

2009 HOUSE JUDICIARY

HB 1106

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1106


House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/13/09

Recorder Job Number: 6873

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1106.

**Lisa Fair McEvers, Commissioner of Labor:** (attachment)

**Rep. Griffin:** What is the background of why you brought forward this bill.

**Lisa Fair McEvers:** The case was an instance of where a woman filed a complaint to the Department who was living in an apartment, alleging that the landlord had not provided reasonable accommodation. She said she was in need of an assisted animal and she was asking for a reasonable accommodation that the landlord allow the animal, but he had a no pet policy. That was the underlying issue in the case. It did go to trial and we had a doctor there that testified as to her need for the animal, but in some of the cross-examination of the doctor, he said he wasn't aware of something and said that if he had known that information, he might not have stated that she needed a dog. It was of those things that have been pulled at trial, that under further scrutiny that the doctor testified differently than what had been represented to the Department. So the finding was that she didn't really need a dog so there was no accommodation requirement, and that was the basis for the Dept. losing the case. Certainly there was no question that she was a person with a disability, but just that the dog wasn't a reasonable accommodation that was necessary; they said she didn't need the dog. Our

investigation had indicated our belief that she did need the dog and we still felt that way after we had interviewed the doctor.

**Rep. Klemin:** The way the amendment is written, this would insulate the Dept. from being liable for the other party's attorney fees; but would not have the same effect for the other party. They could still be liable for the attorney fees of the Dept. regardless of the discretion of the court. Am I reading this correctly.

**Lisa Fair McEvers:** That is correct. I think I am looking to protect the Dept. I am not looking at it to protect the other side and actually I would like for the Dept. to be able to ask for the award of attorney fees, because we would like these cases to settle as well. I think that we become like the prosecutor in these matters; and we are required by law to bring this case.

Now, when we don't win, it's like asking the prosecutor, who just lost at trial to have to pay the attorney's fees who are acting on behalf of the state. We will settle for what we feel is a reasonable settlement. We're not out to get money for the Dept. In the 10 years that we have been taking these cases to trial, and there have only been a handful, probably less than 10, there has only been an award of attorney fees against the respondent in one case, and that was a relatively egregious case. That was another case where a person with a disability, needed an assisted animal and the dispute was for \$500 in expenses and the respondent wouldn't settle. So we went to trial for \$500 and we did ask for the award of attorney fees and the truth is, the matter should have settled.

**Rep. Klemin:** If we look at this from both sides, you say that you need this because of the threat of attorney fees, and of course, you said that it doesn't happen very often; but because of that you are being forced to litigate these matters. If we put this in, the other side could say the same thing. They are being forced to settle these cases because of the threat of attorney fees being awarded to the Dept. Shouldn't it work both ways.

**Lisa Fair McEvers:** It doesn't work both ways under the Administrative Practices Act. That's the whole thing. If the choice were to go before an ALJ, and asking for the same level required that there would be under the Administrative Practices Act, so I don't think it's enforceable there. I think that when the Dept. doesn't have any choice but to bring an action, I think that's what makes it different. If you are talking about a criminal case, the defense attorney isn't able to recoup their attorney fees. That's part of the cost of doing business.

**Rep. Klemin:** Attorney fees are one thing, but this amendment encompasses court costs also. Now the expert witness that you had at trial, who sank your case, he charged a fee I'm sure. So even if you went to court and lost the case, would you be entitled to recover fees for that expert witness as court costs.

**Lisa Fair McEvers:** He was our witness and had we won, I expect we would have asked for expert witness fees on that as well. Yes, I guess that is part of the risk in having to litigate and go to trial that there could be costs to bear by either side. All I'm asking is that the State has a different burden that it has to meet. We are not bringing frivolous actions to the court. We are bringing actions that we are required to bring by statute and there should be some statute for the State agency that is required to bring that action. If you want to change it so that it goes both ways, so that the State is limited in recovering attorney fees and costs; like I've said, most times we don't ask for it, and when we have asked for it, I can tell you that the amount of money that was awarded has not been collected. I checked with the AG's office not too long ago, when the State does get such awards, it is often times in a judgment, but we are trying to send the message that we do want to resolve these matters for a reasonable amount. I do think that there should be a different burden for the State, because of the requirement to bring an action.

