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**LEGISLATIVE
RESEARCH COMMISSION**

**ALTERNATIVE APPROACHES TO DEAL WITH
DISCRIMINATION IN EMPLOYMENT**



**REPORT TO THE
1991 GENERAL ASSEMBLY
OF NORTH CAROLINA
1992 SESSION**

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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611



May 26, 1992

TO THE MEMBERS OF THE 1991 GENERAL ASSEMBLY (REGULAR SESSION, 1992):

The Legislative Research Commission herewith submits to you for your consideration its interim report on alternative approaches to deal with discrimination in employment. The report was prepared by the Legislative Research Commission's Committee on Alternative Approaches to Deal with Discrimination in Employment pursuant to Section 2.1 of Chapter 754 of the 1991 Session Laws.

Respectfully submitted,

A large, stylized handwritten signature of Daniel T. Blue, Jr. in black ink.

Daniel T. Blue, Jr.
Speaker of the House

A large, stylized handwritten signature of Henson P. Barnes in black ink.

Henson P. Barnes
President Pro Tempore

Cochairmen
Legislative Research Commission



1991-1992

LEGISLATIVE RESEARCH COMMISSION

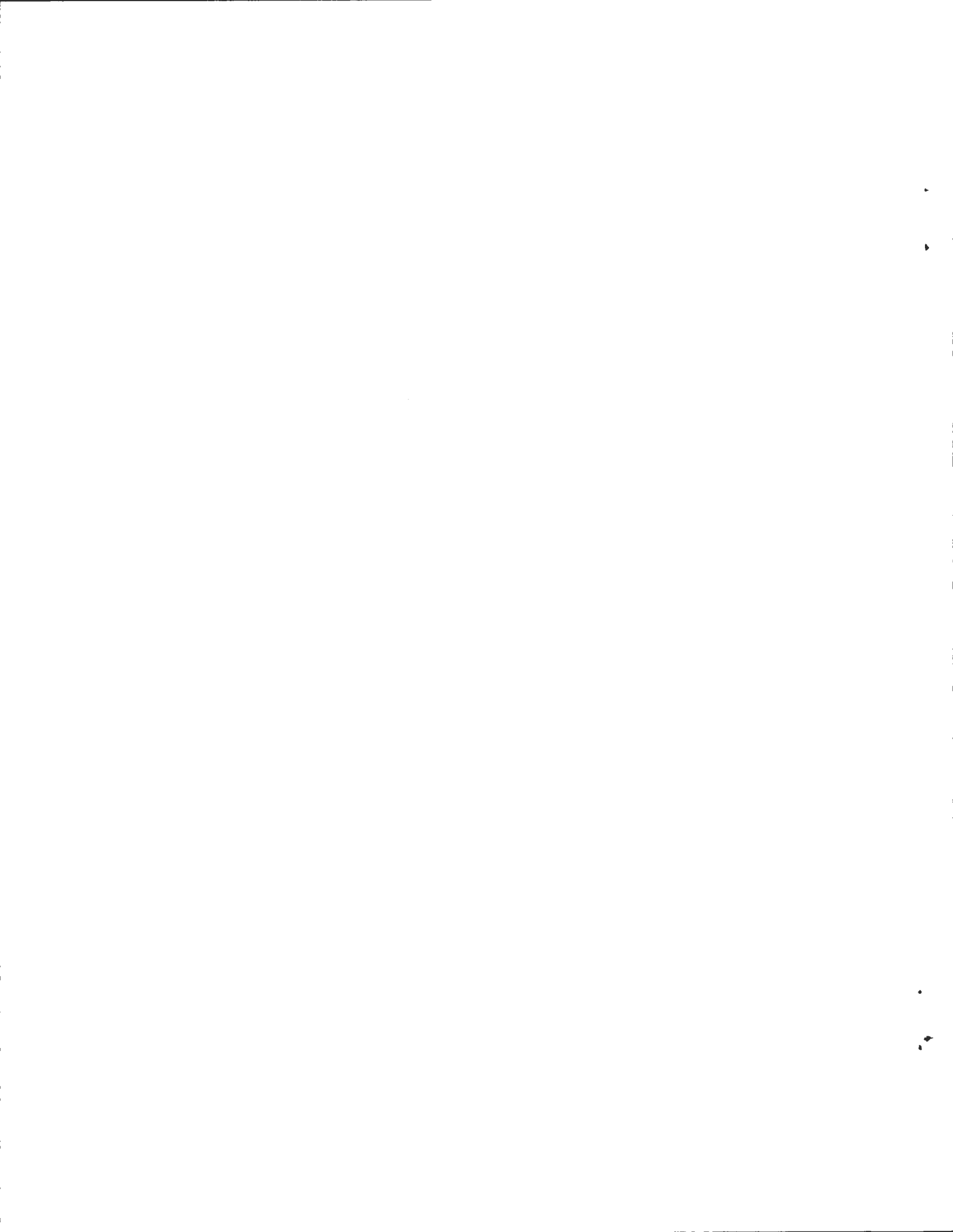
MEMBERSHIP

President Pro Tempore of
the Senate
Henson P. Barnes, Cochair

Senator Frank W. Ballance, Jr.
Senator Howard F. Bryan
Senator J. K. Sherron, Jr.
Senator Lura Tally
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Speaker of the House of
Representatives
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Rep. Peggy M. Stamey



PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is a general purpose study group. The Commission is cochaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

At the direction of the 1991 General Assembly, the Legislative Research Commission has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Cochairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Cochairs, one from each house of the General Assembly, were designated for each committee.

The study of Alternative Approaches to Deal with Discrimination in Employment was authorized by Section 2.1 of Chapter 754 of the 1991 Session Laws (1991 Regular Session). That act states that the Commission may consider House Bill 555 in determining the nature, scope and aspects of the study. The relevant portions of Chapter 754 are included in Appendix A. A copy of House Bill 555 is included in Appendix B. The Legislative Research Commission grouped this study in its Labor area under the direction of Representative Pete Cunningham. The Committee is chaired by Senator Helen Marvin and Representative Annie B. Kennedy. The full membership of the Committee is listed in Appendix C of this report. A committee

notebook containing the committee minutes and all information presented to the committee will be filed in the Legislative Library.

COMMITTEE PROCEEDINGS

The Legislative Research Commission study Committee on Alternative Approaches to Discrimination in Employment met five times after the close of the 1991 Session of the General Assembly: December 16, 1991, January 21, 1992, February 25, 1992, March 31, 1992, and April 22, 1992. The purpose of the Committee's primary effort during these meetings has been to identify, define, and prioritize the specific issues and concerns to be addressed.

