CHAPTER 28
Human Rights

ARTICLE 1
Human Rights

28-1-1. Short title.

Chapter 28, Article 1 NMSA 1978 may be cited as the "Human Rights Act".

History: 1953 Comp., § 4-33-1, enacted by Laws 1969, ch. 196, § 1; 2000, ch. 4, § 1.

ANNOTATIONS

Cross references. — For commission on status of women, *see* 28-3-1 NMSA 1978.

For sex discrimination prohibited, *see* N.M. Const., art. II, § 18.

For Uniform Owner-Resident Relations Act, *see* 47-8-1 NMSA 1978.

The 2000 amendment, effective February 15, 2000, substituted "Chapter 28, Article 1 NMSA 1978" for "this act".

Human Rights Act protects against discriminatory treatment, not against general claims of employer unfairness. Juneau v. Intel Corp., 2006-NMSC-002, 139 N.M. 12, 127 P.3d 548.

Evidence of discrimination. — In an action based on a claim of racial discrimination, racist statements made by defendant that were not directed at plaintiff and that did not purport to describe her did not constitute direct evidence of racial discrimination. Perry v. Woodward, 199 F.3d 1126 (10th Cir. 1999).

Punitive damages in civil rights action. — Where plaintiff sued state hospital in state court alleging that employees of the hospital had retaliated against plaintiff for filing a human rights commission claim; plaintiff did not sue any individual employees in the state court action; plaintiff obtained an award for compensatory damages in state court; and plaintiff sued individual employees of the hospital in federal court for violation of plaintiff's civil rights for retaliating against plaintiff, plaintiff was not barred from suing individual employees for retaliation and recovering punitive damages, because different rules governed the measure of damages in the state action and in the federal action. Gonzales v. Hernandez, 175 F.3d 1202 (10th Cir. 1999).

Notice requirement where federal court action. — Failure to give notice to New Mexico human rights commission before bringing action in federal court bars recovery in federal court. Harris v. Ericson, 457 F.2d 765 (10th Cir. 1972).

Judicial review of discrimination claims. — Court's failure to explicitly apply framework for analyzing employment discrimination suits set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and adopted by the New Mexico Supreme Court in Smith v. FDC Corp., 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433, was not error where the court's findings were consistent with a proper application of the McDonnell Douglas/Smith framework and the record contained substantial evidence to support the court's finding that the employer did not perceive the employee to be handicapped. Martinez v. Yellow Freight Sys., 1992-NMSC-015, 113 N.M. 366, 826 P.2d 962.

Retaliatory discharge. — A common-law tort action for retaliatory discharge may be brought when the claimant alleges she was discharged from her employment because she earlier sought relief against her employer under the New Mexico Human Rights Act. Gandy v. Wal-Mart Stores, Inc., 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859; EEOC v. MTS Corp., 937 F. Supp. 1503 (D.N.M. 1996).

Employer's burden of proof in sex discrimination and wrongful discharge cases. — In a sex discrimination case, as with damages recoverable in cases of wrongful discharge, the employer has the burden of proving the employee did not exercise reasonable diligence in mitigating lost earnings. It is for the jury to decide, under the facts of each case, whether seeking formal education represents care or diligence to minimize damages. Montoya v. Super Save Warehouse Foods, 1991-NMSC-003, 111 N.M. 212, 804 P.2d 403.

Availability of equal protection claim. — The law in New Mexico is unsettled as to whether a claim of discrimination in employment that is asserted under this act can also be maintained under the equal protection clause of the New Mexico constitution. Roybal v. City of Albuquerque, 653 F. Supp. 102 (D.N.M. 1986).

New Mexico created state remedy for age discrimination through the New Mexico Human Rights Act that affords victims back wages and other monetary relief. Gill v. Public Employees Ret. Bd., 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491.

Age and disability claims must be pursued under administrative procedures available in the New Mexico Human Rights Act and do not lie in common-law tort. Gormley v. Coca-Cola Enter., 2004-NMCA-021, 135 N.M.128, 85 P.3d 252, *aff'd*, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280.

Effect on municipalities. — The passage of the 1969 "Human Rights Act" does not remove the authority municipalities already possess in the realm of human rights. Whatever ordinance is passed cannot lower or be inconsistent with the state standards that have been set for human rights in this article. 1971 Op. Att'y Gen. No. 71-64.

Law reviews. — For note and comment, "For This Right There is a Remedy: New Mexico Supreme Court's Application of Ex Parte Young to Allow Suits Against the State in Gill v. Public Employees Retirement Board", see 35 N.M.L. Rev. 501 (2005).

For article, "Reticent Revolution: Prospects For Damage Suites Under New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).

For student article, "The Sexual Harassment Claim Quandary: Workers' Compensation as an Inadequate and Unavailable Remedy: Cox v. Chino Mines/Phelps Dodge", see 24 N.M.L. Rev. 565 (1994).

For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

For article, "The Tort of 'Outrageous Conduct' In New Mexico: Intentional Infliction of Emotional Harm Without Physical Injury," see 19 N.M.L. Rev. 425 (1989).

For note, "Claiming Employment Discrimination in New Mexico Under State and Federal Law," see 21 N.M.L. Rev. 415 (1991).

For article, "Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

In-house counsel's right to maintain action for wrongful discharge, 16 A.L.R.5th 239.

Pre-emption of wrongful discharge cause of action by civil rights laws, 21 A.L.R.5th 1.

Excessiveness or adequacy of damages for wrongful termination of at-will employee under state law, 86 A.L.R.5th 397.

Standing of state, local government, or agency thereof to bring suit under Civil Rights Act of 1871 (42 USCS § 1983), 106 A.L.R. Fed. 586.

Application of Age Discrimination in Employment Act (29 USCS § 621 et seq.) to religious institutions, 136 A.L.R. Fed. 487.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 USCA § 1981a; 42 USCA § 2000e et seq.), 150 A.L.R. Fed. 601.

Actions brought under 42 U.S.C.A. §§ 1981-1983 for racial discrimination - supreme court cases, 164 A.L.R. Fed. 483.

28-1-2. Definitions.

As used in the Human Rights Act:

A. "person" means one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers or the state and all of its political subdivisions;

B. "employer" means any person employing four or more persons and any person acting for an employer;

C. "commission" means the human rights commission;

D. "director" or "bureau" means the human rights bureau of the labor relations division of the workforce solutions department;

E. "employee" means any person in the employ of an employer or an applicant for employment;

F. "labor organization" means any organization that exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment;

G. "employment agency" means any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit or refer employees;

H. "public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private;

I. "housing accommodation" means any building or portion of a building that is constructed or to be constructed, which is used or intended for use as the residence or sleeping place of any individual;

J. "real property" means lands, leaseholds or commercial or industrial buildings, whether constructed or to be constructed, offered for sale or rent, and any land rented or leased for the use, parking or storage of house trailers;

K. "secretary" means the secretary of workforce solutions;

L. "unlawful discriminatory practices" means those unlawful practices and acts specified in Section 28-1-7 NMSA 1978;

M. "physical or mental handicap" means a physical or mental impairment that substantially limits one or more of a person's major life activities. A person is also considered to be physically or mentally handicapped if the person has a record of a physical or mental handicap or is regarded as having a physical or mental handicap;

N. "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

O. "applicant for employment" means a person applying for a position as an employee;

P. "sexual orientation" means heterosexuality, homosexuality or bisexuality, whether actual or perceived; and

Q. "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth.

History: 1953 Comp., § 4-33-2, enacted by Laws 1969, ch. 196, § 2; 1973, ch. 155, § 1; 1983, ch. 241, § 1; 1987, ch. 76, § 1; 1987, ch. 342, § 16; 1993, ch. 268, § 1; 2003, ch. 383, § 1; 2007, ch. 200, § 17.

ANNOTATIONS

The 2007 amendment, effective July 1, 2007, defined "bureau" as the human rights bureau of the labor relations division of the workforce solutions department and "secretary" as the secretary of workforce solutions.

The 2003 amendment, effective July 1, 2003, in Subsection M, substituted "a person's" for "an individual's" preceding "major life activities", substituted "A person" for "An individual" preceding "is also considered"; and added Subsections P and Q.

The 1993 amendment, effective June 18, 1993, substituted "labor department" for "department of labor" in Subsection D.

Commercial photography business was a public accommodation. — Where plaintiff offered photography services to the public on a commercial basis and solicited customers by offering its services to the public at large through its website, advertisements on multiple search engines, and in the Yellow Pages; and plaintiff did not participate in selective advertising, such as telephone solicitation, or in any way

seek to target a select group of people through its advertisements, plaintiff constituted a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008.

University of New Mexico is not a "public accommodation" within the meaning of the New Mexico Human Rights Act, and is not subject to the jurisdiction of the human rights commission in the instance of a nursing student's complaint of racial discrimination. Human Rights Comm'n v. Board of Regents, 1981-NMSC-026, 95 N.M. 576, 624 P.2d 518.

Meaning of "places of accommodation" in former law. — Single dwellings, duplexes and apartment buildings, being in their nature distinctly private, were not "places of accommodation" as defined in the Civil Rights Act, 49-8-1 to 49-8-7, 1953 Comp. (now repealed), and consequently the restrictions against discrimination did not apply thereto. 1963-64 Op. Att'y Gen. No. 63-150 (opinion rendered under prior law).

Law reviews. — For note and comment, "New Tort Rules Unmarried Partners: The Enhanced Potential for Successful Loss of Consortium and NIED Claims by Same Sex Partners in New Mexico After Lozoya", see 34 N.M.L. Rev. 461 (2004).

For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For note, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act"? see 12 N.M.L. Rev. 541 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes private club or association not otherwise open to public that is exempt from state civil rights statute, 83 A.L.R.5th 467.

Meaning of term "employer" as defined in § 701(b) of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e(b)), 69 A.L.R. Fed. 191.

Who is "employer" within meaning of Age Discrimination in Employment Act of 1967 (29 USCS § 621 et seq.), 137 A.L.R. Fed. 551.

What constitutes religious harassment in employment in violation of Title VII of Civil Rights Act of 1964 (42 USCA § 2000e et seq.), 149 A.L.R. Fed. 405.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - nonemployment cases, 152 A.L.R. Fed. 1

28-1-3. Human rights commission.

A. There is created the "human rights commission" consisting of eleven members appointed by the governor with the advice and consent of the senate. Not more than six of the members shall be of the same political party. Not more than one member may be appointed from any one county. The governor shall designate a member to serve as chairman. The commission shall designate one of its members as vice chairman to preside in the absence or incapacity of the chairman.

B. The term of office of each member of the commission is for four years; however, of the commissioners first appointed, one shall be appointed for a term ending December 31, 1969, one for a term ending December 31, 1970, one for a term ending December 31, 1971 and two for terms ending December 31, 1972; provided, the two additional members added pursuant to this 1975 amendment shall be initially appointed for staggered terms of two and three years respectively so that one term ends on December 31, 1977 and one ends on December 31, 1978. The four additional commissioners added pursuant to this 1991 amendment shall be appointed for staggered terms; two shall be appointed for terms ending December 31, 1992; and two shall be appointed for terms ending December 31, 1993.

C. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the remainder of the unexpired term. Six members of the commission constitute a quorum to conduct business. Vacancies on the commission shall not impair the right of the remaining members to exercise the powers of the commission.

D. Each member of the commission shall be reimbursed, as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], during the performance of official duties and shall receive no other compensation, perquisite or allowance.

History: 1953 Comp., § 4-33-3, enacted by Laws 1969, ch. 196, § 3; 1975, ch. 124, § 1; 1987, ch. 342, § 17; 1991, ch. 104, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, in Subsection A, substituted "eleven members" for "seven members" in the first sentence and "six of the members" for "four of the members" in the second sentence; added the second sentence in Subsection B; and, in Subsection C, substituted "the remainder of the unexpired term" for "the unexpired term of the member whom he is to succeed" at the end of the first sentence and "Six members" for "Four members" at the beginning of the second sentence.

Law reviews. — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

28-1-4. Powers and duties.

A. The commission may:

(1) hear complaints and issue orders, including cease and desist orders concerning alleged unlawful discriminatory practice;

(2) hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath, order depositions and require the production for examination of any books, records, correspondence, documents and other evidence relating to any matter under investigation or in question before the commission. Contumacy or refusal to obey a subpoena issued pursuant to this section constitutes contempt punishable by the district court of the judicial district in which the witness may be found. No individual shall be excused from attending and testifying or from producing evidence in obedience to a subpoena issued pursuant to this section on the grounds that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or a forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture concerning any matter for which he is compelled to testify or give evidence after having claimed his right against self-incrimination. Nevertheless, the individual so testifying shall not be exempt from prosecution and punishment for perjury committed while testifying.

B. The division may:

(1) receive and investigate complaints of alleged unlawful discriminatory practice;

(2) seek to eliminate discrimination through conciliation and persuasion by voluntary conferences with interested parties;

(3) recommend application by the director to a district court in the county where the violating party resides for specific performance of any conciliation agreement or for enforcement of any order issued by the commission;

(4) endeavor to eliminate prejudice and to further good will. The division in cooperation with the state department of public education and local boards of education shall encourage an educational program for all residents of the state, calculated to eliminate prejudice, its harmful effects and its incompatibility with principles of fair play, equality and justice;

(5) encourage voluntary advisory groups to study problems of discrimination in all fields, to foster, through community efforts, good will and cooperation in this state

and to make recommendations to the secretary for the development of policies and procedures which the secretary may recommend to appropriate state agencies;

(6) seek and enlist the cooperation and contributions and grants of individuals and foundations, private, charitable, religious, labor, civic and benevolent organizations and the federal government for the purposes of this section;

(7) issue publications and release the results of investigation and research which in the secretary's judgment will tend to promote good will and prevent or eliminate discrimination; and

(8) submit annually a written report of all its activities and recommendations to the secretary, the governor and the legislature.

History: 1978 Comp., § 28-1-4, enacted by Laws 1987, ch. 342, § 18.

ANNOTATIONS

Repeals and reenactments. — Laws 1987, ch. 342, § 18 repealed former 28-1-4 NMSA 1978, as enacted by Laws 1969, ch. 196, § 4, effective July 1, 1987 and enacted a new section.

Law reviews. — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

28-1-5. Procedures for adopting regulations.

A. The secretary may adopt, promulgate, amend and repeal rules and regulations to carry out the provisions of the Human Rights Act.

B. No rule or regulation of general application may be adopted, amended or repealed without a public hearing before the secretary or his designee.

C. The public hearing shall be in Santa Fe, and notice of the subject, time and place of the meeting, the manner in which interested persons may present their views and the method by which copies of the proposed rule, regulation or amendment may be obtained shall be:

(1) published in each county at least thirty days prior to the hearing date in a newspaper of general circulation; and

(2) mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of the hearing.

D. The secretary shall allow all interested persons a reasonable opportunity to submit arguments and to examine witnesses testifying at the hearing.

E. The secretary may designate a hearing officer to take evidence at the hearing.

F. Any person appearing or represented at the hearing shall be given written notice of the secretary's action on the proposed rule, regulation, amendment or repeal.

G. No rule, regulation, amendment or repeal shall become effective until thirty days after its filing.

History: 1953 Comp., § 4-33-5, enacted by Laws 1969, ch. 196, § 5; 1987, ch. 342, § 19.

28-1-6. Validity of regulation; judicial review.

A. Any person who is or may be affected by a regulation adopted by the secretary may appeal to the court of appeals for further relief. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation.

B. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy of the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the secretary for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the secretary.

C. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by a preponderance of evidence in the record; or

(3) otherwise not in accordance with law.

History: 1953 Comp., § 4-33-6, enacted by Laws 1969, ch. 196, § 6; 1987, ch. 342, § 20.

28-1-7. Unlawful discriminatory practice.

It is an unlawful discriminatory practice for:

A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity;

B. a labor organization to exclude a person or to expel or otherwise discriminate against any of its members or against any employer or employee because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, physical or mental handicap or serious medical condition;

C. any employer, labor organization or joint apprenticeship committee to refuse to admit or employ any person in any program established to provide an apprenticeship or other training or retraining because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation;

D. any person, employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, to use any form of application for employment or membership or to make any inquiry regarding prospective membership or employment that expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation, unless based on a bona fide occupational qualification;

E. an employment agency to refuse to list and properly classify for employment or refer a person for employment in a known available job, for which the person is otherwise qualified, because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, physical or mental handicap or serious medical condition, unless based on a bona fide occupational qualification, or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on the basis of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, physical or mental handicap or serious medical condition, unless based on a bona fide occupational qualification;

F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual

orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

G. any person to:

(1) refuse to sell, rent, assign, lease or sublease or offer for sale, rental, lease, assignment or sublease any housing accommodation or real property to any person or to refuse to negotiate for the sale, rental, lease, assignment or sublease of any housing accommodation or real property to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

(2) discriminate against any person in the terms, conditions or privileges of the sale, rental, assignment, lease or sublease of any housing accommodation or real property or in the provision of facilities or services in connection therewith because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation; or

(3) print, circulate, display or mail or cause to be printed, circulated, displayed or mailed any statement, advertisement, publication or sign or use any form of application for the purchase, rental, lease, assignment or sublease of any housing accommodation or real property or to make any record or inquiry regarding the prospective purchase, rental, lease, assignment or sublease of any housing accommodation or real property that expresses any preference, limitation or discrimination as to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

H. any person to whom application is made either for financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or real property or for any type of consumer credit, including financial assistance for the acquisition of any consumer good as defined by Section 55-9-102 NMSA 1978, to:

(1) consider the race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap of any individual in the granting, withholding, extending, modifying or renewing or in the fixing of the rates, terms, conditions or provisions of any financial assistance or in the extension of services in connection with the request for financial assistance; or

(2) use any form of application for financial assistance or to make any record or inquiry in connection with applications for financial assistance that expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap;

I. any person or employer to:

(1) aid, abet, incite, compel or coerce the doing of any unlawful discriminatory practice or to attempt to do so;

(2) engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act; or

(3) willfully obstruct or prevent any person from complying with the provisions of the Human Rights Act or to resist, prevent, impede or interfere with the commission or any of its members, staff or representatives in the performance of their duties under the Human Rights Act; or

J. any employer to refuse or fail to accommodate a person's physical or mental handicap or serious medical condition, unless such accommodation is unreasonable or an undue hardship.

History: 1953 Comp., § 4-33-7, enacted by Laws 1969, ch. 196, § 7; 1973, ch. 58, § 1; 1973, ch. 155, § 2; 1975, ch. 62, § 1; 1983, ch. 241, § 2; 1987, ch. 76, § 2; 1995, ch. 125, § 1; 2001, ch. 347, § 1; 2003, ch. 383, § 2; 2004, ch. 115, § 1.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, amended Subsection A to delete "sexual orientation, gender identity" and to add at the end of the Subsection "or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity;".

The 2003 amendment, effective July 1, 2003, deleted "the" following "therewith because of" in Paragraph G(2); substituted "55-9-102" for "55-9-109" following "defined by Section" in Subsection H; substituted "a person's" for "to an individual's" following "fail to accommodate" in Subsection J; inserted "sexual orientation, gender identity" throughout the section; and substituted "a person" for "an individual", "person" for "individual", and "a person's" for "an individual's" throughout the section.

The 2001 amendment, effective June 15, 2001, in Subsection A, inserted "or other statutory prohibition" following "bona fide occupational qualification", deleted "marital

status" preceding "physical or mental handicap", and inserted "or, if the employer has fifty or more employees, spousal affiliation" following "serious medical condition"; in Subsections B through H, substituted "spousal affiliation" for "marital status"; and in Subsection E, inserted "or serious medical condition" following the first instance of "mental handicap".

The 1995 amendment, effective June 16, 1995, inserted "serious" preceding "medical condition" throughout the section.

I. GENERAL CONSIDERATION.

"Otherwise qualified". — An employee is required to demonstrate that he or she is "otherwise qualified" to show a public policy violation based on Section 28-1-7A NMSA 1978. Chavez v. Qwest, Inc., 483 F.Supp.2d 1103 (D.N.M. 2007).

ERISA actions. — Where a complaint asserts a mixed motive of both discrimination because of age and discrimination because of a benefits-defeating motive, ERISA does not completely preempt a state age-discrimination claim. Ruby v. Sandia, 699 F.Supp.2d 1247 (D.N.M. 2010).

Constitutionality of section. — This section defines what is an unlawful discriminatory practice with sufficient particularity to effectuate the legislative intent of the Human Rights Act, and therefore is not repugnant to the New Mexico constitution. Keller v. City of Albuquerque, 1973-NMSC-048, 85 N.M. 134, 509 P.2d 1329, *overruled on other grounds*, Green v. Kase, 1992-NMSC-004, 113 N.M. 76, 823 P.2d 318.

Burden of proving exhaustion of administrative remedies. — Plaintiffs, who have alleged in their complaint that they have exhausted their administrative remedies, have the burden of proving exhaustion of their administrative remedies in order for their case to proceed at the district court level. Rist v. Design Ctr. at Floor Concepts, 2013-NMCA-109.

Failure to exhaust administrative remedies deprives the court of subject matter jurisdiction. — Where plaintiffs alleged that they were dismissed from their jobs for not participating in defendant's religious activities; plaintiffs filed complaints with the equal employment opportunity commission and cross filed the complaints with the human rights division; plaintiffs did not receive a letter of non-determination from the division; and after receiving right-to-sue letters from the commission, plaintiffs filed suit against defendant for wrongful termination and discrimination, plaintiffs failed to exhaust their remedies under the Human Rights Act, which deprived the district court of subject matter jurisdiction, requiring the dismissal of the complaint with prejudice. Rist v. Design Ctr. at Floor Concepts, 2013-NMCA-109.

Prohibiting commercial photography business from discriminating based on sexual orientation did not violate freedom of expression. — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public

accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds; and plaintiff claimed that the act compelled plaintiff to express a positive image and message about same-sex commitment ceremonies contrary to plaintiff's beliefs, the act did not violate plaintiff's first amendment rights to refrain from speaking because the act only requires that businesses that operate as a public accommodation, cannot discriminate against potential clients based on their sexual orientation, it does not compel plaintiff to either speak a government-mandated message or to publish the speech of another person. Elane Photography, LLC v. Willock, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

Where plaintiff violated the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of expression because photography is an artistic expression entitled to first amendment protection, the act did not violate plaintiff's freedom of expression because the act regulated plaintiff's conduct in its commercial business, not its speech or right to express its views about same-sex relationships. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, *aff'd*, 2013-NMSC-040.

Prohibiting commercial photography business from discriminating based on sexual orientation did not violate freedom of religion. — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds; and plaintiff claimed that the act compelled plaintiff to express a positive image and message about same-sex commitment ceremonies contrary to plaintiff's beliefs, the act did not violate plaintiff's first amendment free exercise rights because the act is a neutral law of general applicability that ensures that businesses that choose to operate as a public accommodation do not discriminate against protected classes of people, it does not target only religiously motivated discrimination. Elane Photography, LLC v. Willock, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

Where plaintiff violated the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of religion because the act forced plaintiff to photograph same-sex marriages in violation of plaintiff's owner's religious belief that marriage is the union of one man and one woman, the act did not violate plaintiff's freedom of religion because the act is directed at and applies generally to all citizens transacting business through public accommodations that deal with the public at large, any burden on religion or religious beliefs was incidental and uniformly applied to all citizens, and a rational basis existed to support the governmental interest in protecting specific classes of citizens

from discrimination in public accommodations. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, *aff'd*, 2013-NMSC-040.

Burden of proof. — To avoid an adverse judgment as a matter of law, the plaintiff ordinarily need not introduce additional evidence of discrimination beyond evidence establishing a prima facie case and evidence of the falsity of the proffered reason for the employment action. Garcia-Montoya v. State Treasurer's Office, 2001-NMSC-003, 130 N.M. 25, 16 P.3d 1084.

Burden of proof on claims of unlawful discrimination. — For claims of unlawful discrimination, the plaintiff bears the initial burden of demonstrating a prima facie case of discrimination by showing that he or she is a member of the protected group, that he or she was qualified to continue in his or her position, that his or her employment was terminated, and that his or her position was filled by someone not a member of the protected class, or that he or she was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained. A plaintiff is also afforded the opportunity to rebut the employer's proffered reason as pretextual. Garcia v. Hatch Valley Pub. Schs., 2016-NMCA-034, cert. granted, 2016-NMCERT-____.

Rebutting presumption of liability. — Where no tangible employment action has been taken against the employee, the employer may rebut the presumption of liability by proving elements of an affirmative defense. Ocana v. Am. Furniture Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

Failure to state claim for common law retaliatory discharge. — Where plaintiffs, who brought a claim for wrongful termination based on religious discrimination, alleged that defendant discriminated against plaintiffs because of plaintiffs' religion, created a hostile work environment for plaintiffs and retaliated against plaintiffs by terminating plaintiffs in violation of the Human Rights Act, specifically Section 28-1-7 (A) NMSA 1978, plaintiffs did not plead a claim for the common law tort of retaliatory discharge nor did they give defendant adequate notice of the common law tort claim separate from the wrongful termination charge filed under the Human Rights Act. Rist v. Design Ctr. at Floor Concepts, 2013-NMCA-109.

Summary judgment appropriate. — Because plaintiff had acknowledged that she could not reasonably be accommodated in her former job and reassignment was not required under the Human Rights Act, summary judgment on a Human Rights Act claim was appropriate. Albert v. Smith's Food & Drug Ctrs., Inc., 356 F.3d 1242 (10th Cir. 2004).

Guidance provided by interpretation of federal law. — The evidentiary methodology adopted by the United States Supreme Court in interpreting the federal Civil Rights Act of 1964 provides guidance for proving a violation of the New Mexico Human Rights Act. Smith v. FDC Corp., 109 N.M. 514, 787 P.2d 433 (1990).

Reassignment. — Although the Human Rights Act was intended to eliminate unlawful discriminatory practice, nothing in that broad purpose requires that reasonable accommodation be read to include reassignment. Albert v. Smith's Food & Drug Ctrs., Inc., 356 F.3d 1242 (10th Cir. 2004).

"Reasonable accommodation" defined. — Although the statute does not define what constitutes a "reasonable accommodation", the New Mexico Human Rights Commission regulations, 9.1.1.7 NMAC, define reasonable accommodation. Albert v. Smith's Food & Drug Ctrs., Inc, 356 F.3d 1242 (10th Cir. 2004).

II. SEXUAL HARASSMENT AND DISCRIMINATION.

Refusal by commercial photography business to photograph a same-sex commitment ceremony constituted discrimination. — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; and plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds, plaintiff violated the act because plaintiff discriminated against defendant on the basis of plaintiff's sexual orientation. Elane Photography, LLC v. Willock, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

Where plaintiff, which was a commercial photography business, refused to photograph defendant's commitment ceremony with defendant's same-sex partner based on plaintiff's owners' religious and moral beliefs which prohibited plaintiff from photographing images that convey a message that marriage can be defined other than as the union of one man and one woman; and plaintiff constituted a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., plaintiff violated the act by discriminating against defendant based on defendant's sexual orientation. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, *aff'd*, 2013-NMSC-040.

Hostile work environment sexual harassment. — A plaintiff's claim of hostile work environment sexual harassment was supported by substantial evidence where she proved the following: an attorney, who worked with plaintiff as a paralegal, regularly made sexual innuendoes and told dirty jokes that were demeaning to women, engaged in sexual discussions and flirted with female employees, inappropriately touched female employees, commented about employees' sexual preferences and tolerated similar conduct by other office employees and the attorney became more aggressive when plaintiff reported the occurrences to her employer, followed plaintiff and yelled at her, disciplined plaintiff for pretextual reasons and berated and belittled her publicly. Littell v. Allstate Ins. Co., 2008-NMCA-012, 143 N.M. 506, 177 P.3d 1080.

Employer liability will be presumed where there is actionable sexual harassment and the harassing employee has supervisory authority over the victimized employee. Ocana v. American Furn. Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

Proof of sex discrimination. — In plaintiff's action alleging that her employer discriminated against her on the basis of her sex, the trial court properly allowed her to compare her wages with those of males employed as subsidiary managers by the company in other cities. Sonntag v. Shaw, 2001-NMSC-015, 130 N.M. 238, 22 P.3d 1188.

Hostile work environment claim was established by aggregation of incidents reflecting severity and pervasiveness of harassment almost daily for nineteen months. Nava v. City of Santa Fe, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

Standard applicable to hostile work environment claims. — To state a claim for a hostile work environment, the alleged conduct must be so severe and pervasive that the workplace is transformed into a hostile and abusive environment for the employee. Herald v. Board of Regents of the Univ. of N.M., 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

Where plaintiff, a resident physician at the university of New Mexico school of medicine, was dismissed from the residency program and brought suit against the board of regents of the university of New Mexico claiming sex discrimination, and where plaintiff proffered a jury instruction stating that to prove her hostile work environment, she was required to establish that defendant's conduct, after it learned of plaintiff's allegations of rape, was based on her sex and was "severe or pervasive," the district court's denial of plaintiff's instruction was proper, and the court's instruction, stating that to find a hostile work environment, plaintiff had to establish that defendant's conduct was based on plaintiff's sex and was "severe and pervasive," accurately stated the law. Herald v. Board of Regents of the Univ. of N.M., 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

Claim not barred by exclusivity provision of Worker's Compensation Act. — The plaintiff's claim of sex discrimination under the New Mexico Human Rights Act was not barred by the exclusivity provision of the Worker's Compensation Act, Section 52-1-6 NMSA 1978 et seq., even though her claim for worker's compensation and for violation of the NMHRA stemmed from the same set of facts. Sabella v. Manor Care, Inc., 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

Claim under the Human Rights Act was not barred by the Personnel Act. — The protections against discrimination and retaliation contained in the Human Rights Act apply to probationary employees of the state who have been discharged pursuant to the Personnel Act, Section 10-9-1 NMSA 1978 et seq. Rodriguez v. N.M. Dep't of Workforce Solutions, 2012-NMCA-059, 278 P.3d 1047.

Where the employee was hired as a probationary employee of the Department of Workforce Solutions; while the employee was a probationary employee, the employee was given notice of dismissal from the employee's position pursuant to the Personnel Act, Section 10-9-1 NMSA 1978 et seq., which permitted the department to terminate the employee without cause; as a probationary employee, the employee had no

property interest in continuing employment; and the employee filed a claim under the Human Rights Act alleging discrimination and retaliation based on sex and age, the employee had a right to pursue the claims under the Human Rights Act. Rodriguez v. N.M. Dep't of Workforce Solutions, 2012-NMCA-059, 278 P.3d 1047.

Human Rights Act prohibition against discrimination on the basis of spousal affiliation or sexual orientation. — An owner of a mobile home park was not "using" property for an immoral purpose when renting to cohabiting couples, or to tenants engaged in drug trafficking in the absence of a showing of knowledge of the drug trafficking. Maloof v. Prieskorn, 2004-NMCA-126, 136 N.M. 516, 101 P.3d 327, cert. denied, 2004-NMCERT-011, 136 N.M. 656, 103 P.3d 580.