**Rep. Klemin:** When you get a judgment for court costs or attorney fees, that operates as a lien on your real property, and since you are dealing with housing discrimination, wouldn't that lien the tax to the property that the respondent owns.

**Lisa Fair McEvers:** That's correct, but the property in question was of little to no value, so it was uncollectible.

**Rep. Klemin:** As I recall, there is a multi-step process or analysis that a court has to go through to determine the reasonableness of the attorney fees. That, of course, is subject to appeal, did any of that happen on this case.

**Lisa Fair McEvers:** That did not happen. The level that the burden of proof that the Dept. of Labor would have to get by in order to win this case, would have been abuse of discretion. We did discuss that with the AG's office and it really is a difficult decision when you have other cases pending before that same judge, to decide whether there would have been appeal issues. We were told that you don't use abuse of discretion unless the judge does completely bizarre. Currently, the judge had the discretion to do this. I think he was very close to abusing his discretion, to be honest with you; but to win that in Supreme Court, abuse of discretion standards to win, the AG's office told us it was nearly impossible. So do we raise the ire of that judge, before whom we had other cases pending, to appeal his decision where we would have told him that he was wrong. So we did not appeal it, but we certainly considered it and I thought it was in the best interest of the Dept. to ask you to change the law.

**Rep. Klemin:** So it would be easier to convince the Legislature to change the law, than to tick off the judge that you work with.

**Lisa Fair McEvers:** I've often been told that you have to pick your battles. Picking a losing battle with regard to a judge who is hearing your next case, is not a good fight to pick. So I chose to come before a group of more reasonable people.

**Rep. Koppelman:** The Administrative Practices Act slants to government. Is there not some way to put this on level ground. You mentioned that the fees are not awarded very often, and my understanding of court cases in ND, maybe it's not true with administrative agencies, that attorney fees in civil cases aren't awarded now. Is that accurate.

**Lisa Fair McEvers:** I wouldn't be against amending it, but I am here representing the Dept. I am trying to protect the State and Dept. I think that you are also correct that attorney fees are not always awarded, but a single case like this, takes 1% of my entire budget, certainly has an effect on how we look at cases, and I can't allow my staff to be afraid to make the right decision for the claimants that before us, because we can't afford it, or because we're afraid that we have to pay the bill. Do I object to having it more level for both sides, no I don't object to that because we wouldn't ask for attorney fees unless we thought it should have settled before it went to court. That wasn't my purpose in bringing this.

**Chairman DeKrey:** Thank you. Further testimony in HB 1106.

**Amy Nelson, Executive Director of the Fair Housing of the Dakotas:** (attachment)

**Chairman DeKrey:** Thank you. Further testimony in support.

**Lisa Fair McEvers:** I would ask that if any amendments are considered that you do take a look at the Equal Access to Justice Act to make sure that any amendments would meet the substantial equivalency of the Dept. of Labor. It is possible that by making any such amendments that you could be taking us out of the substantial equivalency and providing more protections for landlords than would be provided under the Fair Housing Law under the Equal Access to Justice Act.

**Rep. Koppelman:** If we did use that amendment, instead of using that language, if we changed the department to say prevailing party may be liable for attorney fees, court costs, etc. Would that equalize it.

**Lisa Fair McEvers:** I believe that would equalize it, but by equalizing it, it's not meeting the substantial equivalency to the HUD federal fair housing laws. By providing that protection to landlords somehow we might lose the substantial equivalency. I haven't studied the landlord side of it, but I do think that provides more protection than is provided under the Equal Access to Justice Act.

