ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA ASSEMBLY SESSION

MINUTES

April 17, 1975

This meeting of the Assembly Judiciary Committee was called to order by Chairman Robert R. Barengo at the hour of 8:15 a.m. on Thursday, April 17, 1975.

MEMBERS PRESENT: Messrs. BARENGO, BANNER, HEANEY, HICKEY, LOWMAN, POLISH, SENA, Mrs. HAYES and Mrs. WAGNER.

MEMBERS ABSENT: NONE.

Guests present at this meeting were Richard R. Garrod, Farmers Insurance Group; Virgil P. Anderson, AAA; John R. Kimball, 16 County Advisory Committee on Aging; Peter Chase Neumann, Nevada Trial Lawyers; Alan R. Earl, Nevada Trial Lawyers; Jim Brooke, Nevada Trial Lawyers; George Vargas, Reno attorney; Jessie D. Scott; Executive Director, Equal Rights Commission; Claudette Enus, Research Director, Equal Rights Commission; Robert Petroni, Las Vegas Attorney; and Larry Dunphy, NAACP and Franciscan Center. Attached to these Minutes is a Guest Register from this meeting.

Alan R. Earl, a practicing Las Vegas trial lawyer, testified on A.B.460. This bill concerns amending the law on comparative negligence whereby a plaintiff can now recover--even though he may be partially liable.
The Trial Lawyers would like to recommend that each defendant be jointly and severally liable for the entire amount of the judgment. Defendants are severally liable to the plaintiff under present law. There is a problem between comparative negligence and the Uniform Contribution between Tortfeasors Act. He read NRS 41.141, Section 3(b) to this Committee, as well as part of NRS 17.295. These two statutes are diametrically opposed. He feels that it should be changed. If you make the defendants jointly liable, the plaintiff can collect from each one. But, the way it stands now, we have two statutes which are opposed. Under the Uniform Contribution Act, the defendants are jointly liable. He referred to some particular language put in the bill by the bill drafters. There is some language which Mr. Earl feels must be eliminated to have a Uniform Tortfeasors Act. Summing up his testimony, Mr. Earl said it is crucial from an advocate's point of view that defendants be jointly liable as they have always been. Mr. Earl was questioned at length by the Committee.

Peter Chase Neumann, also representing the Nevada Trial Lawyers, testified on A.B.460. He gave a talk to the trial lawyers after the last session. In regard to the comparative negligence, the cases are just starting to surface, and will do so in the next couple of years, due to the statute of limitations. In the American and English system, for over 200 years the law has been that the tortfeasors are jointly and severally liable.

Mr. Neumann told this Committee that the law should be apportioned on the tortfeasors rather than on the plaintiff. Why should you make the plaintiff bear the brunt of the fact that one tortfeasor is more liable than the other, if the plaintiff is free of blame or relatively so? He gave an example to this Committee of a situation that could occur. Mr. Neumann said that the innocent party who was injured through no fault of his own should be able to collect damages. He believes that when the legislation was passed two years ago, there was merely an oversight, which allowed the clauses in question to be passed as written. Mr. Neumann also represented to this Committee that the Board of Bar Governors is in support of passage of this bill. Committee questioning ensued.

Jim Brooke, representing the State Bar of Nevada, testified on A.B.460. The State Bar is in favor of some amendment to clarify the dilemna that the present state of the law is in. The difference between the two statutes in question is irreconcilable. Mr. Brooke, however, feels that there is a problem with the way the bill is drafted. The purpose of the joint act is to allow the plaintiff to recover from multiple defendants. He read Section 3(b) as it is now drafted. It seems to be in conflict with 17.295. He suggests that Section 3 end at the end of Paragraph a. He pointed out that sometimes we lose perspective when dealing with comparative negligence. The only time this statute will be used is where contributory negligence is affirmed as a defense. And, we lose sight of where we are going sometimes when we are talking about multiple defendants. It is for the purpose of determining whether the plaintiff's negligence is less than or more than all or any of the defendants. Defendants are and have been traditionally jointly liable.

Mr. Sena was excused from the meeting during Mr. Brooke's testimony.

The Committee questioned Mr. Brooke at length, and proposed amending language to A.B.460 was discussed.

George Vargas, Reno attorney, commented briefly from the audience and gave a further example to this Committee of a case of contributory negligence and a case of comparative negligence.

Virgil Anderson, representing AAA, testified regarding A.B.460. He commented that he thinks that it is best to make a target of the insured defendant being solely liable. He informed this Committee the background of the Uniform Tortfeasors Act. He said he worked with the late Assemblyman Howard McKissick in the drafting of this type of legislation last session. He said he agrees that there is a conflict as regards the contribution act and suggested that the act be amended to specifically provide that it

has no application to the comparative negligence act which was enacted in the 1973 Session. Mr. Anderson said that if you have a jury making the determination as to the degree of liability of the plaintiff, they first determine what his damages are and then they assess the degree of negligence.

George Vargas, Esq., representing the American Insurance people, testified. He has had two cases which involve the legislation passed in 1973. He said he had no indication that two trials would be necessary in each case to eventually determine each defendants' percentage of liability.

Mr. Earl commented that contributory negligence is not raised as a defense, except rarely. He said that in 99% of the answers filed by insurance companies, contributory negligence is always raised.

Chairman Barengo questioned why it was necessary to raise contributory negligence is an answer. Mr. Brooke commented that you have to raise it in the answer to even argue it to the jury.

Next to be considered during this meeting were the bills requested by the Equal Rights Commission, A.B.484, A.B.485, A.B.486, A.B.487, A.B.488, and A.B.489.

First to testify regarding these bills were Jessie D. Scott, Executive Director of the Equal Rights Commission, and Mrs. Claudette Enus, Research Director for the Commission. Both are from Las Vegas. Their Commission completed a Biennial Report for 1973-74, and the Committee was furnished with copies. One of these copies is attached to the original Minutes of this meeting. Attached to these Minutes, also, is a copy of the Agenda for this meeting with the Commission's reasons for requesting each of these bills. Mr. Scott explained the Commission's threefold duties:

(1.) To enforce laws enacted by the legislature and all federal regulations;

(2.) To serve as mediator of disputes through negotiations; and

(3.) To compile information and statistics in the field of equal rights.

As to A.B.484, this is a proposal made to give the Commission the authority to subpoena information at the time their investigation is made, which they feel will assist them greatly, as they have not been able to get all the information they need in many instances. Page 1 of the attached "Rationale for A.B.484" explains the Commission's position in more detail.

Mr. Scott explained after questioning from the Committee their Commission's hearing procedure and the general handling of the complaints they receive, from finding out both sides and negotiating to filing complaints.

Mrs. Enus commented that a large percentage of the respondents to their complaints are represented by very capable attorneys and/or law firms. She then discussed the Commission's case volume. On Page 19 of their Report are the figures.

As to A.B.485, Mr. Scott told the Committee the Commission has been turning away two to three complaints a month because they cannot become involved with an employer who has less than 15 employees. Therefore, they request a change from 15 to 5, with the exclusion of a family business. This bill is discussed on Page 2 of the attached "Rationale for A.B.485". Mrs. Ennus commented that she did not feel that there would be any side effects in reducing the number of employees to less than 15 before the Commission could become involved and talk to the employer.

Attorney Robert Petroni testified at this point, as he had to catch a plane shortly. His testimony was relative to A.B.484 and A.B.487. He said he did not mind if the Commission had subpoena power if it related to a formal complaint. He related a situation where the Equal Rights Commission delivered interrogatories to a company and wanted answers immediately which the company could not supply. He definitely said that if the power to subpoena could be limited to formal complaints, that was fine with him.

Mr. Scott replied that if the state supplies them with the resources, they could handle this. He explained that each state in the nation has 60 days to see if they can process a complaint, and if not, on the 61st day, the federal government comes in.

Mr. Scott commented that they need statutory latitude and resources to do their job more effectively. He feels that chances are they will not get all the funds requested of the legislature. Of course, they would like to have all which they requested, but they will be happy and make the best use out of what they get.

As to A.B.486, this bill is to provide compensation to the Equal Rights Commissioners for time spent in conducting their agency's business. Chairman Barengo explained that a bill passed the Assembly which dealt with per diem expenses. On Page 3 of the "Rationale for A.B.486" is found in detail the Commission's reasons for requesting this bill.

Dealing next with A.B.487, Mr. Scott said this would allow them to go into court immediately to get an injunction under particular circumstances which would arise out of an aggravated situation, such as an impending race riot. Page 4 of the "Rationale for A.B.487" discusses this further.

Mrs. Ennus discussed their relationship with the Legal Aid Society in Clark County, and explained how they assisted the Commission and under what conditions they could not assist them.