City of Albuquerque ordinance which prohibits public nudity does not violate the New Mexico Human Rights Act which in general prohibits an establishment that offers services to the public from discriminating on the basis of sex. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Summary judgment appropriate. — Where superior told plaintiff over a two-month period that he found plaintiff attractive and asked if plaintiff was interested in a relationship, but did not pursue the matter after he was rebuffed by plaintiff and reduced his contact with plaintiff; superior never made any comment connecting a promised raise to anything other than plaintiff's job performance; and plaintiff offered no evidence that her work performance was affected, that she felt compelled to resign, that her superior made any suggestion that her response to his advances would have an impact on her compensation or other aspect of her employment, or that plaintiff suffered any adverse employment action after she reported what she believed to be harassment to her superior, plaintiff failed to show quid pro quo sexual harassment, hostile work environment sexual harassment, constructive discharge or retaliation. Ulibarri v. State, 2006-NMSC-009, 139 N.M. 193, 131 P.3d 43.

III. AGE, DISABILITY AND RACE DISCRIMINATION.

Age and disability claims must be pursued under the New Mexico Human Rights Act and do not lie in common law tort. Employees may not pursue age and discrimination claims outside the Act that do not contain allegations sufficient to meet the elements of retaliatory discharge, intentional infliction of emotional distress, prima facie tort, or other existing independent torts. Gormley v. Coca-Coca Enters., 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252, aff'd, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280.

Disability based on serious medical condition. — Plaintiff established a prima facie case of disability for purposes of an employment discrimination claim based on plaintiff's breast cancer and on the effects of plaintiff's cancer medication which substantially impaired plaintiff's normal sex life. Keller v. Board of Educ. of City of Albuquerque, 182 F. Supp. 2d 1148 (D.N.M. 2001).

Human Rights Act prohibits employers from refusing to reasonably accommodate individual's disability. Albert v. Smith's Food & Drug Centers, Inc., 356 F.3d 1242 (10th Cir. 2004).

New Mexico created state remedy for age discrimination through the New Mexico Human Rights Act that affords victims back wages and other monetary relief. Gill v. Pub. Employees Ret. Bd., 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491.

Bona fide occupational qualification. — Termination of nanny who, due to illness, was unable to perform job was not a wrongful discharge under this section; the ability to attend work regularly is a bona fide occupational qualification within the meaning of Subsection A. Stock v. Grantham, 1998-NMCA-081, 125 N.M. 564, 964 P.2d 125, cert. denied, 125 N.M. 322, 961 P.2d 167.

Race discrimination not shown. — Shopping center manager did not discriminate against an East Indian store owner by refusing to renew the owner's lease of a space in the shopping center, where the decision not to renew the lease was purely a business judgment based on efforts to improve the center's "tenant mix". Goradia v. Hahn Co., 1991-NMSC-040, 111 N.M. 779, 810 P.2d 798.

Classifications such as Caucasian, white, and non-Hispanic are protected. — Where plaintiff, a Caucasian and of German descent, claimed that she was subject to discrimination based on her status as a non-Hispanic, the district court erred in granting defendant's motion for summary judgment on the grounds that the school district that refused to renew plaintiff's employment contract was not aware of plaintiff's asserted national origin, and therefore plaintiff's national origin could not, as a matter of law, have been a motivating factor in the decision to terminate her employment. A national origin discrimination claim based on the ethnic distinction between Hispanics and non-Hispanics is actionable under the New Mexico Human Rights Act. Garcia v. Hatch Valley Pub. Schs., 2016-NMCA-034, cert. granted, 2016-NMCERT-____.

Reverse discrimination claims. — Reverse discrimination claims are analyzed like any other racial discrimination claim, and where plaintiff, who identified her protected group as white or non-Hispanic, presented evidence concerning her training and experience, as well as evidence that other school bus drivers, who did not belong to the protected class, had similar performance issues and were not terminated, plaintiff satisfied the prima facie case requirement to show that the circumstances of her termination give rise to an inference of discrimination, and the burden shifts to the school district to provide a legitimate purpose for plaintiff's termination. Plaintiff's evidence was also sufficient to raise a question as to pretext, and therefore plaintiff put forward sufficient evidence to create genuine issues of material fact with respect to her discrimination claim against defendant. The district court erred in granting summary judgment dismissing plaintiff's claim. Garcia v. Hatch Valley Pub. Schs., 2016-NMCA-034, cert. granted, 2016-NMCERT-____.

Age and race discrimination shown. — Fifty-nine year-old Navajo Indian made out a case that he was terminated because of his age and race, where he identified age and race-based animus, and demonstrated that he was treated differently than similarly situated young, non-Native Americans, to a degree sufficient to support a judgment and award of damages. Smith v. FDC Corp., 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

Age discrimination not shown. — Employee's charge of age discrimination was not established where the evidence showed that the employer did not breach its reduction-in-force policy, plaintiff was not treated less favorably than younger employees, and the employer had a legitimate nondiscriminatory reason not to retain the employee. Cates v. Regents of N.M. Inst. of Mining & Tech., 1998-NMSC-002, 124 N.M. 633, 954 P.2d 65.

"Medical condition" does not include a temporary injury with minimal residual effects. Trujillo v. N. Rio Arriba Elec. Coop., Inc., 2002-NMSC-004, 131 N.M. 607, 41 P.3d 333.

Court may not impute knowledge of certain medical conditions. — Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, the employer cannot be held to have imputed knowledge of a medical condition. Trujillo v. N. Rio Arriba Elec. Coop., 2002-NMSC-004, 131 N.M. 607, 41 P.3d 333.

Totally disabled employee. — By admitting in his worker's compensation claim that he was totally disabled, an employee also admitted that he was not "otherwise qualified", per Subsection A, and, thus, was barred as matter of law from recovery under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq. Kitchell v. Pub. Serv. Co., 1998-NMSC-051, 126 N.M. 525, 972 P.2d 344.

IV. RETALIATION.

Retaliation provisions. — The plain language of the New Mexico Human Rights Act retaliation provision in Section 28-1-7I(2) NMSA 1978 is broad enough to provide protection to a defense attorney participating in a mediation. Kelley v. City of Albuquerque, 542 F.3d 802 (10th Cir. 2008)

Acts of retaliation. — Prohibited acts of "threats, reprisal or discrimination" are considered together under the general label of unlawful retaliation. Juneau v. Intel Corp., 2006-NMSC-002, 139 N.M. 12, 127 P.3d 548.

Prima facie case of retaliation. — To present a prima facie case of retaliation, opposition to a discriminatory practice must be shown and regardless of how a complaint of discrimination is made to the employer, the employee's communication to the employer must sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner and at the very least, if the statement does not mention a specific act of discrimination, the employer must be able to discern from the context of the statement that the employee opposes an

allegedly unlawful employment practice. Ocana v. American Furniture Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

Burden of proof. — In action for retaliation under the New Mexico Human Rights Act, the plaintiff has the burden of establishing that the defendant's actions were taken with the intent to retaliate against the plaintiff. Gioia v. Pinkerton's, Inc., 194 F. Supp. 2d 1207 (D.N.M. 2002).

Plaintiff who is not at-will employee may not pursue action for tort of retaliatory discharge under the policy exception to the at-will doctrine when the plaintiff has an alternative remedial grievance procedure available under a collective bargaining agreement. Silva v. American Fed'n. of State, County & Mun. Employees, 231 F.3d 691 (10th Cir. 2001).

Continuing violation doctrine applies to retaliation claim. — The continuing violation doctrine applies to retaliation claims. If one act contributing to a retaliation claim based on a series of actions and not a single, discrete act occurred within the statutory period for filing complaints, all acts creating the retaliation claim may be considered, including facts and evidence of facts that occurred prior to the one-hundred-eighty-day statute of limitations cut-off for filing complaints. Charles v. NMSU Regents, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where plaintiff complained several times about the conduct of a co-worker and after each complaint, the co-worker and plaintiff's supervisors retaliated with harassment, threatening behavior, discrimination and reprisals, plaintiff's claim of retaliation was based on a cumulative series of acts, not a discrete discriminatory act, the continuing violation doctrine applied, and the court could consider all of the conduct that occurred during plaintiff's employment, including conduct that occurred more than 180 days prior to the date plaintiff filed a complaint. Charles v. NMSU Regents, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Sufficient evidence of constructive discharge. — Where plaintiff testified that during plaintiff's four years of employment with defendant, plaintiff's co-worker yelled at plaintiff, told plaintiff to "shut up", accused plaintiff of not doing anything, called plaintiff insulting names, subjected plaintiff to intimidating conduct by yelling at plaintiff, slammed drawers and cabinets, refused to give plaintiff receipts for purchases made using a university card that was issued to plaintiff, made fun of plaintiff, and told plaintiff to hold plaintiff's blouse closed when plaintiff bent down or the co-worker would kick plaintiff; some of the co-worker's conduct occurred in front of students; and plaintiff's supervisor yelled at plaintiff and criticized plaintiff in front of students, threw a cigarette butt at plaintiff, unfairly criticized plaintiff's work performance, accused plaintiff of being late to work, and decreased plaintiff's performance rating with respect to working relations, plaintiff's evidence was sufficient to support the jury's findings that plaintiff was constructively discharged. Charles v. NMSU Regents, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Retaliatory discharge shown. — In an action by an employee against an employer alleging gender discrimination and retaliatory discharge, since the supervisor's own testimony constituted an admission that the employee's complaint of gender discrimination caused him to make the determination to terminate her, the employee was entitled to judgment as a matter of law. Brillhart v. Philips Elec. N. Am. Corp., 938 F. Supp. 742 (D.N.M. 1996), *rev'd*, 179 F.3d 1271 (10th Cir. 1999).

Retaliatory actions shown. — Jury reasonably concluded that retaliation was the motive behind the unfair criticism and isolation to which the employee was subjected after she filed a discrimination claim, as well as the employer's failure to give her the same consideration for a particular position as other employees. Gonzales v. N.M. Dep't of Health, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

Prospective employee may be required to enter race on application for security reasons despite provisions of Section 59-4-4C, 1953 Comp. (similar to Subsection D of this section). 1963-64 Op. Att'y Gen. No. 63-163.

Law reviews. — For note and comment, "The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation That Denies Equal Protection to Members of the Gay Community," see 36 N.M.L. Rev. 565 (2006).

For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For note, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act"? see 12 N.M.L. Rev. 541 (1982).

For article, "Defending the Abusively Discharged Employee: In Search of a Judicial Solution," see 12 N.M.L. Rev. 711 (1982).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights §§ 28 to 34, 41 to 60, 98 to 175, 193 to 206, 226 to 242, 249 to 256.

Tenants or buyers: race or religious belief as permissible consideration in choosing tenants or buyers of real estate, 14 A.L.R.2d 153.

Discharge from private employment on ground of political views or conduct, 51 A.L.R.2d 742, 29 A.L.R.4th 287, 38 A.L.R.5th 39.

Businesses or establishments falling within state civil rights statute provisions prohibiting discrimination, 87 A.L.R.2d 120.

Blockbusting: validity and construction of anti-blockbusting regulations designed to prevent brokers from inducing sales of realty because of actual or rumored entry of racial group in neighborhood, 34 A.L.R.3d 1432.

Exclusion of or discrimination against physician or surgeon by hospital, 37 A.L.R.3d 645.

Aliens: constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 A.L.R.3d 1213.

Discrimination in provision of municipal services or facilities as civil rights violation, 51 A.L.R.3d 950.

Trailer park as place of public accommodation within meaning of state civil rights statutes, 70 A.L.R.3d 1142.

Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

State laws prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages, 89 A.L.R.3d 7.

Construction and effect of state legislation forbidding job discrimination because of physical handicap, 90 A.L.R.3d 383.

Union security arrangements in state public employment, 95 A.L.R.3d 1102.

Application of state law to age discrimination in employment, 96 A.L.R.3d 195.

Prohibition, under state civil rights laws, of racial discrimination in rental of privately owned residential property, 96 A.L.R.3d 497.

Identification of jobseeker by race, religion, national origin, sex, or age, in "situation wanted" employment advertising as violation of state civil rights laws, 99 A.L.R.3d 154.

On-the-job sexual harassment as violation of state civil rights law, 18 A.L.R.4th 328.

Construction and effect of state legislation forbidding discrimination in housing on account of physical handicap, 28 A.L.R.4th 685.

What constitutes illegal discrimination under state statutory prohibition against discrimination in housing accommodations on account of marital status, 33 A.L.R.4th 964.

What constitutes employment discrimination on basis of "marital status," for purposes of state civil rights laws, 44 A.L.R.4th 1044.

Discipline or discharge for sexual conduct as violative of state fair employment laws, 47 A.L.R.4th 863.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 A.L.R.4th 853.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

State civil rights legislation prohibiting sex discrimination in housing, 81 A.L.R.4th 205.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Liability for discharge of employee from private employment on ground of political views or conduct, 38 A.L.R.5th 39.

Application of state law to age discrimination in employment, 51 A.L.R.5th 1.

Validity, construction, and application of state enactment, order, or regulation expressly prohibiting sexual orientation discrimination, 82 A.L.R.5th 1.

Individual liability of supervisors, managers, officers or co-employees for discriminatory actions under state Civil Rights Act, 83 A.L.R.5th 1.

When is supervisor's or coemployee's hostile environment sexual harassment imputable to employer under state law, 94 A.L.R.5th 1.

Discrimination against pregnant employee as violation of state fair employment laws, 99 A.L.R.5th 1.

What constitutes substantial limitation on major life activity of working for purposes of state civil rights acts, 102 A.L.R.5th 1.

Necessity of, and what constitutes, employer's reasonable accommodation of employee's religious preference under state law, 107 A.L.R.5th 623, § 7.

Refusal to hire, or dismissal from employment, on account of plaintiff's sexual lifestyle or sexual preference as violation of federal constitution or federal civil rights statutes, 42 A.L.R. Fed. 189.

Sex discrimination in law enforcement and corrections employment, 53 A.L.R. Fed. 31.

Actions, under 42 USCS § 1983, for violations of federal statutes pertaining to rights of handicapped persons, 63 A.L.R. Fed. 215.

Age as bona fide occupational qualification "reasonably necessary" for normal conduct of business under § 4(f)(1) of Age Discrimination in Employment Act (29 USCS § 623(f)(1)), 63 A.L.R. Fed. 610.

Admissibility, in action under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), of evidence of discriminatory practices predating the Act, 63 A.L.R. Fed. 891.

Liability under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.) of employer, as successor employer, for discriminatory employment practices of predecessor, 67 A.L.R. Fed. 806.

Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 68 A.L.R. Fed. 19.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e et seq.), 78 A.L.R. Fed. 252.

Reinstatement as remedy for discriminatory discharge or demotion under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 78 A.L.R. Fed. 575.

Actions under Age Discrimination in Employment Act (29 USCS §§ 621-634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

Who is "qualified" handicapped person protected from employment discrimination under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and regulations promulgated thereunder, 80 A.L.R. Fed. 830.

Effect of mixed or dual motives in actions under Title VII (equal employment opportunities subchapter) of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 83 A.L.R. Fed. 268.

Actionability, under federal and state antidiscrimination legislation, of foreign employer's discriminating in favor of foreign workers in hiring and other employment matters, 84 A.L.R. Fed. 114.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another, 86 A.L.R. Fed. 230.

Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 93 A.L.R. Fed. 10.

When does adverse employment decision based on person's foreign accent constitute national origin discrimination in violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 104 A.L.R. Fed. 816.

Protection of debtor from acts of discrimination by private entity under § 525(b) of Bankruptcy Code of 1978 (11 USCS § 525(b)), 105 A.L.R. Fed. 555.

Sex discrimination in job assignment or transfer as violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 123 A.L.R. Fed. 1

Who, other than specifically excluded persons, is "employee" under § 4(a)(1) of Age Discrimination in Employment Act of 1967 (29 USC § 623(a)(1)), 125 A.L.R. Fed. 273.

Employee's retention of benefits received in consideration of promise not to enforce claims under Age Discrimination in Employment Act as ratification of otherwise invalid or voidable waiver under § 7(f)(1) of act (29 USC § 626(f)(1)), 128 A.L.R. Fed. 577.

Validity, construction, and application of § 274A of Immigration and Nationality Act (8 USCS § 1324a), involving unlawful employment of aliens, 130 A.L.R. Fed. 381.

What constitutes employer's reasonable accommodation of employee's religious preferences under Title VII of Civil Rights Act of 1964, 134 A.L.R. Fed. 1.

Who is "employer" within meaning of Age Discrimination in Employment Act of 1967 (29 USCS § 621 et seq.), 137 A.L.R. Fed. 551.

Conduct of plaintiff as defense in action for employment discrimination based on sexual harassment under federal civil rights statutes, 145 A.L.R. Fed. 459.

Construction and application of § 804(f) of Fair Housing Act (42 USCA § 3604(f)), prohibiting discrimination in housing because of individual's disability, 148 A.L.R. Fed. 1.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes - public employment cases, 153 A.L.R. Fed. 609.

What constitutes direct evidence of age discrimination in action under age discrimination in employment act (29 U.S.C.A. §§ 621et seq.) - post-Price Waterhouse cases, 155 A.L.R. Fed. 283.

What constitutes racial harassment in employment violative of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.), 156 A.L.R. Fed. 1.

Sex discrimination in public education under Title IX - supreme court cases, 158 A.L.R. Fed. 563.

Liability of employer, under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) for sexual harassment of employee by customer, client, or patron, 163 A.L.R. Fed. 445.

What constitutes "Willful violation" under age discrimination in employment act (29 U.S.C. § 626 et seq.) entitling victim to liquidate damages, 165 A.L.R. Fed. 1.

What constitutes reverse sex or gender discrimination against males violative of federal constitution or statutes - nonemployment cases, 166 A.L.R. Fed. 1.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - public employment cases, 168 A.L.R. Fed. 1.

14 C.J.S. Civil Rights, §§ 53 to 67, 146 to 181.

28-1-7.1. Prohibiting discrimination against seniors in certain volunteer service.

The state or a political subdivision of the state shall not exclude a person older than sixty years of age from volunteer service as long as the person is physically, mentally and professionally capable of performing the services involved. For the purposes of this section, "professionally capable" means having the ability to demonstrate reasonable proficiency and having any relevant certification in accordance with the laws, rules or technical standards that may govern the particular profession.

History: Laws 2003, ch. 231, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 231, § 2 made the act effective July 1, 2003.

28-1-7.2. Quotas prohibited.

A person, employer, employment agency or organization shall not use the provisions of the Human Rights Act to adopt or implement a quota on the basis of sexual orientation or gender identity.

History: Laws 2003, ch. 383, § 3.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 383, § 5 made the act effective July 1, 2003.

28-1-8. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 241, § 6, repealed 28-1-8 NMSA 1978, as enacted by Laws 1973, ch. 155, § 3, relating to certification of preexisting disability, effective June 17, 1983.

28-1-9. Exemptions.

Nothing contained in the Human Rights Act shall:

A. apply to any single-family dwelling sold, leased, subleased or rented by an owner without the making of any notice, statement or advertisement with respect to the sale, lease, sublease or rental of a dwelling unit that indicates any preference, limitation or discrimination based on race, color, religion, national origin, ancestry, sex, sexual orientation or gender identity. This exemption is subject to these further reservations:

(1) to qualify for the exemption, the seller must not be an owner of or own or have reserved any interest in more than three single-family dwellings; and

(2) if the seller does not currently live in the dwelling or he was not the most recent occupant, the exemption granted in this section shall only apply to one sale in twenty-four months;

B. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained, unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry;

C. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory employment or renting practices that are based upon sexual orientation or gender identity; provided, that the provisions of the Human Rights Act with respect to sexual orientation and gender identity shall apply to any other:

(1) for-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986, as amended; or

(2) nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

D. apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence;

E. apply to public restrooms, public showers, public dressing facilities or sleeping quarters in public institutions, where the preference or limitation is based on sex; and

F. prevent the mandatory retirement of an employee upon reaching the age of sixty-five years or older, if the employer is operating under a retirement plan that meets the requirements of Public Law 93-406, the Employee Retirement Income Security Act of 1974.

History: 1953 Comp., § 4-33-8, enacted by Laws 1969, ch. 196, § 8; 1973, ch. 58, § 2; 1975, ch. 78, § 1; 2003, ch. 383, § 4; 2004, ch. 115, § 2.

ANNOTATIONS

Cross references. — For the federal Employee Retirement Income Security Act of 1974, *see* 26 U.S.C. § 410 et seq.

For Section 511(a) of the Internal Revenue Code of 1986, *see* 26 U.S.C. § 511(a).

For Section 501(c)(3), *see* 26 U.S.C. § 501(c)(3).

The 2004 amendment, effective July 1, 2004, deleted Subsection G, which provided that the Human Rights Act does not apply to a business that employs fourteen or fewer full-time employees.

The 2003 amendment, effective July 1, 2003, substituted "sex, sexual orientation or gender identity" for "or sex" following "national origin, ancestry" in Subsection A; in Paragraph A(2), substituted "does not currently" for "doesn't presently" near the beginning, deleted "then" following "most recent occupant", substituted "shall" for "will" following "in this section"; in Subsection B, substituted "that is operated, supervised" for "which is operated, or supervised" following "institution or organization", inserted "that" following "controlled by or"; added present Subsection C and redesignated former Subsections C to E as Subsections D to F; and added Subsection G.

Law reviews. — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of provisions of § 702 of Civil Rights Act of 1964 (42 USCS § 2000e-1) exempting activities of religious organizations from operation of Title VII Equal Employment Opportunity provisions, 67 A.L.R. Fed. 874.

Actions under Age Discrimination in Employment Act (29 USCS §§ 621 to 634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

Validity, construction, and application of § 804 (c) of Civil Rights Act of 1968 (Fair Housing Act) (42 USCS § 3604 (c)) prohibiting discriminatory notice, statement, or advertisement with respect to sale or rental of dwelling, 142 A.L.R. Fed. 1

28-1-10. Grievance procedure.

A. A person claiming to be aggrieved by an unlawful discriminatory practice and a member of the commission who has reason to believe that discrimination has occurred may file with the human rights division of the labor department a written complaint that shall state the name and address of the person alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required by the commission. All complaints shall be filed with the division within three hundred days after the alleged act was committed.

B. The director shall advise the respondent that a complaint has been filed against the respondent and shall furnish the respondent with a copy of the complaint. The director shall promptly investigate the alleged act. If the director determines that the complaint lacks probable cause, the director shall dismiss the complaint and notify the complainant and respondent of the dismissal. The complaint shall be dismissed subject to appeal as in the case of other orders of the commission.

C. If the director determines that probable cause exists for the complaint, the director shall attempt to achieve a satisfactory adjustment of the complaint through persuasion and conciliation. The director and staff shall neither disclose what has transpired during the attempted conciliation nor divulge information obtained during any hearing before the commission or a commissioner prior to final action relating to the complaint. An officer or employee of the labor department who makes public in any manner information in violation of this subsection is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than one year.

D. A person who has filed a complaint with the human rights division may request and shall receive an order of nondetermination from the director without delay after the division's receipt of the complaint and in jointly filed cases, after the federal complaint has been closed. The order of nondetermination may be appealed pursuant to the provisions of Section 28-1-13 NMSA 1978.

E. In the case of a complaint filed by or on behalf of a person who has an urgent medical condition and has notified the director in writing of the test results, the director shall make the determination whether probable cause exists for the complaint and shall attempt any conciliation efforts within ninety days of the filing of the written complaint or notification, whichever occurs last.

F. If conciliation fails or if, in the opinion of the director, informal conference cannot result in conciliation and the complainant has not requested a waiver of right to hearing pursuant to the provisions of Subsection J of this section, the commission shall issue a written complaint in its own name against the respondent, except that in the case of a complaint filed by or on behalf of a person who has an urgent medical condition, who has notified the director in writing of the test results and who so elects, the director shall issue an order of nondetermination, which may be appealed pursuant to the provisions of Section 28-1-13 NMSA 1978. The complaint shall set forth the alleged discriminatory practice, the secretary's regulation or the section of the Human Rights Act alleged to have been violated and the relief requested. The complaint shall require the respondent to answer the allegations of the complaint at a hearing before the commission or hearing officer and shall specify the date, time and place of the hearing. The hearing date shall not be more than fifteen or less than ten days after service of the complaint. The complaint shall be served on the respondent personally or by registered mail, return receipt requested. The hearing shall be held in the county where the respondent is doing business or the alleged discriminatory practice occurred.

G. Within one year of the filing of a complaint by a person aggrieved, the commission or its director shall:

(1) dismiss the complaint for lack of probable cause;

(2) achieve satisfactory adjustment of the complaint as evidenced by order of the commission; or

(3) file a formal complaint on behalf of the commission.

H. Upon the commission's petition, the district court of the county where the respondent is doing business or the alleged discriminatory practice occurred may grant injunctive relief pending hearing by the commission or pending judicial review of an order of the commission so as to preserve the status quo or to ensure that the commission's order as issued will be effective. The commission shall not be required to post a bond.

I. For purposes of this section, "urgent medical condition" means any medical condition as defined by an appropriate medical authority through documentation or by direct witness of a clearly visible disablement that poses a serious threat to the life of the person with the medical condition.

J. The complainant may seek a trial de novo in the district court in lieu of a hearing before the commission, provided the complainant requests from the director, in writing, a waiver of complainant's right to hearing within sixty days of service of written notice of a probable cause determination by the director. The director shall approve the waiver request and shall serve notice of the waiver upon the complainant and respondent. The complainant may request a trial de novo pursuant to Section 28-1-13 NMSA 1978 within ninety days from the date of service of the waiver. Issuance of the notice shall be deemed a final order of the commission for the purpose of appeal pursuant to Section 28-1-13 NMSA 1978.

History: 1953 Comp., § 4-33-9, enacted by Laws 1969, ch. 196, § 9; 1981, ch. 220, § 1; 1983, ch. 241, § 3; 1987, ch. 342, § 21; 1991, ch. 45, § 1; 1993, ch. 268, § 2; 1993, ch. 305, § 1; 1995, ch. 125, § 2; 2005, ch. 311, § 1.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed the time when complaints must be filed from one hundred eighty days to three hundred days in Subsection A; deleted the former provision of Subsection D that the division shall receive an order of non-determination one hundred eighty days after receipt of the complaint; provided in Subsection D that the division shall receive and order of non-determination without delay after receipt of the complaint and in jointly filed cases, after the federal complaint has been closed; and changed the time the complainant may request a trial de novo from thirty days to ninety days.

The 1995 amendment, effective June 16, 1995, made minor stylistic changes in Subsection A, in Subsection F, inserted "and the complainant has not requested a waiver of right to hearing pursuant to the provisions of Subsection J of this section" in the first sentence and "or hearing officer" in the third sentence, and added Subsection J.

The 1993 amendment, effective June 18, 1993, inserted a new Subsection G, and redesignated former Subsections G and H as present Subsections H and I.

The 1991 amendment, effective July 1, 1991, inserted "human rights" in the first sentence of Subsection A; added Subsections D, E and H; redesignated former Subsections D and E as Subsections F and G; in Subsection F added the exception at the end of the first sentence; and made stylistic changes in Subsections A and B.

Exhaustion of administrative remedies. — A plaintiff must exhaust plaintiff's administrative remedies against a party before bringing an action against that party

based on a claim under the Human Rights Act. Sonntag v. Shaw, 2001-NMSC-015, 130 N.M. 238, 22 P.3d 1188.

Independent tort action not precluded. — The Human Rights Act did not preclude the plaintiff from bringing a tort claim against her employer and supervisor based on allegations that the supervisor disparaged and humiliated her in front of other employees necessitating her hospitalization. Beavers v. Johnson Controls World Servs., Inc., 1995-NMCA-070, 120 N.M. 343, 901 P.2d 761.

Compliance with grievance procedure of Human Rights Act is prerequisite to suit under the act. Jaramillo v. J.C. Penney Co., 1985-NMCA-002, 102 N.M. 272, 694 P.2d 528.

Exhaustion of administrative remedies not required. — Because the Human Rights Act does not provide an exclusive remedy, exhaustion of administrative remedies under the act is not a prerequisite to proceeding with an independent tort claim. The legislature did not intend the act's remedies to be exclusive. Gandy v. Wal-Mart Stores, Inc., 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859.

Effect of filing with EEOC. — Even though the plaintiff had filed a sex discrimination complaint against her former employer only with the equal employment opportunity commission (EEOC), she exhausted her administrative remedies and could file an appeal in the district court because a work-sharing agreement between the EEOC and New Mexico human rights division (NMHRD) and NMHRD regulations provided that NMHRD procedural requirements were met by filing a complaint with either the NMHRD or the EEOC. Sabella v. Manor Care, Inc., 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

Notice required. — Plaintiff has to give notice to the New Mexico human rights commission (now the human rights division of the department of labor) of the alleged discrimination before commencement of his action in federal court. Harris v. Ericson, 457 F.2d 765 (10th Cir. 1972).

Notice of right to sue from EEOC. — Receiving a notice of right to sue from the equal employment opportunity commission did not satisfy the state law requirement of obtaining an order from the human rights division, nor did such notice affect the 30-day time limit for filing an appeal from an order of the division in state court. Mitchell-Carr v. McLendon, 1999-NMSC-025, 127 N.M. 282, 980 P.2d 65.

Statute of limitations begins to run from the date of an adverse employment action. — In age discrimination cases, the statute of limitations commences to run when a plaintiff knows or should know of the adverse employment action, regardless of whether the plaintiff then has or should have knowledge of the employer’s discriminatory intent. Slusser v. Vantage Builders, Inc., 2013-NMCA-073.

Statute of limitations began to run upon termination of employment. — Where plaintiff, who held a managerial position in defendant's accounting department and who met or exceeded defendant's expectations, was terminated by defendant in February 2006 ostensibly because plaintiff's position had been eliminated by a restructuring of the accounting department; in June 2007, plaintiff learned that a younger person, who was paid substantially less than plaintiff, had been assigned plaintiff's position and had the same roles and performed the same job as plaintiff; plaintiff filed a charge of discrimination in October 2007; and plaintiff claimed that the statute of limitations began to run when plaintiff learned that defendant's action was discriminatory, the statute began to run upon plaintiff's termination and expired prior to the filing of plaintiff's action. Slusser v. Vantage Builders, Inc., 2013-NMCA-073.

Statute of limitations was not equitably tolled. — Where plaintiff asserted that evidence of discrimination existed immediately after plaintiff's termination that a younger employee took over plaintiff's responsibilities; and plaintiff never showed that plaintiff acted diligently to discover the evidence and pursue plaintiff's rights or that plaintiff could not have known about the discrimination even with reasonable diligence in investigating the basis of plaintiff's termination, the statute of limitations was not equitably tolled. Slusser v. Vantage Builders, Inc., 2013-NMCA-073.

Equitable estoppel did not prevent the assertion of statute of limitations. — Where defendant told plaintiff that plaintiff was being terminated because plaintiff's position had been eliminated as a result of a restructuring of defendant's business and plaintiff later learned that plaintiff's termination was performance related, defendant's original statement to plaintiff did not constitute active steps to prevent plaintiff from timely filing an age discrimination complaint and defendant was not equitably estopped from asserting a statute of limitations defense. Slusser v. Vantage Builders, Inc., 2013-NMCA-073.

Notice not timely filed. — Failure to file within the time set forth in Subsection A deprives the New Mexico commission of a bona fide opportunity to consider or act upon the discrimination complaint, and plaintiff cannot successfully rely on the resultant rejection as such a termination of state proceedings within the meaning of § 706(d), of Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(d), so as to invoke the extended federal filing period. Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972).

Time limit under Subsection G. — Subsection G does not expressly place a jurisdictional time limit on the issuance of orders of nondetermination. Mitchell-Carr v. McLendon, 1999-NMSC-025, 127 N.M. 282, 980 P.2d 65.

Effect of not meeting state notice requirement on federal age discrimination action. — The failure to satisfy the state notice requirement within the time limits specified by state law does not bar a federal action which has already been commenced, but such federal action should be held in abeyance so as to give the state agency the opportunity to entertain respondent's grievance. Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980).

