

## LEGISLATIVE BILL 161

Approved by the Governor May 5, 1977

Introduced by Judiciary Committee, Barnett, 26, Chmn.; Reutzel, 15; Chambers, 11; Carsten, 2; Cullan, 49; Venditte, 7; Stoney, 4

AN ACT to amend sections 48-1102, 48-1104, 48-1105, 48-1106, 48-1107, 48-1108, 48-1111, 48-1113, 48-1115, 48-1116, 48-1117, 48-1118, 48-1119, and 48-1120, Reissue Revised Statutes of Nebraska, 1943, relating to the Nebraska Fair Employment Practice Act; to define terms; to amend references to apply to both sexes; to change unlawful employment practices as prescribed; to provide a per diem; to provide that the Equal Opportunity Commission may become a party to court action; to confer additional rights and powers on the commission; to provide severability; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 48-1102, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1102. As used in sections 48-1101 to 48-1125, unless the context otherwise requires:

(1) Person includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers;

(2) Employer shall mean a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (a) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe, or (b) a bona fide private membership club, other than a labor organization, which is exempt from taxation under section 501 (c) of the Internal Revenue Code of 1954; Provided, that in accordance with the fundamental condition accepted by the people of the State of Nebraska as shown by the acts of admission of this state into the Union that there shall be no denial of any right to any person by reason of race or color, it shall be the policy of the State of Nebraska and of its political

subdivisions to insure equal employment opportunities for employees of the state and of its political subdivisions without discrimination because of race or color, and all officers of the state and of its political subdivisions shall use their existing powers to effectuate this policy;

(3) Labor organization shall mean any organization which exists wholly or in part for one or more of the following purposes: Collective bargaining; dealing with employers concerning grievances, terms, or conditions of employment; or of mutual aid or protection in relation to employment;

(4) Employment agency shall mean any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, except that such term shall include the United States Employment Service and the system of state and local employment services receiving federal assistance;

(5) Privileges of employment shall mean terms and conditions of any employer-employee relationship, opportunities for advancement of employees, and plant conveniences;

(6) Employee shall mean an individual employed by an employer;

(7) Commission shall mean the Equal Opportunity Commission; and

(8) Disability shall mean any physical or mental condition, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including epilepsy or seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide, wheelchair, or other remedial appliance or device and shall also mean the physical or mental condition of a person which constitutes a substantial handicap, as determined by a physician, but is unrelated to such person's ability to engage in a particular occupation; and

(9) Marital status shall mean the status of a person whether married or single.

Sec. 2. That section 48-1104, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1104. It shall be an unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin; or

(2) To limit, advertise, solicit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his such individual's status as an employee, because of such individual's race, color, religion, sex, disability, marital status, or national origin.

Sec. 3. That section 48-1105, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1105. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, disability, marital status, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, disability, marital status, or national origin.

Sec. 4. That section 48-1106, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1106. It shall be an unlawful employment practice for a labor organization:

(1) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, disability, marital status, or national origin;

(2) To limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his such

individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin; or

(3) To cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sec. 5. That section 48-1107, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1107. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, disability, marital status, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Sec. 6. That section 48-1108, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1108. Notwithstanding any other provision of sections 48-1101 to 48-1125, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, disability, marital status, or national origin in those certain instances where religion, sex, disability, marital status, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other

educational institution of learning is directed toward the propagation of a particular religion.

Sec. 7. That section 48-1111, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1111. Notwithstanding any other provision of sections 48-1101 to 48-1125, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, if such differences are not the result of an intention to discriminate because of race, color, religion, sex, disability, marital status, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test if such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, disability, marital status, or national origin. ~~It shall not be an unlawful employment practice under sections 48-1101 to 48-1125 for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended:~~

It shall not be an unlawful employment practice for an employer, employment agency, labor organization, or joint labor-management committee to deny privileges of employment when the nature and extent of a disability reasonably precludes the performance of the particular employment.

It shall not be an unlawful employment practice to refuse employment based on a policy of not employing both husband and wife if such policy is equally applied to both sexes.

Sec. 8. That section 48-1113, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1113. Nothing contained in sections 48-1101 to 48-1125 shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to sections 48-1101 to 48-1125 to grant preferential treatment to any individual

or to any group because of the race, color, religion, sex, disability, marital status, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, disability, marital status, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, disability, marital status, or national origin in any community, section, or other area, or in the available work force in any community, section, or other area.

Sec. 9. That section 48-1115, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1115. It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, disability, marital status, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex, disability, marital status, or national origin when religion, sex, disability, marital status, or national origin is a bona fide occupational qualification for employment.

