

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-12

Date issued: May 7, 1990
Requested by: Judy L. DeMers
State Representative

- QUESTION PRESENTED -

Whether it is an unlawful discriminatory practice under N. D. C. C. ' 14-02. 4-12 to refuse to rent housing to unmarried persons of the opposite sex who desire to live together as a married couple.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that it is not an unlawful discriminatory practice under N. D. C. C. ' 14-02. 4-12 to refuse to rent housing to unmarried persons of the opposite sex who desire to live together as a married couple.

- ANALYSIS -

The University of North Dakota (UND) provides housing for students who meet certain eligibility requirements. To qualify for UND Family Housing, a UND student is required to sign a lease with the UND Housing Office. The Family Housing lease provides in relevant part:

- A. Family Housing - Any full-time student who is married and living with his/her spouse or a solo parent with custody of children . . . is eligible for family housing. . . . Only the student (leaseholder), spouse and their children may reside in Family Housing. Written permission from the Housing Office must be secured before any other person is allowed to reside in the said unit. This does not apply to occasional guests.

UND only leases Family Housing to students who are: married and living with their spouse, or a solo parent with custody of children for 50% of the calendar year.

N. D. C. C. ' 14-02. 4-12 provides, in part:

14-02. 4-12. Discriminatory housing practices by owner or agent. It is discriminatory practice for an owner of rights to housing or real property or the owner's agent or a person acting under court order, deed or trust, or will to:

1. Refuse to transfer an interest in real property or housing accommodation to a person because of race, color, religion, sex,

national origin, age, physical or mental handicap, or status with respect to marriage or public assistance;

(Emphasis supplied.) However, N. D. C. C. ' 12.1-20-10 prohibits unmarried persons of the opposite sex from openly living together as a married couple. The North Dakota Supreme Court has not ruled on the apparent conflict between N. D. C. C. ' 14-02.4-12's protection of a person's right to housing notwithstanding the person's marital status, and N. D. C. C. ' 12.1-20-10's prohibition against allowing unmarried couples to live as a married couple. However, there has been similar litigation in other states whose laws prohibit both cohabitation and discriminatory housing practices based on marital statutes. In McFadden v. Elma Country Club, 26 Wash. App. 146, 613 P.2d 146 (1980), the court held that, notwithstanding a statute prohibiting discrimination based upon marital status, a country club could refuse to admit to membership an unmarried woman cohabiting with a man. Id. at 152. The court's holding was based upon the fact the statute prohibiting cohabitation was not repealed when the discrimination statute was enacted. This fact the court said "would vitiate any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation." Id. at 150.

As in the McFadden case, N. D. C. C. ' 12.1-20-10 was not repealed when N. D. C. C. ' 14-02.4-12 was enacted. Thus, the continuing existence of the unlawful cohabitation statute after the enactment of N. D. C. C. ' 14-02.4-12 vitiates "any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation." McFadden at 150.

Additionally, where there is a conflict between two statutes, the particular provision will control the general so that effect can be given to both statutes. N. D. C. C. ' 1-02-07. In this conflict N. D. C. C. ' 12.1-20-10 regulates one particular activity, unmarried cohabitation. N. D. C. C. ' 14-2.4-12 on the other hand, regulates several bases for discrimination. Consequently, the conflict is resolved by applying the terms of N. D. C. C. ' 12.1-20-10 to this situation.

Therefore, it is my opinion that it is not an unlawful discriminatory practice under N. D. C. C. ' 14-02.4-12 to discriminate against two individuals who chose to cohabit together without being married.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

ATTORNEY GENERAL' S OPINION 90-12
May 7, 1990
Page 3

Nicholas J. Spaeth
Attorney General

Assisted by: Gregory B. Gullickson
Assistant Attorney General

dfm