MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2117

2005 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2117

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2117

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-12-05

Tape Number	Side A	Side B	Meter #
1	xxx		80-4510

Committee Clerk Signature Lisa VanBerkom

Minutes: **Chairman Mutch opened the hearing on SB 2117. All Senators were present.**

SB 2117 relates to the Department of Labor discriminatory practices proceedings.

Leann Bertsch, North Dakota Labor Commissioner, introduced the bill. See attached testimony.

Senator Klein : What does prima facie mean?

Leann: Prima facie case is basically the evidentiary burden. A prima facie case is the specific element that the charging party would have to choose to be able to even go forward in a discriminatory case. Basically, once they meet that prima facie case, then the burden of evidence shifts to the other party to come forward and overcome that initial burden.

Senator Klein: What we are attempting to do here is to do what you are currently doing or try to more clearly represent what the Department does, or assumes to be the correct way to do these things?

Leann: The prima facie case would be new. It would just basically clarify at the outset of an administrative hearing, that the burden simply had a full investigation and that the Department had found probable cause to believe that discriminatory practices exist. The burden is then placed on the respondent.

Senator Klein : But in section 2, you are trying to more clearly put into the law, exactly what you believe are your rights or what the Department needs to do to function, so there is no question whether the Attorney General represents the plaintiff or the respondent.

Leann: Yes, that's exactly it. It's always been that a government attorney does not represent individuals, they represent state entities. Although it is on behalf of the individual, the interest may be served through that agency. This just clarifies what is already in place so there is no confusion.

Senator Fairfield : Adding the definition "readily achievable", is the definition of that word in Title 3 of the ADA? Who is going to make the determination of what is "readily achievable"?

Leann: Yes, "readily achievable" is the definition that is used within Title 3 of the ADA. Basically that tracks with the removal of the language that we are proposing to amend regarding the removal of physical barriers.

Senator Fairfield : The definition seems very, very broad. The is just a matter of prospective. Certainly, everyone involved will have a definition of what is readily achievable?

Leann: Actually, we don't have anything right now that even says this. It just says that it is discriminatory to have a facility that is not acceptable to people that may be of a protective class. It is vague, but as I indicated to you, there are guidelines to follow.

Doug Bahr, ND Office of the Attorney General, spoke in support of the bill. The last page of the bill, section 5 and 6. I want to explain that the Attorney General's position regarding his role in litigation on behalf of the state. The Attorney General is the chief law officer of the state. He provides legal advise to state officials. He has specific duties to represent the state in litigation. Any time the Attorney General is appearing in court, it is on behalf of the state, it's officials, or it's employees. The Attorney General does not and cannot represent private individuals. This language was proposed to make this clear. I want to explain three important policy reasons why the Attorney General believes that it can only represent the department. First, the legislature establishes the policy of North Dakota, regarding Human Rights Act, housing information, those type of issues. The legislature has given to the commissioner of labor, the authority to implement that policy. The commission of labor, reports to the governor, who is responsible to the people. It is the Commissioner of Labor, under the authority of the legislature, who should determine how to implement those policies. The second issue is the use of government resources. Both the time and resources of the Department of Labor, and the Attorney General's office are important and limited resources. The cost of litigation is very high. If it is up to the private individual how to use government time and resources, then we are basically giving individuals the opportunity to direct government resources. Third, the ethical concerns. An attorney cannot represent two masters who have inconsistent and sometimes contrary goals. An attorney can only take direction from one individual.

Chairman Mutch : Well, on Section 4, subsection 4, the new language there is a probable cause determination of a violation of this chapter. Is that necessary?

Doug: The Attorney General does not really have a position regarding that section.

Senator Fairfield: Can you explain the definition of "readily achievable". The ADA definition is not the same as the Federal definition. The commissioner said that we don't have to adhere to the Federal Standards of that definition?

Doug: I don't know. Specifically, I was not involved in the drafting of that section. What we put in the state definition and what we put in this, is not controlled by Federal Law.

Chairman Mutch entertained opposing testimony.

Cheryl Bergian, North Dakota Human Rights Coalition, spoke in support of the bill, with the attached amendments. See attached testimony with amendments.

Senator Fairfield : Can you walk me through section 4 of what this change would mean?

Cheryl: What the law says and what the Labor Department have been doing is two different things.

Senator Fairfield : Your position is that they should NOT amend the law to meet with their process, they should in fact follow the law.

Cheryl: Yes, that is correct.

Senator Fairfield : Section 3, that eliminates punitive and compensatory damages, can the aggrieved person still appeal that through the court, or go through a different system?

Cheryl: The person always has the option of going to district court, hiring an attorney and filing a discrimination complaint in district court.

Senator Klein: After the amendments and removals, is there anything left?

Cheryl: Page 1 and 6 are helpful legislation. It was a question of whether to oppose it or not.

Senator Klein : There just doesn't seem to be much left.

Cheryl: The House committee that was hearing corollary amendments to the Housing Discrimination Act, appointed a sub committee, and I don't know if the House and Senate committees confer with each other, but since they are similar changes to the two.

Chairman Mutch : What's the bill number on the House Bill?

Cheryl: HB 1158. Chairman Dekrey.

Senator Espegard : When you say, "changes to meet the ADA", I understand that it's really not the law, it's suggested guidelines?

Cheryl: There are guidelines provided in the law. They do provide criteria for determining "readily achievable".

Chairman Mutch : What category are most of the complaints made from?

Cheryl: If I could defer to the Labor Commissioner for those questions?

Mark Hill, Vice President of the North Dakota Association of the Deaf, submitted his written testimony in support of the bill, with the amendments proposed by the North Dakota Human Rights Coalition. See attached testimony.

Senator Krebsbach: For point of information, I wonder if we could request a copy of the number of complaints that we have had in the past two years and the nature of the complaints?

Leann Bertsch: I have those here. The first eight-teen months of this biennium we have resolved two hundred and forty three employment discrimination complaints, seventy housing complaints, and thirty-four complaints addressing discrimination in public accommodations and public service. We obtained over $211, 409 in monitory relief for claimants.

Chairman Mutch : Does that include wages?

Leann: No, that doesn't. Wages would probably be another two hundred and fifty-some thousand dollars that we have collected.

Senator Klein : How many would relate to that issue of the barriers of "readily achievable" in section 2, and number two. How does it address those particular numbers?

Leann: The thirty four cases that we have closed in this current biennium, address public service, public accommodation. The majority of those are based on accessibility to individuals with disabilities. We believe that going this much further in adding the additional language would assist us in providing more guidance, not just to the department in making those determinations, but to the people who need to make their facility accessible in looking at what modifications to those facilities.

Senator Fairfield : If you took it right out of Title 3 of the ADA, why didn't you take the entire definition?

Leann: That was a consideration, but we revised that we don't want to install the federal law in it's entirety because at this point, by doing that, every time there is a change, we would be constantly having to update the law and change it and we wouldn't be in compliance with the federal law if we adopted it whole heartedly. It allows flexibility for North Dakotans and it still requires them to remove the barriers.

After the hearing was closed, **Nate Aalgaard, Executive Director of Freedom Resource Center for Independent Living,** submitted written testimony.

No further testimony. Hearing was closed. No Action was taken.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2117

Senate Industry, Business and Labor Committee

❑ Conference Committee

Hearing Date 2-08-05

Tape Number	Side A	Side B	Meter #
tape failed			
Committee Clerk Signature	Lisa VanBerkom		

Minutes: **Chairman Mutch allowed committee discussion on SB 2117. All Senators were present.**

Senator Klein moved a do pass.

Senator Espegard seconded.

Roll Call Vote: 7 yes. 0 no. 0 absent.

