

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SEN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1448

2001 HOUSE HUMAN SERVICES

HB 1448

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1448

House Human Services Committee

☐ Conference Committee

Hearing Date January 31, 2001

Tape Number	Side A	Side B	Meter #
Tape 1	X		0 to 2350
Committee Clerk Signature <i>Corinne Easton</i>			

Minutes:

Chairman Price, Vice Chairman Devlin, Rep. Dosch, Rep. Galvin, Rep. Klein, Rep. Pollert, Rep. Porter, Rep. Tieman, Rep. Weiler, Rep. Weisz, Rep. Cleary, Rep. Metcalf, Rep. Niemeier, Rep. Sandvig

Chairman Price: Open hearing on HB 1448.

Rep. Kasper: Presented Bill. (See written testimony.) This bill will clarify the potential conflict in North Dakota law between North Dakota Century Code relating to housing discrimination with respect to marital status and North Dakota's unlawful cohabitation statute. I urge you to support HB 1448.

Rep. Koppelman: Cosponsor of Bill. We are asked to preserve the rights as stated in the law. We are not here to make a moral judgment. I urge your favorable consideration of this bill.

Rep. Devlin: Is it totally within the jurisdiction of the state, and there are no federal requirements?

Rep. Koppelman: It is not a federally protected area - only state protected.

David Peterson: Property Owner. (See support of HB 1448 in written testimony.) I was sued by North Dakota Housing because we do not rent to illegal cohabiting couples because it is against the law and it violates my religious rights. I ask that you pass this bill.

Arthur Bayley: (See support of HB 1448 in written testimony.) I believe the core issue addressed in this bill is discrimination. Therefore, if a couple chooses not to marry, it is not discrimination for a landlord not to rent to them. Both have a choice.

Carol Two Eagles: In opposition of HB 1448. This bill makes an assumption of morality. I am against this bill.

Rep. Devlin: You think landlords have the right to rent to who they want. It is my understanding that this is essentially the purpose of this bill.

Carol Two Eagles: I'm just cautious because of the assumption of morality.

Rep. Metcalf: You said you had to rent to people with children or people on welfare. Why was that required?

Carol Two Eagles: I was served with papers that said I had to rent to these people.

Rep. Weisz: The situation you just presented, isn't that exactly what you're now denying the ability for someone else to do?

Carol Two Eagles: Nothing to do with morals, it has to do with behavior.

Rep. Galvin: You make assumptions, but the landlord could also have the other assumption. If it is something a landlord feels is morally wrong, then don't you think he should have the right to make that choice?

Carol Two Eagles: You cannot mandate morals.

Page 3

House Human Services Committee

Bill/Resolution Number HB 1448

Hearing Date January 31, 2001

Bob Kippen: Voice opposition. Discussed what will happen in the case where a couple is living together, they want to get married, but they will lose their benefits if they do. Bill can prevent or postpone a marriage due to the financial aspect of their situation.

Chairman Price: Close hearing on HB 1448.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1448 A

House Human Services Committee

☐ Conference Committee

Hearing Date February 6, 2001

Tape Number	Side A	Side B	Meter #
Tape 2	X		500 to 2170
Committee Clerk Signature <i>Corinne Easton</i>			

Minutes:

**COMMITTEE WORK:**

CHAIRMAN PRICE: 1448. (Committee discussion.)

VICE CHAIRMAN DEVLIN: I can understand someone just not wanting an unmarried couple living in their house, but that is about all I understand about this bill.

REP. GALVIN: This bill doesn't really mandate anything. Isn't there already a law in North Dakota that prevents cohabitation?

CHAIRMAN PRICE: Because they don't want to rent to them in the first place instead of turning them in afterwards.

REP. CLEARY: If a brother and sister are living together, or an elderly couple that live together to save money but if they get married they lose their benefits - those are just two examples.

VICE CHAIRMAN DEVLIN: I'm going to move amendment to change the word to "unrelated".

Page 2  
House Human Services Committee  
Bill/Resolution Number HB 1448  
Hearing Date February 6, 2001

REP. PORTER: Second.

REP. SANDVIG: There really are a lot of people who want to be married, but can't because of losing their benefits. It really is a situation out there and it is really scary. After thoughts told me I can't support this bill.

REP. METCALF: There is nothing in this bill that says you can't rent. It is just basically saying that if I so desire, I don't have to rent to unmarried couples.

REP. NIEMEIER: A lot of people share housing to cut the rent - a boy and girl in college or young workers. It can be a purely platonic relationship.

CHAIRMAN PRICE: We have an amendment in front of us to put in "unrelated". No opposition. What are your wishes on an amended bill?

REP. CLEARY: I move a DO NOT PASS.

REP. NIEMEIER: Second.

CHAIRMAN PRICE: Discussion?

REP. WEILER: If I own an apartment building, I should have total say as to who I can and cannot rent to. I don't think there are very many individuals that rent property who have a problem.

CHAIRMAN PRICE: The clerk will call the roll on a DO NOT PASS. (3 Yes, 11 No.) The clerk will call the roll on a **DO PASS as amended.**

**12 YES   2 NO   0 ABSENT   CARRIED BY REP. TIEMAN**

10725.0101  
Title.0200

Adopted by the Human Services Committee  
February 6, 2001

VR  
2/6/01

HOUSE AMENDMENTS TO HB 1448    HOUSE HS    2-7-01

Page 1, line 6, after "two" insert "unrelated"

Renumber accordingly



Date: 2-6-01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1448

House Human Services Committee

☐ Subcommittee on \_\_\_\_\_

or

☐ Conference Committee

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

Action Taken

move to Amend bill <sup>change "unrelated"</sup>  
~~to be unrelated~~

Motion Made By

Devlin

Seconded

By

Porter

Representatives	Yes	No	Representatives	Yes	No
Rep. Clara Sue Price, Chairman	✓		Rep. Audrey Cleary	✓	
Rep. William Devlin, V, Chairman	✓		Rep. Ralph Metcalf	✓	
Rep. Mark Dosch	✓		Rep. Carol Niemeier	✓	
Rep. Pat Galvin	✓		Rep. Sally Sandvig	✓	
Rep. Frank Klein	✓				
Rep. Chet Pollert	✓				
Rep. Todd Porter	✓				
Rep. Wayne Tieman	✓				
Rep. Dave Weiler	✓				
Rep. Robin Weisz	✓				

Total (Yes) 14 No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Date: 2-6-01  
Roll Call Vote #: 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1448

House Human Services Committee

☐ Subcommittee on \_\_\_\_\_  
or  
☐ Conference Committee

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

Action Taken DO NOT PASS

Motion Made By Cleary Seconded By Niemeier

Representatives	Yes	No	Representatives	Yes	No
Rep. Clara Sue Price, Chairman		✓	Rep. Audrey Cleary	✓	
Rep. William Devlin, V, Chairman		✓	Rep. Ralph Metcalf		✓
Rep. Mark Dosch		✓	Rep. Carol Niemeier	✓	
Rep. Pat Galvin		✓	Rep. Sally Sandvig	✓	
Rep. Frank Klein		✓			
Rep. Chet Pollert		✓			
Rep. Todd Porter		✓			
Rep. Wayne Tieman		✓			
Rep. Dave Weiler		✓			
Rep. Robin Weisz		✓			

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Date: 2-6-01  
Roll Call Vote #: 3

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1448

House Human Services Committee

☐ Subcommittee on \_\_\_\_\_  
or  
☐ Conference Committee

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

Action Taken Do Pass As Amended

Motion Made By Rep Porter Seconded  
By Rep Weiler

Representatives	Yes	No	Representatives	Yes	No
Rep. Clara Sue Price, Chairman	✓		Rep. Audrey Cleary		✓
Rep. William Devlin, V, Chairman	✓		Rep. Ralph Metcalf	✓	
Rep. Mark Dosch	✓		Rep. Carol Niemeier	✓	
Rep. Pat Galvin	✓		Rep. Sally Sandvig		✓
Rep. Frank Klein	✓				
Rep. Chet Pollert	✓				
Rep. Todd Porter	✓				
Rep. Wayne Tieman	✓				
Rep. Dave Weiler	✓				
Rep. Robin Weisz	✓				

Total (Yes) 12 No 2

Absent \_\_\_\_\_

Floor Assignment Rep Tieman

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

**REPORT OF STANDING COMMITTEE (410)**  
February 7, 2001 12:18 p.m.

Module No: HR-22-2572  
Carrier: Tiehan  
Insert LC: 10725.0101 Title: .0200

**REPORT OF STANDING COMMITTEE**

**HB 1448: Human Services Committee (Rep. Price, Chairman)** recommends  
**AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS**  
(12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1448 was placed on the  
Sixth order on the calendar.

Page 1, line 6, after "two" insert "unrelated"

Renumber accordingly

2001 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1448

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1448

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date March 13, 2001.

Tape Number	Side A	Side B	Meter #
1	x		37.5 to end
		x	0 to 7.8
(3/14/01) 1	x		43.4 to end
		x	0 to 0.7
Committee Clerk Signature <i>Debbie E. Perez</i>			

Minutes:

The meeting was called to order. All committee members present. Hearing was opened on HB 1448 relating to rental property for unmarried couples.