**Rep. Koppelman:** You could check with Legislative Council on this.

**Lisa Fair McEvers:** I would be happy to do more research.

**Rep. Delmore:** My problem with this bill is that it is opening it up to a lot of other agencies when people think that they have gotten a wrong ruling by the judge. Has any other agency in ND or anywhere else has asked for this type of dispensation where the attorney fees and court costs could be covered.

**Lisa Fair McEvers:** To my knowledge, the Dept. of Labor is one of the few places where people don't have to go to the Administrative Practices Act under that procedure in order to get the State involved, other than a prosecutor in a criminal action. It's only because we are trying to be of assistance, that our Dept. is involved. Under the Human Rights Act, which is the other discrimination statute that we work under, a person can either ask for an administrative hearing through the Dept. or if they want to go to district court, they have to go privately and go on their own in court, in which case the Dept. would not be involved. Because of the substantial equivalent of the federal Fair Housing Law, in that law the federal government tacks on the costs. When the Dept. is required to act on behalf of the State because of a violation of the law, that's where this comes into play.

**Rep. Delmore:** You said you've had 10 cases and this is the only one in which you were responsible for paying.

**Lisa Fair McEvers:** I don't know the exact number of cases that we have tried, we have had a number of them been filed in court, but probably fewer than 15 cases have been tried in the 10 years that we've had these cases; probably fewer than 10. We currently have a number of cases pending in litigation and at the Supreme Court level as well. It is a relatively small number of cases, this is the first time we've had an award against the Dept. of Labor in that time period.

**Rep. Koppelman:** On page 2 of your testimony, the fourth paragraph from the top, you reference the fact that current case law has interpreted this standard you are proposing we add to the statute, it says that it's so frivolous that no one would ever bring it for an action on this issue. If that's true, would adding this language, whether it's profitable for both parties, basically make that award an issue; because it would have to be a pretty extreme situation where they would say that no reasonable human being would look at these facts and say this shouldn't be an issue.

**Lisa Fair McEvers:** I think it would eliminate the possibility of awards against the State. I don't know that this standard, of substantial justification has ever been used by the other side. In federal law, the burden is on HUD to be able to show substantial justification.

**Rep. Klemin:** The term "substantial justification" is not defined in this bill, but is there a definition for it.

**Lisa Fair McEvers:** The definition is through case law, and that's why I brought forward for discussion in my testimony. If you look at the statute under 28-32-50 in the annotation, that's what this discussion is about, where it calls for it. Substantial justification is a reasonable standard, it's a reasonable person's standard and if you are reasonable there wouldn't be attorney fees awarded against you. That's the general definition from case law. I don't know if there is a statutory definition.



**Rep. Klemin:** The party that you sued here had to pay out \$16,500 in attorney fees and expenses, including court costs to successfully defend himself against the power of the State in this case. That is a substantial sum to pay in this kind of an action, too. I'm kind of surprised that the Dept. didn't know this about the facts relating to its own expert witness before it went to trial.

**Lisa Fair McEvers:** In all honesty, we should always know what our witnesses are going to say. If you have tried cases, there are often some unusual things that pop up, that you don't expect. This is the same doctor who met with us on several occasions and he supported our finding all the way along. A skillful attorney can sometimes massage the facts that will change the person's position. This is the person's individual doctor that we're talking about. It's not someone that we hired that was skillful at testifying in court. It was a personal doctor.

**Rep. Klemin:** But you could have retained a hired gun, couldn't you.

**Lisa Fair McEvers:** We're not out to get landlords; we are the initial investigative agency and the reason that we are bringing these actions is to make sure that the law is being complied with. Our goal is similar to being a prosecutor on a criminal case. If there is a violation of the law, or reasonable cause that there is a violation, then we file a probable cause. If you want the State to have the law enforced, somebody needs to be in charge of that, and we've been designated as the Agency who is supposed to enforce the housing laws. So we're not trying to be punitive to landlords, but if we believe there is a violation of the law, we stand ready to enforce that law.

**Rep. Hatlestad:** You said that 15 cases went to court, they didn't require an administrative hearing before the option of court; the other cases were resolved before they went to court.