December 16, 1991 Meeting

The Committee held its first meeting and focused primarily on organization and information matters. The Committee received a summary briefing on the background of House Bill 555 which may be considered by the Committee during the study process. The bill's original purpose, as stated by Mr. Danny Addison of the North Carolina Human Relations Commission, was to establish discrimination or fair employment practices legislation, similar to those in the majority of other states, for the State of North Carolina. Mr. Addison gave a synopsis of the existing federal legislation and outlined the current protections under each. The Committee noted that employers with fewer than 15 employees are exempt from coverage under those laws. North Carolina remains one of only a handful of states with no statutory anti-discrimination law.

To begin its substantive investigation of the very broad issue of discrimination in employment, Professor Wilson Parker, Professor of Constitutional and Employment Law with Wake Forest University, presented an overview of the federal and state legislative roles and the judicial role in the employment law arena. He outlined the

history of the Civil Rights Act of 1964 and referenced the changes to that Act as a result of the passage of the Civil Rights Act of 1991. He discussed common law rights and their use by courts in providing remedies to those employees who are not covered by existing anti-discrimination legislation.

Based on the informational briefings, the Committee requested data concerning case processing timeframes by the Equal Employment Opportunity Commission (EEOC); the existence of anti-discrimination legislation and the minimum coverage levels in other states; general statistics on the number of workers statewide, EEOC cases filed, etc. A subcommittee was assigned for the purpose of: (a) identifying and defining specific issues or areas in which the Committee might wish to concentrate its efforts and (b) proposing specific alternatives.

January 21, 1992 Meeting

At its second meeting, the Committee focused on defining the specific areas and issues for attention and continued with its data collection efforts. The areas and issues that the Committee might consider investigating and acting upon were received from the subcommittee. They included:

- Extending any state anti-discrimination law beyond the federal coverage threshold of 15 employees;
- Addressing the need to add a statutory provision in G.S. 126, the State Personnel Act, specifically to prohibit discrimination in state government employment;
- Establishing enabling legislation for local jurisdictions to enact their own fair employment practices laws;
- Providing for a private right of action to give those employees filing suit the option to go directly with the administrative or civil process; and

- The need to hear the public's perspective on the subject.

Staff explained data from the Equal Employment Opportunity Commission (EEOC) concerning the 3440 cases in North Carolina which were filed with the agency during its 1991 fiscal year. Survey results which summarized the existence of anti-discrimination laws in other states and the District of Columbia were also presented.

