MIAMIBEACH

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City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

RAUL J. AGUILA, CITY ATTORNEY
Office of the City Attorney
Tel: 305-673-7470, Fax: 305-673-7002

October 24, 2019

Via U.S. Mail and e-Mail: jholic@venicegov.com

Mayor John Holic
City of Venice
401 West Venice Avenue
Venice, FL 34285

Dear Mayor Holic:

As you know, City of Venice is one of forty-four Florida local governments that has enacted a local Human Rights Ordinance ("HRO"), prohibiting discrimination, that is both more protective and more inclusive than Florida state law as set forth in the Florida Civil Rights Act ("FCRA"). The Florida Supreme Court has long held and established that local governments have the constitutional power to enact these anti-discrimination ordinances, and that local HROs such as yours are not preempted by the FCRA.

Despite this long-established rule, a Circuit Court judge in Orange County, Florida has found that the Orange County HRO, which is substantially similar to yours, is preempted by the FCRA. The case is *Yanes v. O C Food & Beverage, LLC*, Case No. 18-CA-003554-O. In that case, the female plaintiffs alleged that an entertainment venue's policy of refusing to admit females unaccompanied by males violated the Orange County HRO's prohibition against gender discrimination. Refusing to take up the merits of the case, the Circuit Court judge found that the Orange County HRO was impliedly preempted by the FCRA because the HRO did not require Plaintiffs to exhaust the administrative prerequisites enumerated in the FCRA. The Circuit Court order is attached here.

The Circuit Court order is currently the subject of an appeal in Florida's Fifth District Court of Appeals. If the Circuit Court order were to be affirmed, all forty-four local HROs in Florida would be in peril of being invalidated. This is because an appellate ruling that the FCRA impliedly preempts local HROs would arguably apply to all forty-four HROs statewide.

The City of Miami Beach is working in close strategic partnership with Orange County to craft an *amicus curiae* brief that represents the clear and unified voice of Florida local governments in support of the local authority to enact HROs to prohibit invidious discrimination.

We now invite other Florida cities and counties that have enacted HROs to sign on to this *amicus* brief in order to clearly set forth that we have a strong governmental interest in fighting discrimination and that we have the authority to do so. We are

asking that each municipal government that has enacted an HRO join us in this single unified local government *amicus* brief.

The *amicus* brief, which is currently being drafted, explains how local governments have a strong interest in fighting discrimination, that we have always had the local home rule authority to do so, and that this authority is not preempted by the FCRA.

In order to sign on to the brief, simply follow whatever procedure is appropriate for your jurisdiction in order to authorize signing on to the *amicus* brief. Typically, a city or county council or commission will simply pass a motion or resolution authorizing the City of Miami Beach to add your name to the list of parties filing the brief. There is no financial impact or staff commitment associated with signing on. There is no need to independently draft or file any brief or document in the case. I also attach our commission memorandum, as a suggested template.

Please do not hesitate to contact me at (305) 673-7470 ext. 6521 or by e-mail at robertrosenwald@miamibeachfl.gov, or Farosha Andasheva at (305) 673-7470 ext. 6459 or by e-mail at faroatandasheva@miamibeachfl.gov, for additional information.

Sincerely,

Robert F. Rosenwald, Jr.

Robert F. Rosenwald, Jr.
First Assistant City Attorney

RFR/ym

Attachments

Filing # 89765390 E-Filed 05/20/2019 10:22:33 AM

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

ANITA YANES and
BRITTANY SMITH,

CASE NO.: 2018-CA-003554-O

Plaintiffs,

v.

O C FOOD & BEVERAGE, LLC,
d/b/a/ RACHEL'S, and WEST PALM
BEACH FOOD AND BEVERAGE, LLC,
d/b/a RACHEL'S ADULT ENTERTAINMENT
AND STEAKHOUSE,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' "COMPOSITE MOTION TO DISMISS COMPLAINT DATED APRIL 6, 2018"
and
ORDER DISMISSING THE PLAINTIFFS' COMPLAINT WITHOUT PREJUDICE

THIS MATTER came before the Court for a hearing on January 24, 2019 upon the "Composite Motion to Dismiss Complaint Dated April 6, 2018," filed on May 25, 2018. The Court, having considered the Motion, case law, and arguments of counsel, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

This action arises from the Plaintiffs' visit to the Defendants' place of business, wherein the Plaintiffs, two women, were told that they were not allowed to enter the premises unless accompanied by a male companion. The Plaintiffs filed their Complaint based on unlawful discrimination pursuant to section 22-42 of the Orange County Code:

> (a) It is a violation of this article for a person who owns or operates a place of public accommodation, whether personally or through the actions of an employee or independent contractor, to deny or refuse to another individual the full and equal enjoyment of the facilities and services of any place of public

> accommodation on the basis of that individual's age, race, color, religion, national origin, disability, marital status, familial status, sex, or sexual orientation.
>
> (b) It is a violation of this article for a person who owns or operates a place of public accommodation, either personally or through the actions of an employee or independent contractor, to display or publish any written communication which is to the effect that any of the facilities and/or services of a place of public accommodation will be denied to any individual or that any such individual is unwelcome, objectionable or unacceptable because of that individual's age, race, color, religion, national origin, disability, marital status, familial status, sex, or sexual orientation.

