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## STATE BAR JOURNAL

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### THE LAW AGAINST DISCRIMINATION IN EMPLOYMENT

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**D**URING its 1949 session, the legislature of the state of Washington enacted Chapter 183, a law known as "The Law against Discrimination in Employment."<sup>1</sup> That law follows in a general way the form and the substance of the New York law entitled, "Law against Discrimination," enacted in 1945,<sup>2</sup> but the authors of the Washington Act adopted some of the provisions of the Connecticut Act relating to procedure.<sup>3</sup> Note will be taken of differences between the Washington law and the law of other states having similar legislation.<sup>4</sup>

The Washington law declares that practices of discrimination because of race, creed, color, or national origin are matters of state concern and menace the foundations of a free democratic state. It also declares that the opportunity to obtain employment without discrimination because of race, creed, color, or national origin is recognized as a civil right. It is an unfair employment practice:<sup>5</sup>

1. For an employer to refuse to hire any person or to discharge or

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<sup>1</sup> REM. REV. STAT. § 7614-20 *et seq.* (Supp. 1949).

<sup>2</sup> N. Y. LAWS 1945, c. 118 § 1, N. Y. EXECUTIVE LAW (McKINNEY), § 127, effective July 1, 1945.

<sup>3</sup> REM. REV. STAT. § 7614-27 (Supp. 1949), CONN. GEN. STAT. 1949, c. 371, § 7406.

<sup>4</sup> CONN. GEN. STAT. 1949, c. 371, § 7400 *et seq.*, RHODE ISLAND, P. L. 1949, c. 2181, MASS. ACTS 1946, c. 368, NEW JERSEY LAWS 1945, c. 169, as amended by N. J. LAWS 1949, c. 11, OREGON LAWS 1949, c. 221, WISCONSIN STATS. 1949, § 111.31, effective July 25, 1945. The Wisconsin law declares the public policy of the state but does not provide any sanctions. It directs investigation and study.

<sup>5</sup> REM. REV. STAT. § 7614-26 (Supp. 1949).

bar any person from employment or to discriminate against any person in compensation or any other terms or conditions of employment because of such person's race, creed, color, or national origin.

2. For a labor union to deny full membership rights and privileges to or to expel from membership any person or to discriminate against any employer or employee because of such person's race, creed, color, or national origin.

3. For an employment agency to fail or refuse to classify properly or refer for employment or otherwise to discriminate against any individual for the same reasons.

It is also an unfair employment practice for any employer, employment agency, or labor union to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden by the Act or because he has filed a charge, testified or assisted in any proceeding under the Act.

It is also an unlawful employment practice for any person to aid, abet, encourage, or incite the commission of an unlawful employment practice or to obstruct or prevent any other person from complying with the provisions of the Act or any order issued thereunder.

Under the law in New York, it is an unlawful employment practice

For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to race, creed, color or national origin, or any intent to make any such limitation, specification or discrimination unless based upon a bona fide occupational qualification.<sup>6</sup>

In Washington, a Board is created composed of five nonsalaried members, who are authorized to enforce the Act. The Board has an official seal, maintains its principal place of business in Seattle, formulates policies, and adopts rules to carry out the Act, receives complaints, and is authorized to hold hearings and compel the attendance of witnesses and the production of papers.<sup>7</sup> Complaints may be filed with the Board by any person claiming to be aggrieved, by the Board itself, or by any employer whose employees refuse or threaten to refuse to comply with the provisions of the Act. The

<sup>6</sup> N. Y. EXECUTIVE LAW (McKINNEY), § 131-3, effective July 1, 1945. A similar provision is found in the New Jersey Act, the Massachusetts Act, the Oregon Act and the Rhode Island Act. See note 4 *supra*.

<sup>7</sup> REM. REV. STAT. § 7614 (23-25-27) (Supp. 1949).

complaint is referred to a member or an investigator and, if reasonable cause is found for believing that an unfair employment practice has been or is being committed, said person shall immediately endeavor to eliminate the practice by *conference, conciliation and persuasion*. (The italics are used to call attention to this procedure, which is emphasized by the laws of many states and which is one of the most important provisions relating to enforcement.) If the member or investigator fails to eliminate such practice, a hearing tribunal is appointed which will give notice requiring the employer, labor organization, or employment agency, as the case may be, to answer the complaint. If upon all of the evidence the tribunal finds that a respondent has engaged in an unfair employment practice, it shall make findings of fact and issue and serve an order requiring the respondent to cease and desist from such employment practice.

The law in New York gives the Commission at this point the right to employ additional means to suppress the unlawful practice and to penalize the respondent for a violation of the Act. In New York the Commission, corresponding to the Board in Washington, is authorized to take such affirmative action, including (but not limited to) hiring, reinstatement, or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as in the judgment of the Commission will effectuate the purposes of the law.<sup>8</sup>

Under the Washington law, the Board may petition the court for the enforcement of its order and for appropriate temporary relief or a restraining order. The respondent, feeling himself aggrieved by the order of the Board, may have a review of such order by the superior court. In either event, a complete transcript of the entire record is certified and filed with the court and the court is authorized to enter a decree enforcing, modifying, enforcing as so modified, or setting aside in whole or in part such order. The findings of the hearing tribunal, if supported by substantial and competent evidence, shall be conclusive.<sup>9</sup>

The Washington law contains a provision that the court may

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<sup>8</sup> N. Y. EXECUTIVE LAW (MCKINNEY), § 132, effective July 1, 1945. Similar authority is granted to the Commission or Board in Massachusetts, Rhode Island, and New Jersey. See note 4 *supra*.

