

## **DISCRIMINATION IN NORTH DAKOTA - BACKGROUND MEMORANDUM**

Senate Concurrent Resolution No. 4036 (copy attached as an appendix) directs the Legislative Council to study the level of and remedies for discrimination in this state. The resolution further provides that in conducting the study, the Legislative Council is to determine the degree of discrimination in this state, determine current and additional remedies including educational initiatives to prevent discrimination, and develop recommendations to establish a commission visible to the public with representative membership able to objectively investigate citizen complaints and enforce remedies. In addition, the study is to include an examination of the membership, structure, authority, duties and responsibilities, and funding of commissions in other states.

The testimony received during the hearings on Senate Concurrent Resolution No. 4036 indicated that the state has human rights statutes but does not have a human rights commission or other complaint mechanism to take or resolve discrimination cases. Testimony also indicated that a need exists for citizens to have a mechanism for resolving discrimination cases other than a civil suit.

Senate Bill No. 2332, which would have created a human rights commission, failed to pass the Senate.

### **BACKGROUND**

#### **Civil Rights and Discrimination**

A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, assembly, the right to vote, freedom from involuntary servitude, and the right to equality in public places. Discrimination occurs when the civil rights of an individual are denied or interfered with because of their membership in a particular group or class. Statutes, both state and federal, have been enacted to prevent discrimination because of a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual preference.

The most important expansion of civil rights in the United States was the enactment of the 13th and 14th Amendments. The 13th Amendment (United States Constitution Amendment XIII) abolished slavery throughout the United States. The 14th Amendment (United States Constitution

Amendment XIV) was passed to ensure that no state "shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States . . . [or] deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the 14th Amendment gave Congress the power to pass any laws needed for its enforcement. Many of these statutes are still in force today and protect individuals from discrimination and from the deprivation of their civil rights.

The most prominent civil rights legislation since the reconstruction is the Civil Rights Act of 1964. Congress enacted the Civil Rights Act of 1964 under its power to regulate interstate commerce. Under 42 U.S.C. § 2000a, discrimination based on "race, color, religion, or national origin" in public establishments that had a connection to interstate commerce or was supported by the state is prohibited. Public establishments include places of public accommodation (e.g., hotels, motels, trailer parks), restaurants, gas stations, bars, taverns, and places of entertainment in general. The Civil Rights Act of 1964 and subsequent legislation also declared a strong legislative policy against discrimination in public schools and colleges. Title VI of the Civil Rights Act prohibits discrimination in federally funded programs. Title VII of the Civil Rights Act prohibits employment discrimination where the employer is engaged in interstate commerce. Congress has since passed numerous other laws dealing with employment discrimination.

The judiciary, most notably the Supreme Court, plays a crucial role in interpreting the extent of the civil rights. Supreme Court decisions can affect the manner in which Congress enacts civil rights legislation, as occurred with the Civil Rights Act of 1964. The federal courts are crucial in mandating and supervising school desegregation programs and other programs established to rectify state or local discrimination.

#### **NORTH DAKOTA DISCRIMINATION LAWS**

State constitutions, statutes, and municipal ordinances provide further protection of civil rights and protection from discrimination. Article I of the Constitution of North Dakota and North Dakota Century Code Chapter 14-02.4 contain provisions that provide for the protection of civil rights in North Dakota.

## North Dakota Constitution

Article I of the Constitution of North Dakota contains the state's declaration of rights. Within this article are the protections afforded to the people of North Dakota regarding civil rights and discrimination. Section 1 of Article I provides:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

The North Dakota Supreme Court, in *State v. Cromwell*, 9 N.W.2d 914 (1943), has determined that "liberty" includes the citizen's right to use his faculties in all lawful ways, live and work where he will, and contract for that purpose, buy and sell, select tradesmen freely, manufacture, acquire property, free speech and self-defense, and the opportunity to do those things which ordinarily are done by free men. The court has also construed "pursuit of happiness" to be personal freedom, exemption from oppression, and the right to choose an occupation and liberty of conscience, and to devote the mental and physical powers to obtain happiness without restriction except as necessary to secure the equal rights of others.

Section 7 of Article I contains the declaration of rights regarding employment. Section 7 provides:

Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

## North Dakota Century Code

### Classification of Civil Rights

North Dakota Century Code Section 1-01-07 provides that all original civil rights are either rights of person or rights of property. Section 1-01-08 provides that rights of property and of person may be waived, surrendered, or lost by neglect.