The Defendants filed their "Composite Motion to Dismiss Complaint Dated April 6, 2018," arguing that the Complaint should be dismissed because the Plaintiffs failed to state a cause of action because they should have filed suit under Chapter 760, Florida Statutes (2018) rather than the local ordinance. The Court heard the Motion on January 24, 2019; this Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

The Defendants raise two arguments for dismissal in their Motion: (1) the Plaintiffs fail to state a cause of action because they predicated their Complaint on Orange County Code Sections 22-4 and 22-42, rather than Chapter 760, Florida Statutes (2018), and the Plaintiffs have not complied with Chapter 760's conditions precedent; and (2) the Court is without personal and/or subject matter jurisdiction over West Palm Beach Food and Beverage, LLC, because it does not own or operate a business in Orange County, Florida. The Plaintiffs respond that the Orange County Code is constitutional and is not preempted by the statute, and the Defendants have failed to take the necessary steps to challenge the constitutionality of the local ordinance.

"**Local ordinances are inferior to the laws of the state** and must not conflict with any controlling provision of a statute." *Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309, 314 (Fla. 2008) (citing *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993)) (emphasis added). It is true that Florida counties are given broad authority to enact local ordinances, but the legislature can preempt that authority either expressly or by implication. *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005). "Preemption by state law, however, need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014). "Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme." *Id.*

When reviewing Chapter 760, Florida Statutes (2018), it becomes clear that the legislature crafted a comprehensive scheme in which a person can seek relief from unlawful discrimination. The chapter includes a section on the purpose of the law, how it is enforced, and remedies. *See generally* Fla. Stat. §§ 760.01, 760.021, 760.07 (2018). While the statutes do not explicitly state that any local ordinance is preempted, when examining the chapter as a whole, it

appears that it is intended to be a complete structure for litigating discrimination cases, such as alleged here. Additionally, as the Defendants note, Chapter 760 requires that a party exhaust all of his/her administrative remedies, whereas the ordinance makes no such provision. The Court therefore agrees with the Defendants that the Plaintiffs must seek relief under Chapter 760, and the Complaint must be dismissed.[1]

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Defendants' Motion is **GRANTED.** The Plaintiffs' Complaint is **DISMISSED without prejudice.** The Plaintiffs shall file an amended Complaint within 20 days of the rendition of this Order, and the Defendant shall file any responsive pleadings within 20 days after that.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 2 - day of ~~April~~ May, 2019.

KEITH A. CARSTEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 20, 2019, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

[1] Because the Court has dismissed the Complaint in its entirety on other grounds, it declines to address the Defendants' jurisdictional argument as to West Palm Beach and Beverage, LLC.

MIAMIBEACH

OFFICE OF THE CITY ATTORNEY

RAUL AGUILA, CITY ATTORNEY

COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission
Jimmy L. Morales, City Manager

FROM: Raul J. Aguila, City Attorney

DATE: September 11, 2019

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, DIRECTING THE CITY ATTORNEY TO SEEK LEAVE OF COURT TO APPEAR AS AMICUS CURIAE AND FILE A BRIEF IN SUPPORT OF THE PLAINTIFFS IN ANY APPEAL OF A TRIAL COURT ORDER IN *YANES V. O C FOOD & BEVERAGE, LLC* (CASE NO. 18-CA-003554-O), WHICH FOUND THAT THE ORANGE COUNTY HUMAN RIGHTS ORDINANCE WAS PREEMPTED BY THE FLORIDA CIVIL RIGHTS ACT.**

The attached Resolution is submitted for consideration by the Mayor and City Commission at the September 11, 2019 City Commission meeting. The Resolution is sponsored by Commissioner Michael Gongora and co-sponsored by Mayor Dan Gelber.

On April 6, 2018, Plaintiffs, Anita Yanes and Brittney Smith ("Plaintiffs"), filed a complaint in Orange County Circuit Court against O C Food & Beverage, LLC., d/b/a/ Rachel's and West Palm Beach Food and Beverage, LLC, d/b/a Rachel's Adult Entertainment and Steakhouse ("Defendant"), alleging unlawful discrimination on the basis of sex pursuant to Orange County's Human Rights Ordinance and seeking injunctive relief and compensatory damages.

