

SB

354

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
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May 3, 2004

Representative Lesil McGuire
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol, Room 118
Juneau, AK 99801

Re: SB 354 - "An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; and making conforming amendments."

Dear Representative McGuire:

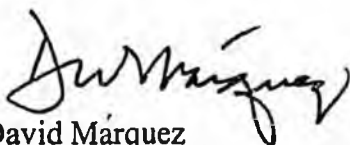
I am writing this letter to request that you schedule the above bill for a hearing, pending referral, at your earliest convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:



David Márquez
Chief Assistant Attorney General

DWM/lcc

cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

CSSB 354 (STA)

THIS BILL IS INTENDED TO IMPROVE THE EFFECTIVENESS OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS AND MAKE ITS PROCEDURES MORE BALANCED AND FAIR.

1. The commission does not have the discretion to choose which complaints to prosecute.
 - A court case -- *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995) -- requires the commission to prosecute every claim of unlawful discrimination that is supported by substantial evidence of unlawful discrimination. Substantial evidence is any evidence that supports the complaint. The commission cannot weigh the evidence or look at the strength of an employer's (or other respondent's) defenses to the complaint when it applies this test so the commission is forced to take even a weak case to hearing.
 - The bill authorizes commission staff to choose the complaints of unlawful discrimination that merit pursuit, based on such factors as strength of evidence, severity of alleged violation, employer's history of discrimination, or complaint's value in establishing precedent. (Sec. 4)
 - By allowing the commission to evaluate complaints of unlawful discrimination and to allocate its resources to prosecuting those complaints that will best serve the commission's goal of eliminating unlawful discrimination, the commission will be able to use its resources more effectively.
 - The bill avoids conflicts between (1) staff's exercise of its expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures, and after opting out, to pursue claim independently of commission in another forum (e.g. Alaska Superior Court). (Sec. 1)

2. There is a question whether current law allows the commission to compromise a claim of discrimination during the conciliation phase that follows the investigation of a complaint of unlawful discrimination.
 - The bill permits agreements during the conciliation phase to compromise damage claims. (Sec. 3)
 - The bill requires that agreements be reduced to writing, and provides that agreements are enforceable as commission orders. (Sec. 3)

3. Commission hearing procedures are cumbersome and antiquated. Once there is a finding of "substantial evidence", persons appearing before the commission cannot obtain a decision without incurring the expense of a hearing, even when facts are undisputed.

- The bill requires the commission to follow the Administrative Procedure Act, unless AS 18.80 provides a different procedure. (Secs. 5, 12)
- The bill ties rate of interest awarded by commission to the legal rate in AS 09.30.070, bringing commission into conformity with other administrative agencies and the courts. (Sec. 8)
- The bill empowers the commission to issue summary decisions similar to the summary judgments that courts issue. That is, if the facts are not disputed, the commission can rule without providing a full hearing. (Sec. 5)

4. Commission procedures now allow a complaint to be amended to add new charges of unlawful discrimination for which no finding of "substantial evidence" was made. Bypassing informal proceedings (investigation and conciliation) removes an opportunity to resolve a complaint before a hearing.

- The bill requires staff to base the charges in the accusation (which is issued before a hearing) on the investigator's determination of "substantial evidence." (Sec. 5)
- The bill requires that "substantial evidence" support any new charges of unlawful discrimination added when an accusation is amended. (Sec. 5)
- The bill requires that respondent have an opportunity to address all charges informally (even charges added by amendment) before being required to defend them at a hearing. (Sec. 5)

5. The remedies that the commission may award are not clearly listed in statute.

- The bill prohibits noneconomic or punitive damages, which is consistent with Alaska courts' interpretation of existing law. (Sec. 6)
- The bill limits remedies (normally) to restoration of actual benefits lost. For employers this means payment of back pay and hiring, promoting, or reinstating an employee to a position. This is also consistent with Alaska case law. (Sec. 6)
- But the bill allows an award of front pay for a period of up to one year if returning to work is impossible because no vacancy exists, the employer's

unlawful discrimination made the employee incapable of work, or the working environment deteriorated intolerably. The courts have not definitively ruled that the commission has the current authority to award front pay at all, although the commission takes the position that it does. (Sec. 6)

- The bill requires any award of wages (front pay or back pay) to be reduced by the amount the employee should be able to earn with a "reasonably diligent" effort. (Sec. 6)
- Other remedies remain available to employees who bring an action in the Alaska Superior Court (e.g., punitive damages, non-economic damages, unlimited front pay, medical expenses incurred).