**Representative Jim Kasper**, District 46, cosponsor. This bill will clarify the potential conflict between the ND Century Code provisions relating to housing discrimination with respect to marital status and the unlawful cohabitation statute. Written testimony attached. Distributed copies of preamble to the ND Constitution and copies of letter from the Legislative Council. Read letter from the Attorney General reaffirming constitutionality of statutes. Distributed copies of two court opinions.

**David Peterson**, landlord being sued for refusing to rent to unmarried couples. Written testimony attached.

**Representative Kim Koppelman**, District 13. The sponsor asked me to testify. This bill has nothing to do with morality but with existing laws: Fair Housing Statutes and ND cohabitation

Page 2  
Senate Industry, Business and Labor Committee  
Bill/Resolution Number HB 1448  
Hearing Date March 13, 2001.

laws. In two rulings the court ruled in favor of ND cohabitation laws. We should clarify the laws.

This bill is in keeping with the courts' decision.

Tape 1-B-0 to 7.8

**Arthur Bayley**, on his own behalf, in favor. Written testimony attached.

**Everett Herrick**, on his own behalf, in opposition. Written testimony attached.

No further testimony. Hearing closed.

March 14/01. Tape 1-A- 43.4 to end; 1-A-0 to 0.7

Committee reconvened. All members present.

**Senator Every**: I agree with morality issues, however one thing that bothers me is if the North Dakota Supreme Court has not made a decision yet, how come we can make a decision so quick. That is my only reservation.

**Senator Mathern**: I have a real dilemma, this is a moral thing, you should be able to choose but on the other hand you should not dictate to people.

**Senator Espegard**: This is a property right decision.

Discussion held.

**Senator Klein**: What we do here will not preempt what they are doing.

**Senator Espegard**: Motion: do pass. **Senator Klein**: Second.

Roll call vote: 5 yes; 2 no. Motion carried. Floor assignment: **Senator Klein**.

Date: 3/14/01

Roll Call Vote #: /

## 2001 SENATE STANDING COMMITTEE ROLL CALL VOTES

**BILL/RESOLUTION NO. 1448**

## Senate Industry, Business and Labor

Committee

☐ Subcommittee on \_\_\_\_\_  
or \_\_\_\_\_

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Sen Espreguird Seconded By Sen Klein

[illegible]

Total (Yes) 5 No 2

Absent 0

Floor Assignment Sen. Klein

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



**REPORT OF STANDING COMMITTEE (410)**  
**March 14, 2001 1:53 p.m.**

**Module No: SR-44-5609**  
**Carrier: Klein**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1448, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends DO PASS (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1448 was placed on the Fourteenth order on the calendar.**

2001 TESTIMONY

HB 1448

TESTIMONY ON HB 1448  
PREPARED BY REPRESENTATIVE JIM KASPER  
WEDNESDAY, JANUARY 31, 2001  
HUMAN SERVICES COMMITTEE

---

Chairman Price and Members of the Human Services Committee.

For the record, my name is Representative Jim Kasper from District 46, Southeast Fargo.

House Bill 1448 creates a new section to North Dakota law, relating to the rights of property owners to refuse to rent property to unmarried couples. This bill will clarify the potential conflict in North Dakota law between North Dakota Century Code relating to housing discrimination with respect to marital status and North Dakota's unlawful cohabitation statute, NDCC Section 12.1-20-10.

To provide you with a little background on this matter, I would like to draw your attention to the Constitution of the State of North Dakota, Article I, Section 1, of the Declaration of Rights. I quote "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring , possessing and protecting property and reputation".

North Dakota has in Statute NDCC 12.1-20-10 (1993) which prohibits anyone to live "open and notoriously with a person of the opposite sex as a married couple without being married to the other person". In Baker vs. Baker, the North Dakota Supreme Court stated that "cohabitation without being married is ...regulated by North Dakota law". Baker vs. Baker 1997.

House Bill 1448 was introduced at the request of a constituent who was aware of what had happened to Dave and Nancy Peterson of Fargo, when they were exercising their Constitutional rights, and refused to rent to a man and woman who were not married when they desired to rent from the Petersons'. Dave is here today and will be sharing his testimony with the Committee.

North Dakota has a long history and tradition of defending the property rights of our citizens. House Bill 1448 will reaffirm that commitment. It will make it clear that a landlord may refuse to rent to individuals of the opposite gender who are not married to each other.

I urge you to support House Bill 1448. Thank you Chairman Price and members of the Committee.

Chair Person: Clara Sue Price

My name is David Peterson. I live in Fargo, N.D. and am the person that was sued by the ND Housing Council and the Kippens on August 9, 1999, because we do not rent to illegal Co-habiting couples. We presented our case to the ND Supreme Court, November 17, 2000, and have not yet received their ruling.

The Federal Housing Authority does not protect co-habiting couples, The ND law needs House Bill #1448 to clarify the language of it. There is no dictionary definition for marital status, and the plaintiff's attorney failed to prove his case in Judge Ralph Erickson's Court in Fargo, ND. He also failed to prove his case in Magistrate Dwight Kautzman's Court here in Bismarck.

I do not rent to co-habiting couples for two reasons:

1. It is against the law.
2. It violates my Religious beliefs.

House Bill #1448 is precise and simplistic. I compliment The Honorable Jim Kasper for the wording of this bill, and ask that you, as our representatives, pass this bill.

Thank You,

David & Mary Peterson

*David Peterson*  
*Mary Peterson*

"Stenehjem, Wayne  
K."  
<wsteneh@state.nd.u  
s>

To: "Kasper, Jim M." <jkasper@state.nd.us>  
cc:

Subject:

01/25/01 06:21 AM

I agree with HB 1448. However, I recall when I was going to college, my sister and I rented an apartment. Many parents also rent apartments for their kids who go to college. I wonder if your bill should say "unrelated" couples of opposite genders. There are also parents who may rent an apartment with their children. Just a thought.

Wayne

Jan. 31, 2001

**Arthur W. Bayley**

2608 Pacific Drive #1

Fargo, ND 58103

To the members of the **Human Services Committee** of the ND House  
of Representatives.

Phone: (701) 239-4985

abayley@i29.net

My name is Arthur Bayley and I live in Fargo, ND. I am speaking in support of **HOUSE BILL NO. 1448.**

As I see it, the need for this bill is the result of a lawsuit filed against David and Mary Peterson of Fargo, ND by the ND Fair Housing Council. A word concerning the ND Fair Housing Council. They are a Quote: "private" Unquote organization. In 1997 they received a 2 year U.S. Government HUD grant in the amount of \$349,879.00. Their Oct., 2000 Newsletter states that they received a 2nd HUD grant...this one for \$ 299,999.00. The ND Fair Housing Council also claims to have received private donations.

I believe the core issue addressed by House Bill No. 1448 is **DISCRIMINATION.**

In his famous speech, Martin Luther King, Jr. said he had a dream that the time would come when his children would not be judged by the color of their skin but rather by the content of their character. In other words, not by their color, but by their conduct. Not by a condition they had no control over, but by the conduct they chose.

Choosing not to be married is a choice of conduct. If it is a "condition," it is a condition that results from a choice. It is a "condition" over which the affected parties have control.

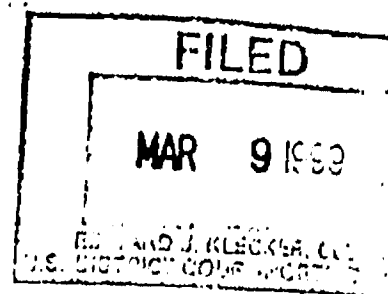
Therefore, if a couple chooses not marry; it is not discrimination for a landlord to choose not to rent to them. Both have a choice.

This is not a new issue in North Dakota. On May 31, 2000, Judge Ralph R. Erickson, of the East Central Judicial District, cited several opinions and Court rulings on this subject. Judge Erickson's ruling supports the concept embodied in House Bill No. 1448.

In conclusion, I believe both Logic and Law agree.

*Arthur W. Bayley*

HB 1448



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION

NORTH DAKOTA FAIR HOUSING )  
COUNCIL, INC., VINIER DAVIS III, )  
DAWN DECOTEAU, NEAKISKA )  
FORDERER, JEROME JASZKOWIAK, )  
MELANIE JOHNSON, and MATTHEW )  
MARTEL, )

Civil No.: A1-98-077

Plaintiffs, )

MEMORANDUM and ORDER

vs. )

JOHN HAIDER, )

Defendant. )

The defendant has filed a motion for partial summary judgment in this matter, requesting that the court dismiss the allegations of paragraphs 18 through 21, paragraphs 27 through 30, and paragraphs 93 through 97 of the complaint herein for failing to state a cause of action upon which relief can be granted. Plaintiffs have strenuously objected to the defendant's motion.

In accordance with the consent of the parties, pursuant to 28 U.S.C. § 636(c) and Fed.R.Civ.P. 73, this dispositive motion is before the undersigned Magistrate for determination.

**BACKGROUND**

Plaintiffs have brought suit against the defendant, claiming that defendant discriminates against women, families with children, Native Americans, unmarried couples, persons receiving public assistance, and young people in the selection of tenants, provisions of leases, and rental of housing in the City of Bismarck, North Dakota. Plaintiffs allege that defendant has violated the provisions of the Fair Housing Act [42 U.S.C. § 3601, et seq.], that he has violated the provisions



of the North Dakota Century Code on Human Rights, Discriminatory Housing Practices by Owner or Agent, [N.D.Cent. Code § 14-02.4-12], that the defendant has committed consumer fraud in violation of N.D.Cent. Code § 51-15 and that defendant was negligent in failing to fulfill his duty to operate his rental properties in a manner that is free from unlawful discrimination, and to hire, train, supervise and discipline employees and agents to fulfill that duty.