**Lisa Fair McEvers:** I don't know the answer to that question, but I can tell you that by requiring that, we would not be in substantial equivalent of the federal Fair Housing law and we

could lose our status as a federal housing assistance program, so we could lose our federal funding if we make that change. I don't think that's for us.

**Rep. Koppelman:** The substantial justification standard, is that stronger than frivolous, is there a standard that is stronger than substantial justification.

**Lisa Fair McEvers:** I'm not aware of any other intermediate levels of proof that have been used in the past. This is what I found when I looked in our other areas. I tried to choose something that had language in ND law so that you could have some guidance; if you're asking what is substantial justification, that has been defined by the Supreme Court, interpreted by the Supreme Court and it's also been in our language under the Equal Justice Act. I'm trying to make sure that we don't lose our substantial equivalency and yet are using language that is common in ND.

**Rep. Koppelman:** What do you mean when you say you are required to bring this case forward.

**Lisa Fair McEvers:** What triggers us to bring an action to court is the cause of finding. In the century code section, 14-02.5-36 that requires the Dept. to authorize the AG's office to file in court on their behalf.

**Chairman DeKrey:** Thank you. Any testimony in opposition.

**Krista Andrews written testimony was read by Ann Springer:** (attachment)

**Chairman DeKrey:** Thank you. Further testimony in opposition.

**Rocky Gordon, ND Apartment Association:** Historically, the ND Apt. Assoc. was very much in favor of the Dept. of Labor handling discrimination cases. In the past, a person filled out a complaint postcard, the investigator came out and you would receive a determination, usually that they weren't going to pursue the complaint. We're in favor of the Dept. of Labor continuing their investigations into these cases in ND. In the previous testimony, a lot of concerns were

raised by committee members about the fairness of the bill. I agree with that. Then if we try to amend it we might harm our substantial equivalency status with HUD. We have that now. We have the substantial equivalency, so let's leave it alone. This is sort of a knee-jerk reaction to one case that happened in many years. It's one case.

**Rep. Koppelman:** Has Dept. of Labor been fair in the past in dealings with landlords, etc.

**Rocky Gordon:** Generally Dept. of Labor has been doing a good job.

**Chairman DeKrey:** Thank you. Further testimony in opposition. We will close the hearing.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1106

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/13/09

Recorder Job Number: 6930

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will take a look at HB 1106. What are the committee's wishes.

**Rep. Klemin:** I move a Do Not Pass.

**Rep. Kretschmar:** Second.

**Rep. Klemin:** The way this bill now reads it's discretionary with the court. The court may award reasonable attorney fees to the prevailing party and assess court costs. That means that the court may choose not to do that and do it for either party. As I recall, there is a multiple step process that the court is supposed to go through to determine the reasonableness of attorney fees. The prevailing party is going to have to put in an application for the attorney fees and explain why it costs this or that. Court costs are fairly routine, such as filing fees. They have to pay a filing fee to start a lawsuit, you have to pay a filing fee to answer a lawsuit. You may have to pay some fees to compel witnesses to testify like a subpoena. Some of the major expenses come in the form of expert witness fees and those, too, the court has discretion to decide whether to award or whether they should be in the amount requested. In other words, the court has the discretion to decide whether it is reasonable what that expert charged or not. I have had cases where the court has awarded no fees or has reduced the amount you have requested based on those kinds of factor. What

this does, it takes away part of that court's discretion and instead substitutes a new standard only for one side of the equation, only for one party, that being the government. I don't think that's fair. I think if the government is going to bring this action, it has a duty to do its homework. In the example before us, it seems to me that the government should have done a better job in getting the facts straight before they went into court, and then maybe they wouldn't have had to incur all those expenses. By the same token, that landlord spent a lot of money on attorney fees and court costs in order to defend itself against the power of the state. Just to make it one-sided, I just don't think it is appropriate. I believe we should kill this bill.

**Rep. Dahl:** It happens that witnesses can change their testimony. If there is reasonable expectation to bring an action forward and when you do that they have to bring it to district court. I just don't think that the substantial justification standard is impossible or really that high of a standard.