Carrier: Chairman Mutch

FISCAL NOTE

Requested by Legislative Council
03/09/2005

Amendment to: SB 2117

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$0	$0	$0
Appropriations	$0	$0	$0	$0	$0	$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Senate Bill No. 2117 with House Amendments will not require any additional funding or appropriation.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Leann K. Bertsch	**Agency:**	Department of Labor
Phone Number:	701 328-2660	**Date Prepared:**	03/09/2005

FISCAL NOTE

Requested by Legislative Council
12/23/2004

Bill/Resolution No.: SB 2117

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$0	$0	$0
Appropriations	$0	$0	$0	$0	$0	$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Senate Bill No. 2117 will not require any additional funding or appropriation.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Leann K. Bertsch	**Agency:**	Department of Labor
Phone Number:	328-2660	**Date Prepared:**	12/23/2004

Date: 2-8-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2117

Senate **Industry, Business, and Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Klein Seconded By Espegard

Senators	Yes	No	Senators	Yes	No
Chairman Mutch	X		**Senator Fairfield**	X	
Senator Klein	X		**Senator Heitkamp**	X	
Senator Krebsbach	X				
Senator Espegard	X				
Senator Nething	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Mutch

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

REPORT OF STANDING COMMITTEE (410)
February 8, 2005 3:33 p.m.

Module No: SR-25-2184
Carrier: Mutch
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2117: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2117 was placed on the Eleventh order on the calendar.

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2117

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2117

House Industry, Business and Labor Committee

❑ Conference Committee

Hearing Date 3-7-05

Tape Number	Side A	Side B	Meter #
1	x		0-end
1		x	0-12.9
2		x	17.0-28.0
Committee Clerk Signature			

Minutes:

Chairman Keiser: Opened the hearing on SB 2117.

Leann Bertsch, Commissioner of Labor, ND: Appeared in support of bill and provided a written statement (SEE ATTACHED TESTIMONY).

Representative Nottestad: On the third page you talk about the 2 parties sitting down if they have a complaint and it gets resolved and it doesn't go to administrative hearings, which to Rep. kstrom: is the best way to resolve anything , my question is when it is done that way and another complaint comes up in a different area of the state, do you sit down with them and say this is the way it was resolved in the past can and does it generate other complaints that have to put down and worked out again or can you use the original to the benefit both your office and the parties involved.

Leann Bertsch: Say some one files a complaint and we process the complaint, but immediately when someone files a complaint we send out notifications that the party can conciliate or engage

in mediation, and if they choose to conciliate and come to a resolution, then we are not going to go forward and do a full investigation.

Doug Barr, Director of Civil Litigation, Attorney General Office, ND: Appeared in support of SB 2117, and I want to discuss the last page, the attorney general is the chief legal advisor in the state he has specific duties, the attorney general does not and can not represent private individuals. If the attorney general represents a private individual, the attorney general is no longer responding to the legislature and the individual with the power to interpret and enforce those laws. The concern is that a private individual should not direct the policies of the state by being represented by the attorney general in litigation. The second important part of policy, is ethical concerns, with the office of attorney general, we all know you cannot serve 2 masters. We hope in most cases the charging parties and the department interest coincide. We only represent the department, the department is our client and directs us how to proceed. This provides additional protection.

The charging party is the one that is being discriminated against and if the department say that you are right your employer has to at least show up for the hearing and provide some evidence that the department was not accurate.

David Boyck, Protection and Advocacy Project: Appeared in support of bill, there are a couple of things that could be clarified, the first is on page one, line 11 and 12, as I understand it isn't really any person, but a member of the protected class, and if you want to make that distinction, we should put that in, and then towards the end of that line it uses the word "injured" and lawyers can argue forever about what is injured, but the bottom of the page in the definition of discriminatory practice on line 24, the term adversely affects is used and I think that also to be

used here so there is consistency used with in the act, so of instead of injured it would say adversely affected. On page 4, lines 1 through 3, is the definition of "readily achievable", and I agree with the commissioner that as this is written, this means the same as it does in title 3. The commissioner has recommended a change on page 4, lines 30-page 5 line 3, about making sure one hurdle is completed before attempted the second hurdle and I support the amendment there. The amendment on line 9, I think that is a real serious issue, because if you have someone who is discriminating, and continues, there really is no reason not to continue that until they get a order, if they know they are going to have to pay something, for the actual disadvantage to the individual who is the object of discrimination it makes more sense, or someone who's otherwise intent on discriminating to change that practice. I think there are other cases, like WSI, when there is litigation at the administrative level, or the department level, or agency level, damages can be awarded, and these go against the account of the employer, so there is an effect, but it does exact monetary consequence for the employer.

Representative Kasper: On page 4, line 30, What is a communication barrier?

David Boyck: It would be someone who is hearing impaired. Like a fire alarm, that flashes a light instead of depending on someone to hear it. There are in theaters, assisted listening devices for people that have hearing impairments in concerts and so on.

Opposition

Cheryl Bergian, Director of the North Dakota Human Rights Coalition: Appeared in opposition and provided a written statement **(SEE ATTACHED TESTIMONY).**

Neutral Position

Nate Aalgaard, Executive Director, Human Resource Center for Independent Living, Fargo, Jamestown: We are a disability advocate organization, we are very interested in anything that promotes integration including people with disabilities, giving equal opportunity to be a part of society. I want to compliment the labor commissioner, we talked about her testimony on the amendment, and I support what she is recommending.

Austin Gillette, Three Affiliated Tribes: Appeared in opposition, but after listening to your discussion, we will support this bill with consideration for the amendments that are pending.

Chairman Keiser: There was some concern that the commissioners amendments may not be completely appropriate in addressing the concerns expressed by the opposition.

Representative Ekstrom: There for we would add an additional line to our amendment. On page 5, delete section 3 line 4-18 not delete it just not include it in the bill, or leave it as is.

Representative Johnson: So what you are saying is that you already have it in statute?

Representative Ekstrom: I move to **ADOPT** amendments.

Representative Thorpe: I **SECOND** the adoption of amendments.

Motion Failed. VOTE: 4-YES 9-NO 2-Absent (Kasper, Dosch)

Representative Ekstrom: I move to retain amendment as presented.

Representative Johnson: I **SECOND** the motion on **SB 2117.**

Motion carried voice vote.

Representative Ekstrom: I move **a DO PASS AS AMENDED on SB 2117.**

Representative Ekstrom will carry the bill on the floor.

Date: 3-7-05

Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2117

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Adopt Amendments

Motion Made By Rep. Ekstrom Seconded By Rep. Thorpe

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman		X	Rep. B. Amerman	X	
N. Johnson-Vice Chairman		X	Rep. T. Boe	X	
Rep. D. Clark		X	Rep. M. Ekstrom	X	
Rep. D. Dietrich		X	Rep. E. Thorpe	X	
Rep. M. Dosch	A	A			
Rep. G. Froseth		X			
Rep. J. Kasper	A	A			
Rep. D. Nottestad		X			
Rep. D. Ruby		X			
Rep. D. Vigesaa		X			

Failed

Total (Yes) 4 No 9

Absent 2 (Kasper & Dosch)

Floor Assignment Rep. Ekstrom

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

Date: 3-7-05

Roll Call Vote #: 2

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2117

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Retain Amendment before us w/o taking out Sect. 3

Motion Made By Rep. Ekstrom Seconded By Rep. Johnson voice vote

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman			Rep. B. Amerman		
N. Johnson-Vice Chairman			Rep. T. Boe		
Rep. D. Clark			Rep. M. Ekstrom		
Rep. D. Dietrich			Rep. E. Thorpe		X
Rep. M. Dosch					
Rep. G. Froseth					
Rep. J. Kasper					
Rep. D. Nottestad					
Rep. D. Ruby					
Rep. D. Vigesaa					