Defendant seeks summary judgment pursuant to Rule 56 Fed.R.Civ.P. on the claims of consumer fraud, negligence and violations of N.D.Cent. Code § 14-02.4-12.

**CERTIFICATION OF QUESTIONS TO  
THE NORTH DAKOTA SUPREME COURT**

In their brief in response to defendant's motion, the plaintiffs state that defendant's motion presents two issues of first impression under North Dakota law. One, whether N.D.Cent.Code § 14-02.4-12's prohibition on housing discrimination on the basis of "status with regard to marriage" protects unmarried cohabitating persons from such discrimination, and two, whether N.D.Cent.Code § 51-15-09, which provides for a private right of action against deceptive business practices, allows a right of action by a claimant who is injured by the deceptive practice but who has not lost money or property to the person engaging in the deceptive practice. Plaintiffs indicate that if this court determines to certify these questions to the North Dakota Supreme Court pursuant to North Dakota Rules of Appellate Procedure Rule 47, they would not oppose such a decision.

Whether a federal court should certify a question to a state court is a matter of discretion. See Lehman Bros. V. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974); Perkins v. Clark Equip. Co., 823 F.2d 207, 209 (8th Cir. 1987). Unless there is a "close" question of state law or the lack of state sources, a federal court should determine all the issues before it. Perkins, 823 F.2d at 209.

This court cannot find that the questions presented are either "close" or that there is a lack of state sources from which a determination can be made. Accordingly, the court declines to certify the questions to the North Dakota Supreme Court.

### STANDARD OF REVIEW

A motion to dismiss is the proper vehicle to test the legal sufficiency of a complaint, and does not address the claims on their merits. See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). As noted by the plaintiffs in their response to defendant's motion for partial summary judgment, the motion challenges the legal sufficiency of the allegations contained in the complaint and does not refer to or rely on any matters outside the pleadings. The Eighth Circuit Court of Appeals has opined that "[A] summary judgment motion filed solely on the basis of the pleadings is the functional equivalent of a dismissal motion." North Arkansas Medical Center v. Barrett, 962 F.2d 780, 784 (8th Cir. 1992). Accordingly, the court will view defendant's motion as a motion to dismiss.<sup>1</sup>

When analyzing a motion to dismiss, the court looks to the complaint as pleaded. The complaint must be liberally construed and viewed in the light most favorable to the plaintiff. The court will dismiss a complaint only when it appears that the plaintiff cannot prove any set of facts

---

<sup>1</sup>Defendant's motion requests partial dismissal of the complaint for failing to state a cause of action upon which relief can be granted. Technically, a Rule 12(b)(6) motion cannot be filed after an answer has been submitted. See Fed.R.Civ.P. 12(b). But since Rule 12(h)(2) provides that "[a] defense of failure to state a claim upon which relief can be granted" may be advanced in a motion for judgment on the pleadings under Rule 12(c), the defendant's motion will be treated as if it had been styled a 12(c) motion. See St. Paul Ramsey County Med. Ctr. v. Pennington County, 857 F.2d 1185, 1187 (8th Cir. 1986). The distinction is purely formal, since Rule 12(c) motions are reviewed under the standard that governs Rule 12(b)(6) motions. Id.

that support the claim. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

### PLAINTIFFS' CLAIMS

#### 1. Consumer Fraud.

The complaint alleges that:

Defendant knowingly acted, used, or employed deceptive acts or practices, fraud, false pretenses, false promises or misrepresentation, with the intent that each plaintiff rely thereon, in connection with the sale or advertisement of defendant's rental services and real estate for rent. In doing so, defendant committed an unlawful practice under the consumer fraud statutes of the State of North Dakota, N.D. Cent. Code section 51-15.

Defendant argues that while N.D.Cent. Code § 51-15-09<sup>2</sup> authorizes a claim for relief by any person "against any person who acquired any monies or properties" by means declared to be unlawful by the consumer fraud statutes, the plaintiffs in this case have not alleged that defendant acquired any money or property from them and, therefore, they have failed to state a claim upon which relief can be granted.

Plaintiffs counter that to prevail on their claim of consumer fraud, they must only show that the defendant acquired money or property from any person as a result of his alleged unlawful practice. As an example, plaintiffs state that defendant refused to rent apartments to Native

---

<sup>2</sup>N.D.Cent.Code § 51-15-09 provides:

The provisions of this chapter do not bar any claim for relief by any person against any person who has acquired any moneys or property by means of any practice declared to be unlawful in this chapter. If the court finds the defendant knowingly committed the conduct, the court may order that the person commencing the action recover up to three times the actual damages proven and the court must order that the person commencing the action recover costs, disbursements, and actual reasonable attorney's fees incurred in the action.

Americans on the basis of their national origin, but then presumably rented to non-Native American persons. Since he would most likely have accepted rent money from those persons, the plaintiffs postulate that the conditions of the statute are satisfied. Plaintiffs argue that if the legislature had intended to require that a claimant show a loss of his or her own property or money, the legislature would have clearly stated so in the statute.

The court must interpret the statute in light of the purposes the Legislature sought to serve, see Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979), and legislative history plays an important part in discerning these purposes. Notable among the minutes and testimony from both the Senate and House committee hearings on North Dakota's consumer fraud legislation are comments such as the following:

"Are there any provisions in here to protect the businessman so he at some point can say OK I'll give you your money back without having to pay triple?" *Proposed Amendment of Consumer Fraud Statute: Hearing Before House Comm. on the Judiciary*, HB 1255, 52d Leg. (N.D. 1991) (statement of Rep. Skar). (Emphasis added.)

"What you triple is your proven damages. You are entitled to the benefit of your bargain." *Id.* (statement of Dave Huey, Assist. Atty Gen.). (Emphasis added.)

"... The possibility of treble damages should also encourage unethical businessmen to refund consumers their money before legal action is commenced. ..." *Proposed Amendment of Consumer Fraud Statute: Hearings Before House and Senate Comm. on the Judiciary*, HB 1255, 52d Leg. (N.D. 1991) (testimony of Tom F. Engelhardt, Dir. Consumer Fraud Section, Office of Atty Gen.). (Emphasis added.)

Accordingly, using the legislative history as a guide to the interpretation of the N.D. Cent. Code § 51-15-09, this court must conclude that plaintiffs' theory that they must only show that the defendant acquired money or property from any person as a result of an alleged unlawful practice is in contravention of the intent behind the statute. Since it appears that the plaintiffs can prove no set of facts from their complaint that support this claim, the court must find that they have failed to

state a claim upon which relief can be granted with regard to paragraph 93 of their complaint and the same shall be dismissed.

**2. North Dakota's Human Rights Statute.**

The paragraphs of plaintiffs' complaint alleging violations of the North Dakota Human Rights Statute which defendant seeks to dismiss concern allegations that defendant discriminated against plaintiffs Dawn Decoteau and Vinier Davis, and Neakiska Forderer and Matthew Martel, in violation of N.D.Cent.Code § 14-02.4-12, by refusing to rent to them as cohabitating couples because they were unmarried.<sup>3</sup> Defendant contends that based upon N.D.Cent.Code § 12.1-20-10, which provides that "[a] person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person," the act of renting an apartment to the named plaintiffs would have put him in a position of assisting them in violating the law and thereby possibly exposing himself to criminal liability. Plaintiffs counter that there is no criminal liability involved, and that N.D.Cent.Code § 12.1-20-10

---

<sup>3</sup>N.D.Cent.Code § 14-02.4-12 provides:

It is a discriminatory practice for an owner of rights to housing or real property or the owner's agent or a person acting under court order, deed or trust, or will to:

1. Refuse to transfer an interest in real property or housing accommodation to a person because of race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance.
2. Discriminate against a person in the terms, conditions, or privileges of the transfer of an interest in real property or housing accommodation because of race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance; or
3. Indicate or publicize that the transfer of an interest in real property or housing accommodation by persons is unwelcome, objectionable, not acceptable, or not solicited because of a particular race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance.

is not intended to punish unmarried, opposite sex cohabitation per se, but to punish such cohabitating couples that hold themselves out to the public as married for purposes that may be unlawful.

On May 7, 1990, the Office of the Attorney General for the State of North Dakota issued an opinion to State Representative Judy L. DeMers on the question of whether it is an unlawful discriminatory practice under N.D.Cent.Code § 14-02.4-12 to refuse to rent housing to unmarried persons of the opposite sex who desire to live together as a married couple in light of the prohibition against such cohabitation under N.D.Cent.Code § 12.1-20-10. See 1990 N.D. Op. Atty. Gen. 43. The Attorney General determined that such a refusal was not an unlawful discriminatory practice. Id.

"The Supreme Court of North Dakota has held that an Attorney General's opinion has the force and effect of law until a contrary ruling by a court. That court has further held that opinions of an Attorney General are 'entitled to respect,' and a court should follow them if 'they are persuasive.'" Fargo Women's Health Organization, et al., v. Schafer, et al., 18 F.3d 526, 530 (8th Cir. 1994) (citations omitted). In this case, the opinion is highly persuasive, and is consistent with an independent analysis of the question presented. Foremost for consideration is the fact that N.D.Cent.Code § 12.1-20-10 was not repealed when N.D.Cent.Code § 14-02.4-12 was enacted in 1983; nor was it repealed in 1995 when the discriminatory housing practices statute was last amended and reenacted, despite the issuance of the Attorney General's opinion in 1990. Additionally, when recently presented with the opportunity to speak to the "public policy/morality issue" of N.D.Cent.Code § 12.1-20-10, the North Dakota Supreme Court declined to address it. See Cermak v. Cermak, 569 N.W.2d 280, 285-86 (N.D. 1997).