**Rep. Koppelman:** What extent are they obligated to take these cases to court.

**Rep. Klemin:** They aren't obligated to go to court if they can settle it. They use this as leverage to settle the case. It's hard to fight the state.

**Rep. Koppelman:** Is that a valid argument, consider doing this but making it equal on both sides. Then either can use it to force settlement, yet they both have different standards.

**Rep. Klemin:** I think that was answered by Lisa, that would probably put us in non-compliance with the federal law, which we are in compliance with now. You were saying that substantial standard was somewhat of a low standard to achieve.

**Rep. Dahl:** I didn't say it was a low standard but it's not impossible standard, it's not exceedingly hard.

**Rep. Klemin:** So it would be easier for the Dept. to establish substantial justification to bring the action. This would tend to stack the deck against the respondent.

**Chairman DeKrey:** As a small business owner, I can guarantee that the government has got the deep pockets, and they can do what they want to you, and I think what happened to the Labor Dept. is that they finally ran up against someone who said, "enough is enough". They had the means to fight it. When the Labor Dept. lost, they come to the Legislature and get this changed.

**Rep. Zaiser:** How does the Dept. deal with tenants. Do they handle them in the same way, sometimes they might be harder on the landlords.

**Chairman DeKrey:** She came to protect the interests of the State, she did her job. The clerk will call the roll on a DNP motion.

**11 YES 2 NO 0 ABSENT**

**DO NOT PASS**

**CARRIER: Rep. Klemin**

Date: 1/13/09  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1106

**HOUSE JUDICIARY COMMITTEE**

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Legislative Council Amendment Number \_\_\_\_\_

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep. Klemin Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl		✓	Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser		✓
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 11 No 2

Absent 0

Floor Carrier: Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
January 13, 2009 3:41 p.m.

**Module No: HR-06-0248**  
**Carrier: Klemin**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1106: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS**  
(11 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1106 was placed on the  
Eleventh order on the calendar.



2009 TESTIMONY

HB 1106

John Hoeven  
Governor

Lisa K. Fair McEvers  
Commissioner



State Capitol - 13th Floor  
600 E Boulevard Ave Dept 406  
Bismarck, ND 58505-0340

[nd.gov/labor](http://nd.gov/labor)  
[nd.gov/humanrights](http://nd.gov/humanrights)

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Testimony on HB 1106  
Prepared for the  
Judiciary Committee  
January 13, 2009

Chairman DeKrey and members of the Judiciary Committee, I am Lisa Fair McEvers, Commissioner of Labor. I appear before you in support of HB 1106 relating to the award of attorney's fees and court costs in actions brought by the Department of Labor under the North Dakota Housing Discrimination Act.

As you are probably aware, since 1999, the Department of Labor has been authorized under N.D.C.C. chapter 14-02.5, the Housing Discrimination Act, to receive and investigate complaints alleging discriminatory housing practices. In addition to investigating housing discrimination complaints under state law, the department, under contract with the Department of Housing and Urban Development (HUD), investigates allegations of discrimination under the federal Fair Housing Act. In order to maintain such a relationship, North Dakota's housing laws must be "substantially equivalent" to the federal fair housing laws.

When a housing complaint is filed with the department, the department attempts conciliation to resolve the matter. If conciliation is not successful, the department conducts a full investigation and issues a determination indicating whether or not reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. If the department issues a determination indicating that no reasonable cause exists, the complaint is dismissed.

If the department issues a "cause" determination, a complainant, a respondent, or an aggrieved person may elect to have the claim asserted in a civil action in district court. If such an election is not made, the department must provide an administrative hearing on the charge.

During the nearly ten years that the department has been investigating housing discrimination complaints, the election of district court has been the overwhelming choice—to my knowledge, the department has never provided an administrative hearing on a housing discrimination complaint.

Once the election is made, the department is required by N.D.C.C. § 14-02.5-36 to authorize the attorney general to file a claim for relief on behalf of the aggrieved person in district court. While the attorney general files the claim on behalf of the aggrieved person, the role of the attorney general is to represent the department, and the department's finding of reasonable cause.

