

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1105

Page 2, line 3, remove the overstrike over "~~The act of a woman~~"

Page 2, line 3, remove the overstrike over "~~breastfeeding her child is not a violation of this section.~~"

Page 2, line 4, remove the overstrike over "5."

Page 2, line 9, remove "**- Penalty**"

Page 2, line 12, remove "Any person that prohibits or attempts to prohibit an individual from"

Page 2, remove line 13

Renumber accordingly

HOUSE BILL NO. 1105

Introduced by

Representatives Dobervich, P. Anderson, Buffalo, Hanson, Pyle

Senators Bakke, Heckaman, Hogan, Mathern, Oban

1 A BILL for an Act to amend and reenact sections 12.1-20-12.1 and 23-12-16 of the North
2 Dakota Century Code, relating to breastfeeding; and to provide a penalty.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 12.1-20-12.1 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **12.1-20-12.1. Indecent exposure.**

- 7 1. ~~A person~~An individual, with intent to arouse, appeal to, or gratify that
8 ~~person's~~individual's lust, passions, or sexual desires, is guilty of a class A
9 misdemeanor if that ~~person~~individual:
- 10 a. Masturbates in a public place or in the presence of a minor;
11 b. Exposes ~~one's~~the individual's penis, vulva, or anus in a public place or to a minor
12 in a public or private place;
13 c. Exposes ~~one's~~the individual's penis, vulva, or anus by unsolicited electronic
14 means; or
15 d. Exposes ~~one's~~the individual's penis, vulva, or anus by any electronic means to a
16 minor.
- 17 2. ~~A person~~An individual is guilty of a class C felony if the ~~person~~individual violates
18 subsection 1 after a previous conviction for violating subsection 1, after a previous
19 conviction for violating section 12.1-20-12.2, or after being required to register under
20 section 12.1-32-15.
- 21 3. ~~A person~~An individual who commits a violation of subdivision a or b of subsection 1
22 within fifty feet [15.24 meters] of or on the real property comprising a public or
23 nonpublic elementary, middle, or high school is guilty of a class C felony. ~~A person~~An
24 individual who commits a violation of subsection 2 within fifty feet [15.24 meters] of or

1 on the real property comprising a public or nonpublic elementary, middle, or high
2 school is guilty of a class B felony.

3 4. The act of a woman ~~discreetly~~ breastfeeding her child is not a violation of this section.

4 5. As used in this section, "electronic means" includes images and pictures transmitted
5 via electronic mail, electronic messaging, or from an electronic communications
6 device.

7 **SECTION 2. AMENDMENT.** Section 23-12-16 of the North Dakota Century Code is
8 amended and reenacted as follows:

9 **23-12-16. Right to breastfeed—~~Penalty.~~**

10 ~~If the woman acts in a discreet and modest manner, a woman~~An individual may breastfeed
11 her child in any location, public or private, ~~where the woman~~the individual and child are
12 otherwise authorized to be. ~~Any person that prohibits or attempts to prohibit an individual from~~
13 ~~breastfeeding her child, as authorized under this section, is guilty of an infraction.~~

MEMORANDUM

TO: Chairman Lawrence Klemin (Judiciary Committee)
FROM: Katie Winbauer, Legislative Council Intern
RE: HB 1105
DATE: January 18, 2021

Chairman Klemin, you asked me to research the “Void for Vagueness” doctrine, North Dakota authority interpreting the words “discreet” and “modest,” and consequences of multiple infractions against individuals and entities encompassed by the word “person.” You also asked me research penalties under chapter 23-12, which pertains to Section 2 of HB 1105.

1. Void for Vagueness

In accordance with the Due Process clause of the Fourteenth Amendment, laws that fail to establish standards for police and public citizens to follow may be considered “vague” and unconstitutional.¹

All laws must meet two requirements to survive a void-for-vagueness challenge: (1) the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; and (2) the law must provide a reasonable person with adequate and fair warning of the proscribed conduct.²

When analyzing whether the law gives adequate and fair warning, courts view the law “from the standpoint of the reasonable person who might be subject to its terms.” The important tenant of the Void for Vagueness doctrine is that the “legislature establish minimal guidelines to govern law enforcement.”³ In the criminal law context, the standard of certainty required is more stringent.⁴ “This is simply because it would be unthinkable to convict [an individual] for violating a law he [or she] could not understand.”⁵ Notably, vagueness challenges can be cured by definition contained in other statutes or clear definitions in the dictionary.⁶

2. Discreet and Modest

I could not find any North Dakota authority interpreting the words “discreet” or “modest.” Nor could I find any statutory law in other states defining the words “discreet” or “modest.” The word “discreet” has been used in some North Dakota Supreme Court opinions, most of them from the early 1900s.⁷ “Modest” is used more frequently in North Dakota Supreme Court opinions, but it is most often used in reference to money or assets.⁸

¹ See *City of Belfield v. Kilkenny*, 2007 ND 44, ¶¶ 7-9, 729 N.W.2d 120, 123-24.

