LETTER OPINION
2001-L-09

March 21, 2001

Ms. Judy L. DeMers
2200 South 29th Street Apt. 92N
Grand Forks, ND 58201-5869

Dear Ms. DeMers:

Thank you for your letter asking if North Dakota's Human Rights Act requires an employer to pay in cash the value of fringe benefits declined by an employee who has no need for them, and if North Dakota's Equal Pay Act makes it a "comparable worth" state.

The North Dakota Human Rights Act on employment discrimination provides, in relevant part:

> It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.

N.D.C.C. § 14-02.4-03.

Section 14-02.4-03 forbids an employer to accord adverse or unequal treatment to an employee based on one of the protected categories concerning, among other things, compensation or a term, privilege, or condition of employment. Therefore, if an employer provides uniform opportunities for its employees with respect to the compensation package, and does not pay at differing rates or provide less favorable benefits based on sex, for example, the employer is not in violation.

An individual employee may not want or need all parts of an available compensation package. However, the individual desires of or choices made by such an employee do not

render an employer's compensation package discriminatory. The element of a choice between reasonable options given to an individual employee shows that an employer's actions are not discriminatory. Farmington Educ. Ass'n v. Farmington School Dist., 351 N.W.2d 242, 247 (Mich. App. 1984). (In a collective bargaining agreement teachers were not allowed duplicate health insurance coverage from the school district if they received health coverage from an outside source. The court held women or married teachers did not suffer discrimination under the state's Civil Rights Act because they could choose the school district coverage.) (Note that the nonduplication of health insurance provision has been held discriminatory in Wisconsin as applied under certain circumstances. Braatz v. Labor and Industry Review Com'n, 496 N.W.2d 597 (Wis. 1993).)

It is my opinion that an individual employee's lack of need for a feature of a reasonable available compensation package and not receiving a cash alternative is not employment discrimination under N.D.C.C. § 14-02.4-03.

North Dakota's Equal Pay Act provides, in part:

> No employer may discriminate between employees in the same establishment on the basis of gender, by paying wages to any employee in any occupation in this state at a rate less than the rate at which the employer pays any employee of the opposite gender for comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility.

N.D.C.C. § 34-06.1-03.

The prohibition in this section relates to "comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility." This section was enacted in 1965 (1965 N.D. Sess. Laws ch. 238, § 3) and amended in 1995 (1995 N.D. Sess. Laws ch. 338, § 1) to remove physical strength as a differentiating factor.

The theory of "comparable worth" relates to discrimination against women based on job categories dominated by women being paid at rates less than job categories dominated by men, where both jobs are deemed to be of comparable worth to the employer. Bohm v. L.B. Hartz Wholesale Corp., 370 N.W.2d 901, 906 (Minn. App. 1985). The theory rejects labor market analyses as a wage setting mechanism in favor of a subjective opinion whether work of differing skills may be of equal value to the employer. Id. The theory has been rejected in human rights and equal employment opportunity cases by both state and federal courts. Id. However, comparable worth has been adopted in Minnesota for political subdivision employees by specific statute. See Minnesota Pay Equity Act (MPEA) Minn. Stat.

Ann. §§ 471.991-471.999. Armstrong v. Civil Service Com'n., 498 N.W.2d 471, 476 (Minn. App. 1993).

The North Dakota Equal Pay Act deals with the work done and the nature of the jobs, but does not relate to an analysis of the perceived value of the jobs to the employer. Merely using the word "comparable" in the section does not show an intent to avoid market analyses in setting wages, nor does it imply a need to assign a subjective value or worth of each job to the employer. See Alaska State Comm'n for Human Rights v. State of Alaska, Dep't of Administration, 796 P.2d 458, 461-62 (Alas. 1990). The Equal Pay Act specifically exempts from prohibition pay differentials based upon factors like "job descriptive systems." N.D.C.C. § 34-06.1-03. This contradicts any inference that the Legislature may have intended to adopt the comparable worth theory in N.D.C.C. § 34-06.1-03.

Sincerely,

Wayne Stenehjem
Attorney General

rel/eee/vkk
cc: Mark Bachmeier, Labor Commissioner