<sup>9</sup> REM. REV. STAT. § 7614-27 A(b) (Supp. 1949). In New York the findings of the Commission shall be conclusive if supported by sufficient evidence on the record considered as a whole. In Connecticut the findings of the hearing tribunal are conclusive if supported by substantial and competent evidence. In Massachusetts the findings are conclusive if supported by sufficient evidence. See note 4 *supra*.

permit each party to introduce such additional evidence as the court may believe necessary to a proper decision of the cause.<sup>10</sup> This provision is unique and not found in similar laws of the other states. In several of the other laws the court is authorized to remit the case to the Commission or Board in the interests of justice for the purpose of adducing additional specified and material evidence.<sup>11</sup>

Under the Washington law, the order to cease and desist, if disobeyed, may be enforced either by an order of the court or by criminal proceedings. Sec. 10 of the Washington law makes it a misdemeanor to wilfully violate any order of the Board.

To assist in the enforcement of the law and to educate the people of the state on the reasons for the law, the Board in Washington is given authority to create advisory agencies and conciliation councils and empower them to study problems of discrimination in all fields and in specific instances, to foster through community effort good will and cooperation and to make recommendations for programs of education. The Board is authorized to make such technical studies and to issue such publications and such results of investigation and research as will minimize or eliminate discrimination.<sup>12</sup>

### *Enforcement*

The course which has been taken in New York and other states to enforce the provisions of law adopted to prevent discrimination in employment, the problems presented in such other states, the solution of them, and the success attained there will be of interest to those who are studying the law of Washington and observing the activities of the Washington Board in the enforcement of the law under which it was appointed.

In other states great emphasis is placed upon conference, conciliation, and persuasion. In some states, no formal hearing and formal cease and desist orders have been entered. On only rare occasions has any court review or enforcement order been obtained. Experience has shown the wisdom of conference with the respondent, with a full discussion and explanation of the law. Compliance is thereby generally obtained. But the willingness of the respondent to obey the law, his consent to an agreement as to his hiring or referral

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<sup>10</sup> REM. REV. STAT. § 7614-27 A(b) (Supp. 1949).

<sup>11</sup> N. Y. EXECUTIVE LAW (MCKINNEY), § 133, RHODE ISLAND P. L. 1949, c. 2181, § 9(d), MASS. ACTS 1946, c. 368, § 6, CONN. GEN. STAT. 1949, c. 371, § 7407

<sup>12</sup> REM. REV. STAT. § 7614-25 (h, i, and k) (Supp. 1949).

policies, is often facilitated by the sanctions and the enforcement features found in the law

The New York Commission has found that satisfactory enforcement cannot be obtained merely by adjustment of an individual complaint; that an investigation must include every step in the employment process, the method of personnel recruitment, the sources of recruitment, the form of application blank used, and the procedures for hiring, promotion, and dismissal. The investigator seeks to make an adjustment agreement with the respondent which will achieve compliance with the law in the hiring policy on every occupational level. Such agreement may include a re-interview with the complainant or an agreement to make available to complainant the next job opportunity for which he is qualified. It may include financial compensation to complainant, the display of posters setting forth the terms of the law and the intention of the respondent to comply addressed to its staff, or an agreement to send a letter of instructions to each employment agency with which it deals or to broaden its sources of personnel recruitment. If the respondent is an employment agency, the agreement may include an undertaking to accept no discriminatory job orders and to advise all employers that it will make no referrals except on a basis of individual qualification.

The filing of a complaint is not paraded in the public press and what happens in conference with the respondent is not admissible in evidence in the event a formal hearing is held.<sup>13</sup>

Since the agreement entered into with the respondent may include commitments for future action, the New York Commission has established a systematic procedure for review of closed complaints.

In New York and other states<sup>14</sup> the use of a form of application or the printing of an advertisement containing any limitation or specification as to race, creed, color, or national origin may in itself be an unlawful employment practice. While this is not true in Washington, the use of such form or the making of such advertisement would be evidence to support a charge of unfair employment practice, and the Board in Washington is making an effort to control discrimination in advertising by newspapers and other publications.

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<sup>13</sup> REM. REV. STAT. § 7614-27 (Supp. 1949), N. Y. EXECUTIVE LAW (McKINNEY), § 132, effective July 1, 1945.

<sup>14</sup> See note 6 *supra*.

Several states by regulation have specified what inquiries may properly be made to persons seeking employment.<sup>15</sup>

Whether the inquiry is direct or indirect is immaterial. Of course, the direct inquiry, "What is your religion?" is improper.

