WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

Do not mark in this box
Filing Date

FILED

Jun 28 11 48 AM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Human Rights Commision TITLE NUMBER: 77

CITE AUTHORITY: Section 5-11-8(h); 29A-3-1 et. seq.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES [X] NO [ ]

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 77 CSR 1

TITLE OF RULE BEING AMENDED: Legislative Rules West Virginia Human Rights Commission Hard.capped

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY:

TITLE OF RULE BEING FILED AS AN EMERGENCY:

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The Human Rights Commission must have their regulations in conformity with the Americans with Disabilities Act regulations this year or the EEOC will not contract with the Commission as a substantially equivalent agency.

5.40

Use additional sheets if necessary

Signature

FISCAL NOTE FOR PROPOSED EMERGENCY RULE

A fiscal note is inapplicable to the West Virginia Human Rights Commission's amendment of WV 77 CSR 1 "Rules Regarding Discrimination Against the Handicapped," filed 28 June 1993.

Brief Summary of Proposed Emergency Rule

The West Virginia Human Rights Commission is amending WV 77 CSR 1 "Rules Regarding Discrimination Against the Handicapped," filed 28 June 1993, in order to substantially conform to the Americans with Disabilities Act of 1990 and to obtain substantial equivalency status with the Equal Employment Opportunity Commission.

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Jan 28 11 48 AM '93

OFFICE OF WEST VIRGINIA SECRETARY OF STATE

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 1

RULES REGARDING DISCRIMINATION AGAINST ~~THE HANDICAPPED~~ INDIVIDUALS WITH DISABILITIES

§77-1-1. General.

1.1. Scope -- The following legislative regulations of the West Virginia Human Rights Act set forth rules for complying with the ~~handicap~~ disability provisions of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., and are intended to interpret and implement the provisions of the West Virginia Human Rights Act, particularly the 1989 amendments relating to ~~handicap~~ disability discrimination, and to assist all persons in understanding their rights, obligations, and duties under the law.

In these regulatioins, the word "handicap" and its derivations are replaced by the word "disability" and its derivations in order to conform with the Americans with Disabilities Act of 1990 §§101-108, 42 U.S.C. §§ 12111-12117 even though the provisions of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. uses the term "handicap."

1.2. Authority -- These regulations are issued under authority of W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq.

1.3. Filing Date -- These regulations are promulgated on the _____ day of _____, 1993, and filed on the _____ day of _____, 1993, in the Secretary of State's Office.

1.4. Effective Date -- These regulations become effective on the _____ day of _____, 1993.

1.5. Repeal of Former Rule -- This legislative rule repeals and replaces WV 77 CSR 1 "Rules Regarding Discrimination Against the Handicapped" filed 20 July 1982 and effective 1 August 1982.

§77-1-2. Definitions.

2.1. ~~"Handicapped Person"~~ "Disability" means, ~~a person who~~ with respect to an individual--:

2.1.1. ~~Has~~ a mental or physical impairment which substantially limits one or more of a person's major life activities; or

2.1.2. ~~Has~~ a record of such impairment; or

2.1.3. ~~Is~~ Being regarded as having such an impairment.

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This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat (as defined in Rule 4.8) to property or the safety of others.

2.2. "Physical Impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.

2.3. "Mental Impairment" means any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "mental impairment" shall not include:

2.3.1. Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

2.3.2. Compulsive gambling, kleptomania, or pyromania;

2.3.3. Psychoactive substance use disorders resulting from current illegal use of drugs.

2.4. "Physical or Mental Impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

2.5. "Substantially Limits" means interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flue, or sprains or minor injuries.

2.6. "Major Life Activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, transportation, and adapting to housing.

2.7. "Has a Record of Such Impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

2.8. "Is Regarded as Having an Impairment" means any of the following:

2.8.1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by another as having such a limitation;

2.8.2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

2.8.3. Has none of the impairments defined above but is treated by another as having such an impairment.

§77-1-3. Verification of ~~Handicap~~ Disability.