² *Id.* at ¶ 10 (citing *Kolander v. Lawson*, 461 U.S. 652, 357 (1983)).

³ *Id.* at ¶ 11 (citing *Kolander*, 461 U.S. at 358).

⁴ *Id.*

⁵ *Id.* (quoting *Barenblatt v. U.S.*, 360 U.S. 109, 137 (1959)).

⁶ See *id.* at ¶ 19.

⁷ See *State v. Weber*, 191 N.W. 610, 612 (N.D. 1922) (“He must exercise a wholesome and **discreet** supervision over the jury in this respect.”); see also *De Roche v. De Roche*, 94 N.W. 767, 769 (N.D. 1903) (quoting a New York case which said “If the wife had been perfectly **discreet**, provident, and submissive to her husband, I should have allowed her half this property.”)

⁸ See *Donlin v. Donlin*, 2007 ND 5, ¶ 16, 725 N.W.2d 905, 909 (“[B]oth Daniel Donlin and June Donlin have a **modest** standard of living, which would remain **modest** for a period of time after divorce[.]”); see also *Knudson v. Knudson*, 2018

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Black's Law Dictionary,⁹ which is commonly referred to by courts, defines "discreet" as "wise in avoiding potential errors or in choosing the best, most creditable means for accomplishing an end, esp. when confidentiality is required; prudent; judicious; discerning." Black's does not define "modest," but the definition according to Merriam-Webster is "(3) observing the proprieties of dress and behavior: decent."¹⁰

3. Multiple Infractions Against a "Person"

House Bill 1105 (page 2, lines 12-13) provides that a "person" who prohibits someone from breastfeeding a child is guilty of an infraction. The word "person" includes "an individual, organization, government, political subdivision, or government agency or instrumentality."¹¹ An "individual" is a human being.¹²

A person convicted of an infraction is subject to a maximum fine of \$1,000.¹³ If a person who is convicted of an infraction has been previously convicted two times or more for the same offense within one year, then the infraction can be punishable as a class B misdemeanor.¹⁴ A class B misdemeanor carries a maximum punishment of thirty days' imprisonment and/or a fine of \$1,500.¹⁵ Penalties for organizations, which includes business entities, are different.¹⁶ Organizations are subject to a maximum fine of \$20,000 for a class B misdemeanor.¹⁷ Thus, if a business is convicted of three of the same infractions in one year, it could be punishable as a class B misdemeanor, which would subject the business to a \$20,000 fine.

4. Penalty in Chapter 23-12-16

Section 2 of HB 1105 pertains to § 23-12-16 of the century code, which is a public health chapter. Currently, "If the woman acts in a discreet and modest manner, a woman may breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be."¹⁸ Although there is no penalty included in section 16, N.D.C.C. § 23-12-07 provides "Any person who willfully violates any provision of this title, if another penalty is not specifically provided for such violation, is guilty of an infraction." Therefore, there currently is a criminal penalty, an infraction, attached to the breastfeeding law.

ND 199, ¶ 14, 916 N.W.2d 793, 797 ("[T]hey resided in a **modest** farmhouse on the Knudson family farmstead, and they maintained a **modest** lifestyle during the marriage.")

⁹ Black's Law Dictionary (11th ed. 2019).

¹⁰ Modest | Definition of Modest by Merriam-Webster (merriam-webster.com)

¹¹ N.D.C.C. § 1-01-49(8).

¹² N.D.C.C. § 1-01-49(3).

¹³ N.D.C.C. § 12.1-32-01(7).

¹⁴ *Id.*

¹⁵ N.D.C.C. § 12.1-32-01(6).

¹⁶ *See* N.D.C.C. § 12.1-32-01.1.

¹⁷ N.D.C.C. § 12.1-32-01.1(5).

¹⁸ N.D.C.C. § 23-12-16.

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5. Conclusion

In closing, it is possible the words “discreet” and “modest” as used in the current breastfeeding law could be viewed as vague and unconstitutional since there are no definitions contained in statute and a reasonable person may not feel she has adequate warning. Regarding the infraction, if a person or business is convicted for prohibiting breastfeeding multiple times, they may be subject to punishment as if the crime were classified as a class B misdemeanor. Finally, Chapter 23-12 of the century code provides an infraction for violation of the current breastfeeding law, codified at § 23-12-16.