These statutes can be construed "... so that effect may be given to both provisions ..." See N.D.Cent.Code § 1-02-07. The conflict between the two provisions is not irreconcilable because the statutes can be harmonized to provide an interpretation that gives effect to both provisions. The phrase "status with respect to marriage" contained within N.D.Cent.Code § 14-02.4-12 is not rendered meaningless by application of the language of the unlawful cohabitation statute to exclude unmarried, opposite sex cohabitators. The statute will still regulate against several discriminatory housing practices based on status with respect to marriage.

Accordingly, the court must find that the allegations of the plaintiffs in paragraphs 18 through 21 and 27 through 30 have failed to state a claim upon which relief can be granted with regard to plaintiffs' claims of discrimination based on status with respect to marriage contained in paragraphs 91(A), (B) & (C) of their complaint and said claims shall be dismissed to the extent they allege such discrimination.

### 3. Negligence.

Plaintiffs' fourth cause of action states a common law claim for negligence. However, there is no duty at common law to operate a rental premises in a manner that is free from unlawful discrimination, or to obtain or provide training to fulfill that duty. "It is the general rule that if a statute creates liability (or right) and gives a special remedy for the enforcement of that liability or right, that remedy is the exclusive one." Fleming v. Miller, 47 F.Supp. 1004, 1008 (D.Minn. 1942) (citations omitted). There was no established public policy prohibiting housing discrimination prior to the passage of state and federal statutes regarding the same.<sup>4</sup> The remedies contained in these

---

<sup>4</sup>In North Dakota, there was no established public policy prohibiting housing discrimination prior to the passage of the North Dakota Human Rights Act. "The enactment of

statutes are arguably available to the plaintiffs in this regard. See, e.g., 42 U.S.C. § 3613(c) ("the court may award to the plaintiff actual and punitive damage") and N.D.Cent.Code § 14-02.4-20 ("... the court may enjoin the respondent from engaging in such unlawful practice and order such appropriate relief as will be appropriate . . ."). Accordingly, plaintiffs may not state a claim for negligence in this matter, and this claim shall be dismissed.

### CONCLUSION

Based on the foregoing discussion and analysis, it is hereby **ORDERED** that the defendant's motion for partial disposition of this matter (Docket #11) is hereby **GRANTED**. It is further **ORDERED** that the following claims of the plaintiff are dismissed with prejudice:

1. Consumer fraud;
2. Housing discrimination based on status with respect to marriage; and
3. Negligence.

**JUDGMENT SHALL BE ENTERED ACCORDINGLY.**

Dated this 9<sup>th</sup> day of March, 1999.

  
Dwight C. H. Kautzmann  
United States Magistrate

---

the Human Rights Act identified important public interests in eradicating discrimination and designed remedies for violation of an individual's rights to be free of discrimination." Moses v. Burleigh County, et al., 438 N.W.2d 186, 189 (N.D. 1989). On the federal level, there was no established public policy prohibiting housing discrimination prior to Title VIII of the Civil Rights Act of 1968. "[T]he Fair Housing Title of the Civil Rights Act of 1968 and the 1866 Civil Rights Act together comprehensively spell out the right of an individual to rent or purchase housing without suffering discrimination and to obtain federal enforcement of that fundamental guarantee." Williams v. The Matthews Company, et al., 499 F.2d 819, 825 (8th Cir. 1974).



**PROOF OF SERVICE BY U.S. MAIL**

**STATE OF CALIFORNIA, COUNTY OF SAN MATEO**

I am employed in the County of San Mateo, State of California. I am over the age of 18 and not a party to the within action; my business address is P.O. Box 686, Pescadero, California 94060.

On February 4, 2000, I served **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** on the Interested Parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid for U.S. Mail, in the United States mail at Pescadero, California, addressed as follows:

Jack G. Marcell, Serkland Law Firm, 10 Roberts Street, P.O. Box 6017, Fargo, ND 58108-6017;

Edwin W.F. Dyer III, Dyer & Summers, P.C., 418 E. Broadway Ave., Suite 230, P.O. Box 2261, Bismarck, ND 58502.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2000, at Pescadero, California.

Heather Collins  
Heather Collins

## **PREAMBLE**

We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution.

# ARTICLE I

## DECLARATION OF RIGHTS

**Section 1.** All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

**Section 2.** All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require.

**Section 3.** The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

**Section 4.** Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.

**Section 5.** The citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the powers of government for the redress of grievances, or for other proper purposes, by petition, address or remonstrance.

**Section 6.** Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this state.

**Section 7.** Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

**Section 8.** The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

**Section 9.** All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

**Section 10.** Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information. The legislative assembly may change, regulate or abolish the grand jury system.

**Section 11.** All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall

not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.

**Section 12.** In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

**Section 13.** The right of trial by jury shall be secured to all, and remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases, provided that the jury consists of at least six members. All verdicts must be unanimous.

**Section 14.** The privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require.

**Section 15.** No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law; or in cases of tort; or where there is strong presumption of fraud.

**Section 16.** Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation. Compensation shall be ascertained by a jury, unless a jury be waived. When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.

**Section 17.** Treason against the state shall consist only in levying war against it, adhering to its enemies or giving them aid and comfort. No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or confession in open court.

**Section 18.** No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

**Section 19.** The military shall be subordinate to the civil power. No standing army shall be maintained by this state in time of peace, and no soldiers shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, except in the manner prescribed by law.

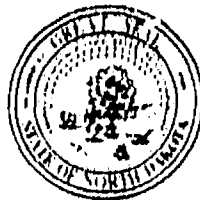
**Section 20.** To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

**Section 21.** No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

**Section 22.** All laws of a general nature shall have a uniform operation.

**Section 23.** The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.

**Section 24.** The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise.



# North Dakota Legislative Council

GARY J. NELSON  
State Senator  
Chairman

JOHN D. OLBRUD  
Director

JAY B. BURINORUD  
Assistant Director

JIM W. SMITH  
Legislative Budget  
Analyst & Auditor

JOHN WALSTAD  
Code Revisor

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK, ND 58505-0360 (701) 328-2916 TTY: 1-800-366-6888

December 27, 2000

Honorable Jim Kasper  
State Representative  
1128 Westrac Drive  
Fargo, ND 58103

Dear Representative Kasper:

This is in response to your request for information regarding whether the state can prohibit the North Dakota Fair Housing Council from suing property owners who refuse to rent to certain persons, such as unmarried couples.

The North Dakota Supreme Court has under review a case involving the North Dakota Fair Housing Council and landlords who refused to rent an apartment to an unmarried couple based upon their unmarried status. The case was argued before the Supreme Court on November 17, 2000, and the court has yet to issue a ruling in the case. The issue presented in that case is whether the North Dakota Human Rights Act in effect on August 26, 1999, and which prohibited housing discrimination based on an individual's status with respect to marriage, applied to protect an unmarried couple from a refusal to rent because they were unmarried. In the case, the Fair Housing Council joined with the individuals who were denied the opportunity to rent in bringing a housing discrimination claim.

The district court dismissed the North Dakota Fair Housing Council as a party. The Fair Housing Council is a nonprofit corporation with its principal place of business in Bismarck. The primary purpose of the Fair Housing Council is to promote equal opportunity in housing and to eliminate all forms of housing discrimination. On appeal, the Fair Housing Council argued that in furtherance of its mission to eliminate housing discrimination, the council suffered legally cognizable injuries as a result of the failure of the landlords to rent to the unmarried couple.

The district court also granted summary judgment against the Fair Housing Council and the unmarried couple on the ground that a refusal to rent to an unmarried couple is not discrimination based on status with respect to marriage within the meaning of a section of the North Dakota Century Code (NDCC) which has since been repealed. (The 1999 North Dakota Legislative Assembly adopted a new statutory provision relating to housing discrimination with respect to marital status.) The district court also held that North Dakota's unlawful cohabitation statute, NDCC Section 12.1-20-10, conflicts with the protection for unmarried couples from housing discrimination statute. Thus, the court concluded that the protection in the Human Rights Act from housing discrimination did not protect unmarried couples.

On appeal, the unmarried couple and the North Dakota Fair Housing Council argued that status with respect to marriage protects individuals against discrimination based on whether the individuals are married, unmarried, divorced, separated, or single. They also argued that there is no conflict between the unlawful cohabitation statute and the protection for unmarried couples under the housing discrimination law. They argued that the cohabitation statute only applies to persons holding themselves out as married when in fact they are not married. In addition, they argued that even if the unlawful cohabitation statute were construed to prohibit the act of cohabitation, the statute is "antiquated, out of touch with actual practices, and unconstitutional as an invasion of freedom of intimate association, sexual privacy and substantive due process protection for the decision when and whether to marry."