Total (Yes) 11 No 1

Absent 2 (Dosh & Kasper)

Floor Assignment _____

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

Date: 3-7-05

Roll Call Vote #: 3

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2117

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 58110.0101 .0200

Action Taken Do Pass As Amended

Motion Made By Rep. Ekstrom Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman	X		Rep. B. Amerman		X
N. Johnson-Vice Chairman	X		Rep. T. Boe	X	
Rep. D. Clark	X		Rep. M. Ekstrom	X	
Rep. D. Dietrich	X		Rep. E. Thorpe		X
Rep. M. Dosch	A	A			
Rep. G. Froseth	X				
Rep. J. Kasper	A	A			
Rep. D. Nottestad	X				
Rep. D. Ruby		X			
Rep. D. Vigesaa	X				

Total (Yes) 9 No 3

Absent (2) Kasper & Dosch

Floor Assignment Rep. Ekstrom

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

REPORT OF STANDING COMMITTEE

SB 2117: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). SB 2117 was placed on the Sixth order on the calendar.

Page 1, line 1, after the second comma insert "14-02.4-19,"

Page 5, line 1, replace ", or" with ". If a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation"

Page 5, after line 3, insert:

"**SECTION 3. AMENDMENT.** Section 14-02.4-19 of the North Dakota Century Code is amended and reenacted as follows:

14-02.4-19. Actions - Limitations.

1. Any person claiming to be aggrieved by a discriminatory practice with regard to public services or public accommodations in violation of this chapter may file a complaint of discriminatory practices with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed or in the district in which the person would have obtained public accommodations or services were it not for the alleged discriminatory act within one hundred eighty days of the alleged act of wrongdoing.

2. Any person claiming to be aggrieved by any discriminatory practice other than public services or public accommodations in violation of this chapter may file a complaint of discriminatory practice with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed, in the district in which the records relevant to the practice are maintained and administered, or in the district in which the person would have worked or obtained credit were it not for the alleged discriminatory act within three hundred days of the alleged act of wrongdoing.

3. If a complaint of a discriminatory practice is first filed with the department, the period of limitation for bringing an action in the district court is ninety days from the date the department dismisses the complaint or issues a written ~~notice to the complainant that administrative action on the complaint has concluded~~ probable cause determination.

4. If a person elects to bring an action in the district court under this chapter, any pending administrative action based upon the same discriminatory acts must be dismissed immediately."

Page 5, line 30, after "occurred" insert "with regard to one or more of the claims of the aggrieved person's complaint" and after "dismiss" insert "all or a portion of"

Page 6, line 3, after "shall" insert "issue a probable cause determination and"

Renumber accordingly

2005 TESTIMONY

SB 2117

FREEDOM Resource Center For Independent Living, Inc.

Testimony regarding SB 2117

January 8, 2005

Chairman Mutch and members of the committee:

My name is Nate Aalgaard. I am the Executive Director of Freedom Resource Center for Independent Living. We have offices in Fargo and Jamestown and serve the southeast quarter of the state. As a disability advocacy organization, we are vitally interested in any issue that would affect the ability of people with disabilities to be independent, productive, and contribute to the life of their community. That is why I would like to comment on this bill.

Part 2 of section 2 of SB 2117 refers to readily achievable barrier removal. The language that is recommended by the Labor Department allows business owners to either remove readily achievable barriers or make goods and services available through alternative methods. I believe that this word "or" makes the removal of barriers optional, even if it could be done very easily and without much expense. I would like to see the language changed to make the removal of such barriers the first priority for places of public accommodation. I would also like to see the language require that if such barrier removal is not possible, because of financial or architectural constraints, the next best option would be to provide goods or services by alternative methods.

The good example of the situation would be a restaurant that has it one-step entrance. If the proposed language in this bill were enacted, this restaurant could provide curbside service rather than putting up a small ramp so that someone with a mobility impairment could enter the restaurant and eat in the same location as other customers. By enacting this language, even very simple things like installing parking spaces for people with mobility impairments would become optional, and in fact may conflict with other state laws regarding parking.

My belief is that the North Dakota Human Rights Act and similar legislation has been enacted in an effort to ensure equal treatment for all of our citizens and visitors in places of public accommodation. I think that it is certainly appropriate to expect that businesses engaged in providing services and goods to the public should be able to make some modifications to their facilities in order to provide equal access. Most businesses would be eligible for federal tax credits for doing so.

I have additional concerns about two other parts of this proposed bill. In section 3, the awarding of compensatory and punitive damages is prohibited. I believe that in many situations the awarding of damages would be appropriate and necessary. In section 4, the department is allowed to negotiate complaints without finding a probable cause. I believe that probable cause should be made and that the claimant should have the option of going to negotiation or continuing with private action or an administrative hearing.

2701 9th Ave. S • Fargo, ND 58103
Phone: V/TTY 701-478-0459 • 1-800-450-0459 • *Fax:* 701-478-0510
www.freedomrc.org

North Dakota Association of the Deaf

Testimony
Senate Bill 2117
Senate Industry, Business and Labor Committee
January 12, 2005

Chairman Mutch and members of the Senate Industry, Business and Labor Committee, the North Dakota Association of the Deaf thank you for the opportunity to give us to give a thought of the Senate Bill 2117. I am Mark Hill, the lobbyist and Vice-President for the North Dakota Association of the Deaf. This organization believes in the equal rights for all North Dakotans.

We, the North Dakota Association of the Deaf, support the objections of the North Dakota Human Rights Coalition to the changes in the North Dakota Human Rights Act.. Please amend the bill to delete these changes. They are not necessary and would decrease the effectiveness of enforcement of the North Dakota Human Rights Act.

From my knowledge as an advocate for the deaf and hard of hearing, this legislation, as written now, it does show a conflict with the federal law, the Americans with Disabilities Act (ADA) and becomes too loosely than the ADA related to the "ready achievable" issue. The Act (ADA) only permits an alternative if the removal of a barrier is not "readily achievable". Therefore, It needs to amend to the legislation to be similar to the Act (ADA). I have a copy of the ADA information about public accommodation to be passed out.

We request for a do-pass recommendation on Senate Bill 2117 with amendments proposed by the North Dakota Human Rights Coalition. I appreciate this opportunity to testify to the committee on the behalf of the North Dakota Association of the Deaf

Mark Hill
Lobbyist #52
Vice- President
North Dakota Association of the Deaf
1617 2nd Street North
Fargo ND 58102
TTY 701-293-8554

Under the Title III of the Americans with Disabilities Act (ADA)

Public accommodations must --
Provide goods and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity.

Eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a place of public accommodation.

Make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration would result in the nature of the goods and services provided.

Furnish auxiliary aids when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.

Remove architectural and structural communication barriers in existing facilities where readily achievable.

Provide readily achievable alternative measures when removal of barriers is not readily achievable.

Provide equivalent transportation services and purchase accessible vehicles in certain circumstances.

Maintain accessible features of facilities and equipment.

Design and construct new facilities and, when undertaking alterations, alter existing facilities in accordance with the Americans with Disabilities Act Accessibility Guidelines issued by the Architectural and Transportation Barriers Compliance Board and incorporated in the final Department of Justice title III regulation.
A public accommodation is not required to provide personal devices such as wheelchairs; individually prescribed devices (e.g., prescription eyeglasses or hearing aids); or services of a personal nature including assistance in eating, toileting, or dressing.

A public accommodation may not discriminate against an individual or entity because of the known disability of a person with whom the individual or entity is known to associate.

