

IN DISTRICT COURT

STATE OF NORTH DAKOTA

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

North Dakota Human Rights Coalition,)
a North Dakota non-profit corporation;)
Richard Folstrom, Christopher Beeter,)
Shelly Ann Peterson, Jerry Zillier, Dave)
Shove, Charles Stebbins, and Patricia)
Villanueva (legal guardian for Lisa)
Villanueva); individually, and on behalf)
of all others similarly situated,)

Civil No. 09-04-C-00881

AMENDED COMPLAINT

Plaintiffs,)

) **FOR MANDAMUS AND
DECLARATORY RELIEF**

v.)

Mark D. Bachmeier, Commissioner,)
North Dakota Department of Labor,)

Defendant.)

COMES NOW, the Plaintiffs in the above-entitled class action, and through their attorney, Mark G. Schneider, PLLC, 815 Third Avenue South, Fargo, ND 58103, state as follows:

I.

INTRODUCTION

1. This is a class action for mandamus and, as necessary, declaratory and injunctive relief, authorized by: North Dakota Century Code, Chapter 32-34 (Writ of Mandamus); North Dakota Century Code, Chapter 32-23 (Declaratory Judgments);

North Dakota Century Code, Ch. 14-02.4 (North Dakota Human Rights Act) and Rule 23, North Dakota Rules of Civil Procedure.

2. This action challenges Defendant Bachmeier's (Commissioner, North Dakota Department of Labor (NDDOL)) policy of failing and refusing to perform his mandatory, nondiscretionary duties under The North Dakota Human Rights Act as follows:

- (1) To provide administrative hearings for the benefit of those persons alleging violation of their human rights under the North Dakota Human Rights Act even though the Commissioner has found “. . . probable cause exists to believe that a discriminatory practice has occurred and [the Department of Labor] is unable to resolve the complaint through informal negotiations or conciliation” (N.D.C.C. § 14-02.4-23(3)); and
- (2) To, in the vast majority of human rights complaints filed with the Department of Labor, “. . . determine from the facts whether probable cause exists to believe that a discriminatory practice has occurred.” (N.D.C.C. § 14-02.4-23(2)).

3. These violations by the Commissioner of Labor of his statutorily mandated nondiscretionary duties under the North Dakota Human Rights Act have resulted, and will continue to result, in abdication of the legislatively mandated state policy to “prevent and eliminate discrimination.” N.D.C.C. § 14-02.4-01.

4. The abdication by the Commissioner of Labor of his fundamental responsibilities to make a probable cause determination on each complaint and, where found, (if the complaint is unresolved through conciliation) take that probable cause determination to a hearing before an independent Administrative Law Judge, violates the rights of each member of this class action. It further renders the statutory right and promise of a fair and effective investigation of, and redress for, violation of human rights in North Dakota, a mockery of justice.

II.

PLAINTIFFS

A. North Dakota Human Rights Coalition

5. Plaintiff North Dakota Human Rights Coalition (“Human Rights Coalition”), is a not-for-profit corporation, in good standing, under the laws of the state of North Dakota.

6. The mission statement of the Human Rights Coalition is: “The North Dakota Human Rights Coalition works to effect change so that all people in North Dakota enjoy full human rights.”

7. The Human Rights Coalition (through 2003) consists of 31 organizational members as follows:

1. AARP of North Dakota
2. American Association of University Women of North Dakota
3. Bismarck-Mandan Unitarian Universalist Church
 1. Bremer Bank
 2. Catholic Charities North Dakota

3. Cultural Diversity Resources
4. Dakota Center for Independent Living
5. Dakota Resource Council
6. Equality North Dakota
7. Fargo-Moorhead Amnesty International
8. Grand Forks Unitarian Universalist Fellowship
9. League of Women Voters of North Dakota
10. Mental Health Association of North Dakota
11. Minnesota State University-Moorhead Social Work Department
12. Nativity Social Justice Ministry
13. Nokomis Child Care Center
14. North Dakota Association of the Deaf
15. North Dakota Disability Advocacy Consortium
16. North Dakota Fair Housing Council
17. North Dakota Peace Coalition
18. People Escaping Poverty Project
19. Peoples' Diversity Forum
20. PFLAG - Central Dakota
21. PRIDE Collective LGBT Community Center
22. Red River Friends
23. Sisters of the Presentation - Sacred Heart Convent
24. Statewide Independent Living Council
25. Temple Beth El
26. The Arc of Cass County
27. The GOD'S CHILD Project North Central
28. Women's Network of Red River Valley.