Commencement of state proceeding prerequisite to federal age discrimination action. — The commencement of state proceedings, in so-called deferral states such as New Mexico, is a jurisdictional requirement of the federal Age Discrimination in Employment Act. Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980).

When statutory period commences to run anew. — The statutory period commences to run anew from the last allegedly unlawful employment practice. Molybdenum Corp. of Am. v. EEOC, 457 F.2d 935 (10th Cir. 1972).

Commencement when no continuing unlawful practice. — The limitation period for filing a complaint commenced to run when second employment application was denied for the same reason as first, and where refusal to hire was not actuated by a continuing discriminatory employment practice. Molybdenum Corp. of Am. v. EEOC, 457 F.2d 935 (10th Cir. 1972).

Exhaustion of remedies. — A plaintiff suing as the personal representative of a decedent, rather than on her own behalf, must still exhaust the administrative remedies pursuant to this act against the defendant before she may sue the defendant in court. Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994), aff'd, 74 F.3d 1250 (10th Cir. 1996).

Complaint form denied filers the right to exhaust administrative remedies. — Where the charge of discrimination form prescribed by regulation of the human rights division instructed filers to identify the alleged discriminating agency by the name and address of the agency, but did not require any identification of individual agency employees involved in the discrimination, the form did not provide filers a fair and adequate opportunity to exhaust administrative remedies and preserve the right to pursue judicial remedies for liability against individual defendants under the Human Rights Act and filers who filed the prescribed form were not required to have exhausted administrative remedies against the previously unnamed individual defendants before pursuing their judicial remedies against the previously unnamed individual defendants. Lobato v. N.M. Env't Dep't, 2012-NMSC-002, 268 P.3d 1284.

Law reviews. — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights § 261.

14 C.J.S. Civil Rights, §§ 448 to 462.

28-1-11. Hearing procedures.

A. The respondent to a complaint made pursuant to Section 28-1-10 NMSA 1978 may file a written answer to the complaint, appear at the hearing, give testimony and be represented by counsel and may obtain from the commission subpoenas for any person or for the production of any evidence pertinent to the proceeding. The complainant shall be present at the hearing and may be represented by counsel. Each party shall have the right to amend his complaint or answer.

B. A panel of three members of the commission designated by the chairman shall sit, and a decision agreed upon by two members of the panel shall be the decision of the commission. However, no commissioner who has filed a complaint may sit on the panel hearing his complaint. Hearings also may be conducted by a hearing officer employed by the human rights division of the labor department or, if the hearing officer is unavailable, one member of the commission may be designated by the chairman to act as a hearing officer. A hearing officer shall have the same powers and duties as a commissioner as set forth in Paragraph (2) of Subsection A of Section 28-1-4 NMSA 1978.

C. The complainant or his representative shall present to the commission or the hearing officer the case supporting the complaint. No evidence concerning prior attempts at conciliation shall be received. The director shall not participate in the hearing, except as a witness.

D. The commission and the hearing officer shall not be bound by the formal rules of evidence governing courts of law or equity but shall permit reasonable direct examination and cross-examination and the submission of briefs. Testimony at the hearing shall be taken under oath and recorded by tape or otherwise. Upon the request of any party, testimony shall be transcribed, provided that all costs of transcribing shall be paid by the party so requesting. Each commissioner and hearing officer may administer oaths.

E. Upon the conclusion of a hearing conducted by a hearing officer, the hearing officer shall prepare a written report setting forth proposed findings of fact and conclusions of law and recommending the action to be taken by the commission. The hearing officer shall submit the report to a review panel consisting of no more than three members of the commission designated by the chairman. No commissioner may sit on the panel reviewing the hearing officer's report issued in connection with a complaint filed by the commissioner. A decision by a majority of the members of the review panel shall be the decision of the commission. If the commission finds from the evidence presented at any hearing held pursuant to this section that the respondent has engaged in a discriminatory practice, it shall make written findings of fact, conclusions of law and its decision based upon the findings of fact and conclusions of law. The commission may adopt, modify or reject the proposed findings of fact and conclusions of law and the action recommended by the hearing officer. Within five days after any order is rendered by the commission following a hearing, the commission shall serve upon each party of record and his attorney, if any, a written copy of the order by certified mail to the party's address of record. All parties shall be deemed to have been served on the tenth day

following the mailing. As part of its order, the commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorneys' fees, if the complainant was represented by private counsel, and to take such affirmative action as the commission considers necessary, including a requirement for reports of the manner of compliance.

F. If the commission finds from the evidence that the respondent has not engaged in a discriminatory practice, it shall make written findings of fact and serve the complainant and respondent with a copy of the findings of fact and with an order dismissing the complaint.

History: 1953 Comp., § 4-33-10, enacted by Laws 1969, ch. 196, § 10; 1975, ch. 248, § 1; 1983, ch. 241, § 4; 1987, ch. 342, § 22; 1995, ch. 125, § 3.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, substituted "must" for "shall" in Subsection A; added the third and fourth sentences in Subsection B; in Subsection C, substituted "The complainant or his representative" for "A member of the division staff, the attorney general or special counsel" and inserted "or the hearing officer"; in Subsection D, inserted "and the hearing officer" in the first and last sentences; and in Subsection E, added the first through the fourth and the sixth sentences, inserted "presented at any hearing held pursuant to this section" in the fifth sentence, and made a minor stylistic change in the last sentence.

Proceeding not stayed by filing federal suit. — The filing of an age discrimination complaint in federal court does not stay a proceeding before the commission to redress the same alleged unlawful discriminatory practice. Mares v. Santa Fe Pub. Schools, 1987-NMSC-074, 106 N.M. 354, 743 P.2d 110.

"Actual damages". — The law in New Mexico is unsettled as to whether the provision for "actual damages," Subsection E, encompasses damages for emotional harm. Roybal v. City of Albuquerque, 653 F. Supp. 102 (D.N.M. 1986).

Law reviews. — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights § 261.

Award of front pay under state job discrimination statutes, 74 A.L.R.4th 746.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another, 86 A.L.R. Fed. 230.

Evidence of discriminatory effect alone as sufficient to prove, or to establish prima facie case of, violation of Fair Housing Act (42 USCS §§ 3601 et seq.), 100 A.L.R. Fed. 97.

Availability of nominal damages in action under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 143 A.L.R. Fed. 269.

Actions under Fair Housing Act (42 USCS § 3601 et seq.), based on sexual harassment or creation of hostile environment, 144 A.L.R. Fed. 595.

Availability of damages under § 504 of the Rehabilitation Act (29 USCA § 794) in actions against persons or entities other than federal government or agencies thereof, 145 A.L.R. Fed. 353.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 USCA § 1981a; 42 USCA §§ 2000e et seq.), 150 A.L.R. Fed. 601.

Award of compensatory damages under 42 USCA § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 A.L.R. Fed. 347.

14 C.J.S. Civil Rights, §§ 454 to 459.

28-1-12. Enforcement.

If a respondent to a complaint filed pursuant to the Human Rights Act is not complying with an order of the commission, the attorney general or district attorney, at the request of the secretary, shall secure enforcement of the commission's order by a district court. The proceeding shall be initiated by the filing of a petition in the district court where the respondent is doing business or the alleged discriminatory practice occurred. A copy of the petition shall be served on the respondent personally or by registered mail, return receipt requested. The court may make and enter upon the proceedings an order to decree enforcement of the order of the commission.

History: 1953 Comp., § 4-33-11, enacted by Laws 1969, ch. 196, § 11; 1987, ch. 342, § 23.

ANNOTATIONS

Subject matter jurisdiction could not be raised in enforcement action. — Where the human rights commission’s complaint was heard more than fifteen days following

service of the complaint; at the hearing on the complaint, respondent argued that the commission had lost subject matter jurisdiction to hear the complaint because the hearing had not occurred within the required time; and respondent did not appeal the commission's adverse judgment, respondent could not challenge the subject matter jurisdiction of the commission in an action filed by the attorney general to enforce the commission's judgment. N.M. Human Rights Comm'n v. Accurate Machine & Tool Co., Inc., 2010-NMCA-107, 149 N.M. 119, 245 P.3d 63, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Pursuit of nonjudicial remedy for employment discrimination as amounting to election against judicial remedy, 103 A.L.R.5th 557.

28-1-13. Appeal.

A. A person aggrieved by an order of the commission may obtain a trial de novo by filing a notice of appeal in the district court of the county where the discriminatory practice occurred or where the respondent does business. The notice of appeal must be filed within ninety days from the date of service of the commission's order. A copy of the notice of appeal shall be served personally or by certified mail, return receipt requested, on all parties who appeared before the commission at their last known addresses. A copy of the notice of appeal shall also be served at the division in Santa Fe. An order of the commission shall not be superseded or stayed during the appeal unless the district court so directs after notice to the commission and a hearing.

B. If testimony at the hearing was transcribed, the division shall, upon receipt of the notice of appeal, file so much of the transcript of the record as the parties requesting the transcript designate as necessary for the appeal with the district court.

C. Upon appeal, either party may request a jury. The jurisdiction of the district court is exclusive and its judgment is final, subject to further appeal to the court of appeals.

D. If the complainant prevails in an action or proceeding under this section, the court in its discretion may allow actual damages and reasonable attorney fees, and the state shall be liable the same as a private person.

History: 1953 Comp., § 4-33-12, enacted by Laws 1969, ch. 196, § 12; 1975, ch. 248, § 2; 1983, ch. 241, § 5; 1987, ch. 342, § 24; 2005, ch. 309, § 1; 2005, ch. 311, § 2.

ANNOTATIONS

Cross references. — For procedures governing appeals to the district court, *see* Rule 1-076 NMRA.

For scope of review of the district court, *see* Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

2005 Multiple Amendments. — Laws 2005, ch. 309, § 1 and Laws 2005, ch. 311, § 2 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2005, ch. 311, § 2, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2005, ch. 309, § 1 and Laws 2005, ch. 311, § 2 are described below. To view the session laws in their entirety, *see* the 2005 session laws on *NMONESOURCE.COM*.

Laws 2005, ch. 311, § 2, effective June 17, 2005, changed the time within which a notice of appeal must be filed from thirty days to ninety days in Subsection A and changed the appellate court in Subsection C from the supreme court to the court of appeals.

Laws 2005, ch. 309, § 1, effective June 17, 2005, in Subsection A, in the first sentence, after "trial de novo" added "by filing a notice of appeal"; in the second sentence, added "must be filed"; in the fourth sentence, added "A copy of the notice of appeal"; and in Subsection C, changed "supreme court" to "court of appeals".

I. GENERAL CONSIDERATION.

Collateral estoppel did not apply. — The findings made in administrative proceedings are not entitled to collateral estoppel in New Mexico Human Rights Act actions because by specifically providing for a "trial de novo in district court" in New Mexico Human Rights Act actions, the legislature created a statutory exception to the application of collateral estoppel in such cases. Contreras v. Miller Bonded, Inc., 2014-NMCA-011, cert. granted, 2013-NMCERT-012.

Where a municipal bus driver was terminated for cause; the bus driver's claim that the termination resulted from discrimination based on sex and medical condition was fully contested before the municipal personnel board; on appeal, the district court determined that there was substantial evidence to support the termination for cause and that the termination had not resulted from discrimination; and where a sheetmetal apprentice, who suffered a work injury and who did not give notice of the injury, was terminated for failure to show up for work; the sheetmetal apprentice's claim that the termination resulted from discrimination based on a serious medical condition was fully litigated before a workers' compensation judge who determined that the termination was for cause and that the sheetmetal apprentice had failed to give notice of the injury before the termination; on appeal, the court of appeals summarily affirmed the compensation order; the bus driver and the sheetmetal apprentice filed complaints in district court alleging that their terminations resulted from discrimination in violation of the New Mexico Human Rights Act; and the district court determined that the bus driver and the sheetmetal apprentice were precluded by collateral estoppel from re-litigating their discrimination claims and granted summary judgment against them, the district court erred in granting summary judgment because the findings of an administrative agency have no collateral estoppel effect on actions filed under the New Mexico Human Rights Act. Contreras v. Miller Bonded, Inc., 2014-NMCA-011, cert. granted, 2013-NMCERT-012.

Hostile work environment sexual harassment. — Plaintiff presented a prima facie case of hostile work environment sexual harassment where supervisor began to harass plaintiff when supervisor became general manager of store where plaintiff worked, supervisor follower plaintiff around, supervisor would approach plaintiff when she was alone, stare at her, and touch himself in a sexually suggestive manner, supervisor would stand near plaintiff and stare at her breasts, supervisor usually had an erection when plaintiff saw him and he rubbed up against plaintiff with an erection on one occasion; supervisor parked his car next to plaintiff's car even though supervisor had a designated parking area, supervisor would appear out of nowhere when plaintiff went to the warehouse; and supervisor's behavior made plaintiff feel uncomfortable and supervisor's presence affected plaintiff's performance at work. Ocana v. Am. Furniture Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

Vicarious liability of employer. — Employer may be held vicariously liable to employee for an actionable hostile environment created by a supervisor with immediate authority over the employee. Employer liability will be presumed where there is actionable sexual harassment and the harassing employee has supervisory authority over the victimized employee. Where no tangible employment action has been taken against the employee, the employer may rebut the presumption by proving that the employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior and the employee reasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Ocana v. Am. Furniture Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

Section applies only to de novo appeals from commission decision; when the administrative procedure was never invoked, a district court action was not an appeal under this section. Jaramillo v. J.C. Penney Co., 1985-NMCA-002, 102 N.M. 272, 694 P.2d 528.

Venue. — The legislature intended that appeal for a trial de novo be limited to the district court of the county of the place elected by the commission to hear the complaint, as between a place of employer's doing business or of the alleged discriminatory practice. Montoya v. Super Save Warehouse Foods, 1991-NMSC-003, 111 N.M. 212, 804 P.2d 403.

Section not overridden by Tort Claims Act. — The Tort Claims Act (Article 4 of Chapter 41 NMSA 1978) does not override or supersede the Human Rights Act so as to shield a governmental entity from liability otherwise flowing from a discriminatory practice proscribed by the latter act. This section constitutes a waiver of sovereign immunity for liability imposed on public entities by the human rights commission, or by a district court on appeal from a commission decision, for violations of the Human Rights Act. Luboyeski v. Hill, 1994-NMSC-032, 117 N.M. 380, 872 P.2d 353.

Remedies are not exclusive. — The Whistleblower Protection Act (WPA), 10-16C-1 through -6 NMSA 1978, and the New Mexico Human Rights Act (HRA), 28-1-1 through -15 NMSA 1978, are not in irreconcilable conflict; a plaintiff may state a WPA claim

alongside a claim under the HRA. Herald v. Board of Regents of the Univ. of N.M., 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

Where plaintiff, a resident physician at the university of New Mexico school of medicine, was dismissed from the residency program and brought suit against the board of regents of the university of New Mexico claiming that her termination was driven by discrimination and retaliation in violation of the New Mexico Human Rights Act (HRA), 28-1-1 NMSA 1978 et seq., and the Whistleblower Protection Act (WPA), 10-16C-1 NMSA 1978 et seq., the district court erred in dismissing plaintiff's WPA claims on the grounds that the WPA and the HRA are irreconcilably conflicting and in concluding that plaintiff could therefore only proceed under the HRA. Herald v. Board of Regents of the Univ. of N.M., 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

Admissibility of reports not in record. — Ordinary rules of evidence govern the admissibility of administrative findings, and the district court is not precluded from adherence to the hearsay evidence rule in ruling on the admissibility of official reports or statements that are not in the nature of a transcript of the record. Behrmann v. Phototron Corp., 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

"Actual damages" construed. — The term "actual damages" in Subsection D is synonymous with compensatory damages, and excludes punitive damages. As for prospective damages, because they are a species of actual damages, they properly may be granted where evidence has been presented as to their present worth. Behrmann v. Phototron Corp., 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

Evidence supporting award of front pay. — Evidence of plaintiff's inability to find full-time employment in his locality, despite his strenuous efforts, constitutes sufficient evidence of his inability to mitigate damages to support the court's discretion in determining that future employment would be unlikely and to support an award of front pay. Smith v. FDC Corp., 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

State immunity from interest not waived. — Subsection D of this section does not explicitly waive the state's immunity from post-judgment interest. Nava v. City of Santa Fe, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

Interest not authorized. — Trial court did not abuse its discretion by refusing to assess interest on the judgment, fees, and costs in plaintiff's retaliation suit, because an interest award under Section 56-8-4 NMSA 1978 is not an absolute right, but rather is a matter to be left to the discretion of the trial court, and there is no authority suggesting that the phrase "actual damages and reasonable attorney's fees" in Subsection D of this section should be expanded to include interest. Gonzales v. N.M. Dep't of Health, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

Validity of certain jury instructions. — The court did not abuse its discretion in giving "sex stereotyping" and "absence-of-direct-proof" instructions to the jury in an action brought by an employee who alleged that she was wrongfully terminated from her job as

a salesperson because she became pregnant. Behrmann v. Phototron Corp., 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Exhaustion of remedies against individual defendants required. — Individual defendants cannot be sued in district court under this article unless and until the complainant exhausts her administrative remedies against them. Luboyeski v. Hill, 1994-NMSC-032, 117 N.M. 380, 872 P.2d 353.

Liability of individual. — Where plaintiff named only the corporation as a defendant in her complaint for discrimination before the human rights division, the president of the corporation was not now personally liable in district court because, while she exhausted her administrative remedies against the corporation, she failed to do so against the president individually. Sonntag v. Shaw, 2001-NMSC-015, 130 N.M. 238, 22 P.3d 1188.

Complaint form denied filers the right to exhaust administrative remedies. — Where the charge of discrimination form prescribed by regulation of the human rights division instructed filers to identify the alleged discriminating agency by the name and address of the agency, but did not require any identification of individual agency employees involved in the discrimination, the form did not provide filers a fair and adequate opportunity to exhaust administrative remedies and preserve the right to pursue judicial remedies for liability against individual defendants under the Human Rights Act and filers who filed the prescribed form were not required to have exhausted administrative remedies against the previously unnamed individual defendants before pursuing their judicial remedies against the previously unnamed individual defendants. Lobato v. N.M. Env't Dep't, 2012-NMSC-002, 268 P.3d 1284.

Exhaustion of administrative remedies. — Even though the plaintiff had filed a sex discrimination complaint against her former employer only with the equal employment opportunity commission (EEOC), she exhausted her administrative remedies and could file an appeal in the district court because a work-sharing agreement between the EEOC and New Mexico human rights division (NMHRD) and NMHRD regulations provided that NMHRD procedural requirements were met by filing a complaint with either the NMHRD or the EEOC. Sabella v. Manor Care, Inc., 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

III. TIME LIMITATIONS.

Time limitations. — Where human rights division did not give plaintiff's attorney notice of its record of decision even though attorney filed an entry of appearance with the division, district court could find that the division's actions tolled the thirty-day time limit to file an appeal to district court and required district court to deny defendant's motion for summary judgment that plaintiff had not timely filed notice of appeal. Ocana v. Am. Furniture Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

Time limit on filing complaint. — Receiving a notice of right to sue from the equal employment opportunity commission did not satisfy the state law requirement of obtaining an order from the human rights division, nor did such notice affect the thirty-day time limit for filing an appeal from an order of the division in state court. Mitchell-Carr v. McLendon, 1999-NMSC-025, 127 N.M. 282, 980 P.2d 65.

Time limits tolled. — Although the EEOC issued its decision in July, 1999, the division did not notify complainant's attorney of record of the decision because he was erroneously not put on the mail distribution list. Although the division normally corresponds with a complainant through his or her attorney once the attorney files an entry of appearance on the complainant's behalf, the division did not do this, and, as a result, complainant did not receive notice of the division's decision until much later. Thus, a fact-finder could find that the division's actions tolled the time limits. Ocana v. Am. Furniture Co., 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

IV. SCOPE OF REVIEW.

Scope of review. — In appeals from the human rights commission (now the human rights division of the department of labor), the district court, by virtue of specific provisions for trial de novo and jury trial, has the right to make an independent determination of the facts. The general rule in respect to appeals from administrative bodies is not applicable. Keller v. City of Albuquerque, 1973-NMSC-048, 85 N.M. 134, 509 P.2d 1329, *overruled on other grounds*, Green v. Kase, 113 N.M. 76, 823 P.2d 318.

Review of transcript. — There is no statutory requirement that on de novo appeals from the commission, the jury or the judge must hear the transcript of the proceedings before the commission. Green v. Kase, 1992-NMSC-004, 113 N.M. 76, 823 P.2d 318.

Administrative review distinguished. — The scope of judicial review contemplated by this section is much broader than in appeals brought generally under the Administrative Procedures Act (12-8-1 NMSA 1978 et seq.), where judicial review is restricted to the record. School district appealing decision of human rights commission was not required to state grounds for appeal, and therefore its notice of appeal was effective to give the district court jurisdiction to try the case de novo. Linton v. Farmington Mun. Schools, 1974-NMSC-079, 86 N.M. 748, 527 P.2d 789.

Review of jurisdiction. — Court of appeals has no authority to review a judgment of the district court on the issue of jurisdiction. Dominguez v. Stone, 1981-NMCA-146, 97 N.M. 211, 638 P.2d 423.

V. ATTORNEY FEES.

In determining the reasonableness of an award of attorney's fees, a court should consider a variety of factors, including: (1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time

limitations; and (5) the ability, experience, and reputation of the attorney performing the services. Smith v. FDC Corp., 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

Recovery of attorney's fees. — Time records do not constitute essential evidence for recovering attorney's fees. Lucero v. Aladdin Beauty Colls., Inc., 1994-NMSC-022, 117 N.M. 269, 871 P.2d 365.

Computation of attorney fees. — Although the trial court did not determine what the customary fee would be, it did not abuse its discretion by awarding an amount that was approximate to the reasonable hourly rate multiplied by the reasonable number of hours spent on the case. Lucero v. Aladdin Beauty Colls., Inc., 1994-NMSC-022, 117 N.M. 269, 871 P.2d 365.

Recovery of attorney fees. — Subsection D of this section may be interpreted to include attorney's fees for administrative proceedings, but in order to receive the fees, the complainant must prevail. Gonzales v. N.M. Dep't of Health, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

Fee award at $200 per hour, rather than requested rate of $230, was not abuse of discretion where trial court judge did not cut number of hours claimed and actually added five hours for work in connection with motions for fees, costs, and interest, and resulting award of $97,290.47 was approximately 34% of total judgment rendered by jury and was actually greater than judgment following remittitur. Nava v. City of Santa Fe, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

Law reviews. — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Availability and scope of punitive damages under state employment discrimination law, 81 A.L.R.5th 367.

Evidence of discriminatory effect alone as sufficient to prove, or to establish prima facie case of, violation of Fair Housing Act (42 USCS § 3601 et seq.), 100 A.L.R. Fed. 97.

Factors or conditions in employment discrimination cases said to justify increase in attorney's fees awarded under § 706 (k) of Civil Rights Act of 1964 (42 USCS § 2000e-5(k)), 140 A.L.R. Fed. 301.

Availability of nominal damages in action under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 143 A.L.R. Fed. 269.

Availability of damages under § 504 of the Rehabilitation Act (29 USCA § 794) in actions against persons or entities other than federal government or agencies thereof, 145 A.L.R. Fed. 353.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 USCA § 1981a; 42 USCA §§ 2000e et seq.), 150 A.L.R. Fed. 601.

Factors or conditions in employment discrimination cases said to justify decrease in attorney's fees awarded under § 706(k) of Civil Rights Act of 1964 (42 USCA § 2000e-5(k)), 151 A.L.R. Fed. 77.

Award of compensatory damages under 42 USCA § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 A.L.R. Fed. 347.

28-1-14. Posting of law and information.

Every person who is subject to the Human Rights Act, except an individual selling houses, shall keep posted in a conspicuous place on his premises notices prepared by the division which shall set forth excerpts of the Human Rights Act and other relevant information as determined by the secretary.

History: 1953 Comp., § 4-33-13, enacted by Laws 1969, ch. 196, § 13; 1987, ch. 342, § 25.

28-1-15. Repealed.

ANNOTATIONS

Repeals. — Laws 2005, ch. 208, § 27 repealed 28-1-15 NMSA 1978, as enacted by Laws 1987, ch. 333, § 1, relating to termination of the Human Rights Act, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on NMONESOURCE.COM.

ARTICLE 2
Criminal Offender Employment Act

28-2-1. Short title.

Sections 1 through 6 [28-2-1 to 28-2-6 NMSA 1978] of this act may be cited as the "Criminal Offender Employment Act".

History: 1953 Comp., § 41-24-1, enacted by Laws 1974, ch. 78, § 1.

ANNOTATIONS

Law reviews. — For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

28-2-2. Purpose of act.

The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.

History: 1953 Comp., § 41-24-2, enacted by Laws 1974, ch. 78, § 2.

ANNOTATIONS

Law reviews. — For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

28-2-3. Employment eligibility determination.

A. Subject to the provisions of Subsection B of this section and Sections 28-2-4 and 28-2-5 NMSA 1978, in determining eligibility for employment with the state or any of its political subdivisions or for a license, permit, certificate or other authority to engage in any regulated trade, business or profession, the board or other department or agency having jurisdiction may take into consideration a conviction, but the conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession. A board, department or agency of the state or any of its political subdivisions shall not make an inquiry regarding a conviction on an initial application for employment and shall only take into consideration a conviction after the applicant has been selected as a finalist for the position.

B. The following criminal records shall not be used, distributed or disseminated in connection with an application for any public employment, license or other authority:

(1) records of arrest not followed by a valid conviction; and

(2) misdemeanor convictions not involving moral turpitude.

History: 1953 Comp., § 41-24-3, enacted by Laws 1974, ch. 78, § 3; 2010, ch. 76, § 1.

ANNOTATIONS

Cross references. — For persons convicted of felonious or infamous crime ineligible for public office unless pardoned or restored to political rights, *see* 10-1-2 NMSA 1978.

The 2010 amendment, effective May 19, 2010, in Subsection A, after "Sections", deleted "3 and 4 of the Criminal Offender Employment Act" and added "28-2-4 and 28-2-5 NMSA 1978"; and added the last sentence.

State board of education subject to article. — The state board of education is subject to the provisions of Criminal Offender Employment Act (COEA), because it is an agency which determines eligibility for employment with the state. Bertrand v. N.M. State Bd. of Educ., 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Testimony concerning indictment. — Because an agency has wide discretion in receiving and excluding evidence in proceedings under the Uniform Licensing Act, any error in allowing reference to an indictment against a dentist was harmless. Weiss v. N.M. Bd. of Dentistry, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

28-2-4. Power to refuse, renew, suspend or revoke public employment or license.

A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession for any one or any combination of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession;

(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust; or

(3) where the applicant, employee or licensee has been convicted of trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the applicant, employee or licensee has applied for reinstatement or issuance of a teaching certificate, a license to operate a child-care facility or employment at a child-care facility, regardless of rehabilitation.

B. The board or other agency shall explicitly state in writing the reasons for a decision which prohibits the person from engaging in the employment, trade, business or profession if the decision is based in whole or in part on conviction of any crime described in Paragraphs (1) and (3) of Subsection A of this section. Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction

shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.

History: 1953 Comp., § 41-24-4, enacted by Laws 1974, ch. 78, § 4; 1985, ch. 234, § 1; 1997, ch. 238, § 5; 1997, ch. 251, § 1.

ANNOTATIONS

1997 Multiple Amendments. — Laws 1997, ch. 238, § 5 and Laws 1997, ch. 251, § 1 both enacted amendments to this section. Pursuant to 12-1-8 NMSA 1978, Laws 1997, ch. 251, § 1, as the last act signed by the governor, has been compiled into the NMSA 1978 as set out above, and Laws 1997, ch. 238, § 5, while not compiled pursuant to 12-1-8 NMSA 1978, is set out below.

Laws 1997, ch. 251, § 1 [set out above], effective July 1, 1997, inserted "or employee" in two places and "a license to operate a child-care facility or employment at a child-care facility" in Paragraph A(3).

Laws 1997, ch. 238, § 5 [set out below], effective June 20, 1997, in Paragraph A(3), inserted "homicide, kidnapping" following "convicted of" near the beginning and "renewal" following "reinstatement" near the end.

"28-2-4. Power to refuse, renew, suspend or revoke public employment or license.

A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession for any one or any combination of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession;

(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust; or

(3) where the applicant or employee has been convicted of homicide, kidnapping, trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the applicant or employee has applied for reinstatement, renewal or issuance of a teaching certificate, regardless of rehabilitation.

B. The board or other agency shall explicitly state in writing the reasons for a decision which prohibits the person from engaging in the employment, trade, business or profession if the decision is based in whole or in part on conviction of any crime described in Paragraphs (1) and (3) of Subsection A of this section. Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section."

The purpose of a license revocation proceeding is not to punish the licensee but to protect the public from practitioners who do not possess the necessary qualifications. Varoz v. N.M. Bd. of Podiatry, 1986-NMSC-051, 104 N.M. 454, 722 P.2d 1176.

Content of notice of contemplated action. — The "evidence" to be set out in the notice of contemplated action under Section 61-1-4 NMSA 1978 is the evidence of the ground or grounds to be relied upon in taking the contemplated action under former Section 61-5-14 NMSA 1978, not the evidence to the adduced by way of explanation and determination of rehabilitation under Criminal Offender Employment Act. Weiss v. N.M. Bd. of Dentistry, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

Jury determination of guilt relevant concern. — For purposes of this article, a jury determination of a teacher's guilt of sexual misconduct with a minor acted as a conviction, despite subsequent dismissal of the case after the teacher completed his deferred sentence. Garcia v. State Bd. of Educ., 1984-NMCA-102, 102 N.M. 306, 694 P.2d 1371, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

Decertified teacher has burden of proving rehabilitation. — A teacher who was found guilty of sexual misconduct with a minor was convicted of a crime directly relating to the teaching profession and, therefore, had the burden of showing, upon application for recertification, that he had been sufficiently rehabilitated. Garcia v. State Bd. of Educ., 1984-NMCA-102, 102 N.M. 306, 694 P.2d 1371, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

Revocation of dental license. — Where a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. Weiss v. N.M. Bd. of Dentistry, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

Meaning of rehabilitation. — While "rehabilitation" is not defined in this section (although the statute does create a presumption of rehabilitation after completion of parole, or after a certain period has elapsed after release from prison), its dictionary definition is "to restore a condition of good health, ability to work or the like". Bertrand v. N.M. State Bd. of Educ., 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Board must state reasons why applicant has not been rehabilitated and may not rely solely on the fact of conviction to deny an application. Garcia v. State Bd. of Educ., 1984-NMCA-102, 102 N.M. 306, 694 P.2d 1371, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

Distinction in treatment of crimes relates to burden of proof. — The distinction in treatment, under this section, between crimes that directly relate to a profession and crimes that do not directly relate to a profession concerns the burden of proof: under Subsection A(1), an applicant for issuance or reinstatement of a license or certificate has the burden of proving that he or she has been sufficiently rehabilitated, while, under Subsection A(2), there is a presumption of rehabilitation and the board or agency has the burden of proving an applicant for issuance or reinstatement of a license or certificate has not been sufficiently rehabilitated. N.M. Bd. of Pharmacy v. Reece, 1983-NMSC-080, 100 N.M. 339, 670 P.2d 950.