Commercial facilities are only subject to the requirement that new construction and alterations conform to the ADA Accessibility Guidelines. The other requirements applicable to public accommodations listed above do not apply to commercial facilities.

Private entities offering certain examinations or courses (i.e., those related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes) must offer them in an accessible place and manner or offer alternative accessible arrangements.

North Dakota Human Rights Coalition
P.O. Box 1961, Fargo, ND 58107-1961 (701) 239-9323 Fax (701) 478-4452 www.ndhrc.org

Testimony
Senate Bill 2117
Senate Industry, Business and Labor Committee
January 12, 2005

Chairman Mutch and members of the Committee, thank you for the opportunity to present testimony in favor of Senate Bill 2117. I am Cheryl Bergian, Director of the North Dakota Human Rights Coalition. The Coalition includes a broad-based, statewide membership of individuals and organizations interested in the furtherance of human rights in North Dakota; the Coalition's mission is to effect change so that all people in North Dakota enjoy full human rights.

We support the work of the Division of Human Rights in the North Dakota Department of Labor for the enforcement of the North Dakota Human Rights Act and North Dakota Housing Discrimination Act. However, we have some objections to changes the Labor Commissioner is proposing to the North Dakota Human Rights Act.

The Labor Commissioner is adding a definition of "readily achievable", amending 14-02.4-02 to add section 16, page 4, lines 1-3. We would like to note that the American with Disabilities Act includes factors to be considered, and that the Labor Commissioner and Committee may wish to include those factors in amending the North Dakota Human Rights Act.

The Labor Commission is amending 14-02.4-14, page 4, lines 30-31, and page 5, lines 1-3 to add the provision that architectural or communication barriers must be removed if readily achievable **or** the entity must provide accommodations through alternative methods, if those methods are readily achievable. We are concerned about the apparent option of the entity to choose the avenue for the resolution of barriers. That does not mirror the Americans with Disabilities Act, which provides for alternative methods for the provision of services only if the removal of barriers is not readily achievable. The NDHRC asks that SB 2117 be amended to follow the provisions of the ADA in providing that alternative methods only be available if barrier removal is not readily achievable.

The Labor Commissioner is also asking that the North Dakota Human Rights Act, 14-02.4-20, page 5, lines 11-12, be amended to state that compensatory or punitive damages are not available under the chapter, through the department or through an administrative hearing. The NDHRC understands that this is because of an informal opinion of the Attorney General's office, by e-mail during the 2003 Legislative Session, that the award of compensatory or punitive damages under the Act by the department or in an administrative hearing may be unconstitutional. The Attorney General's Office has not issued a formal opinion on this question, nor was the Attorney General's Office able to provide the basis for this informal, undocumented opinion. The NDHRC asks that the Committee amend and delete the amendment to 14-02.4-20, page 5, lines 11-12 because of the uncertainty of the need for this amendment. According to a conversation with the Attorney General's Office, the possibility of unconstitutionality of the provision is based on decisions in some other states by courts regarding those states' constitutions. The North Dakota Supreme Court has not issued an decision regarding this

question, nor has it had an opportunity to address the question under North Dakota's Constitution. It is speculation at this point how the North Dakota Supreme Court would respond on this question, and to amend the North Dakota Human Rights Act at this time is premature and unnecessary.

The Labor Commissioner is asking that the North Dakota Human Rights Act be amended to delete the requirement that the Labor Commissioner make a probable cause finding in all complaints filed with the Department, amending 14-02.4-23(2), page 5, lines 26-27. The Department wishes to continue its current practice of pursing conciliation with the parties before providing to the complainant and respondent the opinion of the Department on whether there is probable cause to believe that discrimination has occurred. This requirement has been in place since the inception of the North Dakota Human Rights Act, and the Labor Department should give both the complainant and respondent the information they deserve on whether the Department can determine whether there is probable cause to believe that discrimination has occurred. This would facilitate the settlement of the action in those cases in which probable cause is found. The cases in which probable cause is not found are already dismissed by the Department and no further action is taken.

Regarding amendments proposed 14-02.4-23(5) and (6), page 6, lines 7-16, an issue has arisen regarding enforcement of the North Dakota Human Rights Act and the interplay among the North Dakota Department of Labor, the North Dakota Attorney General's Office, and the person while has filed a complaint under the North Dakota Human Rights Act. The Attorney General's Office has taken the position that they do not represent the complainant in enforcement actions under the Act, and that they only represent the State of North Dakota (the Labor Department). This has resulted in the Attorney General's Office's refusal to communicate with the complainant after a probable cause determination has been issued by the Labor Department under the North Dakota Housing Discrimination Act, and to only communicate with the Labor Department. The ultimate result is that the Attorney General's Office and the Labor Department have actually settled a complaint under the North Dakota Housing Discrimination Act without informing the complainant that the settlement was in the offing, and without conferring with the complainant regarding that settlement.

This is not how the federal government acts when the U.S. Department of Justice and the U.S. Department of Housing and Urban Development enforce the federal Fair Housing Act; it is this relationship that the Labor Commissioner can model for enforcement of the North Dakota Human Rights Act. The DOJ files complaints in the name of the complainant and HUD, and confers with the complainant and HU regarding the progress of the complaint and any settlement prospects. The DOJ does acknowledge that it represents only HUD as it proceeds, but it sees its role as enforcing the Fair Housing Act for both the complainant and HUD.

The NDHRC asks that the amendments proposed by the Labor Commissioner in SB 2117 regarding 14-02.4-23(5) and (6), page 6, lines 7-16 be amended and deleted by this committee.

We ask for a do pass recommendation, with the above amendments, on Senate Bill 2117. I appreciate this opportunity to testify on behalf of the North Dakota Human Rights Coalition.

John Hoeven
Governor

Leann K. Bertsch
Commissioner

NORTH DAKOTA
Department of
LABOR

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

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Testimony on SB 2117
Prepared for the
Senate Industry, Business, and Labor Committee

March 12, 2005

Chairman Mutch and members of the Industry, Business, and Labor Committee, good morning. For the record, I am Leann Bertsch, Commissioner of Labor.

Chapter 14-02.4 of the North Dakota Century Code contains the North Dakota Human Rights Act. This bill proposed amendments to several sections of the statute.

The amendments proposed in section 1 of the bill provide for definitions of an "aggrieved person" and "readily achievable". The term "aggrieved person" is used throughout the Human Rights Act and providing a definition adds clarification to the statute.

The second definition proposed in section 1 of the bill provides for a definition of "readily achievable". This definition relates to Section 14-02.4-14 of the North Dakota Century Code, the provision of the Human Rights Act which addresses discriminatory practices in places of public accommodation. This definition explains when a person engaged in the provision of public accommodations may have to make changes to their facilities or services in order to provide access all individuals.

The change proposed in section 2 of the bill also relates to the provision of the Human Rights Act which addresses discriminatory practices in places of public accommodation. The added language specifies when an architectural or communication barrier needs to be removed in a place of public accommodation in order to allow equal access to such facilities or services to all. The proposed change adds additional enforcement teeth with which to address discrimination in public accommodations. The federal law which addresses discriminatory practices in public accommodations is Title III of the Americans With Disabilities Act of 1990 (ADA). The North Dakota Human Rights Act is patterned after Title III of the ADA with regard to explaining that it is a discriminatory practice to deny access to

public services or facilities based on a person's membership in a protected class. However, the Human Rights Act stops there and fails to provide for any obligation on the part of the provider of public accommodations to make reasonable modifications to its policies, practices, or procedures to avoid discrimination. The proposed language tracks the federal law in addressing when barriers need to be removed in order to avoid discrimination.

