

SB

132

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FISCAL NOTE

STATE OF ALASKA 4/20/06
 2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
 Bill Version: HCS SB 132(JUD)
 (H) Publish Date: 3/3/06

Revision Date/Time (Note if correction): Dept. Affected: LAW
 Title: "An Act relating to complaints filed with investigations...The State Commission for Human Rights..." RDU: CIVIL
 Component: Labor & State Affairs
 Sponsor: Requester: Governor Component No:

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
1007 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 (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 18.60.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhete, Director Phone: 465-3873
 Division: Administrative Services Division Date/Time: 3/10/06 9:22 AM
 Approved by: Kathryn Daughhete for David Marquez, Attorney General Date: 3/10/06
 Agency: Department of Law

REPORTED OUT OF
HFC 4/20/06 FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HCS SB 132(IUD)
(H) Publish Date: 3/3/06

Revision Date/Time (Note if correction): _____ Dept. Affected: OOG
Title "An Act relating to complaints filed RDU Commissions/Special Offices
with investigations...of the State Human Rights Comm..." Component Human Rights Commission
Sponsor Rules Committee
Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
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	0.0	0.0	0.0	0.0	0.0	0.0
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 (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Kevin Jardell, Legislative Director
Division: Governor's Legislative Office
Approved by: Kevin Jardell, Legislative Director
Agency: Governor's Legislative Office

Phone 465-4021
Date/Time 1/12/06 12:00 AM
Date 1/12/2006

Fail

(Offered)

24-GS1110Y.1
Kane
4/19/06

AMENDMENT 2

Kerthula

OFFERED IN THE HOUSE

TO: HCS SB 132(), Draft Version "Y"

1 Page 1, line 2:

2 Delete "and"

3 Insert "providing for attorney fees and costs in cases involving human rights
4 violations;"

6 Page 1, line 3, following "amendments":

7 Insert "; and amending Rule 82, Alaska Rules of Civil Procedure"

9 Page 6, following line 12:

10 Insert a new bill section to read:

11 **"* Sec. 11. AS 18.80 is amended by adding a new section to article 2 to read:**

12 **Sec. 18.80.147. Attorney fees and costs.** (a) In an action brought by a person
13 under AS 22.10.020(i), a prevailing plaintiff shall be awarded costs as provided by
14 court rule and full reasonable attorney fees at the prevailing reasonable rate.

15 (b) Unless the action is found to be frivolous, in an action brought by a person
16 under AS 22.10.020(i), a prevailing defendant shall be awarded attorney fees and costs
17 as provided by court rule. If the action is found to be frivolous, the attorney fees to be
18 awarded to the defendant shall be full reasonable attorney fees at the prevailing
19 reasonable rate

20 (c) In this section, "frivolous" means

21 (1) not reasonably based on evidence or on existing law or a
22 reasonable extension, modification, or reversal of existing law; or

23 (2) brought to harass the defendant or to cause unnecessary delay or

1 needless expense."

2

3 Renumber the following bill sections accordingly.

4

5 Page 6, following line 31:

6 Insert a new bill section to read:

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

9 INDIRECT COURT RULE AMENDMENT. The provisions of sec. 11 of this Act
10 have the effect of changing Rule 82, Alaska Rules of Civil Procedure, by requiring the award
11 of full reasonable attorney fees in certain cases."

12

13 Renumber the following bill sections accordingly.

14

15 Page 7, line 4:

16 Delete "secs. 1 - 13"

17 Insert "secs. 1 - 14"

HOUSE FINANCE
COMMITTEE
ROLL CALL

DATE: 4/20

Amendment: #1 Kerttula.

