

2009 HOUSE HUMAN SERVICES

HB 1092

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1092

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: January 7, 2009

Recorder Job Number: 6660 31 min. 20 sec.

Committee Clerk Signature

Vicky Crabtree

Minutes:

Chairman Weisz: We will call the House Human Services committee back to order. We will open the hearing on HB 1092. Is there someone here to lead with this one?

Lisa Fair McEvers, Commissioner of Labor, in support of the bill. See attached Testimony #1.

Chairman Weisz: Thank you Lisa. Are there any questions from the committee? If not, thank you very much. Is there anyone else here in support of HB 1092? Last call of anyone in support of HB 1092. Anyone here in opposition to HB 1092?

Marilyn Foss, from the Bankers Association, talked about the issue of ATM machines and the ADA issue. The bank association is unclear of what this change would do. Currently there is a regulatory proposal to require banks to essentially retro fit all ATM machines with voice capability. This item would cost from \$12,000 to \$15,000 per machine and there is deep concern that if the regulatory proposal passes that the affect will be that banks stop offering this service especially where small banks are concerned. If the committee considers the bill overall, it should consider as a general matter a couple of things. I will leave with the committee clerk a copy of the federal bill so you can see the actual sections and the construction of the terms. My concern to you is to provide a bill that does limit the change in

definition to employment matters. Marilyn Foss discussed her proposed amendments handout. Feels there is a grammatical inconsistency of the bill. The bill isn't being interpreted much by anyone, certainly not judicially at this point. As we go forward there will be agency and judicial interpretations of it. Bill doesn't have clarity and has potential for consequences which are unintended and perhaps unanticipated.

Chairman Weisz: Thank you Marilyn. Are there any questions from the committee?

Representative Conrad: Couldn't we just say at the top that related to the definition of disability as applied in regulated to section 14-02?

Marilyn Foss: This is a general definition of disability.

Representative Conrad: Why do we need to put this into law? If the law only relates as North Dakota's only focus on employment, then why do we need to put this in?

Marilyn Foss: The Human Rights Act goes well beyond employment. The definition for 14-02.4-02 applies beyond employment. So if we are going to make a change that is related to employment, because the federal statute was intended to address employment decisions as I understand it, and want to narrow it in North Dakota for the moment. Let's limit change to employment. That's what my amendments do.

Chairman Weisz: Any questions from the committee? Thank you very much. Is there anyone else here in opposition to HB 1092?

Greg Tschider representing Mid America Credit Union Association: We do not oppose the legislation the fact that we feel it is extremely important that this bill be applied to employment issues, regardless who the employer is. Concern is if bill passed as is, it will impact how we handle ATM machines and having to replace present ones with new ones at a cost. Concerned about the President indicating that all of these of rules and regulations be interpreted broadly which means interpreted generally in favor of the alleged injured part.

That's not a standard we usually use in North Dakota in our cases. Small credit unions at this point, aren't in a financial position to spend the money. Concerned about existing language and support the position Marilyn Foss has brought to the committee. This bill is too broad at this point.

Chairman Weisz: Thank you. Any questions from the committee?

Rep. Potter: Would you agree with the amendments that Ms. Foss suggested with those words as far as you are concerned to make this bill what you would prefer?

Greg Tschider: If it's acceptable. Let's limit it to the employment issues. If the committee feels better language is appropriate, wonderful.

Rep. Conklin: The federal law doesn't apply to you then? Because this is changing North Dakota law to comply with the federal law. You don't have to comply with federal law?

Greg Tschider: Yes we do have to apply, but there is a battle going on over the regulations. If one department or circuit court say A and another says B, which one do we get blessed with? Let's limit this employment issues and see what happens on the federal level. This will change as we have a change in administration and Congress (United States Government).

Chairman Weisz: Thank you very much.

Representative Conrad: I like to hear from the Commissioner to hear what she has to say about the amendments and if she has any problem with them?

Lisa Fair McEvers: I would oppose the amendments. Department wants same definition of disability in all the areas under the Human Rights Act. When we look for interpretation of some of these terms we will look first to the EOC for guidance and look at a main circuit court case. We will use the clearest interpretation that we have that will apply to North Dakota law. About ATM machines, it is speculative if federal regulations will affect banks. We as a Department of Labor do not go out looking for complaints. When someone files a complaint with us we

investigate it. If a small bank finds it a hardship, possibly they won't have to give the accommodation of replacing their ATM machine. Generally the federal law is going to apply to everybody, but employment discrimination on the federal level only applies to employers with 15 or more employees under the Age and Discrimination Employment Act. Adding all of the amendments and having definitions for everything that fell into the federal law and then realized that the Human Rights Act doesn't have those terms within the Human Rights Act. We would be defining terms in the definitions that don't follow the language in the statutes themselves.

Representative Conrad: Have you had any complaints about ATM machines?

Lisa Fair McEvers: I have not had any complaints about ATM machines. To my knowledge the department has never had any complaints about ATM machines.

Chairman Weisz: We will close the hearing on HB 1092.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1092

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: February 11, 2009

Recorder Job Number: 9189

Committee Clerk Signature

Vicky Crabtree

Minutes:

Chairman Weisz: Let's take up HB 1092. Rep. Conrad handed something out for us. If we pass this bill it won't affect HUD. All employers with 15 or less employees would fall under the broader interpretation of ADA Act.

N **Rep. Porter:** Example of a farmer hiring hired hand and under current law, he does not have to meet any ADA requirements. If bill is passed as is, the single employee will cause employer to put into place all of the ADA federal standards.

Chairman Weisz: I believe agriculture is exempted unless over 12 employees. I could be wrong, because I didn't get an answer to that question, but any other employer would have to for one employee. There is approximately 25,000 businesses in ND and around 20,000 of them has 15 or less employees.