The case under review by the Supreme Court is based upon North Dakota law in effect before October 1, 1999. Because the current statutes relating to housing discrimination (NDCC Chapter 14-02.5) provide that any aggrieved individual may bring an action with respect to a discriminatory housing practice, it appears that an entity such as the North Dakota Fair Housing Council does not have the right to file a complaint under the current North Dakota fair housing law. Section 14-02.5-01 defines an "aggrieved individual" as "any individual who claims to have been injured by a discriminatory housing practice or believes that the individual will be injured by a discriminatory housing practice that is about to occur." Section 1-01-49 defines an individual as "a human being."

We hope this information is of assistance. Please feel free to contact this office if you have additional questions.

Sincerely,



John D. Bjornson  
Counsel

JDB/JFB



Heidi Heitkamp  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL  
600 E BOULEVARD AVE  
BISMARCK ND 58505-0040  
(701) 328-2210 FAX (701) 328-2226

July 16, 1999

Mr. Richard J. Riha  
Burleigh County State's Attorney  
514 East Thayer Avenue  
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for your letter asking that I reconsider a prior opinion of this office relating to the relationship between North Dakota's prohibition of cohabitation (N.D.C.C. § 12.1-20-10) and its prohibition against housing discrimination based on "status with respect to marriage" (N.D.C.C. § 14-02.4-12). The previous opinion of this office appeared at 1990 N.D. Op. Att'y Gen. 43 (numbered 90-12).

It is the long-standing policy of this office not to issue opinions on issues under consideration in pending litigation. See 1995 N.D. Op. Att'y Gen. L-53; 1993 N.D. Op. Att'y Gen. L-62; Letter from Attorney General Nicholas J. Spaeth to Joseph H. Kubik (June 1, 1989). The issues you raise in your request to reconsider the above-cited opinion and the argument you submit with your request for reconsideration are currently the subject of litigation in the federal district court for the district of North Dakota. See North Dakota Fair Housing Council, et al. v. Haider, A1-98-77.

Consequently, I must decline to reconsider 1990 N.D. Op. Att'y Gen. 43.

For your information, although N.D.C.C. § 14-02.4-12 will be repealed effective October 1, 1999, the same language at issue concerning marriage will be continued in new N.D.C.C. § 14-02.5-02. See 1999 H.B. 1043. You might also be interested in the opinions of the Minnesota Supreme Court in State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990), and the United States Court of Appeals for the Fourth Circuit in Doe v. Duling, 782 F.2d 1202 (1986).

Sincerely,

Heidi Heitkamp  
Attorney General

rel/pg



\*1145 Office of the Attorney General  
State of North Dakota

Opinion No. 90-12  
May 7, 1990

Judy L. DeMers  
State Representative

- QUESTIONS PRESENTED -

Whether it is an unlawful discriminatory practice under N.D.C.C. § 14-02.4-12 to refuse to rent housing to unmarried persons of the opposite sex who desire to live together as a married couple.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that it is not an unlawful discriminatory practice under N.D.C.C. § 14-02.4-12 to refuse to rent housing to unmarried persons of the opposite sex who desire to live together as a married couple.

- ANALYSES -

The University of North Dakota (UND) provides housing for students who meet certain eligibility requirements. To qualify for UND Family Housing, a UND student is required to sign a lease with the UND Housing Office. The Family Housing lease provides in relevant part:

A. Family Housing - Any full-time student who is married and living with his/her spouse or a solo parent with custody of children ... is eligible for family housing .... Only the student (leaseholder), spouse and their children may reside in Family Housing. Written permission from the Housing Office must be secured before any other person is allowed to reside in the said unit. This does not apply to occasional guests.

UND only leases Family Housing to students who are: married and living with their spouse, or a solo parent with custody of children for 50% of the calendar year.

N.D.C.C. § 14-02.4-12 provides, in part:

14-02.4-12. Discriminatory housing practices by owner or agent. It is discriminatory practice for an owner of rights to housing or real property or the owner's agent or a person acting under court

order, deed or trust, or will to:

1. Refuse to transfer an interest in real property or housing accommodation to a person because of race, color, religion, sex, national origin, age, physical or mental handicap, or status with respect to marriage or public assistance;

(Emphasis supplied.) However, N.D.C.C. § 12.1-20-10 prohibits unmarried persons of the opposite sex from openly living together as a married couple. The North Dakota Supreme Court has not ruled on the apparent conflict between N.D.C.C. §§ 14-02.4-12's protection of a person's right to housing notwithstanding the person's marital status, and N.D.C.C. § 12.1-20-10's prohibition against allowing unmarried couples to live as a married couple. However, there has been similar litigation in other states whose laws prohibit both cohabitation and discriminatory housing practices based on marital statutes. In McFadden v. Elma Country Club, 26 Wash. App. 146, 613 P.2d 146 (1980), the court held that, notwithstanding a statute prohibiting discrimination based upon marital status, a country club could refuse to admit to membership an unmarried woman cohabiting with a man. *Id.* at 152. The court's holding was based upon the fact the statute prohibiting cohabitation was not repealed when the discrimination statute was enacted. This fact the court said "would vitiate any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation." *Id.* at 150.

As in the McFadden case, N.D.C.C. § 12.1-20-10 was not repealed when N.D.C.C. § 14-02.4-12 was enacted. Thus, the continuing existence of the unlawful cohabitation statute after the enactment of N.D.C.C. § 14-02.4-12 vitiates "any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation." McFadden at 150.

Additionally, where there is a conflict between two statutes, the particular provision will control the general so that effect can be given to both statutes, N.D.C.C. § 1-02-07. In this conflict N.D.C.C. § 12.1-20-10 regulates one particular activity, unmarried cohabitation. N.D.C.C. § 14-02.4-12 on the other hand, regulates several bases for discrimination. Consequently, the conflict is resolved by applying the terms of N.D.C.C. §

12.1-20-10 to this situation.

Therefore, it is my opinion that it is not an unlawful discriminatory practice under N.D.C.C. § 14-02.4-12 to discriminate against two individuals who chose to cohabit together without being married.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials

until such time as the question presented is decided by the courts.

Nicholas J. Spaeth

Attorney General

Assisted by:

Gregory B. Gullikson

Assistant Attorney General

plained, *State v. Beck*, 52 N.D. 391, 202 N.W. 857 (1925).

The provisions of adultery statute were mandatory, but when the prosecution was commenced, on the complaint of the husband or wife, the general criminal procedure of the court was invoked, and the husband or wife had no further control of the prosecution. *State v. Beck*, 52 N.D. 391, 202 N.W. 857 (1925).

#### Definition.

The term adultery had no technical meaning in law distinct from its significance in its ordinary and popular sense. *State v. Hart*, 30 N.D. 368, 152 N.W. 672 (1915).

#### Information Sufficient.

In an information charging the crime of adultery it was not necessary to allege that

the prosecution was commenced by the husband or wife. *State v. Beck*, 52 N.D. 391, 202 N.W. 857 (1925).

#### Collateral References.

Adultery  $\Rightarrow$  1 et seq.

2 Am. Jur. 2d, Adultery and Fornication, § 1 et seq.

2 C.J.S. Adultery, § 1 et seq.

Mistaken belief in existence, validity, or effect of divorce or separation as defense to prosecution for adultery, 56 A.L.R.2d 915.

Reversal of divorce decree: cohabitation under marriage contracted after divorce decree as adultery, where decree is later reversed, or set aside, 63 A.L.R.2d 816.

Validity of statute making adultery and fornication criminal offense, 41 A.L.R.3d 1338.

**12.1-20-10. Unlawful cohabitation.** A person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

Source: S.L. 1973, ch. 117, § 1.

#### DECISIONS UNDER PRIOR LAW

##### "Open and Notorious."

In a prosecution for openly and notoriously living and cohabiting together as husband and wife, without being married, it was not necessary that the living together should be more open and notorious than the living together of a married couple, but it should have partaken of the same quality. *State v. Hoffman*, 68 N.D. 610, 282 N.W. 407 (1938).

The terms "open" and "openly" meant undisguised and unconcealed as opposed to hidden and secret; the term "notoriously" meant generally known, as a matter of common knowledge in the community where the defendants were living; and the term "cohabit as husband and wife" merely meant having intercourse with each other the same as husband and wife would have. *State v. Hoffman*, 68 N.D. 610, 282 N.W. 407 (1938).

Under a charge of cohabitation, the state had to prove the parties were not married to each other, but this could be proved by circumstantial evidence. *State v. Hoffman*, 68 N.D. 610, 282 N.W. 407 (1938).

#### Collateral References.

Fornication  $\Rightarrow$  1 et seq.; Lewdness  $\Rightarrow$  1 et seq.

2 Am. Jur. 2d, Adultery and Fornication, § 1 et seq.

37 C.J.S. Fornication, § 1 et seq.; 53 C.J.S. Lewdness, § 1 et seq.

Mistaken belief in existence, validity, or effect of divorce or separation as defense to prosecution for unlawful cohabitation, 56 A.L.R.2d 915.

Validity of statute making adultery and fornication criminal offense, 41 A.L.R.3d 1338.

**12.1-20-11. Incest.** A person who intermarries, cohabits, or engages in a sexual act with another person related to him within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03, knowing such other person to be within said degree of relationship, is guilty of a class C felony.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Robert Ray Klippen and  
Patricia Yvonne Klippen,

Plaintiffs,

v.

David Peterson and  
Mary Peterson,

Defendants.

