

January 20, 2021
House Judiciary Committee
HB 1138
Rep. Lawrence R. Klemin, Chair

For the record, I am Stephanie Dassinger. I am appearing on behalf of the North Dakota League of Cities. I am the deputy director and attorney for the League.

The North Dakota League of Cities recognizes the crucial rights to free speech protected in both the North Dakota Constitution and the Federal Constitution; however, the League appears in opposition to HB 1138 because individuals already have remedies to address violations of their rights to free speech and strong public policy reasons exist against creating a cause of action that awards treble and punitive damages against a city or a city's employees for conduct done within the scope of employment.

Punitive Damages Based on a Negligence Standard

HB 1138 allows for a court to award punitive damages when an individual prevails in a lawsuit to litigate a violation of the rights to free speech in the North Dakota Constitution. The culpability threshold for awarding punitive damages is mere negligence.

Under North Dakota law, punitive damages are only allowed in limited circumstances and when the defendant is shown to have engaged in conduct of "oppression, fraud, or actual malice." N.D.C.C. § 32-03.2-11. Further, the purpose of punitive damages is to punish the defendant. N.D.C.C. § 32-03.2-11. This bill sets the threshold for awarding punitive damages at negligence. Generally, I think of negligent conduct as conduct based on a mistake or simply a lack of ordinary care under the circumstances.

Currently, the law does not allow for punitive damages against political subdivisions. N.D.C.C. § 32-12.1-03(2). There are strong public policy reasons for not allowing awards of punitive damages against political subdivisions. We must remember that political subdivisions are spending public money. A significant part of most city budgets comes from property tax. Awarding punitive damages against a city could mean that a city would have to raise property taxes to pay a judgment for punitive damages that was based on someone negligently violating Article 1, Section 4 of the North Dakota Constitution.

Treble Damages

The bill provides that "the state or political subdivision is liable for treble damages for compensatory, consequential, and incidental damages." In other words, the court is required to award three times what a plaintiff's provable damages are. There are other instances in the law where a court may award treble damages; however, I have not performed exhaustive research to find all the instances where this may appear. A couple examples I have found that allow for treble damages are when a landlord withholds a security deposit without reasonable

justification (N.D.C.C. § 47-16-07.1) and for improper acts by an attorney that would constitute a Class A misdemeanor such as deceit or collusion (N.D.C.C. § 27-13-08).

The conduct in both of those instances is intentional misconduct. As explained above, providing for an award of treble damages against a political subdivision for conduct that is merely negligent is problematic. It is especially problematic when a political subdivision, like a city, would be forced to raise property taxes to satisfy the judgment.

Submitting City Employees to Personal Liability

As I read HB 1138, it also appears to allow a cause of action against an individual city employee for their actions while acting in their scope of employment. Additionally, that employee is liable if his or her conduct is merely negligent.

North Dakota law generally provides that city employees are not liable for acts or omissions when acting within their scope of employment. (N.D.C.C. § 32-12.1-04(2)). There is an exception to this immunity when an employee's conduct is reckless or grossly negligent or when the conduct is willful or wanton misconduct. (N.D.C.C. § 32-12.1-04(3)). North Dakota case law provides insight on the meaning of these terms stating, willful or wanton misconduct requires proof of conduct that is "reckless, heedless, malicious; characterized by extreme recklessness or fool hardiness; recklessly disregardful of the rights or safety of others or of consequences." Smith ex rel. Smith v. Kulig, 2005 ND 93, ¶12. Similarly, "gross negligence, is all intents and purposes, no care at all." Jones v. Ahlberg, 489 N.W.2d 576, 581 (N.D. 1992). This bill would allow a lawsuit to be pursued against an employee, individually, while acting within his/her scope of employment and where with the employee's conduct was merely negligent.

In summary, this bill appears to allow a city employee, who is at work and makes a mistake, be sued and, if found liable, be required to pay out of pocket treble actual damages and potentially punitive damages. This substantially changes the risk level associated with city employees who wish to serve their community through working for a city.

Remedies Already Exist

HB 1138 appears to create a state cause of action for a violation of an individual's rights under Section 4, Article 1 of the North Dakota Constitution. That Section provides, "[e]very man may freely write, speak and publish his opinions on all subjects." This provision is viewed as the equivalent to the free speech rights protected in the First Amendment to the US Constitution, also known as the right to free speech. An individual who believes his or her free speech rights under the 1st Amendment of the Federal Constitution have been violated, has the right to bring a claim to defend his or her rights under 42 U.S.C. § 1983 which allows a claim to be filed in either federal or state court for violation of the First Amendment of the US Constitution. Thus, a remedy already exists for these situations.

Conclusion

In conclusion, because a remedy already exists and several problems exist with awarding treble damages, for allowing punitive damages, and for allowing personal lawsuits against employees, the North Dakota League of Cities respectfully requests a DO NOT PASS recommendation on HB 1138.

Thank you for your consideration.