

HB

525

23-GH2024\D
Bullock
4/19/04

CS FOR HOUSE BILL NO. 525()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

BY

**Offered:
Referred:**

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to complaints filed with, and investigations, hearings, and orders of,**
2 **the State Commission for Human Rights; making conforming amendments; and**
3 **providing for an effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 *** Section 1. AS 18.80.100 is amended to read:**

6 **Sec. 18.80.100. Complaint; time limitations.** A person who is aggrieved by
7 **a [ANY] discriminatory practice [CONDUCT]** prohibited by this chapter may sign
8 **and file with the commission a written, verified complaint stating the name and**
9 **address of the person alleged to have engaged in the discriminatory practice**
10 **[CONDUCT], and the particulars of the discrimination. A complainant may**
11 **withdraw the complaint at any time before the service of an accusation under**
12 **AS 18.80.120. A withdrawal must be signed by the complainant and be in**
13 **writing. A withdrawal does not limit the discretion of the executive director**
14 **provided in (b) of this section** [THE EXECUTIVE DIRECTOR MAY FILE A

1 COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION
2 COMES TO THE ATTENTION OF THE DIRECTOR].

3 * Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

4 (b) The executive director may file a complaint in the manner provided in (a)
5 of this section when a discriminatory practice comes to the attention of the executive
6 director.

7 (c) A complaint may be filed not later than 180 days after the alleged
8 discriminatory practice or, for a continuing discriminatory practice, not later than 180
9 days after the alleged discriminatory practice stopped.

10 * Sec. 3. AS 18.80.110 is amended to read:

11 **Sec. 18.80.110. Investigation and conciliation.** The executive director or a
12 member of the commission's staff designated by the executive director shall
13 informally investigate the matters set out in a filed complaint, promptly and
14 impartially. If the investigator determines that there is [THE ALLEGATIONS ARE
15 SUPPORTED BY] substantial evidence of a discriminatory practice under this
16 chapter, the investigator shall immediately try to eliminate or remedy the
17 discriminatory practice through an agreement reached [DISCRIMINATION
18 COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is
19 reached, it must be reduced to writing and signed by the complainant, executive
20 director, and respondent. The agreement is binding and enforceable under this
21 chapter as an order of the commission. Any agreement reached under this
22 section may include the compromise of damages authorized under this chapter.

23 * Sec. 4. AS 18.80 is amended by adding a new section to read:

24 **Sec. 18.80.112. Dismissal for administrative convenience.** (a) At any time
25 before the issuance of an accusation under AS 18.80.120, the executive director may
26 dismiss without prejudice a complaint for administrative convenience if the executive
27 director determines, in the executive director's discretion, that

28 (1) the complainant's objection to a proposed conciliation agreement is
29 unreasonable;

30 (2) the complainant is unavailable or unwilling to participate in a
31 hearing;

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- (3) relief is precluded by the absence of the person alleged to have engaged in the discriminatory practice;
- (4) a hearing will not benefit the complainant;
- (5) the person aggrieved by the discriminatory practice has initiated or wants to initiate an action or proceeding in another forum based on the same facts;
- (6) a hearing will not represent the best use of commission resources;
- (7) a hearing will not advance the purposes stated in AS 18.80.200;
- (8) the probability of success of the complaint on the merits is low; or
- (9) proceeding to a hearing will not serve the public interest.

(b) Dismissal under this section does not prevent a complainant from

- (1) initiating an action or proceeding in another forum; or
- (2) filing a new complaint under AS 18.80.100 that adequately addresses the grounds for the dismissal under (a) of this section.

* **Sec. 5.** AS 18.80.120 is repealed and reenacted to read:

Sec. 18.80.120. Hearing. (a) If informal efforts under AS 18.80.110 to eliminate or remedy the alleged discriminatory practice are unsuccessful and the executive director determines, in the executive director's discretion, to refer the complaint for hearing, the executive director shall issue an accusation based on the investigator's determination of substantial evidence and serve the person charged in the accusation and the complainant with notice of the referral and a copy of the accusation. The executive director's decision to refer the complaint to hearing is not reviewable by the commission under this chapter. The location of the hearing is the commission office unless the commission designates another location. The executive director, or the executive director's designee, presents the case in support of the accusation before the commission. The person charged in the accusation may file a written answer and may appear at the hearing, with or without counsel, and submit evidence.

(b) The commission shall follow the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure Act) except as otherwise provided in this chapter.

(c) An accusation may be amended by the commission only upon a showing of good cause. An amendment to name a different discriminatory practice must be

1 supported by substantial evidence, and the discriminatory practice must be referred for
2 conciliation as provided in AS 18.80.110, before a hearing may proceed.