### Antidiscrimination Statutes

Chapter 14-02.4 deals with discrimination in general. Discrimination on the basis of sex, race, color, religion, national origin, age, physical or mental handicap, or status with respect to marriage or public assistance is prohibited. The chapter contains

numerous provisions that are similar to the protections against discrimination which are afforded by federal law. This chapter is frequently referred to as the "North Dakota Human Rights Act." The state policy against discrimination is contained in Section 14-02.4-01. Section 14-02.4-01 provides:

It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer; to prevent and eliminate discrimination in employment relations, public accommodations, housing, state and local government services, and credit transactions; and to deter those who aid, abet, or induce discrimination, or coerce others to discriminate.

The North Dakota statutes contained in Chapter 14-02.4 also provide protection against discrimination in the areas of employment, public accommodations, housing, state and local government services, and credit transactions. Sections 14-02.4-03 through 14-02.4-10 prohibit discriminatory practices by employers; Sections 14-02.4-12 and 14-02.4-13 prohibit discriminatory housing practices; Sections 14-02.4-14 through 14-02.4-16 prohibit discriminatory practices in public accommodations; and Section 14-02.4-17 prohibits discriminatory practices in credit transactions.

### Remedies

The remedies for a person with a discrimination claim that arises under Chapter 14-02.4 are found in Sections 14-02.4-19 and 14-02.4-20. Under Section 14-02.4-19, a person may bring an action in district court within three years of the alleged act. If the discrimination claim involves an employer's discriminatory practice, the complaint of discrimination must be made to the Department of Labor within 300 days of the alleged discriminatory act. For a claim of discrimination regarding housing, public accommodations, or services, the claim must be made within 180 days of the alleged act.

Section 14-02.4-20 provides that if a person is determined by the district court to have committed a discriminatory practice, the court may order relief in the form of a temporary or permanent injunction, equitable relief, or back pay. The section also authorizes a court to grant to the prevailing party reasonable attorney's fees.

## EMPLOYMENT DISCRIMINATION

While cases of discrimination arise in many areas, including housing, government services, insurance, public accommodations, and education, discrimination in employment tends to be the area which directly affects the most people. Employment discrimination laws seek to prevent discrimination by employers based on race, sex, religion, national origin, physical disability, and age. In addition, there is a growing body of law preventing or occasionally justifying employment discrimination based on sexual orientation. Discriminatory practices include bias in hiring, promotion, job assignment, termination, compensation, and various types of harassment. The main body of employment discrimination laws is composed of federal and state statutes.

### Federal Statutes

The Fifth and 14th Amendments of the United States Constitution limit the power of the federal and state governments to discriminate. The Fifth Amendment (United States Constitution Amendment V) has an explicit requirement that the federal government not deprive any individual of "life, liberty, or property," without the due process of the law. It also contains an implicit guarantee that each person receive the equal protection of the laws. The 14th Amendment (United States Constitution Amendment XIV) explicitly prohibits states from violating an individual's rights of due process and equal protection.

Discrimination in the private sector is not directly constrained by the constitution, but has become subject to a growing body of federal and state statutes. The federal statutes are summarized as follows:

- **The Equal Pay Act** (29 U.S.C. § 206) amended the Fair Labor Standards Act in 1963. The Act prohibits the paying of wages by employers to be based on sex, but does not prohibit other discriminatory practices based on sex such as bias in hiring. Under the Equal Pay Act, equal pay must be paid workers for equal work if the jobs performed require "equal skill, effort, and responsibility and are performed in similar working conditions."
- **Title VII of the Civil Rights Act of 1964** (42 U.S.C. Chapter 21) prohibits discrimination in many more aspects of the employment relationship and applies to most employers engaged in interstate commerce with more than 15 employees, labor organizations, and employment agencies. The Act applies to discrimination based on race, color, religion, sex, or national origin.

