



October 21, 2022

MEMO TO: City Council
J. Carter Napier, City Manager 

FROM: John Henley, City Attorney 

SUBJECT: An Ordinance Amending Chapter 9.08 - Offenses Against the Person, of the Casper Municipal Code to Add Section 9.08.020 “Malicious Harms Based on Race, Color, Religion, Sex, Sexual Orientation, Gender Identity, Gender Expression, National Origin, or Disability.”

Meeting Type & Date:
Regular Council Meeting
November 1, 2022

Action type:
Conduct a Public Hearing and First Reading regarding An Ordinance Amending Chapter 9.08 - Offenses Against the Person, of the Casper Municipal Code to Add Section 9.08.020 “Malicious Harms Based on Race, Color, Religion, Sex, Sexual Orientation, Gender Identity, Gender Expression, National Origin, or Disability.”

Recommendation:
That City Council conduct Public Hearing and First Reading of the referenced ordinance.

Summary:
The City of Casper’s LGBTQ Advisory Board requested City Council to consider an ordinance concerning malicious harms based on race, color, religion, sex, sexual orientation, gender identity, gender expression, national origin or disability to discourage discrimination in employment, housing and public accommodations of such protected classes.

On October 11, 2022, the City Council discussed a proposed ordinance and on October 18, 2022, City Council established the Public Hearing and First Reading of the Ordinance for November 1, 2022.

The Ordinance is based, to a large degree, on a Cheyenne, Wyoming ordinance with the addition of the original and ongoing concerns of the Council’s advisory board, concerning employment, housing, and public accommodations.

There are federal laws addressing employment, housing and public accommodation discrimination, but the reach of those statutes is generally directed at employers with a sizable workforce; the process has no urgency and can take years before a complaint is resolved. (See the

Bostock v. Clayton County, Georgia bullet points attached; two of the three plaintiffs in the three cases heard by the U.S. Supreme Court had already passed away before the Supreme Court decided the issue.)

The physical harms included within the proposed ordinance are based upon the current definitions for assault and assault and battery. The difference is that an enhanced penalty is available to the Court upon a first offense. Currently, for a first offense of battery in the Municipal Court, the maximum punishment is up to \$750.00. Under the proposed ordinance if the battery was committed because of hate or prejudice against another due to the other's color, ethnicity, sex, sexual orientation, etc., the municipal judge will have the ability to consider incarceration for a violation proved beyond a reasonable doubt in the Court's sentencing decision.

An exception within the terms of the ordinance is the Religious Freedom Restoration Act (42 U.S.C. 200bb-1 through 2000bb-4). Concern has been voiced regarding the Statutes protection for a "person's" exercise of religion. The concern was that the reference to person was not broad enough to protect corporations. *Hobby Lobby v Sebelius*, a 2013 Tenth Circuit case, at page 1129 answered this question:

"We begin with the statutory text. RFRA contains no special definition of "person." Thus, our first resource in determining what Congress meant by "person" in RFRA is the Dictionary Act, which instructs: "In determining the meaning of any Act of Congress, unless the context indicates otherwise *** the word 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, we could end the matter here since the plain language of the text encompasses "corporations," including ones like Hobby Lobby and Mardel. In addition, the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form." *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir.2004) (en banc) (affirming a RFRA claim brought by "a New Mexico corporation on its own behalf"), *aff'd*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

[We have been given] no persuasive reason to think that Congress meant 'person' in RFRA to mean anything other than its default meaning in the Dictionary Act-which includes corporations regardless of their profit-making status. *Hobby Lobby Stores, Inc. v Sebelius* 723 F.3d 1114 (2013)

However, notwithstanding the 10th Circuit and U.S. Supreme Court decisions, to give additional clarification to the Council's intention within the ordinance, an amendment is recommended. On page 3, paragraph F. 1. a. the language may be amended from the first paragraph to the second proposed paragraph:

Ordinance as proposed:

- F. 1. Exceptions. Notwithstanding anything contained in this Section, the following practices shall not be a violation of this Section:
 - a. Any action or right authorized or protected by the Religious Freedom Restoration Act (42 U.S.C. § 2000bb – 2000bb-4), Wyoming Statutes, the United States Code, the United States Constitution, or the Wyoming Constitution.