Recently, the attorney general's office brought a claim in district court and was not successful in winning the case. The judge who heard this case used his discretion under N.D.C.C. § 14-02.5-44 as it currently exists and ordered the department to pay over \$16,500 in attorneys fees and costs (more than 1% of the department's entire biennial budget). As any of you who have been involved in litigation know, reasonable cause or probable cause is a very low standard—less than is required to convince a judge or a jury that your claim has merit, which would require a preponderance of the evidence.

While I wouldn't generally be an advocate to limit judicial discretion, I believe that this example shows there must be some limitation. Had one of the parties not made an election to go to district court, the department would have provided for an administrative hearing under the Administrative Agencies Practice Act. Under this Act, an award of attorney's fees and costs may only be assessed against a state agency if the agency acted without substantial justification. In the case at hand, the department had no choice but to bring the action in district court, and yet it was penalized for acting on behalf of an aggrieved person because it was unsuccessful in convincing the judge of the overall merits of the case.

The department does not issue reasonable cause determinations if there is not sufficient evidence to support such a finding; however, the burden of proof necessary to file a complaint in court is not the same burden needed to prevail in court. The recommended amendment to N.D.C.C. § 14-02.5-44 is patterned after N.D.C.C. § 28-32-50, the statute under the Administrative Agencies Practice Act pertaining to the award of attorney fees and costs when a court finds in favor of a party other than an administrative agency. Under this statute, the court may assess attorney's fees and costs against a state agency only if a finding is made that the agency acted without substantial justification.

Case law has interpreted this to mean that a position may be justified, despite being incorrect, so long as a reasonable person could think that it has a reasonable basis in law and fact. In other words, substantial justification represents a middle ground between the automatic award of fees to the prevailing party on one side, and the award of fees only when a position is frivolous or completely without merit.

The proposed amendment would also be consistent to what attorney's fees and costs could be imposed under federal law, if HUD were bringing the complaint on behalf of an aggrieved person. Under the Equal Access to Justice Act, an award of attorney's fees may be made to a litigant who prevails in actions against HUD, unless HUD's position was substantially justified or circumstances indicate that an award of attorney's fees would be unjust.

I am asking for a common sense approach to address this important issue. Attorneys who represent respondents are now using the threat of attorney's fees to attempt to chill the department's decisions to issue reasonable cause determinations and force negotiated settlements which may not be in the best interests of the public. I would be happy to answer any questions you may have in regard to this bill.

# FAIR HOUSING OF THE DAKOTAS

*(The Fair Housing of the Dakotas serves North and South Dakota and works to eliminate housing discrimination and to ensure equal housing opportunities for all.)*

Telephone: 701-221-2530  
ND Relay: 1-800-366-6889 (Voice)  
SD Relay: 1-800-877-1113 (Voice)  
Address: 909 Basin Avenue, Suite 2, Bismarck, ND 58504

Toll Free: 1-888-265-0907  
Fax: 701-221-9597  
ND TDD: 1-800-927-9275  
SD TDD: 1-866-273-3323

## Testimony before the House Judiciary Committee on House Bill 1106 by the Fair Housing of the Dakotas January 13, 2009

Mr. Chairman, and members of the Committee, my name is Amy S. Nelson and I am the Executive Director of the Fair Housing of the Dakotas (FHD). The FHD is a non-profit agency which serves North and South Dakota. We work to eliminate housing discrimination and to ensure equal housing opportunities for all. The FHD educates the public on Fair Housing Laws and also investigates allegations of housing discrimination. When discrimination is found, we assist complainants in filing complaints of housing discrimination with the North Dakota Department of Labor (NDDOL) and/or in state or federal court. In some situations, we also file complaints on our behalf when discrimination is found. This can occur when the FHD has expended significant funds in the course of an investigation of an allegation of housing discrimination, has diverted resources as a result of an alleged act of discrimination, when a FHD client chooses not to go forward and file a complaint of discrimination despite evidence of discrimination or when a training requirement or change in rules or policy to eliminate discriminatory practices is needed which cannot be addressed by a FHD client. As a result, there are times when the FHD is an aggrieved person and complaints are filed by it or on its behalf by the NDDOL following cause rulings.