Where court accepted board rehabilitation decision. — Probative evidence of rehabilitation of a teacher who was on one year's probation for one count of distribution of marijuana included her conscientious and successful performance at her job and the parents' perception of her as a person with whom they would trust their children; but evidence that she had become angry when her probation officer would not let her see her file, made a derogatory comment about the laws and "narcs," told a student who asked her about drugs that he could get in some trouble because of some bad laws, but for him to do what he wanted, was probative of what the board could conclude was a poor attitude towards criminal offenses for one who was a teacher, and since the state board members spoke to her at some length themselves and were able to draw their own impressions of her progress towards rehabilitation, the appellate court would not substitute its judgment for that of the board. Bertrand v. N.M. State Bd. of Educ., 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Standard for use of conviction to revoke license. — In order for a conviction to be used as a basis for a license revocation, the licensing agency must explicitly state its reasons for a decision prohibiting the licensee from engaging in his or her employment or profession, and the agency must find that the licensee has not been sufficiently rehabilitated to warrant the public trust and must give reasons for this finding. Weiss v. N.M. Bd. of Dentistry, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

Writing requirement explained. — When a decision is made on grounds that a criminal conviction directly relates to a person's profession, the reasons for such a decision must be explicitly stated in writing. It is not sufficient to merely recite the language of the statute, but rather the "reasons" for the conclusion that there is a direct relation must be given, especially so that a reviewing body may know the reasons for the administrative body's conclusion; and if the conviction of a crime is to operate as other than an automatic bar to employment, the administrative agencies must explain what they perceive the detrimental effect of employment to be. Bertrand v. N.M. State Bd. of Educ., 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Scope of writing required under Subsection B. — Subsection B of Section 28-2-4 NMSA 1978 requires the board to state the reasons for its decision that the crime for which the professional was convicted directly relates to the practice of the profession, and also the reasons, if any, why the professional has not been rehabilitated and why he should be prevented from practicing the profession. N.M. Bd. of Pharmacy v. Reece, 1983-NMSC-080, 100 N.M. 339, 670 P.2d 950.

Knowledge of public record not imputed to estop dismissal. — Where the local school board did not have knowledge of a teacher's conviction until approached by her probation officer, although it was a matter of public record, the court of appeals declined to impute this knowledge to the board so as to estop it from dismissing her. Bertrand v. N.M. State Bd. of Educ., 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Prejudicial error resulted from failure to follow revocation procedures. — Failure of real estate commission to follow the procedures established by this section in its revocation of a real estate license for conviction of conspiracy to import marijuana was prejudicial error. McCoy v. N.M. Real Estate Comm'n, 1980-NMSC-081, 94 N.M. 602, 614 P.2d 14 (1980).

Required procedure for denial, suspension, or revocation of real estate license. — In each instance in which the real estate commission contemplates the denial, suspension or revocation of a license because of a criminal conviction, certain steps should be followed: 1) whether the conviction directly relates or does not directly relate to real estate, notice should be given to the licensee that the basis for the action is warranted by the Criminal Offender Employment Act; 2) evidence should be introduced on behalf of the commission supporting whether the conviction is directly related or not directly related to the business of a real estate broker or salesperson, and whether sufficient rehabilitation has been made, if required by the Criminal Offender Employment Act; 3) findings should be made after the hearing to uphold the decision of the commission under the Criminal Offender Employment Act as well as under the Real Estate Licensing Act. 1982 Op. Att'y Gen. No. 82-02.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Licenses and Permits §§ 56, 58, 106, 142; 63A Public Officers and Employees §§ 48 to 50, 184 to 186, 241 to 243, 291.

53 C.J.S. Licenses §§ 39, 52; 67 C.J.S. Officers and Public Employees §§ 22, 101, 110, 125.

28-2-5. Nonapplicability to law enforcement agencies.

The Criminal Offender Employment Act is not applicable to any law enforcement agency; however, nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth herein.

History: 1953 Comp., § 41-24-5, enacted by Laws 1974, ch. 78, § 5.

28-2-6. Applicability.

The provisions of the Criminal Offender Employment Act relating to any board or other agency which has jurisdiction over the practice of any trade, business or profession apply to authorities made subject to its coverage by law, or by any such authorities' rules or regulations if permitted by law.

History: 1953 Comp., § 41-24-6, enacted by Laws 1974, ch. 78, § 6.

ANNOTATIONS

Suspension or revocation of real estate license. — The provisions of the Criminal Offender Employment Act must be followed by the real estate commission in any action by the commission to suspend or revoke a broker's or salesperson's license because of a conviction of a felony or misdemeanor involving moral turpitude. 1982 Op. Att'y Gen. No. 82-02.

ARTICLE 3
Commission on the Status of Women

28-3-1. Commission on the status of women; creation.

A. The "commission on the status of women" is created. The commission consists of fifteen members, including one member of the human rights commission, representative of all fields of interest to women. Members shall be appointed by the governor. Members of the first commission shall be appointed for staggered terms, five ending on December 31, 1975 and five on December 31 of each of the following two years. Thereafter, appointments shall be for terms of three years or less made in such manner that the terms of five members expire on December 31 of each year. At least one member shall be appointed from, and reside in, each planning and development district. A majority of the members appointed shall be women and no more than eight members shall belong to any one political party.

B. A majority of the commission's members constitutes a quorum for the transaction of business. The governor shall designate a chairman and vice-chairman from among the membership.

History: 1953 Comp., § 4-33A-1, enacted by Laws 1974, ch. 90, § 1.

ANNOTATIONS

Cross references. — For Human Rights Act, *see* Chapter 28, Article 1 NMSA 1978.

For discrimination on basis of sex prohibited, *see* N.M. Const., art. II, § 18.

Compiler's notes. — Pursuant to Laws 1977, ch. 252, § 9, the commission on the status of women is administratively attached to the human services department.

28-3-2. Commission on the status of women; duties.

The commission shall:

A. stimulate and encourage throughout the state the study and review of the status of women in New Mexico and may act as a clearinghouse for all activities involving the status of women;

B. recommend methods of overcoming discrimination against women in public and private employment;

C. promote methods for enabling women to develop their skills, continue their education and be retrained;

D. cooperate with and assist public and private entities dealing with women;

E. conduct periodic conferences throughout the state to apprise women of their rights and opportunities and to learn from them of their needs and problems; and

F. secure recognition of women's accomplishments and contributions to New Mexico.

History: 1953 Comp., § 4-33A-2, enacted by Laws 1974, ch. 90, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

28-3-3. Commission on the status of women; powers.

The commission:

A. may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

B. is designated as the state agency for handling all United States government programs related to the status of women except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the United States government for this purpose.

History: 1953 Comp., § 4-33A-3, enacted by Laws 1974, ch. 90, § 3.

28-3-4. Commission on the status of women; staff.

The commission shall appoint a director, who is the administrative officer of the commission. The director shall employ other necessary employees under the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

History: 1953 Comp., § 4-33A-4, enacted by Laws 1974, ch. 90, § 4.

28-3-5. Commission on the status of women; reports.

The commission shall submit reports on its preceding year's work to the governor and the legislature by December 1 of each year. The reports shall contain recommendations, if any, for legislation or other appropriate action.

History: 1953 Comp., § 4-33A-5, enacted by Laws 1974, ch. 90, § 5.

28-3-6. Commission on the status of women; compensation.

Commission members shall be reimbursed as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], and shall receive no other compensation, perquisite or allowance.

History: 1953 Comp., § 4-33A-6, enacted by Laws 1974, ch. 90, § 6.

28-3-6.1. Office of the governor's council on women's health created.

A. The "office of the governor's council on women's health" is created and is administratively attached to the commission on the status of women.

B. The office of the governor's council on women's health shall:

(1) serve as a clearinghouse for education and information on women's health;

(2) recommend performance measures and outcomes specific to women's health;

(3) report annually by September 1 to the governor on women's health policy issues;

(4) assist in developing policy to improve women's health and well-being, including policies that explain and explore the links between women's health and economic security; and

(5) assist state agencies, including the department of health, to improve access to health care for women.

C. The governor shall appoint the director of the office of the governor's council on women's health, who shall serve at the pleasure of the governor.

D. The governor shall appoint advisors to the office of the governor's council on women's health to represent the geographic diversity of the state as follows:

(1) one representative from each of the following:

(a) the commission on the status of women;

(b) the department of health;

(c) the New Mexico health policy commission;

(d) the children, youth and families department;

(e) the human services department;

(f) the Indian affairs department;

(g) the veterans' services department; and

(h) the office on African American affairs;

(2) one representative of providers of women's health services;

(3) two representatives from rural counties; and

(4) four representatives of advocacy, community or consumer groups.

E. Advisors to the office of the governor's council on women's health shall serve at the pleasure of the governor, shall meet at least four times per year and shall serve for two-year terms.

F. For purposes of conducting business, a majority of the advisors to the office of the governor's council on women's health shall constitute a quorum.

G. The advisors to the office of the governor's council on women's health may organize statewide meetings and focus groups to involve members of the public further in improving women's health and to identify emerging issues around women's health care delivery and services.

History: Laws 2009, ch. 83, § 1.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 83 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

28-3-7. Short title.

This act [28-3-7 to 28-3-11 NMSA 1978] may be cited as the "Displaced Homemakers Act".

History: 1953 Comp., § 4-33A-7, enacted by Laws 1977, ch. 292, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Who, other than specifically excluded persons, is "employee" under § 4(a)(1) of Age Discrimination in Employment Act of 1967 (29 USC § 623(a)(1)), 125 A.L.R. Fed. 273.

28-3-8. Findings and purpose of act.

The legislature finds that there is an increasing number of persons in New Mexico who, in their middle years and having fulfilled the role of homemaker, find themselves displaced because of dissolution of marriage, death of a spouse or other loss of family income. As a consequence of this displacement such persons suffer a greatly reduced income, high rate of unemployment because of age, lack of work experience, discrimination and limited or no opportunity to collect funds of assistance such as social security, unemployment compensation, medicaid and other health insurance benefits or pension plans of the spouse. It is the purpose of this legislation to provide research and planning for programs to serve such displaced homemakers.

History: 1953 Comp., § 4-33A-8, enacted by Laws 1977, ch. 292, § 2.

28-3-9. Definitions.

As used in the Displaced Homemakers Act [28-3-7 to 28-3-11 NMSA 1978] :

A. "displaced homemaker" means any individual who has worked in the home for a substantial number of years providing unpaid household services for family members and who:

(1) has difficulty obtaining adequate employment; or

(2) has been dependent on the income of another family member but is no longer supported by such income, has been dependent on federal assistance but is no longer eligible for such assistance or is supported as the parent of minor children by federal assistance or spousal support; and

B. "income of another family member" means any income in support of an entire family unit used for the purpose of providing that family with economic security, but does not include the payment of alimony or child support.

History: 1953 Comp., § 4-33A-9, enacted by Laws 1977, ch. 292, § 3.

28-3-10. Office for displaced homemakers; creation; research and planning for displaced homemaker programs.

There is created in the commission on the status of women an "office for displaced homemakers." The office for displaced homemakers shall conduct research and planning for programs to meet the needs of displaced homemakers, which programs may include:

A. job counseling services specifically designed for a person entering the job market after a number of years as a homemaker;

B. job training and job placement services, including but not limited to:

(1) assistance in gaining admission to existing public and private job training programs and opportunities;

(2) development of training and placement programs for jobs in the private and public sectors, in conjunction with state and local government agencies, private employers and already existing training and placement programs; and

(3) identification of community needs and fundseeking for creation of new public service jobs which displaced homemakers might fill;

C. information and assistance with respect to health care, financial matters, education, nutrition and legal problems;

D. a clearinghouse of information to compile, coordinate and disseminate information about services and programs available to displaced homemakers;

E. training for service agency personnel who work with displaced homemakers; and

F. the development of methods and materials aimed at facilitating outreach and communication for displaced homemaker service agencies and programs.

History: 1953 Comp., § 4-33A-10, enacted by Laws 1977, ch. 292, § 4; 1978, ch. 126, § 1.

28-3-11. Report and recommendations.

The director of the commission on the status of women, in conjunction with the office for displaced homemakers, shall submit to the legislature an annual report on the number of displaced homemakers served by existing public and private agencies and shall make recommendations for displaced homemaker programs which may include:

A. a plan for the establishment, funding and implementation of regional displaced homemaker service centers in New Mexico; and

B. recommendations for legislative action.

History: 1953 Comp., § 4-33A-11, enacted by Laws 1977, ch. 292, § 5; 1978, ch. 126, § 2.

ARTICLE 4
Aging and Long-term Services

28-4-1. Commission on aging [Aging and long-term services department]; duties.

The commission on aging [aging and long-term services department] shall establish and maintain a comprehensive statewide program designed to meet the social service needs of the state's aged population. Not by way of limitation, the commission [department] shall:

A. strengthen and coordinate services of state and local public bodies for the benefit of the aged;

B. promote the utilization of older persons in all phases of employment;

C. disseminate information to the aged relative to federal, state and local services for the aged;

D. encourage training programs, retraining programs and opportunities for older workers;

E. develop new methods of job placement for older workers;

F. promote public recognition of the advantages of hiring and retaining older workers; and

G. promote and develop programs of community resources and facilities designed to meet the social needs of older persons.

History: 1953 Comp., § 13-1-59, enacted by Laws 1969, ch. 55, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Laws 2003, ch. 403, §§ 1 and 2, effective June 20, 2003, provided that the governor may, by executive order issued in 2003, make the following state agencies cabinet-level departments: (1) the state agency on aging may become the aging and long-term care department [aging and long-term services department]; (2) the office of cultural affairs may become the cultural affairs department; (3) the New Mexico office of Indian affairs may become the Indian affairs department; and (4) the New Mexico veterans' service commission may become the veterans' service department. Functions, personnel, appropriations, money, records, files, furniture equipment, and property of a specified agency would be transferred to the resulting departments.

Cross references. — For provisions regarding the office of guardianship, *see* 28-16B-1 NMSA 1978 et seq.

For elderly homeowners' maximum property tax liability and income tax credit or refund for excess, *see* 7-2-18 NMSA 1978.

For definitions applicable to provisions of the first three sections of this article, *see* 27-1-1 NMSA 1978.

28-4-2. Definitions.

The commission on aging shall mean the aging services bureau of the social services division of the human services department [aging and long-term services department].

History: 1953 Comp., § 13-1-59.1, enacted by Laws 1977, ch. 252, § 17.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

28-4-3. Commission on aging [Aging and long-term services department]; powers.

The commission [department]:

A. may receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out its duties; and

B. is designated as the state agency for handling all programs of the federal government related to the aging, except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the federal government for this purpose.

History: 1953 Comp., § 13-1-60, enacted by Laws 1969, ch. 55, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

28-4-4. Agency created.

There is created as an entity of state government the "state agency on aging," ["aging and long-term services department"] which shall be administratively attached to the human services department. The administrative head of the agency shall be the director, who shall be appointed by and serve at the pleasure of the governor.

History: Laws 1979, ch. 203, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

28-4-5. Agency duties.

The state agency on aging [aging and long-term services department] shall establish and maintain a comprehensive statewide program designed to meet the social service needs of the state's aged population, including but not limited to the following:

A. strengthen and coordinate services of state and local public bodies for the benefit of the aged;

B. promote the utilization of older persons in all phases of employment;

C. disseminate information to the aged relative to federal, state and local services for the aged;

D. encourage training programs, retraining programs and opportunities for older workers;

E. develop new methods of job placement for older workers;

F. promote public recognition of the advantages of hiring and retaining older workers; and

G. promote and develop programs of community resources and facilities designed to meet the social needs of older persons.

History: Laws 1979, ch. 203, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

28-4-6. Agency powers.

A. The state agency on aging [aging and long-term services department]:

(1) may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

(2) is designated as the state agency [department] for handling all programs of the federal government related to the aged, except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the federal government for this purpose.

B. The state agency on aging [aging and long-term services department] may adopt and promulgate such reasonable rules and regulations as are deemed necessary to carry out its duties. Unless otherwise provided by law, no rule or regulation affecting any person or agency outside the state agency on aging [aging and long-term services department] shall be adopted, amended or repealed without a public hearing on the

proposed action before the director of the state agency on aging [aging and long-term services department] or a hearing officer designated by him. The public hearing shall be held in Santa Fe unless otherwise permitted by statute. Notice of the subject matter of the rule or regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed rule or regulation or proposed amendment or repeal of an existing rule or regulation may be obtained shall be published once at least thirty days prior to the hearing in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. The director of the state agency on aging [aging and long-term services department] shall also provide such notice to the director of each senior citizen center no later than forty days prior to the public hearing. All rules and regulations shall be filed in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978].

C. To ensure that the health and safety needs of the state's aged population are being met, the state agency on aging [aging and long-term services department] may conduct unannounced quality care evaluations of health and long-term care facilities that provide services to the aged, including the use of undercover patients or employees. Any employee or contractor of the state agency on aging [aging and long-term services department] who participates in such an evaluation shall be immune from liability in any civil action related to the evaluation, provided it is conducted in good faith. The purpose of this subsection is to confirm and clarify the authority of the state agency on aging [aging and long-term services department] to conduct quality care evaluations to protect the interests of the state's aged population.

History: Laws 1979, ch. 203, § 3; 1989, ch. 249, § 1; 1997, ch. 257, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

The 1997 amendment, effective July 1, 1997, added Subsection C and made stylistic changes in Subsection B.

28-4-7. Agency staff.

The director shall hire such staff as is necessary, all of whom shall be subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

History: Laws 1979, ch. 203, § 4.

28-4-8. Reports.

The state agency on aging [aging and long-term services department] shall submit reports on its work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session. The reports shall contain recommendations on present and future needs of the aged.

History: Laws 1979, ch. 203, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

28-4-9. Advisory committee.

The governor shall appoint an eleven-member advisory committee to the state agency on aging [aging and long-term services department] in accordance with the provisions of the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978]. In establishing the committee, the governor shall take note of any federal requirements regarding membership and shall appoint members for staggered terms of four years. Members of the committee shall be reimbursed for services as provided for in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

History: Laws 1979, ch. 203, § 6; 1989, ch. 249, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

ARTICLE 5
Committee on Children and Youth

(Repealed by Laws 1988, ch. 101, § 51.)

28-5-1 to 28-5-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1988, ch. 101, § 51 repealed 28-5-1 to 28-5-3 NMSA 1978 as enacted by Laws 1977, ch. 252, § 18 and Laws 1967, ch. 235, §§ 2 and 3, relating to the committee on children and youth, effective July 1, 1989.

ARTICLE 6
Age of Majority

28-6-1. Age of majority; eighteen years; exception.

A. Except as provided in Subsection B or otherwise specifically provided by existing law, any person who has reached his eighteenth birthday shall be considered to have reached his majority as provided in Section 12-2-2 NMSA 1978 [repealed] and is an adult for all purposes the same as if he had reached his twenty-first birthday.

B. For the purposes of the Uniform Gifts to Minors Act [repealed], as it relates to any gift made prior to June 18, 1971, the donee shall not be entitled to delivery or payment over of the gift until he has reached his twenty-first birthday.

History: 1953 Comp., § 13-13-1, enacted by Laws 1971, ch. 213, § 1; 1973, ch. 138, § 12.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Section 12-2-2 NMSA 1978 was repealed in 1997. For comparable provisions, *see* 12-2A-3 NMSA 1978.

The Uniform Gifts to Minors Act, referred to in Subsection B, formerly appeared as 46-7-1 to 46-7-10 NMSA 1978, but was by repealed Laws 1989, ch. 357, § 26. For present comparable provisions, *see* the Uniform Transfers to Minors Act, 46-7-11 NMSA 1978 et seq.

Cross references. — For consent to prenatal, delivery and postnatal treatment, *see* 24-1-13.1 NMSA 1978.

For contributing to delinquency of minor, *see* 30-6-3 NMSA 1978.

For sexually oriented material harmful to minors, *see* 30-37-2 NMSA 1978.

For "adult" as person 18 years of age or over under Children's Code, *see* 32A-1-4 NMSA 1978.

For educational loans, legal disability of minors removed, *see* 58-6-3 NMSA 1978.

For alcoholic beverages, sale to person under 21 unlawful, identity cards, employment, *see* 60-7B-1 to 60-7B-11 NMSA 1978.

Section not unconstitutional. — Although trial court had continuing jurisdiction to modify divorce decree containing child custody provisions under the provisions of Section 40-4-7 NMSA 1978, that decree was considered final and not within the meaning of a "pending case" in N.M. Const., art. IV, § 34. Therefore, this section, which by its operation freed divorced father from making support payments to daughter who had reached age of 18, and thus, under the new section, was no longer a minor, is not unconstitutional. Phelps v. Phelps, 1973-NMSC-044, 85 N.M. 62, 509 P.2d 254.

Purpose of section. — The phrase "for all purposes" does not bar the right of parties to a contract to agree that "of full age" may be stipulated to mean 21 years; the purpose of the statute is to substitute the age of 18 for the age of 21 when any prior special law fixes an adult age of 21 years, subject to the specific exception of liquor control, and there is no analogical or interpretive basis for the contention that "for all purposes" means that a person 18 years of age is an adult in every phase of law, including the law of contracts and the modification of contracts. Peterson v. Romero, 1975-NMCA-127, 88 N.M. 483, 542 P.2d 434.

Effect of section on contracts where age stipulated. — Rental contract requiring that the rented vehicle be driven by "persons of full age (21 years)" was not modified by this section, and therefore neither car lessee nor estate of 18-year-old deceased driver were covered by the insurance provisions of the rental contract. Peterson v. Romero, 1975-NMCA-127, 88 N.M. 483, 542 P.2d 434.

On child-support payments. — Divorced husband was relieved by enactment of this statute from making further child-support payments under decree which required husband to make such payments during minority of his children or until they earlier become married or otherwise emancipated, where children were age 20 and 18 respectively. Mason v. Mason, 1973-NMSC-031, 84 N.M. 720, 507 P.2d 781.

Relation between age and voluntariness of confession. — Age is a factor to be considered in determining the voluntariness of a confession; however, a person who has reached the age of 18 is considered an adult for most purposes. State v. Aguirre, 1978-NMCA-029, 91 N.M. 672, 579 P.2d 798, cert. denied, 91 N.M. 751, 580 P.2d 972.

Law reviews. — For student article, "Tort Law — Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M.L. Rev. 373 (1993).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Infants § 4.

Inclusion or exclusion of the day of birth in computing one's age, 5 A.L.R.2d 1143.

Infant's liability for medical, dental, or hospital services, 53 A.L.R.4th 1249.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 A.L.R.5th 856.

43 C.J.S. Infants §§ 2, 3.

28-6-2 to 28-6-8. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 206, § 4 repealed former 28-6-2 through 28-6-8 NMSA 1978, as enacted by Laws 1981, ch. 270, §§ 1 through 7, relating to the age of majority and the emancipation of minors, effective July 1, 1995. For provisions of former sections, *see* the 1994 NMSA 1978 on NMONESOURCE.COM. For present comparable provisions, *see* 32A-21-1 to 32A-21-7 NMSA 1978.

ARTICLE 7
Blind and Disabled Persons

28-7-1. Short title.

This act [28-7-1 to 28-7-7 NMSA 1978] may be cited as the "White Cane Law".

History: 1953 Comp., § 12-13-1, enacted by Laws 1967, ch. 232, § 1; recompiled as 1953 Comp., § 12-26-1, by Laws 1972, ch. 51, § 9.

ANNOTATIONS

Cross references. — For governor's commission on disability, *see* 28-10-1 NMSA 1978 et seq.

For guide dogs for blind, penalty for refusing admittance, hearing ear aid dogs, exemption of guide dogs from municipal licensing, *see* Chapter 28, Article 11 and 77-1-15.1 NMSA 1978.

For voting assistance, *see* 1-12-12 NMSA 1978 et seq.

For public employment, blind not barred from competitive examination, *see* 10-9-14 NMSA 1978.

For school for visually handicapped, *see* 21-5-1 NMSA 1978 et seq.

For vending stand program for the blind, *see* 22-14-24 NMSA 1978 et seq.

For health insurance, *see* 59A-22-33 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Visual impairment as handicap or disability under state employment discrimination law, 77 A.L.R.5th 595.

Availability and scope of punitive damages under state employment discrimination law, 81 A.L.R.5th 367.

Remedies available under Americans with Disabilities Act (42 USCS § 12101 et seq.), 136 A.L.R. Fed. 63.

To what extent are federal entities subject to suit under § 504(a) of Rehabilitation Act (42 USCA § 794(a)), which prohibits any program or activity conducted by any executive agency or the postal service from discriminating on basis of disability, 146 A.L.R. Fed. 319.

What constitutes federal financial assistance for purposes of § 504 of Rehabilitation Act (29 USCA § 794), which prohibits any program or activity receiving federal financial assistance from discriminating on basis of disability, 147 A.L.R. Fed. 205.

Action under Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.), to remedy alleged harassment or hostile work environment, 162 A.L.R. Fed. 603.

What constitutes employment discrimination by public entity in violation of Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12132, 164 A.L.R. Fed. 433.

28-7-2. Policy.

It is the policy of this state to encourage and enable persons who are blind, visually impaired or who have another physical disability to participate fully in the social and economic life of the state and to engage in remunerative employment.

History: 1953 Comp., § 12-13-2, enacted by Laws 1967, ch. 232, § 2; recompiled as 1953 Comp., § 12-26-2, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 24.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Remedies available under Americans with Disabilities Act (42 USCS § 12101 et seq.), 136 A.L.R. Fed. 63.

To what extent are federal entities subject to suit under § 504(a) of Rehabilitation Act (42 USCA § 794(a)), which prohibits any program or activity conducted by any executive agency or the postal service from discriminating on basis of disability, 146 A.L.R. Fed. 319.

When is individual regarded as having or perceived to have, impairment within meaning of Americans with Disabilities Act (42 USCA § 12102(2)(c)), 148 A.L.R. Fed. 305.

Action under Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.), to remedy alleged harassment or hostile work environment, 162 A.L.R. Fed. 603.

28-7-3. Equal right to use public facilities.

A. Persons who are blind, visually impaired or who have another physical disability have the same right as others to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places.

B. Persons who are blind, visually impaired or who have another physical disability are entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort and any other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

C. Every totally or partially blind person shall have the right to be accompanied by a guide dog, specially trained for the purpose, in any of the places listed in this section without being required to pay an extra charge for the guide dog; provided that the person shall be liable for any damage done to the property or facilities by the dog.

D. The attorney general, district attorney or any person with a disability may file an action in the judicial district when a building has been built or altered and the work has not been accomplished in accordance with the current uniform building code, other applicable publications and established handicapped standards. The building official shall notify those applying for a permit that they shall comply with established standards. Any interested person may appeal the granting or denial of a waiver to the district court where the building is located. If the court finds that the building owner was required to comply with handicap access standards of the uniform building code and has failed to comply with such standards within a reasonable period of time, then the party filing action shall recover the court costs, attorney fees and appropriate injunctive relief to remedy the violation.

History: 1953 Comp., § 12-13-3, enacted by Laws 1967, ch. 232, § 3; recompiled as 1953 Comp., § 12-26-3, by Laws 1972, ch. 51, § 9; 1987, ch. 39, § 1; 2007, ch. 46, § 25.

ANNOTATIONS

Cross references. — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

For scope of review of the district court, *see* Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of state legislation forbidding discrimination in housing on account of physical handicap, 28 A.L.R.4th 685.

Validity and construction of state statutes requiring construction of handicapped access facilities in buildings open to public, 82 A.L.R.4th 121.

Validity, construction, and application of § 302 of Americans with Disabilities Act (42 USCS § 12182), prohibiting discrimination on basis of disability by owners or operators of places of public accommodation, 136 A.L.R. Fed. 1

Who is recipient of, and what constitutes program or activity receiving, federal financial assistance for purposes of § 504 of Rehabilitation Act (29 U.S.C.A. § 794), which prohibits any program or activity receiving financial assistance from discriminating on basis of disability, 160 A.L.R. Fed. 297.

When are public entities required to provide services, programs, or activities to disabled individuals under Americans with Disabilities Act, 42 U.S.C.A. § 12132, 160 A.L.R. Fed. 637.

When does a public entity discriminate against individuals in its provision of services, programs, or activities under the Americans with Disabilities Act, 42 U.S.C.A. § 12132, 163 A.L.R. Fed. 339.

28-7-4. Driver to take precautions approaching blind; liability for damage.

The driver of a vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominantly white or metallic in color, with or without a red tip, or using a guide dog shall take all necessary precautions to avoid injury to such blind pedestrian, and any driver who fails to take such precautions shall be liable in damages for any injury caused to such pedestrian; provided that a totally blind or partially blind pedestrian not carrying such a cane or using a guide dog in any of the places, accommodations or conveyances listed herein, shall have all the rights and privileges conferred by law upon other persons, and the failure of a totally blind pedestrian to carry such a cane or to use a guide dog in any such places, accommodations or conveyances shall not be held to constitute nor be evidence of contributory negligence.

History: 1953 Comp., § 12-13-4, enacted by Laws 1967, ch. 232, § 4; recompiled as 1953 Comp., § 12-26-4, by Laws 1972, ch. 51, § 9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Contributory negligence, in motor vehicle accident case, of pedestrian under physical disability, 83 A.L.R.2d 769.

28-7-5. Interference with rights of blind; penalty.

A person, firm or corporation or the agent of a person, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in Section 28-7-3 NMSA 1978 or otherwise interferes with the rights of a blind or visually impaired person or a person who has a physical disability enumerated in the White Cane Law [28-7-1 to 28-7-7 NMSA 1978] is guilty of a misdemeanor.

History: 1953 Comp., § 12-13-5, enacted by Laws 1967, ch. 232, § 5; recompiled as 1953 Comp., § 12-26-5, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 26.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

28-7-6. Annual proclamation of white cane safety day by governor.

Each year, the governor shall take suitable public notice of October 15 as white cane safety day. The governor shall issue a proclamation in which the governor:

A. comments upon the significance of the white cane;

B. calls upon the citizens of the state to observe the provisions of the White Cane Law [28-7-1 to 28-7-7 NMSA 1978] and to take precautions necessary to the safety of persons with a disability;

C. reminds the citizens of the state of the policies with respect to persons with a disability declared in the White Cane Law and urges the citizens to cooperate in giving effect to them; and

D. emphasizes the need of the citizens to be aware of the presence of persons with a disability in the community and to keep streets, highways, sidewalks, walkways, public buildings, public facilities, other public places, places of public accommodation, amusement and resort and other places to which the public is invited safe and functional and to offer assistance to persons with a disability upon appropriate occasions.

History: 1953 Comp., § 12-13-6, enacted by Laws 1967, ch. 232, § 6; recompiled as 1953 Comp., § 12-26-6, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 27.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

28-7-7. Policy of state on employment of persons with a disability.

It is the policy of this state that a person who is blind, visually impaired or who has another physical disability shall be employed in the state service, the service of the political subdivisions of the state, the public schools and all other employment supported in whole or in part by public funds on the same terms and conditions as others, unless it is shown that the particular disability prevents the performance of the work involved.

History: 1953 Comp., § 12-13-7, enacted by Laws 1967, ch. 232, § 7; recompiled as 1953 Comp., § 12-26-7, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 28.

ANNOTATIONS

Cross references. — For public employment, blind not barred from competitive examination, *see* 10-9-14 NMSA 1978.

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Visual impairment as handicap or disability under state employment discrimination law, 77 A.L.R.5th 595.

