
LEGAL UPDATE

Legal Services Division



Ground Floor, State Capitol Building

Des Moines, Iowa 50319

515.281.3566

IOWA CIVIL RIGHTS COMMISSION MEETING --- OCTOBER 11, 2019

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

Date and Location. The Iowa Civil Rights Commission met on October 11, 2019, in the Grimes State Office Building.

Petition for Rulemaking. The commissioners considered a petition for rulemaking submitted by Mr. Emir Dini. Mr. Dini did not appear personally to speak in support of the petition; however, Professor Russell Lovell, Drake University Law School, representing the Des Moines branch of the National Association for the Advancement of Colored People (NAACP), spoke in favor of the petition and offered as support a draft of the petition for rulemaking that the NAACP intends to formally submit to the commission within the next month. Professor Lovell made several objections to the current complaint process and urged reform on several bases. First, he suggested that the current process, which does not share the respondent's reasons for adverse action with the complainant, violates the McDonnell Douglas burden-shifting standard and is inconsistent with most states and the federal Equal Employment Opportunity Commission's approach. Professor Lovell agreed with Mr. Dini's argument that the commission's process violates procedural due process. Professor Lovell indicated that the most significant part of the NAACP's proposal is the right of the complainant to respond to the employer's questionnaire. Professor Lovell also indicated that he would support a verified reply by the respondent which would require the respondent to identify which witnesses were the basis for the adverse action and provide sworn responses, just as the complainant must provide a verified complaint.

Assistant Attorney General Katie Fiala indicated that she would only be responding to Mr. Dini's petition for rulemaking, and would respond to the NAACP's petition when it is formally submitted. She indicated that the administrative closure rate data enclosed in Mr. Dini's petition is misleading because Iowa has a higher rate of administrative closure, where there is no conclusion on probable cause, than other states. She stated that she addressed the request to amend the questionnaire to eliminate redundancy at the prior meeting. She explained that in a limited sense, the narrative section of the questionnaire may be redundant if the complainant already provided the information in the complaint; however, there is no penalty for not answering that section. Commissioner Sam Kooiker asked if the complainant was informed there was no penalty; Ms. Fiala was unsure. Ms. Fiala discussed the request by Mr. Dini that a complainant be contacted three times and to remove the penalty if no response. She stated that if the complaint is cross-filed, those contacts are already made and if no response is reached then the commission proceeds with processing the information that is obtained in the initial complaint. With complaints that are not cross-filed, which are public accommodation cases and employment discrimination complaints against very small businesses, a complainant is sent a 10-day letter and if there is no response, then the complainant still has a right for reconsideration after the case is closed. Ms. Fiala addressed Mr. Dini's request to amend the language for the screening stage for more clarity, stating that the standard is derived from case law and is lower than probable cause.

Ms. Fiala instructed the commissioners that the only petition before them was the petition by Mr. Dini. If the NAACP formally files its petition, then the commission would take up that petition and vote on it. Prior to the vote on Mr. Dini's petition, Commissioner Kooiker told Professor Lovell that he did not want the outcome of this vote to dissuade Professor Lovell and the NAACP from bringing forth their own petition for rulemaking, particularly on the subject of redundancy.

All members of the commission voted in favor of adopting Ms. Fiala's prepared response to deny the petition for rulemaking.

Standard for Damage Awards. Commissioners reviewed a handout of discrimination damage awards prepared by Ms. Fiala. Commissioner Kooiker referenced a 2018 award which he deemed egregious and time consuming and which resulted in an award he deemed too low. He stated that there was room for improvement, asking for awareness, but not for an initiation of rulemaking. Furthermore, he solicited recommendations to be provided at the next meeting from staff and the NAACP. Commissioner Doug Oelschlaeger offered words of caution to respect the system as it currently operates, deferring to the amount that attorneys request for damages and the forum in which plaintiffs chose to have their claims heard. Commissioner Angela Jackson also emphasized that the differences in damages reflect that the forum matters, but stated that the commission may not be privy to all of the facts. Professor Lovell stated that he and the NAACP can provide information but he was not privy to the data. One factor, Professor Lovell stated, was that occasionally complainants have private counsel, but usually the complainant is represented by an assistant attorney general.

Consideration of Adoption of Proposed Rule. Commissioners considered the adoption of the rule that was numbered as Notice ARC 4551C, which is a health care professional form. The health care professional form is currently in effect through emergency rulemaking which was adopted by ARC 4552C and became effective June 26, 2019. Commissioners declined to adopt the rule at the meeting, citing the need for changes. The following suggestions were made. Multiple commissioners expressed support for a statement indicating that the form may contain protected health information. Multiple commissioners also supported removing the line on the form which requires the health care provider to indicate his or her title; Commissioner Oelschlaeger was in support of the title remaining to demonstrate qualification. Commissioner Jackson requested that the title be removed and in its place appear a certification that the person is qualified under Senate File 341, 2019 Iowa Acts, chapter 65. Ms. Fiala stated that she would work with the Legislative Services Agency staff to the Administrative Rules Review Committee to determine the next steps in rulemaking.

Reports. Commissioner Oelschlaeger provided updates of two recent court decisions. He highlighted *Rixner v. Boyd*, No. 18-0811 (IA COA Oct. 9, 2019), in which the Sioux City Human Rights Commission joined as a plaintiff and the Iowa Civil Rights Commission authored an amicus brief. Commissioner Oelschlaeger described it as a housing testing case under Iowa Code chapter 216A, which held that a tester had standing under the statute. Commissioner Oelschlaeger also referenced a 9th Circuit Court of Appeals case in which the Supreme Court denied a petition of writ of certiorari after the 9th Circuit ruled against Domino's Pizza and held that a website needed to be accessible to the blind.

Executive Director Liz Johnson provided a report. She stated that the commission is working to make its website accessible to all regardless of disability. She circulated a draft of the commission's annual report and solicited feedback from commissioners. She also provided an update on hiring, stating that she is in the final stages of interviewing for a public service manager position and after she is done the commission will be fully staffed. She then provided an overview of recent outreach events and a preview of upcoming events. She stated that she has prepared the FY 2021 budget and will be requesting a status quo budget and does not anticipate any issues. A discussion ensued. Director Johnson indicated that last year was a status quo budget as well and that the proposed budget had been drafted in coordination with the Governor's office. Commissioner Kooiker indicated support for a small increase and asked how to convey support for that increase to the Governor's office. Other commissioners stated that an increase would be better received if the reason for the increase was articulated. Discussion included additional staff to increase processing time and closure rate and to increase education. Commissioners discussed drafting a letter to the Governor to request additional funds beyond a status quo budget, but

would await information regarding specifics on rationale from Director Johnson, including the cost for additional staff. Professor Lovell indicated that he would wait to weigh in on the proposal until it is presented, but preliminarily said that his concern was not with the processing time but rather with the administrative closure rate.

Next Meeting. Commissioners scheduled the next meeting for December 6, 2019, at 2:00 p.m. in the Grimes State Office Building.

LSA Staff Contact: Amber Shanahan-Fricke, 515.725.7354 or amber.shanahan-fricke@legis.iowa.gov

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