All of the member organizations support the mission of the North Dakota Human Rights Coalition.

8. The Human Rights Coalition, through its board of directors and its executive director, Cheryl Bergian, has made earnest attempts to work with the Defendant, Commissioner Bachmeier, to support him in his statutory duties. This has been done in furtherance of the mission of the Human Rights Coalition, and also in furtherance of the state policy in the North Dakota Human Rights Act to: “prohibit

discrimination”; “prevent and eliminate discrimination”; and “to deter those who aid, abet, or induce discrimination or coerce others to discriminate.” N.D.C.C. § 14-02.4-01.

9. The efforts of the Human Rights Coalition have been ongoing since before and after the North Dakota Legislature gave the authority to the North Dakota Department of Labor (effective August 1, 2001) to be the sole agency in North Dakota to investigate, conciliate, and redress, through probable cause determinations and subsequent administrative hearings, violations of human rights under the North Dakota Human Rights Act.

10. Despite the willingness of the Defendant to meet with the Human Rights Coalition, nothing of substance has been achieved through those efforts, thereby frustrating the very purpose of the Human Rights Coalition, and requiring the Human Rights Coalition, in furtherance of its mission, to commence civil litigation for the purpose of requiring Defendant Commissioner of Labor to - - simply put - - do his job as mandated by law.

11. The Human Rights Coalition is a “person” within the meaning of the North Dakota Human Rights Act (N.D.C.C. § 14-02.4-02(12)).

12. If the abdication of the Defendant’s statutorily mandated responsibilities (to make probable cause determinations on every complaint filed and, where probable cause has been found, to provide an administrative hearing) is not challenged by Plaintiff, Human Rights Coalition, then the mission of the Human Rights Coalition will be seriously damaged and its effectiveness as a corporate entity greatly diminished, not only

for the numerous organizations that comprise the Coalition and fund, in part, its activities, but also for the public at large, upon which the Human Rights Coalition depends, in part, for its funding.

13. The Human Rights Coalition, in order to be an effective entity and fulfill its mission, needs a competitively salaried professional executive director and support staff. If the Human Rights Coalition does not challenge the wholesale abdication by the Defendant, Commissioner of Labor, of his duties, as plead herein, it will be rightfully viewed as being largely ineffective by its membership and the public at large, its economic support will suffer, and the essential professional support of its executive director and paid staff will likely be lost, all irreparably damaging the Human Rights Coalition itself.

14. Dave Shove, one of the above-named plaintiffs in this class action, is a member of the Plaintiff, Human Rights Coalition, Board of Directors , and an individual member of the Human Rights Coalition, at all times relevant.

B. Richard Folstrom

15. Richard Folstrom is a North Dakota resident who filed a complaint of discrimination with the North Dakota Department of Labor. On June 12, 2003, Defendant issued a determination that the department “reasonably believes the violation of applicable statutes has occurred” (i.e., “probable cause”) and yet the Defendant did not advise Plaintiff Folstrom of, and has repeatedly refused to afford Plaintiff Folstrom with,

his mandatory right to an administrative hearing on his indisputedly meritorious complaint.

16. Rick Folstrom has executed an “Affidavit of Rick Folstrom in Support of Request for Mandamus” dated January 14, 2004 (the original of which is attached to this Complaint as Exhibit I and incorporated herein by reference). Exhibit I includes copies of the following attachments in the affidavit, also incorporated into this Complaint by reference:

- X Attachment A: June 12, 2003, North Dakota Department of Labor (NDDOL) “Determination”;
- X Attachment B: Counsel’s November 20, 2003 letter to NDDOL Commissioner Bachmeier;
- X Attachment C: Commissioner Bachmeier’s November 26, 2003 letter to counsel;
- X Attachment D: Counsel’s December 3, 2003 letter to Commissioner Bachmeier;
- X Attachment E: Commissioner Bachmeier’s December 12, 2003 letter to counsel;
- X Attachment F: Counsel’s December 12, 2003 letter to Commissioner Bachmeier.