SB 132

MEMBER

Favor

Oppose

MEMBER	Favor	Oppose
KELLY		
KERTTULA		
MOSES		
STOLTZE		
WEYHRAUCH —		
FOSTER		
HAWKER —		
HOLM		
JOULE		
MEYER —		
CHENAULT		

Withdraw

~~(folded)~~

24-GS1110Y.2
Kane
4/19/06

AMENDMENT |

Kenttula

OFFERED IN THE HOUSE

TO: HCS SB 132(), Draft Version "Y"

1 Page 2, line 3:

2 Delete "a new subsection"

3 Insert "new subsections"

4

5 Page 2, following line 6:

6 Insert a new subsection to read:

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

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HCS SB 132(JUD)
() Publish Date: _____

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

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	236.1					
Travel	5.0					
Contractual	14.0					
Supplies	1.3					
Equipment	15.0					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	271.4	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	271.4					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type - Do not abbreviate)						
TOTAL	271.4	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This fiscal note reflects the need for one Human Rights Field Representative IV and two Human Rights Field Representative IIIs. The FY07 operating budget request for the Human Rights Commission includes an increment of 179.2 for two additional positions and related costs. Should the Human Rights Commission receive their budget increment, this fiscal note will be reduced to 92.2.

Prepared by: Gail Fenuniar, Asst. Admin. Director LP Phone: 465-3885
Division: Office of the Governor, Administrative Services Date/Time: 2/8/06, 3:05pm
Approved by: Paula Haley, Executive Director Date: 2/8/2006
Agency: Alaska Human Rights Commission

adopted 4/20

24-GS1110V
Kane
4/17/06

HOUSE CS FOR SENATE BILL NO. 132()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to complaints filed with, investigations, hearings, and orders of, and
2 the interest rate on awards of the State Commission for Human Rights; and making
3 conforming amendments."

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 18.80.10J is amended by adding a new subsection 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 * Sec. 3. AS 18.80.110 is amended to read:

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

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

21 **Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) If an
22 investigation of a complaint under AS 18.80.110 fails to discover substantial evidence
23 of an unlawful discriminatory practice under this chapter, the executive director shall
24 issue an order dismissing the complaint without prejudice.

25 (b) At any time before the issuance of an accusation under AS 18.80.120, the
26 executive director may dismiss without prejudice a complaint if the executive director
27 determines that

28 (1) the complainant's objection to a proposed agreement under
29 AS 18.80.110 is unreasonable;

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

1 (3) relief is precluded by the absence of the person alleged to have
2 engaged in the discriminatory practice;

3 (4) the person aggrieved by the discriminatory practice has initiated or
4 wants to initiate an action or proceeding in another forum based on the same facts:

5 (5) a hearing will not represent the best use of commission resources;

6 (6) a hearing will not advance the purposes stated in AS 18.80.200; or

7 (7) the probability of success of the complaint on the merits is low.

8 (c) The commission, in its discretion, may, but is not required to, review the
9 executive director's order of dismissal under (a) or (b) of this section and may affirm
10 the order, remand the complaint for further investigation, or, if the commission
11 concludes that substantial evidence supports the complaint of an unlawful
12 discriminatory practice, refer the complaint for conference, conciliation, and
13 persuasion as provided in AS 18.80.110, or for hearing.

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

15 (1) initiating an action or proceeding in another forum; or

16 (2) filing a new complaint under AS 18.80.100 that resolves the
17 grounds for the dismissal under this section.

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

19 **Sec. 18.80.120. Hearing.** (a) If no agreement is reached under AS 18.80.110
20 and the executive director determines to refer the complaint for hearing, the executive
21 director shall issue an accusation based on the investigator's determination of
22 substantial evidence and serve the person charged in the accusation and the
23 complainant with notice of the referral and a copy of the accusation. The executive
24 director's decision to refer the complaint to hearing is not reviewable by the
25 commission under this chapter. The location of the hearing is the commission office
26 unless the commission designates another location. The executive director, or the
27 executive director's designee, shall present the case in support of the accusation before
28 the commission. The person charged in the accusation may file a written answer and
29 may appear at the hearing, with or without counsel, and submit evidence.

30 (b) The commission shall request the chief administrative law judge to
31 appoint, under AS 44.64.020, an administrative law judge employed or retained by the

1 office of administrative hearings to preside over a hearing conducted under this
2 section. AS 44.64.040 - 44.64.055, 44.64.070 - 44.64.200, and the procedures in
3 AS 44.62.330 - 44.62.630 (Administrative Procedure Act) apply to the hearing except
4 as otherwise provided in this chapter.

5 (c) An accusation may be reasonably and fairly amended by the commission.
6 An amendment to name a different discriminatory practice must be supported by
7 substantial evidence, and the discriminatory practice must be referred for conference,
8 conciliation, and persuasion as provided in AS 18.80.110, before a hearing may
9 proceed.

