LETTER OPINION
2004-L-04

January 13, 2004

Mr. Mark D. Bachmeier
Commissioner of Labor
600 E Boulevard Ave Dept 406
Bismarck, ND 58505-0340

Dear Commissioner Bachmeier:

Thank you for requesting my opinion regarding N.D.C.C. § 14-02.4-23(3). This subsection states:

> If the department determines that probable cause exists to believe that a discriminatory practice has occurred and is unable to resolve the complaint through informal negotiations or conciliation, the department shall provide for an administrative hearing in the manner provided in chapter 28-32 on the complaint.

N.D.C.C. § 14-02.4-23(3).

Subsection 14-02.4-23(3), N.D.C.C., was in enacted in 2001, and took effect on August 1, 2001. N.D. Const. art. IV, § 13. You question whether this section applies retroactively to causes of action that arose prior to its effective date or, whether the alleged discriminatory practice must occur after the effective date of the statute before the department is required to provide for an administrative hearing.

Section 1-02-10, N.D.C.C. states "[n]o part of this code is retroactive unless it is expressly declared to be so." N.D.C.C. § 1-02-10. "A statute is employed retroactively when it is applied to a cause of action that arose prior to the effective date of the statute." State v. Cummings, 386 N.W.2d 468, 471 (N.D. 1986). A cause of action arises when the alleged act of wrongdoing occurs. See N.D.C.C. § 14-02.4-19.

Retroactively applying statutes is generally disfavored because it risks unfairness by imposing new responsibilities for actions already taken. State v. Cummings, 386 N.W.2d at 471. A retroactive law may not be unfair when there is no ex post facto effect. Id. Thus, laws conferring benefits are often excepted from the general rule

against retroactive application. <u>Id.</u> So are laws that change remedies or procedures. N.D.A.G. 95-L-150. "If the statute can have no effect on substantive rights or liabilities but affects only modes of procedure to be followed in future proceedings, it is not in fact retroactive." <u>Gutierrez v. De Lara</u>, 234 Cal. Rept. 158, 160 (Cal. Ct. App. 1987) quoting <u>Aetna Casualty & Surety Co. v. Industrial Accident Com.</u>, 182 P.2d 159 (Cal. 1947). However, "[i]f the application of the statute will change the legal effect of past events, its operation on existing rights is retroactive, even if the statute might ordinarily be classified as procedural." <u>Id.</u>

While N.D.C.C. §14-02.4-23 provides an additional remedy for the aggrieved party, applying it retroactively would change the legal effect of past events for the responding party. Specifically, it would require the responding party to participate in an administrative hearing and subject itself to a possible temporary or permanent injunction, equitable relief, and back pay. <u>See</u> N.D.C.C. § 14-02.4-20. Prior to this statute, the responding party was not subject to any administrative proceeding or remedy. 2001 N.D. Sess. Laws ch. 145. Since N.D.C.C. § 14-02.4-23 affects substantive rights and liabilities of a party to an action, applying this statute to causes of action that occurred prior to its effective date would be a retroactive application of the statute.

"Section 1-02-10, N.D.C.C., is a rule of statutory construction which is 'subservient to the main rule that the intent and purpose of the legislature must be given effect.'" <u>Smith v. Baumgartner</u>, 665 N.W.2d 12, 16 (N.D. 2003) (quoting <u>State v. Davenport</u>, 536 N.W.2d 686, 688 (N.D. 1995). "[T]here is no need to resort to NDCC §1-02-10 to discern legislative intent if we are able to rationally infer from other sources that the legislature intended retroactive application of the statute." <u>Id.</u> quoting <u>Davenport</u>, 536 N.W.2d at 689.

There is no provision within the plain language of the act indicating it was to have retroactive effect. 2001 N.D. Sess. Laws ch. 145. A review of the legislative history provides no indication that the Legislature intended the subsection to have retroactive application.[1]

Since the legislative history does not indicate that the statute should be applied retroactively, the statute must be interpreted using the rules of statutory construction, specifically, N.D.C.C. § 1-02-10. <u>State v. Cummings</u>, 386 N.W.2d at 471-72.

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[1] Note, however, that the Legislature did provide for retroactive application in a number of other bills. <u>See</u> S.B. 2017, 2001 N.D. Leg.; S.B. 2175, 2001 N.D. Leg.; S.B. 2048, 2001 N.D. Leg.; H.B. 1450, 2001 N.D. Leg.; H.B. 1471, 2001 N.D. Leg.; and H.B. 1083, 2001 N.D. Leg. Thus, when it intended retroactive application, the Legislature specifically stated it.

Therefore, it is my opinion that N.D.C.C. §14-02.4-23(3) only applies to causes of action that arose after the effective date of the statute.

Sincerely,

Wayne Stenehjem
Attorney General

njl/vkk