Next to be discussed was A.B.488. See Page 5 of the "Rationale for A.B.488". The Commission was requesting the extension of jurisdiction for their organization to include sex and age. Up until this time the Labor Commission has been handling this situation. Mr. Barengo commented that he received a note from Stan Jones, Labor Commissioner, which said he was amenable to this situation and would not oppose passage of the bill.Mr. Lowman questioned the need for additional manpower. Mr. Scott replied that this was in the budget submitted to the Legislature.

As to A.B.489, the Commission is asking for a hearings officer to hear the cases and give decisions, findings of fact, or whatever is needed. The Commissioners themselves can serve as a hearing officer, but they do not have the time, and many times they do not have the knowledge necessary of the law to do the best job. The hearings officer could sit on an appeal board if the decision is appealed. This is discussed further on Page 6 of the "Rationale for A.B.489".

Mr. Scott presented this Committee with copies of a federally printed report on the Enforcement of Equal Employment Rights, a copy of which is attached to the original Minutes only.

Father Larry Dunphy spoke in favor of the Equal Rights Commission's bills. He represented the NAACP. Attached to these Minutes is his complete statement.

Ms. Ruby Duncan commented on the situation between the Equal Rights Commission and the Legal Aid Society and explained who the Legal Aid Society assists, and when they cannot involve themselves to any great degree with the Commission. They can assist the low income person, and they have guidelines for this, and they can assist senior citizens over the age of 60.

Attached to these Minutes is a letter to Assemblyman Barengo dated April 14, 1975 from Stanley P. Jones, Labor Commissioner in regard to the Equal Rights Commission.

Also, attached to these Minutes is a letter from William E. Isaeff, Deputy Attorney General, dated April 15, 1975 relating to A.B.484, A.B.487, A.B.488 and A.B.489.

Chairman Barengo advised the Committee that there would be a meeting later today at 5:00 p.m. in the Committee room.

A motion for adjournment was made and seconded. Thereafter, Mr. Barengo adjourned the meeting at 10:40 a.m.

ASSEMBLY JUDICIARY COMMITTEE

GUEST REGISTER

DATE: April 17, 1975

NAME	BILL NO.	SPEAKING	REPRESENTING
Richard R. Garrod	AB 460	?	Farmers Ins Group
Virgil P. Anderson	AB460	?	AAA
John R. Kimball	AB 488 489 484		member 16 county adv. comm.
Peter Chase Neumann	AB 460	✓	Nevada Trial Lawyers -
Alan Earl	A.B. 460	✓	" "
Jim Brooke	A.B. 460	✓	" "
Alan R. Earl	A.B. 460	✓	Las Vegas Attorney
Geo. Vargas	A.B. 460	✓	Reno Attorney
Jessie D. Scott		✓	Executive Director, Equal Rights Comm'n.
Claudette Enus		✓	Research Director, Equal Rights Comm'n.
Robert Petroni		✓	Las Vegas Attorney
Larry Dunphy		✓	Franciscan Center & NAACP - Las Vegas

AGENDA

COMMITTEE ON JUDICIARY

Date Thursday, April 17, 1975 Time 8:00 a.m. Room 240

Bill or Resolution to be considered	Subject
A.B.484	Allows use of subpena during investigations by the Nevada commission on equal rights of citizens.
A.B.485	Enlarges definition of employer for purpose of equal employment opportunity.
A.B.486	Provides compensation for members of Nevada commission on equal rights of citizens.
A.B.487	Expands judicial remedies under unfair employment practices actions.
A.B.488	Extends jurisdiction of Nevada commission on equal rights of citizens and clarifies certain practices.
A.B.489	Provides procedures for hearings before the Nevada commission on equal rights of citizens.

RATIONALE FOR AB 484

The purpose of this bill simply stated is to extend our agency's subpoena powers to the investigative stage of our procedure. The Commission feels that this extension of subpoena power will give us an added dimension, in our attempts to conduct more thorough and comprehensive investigations. We sincerely, believe that this expansion of our powers will enhance our constant efforts of seeking complete fairness and impartiality.

The Commission staff believes that if we were allowed to function under these expanded powers, we would be able to significantly increase the pre-hearing settlements and decrease the number and cost of cases going to public hearings. Similar statutes are in effect in such states as Arizona, California and Connecticut.

RATIONALE FOR AB 485

The Commission has been turning away 2 or 3 complaints per month because the employer had fewer than 15 employees. It is their feeling that these employers should not be exempt from having to provide equal employment opportunities, therefore, we are requesting that all employers with five or more employees be subject to NRS chapter 613.

RATIONALE FOR AB 486

The purpose of this bill is to provide compensation to the Commissioners of the Nevada Equal Rights Commission for actual time spent in conducting business of the agency. The Commission has had a history of having the "working" person serve on its board usually at least 80% of the Commissioners fall into this category. Each of these working Commissioners looses a day pay when they are away serving at Commission meetings.

For the most part these are individuals who would be reluctant to take time away from their jobs to conduct Commission business. Therefore it is often difficult to convene a full board of Commissioners. Monetary compensation fcr time spent in carrying out their duties as Commissioners would provide some financial relief for these person, similar to that provided for by Nevada Revised Statutes sections 706.8818 governing the Taxicab Authority and 463.026 governing the Nevada Gaming Commission.

Rationale for AB 487

The purpose for the proposed revision in NRS 613.420 was to allow the complainant or the Commission the option of applying to district court for injunctive relief or other appropriate court action when there is an alleged violation of 613.310 to 613.400. Additionally the revision provides that a public hearing is not a requisite for applying to the district court under this act.

This revision will prohibit a person or group from carrying out a given action in a potentially discriminatory situation. The requested injunctive relief is similar to that provide in numerous other circumstances under Nevada Revised Statute.

RATIONALE FOR AB 488

The Commission is asking for the return of sex jurisdiction and a transfer of age and physical or visual handicap jurisdiction in employment discrimination cases from the Labor Commission to us. The over-riding reasons for these requests are (1) a matter of convenience for the citizens of the state and (2) consistency and continuity of enforcement of similar provision of state statute. Positive actions on these requests would mean that our agency would then have similar jurisdictional authority as the majority of state and local human rights agencies across the country. One agency of the state government could more expeditiously investigate and make a determination on multiple charges of discrimination (i.e., race and sex or national origin and age) made by the same individual.

Consistent with the thrust from the federal level the general provisions governing the Commission have been expanded to include the protection, representation, and provision of equality of opportunities for the handicapped and persons of both sexes.

Rationale for AB 489

During the next biennium, the Commission anticipates conducting more hearings than we have ever held in the past. We hope to increase our hearing output by 2 or 3 hundred percent with the addition of a hearing officer. At present it is an extremely difficult task to convene a hearing board of our Commissioners, due in part to the fact that with one exception they are working men and women and time off from their jobs to conduct commission business usually puts some financial burden on them. We feel that the precedent set by the Nevada State Welfare Department, the Taxicab Authority and the Nevada State Personnel Division in adding a Hearing Officer to their staffs is strong support for the soundness of our judgement for making the request for this particular position.

Unjust and unfounded disrimination or prejudice continues to be an ugly factor of life in this nation and in this state. Sometimes in comes out in gross and unhidden manner as fot instance in the crude and insenstive remarks of certain Las Vegas City Councilmen made in public hearings a bout citizens in certain sections of our city; or it may be slightly less crude but no less obvious than in the prejudicial remarks of certain witnesses before this very committee in this very room earlier in this session when holding hearings on AB 24 who betrayed their prejudices when they tried to convince you that people of a certain a national origin were more suited for stoop labor and menial tasks than the rest of us would be. But prejudice comes mosty in more subtle wa ys; usually it is accompanied by rationalizations which at first migh sound fairly good but which offer specious reasoning for irrational acts such as not hiring persons or even considering them or giving them a chance when there is some slight physical handicap; or its the more subtle thing where numbers of minorities hired in public or priva te employment differ vastly from the proportions of such minorities in the community; or perhaps it is the general assumptions most of us have erroneously and unthinkingly made about women and their capacities in employment or management of and responsibility for money. But I do not need to belabor the point; you lawmakers know that discrimination is with us now and probably will be with us for some time. You know that the effects of prejudice have public cost through the disabling results particularly in the area of employment and ability of self-maintenence. You and I know that you will not legislate prejudice out of existence. However, you can provide the mechanisms through law to reverse some of its effects, to undue some of its harm, and to cause some manifesta tions of it not to be repeated in this state. Since outside of the federal courts little remedy has been provided for persons through the judicial system, the Commission seems to be the best approach to this. Also, it seems best to put all types of unjust discriminatory practices, the investigation of such, and action against within the scope of one agency; they should best be able to develop the needed variety of skills to deal with these situations. However, in order that this assignement be not just another way of pretending to do something while doing nothing serious, you must give them the legal tools they need to a ccomplish their purposes; e.g. the power of subpoena and injuction. To give them th e responsibilities of investigating and correcting discrimination without the necessary means to gather or preserve evidence is to assign them a futile responsibility and is a deceitful pretense to the people of Nevada to pretend to protect theeir equal rights. Likewise to expect the members of the commission to take time from their jobs, loose their pay for the day, and to do so without compensation is also to discourage obtaining

results andis istself an act of prejudice when all other commissions with like responsibilities a re compensated. I would urge the passage of these bills this morning as at least some steps towards diminishing the effects of prejudice and discrimination aga inst persons of whatever grouping in the Sta te of Nevada.