17. Defendant, Commissioner Bachmeier, specifically found, with regard to his mandatory obligation to attempt to “resolve the complaint through informal negotiations or conciliation” (within the meaning of N.D.C.C. § 14-02.4-23) that the “. . . respondent [employer] declined to discuss settlement and an agreement could not be obtained.” Affidavit, Attachment A, p. 6.

18. Plaintiff Folstrom, through his attorney, tried repeatedly (by letters of November 20th, December 3rd and December 12, 2003 to Defendant, Commissioner Bachmeier) to prevail upon the Defendant to provide to Plaintiff Folstrom the administrative hearing as required by law. See Affidavit of Rick Folstrom In Support of Request for Writ of Mandamus, Exhibit I to this Complaint (with Attachments B, D, and F, respectively). The last correspondence from Defendant Bachmeier was a letter of December 12, 2003, wherein the Defendant stated that he would be requesting an Attorney General's opinion and that the Defendant would “. . . act in accordance with his interpretation.” Folstrom Affidavit, at Attachment E.

19. In Plaintiff Folstrom's responsive letter (through counsel) of the same day, December 12, 2003, the position of Plaintiff Folstrom that he was “. . . entitled to an administrative hearing, and, in fact, should have had one months ago” was made. Affidavit, at Attachment F. No response by Defendant Bachmeier, either personally or by anyone on his behalf, has been made to either Plaintiff Folstrom or counsel since December 12, 2003.

20. Plaintiff Folstrom has exhausted all administrative remedies, to no avail.

21. The Plaintiffs bring this action on behalf of themselves and all others similarly situated, and those who either have filed complaints of discrimination with the North Dakota Department of Labor under the North Dakota Human Rights Act or may do so in the future. The individual Plaintiff, Rick Folstrom, and all other individual plaintiffs, past and present, who have filed and will file a complaint of discrimination

with the North Dakota Department of Labor, have been and will continue to be denied their essential rights and remedies under the North Dakota Human Rights Act. These denials are due to the failure and refusal of the Commissioner, North Dakota Department of Labor, to investigate and determine whether “probable cause” exists on each complaint filed with the Department of Labor, as required by law, and, where “probable cause” has been found, provide (absent settlement) an administrative hearing as required by law.

C. Christopher Beeter

22. Christopher Beeter is a North Dakota resident who filed a complaint of discrimination with the North Dakota Department of Labor on October 15, 2001. On January 23, 2003, the Defendant concluded that “[T]he North Dakota Department of Labor determines that the evidence obtained during the investigation **DOES** establish violations of the North Dakota Human Rights Act” In the Determination, the Defendant did not mention - - let alone offer - - to afford Plaintiff Beeter with his mandatory right to an administrative hearing on his indisputably meritorious complaint (“The North Dakota Department of Labor now concludes this processing of this charge”). A true and correct copy of the January 23, 2003 Determination is Exhibit II to this Amended Complaint.

D. Shelly Ann Peterson

23. Shelly Ann Peterson is a North Dakota resident who filed a complaint of discrimination (based on retaliation) on September 16, 2002, with the North Dakota Department of Labor, alleging discrimination occurring on or after August 1, 2001. On

July 31, 2003, Defendant issued a Determination that “. . . we find that probable cause exists to believe that the actions of the [responding party] are a ‘discriminatory practice’ as defined by the NDHRA.” In the Determination, the Defendant did not mention - - let alone offer - - to afford Plaintiff Peterson with her mandatory right to an administrative hearing on her indisputedly meritorious complaint. A true and correct copy of the Defendant’s Determination is Exhibit III to this Amended Complaint.

24. Milena Stojkovic, the NDDOL investigator, informed Plaintiff Peterson both in writing and in a subsequent phone conversation that an administrative hearing could result in only non-monetary relief; she was told that it would only be a hearing to “validate her complaint.”

25. NDDOL Investigator Stojkovic then informed Plaintiff Peterson that she had only ten days to respond as to whether she wanted an administrative hearing on her claim - - unless Plaintiff Peterson advised the Defendant that Plaintiff Peterson needed additional time to consult with an attorney. On August 7, 2003, Shelly Ann Peterson faxed a letter to investigate Stojkovic requesting the offered extension. Plaintiff Peterson attempted unsuccessfully to find an attorney. On or about September 12, 2003, the Defendant unilaterally issued a “complaint closure notice” and a letter from the Defendant informing Plaintiff Peterson that her case was “closed.”