6. The Alaska State Commission for Human Rights supports all of the changes, with the exception of the specified remedy provisions.

- The commission is uncomfortable with specifying the remedies available, although it has offered no alternative language.
- The commission prefers the ambiguous "any appropriate relief, including but not limited to" language.
- The commission does not support a one (or even two year) cap on front pay; it prefers unlimited front pay authority.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 354
 (S) Publish Date: 2/27/04

Revision Date/Time (Note if correction): _____ Dept. Affected: OOG
 Title "An Act relating to complaints filed RDU Executive Operations
with the State Commission for Human Rights.." Component Human Rights
 Sponsor Rules Committee
 Requester Governor Component No. 1

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation has no fiscal impact on the Alaska Human Rights Commission.

Prepared by: Gail Fenumiai, Asst. Admin. Director LP Phone 465-3885
 Division Office of the Governor, Administrative Services Date/Time 2/24/04 9:17 AM
 Approved by: Paula Haley, Executive Director Date 2/24/2004
 Agency Alaska Human Rights Commission

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

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Division: Office of the Governor, Administrative Services Date/Time 2/24/04 9:17 AM
Approved by: Paula Haley, Executive Director Date 2/24/2004
Agency: Alaska Human Rights Commission



DISABILITY
LAW CENTER
OF ALASKA

May 7, 2004

By hand delivery and e-mail

Rep. Bruce Weyhrauch
Chairman, House State Affairs Committee
Alaska Legislature
State Capitol, Room 102
Juneau, Alaska
E-mail: <ginny.austerman@legis.state.ak.us>

JUNEAU

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Juneau, AK 99801
(907) 586-1627
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Re: **Opposition to SB 354 re: Human Rights Commission**

Dear Representative Weyhrauch:

Please accept these comments on CSSB 354 (STA)am(efd fld), the currently available form of this bill.¹ CSSB 354, if passed, will greatly weaken the ability of the Commission to provide this valuable protection for Alaskans with disabilities, not to mention Alaskans protected from discrimination based on gender, marital status, pregnancy, parenthood, race, religion, color or national origin. While CSSB 354 does not purport to directly abrogate or weaken the anti-discrimination rights of AS 18.80.210, the bill will in several ways weaken the protection and enforcement of these important civil rights by limiting the way the Commission enforces those rights. Even to the extent the bill is limited in its impact to employment and housing discrimination claims, it sets a bad precedent in its limitation on the Commission's ability to respond to and prevent discrimination. We oppose the bill in the strongest terms.

A. Statute of limitations of 180 days / process of filing a complaint:

Currently, a discrimination claim is presented to the Commission, is informally investigated by Commission personnel, and if substantial evidence is found to support the claim, a formal "complaint" is drafted by a Commission staff (sometimes an attorney, sometimes an investigator) and formally "filed" by the Commission.

Under current regulation, discrimination complaints thus prepared must be filed within 180 days of discriminatory conduct (or, if the conduct is continuing, within 180 days of the last date of the continuing conduct). 6 Alaska Administrative Code ("AAC") 30.230 (b), (c). Thus, it is currently possible that a complaint may be

¹ Please accept our apology for not submitting comment earlier on this bill, or on its companion bill, HB 525. I have been away from work due to personal and familial health problems since mid-February, and our agency has been short-staffed in the interim.

MEMBER OF THE
NATIONAL
ASSOCIATION OF
PROTECTION &
ADVOCACY
SYSTEMS

dismissed for being untimely, when the delay was not caused by the complainant, but instead by the investigator or staff involved in informal investigation, by delays in communication between the Commission staff and the complainant, or due to disagreement between the complainant and the Commission staff as to how the complaint should be worded.

It is unusual to have a legal process where the timely filing of an administrative complaint depends upon the conduct of a third party (other than a retained attorney) who is employed as personnel of the tribunal. I believe that there is a very strong due process defect in a process where the complainant is not in control of whether a complaint is timely filed.

