

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

February 9, 2022

1:36 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Liz Snyder, Vice Chair
Representative Harriet Drummond
Representative Jonathan Kreiss-Tomkins
Representative David Eastman
Representative Christopher Kurka
Representative Sarah Vance

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 17

"An Act adding to the powers and duties of the State Commission for Human Rights; and relating to and prohibiting discrimination based on sexual orientation or gender identity or expression."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 17

SHORT TITLE: DISCRIMINATION: GENDER ID.;SEXUAL ORIENT.

SPONSOR(S): REPRESENTATIVE(S) JOSEPHSON

02/18/21	(H)	PREFILE RELEASED 1/8/21
02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD
05/05/21	(H)	STA REFERRAL MOVED TO AFTER JUD
05/05/21	(H)	BILL REPRINTED
02/09/22	(H)	JUD AT 1:30 PM GRUENBERG 120

WITNESS REGISTER

REPRESENTATIVE ANDY JOSEPHSON

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: As prime sponsor, introduced HB 17.

MAX KOHN, Staff
Representative Andy Josephson
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: On behalf of the prime sponsor, Representative Josephson, provided a PowerPoint presentation, titled "HB 17: Non-Discrimination Based on Sexual Orientation, Gender Identity or Expression" and summarized the sectional analysis for HB 17.

ROSE O'HARA-JOLLEY, Director
Planned Parenthood Alliance Advocates Alaska
Fairbanks, Alaska

POSITION STATEMENT: Provided invited testimony on HB 17.

ACTION NARRATIVE

[1:36:06 PM](#)

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 1:36 p.m. Representatives Drummond, Snyder, and Claman were present at the call to order. Representatives Eastman, Kurka, Vance, and Kreiss-Tomkins arrived as the meeting was in progress.

HB 17-DISCRIMINATION: GENDER ID.;SEXUAL ORIENT.

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CHAIR CLAMAN announced that the only order of business would be HOUSE BILL NO. 17, "An Act adding to the powers and duties of the State Commission for Human Rights; and relating to and prohibiting discrimination based on sexual orientation or gender identity or expression."

[1:37:33 PM](#)

REPRESENTATIVE ANDY JOSEPHSON, Alaska State Legislature, as prime sponsor, introduced HB 17. He said that many states protect the interests of sexual orientation and gender expression of individuals in civil rights code, while Alaska, as a state, does not. He added that, pertaining to lending, housing, employment, and other areas, some municipalities have protections, resulting in a "patchwork" of [expected] treatment of individuals regarding their sexuality or gender identity. He stated that the proposed HB 17 would expand the authority of the

State Commission for Human Rights ("commission") under Title 18 by adding the investigation of claims of discrimination based on sexual orientation and gender identity. He explained that previous versions of the bill have been heard, and U. S. Supreme Court Justice Anthony Kennedy has ruled in Obergefell v Hodges 576 U.S. 644 (2015), that basic constitutional principles allow for individuals of the same sex to marry.

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REPRESENTATIVE JOSEPHSON stated that U.S. Supreme Court Justice Neil Gorsuch's opinion in Bostock v. Clayton County, 590 U.S. 644 (2020), has ruled that discrimination in employment because of sexual orientation is unconstitutional. He explained that the commission has already accepted an individual's claim of discrimination regarding employment. He stated that HB 17 would codify protections like the rulings found in Bostock v. Clayton County, aligning with the current practice of the commission. He explained that the commission is not permitted to award punitive damages; however, it is allowed to enforce the law by mediating a settlement prior to litigation.

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REPRESENTATIVE EASTMAN asked whether the commission has interpreted the Bostock v. Clayton County ruling to apply to claims beyond those pertaining to employment [discrimination].

REPRESENTATIVE JOSEPHSON, in response, expressed the belief that the commission has expanded its interpretation beyond [employment discrimination].

[1:48:17 PM](#)

MAX KOHN, Staff, Representative Andy Josephson, Alaska State Legislature, on behalf of the prime sponsor, Representative Josephson, presented the PowerPoint presentation, titled "HB 17: Non-Discrimination Based on Sexual Orientation, Gender Identity or Expression" [hard copy included in the committee packet]. On slide 2, he pointed out that Territorial Legislation in Alaska passed the Anti-Discrimination Act in 1945. This addressed discrimination in public accommodations almost 20 years before the national Civil Rights Act of 1964. He continued that today race, religion, color, national ancestry, physical or mental disability, age, sex, marital status, changes in marital status, pregnancy, or parenthood are protected classes from discrimination, and discrimination is prohibited in the areas of

employment, credit and financing, public accommodations, and the sale, lease, or rental of property. He noted that the commission deals with cases of discrimination in housing, employment, and financing; however, members of the lesbian, gay, bisexual, transgender, [and queer] (LGBTQ) community are left without protections under the law.

MR. KOHN drew attention to the data on the slide addressing LGBTQ discrimination in Alaska. He pointed out that this data is similar to national data. He read a quote attributed to Justice Gorsuch, as seen on slide 7, which read as follows [original punctuation provided]:

"Today we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

MR. KOHN stated that HB 17 would codify current practices of the commission into law.