3.1. If, at the time of public hearing, there is a question or dispute as to whether the complainant is an ~~handicapped~~ individual with a disbility person, or as to the nature of the impairment, the burden of proof shall be upon the complainant to present by reasonable medical opinions or records:

3.1.1. The nature of the ~~handicapping condition~~ disability;

3.1.2. Any limitations caused by said ~~handicap~~ disability; and

3.1.3. Any restrictions upon the ~~handicapped~~ individual's work activity. If the complainant prevails, the costs of obtaining and presenting such medical evidence may be assessed against the respondent.

3.2. It is intended that medical evidence will be required only in cases where there is an actual dispute as to the nature or medical implications of the ~~handicapping condition~~ disability.

§77-1-4. Employment Discrimination Prohibited.

4.1. No employer shall, on the basis of ~~handicap~~ disability, subject any qualified ~~handicapped person~~ individual with a disability to discrimination in employment as it relates to:

4.1.1. Recruitment, advertising, and processing applications;

4.1.2. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

4.1.3. Rates of pay or any other form of compensation or changes in compensation;

4.1.4. Job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists;

4.1.5. Leaves of absence, sick leave, or any other leave;

4.1.6. Fringe benefits, such as medical, hospital, accident, disability, life insurance, retirement benefits, unemployment benefits, and profit sharing and bonus plan, whether or not administered by the recipient;

4.1.7. Selection and/or financial support for training, including apprenticeship, professional meetings, conferences, and other related activities and leaves of absence to pursue training;

4.1.8. Employer-sponsored activities, including social or recreational programs;

4.1.9. Any other terms, conditions, or privileges of employment.

4.2. "Qualified ~~Handicapped Person~~ Individual with a Disability" means an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job, ~~in question~~ and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description may be considered evidence of the essential functions of the job. A job function may be considered essential for several reasons, including but not limited to the following:

4.2.1. The function may be essential because the reason the employment position exists is to perform that function;

4.2.2. The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

4.2.3. The function may be essential because of the amount of time spent on the job performing the function.

4.3. "Able and Competent" means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a ~~serious~~ direct threat (as defined in Rule 4.8) of injury to the health and safety of either the individual, other employees, or the public.

4.4. "Reasonable Accommodation" means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an ~~handicapped~~ individual with a disability ~~employee~~ to be hired or to remain in the position for which he was hired. Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable a handicapped employee to remain in the position for which s/he was hired.

4.5. An employer shall make reasonable accommodation to the known physical or mental impairments of qualified ~~handicapped~~ individuals with a disabilities ~~applicants or employees~~ where necessary to enable a qualified ~~handicapped person~~ individual with a disability to perform the essential functions of the job. Reasonable accommodations include, but are not limited to:

4.5.1. Making faculties used by ~~handicapped employees~~ individuals with a disabilities, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by ~~handicapped workers~~ individuals with a disabilities;

4.5.2. Job restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent (as defined in Rule 4.3.) to perform, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions;

4.5.3. ~~Alteration of the amount or methods of training;~~ Appropriate adjustments or modifications of examinations, training materials or policies; and

4.5.4. The preparation of fellow workers for the ~~handicapped employee~~ individual with a disability, to obtain their understanding of the ~~handicapping~~ limitations of the disability and their cooperation in accepting other reasonable accommodations for the ~~handicapped employee~~ individual with a disability.

4.6. An employer shall not be required to make such accommodation if s/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his or her business. ~~In determining whether or not an accommodation would constitute an unreasonable burden upon the employer, the Commission shall consider:~~ The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in the following subparagraphs (4.6.1.-4.6.5.):

4.6.1. The overall financial resources of the employer; the overall size ~~and profitability~~ of the employer's

operation with respect to the number of its employees; the number, type, and location of its facilities;; ~~and/or~~

4.6.2. The nature of the employer's operation, including the composition, ~~and~~ structure, and functions of the employer's workforce; the geographic separateness, administrative, or fiscal relationship of the employer's facility or facilities; ~~and/or~~

4.6.3. The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as Division of Vocational Rehabilitation); the effect on expenses and resources, or the impact otherwise of such accommodation upon the employer's operation;

4.6.4. The possibility that the same accommodations may be able to be used by other prospective employees;

4.6.5. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W. Va. Code § 18-10F-1 et seq. Any changes or alterations required due to the failure of the employer (or his lessee, lessor, or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable.