3 (d) In a hearing on an accusation, each element of an accusation or defense
4 must be proven by a preponderance of the evidence.

5 (e) At any time after the issuance of an accusation, the executive director or
6 the person charged in the accusation may petition for a summary decision on the
7 accusation. The commission shall grant a petition if the record shows that there is no
8 genuine issue of material fact and the petitioner is entitled to an order under
9 AS 18.80.130 as a matter of law.

10 * Sec. 6. AS 18.80.130(a) is amended to read:

11 (a) At the completion of the hearing or after consideration of a petition for
12 summary decision under AS 18.80.120(e), if the commission finds that a person
13 charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has
14 engaged in the discriminatory practice [CONDUCT] alleged in the accusation
15 [COMPLAINT], it shall order the person to refrain from engaging in the
16 discriminatory practice [CONDUCT]. The order must include findings of fact [,] and
17 may prescribe conditions on [THE ACCUSED'S] future conduct relevant to the type
18 of discriminatory practice. The commission may not order an award of
19 noneconomic or punitive damages [DISCRIMINATION]. In a case involving a
20 discriminatory practice [DISCRIMINATION] in

21 (1) employment, the commission may order one or more of the
22 following: the training of the employer, labor organization, or employment
23 agency, and its employees, concerning discriminatory practices; [ANY
24 APPROPRIATE RELIEF, INCLUDING BUT NOT LIMITED TO,] the hiring,
25 reinstatement, or upgrading of an employee with or without back pay; the payment of
26 front pay for a period of not more than two years if hiring, reinstatement, or
27 upgrading of an employee is inappropriate because no vacancy exists, the
28 employer's discriminatory practice rendered the employee incapable of returning
29 to work, or the relationship between the employer and employee has so
30 deteriorated as to make working conditions intolerable; [,] restoration to
31 membership in a labor organization; [,] or admission to or participation in an

1 apprenticeship training program, on-the-job training program, or other retraining
2 program; however, an order for back pay or front pay must be reduced by the
3 amount the employee could have earned or could earn by making reasonable and
4 diligent efforts to obtain similar employment;

5 (2) housing, the commission may order the sale, lease, or rental of the
6 housing accommodation to the aggrieved person if it is still available, or the sale,
7 lease, or rental of a like accommodation owned by the person charged in the
8 accusation [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still
9 available, or the sale, lease, or rental of the next vacancy in a like accommodation,
10 owned by the person charged in the accusation [AGAINST WHOM THE
11 COMPLAINT WAS FILED]; the commission may award actual damages, which shall
12 include [, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for
13 obtaining alternative housing or space; for storage of goods and effects; for moving;
14 and for other costs actually incurred as a result of the unlawful practice or violation.

15 * Sec. 7. AS 18.80.130(c) is amended to read:

16 (c) If the commission finds that a person charged in an accusation
17 [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the
18 discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it
19 shall issue and cause to be served on the complainant an order dismissing the
20 complaint.

21 * Sec. 8. AS 18.80.130 is amended by adding a new subsection to read:

22 (f) The interest rate for an award under this section is determined in the
23 manner provided in AS 09.30.070.

24 * Sec. 9. AS 18.80.140 is amended to read:

25 **Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing
26 compliance with all the terms of a commission order is a bar to criminal prosecution
27 for the particular instances of discriminatory practice [CONDUCT] described in the
28 accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

29 * Sec. 10. AS 18.80.270 is amended to read:

30 **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or
31 employment agency, who or that wilfully engages in an unlawful discriminatory

1 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,
2 impedes, or interferes with the commission or any of its authorized representatives in
3 the performance of duty under this chapter, or who or that wilfully violates an order of
4 the commission, is guilty of a misdemeanor, and upon conviction by a court of
5 competent jurisdiction, is punishable by a fine of not more than \$500, or by
6 imprisonment in a jail for not more than 30 days, or by both.

7 * **Sec. 11.** AS 18.80.300 is amended by adding a new paragraph to read:

8 (17) "complainant" means a person who is aggrieved by a
9 discriminatory practice prohibited by this chapter and who has filed a complaint as
10 provided in AS 18.80.100.

11 * **Sec. 12.** AS 44.62.330(a) is amended by adding a new paragraph to read:

12 (61) State Commission for Human Rights, where procedures are not
13 otherwise expressly provided in AS 18.80.

14 * **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to
15 read:

16 APPLICABILITY. This Act applies to complaints filed on or after the effective date
17 of secs. 1 - 12 of this Act.

18 * **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to
19 read:

20 TRANSITION: REGULATIONS. The State Commission for Human Rights may
21 proceed to adopt regulations necessary to implement the changes made by this Act. The
22 regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the
23 effective date of the statutory change.

