

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE
Revised

House Bill 399

(Delegate Rosenberg, *et al.*)

Health and Government Operations

Judicial Proceedings

Maryland Human Relations Commission - Administrative and Civil Relief -
Waiver of Sovereign Immunity

This bill makes several changes in provisions governing administrative and judicial remedies available in employment discrimination cases. The bill specifies that the State's waiver of sovereign immunity applies to any award in an employment discrimination case and is not limited to a salary award.

Fiscal Summary

State Effect: The bill's provision regarding the State's waiver of sovereign immunity could lead to potentially significant general fund expenditures by State agencies that are held liable in employment discrimination cases.

Local Effect: Any increase in circuit court cases could be handled with existing resources.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: This bill authorizes a *respondent* in a discrimination complaint; in addition to the complainant, to elect to have the claims asserted in the complaint determined in a civil action brought on behalf of the complainant by the Maryland Human Relations Commission. A civil action brought by a *complainant* shall automatically terminate any related proceeding before the commission. The bill provides that the offset against back pay awards is based on amounts "earnable" rather than amounts earned. The bill establishes a two-year statute of limitations to file a civil action

for an employment discrimination complaint and establishes that in order to initiate a civil action, the complainant must have initially filed a *timely* administrative charge or complaint under federal, State, or local law.

The bill specifies that the State may not raise sovereign immunity as a defense against an award made in an employment discrimination case. The bill requires the State, if there are sufficient funds available, to pay any award made against the State under Article 49B as soon as practicable within 20 days after the award is final. If sufficient funds are not available, the affected State unit or officer shall report the outstanding award to the Comptroller, who is required to keep and report to the Governor annually an accounting of all such awards. The bill requires the Governor to include in the State budget sufficient money to pay all such awards and requires the Comptroller, on appropriation of money by the General Assembly, to authorize payment of all outstanding awards in the order of the date on which each award was made.

Current Law: A civil cause of action is available in employment discrimination complaints. A complainant may elect to have the claims asserted in the complaint determined in a civil action brought by MHRC on the complainant's behalf if: (1) a complaint has been filed with MHRC; (2) the commission finds the respondent has engaged in, or is engaging in a discriminatory act; and (3) the parties have failed to reach an agreement for the remedy and elimination of the discriminatory act.

A complainant may also file a civil action if the complainant initially filed a complaint or an administrative charge alleging discrimination under federal, State, or local law; and at least 180 days have elapsed since the filing of this complaint or charge. If a civil action is not elected or brought by the complainant, the case is heard before an administrative law judge. On a finding that the respondent has engaged in or is engaging in an unlawful employment practice, certain relief, including back pay, compensatory damages (within certain limitations) and attorney's fees may be awarded. Back pay is offset by interim earnings or amounts earned with reasonable diligence by the person or persons discriminated against.

The State may not raise sovereign immunity as a defense against a *salary* award in an employment discrimination case.

Background: Several of the provisions of this bill address concerns raised in the Attorney General's bill review letter for SB 678/HB 314 (Chapters 176 and 177) of 2007, which expanded the administrative and judicial remedies available in employment discrimination cases under Article 49B. Specifically, the Attorney General noted that although the bills authorize MHRC and, under certain circumstances, a complainant to go to court to seek back pay, compensatory damages (within certain limitations), attorney's fees, and expert witness fees, the bills did not amend Art. 49B, §17, which only prohibits

the State from raising sovereign immunity as a defense against a *salary* award in an employment discrimination case. Absent a waiver of sovereign immunity, the State and its agencies are immune from monetary liability. The Attorney General further noted that the Court of Appeals has said that even where a statute specifically waives sovereign immunity, a suit may be maintained only where there are funds available for the satisfaction of the judgment or the agency has the power to raise funds to satisfy the judgment.

State Fiscal Effect: Potentially significant general fund expenditures as a result of any award made under the bill's provisions. The applicable statute sets a limit on compensatory and punitive damages that can be awarded based on the size of the employer, ranging from \$50,000 to \$300,000. According to the State Treasurer's Office, the applicable State agency is generally responsible for paying any award based on an employment discrimination complaint. State expenditures for back pay awarded would be reduced by the bill's requirement that any back pay awarded be offset by amounts earnable rather than earned.

MHRC advises that in fiscal 2007, it received 45 complaints against the State for employment discrimination, although none of the complaints were certified for litigation. The Treasurer's Office was unable to provide information on past awards in employment discrimination cases against the State based on time constraints.

Small Business Effect: Small businesses who are the respondents in an employment discrimination case would have the same rights as a complainant to elect that a civil cause of action be brought in the circuit court by MHRC on the complainant's behalf. Small businesses held liable for employment discrimination could benefit from reduced awards in back pay due to the bill's requirement that any back pay awarded be offset by amounts earnable rather than earned.

Additional Information

Prior Introductions: None.

Cross File: SB 528 (Senator Raskin) – Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts), Human Relations Commission, State Treasurer's Office, Department of Legislative Services

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