E. Jerry Zillier

26. Jerry Zillier is a North Dakota resident who filed a complaint of discrimination with the North Dakota Department of Labor on April 17, 2002. On June

30, 2003, the Defendant issued a Determination which concluded that, “[T]he NDDOL finds that reasonable cause does exist to believe the Charging Party was discriminated against because of his disability.” In the “Notice of Rights” portion of the Defendant’s Determination, Plaintiff Zillier was advised: “The North Dakota Human Rights Act provides that when the Department of Labor, Human Rights Division, determines that there is reasonable cause to believe that a discriminatory practice has occurred, the division shall provide for an administrative hearing on the matter.” A true and correct copy of the June 30, 2003 Determination is Exhibit IV to this Amended Complaint.

27. In the same “Notice of Rights” provision, Plaintiff Zillier was advised that, “Please contact us within ten days of from the date of this letter to let us know whether or not you would like an administrative hearing or if you need more time to consult with an attorney. If we do not receive a response from you, we will assume that you elect not to have an administrative hearing and your case will be forwarded to the Equal Employment Opportunity Commission for further processing.” Exhibit IV.

28. Although the ten day reply demanded by the Defendant is neither authorized nor required by any law or regulation, Plaintiff Zillier did contact the Defendant (“Human Rights Division” Director Kathy Kulesa, an employee of the Defendant) within ten days of the Determination of probable cause, referenced above. The Plaintiff inquired of Ms. Kulesa what an administrative hearing would do for him or what relief, if any, would be gained for him through such a hearing. He was informed that it could take “years” for him to have an administrative hearing (as many as up to five

years, he was told, upon further questioning) and that while he may get a favorable result from an administrative hearing, he should get his “right to sue” letter from the EEOC, get a private attorney, and sue in Federal Court where the Judges are more “lenient” than State Judges.

29. Plaintiff Zillier was lead to believe that once he went to the EEOC, Defendant Department of Labor was done with their involvement and would do nothing more on his claim; that NDDOL was simply an intermediary, there simply to collect information and be a go-between between him and his employer. He never got the impression that the Defendant was actually helping him or could help him in any manner.

30. Plaintiff Zillier had to wait three months before the EEOC sent him his “right to sue” letter. Plaintiff Zillier then looked for an attorney and could not find one in the 90-day time frame provided by Federal law. Therefore, despite the Defendant’s Determination of “probable cause” to believe that he was discriminated against, and his right to have an administrative hearing, Plaintiff Zillier received absolutely no recourse or benefit from his meritable complaint filed with the Defendant.

31. Plaintiff Zillier, had he been properly informed, would have chosen to take the matter to an administrative hearing, as required of the Defendant under the North Dakota Human Rights Act, but he was affirmatively lead to believe by the Defendant that this was not in his best interests.

F. David Shove

32. Plaintiff David Shove is a North Dakota resident who filed a complaint of discrimination with the North Dakota Department of Labor on September 19, 2003. On September 19, 2003, (Exhibit V) Plaintiff Shove was informed by the Defendant that “. . . the Department of Labor has decided to file a formal complaint and begin a full investigation into your allegation of human rights discrimination.” Without authority from Plaintiff Shove, the Defendant has engaged in unilateral settlement negotiations with the respondent, Mexican Village, and has not made a “probable cause” determination. A true and correct copy of the September 15, 2003 letter from the Defendant to the four individual complainants (including Plaintiff Shove) is Exhibit VI.

33. Plaintiff Dave Shove is a volunteer for the Freedom Resource Center in Fargo, North Dakota, one of the member organizations included in the Plaintiff North Dakota Human Rights Coalition.

34. Dave Shove is also a duly elected member of the Board of Directors of Plaintiff North Dakota Human Rights Coalition and an individual member of Plaintiff Human Rights Coalition.