4.7. Each ~~handicapped~~ individual's ability to perform a particular job must be assessed on an individual basis. An employer may refuse to hire or may discharge a qualified ~~handicapped person~~ individual with a disability, even after reasonable accommodation, the ~~handicapped person~~ individual is unable to perform the duties of the job without creating a substantial hazard to his/her health and safety or that of others. However, any such decision shall be used upon the individual ~~handicapped person~~'s actual abilities, and not upon general assumptions or stereotypes about persons with particular mental or physical ~~handicaps~~ disabilities.

4.8. In deciding whether an individual poses a ~~serious~~ direct threat ~~to his/her health and safety~~, the employer ~~must show~~ has the burden of demonstrating that a reasonable probability of a materially enhanced risk of substantial harm to the health or safety of others ~~the handicapped employee or handicapped applicant based on a consideration of the job requirements in light of that individual's handicap, and the work and medical history of the handicapped individual. The employer has the burden of demonstrating that his employment decision was based upon competent medical advice specific to the employment at issue~~ cannot be eliminated or reduced by reasonable accommodation. The employer's determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be

based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, factors to be considered include:

4.8.1. The duration of the risk;

4.8.2. The nature and severity of the potential harm;

4.8.3. The likelihood that the potential harm will occur; and

4.8.4. The imminence of the potential harm.

4.9. An employer shall not discriminate against an applicant or employee because of a ~~handicap~~ disability or impairment which is not presently job related but which may worsen and become job related in the future; Provided, that this section shall not be construed so as to impose an undue hardship on the employer. In determining whether the requirements of this section impose an undue hardship on the employer, the Commission shall consider:

4.9.1. The length, cost, and nature of training required for the job;

4.9.2. The length of time that is likely to elapse before the condition becomes job related;

4.9.3. The normal turnover for the position;

4.9.4. The factors listed in Rule 4.6.

4.10. West Virginia Code § 5-11-9 provides an exception to the prohibition of discrimination in employment when such discrimination is based on a bona fide occupational qualification (B.F.O.Q.). The Commission construes the B.F.O.Q. very narrowly and requires that, in order to establish a B.F.O.Q. which excludes all persons with a particular handicap, an employer must prove that all or virtually all persons with that particular ~~handicap~~ disability would be unable to perform the essential functions of the job involved.

4.11. The following are examples of actions which do not warrant application of the B.F.O.Q. exception and which constitute unlawful discrimination with respect to handicap:

4.11.1. Refusal to select an ~~handicapped~~ individual with a disability because of the preference (or assumptions about the preferences) of co-workers, customers, or clients;

4.11.2. Refusal to select an ~~handicapped~~ individual with a disability or a position because of uninsurability or increased cost of insurance (whether actual or anticipated).

4.12. The following is an example of a B.F.O.Q. based upon ~~handicap~~ disability which may be permitted:

4.12.1. Physical standards for employment which are directly related to safe performance of the job and are based upon complete factual information concerning working conditions and hazards, and essential physical requirements of each job.

4.13. When an individual ~~becomes handicapped~~ acquires a disbility in the course of employment, the employer shall, if possible through reasonable accommodation, continue the individual in the same position, or may reassign the employee to a new position for which s/he is qualified or for which, with training, s/he may become qualified. The requirements of this paragraph shall be interpreted in such a way as to be consistent with W. Va. Code § 23-5A-1, which prohibits employers from discriminating against employees because they have applied for or received Worker's Compensation benefits.

4.14. An employer shall offer ~~handicapped employees~~ individuals with a disabilities employees the same opportunity as non~~handicapped~~ disabled employees to obtain health and life insurance benefits, and no ~~handicapped person~~ individuals with a disabilities shall, on the basis of ~~handicap~~ disability, be denied health and life insurance benefits provided in connection with employment, unless otherwise authorized by law.