24 * **Sec. 15.** Section 14 of this Act takes effect immediately under AS 01.10.070(c).

25 * **Sec. 16.** Except as provided in sec. 15 of this Act, this Act takes effect July 1, 2004.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 525
(H) Publish Date: 2/26/04

Revision Date/Time (Note if correction): _____ Dept. Affected: GOV
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 Fenurniai, 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

TESTIMONY OF DAVID MARQUEZ FOR CSHB 525 (ASCHR BILL)

HOUSE STATE AFFAIRS COMMITTEE

April 19, 2004

My name is David Marquez. My title is Chief Assistant Attorney General and Legislative Liaison for the Department of Law. I am pleased to present on behalf of the Governor, HB 525, regarding the Alaska State Commission for Human Rights.

First I will outline for the Committee what the Administration hopes to accomplish through this bill. If enacted this bill will:

- 1. Enhance the effectiveness of the Alaska State Commission for Human Rights 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;**
- 2. Improve Commission procedures;**
- 3. Enhance the fairness of the Commission's procedures;**
- 4. Clarify the remedies that the Commission may award to remedy unlawful discrimination, and**
- 5. Make certain housekeeping changes.**

Please let me provide a more detailed description of the benefits this bill will provide;

First, the bill will enhance the effectiveness of the Commission 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. HB 525

- Authorizes executive director to choose the complaints of unlawful discrimination that merit pursuit, based on factors such as strength of evidence, severity of alleged violation, employer's history before the commission, or complaint's value in establishing precedent. (Sec. 4)
- Has the effect of reversing *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), which required the director to take to hearing any complaint supported by substantial evidence of unlawful discrimination

without regard to such factors as the weakness of the evidence, or the strength of an employer's affirmative defenses. (Sec. 4)

- Allows complainant to withdraw complaint before accusation is served, but preserves executive director's right to file complaint on her own. (Secs. 1,2)
- Avoids conflicts between (1) staff's exercise of expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures, and after withdrawal, to pursue claim independently of commission in another forum. (Sec. 1)

Second, the bill improves Commission procedures. It

- Permits agreements during the prehearing (conciliation) phase to compromise damage claims. (Sec. 3)
- Requires that agreements be reduced to writing, and provides that agreements are enforceable as commission orders. (Sec. 3)
- Requires commission to follow procedures in Administrative Procedure Act, unless AS 18.80 provides different procedure. (Secs. 5, 12)
- Allows the commission to issue a summary decision, which is similar to a motion for summary judgment; if facts are not disputed, the commission can make a ruling without providing a full hearing. (Sec. 5)

Third, HB 525 enhances the fairness of Commission's procedures. It

- Requires the charges in the accusation that the executive director issues after deciding to pursue a complaint to hearing to be based on the investigator's determination of substantial evidence. (Sec. 5)
- Requires that substantial evidence support any new charges of unlawful discrimination that are added when the accusation is amended. (Sec. 5)

- Requires that respondent have an opportunity to address all charges informally (even charges added by amendment) before being required to defend them in a formal hearing. (Sec. 5)
- Ties rate of interest awarded by commission to legal rate in AS 09.30.070, bringing commission into conformity with other administrative agencies and the courts. (Sec. 8)

Fourth, the bill clarifies the remedies that the Commission may award to remedy unlawful discrimination. It

- Prohibits non-economic or punitive damages. (Sec. 6)
- Limits remedies (normally) to restoration of actual benefits lost – *i.e.*, for employers this would mean payment of back pay and hiring, promoting, or reinstating an employee to a position. (Sec. 6)
- But allows the award of front pay for a period of up to one year if a return 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. (Sec. 6)
- Requires any order to pay 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)

Finally HB 525 makes certain housekeeping changes. It

- Would incorporate current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint. (Sec. 2)
- Adds a definition of "complainant." (Sec. 11)

Thank you Mr. Chairman and members of the Committee. I urge your support of this important bill and respectfully request that it be passed out of Committee. I am happy to answer any questions you may have.