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

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

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

18 (a) At the completion of the hearing or after consideration of a petition for
19 summary decision under AS 18.80.120(e), if the commission finds that a person
20 charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has
21 engaged in the discriminatory practice [CONDUCT] alleged in the accusation
22 [COMPLAINT], it shall order the person to refrain from engaging in the
23 discriminatory practice [CONDUCT]. The order must include findings of fact [,] and
24 may order the person to take affirmative action to correct the discriminatory
25 practice. The commission may not order an award of noneconomic or punitive
26 damages in a case [PRESCRIBE CONDITIONS ON THE ACCUSED'S FUTURE
27 CONDUCT RELEVANT TO THE TYPE OF DISCRIMINATION]. In a case
28 involving a discriminatory practice [DISCRIMINATION] in

29 (1) employment, the commission may order any appropriate relief,
30 including one or more of the following: training of an employer, labor
31 organization, or employment agency, and its employees concerning

1 discriminatory practices; an accommodation for a person with a disability;
2 removal of or changes to a personnel record; posting of signs; back pay; [BUT
3 NOT LIMITED TO,] the hiring, reinstatement, or upgrading of an employee with or
4 without back pay; the payment of front pay for a period of not more than one year
5 if hiring, reinstatement, or upgrading of an employee is inappropriate because a
6 vacancy does not exist, the employer's discriminatory practice rendered the
7 employee incapable of returning to work, or the relationship between the
8 employer and employee has so deteriorated as to make working conditions
9 intolerable; [,] restoration to membership in a labor organization; [, OR] admission
10 to or participation in an apprenticeship training program, on-the-job training program,
11 or other retraining program; or restoration of seniority; however, an order for back
12 pay or front pay must be reduced by the amount the employee could have earned
13 or could earn by making reasonably diligent efforts to obtain similar
14 employment;

15 (2) housing, the commission may order the sale, lease, or rental of the
16 housing accommodation to the aggrieved person if it is still available, or the sale,
17 lease, or rental of a like accommodation owned by the person charged in the
18 accusation [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still
19 available, or the sale, lease, or rental of the next vacancy in a like accommodation,
20 owned by the person charged in the accusation [AGAINST WHOM THE
21 COMPLAINT WAS FILED]; the commission may award actual damages, which shall
22 include [, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for
23 obtaining alternative housing or space; for storage of goods and effects; and for
24 moving and [FOR] other costs actually incurred as a result of the unlawful practice or
25 violation.

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

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

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

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

4 * **Sec. 9.** AS 18.80.135(b) is amended to read:

5 (b) The commission may obtain a court order for the enforcement of any of its
6 orders by filing a complaint with the superior court in the judicial district in which the
7 unlawful practice [CONDUCT] is alleged to have occurred.

8 * **Sec. 10.** AS 18.80.140 is amended to read:

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

13 * **Sec. 11.** AS 18.80.270 is amended to read:

14 **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or
15 employment agency, who or that wilfully engages in an unlawful discriminatory
16 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,
17 impedes, or interferes with the commission or any of its authorized representatives in
18 the performance of duty under this chapter, or who or that wilfully violates an order of
19 the commission, is guilty of a misdemeanor and, upon conviction by a court of
20 competent jurisdiction, is punishable by a fine of not more than \$500, or by
21 imprisonment in a jail for not more than 30 days, or by both.

22 * **Sec. 12.** AS 18.80.300 is amended by adding new paragraphs to read:

23 (17) "complainant" means a person who is aggrieved by a
24 discriminatory practice prohibited by this chapter and who has filed a complaint as
25 provided in AS 18.80.100;

26 (18) "pay" means wages; salaries; commissions; amounts an employer
27 contributes to retirement, health, or other fringe benefit plans; and other forms of
28 remuneration paid to an employee for personal services.

29 * **Sec. 13.** AS 44.62.330(a) is amended by adding a new paragraph to read:

30 (46) State Commission for Human Rights, where procedures are not
31 otherwise expressly provided in AS 18.80.