4.15. If an applicant is refused employment, or an employee is discriminated against in any term, condition, or privilege of employment, because of a ~~handicap~~ disability, burden shall be upon the employer to establish that the refusal or discrimination was based upon a bona fide occupational qualification, (as defined in Rule 4.10.) or that, even with reasonable accommodation, the employee would be unable safely and adequately to perform the essential functions of that job, or that employment of an ~~handicapped~~ individual with a disability would impose an undue hardship upon the employer under the circumstances described in ~~Paragraph~~ Rule 4.6.

§77-1-5. Pre-Employment And Employment Practices.

5.1. An employer, labor organization, or employment agency shall not make pre-employment inquiry of an applicant as to whether the applicant has a physical or mental impairment or as to the nature or severity of such impairment, except that an employer, labor organization, or employment agency may ask an applicant whether s/he has any physical or mental impairment that

might interfere with his/her ability to perform ~~the job applied for~~ job-related functions.

~~5.2 Pre-employment examinations relating to minimum physical standards for employment are lawful if:~~

~~5.2.1. The minimum physical standards are necessary for performance of the job for which the person has applied;~~

~~5.2.2. All applicants for the job are subjected to such an examination, regardless of whether they have been identified as handicapped.~~

5.2. An employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination if:

5.2.1. All entering employees are subjected to such an examination regardless of disability;

5.2.2. Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

5.2.2.A Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

5.2.2.B First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

5.2.2.C Government officials investigating compliance with this Act shall be provided relevant information on request; and

5.2.3. The results of such examination are used only in accordance with these regulations.

5.3. An employer shall not use any test or other selection criteria that discriminates against ~~handicapped persons~~ individuals with a disabilities unless:

5.3.1. The employer can demonstrate that the test or other criteria is job related for the job in question; and

5.3.2. The employer can demonstrate that there is not an alternate test or set of criteria that has less discriminatory impact.

5.4. An employer shall select and administer tests concerning employment so as to best ensure that the test results accurately reflect the applicant's job skills, aptitude, or whatever factor the test purports to measure, rather than measuring the applicant's impaired sensory, manual or speech skills, unless those skills are the ones the test purports to measure. The employer shall make reasonable accommodations for ~~handicapped applicants~~ individuals with a disabilities in testing, upon request, by providing such adaptive equipment as may be necessary and modifying testing procedures as appropriate. The employer shall supply such necessary and reasonable equipment for taking the test as the applicant shall request.

5.5. After commencement of employee's employment duties, an employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee has a disability or as to the nature or severity of the disability, unless:

5.5.1. Such examination or inquiry is shown to be job-related and consistent with business necessity; or

5.5.2. Such examination is a voluntary medical examin-nation, including voluntary medical histories, which are part of an employee health program available to employees at that work site; and

5.5.3. Information obtained under subparagraphs 5.5.1. and 5.5.2 regarding medical condition or history of any employee are subject to the requirements of subparagraphs 5.2.2. and 5.2.3. of Rule 5.2.

5.6. For purposes of this Act, a test to determine the illegal use of drugs shall not be considered a medical examination, and nothing in this Act shall be construed to encourage, prohibit, or authorize the conducting of testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

§77-1-6. Housing Discrimination Prohibited.

6.1. The following guidelines on discrimination in housing apply to owners, lessees, sublessees, assignees, or managing agents of, or other persons having the right of ownership or possession of the right to sell, rent, lease, assign, or sublease any housing accommodations or real property or part or portion thereof, or any agents or employees of any of them, or any real estate brokers, real estate salespersons, or employees or agents thereof.

6.2. It is unlawful to print, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication, or sign, or to use any form or application for the purchase, rental, lease, assignment or sublease of any housing accommodations or real property or part or portion thereof, which expresses, directly or indirectly, any discrimination as to ~~handicap~~ disability or any intent to make any such discrimination and the production of any statement, advertisement, publicity, sign, form or application, record or inquiry purporting to be made by any such person shall be prima facie evidence in any action that the same was authorized by such person.

6.3. It is unlawful for any person to make any written or oral record or inquiry, or require the completion of any application which seeks information concerning the ~~handicap~~ disability of any prospective purchaser, tenant, or prospective occupant of any housing accommodations or real property unless such information is required by an agency of state or federal government and the person states clearly that the information requested is intended for use solely by the government agency.

