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NO. STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

DATE: April 5, 1993

SUBJECT: LB 124: Amendment to Nebraska Fair Employment Practice Act Authorizing the Nebraska Equal Opportunity Commission to Grant Injunctive Relief, Damages, Attorney's Fees, and Costs

REQUESTED BY: Senator Kurt A. Hohenstein
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

Legislative Bill 124 seeks to amend Neb. Rev. Stat. § 48-1119(3) (1988), which is part of the Nebraska Fair Employment Practice Act. Section 48-1119(3), as it currently exists, addresses disposition of cases heard by the Nebraska Equal Opportunity Commission (NEOC). Under this section, the NEOC is required to issue cease and desist orders and to order other appropriate affirmative action, which may include reinstatement or hiring of employees, with or without backpay, if the NEOC finds intentional unlawful employment practices. Legislative Bill 124 adds other disposition options to section 48-1119(3) by providing that "[a] complainant who has suffered physical, emotional, or financial harm as a result of a violation of the Nebraska Fair Employment Practice Act shall be entitled to injunctive relief, general and special damages, reasonable attorney's fees, and costs." LB 124, sec. 4 (1993).

You have requested our opinion regarding the constitutionality of the above language. Specifically, you are concerned that the NEOC does not have the constitutional authority to grant these types of relief. We note that the language you question does not

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specifically provide that the NEOC may grant injunctive relief and award damages, attorney's fees, and costs; the provision simply states that certain complainants "shall be entitled" to those types of relief. However, since the proposed amendment to section 48-1119(3) appears within several existing provisions which outline the NEOC's power to dispose of cases by granting various forms of relief, you have obviously assumed that the language at issue means that the NEOC, as opposed to a court, may grant the types of relief in question. For purposes of this opinion, we will make the same assumption.

From our analysis of several cases which address the constitutionality of administrative bodies awarding damages and other types of relief, we have identified three constitutional arguments often raised concerning the granting of such relief: (1) that such awards violate the judicial powers clause; (2) that such awards violate one's right to a jury trial; and (3) that statutorily authorizing administrative bodies to make such awards constitutes an unlawful delegation of power.

I. DISCUSSION

A. Judicial Powers Clause

Article V, section 1, of the Nebraska Constitution vests the judicial power of the state in the courts. Article II, section 1, divides the powers of state government into three departments--the legislative, executive, and judicial--and prevents people "being one of these departments" from exercising any power properly belonging to the others, except as otherwise directed or permitted in the Nebraska Constitution.

Based on these constitutional provisions, administrative agencies generally do not have judicial powers, but may perform "quasi-judicial" duties. ***Transport Workers of America v. Transit Auth.***, 205 Neb. 26, 286 N.W.2d 102 (1979). The conferring upon administrative agencies of executive or administrative functions which require the exercise of quasi-judicial powers does not violate article V, section 1, of the Nebraska Constitution, especially when the matter at issue is affected with a public interest and where appeal to the courts is available from administrative decisions. ***Anderson v. Tiemann***, 182 Neb. 393, 155 N.W.2d 322 (1967).

Like the Nebraska Supreme Court in ***Transport Workers*** and ***Anderson***, courts in other states have routinely categorized various functions performed by administrative entities as "judicial" or

"quasi-judicial" as a means of distinguishing between permissible and prohibited administrative acts. However, the means of categorization used by such courts are often left unexplained. *See* ***Wikman v. City of Novi***, 413 Mich. 617, 322 N.W.2d 103 (1982) (issuance of an injunction is an exercise of judicial power); ***Transport Workers of America v. Transit Auth.***, 205 Neb. 26, 286 N.W.2d 102 (1979) (entering a declaratory judgment and ordering an accounting are judicial functions).

Simply labeling various administrative acts as "judicial" or "quasi-judicial" without setting forth a standard by which these acts are so designated has been criticized by both courts and commentators. ***McHugh v. Santa Monica Rent Control Bd.***, 49 Cal. 3d 348, 777 P.2d 91, 261 Cal. Rptr. 318, at f.n. 30 (1989). Therefore, in ***McHugh*** the California Supreme Court developed a standard by which administrative actions may be evaluated for compliance with the judicial powers clause of the California Constitution, which, like the Nebraska Constitution, states that the judicial power of the state is vested in the state's courts. Cal. Const. art. 6, § 1. The ***McHugh*** test, distilled from case law from nine states, including Wisconsin and Missouri, provides:

> An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief--including certain types of monetary relief--so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the "essential" judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations.

