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PUBLIC OVERSIGHT HEARING

"Notice Requirement Amendment Act of 2013"

B20-321

&

"Human Rights Amendment Act of 2014"

B20-803

Testimony of Mónica Palacio, Director
District of Columbia Office of Human Rights

THE HONORABLE TOMMY WELLS
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

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I. Introduction

Good afternoon, Chairman and members of the Committee. I am Mónica Palacio, Director of the District of Columbia Office of Human Rights, and I am pleased to appear before you today to provide testimony regarding the *Human Rights Act Notice Requirement Amendment Act of 2013 and the Human Rights Amendment Act of 2014.*

II. Office Background

As you know, the DC Office of Human Rights is an agency of the District of Columbia government that seeks to eradicate discrimination, increase equal opportunity, and protect human rights in the city. We attempt to eradicate discrimination by enforcing the District of Columbia Human Rights Act of 1977, as amended, and by enforcing all other federal anti-discrimination laws and policies.

III. Notice Act

The Human Rights Notice Amendment Act primarily would clarify an ambiguity in the law – namely, whether individuals who sue the District under the Human Rights Act must provide at least six (6) months' notice to the District, pursuant to D.C. Code § 12-309, in order to recover unliquidated damages. Liquidated damages are recovered for losses that can be quantified easily, such as back pay. Unliquidated damages are less concrete and more subjective, such as pain and suffering. A recent Court of Appeals decision[1] held that unliquidated damages such as pain and suffering were not available to a plaintiff who had failed to provide notice under § 12-309 when he brought an Human Rights Act action against the District in Superior Court. By contrast, the Court found that attorney's

[1] *Jaiyeola v. District of Columbia*, 40 A.3d 356 (D.C. 2012).

fees and back pay remained available even when notice was not provided to the District.

IV. Affected Agencies and Divisions

While OHR is unaware of the notice requirement being an issue in any administrative proceeding before the Office of Human Rights or the Commission on Human Rights, the proposed amendment would nonetheless clarify any potential ambiguity in those fora. As the law currently stands, the statute of limitations for a Human Rights claim filed in Court against the District for some types of damages is six months as opposed to the one year that the Human Rights Act provides. By clarifying that § 12-309 does not apply to claims against the D.C. government, all plaintiffs bringing a claim under the Human Rights Act will have a one year statute of limitations in Court. The six month statute of limitations for D.C. government employees filing administratively would remain. Thus, OHR would not face any logistical challenges should this amendment become law.

OHR notes that not all Human Rights Act claims brought against the government are from employees or former employees. Some claims fall under the public accommodations provision of the statute and are filed by members of the public who allege that they were denied a service or benefit by the D.C. government

based on a protected characteristic. Should this bill be passed, the District would lose an affirmative defense in actions brought under the Human Rights Act and would consequently be subject to pay more damages in cases where unliquidated damages, such as pain or suffering, are found to exist.

Finally, OHR has not been able to identify any potential legal challenges to this proposed amendment.

V. Human Rights Amendment

The second piece of legislation on which we have been asked to testify is the The Human Rights Amendment Act of 2014 that includes three (3) distinct provisions each of which I will discuss separately.

First, the law would require the Director of the Office of Human Rights to have a demonstrated background in human rights law. The Office and the administration support this common-sense provision because the OHR Director works closely with the General Counsel to issue legal determinations which are subject to court review. In addition, the work itself involves sometimes highly technical legal and civil rights issues. Based on the vast responsibilities of this office, a demonstrated background of working on civil rights under the U.S. system of law and a law

degree ***or*** substantial experience working in human rights and civil rights are very reasonable requirements.

It is our recommendation, Mr. Chairman, that the term "human rights" be clarified to mean U.S. domestic 'civil rights' or that the qualifying adjective "domestic" be included. Although it is customary for state and local discrimination enforcement agencies to use the term 'human rights' to describe their mandate, the term 'human rights' often refers to a comprehensive set of international, fundamental rights contained in documents such as the Universal Declaration of Human Rights, including rights such as the right to life and freedom from government oppression; whereas the term 'civil rights' more often refers to domestic, higher-order rights such as the freedom to be free of discrimination by public or private entities in employment and housing. Thus, the term 'civil rights' better describes the substantive work of the Office of Human Rights.