The action arose from the Plaintiffs' visit to the Defendants' place of business, wherein the Plaintiffs, two women, were told that they were not allowed to enter the premises of the Defendants' adult establishment unless accompanied by a male companion.

In their complaint, Plaintiffs alleged unlawful discrimination on the basis of sex, pursuant to Section 22-42 of the Orange County Code:

> **Sec. 22-42. - Prohibition of discrimination in public accommodations.**
>
> It is a violation of this article for a person who owns or operates a place of public accommodation, whether personally or through the actions of an employee or independent contractor, to deny or refuse to another individual the full and equal enjoyment of the facilities and services of any place of public accommodation on the basis of that individual's age, race, color, religion, national origin, disability, marital status, familial status, sex, or sexual orientation.

Defendant filed a motion to dismiss, arguing that Orange County's Human Rights Ordinance, codified in Chapter 22 of the Orange County Code, is preempted by the Florida Civil Rights Act ("FCRA").

On May 20, 2019, the Circuit Court entered an order granting the dismissal of the Plaintiffs' complaint, finding that the FCRA preempted Orange County's Human Rights Ordinance.

As the Circuit Court's ruling sets a dangerous precedent and jeopardizes the validity of local human ordinances across the state of Florida, including the City's Human Rights Ordinance, Commissioner Gongora hereby requests that the City Commission direct the City Attorney to seek leave of court to appear if *amicus curiae* (friend of court) and file a brief in support of the Plaintiffs in the Fifth District Court of Appeals and in any subsequent appeals therefrom.

RA/FA/sp

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, DIRECTING THE CITY ATTORNEY TO SEEK LEAVE OF COURT TO APPEAR AS *AMICUS CURIAE* AND FILE A BRIEF IN SUPPORT OF THE PLAINTIFFS IN ANY APPEAL OF A TRIAL COURT ORDER IN *YANES V. O C FOOD & BEVERAGE, LLC* (CASE NO. 18-CA-003554-O), WHICH FOUND THAT THE ORANGE COUNTY HUMAN RIGHTS ORDINANCE WAS PREEMPTED BY THE FLORIDA CIVIL RIGHTS ACT.

WHEREAS, on April 6, 2018, Plaintiffs, Anita Yanes and Brittney Smith ("Plaintiffs"), filed a complaint in Orange County Circuit Court against O C Food & Beverage, LLC., d/b/a/ Rachel's and West Palm Beach Food and Beverage, LLC, d/b/a Rachel's Adult Entertainment and Steakhouse ("Defendant"), alleging unlawful discrimination on the basis of sex pursuant to Orange County's Human Rights Ordinance and seeking injunctive relief and compensatory damages; and

WHEREAS, the lawsuit was initiated after the Plaintiffs were denied entry to the Defendant's adult establishment unless they were accompanied by a male companion; and

WHEREAS, in their complaint, Plaintiffs argued that the Defendant's policy was in violation of Orange County's Human Rights Ordinance, which prohibits discrimination in a place of public accommodation on the basis of sex; and

WHEREAS, Defendant filed a motion to dismiss, arguing that the complaint should be dismissed for failure to state a cause of action because the lawsuit should have been filed under the Florida Civil Rights Act ("FCRA") rather than the local human rights ordinance, which, Defendant alleged, is preempted by the FCRA; and

WHEREAS, on May 20, 2019, the Circuit Court entered an order granting the dismissal of the Plaintiffs' complaint, finding that the FCRA preempted Orange County's Human Rights Ordinance, and that the FCRA provides a complete structure for litigating discrimination cases; and

WHEREAS, the Mayor and City Commission assert that the Circuit Court's order of dismissal is erroneous and jeopardizes the validity of local human ordinances across the State of Florida, including the City's own Human Rights Ordinance; and

WHEREAS, the City of Miami Beach has always been at the forefront of protecting civil rights and has one of the most progressive and comprehensive human rights ordinances in the country; and

WHEREAS, as such, the Mayor and City Commission desire that the City Attorney seeks leave of court to appear as *amicus curiae* ("friend of the court") and file a brief in support of Plaintiffs and in defense of Orange County's Human Rights Ordinance.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission hereby direct the City Attorney to seek leave of court to appear as *amicus curiae* and file a brief in support of the Plaintiffs in the case of *Yanes v. O C Food & Beverage, LLC* (Case No. 18-CA-003554-O), which case found that the Orange County Human Rights Ordinance was preempted by the Florida Civil Rights Act..

PASSED AND ADOPTED this 11th day of September, 2019.

ATTEST:

Dan Gelber, Mayor

Rafael E. Granado, City Clerk

(Sponsored by Commissioner Michael Gongora; cosponsored by Mayor Dan Gelber)