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

3 APPLICABILITY. This Act applies to all complaints filed on or after the effective
4 date of secs. 1 - 13 of this Act.

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

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

HOUSE CS FOR SENATE BILL NO. 132(JUD) (3/3/06)
"AN ACT RELATING TO COMPLAINTS FILED WITH, AND
INVESTIGATIONS, HEARINGS, AND ORDERS OF, AND
THE INTEREST RATE ON AWARDS OF THE
STATE COMMISSION FOR HUMAN RIGHTS; PROVIDING FOR ATTORNEY
FEES AND COSTS IN CASES INVOLVING HUMAN RIGHTS VIOLATIONS;
MAKING CONFORMING AMENDMENTS; AND AMENDING RULE 82, ALASKA
RULES OF CIVIL PROCEDURE."

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 from subsection (a) to proposed subsection (b).
- Proposed subsection (c) to 18.80.100 adds a limitation period for filing a complaint. The current limitation period--180 days after the discriminatory act or practice ends--was set by the commission in 6 AAC 30.230. Subsection (c) moves the limitations period to statute and expands it to one year.
- 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 establishing the procedure to be followed if a complaint lacks substantial supporting evidence and expanding the discretion of the executive

director to dismiss a complaint that is supported by substantial evidence in appropriate circumstances and subject to review by the commission. A purpose of the section is to reverse the Alaska Supreme Court's decision in *Department of Fish and Game v. Meyer*, 906 F.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) establishes the procedure that follows a conclusion after investigation that substantial evidence does not support a complaint of unlawful discrimination. The executive director dismisses the complaint without prejudice.

Subsection (b) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the availability or willingness of the complainant to attend a hearing, the complainant's desire to take the claim to another forum, or the weakness of the case.

Subsection (c) provides the commission with the discretion to consider an appeal from an order of dismissal by the executive director under subsection (a) or (b).

Subsection (d) ensures that the executive director's administrative dismissal is not a dismissal on the merits. It allows a complainant to 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) 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 chief administrative law judge appoint the hearing officer who will conduct the hearing, that various statutes applying to the Office of Administrative Hearings (including those addressing disqualification of a hearing officer and administrative hearing records but excluding the section addressing hearing procedures) apply to the hearing, and 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 provides that substantial evidence must support an amendment naming a different discriminatory practice and that the parties must have 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, after the parties have had a reasonable opportunity for discovery, to issue a summary decision without a hearing in

similar circumstances that a court may issue 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 order action to correct the discriminatory practice but may not order awards of noneconomic or punitive damages.

Paragraph (1), addressing remedies for employment discrimination, is amended to expand the examples of appropriate relief 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 authority to order training regarding discriminatory practices, accommodation of a disability, changes to personnel records, posting signs, restoration of seniority, and the 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.

Paragraph (2), addressing remedies for discrimination in housing accommodation,

makes conforming amendments to the terminology.

- 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 18.80.135(b).
- Section 10: Makes conforming amendments to 18.80.140.
- Section 11: Adds 18.80.147 to require the award in court of costs and a full reasonable attorney's fee at the prevailing reasonable rate to a prevailing plaintiff bringing a claim of unlawful discrimination under 18.80.
- Section 12: Makes conforming amendments to 18.80.270.
- Section 13: Adds definitions of "complainant" and "pay" to the definition section in 18.80.300.
- Section 14: Adds a paragraph to the Administrative Procedure Act adding the commission to the list of agencies that the Act's hearing provisions cover.
- Section 15: Amends the uncodified law to amend indirectly Civil Rule 82, which addresses trial courts' awards of attorney's fees, to allow the award of full reasonable attorneys' fees in actions under AS 13.80.
- Section 16: Amends the uncodified law to apply the changes prospectively to complaints filed after the effective date of the act.
- Section 17: 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.

SB132



FRANK H. MURKOWSKI
GOVERNOR
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 3, 2005

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

Dear President Stevens:

Under the authority of art. III, sec. 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 fairness and 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.