Id. at 372, 777 P.2d at 106, 261 Cal. Rptr. at 333 (1989) (emphasis in original deleted).

1. Damage Awards

Part of the amendment proposed in LB 124 would allow the NEOC to award general and special damages.

Based on the test quoted above, the ***McHugh*** court concluded that administrative awards of restitution do not offend the judicial powers clause of the California Constitution when both the substantive and procedural aspects of the test are met. Several other courts have also found that awards of restitution by administrative agencies are constitutionally permissible. *See* ***Sunpower of Arizona v. Arizona State Registrar***, 166 Ariz. 437, 803

P.2d 430 (Ct. App. 1990) (administrative agency's award of restitutionary damages constitutional when due process procedural rights were protected, prohibited conduct was well defined by statute, and judicial review was available); ***Percy Kent Bag Co. v. Missouri Comm'n on Human Rights***, 632 S.W.2d 480 (Mo. 1982) (commission's award of backpay in discrimination case constitutional when statute contained adequate standards, remedy was appropriate in light of public policy of eliminating discrimination, and all administrative decisions were subject to judicial review); ***Jackson v. Concord Co.***, 54 N.J. 113, 253 A.2d 793 (1969) (reimbursement for out-of-pocket loss in housing discrimination case constitutional when award was incidental in connection with a subject delegated to the agency and judicial review available).

In ***Walnut Creek Manor v. Fair Employment & Housing Comm'n***, 54 Cal. 3d 245, 814 P.2d 704, 284 Cal. Rptr. 718 (1991), the California Supreme Court distinguished an administrative agency's award of restitution, defined as a quantifiable amount of money owed to an injured party to compensate for pecuniary loss directly resulting from the other party's violation of the law, from an award of general compensatory damages for emotional distress in a discrimination case. The ***Walnut Creek*** court held that the Fair Employment and Housing Commission's award of unlimited general compensatory damages for emotional distress violated the judicial powers clause of the state constitution because such general compensatory damages were not readily measurable or quantifiable; could be awarded without proof of pecuniary loss; were not necessary or incidental to the agency's purposes under the ***McHugh*** test; and shifted the remedial focus of the administrative hearing from redress for a particular incident of unlawful discrimination, and prevention of a recurrence thereof, to compensation for intangible and nonquantifiable injury to one's psyche in a manner similar to a private tort action. ***See also Broward County v. La Rosa***, 505 So. 2d 422 (Fla. 1987) (administrative agency's award of unliquidated common law damages for humiliation and embarrassment in discrimination case violated separation of powers provision in state constitution).[1]

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[1]There are cases which were decided prior to ***McHugh*** and which came to a contrary conclusion. ***Kentucky Comm'n on Human Rights v. Fraser***, 625 S.W.2d 852 (Ky. 1981) (commission's award of compensatory damages for embarrassment and humiliation caused by discrimination constitutional when procedural due process was provided, prohibited conduct was well defined by statute, and judicial review was available); ***Plasti-Line, Inc. v. Tennessee***

Although we were unable to locate any specific Nebraska authority concerning the constitutionality of an administrative agency awarding general and special damages, we believe the above cases are persuasive. Although Nebraska courts would have final judicial power to make the NEOC's damage awards enforceable and binding, Neb. Rev. Stat. § 48-1120 (1988), awarding damages for injuries like emotional distress would not seem to be reasonably necessary to effectuate the NEOC's purpose of fostering and safeguarding the right to employment without discrimination for the reasons stated in ***Walnut Creek***. Therefore, to the extent that "general and special damages" in LB 124 means general compensatory damages for emotional distress, humiliation, embarrassment, or other types of intangible injury, the provision violates the judicial powers clause contained in article V, section 1, of the Nebraska Constitution. However, damages which are more in the nature of restitution would be constitutionally permissible.

2. Attorney's Fees and Costs

The amendment at issue in LB 124 also allows the NEOC to award attorney's fees and costs. Since these items would be reimbursement for quantifiable, out-of-pocket expenditures incurred by a victim of discrimination as a direct consequence of exercising that victim's rights under the Nebraska Fair Employment Practice Act, awards for attorney's fees and costs would seem to be in the nature of restitution and would not violate the judicial powers clause of the Nebraska Constitution, pursuant to the analysis used in ***McHugh*** and ***Walnut Creek***.