Sec. 10. That section 48-1116, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1116. There is hereby established an Equal Opportunity Commission to consist of seven members to be appointed by the Governor. Terms of members shall be three years. As the terms of the members expire, the Governor shall appoint or reappoint the members of the commission for a term of three years to succeed the members whose terms expire. The commission shall elect one member to serve as chairman chairperson of the commission.

~~Five~~ Four members of the commission shall constitute a quorum for the purpose of conducting the business thereof. Any action of the commission shall require at least four votes. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

Members of the commission shall receive no forty dollars per day as compensation for their services but and shall be reimbursed for their expenses actually and necessarily incurred in the performance of their duties. Reimbursement shall be for not more than two regular meetings per month and not more than three training sessions for any one fiscal year. Any member of the commission may be removed by the Governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

The commission shall establish and maintain its principal office in the city of Lincoln and such other offices within the state as it may deem necessary. The commission may meet and function at any place within the state. ~~The commission may appoint such clerks, agents, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.~~ The commission shall appoint an executive director who shall be directly responsible to the commission. The executive director may appoint such assistants, clerks, agents, and other employees as such executive director may deem necessary, fix their compensation within the limitations provided by law, and prescribe duties of such employees. The executive director may appoint additional staff as the commission deems necessary.

The Attorney General shall represent and appear for the commission in all actions and proceedings involving any question under the provisions of sections 48-1101 to 48-1125 and sections 20-105 to 20-119, 20-122, and 20-123, and shall aid in any investigation or hearing had under the provisions of sections 48-1101 to 48-1125 and sections 20-105 to 20-119, 20-122, and 20-123. The commission shall have an official seal which shall be judicially noticed.

Sec. 11. That section 48-1117, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1117. The commission shall have the following powers and duties:

(1) To receive, investigate, and pass upon charges of unlawful employment practices anywhere in the state;

(2) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and, in connection therewith, to require the production for examination of any books and papers relevant to any allegation of unlawful employment practice pending before the commission. The commission may make rules as to the issuance of subpoenas, subject to the approval by a constitutional majority of the elected members of the Legislature;

(3) To cooperate with the federal government and with local agencies to effectuate the purposes of sections 48-1101 to 48-1125, including the sharing of information possessed by the commission on a case that has also been filed with the federal government or local agencies if both the employer and complainant have been notified of the filing;

(4) To attempt to eliminate unfair employment practices by means of conference, conciliation, and persuasion;

(5) To require that every employer, employment agency, and labor organization subject to sections 48-1101 to 48-1125, shall (a) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (b) preserve such records for such periods, and (c) make such reports therefrom, as the commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of sections 48-1101 to 48-1125 or the regulations or orders thereunder. The commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to sections 48-1101 to 48-1125 which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of sections 48-1101 to 48-1125, including but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and to furnish to the commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may either



apply to the commission for an exemption from the application of such regulation or order, or bring a civil action in the district court for the district where such records are kept. If the commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the commission or the court, as the case may be, may grant appropriate relief; and

(6) To report, not less than once a year, to the Legislature and the Governor, on the hearings it has conducted and the decisions it has rendered, the other work performed by it to carry out the purposes of sections 48-1101 to 48-1125, and to make recommendations for such further legislation concerning abuses and discrimination because of race, color, religion, sex, disability, marital status, or national origin, as may be desirable.

Sec. 12. That section 48-1118, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1118. (1) Whenever it is charged in writing under oath by or on behalf of a person or persons claiming to be aggrieved, and such charge sets forth the facts upon which it is based, that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the commission shall furnish such employer, employment agency, or labor organization with a copy of such charge within ten days, including a statement of the date, place, and circumstances of the alleged unlawful employment practice, and shall make an investigation of such charge, but such charge shall not be made public by the commission. If the commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one hundred dollars or imprisoned not more than thirty days, except as provided in subdivision (3) of section 48-1117.

(2) A written charge of violation of sections 48-1101 to 48-1125 shall be filed within one hundred eighty days after the occurrence of the alleged unlawful employment practice and notice of the charge, including a statement of the date, place, and circumstances of the alleged unlawful employment practice, shall be served upon the person against whom such charge is made within ten days thereafter.

(3) In connection with any investigation of a charge filed under this section, the commission or its authorized agents may, at any time after a complaint is filed, issue or cause to be served interrogatories and shall have at all reasonable times access to, for the purposes of examination, and the right to copy, any evidence or records of any person being investigated or proceeded against that relates to unlawful employment practices covered by sections 48-1101 to 48-1125 and is relevant to the charge under investigation. The commission may seek judicial enforcement through the office of the Attorney General to require the answering of interrogatories and in order to gain access to evidence or records.

