

John Hoeven
Governor

Lisa K. Fair McEvers
Commissioner



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

nd.gov/labor
nd.gov/humanrights

Testimony on HB 1092
Prepared for the
Human Services Committee
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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 it's

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.