Civil No. CV-99-02563

*Memorandum Opinion on Defendant's Motion for Summary Judgment and  
Plaintiff's Motion for Partial Summary Judgment*

*I. Introduction*

The above-encaptioned matter came before the Court on Defendant's Motion for Summary Judgment on the 22nd day of March, 2000. The Plaintiffs appeared through their counsel of record, Edwin W.F. Dyer, III of Bismarck, North Dakota and Christopher Brancart of Pescadero, California. The Defendants appeared through their counsel of record Jack Marcil and Timothy Richard of Fargo, North Dakota.

This matter was commenced by service of a summons and complaint on August 26, 1999. The Defendants interposed an Answer and Counterclaim on the 1st day of November, 1999.

Initially the North Dakota Fair Housing Council was party to this lawsuit, but the NDFHC was dismissed from the lawsuit following a motion by the Defendants to dismiss the NDFHC on the basis that the NDFHC was not a real party in interest. A hearing on the Defendants' motion was held on the 30th day of December. Following the hearing and after reviewing the supporting documents,

the Court issued a memorandum opinion, dated February 16, 2000, granting the Defendants' motion to strike the NDFHC from the action.

On February 4, 2000 the Plaintiffs moved for partial summary judgment. On February 24, 2000 the Defendants responded to the Plaintiffs' motion for partial summary judgment by opposing the Plaintiffs' motion for partial summary judgment and also with their own motion for summary judgment. Both motions were brought under Rule 56 of the North Dakota Rules of Civil Procedure.

A hearing was conducted on March 22, 2000. The Court, being fully informed in the premises, now renders this Opinion.

Because the Court is convinced that there are no questions of material fact and that the Defendants are entitled to judgment as a matter of law, the Court hereby GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion for Partial Summary Judgment.

## *II. Facts*

The facts of this case are not in dispute, but the legal implications of these facts are highly disputed. The statement of the facts will be taken from the Plaintiffs' Separate Statement of Material Facts Not In Genuine Dispute, North Dakota Fair Housing Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson, CV-99-02563, Clerk's Docket #47 (Feb. 7, 2000).

In March of 1999, the Plaintiffs, Robert Kippen and Patricia DePoe, n/k/a Patricia Kippen, were looking for housing in Fargo, North Dakota. *Id.* at 2. At the time of their search for housing, Robert Kippen and Patricia DePoe were unmarried, but were living together. *Id.* On March 8, 1999, Robert Kippen saw an advertisement in the Fargo Forum for a house or duplex to rent. *Id.* Robert Kippen called the telephone number, 235-8338, which was listed in the advertisement and inquired

about renting the property. *Id.*

The telephone number Robert Kippen called was David and Mary Peterson's telephone number. *Id.* at 3. Mary Peterson answered the phone and discussed the rental property. Plaintiffs' Separate Statement of Material Facts Not In Genuine Dispute at 3. The Petersons own and operate approximately 15 residential rental properties in Fargo. *Id.* at 2. The Petersons make it a policy to not rent to unmarried couples who cohabit. *Id.* at 3. When answering the initial inquiry about rental properties, Mary Peterson asks the caller who will be living in the rental property. *Id.* Mary Peterson informs callers that she and David Peterson do not rent to couples who cohabit. *Id.* at 4. The policy is based primarily on the Petersons refusal to allow renters to break North Dakota's cohabitation law. *Id.*

When Robert Kippen talked to Mary Peterson about the rental property, he informed Mary Peterson that he would be living there with his fiancé, Patricia DePoe. Plaintiffs' Separate Statement of Material Facts Not In Genuine Dispute at 4. Mary Peterson then informed Robert Kippen that he and his fiancé would be unable to rent from the Petersons as long as they were going to live together without being married. *Id.*

After being told by Mary Peterson that they would not be able to rent property from the Petersons while living together, Robert Kippen contacted the North Dakota Fair Housing Council. Affidavit of Robert Ray Kippen, ¶ 6, *North Dakota Fair Housing Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson*, CV-99-02563, Clerk's Docket #43 (Feb. 7, 2000). Kristi J. Klein, Housing Coordinator for the NDFHC, received Robert Kippen's telephone call and conversed with Robert Kippen regarding Kippen's attempt to rent property from David and Mary Peterson. Affidavit of Kristi J. Klein, ¶¶ 1, 5 & 6, *North Dakota Fair Housing*

*Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson*, CV-99-02563, Clerk's Docket #44 (Feb. 7, 2000). Based on the conversation with Robert Kippen, Ms. Klein prepared an intake form. *Id.* at ¶ 6. After reviewing the intake form, the NDFHC determined that there have been complaints about the Petersons in the past. Complaint, ¶12, *North Dakota Fair Housing Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson*, CV-99-02563, Clerk's Docket #1 (Aug. 26, 1999). Since 1997, the NDFHC has in its files 3 other complaints concerning the Petersons. *Id.*

In response to Robert Kippen's complaint, the NDFHC decided to conduct what they term "testing." *Id.* at ¶ 19. A fair housing tester called the Petersons posing as a single woman, who was looking to rent an apartment for herself and her boyfriend. *Id.* Mary Peterson then informed the tester that due to the North Dakota law outlawing cohabitation, she and her husband would be unable to rent to the tester. *Id.*

The next day, a different tester, posing as a married woman, called the Petersons and inquired about renting a two-bedroom duplex for herself and her husband. *Id.* at ¶ 20. That tester was told the apartment was available for immediate occupancy. *Id.*

Following the testing by the NDFHC, the agency and Robert and Patricia Kippen commenced this lawsuit against the Petersons. See, Complaint, *North Dakota Fair Housing Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson*, CV-99-02563, Clerk's Docket #1 (Aug. 26, 1999).

### *III. Discussion*

#### *I. Summary Judgment Generally*

Under Rule 56, N.D.R. Civ.P., a summary judgment should be granted only if it appears that there are no issues of material fact or any conflicting inferences which may be drawn from those facts. See, Production Credit Ass'n Of Minot v. Klein, 385 N.W.2d 485 (N.D. 1986). The party seeking summary judgment has the burden to clearly demonstrate that there is no genuine issue of material fact. Binstock v. Tschider, 374 N.W.2d 81, 83 (N.D. 1985). In considering a motion for summary judgment, the court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence to determine whether summary judgment is appropriate. Everett Drill. Vent v. Knutson Flying Serv., 338 N.W.2d 662, 664 (N.D. 1983). The court must view the evidence in a light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. See, Stokka v. Cass Cty. Elec. Co-op, Inc., 373 N.W.2d 911 (N.D. 1985). Courts must also consider the substantive standard of proof at trial when ruling on a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); State Bank of Kenmare v. Lindberg, 471 N.W.2d 470, 474 (N.D. 1991).

The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other documents containing testimony or evidence raising an issue of material fact. Smith v. Land O' Lakes, 1998 ND 219, ¶ 10; 587 N.W.2d 173 (N.D. 1998). Neither the trial court, nor an appellate court has a duty or responsibility to search the record for evidence opposing the motion for summary judgment. *Id.*

Summary judgment is proper when a party fails to raise even a reasonable inference of the



existence of an element essential to the party's claim, which must be proved at trial. *Matter of Estate of Stanton*, 472 N.W.2d 741, 746 (N.D. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

In the instant case the Court finds that the decision is based solely on the interpretation of the applicable law and is ripe for summary judgment.

## 2. North Dakota's Unlawful Cohabitation Statute

The Defendants stated that they refused to rent to the Plaintiffs on the grounds that the Plaintiffs were going to be cohabitating, which is a crime in North Dakota. See, Defendants' Answer To Complaint, ¶ 8, *North Dakota Fair Housing Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson*, CV-99-02563, Clerk's Docket #5 (Nov. 2, 1999). Further, the Defendants further allege that their refusal to rent was based on their religious beliefs. *Id.* at ¶¶ 10, 11. While the Defendants have alleged that their religious beliefs impacted their decision not to rent to the Plaintiffs and that forcing the Defendants to rent to the Plaintiffs impinges upon their religious freedom, the Court will not address that issue because it is the opinion of the Court that the illegality of cohabitation in North Dakota is dispositive in the present action.

North Dakota has codified a prohibition of cohabitation. See N.D.C.C. § 12.1-20-10 (1993). The statute makes it a class B misdemeanor to live "open and notoriously with a person of the opposite sex as a married couple without being married to the other person." *Id.* In *Baker v. Baker*, the North Dakota Supreme Court stated that "cohabitation without being married is ... regulated by North Dakota law." *Baker v. Baker*, 1997 ND 135, ¶12, 566 N.W.2d 806, 810. Discussing the definition of cohabitation, the Supreme Court stated that cohabitation includes, "[t]he mutual assumption of those marital rights, duties and obligations which are usually manifested by married

people, including but not necessarily dependent on sexual relations." *Id.* at ¶13, 566 N.W.2d at 811 (citing to BLACK'S LAW DICTIONARY 260 (6th ed. 1990)). By applying this definition the Supreme Court has interpreted § 12.1-20-10 to apply to cohabitating couples regardless of the presence or lack of a sexual relationship. Using that definition, the plain language of the statute and the fact that Robert Kippen stated to Mary Peterson that he would be living in the apartment with his fiancé, it is clear that Robert Kippen and Patricia DePoe would be in violation of N.D.C.C. § 12.1-20-10.