Professor Wilson Parker summarized the Civil Rights Act of 1991, noting that it essentially reversed precedents established by several recent Supreme Court decisions which were counter to earlier long-standing court interpretations of the Civil Rights Act of 1964. He explained the major changes to and resulting impacts upon the Act.

Mr. Ed Smith, Director of the Civil Rights Division of the Office of Administrative Hearings, presented an overview of the Americans with Disabilities Act (ADA). Mr. Smith pointed out that there are approximately 860,000 disabled individuals in the State of North Carolina. He noted that Title I of the ADA addresses employment provisions and seeks to make certain that qualified disabled persons are not discriminated against in the workplace. He explained the law's definition of "disability" and outlined the three ways for a person to qualify under that definition.

Ms. Judy Burke, Chief Counsel with the Governor's Advocacy Council for Persons with Disabilities, commented briefly as to that group's input at the congressional level during the bill drafting process for the Americans with Disabilities Act and its role in receiving, processing, and litigating and resolving complaints.

February 25, 1992 Meeting

In an effort to gain a fuller perspective and have a clearer picture of some of the actual experiences have been for individual persons, groups, organizations, and other employers, the Committee held a public hearing as the first portion of its third

meeting. Five speakers presented a broad range of points of view, observations, experiences, and concerns which included:

- Industry concern with any increased bureaucracy in addressing discrimination and fair employment allegations;
- Allegations of employment discrimination in State agencies and concern that employees are not fully aware of procedures, resources, and options when faced with addressing a situation involving discrimination;
- The lack of protection afforded State employees under the current State Personnel Act;
- The rising national trend toward discrimination based on lifestyle decisions;
- Support for a fair employment law and state deferral agency in North Carolina;
- The possibility of the State Attorney General's Office providing assistance, through a civil rights division, to State employees in situations involving alleged discrimination.

March 31, 1992 Meeting

The fourth meeting of the Committee was devoted to follow up on several of the areas of concern which were raised during the public hearing. In that regard:

- A letter from the Attorney General's Office on the suggestion to establish a Civil Rights Division was reviewed.
- Ms. Ann Mackey of N.C. Equity made remarks in reference to women and employment discrimination, stressing the need for a state fair employment practices act.
- Ms. Barbara Coward with the Office of State Personnel provided a detailed explanation of the current state employee grievance system and specifically

addressed the issues of whether agencies restricted an employee's use of an attorney during the department phase of the grievance and whether current protections under the State Personnel Act are in fact adequate.

- Mr. George Jones with the Department of Human Resources provided information and statistics on that department's affirmative action and equal employment record.
- Ms. Kristine Lanning of the State Employees Association of North Carolina shared some of the complaints brought to their attention by association members and suggested the need for a vehicle to provide some legal assistance to employees.

Upon reviewing and discussing proposed legislation concerning lifestyle discrimination, the Committee voted to adopt the proposed draft bill and to report to the 1992 Regular Session of the General Assembly.

April 22, 1992 Meeting

The Committee convened to receive additional information regarding the State employee grievance process and to review the draft interim report for transmittal to the 1992 session of the General Assembly. Ms. Barbara Coward from the Office of State Personnel's Commission Staff presented statistical data on the numbers of and rulings on cases processed through the State Personnel Commission.

Ms. Nellie Riley of the Equal Opportunity Services Division in the Office of State Personnel highlighted the evolution of equal employment opportunity in State government, outlined her division's responsibilities, made several observations regarding employee complaints, and suggested four recommendations.

Ms. Kristine Lanning of the State Employees Association of North Carolina reported its members' overwhelming concern with the role that political affiliation

seems to play in State government. She stated the Association's concern with the lack of continuity in decisions among administrative law judges and suggested the possibility of a rotational assignment system. Ms. Lanning further proposed a number of approaches aimed at providing assistance to employees in understanding and navigating the grievance process.

During the discussion phase, all three speakers commented on the use of mediation as a viable means of resolving problem situations before they reached the full-blown, formal complaint stage. The Committee concurred and recommended further use of that vehicle. Mr. G.C. Davis, Deputy Personnel Director at the Office of State Personnel, pointed out that prior to 1985, their office had two staff employees assigned to mediate disputes on a full-time basis.

After approving the draft interim report, the Committee expressed its intent to pursue questions relating to the State employee grievance process upon completion of the Short Session. Mr. Ed Smith presented a proposed list of specific changes to the State Personnel Act and the enabling statutes for the Office of Administrative Hearings. He asked that those proposed changes be considered along with the recommendations presented by Ms. Riley and Ms. Lanning. Mr. Danny Addison reminded the Committee of the need to complete the examination of private sector issues, as well.