Small enough number of employees to have some adequate influence on employment.

MIKE O'CALLAGHAN
GOVERNOR

STATE OF NEVADA
OFFICE OF
LABOR COMMISSIONER
CARSON CITY, NEVADA 89701

STANLEY P. JONES
LABOR COMMISSIONER

PAT F. WINNIE
CHIEF ASSISTANT

KARL G. STEVENS
DEPUTY LABOR COMMISSIONER

April 14, 1975

Mr. Bob Barengo, Chairman
Assembly Judiciary Committee
State Legislative Building
Carson City, Nevada 89701

Dear Mr. Barengo:

Following a number of meetings with the Nevada Commission on the Equal Rights of Citizens and Equal Employment Opportunity Commission it was believed discrimination complaints would best be served if the jurisdiction of all such complaints were vested with one State agency.

Since the vast number of discrimination complaints were in the area of racial discrimination it was apparent the Nevada Commission on Equal Rights of Citizens, together with their existing contractual relationship with the Federal Equal Employment Opportunity Commission, would serve as the State agency receiving and processing all discrimination complaints of every nature.

The Nevada State Labor Commissioner supports A.B. 488.

I would be pleased to discuss this matter with you and your Committee at another time.

Very truly yours,

STANLEY P. JONES
Labor Commissioner

SPJ:br

COPY

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
CARSON CITY 89701

ROBERT LIST
ATTORNEY GENERAL

April 15, 1975

The Honorable Robert Barengo
Chairman, Assembly Judiciary Committee
Legislative Building
Carson City, Nevada 89701

Re: AB 484, 487, 488 and 489

Dear Mr. Barengo:

It is the understanding of this office that hearings will be held before the Assembly Judiciary Committee on Thursday, April 17, 1975, on a series of bills affecting the Nevada Commission on Equal Rights of Citizens, including AB 484, 487, 488 and 489. A prior commitment on that date precludes the undersigned, as attorney for the Nevada Commission on Equal Rights of Citizens, from appearing and testifying. In lieu of such testimony, we would appreciate your including this letter as part of the official record on consideration of these bills.

AB 484 would extend the subpoena powers of the Commission in such a way as to authorize the issuance of subpoenas during investigations by the Commission, and not just at scheduled hearings. It has been the experience of the Commission in the past two years that many persons subject to the various equal rights laws refuse to give to the Commission investigators certain documents in their possession which are often highly relevant to the complaint in question. Although the Commission's present subpoena powers authorize requiring production of these documents at the time of the hearing, it would be much more valuable to both the Commission and its counsel if subpoenas could be issued earlier in the investigation so as to allow full study of the requested documents. In addition, if these documents are turned over to the Commission and its investigators prior to a hearing, analysis of the documents may well reveal that there is no need for a hearing, and thus time and expense is saved by all parties concerned.

This office would also respectfully suggest a slight amendment to AB 484 which would make clear the fact that the Commission may resort to an appropriate district court to enforce compliance with one of its subpoenas. Neither present law nor the proposed language of AB 484 reflects this necessary fact.

AB 487 is intended to make clear the fact that the Commission or any person injured by an unfair employment practice within the scope of NRS 613.310 through 613.400 may, without the need for any prior administrative hearings, apply directly to a district court for an injunction or other appropriate order granting or restoring to the injured person the rights to which he is entitled under such sections. The present wording of NRS 613.410 and 613.415 leaves it unclear whether administrative hearings must first occur prior to the district court action authorized in 613.420. Although we think such hearings are probably unnecessary, the language in AB 487 would set the matter to rest conclusively.

AB 488 would place all enforcement authority over Nevada equal rights statutes in the Nevada Commission on Equal Rights of Citizens. At the present time, Nevada law splits enforcement authority between the Commission and the State Labor Commissioner, the latter having jurisdiction in cases based on sex and visual or physical handicap. To our knowledge, Nevada is the only state with a bifurcated enforcement system such as just described. The Federal Equal Employment Opportunity Commission, which frequently refers cases to the Nevada Commission for investigation and disposition, has on many occasions in the past two years threatened to discontinue referring such cases to the Nevada Commission, and furthermore to cease granting money to the Nevada Commission which is essential to its operations unless all enforcement of equal rights laws is centralized in the NCERC.

Prior to the 1969 session of the legislature, enforcement of the sexual equal rights statutes was with the Nevada Commission on Equal Rights of Citizens. It is clearly the time to return to that status once again in order to insure that Nevada will continue to be designated as a "701" deferral agency under federal law.

The Honorable Robert Barengo
April 15, 1975
Page Three

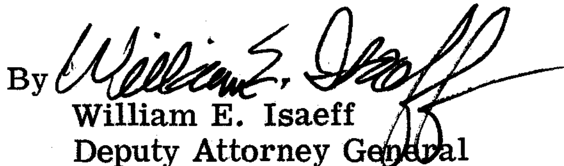
The last bill on which we would like to comment is AB 489. This bill would provide specific legislative sanction for use of hearing officers by the Nevada Commission on Equal Rights of Citizens. At present, it is often very difficult to get the members of the Commission together to hold formal hearings on discrimination complaints. Members of the Commission are for the most part employed individuals who must take time away from their employment and often travel great distances in order to sit as a Commission at these hearings. Due to the rapidly increasing rate of the number of complaints being filed with the Commission, the need for formal hearings grows every month. Other state agencies which experience similar difficulties have successfully used a hearing officer procedure authorized by the legislature. The same situation exists with the Equal Rights Commission, and AB 489 would authorize the same solution. AB 489 would also authorize the Commission to simply hear a case before one or more of its members, rather than the full Commission, in situations where the use of a hearing officer is not practical.

Favorable consideration of AB 484, 487, 488 and 489 is urged by this office. It is our belief that these bills will go far to insure more effective operation of the Commission on Equal Rights of Citizens so as to insure that all Nevadans may enjoy their equal rights to employment, housing and public accommodations as provided by law.

If you or any member of your committee have additional questions concerning these bills, please feel free to call upon this office at any time. In conclusion, we appreciate your reading this letter into the record.

Sincerely,

ROBERT LIST
Attorney General

By 
William E. Isaeff
Deputy Attorney General

WEI/cl

cc: Jesse D. Scott

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STATE OF NEVADA

COMMISSION ON EQUAL RIGHTS OF CITIZENS

BIENNIAL REPORT 1973-74

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NEVADA COMMISSION ON EQUAL RIGHTS OF CITIZENS

BIENNIAL REPORT

January 1973 to December 1974

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STATE OF NEVADA
COMMISSION ON EQUAL RIGHTS OF CITIZENS
STATE OFFICE BUILDING
215 E. BONANZA ROAD • P.O. BOX 791
LAS VEGAS, NEVADA 89101
TELEPHONE (702) 385-0104
BRANCH OFFICE: 560 MILL STREET • RENO, NEVADA 89502
TELEPHONE (702) 784-6355

MIKE O'CALLAGHAN
GOVERNOR

COMMISSIONERS
ROBERT ARCHIE
CHAIRMAN
RAYMOND ANDERSON
JERRY HOLLOWAY
ADOLPH SALAZAR
VIRGINIA MALLIN

JESSE D. SCOTT
EXECUTIVE DIRECTOR

The Honorable Mike O'Callaghan
Governor of the State of Nevada
and
Mr. Arthur J. Palmer, Director of
the Legislative Counsel Dureau of
the State of Nevada

Gentlemen:

Pursuant to the provisions of the Nevada Revised Statutes establishing and governing the Nevada Commission on Equal Rights of Citizens, this biennial report is hereby submitted.

This report highlights the projects, programs, problems, and accomplishments of the Commission. The Commission believes that through this report it has made an accurate and honest assessment of the accomplishments and failures through governmental involvement concerning the problems of equal rights in the State of Nevada. It is the hope of the Commission that this will serve as a critical self-analysis from which will evolve a more realistic plan for accomplishing the annuciated goals and objectives.