28-7-8 to 28-7-12. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 60, § 4, repealed 28-7-8 to 28-7-12 NMSA 1978, as enacted by Laws 1967, ch. 274, §§ 1 to 5 and as recompiled by Laws 1972, ch. 51, § 9, relating to administrative procedures for complaints against the division of services for the blind, and establishing a fair hearing board, effective June 17, 1983. For present provisions, *see* 22-14-12 NMSA 1978.

28-7-13. Prohibiting influence against joining organizations for the visually handicapped.

No officer or employee of the state or any political subdivision of the state who is concerned with the administration of any program for the visually handicapped shall exert the influence of his office or position against the right of a person to join organizations for the visually handicapped.

History: 1953 Comp., § 12-13-13, enacted by Laws 1967, ch. 113, § 1; recompiled as 1953 Comp., § 12-26-13, by Laws 1972, ch. 51, § 9.

28-7-14. Medical eye care.

There is created the "medical eye care and sight conservation program" which shall be operated and administered by the commission for the blind. The medical eye care and sight conservation program shall serve persons who meet the program qualifications established by the commission and who are not eligible for vocational rehabilitation services.

History: 1953 Comp., § 12-26-14, enacted by Laws 1976, ch. 39, § 1; 1986, ch. 108, § 15.

ANNOTATIONS

Cross references. — For Special Medical Needs Act, *see* Chapter 27, Article 4 NMSA 1978.

28-7-15. Short title.

Sections 1 through 9 [28-7-15 to 28-7-23 NMSA 1978] of this act may be cited as the "Commission for the Blind Act".

History: Laws 1986, ch. 108, § 1.

28-7-16. Commission for the blind created.

A. There is created the "commission for the blind", consisting of three members, at least one of whom shall be blind, appointed by the governor with the advice and consent of the senate. Members of the first commission shall be appointed for staggered terms, one ending on December 31, 1988, one ending December 31, 1990 and one ending December 31, 1992. Thereafter, appointments shall be for staggered terms of six years.

B. A majority of the members of the commission constitutes a quorum for the transaction of business. The commission shall elect a chairman from its membership.

C. Members of the commission shall be compensated as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

History: Laws 1986, ch. 108, § 2.

28-7-17. Commission for the blind; powers and duties.

The commission for the blind shall:

A. apply for and receive money from any state or federal agency to be used for purposes relating to blindness and receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out the commission's duties;

B. maintain a complete register of blind persons domiciled in New Mexico, specifying the nature and cause of blindness, capacity and need for educational or industrial training and other pertinent information;

C. maintain bureaus of information and industrial assistance to help blind persons find employment, train them in work which may be pursued in their own homes and assist them in merchandising and marketing their goods;

D. establish, equip and maintain a center with qualified instructors for vocational, industrial and other training of eligible blind persons. The center shall also provide for orientation and assistance for the adjustment of blind persons;

E. research and study the causes of blindness and its prevention in cooperation with the state or any other entity which the commission deems appropriate;

F. cooperate with appropriate state agencies in the adoption and carrying out of preventive measures relating to blindness;

G. promulgate rules and regulations necessary to effectuate the provisions of the Commission for the Blind Act [28-7-15 to 28-7-23 NMSA 1978]; and

H. publish an annual report on the activities and services of the commission.

History: Laws 1986, ch. 108, § 3.

28-7-18. Staff.

The commission shall appoint a director, who is the administrative officer of the commission. The director shall employ such assistants and employees as are necessary for the efficient operation of the commission. The director and all employees are subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

History: Laws 1986, ch. 108, § 4.

28-7-19. Qualification as blind; examinations required.

A. Qualification of a person as blind shall be determined by means of an eye examination by a licensed ophthalmologist. Blindness shall be the major handicap in cases of multiple handicaps. Persons who are not blind but who have been certified by a licensed ophthalmologist as suffering from a deteriorating condition which will result in blindness also qualify as blind.

B. The commission shall determine the procedure to be followed for the examination of any person to establish blindness and shall maintain a list of all ophthalmologists currently licensed in New Mexico. The person may choose any

licensed ophthalmologist to make the examination and the cost shall be paid by the commission pursuant to its regulations.

History: Laws 1986, ch. 108, § 5.

28-7-20. Corrective medical services.

In addition to arranging and paying for examinations to determine blindness, the commission may arrange and pay for medical and surgical treatment of blind persons whenever a listed ophthalmologist judges that the treatment will be beneficial.

History: Laws 1986, ch. 108, § 6.

28-7-21. Reports.

Whenever a licensed ophthalmologist finds a person he has examined to be blind, he shall report this fact, along with details of the examination, to the commission within thirty days of the examination date.

History: Laws 1986, ch. 108, § 7.

28-7-22. Receipt of federal funds; designation.

The commission is authorized to receive and administer any federal funds relating to vocational rehabilitation of blind persons.

History: Laws 1986, ch. 108, § 8.

28-7-23. Hearing; appeal.

The commission shall provide an opportunity for a fair hearing to any person applying for or receiving services who is dissatisfied with any act or failure to act arising from the operation of or administration of any program of the commission. The commission shall adopt rules and regulations as necessary to govern the conduct of such hearings.

History: Laws 1986, ch. 108, § 9.

ARTICLE 8
Identifying Devices and Cards for Disabled Persons

28-8-1. Definitions.

As used in this act [28-8-1 to 28-8-7 NMSA 1978]:

A. "disabled condition" means the condition of being unconscious, semiconscious, incoherent or otherwise incapacitated to communicate;

B. "disabled person" means a person in a disabled condition;

C. "the emergency symbol" means the caduceus inscribed within a six-barred cross used by the American Medical Association to denote emergency information;

D. "identifying device" means an identifying bracelet, necklace, metal tag or similar device bearing the emergency symbol and the information needed in an emergency; and

E. "medical practitioner" means a person licensed or authorized to practice medicine or osteopathy.

History: 1953 Comp., § 12-31-1, enacted by Laws 1973, ch. 265, § 1.

28-8-2. Identifying devices for persons having certain conditions.

A. A person who suffers from epilepsy, diabetes, a cardiac condition or any other type of illness that causes temporary blackouts, semiconscious periods or complete unconsciousness, or who suffers from a condition requiring specific medication or medical treatment, is allergic to certain medications or items used in medical treatment, wears contact lenses or is unable to communicate coherently or effectively in the English language, is authorized and encouraged to wear an identifying device.

B. Any person may carry an identification card bearing his name, type of medical condition, physician's name and other medical information.

C. By wearing an identifying device a person gives his consent for any peace officer or medical practitioner who finds him in a disabled condition to make a reasonable search of his clothing or other effects for an identification card of the type described in Subsection B of this section.

History: 1953 Comp., § 12-31-2, enacted by Laws 1973, ch. 265, § 2.

28-8-3. Duty of peace officer.

A. A peace officer shall make a diligent effort to determin [determine] whether any disabled person he finds is an epileptic or a diabetic or suffers from some other type of illness that would cause the condition. Whenever feasible, this effort shall be made before the person is charged with a crime or taken to a place of detention.

B. In seeking to determine whether a disabled person suffers from an illness, a peace officer shall make a reasonable search for an identifying device and an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA

1978] of this act and examine them for emergency information. The peace officer may not search for an identifying device or an identification card in a manner or to an extent that would appear to a reasonable person in the circumstances to cause an unreasonable risk of worsening the disabled person's condition.

C. A peace officer who finds a disabled person without an identifying device or identification card is not relieved of his duty to that person to make a diligent effort to ascertain the existence of any illness causing the disabled condition.

D. A claim for relief against a peace officer does not arise from his making a reasonable search of the disabled person to locate an identifying device or identification card, even though the person is not wearing an identifying device or carrying an identification card. However, nothing found on the disabled person during a search authorized under this act [28-8-1 to 28-8-7 NMSA 1978] shall be admitted into evidence in any court in a criminal proceeding where the disabled person is a defendant if the admission of the product of the search would not be entitled to admission except for the authority to search granted in Subsection C of this section.

E. A peace officer who determines or has reason to believe that a disabled person is suffering from an illness causing his condition shall promptly notify the person's physician, if practicable. If the officer is unable to ascertain the physician's identity or to communicate with him, the officer shall make a reasonable effort to cause the disabled person to be transported immediately to a medical practitioner or to a facility where medical treatment is available. If the officer believes it unduly dangerous to move the disabled person, he shall make a reasonable effort to obtain the assistance of a medical practitioner.

History: 1953 Comp., § 12-31-3, enacted by Laws 1973, ch. 265, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

28-8-4. Duty of medical practitioners.

A. A medical practitioner, in discharging his duty to a disabled person whom he has undertaken to examine or treat, shall make a reasonable search for an identifying device or an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act and examine them for emergency information.

B. A claim for relief against a medical practitioner does not arise from his making a reasonable search of a disabled person to locate an identifying device or identification card, even though the person is not wearing an identifying device or carrying an identification card.

History: 1953 Comp., § 12-31-4, enacted by Laws 1973, ch. 265, § 4.

28-8-5. Duty of others.

A. A person, other than a peace officer or medical practitioner, who finds a disabled person may make a reasonable effort to notify a peace officer. If a peace officer or medical practitioner is not present, a person who finds a disabled person may:

(1) make a reasonable search for an identifying device; and

(2) if the identifying device is found, may make a reasonable search for an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act.

If a device or a card is located, the person making the search shall attempt promptly to bring its contents to the attention of a peace officer or medical practitioner.

B. A claim for relief does not arise from a reasonable search to locate an identifying device or identification card as authorized by Subsection A of this section.

History: 1953 Comp., § 12-31-5, enacted by Laws 1973, ch. 265, § 5.

28-8-6. Falsifying identification or misrepresenting condition.

A person who, with intent to deceive, provides, wears, uses or possesses a false identifying device or an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act is guilty of a misdemeanor and shall be fined not more than three hundred dollars ($300) or imprisoned for not more than ninety days, or both.

History: 1953 Comp., § 12-31-6, enacted by Laws 1973, ch. 265, § 6.

28-8-7. Other duties.

The duties imposed by this act [28-8-1 to 28-8-7 NMSA 1978] are in addition to, and not in limitation of, other duties existing under the law of this state.

History: 1953 Comp., § 12-31-7, enacted by Laws 1973, ch. 265, § 7.

ARTICLE 9
Employment of Blind Persons

(Recompiled by Laws 1983, ch. 60, § 3.)

28-9-1 to 28-9-6. Recompiled.

ANNOTATIONS

Recompilations. — Laws 1983, ch. 60, § 3, recompiled 28-9-1 to 28-9-6 NMSA 1978, relating to the employment of blind persons, as 22-14-24 to 22-14-29 NMSA 1978, effective June 17, 1983.

ARTICLE 10
Concerns and Employment of the Disabled

28-10-1. Governor's commission on disability.

A. There is created the "governor's commission on disability" consisting of fifteen members, nine of whom shall be appointed by the governor. The six remaining members shall be the director of the vocational rehabilitation division of the public education department, the secretary of labor or the secretary's designee, the director of the behavioral health services division of the human services department, the secretary of children, youth and families or the secretary's designee, the secretary of aging and long-term services or the secretary's designee and the secretary of human services or the secretary's designee. Initially, three members shall be appointed for terms ending December 31, 1978, three members for terms ending December 31, 1980 and three members for terms ending December 31, 1982. Thereafter, appointments shall be for six years expiring on December 31 of even-numbered years. Appointed members shall be appointed from different geographic areas of the state and from the major disability services in the state. Appointed members shall include individuals with disabilities, representatives of government and private enterprise, parents or guardians of individuals with disabilities and professionals in, or those who are interested in, service for individuals with disabilities. Not more than five of the members appointed by the governor shall be of the same political party.

B. A majority of the members of the commission constitutes a quorum for the transaction of business. The commission shall meet at least twice a year and shall annually elect a chair and a vice chair.

C. The commission shall be primarily concerned with those individuals with disabilities who have a condition that, regardless of its physical or mental origin, constitutes a substantial occupational disadvantage.

History: 1953 Comp., § 59-15-1, enacted by Laws 1973, ch. 349, § 1; 1977, ch. 198, § 1; 1979, ch. 34, § 1; 2004, ch. 20, § 1; 2007, ch. 325, § 8.

ANNOTATIONS

Cross references. — For admission of disabled to state educational institutions without charge other than tuition, *see* 22-14-16 NMSA 1978.

For employment of blind persons, *see* 22-14-24 NMSA 1978 et seq.

The 2007 amendment, effective June 15, 2007, changed "department of health" to "human services department" and changed "secretary of aging" to "secretary of aging and long-term services".

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability", and increased the members from 13 to 15 by adding the secretary of children, youth and families and the director of the state agency on aging [aging and long-term services department].

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

28-10-2. Governor's commission on disability; powers and duties.

The governor's commission on disability shall establish and maintain a comprehensive statewide program designed to encourage and promote attention to the concerns of the training and employment of individuals with disabilities in this state. To further this purpose, the commission shall:

A. cooperate with the president's committee on employment of individuals with disabilities and other federal efforts on behalf of disability concerns;

B. cooperate with all employers and training leaders, both public and private, in locating or developing employment opportunities for individuals with disabilities;

C. encourage and assist in the organization and operation of committees at the community level, the chairs of which shall automatically become members of the advisory council authorized under Section 28-10-4 NMSA 1978;

D. assist state, local and federal agencies to coordinate their activities to secure maximum utilization of funds and efforts that aid in the training and employment of individuals with disabilities;

E. enter into written agreements with public and private employers, unions and rehabilitation agencies for the purpose of achieving the maximum employment of individuals with disabilities;

F. inform individuals with disabilities who are seeking jobs of specific facilities available to assist them in locating suitable training and employment;

G. conduct educational programs via publications and other means to acquaint the public, the legislature and the governor with the abilities and the accomplishments of individuals with disabilities;

H. promote the elimination of architectural barriers in construction so as to make buildings used by the public readily accessible to and usable by persons with physical limitations;

I. make such rules as it determines advisable for the conduct of its own business;

J. designate standing committees related to state planning, community organization, public relations and information, legislative action, federal coordination, state coordination, youth, medical rehabilitation, employers and awards;

K. designate such special committees as necessary for undetermined periods to carry out special short-term programs;

L. establish and administer a residential accessibility modification program to assist low-income individuals with disabilities to make accessibility modifications to residential dwellings as needed to enable those individuals with disabilities to remain in their homes or to leave institutional settings and be reintegrated into the community;

M. give advice and testimony on disability concerns to the governor or the legislature or any committee established by them, upon request; and

N. provide training to state and local law enforcement officers regarding matters pertaining to accessible parking for persons with disabilities.

History: 1953 Comp., § 59-15-2, enacted by Laws 1973, ch. 349, § 2; 1977, ch. 198, § 2; 1979, ch. 34, § 2; 2001, ch. 226, § 2; 2004, ch. 20, § 2; 2010, ch. 74, § 1.

ANNOTATIONS

The 2010 amendment, effective May 19, 2010, added Subsection N.

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and made other minor grammatical changes throughout.

The 2001 amendment, effective April 3, 2001, added present Subsection L, and renumbered former Subsection L as M.

Am. Jur. 2d, A.L.R. and C.J.S. references. — When must specialized equipment or other workplace modifications be provided to qualified disabled employee or applicant as reasonable accommodation, 125 A.L.R. Fed. 629.

When must employer offer qualified disabled employee or applicant opportunity to change employee's workplace or work at home as means of fulfilling reasonable accommodation requirement, 133 A.L.R. Fed. 521.

When does job restructuring constitute reasonable accommodation of qualified disabled employee or applicant?, 142 A.L.R. Fed. 311.

28-10-3. Additional powers.

The governor's commission on disability:

A. may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

B. is designated as the state agency for handling all programs of the federal government related to the concerns of individuals with disabilities except those designated by law as the responsibility of another state agency and may enter into contracts and agreements with agencies of the federal government for this purpose that do not conflict with existing programs of other state agencies.

History: 1953 Comp., § 59-15-3, enacted by Laws 1973, ch. 349, § 3; 1977, ch. 198, § 3; 1979, ch. 34, § 3; 2004, ch. 20, § 3.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and "handicapped persons" to "individuals with disabilities".

28-10-3.1. Full-service gasoline stations; decal display; service to person with a disability.

A. The governor's commission on disability shall design and produce a decal for display in full-service gasoline stations signifying that the gasoline station will provide gasoline pumping, window washing, fluid checks and other services provided at its full-service island to any properly permitted or certified driver with a disability at a self-service island.

B. Any full-service gasoline station providing the services described in Subsection A of this section may request and shall receive the decal upon application to the governor's commission on disability.

C. No gasoline station shall display the decal issued by the governor's commission on disability unless it provides full service to any driver with a disability at a self-service island.

D. A gasoline station owner or operator who displays a decal signifying that the station will provide additional services to drivers with a disability at a self-service island and who fails to provide that service shall be subject to revocation of the decal for display according to this section.

History: Laws 1995, ch. 95, § 1; 2004, ch. 20, § 4; 2007, ch. 46, § 29.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's commission on concerns of the handicapped" to the "governor's commission on disability".

28-10-3.2. Short title.

Sections 1 and 2 [28-10-3.2 and 28-10-3.3 NMSA 1978] of this act may be cited as the "Parking Placard Abuse Act".

History: Laws 1999, ch. 297, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 297 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

28-10-3.3. Program created.

The "placard abuse prevention program" is created in the governor's commission on disability to ensure compliance with statutes affecting parking privileges for persons with severe mobility impairment and safe and effective use of designated disabled parking space. The commission shall design and implement a program to:

A. monitor the system of eligibility for and use of parking placards and special registration plates;

B. provide public awareness education and training to address barriers to the appropriate use of designated disabled parking space;

C. pursue efforts to reduce abuse and misuse of designated disabled parking space privileges, including revocation of parking placards and special registration plates; and

D. provide education, training and technical assistance to local law enforcement agencies and volunteers on enforcement of statutes affecting use of designated disabled parking space.

History: Laws 1999, ch. 297, § 2; 2004, ch. 20, § 5.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

28-10-4. Advisory council.

A. The governor's commission on disability shall appoint an appropriate advisory council on disability, which shall include representatives of state departments and agencies and individuals attentive to the concerns of individuals with disabilities.

B. The advisory council shall meet at the call of the chairman and shall make recommendations to the governor's commission on disability for the improvement and coordination of state activities relative to the concerns of individuals with disabilities.

History: 1953 Comp., § 59-15-4, enacted by Laws 1973, ch. 349, § 4; 1977, ch. 198, § 4; 1979, ch. 34, § 4; 2004, ch. 20, § 6.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and changed "handicapped" to "individuals with disabilities".

28-10-5. Disability fund created.

A. There is created in the state treasury a "disability fund". All funds, gifts, donations, bequests and other income of the governor's commission on disability shall be deposited by the director of the commission in the fund and shall be appropriated to the commission to further the purpose of Sections 28-10-1 through 28-10-8.1 NMSA 1978 or for the purposes stated by the donor or grantor of the funds.

B. Distributions made to the disability fund from the housing modification for persons with a disability permanent fund shall constitute a separate account in the fund and are appropriated to the governor's commission on disability for the purpose of carrying out a residential accessibility modification program.

C. Money in the disability fund shall not revert but shall be used only as provided in Sections 28-10-1 through 28-10-8.1 NMSA 1978.

History: 1953 Comp., § 59-15-5, enacted by Laws 1973, ch. 349, § 5; 2001, ch. 226, § 3; 2004, ch. 20, § 7; 2007, ch. 46, § 30.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

The 2001 amendment, effective April 3, 2001, inserted the Subsection A and C designations and added Subsection B; in Subsection A, substituted "the governor's committee on concerns of the handicapped" for "the committee" and "director" for "executive secretary"; and made stylistic changes.

28-10-5.1. Housing modification for persons with a disability permanent fund; investment; distribution.

A. The "housing modification for persons with a disability permanent fund" is created in the state treasury. The fund shall consist of money appropriated to the fund and any gifts, donations or bequests made to the fund. Money in the fund shall be invested by the state investment officer as land grant permanent funds are invested pursuant to Chapter 6, Article 8 NMSA 1978, and earnings from investment of the fund shall be credited to the fund. Money in the fund shall not revert at the end of any fiscal year and shall not be expended for any purpose, except that an annual distribution shall be made to the fund for persons with a disability in accordance with Subsection B of this section.

B. On July 1 of fiscal year 2002 and on July 1 of each fiscal year thereafter, an annual distribution shall be made from the housing modification for persons with a disability permanent fund to the disability fund in an amount equal to three hundred thousand dollars ($300,000) until that amount is less than an amount equal to five percent of the average of the year-end market values of the housing modification for persons with a disability permanent fund for the immediately preceding five calendar years. Thereafter, the amount of the annual distribution shall be five percent of the average of the year-end market values of the housing modification for persons with a disability permanent fund for the immediately preceding five calendar years.

History: Laws 2001, ch. 226, § 1; 2007, ch. 46, § 31.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

28-10-6. Reports.

The governor's commission on disability and the advisory council on disability shall submit reports on their work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session. The report shall contain recommendations on present and future needs of individuals with disabilities.

History: 1953 Comp., § 59-15-6, enacted by Laws 1973, ch. 349, § 6; 1977, ch. 198, § 5; 1979, ch. 34, § 5; 2004, ch. 20, § 8.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and changed "handicapped" to "individuals with disabilities".

28-10-7. Compensation.

Members of the governor's commission on disability shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] but shall receive no other compensation, perquisite or allowance. Members of the advisory council on disability may receive reimbursement in the same manner from funds available to the commission, only for advisory council meetings.

History: 1953 Comp., § 59-15-7, enacted by Laws 1973, ch. 349, § 7; 1977, ch. 198, § 6; 1979, ch. 34, § 6; 2004, ch. 20, § 9.

ANNOTATIONS

Repeals and reenactments. — Laws 1982, ch. 13, § 1, repealed former 28-10-8 NMSA 1978, as enacted by Laws 1977, ch. 198, § 7, relating to the administration and funding for the committee on concerns of the handicapped, and enacted a new section, effective March 1, 1982.

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

28-10-8. Administrative attachment.

The governor's commission on disability is administratively attached, as defined in the Executive Reorganization Act [9-1-1 9-1-10 NMSA 1978], to the department of finance and administration.

History: 1978 Comp., § 28-10-8, enacted by Laws 1982, ch. 13, § 1. ; 2004, ch. 20, § 10.

ANNOTATIONS

Repeals and reenactments. — Laws 1982, ch. 13, § 1, repealed former 28-10-8 NMSA 1978, as enacted by Laws 1977, ch. 198, § 7, relating to the administration and funding for the committee on concerns of the handicapped, and enacted a new section, effective March 1, 1982.

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

28-10-8.1. Director; commission staff.

The governor's commission on disability shall appoint a director who is the administrative officer of the commission. The director shall employ other necessary employees under the provisions of the Personnel Act [10-9-1 NMSA 1978].

History: 1978 Comp., § 28-10-8.1, enacted by Laws 1982, ch. 13, § 2; 2004, ch. 20, § 11.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

28-10-9. Short title.

Sections 28-10-9 through 28-10-12 NMSA 1978 may be cited as the "Disability Employment Act".

History: 1953 Comp., § 5-1-14, enacted by Laws 1969, ch. 129, § 1; 2007, ch. 46, § 32.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

28-10-10. Definition.

As used in the Disability Employment Act [28-10-9 through 28-10-12 NMSA 1978], "persons with a disability" includes persons with a mental or physical disability.

History: 1953 Comp., § 5-1-15, enacted by Laws 1969, ch. 129, § 2; 2007, ch. 46, § 33.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

28-10-11. State policy.

In order to further the efforts of New Mexico in alleviating the problems of persons with a disability, full consideration shall be given to the employment of such persons in state government in positions in which they meet the necessary performance requirements or in positions in which performance requirements can be modified to take advantage of their abilities without detriment to the state service.

History: 1953 Comp., § 5-1-16, enacted by Laws 1969, ch. 129, § 3; 2007, ch. 46, § 34.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

28-10-12. Personnel board; rules.

The personnel board shall establish rules and procedures consistent with the state policy of employment of persons with a disability. The rules and procedures shall be adopted after consultation with appropriate vocational rehabilitation agencies, state institutions, interested private associations and organizations and interested individuals. Any rules or procedures adopted by the personnel board shall provide that:

A. certification in an appropriate form shall be required from an appropriate agency to the effect that:

(1) the person with a disability has the ability to perform the duties of the position sought;

(2) the person with a disability is physically qualified to do the work without hazard to that person or to others; and

(3) the person with a disability is socially competent in a work environment and, either independently or with continuing help as has been provided, in after-working-hours living;

B. there are suitable periods of probation or trial employment for persons with a disability before the employment becomes permanent under the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978]; and

C. the processes set forth in this section for establishing the eligibility of persons with a disability are construed to meet the requirements of competitive entrance examinations under the provisions of the Personnel Act.

History: 1953 Comp., § 5-1-17, enacted by Laws 1969, ch. 129, § 4; 2007, ch. 46, § 35.

ANNOTATIONS

Compiler's notes. — The personnel board is administratively attached to the general services department, as provided in 10-9-11 NMSA 1978.

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

ARTICLE 10A
Human Immunodeficiency Virus Tests as Condition of Employment

28-10A-1. Human immunodeficiency virus related test; limitation.

A. No person may require an individual to disclose the results of a human immunodeficiency virus related test as a condition of hiring, promotion or continued employment, unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification of the job in question.

B. A person who asserts that a bona fide occupational qualification exists for disclosure of an individual's human immunodeficiency virus related test results shall have the burden of proving that:

(1) the human immunodeficiency virus related test is necessary to ascertain whether an individual is currently able to perform in a reasonable manner the duties of the particular job or whether an individual will present a significant risk of transmitting human immunodeficiency virus to other persons in the course of normal work activities; and

(2) there exists no reasonable accommodation short of requiring the test.

History: Laws 1989, ch. 228, § 1.

ARTICLE 11
Service Animal

28-11-1. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 242, § 5 repealed 28-11-1 NMSA 1978, as enacted by Laws 1977, ch. 332, § 1, relating to hearing ear aid dogs, effective June 16, 1989.

28-11-1.1. Short title.

Chapter 28, Article 11 NMSA 1978 may be cited as the "Service Animal Act".

History: Laws 2005, ch. 224, § 1; 2013, ch. 57, § 1.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, changed the name of the act; after "cited as the", deleted "Assistance" and added "Service".

28-11-2. Definitions.

As used in the Service Animal Act:

A. "emotional support animal", "comfort animal" or "therapy animal" means an animal selected to accompany an individual with a disability that does not work or perform tasks for the benefit of an individual with a disability and does not accompany at all times an individual with a disability;

B. "qualified service animal" means any qualified service dog or qualified service miniature horse that has been or is being trained to provide assistance to an individual with a disability; but "qualified service animal" does not include a pet, an emotional support animal, a comfort animal or a therapy animal;

C. "qualified service dog" means a dog that has been trained or is being trained to work or perform tasks for the benefit of an individual with a disability who has a physical or mental impairment that substantially limits one or more major life activities; and

D. "qualified service miniature horse" means a miniature horse that has been trained or is being trained to work or perform tasks for the benefit of an individual with a disability who has a physical or mental impairment that substantially limits one or more major life activities.

History: Laws 1989, ch. 242, § 1; 1999, ch. 262, § 1; 1999, ch. 288, § 1; 2005, ch. 224, § 2; 2013, ch. 57, § 2.

ANNOTATIONS

Cross references. — For the federal Americans with Disabilities Act, *see* 42 U.S.C. § 12101 et seq.

The 2013 amendment, effective June 14, 2013, added terms and definitions relating to emotional support and service animals; added Subsection A; in Subsection B, at the beginning of the sentence, after "qualified", deleted "assistance" and added "service", after "means any", deleted "assistance" and added "qualified service", after "dog or", deleted "other animal" and added "qualified service miniature horse", and after "disability", deleted "and includes" and added "but 'qualified service animal' does not include a pet, an emotional support animal, a comfort animal or a therapy animal"; deleted former Subsection A, which provided that an assistance dog was a qualified assistance animal; deleted former Subsection B, which provided that a guide dog was a qualified assistance animal; deleted former Subsection C, which provided that a hearing dog was a qualified assistance animal; deleted former Subsection D, which provided that a service dog was a qualified assistance animal; and added Subsections C and D.

The 2005 amendment, effective June 17, 2005, deleted the former definition of "qualified assistance animal", which was defined to mean a dog trained by a recognized school to assist persons with disabilities, an animal recognized as a service animal pursuant to the Americans with Disabilities Act or an animal approved by the committee on concerns for the handicapped and added the definition of "qualified assistance animal".

The 1999 amendment, effective June 18, 1999, rewrote the section to the extent that a detailed comparison was impracticable.

28-11-3. Admittance of qualified service animal.

A. Notwithstanding any other provision of law:

(1) a person with a disability who is using a qualified service animal shall be admitted to any building open to the public and to all other public accommodations and shall be allowed access to all common carriers; provided that the qualified service animal is under the control of an owner, a trainer or a handler of the qualified service animal. A person shall not deny an individual with a qualified service animal entry to a building open to the public or to any public accommodation or deny access to a common carrier, regardless of any policy of denying to pets entry to that building, public accommodation or common carrier. A person shall not be required to pay any additional charges for the qualified service animal, but may be liable for any damage done by the qualified service animal; provided that persons without disabilities would be liable for similar damage; and

(2) in an emergency requiring transportation or relocation of the owner or trainer of the qualified service animal, to the extent practicable, accommodations shall be made for the qualified service animal to remain or be reunited with the owner, trainer or handler. When accommodations cannot be made for allowing the qualified service animal to remain with the owner, trainer or handler, the qualified service animal shall be placed pursuant to instructions provided by the owner, trainer or handler.

B. This section does not require a public accommodation or common carrier to permit an owner, trainer or handler using a qualified service animal to have access to a public accommodation or common carrier in circumstances in which the individual's use of the qualified service animal poses a direct threat of significant harm to the health or safety of others.

History: Laws 1989, ch. 242, § 2; 1999, ch. 262, § 2; 1999, ch. 288, § 2; 2005, ch. 224, § 3; 2013, ch. 57, § 3.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided for the entry of qualified service animals to buildings open to the public, public accommodations and public carriers; in the title of the section, deleted "assistance animals" and added "service animal"; in Paragraph (1) of Subsection A, deleted "assistance" and added "service" before "animal", in the first sentence, at the beginning of the sentence, added "a person with a disability who is using", after "and to all", added "other", after "public accommodations", deleted "such as restaurants, hotels, hospitals, swimming pools, stores" and added "and shall be allowed access to all", after "common carriers", deleted "and theaters", and after "owner", deleted "or", after "trainer", added "or a handler"; added the second sentence and at the beginning of the second sentence, deleted "No"; in the third sentence, after "A person shall", deleted "not", after "but", deleted "shall" and added "may", and after "damage done by the qualified service animal", added the remainder of the sentence; in Paragraph (2) of Subsection A, deleted "assistance" and added "service" before "animal", in the first sentence, after "reunited with the owner", deleted "or" and at the end of the sentence, after "trainer", added "or handler"; and added Subsection B.

The 2005 amendment, effective June 17, 2005, added Subsection B to provide that in an emergency, requiring transportation or relocation of the owner or trainer, accommodations shall be made for the qualified assistance animal to remain with the owner or trainer.

The 1999 amendment, effective June 18, 1999, deleted the Subsection A and B designations, substituted "assistance animal" for "service animal" and "assistance animal" for "service animal" throughout the section, substituted "person with a disability or a trainer of assistance animals" for "totally or partially blind, hearing impaired or mobility impaired person. B. Pursuant to Subsection A of this section" at the end of the first sentence, and inserted "qualified assistance" before "animal" at the end of the last sentence.