3. Injunctive Relief

Under ***McHugh***, it is constitutionally permissible, as far as the judicial powers clause is concerned, for an administrative agency like the NEOC to prohibit parties from committing unlawful discriminatory practices since such orders are obviously necessary to accomplish the NEOC's purpose of safeguarding employment without discrimination and since the power to make such orders legally binding and enforceable ultimately lies with the courts. § 48-1120.

Human Rights Comm'n, 746 S.W.2d 691 (Tenn. 1988) (same); ***State Human Rights Comm'n v. Pearlman Realty Agency***, 161 W. Va. 1, 239 S.E.2d 145 (1977) (same).

Although the NEOC may constitutionally grant the type of relief encompassed by an injunction, the NEOC would have no power to grant a legally enforceable injunction. Since an injunction is an equitable remedy issued or granted by a court, Black's Law Dictionary 705 (5th ed. 1979), the NEOC would have no power to issue an "injunction," as that term is legally understood. Further, since section 48-1119(3) currently authorizes the NEOC to issue cease and desist orders, it is unclear why the additional power to grant injunctions is mentioned in the proposed legislation.

B. Right to Jury Trial

Another constitutional argument often raised in the context of administrative agencies awarding damages is that such awards violate the state constitutional right to a jury trial. Neb. Const. art. I, § 6. However, the court in ***McHugh*** noted that many states have addressed such challenges and have almost unanimously held that no jury trial right exists concerning adjudication of a matter within the regulatory power of an administrative agency. ***McHugh***, 49 Cal. 3d at 380, 777 P.2d at 112, 261 Cal. Rptr. at 339. The ***McHugh*** court concluded that restitution-like damage awards by administrative agencies do not violate the jury trial provision in the state constitution.

In contrast, at least one court has held that damages awarded by an administrative agency for humiliation and embarrassment violated the state constitutional right of trial by jury. ***Broward County v. La Rosa***, 505 So. 2d 422 (Fla. 1987). Since the jury trial provision of the Florida Constitution--which is similar to the provision found in Nebraska's Constitution--secures the right to a jury trial in cases which were traditionally afforded a jury trial at common law, and since common law recognized actions for unliquidated damages, the ***Broward*** court concluded that damage awards given by an administrative agency for humiliation and embarrassment violate the constitutional right to a jury trial.

Therefore, if "general and special damages" within the meaning of the proposed language in LB 124 includes damages for humiliation and embarrassment, this provision may be subject to a constitutional challenge on grounds that it violates article I, section 6, of the Nebraska Constitution. Awards of restitution, however, would not be subject to such a challenge.

C. Delegation of Power

We would also like to note a potential delegation problem with the provision at issue. The court in ***County Council for Montgomery County v. Investors Funding Corp.***, 270 Md. 403, 312 A.2d 225 (1973), concluded that an act which authorized an administrative body to impose a civil penalty not exceeding $1,000 for the violation of any provision in a chapter of the act constituted an invalid delegation of legislative power and violated due process requirements. The court stated that although delegation to an administrative body of power to impose a monetary penalty is constitutional, this particular provision was completely without legislative safeguards or standards to guide the agency in exercising its discretion.

Reasonably adequate, sufficient, and definite standards must be provided when conferring discretionary power upon an administrative agency in order to guide the agency in the exercise of the power conferred upon it, and to enable those affected to know their rights and obligations under the law. ***Bosselman, Inc. v. State***, 230 Neb. 471, 432 N.W.2d 226 (1988).

The provision at issue in LB 124 may lack proper standards to guide the NEOC in setting the amount and specific types of damages, fees, and costs which may be awarded, and to alert those affected by the provision to know their obligations under the law.

II. CONCLUSION

If the provision in LB 124 which allows the NEOC to award general and special damages to those suffering physical, emotional, or financial harm as a result of violations of the Nebraska Fair Employment Practice Act includes general compensatory damages for emotional distress, humiliation, embarrassment, and other intangible injury, the provision may violate the judicial powers and jury trial clauses of the Nebraska Constitution. Neb. Const. art. V, § 1 & art. I, § 6. The proposed amendment may also constitute an invalid delegation of legislative power due to the lack of standards to guide the NEOC in exercising its administrative functions under the Nebraska Fair Employment Practice Act.

Sincerely,

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Approved By:

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