One of the most severe problems facing the Commission is the extensive backlog of cases. This extensive case load is only a symptom of the real problem which is insufficient funding by the Legislature for adequate staffing to meet the needs of the constituency which utilizes the services of the Commission.

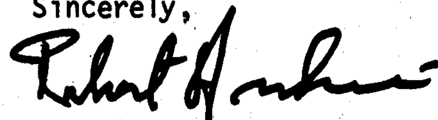
The Commission hopes that this year's budget will make available the necessary resources that are essential to the efficient deliverance of services. If the

The Honorable Mike O'Callaghan
Governor of the State of Nevada
and
Mr. Arthur J. Palmer, Director of
the Legislative Counsel Bureau of
the State of Nevada

Page Two

Legislature finds that it is unable to supply the necessary funding, this agency will become more inefficient and will become the object of intense criticism for its inability to eradicate discriminatory practices in the State of Nevada.

Sincerely,



ROBERT ARCHIE
Chairman

RA:sh:bj

STATE OF NEVADA
COMMISSION ON EQUAL RIGHTS OF CITIZENS
STATE OFFICE BUILDING
215 E. BONANZA ROAD • P.O. BOX 791
LAS VEGAS, NEVADA 89101
TELEPHONE (702) 385-0104
BRANCH OFFICE: 560 MILL STREET • RENO, NEVADA 89502
TELEPHONE (702) 784-6355

MIKE O'CALLAGHAN
GOVERNOR

COMMISSIONERS
ROBERT ARCHIE
CHAIRMAN
RAYMOND ANDERSON
JERRY HOLLOWAY
ADOLPH SALAZAR
VIRGINIA MALLIN

JESSE D. SCOTT
EXECUTIVE DIRECTOR

The Honorable Mike O'Callaghan
Governor of the State of Nevada
and
Mr. Arthur J. Palmer, Director
of the Legislative Counsel Bureau
of the State of Nevada

Gentlemen:

The Nevada Commission on Equal Rights of Citizens presents in the following pages, its Biennial Report for the years 1973 and 1974. As you can see in reading the report, the activities and involvements of the Commission have been many.

The caseload of actual complaints of discrimination continues to show an increase and the number of cases in which discrimination was found continues to be significant. We are as aware as ever of the amount of discrimination that is occurring in the State that we are not able to touch because, at this point, we are unable to keep up with handling of the formal complaints that have been filed with us. We are in great need of additional staff that would work in the areas of eliminating our current backlog, employment monitoring, and checking housing discrimination.

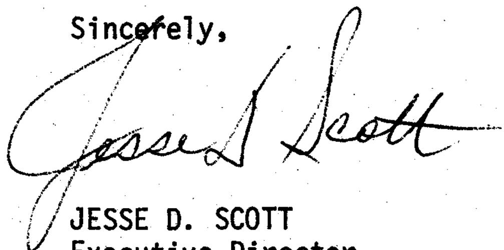
Also, we feel that because of the lack of staff in the Attorney General's office (particularly in Southern Nevada) we have not always had the kind of legal help available which we needed to be most effective. Therefore, we have proposed the assignment of a full-time Deputy Attorney General to the Equal Rights Commission.

We are requesting that the budgetary proposal which we have submitted be given strong consideration and that the needed resources essential to do the job be made available, if we are to continue the types of activities outlined in this report.

The Honorable Mike O'Callaghan
Governor of the State of Nevada
and
Mr. Arthur J. Palmer, Director
of the Legislative Counsel Bureau
of the State of Nevada
Page 2

We respectfully request that the Director of the Legislative Counsel Bureau shall cause this report to be made available to each Nevada State Senator and Assemblyman.

Sincerely,



JESSE D. SCOTT
Executive Director

JDS:bj

THE
COMMISSION

ROBERT ARCHIE
Chairman

****

RAYMOND ANDERSON
Commissioner

*****

JERRY HOLLOWAY
Commissioner

*****

VIRGINIA MALLIN
Commissioner

*****

ADOLPH SALAZAR
Commissioner

******

The Staff

Las Vegas Office
215 E. Bonanza Road

Jesse D. Scott
Executive Director

F. Claudette Enus
Coordinator Education & Research

Edmund C. Miramontes
Equal Opportunity Represenative

E. G. Matthews
Equal Opportunity Representative

Marie A. Montag
Administrative Secretary I

Barbara James
Senior Clerk Stenographer

Barbara Sanders
Career Aid III

Floyd Plymouth
Project Coordinator

Reno Office
560 Mill Street

George L. Cotton
Equal Opportunity Representative

Evalina J. Klein
Senior Clerk Stenographer

Henry A. Hooks III
Equal Opportunity Representative

Melanie A. Ericson
Intermediate Clerk Typist

Doris Wright
Clerk Typist

COMMENTS FROM THE EXECUTIVE DIRECTOR

Unbeknownst to many Nevadans, the Nevada Commission on Equal Rights of Citizens is a department of State Government. In 1961 the state legislature enacted the first enabling legislation creating the Commission. The Commission received its statutes of authority in 1965 to accept complaints alleging racial, religious and national origin discrimination and to process them and enforce the law in the area of employment and public accommodations.

Subsequently, in 1971, the Commission received the authority to handle complaints alleging racial, religious, sex and national origin discrimination in housing.

It is evident that some people mistakingly believe that the Commission is an agency of government established to help only black people with racial problems. The Commission files show that people of all backgrounds are helped with race, religion, or nationality discrimination problems. The purpose of the Commission is to serve as a center where citizens of Nevada can bring their complaints alleging discrimination in the aforementioned categories. Each complaint is examined and a statutory determination is made by the Executive Director for jurisdiction of each complaint.

If proper jurisdiction is determined, the respondent (the party complained against) is notified by certified mail and is given a period of time to respond in writing to the Commission presenting evidence and refuting the allegations made against him by the complainant (the complaining party).

The Executive Director, when jurisdiction comes under our statutes, then assigns the complaint to one of four investigators in the state. When the investigation is completed, it is brought to the Executive Director with a recommendation of probable cause or no probable cause to believe that the allegaions are or are not substantiated.

If the Executive Director agrees that probable cause exists, the staff attempts

to conciliate or settle the dispute between the complainant and the respondent. Unless all parties agree to the conciliation, the complaints go to public hearing for a determination. A Cease and Desist Order is issued if the Commission's finding of fact decision is against the respondent. If the Commission's orders are not carried out after public hearing, relief is sought in District Court compelling the respondent to comply. If the finding of fact decision is not against the respondent, the case is closed.

In those cases, which are the majority (66 2/3%) where no probable cause is found, the parties to the dispute are notified in writing informing them that the Commission found no evidence to substantiate the allegaions of discrimination by the complainant. The complainant is informed that State Statutes provide 60 days after the Commission decision of no probable cause, the opportunity to seek further redress of his or her grievance in District Court, whereupon the Commission closes its file on said cases.

The Commission, as the writer perceives it, has three major functions. One is to enforce the law that has been enacted by the legislature as well as all appropriate federal statutes relative to racial, religious and nationality discrimination findings. Its second function is to serve as a mediator of disputes by and between the citizens of the state through negotiation and conciliation and, finally, the third function is to compile, analyze and disseminate information and statistics in the field of Equal Rights.

This writer is convinced that the Commission, given full opportunity to work, will eliminate the likelihood of social confrontations because people would know what their rights are and where to go to seek redress if they thought their rights were being violated, thereby minimizing heated racial confrontations that lead to racial riots.

Finally, I recognize the dire need for the Commission to receive acceptance and approval by the citizens of Nevada thereby making it unnecessary for federal agencies to come into the state to do those things that it has been mandated to do by state statute.

The staff, through study, conferences and seminars, has made itself knowledgeable about State and Federal Laws in the area of human relations and is prepared to make decisions based upon fairness and equity to all concerned.

We Nevadans have been fortunate, whether by plan, design or happenstance, or maybe by Divine Providence, that there has not been a great racial confrontation the likes of Memphis, Atlanta, Jackson, Mississippi, or Gary or Watts. But if good will and sanity prevail, we need not have such an unfortunate experience - the end product of such an experience results in everyone suffering and everyone losing.

However, we must not make the mistake that other communities have made by waiting, wishing and hoping that it won't happen here. Rather, all of us must begin now to build and mold the kinds of understandings and relationships in Nevada that will make social disruption and conflict unnecessary.