6.4. It is unlawful for any real estate broker, agent or salesperson to accept for listing any housing accommodation when the seller or lessor or his agent has expressed, directly or indirectly, an intention to discriminate against ~~handicapped persons~~ individuals with a disabilities.

6.5. It is unlawful for any person to refuse to sell, rent, lease, assign or sublessee, or to evict or otherwise to deny to or withhold from any person or group of persons any housing accommodations or real property, because of the ~~handicap~~ disability of such person or group of persons. For example, a representation to any person, because that person possesses a ~~handicap~~ disability, that real property is not available for inspection, sale or rental, when such real property is in fact so available, is a violation of the Act. Likewise, it is unlawful for any broker, agency, or salesperson to misrepresent the price of real property listed for sale, rent or lease or to fail to communicate to the seller or lessor any offer made by a prospective buyer or lessor because the applicant or prospective applicant possesses a handicap.

6.6. It is unlawful for any person to fail or refuse to show, rent, or lease any housing accommodations or real property to a person with a disability who is required to be accompanied by a guide animal or by an attendant; or to evict any person for this reason. Policies which restrict the availability of housing accommodations to persons without pets shall be void with respect to persons with a disability who require guide animals.

6.7. It is unlawful to discriminate against any person or group of persons because of their ~~handicap~~ disability in the price, terms, conditions, or privileges of the sale, rental, or lease of any housing accommodations or real property, or in the furnishing of faculties or services in connection therewith. ~~Handicapped persons~~ individuals with a disabilities shall not be required to pay extra compensation due to the fact that they need special aids, accessories, or adaptive equipment.

6.8. It shall be unlawful for any person to refuse to make reasonable accommodations necessary for making housing accommodations or real property accessible to and functional for ~~handicapped persons~~ individuals with a disabilities who rent, lease, or sublease any such housing accommodations or real property. In determining whether an accommodation is reasonable, the Commission shall consider:

6.8.1. The nature of the housing accommodation or real property and the number of living units, if any, which comprise it;

6.8.2. The nature and cost of the accommodation needed (taking into account alternate sources of funding, such as the Division of Vocational Rehabilitation);

6.8.3. Whether or not the housing accommodation or real property was purchased or improved with public funds; and

6.8.4. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W. Va. Code § 18-10F-1 et seq. Any changes or alterations required due to the failure of the owner, managing agent of the owner (or his lessee or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable.

6.9. It is unlawful for any person or financial institution or lender to whom application is made for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodations or real property, or any agent or employee thereof to:

6.9.1. Discriminate against any person or group of persons because of the ~~handicap~~ disability of such person or group of persons, or of the prospective occupants or tenants of such housing accommodation or real property, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions, or provisions of any such financial assistance or in the extension of services in connection therewith; or to

6.9.2. Use any form of application for such financial assistance or to make any record of inquiry in

connection with applications for such financial assistance which expresses, directly or indirectly, any discrimination as to ~~handicap~~ disability or any intent to make any such discrimination, unless such information is required by an agency of the state or federal government, and the person making the inquiry states clearly that the information requested is intended for use solely by the government agency.

§77-1-7. Public Accommodations.

7.1. These regulations apply to any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodations as defined by W. Va. Code § 5-11-2(j).

7.2. It shall be unlawful to refuse, withhold from, or deny, either directly or indirectly, to any individual because of ~~handicap~~ disability, any of the accommodations, advantages, facilities, privileges, or services to qualified ~~handicapped persons~~ individuals with a disabilities, the privileges of such place of public accommodation.

7.3. It shall be unlawful to publish, circulate, issue, display, post, or mail, either directly or indirectly, any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, privileges, or services of any such place shall be refused, withheld from, or denied to any individual on account of ~~handicap~~ disability, or that the patronage or custom threat of any ~~handicapped~~ individual with a disability is unwelcome, objectionable, not acceptable, undesired, or not solicited. However, any person may advertise that a place of public accommodation is barrier free or otherwise accessible to ~~handicapped persons~~ individuals with disabilities.

7.4. It is unlawful to discriminate against a ~~handicapped person~~ individual with a disability in the price, terms, or conditions upon which access to the accommodations, advantages, facilities, services, or privileges of any public accommodation may depend.