COMMITTEE COPY

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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 would expand on a procedural change made in 2004 when the power to appoint the individuals who conduct commission hearings was moved from the commission to the chief administrative law judge in the Department of Administration. The bill would apply all of the statutes regarding hearings of the office of administrative hearings to the commission (including statutes addressing the qualifications of the persons who would conduct the commission's hearings) except for the statutes establishing hearing procedures. The commission's hearing procedures would be any specific procedures set out in AS 18.80 and the uniform procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630. 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 is 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 on commission economic awards to the rate of interest on judgments in AS 09.30.070, to conform the commission's rate to the rate awarded by other administrative agencies and the courts. It would continue to allow the commission to amend an accusation after a case is referred for hearing, but it would require that each new claim be supported by substantial evidence and that the commission provide a respondent with the opportunity to address new claims 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.

The bill would identify the specific relief available to remedy discrimination, to make the process more open and predictable and, thus, fairer. The bill would incorporate into statute the Alaska Supreme Court's conclusion that the commission lacks the authority to award punitive or

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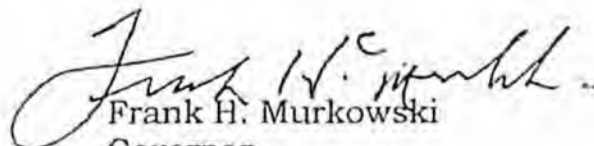
noneconomic damages. The bill would amend AS 18.30.130 to establish restoration of the benefit that was deprived -- hiring, promotion, or reinstatement to a position with back pay -- as the customary remedy for unlawful employment discrimination. The bill would define "pay" broadly to mean all compensation for service, including the cost of employee benefits. In the unusual case of an employee who is unable to return to work, the bill would allow an award of up to one year of future compensation. For any pay that the commission awards, the bill would require the commission to offset the amount an employee should have been able to earn after making a reasonable effort to find similar work.

Very importantly, under the bill the commission would retain the authority to order affirmative action to correct unlawful discrimination and to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination.

By increasing the commission's discretion in handling complaints, the bill 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 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,


Frank H. Murkowski
Governor

Enclosure

ANALYSIS OF SB 132 (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; improves commission procedures; enhances the fairness of commission proceedings; and clarifies the remedies that the commission may award in employment cases.

- 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)

- Establishes procedure to be followed if a complaint is found after investigation to lack sufficient supporting evidence. (Sec. 4)
- 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)

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

- Sets out examples of appropriate action to correct unlawful employment discrimination, including ordering the accommodation of a disability or changes to personnel records, while retaining the commission's general authority to order corrective action. (Sec. 6)
- Prohibits noneconomic or punitive damages. (Sec. 6)
- Defines "pay" (as used in the remedies of back pay and front pay) to include retirement, health, and other fringe benefits, in addition to wages, salary, and commissions. (Sec. 12)

- Limits remedies for employment discrimination (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)

Makes housekeeping changes

- Incorporates current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint. (Sec. 2)
- Incorporates the rate of interest that the commission may award that is now set in regulation (6 AAC 30.480) and which is the statutory interest rate provided in AS 09.30.070. (Sec. 8)
- Adds a definition of "complainant." (Sec. 11)

Rep. Gara's Amendments to SB 132 (Human Rights Bill)

AMENDMENT # 3 (Rep. Gara)

This amendment extends the statute of limitations from the current 180 day limitations period to 365 days.

- The Commission's comments and fiscal note estimate the amendment will result in approximately 125 new cases being filed with the Commission. Of these 125 new cases, approximately 80 will likely be dismissed by the Commission due to lack of evidence that any discrimination occurred. (According to its own annual reports, the Commission dismisses an average of about 65% of claims filed with it on the grounds that there is no substantial evidence any discrimination actually occurred) These 80 employers will have incurred significant costs in terms of time and money to defend themselves from baseless claims.
- Of the remaining 45 cases that are not dismissed, if we assume employers prevail by asserting defenses in ½ of these (through voluntary dismissal, settlement, mediation, or actual decisions by the Commission), then 22 more employers will have incurred costs in terms of time and money to defend themselves against invalid claims.
- Of the remaining 22-23 cases where it appears there is a valid issue of whether discrimination actually occurred, some plaintiffs will voluntarily stay or dismiss their cases with the commission in order to pursue the claims in court where the types of damages available are more favorable.
- The end result of the amendment is that the Commission will have to handle a small number of valid claims while a large number of employers will be put to needless expense in terms of time and money. Expenses that will often come straight out of their pocket since most commercial general liability policies do not cover employment related claims. (A separate policy of "EPL" or employment practices liability insurance is usually required for coverage)
- 32 out of 46 states with civil rights commissions use 180 days as a statute of limitations.