Amendment option:

- F. 1. Exceptions. Notwithstanding anything contained in this Section, the following practices shall not be a violation of this Section:
 - a. Any action or right authorized or protected by the Religious Freedom Restoration Act (42 U.S.C. § 2000bb – 2000bb-4), **this exception is intended to include protection for persons and profit and non-profit religious groups and organizations that provide charitable and/or educational services; rights guaranteed by:** Wyoming Statutes, the United States Code, the United States Constitution, or the Wyoming Constitution.

Financial Considerations:

The Casper Police Department will have additional crimes to charge if appropriate, which may take more time to complete. Similarly, charging someone for an offence with possible incarceration may require additional appointments of court appointed attorneys for indigent defendants.

Oversight/Project Responsibility

City Attorney's Office
Casper Police Department

Attachments

Proposed ordinance.
Bostock v. Clayton County, Georgia bullet points.
Religious Freedom Restoration Act of 1993.

Bostock v. Clayton County, Georgia Bullet Points

- Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league.

Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

- Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.
- Aimee Stephens worked at a funeral home in Garden City, Michigan. When Stephens got the job, Stephens presented as a male.

But two years into service with the company, Stephens began treatment for despair and loneliness. Ultimately, clinicians diagnosed Stephens with gender dysphoria and recommended that Stephens begin living as a woman.

In Stephens sixth year with the company, Stephens wrote a letter to the employer explaining that Stevens planned to "live and work fulltime as a woman" after Stephens returned from an upcoming vacation. The funeral home fired Stevens before Stephens left, telling Stephens "this is not going to work out."

Federal Civil Rights Act 9.02[2][a]:

The term "employer" for federal actions means a person engaged in an industry who has fifteen or more employees.

Public Law 103-141
103d Congress

An Act

Nov. 16, 1993

[H.R. 1308]

Religious
Freedom
Restoration Act
of 1993.
42 USC 2000bb
note.

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

42 USC 2000bb.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) **FINDINGS.**—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) **PURPOSES.**—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 USC
2000bb-1.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) **IN GENERAL.**—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) **EXCEPTION.**—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
 (2) is the least restrictive means of furthering that compelling governmental interest.

(c) **JUDICIAL RELIEF.**—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) **JUDICIAL PROCEEDINGS.**—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting “the Religious Freedom Restoration Act of 1993,” before “or title VI of the Civil Rights Act of 1964”.

(b) **ADMINISTRATIVE PROCEEDINGS.**—Section 504(b)(1)(C) of title 5, United States Code, is amended—

- (1) by striking “and” at the end of clause (ii);
 (2) by striking the semicolon at the end of clause (iii) and inserting “, and”; and
 (3) by inserting “(iv) the Religious Freedom Restoration Act of 1993;” after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

- (1) the term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
 (2) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
 (3) the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion; and
 (4) the term “exercise of religion” means the exercise of religion under the First Amendment to the Constitution.

42 USC
2000bb-2.

SEC. 6. APPLICABILITY.

(a) **IN GENERAL.**—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) **RULE OF CONSTRUCTION.**—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) **RELIGIOUS BELIEF UNAFFECTED.**—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

42 USC
2000bb-3.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this

42 USC
2000bb-4.

Act. As used in this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.

LEGISLATIVE HISTORY—H.R. 1308 (S. 578):

HOUSE REPORTS: No. 103-88 (Comm. on the Judiciary).

SENATE REPORTS: No. 103-111 accompanying S. 578 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 139 (1993):

May 11, considered and passed House.

Oct. 26, 27, S. 578 considered in Senate; H.R. 1308, amended, passed in lieu.

