifically delineates the classifications as they existed in § 18-1724.

Four years after the passage of LB 681, the right of political subdivisions to enforce civil rights protections was addressed again in *Omaha Human Relations Dep't on behalf of Guy v. City Wide Rock & Excavating Co.*, 201 Neb. 405, 268 N.W.2d 98 (1978). That proceeding involved a complaint filed by an employee of City Wide Rock that alleged discrimination because of race, a classification already covered in existing state statute. *Id.* at 406, 268 N.W.2d at 100. The Nebraska Supreme Court cited to *Midwest Employers*, and stated again that in the area of civil rights legislation, municipal corporations require statutory authority from the Legislature.

In 1979, in response to the decision in *City Wide Rock*, the Legislature restated its intent to provide for local enforcement of civil rights remedies as well as more comprehensive protections within existing state classifications by passing LB 438. 1979 Nebraska Laws LB 438. LB 438 amended § 20-113 to provide for additional procedures related to enforcement by municipal corporations. The introducer of LB 438, Senator Newell, indicated that the purpose of the bill was :

. . . to deal with the Supreme Court decision that said the Human Relations Department of the City of Omaha had no authority because it had not been given specific statutory authority by the State of Nebraska. This bill will give it specific statutory authority by the State of Nebraska and it will be able to continue to function.

Floor Debate on LB 438, 86th Neb. Leg., 1st Sess. 2374 (March 29, 1979) (Statement of Senator Dave Newell). The passage of LB 438 supports our conclusion regarding the meaning of the "more comprehensive than" language in § 20-113 because the bill expanded the enumerated sections of state law covered under § 20-113. If "more comprehensive than" in that statute was intended to allow political subdivisions to add new protected classifications for civil rights enforcement, then there was no need for the Legislature to amend new authority into § 20-113.

The passage of LB 438 in 1979 also supports our ultimate conclusion in this instance in another significant way which was not discussed in our previous opinion in 1981. LB 438 created Neb. Rev. Stat. § 20-113.01. That statute provides:

In order to declare the intent of the present Legislature and to effect the original intent of sections 18-1724 and 20-113, the Legislature finds that civil rights are a local as well as state concern and the Legislature desires

to provide for the local enforcement and enactment of civil rights legislation concurrent with the authority of the State of Nebraska.

(Emphasis added). In Nebraska, statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary. *PSC Credit Services, Inc. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997). In that regard, the term "concurrent" has the following meaning:

Running together, having the same authority; acting in conjunction; agreeing in the same act or opinion; pursuit of the same course; contributing to the same event; contemporaneous.

BLACK'S LAW DICTIONARY 263 (5th ed. 1979). As a result, the precise language of § 20-113.01 indicates that the Legislature intended that political subdivisions in Nebraska, including municipalities, should enforce and enact civil rights legislation under §§ 18-1724 and 20-113 in conjunction with the State, and that those entities *have the same authority* under those statutes as the State. That language in § 20-113.01 requires us to conclude that the authority of political subdivisions to legislate in the area of civil rights is limited to the civil rights enumerated in state statute.

We would also point out that our conclusion regarding the authority of political subdivisions to enact civil rights legislation is supported by the fact that the Nebraska Fair Employment Practice Act, cited within § 20-113, explicitly does not include "homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting in physical impairments, [or] other sexual behavior disorders . . . " within the definition of disability. Neb. Rev. Stat. § 48-1102 (Reissue 2010). Further, the purpose of the Nebraska Fair Employment Practice Act is "to foster the employment of all employable persons in the state on the basis of merit regardless of their race, color, religion, sex, disability, or national origin . . ." Neb. Rev. Stat. § 48-1101 (Reissue 2010). A municipal corporation operating with "concurrent" authority to the State should not be allowed to create a new category of employer liability that the Legislature has specifically rejected.

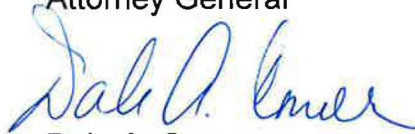
It is also clear that should a political subdivision try to enforce an ordinance beyond the scope of its authority in such a way as to implicate the federal constitutional rights of those subject to enforcement, that action may expose public officers and the political subdivision to liability under 42 U.S.C. § 1983. In *Monroe v. Pape*, the Supreme Court held that a police officer was acting "under color of state law" even though his actions were in violation of state law. 365 U.S. 167 (1961). This was the first case in which the Supreme Court allowed liability to attach where a government official acted outside the scope of the authority granted to him by state law. Although the Court in *Monroe v. Pape* originally held that municipal corporations were excluded from such liability, the Court later reversed its decision and determined in *Monell v. Department of Social Service*, that municipal corporations were within the ambit of § 1983. 436 U.S. 658 (1978). (Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional

implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.) Therefore, any enforcement action by a political subdivision outside of the authority granted to it under state law which implicates federal constitutional rights could subject the subdivision and its officers to liability. Additionally, a plaintiff need only succeed on "any significant issue" in the § 1983 litigation and achieve "some of the benefit" sought in bringing the suit to be deemed a "prevailing party" under 42 U.S.C. § 1988 and be entitled to an award of attorney's fees. See *Texas State Teachers Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989).

In conclusion, Nebraska law, like federal law, recognizes and protects certain classifications of people from discrimination. And, Nebraska's anti-discrimination provisions may be enforced by both the State and certain local political subdivisions. However, while the pertinent Nebraska statutes authorize local legislation on the same subject matter which is not inconsistent with the state's civil rights classifications, they do not authorize political subdivisions in Nebraska, including municipalities, to expand protected classifications beyond the scope of the civil rights classifications created in state statute.

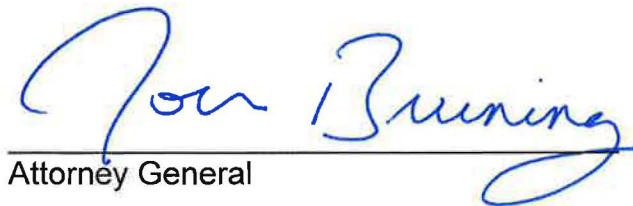
Sincerely,

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