It is unclear whether SB 354 is intended to ratify the current system that allows the filing only of Commission-drafted complaints. The distinction drawn in the current bill between an "accusation" and a "complaint" suggests that the Commission will not in the future insist upon the drafting and filing of a formal complaint, and may not provide assistance to unrepresented lay persons in preparation of a formal complaint. If this is the case, then we suggest deletion of the phrase "verified" in existing AS 18.80.100. There is little purpose served by requiring a "verified" complaint, when a formal "accusation" will be issued later before any administrative action. I have drafted a proposed amended for this purpose. See *DLC Proposed Amendment 1*.

The current draft of the bill also codifies the 180-day time limitation. See Section 2, at page 2, line 4 (adding new AS 18.80.100(c)). I have drafted a proposed amendment that would clarify that a complainant has met this codified statute of limitations by submission of a document signed by the complainant setting forth the claim, without having to depend upon the conduct of Commission staff and without requiring unreasonable procedural formality in the drafting of the complaint. See also *DLC Proposed Amendment 1*. These amendments will prevent unreasonable dismissal of otherwise valid claims.

B. Discretion to dismiss claims having substantial cause:

CSSB 354 purports to grant discretion to the executive director of the Commission to dismiss a complaint even though it has been filed on a finding of *substantial cause*. CSSB 354 (STA)am(efd fld), Section 4, at page 2, line 23 (adding new AS 18.80.112). There is no time limitation on this power. It appears to authorize the executive director to summarily dismiss cases in which the Commission has already issued a substantial cause finding and issued a complaint, but has not adjudicated the case. This may help erase backlogs within the Commission, but it is not good public policy.

For claims based on Alaska anti-discrimination law, it has been held that a claimant has two options: (1) file an administrative claim of discrimination before the ASCHR; or (2) file a complaint directly in Alaska superior court. No "right to sue" letter is required to pursue state claims and remedies, as is required to pursue federal employment discrimination claims under Title I of the federal ADA.

However, practical obstacles prevent superior court from being a meaningful forum for Alaskan claimants of modest means with employment discrimination claims. Litigants in superior court face the potential of paying a portion of the defense attorneys fees if they lose. A claimant discriminated against by a large employer, represented by an expensive law firm, hazards his or her house and other life assets under current rules of Alaska Civil Procedure. A claimant often cannot afford to pay an attorney, because they have just lost their job -- due to the discriminatory conduct.

Many attorneys will not take an employment case on a contingent-fee basis, since many discrimination cases depend upon the differing versions of events by percipient witnesses. So as a result, it can be very difficult for an employment discrimination claimant to pursue a claim in superior court. They can't afford a for-fee attorney, and few attorneys are willing to take these cases on a contingent fee basis.

The Legislature and past administrations have recognized the inherent unfairness of these practical obstacles presented to honest claimants of modest means, and wisely decided to create a system where the Commission "shall" hold a hearing on a claim found supported by substantial evidence if it is not successfully settled after investigation and conciliation. Current AS 18.80.110, 18.80.120. Current law provides a fairer, more level playing field between claimants and defendants by providing a low-cost meaningful administrative forum for complainants, but protecting defendants by permitting only cases found to have "substantial evidence" to go forward to a hearing.

CSSB 354 would permit dismissal of meritorious cases on the thinnest of rationales, that the case "is not in the interest of the State." Basing the protection of an average Alaskans' right against discrimination on the slender reed of one public official's view of "the interest of the State" is bad policy. It cheapens the significance of the right. It is no answer to say dismissal is "without prejudice." Dismissal of an administrative discrimination complaint that is supported by "substantial evidence" likely will, as a practical matter, preclude Alaskans of modest means any forum for their case, since in most cases the claimant cannot find or afford an attorney usually needed for successful prosecution in superior court.

CSSB 354 retreats from the wisdom of current law, and skews the playing field in favor of discrimination. Knowing that the courthouse doors are as a practical matter not open to many claimants, it gives the signal that Alaska is an open field for discrimination, especially if you have the ear of the executive director. It is unwise public policy.

I have drafted an amendment (see *DLC Proposed Amendment 2*) to delete Section 4 and to modify other sections of the bill to preserve the current state of the law that an unresolved complaint found to have substantial cause must proceed to a formal hearing if conciliation efforts are unsuccessful.

