

LEGISLATIVE BILL 124

Approved by the Governor June 10, 1993

Introduced by Landis, 46; Byars, 30; Robak, 22; Schimek, 27;
Abboud, 12

AN ACT relating to employment practices; to amend sections 48-1104, 48-1117, and 48-1119, Reissue Revised Statutes of Nebraska, 1943, and sections 48-1102 and 48-1118, Revised Statutes Supplement, 1992; to define a term; to make harassment based upon race, color, religion, sex, disability, marital status, or national origin an unlawful employment practice; to provide powers and duties for the Equal Opportunity Commission; to change and eliminate provisions relating to charges filed under the Nebraska Fair Employment Practice Act; to provide for mediation and arbitration; to change hearing procedures as prescribed; to provide for civil actions; to provide for general and special damages, injunctions, attorney's fees, and costs as prescribed; to change provisions relating to findings of fact and conclusions of law as prescribed; to harmonize provisions; and to repeal the original sections.

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

Section 1. That section 48-1102, Revised Statutes Supplement, 1992, be amended to read as follows:

48-1102. As used in the Nebraska Fair Employment Practice Act, unless the context otherwise requires:

(1) Person shall include 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, any agent of such a person, and any party whose business is financed in whole or in part under the Nebraska Investment Finance Authority Act and shall include the State of Nebraska, governmental agencies, and political subdivisions, regardless of the number of employees, but such term shall 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;

(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 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 shall include 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;

(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 does not reasonably preclude a person's ability to engage in a particular occupation. Disability shall not include an addiction to alcohol, controlled substances, or gambling which is currently being practiced by the employee. For purposes of this subdivision, does not reasonably preclude shall mean that an employer shall not be subject to more than a de minimis expense;

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

(10) Because of sex or on the basis of sex shall include, but not be limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; ~~and~~

(11) Harass because of sex shall include making unwelcome sexual advances, requesting sexual favors, and engaging in other verbal or physical conduct of a sexual nature if (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment; and

~~(11)~~ (12) Unlawful under federal law or the laws of this state shall mean acting contrary to or in defiance of the law or disobeying

or disregarding the law.

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, or to harass any individual, or otherwise to discriminate against any individual with respect to 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 employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect 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 48-1117, 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~~ the Nebraska Fair Employment Practice Act, 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, mediation, conciliation, arbitration, and persuasion;

(5) To require that every employer, employment agency, and labor organization subject to ~~sections 48-1101 to 48-1125~~ the act 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~~ the act 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~~ the act 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~~ the act, 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;

(6) To report, not less than once ~~each~~ every two years, to the Clerk of 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~~ the act, 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. Each member of the Legislature shall receive a copy of the report required by this subdivision by making a request for it to the chairperson of the commission; and

(7) To adopt and promulgate rules and regulations necessary to carry out the duties prescribed in the act; and sections 48-1101 to 48-1125

(8) To examine and review the policies and procedures of the commission, its investigators, and staff and deliver to the Legislature by January 1, 1994, a report detailing specific proposals designed to expedite the complaint, investigation, and hearing process of the commission. Such report shall include, but not be limited to, an examination of the:

(a) Intake procedures and guidelines of the commission;

(b) Mediation, conciliation, arbitration, and informal conferences designed to settle cases;

(c) Investigation and supervisory procedures which duplicate similar current procedures or which are burdensome to a prompt investigation of a complaint;

(d) Handling of reports and investigations of the commission to develop adequate clerical staff;

(e) Feasibility of revising and developing standard final investigative formats for employment, housing, and harassment cases; and

(f) Proper role and function of the commission in the hearing process.

The review and examination of such policies and procedures in subdivision (8) of this section shall include information from

the executive director, commission members, investigators, supervisory personnel, clerical staff, and the public.