ANALYSIS OF HB 525 (ASCHR BILL)

Enhances effectiveness of the Alaska State Commission for Human Rights 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

- Authorizes executive director to choose the complaints of unlawful discrimination that merit pursuit, based on factors such as strength of evidence, severity of alleged violation, employer's history before the commission, or complaint's value in establishing precedent. (Sec. 4)
- Has the effect of reversing *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), which required the director to take to hearing any complaint supported by substantial evidence of unlawful discrimination without regard to such factors as the weakness of the evidence, or the strength of an employer's affirmative defenses. (Sec. 4)
- Allows complainant to withdraw complaint before accusation is served, but preserves executive director's right to file complaint on her own. (Secs. 1,2)
- Avoids conflicts between (1) staff's exercise of expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures, and after withdrawal, to pursue claim independently of commission in another forum. (Sec. 1)

Improves commission procedures

- Permits agreements during the prehearing (conciliation) phase to compromise damage claims. (Sec. 3)
- Requires that agreements be reduced to writing, and provides that agreements are enforceable as commission orders. (Sec. 3)
- Requires commission to follow procedures in Administrative Procedure Act, unless AS 18.80 provides different procedure. (Secs. 5, 12)

- Allows the commission to issue a summary decision, which is similar to a motion for summary judgment; if facts are not disputed, the commission can make a ruling without providing a full hearing. (Sec. 5)

Enhances fairness of commission's procedures

- Requires the charges in the accusation that the executive director issues after deciding to pursue a complaint to hearing to be based on the investigator's determination of substantial evidence. (Sec. 5)
- Requires that substantial evidence support any new charges of unlawful discrimination that are added when the accusation is amended. (Sec. 5)
- Requires that respondent have an opportunity to address all charges informally (even charges added by amendment) before being required to defend them in a formal hearing. (Sec. 5)
- Ties rate of interest awarded by commission to legal rate in AS 09.30.070, bringing commission into conformity with other administrative agencies and the courts. (Sec. 8)

Clarifies the remedies that the commission may award to remedy unlawful discrimination

- Prohibits noneconomic or punitive damages. (Sec. 6)
- Limits remedies (normally) to restoration of actual benefits lost – *i.e.*, for employers this would mean payment of back pay and hiring, promoting, or reinstating an employee to a position. (Sec. 6)
- But allows the award of front pay for a period of up to two years if a return 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. (Sec. 6)

- Requires any order to pay 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)

Makes housekeeping changes

- Would incorporate current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint. (Sec. 2)
- Adds a definition of "complainant." (Sec. 11)

HOUSE BILL NO. 525
"AN ACT RELATING TO COMPLAINTS FILED WITH,
AND INVESTIGATIONS, HEARINGS, AND ORDERS OF,
THE STATE COMMISSION FOR HUMAN RIGHTS"

SECTIONAL ANALYSIS
OFFICE OF THE ATTORNEY GENERAL

- Section 1: Amends AS 18.80.100 to ensure that a complainant may withdraw a complaint of unlawful discrimination during the investigative and conciliation phases of the procedures and before the executive director issues an accusation, which begins formal hearing proceedings.
- Section 2: Adds new subsections to 18.80.100. The power of the executive director to file a complaint is moved to proposed subsection (b).
- Proposed subsection (c) incorporates current regulation's (6 AAC 30.230) limitation period for filing complaint: 180 days after the discriminatory act or practice ends.
- Section 3: Amends 18.80.110 to require a written and signed agreement if a complaint is resolved in the conciliation phase, to make that agreement the equivalent of a commission order for purposes of enforcement, and to authorize the compromise of a damages claim in the agreement.
- Section 4: Adds a new section expanding the discretion of the executive director to dismiss complaints in appropriate circumstances. The section reverses the Alaska Supreme Court's decision in *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence because the law did not give the commission staff discretion to discontinue action after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The

effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation.

Subsection (a) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, the complainant's cooperation, or the complaint's value in establishing precedent guiding future conduct.

Subsection (b) ensures that the executive director's administrative dismissal is not a dismissal on the merits and that a complainant may file an action with a court or another agency or even file a new complaint with the commission if the reason for the administrative dismissal can be resolved.

Section 5: Repeals and reenacts 18.80.120, which sets out the hearing requirements.

Subsection (a) implements the expanded discretion of the executive director to choose the complaints that commission staff pursue to hearing and provides that the commission may not review the executive director's exercise of that discretion. It also provides that, if the executive director refers a complaint for hearing, the executive director must issue an accusation based on the investigator's determination of substantial evidence.

Subsection (b) adds a requirement that the hearing follow the procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630, except where the statutes

applying to the commission provide otherwise.

Subsection (c) provides for the amendment of an accusation only upon a showing of good cause, and it requires that an amendment adding a different discriminatory practice charge be supported by substantial evidence and that the parties be provided an opportunity to address the new charge in conciliation before the hearing may proceed.

Subsection (d) establishes the burden of proof at a hearing by requiring that the elements of an accusation or defense be proven by a preponderance of the evidence.