RECOMMENDATIONS

The study Committee on Alternative Approaches to Deal with Discrimination in Employment recommends to the 1992 Regular Session of the General Assembly:

Recommendation #1:

That legislation be enacted to prohibit discrimination by an employer against any person for engaging in any lawful activity during nonworking hours and unrelated to employment. (See Legislative Proposal I)

Recommendation #2:

That the Fiscal Research Division staff of the General Assembly be directed to investigate state agency compliance with Executive Order 76 and to report its findings to the appropriate legislative committee(s) during the 1992 Regular Session.

Recommendation #3:

That the Committee have a sufficiency of funds to enable it to complete its examination of and develop sound, viable recommendations to address the major issues relating to discrimination in employment.



APPENDIX A

CHAPTER 754
SENATE BILL 917

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE AND CONTINUE VARIOUS COMMITTEES AND COMMISSIONS, TO MAKE APPROPRIATIONS THEREFOR, TO DIRECT VARIOUS STATE AGENCIES TO STUDY SPECIFIED ISSUES, AND TO MAKE OTHER AMENDMENTS TO THE LAW.

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1991."

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PART II.-----LEGISLATIVE RESEARCH COMMISSION

Sec. 2.1. The Legislative Research Commission may study the topics listed below. Listed with each topic is the 1991 bill or resolution that originally proposed the issue or study and the name of the sponsor. The Commission may consider the original bill or resolution in determining the nature, scope, and aspects of the study. The topics are:

- (13) Alternative Approaches to Deal with Discrimination in Employment (H.B. 555 - Kennedy),
-

Sec. 2.7. Committee Membership. For each Legislative Research Commission Committee created during the 1991-93 biennium, the cochairs of the Commission shall appoint the Committee membership.

Sec. 2.8. Reporting Dates. For each of the topics the Legislative Research Commission decides to study under this act or pursuant to G.S. 120-30.17(1), the Commission may report its findings, together with any recommended legislation, to the 1992 Regular Session of the 1991 General Assembly or the 1993 General Assembly, or both.

Sec. 2.9. Bills and Resolution References. The listing of the original bill or resolution in this Part is for reference purposes only and shall not be deemed to have incorporated by reference any of the substantive provisions contained in the original bill or resolution.

sec. 2.10. Funding. From the funds available to the General Assembly, the Legislative Services Commission may allocate additional monies to fund the work of the Legislative Research Commission.

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PART XXI.-----EFFECTIVE DATE

Sec. 21.1. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 16th day of July, 1991.



APPENDIX B

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

H

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HOUSE BILL 555
Committee Substitute Favorable 6/12/91

Short Title: Employment Discrimination Study.

(Public)

Sponsors:

Referred to:

April 1, 1991

1 A BILL TO BE ENTITLED
2 AN ACT TO CREATE AN INDEPENDENT STUDY COMMISSION TO STUDY
3 THE DIRECTION STATE LAW SHOULD TAKE IN DEALING WITH
4 DISCRIMINATION IN EMPLOYMENT BASED ON RACE, COLOR,
5 RELIGION, SEX, NATIONAL ORIGIN, AGE, OR DISABILITY.
6 Whereas, it is the policy of the State of North Carolina, as stated in
7 G.S. 143-422.2, to "protect and safeguard the right and opportunity of all
8 persons to seek, obtain and hold employment without discrimination and
9 abridgement on account of race, religion, color, national origin, age, sex or
10 handicap by employers which regularly employ 15 or more employees"; and
11 Whereas; the Human Relations Commission in the Department of
12 Administration is now empowered to receive certain discrimination charges
13 under federal law from the U.S. Equal Employment Opportunity Commission
14 and to investigate and conciliate those charges; and
15 Whereas, it has been proposed that the General Assembly enact for
16 the State the contents of the Civil Rights Act of 1964 as amended, the Age
17 Discrimination in Employment Act of 1967 as amended, and the Americans
18 With Disabilities Act of 1990, and empower the Human Relations Commission
19 to enforce those acts through an arrangement with the Equal Employment
20 Opportunity Commission, as is done in some other states; and
21 Whereas, the question has arisen whether such an arrangement
22 would limit the remedies available to plaintiffs in the developing body of

1 antidiscrimination precedents under the common law in North Carolina; Now,
2 therefore,

3 The General Assembly of North Carolina enacts:

4 Section 1. There is established the North Carolina Commission on
5 Employment Discrimination Law (hereinafter "the Study Commission").