C. Representation of the claimant by attorney of choice in accusation proceedings:

One effect of the bill, if passed, would be to change the methods of procedure for employment and housing discrimination adjudicatory hearings – but apparently not other types of discrimination hearings. See CSSB 354, §§ 4, 5, 6, 7, and 12 (referring to “accusation” and making proceedings subject to AS 44.62.330(a)).

The bill affords a respondent (“the person charged in an accusation”) the right to representation by an attorney of the respondent’s choosing, but a similar and parallel right is not afforded to a claimant. See CSSB 354, § 5, at page 3, lines 22-26 (proposed AS 18.80.120(a)).

We do not think it was the intent of the drafters of this bill to imply that the staff of the Commission, having decided to prosecute an accusation, has agreed to provide legal representation to the complainant. Yet we also do not believe it was the intent of the drafters that complainants would be unrepresented by counsel at the formal hearing, since it is a fundamental right of due process of law to be represented by counsel of one’s choosing during a formal hearing at which one’s significant rights are adjudicated, to advise the client and otherwise participate in the proceeding.

To resolve this potential due process defect in the bill, I have drafted an amendment that would insert a phrase in Section 5 that says “The complainant may be represented by counsel of the complainant’s choice.” See *DLC Proposed Amendment 3*.

D. Limitation of Commission remedies violates due process of law:

CSSB 354 removes important teeth from the Commission’s enforcement powers, without any valid policy justification.

The bill at page 4, lines 17-18, would prohibit the Commission from issuing an award of non-economic or punitive damages “in any case” of discrimination. Thus a wealthy entity or individual will be free to engage in discriminatory conduct in Alaska knowing that the Commission cannot impose a meaningful remedy. There is no disincentive against discrimination.

Current employment law allows for a “make whole” remedy in employment and housing claims that is appropriately flexible to each individual case, permitting “any appropriate relief, including but not limited to,” a list of potential remedies for employment claims, and “actual damages, which shall include but not be limited to” specified potential remedies for housing claims. This bill deletes the “any appropriate relief” clause of the employment discrimination remedial section and lists specific relief, raising the potential argument by a losing defendant that only specific listed remedies are permitted. Section 6, at page 4, lines 22-23. The bill eliminates the phrase “but not limited to” in the remedial section for housing discrimination claims, raising the

Rep. Bruce Weyhrauch, chairman, House State Affairs Committee, Alaska Legislature
Re: CSSB 354: Alaska State Commission on Human Rights; Suggested amendments
May 7, 2004
Page 5 of 5

same potential argument in housing claims that the enumerated remedies are exclusive. CSSB 354, at page 5, page 11. This is not only unwise, we believe it violates due process of law.

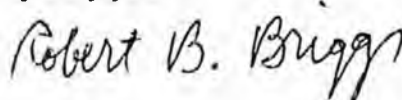
We believe due process of law requires that the remedies available to a claimant must be meaningful, including in appropriate cases the right to seek and be awarded punitive damages commensurate with the defendant's resources and sufficient to present a disincentive to future discrimination. I have already discussed why, as a practical matter, an unemployed claimant with modest assets may find it difficult if not impossible to pursue an employment discrimination claim in superior court. Remedies provided in an administrative proceeding must be meaningful to prevent future discrimination and to make the claimants whole.

The bill limits payment of "front pay" in employment claims to one year. CSSB 354, page 4, lines 24-29 and page 5, lines 1-3. There is no justification for this limitation, particularly in light of the Commission's own testimony objecting to the limitation, stating "[t]here has been no indication that there are problems with the law or the Commission's awards which would warrant the proposed limits on relief." Testimony of Lisa Fitzpatrick, Alaska State Commission on Human Rights, at page 3 (May 4, 2004). For the Legislature to restrict the Commission's powers without a compelling government interest runs afoul of its mandate to implement the anti-discrimination clauses of Alaska's constitution with due process of law. Art. I, §§ 1, 3, 4, and 7.

I have drafted an amendment to the bill that would eliminate the language limiting the Commission's remedial powers. See DLC Proposed Amendment 4 (eliminating language that would prevent the Commission from assessing non-economic or punitive damages) and DLC Proposed Amendment 5 (deleting language limiting the remedies in employment and housing claims).