AMENDMENT #6 (Rep. Gara)

Would require the court to award full attorneys fees to plaintiff's and their attorneys who prevail in court on a discrimination claim.

- Could result in an increase in liability for employers of tens of thousands of dollars in each case where the plaintiff prevails.
- Plaintiff's attorneys will immediately use such a change in the law to threaten defendants / employers in demand letters with increased liability for attorneys' fees if they refuse to pay and the case were to go to a court trial.
- The possibility of receiving an award of full attorneys' fees will work to draw cases away from the Commission as plaintiff's attorneys steer their clients to the forum where the most favorable damages are available.
- There has been no showing that such a change is needed as an incentive for plaintiff's attorneys to take such cases.

COMMENTS OF THE COMMISSIONERS OF THE ALASKA STATE
COMMISSION FOR HUMAN RIGHTS
ON HCS SB 132(STA)
(as amended by the House Judiciary Committee)

August 22, 2005

The Commissioners submit the following comments on HCS SB 132(STA) as amended by the House Judiciary Committee. The Commissioners met in Fairbanks on June 28 and 29 to discuss the bill and the recent amendments. The Commissioners are concerned about the impact of some of the amendments on the Commission's ability to effectively investigate and resolve discrimination claims.

Expanding the Time to File Complaints

The Commissioners are particularly concerned about changes to the bill that would expand the time for filing complaints with the Commission from 180 days to 365 days from the date of harm. Presently, the Commission's regulations provide for 180 days for a person to file a complaint from the date an alleged discriminatory act or practice occurred. 6 AAC 30.230(b). The Commission reduced the filing time from 300 days in 1997 in the face of dwindling resources and a growing backlog of cases. At that time the Commissioners considered the impact to the public and determined that 180 days was sufficient time for Alaskans to bring claims to an administrative agency. The Commission found that reducing the filing time resulted in fewer cases filed and allowed some lessening of the backlog.

Commission staff estimates that expanding the filing time to 365 days will result in approximately 125 additional cases per year. Currently, the backlog of cases awaiting investigation is approximately ninety cases, and most cases are not assigned for investigation for up to eight months after they have been filed. An increase of another 125 filings each year will increase this backlog significantly, and an even greater amount of time will be required before active investigation will begin. The Commission experienced a similar backlog several years ago, frustrating both businesses and complainants seeking efficient resolution of discrimination claims. Although partly lessened by a reduction in filing time, the Commission was able to completely eliminate the backlog after receiving resources for additional staff. These resources have since been reduced and the Commission has lost approximately twenty-five percent of its staff.

The Commissioners believe that, should the filing time be expanded to 365 days, it is imperative that additional resources be given to the Commission to avoid the serious backlog and wait time that would result. At current staffing levels, cases could wait for more than one year before being investigated. The Commission's mandate to conduct prompt investigations would be frustrated by this outcome.

The Commissioners are also concerned that expanding the filing time to 365 days, especially without the influx of additional resources, will cause most cases to become stale before they are ever investigated. As mentioned above, cases now must wait up to eight months before being assigned for active investigation. In cases where complainants wait up to 365 days to file complaints *and* where the cases has been backlogged for up to a year, two year's time could clapse between the alleged discriminatory act and the beginning of the investigation. Even where shorter times have passed, problems with locating witnesses, accurate recollections, and retention of evidence already exist. Moreover, the parties will continue to be frustrated by the additional delays.

Finally, the Commissioners believe that, as a matter of policy, 180 days is sufficient time to allow for the filing of a complaint with the agency. The Commission is an alternative forum in which to file discrimination complaints. Alaskans retain the right to file a complaint in court for up to two years from the date of the alleged discrimination, and are not required to first exhaust their administrative remedies with the Commission. The Commissioners do not believe that 180 days is an inadequate amount of time for complainants to choose between these alternatives.