- **The Nineteenth Century Civil Rights Acts** (42 U.S.C. §§ 1981, 1981a, 1983, 1988), amended in 1993, ensure all persons equal rights under the law and outline the damages available to complainants in actions brought under the Civil Rights Act of 1964, Title VII, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973.
- **The Age Discrimination in Employment Act (ADEA)** (29 U.S.C. §§ 621 through 634) prohibits employers from discriminating on the basis of age. Under the Act, an employee is protected from discrimination based on age if the employee is over 40 years of age. The ADEA contains explicit guidelines for benefit, pension, and retirement plans.
- **The Rehabilitation Act's** (29 U.S.C. §§ 791, 793, 794(a)) purpose is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals," through the elimination of discrimination and affirmative action programs. Employers covered by the Act include agencies of the federal government and employers receiving federal contracts over \$2,500 or federal financial assistance.
- **The Americans with Disabilities Act (ADA)** (42 U.S.C Chapter 126) was enacted to eliminate discrimination against those with handicaps throughout society. It prohibits discrimination based on a physical or mental handicap by employers engaging in interstate commerce and state governments. The type of discrimination prohibited is broader than that explicitly outlined by Title VII.
- **The Black Lung Act** (30 U.S.C. § 938) prohibits discrimination by mine operators against miners who suffer from "black lung" (pneumoconiosis).

The Equal Opportunity Employment Commission interprets and enforces the Equal Pay Act, the Age Discrimination in Employment Act, Title VII, the Americans with Disabilities Act, and sections of the Rehabilitation Act. The commission itself was established by Title VII. The Commission's enforcement provisions are contained in 42 U.S.C. § 2000e-5 and its regulations and guidelines are contained in Title 29 of the Code of Federal Regulations, part 1614.

### North Dakota Law on Employment Discrimination

North Dakota statutes in the area of employment discrimination, contained in Chapter 14-02.4, are intended to assure equality of opportunity in employment and to prohibit the denial of equal opportunity.

Section 14-02.4-03 provides that it is a discriminatory practice for an employer to:

[F]ail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer. It is a discriminatory practice for an employer to fail or refuse to make reasonable accommodations for an otherwise qualified person with a physical or mental disability or because of that person's religion.

The employment discrimination statutes are based on several federal laws, including Title VII of the 1964 Civil Rights Act, the Equal Pay Act Amendments to the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Rehabilitation Act, and the Americans with Disabilities Act, which were previously discussed in this memorandum.

## **DISCRIMINATION STATUTES OF SURROUNDING STATES**

Most states have civil or human rights statutes of one form or another. North Dakota's neighboring states, Minnesota, Montana, and South Dakota, all have comprehensive discrimination statutes.

Minnesota statutes prohibit unfair discriminatory practice. Minnesota's Human Rights Act is administered by the Department of Human Rights, which is headed by a human rights commissioner appointed by the Governor. The Act provides for enforcement and procedures from the initial filing of a charge of unfair discriminatory practice through judicial review of any action ordered by the commissioner.

The Montana Human Rights Act prohibits certain unlawful discriminatory practices. The Commission for Human Rights has statutory authority to enforce Montana's human rights laws. The commission is a neutral, quasi-judicial board, made up of five persons appointed by the Governor. The commission uses an administrative process rather than the court system to adjudicate discrimination complaints.

The South Dakota statutes on human rights prohibit certain unfair and discriminatory practices. The statutes are administered by the Human Rights Commission, which is under the direction and

supervision of the Division of Human Rights. South Dakota law also provides for procedures upon filing a complaint with the commission, notice of the complaint, commission hearings and orders, and judicial review.

## **PREVIOUS STUDIES 1977-78 Interim Study**

Senate Concurrent Resolution No. 4079 (1977) directed a study of the feasibility of enacting comprehensive human rights legislation in North Dakota and the adequacy and enforcement of present statutes relating to human rights. The study, which was assigned to the Legislative Council's interim Committee on Social Services, was conducted in response to two bills relating to human rights which failed during the 1977 Legislative Assembly. Senate Bill No. 2424 would have provided for the establishment of a human rights commission to administer a human rights act. The bill specified a complaint procedure, defined discriminatory practices, and provided for judicial review of a commission order. Senate Bill No. 2045 would have prohibited employment discriminatory practices. The Labor Commissioner was designated by the bill to be the administrator of the act. The bill specified a complaint procedure as well as a procedure for judicial review.

The committee heard testimony which identified the lack of any single place or person to whom persons with complaints could be referred and pointed out that human rights legislation was a means of providing a guarantee for enforcement of human rights on the local and state levels.

The Committee on Social Services made no recommendation concerning the study.