Nov. 3, House concurred in Senate amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 29 (1993):

Nov. 16, Presidential remarks.

ORDINANCE NO. 18-22

AN ORDINANCE AMENDING CHAPTER 9.08 – OFFENSES AGAINST THE PERSON, OF THE CASPER MUNICIPAL CODE TO ADD SECTION 9.08.020 “MALICIOUS HARMS BASED ON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION, NATIONAL ORIGIN, OR DISABILITY.”

WHEREAS, the governing body of the City of Casper has the authority granted by Wyoming State Statute §15-1-103(a)(xviii), xvi(C) and (xli) to adopt ordinances and resolutions necessary to protect the health, safety and welfare of the City and of its citizenry; and,

WHEREAS, the governing body of the City of Casper may perform acts authorized by the powers granted by the state in relation to the concerns of the city; and,

WHEREAS, the City of Casper is composed of and welcomes diverse individuals, groups and communities; and,

WHEREAS, the City of Casper values diversity and seeks to encourage and allow all residents and visitors to contribute to the commercial life and activities of the City and to the cultural and social life of the City; and,

WHEREAS, affirming nondiscrimination protections and investing in social safety will help reduce vulnerable communities’ exposure to potential violence, economic injury and discrimination; and,

WHEREAS, the governing body of the City of Casper desires to amend Chapter 9.08 – of the Casper Municipal Code by creating Section 9.08.020.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF CASPER, WYOMING: that Section 9.08.020 is created and shall be codified as follows:

Section 9.08.020 Malicious harms based on race, color, religion, sex, sexual orientation, gender identity, gender expression, national origin, or disability.

A. Unlawful physical actions committed on the basis of protected characteristics

It shall be unlawful and an offense for any person to commit any of the following acts maliciously and with the specific intent to intimidate or harm another person because of that person’s race, color, religion, ancestry, sex, sexual orientation, gender identity, gender expression, national origin, or disability (hereafter collectively “protected characteristics”):

1. a. **Assault of another.** Whoever, having the present ability to do so, attempts to commit a violent injury on another person because of one or more protected characteristics of that person, is guilty of an assault under this section.

b. **Assault and Battery of that person.** Whoever, in a rude, insolent or angry manner, unlawfully touches another person because of one or more protected characteristics of that person, is guilty of an assault and battery under this section.

2. **Injuring, defacing or destroying property of another.** No person shall (a) willfully injure, deface or destroy, or attempt to injure, deface or destroy, any other person's building or any fixture thereof, (b) injure, destroy or secrete any goods, chattels or valuable papers of any other person, (c) injure, deface, or destroy any fence, foundation, sidewalk, trees or any other private property of any other person without permission, or (d) damage, destroy, vandalize, deface, trespass upon, or steal any real or personal property of any other person because of one or more protected characteristics of that person, is guilty of injuring, defacing or destroying property of another under this section.

B. Inciting imminent lawless violence against another.

It shall be unlawful and a violation hereof for any person, by words, depictions or actions, to incite or produce imminent lawless violence directed against another person because of one or more protected characteristics of that person, including circumstances in which such words, depictions, or actions were intended and likely to incite or produce such imminent lawless violence, but failed in their objective.

C. Places of public accommodation; discrimination prohibited.

It shall be unlawful and an offense for any person, with malice or prejudice, to restrict another person from obtaining the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation because of one or more protected characteristics of that person. For purposes of this paragraph, "place of public accommodation" means, businesses, and locations which are open to the public., or which invite the patronage of the public.

D. Housing; illegal discrimination prohibited.

It shall be unlawful for any person or entity to discriminate against another person in the sale, lease, or rental of any housing facility, or to otherwise discriminate against such person in the terms, conditions, maintenance, improvement, or repair of any housing facility, because of one or more protected characteristics of that person.