Subsection (e) authorizes the commission to issue a summary decision without a hearing in the same manner that a court may issue a summary judgment -- when the facts are not in dispute and the party petitioning for a summary decision is entitled to an order as a matter of law.

Section 6: Amends the remedial provisions in 18.80.130(a) to authorize the commission to order a remedy after a hearing or after considering a petition for a summary decision. It prohibits the commission from issuing awards of noneconomic or punitive damages.

Paragraph (1), addressing employment, is amended to set out the specific remedies that the commission can award to remedy a discriminatory employment practice. To the remedies of hiring, reinstatement or upgrading an employee with or without back pay, it adds the remedy of payment of front pay for a period of two years in special circumstances: if hiring, reinstatement or upgrading of an employee cannot be accomplished because the employer does not have a vacancy; the employer's discriminatory conduct made the employee incapable of returning to work; or the

working environment had deteriorated intolerably. The paragraph adds a duty to mitigate: an order for either front pay or back pay must be reduced by the amount that the employee should have earned by making a reasonable and diligent effort to obtain comparable employment.

- Section 7: Makes conforming amendments to 18.80.130(c).
- Section 8: Adds a provision tying the rate of interest when the commission awards interest to the legal rate in AS 09.30.070.
- Section 9: Makes conforming amendments to 18.80.140.
- Section 10: Makes conforming amendments to 18.80.270.
- Section 11: Adds a definition of "complainant" to the definition section in 18.80.300.
- Section 12: Adds a paragraph to the Administrative Procedure Act adding the commission to the list of agencies that the Act's hearing provisions cover.
- Section 13: Applies the law prospectively, to complaints filed after it is enacted.
- Section 14: Authorizes the commission to begin adopting regulations to implement the changes before the effective date of the act and provides that the regulations may not take effect before the act's effective date.
- Section 15: Provides an immediate effective date for section 14, which authorizes the commission to begin procedures to adopt regulations.
- Section 16: Provides an effective date of July 1, 2004.

THE
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FAX TRANSMISSION SHEET

**Alaska State Commission For Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669**

PHONE: (907) 276-7474

FAX: (907) 276-7462

DATE: April 23, 2004

TIME: 12:58 PM

**TO: Representative Bruce Weyhrauch
Chair House State Affairs Committee
Alaska State Legislature**

**FROM: Lisa Fitzpatrick
Chairperson
Human Rights Commission**

FAX #: 907/465-2273

THIS FAX IS:

- CONFIDENTIAL
- URGENT
- For action/processing
- For your information
- As requested
- No Hard copy will follow

ADDITIONAL INFORMATION:

Dear Representative Weyhrauch:

I am sending you the written testimony which you requested regarding HB525. You are welcome to contact me on my cell phone at 830-9820.

Lisa Fitzpatrick
Chairperson

PLEASE CALL IMMEDIATELY IF YOU DO NOT RECEIVE ALL PAGES. THANK YOU.

of Pages: 7
(Including cover sheet)
forms/fax

Operator: A.Keene
Extension No.: 237
10/21/93

HB 525
TESTIMONY SUBMITTED TO THE
HOUSE STATE AFFAIRS COMMITTEE
APRIL 23, 2004

The Human Rights Commission appreciates the opportunity to submit comments to the House State Affairs Committee on HB 525, 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. The Commissioners are also concerned about other provisions of the bill that would create additional barriers for victims of discrimination who are seeking a fair remedy for Human Rights Law violations.

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 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.

The Commissioners are opposed to the provision of Section 6 which would require a complainant to make both reasonable and diligent efforts to secure similar employment before allowing an award of back or front pay. The Commissioners recommend using the legal standard applied by the courts, that is, whether a person's efforts are reasonably diligent. The Commission has found this standard to be particularly appropriate in Alaska where long distances and remote areas necessitate considering what is reasonable given the State's unique geography. The Commissioners are opposed to this provision

because it creates two separate standards which would be unfair to Alaskans. The Department of Law has agreed to adopt the Commission's recommended language in this provision.

Restrictions on Amending Complaints

The Commissioners are opposed to the provision in Section 5 that prohibits amendments to the accusation unless the executive director could show that there is "good cause" to do so. The current statute provides that the executive director may amend the complaint "reasonably and fairly." Rules governing the amendment of complaints in superior court allow amending as of right before an answer is filed, and leave to amend is "to be freely given when justice so requires" after that. See Civil Rule 15(a). The "good cause" standard is much more stringent than the Commission's present statute or the rules of practice in superior court. The Commissioners request that the current statutory standard or the standard applied in court be used. The Department of Law has agreed to adopt the Commission's recommended language in this provision.

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, 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.