28-11-4. Penalty.

A. A person who violates a provision of the Service Animal Act is guilty of a misdemeanor and, upon conviction, shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

B. Nothing in this section shall be construed to preclude any other remedy otherwise available pursuant to common law or other law of this state.

History: Laws 1989, ch. 242, § 3; 2005, ch. 224, § 4; 2013, ch. 57, § 4.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided that the section does not preclude other available remedies; in Subsection A, after "violates a provision of the", deleted "Assistance" and added "Service"; and added Subsection B.

The 2005 amendment, effective June 17, 2005, changed the statutory reference to the Assistance Animal Act.

28-11-5. Findings and purpose; interference with qualified service animals prohibited; criminal and civil penalties.

A. The legislature finds that unrestrained animals constitute a danger to qualified service animals and public safety. The purpose of this section is to protect persons with disabilities and qualified service animals from attack by unrestrained animals.

B. It is unlawful for any person, with no legitimate reason, to:

(1) intentionally interfere with the use of a qualified service animal by harassing or obstructing the owner, trainer or handler of the qualified service animal or the qualified service animal; or

(2) intentionally fail or refuse to control the person's unrestrained animal, which animal interferes with or obstructs the owner, trainer or handler of the qualified service animal.

C. The provisions of this section shall not apply to unrestrained animals on private property not open to the public.

D. A person who violates the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished pursuant to Section 31-19-1 NMSA 1978. A person convicted under this section may be ordered to pay restitution, including, but not limited to, actual damages.

E. Nothing in this section shall be construed to preclude any other remedies otherwise available pursuant to common law or the NMSA 1978.

History: Laws 1999, ch. 113, § 1; 2005, ch. 224, § 5; 2013, ch. 57, § 5.

ANNOTATIONS

Cross references. — For definition and degrees of cruelty to animals, *see* 30-18-1 NMSA 1978.

For the federal Americans with Disabilities Act, *see* 42 U.S.C. § 12101 et seq.

The 2013 amendment, effective June 14, 2013, expanded the application of the section to include animals in addition to dogs; in the title of the section, deleted "assistance" and added "service"; in Subsection A, deleted "assistance" and added "service" before "animal", and deleted "dogs" and added "animals"; in Subsection B, in the introductory sentence, after "with no", deleted "legal justification" and added "legitimate reason"; in Paragraph (1) of Subsection B, deleted "assistance" and added "service" before "animal", after "obstructing the owner", deleted "or", and after "trainer", added "or handler"; in Paragraph (2) of Subsection B, deleted "assistance" and added "service" before "animal", after "person's unrestrained", deleted "dog, and that dog" and added "animal, which animal", after "obstructs the owner", deleted "or", after "trainer", added "or handler", and after "service animal", deleted "or the qualified assistance animal"; in Subsection C, after "unrestrained", deleted "dogs" and added "animals"; and in Subsection D, in the second sentence after "to pay restitution, including", deleted "the cost of veterinary bills and replacement and training costs of a qualified assistance animal, if such costs are incurred as a result of the violation" and added "but not limited to, actual damages".

The 2005 amendment, effective June 17, 2005, deleted the former provision of Subsection B, which defined "assistance dog" as a dog that has been trained for persons with a hearing, sight or other physical disability or impairment; provided in Subsection B(1) that it is unlawful for a person to interfere with the use of a qualified assistance animal by harassing or obstructing the owner or trainer of the animal, or the animal; provides in Subsection B(2) that it is unlawful for a person to fail or refuse to control that person's unrestrained dog and that dog interferes with or obstructs the owner or trainer of a qualified assistance animal or the animal; provided in Subsection C that this section does not apply to unrestrained dogs on private property; and deleted former Subsection G, which defined "assistance animal" to mean an animal recognized as a service animal pursuant to the Americans with Disabilities Act.

28-11-6. Prohibition of false presentation of animal as a qualified service animal.

A. A person shall not knowingly present as a qualified service animal any animal that does not meet a definition of "qualified service animal" pursuant to Section 28-11-2 NMSA 1978. A person who violates the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished pursuant to Section 31-19-1 NMSA 1978.

B. Nothing in this section shall be construed to preclude any other remedies otherwise available pursuant to common law or the NMSA 1978.

History: Laws 2013, ch. 57, § 6.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

ARTICLE 11A
Telecommunication Devices for the Deaf

28-11A-1. Legislative finding.

The legislature finds that many state citizens who are unable to utilize telephone services in a regular manner due to hearing impairments are able to communicate through the use of telecommunication devices and that such devices should be installed in municipal police and county sheriff departments in areas where such units are in use by deaf persons and in the communications section of the state police in order to assure prompt response to emergency situations.

History: Laws 1981, ch. 260, § 1.

28-11A-2. Definitions.

As used in this act [28-11A-1 to 28-11A-3 NMSA 1978]:

A. "deaf person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit him from understanding telephonic voice communications; and

B. "telecommunication device for the deaf " means a teletypewriter or other instrument for telecommunication in which speaking or hearing is not required for communication.

History: Laws 1981, ch. 260, § 2.

28-11A-3. Vocational rehabilitation division; purchase of telecommunication devices for the deaf.

A telecommunication device for the deaf shall be purchased by the vocational rehabilitation division of the department of education and installed in the office of the municipal police department of any municipality with a population in excess of ten thousand inhabitants if the division determines and verifies that at least five telecommunication devices for the deaf are in use by deaf persons in the municipality,

and in the office of the county sheriff in counties not having a municipality with a population in excess of ten thousand inhabitants if the division determines and verifies that at least five such devices are in use by deaf persons in that county.

History: Laws 1981, ch. 260, § 3.

ARTICLE 11B
Commission for Deaf and Hard-of-Hearing Persons

28-11B-1. Commission for deaf and hard-of-hearing persons created.

A. There is created the "commission for deaf and hard-of-hearing persons", consisting of seven members, a majority of whom are deaf or hard-of-hearing persons, including three ex-officio members and four members appointed by the governor without regard for party affiliation, with the advice and consent of the senate. Terms of appointed members shall be for six years, expiring on December 31 of odd-numbered years, in accordance with the staggered terms of the appointed members holding office on the effective date of this 1999 amendment.

B. Ex-officio members are:

(1) the president of the New Mexico association for the deaf or his designee;

(2) the superintendent of the New Mexico school for the deaf or his designee; and

(3) the director of the vocational rehabilitation division of the state department of public education or his designee who shall be knowledgeable in the area of deafness.

C. Appointed members are:

(1) a parent of a deaf or hard-of-hearing child;

(2) a professional person who is deaf or hard of hearing;

(3) a deaf or hard-of-hearing person who resides in southern New Mexico; and

(4) a deaf or hard-of-hearing person who resides in northern New Mexico.

D. A majority of the members of the commission for deaf and hard-of-hearing persons constitutes a quorum for transaction of business. The commission shall elect a chairman from its membership.

E. Members of the commission for deaf and hard-of-hearing persons shall be compensated as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

F. Commission members who are serving upon the effective date of this 1999 act shall serve out the terms to which they were appointed.

History: Laws 1991, ch. 72, § 1; 1999, ch. 72, § 1.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, in Subsection A, inserted "including three ex-officio members and four members" in the first sentence, deleted the former second sentence, which read "Initially, three members shall be appointed for terms ending December 31, 1993, two members for terms ending December 31, 1995 and two members for terms ending December 31, 1997", in the second sentence, substituted "Terms of appointed members" for "Thereafter, appointments" and added the language beginning "in accordance" to the end; in Subsection B, substituted "Ex-officio members are" for "Appointments shall include" in the introductory language, deleted former Paragraph (3) which read, "a parent of a deaf or hard-of-hearing child", redesignated former Paragraph (4) as Paragraph (3); added the Subsection C designation, the introductory language, and Paragraph C(1); redesignated former Paragraphs B(5) through B(7) as Paragraphs C(2) through C(4); redesignated former Subsections C and D as Subsections D and E; added Subsection F; and made minor stylistic changes.

28-11B-2. Commission for deaf and hard-of-hearing persons; powers and duties.

The commission for deaf and hard-of-hearing persons shall:

A. supervise the activities of the executive director of the commission;

B. identify the needs of the deaf and hard-of-hearing population of New Mexico;

C. provide educational assistance to state agencies and, specifically, ensure agency compliance with regulations pertaining to deafness promulgated pursuant to the federal Americans with Disabilities Act;

D. coordinate with state agencies providing services for deaf and hard-of-hearing persons;

E. advocate for equal access to services and opportunities for deaf and hard-of-hearing persons;

F. provide continuing education services to deaf and hard-of-hearing persons;

G. assist in the establishment of a statewide interpreter referral service;

H. review and coordinate certification and evaluation processes for interpreters;

I. convene a minimum of four times each year in varying locations throughout the state; and

J. submit reports on its work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session.

History: Laws 1991, ch. 72, § 2.

ANNOTATIONS

Cross references. — For the federal Americans with Disabilities Act, *see* 42 U.S.C. § 12101 et seq.

28-11B-3. Commission; staff.

A. The commission for deaf and hard-of-hearing persons shall appoint an executive director, who shall be the administrative officer of the commission. A preference will be given to applicants for the executive director position who are deaf or hard of hearing.

B. The executive director shall employ such assistants and employees as are necessary for the efficient operation of the commission for deaf and hard-of-hearing persons. There shall be a minimum of five full-time staff members. The executive director shall not be subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978]. All other staff members shall be subject to the Personnel Act.

History: Laws 1991, ch. 72, § 3.

28-11B-4. Commission; task forces.

The commission for deaf and hard-of-hearing persons may appoint task forces as they are needed to study specific issues regarding deaf and hard-of-hearing persons. The task forces shall make written recommendations to the commission regarding improvement and coordination of activities relative to the concerns of deaf and hard-of-hearing persons.

History: Laws 1991, ch. 72, § 4.

ARTICLE 11C
Deaf and Hard-of-Hearing Children's Educational Bill of Rights

28-11C-1. Short title.

This act [28-11C-1 to 28-11C-3 NMSA 1978] may be cited as the "Deaf and Hard-of-Hearing Children's Educational Bill of Rights".

History: Laws 2004, ch. 107, § 1 and Laws 2004, ch. 111, § 1.

ANNOTATIONS

Effective dates. — Laws 2004, ch. 107 and Laws 2004, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, were effective May 19, 2004, 90 days after adjournment of the legislature.

Compiler's notes. — Laws 2004, ch. 107, § 1 and Laws 2004, ch. 111, § 1 enacted identical new sections of law. Both were compiled as section 28-11C-1 NMSA 1978.

28-11C-2. Findings and purpose.

A. The legislature finds that:

(1) hearing loss affects the most basic human need, communication. Without quality communication a child is isolated from other human beings and from the exchange of knowledge essential for educational growth and, therefore, cannot develop the skills required to become a productive, capable adult and a fully participatory member of society;

(2) children with hearing loss have the same innate capabilities as any other children. They communicate in a wide variety of manual and spoken modes, languages and systems. Some use aural/oral modes of communication, while others use a combination of aural/oral and manual communication. Many use American sign language, which is a formal language, as well as the preferred everyday language of the deaf community. Obviously, all children need to develop English proficiency; and

(3) it is, therefore, critical that all New Mexicans work toward ensuring that:

(a) deaf and hard-of-hearing children, like all children, have quality, ongoing and fluid communication, both in and out of the classroom;

(b) deaf and hard-of-hearing children be placed in the least restrictive educational environment and receive services based on their unique communication, language and educational needs, consistent with 20 U.S.C. §1414(d)(3)(B)(iv) of the federal Individuals with Disabilities Education Act;

(c) deaf and hard-of-hearing children be given an education in which teachers and related service providers and assessors understand the unique nature of deafness,

are specifically trained to work with hard-of-hearing and deaf pupils and can communicate spontaneously and fluidly with these children;

(d) deaf and hard-of-hearing children, like all children, have the benefit of an education in which there are a sufficient number of age-appropriate peers and adults with whom they can interact and communicate in a spontaneous and fluid way;

(e) deaf and hard-of-hearing children receive an education in which they are exposed to deaf and hard-of-hearing role models;

(f) deaf and hard-of-hearing children, like all children, have direct and appropriate access to all components of the educational process, including recess, lunch and extracurricular, social and athletic activities;

(g) deaf and hard-of-hearing children, like all children, be provided with programs in which transition planning, as required under the federal Individuals with Disabilities Education Act, focuses on their unique vocational needs; and

(h) families of children who are deaf or hard-of-hearing receive accurate, balanced and complete information regarding their child's educational and communication needs and the available programmatic, placement and resource options, as well as access to support services and advocacy resources from public and private agencies, departments and all other institutions and resources knowledgeable about hearing loss and the needs of children who are deaf or hard-of-hearing.

B. Given the central importance of communication to all human beings, the purpose of the Deaf and Hard-of-Hearing Children's Educational Bill of Rights is to encourage the development of a communication-driven and language-driven educational delivery system in New Mexico for children who are deaf or hard-of-hearing.

History: Laws 2004, ch. 107, § 2 and Laws 2004, ch. 111, § 2.

ANNOTATIONS

Effective dates. — Laws 2004, ch. 107 and Laws 2004, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, were effective May 19, 2004, 90 days after adjournment of the legislature.

Compiler's notes. — Laws 2004, ch. 107, § 2 and Laws 2004, ch. 111, § 2 enacted identical new sections of law. Both were compiled as section 28-11C-2 NMSA 1978.

28-11C-3. Educational rights of deaf and hard-of-hearing children; additional duty of public education department.

A. The state of New Mexico recognizes the unique communication needs of children who are deaf or hard-of-hearing and encourages the development of specific

recommendations by all state agencies, institutions and political subdivisions concerned with the early intervention, early childhood and kindergarten through twelfth grade education of students who are deaf or hard-of-hearing, including the public education department, the New Mexico school for the deaf and the department of health, to ensure that:

(1) these children have what every other child takes for granted, including an educational environment in which their language and communication needs are fully addressed and developed and in which they have early, ongoing and quality access to planned and incidental communication opportunities; and

(2) the recommendations, consistent with the findings and purpose of the Deaf and Hard-of-Hearing Children's Educational Bill of Rights, be completed expeditiously.

B. Since 20 U.S.C. §1414(d)(3)(B)(iv) of the federal Individuals with Disabilities Education Act requires that the individual education plan team consider the unique communication needs of children who are deaf or hard-of-hearing, the public education department shall develop a model "communication consideration for students who are deaf or hard-of-hearing", to become part of the individual education plan process. The model shall be disseminated to all local school districts, with training to be provided as determined by the department.

History: Laws 2004, ch. 107, § 3 and Laws 2004, ch. 111, § 3.

ANNOTATIONS

Cross references. — For the Behavior Health Capital Funding Act, *see* 9-7-1 NMSA 1978.

For the Public Education Department Act, *see* 9-24-1 NMSA 1978.

For the School for the Deaf, *see* 21-6-1 NMSA 1978.

Compiler's notes. — Laws 2004, ch. 107, § 3 and Laws 2004, ch. 111, § 3 enacted identical new sections of law, both effective May 19, 2004. Both were compiled as 28-11C-3 NMSA 1978.

ARTICLE 12
Indian Affairs

28-12-1 to 28-12-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1996, ch. 25, § 3 repealed 28-12-1 to 28-12-3 NMSA 1978, as enacted by Laws 1939, ch. 42, § 1, and Laws 1967, ch. 299, §§ 1 and 2, relating to the intertribal Indian ceremonial association, effective July 1, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on NMONESOURCE.COM. For present comparable provisions, *see* 9-15A-7.1 NMSA 1978.

28-12-4 to 28-12-9. Repealed.

ANNOTATIONS

Repeals. — Laws 2004, ch. 18, § 18 and Laws 2004, ch. 24, § 18 repealed 28-12-4 to 28-12-9 NMSA 1978, effective May 19, 2004. For provisions of former sections, *see* the 2003 NMSA 1978 on NMONESOURCE.COM.

ARTICLE 13
Veterans' Services

28-13-1 to 28-13-14. Repealed.

ANNOTATIONS

Repeals. — Laws 2004, ch. 19, § 33 repealed 28-13-1 to 28-13-14 NMSA 1978, effective May 19, 2004. For provisions of former sections, *see* the 2003 NMSA 1978 on NMONESOURCE.COM.

28-13-15. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 317, § 12, repealed 28-13-15 NMSA 1978, relating to the exemption of the responsibilities of the veterans' service committee from the authority of the secretary of the human services department, effective July 1, 1979.

28-13-16. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2004, ch. 19, § 31 recompiled former 28-13-16 NMSA 1978 as 14-8-17 NMSA 1978, effective May 19, 2004.

ARTICLE 13A
Veterans' Special Recreation and Museum Privileges

28-13A-1. Special recreation and museum privileges.

A. On the federally designated legal holiday known as "Veterans' Day", any New Mexico resident, who provides satisfactory proof that the resident is currently serving or has served in the armed forces of the United States, and the resident's spouse and dependent children, shall be entitled to:

(1) free use of any state park or recreation area operated by the state parks division of the energy, minerals and natural resources department, including the waiving of all admittance, camping, permit or other user fees or charges; and

(2) free general admission to any state museum or historic site.

B. The governing boards of state museums and historic sites shall waive general museum and historic site admission fees for fifty percent or more disabled veterans residing in the state. Proof of disability satisfactory to the governing boards of the state museums and historic sites is required to obtain the privileges pursuant to this subsection.

History: Laws 1991, ch. 93, § 1; 2007, ch. 13, § 2; 2013, ch. 67, § 6.

ANNOTATIONS

Cross references. — For the Veterans' Services Department Act, *see* 9-22-1 NMSA 1978.

For source and disbursement of state park and recreation revenues, *see* 16-2-19 NMSA 1978.

For the establishment, location, and property of the museum of New Mexico, *see* 18-3-1 NMSA 1978.

For the museum of space history division, *see* 18-7-1 NMSA 1978.

For the Natural History and Science Museum Act, *see* 18-3A-1 NMSA 1978.

The 2013 amendment, effective June 14, 2013, renamed state monuments as historic sites; and in Paragraph (2) of Subsection A and in Subsection B, deleted "monument" and added "historic sites" and after "museums and" added "historic sites".

The 2007 amendment, effective July 1, 2007, in Subsection B, provided for the waiver of admission fees for fifty percent or more disabled veterans residing in New Mexico upon proof of disability and generally reorganized the contents of the section.

ARTICLE 14
Aid to Children of Deceased Military and State Police Personnel

28-14-1. Use of funds for children of deceased New Mexico military personnel and state policemen.

A. The funds set aside under the provisions of Sections 28-14-1 through 28-14-4 NMSA 1978 shall be used for the sole purposes of providing for matricular fees, board and room rent and books and supplies for the use and benefit of the children, not under sixteen and not over twenty-six years of age, of:

(1) those persons who were residents of New Mexico at the time of entry into military service and who entered the military service of the United States during World War I or II, or during any action in which the military forces of the United States are engaged in armed conflict, and who were killed in action or died of other cause during the conflict or as a result of such military service;

(2) deceased members of the New Mexico national guard who were killed while on active duty in the service of the state after having been called to active duty by the governor; and

(3) deceased members of the New Mexico state police who were killed while on active duty in the service of the state.

B. The benefits enumerated in Subsection A of this section shall further be restricted to children who are attending or who may attend a state educational or training institution of a secondary or college grade. Children shall be selected under the provisions of Section 28-14-3 NMSA 1978 and shall be admitted to state institutions of secondary or college grade free of tuition.

History: 1941 Comp., § 66-1701, enacted by Laws 1949, ch. 170, § 1; 1953, ch. 31, § 1; 1953 Comp., § 74-4-1; Laws 1955, ch. 216, § 1; 1971, ch. 83, § 3; 1973, ch. 203, § 1; 1975, ch. 29, § 1; 1975, ch. 89, § 1.

ANNOTATIONS

Generally. — A child may be granted a scholarship or other aid covering periods of more than one year. Further, there is no objection to granting these benefits to two or more children of the same deceased veteran. The only basis for determining who shall receive the benefits is "need and merit" as determined by the state board of education. 1955-56 Op. Att'y Gen. No. 55-6287.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 C.J.S. Armed Services § 113.

28-14-2. Amounts payable to institutions; eligibility.

The amounts due to any educational or training institution pursuant to Chapter 28, Article 14 NMSA 1978 shall be payable to those institutions on vouchers signed by the secretary of veterans' services or the secretary's authorized representative. The veterans' services department shall determine the eligibility of children making application for the benefits provided in Chapter 28, Article 14 NMSA 1978 and shall satisfy itself of the attendance of the children and of the accuracy of charges submitted to the department. No staff of the department shall receive any compensation for this service except as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

History: 1941 Comp., § 66-1702, enacted by Laws 1949, ch. 170, § 2; 1953 Comp., § 74-4-2; Laws 1975, ch. 29, § 2; 2004, ch. 19, § 26.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, added "Chapter 28, Article 14 NMSA 1978" in two places and changed "director of veterans' affairs" to "secretary of veterans' services".

28-14-3. Selection by veterans' services department.

Children who are to receive the educational benefits provided under Section 28-14-1 NMSA 1978 shall be selected by the veterans' services department on the basis of need and merit. Nominations shall be made by:

A. the department, for children of deceased veterans;

B. the adjutant general, for children of deceased national guard of New Mexico members; and

C. the New Mexico state police board, for children of deceased New Mexico state police members.

History: 1941 Comp., § 66-1703, enacted by Laws 1949, ch. 170, § 3; 1953 Comp., § 74-4-3; Laws 1973, ch. 203, § 2; 1975, ch. 29, § 3; 1975, ch. 89, § 2; 2004, ch. 19, § 27.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, changed "veterans' service commission" to "veterans' services department".

28-14-4. Maximum payments.

Not more than three hundred dollars ($300) shall be paid, in addition to the free tuition, for any child for one year.

History: 1941 Comp., § 66-1704, enacted by Laws 1949, ch. 170, § 4; 1953 Comp., § 74-4-4; Laws 1975, ch. 29, § 4.

ARTICLE 15
Reemployment of Persons in Armed Forces

28-15-1. Reemployment of persons in armed forces.

Any person who, since July 1, 1940, has left or leaves a position he has held, other than a temporary position, in the employ of any employer to enter the armed forces of the United States, national guard or organized reserve, and who serves on active duty and is honorably discharged or released from active duty to complete his remaining service in a reserve component, or is entitled to a certificate of service, or who terminates his service without dishonor, if an officer, and is still qualified to perform the duties of such position, and makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year shall be reemployed as follows:

A. if the person's position was in the employ of a private employer, the employer shall restore him to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; or

B. if the person's position was in the employ of the state of New Mexico or any political subdivision thereof, he shall be deemed to meet all the requirements of the Personnel Act [10-9-1 NMSA 1978] as well as all residency requirements or other provisions of law and shall be restored to such position or to a position of like seniority, status and pay.

History: Laws 1941, ch. 10, § 1; 1941 Comp., § 57-701; Laws 1945, ch. 24, § 1; 1953 Comp., § 74-5-1; Laws 1969, ch. 260, § 1; 1971, ch. 163, § 1.

ANNOTATIONS

Cross references. — For veteran's preference in Personnel Act, *see* 10-9-13.2 NMSA 1978.

Sovereign immunity barred USERRA claim against the state. — Article I, Section 8, Clause 11 of the United States Constitution, known as the war powers clause, does not authorize congress to subject the state to private suits for damages in state courts pursuant to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301 to 4335, absent the state’s consent and the Legislature has not waived

the state’s constitutional immunity to private USERRA suits for damages. Ramirez v. State ex rel. CYFD, 2014-NMCA-057, cert. granted, 2014-NMCERT-005.

Where plaintiff, who was a member of the New Mexico national guard, was employed by the department; plaintiff was deployed to Iraq; upon plaintiff’s return from active duty, plaintiff was reemployed by the department in plaintiff’s previous position; plaintiff’s working relations with plaintiff’s supervisors deteriorated and plaintiff’s employment was terminated; and filed a suit under Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301 to 4335, alleging that the department discriminated against plaintiff and terminated plaintiff because of plaintiff’s military service, plaintiff’s claim was barred by state sovereign immunity. Ramirez v. State ex rel. CYFD, 2014-NMCA-057, cert. granted, 2014-NMCERT-005.

Generally. — An "employee," who leaves a position to enter the armed forces of the United States, may remain in the service indefinitely and retain his reemployment rights. No distinction is made between volunteers and draftees under the Veterans' Reemployment Act (Sections 28-15-1 to 28-15-3 NMSA 1978). No distinction is drawn between officers and enlisted personnel under the Veterans' Reemployment Act. 1959-60 Op. Att'y Gen. No. 59-18.

Scope of benefits. — Volunteers as well as draftees are entitled to the benefits of this act (Sections 28-15-1 to 28-15-3 NMSA 1978). 1941-42 Op. Att'y Gen. No. 42-4104.

Legislative intent. — The legislative policy indicated by this act (Sections 28-15-1 to 28-15-3 NMSA 1978) is to restore the veteran to his old position whenever possible, and if not, to a position of like seniority, status and pay. 1945-46 Op. Att'y Gen. No. 46-4832.

Intent regarding Personnel Act. — The language of Subsection B makes it clear that the legislature does not intend for returning veterans seeking reemployment with the state to meet the standards of the Personnel Act. 1969 Op. Att'y Gen. No. 69-108.

Officers of state not affected. — This act (28-15-1 to 28-15-3 NMSA 1978) does not apply to officers of the state of New Mexico or its subdivisions, but only to employees. 1945-46 Op. Att'y Gen. No. 46-4882.

Time between leaving employment and induction. — An employee who left his employment within a reasonable time before induction without obtaining other employment in the meantime is entitled to reemployment. 1945-46 Op. Att'y Gen. No. 45-4829.

Effect of return of veteran. — Since contracts are entered into subject to existing statutes, where a teacher is employed to fill a vacancy caused by the absence of a person in the armed forces, his contract is terminated when the veteran returns to his former position. 1945-46 Op. Att'y Gen. Nos. 45-4813, 45-4818.

Seven-year absence. — A veteran who was employed within the state of New Mexico as a locomotive fireman and locomotive engineer on January 27, 1951, at which time he was called to active service with the United States Air Force, may upon his discharge from military service on January 31, 1958 secure reemployment under Sections 28-15-1 to 28-15-3 NMSA 1978. 1957-58 Op. Att'y Gen. No. 58-209.

Salary increases. — When a veteran returns to his former position, he is entitled to proportionate salary increases and other benefits, if any, to which other employees who continued in service have become entitled. 1945-46 Op. Att'y Gen. Nos. 46-4815, 46-4832.

Service credit for retirement purposes. — Section 10-11-6A(1) NMSA 1978 must be interpreted in a manner consistent with the federal and state laws on veteran reemployment rights. If the veteran otherwise qualifies for reemployment and applies within 90 days of the termination of his active duty period, he still may acquire service credit for retirement purposes even though the employer does not actually rehire him until after the ninetieth day. 1988 Op. Att'y Gen. No. 88-24.

Employee more rights than probationer. — If a person contemplated by Subsection B has gained the status of an "employee" as that term is defined by Section 10-9-3 NMSA 1978 and the personnel board rules, he will have additional rights under the state personnel board rules that a "probationer" would not. 1969 Op. Att'y Gen. No. 69-108.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 77 Am. Jur. 2d Veterans and Veterans' Laws § 88 et seq.

Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960.

When does sale or reorganization exempt business from reemployment requirements of military veterans' reemployment laws (38 USCS §§ 2021 et seq.), 63 A.L.R. Fed. 132.

6 C.J.S. Armed Services §§ 268 to 287.

28-15-2. [Status on reinstatement; restriction on discharge.]

Any person who is restored to a position in accordance with the provisions hereof shall be considered as having been on furlough or leave of absence during his services in the armed forces of the United States, and shall be restored without loss of seniority, and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person entered the armed forces of the United States, and shall not be discharged from such position without cause within one year after such restoration.

History: Laws 1941, ch. 10, § 2; 1941 Comp., § 57-702; 1953 Comp., § 74-5-2.

ANNOTATIONS

Salary increases and benefits. — When a veteran returns to his former position, he is entitled to proportionate salary increases and other benefits, if any, to which other employees who continued in service have become entitled. 1945-46 Op. Att'y Gen. Nos. 46-4815, 46-4832.

28-15-3. [Enforcement in district court; procedure.]

In case any person acting either in a public or private capacity fails or refuses to comply with the provisions hereof the district court of the district in which such person maintains a place of business (if such person is a private employer), or in which such person is a public official, shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer or public officials to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reasons of such employer's or official's unlawful action. The court shall order a speedy hearing in any such case, and shall advance it on the calendar. Upon application to the district attorney for the pertinent district by any person claiming to be entitled to the benefits of such provisions, such district attorney, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require the compliance with such provisions: provided, that no fees or court costs shall be taxed against the person so applying for such benefits.

History: Laws 1941, ch. 10, § 3; 1941 Comp., § 57-703; 1953 Comp., § 74-5-3.

ANNOTATIONS

Bringing suit to restore position. — Only the returning veteran or the district attorney of the appropriate district can bring an action to have the veteran restored to his prior position if employment is refused. 1969 Op. Att'y Gen. No. 69-108.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS § 2025, 53 A.L.R. Fed. 451.

ARTICLE 16
Developmental Disabilities Community Services

28-16-1 to 28-16-15.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 50, § 19 repealed 28-16-1 to 28-16-15.1 NMSA 1978, as enacted or amended by Laws 1984, ch. 100, §§ 1-4, §§ 6-8, and § 10, Laws 1989, ch. 70, § 1, Laws 1989, ch. 92, § 2, Laws 1989, ch. 195, §§ 1-4, Laws 1990, ch. 97, § 2, and Laws 1991, ch. 11, § 1, relating to developmental disabilities community services, effective June 18, 1993. For provisions of former sections, *see* the 1992 NMSA 1978 on NMONESOURCE.COM. For present comparable provisions, *see* 28-16A-1 to 28-16A-18 NMSA 1978.

Compiler's notes. — Laws 1990, ch. 97, § 3, as amended by Laws 1993, ch. 84, § 3, repealed 28-16-15.1 NMSA 1978, as enacted by Laws 1990, ch. 97, § 2, effective July 1, 1995. The delayed repeal was not given effect, due to the prior repeal of 28-16-15.1 NMSA by Laws 1993, ch. 50, § 19.

28-16-15.2. Developmental disabilities planning council; additional duties.

The developmental disabilities planning council shall cooperate with the department of health and the human services department to:

A. provide data to support an amendment to the developmental disabilities medicaid waiver program to increase the number of eligible persons served;

B. develop a contingency plan to describe the role and control the growth of intermediate care facilities for the mentally retarded; and

C. develop flexibility in the system of prioritization for admission to allow persons to move within the service system to an appropriate level of service, including movement of residents of intermediate care facilities for the mentally retarded to the developmental disabilities medicaid waiver program.

History: Laws 1993, ch. 84, § 2.

ANNOTATIONS

Compiler's notes. — The developmental disabilities planning council, referred to in this section, was originally created by 28-16-14 NMSA 1978. That section was repealed in 1993. *See* Chapter 28, Article 16A NMSA 1978.