The change proposed in section 3 of the bill clarifies what relief is available or not available in an administrative hearing under the Human Rights Act. Although the issue of whether compensatory or punitive damages are available in an administrative hearing has not been litigated in North Dakota courts, courts in other states have ruled that such damages in administrative hearings are not available.

The first change proposed in section 4 of the bill at number 2 provides that the Department is not required to make a determination on every charge of discrimination. The Department has a statutory obligation to emphasize conciliation to resolve complaints pursuant to N.D.C.C. § 14-02.4-22. The Department can assist the charging party and respondent in resolving the dispute even before a determination is made. If the dispute is resolved through settlement, proceeding forward with a determination and hearing accomplishes nothing. Rather, to do so would deprive the charging party the autonomy to resolve the matter. Such a process would also discourage prompt, efficient, and fair resolution of charges of discrimination. Forcing a determination, rather than permitting settlement, would delay correction of the alleged discriminatory conduct. It does not serve the interest of the charging party or the public to delay correction of the alleged discrimination. Furthermore, when the charging party agrees to settle, it is not in the charging party's interest for the Department to issue a determination, the possibility existing that the determination may be adverse to the charging party. Prohibiting settlements until after a determination is issued may also break down settlements, resulting in the matter going to hearing, which again delays resolution of the issue and subjects the charging party to the risk of an adverse administrative decision. This issue was addressed by a district court in a lawsuit against the Department and the court agreed with the Department that a determination of whether probable cause exists need not be made in every case for the exact reasons I just explained.

The second change proposed in section 4 of the bill at number 4 provides that a probable cause determination by the Department is prima facie evidence of a violation of the Human Rights Act. This change would in effect shift the burden to the Respondent at the outset of the administrative hearing process.

The third change proposed in section 4 of the bill at number 5 and 6 bill relates to the representation of an aggrieved person in an administrative hearing. The added language clarifies that the attorney general represents the Department, not the aggrieved person. Although the attorney general's representation of the Department is to advocate for the Department's finding of probable cause, the representation is also for the purpose of seeking relief for the benefit of the aggrieved person. The added language makes clear that the aggrieved person may participate in the hearing on his or her own behalf and be represented by private counsel. This amendment does not substantively change the law, but provides a clearer explanation of the representation of the attorney general and the rights of parties to participate in administrative proceedings.

Thank you for your time. I would be happy to answer any questions you have.

Maragos, Andrew G. 9:00

From: Mark Hill [mhill@c-s-d.org]
Sent: Monday, January 10, 2005 11:23 AM
To: Maragos, Andrew G.
Subject: Interpreter request - Wednesday morning for SB 2117

Andy ;

I know you are pretty busy. But I need to request an interpreter for the Senate Industry, Business and Labor Committee hearing at 9 am on SB 2117 Can you relay the message to Senate clerk? I know it is a short notice especially hearings

The CSD interpreter services phone number is 800 467 5341 –

Mark Hill
Community Specialist
CSD of North Dakota
800 Holiday Drive #260
Moorhead, MN 56560
(218)291-1120 TTY

711 218-291-1137

no

Mary Heinz no left 255-6592 message

CIC - Fergus Falls no 877-283-5331 Lori

ASI - cell: 701-361-0824 David Kathy left message Obregon

-----Original Message-----
From: Maragos, Andrew G. [mailto:amaragos@state.nd.us]
Sent: Thursday, January 06, 2005 10:29 AM
To: Mark Hill
Subject: RE: Flashing devices in Apts and other housing legislation request

Hi Mark,

I have been reviewing your proposed legislation and am quite worried that it will have a great deal of trouble. First who will pay for these upgrades,
and what will be the penalty for not adhering to the requirements. I will wait for your response. Thanks

Sincerely,

Andy Maragos

From: Mark Hill [mailto:mhill@c-s-d.org]
Sent: Tuesday, January 04, 2005 12:32 PM
To: amaragos@state.nd.us
Subject: Flashing devices in Apts and other housing legislation request

Hi Andy
I was not sure if you received an email with a bill attachment yesterday. Also, Just faxed to legislative council this am under your name about the reintroduction of Deaf child's bill of Rights legislation.

Thanks Andy

Mark Hill
ND Association of the Deaf

SB 2117
Re: Request for an interpreter
Hearing date: 1-12-05 9:00am
Senate Industry, Business, and Labor Committee
Roosevelt Room
Chairman D. Mutch

Monday, January 10, 2005- Received copy of e-mail from Rep. Maragos regarding a constituent request for an interpreter.

Monday January 10, 2005 (1:00 p.m.)
Contacted the following agencies to request services:
CSD- 1-800-467-5341- I spoke with Kathy Obregon who said there was no one available and stated that the client is "difficult" to work with and that it would be difficult to find someone, but gave me numbers for three other agencies or private interpreters.
CIC- of Fergus Falls, MN-1-877-283-5331- I spoke with Lorie who explained that there was no one available.
ASI- 701-361-0824- Left a message for David (private interpreter) but did not receive a call back.
Tuesday, January 11, 2005
Mary Heinz-Local interpreter- 255-6592. Mary asked who the client was and when I told her she declined and stated that he was "difficult" to work with.

At 1:00pm I sent an e-mail to Mark. See attached.
At 1: 30 p.m. I contacted a TTY relay service (711)218-291-1137 who communicated a conversation via typing between Mark and myself. He stated that he realized it was short notice, but that he would be here tomorrow regardless with written testimony and that the senators could write any questions they have for him on paper. He was disappointed, but understood that under the circumstances, there was not enough notice to schedule an interpreter.

S IBL NDLA

01/11/2005 01:27 PM

To: mhill@c-s-d.org
cc:
Subject: SB 2117

Lisa Van Berkom
IBL Committee Clerk
Phone:328-3523

Mark:

I have requested an interpreter for you with four different entities and I am unable to find someone with the availability to be here tomorrow.
You can submit a written testimony if you wish and we are happy to work with you in any way we can. The short notice made it impossible for anyone to get to Bismarck. I will wait to hear back from you.

Sincerely,

Lisa Van Berkom

FREEDOM
Resource Center
For Independent Living, Inc.

Testimony regarding SB 2117

March 7, 2005

Chairman Keiser and members of the committee:

My name is Nate Aalgaard. I am the Executive Director of Freedom Resource Center for Independent Living. We have offices in Fargo and Jamestown and serve the southeast quarter of the state. As a disability advocacy organization, we are vitally interested in any issue that would affect the ability of people with disabilities to be independent, productive, and contribute to the life of their community. That is why I would like to comment on this bill.

Part 2 of section 2 of SB 2117 refers to readily achievable barrier removal. The language as it stands allows the business to either remove readily achievable barriers or make goods and services available through alternative methods. I believe that this word "or" makes the removal of barriers optional, even if it could be done very easily and without much expense. I would like to see the language changed to that of the Americans with Disabilities Act, which makes the removal of such barriers the first priority for places of public accommodation. It says:

A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable. Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable.

An example of the situation would be a restaurant that has it one-step entrance. If the current language in this bill were enacted, this restaurant could provide curbside service rather than putting up a small ramp so that someone with a mobility impairment could enter the restaurant and eat in the same location as other customers. A retail store could ask people to shop on-line, or phone in to order items, even though they would not be able to see everything that is available. By enacting this current language, even very simple things like installing parking spaces for people with mobility impairments would become optional, and in fact may conflict with other state laws regarding parking.