### 3. North Dakota's Prohibition on Housing Discrimination

At the time that Robert Kippen and Patricia DePoe attempted to rent property from the Petersons, North Dakota had a section which prohibited discrimination in housing by an owner of real property or that owner's agent. See N.D.CENT.CODE § 14-02.4-12 (1997)(repealed eff. Oct. 1, 1999). The statute, in effect at that time, states that:

**14-02.4-12. Discriminatory housing practices by owner or agent.** It is a discriminatory practice for an owner of rights to housing or real property or the owner's agent or a person acting under court order, deed or trust, or will to:

1. Refuse to transfer an interest in real property or housing accommodation to a person because of race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance;
2. Discriminate against a person in the terms, conditions, or privileges of the transfer of an interest in real property or housing accommodation because of race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance; or
3. Indicate or publicize that the transfer of an interest in real property or housing accommodation by persons is unwelcome, objectionable, not acceptable, or not solicited because of a particular race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance.

*Id.* Thus, the law prohibits discrimination in a housing context based on race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance. The phrase "status with respect to marriage" is not defined by the North Dakota Century

Code, nor has a meaning been given to that phrase by the North Dakota Supreme Court. However, the phrase, "status with regard to public assistance" is defined in the North Dakota Century Code. See, N.D.CENT.CODE § 14-02.4-03 (18) (1997). "Status with regard to public assistance" is defined as the "condition of being a recipient of federal, state, or local assistance." *Id.* By applying that form of definition to "status with regard to marriage" it would appear that the Legislature intended the phrase to mean being married, single, separated or divorced.

Using the definition of cohabitation discussed above, the Court finds that cohabitation is not a status with regard to marriage. Cohabitation has a specific definition, which is "[t]he fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations." BLACK'S LAW DICTIONARY 254 (7th ed. 1999). The Petersons refused to rent to Robert Kippen and Patricia DePoe, not because of their marital status but rather because the Plaintiffs were planning on living together in violation of North Dakota law. See, Defendants' Answer To Complaint, ¶ 8, *North Dakota Fair Housing Council, Inc., Robert Ray Kippen, and Patricia Yvonne Kippen v. David Peterson and Mary Peterson*, CV-99-02563, Clerk's Docket #5 (Nov. 2, 1999). The North Dakota Supreme Court has not addressed the issue of refusing to rent to unmarried cohabitants. Thus, the Court will look to other sources for support in issuing this order.

#### 4. The North Dakota Attorney General's Opinion and Magistrate Kautzmann's Opinion

In 1990, the North Dakota Attorney General issued an opinion dealing with Family Housing at the University of North Dakota. 1990 N.D.Op.Atty.Gen. 43. In 1990, the North Dakota Supreme Court had not ruled on "the apparent conflict between N.D.C.C. § 14-02.4-12's protection of a person's right to housing notwithstanding the person's marital status, and N.D.C.C. § 12.1-20-10's prohibition against allowing unmarried couples to live as a married couple." *Id.* The same is true

today. No opinions of the North Dakota Supreme Court have dealt with this conflict. The Attorney General, in finding it permissible for UND to only allow married couples to live in some of the campus housing, said that while there was an apparent conflict between the two statutes, under N.D. CENT.CODE § 1-02-07, the particular statute must control the general. *Id.* The Attorney General stated that N.D.C.C. § 12.1-20-10 regulates one particular activity, which is unmarried cohabitation. *Id.* N.D.C.C. § 14-02.4-12 "regulates several bases for discrimination." 1990 N.D. Op. Atty. Gen. 43. Since § 12.1-20-10 is more specific than § 14-02.4-12, the terms of § 12.1-20-10 will control the housing discrimination statute. *Id.*

While the Attorney General's opinion is not binding on this Court, the Court will "give respectful attention to the Attorney General's opinions and follow them when [it] find[s] them persuasive." *Holmgren v. N. D. Workers Comp. Bureau*, 455 N.W.2d 200, 204 (N.D. 1990). This Court agrees with the analysis of the Attorney General's opinion and will follow the opinion.

In March of 1999, the North Dakota Federal District Court decided a case with a very similar question concerning cohabitation and housing discrimination. See, *North Dakota Fair Housing Council, Inc. et. al. v. John Haider*, No. A1-98-077 (D.N.D. March 1999). In that case, the Federal District Court looked at the Attorney General's opinion and found it to be "persuasive and consistent with an independent analysis." *Id.* The magistrate also noted that the Legislature did not repeal the cohabitation statute, § 12.1-20-10, when § 14-02.4-12 was enacted in 1983 and further § 12.1-20-10 has not been repealed following the Attorney General's opinion. *Id.* The court acknowledged that the North Dakota Supreme Court declined to address the morality or public policy issue of N.D.CENT.CODE § 12.1-20-10 in the case of *Cermak v. Cermak*, 569 N.W.2d 280, 285-86 (N.D. 1997). *Id.* This Court finds that while the Federal District Court's decision is not binding on the

State District Court, the opinion's logic and reasoning are sound and comport with this Court's view of the applicable statutes and the limited case law in this area.

5. Case law from Other Jurisdictions

*A. Wisconsin*

The Wisconsin Supreme Court addressed this issue in *County of Dane v. Norman*, 497 N.W.2d 714 (Wis. 1993). A duplex owner refused to rent to groups of unrelated individuals. *Id.* The Supreme Court struck the provision of the statute that attempted to protect cohabitants. *Id.* at 716. The Court ruled that the statute's "requirement ~~that~~ landlords make available their rental units to 'cohabitants' is inconsistent with the public policy of this state which seeks to promote the stability of marriage and family." *Id.* The Court cited to Chapters 765-768 of the Wisconsin statutes which state Wisconsin's policy of encouraging and protecting marriage. *Id.*

Arriving at its conclusion the Supreme Court stated that "Norman's motivation for denying rental to the individuals in this case was triggered by their 'conduct' not their 'marital status.'" *Id.* at 717. The court stated that "[t]heir living together is 'conduct,' not 'status.'" *Id.* The Court ruled that the statutes prohibited discrimination based on "the state or condition of being married, the state or condition of being single, and the like." *Id.* at 717-18. The Court held that living together does not confer the status of marriage and thus is not protected under the discrimination statute. *Id.* at 718.

This approach as cohabitation as being conduct rather than status is logical and appears to be consistent with North Dakota's statutory language. Thus since the conduct is not controlled by the statute, but rather the status is what is regulated by that statute, Robert Kippen and Patricia DePoe are afforded no protection to cohabit, as that is not contemplated by the statute.

### *B. Minnesota*

Minnesota has also addressed the issue of renting to cohabitants. See, *Minnesota v. French*, 460 N.W.2d 2 (Minn.1990). The Minnesota Supreme Court held that a landlord's refusal to rent to tenant because of intended cohabitation did not violate Human Rights Act, and the Freedom of Conscience Provision of the Minnesota Constitution outweighed any interest of a tenant to cohabit with his fiancé. See, *Minnesota v. French*, 460 N.W.2d 2. Minnesota's Human Right's Act, codified at Minn.Stat. § 363.03 (2), is similar to N.D.C.C. § 14-02.4-12.

The Minnesota court looked at the history of the Minnesota Human Rights Act. *Minnesota v. French*, 460 N.W.2d at 5. The Court determined that marital status did not encompass cohabitation, finding that the Minnesota Legislature had a past policy of discouraging fornication and protecting marriage. *Id.* The Minnesota court cited to *Kraft, Inc. v. State, ex. rel. Wilson*, 284 N.W.2d 386, 388 (Minn.1979), in which the court looked to Minnesota's fornication statute as a valid expression of Minnesota public policy. *French*, 460 N.W.2d at 5. The court went on to say that without express legislative intent the term "'marital status' will not be construed in a manner inconsistent with this State's policy against fornication and in favor of the institution of marriage." *Id.* at 6. The court stated that it was obvious that the legislature did not want to extend discrimination protection to unmarried cohabitants in housing cases. *Id.* at 7.

The Minnesota Supreme Court also looked at other incidents in which cohabitants are not allowed protection and given the same status as married couples, such as life and health insurance coverage. *Id.* at 10. The court also examined the rules of intestate succession and the rules of evidence, specifically the rules of marital privilege. *Id.* The Court concluded its opinion by stating, "[b]ecause the State should not be able to force a person to break one statute to obey another,

because there is a less restrictive means to reconcile the statutes in question, and because of the State's paramount need under our constitution to protect religious freedom, we reverse the decision of the court of appeals," which had upheld a grant of summary judgment against the landowner. *Id.* at 11.

By requiring the Petersons to rent to unmarried cohabitants, this Court would require the Petersons to become accessories to a crime. That result is repugnant and illegal and the Court declines to force the Petersons to rent to the Plaintiffs, especially when there is a less restrictive way to reconcile the apparently conflicting statutes.

### *C. Washington*

Washington has also addressed marital status discrimination in a case dealing with the sale of country club membership, which was required to purchase a lot in the country club. *McFadden v. Elma Country Club*, 613 P.2d 146 (Wash. Ct. App. 1980). At the time of the alleged discrimination, Washington had a statute that made cohabitation a crime. *Id.* at 150. The court ruled that since the cohabitation statute remained in effect when the discrimination statute was enacted that the legislature had made a determination that cohabitation was not included in the prohibition against marital status discrimination. *Id.* Furthermore, when the Washington Human Rights Commission determined that it was unlawful for the state run colleges to restrict some housing for only married couples, the legislature responded by granting an exemption to the colleges to allow for married student housing. *Id.* 150-51. The plaintiffs argued unsuccessfully to the court that the legislature had only intended for the exemption to apply to the colleges, but the court ruled that the legislature's action was a statement of "broader public policy against protection of unmarried living arrangements." *Id.* The court concluded that marital status discrimination protection did not include

discrimination against unmarried couples who chose to live together. *Id.* at 152.