I honestly believe that the best way to eliminate the negative is to plan and work for the positive. Because of the trend that has been established in the past several years bringing more people seeking the glamour and environs of our state, most of the population growth experts seem to agree that within the next ten years Nevada will experience a fantastic population expansion. If these predictions hold true, then our people problem situation will be compounded. Also, if these predictions hold true, we can expect hundreds of thousands of people to come to Nevada from other parts of the United States. When these newcomers land here, they will

bring with them the same needs, problems and prejudices that you and I have. Therefore, we must plan now by helping to create a multi-racial community of opportunity before they get here. The Equal Rights Commission is trying to prepare for this eventuality by requesting from the State the necessary resources, both economic and human, to provide the services that people need.

These services include, but are not limited to, receiving and expeditiously processing complaints, serving as mediator to settle disputes between citizens, research, compiling and disseminating information that will improve and enhance the life style as well as human relations in Nevada.

During the biennium, the Commission, through its education and research section, has been developing some programmatic inovations to enhance its work such as: revision of the Commission's operation procedures, collaborating with state personnel in establishing affirmative action programs for state government, developing staff training programs and minimum production standards.

Although the Commission's complaint intake has increased more than 176% within the last four years, it is still seeking to find ways and means to reach and serve more Nevadans.

The Commission staff members are twelve in number and the appointed Commissioners total five. The racial composition is White, Black, Latino and Indian. The Commission and staff are committed to a program of affirmative action for itself as well as for others both in and out of state government.

A statutory request will be made to the Nevada Legislature requesting that it give to the Equal Rights Commission full jurisdiction in discrimination cases. Full jurisdiction would include sex, physical and visual handicap and age, plus our present jurisdiction of race, religion, and nationality. Most state agencies in the

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United States (35 out of 40), possess full discrimination jurisdiction which includes all of the above categories.

Finally, the Commission is requesting that the legislature provide more staff personnel so that a more expeditious level of service can be provided for the people of the state and to substantially reduce a backlog of more than 200 complaints it now has on file.

WASHINGTON EXECUTIVE OFFICE
NIEL THOMAS
TRAINING COORDINATOR
1625 K ST. N.W. SUITE 102
WASHINGTON, D.C. 20006
(202) 347-3588

OFFICERS

CHAIRMAN
ARTHUR L. GREEN
EXECUTIVE DIRECTOR
CONNECTICUT COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES
90 WASHINGTON STREET
HARTFORD, CONNECTICUT 06115
(203) 522-5047

1ST VICE-CHAIRMAN
VIVIAN L. CAVER
ASSISTANT DIRECTOR
SEATTLE HUMAN RIGHTS DEPARTMENT
2600 SO. JACKSON STREET
SEATTLE, WASHINGTON 98144
(206) 324-5335

2ND VICE-CHAIRMAN
FRED CLOUD
EXECUTIVE DIRECTOR
METRO HUMAN RELATIONS COMMISSION
P. O. BOX 916
NASHVILLE, TENNESSEE 37202
(615) 747-4385

SECRETARY-TREASURER
ALLEN CORRELL
DIRECTOR
DES MOINES HUMAN RIGHTS COMMISSION
ARMORY BUILDING
EAST 1ST & DES MOINES STREETS
DES MOINES, IOWA 50309
(515) 283-4284

EXECUTIVE COMMITTEE

ATLANTIC REGION
HOMER C. FLOYD
EXECUTIVE DIRECTOR
PENNSYLVANIA HUMAN RELATIONS COMMISSION
NORTH CAMERON STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 787-4410

MIDWEST REGION
ROGER W. SAYERS
DIRECTOR
HUMAN RELATIONS DEPARTMENT
CITY OF OMAHA
18TH AND DODGE STREETS
OMAHA, NEBRASKA 68102
(402) 341-8122 EXT. 209

SOUTHERN REGION
THOMAS G. WARD
ASSISTANT DIRECTOR
CITY OF ATLANTA
COMMUNITY RELATIONS COMMISSION
121 MEMORIAL DRIVE, S. W.
ATLANTA, GEORGIA 30303
(404) 659-4463 EXT. 433

WESTERN REGION
ROBERT TYLER
EXECUTIVE DIRECTOR
SACRAMENTO HUMAN RELATIONS COMMISSION
2001 - 21ST STREET
SACRAMENTO, CALIFORNIA 95818
(916) 452-4453

CANADA
DR. DANIEL G. HILL, JR.
CHAIRMAN
ONTARIO HUMAN RIGHTS COMMISSION
400 UNIVERSITY AVENUE
TORONTO 2, ONTARIO
CANADA
(416) 965-6845

AT-LARGE
RAFAEL R. JIMENEZ
EXECUTIVE DIRECTOR
SAN JOSE HUMAN RELATIONS COMMISSION
729 NO. SAN PEDRO STREET
SAN JOSE, CALIFORNIA 95110
(408) 277-4000

IMMEDIATE
PAST IAOHRA CHAIRMAN

JAMES H. BLAIR
DIRECTOR
DIVISION ON CIVIL RIGHTS
DEPARTMENT OF LAW AND PUBLIC SAFETY
STATE OF NEW JERSEY
1100 RAYMOND BOULEVARD
NEWARK, NEW JERSEY 07102
(201) 648-2700

IN REPLY ADDRESS TO:

WASHINGTON EXECUTIVE OFFICE

SYNOPSIS OF MAJOR EMPLOYMENT PRACTICE DECISIONS

The following pages contain a brief outline and provide citations of many of the cases in fair employment law that will be discussed during the conference sessions. The format approximates the investigative process and is designed to aid you in the problem-solving in which you will be actively engaged as conference participants. It is suggested that you familiarize yourself with its contents before the training sessions begin.

The listing is by no means intended to be exhaustive, but merely attempts to show the broad sweep of federal law in the area of employment discrimination and to indicate the extent to which the courts, on the whole, have proved to be a friendly and effective forum for the elimination of discrimination.

THE ENFORCEMENT OF EQUAL EMPLOYMENT RIGHTS

A. THE CONSTITUTIONAL OBLIGATION OF STATE AND LOCAL AGENCIES AND STATE COURTS CHARGED WITH THE ENFORCEMENT OF FEDERALLY PROTECTED RIGHTS

1. State agencies and courts are under a constitutional obligation to enforce federal rights and to provide the same remedies that are available in federal court. In Testa v. Katt, 330 U.S. 386 (1947,) ancaction brought under the federal Emergency Price Control Act of 1946, a state supreme court refused to award treble damages for a violation, notwithstanding the Act's express provision for such damage. The U.S. Supreme Court held that the state court's decision was in violation of Article VI, § 2 of the U.S. Constitution which binds state judges to the "supreme law of the land."

2. A failure to seek out affirmatively and to eliminate discrimination makes the agency or court an "instrument" of the discrimination. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) the Court said, "...no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them..." If it does not act, the state not only becomes a party to the discrimination, but it also "...must be recognized as a joint participant in the challenged activity..." See also Etheridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) and Weiner v. Cayahoga Community College District, 238 N.E. 2d 839, cert. denied, 396 U.S. 1004 (1970.)

B. THE LEGAL AUTHORITY UNDER WHICH AN ADMINISTRATIVE AGENCY MAY ISSUE A COMPLAINT IN ITS OWN NAME ALLEGING A PATTERN OR PRACTICE OF DISCRIMINATION

1. The U. S. Supreme Court has defined the broad power of the administrative agency to set the investigative machinery into motion by the initiation of an agency charge:

> "An administrative agency has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function.

It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on the suspicion that the law is being violated or even just because it wants assurance that it is not." U.S. v. Morton Salt, 338 U.S. 632 (1949.)

2. The Morton Salt holding has been specifically adopted by federal courts in affirming the validity of a Commissioner charge issued under Title VII of the Civil Rights Act of 1964:

It is to be said that there is no constitutional prohibition to Congress permitting investigations of corporate behavior based upon nothing more than official curiosity, as Judge Wilson, in the District Court, pointed out, citing U.S. v. Morton Salt... "Bowaters v. Southern Paper Corp., (6th Cir. 1970)
428 F. 2d 799 (1970,) cert. denied 400 U.S. 942 (1970.) See also Sheetmetal Workers, Local 104 v. EEOC, 439 F. 2d 237 (9th Cir. 1971) where the court upheld a charge issued by a Commissioner based upon a pattern or practice of discrimination without an allegation of a particular instance of discrimination; General Employment Enterprises, Inc. v. EEOC, 440 F. 2d 783 (7th Cir. 1971,) which sustained a Commissioner's charge that simply alleged the Respondent's failure to hire Blacks and Jews.

3. Allegations of a general pattern of discrimination as evidenced by statistical disparities in the work force are sufficient legal bases for an agency charge:

Statistics show a "high probability of discrimination" and "Such statistics alone would be sufficient to form the basis of an EEOC complaint." Cameron Iron Works, Inc. v. EEOC, 320 F. Supp. 1191 (S.D. Tex. 1970.)