G. Charles Stebbins

35. Charles Stebbins is a North Dakota resident who filed a complaint of discrimination with the North Dakota Department of Labor. He is one of the four complainants, including Plaintiff David Shove (see above; and see Exhibit VI), who has filed a complaint against respondent Mexican Village regarding discrimination in public accommodations. Plaintiff Stebbins, on a complaint form drafted by the Defendant,

dated and signed his complaint of human rights discrimination on September 14, 2003 and filed it with the Defendant. Without authority from Plaintiff Stebbins, the Defendant has engaged in unilateral settlement negotiations with the respondent, Mexican Village, and has not made a “probable cause” determination. A true and correct copy of the September 14, 2003 complaint is Exhibit VII.

H. Patricia Villanueva

36. Patricia Villanueva is the mother and legal guardian of her daughter, Lisa Villanueva. Both Patricia and Lisa Villanueva are residents of the State of North Dakota. A charge of discrimination was made on behalf of Lisa Villanueva by her legal guardian, Patricia Villanueva, on October 24, 2003. Without authority from Plaintiff Villanueva, the Defendant has engaged in unilateral settlement negotiations with the respondent, and has not made a “probable cause” determination. A true and correct copy of the October 24, 2003 complaint is Exhibit VIII.

37. On December 12, 2003, the Defendant wrote a “Mediation Notice” letter thanking Lisa Villanueva for “electing this option.” At no time did the Plaintiff (or her ward) “elect” this option and Plaintiff is still waiting for the Defendant to determine if her complaint is supported by “probable cause.” A true and correct copy of the December 12, 2003 letter is Exhibit IX.

III.

DEFENDANT

38. Defendant, Mark D. Bachmeier, is the Commissioner, North Dakota Department of Labor (NDDOL), having been duly appointed by the Governor of North Dakota, and serves at the pleasure of the Governor.

39. Among the mandatory, nondiscretionary duties of the Commissioner, Department of Labor, are the following: (1) “. . . shall investigate complaints of alleged discriminatory practices; (2) “. . . shall determine from the facts whether probable cause exists to believe a discriminatory practice has occurred”; and (3) “If the department determines that probable cause exists to believe a discriminatory practice has occurred and is unable to resolve the complaint through informal negotiations or conciliation, the department shall provide for an administrative hearing in the manner provided in chapter 28-32 on the complaint”; all as set forth at N.D.C.C. § 14-02.4-23.

40. Since August 1, 2001, Defendant, North Dakota Department of Labor, has had the nondiscretionary obligation to find probable cause on each complaint of alleged discrimination and, where probable cause is found, to provide for an administrative hearing on the charge (absent settlement). N.D.C.C. § 14-02.4-23(2)(3).

IV.

CLASS ACTION ALLEGATIONS

41. The requirements of N.D.Civ.P. Rule 23(a)(1) are satisfied in that the members of the Plaintiffs’ class are so numerous as to make joinder impracticable. The members of the class, anticipated to be several hundred, if not a thousand or more, are scattered throughout the state of North Dakota and elsewhere, but their identities and

location could easily be determined through the North Dakota Department of Labor's records.

42. The requirements of Rule 23(a)(2) are met in that there are questions of law and fact common to the class. The Defendant has acted in a similar manner towards all class members, by: either not making a "probable cause" determinations on the Plaintiffs complaint (as mandated by N.D.C.C. § 14-02.4-23(2)) or, having found "probable cause" (and having been unable to resolve the complaint through informal negotiations or conciliation) refusing to ". . . provide for an administrative hearing in the manner provided in chapter 28-32 on the complaint" (as mandated by N.D.C.C. § 14-02.4-23(3)).

43. The requirements of Rule 23(b)(2)(B) regarding fair and efficient adjudication of this controversy are met because the North Dakota Department of Labor is the sole state agency with mandatory duties and powers, on a statewide basis, to ". . . determine from the facts whether probable cause exists to believe a discriminatory practice has occurred" on each complaint filed and when the department has found ". . . that probable cause exists to believe that a discriminatory practice has occurred" then (absent settlement) ". . . the department **shall** provide for an administrative hearing in the manner provided in chapter 28-32 on the complaint." N.D.C.C. § § 14-02.4-23(2) and (3); emphasis added. This class action permits the fair and efficient adjudication of the controversy by insuring that one action, including all members of the class, is taken against the sole agency in North Dakota that must vindicate their rights. There is no assurance that, if any one class member prevailed in an independent suit, the Defendant

would conform its conduct to that decision. The prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendant.