E. Employment discrimination prohibited.

1. It shall be unlawful and an offense for any employer to refuse to hire or promote a person, or to discriminate against a person in matters of compensation or the terms, conditions or privileges of employment, because of one or more protected characteristics of that person.
2. It shall be unlawful and an offense for any person, an employer, an employment agency, a labor organization, or its employees or members, to discriminate in matters of employment or membership, including customary benefits of the employment membership, against a qualified person, because of one or more protected characteristics of that person.
3. It shall be unlawful and an offense for an employer to reduce the wage or benefits of any employee because of one or more protected characteristics of that person.

F. 1. Exceptions. Notwithstanding anything contained in this Section, the following practices shall not be a violation of this Section:

- a. Any action or right authorized or protected by the Religious Freedom Restoration Act (42 U.S.C. § 2000bb – 2000bb-4), Wyoming Statutes, the United States Code, the United States Constitution, or the Wyoming Constitution.
- b. For a religious organization or institution to restrict any of its facilities of housing or accommodations which are operated as a direct part of religious activities to individuals of the religious organization or institution involved or to restrict employment opportunities for officers, religious instructors and clergy to individuals of that religious organization or institution.
- c. For the owner of an owner-occupied one-family or two-family dwelling, or a housing facility or public accommodation facility, respectively, devoted entirely to the housing and accommodation of individuals of one sex, to restrict occupancy and use on the basis of sex.
- d. To discriminate in any arrangement for the sharing of a dwelling unit by an individual who is sharing the unit.

2. Exceptions. Notwithstanding anything contained in this Section, the following entities or their agencies shall not be prosecuted pursuant to Subsections C., D., and E., of this Section:

- a. The United States or any department or agency thereof, a corporation wholly owned by the government of the United States or Indian Tribe;
- b. The State of Wyoming or any department or agency thereof, including any political subdivision of the State;
- c. A bona fide private membership club (other than a labor organization) which is exempt from taxation under the Internal Revenue Code of 1986; or,

- d. A fraternal or religious association or corporation if the association or corporation is neither organized for private profit nor has as its primary purpose the provision of accommodations or services that are available on a non-membership basis.
- e. An institution, club, or place of accommodation that proves that it is, by its nature, distinctly private. An institution, club, or place of accommodation is not by its nature distinctly private if:
 - i. It has more than twenty-five) members, and
 - ii. Provides regular meal service, and
 - iii. Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of members. For the purposes of this definition, any lodge of a recognized national fraternal organization is considered by its nature distinctly private.

G. Burden of proof. Investigations of alleged violations of this code are undertaken based upon a strong showing of reasonable suspicion that the violation occurred because the alleged perpetrator's actions were based on one or more protected characteristics of the victim(s). Reasonable suspicion is best demonstrated by expressions of bias, hate or prejudice, made or encouraged by the perpetrator at or near the time of the alleged violation, or, through a sustained pattern of conduct which demonstrates the perpetrator's motivation. Violations of this code section, must be proved beyond a reasonable doubt .

H. Penalty.

1. Any person found guilty of violating subsections A. and/or B., of this section, may be punished by a fine up to \$750.00 or up to six (6) months in jail, or both.
2. Any person found guilty of violating the subsections C., D., or E., of this section, may be punished by a fine up to \$750.00, under the general provisions of Section 1.28.010 of the Casper City Code.

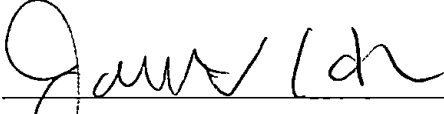
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PASSED on 1st reading the ____ day of _____, 2022.

PASSED on 2nd reading the ____ day of _____, 2022.

PASSED, APPROVED, AND ADOPTED on third and final reading the _____ day of _____, 2022.

APPROVED AS TO FORM:



ATTEST:

CITY OF CASPER, WYOMING
A Municipal Corporation

Fleur Tremel
City Clerk

Ray Pacheco
Mayor