Alaskans with disabilities depend upon the Commission to fulfill the important role of protecting the rights of average Alaskans. The bill threatens the well-being of Alaskans with disabilities, exposing them to discrimination in employment, housing, places of public accommodation, rental or sale of real property, in obtaining credit or financing, and in other aspects of life. A right without a meaningful remedy, without powerful enforcement, is no right at all. We urge that CSSB 354 not be passed. Thank you for consideration of these comments.

Very truly yours,



Robert B. Briggs, staff attorney

Encl.

Cc: (w/ encl.)

Members, House State Affairs Committee

Dave Fleurant, executive director, DLC-Anchorage

AMENDMENT NO. _____

OFFERED BY: _____

1 At page 1, line 7, delete the phrase:

2 “, verified”

3 At page 2, line 8, after “. . . alleged discriminatory practice stopped.” insert:

4 “A written document signed or made by the claimant in substantial compliance
5 with AS 18.80.100 that is received by the commission or post-marked within the
6 time limit of this subsection shall be deemed timely under this subsection.”

AMENDMENT NO. _____

OFFERED BY: _____

- 1 At page 2, line 22, delete Section 4 and renumber remaining sections accordingly.
- 2 At page 3, line 15, delete the phrase "and the executive director determines, in the
3 executive director's discretion, to refer the complaint for hearing"
- 4 At page 3, line 20, delete the sentence "The executive director's decision to refer the
5 complaint to hearing is not reviewable by the commission under this chapter."

AMENDMENT NO. _____

OFFERED BY: _____

- 1 At page 3, line 24, after the phrase “. . . the commission.” insert sentence:
- 2 “The complainant may be represented by counsel of the complainant’s choice.”

AMENDMENT NO. _____

OFFERED BY: _____

1 At page 4, line 17, delete the phrase:

2 “discriminatory practice. The commission may not order an award of
3 noneconomic or punitive damages in any case [DISCRIMINATION]”

4 At page 4, lines 16-17, after the phrase “. . . type of” insert:

5 “discrimination.”

AMENDMENT NO. _____

OFFERED BY: _____

1 At page 4, line 20, after the phrase “. . . may order” insert the phrase:

2 “any appropriate relief, including but not limited to”

3 At page 4, line 20, delete the phrase:

4 “one or more of the following:”

5 At page 4, line 25, delete the phrase:

6 “for a period of not more than one year if hiring, reinstatement, or
7 upgrading of an employee is inappropriate because no vacancy exists, the
8 employer’s discriminatory practice rendered the employee incapable of
9 returning to work, or the relationship between the employer and the
10 employee has so deteriorated as to make working conditions intolerable”

11 At page 5, line 1, delete “must” and insert “may”

12 At page 5, line 11, delete “[, BUT NOT LIMITED TO,]”

CSSB 354
TESTIMONY SUBMITTED TO THE
HOUSE STATE AFFAIRS COMMITTEE
May 3, 2004

The Human Rights Commission submits the following comments to the House State Affairs Committee on CSSB 354, a bill that would significantly affect the Commission's authority and procedures. These comments are being submitted by the Commission's Chairperson, Lisa Fitzpatrick, on behalf of the entire Commission.

The Commissioners support the provisions of the bill that provide discretion to the staff to focus agency resources on cases of greater merit. The Commissioners have serious concerns, however, about the limitations on available relief that would be imposed by this legislation.

BACKGROUND

The Human Rights Commission was created over forty years ago to enforce Alaska's strong public policy against discrimination, and provide an alternative forum to bringing a lawsuit in court. The Commission's purpose is to make whole those persons who are found to be victims of illegal discrimination. When an Alaskan alleges a harm because of discrimination in employment, housing, or a practice by the State because of their race, sex, disability, age, or other prohibited reason, they may file with the Commission. Thousands of Alaskans contact the Commission each year for assistance, but the Commission only accepts complaints that it determines are jurisdictional with the agency. Over the past ten years the Commission accepted an annual average of 453 complaints for filing.