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MR. KOHN drew attention to slide 10 and slide 11 which depict the laws in Alaskan communities and laws around the nation which protect against employment discrimination. He noted that only 12 states do not have protections explicitly in law against employment discrimination. He stated that the federal Equal Employment Opportunity Commission exists to remedy claims of discrimination. He characterized the process as burdensome to individuals and suggested that the state should become involved on behalf of individuals. He then drew attention to slide 13 and explained how LGBTQ nondiscrimination policies are good for commerce. He pointed out that 96 percent of top Fortune 500 companies include sexual orientation in their nondiscrimination policies. He stated that economic benefits include higher recruitment and retention; increased generation of ideas and innovation; diversified consumer base; increased employee productivity; securing more public sector clients; and improved employee relations and morale. He expressed the opinion that most Fortune 500 companies have these policies in place because they are good for business.

MR. KOHN summarized the sectional analysis beginning on slide 15. He explained that HB 17 would add "sexual orientation, gender identity or expression" to existing statute relating to the commission. He stated that "public accommodation" is defined in statute and includes businesses and public places. He further stated that "sexual orientation and gender expression" is also defined in statute.

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REPRESENTATIVE JOSEPHSON stated that he expected questions to arise regarding faith-based organizations [pertaining to HB 17] and stated that the U.S. Supreme Court Case Fulton v. Philadelphia, 593 U.S. ____ (2021), had found that Catholic Social Services in the City of Philadelphia was not obligated to include same-sex couples in its foster care program. He cautioned to keep in mind that the proposed legislation would have "carve-outs" for religious exemptions.

[1:58:39 PM](#)

ROSE O'HARA-JOLLEY, Director, Planned Parenthood Alliance Advocates Alaska, provided invited testimony on HB 17. [The testifier identified by using the pronoun "they".] They explained that protections against discrimination exist based on race, religion, color, age, disability, and marital status; however, protections do not extend to individuals who identify as LGBTQ. They expressed the opinion that many employees hide sexual orientation or gender identity, and many employers pay individuals who identify as LGBTQ less, and these individuals experience fewer employment opportunities than their non-LGBTQ peers. They stated that 44 percent of LGBTQ residents in Anchorage reported harassment; 16 percent reported that they were forced to leave jobs because of harassment; 21 percent reported having been turned down for a job; 18 percent reported having been denied a promotion; and 15 percent reported having been fired. The testifier identified as a member of the queer community and, in doing so, was at risk of their job, their housing, and discrimination in lending. They expressed strong support for HB 17.

[2:02:56 PM](#)

REPRESENTATIVE KURKA questioned the "carveouts" for religious exemptions in the proposed legislation.

REPRESENTATIVE JOSEPHSON responded that carveouts exist by operation of case law. He explained that federal case law would be applicable to courts in Alaska. In response to a follow-up question, he responded that the ruling in Fulton v. Philadelphia had been made by the U.S. Supreme Court, which is the highest jurisdiction; thereby, above the jurisdiction of the Ninth Circuit Court of Appeals.

MR. KOHN described the case in Alaska where a man was denied lodging at a homeless shelter because he had a service animal. He stated that the ruling of the court had found that the shelter was not public accommodation because of its status as a religious organization.

CHAIR CLAMAN added that the Ninth Circuit Court of Appeals is bound as a lower court to the ruling of the U.S. Supreme Court.

[2:07:16 PM](#)

REPRESENTATIVE KURKA questioned the proposed protections in the legislation regarding schools as public accommodation and the use of gendered bathrooms and participation in sports.

REPRESENTATIVE JOSEPHSON, responding, expressed the opinion that the commission would not likely have jurisdiction over this. He stated that the bill would add the terms "sexual orientation" and "gender identity or expression" as protected classes, which would allow claims using these clauses to be investigated by the commission regarding allegations on employment, housing, and lending discrimination. In response to a follow-up question, he explained that issues involving transgender athletes may be based in confusion and consternation on the part of some individuals. He drew the distinction that should the same transgender person experience discrimination in the context of employment, housing, or lending, discrimination would not be permissible. He offered that AS 18.80 does not answer questions regarding transgender students or athletes.

[2:10:51 PM](#)

REPRESENTATIVE EASTMAN asked Rose O'Hara-Jolley if they should be fired due to gender identity, whether they could file a complaint.

ROSE O'HARA-JOLLEY expressed the belief that the federal employment law protects against discrimination for gender identity, and this would apply to employers with 15 or more

employees. They suggested that the proposed legislation would make it evident for all businesses and employers that this type of discrimination would not be allowed, and a remedy would be provided at the state level.

REPRESENTATIVE EASTMAN, [should HB 17 not pass], asked whether that the previous example of discrimination would not be considered by the commission.

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REPRESENTATIVE JOSEPHSON answered that, under the current administration, the commission may investigate such claims of discrimination. He cautioned that future administrations may hold a different policy position and cease investigations. He drew a comparison between the cases, Bostock v. Clayton County and the Brown v. Board of Education, 347 U.S. 483 (1954), of which the latter having been a case predicated on desegregation of public schools and "it wasn't about water fountains." He stated that the system of Jim Crow [laws] had subsequently imploded. He expressed his appreciation for the administration addressing the matters of alleged discrimination and postulated that the policy "may not stick" in the future.