## **1985-86 Interim Study**

Senate Concurrent Resolution No. 4016 (1987) directed the study of the use of comparable worth to determine the existence of wage-based sex discrimination. Comparable work represents the concept that men, women, minorities, and whites should receive equal pay for work that is of equal value. The study was assigned to the Legislative Council's interim Budget Committee on Government Administration. By Legislative Council directive, the study was limited to state government.

The committee recommended three bills, all of which were enacted by the 1989 Legislative Assembly. House Bill No. 1033 required the director of the Central Personnel Division to develop procedures to ensure that the salaries of all state classified employees are paid in a manner consistent with the state's compensation, classification, and salary administration policies. House Bill No. 1034 defined the compensable factors of the state's classification

plan and required all state classified employees to be under one classification plan by June 30, 1993. House Bill No. 1035 contained the state's comparable worth policy.

## 1997 LEGISLATION

### Bills Enacted

**House Bill No. 1100** provides that the Labor Commissioner may investigate complaints of discriminating employment practices to determine if there is probable cause to believe the complaint is meritorious. The bill further provides that the complaint and information obtained during the investigation is confidential and is exempt from the state's open records law.

**Senate Bill No. 2181** prohibits a governmental entity from discriminating against any health care institution or any private agency in any grant, contract, or program because of the institution's or agency's refusal to perform or participate in any health care service that violates the institution's or agency's written religious or moral policies.

### Failed Bills

**House Bill No. 1422** would have created a bill of rights for children who are deaf or hard of hearing.

**Senate Bill No. 2332** would have created a human rights commission that would have the authority to enforce the state's discrimination statutes and to implement all reasonable measures to correct the discrimination. The bill also would have authorized the commission to resolve complaints by mediation. The bill failed to pass the Senate.

## SUGGESTED STUDY APPROACH

A possible approach to the study of discrimination in the state would be to:

1. Specifically review the federal statutes providing protection to human and civil rights to determine the application of those statutes to North Dakota.
2. Receive testimony from individuals in North Dakota who are involved in handling discrimination grievances to determine the level of discrimination in the state and to determine if present North Dakota statutes or enforcement of federal statutes is adequate.
3. Review the coverage of human rights statutes in states comparable to North Dakota to determine whether those statutes would be adequate to provide the necessary protection if adopted by North Dakota.

During this study, a determination could be made as to the extent of coverage of federal statutes, the adequacy of enforcement of federal statutes in North Dakota, whether North Dakota should provide for protection of the human and civil rights of its citizens, and whether a state department responsible for administration of a human rights statute would result in better protection of human rights than that presently provided by different state agencies through fragmented state enforcement of federal requirements.

ATTACH:1

**Fifty-fifth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Monday, the sixth day of January, one thousand nine hundred and ninety-seven**

**SENATE CONCURRENT RESOLUTION NO. 4036**  
(Senators Nalewaja, Cook, C. Nelson, Robinson, W. Stenehjem)  
(Representative Kliniske)

A concurrent resolution directing the Legislative Council to study the level of and remedies for discrimination in this state.

**WHEREAS**, Congress and the North Dakota Legislative Assembly have enacted laws prohibiting discrimination; and

**WHEREAS**, this state has operating within it many state and federal agencies with the power to investigate and provide appropriate remedies in different cases of discrimination; and

**WHEREAS**, there needs to be a determination of whether there are instances of discriminatory actions in violation of state and federal laws before the Legislative Assembly can fashion appropriate remedies; and

**WHEREAS**, if discriminatory actions are found to exist, there needs to be a determination of whether existing state agencies have the power to remedy those activities; and

**WHEREAS**, remedies available in this state should be compared to procedures used by other states to investigate and provide appropriate remedies in cases of discrimination;

**NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:**

That the Legislative Council study the level of and remedies for discrimination in this state; and

**BE IT FURTHER RESOLVED**, that the study determine the degree of discrimination in this state, determine current and additional remedies including educational initiatives to prevent discrimination, and develop recommendations to establish a commission visible to the public with representative membership able to objectively investigate citizen complaints and enforce remedies; and

**BE IT FURTHER RESOLVED**, that the study include an examination of the membership, structure, authority, duties and responsibilities, and funding of commissions in other states; and

**BE IT FURTHER RESOLVED**, that the Legislative Council report its findings and recommendations, together with any legislation required to implement the recommendations, to the Fifty-sixth Legislative Assembly.

Filed March 19, 1997