C. COMPLAINTS FILED BY INDIVIDUALS SERVE THE SAME FUNCTION AS THE AGENCY INITIATED CHARGE AND THE COURTS HAVE LIBERALLY CONSTRUED PROCEDURAL FILING REQUIREMENTS.

1. Charges may be perfected or amended subsequent to their filing, but it is not expected or required that the original complaint be drafted with lawyer-like precision:

For a lay-initiated proceeding, it would be out of keeping with the act to import common-law pleading niceties to (this) "charge"...All that is required is that it gives sufficient information to enable EEOC to see what the grievance is about."
Jenkins v. United Gas, Corp., 400 F. 2f 28 (5th Cir. 1968

See also Weeks v. Southern Bell Tel. & Tel., 408 F. 2d (5th Cir. 1969) which approved EEOC's procedural regulations concerning amendments to charges and considered an unsworn charge filed when received by EEOC for the purposes of the statute of limitations; and Georgia Power v. EEOC, 412 F. 2d 462 (5th Cir. 1969,) which held that an unsworn letter was an effective charge; and Tidewell v. American Oil Co., 332 F. Supp. 424 (D.C. Utah 1971) which held that the state anti-discrimination law authorized but did not require the filing of a written complaint and that an oral complaint was sufficient to meet the time requirements imposed by the statute of limitations. LOVE VS Pullman - for procedural precedent.

2. A charging party may make general allegations of discriminatory policies without alleging names, incidents, or dates of discriminatory conduct. "...Sophisticated general policies and practices of discrimination are not susceptible to such precise delineation by a layman..." and "This is precisely the type of information that the EEOC is empowered to ascertain by utilization of its subpoena powers..." Graniteville Co., Sibley Div. v. EEOC, 438 F. 2d 32 (4th Cir. 1971.)

3. An erroneous legal conclusion drawn by the complainant, such as stating that national origin rather than sex is the basis of a complaint of discrimination, is a mere technical defect. Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (5th Cir. 1970.) Expanded from what you're told by ~~the~~ complainant.

*D. THE ABILITY OF THE INDIVIDUAL COMPLAINANT TO RAISE CLASS ACTION ALLEGATIONS

1. Regardless of the language of the complaint, and regardless whether the agency seeks to investigate and remedy it as such, each complaint filed by an individual assumes class action proportions:

"Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated."

Jenkins v. United Gas Corp., supra; also see Bowe v. Colgate-Palmolive 416 F. 2d 711 (7th Cir., 1969.)

2. The private complainant acts as an attorney general and is a vindicator of public policy. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968,) Oatis v. Crown Zellerbach Corp., et al., 398 F. 2d 496 (5th Cir. 1968,) Jenkins v. United Gas, supra.

3. The majority of federal courts have broadly interpreted federal civil procedural rules governing the requirements of a class action: "...whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all members of the class." Hall v. Werthan Bag Corp., 251 F. Supp. 184 (D.C. Tenn. 1966.)

4. A complainant who is alleging a discriminatory refusal to hire prospective may allege "across the board" discriminatory practices, including, but not limited to discriminatory job assignment practices, promotional policies, seniority systems, terminations, and lay-offs. See Carr v. Conoco Plastics, Inc., 423 F. 2d 57 (5th Cir. 1970,) cert. denied, 40 U.S. 951 (1970,) where plaintiffs, alleging discriminatory refusals to hire, sought to enjoin company-wide discriminatory practices and the court held that they had raised a "question of fact common to all members of their class-racial discrimination against all Negroes." See also Clark v. American Marine Corp., 297 F. Supp. 1305 (D.C. La. 1969,) aff'd. per curiam on another issue, 437 F 2d 959 (5th Cir. 1971.)

5. A complainant who is alleging a discriminatory discharge may also allege, retropectively, discrimination pertaining to hiring and internal practices. In Johnson v. Georgia Highway Express, 417 F. 2d 1122 (5th Cir. 1969,) the court noted that if, after appropriate investigation, the Charging Party proved not to represent the interests of all Negroes who were employed or who may be employed at Respondent's Company, then sub-classes could be formed. See also Hacket v. McGuire 445 F 2d 442 (3rd Cir. 1971) and Tipler v. Dupont 443 F 2d 125 (6th Cir. 1971.) But see Danner v. Phillips Petroleum Co. 447 F 2d 159 (5th Cir. 1971.)

E. THE VIOLATION IS TO BE ESTABLISHED AT THE TIME OF THE ALLEGED DISCRIMINATORY ACT OR ACTS

1. A post-complaint offer to hire (reinstate, etc.) does not moot the case: Jenkins v. United Gas, supra; Parham v. Southwestern Bell Telephone Co., 433 F 2d 421 (8th Cir. 1970;) Cypress v. Newport News General and Nonsectarian Hospital Ass'n., 375 F 2d 648 (4th Cir. 1967) ("Such a last minute change of heart is suspect to say the least.")

2. A change of policy during the pendency of the proceedings does not moot the case, U.S. v. Plumbers, Local 73, 314 F. Supp. 160 (S.D. Ind. 1969;) Local 53 of Int. Ass'n. of Heat and Frost I. & A. Workers v. Vogler, 407 F 2d 1047 (5th Cir. 1969.)

F. THE COURTS READILY ACKNOWLEDGE STATISTICAL EVIDENCE OF DISCRIMINATION

"Statistics often tell much and courts listen..." State of Alabama v. U.S., 305 F 2d 583 (5th Cir. 19,) aff'd. per curiam, 371 U.S. 37 (1962.)

1. Evidence of statistical disparity between the racial, sexual, etc. composition of the Respondent's work force and the available labor market is sufficient to establish a prima facie case of discrimination: In Jones v. Lee Way Motor Freight, Inc., 431 F 2d 235 (10th Cir. 1970,) cert. denied, U.S. (1971,) the plaintiff there did not offer any proof of individual instances of discrimination but relied on statistical evidence and the court held that the statistics established a prima facie case of discrimination which was not rebuttable by the defendant's conclusory claim of non-discrimination. See also Penn v. Stump, 308 F. Supp. 1238 (D.C. Calif. 1970;) Carter v. Gallagher 452 F 2d 315 (8th Cir. 1971,) cert. denied, U.S. 66 (1972;) U.S. v. Ironworkers, Local 86 443 F 2d 544 (9th Cir. 1971,) cert. denied, ___U.S.___ (197 :) Rowe v. General Motors, 457 F 2d 348 (5th Cir. 1972.)

2. Statistics showing disparities have been held, as a matter of law, to be evidence of a violation of the law: Parham v. Southwestern Bell Telephone Co., supra, Rios v. Enterprise Ass'n. Steamfitters, Local 638, 326 F. Supp. 198 (D.C. NY 1971.)

3. Statistics may be used as evidence in a case which is not being treated as a class action or a pattern or practice case, in order to show discrimination as to the individual: Marquez v. Ford Motor Co., Omaha District Sales Office, 440 F 2d 1157 (8th Cir. 1971.)

*G. THE RELEVANCY OF EVIDENCE OF A DISCRIMINATORY REPUTATION

1. A Respondent may not rebut statistical disparities by showing that few or no members of the protected class applied for positions (made bids for promotion, etc.:)

> "That so few Negro physicians have applied is no indication of a lack of interest, but indicates, we think, a sense of the futility of such an effort in the face of the notorious discriminatory policy of the hospital." Cypress v. Newport News General & Nonsectarian Hospital Ass'n., supra.

2. Respondent's reputation in the community may produce a "chilling effect" on potential applicants: In Lea v. Cone Mills, 301 F. Supp. 97 (D.C. N.C. 1969,) the court disregarded the defendant's argument that the paucity of black females proved lack of interest and lack of discrimination and said that "the more plausible explanation of this inaction is that, because of defendant's hiring practices over a long period of years, Negro females felt their efforts to obtain employment would be futile."

*H. THE DUTY OF FAIR RECRUITMENT

1. A recruitment system which prefers the relatives of incumbent employees operates discriminatorily if the current work force is predominately White (or male, Anglo, etc.) In U.S. v. Plumbers, Local 73, supra, the court noted that relatives of union members "fared significantly better" in gaining admission to the apprenticeship program, and that these nepotistic practices served to exclude Black applicants. Asbestos Workers Local 53 v. Vogler also dramatically illustrates this point.

2. Similarly, a recruitment policy which is implemented by the recommendations of the Respondent's employees may, in certain circumstances, be violative:

> "A recruitment policy depending primarily on referrals from almost completely White work force, although racially neutral on its face, predictably produces White applicants." Parham v. Southwestern Bell, supra.