28-16-16 to 28-16-18. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 50, § 19 repealed 28-16-16 through 28-16-18 NMSA 1978, as enacted Laws 1989, ch. 92, §§ 3-5 and Laws 1990, ch. 97, § 2, relating to the developmental disabilities planning council, effective June 18, 1993. For provisions of

former sections, *see* the 1992 NMSA 1978 on NMONESOURCE.COM. For present comparable provisions, *see* 28-16A-1 to 28-16A-18 NMSA 1978.

ARTICLE 16A
Developmental Disabilities

28-16A-1. Short title.

Sections 1 through 18 [28-16A-1 to 28-16A-18 NMSA 1978] of this act may be cited as the "Developmental Disabilities Act".

History: Laws 1993, ch. 50, § 1.

ANNOTATIONS

Cross references. — For the Children's Mental Health and Developmental Disabilities Act, see Chapter 32A, Article 6A NMSA 1978.

28-16A-2. Legislative purpose.

A. It is the purpose of the legislature in enacting the Developmental Disabilities Act to promote opportunities for all persons with developmental disabilities to live, work and participate with their peers in New Mexico communities. Priority shall be given to the development and implementation of support and services for persons with developmental disabilities that will enable and encourage them to:

(1) exert control and choice over their own lives;

(2) achieve their greatest potential for independent and productive living by participating in inclusive community activities; and

(3) live in their own homes and apartments or in facilities located within their own communities and in contact with other persons living in their communities.

B. The Developmental Disabilities Act authorizes the department to plan, provide and coordinate support and services to persons with developmental disabilities.

History: Laws 1993, ch. 50, § 2.

ANNOTATIONS

Purpose of act. — The Developmental Disabilities Act expresses a clear state policy in favor of integrating disabled students into communities. Although this act is directed at assisting individuals with developmental disabilities, such as autism or mental retardation, this important state policy applies with equal force to individuals with any

form of disability or handicap. Hill v. Community of Damien of Molokai, 1996-NMSC-008, 121 N.M. 353, 911 P.2d 861.

28-16A-3. Definitions.

As used in the Developmental Disabilities Act:

A. "assessment" means a process for measuring and determining a person's strengths, needs and preferences to determine eligibility for support and services and to develop or modify an individual support and service plan;

B. "case management" means a process that assists a person with a developmental disability to know and understand his choices and rights, to obtain support and services that the person is eligible to receive and that is reflected in the individual support and service plan and monitors the provision of support and services received by the person;

C. "department" means the department of health;

D. "diagnostic evaluation" means an empirical process that determines if, and to what degree, a person has a developmental deficiency and the type of intervention and services that are needed for the person and that person's family;

E. "inclusive" means using the same community resources that are used by, and available to, all citizens and developing relationships with nonpaid caregivers or recipients of support and services for persons with developmental disabilities;

F. "individual support and service plan" means a plan developed by an interdisciplinary team and agreed to by a person with a developmental disability, or a parent of a minor or legal guardian, as appropriate, that describes the combination and sequence of special, interdisciplinary or generic care, treatment or other support and services that are needed and desired by a person with a developmental disability;

G. "interdisciplinary team" means a group of persons drawn from or representing professions that are relevant to identifying the needs of a person with a developmental disability and designing a program to meet that person's needs. The team shall include the person with a developmental disability, the parent of a minor child or legal guardian, as appropriate; and

H. "service provider" means a nonprofit corporation, tribal government or trival [tribal] organization, unit of local government or other organization that has entered into a contract or provider agreement with the department for the purpose of providing developmental disabilities support and services.

History: Laws 1993, ch. 50, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler to correct a typographical error and it is not part of the law.

28-16A-4. Developmental disabilities planning council; creation; membership; terms.

A. The "developmental disabilities planning council" is created in accordance with the federal Developmental Disabilities Assistance and Bill of Rights Act. The developmental disabilities planning council shall be an adjunct agency as provided in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978].

B. The developmental disabilities planning council shall consist of no fewer than eighteen members, at least half of whom shall be persons with developmental disabilities or parents, immediate relatives or legal guardians of persons with developmental disabilities. The developmental disabilities planning council shall include:

(1) the secretary of health, or his designee;

(2) the secretary of human services, or his designee;

(3) the secretary of children, youth and families, or his designee;

(4) the director of the state agency on aging [aging and long-term services department], or his designee;

(5) two directors from the state department of public education, including the vocational rehabilitation division;

(6) the director of the state protection and advocacy system established pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act;

(7) representatives of institutions of post-secondary education;

(8) representatives of each program established within institutions of post-secondary education, pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act; and

(9) representatives of local government agencies, nongovernment agencies or nonprofit groups concerned with services to persons with developmental disabilities, including a service provider.

C. Members, except for ex-officio members, shall be appointed by the governor for terms of three years.

History: Laws 1993, ch. 50, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

Cross references. — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6000 et seq.

28-16A-5. Powers and duties.

A. The developmental disabilities planning council shall:

(1) act as a planning and coordinating body for persons with developmental disabilities;

(2) provide statewide advocacy systems for persons with developmental disabilities;

(3) work with appropriate state agencies to develop the developmental disabilities three-year plan as required by the federal Developmental Disabilities Assistance and Bill of Rights Act;

(4) monitor and evaluate the implementation of the developmental disabilities state plan;

(5) to the maximum extent feasible, review and comment on all state plans that relate to programs affecting persons with developmental disabilities;

(6) submit to the secretary of the United States department of health and human services, through the office of the governor, periodic reports that the secretary may request;

(7) advise the governor and the legislature about the needs of persons with developmental disabilities; and

(8) carry out any other activities authorized or required by the provisions of the federal Developmental Disabilities Assistance and Bill of Rights Act.

B. The developmental disabilities planning council is authorized to:

(1) award grants and enter into contracts to carry out its duties;

(2) seek funding from sources other than the state;

(3) create and support regional county or local advisory councils; and

(4) provide training to persons with developmental disabilities, their families and providers of support and services through traineeships, sponsoring training opportunities and by other means determined appropriate by the developmental disabilities planning council.

History: Laws 1993, ch. 50, § 5.

ANNOTATIONS

Cross references. — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6000 et seq.

28-16A-6. Eligibility.

For purposes of eligibility for support and services:

A. "developmental disability" means a severe chronic disability of a person that:

(1) is attributable to a mental or physical impairment, including the result from trauma to the brain, or combination of mental and physical impairments;

(2) is manifested before the person reaches the age of twenty-two years;

(3) is expected to continue indefinitely;

(4) results in substantial functional limitations in three or more of the following areas of major life activity:

(a) self-care;

(b) receptive and expressive language;

(c) learning;

(d) mobility;

(e) self-direction;

(f) capacity for independent living; and

(g) economic self-sufficiency; and

(5) reflects the person's need for a combination and sequence of special, interdisciplinary or generic care treatment or other support and services that are of life-long or extended duration and are individually planned and coordinated;

B. are children, birth through two years of age, who are at risk for or have developmental delays as defined by the department. These children are eligible for early intervention services; or

C. is a person who is eligible for services based on any previous definition of developmental disability used by the state and is receiving services on the effective date of the Developmental Disabilities Act. However, children birth through age two who were determined to be a risk for or have developmental delays are eligible for early intervention services only, unless meeting the criteria set forth in Subsection A of this section.

History: Laws 1993, ch. 50, § 6.

ANNOTATIONS

Compiler's notes. — Subsections B and C are set out above as they appear in the printed act.

The phrase "effective date of the Developmental Disabilities Act", means June 18, 1993, the effective date of Laws 1993, Chapter 50.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes substantial limitation on major life activity of working for purposes of Americans with Disabilities Act (42 USCS § 12101-12213), 141 A.L.R. Fed. 603.

28-16A-7. Assessment of needs of persons with developmental disabilities.

A. In order to comply with the provisions of 42 U.S.C. Section 6067, the developmental disabilities planning council shall conduct a needs assessment of persons with developmental disabilities to determine:

(1) the number residing in New Mexico;

(2) the range and degree of severity of their disabilities;

(3) the present placement and support and services being received; and

(4) the needs for support and services and the extent that their needs are unserved or underserved.

B. The findings of the assessment shall be included in the state plan for developmental disabilities services and support. The assessment shall be repeated at least every two years, with a summary of the findings distributed to relevant organizations, programs and agencies in the state.

History: Laws 1993, ch. 50, § 7.

ANNOTATIONS

Compiler's notes. — 42 U.S.C. § 6067, referred to in the introductory language of Subsection A, was omitted in 1984. Present comparable provisions are found at 42 U.S.C. § 6024.

28-16A-8. Planning for community services for persons with developmental disabilities.

A. The developmental disabilities planning council shall coordinate, review and comment upon plans for services to persons with developmental disabilities developed by all major state agencies providing or funding services to persons with developmental disabilities based, to the greatest extent possible, upon the most recent needs assessment completed pursuant to Section 7 [28-16A-7 NMSA 1978] of the Developmental Disabilities Act.

B. The department of health, the human services department, the state department of public education, the vocational rehabilitation division of the state department of public education, the children, youth and families department, the New Mexico school for the visually handicapped and the New Mexico school for the deaf shall each submit a plan for support and services for persons with developmental and other disabilities within a reasonable time to allow for meaningful coordination, review and comment by the developmental disabilities planning council.

C. Each plan shall define and provide for the support and services that are required within the scope of each respective agency's applicable federal and state laws and regulations. The goal of each plan is to enable persons with developmental disabilities to maximize their potential, live as independently as possible in their own homes and communities and achieve productive lives through involvement in inclusive service settings.

History: Laws 1993, ch. 50, § 8.

28-16A-9. Information and referral system; coordination and continuation.

In order to coordinate information and referral services and eliminate the duplication of effort, the developmental disabilities planning council shall provide information and

referral services for persons with disabilities, their families, providers of support and services and local and state agencies, including:

A. the human services department;

B. the department of health;

C. the state department of public education and its vocational rehabilitation division;

D. the New Mexico school for the deaf;

E. the New Mexico school for the visually handicapped;

F. the Carrie Tingley crippled children's hospital; and

G. the children, youth and families department.

History: Laws 1993, ch. 50, § 9.

28-16A-10. Developmental disabilities planning council; staff.

The developmental disabilities planning council shall employ an executive director, who is the administrative officer of the council. The executive director shall employ other necessary employees pursuant to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

History: Laws 1993, ch. 50, § 10.

28-16A-11. Developmental disabilities planning council; reports.

The developmental disabilities planning council shall submit reports on its preceding year's work to the governor and the legislative interim health and human services committee by December 1 of each year. The reports shall contain recommendations, if any, for legislation or other appropriate action.

History: Laws 1993, ch. 50, § 11.

28-16A-12. Developmental disabilities planning council; compensation.

Developmental disabilities planning council members shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]. Reasonable accommodations shall be made available to permit full participation in council activities by its members, including personal assistance to members with developmental disabilities and respite care for members that are parents, immediate relatives or legal

guardians of persons with developmental disabilities. No other compensation, perquisite or allowance shall be received.

History: Laws 1993, ch. 50, § 12.

28-16A-13. Authorization for providing community-based services for persons with developmental disabilities.

A. Subject to the availability of appropriations provided expressly for this purpose, the department may:

(1) acquire, provide or coordinate support and services for persons with developmental disabilities;

(2) enter into contracts and provider agreements with agencies and individuals capable of providing support and services to persons with developmental disabilities that promote the objectives of the department's state plan, prepared pursuant to Section 5 [28-16A-5 NMSA 1978] of the Developmental Disabilities Act; and

(3) establish advisory councils and task forces as necessary to guide the development and review of support and services to persons with developmental disabilities.

B. Support and services shall be provided based on individual support and service plans developed by an interdisciplinary team. The team is responsible for collectively evaluating the child's or adult's needs and developing an individual support and service plan to meet the needs.

C. The department shall:

(1) solicit the involvement of consumers, providers, parents, professional organizations and other governmental organizations prior to the adoption or revision of any policies or regulations concerning the provision of support, services, standards or funding systems. Participants shall be selected in a manner that reflects geographical, cultural, organizational and professional representation across the state;

(2) develop policies, procedures, rules and regulations that to the extent possible will promote uniformity in reimbursement and quality assurance systems regardless of the source of funding; and

(3) convene and maintain a family infant toddler inter-agency coordinating council and a statewide adult support and services task force that shall, at a minimum, address quality assurance.

History: Laws 1993, ch. 50, § 13.

ANNOTATIONS

Governor entitled to legislative immunity. — Although actions of the governor recommending state appropriations for medicaid waivers, revamping the state personnel system and plan for growth in the medicaid programs were legislative in nature and therefore the governor is entitled to legislative immunity, Lewis v. New Mexico Dept. of Health, 275 F.Supp.2d 1319 (D.N.M. 2003), an action brought against other state officials in their individual capacities are permitted under the Ex Parte Young doctrine. Lewis v. N.M. Dept. of Health, 261 F.3d 970 (10th Cir. 2001).

28-16A-14. Quality assurance system.

A. The department shall develop and maintain a quality assurance system to improve and enhance the quality of support and services for persons with developmental disabilities. The management information system portion of the quality assurance system shall track and maintain information concerning the characteristics of the persons served, support and services received and the length of time support and services are provided.

B. The program evaluation portion of the quality assurance system shall consist of a comprehensive collection of data from providers and analysis of measures of effectiveness, efficiency and consumer satisfaction.

C. The department shall adopt regulations that ensure compliance with recognized professional standards for support and services.

History: Laws 1993, ch. 50, § 14.

28-16A-15. Admission, transfer, withdrawal and discharge of persons receiving support and services purchased or provided by the department.

A. In cooperation with other state agencies, the department shall adopt requirements for admission, transfer, withdrawal and discharge of persons receiving support and services funded in whole or in part by state funds.

B. The department shall maintain a centralized registry of persons who are requesting or receiving support and services and a centralized referral system that promotes the delivery of support and services within the person's home community and reflects the person's informed selection and choice of a support or service provider. This centralized referral system shall determine eligibility based on a comprehensive assessment and shall prioritize individuals waiting to access publicly funded developmental disability support and services.

C. The centralized referral system shall maintain information regarding the needs of persons not receiving services and shall report the information annually to the legislature. The department shall have the authority to provide assessments and case management services to persons applying for and receiving publicly funded support and services necessary to implement the provisions of this section.

History: Laws 1993, ch. 50, § 15.

28-16A-16. Determination of rates for payment for support and services.

A. The department shall develop, implement and maintain a provider reimbursement system based on the level of support and services required by a person with a developmental disability.

B. If the approved funding from the legislature does not permit the implementation of a reimbursement system using the considerations provided for in this section, the department shall develop and implement a service reduction plan.

C. The department shall report to the legislature and the governor the impact of any service reduction plans and the steps that will be taken to reinstate those services.

D. The department shall report annually to the legislature and the governor an estimate of the costs of maintaining support and services for persons with developmental disabilities being served, including the effects of changes in the costs of providing support and services, an estimate of the costs of providing support and services to persons that are eligible for service but not receiving services, and the request of the department for funding of services.

E. Contractors shall be required to submit records of support and services delivered as determined by the department, subject to monitoring by the department.

F. Contingent upon appropriations, the department shall conduct an independent biannual cost study for the purpose of establishing payment rates. The results of this study shall be submitted to the legislature.

History: Laws 1993, ch. 50, § 16.

28-16A-17. Independent status of service providers.

Except as otherwise provided, each service provider shall be considered to be an independent contractor and not an entity of state government.

History: Laws 1993, ch. 50, § 17.

28-16A-18. Developmental disabilities early childhood evaluation system.

The state shall have a timely, comprehensive, multidisciplinary system for evaluating infants, toddlers and preschool-age children suspected of having developmental delays. Diagnostic evaluations for infants and toddlers shall address family service needs and shall include training capabilities to educate community providers and parents in the understanding and application of the evaluations. This diagnostic evaluation system shall be jointly provided through a coordinated system by the children's medical services bureau of the public health division or the developmental disabilities division of the department, the university of New Mexico's developmental disabilities team and the state department of public education.

History: Laws 1993, ch. 50, § 18.

28-16A-19. Information and referral task force creation.

There is created an information and referral task force located in the developmental disabilities planning council to develop a statewide, comprehensive "211" information and referral plan for use as a telephone dialing code for access to health and human services. The plan shall include a tariff structure based on existing agreements, a common taxonomy of terms, coordination between public and private systems and standardized statewide training and exploration of a centralized information repository. The task force shall include representation from the department of health; the human services department; the children, youth and families department; the labor department; the state agency on aging [aging and long-term services department]; the internet long-term care link program; the governor's committee on concerns of the handicapped; the New Mexico commission for the blind; the commission for deaf and hard-of-hearing persons; a statewide organization that raises money for health and human service purposes; and other interested parties.

History: Laws 2003, ch. 323, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

Effective dates. — Laws 2003, ch. 323 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

ARTICLE 16B
Office of Guardianship

28-16B-1. Short title.

Chapter 28, Article 16B NMSA 1978 may be cited as the "Office of Guardianship Act".

History: Laws 2003, ch. 280, § 1; 2009, ch. 159, § 7.

ANNOTATIONS

Cross references. — For mental health and development disabilities, *see* Chapter 43, Article 1 NMSA 1978.

The 2009 amendment, effective June 19, 2009, changed the reference to the act to the chapter and article of NMSA 1978.

28-16B-2. Office of guardianship; created; staff.

A. The "office of guardianship" is created in the developmental disabilities planning council.

B. The director of the developmental disabilities planning council shall employ a head of the office who shall be hired on the basis of ability, experience and knowledge of guardianship issues under the Uniform Probate Code [Chapter 45 NMSA 1978]. The position shall be classified pursuant to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

C. Subject to appropriations, the director may hire such other professional and clerical staff as necessary to carry out the purposes of the office.

History: Laws 2003, ch. 280, § 2.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 280, § 10 made the act effective July 1, 2003.

Temporary provisions. — Laws 2003, ch. 280, § 7, effective July 1, 2003, provided for transfer of functions, property, contractual obligations, and references to the office of guardianship services of the office of the attorney general to the office of guardianship of the developmental disabilities planning council.

28-16B-3. Office; powers and duties.

A. The office of guardianship may:

(1) promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to carry out the provisions of the Office of Guardianship Act; and

(2) enter into agreements with other state or federal agencies to provide guardianship services and to provide or receive payment for such services.

B. The office of guardianship shall:

(1) contract for the provision of probate guardianship services to income-eligible incapacitated persons, including temporary guardianship as provided in Section 45-5-310 NMSA 1978;

(2) provide for the recruitment and training of persons interested and willing to serve as mental health treatment guardians;

(3) provide training and information to interested persons on the duties and responsibilities of guardians, including alternatives to guardianship and mental health treatment guardianship;

(4) establish procedures for the investigation and resolution of complaints against contractors;

(5) contract for attorneys to petition the district court for guardianship of persons believed to be incapacitated or to seek amendment or termination of existing guardianship orders if the needs or situation of protected persons have changed; provided that the selection of persons to be served under such contracts shall be made by the office based on selection criteria established by rule; and

(6) serve as an interested person as defined in Subsection I of Section 45-5-101 NMSA 1978.

History: Laws 2003, ch. 280, § 3; 2009, ch. 159, § 8.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Paragraph (5) of Subsection B, changed "ward" to "protected person".

28-16B-4. Contract monitoring and enforcement.

A. The office of guardianship shall monitor and enforce all guardianship contracts. In carrying out this duty, the office may:

(1) have access to case records, copies of court filings and reports, financial records and other records maintained by contractors related to contract services provided unless specifically sequestered by the court;

(2) petition the court of jurisdiction for access to records that have been sequestered;

(3) arrange visits with protected persons who are served by contract guardians; and

(4) pursue legal and other remedies against contractors for noncompliance with contract provisions.

B. The office shall protect and maintain the confidentiality of all client-specific information and records obtained to the same extent as required for the contractor and to any extent otherwise required by state or federal law.

History: Laws 2003, ch. 280, § 4; 2009, ch. 159, § 9.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Paragraph (3) of Subsection A, changed "ward" to "protected person".

28-16B-5. Contracts.

A contract for guardianship services shall include:

A. a requirement that contractors and their staff meet nationally recognized standards for guardianship services;

B. a requirement for adoption and compliance with a code of ethics for guardians;

C. the maximum caseload for guardians;

D. the fee schedule for services provided;

E. assurance that the civil rights of protected persons served by the contractor shall be met, including the right to be served in the most integrated setting appropriate to the needs of the protected person;

F. provisions for access by the office of guardianship to records, protected persons and contractor staff as needed to monitor and enforce contract compliance and for quality assurance purposes; and

G. minimum financial accounting and reporting requirements.

History: Laws 2003, ch. 280, § 5; 2009, ch. 159, § 10.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsections E and F, changed "ward" to "protected person".

28-16B-6. Resolution of complaints.

A. The office of guardianship shall establish by rule for the filing, investigation and resolution of complaints about guardianship services provided by contractors.

B. The office shall acknowledge receipt of the complaint, notify all parties involved and initiate an investigation within fifteen working days of the filing of the complaint.

C. A determination shall be made and a decision rendered on the complaint within sixty working days unless mutually agreed upon by all parties or unless a shorter time is required to protect the protected person.

D. The office may refer complaints to other agencies for investigation or prosecution, as appropriate.

E. Complaints against the office or a staff member of the office shall be investigated by the human services department.

History: Laws 2003, ch. 280, § 6; 2009, ch. 159, § 11.

ANNOTATIONS

Cross references. — For the Department of Health Act, *see* Chapter 9, Article 7 NMSA 1978.

The 2009 amendment, effective June 19, 2009, in Subsection C, changed "ward" to "protected person".

28-16B-7. Office of guardianship fund; creation; appropriation.

A. The "office of guardianship fund" is created in the state treasury. All gifts, donations, bequests and interest income of the developmental disabilities planning council's office of guardianship shall be deposited by the executive director of the developmental disabilities planning council into the fund. The developmental disabilities planning council shall administer the fund, and money in the fund is appropriated to the office of guardianship to further the purposes of the Office of Guardianship Act. Income from investment of the fund shall be credited to the fund. Money in the fund shall be disbursed on warrants signed by the secretary of finance and administration pursuant to

vouchers signed by the executive director of the developmental disabilities planning council or the executive director's authorized representative.

B. Money in the office of guardianship fund shall not revert or be transferred to any other state fund at the end of any fiscal year and shall not be expended for any purpose except as provided in this section.

History: Laws 2013, ch. 107, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 107 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

ARTICLE 17
Long-Term Care Ombudsman

28-17-1. Short title.

Sections 1 through 19 [28-17-1 to 28-17-19 NMSA 1978] of this act may be cited as the "Long-Term Care Ombudsman Act".

History: Laws 1989, ch. 208, § 1.

ANNOTATIONS

Cross references. — For the Continuing Care Act, *see* Chapter 24, Article 17 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40A Am. Jur. 2d Hospitals and Asylums § 39.

Liability of nursing home for violating statutory duty to notify third party concerning patient's medical condition, 46 A.L.R.5th 821.

7 C.J.S. Asylums and Institutional Care Facilities §§ 5, 6, 14.

28-17-2. Purpose.

The legislature recognizes that the state agency on aging [aging and long-term services department] pursuant to a grant from the federal government has established an office of the state long-term care ombudsman. The legislature declares that it is the public policy of this state to encourage community contact and involvement with patients, residents and clients of long-term care facilities. The legislature finds that in

order to comply with the federal Older Americans Act and to effectively assist patients, residents and clients of long-term care facilities in the assertion of their civil and human rights, the structure, powers and duties of the office of the state long-term care ombudsman shall be specifically defined.

History: Laws 1989, ch. 208, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the "state agency on aging" be deemed references to the "aging and long-term services department".

Cross references. — For the federal Older Americans Act, *see* 42 U.S.C. § 3001 et seq.

28-17-3. Definitions.

As used in the Long-Term Care Ombudsman Act:

A. "adult protective services" means the children, youth and families department pursuant to the Adult Protective Services Act [Sections 27-7-14 through 27-7-31 NMSA 1978];

B. "agency" [department] means the state agency on aging [aging and long-term services department];

C. "care" means assistance with the activities of daily living, including eating, dressing, oral hygiene, bathing, mobility, toileting, grooming, taking medications, transferring from a bed or chair and walking;

D. "director" means the director of the state agency on aging [aging and long-term services department];

E. "licensing and certification" means the licensing and certification bureau of the public health division of the department of health;

F. "long-term care facility" means any residential facility that provides care to one or more persons unrelated to the owner or operator of the facility, including:

(1) a skilled nursing facility;

(2) an intermediate care nursing facility, including an intermediate care facility for the mentally retarded;

(3) a nursing facility;

(4) an adult residential shelter care home;

(5) a boarding home;

(6) any other adult care home or adult residential care facility;

(7) a continuing care community;

(8) any swing bed in an acute care facility or extended care facility; and

(9) any adult day care facility;

G. "office" means the office of the state long-term care ombudsman;

H. "Older Americans Act" means the federal Older Americans Act;

I. "ombudsman" means an individual trained and certified to act as a representative of the office of the state long-term care ombudsman;

J. "ombudsman coordinator" means the coordinator of a regional or local ombudsman program designated by the office of the state ombudsman;

K. "program" means the New Mexico long-term care ombudsman program;

L. "resident" means any patient, client or person residing in and receiving care in a long-term care facility;

M. "state ombudsman" means the state long-term care ombudsman; and

N. "surrogate decision maker" means a legally appointed agent, guardian or surrogate who is authorized to act on behalf of a resident.

History: Laws 1989, ch. 208, § 3; 1997, ch. 257, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

Cross references. — For the federal Older Americans Act, *see* 42 U.S.C. § 3001 et seq.

The 1997 amendment, effective July 1, 1997, added Subsections C, K, L and N, deleted former Subsection H defining "older individual", and redesignated former Subsections C through G and K as D through H and M; substituted "children, youth and families" for "human services" in Subsection A; substituted "department of health" for "health and environment department" in Subsection E; added the language beginning "any residential facility" at the end of the introductory paragraph in Subsection F; added "including an intermediate care facility for the mentally retarded" at the end of Paragraph F(2); deleted former Paragraph F(3), which read "intermediate care facility for the mentally retarded"; redesignated former Paragraphs F(4) through F(10) as F(3) through F(9); added "or adult residential care facility" at the end of Paragraph F(6); deleted "health" preceding "care" in Paragraph F(9); and made stylistic changes in Subsection F.

28-17-4. Establishment of the office of the state long-term care ombudsman; general duties of the office.

A. Pursuant to the Older Americans Act, the agency shall establish and operate an "office of the state long-term care ombudsman" either directly or by contract or other arrangement with any public agency or nonprofit private organization; except that no contract or arrangement may be made with any entity that is responsible for licensing or certifying long-term care services or an association or association affiliate of long-term care facilities or of any other residential facilities.

B. The director shall designate the state ombudsman.

C. The ombudsman shall serve on a full-time basis, and shall, personally or through representatives of the office:

(1) identify, investigate and resolve complaints that are made by, or on behalf of, residents and that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents, including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees, of:

(a) providers, or representatives of providers, of long-term care services;

(b) public agencies; or

(c) health and social service agencies;

(2) provide services to assist the residents in protecting the health, safety, welfare and rights of the residents;

(3) inform the residents about means of obtaining services;

(4) ensure that the residents have regular and timely access to the services provided through the office and that the residents and complainants receive timely responses from representatives of the office;

(5) represent the interests of the residents before governmental agencies and seek administrative, legal and other remedies on behalf of residents to protect the health, safety, welfare and rights of the residents;

(6) provide administrative and technical assistance to designated regional and local ombudsman programs and assist the programs in participating in the program;

(7) analyze, comment on and monitor the development and implementation of federal, state and local laws, regulations and other governmental policies and actions that pertain to the health, safety, welfare and rights of the residents, with respect to the adequacy of long-term care facilities and services in the state and recommend any changes in such laws, regulations, policies and actions as the office determines to be appropriate; and facilitate public comment on the laws, regulations, policies and actions;

(8) provide for training representatives of the office, promote the development of citizen organizations to participate in the program and provide technical support for the development of resident and family councils to protect the well-being and rights of residents;

(9) prepare an annual report:

(a) describing the activities carried out by the office in the year for which the report is prepared;

(b) containing and analyzing the data collected;

(c) evaluating the problems experienced by, and the complaints made by or on behalf of, residents;

(d) containing recommendations for improving quality of the care and life of the residents, and protecting the health, safety, welfare and rights of the residents;

(e) analyzing the success of the program, including success in providing services to residents of board and care facilities and other similar adult care facilities;

(f) identifying barriers that prevent the optimal operation of the program; and

(g) providing policy, regulatory and legislative recommendations to solve identified problems, to resolve complaints, to improve the quality of care and life of residents, to protect the health, safety, welfare and rights of residents and to remove the barriers;

(10) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illness;

(11) provide such information as the office determines to be necessary to public and private agencies, legislators and other persons regarding the problems and concerns of older individuals residing in long-term care facilities; and recommendations related to the problems and concerns; and

(12) carry out such other activities as the state ombudsman determines to be appropriate.

History: Laws 1989, ch. 208, § 4; 1997, ch. 257, § 3.

ANNOTATIONS

Cross references. — For the federal Older Americans Act, *see* 42 U.S.C. § 3001 et seq.

The 1997 amendment, effective July 1, 1997, in Subsection A, deleted "either directly or by contract or other arrangement" following "operate" and added the language beginning with that phrase at the end; and rewrote Subsection C.

28-17-5. Rule-making authority of director.

The director shall adopt and promulgate such reasonable rules and regulations as are deemed necessary to carry out the provisions of the Long-Term Care Ombudsman Act. Unless otherwise provided by statute, no regulation affecting any person or agency outside the office shall be adopted, amended or repealed without a public hearing on the proposed action before the director or a hearing officer designated by him. The public hearing shall be held in Santa Fe unless the public notice of hearing indicates otherwise. Notice of the subject matter of the regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules and regulations shall be filed in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978].

History: Laws 1989, ch. 208, § 5.

28-17-6. Regional and local long-term care ombudsman programs.

A. In carrying out the duties of the office, the state ombudsman may designate an entity as a regional or local ombudsman entity, and may designate an employee or

volunteer to represent the entity. An individual so designated shall, in accordance with the policies and procedures established by the office and the agency:

(1) provide services to protect the health, safety, welfare and rights of residents;

(2) ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;

(3) identify, investigate and resolve complaints made by or on behalf of residents that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents;

(4) represent the interests of residents before government agencies and seek administrative, legal and other remedies to protect the health, safety, welfare and rights of the residents;

(5) review and, if necessary, comment on any existing and proposed laws, regulations and other government policies and actions, that pertain to the rights and well-being of residents;

(6) facilitate the ability of the public to comment on the laws, regulations, policies and actions;

(7) support the development of resident and family councils; and

(8) carry out other activities that the ombudsman determines to be appropriate.

B. To be eligible to be designated as regional or local ombudsman entities, and individuals eligible to be designated as representatives of such entities, the entities shall:

(1) have demonstrated capability to carry out the responsibilities of the office;

(2) be free of conflicts of interest;

(3) in the case of the entities, be public or nonprofit private entities; and

(4) meet such additional requirements as the state ombudsman may specify.

History: Laws 1989, ch. 208, § 6; 1997, ch. 257, § 4.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, rewrote the section to such an extent that a detailed comparison would be impracticable.

28-17-7. Training and certification.

A. The state ombudsman shall ensure that office staff, including volunteers and other representatives of the office, are trained in:

(1) federal, state and local laws, regulations and policies with respect to long-term care facilities in the state;

(2) investigative techniques; and

(3) such other matters as the agency deems appropriate.