The FHD does not file frivolous complaints. We only file cases on our behalf when evidence has been obtained showing that discrimination has occurred. Consequently, we have received extremely few no cause rulings by the NDDOL on cases we have filed on our behalf. Although the FHD has not been required to pay any attorney fees in cases in which it has initiated or that have been filed on its behalf by the NDDOL, we are concerned that any proposed language in this legislation also include aggrieved individuals and not just the NDDOL (department). Aggrieved individuals can include not only organizations like the FHD but individuals who feel they have been a victim of housing discrimination and are pursuing on their own behalf without FHD assistance.

We would encourage the following amendment to the proposed language change (in bold):

**The department or any aggrieved party may be liable for attorney's fees and court costs only upon a finding by the court that the department or aggrieved party acted without substantial justification in bringing the action.**

The Fair Housing of the Dakotas supports passage of House Bill 1106 provided the amendment above is included. I thank you for the opportunity to provide testimony today and please let me know if you have any questions. Thank you.





## **North Dakota Apartment Association**

1811 E. Thayer Avenue \* Bismarck, ND 58501

Phone: 1-800-990-NDAA (6322)

Website: [www.ndaa.net](http://www.ndaa.net) Email: [info@ndaa.net](mailto:info@ndaa.net)

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**North Dakota Apartment Association's Testimony  
On House Bill 1106  
House Judiciary Committee  
Prairie Room  
January 13, 2009**

Chairman DeKrey and members of the House Judiciary Committee. My name is Krista Andrews, and I am a lobbyist for the North Dakota Apartment Association (NDAA). I regret being unable to testify in person, but wanted to submit written testimony on behalf of the North Dakota Apartment Association, in opposition to HB 1106.

The NDAA is a non-profit trade association representing owners, developers, investors, managers and employees of apartment communities in the state. The NDAA represents apartment units, management companies, apartment communities and associate members. Associate members are suppliers, vendors, and contractors dedicated to the apartment industry.

The NDAA opposes HB 1106, which limits the Department of Labor's liability for attorney's fees and court costs in civil actions brought under chapter 14-02.5 "only upon a finding by the court that the department acted without substantial justification in bringing the action." The "substantial justification" language creates a very broad and easy threshold for the Department of Labor to meet. By meeting this threshold, the Department of Labor would not be responsible for attorney's fees and costs incurred by a prevailing opposing party in a civil action. Let me provide the example which is the impetus for this bill.

The Department of Labor made a finding of "reasonable cause" against a landlord that a discriminatory housing practice occurred under chapter 14-02.5. After a lengthy discovery period and costly trial preparation, the case was tried before a district court judge in a full-day bench trial. During the course of the trial, various facts emerged that were not fully explored by the Department of Labor during their investigation. Based upon the facts presented at trial, the district court judge ruled in favor of the landlord and ordered the Department of Labor to reimburse the landlord for its attorney's fees and court costs incurred of approximately \$15,000.

Had the language found in HB 1106 been the law during this trial, the landlord would have been required to defend the case brought against it and even though prevailing at trial, also pay its attorney's fees and costs if the judge determined that the Department of Labor acted with substantial justification. Such an outcome would be economically devastating for many housing providers, and fundamentally unfair.

HB 1106 provides little incentive for the Department of Labor to proactively ensure that their case is brought with substantial justification by essentially removing the possibility that it will be responsible for a housing provider's attorney's fees and court costs in civil actions. HB 1106 further provides essentially no opportunity for reimbursement for landlords that prevail in cases brought against them by the Department of Labor. If the Legislature decides to pass HB 1106, the NDAA asks that similar language be included in the bill to protect the housing provider in the same circumstances. Thank you.