7.5. ~~Handicapped persons~~ individuals with disabilities have the right to be accompanied by a guide animal in any place of public accommodation.

7.6. ~~Handicapped persons~~ individuals with disabilities have the right to be accompanied by an attendant in any place of public accommodation.

7.7. It shall be unlawful to refuse to make reasonable accommodations necessary to make any public accommodation accessible to and functional for ~~handicapped persons~~ individuals

with disabilities. In determining whether an accommodation is reasonable, the Commission shall consider:

7.7.1. The nature and size of the public accommodation;

7.7.2. The nature and cost of the accommodation needed;

7.7.3. Whether or not the public accommodation is owned, operated, funded, or used, by an agency of government; and

7.7.4. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W. Va. Code § 18-10F-1 et seq. Any changes or alterations required due to the failure of the owner, managing agent of the owner (or his lessee or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

812 Quarrier Street
L&S Building, Sixth Floor
Charleston, West Virginia 25301
FAX (304) 558-0184

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

Antitrust & Consumer Protection Division (304) 558-8986
Civil Rights Division (304) 558-0546
Preneed Funeral Services (304) 558-0303
Consumer Hotline (800) 368-8808

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

August 2, 1993

Faxed Aug. 2 - 1993 MOB

FACSIMILE
558-0900

Judy Cooper, Director
Administrative Law Division
Office of the Secretary of State
Suite 157-K, State Capitol
Charleston, West Virginia 25305

Re: West Virginia Human Rights Commission's Rules Regarding Discrimination Against the Handicapped (Title 77, Series 1)

Dear Ms. Cooper:

Please be advised that the West Virginia Human Rights Commission is withdrawing the above rules which were recently filed with your office as emergency regulations. The Commission will be re-filing these regulations at a later date.

If you have any questions, please do not hesitate to contact me. Thank you for your cooperation in this matter.

Sincerely,

Mary Kay Buchmelter/90 Mon

MARY CATHERINE BUCHMELTER
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MCB/jm

cc: Quewanncoii C. Stephens
Executive Director
West Virginia Human
Rights Commission

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

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August 2, 1993

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MARY CATHERINE BUCHMELTER
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

MCB/jm

cc: Quewanncoii C. Stephens
Executive Director
West Virginia Human
Rights Commission

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

July 29, 1993

Ms. Judy Cooper
Director of Administrative Law
Office of the Secretary of State
Suite 157-K
1900 Kanawha Blvd.
State Capitol Complex
Charleston, WV 25350

Re: Emergency Regulations Relating to Discrimination Against Individuals with a Disability

Dear Ms. Cooper:

The Equal Employment Opportunity Commission (EEOC) contributes approximately $112,000 annually to the West Virginia Human Rights Commission (WVHRC). The key requirement for funding is substantial equivalency. In order to be eligible for funding, the WVHRC must provide the same protection to citizens under state law that exists under federal law.

Mr. James Troy, Director of the Office of Program Operations at EEOC, stresses this point in the attached letter when he states that:

> "It is important that we establish a mechanism to insure the Federal rights under ADA are made available and accessible to all individuals who seek protection."

EEOC will not fund any agency that does not adhere to this requirement.

The loss of the federal dollars will have adverse effect on the agency and its ability to complete its mission. For example, the agency will be unable to process ADA complaints. What is more, the loss of federal money would require the agency to seek additional dollars from the Legislature.

The need for emergency regulations will result in the aggrieved citizens of West Virginia not having the same protection under state law as under federal law. These individuals would have to file their complaints in Pittsburgh, Pennsylvania at the area EEOC office.

Finally, the delay in approving the Emergency Regulations would cause a void in protecting those who would be covered by the Act. The State of West Virginia runs the risk of losing Primacy in Employment Discrimination cases. Thus, we would have to defer the Federal Authorities to do a job best handled by West Virginia who understand the history, case law and legislative intent of our elected officials with respect to Employment Discrimination Law.

The WVHRC therefore prays that the above factors be considered in your analysis.