#### *IV. Conclusion*

Since North Dakota has failed to repeal the statute outlawing unlawful cohabitation, the North Dakota Legislature has determined that public policy is still against unmarried couples living together. Therefore, it is permissible for the Petersons to refuse to rent to unmarried couples who intend to cohabit. The Defendants' Motion for Summary Judgment is GRANTED. The Plaintiffs' Motion for Partial Summary Judgment is DENIED.

#### **ORDER**

THEREFORE IT IS THE ORDER OF THE COURT that the Plaintiffs' motion for partial summary judgment shall be in all things DENIED and further, that the Defendants' motion for summary judgment is GRANTED. The Defendants will prepare an appropriate Order for Judgment and Judgment of Dismissal.

Dated this 21 day of <sup>May</sup>~~April~~, 2000.

BY THE COURT:



RALPH R. ERICKSON  
Judge of District Court  
East Central Judicial District



Chair Person: Duane Mutch

My name is David Peterson. I live in Fargo, N.D. and am the person that was sued by the ND Housing Council and the Kippens on August 9, 1999, because we do not rent to illegal Co-habiting couples. We presented our case to the ND Supreme Court, November 17, 2000, and have not yet received their ruling.

The Federal Housing Authority does not protect co-habiting couples. The ND law needs House Bill #1448 to clarify the language of it. There is no dictionary definition for marital status, and the plaintiff's attorney failed to prove his case in Judge Ralph Erickson's Court in Fargo, ND. He also failed to prove his case in Magistrate Dwight Kautzman's Court here in Bismarck. In 1990 then attorney Nicholas Spaeth made a similar ruling for UND and NDSU. universities.

I do not rent to co-habiting couples for two reasons:

1. It is against the law.
2. It violates my Religious beliefs.

House Bill #1448 is precise and simplistic. I compliment The Honorable Jim Kasper for the wording of this bill, It does not change any law it does clarify what martial status should mean. We ask that you, as our representatives, pass this bill.

Thank You,

*Mary Peterson*  
*David Peterson*  
David & Mary Peterson

ATTORNEY GENERAL'S OPINION 90-12  
May 7, 1990  
Page 3

Therefore, it is my opinion that it is not an unlawful discriminatory practice under N.D.C.C. § 14-02.4-12 to discriminate against two individuals who chose to cohabit together without being married.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

*Nicholas Spaeth*

Nicholas J. Spaeth  
Attorney General

Assisted by: Gregory B. Gullickson  
Assistant Attorney General

dfm

000017

March 13, 2001

**Arthur W. Bayley**

2608 Pacific Drive #4

Fargo, ND 58103

To: Members of the Senate **Industry, Business and Labor Committee.**

Phone: (701) 239-4985

My name is Arthur abayley@i29.net Bayley and I live in Fargo.  
I speak in favor of **HOUSE BILL NO. 1448.**

As I see it, the need for this bill is the result of a lawsuit filed against David and Mary Peterson of Fargo by the ND Fair Housing Council.

A word about NDFHC. They are; Quote: "a private organization" Unquote. But in 1997 they received a 2 year U. S. HUD grant of \$ 349,879. Their Oct., 2000 newsletter states that they received a second HUD grant...this one for \$ 299,999.00.

The issue before us is DISCRIMINATION. In his famous speech, Martin Luther King, Jr. said he had a dream that the time would come when his children would not be judged by the color of their skin, but rather by the content of their character. In other words, not by their color, but by their conduct. Not by a condition over which they had no control, but by the conduct they chose.

Choosing unmarried cohabitation is conduct. It is a condition made by choice. Not to rent to unmarried cohabitants is also a choice, and is not discriminatory.

It has been argued that "You can't legislate morality." **BUT** you can legislate conduct. I believe government ought to favor the institution of marriage and not contribute to the erosion of a fundamental institution that has formed the foundation of our civilization for centuries. *They say, "Keep government out of my bedroom. But make government force landlords to have co-habiting couples in their bedrooms."*

News Item: WORLD magazine, Feb. 13, 1999: "In a 2-1 decision last month, a panel of the 9th U.S. Circuit Court of Appeals in San Francisco ruled in favor of two Anchorage landlords fighting Alaska's ban on housing discrimination based on marital status. The majority opinion said the Alaska law...interfered with property owners' free exercise of religion as well as their property rights and freedom of speech."

I grew up on N.D. dirt. When I retired I moved back to N.D. I even like blizzards. I urge you to keep N.D. a great place to live.

*Arthur W. Bayley*

Committee Chairperson and Senators.

I am here today to voice my opposition to the House bill 1448, the renting of property to unmarried couples. First I would like to explain my personal situation that has led me to come in front of you to oppose this bill. I am a father of 2 children ages 2 and 9 months. I live with my Fiance (who is also the mother of the children). I work here in Bismarck and my fiance is entering her third year of school in hopes of becoming an elementary school teacher.

There are a wide variety of reasons to oppose this bill, I hopefully will articulate my reasons well enough for you to see through this oppressing piece of legislation. The wording of the bill as I know it states " the property owner has the right to refuse rental to, two unmarried people of the opposite sex." Just the wording here frightens me. What about the people of the same sex who choose to live together? Will they be discriminated against for there sexual orientation, or do basic rights obtained in the Bill of Rights already protect them? These questions I pose to you need to be asked and answered. It seems to me that the U.S. Constitution and Bill of Rights protect everyone, except here in North Dakota. It is very clear that this bill singles out unmarried couples of opposite sexes. Why should a landlord be given the right to choose who may live together? It sounds like selective profiling to me. I understand it is there property, but I also understand that by opening up a rental unit, you also open yourself up to the Equal Housing Oppurtunity laws. These laws are there to protect both the leaser and leasee, not one or the other. This bill clearly shifts that neutrality into the landlord's hands. To give one person or many in this case the right to refuse rental over their marriage status is a throwback to the 1950's, which incedentially is where this state seems to be stuck in

philisophically. How do you as legislatures expect young people to live with this oppressing legislation? Imagine you are a student at NDSU, UND, BSC, MSU, or DSU, now you go looking for apartments with friends and are turned away because there will be opposite sexes in the house that are unmarried. Which forces many to live in overpriced units more willing to allow unmarried people to live there. This bill forces oppresion on every citizen in this state. You are taking away a fundamental right of passage weather you like it or not, more Americans are living together today before they get married. And for numerous reasons, the least of which I am sure is so they can get more benefits from the state. I am unmarried at this point because I could not afford to pay for my girlfriends schooling, by staying independent she is able to receive better loans and more grants to achieve her goal of being a teacher. Which leads me to my point, Not only are we getting short changed in teachers pay and benefits, but to know that we are sacrificing so that she may better the students of this state very soon through teaching is discouraging. Then on top of that you would even think of oppresing where we may live and with whom is plain lunacy. I tell you know that if bills like these are passed along with the lack of teacher support, we are moving out of state to a state willing to work with the younger generation. I hope you all think of this when you vote. That would mean 1 hard working man, 1 teacher, and 2 children that you will have forced from our state due to your actions. This bill is oppressing and frankly downright insane. To think we are all wasting time on this when there are so many truly needed bills that you could be working on. Send a clear message to the people and toss this bill out. It is clear that it benefits few and hurts many. I hope that my point of view has let you see that oppressing is a thing of the past, get with the program and start given us legislation

that gives us something, not legislation that denies us basic freedoms, thank you for your time.

Everett Herrick

TESTIMONY ON HB 1448  
PREPARED BY REPRESENTATIVE JIM KASPER  
TUESDAY, MARCH 13, 2001  
SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE

---

Chairman Mutch and Members of the Senate Industry, Business and Labor Committee. For the record, my name is Representative Jim Kasper from District 46, Southeast Fargo.

House Bill 1448 creates a new section to North Dakota law, relating to the rights of property owners to refuse to rent property to unmarried couples. This bill will clarify the potential conflict in North Dakota law between North Dakota Century Code relating to housing discrimination with respect to marital status and North Dakota's unlawful cohabitation statute, NDCC Section 12.1-20-10.

To provide you with a little background on this matter, I would like to draw your attention to the Constitution of the State of North Dakota, Article I, Section I, of the Declaration of Rights. I quote "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring , possessing and protecting property and reputation".

North Dakota has in Statute NDCC 12.1-20-10 (1993) which prohibits anyone to live "open and notoriously with a person of the opposite sex as a married couple without being married to the other person". In Baker vs. Baker, the North Dakota Supreme Court stated that "cohabitation without being married is ...regulated by North Dakota law". Baker vs. Baker 1997.

House Bill 1448 was introduced at the request of a constituent who was aware of what had happened to Dave and Nancy Peterson of Fargo, when they were exercising their Constitutional rights, and refused to rent to a man and woman who were not married when they desired to rent from the Petersons'. Dave is here today and will be sharing his testimony with the Committee.

North Dakota has a long history and tradition of defending the property rights of our citizens. House Bill 1448 will reaffirm that commitment. It will make it clear that a landlord may refuse to rent to individuals of the opposite gender who are not married to each other.

I urge you to support House Bill 1448. Thank you Chairman Mutch and members of the Committee.