My belief is that the North Dakota Human Rights Act and similar legislation has been enacted in an effort to ensure equal treatment for all of our citizens and visitors in places of public accommodation. As people live longer, healthier lives with chronic conditions, we will all know more and more people with mobility impairments. We all would want our friends or family to be able to go with us to eat, shop, or enjoy entertainment. I think that it is certainly appropriate to expect that businesses engaged in providing services and goods to the public should be able to make some reasonable modifications to their facilities in order to provide equal access. Many businesses would be eligible for federal tax credits for doing so.

2701 9th Ave. S • Fargo, ND 58103
Phone: V/TTY 701-478-0459 • 1-800-450-0459 • *Fax:* 701-478-0510
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John Hoeven
Governor

Leann K. Bertsch
Commissioner

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discovernd.com/humanrights

Testimony on SB 2117
Prepared for the
House Industry, Business, and Labor Committee

March 7, 2005

Chairman Keiser and members of the Industry, Business, and Labor Committee, good morning. For the record, I am Leann Bertsch, Commissioner of Labor.

Chapter 14-02.4 of the North Dakota Century Code contains the North Dakota Human Rights Act. This bill proposes amendments to several sections of the statute. I am also submitting amendments to Senate Bill 2117. I apologize for having to amend our own agency bill. However, Human Rights Act is still a fairly new act and as the Department of Labor has moved forward in carrying out the provisions of this act, it has become apparent that there are provisions which need to be clarified or expanded.

Section 1 of the bill amends the definition section of Chapter 14-02.4 to include definitions of an "aggrieved person" and "readily achievable". The term "aggrieved person" is used throughout the Human Rights Act and providing a definition adds clarification to the statute.

The second definition proposed in section 1 of the bill provides for a definition of "readily achievable". This definition relates to Section 14-02.4-14 of the North Dakota Century Code, the provision of the Human Rights Act which addresses discriminatory practices in places of public accommodation. This definition explains when a person engaged in the provision of public accommodations may have to make changes to their facilities or services in order to provide access to all individuals.

Section 2 of the bill also relates to the provision of the Human Rights Act which addresses discriminatory practices in places of public accommodation. The added language specifies when an architectural or communication barrier needs to be removed in a place of public accommodation in order to allow equal access to such facilities or services to all. The proposed change adds additional enforcement teeth with which to address discrimination in

public accommodations. The federal law which addresses discriminatory practices in public accommodations is Title III of the Americans With Disabilities Act of 1990 (ADA). The North Dakota Human Rights Act is patterned after Title III of the ADA with regard to explaining that it is a discriminatory practice to deny access to public services or facilities based on a person's membership in a protected class. However, the Human Rights Act stops there and fails to provide for any obligation on the part of the provider of public accommodations to make reasonable modifications to its policies, practices, or procedures to avoid discrimination. It is intended that the language of the Human Rights Act track the federal law in addressing when barriers need to be removed in order to avoid discrimination. The Department is requesting that this section of the bill be amended as follows: On page 5, line 1, after "achievable" delete the second command and "or" and insert a period and Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation, . The amended language is consistent with Title III of the ADA. By having the word "or" in the statute, the removal of barriers would be optional, even it such removal could be done very easily and without much expense. It was not the intent in drafting this provision of SB 2117, to provide less protection than what Title III of the ADA provides. The proposed amended language to SB 2117 is consistent with ADA protections.

The Department of Labor is also requesting to amend SB 2117 by inserting at Section 3 language amending Section 14-02.4-19 of the North Dakota Century Code. This is the provision of the Human Rights Act that deals with Actions and Limitations. As that Department of Labor has taken cases to administrative hearings, attorneys and administrative law judges have raised concerns about the confusing language in the statute. Specifically, the Department is requesting that SB 2117 be amended to insert language to clarify that the period of limitation for bringing an action in the district court is ninety days from the date the department dismisses the complaint or issues a written probable cause determination and it deletes the language that indicates that such period is from the date the department issues a written notice to the complainant that administrative action on the complaint has concluded. The reason that this section of the statute needs to be amended is that the current language, "administrative action" could be interpreted to mean the whole administrative hearing process rather than the Department of Labor's investigation and processing of the complaint filed with the Department. Potentially, if "administrative action" is interpreted to encompass the administrative hearing process, an individual could choose an administrative hearing, and then file for a whole new proceeding

in district court following an administrative hearing. The proposed amendment to SB 2117 is to clarify that the conclusion of the administrative action is either a dismissal of the complaint, or the issuance of a probable cause determination.

Section 3 of the bill clarifies what relief is available or not available in an administrative hearing under the Human Rights Act. Although the issue of whether compensatory or punitive damages are available in an administrative hearing has not been litigated in North Dakota courts, courts in other states have ruled that such damages in administrative hearings are not available.

Section 4 of the bill at number 2 provides that the Department is not required to make a determination on every charge of discrimination. The Department has a statutory obligation to emphasize conciliation to resolve complaints pursuant to N.D.C.C. § 14-02.4-22. The Department can assist the charging party and respondent in resolving the dispute even before a determination is made. If the dispute is resolved through settlement, proceeding forward with a determination and hearing accomplishes nothing. Rather, to do so would deprive the charging party the autonomy to resolve the matter. Such a process would also discourage prompt, efficient, and fair resolution of charges of discrimination. Forcing a determination, rather than permitting settlement, would delay correction of the alleged discriminatory conduct. It does not serve the interest of the charging party or the public to delay correction of the alleged discrimination. Furthermore, when the charging party agrees to settle, it is not in the charging party's interest for the Department to issue a determination, the possibility existing that the determination may be adverse to the charging party. Prohibiting settlements until after a determination is issued may also break down settlements, resulting in the matter going to hearing, which again delays resolution of the issue and subjects the charging party to the risk of an adverse administrative decision. This issue was addressed by a district court in a lawsuit against the Department and the court agreed with the Department that a determination of whether probable cause exists need not be made in every case for the exact reasons I just explained.

The Department is requesting that section 4 of the bill be amended at page 5, line 30, after "occurred" delete the period and insert a command and with regard to one or more of the claims of the aggrieved person's complaint, and on line 31 before "the" insert all or a portion of . This language is necessary to address cases in which the Department of Labor

determines that probable cause exists to believe that a discriminatory practice occurred with regard to one or more claims made by an aggrieved person, but that no probable cause exists with regard to other claims within the same complaint. The proposed amendments to section 4 of SB 2117 clarify that only those portions of the complaint where no probable cause was found to exist be dismissed. The aggrieved person would then be able to request an administrative hearing on the remaining portions of the complaint where probable cause was determined to exist.

The Department is requesting that section 4 of the bill be amended at page 6, line 3 after "shall" by inserting "issue a probable cause determination and" . This language clarifies that the critical event entitling an aggrieved person the right to have an administrative hearing is the probable cause determination. The word complaint is confusing in that "complaint" is also the term used describe what a claimant files with the Department to commence an investigation into the alleged discriminatory practice. The proposed amendment makes clear that the hearing is on the probable cause determination.

Section 4 of the bill at number 4 provides that a probable cause determination by the Department is prima facie evidence of a violation of the Human Rights Act. This change would in effect shift the burden to the Respondent at the outset of the administrative hearing process.

Section 4 of the bill at numbers 5 and 6 bill relates to who is deemed a party in an administrative hearing and the representation of an aggrieved person in an administrative hearing. The language makes clear that the aggrieved person is a party to the hearing. By being deemed a party to the hearing, that person will be able to participate fully in the hearing, receive all correspondence and pleadings in the hearing process, and have input into any remedy fashioned by the administrative law judge. The added language clarifies that the attorney general represents the Department, not the aggrieved person. Although the attorney general's representation of the Department is to advocate for the Department's finding of probable cause, the representation is also for the purpose of seeking relief for the benefit of the aggrieved person. The added language makes clear that the aggrieved person may participate in the hearing on his or her own behalf and be represented by private counsel. This amendment does not substantively change the law, but provides a

clearer explanation of the representation of the attorney general and the rights of parties to participate in administrative proceedings.