Respectfully submitted,

Brian D. Williams
Commissioner
WV Human Rights Commission

Convenor
Public Hearing on the
Commission's Modified Regulations Regarding Discrimination
Against the Handicapped

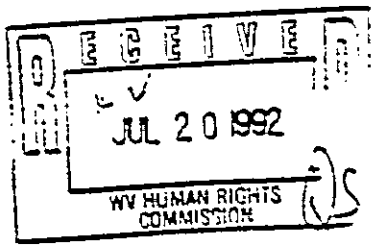
BDW/mst

Attachment

cc: Quewanncoii C. Stephens, Executive Director
Norman Lindell, Assistant Director
Mary C. Buchmelter, Deputy Attorney General

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUL 16 1992



Dear FEPA Agency Director:

As you know, on July 26, 1992, the Commission begins its enforcement of the ADA. Pursuant to Section 107(a) of Title I of the ADA and Section 706(c) of Title VII of the Civil Rights Act, charges containing disability based allegations must be deferred if the State or local agency has a disability statute covering the allegation. To facilitate the process of establishing an ADA deferral relationship, we have attached documents that require your immediate attention.

Attachment I - Memorandum of Understanding (MOU)

Attached is a copy of a MOU that addresses deferral of ADA charges. Two major issues regarding the processing of ADA charges are addressed in the MOU.

(1) It is important that we establish a mechanism to ensure that Federal rights under the ADA are made available and accessible to all individuals who seek its protection. To that end, the attached MOU establishes a dual-filing relationship with FEPAs for ADA charges; and,

(2) During the first few months following the enactment of enforcement responsibilities, we want to maintain strict control over all ADA charges initially filed with EEOC. To that end, the MOU provides for an advance waiver from the FEPAs of those ADA charges initially taken by EEOC. To the extent possible, EEOC will process what it takes and the FEPA will do likewise.

You can expect the District Director to contact you regarding the execution of the MOU. By establishing an MOU with you now, we eliminate potential processing disruptions as we meet our enforcement responsibilities under the ADA. It will also provide for a smooth transition from FY '92 into FY '93.

We expect to include, in all FY 1993 Worksharing Agreements between EEOC and appropriate FEPAs, provisions that will define our ADA charge processing relationship. This does not mean that we will contract for ADA charges in FY 1993. At this time, funds have not been authorized for ADA contracts. When the Commission determines that ADA contracting is viable, the mechanisms and provisions to achieve that end will be in place.

Attachment II - Deferrable Issues

In order to appropriately structure Worksharing Agreements, an analysis of state disability statutes is necessary. Under the ADA, EEOC must defer charges to only those FEPAs which have a statute covering the allegation. In order to make an initial determination regarding the compatibility of federal and state/local statutes as it affects our deferral responsibilities, we have conducted a **preliminary** assessment of the **state** disability statutes. We have made an initial determination as to the type of charges that must be deferred to the State FEPA. We are aware of the wide range of statutory coverages among the various jurisdictions and that many issues may be resolved only as a result of future litigation. However, the accuracy of this initial assessment is extremely important in the process of protecting the Federal rights of charging parties. Clearly, timeframes for filing and deferral requirements are contingent on what allegations are covered by the State laws.

It is essential that we immediately initiate the process of verifying the accuracy of the information we have initially compiled, and the extent to which it needs to be revised. Therefore, your District Director is forwarding a copy of our assessment of State or local laws, as appropriate, as they relate to the issue of deferral. With your help, we can assess the compatibility of State and local laws with the requirements of the federal statute.

Where changes are necessary, either because of statutory provisions of which we were unaware or because of a different interpretation of the statute due to regulation, case authority, etc., we are asking the District Director to correct the document and return a copy to the State and Local Programs Division (SLPD). If you administer a disability statute that is not included in our preliminary assessment please advise the District Director immediately.

We have asked District Directors to complete action on the MOU, Attachment I, and any changes to our assessment of the State's disability law no later than July 24, 1992. We regret the short turnaround time, but decisions related to implementation of the ADA in FEPA's were only recently made. If you have any questions, you may contact Mike Dougherty at (202) 663-4944.

Sincerely,

James H. Troy, Director
Office of Program Operations

Attachments

cc: Field Management Programs East/West