The following indirect inquiries have been deemed improper: "What religious holidays do you observe?" "If you have changed your name, what was your original name?" "What is the nationality of your parents?" "Are you a naturalized or native born citizen?"

Requests for a photograph or questions as to color of skin are not allowed. Of course, it is proper to ask if the applicant is a citizen and to inquire as to his age, but production of a birth certificate should not be required. It is proper to ask for a certificate of age or a work permit issued by school authorities.<sup>16</sup>

The New York Commission has investigated advertising in the classified telephone directories dealing with industrial or commercial help. Advertising for Chinese help or colored help is improper; for Spanish speaking clerks or cooks trained in Italian style is acceptable.<sup>17</sup>

The Commission has also investigated the constitution and by-laws of labor unions and efforts have been made to induce unions to eliminate the "Caucasian" clause and similar restrictive provisions.

### *Bona Fide Occupational Qualification*

The Washington law recognizes that race, color, creed, or national origin may be a legitimate qualification for some occupations. Therefore, in Sec. 7, (1) (a) we find the exception. "unless based upon a bona fide occupational qualification," and in Sec. 7, (3) "except in the case of a bona fide occupational qualification or need." This phrase in Sec. 7, (1) (a) is found in Sec. 131 of the New York Law.<sup>18</sup> Since this language is quite vague, its interpretation in Washington will be influenced by administrative construction in other states. The New York Commission has adopted the principle that a case will not come within the terms of this phrase unless race, color, creed, or national origin are material to job performance. Traditional policies or preferences of customers, employers, and employees will not be enough. Examples are given of cases which do qualify For

<sup>15</sup> See Report of Progress 1948, New York State Commission against Discrimination, p. 57, Policies of Rhode Island Commission adopted July 27, 1949; Policies of Massachusetts Fair Employment Commission, July 1, 1947, Publication of Oregon Bureau of Labor entitled, "Employment Inquiries."

<sup>16</sup> Report of New York Commission, note 15 *supra*.

<sup>17</sup> Report of New York Commission 1948, p. 37, note 15 *supra*.

<sup>18</sup> See note 2 *supra*.

example: (a) foreign language teachers should be born and educated in the country where the language to be taught is spoken as a native tongue; (b) where some governmental agency requires such information; (c) where patrons of a particular business, such as a restaurant, are principally one race of people.<sup>19</sup>

In Rhode Island and Massachusetts, statements of policies<sup>20</sup> say that each case submitted under this exception will be determined after submission of such data as the Commission deems necessary

### *Educational Program*

The Board in Washington and the commissions of the other states having a similar law are charged with an educational program by the law itself. In New York the Commission has set up a Division of Education which provides services and materials to all communities and organizations throughout the state. This includes speakers, films, radio programs, exhibits, and publications, all for the purposes of bringing about a sympathetic understanding of the democratic principles underlying the law and enlisting aid in the solution of particular problems of discrimination as they arise throughout the state. Advisory agencies and conciliation councils composed of representative citizens serving without pay are organized. Institutes for students, workers, and leaders are planned and held. Programs in schools and institutions of higher learning are encouraged. Much has been done in New York to bring about not only an understanding but an acceptance of the law<sup>21</sup>

### *The Washington Board*

The Board charged with enforcing the Washington law was organized and its first meeting was held on July 21, 1949. It has devoted most of its time to an educational program. Meetings have been held in various cities throughout the state to which interested people have been invited. These meetings have been held to explain the law and its enforcement. A period is devoted to questions and answers. Some time is devoted by Board members in interviewing employers of labor, leaders of labor unions and heads of employment agencies. Community councils are organized to promote further the effort in education.

The Board by regulation has prepared a poster to be displayed by all employers. The poster gives the substance of the law and the

<sup>19</sup> Report of New York Commission, p. 62, note 15 *supra*.

<sup>20</sup> See note 15 *supra*.

<sup>21</sup> Report of New York Commission, p. 68, note 15 *supra*.



rights of employees. An effort has also been made to contact newspapers and other publications with a view to eliminating advertisements which indicate an intent to discriminate. The Secretary of the Board has found a general willingness of the people affected by the law to comply as soon as the terms of it are understood. He reports that several department stores recently have employed negroes in clerical and sales capacities without adverse results or comment from the public or other employees. These new employees are received and accepted on their merits.

### *Conclusion*

A reference to the Reports of the Commissions or Boards charged with the enforcement of laws against discrimination in employment shows that the enactment of the law generally creates considerable apprehension and fear. Fear that this effort at control of human behavior and to change long-established habit and custom would fail; apprehension that employers would be compelled to hire a quota of minority races regardless of qualification; that compliance would create much resistance from patrons and employees. These fears and apprehensions have proved without foundation. Many department stores and other industrial and commercial companies have added negroes and others from minority races to their staffs without serious repercussions. Instead, they have received widespread approval for their liberal attitude. A study of these reports convinces the writer that these laws are effective and are in successful operation, that the enforcement of them has made a distinct improvement in the relation of groups to each other, and that their enactment and enforcement have given new hope and encouragement to races of people who were restless and unhappy under a system of prejudices which denied them the chance to rise as far as their abilities might permit.