Second, the proposed amendment would require the Office's annual report to include information on investigations and public hearings that have been initiated by the Office. Generally, there are two kinds of complaints investigated by the Office – Complainant initiated and Director initiated. The most common are complainant initiated, which are those that are filed by private persons against

companies, nonprofits, or the D.C. Government. In OHR's annual reports, the Office provides aggregated statistical data to the public and to this Committee on this type of complainant initiated cases filed at the office, which includes the protected characteristics alleged in each complaint.

However, this portion of the provision in the proposed amendment deals specifically with Director initiated complaints. There are two types of Director initiated complaints. One is a pre-complaint *Director's Inquiry* under Chapter 9 of the Municipal Regulations implementing the Human Rights Act and results in an advisory opinion that may under some circumstances be made public. The second is a formal Charge of Discrimination filed by the Director, which would not be made public unless and until a probable cause determination is issued and the case reaches the Commission on Human Rights.

The Office and the Administration also support this provision requiring the Office to report on these types of investigations. However, we have two suggestions. First, we recommend that an exception be inserted whereby the Office not be required to report the existence or status of an ongoing *Director's Inquiry* if the Office determines that such disclosure would either a) unduly prejudice the subject of the investigation or b) undermine the integrity of the investigation. Even with

this modification, the Office would still be required to generally report the existence of, and outcome of an investigation after the Office makes a final probable cause determination. Second, the Office also requests that the name of any entity being investigated, either pursuant to a Director's Inquiry or to a formal Charge filed by the Director, need not be disclosed unless probable cause is established and the matter certified to the Commission on Human Rights. OHR believes that in most cases the same confidentiality rules that apply to private complaints should also apply to Director initiated complaints whereby the identity of the parties is not public knowledge unless and until the matter is certified to a public hearing before the Commission on Human Rights.

VII. Third provision description

The third provision would repeal the exemption under the statute that permits religiously-affiliated educational institutions to withhold meeting space and other services from gay and lesbian organizations. This exemption is commonly referred to as the "religious exemption." I will now quote § 2-1402.41 (3), the provision proposed to be repealed, in its entirety.

Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for any educational institution that is affiliated with a religious organization or closely associated with the tenets of a religious organization to deny, restrict, abridge, or condition the use of any fund, service, facility, or benefit; or the granting of any

endorsement, approval, or recognition, to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief.

VIII. Affected Institutions

I will begin my testimony with a brief review of applicable law and jurisprudence. The District of Columbia Human Rights Act prohibits discrimination based on numerous characteristic, including sexual orientation, in the areas of employment, housing, public accommodation, and pertinent to today's discussion – education. Specifically, the HRA covers all educational institutions, including both public and private schools. Section 241 of the Human Rights Act states in pertinent part, "it shall be an unlawful discriminatory practice for an educational institution to deny, restrict, abridge or condition the use of or access to any of its facilities, services, programs, or benefits to any person otherwise qualified, wholly or partially, for a discriminatory reason, including based upon the actual or perceived sexual orientation of that individual."

Public schools are required by both Federal and District law to provide equal access. The Federal Equal Access Act of 1984 requires secondary public schools receiving federal funding to permit religious student organizations to meet during non-curricular time in the same manner as it permits other student organizations to

meet. The law has since been interpreted to extend similar protections to GLBT students and organizations at secondary public schools. As you can see, the Human Rights Act goes further than federal law, because it applies to private educational institutions.

The removal of this exemption thus would only affect religiously-affiliated private educational institutions that are not currently providing equal access and benefits to GLBT groups. OHR notes, however, that some religiously-affiliated educational institutions already provide equal access to GLBT clubs. Notable among them is Georgetown University, which is affiliated with the Society of Jesus and with the Roman Catholic Church.

