

SB

354

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 5, 2004

APR 5 2004

Senator Ralph Seekins
Chair, Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 125
Juneau, Alaska 99801

Re: SB 354 – “An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; making conforming amendments; and providing for an effective date.”

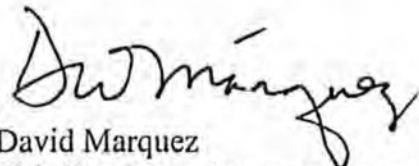
Dear Senator Seekins:

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

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

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: 
David Marquez
Chief Assistant Attorney General

DWM/lcc

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

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 25, 2004

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill that would amend the investigation and procedure laws of the State Commission for Human Rights (commission). The bill would amend the investigation and hearing procedures to enhance efficiency and to give the commission more enforcement discretion to increase its effectiveness in combating unlawful discrimination.

The bill would add a new statutory provision, AS 18.80.112, to provide the staff of the commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The purpose of the amendment is to reverse 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. The court concluded that the state human rights laws did not give the commission staff discretion to discontinue action on a complaint 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. Providing the commission with genuine prosecutorial discretion would allow the commission to commit its resources to complaints it determines merit pursuit, 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, or the complaint's value in establishing precedent guiding future conduct.

The discretion of the staff of the commission would also be expanded to allow it to compromise a claim for damages in the conciliation (or prehearing) phase of the procedures. The bill would avoid conflicts between staff's exercise

of its expanded discretion to compromise, dismiss, or pursue a complaint and the concerns of the victims of unlawful discrimination by allowing a complainant to opt out of commission procedures. A complainant may withdraw the complaint at any time before the executive director of the commission makes the decision to go to hearing and, after withdrawal, pursue the claim independently of the commission in another forum.

The bill also would change the hearing procedures. These changes include requiring the commission to follow the procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630, unless AS 18.80 provides a different procedure. The bill would eliminate from AS 18.80 some duplicative procedural requirements that are addressed in the Administrative Procedure Act, such as the admissibility of evidence and the requirement that testimony be under oath. Another change would be the addition of a provision similar to a motion for summary judgment in the civil rules of court to allow a summary decision on the law if the facts are not disputed. The reason for allowing a summary decision would be that it is a faster procedure than a hearing, and it would provide a sufficient opportunity to be heard on the legal issues when the facts are not in dispute. The bill would add a provision tying the rate of interest when the commission awards interest to the legal rate in AS 09.30.070 to bring the commission into conformity with other administrative agencies and the courts. It would limit amendments to a complaint after a case is referred for hearing to ensure that all changes are supported by substantial evidence and that a respondent has an opportunity to address all charges informally before being required to defend them in a formal hearing. The bill would move the statute of limitations for bringing a claim from regulation (6 AAC 30.230) to statute.

Finally, the bill would amend AS 18.30.130, which addresses the authority of the commission to remedy unlawful discrimination, to establish that the appropriate remedy for unlawful employment discrimination normally would be to restore the actual benefit that was deprived -- hiring, promotion, or reinstatement to a position. In the unusual case where the relationship is so poisoned that the employee cannot return to work, the bill would allow an award of up to two years of compensation, minus the wages that the employee should be able to earn. Additionally, under the bill the commission would be able to order training regarding discriminatory practices.

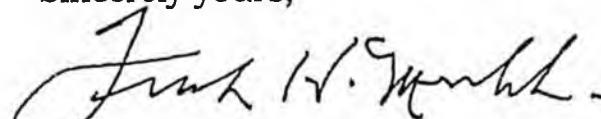
This bill, by increasing the commission's discretion in handling complaints, would enable the commission to allocate its diminishing resources to cases in which the commission could be the most effective in addressing and eliminating unlawful discrimination. By streamlining commission procedures,

The Honorable Gene Therriault
February 25, 2004
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the bill would help contain costs and ensure that the procedures are equitable to both complainants and the persons, businesses, labor organizations, and employment agencies charged before the commission with unlawful discrimination.

I urge your prompt and favorable action on this bill.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Frank H. Murkowski".

Frank H. Murkowski
Governor

Enclosure

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: COG
 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

CS FOR SENATE BILL NO. 354 (STA)
"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 procedures.

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) adds to 18.80.100 the limitation period for filing a complaint set out in 6 AAC 30.230. The limitation period established allows the filing of a complaint for 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 purpose of the section is to reverse 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. The Court concluded that the law did not give the commission

staff discretion to discontinue action on a complaint 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 requirements for a hearing on a complaint of discrimination.

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) allows reasonable and fair amendments to an accusation, but it requires that substantial evidence support an amendment naming a different discriminatory practice and that the parties be provided an opportunity to resolve the different discriminatory practice 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 clarifies the remedial authority of the commission by providing that the commission may not order awards of noneconomic or punitive damages in any cases.

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 one year in special

circumstances: if hiring, reinstatement or upgrading of an employee cannot be accomplished because the employer does not have an appropriate vacancy; if the employer's discriminatory conduct made the employee incapable of returning to work; or if the relationship between the employer and employee has so deteriorated that they cannot work together. 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 could have earned if the employee made a reasonably 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 18.30.270.
- 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.