Additionally, adjudications with respect to individuals and members of the class would, as a practical matter, due to the typicality and commonality of their claims, be dispositive of the interests of the other members not parties to the adjudications and risk substantial impairment, if not complete loss, of their rights under the North Dakota Human Rights Act.

44. The requirement of Rule 23(b)(2)(C) will be met because the Plaintiffs will fairly and adequately protect the interests of the class. Defendant has acted on grounds generally applicable to the class by failing or refusing to perform his mandatory, nondiscretionary duties, as referenced above. The named Plaintiffs, as representatives of the entire class described, seek herein to have the court declare that Defendant, Mark D. Bachmeier, Commissioner, North Dakota Department of Labor, has affirmatively failed and refused to perform certain mandatory, nondiscretionary functions of his office, refusals and failures that commonly affect all class members and the correction of which, by writ of mandamus, would benefit all class members.

45. In granting class action status, it would be appropriate for the court to conclude, in its order of certification, that two subclasses have been created, to wit:

- (a) That subclass of persons whose complaints have lead to “probable cause” (or the like) determinations from the North Dakota

Department of Labor (and have not been resolved through informal negotiations or conciliations) but who have not been provided by Defendant, Commissioner of Labor, with the “administrative hearing in the manner provided in Ch. 28-32 on the complaint,” as mandated by N.D.C.C. § § 14-02.4-23(3); and

- (b) That subclass of persons who have filed complaints of alleged discriminatory practices (within the meaning of N.D.C.C. § 14-02.4-23(1)) but whose complaints have not been “. . . determine[d] from the facts whether probable cause exists to believe that a discriminatory practice has occurred”, as the Defendant, Department of Labor, is mandated to do under N.D.C.C. § 14-02.4-23(2).

V.

FACTUAL ALLEGATIONS

46. Since August 1, 2001, Defendant, Commissioner of Labor, has had the mandatory duty to investigate complaints of alleged discriminatory practices, determine from the facts whether probable cause exists to believe that a discriminatory practice has occurred and, where the Defendant has determined that probable cause exists to believe that a discriminatory practice has occurred (and the complaint has not been resolved through informal negotiations or conciliation) to provide an administrative hearing in the manner provided in Ch. 28-32 on the complaint. N.D.C.C. § 14-02.4-23.

47. In the over 33 months of time that the Defendant, Commissioner, North Dakota Department of Labor, has had the authority to investigate, make probable cause determinations, and take probable cause cases to hearing, the Defendant has never provided “. . . for an administrative hearing in the manner provided in chapter 28-32 on [any] complaint” despite the mandatory duty of the Defendant to do so as set forth at N.D.C.C. § 14-02.4-23(3).

48. In the vast majority of complaints filed with the Department of Labor, no “probable cause” determination has been made as to whether a “. . . discriminatory practice has occurred,” despite the mandatory duty of the Defendant to do so, as set forth at N.D.C.C. § 14-02.4-23(2).

49. Without Defendant’s mandated obligation to “. . . determine from the facts whether probable cause exists to believe a discriminatory practice has occurred” on each complaint, neither the complaining party nor the person against whom the complaint has been filed has the benefit of knowing the results of the Defendant’s independent investigation and allegedly expert judgment as to the merits of each complaint, leaving both sides without the benefit of the Defendant’s mandatory obligation in these regards, all to the detriment of the clear legislative intent to “. . . emphasize conciliation to resolve complaints” as set forth at N.D.C.C. § 14-02.4-22.

50. Despite having the specific legislative authority to “. . . adopt the rules necessary to implement . . .” the Department’s duties and powers under the North Dakota Human Rights Act, Defendant Bachmeier has not promulgated any rules (within the

meaning of the Administrative Agencies Practice Act, N.D.C.C. Ch. 28-32) that in any manner pertain to the duties and powers of his department under the North Dakota Human Rights Act. Defendant Bachmeier has recently proposed rules regarding his human rights duties, but the hearing on the proposed rules was not held until May 2004 and any rules, if any, that are finally promulgated will be issued over three years after the Defendant had the authority to adopt rules to complement his mandatory duties under the North Dakota Human Rights Act.

51. The Defendant's proposed rules underscore the abdication of his duty to take "probable cause" complaints to administrative hearings before independent Administrative Law Judges. Although this power is the ultimate enforcement authority of the Defendant under the Human Rights Act, the Defendant's proposed rules do not even **mention** this **mandatory** remedy for the complaining party where "probable cause" has been determined by the Defendant and settlement is unavailing..