IX. Legislative Background

As you are aware, the exemption the Council is seeking to repeal was not included in the Human Rights Act as passed by the Council in 1977; rather, Congress took action to insert the exemption in 1989, and the background that led to Congress inserting this exception into the statute is instructive. In 1987, after much litigation, the D.C. Court of Appeals found that a religiously affiliated university may not lawfully withhold tangible benefits, other than direct monetary funding, to

a student organization based on sexual orientation.[2] The Court noted that the Human Rights Act does not require any entity to endorse another entity, and that it would not violate the Human Rights Act for a religiously affiliated university to refuse to endorse a student organization based on the sexual orientation of its members so long as it affords that club the same non-monetary, tangible benefits as it does to other similarly situated clubs.

Of great significance is the fact that the Court of Appeals' decision in 1987 did not require religiously affiliated institutions to provide funding to a student group whose views conflicted with a sincerely held religious belief of that institution. However, the Court of Appeals did find in the particular case under review that the Human Rights Act required a religiously affiliated university to provide a mailbox and use of the university mail service, permission to apply for (but not necessarily to receive) funding, and a label maker. In response, Congress conditioned all of D.C.'s appropriation for 1989 on the Council amending the Human Rights Act to include the exemption at hand. Instead of amending the Human Rights Act, all thirteen (13) members of this Council sued the United States Government and prevailed in federal district court and at the Court of Appeals for the D.C. Circuit.[3]

[2] *See Gay Rights Coalition of Georgetown University Law Center, et. al., v. Georgetown University, et. al.*, 536 A.2d 1 (D.C. 1987).
[3] *See David A. Clarke, et. al., v. United States of America*, 886 F.2d 404 (D.C. 1989).

Congress subsequently chose to pass the exception in 1989 using its constitutional power to legislate for the District of Columbia.

Although OHR interprets the exemption to permit religiously affiliated educational institutions to restrict the access of GLBT groups to school benefits and facilities, the actual language of the exemption could be construed more broadly. For example, if a student or teacher expressed a viewpoint regarding GLBT rights with which the religiously affiliated institution disagreed, could the "condoning" part of the exemption be used to target that student or teacher? If a student posts his same-sex relationship status on Facebook, could the school discriminate based on the "promoting" aspect of the exemption? While it is OHR's position that the Human Rights Act still offers protection to GLBT students and employees by prohibiting a religiously affiliated educational institution from discriminating against an individual student or teacher based solely on that individual's sexual orientation, the exemption as it stands creates a grey area whereby a religiously affiliated educational institution may assert a defense to a Charge of Discrimination.

X. Legal Challenges

Based on our research, there could be legal challenges regarding the application of the Human Rights Act absent the exemption. As you are aware, Mr. Chairman, the Home Rule Act permits the Council to adopt legislation to repeal or amend a purely local act of Congress that applies only to the District so long as the text of the Congressional act neither states nor implies that the Council is barred from taking such action. The exemption being considered today does not include such language. However, OHR notes that this legislation would repeal an act of Congress should it pass Congressional review.

In addition, there is a question as to whether the First Amendment's freedom of speech and freedom of religion clauses could be violated if the Human Rights Act absent the exemption were interpreted to require a religiously affiliated educational institution to provide equal funding to an organization that holds or espouses views that conflict with a sincerely held religious belief of that school. Also, the Religious Freedom Restoration Act prohibits federal and District statutes and regulations from imposing substantial burdens on religious institutions unless those burdens are narrowly tailored to a compelling governmental interest. OHR also notes that the repeal of this exemption would not affect the ministerial exception which provides that a religious institution may discriminate in the employment

context against an individual who occupies a position that entails teaching church doctrine or speaking on behalf of the religious institution.

Therefore if this exemption is repealed, the primary guidance in applying the Human Rights Act to a claim that would have otherwise been covered by the exemption at hand would be the 1987 Court of Appeals decision, subsequent First Amendment jurisprudence and the Religious Freedom Restoration Act.

In conclusion, Mr. Chairman, if this exemption is removed, OHR could, through its rulemaking authority, reasonably interpret the statute to balance the compelling interest to prevent and correct invidious discrimination with the constitutional and federal statutory protections afforded to religiously affiliated educational institutions. Similarly, if this exemption is not repealed, OHR could also issue rules that clarify the scope of the exemption.

Conclusion

Thank you for the opportunity to provide testimony. I would be happy to take any questions from you, Mr. Chairman, at this time.