Thank you for your time. I would be happy to answer any questions you have.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2117

Page 1, line 1 after the second comma insert "14-02.4-19,"

Page 5, line 1, after "achievable" delete the second comma and "or" and insert a period and "Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation,

Page 5, after line 3, insert:

SECTION 3. AMENDMENT. Section 14-02.4-19 of the North Dakota Century Code is amended and reenacted as follows:

14-02.4-19. Actions - Limitations.

1. Any person claiming to be aggrieved by a discriminatory practice with regard to public services or public accommodations in violation of this chapter may file a complaint of discriminatory practices with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed or in the district in which the person would have obtained public accommodations or services were it not for the alleged discriminatory act within one hundred eighty days of the alleged act of wrongdoing.

2. Any person claiming to be aggrieved by any discriminatory practice other than public services or public accommodations in violation of this chapter may file a complaint of discriminatory practice with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed, in the district in which the records relevant to the practice are maintained and administered, or in the district in which the person would have worked or obtained credit were it not for the alleged discriminatory act within three hundred days of the alleged act of wrongdoing.

3. If a complaint of a discriminatory practice is first filed with the department, the period of limitation for bringing an action in the district court is ninety days from the date the department dismisses the complaint or issues a written ~~notice to the complainant that administrative action on the complaint has concluded~~ probable cause determination.

4. If a person elects to bring an action in the district court under this chapter, any pending administrative action based upon the same discriminatory acts must be dismissed immediately.

Page 5, line 30, after "occurred" delete the period and insert a comma and with regard to one or more of the claims of the aggrieved person's complaint, and on line 31 before "the" insert all or a portion of

Page 6, line 3, after "shall" insert "issue a probable cause determination and"

Renumber accordingly

North Dakota Human Rights Coalition
P.O. Box 1961, Fargo, ND 58107-1961 (701) 239-9323 Fax (701) 478-4452 www.ndhrc.org

Testimony
Senate Bill 2117
House Industry, Business and Labor Committee
March 7, 2005

Chairman Keiser and members of the Committee, thank you for the opportunity to present testimony in opposition to Senate Bill 2117. I am Cheryl Bergian, Director of the North Dakota Human Rights Coalition. The Coalition includes a broad-based, statewide membership of individuals and organizations interested in the furtherance of human rights in North Dakota; the Coalition's mission is to effect change so that all people in North Dakota enjoy full human rights.

We support the work of the Division of Human Rights in the North Dakota Department of Labor for the enforcement of the North Dakota Human Rights Act and North Dakota Housing Discrimination Act. However, we have some objections to changes the Labor Commissioner is proposing to the North Dakota Human Rights Act.

The Labor Commissioner is adding a definition of "readily achievable", amending 14-02.4-02 to add section 16, page 4, lines 1-3. We would like to note that the American with Disabilities Act includes factors to be considered, and that the Labor Commissioner and Committee may wish to include those factors in amending the North Dakota Human Rights Act.

The Labor Commissioner is amending 14-02.4-14, page 4, lines 30-31, and page 5, lines 1-3 to add the provision that architectural or communication barriers must be removed if readily achievable **or** the entity must provide accommodations through alternative methods, if those methods are readily achievable. We are concerned about the apparent option of the entity to choose the avenue for the resolution of barriers. That does not mirror the Americans with Disabilities Act, which provides for alternative methods for the provision of services only if the removal of barriers is not readily achievable. The NDHRC asks that SB 2117 be amended to follow the provisions of the ADA in providing that alternative methods only be available if barrier removal is not readily achievable.

The most common way that discrimination against people with disabilities manifests itself is through their exclusion from their communities (work, civic, recreational, etc.). This used to be even more extreme because of the institutionalization of disabled people that totally removed them from society; while this is not as common now, disabled people are still routinely excluded from society as a result of the 'built environment' having been designed without their needs in mind (i.e., narrow doorways, steps in front of entrances, etc.). One of the primary findings Congress made in enacting the ADA is that "society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Consequently, to remedy that discrimination and work toward meaningful integration, places of public accommodation need to affirmatively engage in removal of those barriers that prevent people from participating.

The obligation to remove barriers and ensure integration is not absolute. In enacting the barrier removal/reasonable accommodation provisions of the ADA, Congress was trying to balance two things: the integration of people with disabilities into society and the cost to businesses of retrofitting their facilities. Title III's two-step test does a good job of working this balance by first requiring (if it's readily achievable-a very low standard) barrier removal that will allow disabled people to participate just like everyone else. If that doesn't work, to prevent the total exclusion of disabled people, goods/services are required to be provided through alternative methods, but the latter is clearly not an integrated approach and therefore should only be used if it's not readily achievable to remove barriers so that disabled people can participate just like everyone else. Having someone bring your groceries out to the curb is not the same as picking the apples you want out of the bin yourself. Just as the Supreme Court recognized in Brown v. Board of Education that "separate but equal" facilities for black and white students "have no place," so too with people with disabilities. Consequently, providing goods/services through alternative methods should be a last resort.

Because of the 'readily achievable' standard, the ADA (and the North Dakota Human Rights Act) doesn't even impose an absolute nondiscrimination requirement on public accommodations to integrate people with disabilities. Requiring them to go through the two-step inquiry really is not asking a lot. The 'readily achievable' standard for barrier removal in existing facilities is already quite low (i.e., "easily accomplishable and able to be carried out without much difficulty or expense." 28 CFR 36.304(a)). Consequently, requiring entities to demonstrate that barrier removal is not readily achievable is not particularly burdensome. If they are able to make that showing, they then move to the alternative method analysis, which, because it also has a readily achievable standard, is also not particularly onerous.

To allow businesses to bypass an assessment of whether barrier removal is readily achievable and go straight to alternative methods undermines the major goal and spirit of law, which is to "let the shameful wall of exclusion finally come tumbling down" and to welcome the integration of people with disabilities into "the mainstream of American life." Statement of President George Bush at the Signing of the Americans With Disabilities Act, July 26, 1990.
See <http://www.eeoc.gov/ada/bushspeech.html>

The Labor Commissioner is also asking that the North Dakota Human Rights Act, 14-02.4-20, page 5, lines 11-12, be amended to state that compensatory or punitive damages are not available under the chapter, through the department or through an administrative hearing. The NDHRC understands that this is because of an informal opinion of the Attorney General's office, by e-mail during the 2003 Legislative Session, that the award of compensatory or punitive damages under the Act by the department or in an administrative hearing may be unconstitutional. The Attorney General's Office has not issued a formal opinion on this question, nor was the Attorney General's Office able to provide the basis for this informal, undocumented opinion. The NDHRC asks that the Committee amend and delete the amendment to 14-02.4-20, page 5, lines 11-12 because of the uncertainty of the need for this amendment. According to a conversation with the Attorney General's Office, the possibility of unconstitutionality of the provision is based on decisions in some other states by courts regarding those states' constitutions. The North Dakota Supreme Court has not issued an decision regarding this question, nor has it had an opportunity to address the question under North Dakota's Constitution. It is speculation at this point how the North Dakota Supreme Court would respond on this question, and to amend the North Dakota Human Rights Act at this time is premature and unnecessary. A similar provision regarding compensatory damages was proposed by the Labor Commissioner to the North Dakota Housing Discrimination Act in HB 1158. That provision was amended out of the HB 1158 by

2.1 Att. 9

the House Judiciary Committee, and HB 1158 has passed the House and the Senate without the provision regarding compensatory in it.