Proposal to Allow Recovery of Non-Economic Damages

The Commissioners are also concerned about the proposed amendment to the bill that would provide for the recovery of non-economic damages. The Commissioners oppose the passage of this amendment. As noted above, the Commissioners believe that the Commission is intended to be an alternative forum to filing a civil action in court. The Commissioners believe that the appropriate avenue to seek redress for non-economic damages is to pursue a civil action. The Commissioners believe that the Commission's remedial authority, as set forth in the bill, is sufficient to protect the public interest and to compensate victims of discrimination who choose the Commission as the place to file a complaint.

Additional Changes to SB 132

The Commissioners reviewed the pending legislation prior to its introduction and agreed to support the bill as a whole in its original form. The present committee substitute, as amended, contains changes in addition to those mentioned above; however, the Commissioners do not believe that these additional amendments sufficiently alter the substance of the legislation. The Commissioners have therefore taken no position on the remaining amendments to the bill.

Conclusion

The Commissioners continue to support the passage of SB 132. However, the Commissioners are concerned that expanding the time to file complaints to 365 days would adversely affect the Commission's ability to resolve discrimination complaints. The Commissioners are also opposed to the proposed amendment to allow for the recovery of non-economic damages. The Commissioners take no position on the other amendments to the bill.

32 out of 46 (2/3rds) of states with a state civil rights commission use 180 days as their statute of limitations

<u>State</u>	<u>Reg / Statute / Code</u>	<u>Time to File</u>
Alaska	6 AAC 30.310	180 days
Arizona	ARS 41-1471A	180 days
Colorado	CRSA 24.34-403	180 days
Connecticut	CT-CGSA 46a-82(e)	180 days
Delaware	DE-6-4508(b)	90 days
Hawaii	HRS 368-11(c)	180 days
Illinois	ILCS 775-7A-102(A)	180 days
Indiana	IC 2209-3(p)(5)	180 days
Iowa	ICA 216-15-12	180 days
Kansas	KSA 44-1005(i)	180 days
Kentucky	KRS 344-200(1)	180 days
Louisiana	LSA 51-38-2257(A)	180 days
Maine	5 M.R.S.A. 4611	180 days
Maryland	MD Code 1957, 49B-5	180 days
Michigan	Rule 4 (5)	180 days
Missouri	VAMS 213.075(1)	180 days
Montana	MCA 49-2-501	180 days
New Hampshire	HUM 201.04	180 days
New Jersey	NJSA 10:5-18	180 days
New Mexico	NMSA 28-1-11	180 days
North Dakota	14-02.4-19(1)	180 days
Ohio	R.C. 4112.05	180 days
Oklahoma	25 Okl.St. Ann 1502(A)	180 days
Pennsylvania	43 P.S. 959(h)	180 days
South Carolina	1-13-90(a)	180 days
South Dakota	SDCL 20-13-31	180 days
Tennessee	TCA 4-21-302(c)	180 days
Texas	VTCA 21-202(a)	180 days
Utah	UCA 34A-5-107(1)(c)	180 days
Virginia	2.2-2636	180 days
Washington	RCWA 49.60.230(2)	180 days
Wyoming	WS 27-9-106(a)	180 days



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April 18, 2006

Rep Kevin Meyer
House Finance Committee Co-Chair (fax 465-3476)
Alaska State Legislature
State Capital (MS3100)
Juneau, Alaska 99801-1182

As an independent businessman and a NFIB member, I strongly encourage your support to amend the SB132 Human Rights Commission bill to DELETE the provisions added by the House Judiciary Committee. I would like to have removed the provisions that requires the employer to pay full plaintiff attorney's fees if they prevail in a civil court claim, and changing the statute of limitations back to the original 180 days (vs 365 days).

The Senate Bill 306 (Federal UI Tax Credit) makes a number of changes in state law to conform with the 2004 federal law. These changes will stop deceptive practices in obtaining a lower UI rate. I support this bill because if it is not passed, Alaska's Unemployment Insurance Program will be de-certified and all employers in the state would lose their federal offset credit of 5.4 percent. This bill must pass this year in order for employers to continue to receive the 5.4 percent credit on their federal income tax!

Thank you for your immediate attention to these issues.

Respectfully,

A handwritten signature in black ink that reads "Tim Agosti".

Tim Agosti
President

Home address:
36894 Virginia Dr
Kenai, AK 99611