And in Clark v. American Marine Corp. supra, it was said that recruitment done by "word of mouth" in a company with an all White work force was illegal because "...the inevitable effect of the company policy is to perpetuate the White monopoly on craft jobs." EEOC has held such a policy violative on its face in 6 Decision No. 70-422, January 19, 1970.

3. Any recruitment system which fails to apprise minority as well as majority members of the community of job opportunities fails to meet the duty of fair recruitment: Lea v. Cone Mills, supra; Dobbins v. IBEW, Local 212, 292 F. Supp. 413 (D.C. Ohio 1968.)

4. The failure to advertise the discontinuance of former discriminatory policies and practices is illegal: U.S. v. Sheet Metal Workers, Local 36, 439 F 2d 237 (8th Cir. 1969.)

5. A newspaper may be liable for aiding an employer's discriminatory recruitment system by allowing the publication of segregated male and female columns: Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, Pa. Com. Ct., 1972, cert. granted, 41 LW 3305, Dec. 4, 1972.

* I. EVIDENCE THAT AN EMPLOYEE SELECTION DEVICE PRODUCES AN ADVERSE IMPACT ON PROTECTED CLASSES AND BEARS NO RELATIONSHIP TO THE JOB IN QUESTION ESTABLISHES A VIOLATION

1. The U.S. Supreme Court has set the standard by which all hiring criteria must be examined in light of Title VII:

> "The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401 U.S. 424 (1971.)

Footnote 6

2. Some of the hiring criteria the courts have struck under the "adverse impact" doctrine approved by Griggs are as follows:

a. Written tests:

- the absence of a validation study established a violation, Hicks v. Crown Zellerbach, 319 F. Supp. 314 (D.C. Lr. 1970)
- Arrington v. Mass. Bay Transit Authority, 306 F. Supp. 1355 (D. Mass. 1969) (General Aptitude Test Battery)
- Carter v. Gallagher, 452 F 2d 315 (8th Cir. 1971) and Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (D.C. Calif. 1972) firefighters exams)
- Chance v. Board of Examiners, 468 F. 2d 1167 (2nd Cir. 1972 (civil service promotion exam for school administrators)
- Penn v. Stumpf, supra; Castro v. Beecher 459 F. 2d 725 (1st Cir. 1972;) Morrow v. Crisgler, ___ F. Supp. ___ (D.C. Miss. 1971) (policeman's exams)

b. Minimum educational requirements:

- Griggs v. Duke Power Co., supra; Carter v. Gallagher, supra; U.S. v. Georgia Power Co., ___ F. Supp. ___ (D.C. Ga. 1971;) Johnson v. Georgia Highway Express, ___ F. Supp. ___ (D.C. Ga. 1972) (high school diplomas or G.E.D.'s)
- EEOC Dec. No. 70-402 Jan. 10, 1970 (college degree)

c. Arrest records:

- Gregory v. Litton Systems, 316 F. Supp. 401 (D.C. Calif. 1970;)
- Carter v. Gallagher, supra

d. Convictions:

- Carter v. Gallagher, supra (striking employer's absolute felony bar to employment as firefighter)
- EEOC Dec. No. 71-2682, June 28, 1971 (gambling convictions)
- EEOC Dec. No. 72-1460, March 19, 1972 (arrest-conviction pre-employment inquiry)

e. Garnishments

- Johnson v. Pike, 332 F. Supp. 490 (D.C. Calif. 1971)

f. Minimum height-weight requirements:

- New York State Division on Human Rights v. N.Y. Pa. Baseball League, 29 N.Y. 2d 921 (1972) (female excluded from umpire's job)
- EEOC Dec. No.. 71-1418, March 17, 1971 (discriminatory as to Chicanos)
- EEOC Dec. No. 1529, April 2, 1971 (discriminatory as to females)

g. Previous experience requirements:

- Local 189, United Papermakers and Paperworkers v. U.S. 416 F. 2d 980 (5th Cir. 1969,) cert. denied, 397 U.S. 919 (1970;) Dobbins v. Local 212, supra; Quarles v. Phillip Morris, 279 F. Supp. 505 (E.D. Va. 1968.) (cannot use requirement where it has the effect of freezing out previously excluded group.)
- U.S. v. Iron Workers, Local 86, supra (modification of experience requirement consistent with a demonstrable relationship to requirements of job)

h. Rejection for poor grammar:

- EEOC Dec. No. 71-1683, April 12, 1971

i. Grooming standards:

- Braxton v. Board of Public Instruction, 303 F. Supp. 958 (M.D. Fla. 1969) (Afro hair style)

j. Credit references, stability

- Bobby Milton v. Wisconsin State Personnel Bd., 1 Equal Rights Decisions of the Dept., p. 42, March 14, 1972 (credit reference check)
- In re: Ferguson v. United Parcel Service, dec. of Md. Com. Human on Relations, Mar. 8, 1972 (stable personal life, employment record, credit)

k. Non-participation in civil rights demonstrations:

- McDonnell Douglas Corp. v. Green, 463 F. 2d 337 (8th Cir. 1972,) cert. granted, ___U.S. ___

Polygraphic tests

(Dec. 4, 1972) (laid-off employee not recalled due to his demonstration against alleged discriminatory lay-off policy)

L Employment decisions made on the basis of sex:

- customer perference an improper consideration on which to base hiring decisions: Diaz v. Pan American Airways, Inc. 442 F. 2d 385 (5th Cir. 1971)
- state "protective" laws contrary to federal fair employment law: Weeks v. Southern Bell Telephone and Telegraph, 408 F 2d 228 (5th Cir. 1969)
- the bona fide occupational qualification (BFOQ) as illegal and a form of romantic paternalism: Weeks v. Southern Bell T & T supra (the employer has the burden of proving that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.") See also Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F. Supp. 754 (M.D. Ala. 1969)

1. Employment decisions made on the basis of "sex plus":

- marital status: Sprogis v. United Airlines, 444 F. 2d 1194 (7th Cir. 1971;) Doe v. Osteopathic Hospital of Wichita, Inc., 333 F. Supp. 1357 (D.C. Kan. 1971)
- pre-school age children: Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)

m. Maternity leave policies:

- mandatory leave policy unsupported by medical evidence and an unlawful classification by sex, La Fleur v. Cleveland Board of Education, ___ F. 2d ___ (6th Cir. 1972;) contra; Schattman v. Texas Employment Commission, 459 F. 2d 32, cert. filed Sept. 21, 1972

*J. THE ILLEGALITY OF SENIORITY AND PROMOTION SYSTEMS WHICH PERPETUATE THE EFFECTS OF DISCRIMINATORY HIRING PRACTICES

1. A seniority or promotion system which carries forward the effects of prior discriminatory practices has the effect of "freezing in an entire generation" of the affected class: Quarles v. Philip Morris, Inc., 279 F/ Supp. 505 (E.D. Va. 1968) and Hicks v. Crown Zellerbach, supra. In Local 189, United Papermakers and Paperworkers v. U.S., the court said:

> "Every time a Negro worker hired under the old segregated system bids against a White worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias. It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the past is to cut into the employees present right not to be discriminated against on the ground of race."

The initial segregation may have occured through overt discrimination as in the case cited above (see also Dobbins v. IBEW, 212, supra,) or through covert discrimination as in U.S. v. Georgia Power, supra, where the affected class's promotion rights were restricted due to job assignments made on the basis of discriminatory testing and minimum educational devices used as entry level hiring criteria.

2. Promotional policies for executive level employees are subject to standards of objectivity and relationship to the job. In Marquez v. Ford Motor Co., Omaha District Sales Office, supra, it was acknowledge that advancement to leadership positions involved complex issues and more intense competition, but the court found that the absence of minorities in the defendant's work force, coupled with the defendant's failure to provide an adequate explanation for its failure to promote the complainant, was sufficient evidence of a violation of the law.