52. Without resort to mandamus and declaratory judgment proceedings, Plaintiffs have no other plain, speedy, and adequate remedy in the ordinary course of law to compel Defendant, Mark D. Bachmeier, Commissioner, Department of Labor, to fulfill his non-discretionary mandatory duties to the class members under the North Dakota Human Rights Act.

53. Plaintiffs have suffered and continue to suffer irreparable harm as a result of the Defendant's refusal to exercise his ministerial, nondiscretionary functions of making probable cause determinations and, where probable cause has been found, to take

(absent settlement) the probable cause case to an administrative hearing. This harm includes wholesale denial of essential justice to all those class members who have been promised relief from unlawful discrimination in violation of their human rights under the North Dakota Human Rights Act. The Defendant's failure to investigate, protect, and forward the cause of human rights for all class members - - not only makes the promise of the State of North Dakota of enjoyment of Human Rights without unlawful discrimination a mockery of justice - - but also promotes contempt for the rule of law engendered when the law promises effective remedies for human rights violations but utterly fails to fulfill them.

54. There is no reasonable basis for the Defendant's failure and refusal to do his mandatory, nondiscretionary duties and the Defendant's position is not substantially justified under the law. Because the Plaintiffs have exhausted all administrative remedies available, have shown that no other adequate remedy exists, and because Plaintiffs cannot otherwise obtain a determination of either probable cause of their complaints or, when probable cause is found, an administrative hearing on the merits, only relief in the nature of mandamus will protect the Plaintiffs from Defendant's unlawful refusals and failures to act.

55. Plaintiffs are entitled under the North Dakota Human Rights Act to an order in the nature of mandamus to compel Defendant to (1) timely provide an "administrative hearing in the manner provided in Ch. 28-32 on the complaint" to each class member where probable cause exists to believe that a discriminatory practice has occurred (and

the parties have been unable to settle); and (2) timely “. . . determine from the facts whether probable cause exists to believe that a discriminatory practice has occurred on each complaint. . .” filed by a class member.

56. Plaintiffs are eligible for payment of attorney’s fees, related expenses, and costs pursuant to North Dakota’s version of the “Equal Access to Justice Act”, N.D.C.C. § 28-32-50(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant the following relief:

1. Enter an Order pursuant to Rule 23 of the North Dakota Rules of Civil Procedure that this cause be maintained as a class action.
2. Order judgment of this Court mandating Defendant to: (a) immediately provide for administrative hearings to those class members where probable cause has been, or will be, found to exist that a discriminatory practice has occurred (and settlement could not be obtained); and (b) promptly “. . . determine from the facts whether probable cause exists to believe a discriminatory practice has occurred” on each complaint of discrimination that has been, or will be, filed with the Department.
3. Declare that all persons filing a complaint with Defendant, North Dakota Department of Labor, have the right to a probable cause determination on their complaint and that, if probable cause exists (and the matter cannot be

settled) that those persons are entitled to an administrative hearing in the manner provided in Ch. 28-32 on the complaint.

4. Declare that Defendant, Commissioner, North Dakota Department of Labor has failed and refused to do his mandatory, nondiscretionary duty to find probable cause determinations on each complaint of discrimination filed and, when such probable cause determinations have been made (and absent settlement) has failed to ensure that each probable cause determination proceed to an administrative hearing.
5. Mandate the Defendant to perform his duty to act in accordance with the state policy against discrimination (within the meaning of N.D.C.C. § 14-02.4-01), generally, and to promptly and completely fulfill his ministerial, nondiscretionary duties as mandated by N.D.C.C. § 14-02.4-23, specifically.
6. Award Plaintiffs' attorney's fees, costs and expenses under the State of North Dakota's version of the "Equal Access to Justice Act" (N.D.C.C. § 28-32-50(1)).
7. For the Court to maintain jurisdiction over this matter, after Judgment, to ensure compliance by the Defendant with the Judgment of the Court and to provide such supplemental relief, including injunctive, as is necessary to protect the rights of the class members.

8. For the Court to grant such other and further relief that this Court deems proper under the circumstances.

Respectfully submitted this 11th of May 2004.

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