B. The state ombudsman shall develop procedures for the certification of ombudsmen.

C. No officer, employee or other representative of the office shall investigate any complaint filed with the office unless such person is certified by the office.

History: Laws 1989, ch. 208, § 7.

28-17-8. Investigation and resolution of complaints.

The office shall investigate and seek to resolve complaints and concerns communicated by or on behalf of patients, residents or clients of any long-term care facility. The office may initiate investigations based on its observations of the conditions in a long-term care facility. If the office does not investigate a complaint, the complainant shall be notified of the decision not to investigate and the reasons for the decision.

History: Laws 1989, ch. 208, § 8.

28-17-9. Referrals.

A. When abuse, neglect or exploitation of a patient, resident or client of a long-term care facility is suspected, the office shall make a referral to adult protective services and licensing and certification, where appropriate. The office shall coordinate with adult protective services and licensing and certification pursuant to any investigation of abuse, neglect or exploitation undertaken by those agencies.

B. The following state agencies or boards shall endeavor to give priority to any complaint referred to them by the office:

(1) licensing and certification;

(2) the children, youth and families department;

(3) the New Mexico board of medical examiners;

(4) the board of nursing;

(5) the board of nursing home administrators; or

(6) the board of pharmacy.

The office shall coordinate its efforts with those of any state agency or board to which it makes investigation referrals.

C. Any state agency or board which responds to a complaint against a long-term care facility or licensed individual that was referred to the agency by the office shall forward to the office copies of related inspection reports and plans of correction, notice of any citations and sanctions levied against the long-term care facility or the licensed individual.

History: Laws 1989, ch. 208, § 9; 1997, ch. 257, § 5.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "children, youth and families" for "human services" in Paragraph B(2) and deleted "state" preceding "board" in Paragraph B(5).

28-17-10. Facility posting of ombudsman information.

Every long-term care facility shall post in a conspicuous location a notice of the name, address and phone number of the office. The name and phone number of the nearest designated program and that of the ombudsman assigned to that long-term care facility shall be posted, where applicable. A brief description of the services provided by the office and the designated program shall be included in the notice. The form of the notice shall be approved by the office.

History: Laws 1989, ch. 208, § 10.

28-17-11. Access to agency records.

Upon request, the office shall have access to records of any state or local government agency, including copies of all licensing and certification records relating to long-term care facilities as necessary to carry out its responsibilities under the Long-Term Care Ombudsman Act and which records are available to the patient, resident or client, except for records and information unavailable pursuant to Section 7-1-8 NMSA 1978.

History: Laws 1989, ch. 208, § 11; 1997, ch. 257, § 6.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, rewrote the section.

28-17-12. Access to long-term care facilities.

Representatives of the office shall have immediate access to any patient, resident or client for the purpose of effectively carrying out the provisions of the Long-Term Care Ombudsman Act.

History: Laws 1989, ch. 208, § 12.

28-17-13. Access to records of patients, residents or clients.

A. In order for the office to carry out its responsibilities, including conducting investigations, under the Long-Term Care Ombudsman Act, the office shall have full and immediate access to readily available medical, personal, financial and other nonmedical records, which include administrative records, policies, procedures or documents that concern, involve or pertain to a resident's diet, comfort, health, safety or welfare, but do not include internal quality assurance and risk management reports, of a patient, resident or client of a long-term care facility that are retained by the facility or the facility's parent corporation or owner. If the records are not readily available, they are to be provided to the office within twenty-four hours of the request. If the patient, resident or client:

(1) has the ability to consent in writing, access may only be obtained by the written consent of the patient, resident or client;

(2) is unable to consent in writing, oral consent may be given in the presence of a third party as witness;

(3) has a legally appointed surrogate decision maker authorized to approve review of records, the office shall obtain the permission of the surrogate decision maker for review of the records, unless any of the following apply:

(a) the existence of the surrogate decision maker is unknown to the office or the facility;

(b) the surrogate decision maker cannot be reached within five working days;

(c) access to the records is necessary to investigate or evaluate a complaint; or

(d) the surrogate decision maker refuses to give the permission and a representative of the office has reasonable cause to believe that the surrogate decision maker is not following the wishes of the resident; and

(4) is unable to express written or oral consent and there is no surrogate decision maker or the notification of the surrogate decision maker is not applicable for reasons set forth in Paragraph (3) of this subsection or the patient, resident or client is deceased, inspection of records may be made by employees of the office, ombudsman coordinators and by ombudsmen approved by the ombudsman coordinator or the state ombudsman.

B. Copies of records may be reproduced by the office. If investigation of records is sought pursuant to this section, the ombudsman shall upon request produce a statement signed by the ombudsman coordinator or state ombudsman authorizing the ombudsman to review the records. Facilities providing copies of records pursuant to this section may charge the office for the actual copying cost for each page copied.

C. Upon request by the office, a long-term care facility shall provide to the office the name, address and telephone number of the guardian, conservator, attorney-in-fact, legal representative or next-of-kin of any patient, resident or client and a copy of any document granting legal decision-making power over a resident.

D. The long-term care facility and personnel who disclose records pursuant to this section shall not be liable for the disclosure.

E. In order to carry out its responsibilities as a health oversight agency, the office shall establish procedures to protect the confidentiality of records obtained pursuant to this section and in accordance with the federal Health Insurance Portability and Accountability Act of 1996 regulations.

History: Laws 1989, ch. 208, § 13; 1997, ch. 257, § 7; 2003, ch. 109, § 1.

ANNOTATIONS

Cross references. — For the federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. 300gg et seq.

The 2003 amendment, effective June 20, 2003, rewrote Subsection A; inserted "or evaluate" in Subparagraph A(3)(c); added the Subparagraph A(3)(d) designation; in Subsection E, added "In order to carry out its responsibilities as a health oversight agency, the" at the beginning, and added "and in accordance with the federal Health Insurance Portability and Accountability Act of 1996 regulations" at the end.

The 1997 amendment, effective July 1, 1997, substituted "surrogate decision maker" for "guardian or conservator" and "guardianship or conservatorship" throughout the section; substituted "residents" for "resident" in the section heading; substituted "has a

legally appointed surrogate decision maker authorized" for "is under New Mexico guardianship or conservatorship that provides the guardian or conservator with the authority" in Paragraph A(3); added Subparagraph A(3)(c); inserted "of records" near the beginning of Subsection B; and added the language beginning "and a copy" at the end of Subsection C.

28-17-14. Confidentiality of information.

A. The files and records of the office may be disclosed only for purposes of fulfilling the duties of the office pursuant to Subsection C of Section 28-17-4 NMSA 1978 at the discretion of the state ombudsman or the state ombudsman's designee. All state ombudsman files and records pertaining to clients, patients and residents are confidential and not subject to the provisions of the Inspection of Public Records Act [Chapter 14, Article 3 NMSA 1978]. The state ombudsman shall not disclose the identity of any complainant, resident, client or patient about whom the office maintains files or records unless:

(1) the complainant, resident, client or patient or the legal representative of that person consents in writing to the disclosure;

(2) the complainant, resident, client or patient gives oral consent that is documented immediately in writing by a representative of the office;

(3) disclosure is necessary for the provision of ombudsman services to the patient, resident or client and the patient, resident or client is unable to express written or oral consent; or

(4) disclosure is ordered by the court.

B. The director shall have access to the records and files of the office to verify the effectiveness and quality of the program where the identity of any complainant, witness, patient, resident or client is not disclosed.

History: Laws 1989, ch. 208, § 14; 1997, ch. 257, § 8; 2003, ch. 109, § 2.

ANNOTATIONS

The 2003 amendment, effective June 20, 2003, in Subsection A, deleted "of the ombudsman" preceding "pursuant to Subsection C", substituted "the state ombudsman's designee" for "person designated by him" following "state ombudsman or", inserted the second sentence, substituted "resident, client or patient" for "or resident" following "of any complainant"; rewrote Paragraph A(1); substituted "resident, client or patient" for "or resident" near the beginning of Paragraph A(2); and deleted "ombudsman" following "and quality of the" in Subsection B.

The 1997 amendment, effective July 1, 1997, rewrote Subsection A; deleted former Subsection B relating to access of complainants, witnesses, patients, residents or clients to records and files; and redesignated former Subsection C as Subsection B.

28-17-15. Conflict of interest.

The agency shall ensure that:

A. no individual or a member of the immediate family of an individual involved in the designation of the ombudsman or the designation of a regional or local ombudsman is subject to a conflict of interest;

B. no officer or employee of the office, ombudsman coordinator or representative, or a member of their immediate family, is subject to a conflict of interest; and

C. any ombudsman:

(1) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(2) does not have an ownership or investment interest, represented by equity, debt or other financial relationship, in a long-term care facility or a long-term care service;

(3) is not employed by, or participating in the management of, a long-term care facility; and

(4) does not receive, or have the right to receive, directly or indirectly, remuneration in cash or in kind under a compensation arrangement with an owner or operator of a long-term care facility.

History: Laws 1989, ch. 208, § 15; 1997, ch. 257, § 9.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, rewrote the section to such an extent that a detailed comparison would be impracticable.

28-17-16. Representatives of the office.

Any regional or local ombudsman program designated by the office or any individual certified by the office, whether an employee or an unpaid volunteer, shall be treated as a representative of the office.

History: Laws 1989, ch. 208, § 16.

28-17-17. Immunity from liability.

No representative of the office shall be liable under state law for the good faith performance of official duties pursuant to the Long-Term Care Ombudsman Act.

History: Laws 1989, ch. 208, § 17.

28-17-18. Availability of legal counsel.

The agency shall ensure that:

A. adequate legal counsel is available and is able, without conflict of interest, to:

(1) provide advice and consultation needed to protect the health, safety, welfare and rights to residents; and

(2) assist the ombudsman and representatives of the office in the performance of the official duties of the ombudsman and representatives;

B. representation is provided to any representative of the office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the ombudsman or such a representative; and

C. the office pursues administrative, legal and other appropriate remedies on behalf of residents.

History: Laws 1989, ch. 208, § 18; 1997, ch. 257, § 10.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, rewrote the section.

28-17-19. Interference with the office and retaliation prohibited; penalty; civil; appeal.

A. No person shall willfully interfere with the lawful actions of the office, including the request for immediate entry into a long-term care facility.

B. No person shall institute discriminatory, disciplinary or retaliatory action against any resident, employee or other person for filing a complaint, providing information to or otherwise cooperating with a representative of the office.

C. Any person who violates Subsection A of this section shall be subject to a civil penalty of up to five thousand dollars ($5,000) per occurrence. Any person who violates Subsection B of this section shall be subject to a civil penalty of up to ten thousand

dollars ($10,000) per occurrence. The agency may assess and collect the penalty after notice and an opportunity for hearing, before a hearing officer designated by the agency to hear the matter, upon a determination that a person willfully interfered with the office or discriminated, disciplined or retaliated against an individual who communicated or disclosed information to the office in good faith pursuant to Subsection A or B of this section. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. However, if the violation is against a person covered by the Personnel Act [Chapter 10, Article 9 NMSA 1978], the office shall refer the matter to the agency employing the person for disciplinary action.

D. Any party may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

History: Laws 1989, ch. 208, § 19; 1997, ch. 257, § 11; 1998, ch. 55, § 39; 1999, ch. 265, § 41.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, substituted "Subsection A or B" for "Subsections A and B" in the third sentence of Subsection C and substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection D.

The 1998 amendment, effective September 1, 1998, in the section heading, inserted "; appeal"; in Subsection B, substituted "a" for "any"; and rewrote Subsection D.

The 1997 amendment, effective July 1, 1997, rewrote Subsection B and, in Subsection C, substituted "five thousand dollars ($5,000)" and "ten thousand dollars ($10,000)" for "two thousand five hundred dollars ($2,500)" and "five thousand dollars ($5,000)", respectively, and made stylistic changes.

ARTICLE 18
Education of the Handicapped

28-18-1. Department designation; authorization; payment system.

A. The department of health is designated as the lead state agency for the development and administration of a statewide system of comprehensive, coordinated, multidisciplinary, interagency early intervention services for eligible children with or at risk of developmental delay and their families. The program shall be known as the "family, infant, toddler program".

B. The parent may choose whether the parent's eligible child shall participate in the family, infant, toddler program.

C. The public education department, the human services department, the children, youth and families department and other publicly funded services shall collaborate with the department of health and continue to provide all services within their respective statutory responsibilities to eligible children. State and local interagency agreements shall delineate responsibility for provisions of the family, infant, toddler program.

D. The department of health shall establish a payment system that shall maximize funds from appropriate federal, state, local and private sources to support the family, infant, toddler program.

E. The secretary of health shall meet the requirements of the Individuals with Disabilities Education Act, 20 U.S.C., Sections 1475(c) and 1476(a), contingent upon voluntary participation by the state, including:

(1) establishing policies and adopting rules necessary to comply with those sections of that act;

(2) implementing procedures to ensure that services are provided to eligible children in a timely manner;

(3) making arrangements for the provisions of the family, infant, toddler program;

(4) carrying out the general administration, supervision and monitoring of the family, infant, toddler program;

(5) resolving complaints concerning the family, infant, toddler program;

(6) maintaining and expanding state and local coordination and interagency agreements pertaining to the family, infant, toddler program;

(7) identifying and coordinating all available resources for early intervention services for the family, infant, toddler program; and

(8) establishing requirements for qualified personnel involved in the family, infant, toddler program.

F. As used in this section:

(1) "early intervention services" means services that are designed to meet the developmental needs of eligible children, including physical development, communications development, adaptive development, social and emotional development or sensory development; and

(2) "eligible child" means infants and toddlers between the ages of birth and thirty-six months with developmental delay or who are at risk of delay according to specific criteria established by the department of health.

History: Laws 1990, ch. 4, § 1; 1993, ch. 34, § 1; 1993, ch. 178, § 1; 1995, ch. 69, § 4; 2011, ch. 166, § 2.

ANNOTATIONS

The 2011 amendment, effective July 1, 2012, eliminated the option of having a child who is enrolled in family, infant, toddler program remain in the program during the child's third year and the option of having a child with a disability who is enrolled in a preschool program receive special education services during the child's third year.

The 1995 amendment, effective June 16, 1995, added Subsection C, redesignated former Subsections C through F as Subsection D through G, and inserted "Sections" and deleted "et seq." preceding "contingent" in the introductory language of Subsection F.

The 1993 amendment, effective June 18, 1993, rewrote the section to the extent that a detailed comparison was impracticable.

28-18-2. Custodian of funds.

The department of health is designated as the custodian of all money that may be received by the state of New Mexico from any appropriation made by the congress of the United States for the purpose of implementing the Individuals with Disabilities Education Act, 20 U.S.C. 1475(c) and 1476(a), et seq.

History: Laws 1990, ch. 4, § 2; 1993, ch. 34, § 2; 1993, ch. 178, § 2.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "department of health" for "health and environment department" and "the Individuals with Disabilities Education Act, 20 U.S.C. 1475(c) and 1476(a), et seq." for "Section 1471, et seq. of the federal Education of the Handicapped Act".

Laws 1993, ch. 34, § 2 and Laws 1993, ch. 178, § 2 enacted identical amendments to this section.

ARTICLE 19
Martin Luther King, Jr. Commission

28-19-1. Martin Luther King, Jr. commission; created; defined; members; terms; compensation.

A. The "Martin Luther King, Jr. commission" is created. The purpose of the commission is to develop, promote, coordinate and review statewide plans and activities for the annual commemoration and celebration of the birthday of Martin Luther King, Jr. in accordance with Section 12-5-2 NMSA 1978.

B. As used in Sections 1 through 4 of this act [28-19-1 to 28-19-4 NMSA 1978], "commission" means the Martin Luther King, Jr. commission.

C. The commission shall be comprised of thirteen members as follows:

(1) four members appointed by the governor;

(2) one member appointed by the president pro tempore of the senate;

(3) one member appointed by the minority leader of the senate;

(4) one member appointed by the speaker of the house of representatives;

(5) one member appointed by the minority leader of the house of representatives;

(6) the state treasurer or his designee;

(7) the secretary of state or his designee;

(8) a native American appointed by the New Mexico office of Indian affairs [Indian affairs department];

(9) the director of the human rights division of the labor department or his designee; and

(10) the chairman of the New Mexico state corporation commission [public regulation commission] or his designee.

D. Members of the commission shall be appointed initially for terms as follows: seven members shall be appointed for terms of two years and six members shall be appointed for terms of four years. The initial terms shall be selected by random drawing. After the expiration of the initial terms, all members shall be appointed for four-year terms. The initial commission shall be appointed within forty-five days of the effective date of this act. Vacancies resulting from the death or resignation of a member shall be filled by appointment by the commission chairman for the unexpired portion of the term of the member creating the vacancy. In filling any vacancy, the commission chairman

may accept recommendations from the person who originally appointed the member creating the vacancy.

E. The members of the commission shall receive no compensation for their service.

F. The members of the commission shall select a chairman from among the members of the commission.

G. The commission shall appoint an executive director to coordinate all activities on the commission's behalf.

History: Laws 1991, ch. 252, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

Laws 2004, ch. 24, § 17 provided that statutory references to the New Mexico office of Indian affairs be changed to the Indian affairs department pursuant to an executive order issued in accordance with Laws 2003, Chapter 403.

28-19-2. Martin Luther King, Jr. fund; created.

A. There is created within the state treasury for the commission a fund that shall be designated as the "Martin Luther King, Jr. fund" that shall consist of appropriations, endowments and bequests.

B. Money from the fund shall be disbursed upon warrant of the secretary of finance and administration pursuant to vouchers submitted by the executive director of the commission for the purpose of carrying out the provisions of this act [28-19-1 to 28-19-4 NMSA 1978].

History: Laws 1991, ch. 252, § 2.

28-19-3. Duties of the commission.

The duties and powers of the commission shall include, but not be limited to, the following:

A. to develop a plan for the commemoration and celebration of the official legal holiday honoring Martin Luther King, Jr.;

B. to develop and submit to the governor and the legislature recommendations for specific commemorative activities to be undertaken by the state for the Martin Luther King, Jr. holiday;

C. to coordinate state plans and activities with federal plans and activities for the commemoration and celebration of Martin Luther King, Jr.'s birthday;

D. to develop, with other agencies of the state, an interpretive program that explores the historical, social, political and cultural themes associated with the life and works of Martin Luther King, Jr.;

E. to develop and acquire interpretive materials and publications on the significance of Martin Luther King, Jr.'s work and develop a commemorative program for state employees, school children and the general public;

F. to create a process to facilitate the implementation of the master plan project and other recommendations made by the commission;

G. to prepare and provide to the general public advice, assistance and information on the Martin Luther King, Jr. holiday activities recommended by the commission;

H. to submit other studies, reports and recommendations to the governor and the legislature as are necessary with respect to activities for the continued commemoration and celebration of Martin Luther King, Jr.; and

I. to accept endowments and bequests for the Martin Luther King, Jr. fund.

History: Laws 1991, ch. 252, § 3.

28-19-4. Commission report.

The commission shall make an initial report to the governor and the legislature of its findings, conclusions, proposals and recommendations for the observance of the Martin Luther King, Jr. holiday within ninety days of the effective date of this act. The commission shall submit an annual report of its activities to the legislature no later than December 1 of each year. The first annual report shall be submitted no later than December 1, 1989.

History: Laws 1991, ch. 252, § 4.

ANNOTATIONS

Compiler's notes. — The phrase "effective date of this act" means April 4, 1991, the effective date of Laws 1991, Chapter 252.

ARTICLE 20
Nursing Mothers

28-20-1. [Right to breastfeed.]

A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present.

History: Laws 1999, ch. 117, § 1.

ANNOTATIONS

Cross references. — For indecent exposure, *see* 30-9-14 NMSA 1978.

Effective dates. — Laws 1999, ch. 117 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

28-20-2. Use of a breast pump in the workplace.

A. In order to foster the ability of a nursing mother who is an employee to use a breast pump in the workplace, an employer, including the state and its political subdivisions, shall provide:

(1) a space for using the breast pump that is:

(a) clean and private;

(b) near the employee's workspace; and

(c) not a bathroom; and

(2) flexible break times.

B. An employer shall not be liable for:

(1) storage or refrigeration of breast milk;

(2) payment for a nursing mother's break time in addition to established employee breaks; or

(3) payment of overtime while a nursing mother is using a breast pump.

History: Laws 2007, ch. 18, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 18, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

ARTICLE 21
African American Affairs

28-21-1. Short title.

This act [28-21-1 to 28-21-4 NMSA 1978] may be cited as the "African American Affairs Act".

History: Laws 1999, ch. 163, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

28-21-2. Definitions.

As used in the African American Affairs Act:

A. "fund" means the office on African American affairs fund; and

B. "office" means the office on African American affairs.

History: Laws 1999, ch. 163, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

28-21-3. Office created; powers and duties.

A. The "office on African American affairs" is created and attached administratively to the human services department.

B. The governor shall appoint a director, who shall work at the pleasure of the governor. The director shall employ other necessary employees, who shall be subject to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

C. The office, in cooperation with the Martin Luther King, Jr. commission, shall:

(1) study issues important to African Americans, including history and culture; education, scholarships and other financial assistance for education and career development; economic and social problems and issues such as jobs, housing, discrimination, family support, youth idleness and crime; and health care, maternal and child health, teen pregnancy, access and other health issues;

(2) secure recognition of African Americans' accomplishments and contributions to New Mexico and the United States;

(3) cooperate with and assist public and private entities dealing with issues important to African Americans;

(4) direct the operations of the office;

(5) where appropriate, conduct periodic conferences throughout the state to inform African Americans of the opportunities available to them through state and private sources, to encourage them to share their history and culture with other New Mexicans and participate in the social and political processes of their communities and to learn from conference participants their needs and problems; and

(6) otherwise act as an advocate for African American citizens of New Mexico.

D. Additionally, the office shall:

(1) act as a clearinghouse for information important to the African American community;

(2) function as the coordinating office for all services and activities of state agencies and programs pertaining to African Americans;

(3) encourage funding and implementation of training programs and other opportunities for African Americans;

(4) promote and develop programs about community resources designed to meet the needs of African Americans;

(5) prepare and submit a budget for the office; and

(6) publish an annual report on the activities and services of the office.

E. The office may:

(1) adopt and promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to carry out the duties of the office;

(2) accept gifts, grants, donations, bequests and devises from any source to be used to carry out its duties; and

(3) enter into contracts.

History: Laws 1999, ch. 163, § 3.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

Temporary provisions. — Laws 2014, ch. 68, § 1, effective May 21, 2014, provided:

A. By July 1, 2014, the director of the office on African American affairs shall create and implement a one-year pilot program in Bernalillo county. The pilot program shall seek to reduce infant mortality and enhance maternal health among African American residents.

B. The office on African American affairs shall partner with competent direct service providers to employ and track implementation of a prenatal health care model known as "centering" among pregnant African American women that has been proven nationally to reduce infant mortality and premature birth rates.

C. The office on African American affairs shall design and implement a culturally competent tool for providing health care education and outreach to pregnant African American women living in Bernalillo county. Women participating in the pilot program shall be offered solutions for enhancing their health during pregnancy and reducing the risk of infant mortality.

D. The office on African American affairs shall establish benchmarks for the pilot program. It shall collect and analyze qualitative data about the pilot program's outcomes and compare these outcomes to the benchmarks.

E. By November 1, 2015, the director of the office on African American affairs shall report the findings and recommendations arising from the pilot program to the governor, the secretary of health and the legislative health and human services committee.

28-21-4. Fund created; administration.

The "office on African American affairs fund" is created in the state treasury. The fund shall consist of gifts, grants, donations and bequests. Money in the fund at the end of any fiscal year shall not revert. The fund shall be administered by the office, and

disbursements from the fund shall be made on warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the director of the office or his authorized representative.

History: Laws 1999, ch. 163, § 4.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

ARTICLE 22
Religious Freedom Restoration

28-22-1. Short title.

Sections 1 through 5 [28-22-1 to 28-22-5 NMSA 1978] of this act may be cited as the "New Mexico Religious Freedom Restoration Act".

History: Laws 2000 (2nd S.S.), ch. 17, § 1.

ANNOTATIONS

Effective dates. — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

The New Mexico Religious Freedom Restoration Act does not apply to actions between private parties. — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds, defendant filed a discrimination complaint against plaintiff with the human rights commission; and the human rights commission determined that plaintiff had violated the act by discriminating against defendant on the basis of defendant's sexual orientation, the New Mexico Religious Freedom Restoration Act, Section 28-22-1 NMSA 1978 et seq., did not apply to the enforcement of the Human Rights Act by the commission, because the commission acted as an administrative tribunal, not as a party to the suit between plaintiff and defendant as private parties. Elane Photography, LLC v. Willock, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

The New Mexico Religious Freedom Restoration Act, Section 28-22-1 NMSA 1978 et seq. applies only in cases that involve a governmental agency as a adverse party. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008.

The act does not apply in cases that involve non-governmental parties. — Where defendant filed a discrimination claim with the human rights commission alleging that plaintiff violated the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of religion because the act forced plaintiff to photograph same-sex marriages in violation of plaintiff's owner's religious belief that marriage is the union of one man and one woman, the New Mexico Religious Freedom Restoration Act, Section 28-22-1 NMSA 1978 et seq., did not apply to the litigation between plaintiff and defendant because neither party was a governmental agency. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008.

28-22-2. Definitions.

As used in the New Mexico Religious Freedom Restoration Act:

A. "free exercise of religion" means an act or a refusal to act that is substantially motivated by religious belief; and

B. "government agency" means the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities.

History: Laws 2000 (2nd S.S.), ch. 17, § 2.

ANNOTATIONS

Effective dates. — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

28-22-3. Religious freedom protected; exceptions.

A government agency shall not restrict a person's free exercise of religion unless:

A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and

B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

History: Laws 2000 (2nd S.S.), ch. 17, § 3.

ANNOTATIONS

Effective dates. — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

The criminal sexual contact of a minor and contributing to the delinquency of a minor statutes do not violate the Religious Freedom Restoration Act. — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor and of contributing to the delinquency of a minor based on unclothed experiences with two teenage children; and defendant claimed that because defendant believed that touching the children was a religious act, defendant was not guilty of committing a crime and that the criminal sexual contact of a minor statute, Section 30-9-13 NMSA 1978 and the contributing to the delinquency of a minor statute, Section 30-6-3 NMSA 1978, violate the Religious Freedom Restoration Act, because the statutes are laws of general applicability that do not directly discriminate against or among religions, the protection of minors from sexual abuse and delinquency is a compelling governmental interest, and the statutes are the least restrictive means of achieving the government's goal of protecting minors from sexual abuse and delinquency, the statutes do not violate the act. State v. Bent, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

28-22-4. Private remedies.

A. A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency, including:

(1) injunctive or declaratory relief against a government agency that violates or proposes to violate the provisions of the New Mexico Religious Freedom Restoration Act; and

(2) damages pursuant to the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978], reasonable attorney fees and costs.

B. Immunity from liability of the government agency and its employees is waived for an action brought pursuant to this section.

History: Laws 2000 (2nd S.S.), ch. 17, § 4.

ANNOTATIONS

Effective dates. — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

28-22-5. Construction of act.

Nothing in the New Mexico Religious Freedom Restoration Act authorizes a government agency to burden a person's free exercise of religion. The protection of the free exercise of religion granted in that act is in addition to the protections granted by federal law and the state and federal constitutions. The New Mexico Religious Freedom Restoration Act does not affect the grant of benefits or tax exemptions to religious organizations nor does it impair any other exemptions granted by law.

History: Laws 2000 (2nd S.S.), ch. 17, § 5.

ANNOTATIONS

Effective dates. — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

ARTICLE 23
Fair Pay for Women

28-23-1. Short title.

This act [28-23-1 to 28-23-6 NMSA 1978] may be cited as the "Fair Pay for Women Act".

History: Laws 2013, ch. 12, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

28-23-2. Definitions.

As used in the Fair Pay for Women Act:

A. "commission" means the human rights commission;

B. "director" means the chief of the human rights bureau of the labor relations division of the workforce solutions department;

C. "employ" means suffer or permit to work;

D. "employee" means any individual employed by an employer;

E. "employer" means a person employing four or more employees and any person acting for an employer;

F. "unpaid wage" means the difference between the wages paid to the employee and the wages that would have been paid to the employee had the discrimination not occurred; and

G. "wage" means compensation for performance of services by an employee for an employer whether paid by the employer or another person, including cash value of all compensation paid in any medium other than cash.

History: Laws 2013, ch. 12, § 2.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

28-23-3. Prohibition on paying employees less for same work.

A. No employer shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in the establishment at a rate less than the rate that the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility and that are performed under similar working conditions, except where the payment is made pursuant to a:

(1) seniority system;

(2) merit system; or

(3) system that measures earnings by quantity or quality of production.

B. An employer shall not reduce the wage of an employee to comply with this section.

C. No agreement between an employer and an employee for a specific wage in violation of the Fair Pay for Women Act shall prevent the employee from raising a claim based on a violation of the Fair Pay for Women Act.

History: Laws 2013, ch. 12, § 3.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

28-23-4. Grievance procedure.

A. A person claiming to be aggrieved by an unlawful discriminatory practice in violation of the Fair Pay for Women Act may:

(1) maintain an action to establish liability and recover damages and injunctive relief in any court of competent jurisdiction by any one or more employees on behalf of the employee or employees or on behalf of other employees similarly situated; or

(2) seek relief under the Human Rights Act [Chapter 28, Article 1 NMSA 1978] pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978.

B. The court in any action brought under this section shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of the action and reasonable attorney fees to be paid by the defendant. In any proceedings brought pursuant to the provisions of this section, the employee shall not be required to pay any filing fee or other court costs necessarily incurred in such proceedings.

C. The court in any action brought under this section may order appropriate injunctive relief, including requiring an employer to post in the place of business a notice describing violations by the employer as found by the court or a copy of a cease and desist order applicable to the employer.

D. An action arising under the Fair Pay for Women Act shall be brought no later than two years from the last date of the employee's employment.

E. A person claiming to be aggrieved by an unlawful discriminatory practice in violation of the Fair Pay for Women Act need not exhaust state administrative remedies.

F. The initiation of an administrative process under the Human Rights Act pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978 shall toll the statute of limitations for initiating a claim under the Fair Pay for Women Act.

History: Laws 2013, ch. 12, § 4.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

28-23-5. Retaliation prohibited.

It is a violation of the Fair Pay for Women Act for an employer or any other person to discharge, demote, deny promotion to or in any other way discriminate against an employee in the terms or conditions of employment in retaliation for the person asserting a claim or right pursuant to the Fair Pay for Women Act or assisting another person to do so, or for informing another person about employment rights or other rights provided by law.

History: Laws 2013, ch. 12, § 5.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

28-23-6. Enforcement; penalties; remedies.

A. An employer who violates a provision of the Fair Pay for Women Act shall be liable to the affected employee for damages and equitable relief, including employment, reinstatement and promotion. Damages shall be calculated on the basis of:

(1) the affected employee's unpaid wages and the damages from retaliation;

(2) all other actual damages; and

(3) treble damages.

B. The court may, in its sound discretion, not award treble damages or award any amount thereof not to exceed the amount specified in this section if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that the employer had reasonable grounds for believing that the employer's act or omission was not a violation of the Fair Pay for Women Act.

C. An employer who violates a provision of the Fair Pay for Women Act may also be liable to the employee for punitive damages.

D. Recovery of unpaid wages is limited to six years prior to the date of the last violation of the Fair Pay for Women Act.

History: Laws 2013, ch. 12, § 6.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.