A large percentage of cases are resolved short of a full investigation. Immediately after a complaint is filed, the parties are offered an opportunity to participate in a voluntary mediation program. The Commission's success rate in the program is over 80%. Between one quarter and one third of cases filed with the Commission are resolved through mediation.

If cases don't resolve in voluntary mediation, the Commission staff investigates the allegations, impartially and informally. Investigations are not adversarial, and the informal nature of investigations means that it is not necessary for respondents to hire attorneys to represent them in this process. In fact, only about 20% of respondents, most of whom are large employers, engage legal counsel for this purpose.

After reviewing all of the evidence gathered, the Commission staff makes a threshold determination as to whether there is substantial evidence to support the allegations. If there is not substantial evidence, the Commission closes the matter and takes no further action. If there is substantial evidence to support the claims, the

Commission tries to informally resolve the matter through a process known as conciliation. At this point, the Commission attempts to secure "make whole" relief for the complainant. Nothing prevents the complainant from accepting less than make whole relief, and the Commission often resolves cases at this stage for much less than the complainant would be entitled if they pursued the claim. The Commission will close the case if the complainant refuses to accept relief that the Commission believes is reasonable.

If the matter cannot be resolved through conciliation, the Commission holds a hearing to determine whether unlawful discrimination occurred. Respondents often do hire attorneys at this point in the process, although the Commission encourages the parties to proceed as informally as possible. It is important to recognize, however, that contrary to many common perceptions, neither the Commission nor the Commission's attorney represent the complainant at such hearings. The complainant is the beneficiary of a successful case, but the Commission seeks to enforce the State's important public policy against discrimination when it prosecutes a violation of the law. In this manner, the Commission acts much like a public prosecutor who seeks to enforce the laws of the State. As the United States Supreme Court has said, civil rights enforcement agencies like the Human Rights Commission seek to vindicate the public's interest when seeking remedies that will benefit victims of discrimination.

If, at the conclusion of a hearing, the Commission finds that illegal discrimination has occurred, the Commission can award "make whole" relief—relief that would put the victim in the same position they would have been in absent the illegal discrimination—and no more. In practice, if someone has a case where they want to recover a large damage award, and can find an attorney, they go to court.

Commission cases often don't involve the types of large damages available in court. **The average amount of awards where the Commission has found substantial evidence of discrimination in employment cases is less than forty-eight hundred dollars (\$4800).** In most of these cases, people come to the Commission, not the courts, because lawyers cannot afford to take their cases for such small awards. In these situations, the Commission really is the only place a person can come to get relief.

PROVISIONS OF HB 525

Discretion to Dismiss Complaints

The Commissioners support Section 4, which adds a new provision giving the executive director discretion to dismiss complaints before an accusation is issued. This would mean that a hearing would no longer be required by law in every case where substantial evidence is found. This provision allows the Commission to take forward only those cases that will promote the public policy of the State. Complainants would be free to file a timely case in court after a case is dismissed under this section regardless of

the reasons for the dismissal. This section also allows the executive director to dismiss a case prior to a finding of no substantial evidence and promotes efficiency in processing complaints.

Limits on the Type of Relief the Commission Can Award

The Commission believes that this bill goes too far in limiting the amounts and types of remedies that can be awarded. There has been no indication that there are problems with the law or the Commission's awards which would warrant the proposed limits on relief. The Commission discussed some of the limits on relief with the Department of Law, but did not ultimately come to an agreement on all issues. After having these discussions with the Department of Law, and as a result of its ongoing analysis, other problems with the limitations on relief have become more apparent to the Commission.

Currently, the statute now provides for the award of "any appropriate relief." The provisions of Section 6 of the bill remove that authority and limit relief to only those specifically enumerated listed remedies. **This would preclude many types of remedies that are basic, common sense, make whole remedies—ones that do not seek to punish or in any way give a windfall to complainants, but simply to put them in the position they would have been in but for the illegal discrimination.** For example, under current provisions of the bill, the Commission is concerned that it could **NOT:**

Require a reasonable accommodation for a person with a disability— something that can be an integral part of making the workplace accessible to all persons who can otherwise do the job.

Require the payment of retirement benefits where the employer's contributions to a plan are no longer made because a person has been fired due to age discrimination.