Rep. Porter: Motion for a DO NOT PASS.

Rep. Hofstad: Second.

Rep. Nathe: As a small business owner, I agree with motion.

Rep. Conrad: Talked to commissioner, we don't move anyone from existing law. Right?

Chairman Weisz: Correct. Every employer under ADA Act.

Rep. Porter: Any relative court cases where the court has said that the law is to be interpreted in a different way and verbatim puts the federal law on the state's books rather than case law on the state's books and as we know, different circuits of different courts, interpret the laws differently.

Chairman Weisz: Currently, if they wanted they could file an action directly into federal court. If we don't pass the bill, they have the ability to do that.

Roll Call Vote on a DO NOT PASS: 12 yes, 1 no, 0 absent

MOTION CARRIED ON DO NOT PASS.

BILL CARRIER: Rep. Nathe

Date: 2-11-09
Roll Call Vote #:

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1092

House HUMAN SERVICES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☒ Do Not Pass ☐ Amended

Motion Made By Rep. Porter Seconded By Rep. Hofstad

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN ROBIN WEISZ	✓		REP. TOM CONKLIN	✓	
VICE-CHAIR VONNIE PIETSCH	✓		REP. KARI L CONRAD	✓	✓
REP. CHUCK DAMSCHEN	✓		REP. RICHARD HOLMAN	✓	
REP. ROBERT FRANTSVOG	✓		REP. ROBERT KILICHOWSKI	✓	
REP. CURT HOFSTAD	✓		REP. LOUISE POTTER	✓	
REP. MICHAEL R. NATHE	✓				
REP. TODD PORTER	✓				
REP. GERRY UGLEM	✓				

Total (Yes) 12 No 1

Absent 0

Bill Carrier Rep. Nathe

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

*Motion Carried
on DO NOT Pass*

REPORT OF STANDING COMMITTEE

HB 1092: Human Services Committee (Rep. Weisz, Chairman) recommends DO NOT PASS (12 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1092 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

HB 1092

John Hoeven
Governor

Lisa K. Fair McEvers
Commissioner



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nd.gov/labor
nd.gov/humanrights

Testimony on HB 1092
Prepared for the
Human Services Committee
January 7, 2009

Chairman Weisz and members of the Human Services Committee, I am Lisa Fair McEvers, Commissioner of Labor. I appear before you in support of HB 1092 relating to the definition of disability within the North Dakota Human Rights Act.

As you may be aware, the Department of Labor has responsibility for administering and enforcing human rights under N.D.C.C. chapter 14-02.4, the North Dakota Human Rights Act. More specifically, the department is authorized to investigate complaints alleging discrimination in employment, public services, public accommodations and credit transactions based on an aggrieved person's membership in a protected category. The Human Rights Act prohibits discrimination on the basis of: race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.

In addition to investigating complaints of discrimination under state law, the department has been designated as a Fair Employment Practices Agency (FEPA) by the Federal Equal Employment Opportunity Commission (EEOC) since 1987. This designation permits the department to contract with the EEOC to conduct investigations for the federal agency. Under contract, complaints meeting both federal and state jurisdiction are "dual-filed" under both state and federal statutes, with one investigation being conducted by the department. Complaints subject to dual-filing are those meeting jurisdictional requirements under federal equal employment laws, including: Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA).

As noted above, one of the protected categories which may be a basis for discrimination under both state and federal law is disability. The term disability as defined in the Human Rights Act was first adopted in 1995, by SB 2285. The term's definition is nearly identical to the definition of disability adopted under federal law under the ADA. The testimony supporting the Human Rights Act definition of disability from 1995 indicates that "Changing the language will bring the century code into line with terminology in the ADA and what is generally used today." It is clear from this testimony that the definition of disability as used in the Human Rights Act was intended to follow the definition under the ADA. In fact, the North Dakota Supreme Court has used the ADA and its

interpretations as guidance when interpreting terms relating to disability under the Human Rights Act.

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008. This Act makes important changes to the interpretation of the definition of the term "disability" by rejecting the holdings in several United States Supreme Court decisions and portions of the EEOC's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act directs the EEOC to revise that portion of its regulations defining the term "substantially limits." In addition, the Act expands the definition of "major life activities" by including two non-exhaustive lists, one for activities and another listing major bodily functions.

The Act also contains other specific items to assist in applying the definition: 1) it states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability; 2) it clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; 3) it provides that an individual subjected to an action prohibited by the ADA because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor; 4) it provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and 5) it emphasizes that the definition of "disability" should be interpreted broadly.

The effective date of this federal legislation was January 1, 2009.

Since the department investigates discrimination under state and federal law, it would prefer to use the same interpretation of the definition of disability for employment discrimination that is the same as is used by the EEOC. Even though the department does not investigate allegations involving discrimination for public services, public accommodation and credit transactions under federal law, for consistency, the department would prefer to have one interpretation apply for all areas covered by the Human Rights Act.

As indicated earlier, the actual definition of disability has not changed, but clearly, Congress in passing the federal statutes intended to broaden the interpretation of what it means to be a person with a disability. Since the Human Rights Act has consistently followed the federal definition of disability, I am only asking that this policy continue.

I urge you to add the language to the Human Rights Act to make it clear that North Dakota intends to follow the direction of the federal government in applying the term disability. I would be happy to answer any questions you may have in regard to this bill.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1092

Page 1, line 8, after "impairment." insert "For purposes of section 14-02.4-03,"

Page 1, line 8, replace "The" with "the"

Page 1, line 8 replace "those" with "the"

Page 1, line 9, replace "terms" with "term"