Sec. 13. That section 48-1119, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1119. (1) In case of failure to eliminate any unlawful employment practice by informal methods of conference, conciliation, and persuasion, the commission may order a public hearing. If such hearing is ordered, the commission shall cause to be issued and served a written notice, together with a copy of the complaint, requiring the person, employer, labor organization or employment agency named in the complaint, hereinafter referred to as respondent, to answer such charges at a hearing before the commission at a time and place which shall be specified in such notice. Such hearing shall be within the county where the alleged unfair practice occurred. The complainant shall be a party to the proceeding, and in the discretion of the commission any other person whose testimony has a bearing on the matter may be allowed to intervene therein. Both the complainant and the respondent, in addition to the commission, may introduce witnesses at the hearing. The respondent may file a verified answer to the allegations of the complaint and may appear at such hearing in person and with or without counsel. Testimony or other evidence may be introduced by either party. All evidence shall be under oath and a record thereof shall be made and preserved. Such proceedings shall, so far as practicable, be conducted in accordance with the rules of

evidence applicable in the district courts of the State of Nebraska, and shall be of public record.

(2) No person shall be excused from testifying or from producing any book, document, paper, or account in any investigation, or inquiry by, or hearing before the commission when ordered to do so, upon the ground that the testimony or evidence, book, document, paper, or account required of him such person may tend to incriminate him such person in or subject him such person to penalty or forfeiture; but no person shall be prosecuted, punished or subjected to any forfeiture or penalty for or on account of any act, transaction, matter or thing concerning which he such person shall have been compelled under oath to testify or produce documentary evidence; Provided, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him such person in his or her testimony; and provided further, that the immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath. Nothing in this subsection shall be construed as precluding any person from claiming any right or privilege available to him such person under the fifth amendment to the Constitution of the United States.

(3) After the conclusion of the hearing, the commission shall make and file its findings of fact and conclusions thereon, and make and enter an appropriate order. Such findings shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceedings and whether proper weight was given to the evidence. If the commission shall determine that the respondent has intentionally engaged in or is intentionally engaging in any unlawful employment practice, it shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and order such other affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the commission shall require the admission or reinstatement of an individual as a member of a labor organization or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex,

disability, marital status, or national origin, or in violation of section 48-1114. If the commission shall find that respondent has not engaged in any unfair employment practice, it shall state its findings of fact and conclusion thereon. A copy of any order shall be served upon the person against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings or their attorneys. Such order shall take effect twenty days after the service thereof, unless otherwise provided, and shall continue in force, either for a period which may be designated therein or until changed or revoked by the commission.

(4) Until a transcript of the record of the proceedings shall be filed in a court as provided in section 48-1120, the commission may, at any time, upon reasonable notice, and in such a manner it shall deem proper, modify or set aside, in whole or in part, any finding or order made by it.

Sec. 14. That section 48-1120, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

48-1120. (1) Any party to a proceeding before the commission aggrieved by such decision and order and directly affected thereby may institute proceedings in the district court within any county wherein the alleged unlawful employment practice which is the subject of the order was committed, or wherein any respondent required in the order to cease and desist from an unlawful employment practice or to take other affirmative action, resides or transacts business; Provided, that the time for appeal from such order of the commission to the district court shall be limited to thirty days from the date of the entry of the order to which complaint is made; and provided further, that the order of the commission shall be stayed until the adjudication by the district court.

(2) Such proceeding shall be initiated by the filing of a petition in such court, together with a transcript of the record upon the hearing before the commission and the service of a copy of such petition upon the commission and upon all parties who appeared at the hearing. Thereupon the court shall have jurisdiction of the proceeding and of the question determined therein.

(3) The evidence presented before the commission as reported by its official stenographer and reduced to writing, shall be duly certified to by the stenographer and the chairman chairperson of the commission as the true bill of exceptions, which, together with the

pleadings and filings duly certified in the case under the seal of the commission, shall constitute the complete record and the evidence upon which the case shall be presented to the district court. The determination of the case by the district court shall extend to all questions of law and fact presented by the entire record before it. The commission's orders shall not be vacated, modified, or set aside unless:

(a) Such order is prohibited by the provisions of sections 48-1101 to 48-1125, or in violation of constitutional rights, or otherwise contrary to law; or

(b) The findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence.

(4) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to appellate review as provided by law.

(5) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination.

(6) In any action or proceeding under sections 48-1101 to 48-1125, wherein an appeal is lodged in the district court, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) If no proceeding to obtain judicial review is instituted by a respondent within thirty days from the service of an order pursuant to subsection (2) or (3) of section 48-1119, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction, and resides or transacts business within the county in which the petition for enforcement is brought.

Sec. 15. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 16. That original sections 48-1102, 48-1104, 48-1105, 48-1106, 48-1107, 48-1108, 48-1111, 48-1113, 48-1115, 48-1116, 48-1117, 48-1118, 48-1119, and 48-1120, Reissue Revised Statutes of Nebraska, 1943, are repealed.