Make a person whole for lost benefits that weren't included in their pay check, such as housing, which was part of a compensation package – e.g., in rural Alaska, employees may be paid \$10/hour instead of \$15, but given a place to live to make up for the difference.

Provide an employee health benefits lost— e.g., where an employer drops a pregnant employee from its insurance upon learning the employee is pregnant, she would be faced with the unexpected cost of having the baby, even though that action was illegal discrimination based on pregnancy.

It would also not allow the Commission to require an employer to remove records of discipline that was discriminatory—e.g., counseling and probationary documents which were created because of a person's race. Such a record can follow a person and prevent them from getting another job.

Other types of compensation that the Commission is concerned it could **NOT** provide would include:

Vesting in a retirement plan – e.g., in an age discrimination case, an employer fired an employee 6 months before they would vest.

Bonuses – these are not specifically back-pay – e.g. holiday bonuses, profit sharing that would have been available to the employee had the employer not terminated her because of sex discrimination.

Posting of signs and distribution of policies—e.g., regarding sexual harassment or disability. These remedial measures help assure the workplace is free from future problems with discrimination.

Vacation – e.g., what would have accrued if not terminated.

Restoration of Seniority – e.g., lost seniority impacts future bumping and layoffs.

Reimbursed medical costs – e.g. where an employer has provided compensation to offset deductibles or employee co-pay amounts.

Other out of pocket expenses – e.g. those related to seeking other employment after being illegally fired.

The Commissioners are concerned about the limit on front pay to a period of two years and restrictions on when it can be awarded in Section 6. Where appropriate, reinstatement is the preferred remedy for an illegal firing. Front pay is awarded in cases where reinstatement is not feasible, and compensates the victim for the future effects of discrimination when a person has been denied continued employment. Although infrequently used, front pay is an important make whole remedy when needed. Courts have upheld front pay awards for periods of longer than two years where it is justified to make the victim of discrimination whole, and Commission front pay awards have been consistent with judicial precedent.

FORCING THE COMMISSION TO PAY ATTORNEY'S FEES WOULD UNDULY HARM THE MISSION OF ELIMINATING DISCRIMINATION

At the House State Affairs Committee hearing on April 21 on HB 525, suggestions were made to require the Commission to pay attorney's fees to respondents in the event the Commission is unsuccessful in proving discrimination at a hearing. **Requiring the Commission to pay attorney's fees would substantially harm the Commission's ability to enforce the Human Rights Law and pursue the State's public policy of preventing and eliminating discrimination.** A mandate similar to Civil Rule 82 would

require the Commission to pay 30% of a respondent's attorney's fees when the respondent prevails. In other cases, the Commission could be liable for up to 75% of the fees under the rules governing offers of judgments. These amounts could be up to and exceed \$25,000.

In contrast, a rule similar to Civil Rule 82 would limit the fees the Commission could collect when it prevails to 20% of the damages awarded. Since, as noted above, the average Commission award is below \$5000, the Commission would receive less than \$1000 in fees when it successfully prosecuted a case.

The Commission is a small agency with a very limited budget. In the past two years the Commission lost 20% of its staff and now operates with just 15 employees where it had 22 just four years ago. Requiring the Commission to pay such large amounts for unsuccessful attempts to prosecute violations of the Human Rights Law would most likely mean further reductions in staff and a crippling of the agency's ability to pursue the public's interest in preventing and eliminating discrimination. Such a scheme would be similar to forcing a public prosecutor to pay a criminal defendant when the defendant is found not guilty.

The Commissioners are also extremely concerned that this section would undermine the public's confidence in the agency's diligent enforcement of the law. This could also create an appearance of conflict in the decision making process as the public might view the staff and Commissioner's decisions to be influenced by the concern that fees would be awarded against the agency.

CONCLUSION

The Commission appreciates the opportunity to comment on this bill. The Commissioners recognize the positive aspects of the legislation, but do not believe further limits on the Commission's ability to remedy discrimination are warranted. Again, it is important to note that the vast majority of discrimination claims in Alaska are brought to the Commission. Alaska has a strong and noble public policy against discrimination, and has had a long history of trying to remedy the unfairness that comes with treating people differently for no reason but prejudice or stereotype. This bill would undermine that policy by eliminating full make whole remedies for most acts of discrimination.