3. Similarly, a promotional policy which is not objective and job-related and which is implemented by predominately White supervisors, can have a discriminatory effect on non-White employees:

> "All we do today is recognize that promotion/ transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination ...We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." Rowe v. General Motors Corp., ___F. 2d ___ (5th Cir. 1972)

K. THE EMPLOYER'S BURDEN OF PROVING A BUSINESS NECESSITY FOR THE CONTINUANCE OF AN EMPLOYMENT POLICY OR PRACTICE WHICH ADVERSELY AFFECTS PROTECTED CLASSES

1. The U.S. Supreme Court in Griggs v. Duke Power, supra, spoke of the business necessity doctrine as the "touchstone" of an employer's defense of practices that have been shown to adversely impact on protected classes. The court in Robinson v. Lorrillard Corp., 444 F. 2d 791 (4th Cir. 1971) has provided the best working definition of that defense:

   > "The applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve: and there must be no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

2. In the following cases the business necessity defense was advanced and deemed legally insufficient to permit the continuance of the challenged practice or policy:

   - U.S. v. Jacksonville Terminal ___ F. 2d ___ (5th Cir. 1971) (positive, empirical evidence, not the subjective opinion of a supervisor, is necessary to establish a good defense)

   - Johnson v. Pike Corp., supra; Bing v. Roadway Express, Inc., 444 F. 2d 687 (4th Cir. 1971) (increased costs and inconvenience are inadequate argruments)

   - Diaz v. Pan American Airways, supra; Sprogis v. United Air Lines, supra (customer preferences inadequate defense)

L. RELIEF

1. Temporary Injunctions

An agency may seek a temporary injunction and temporary affirmative relief without a full hearing on the merits of the case and without a showing of irreparable injury:

> "We take the position that in such a case, irreparable injury should be presumed from the very fact that the statute has been violated. Whenever a qualified Negro employee is discriminatorily denied a chance to fill a position for which he is qualified and has the seniority to obtain, he suffers irreparable injury and so does the labor force of the country as a whole." U.S. v. Hayes International Corp., 415 F. 2d 1038 (5th Cir. 1969:) and see Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970.)

2. Temporary Affirmative Relief

The affirmative temporary relief which has been granted by some courts includes the immediate hiring of named individuals and hiring in accord with prescribed racial ratios for all future vacancies arising prior to a full hearing on the merits of the complaint. In U.S. v. Central Motor Lines, Inc., 325 F. Supp. 478 (D.C. N.C. 1970) the court issued a temporary injunction, ordered the immediate hiring of six Black persons, and required that 50% of all other vacanancies be filled by Black persons. See also Rios v. Enterprise Assoc., Steamfitters, Local 638, supra.

3. Affirmative Remedial Orders

The agency has a duty to award class-wide relief and to remedy all found discrimination. In Jenkins v. United Gas, supra, the court said:

> "Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee's behalf, the result would be the incongrous one of the Court - a Federal Court, no less - itself being the intrument of racial discrimination, which brings to mind our rejection of like arguments and result in Potts v. Flax, 5 Cir., 1963, 313 F. 2d 284, 289."

In U.S. v. Household Finance, Corp., a consent decree was entered on February 29, 1972 (C.A. 72C 515) which provided for such broad relief, including the suspension of tests, the promotion of specific discriminates with back pay, the establishment of a non-discriminatory lending program, the hiring of certain percentages of females, Spanish-surnamed Americans, Blacks and Indians, and extensive reporting provisions. In order to equalize the effects of

discriminatory recruitment systems, courts have ordered extensive recruitment programs designed to increase the flow of minority applicants NAACP v. Allen, ___ F. Supp. ___ (M.D. Ala. 1972;) Parham v. Southwestern Bell, supra.

In remedying discriminatory seniority or transfer systems, the courts have required "red circling" of wage rates where the newly opened jobs pay less initially than current wages. U.S. v. Bethlehem Steel, Corp., 446 F. 2d 652 (2d Cir. 1971;) Hicks v. Crown Zellerbach, supra; Robinson v. Lorillard, supra. Also, members of the class have been allowed to skip jobs in lines of progression which did not provide training in skills necessary for higher level jobs. U.S. v. Continental Can Co., 319 F. Supp. 161 (D.C. Va. 1970.)

4. Preferential Treatment

The imposition of benevolent quotas and ratio hiring for the purpose of remedying discrimination has become one of the most frequently used mechanisms to achieve a rapid remedy for discriminatory practices creating an imbalance in a work force. In Contractors' Ass'n. v. Shultz, 442 F. 2d 159 (3rd Cir. 1971) cert. denied, ___ u.S. ___ (1971,) the timetables imposed by the Philadelphia Plan were upheld and the court noted that "...color-consciousness has been deemed to be an appropriate remedial posture." In Joyce v. McCranee, 320 F. Supp. 1284 (D.C. N.J. 1970,) it was held that goals for the hiring of minorities are not in conflict with statutory prohibitions against preferential treatment to remedy imbalance.

After a finding of discrimination, and in numerous consent decrees, specific numbers, percentages, and ratios have been written into remedies. The formulas vary, but they all have as their goal the avoidance of tokenism and the creation of work force that approximates the racial, sexual, and ethnic labor market in the area. See e.g., Asbestos Workers, Local 53 v. Vogler, supra; Carter v. Gallagher, supra; NAACP v. Allen, supra; U.S. v. Local 86, Iron Workers, supra; U.S. v. Dillon Supply, C.A. 4-1970 (D.C. N.C. 1971:) Madlock v. Sardis Luggage, (No. D.C. 693-S (NID Miss. 1971:) U.S. v. Virginia Electric & Power Co., (No. 638-70 (D.C.

Va. 1971:) U.S. v. Central Motor Lines, supra.

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5. Compensatory Relief

Back pay is often a necessary element in making the complainant and the class he/she represents completely whole. In Robinson v. Lorillard back pay was described as "...not a penalty imposed as a sanction for moral turpitude," but, rather, as a "...compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition." In that case the class was given $500,000.00 in back pay. And in Madlock v. Sardis Luggage, supra, the award amounted to $120,000.00 for the class. In Bowe v. Colgate-Palmolive, Co., 416 F. 2d 711 (7th Cir. 1969) there was also an award to all members of the class in a single action because the court could see no "...justification for treating such a suit as a class action for injunctive purposes but not treat it so for purposes of other relief." The consent decree entered in U.S. v. AMBAC Industries, Inc. (D.C. Mass, 1972) called for back pay awards to applicants who were discriminatorily denied positions.

While EEOC is now limited by statutory amendments which limit the computation of back pay to 2 years preceding the filing of the charge, the majority of state and local agencies do not have a statutory limitation prohibiting them from computing back pay to the effective date of their enabling legislation.

6. Punitive Damages Possibilities

There have been no cases brought under Title VII awarding punitive damages to plaintiffs, but in Tooles v. Kellogg Co., 336 F. Supp. 142 (D.C. Neb. 1972) the court, in refusing to strike a prayer for punitive damages said that "...a punitive damage remedy might in an appropriate case be a proper award..." and cited as support for its position, Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109. In Tidwell v. American Oil Co., supra, the court similarly refused to grant a motion to strike a prayer seeking back pay and punitive damages totalling $500,000.

Following the Supreme Court's decision in Nixon v. Herndon, 273 U.S. 536 (1927) a voting rights case brought under the 14th Amendment, federal courts have awarded punitive damages for violations of civil rights laws. In Basista v. Weir, 340 F. 2d 74 (3rd Cir. 1965,) punitive damages were awarded in the absence of specific statutory authority, and in Caperci v. Huntoon, 397 F. 2d 799 (1st Cir. 1968,) punitive damages were awarded where there was no proof of actual damages.

7. Attorney's Fees

Lawyers representing private complainants before administrative hearing tribunals should be awarded attorney's fees where it is appropriate to do so. In Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) the Court noted that attorney's fees are not ordinarily available without specific statutory authority, but said that if such fees are necessary to promote the private enforcement of a statute, and the action brought benefits others as well, attorney's fees are recoverable.

In Lea v. Cone Mills, supra, the plaintiff had been "testing" the Respondent was not an actual job applicant, but she was awarded attorney's fees because her complaint served to vindicate public policy. See also Newman v. Piggie Park Enterprises, supra, (Title II of the Civil Rights Act of 1964.) In Parham v. Southwestern Bell, the court found no discrimination with respect to the plaintiff but found certain company policies and practices discriminatory and awarded attorney's fees for the role played by the plaintiff in bringing the company into compliance.

M. THE LEGAL EFFECT OF ADMINISTRATIVE RULES, REGULATIONS, AND GUIDELINES

The courts accord great deference to an administrative agency's interpretation of its law, Udall v. Tallman 380 U.S. 1 (1965,) and in the following cases Title VII regulations were cited with approval:

- Griggs v. Duke Power Co., supra, (employee selection guidelines)
- Love v. Pullman, ___ U.S. ___ (1972) (regulations governing the deferral of charges to state and local agencies)
- Weeks v. Southern Bell, supra (sex guidelines)
- Riley v. Bendix, ___ F. 2d ___ (5th Cir. 1972) religious guidelines)

In New Jersey Builders, etc. v. Blair, decided March 27, 1972, the authority of the New Jersey Division on Civil Rights to promulgate a rule which required certain landlords to report to it on an annual basis the racial composition of applicants and tenants, as well as other information, was challenged unsuccessfully. The New Jersey State Supreme Court said in a unanimous decision that "...those who seek to end racial discrimination must often be acutely color-conscious" and that because discrimination still persisted, the agency must employ more aggressive means to achieve satisfactory results.