REPRESENTATIVE EASTMAN asked whether an individual who experienced discrimination in pay [due to sexual orientation and gender identity or expression] could pursue a claim of discrimination with the commission.

REPRESENTATIVE JOSEPHSON answered yes and added that each case is unique and would be subject to strong evidentiary requirements, such as a case in which an exemplary employee was repeatedly overlooked for promotions. In response to a follow-up question, he stated that HB 17 would change this by codifying [protections for sexual orientation and gender identity or expression] into law, and the practice would evolve from case law into code.

[2:16:12 PM](#)

REPRESENTATIVE EASTMAN referred to Section 11 of the proposed legislation, which defines gender identity or expression. He questioned whether the scope of the definition would be limited to gender, as compared with the expression of self-image, appearance, or behavior, for example.

REPRESENTATIVE JOSEPHSON answered that self-image relates to gender and pointed to Section 11, line 9. He reminded the committee that strong evidentiary requirements would need to exist. In response to a follow-up question, he stated that the definition would not exclude gender-fluid individuals. He continued to explain that a claim, being subject to strong evidentiary requirements, would require there to be a genuine and bona fide persistent self-image, worthy of respect. He noted that Justice Gorsuch opined that discrimination against an individual for sexual identity would be categorized as discrimination against an attribute of sex. He stated that the court's decision has resulted in a change to the current administration's policy to investigate claims. He argued that codifying these protections would prevent a reversal of the current practice.

[2:20:39 PM](#)

REPRESENTATIVE KURKA drew attention to sections of the bill which refer to "public accommodation" and suggested that public restrooms in public schools would be categorized as this. He questioned the proposed bill's effect when an individual who identifies as a woman, but is biologically male, enters a women's restroom.

REPRESENTATIVE JOSEPHSON answered that a student would not be an employee of a school. He suggested that the Human Rights Commissioner should be consulted to discuss the matter more in depth.

CHAIR CLAMAN, because the ruling in Bostock v. Clayton County had been on [discrimination] in employment, questioned whether it is only confined to this original complaint. He posited if the matter of housing been brought before the court in the complaint, whether the ruling would apply equally to [discrimination] in housing.

REPRESENTATIVE JOSEPHSON answered yes, as Justice Gorsuch had conveyed that the ruling is based on the Civil Rights Act of 1964.

REPRESENTATIVE EASTMAN asked whether the sponsor would support an amendment which would explicitly exclude participation in women's sports [of a transgender female].

REPRESENTATIVE JOSEPHSON, responding, expressed opposition to such an amendment. He expressed the opinion that this would be

a distraction [from the intent of the bill]. He pointed out the controversy regarding the eligibility of a collegiate athletic because of the athlete's [gender] status.

[2:25:01 PM](#)

REPRESENTATIVE EASTMAN asked how the bill would align with Article 1, Section 25 of the Alaska State Constitution, which refers to marriage.

REPRESENTATIVE JOSEPHSON expressed the opinion that this clause would be no concern with the proposed bill. He stated that the United States Constitution had treated slaves as three-fifths of a person [and was later overturned.] He characterized the clause in the Alaska State Constitution as the most current historical reflection of the will of the people regarding marriage, and this would have no effect on the proposed bill.

REPRESENTATIVE EASTMAN asked, since Representative Josephson had claimed that this bill would not be affected by the constitutional clause, what other parts of the constitution would not be binding.

CHAIR CLAMAN interjected that Article 1, Section 25 of the Alaska State Constitution has been ruled unconstitutional by the federal court. He expressed the opinion that other sections of the constitution are not germane to the bill under consideration.

[2:27:22 PM](#)

REPRESENTATIVE EASTMAN, in regard to the protection of self-image, asked whether uniform [requirements] and school and workplace dress codes would be impacted by the proposed legislation.

REPRESENTATIVE JOSEPHSON, responding, expressed the understanding that employers may still require reasonable and appropriate dress codes and uniforms. He suggested that the protection would still exist if an employer required an individual thought to be a man, to dress like a man, as this protection is supported by Bostock v. Clayton County.

REPRESENTATIVE EASTMAN stated that the United States Military has only two types of uniforms "as far as gender goes" and asked whether an employer in Alaska requiring an employee to select

only one of two [types of available uniforms] would be violating the rights protected in the proposed bill.

REPRESENTATIVE JOSEPHSON, responding, expressed the opinion that this example would not be violating the proposed legislation.

[2:29:28 PM](#)

REPRESENTATIVE EASTMAN, concerning the proposed legislation, asked whether a violation would result in a case where a retailer offered a class solely to members of the transgender community.

REPRESENTATIVE JOSEPHSON answered that he could not conceive of the scenario as being related to [one's] employment.

CHAIR CLAMAN announced that HB 17 was held over.

[2:31:36 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:31 p.m.