~~Each member of the Legislature shall receive a copy of the report required by subdivision (6) of this section by making a request for it to the chairperson of the commission.~~

Sec. 4. That section 48-1118, Revised Statutes Supplement, 1992, be amended to read as follows:

48-1118. (1) Whenever it is charged in writing under oath or affirmation 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 staff 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. Prior to initiating any investigation, the commission staff shall screen a charge pursuant to an established, clearly defined prescreening procedure to determine subject matter jurisdiction to handle such charge. Any charge without sufficient subject matter jurisdiction shall not be investigated and notice of such prescreening determination shall be promptly conveyed by the executive director to the person claiming to be aggrieved. When a charge is determined to be within the subject matter jurisdiction of the commission, the commission staff ~~and~~ shall make an investigation of such charge, but such charge shall not be made public by the commission. If the executive director determines after such investigation that there is not reasonable cause to believe that the charge is true, the executive director shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of his or her action. ~~If the commission executive director~~ determines 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 and settle any claim by informal methods of conference, conciliation, ~~and~~ persuasion, mediation, or arbitration. The settlement efforts shall be scheduled and completed within thirty days of the probable cause finding. 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~~ makes public in any manner whatever any information in violation of this subsection; shall be guilty of a Class III misdemeanor except as provided in subdivision (3) of section 48-1117.

(2) A written charge of violation of the Nebraska Fair Employment Practice Act shall be filed within ~~one~~ three 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) A respondent shall be required to file with the commission a written response to the written charge of violation within thirty days after service upon the respondent. Failure to file a written response within thirty days, except for good cause shown, shall result in a mandatory reasonable cause finding against the respondent by the executive director. Failure by any complainant to cooperate with the commission, its investigators, or staff, except for good cause shown, shall result in dismissal of the complaint by the executive director.

(4) (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 charge 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 relate to unlawful employment practices covered by the act and are relevant to the charge under investigation. The commission may seek preparation of and judicial enforcement of any legal process or interrogatories through the office of the Attorney General, to require the answering of interrogatories and in order to gain access to evidence or records:

Sec. 5. 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, mediation, or arbitration, 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 unlawful employment 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 such person may tend to incriminate such person in

or subject 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 such person shall have been compelled under oath to testify or produce documentary evidence, except ~~;~~ ~~PROVIDED~~; that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by such person in his or her testimony. Such ~~;~~ ~~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 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. After the conclusion of the hearing, the commission shall, within ten days of the receipt of the transcript or the receipt of the recommendations from the hearing officer, make and file its findings of fact and conclusions of law and make and enter an appropriate order. The hearing officer need not refer to the page and line numbers of the transcript when making his or her recommendation to the commission. Such findings of fact and conclusions of law shall be in sufficient detail to enable a 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~~ determines 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, but shall not be limited to, reinstatement or hiring of employees, with or without backpay. Backpay liability shall not accrue from a date more than two years prior to the filing of the charge with the commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable.

(4) A complainant who has suffered physical, emotional, or financial harm as a result of a violation of section 48-1104 may, at any stage of the proceedings prior to dismissal, file an action directly in the district court of the county where such alleged violation occurred. Written notice of such filing shall be given to the commission and shall immediately terminate all proceedings before the commission. The district court shall docket and try such case as any other civil action, and any successful complainant shall be entitled to appropriate relief, including temporary or permanent injunctive relief, general and special damages,

reasonable attorney's fees, and costs.

(5) 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 or her of any backpay, 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 finds that a respondent has not engaged in any unfair employment practice, it shall within thirty days state its findings of fact and conclusions of law. A copy of any order shall be served upon the person against whom it runs or his or her 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 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. 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.

(6) Except as provided in subsection (4) of this section, until (4) Until a transcript of the record of the proceedings shall be is filed in a the district 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. 6. That original sections 48-1104, 48-1117, and 48-1119, Reissue Revised Statutes of Nebraska, 1943, and sections 48-1102 and 48-1118, Revised Statutes Supplement, 1992, are repealed.