The Labor Commissioner is asking that the North Dakota Human Rights Act be amended to delete the requirement that the Labor Commissioner make a probable cause finding in all complaints filed with the Department, amending 14-02.4-23(2), page 5, lines 26-27. The Department wishes to continue its current practice of pursing conciliation with the parties before providing to the complainant and respondent the opinion of the Department on whether there is probable cause to believe that discrimination has occurred. This requirement has been in place since the inception of the North Dakota Human Rights Act, and the Labor Department should give both the complainant and respondent the information they deserve on whether the Department can determine whether there is probable cause to believe that discrimination has occurred. This would facilitate the settlement of the action in those cases in which probable cause is found. The cases in which probable cause is not found are already dismissed by the Department and no further action is taken.

Regarding amendments proposed 14-02.4-23(5) and (6), page 6, lines 7-16, an issue has arisen regarding enforcement of the North Dakota Human Rights Act and the interplay among the North Dakota Department of Labor, the North Dakota Attorney General's Office, and the person while has filed a complaint under the North Dakota Human Rights Act. The Attorney General's Office has taken the position that they do not represent the complainant in enforcement actions under the Act, and that they only represent the State of North Dakota (the Labor Department). This has resulted in the Attorney General's Office's refusal to communicate with the complainant after a probable cause determination has been issued by the Labor Department under the North Dakota Housing Discrimination Act, and to only communicate with the Labor Department. The ultimate result is that the Attorney General's Office and the Labor Department have actually settled a complaint under the North Dakota Housing Discrimination Act without informing the complainant that the settlement was in the offing, and without conferring with the complainant regarding that settlement.

This is not how the federal government acts when the U.S. Department of Justice and the U.S. Department of Housing and Urban Development enforce the federal Fair Housing Act; it is this relationship that the Labor Commissioner can model for enforcement of the North Dakota Human Rights Act. The DOJ files complaints in the name of the complainant and HUD, and confers with the complainant and HU regarding the progress of the complaint and any settlement prospects. The DOJ does acknowledge that it represents only HUD as it proceeds, but it sees its role as enforcing the Fair Housing Act for both the complainant and HUD.

The NDHRC asks that the amendments proposed by the Labor Commissioner in SB 2117 regarding 14-02.4-23(5) and (6), page 6, lines 7-16 be amended and deleted by this committee. I appreciate this opportunity to testify on behalf of the North Dakota Human Rights Coalition.

3-7-25
SB 2117

North Dakota Human Rights Coalition

P.O. Box 1961, Fargo, ND 58107-1961 (701) 239-9323 Fax (701) 478-4452 www.ndhrc.org

MEMBER ORGANIZATIONS

- AARP of North Dakota
- AFL-CIO of North Dakota
- American Association of University Women Fargo
- Arc of Cass County
- Bismarck-Mandan Unitarian Universalist Church
- Bremer Bank - Fargo
- Cultural Diversity Resources
- Dakota Center for Independent Living
- Dakota Resource Council
- Dorothy Day House
- Fargo Human Relations Commission
- Fargo-Moorhead Amnesty International
- Freedom Resource Center for Independent Living
- The GOD'S CHILD Project North Central
- Grand Forks Unitarian Universalist Fellowship
- MSUM Social Work Department
- Mental Health Association in North Dakota
- Montana Human Rights Network
- Nativity Social Justice Ministry
- North Dakota Association of the Deaf
- North Dakota Disabilities Advocacy Consortium
- North Dakota Fair Housing Council
- North Dakota Progressive Coalition
- North Dakota Public Employees Association
- North Dakota Statewide Independent Living Council
- Pride Collective and Community Center
- Social Action Committee of Fargo-Moorhead Unitarian Universalist Church
- Student Social Work Organization – Minot State University

3-7-05 PM

Technical Amendment

PROPOSED AMENDMENTS TO SENATE BILL NO. 2117

Page 1, line 1 after the second comma insert "14-02.4-19,"

Page 5, line 1, after "achievable" delete the second comma and "or" and insert a period and "Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation,

Page 5, after line 3, insert:

SECTION 3. AMENDMENT. Section 14-02.4-19 of the North Dakota Century Code is amended and reenacted as follows:

14-02.4-19. Actions - Limitations.

1. Any person claiming to be aggrieved by a discriminatory practice with regard to public services or public accommodations in violation of this chapter may file a complaint of discriminatory practices with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed or in the district in which the person would have obtained public accommodations or services were it not for the alleged discriminatory act within one hundred eighty days of the alleged act of wrongdoing.

2. Any person claiming to be aggrieved by any discriminatory practice other than public services or public accommodations in violation of this chapter may file a complaint of discriminatory practice with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed, in the district in which the records relevant to the practice are maintained and administered, or in the district in which the person would have worked or obtained credit were it not for the alleged discriminatory act within three hundred days of the alleged act of wrongdoing.

3. If a complaint of a discriminatory practice is first filed with the department, the period of limitation for bringing an action in the district court is ninety days from the date the department dismisses the complaint or issues a written ~~notice to the complainant that administrative action on the complaint has concluded~~ probable cause determination.

4. If a person elects to bring an action in the district court under this chapter, any pending administrative action based upon the same discriminatory acts must be dismissed immediately.

2nd insert

Page 5, line 30, after "occurred" ~~delete the period and insert a comma and~~ with regard to one or more of the claims of the aggrieved person's complaint, and on line 31 before "the" insert all or a portion of

Page 6, line 3, after "shall" insert "issue a probable cause determination and"

Renumber accordingly

Rep. Dan Ruby 3-7-05
TPA Bill
For questions, Please call Laurie Wolf 8-2442

March 7, 2005

PROPOSED AMENDMENTS TO SENATE BILL NO. 2187

Page 1, line 1, replace "sections 26.1-27-02.1 and" with "section"

Page 1, line 2, remove "the definition of home state and"

Page 1, remove lines 9 through 16

Page 2, line 21, replace "**Home state bond**" with "**Bond**"

Page 2, line 22, replace "its home state or any other" with "this"

Page 2, line 23, remove "home state" and remove "and the insurance regulatory"

Page 2, remove line 24

Page 2, line 25, replace "and cover" with "for covered"

Page 2, line 29, replace "self-funded" with "administered"

Page 2, line 30, replace "the administrator's home" with "this" and remove "and all additional states in which the"

Page 2, remove "administrator is authorized to conduct business"

Renumber accordingly

Pat O.
Amendments
new

PROPOSED AMENDMENT TO SENATE BILL NO. 2187

Page 1, line 1, replace "sections 26.1-27-02.1 and" with "section"

Page 1, line 2, remove "the definition of home state and"

Page 1, remove lines 9 through 17

Page 1, line 17, replace the first "**2**" with "**1**"

Page 2, line 19, replace the first "**3**" with "**2**"

Page 2, line 21, replace "**Home state bond**" with "**Bond**"

Page 2, line 22, replace "its home state or any other state" with "North Dakota"

Page 2, line 23, remove "the home state commissioner and the insurance regulatory"

Page 2, remove line 24

Page 2, line 25, replace "and cover" with "covered"

Page 2, line 26, replace "in the greater of the following" with ". The bond shall meet one of the following requirements:"

Page 2, remove line 27

Page 2, line 29, replace "self-funded" with "administered"

Page 2, line 31, replace "." with "; or

3. Produce certificates of insurance evidencing coverage in excess of the aggregate amount of monies remitted to the administrator in the course of business during one fiscal year."

Page 3, line 1, replace the first "**4**" with "**3**"

Renumber accordingly