6 Sec. 2. The Study Commission shall be composed of 14 members:
7 seven to be appointed by the Speaker of the House of Representatives and
8 seven to be appointed by the President Pro Tempore of the Senate.
9 Appointments to the Study Commission shall be made within 30 days
10 subsequent to the adjournment of the General Assembly in 1991. The Speaker
11 of the House and the President Pro Tempore of the Senate shall each designate
12 a cochair from among their appointees. Either cochair may call the first
13 meeting of the Study Commission. Vacancies shall be filled in the same
14 manner as the original appointments were made.

15 Sec. 3. The Study Commission may study the desirability of various
16 alternative approaches that might be taken in State law to deal with
17 discrimination in employment, including but not limited to enacting the
18 contents of federal antidiscrimination legislation and empowering the Human
19 Relations Commission to enforce those provisions.

20 Sec. 4. At the request of the Study Commission, the Legislative
21 Services Commission may assign professional and clerical staff to assist in the
22 work of the Study Commission. The Study Commission may also employ any
23 professional and clerical staff it deems necessary to the performance of its
24 duties. With the approval of the Legislative Services Commission, the Study
25 Commission may meet in the State Legislative Building or the Legislative
26 Office Building.

27 Sec. 5. Members of the Study Commission who are members of the
28 General Assembly shall receive subsistence and travel allowances as provided
29 by G.S. 120-3.1. Members who are State officers or employees shall receive
30 subsistence and travel allowances as provided by G.S. 138-6. All other
31 members shall receive per diem, subsistence, and travel allowances as provided
32 by G.S. 138-5.

33 Sec. 6. The Study Commission may report its findings, together
34 with any recommended legislation, to the 1992 Session of the 1991 General
35 Assembly, to the 1993 General Assembly, or to both.

36 Sec. 7. Of the funds appropriated to the General Assembly there is
37 allocated the sum of \$50,000 for the 1991-92 fiscal year and the sum of
38 \$50,000 for the 1992-93 fiscal year to fund the work of the Study Commission
39 created by this act.

40 Sec. 8. This act is effective upon ratification.

APPENDIX C

MEMBERSHIP OF LRC COMMITTEE ON ALTERNATIVE APPROACHES TO DEAL WITH DISCRIMINATION IN EMPLOYMENT

LRC Member: Representative W. Pete Cunningham
3121 Valleywood Pl.
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Mr. Stephen B. Hill
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Sen. David R. Parnell
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Sen. James F. Richardson
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Staff:

Ms. Carolyn Johnson
Ms. Sandra Timmons
(919) 733-2578

Clerk:

Ms. Judy Robey

APPENDIX D

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

S

D

Senate 1991-RK-2

THIS IS A DRAFT AND NOT READY FOR INTRODUCTION

Short Title: Discrimination/Nonworking Hours.

(Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT DISCRIMINATION AGAINST ANY PERSON FOR ENGAGING IN ANY LAWFUL ACTIVITY DURING NONWORKING HOURS UNRELATED TO EMPLOYMENT.

The General Assembly of North Carolina enacts:

Section 1. Article 3 of Chapter 95 of the General Statutes is amended by adding a new section to read:

"§ 95-28.2. Discrimination against lawful activity during nonworking hours prohibited.

(a) It is an unlawful employment practice for an employer to fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because of any lawful activity the prospective employee or the employee engages in outside the premises of the employer during nonworking hours, if that activity does not adversely affect the employee's job performance or the safety of other employees.

(b) An employee who is discharged or otherwise discriminated against, or a prospective employee who is denied employment in violation of subsection (a) of this section may bring a civil action against the employer who violates the provisions of subsection (a) and obtain any of the following:

- (1) Any wages or benefits lost as a result of the violation;
- (2) An order of reinstatement without loss of position, seniority, or benefits;
- or
- (3) An order directing the employer to offer employment to the prospective employee.

1 (c) The court shall award reasonable costs, including court costs and attorneys fees, to
2 the prevailing party in an action brought pursuant to this section."
3 Sec. 2. This act shall become effective October 1, 1992.

EXPLANATION OF ANTIDISCRIMINATION PROPOSAL

The proposed legislation makes it unlawful for an employer to discriminate against a prospective employee or an employee because of any lawful activity that the individual engages in outside the premises of the employer during nonworking hours if that activity does not adversely affect job performance or the safety of others.

A civil action may be brought against an employer who violates this provision. The court may award (1) any lost wages or benefits; (2) an order of reinstatement without loss of position, seniority or benefits; or (3) an order directing an offer of employment to a prospective employee.

The court is required to award reasonable costs, including court costs and attorneys fees, to the prevailing party.

This act would become effective October 1, 1992.

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