

1 **State of Arkansas**
2 **79th General Assembly**
3 **Regular Session, 1993**
4 **By: Senator Chaffin**

A Bill

SENATE BILL 500

For An Act To Be Entitled

"ARKANSANS WITH DISABILITIES ACT."

Subtitle

"ARKANSANS WITH DISABILITIES ACT."

13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

15 SECTION 1. This Act shall be known and may be cited as the "Arkansans
16 with Disabilities Act".

18 SECTION 2. PURPOSES. It is the purpose of this Act:

19 (a) to provide a clear and comprehensive State mandate for the
20 elimination of discrimination against individuals with disabilities;

21 (b) to provide clear, strong, consistent, enforceable standards
22 addressing discrimination against individuals with disabilities;

23 (c) to ensure that the State government plays a central role in
24 enforcing the standards established in this Act on behalf of individuals with
25 disabilities;

26 (d) to promote equality of opportunity, full participation,
27 independent living, and economic self-sufficiency for individuals with
28 disabilities; and

29 (e) to invoke the sweep of State authority, including its power to
30 enforce Art. 2, Sec. 3 of the Arkansas Constitution, in order to address the
31 major areas of discrimination faced day-to-day by people with disabilities.

33 SECTION 3. DEFINITIONS. As used in this Act:

34 (a) "Auxiliary aids and services" includes:

35 (1) qualified interpreters or other effective methods of making

1 aurally delivered materials available to individuals with hearing impairments;
2 (2) qualified readers, taped texts, or other effective methods
3 of making visually delivered materials available to individuals with visual
4 impairments;

5 (3) acquisition or modification of equipment or devices; and

6 (4) other similar services and actions.

7 (b) "Complaining party" and "Complainant" mean the Division or person
8 who is bringing an action or proceeding under this Act.

9 (c) "Covered entity" means an employer, employment agency, labor
10 organization, or joint labor-management committee.

11 (d) "Demonstrate" means meets the burdens of production and
12 persuasion.

13 (e) "Direct threat" means a significant risk to the health or safety
14 of others that cannot be eliminated by reasonable accommodation.

15 (f) "Disability" means, with respect to an individual:

16 (1) a physical or mental impairment that substantially limits one
17 or more of the major life activities of such individual;

18 (2) a record of such an impairment; or

19 (3) being regarded as having such an impairment.

20 (g) "Division" means the Division on Disability Rights within the
21 Arkansas Attorney General's office.

22 (h) "Drug" means a controlled substance, as defined in schedules I
23 through VI of the Uniform Controlled Substances Act, found in Ark. Code Ann. §
24 5-64-101, et seq.

25 (i) "Employee" means an individual employed by an employer.

26 (j) (1) "Employer" means, in general, a person who has *ten (10)* or more
27 employees employed in Arkansas for each working day in each of twenty (20) or
28 more calendar weeks in the current or preceding calendar year, and any agent
29 of such person, except that, for one year following the effective date of this
30 Act, an employer means a person who has twenty-five (25) or more employees for
31 each working day in each of twenty (20) or more calendar weeks in the current
32 or preceding year, and any agent of such person.

33 (2) The term "employer" does not include:

34 (A) the United States, a corporation wholly owned by the
35 government of the United States, or an Indian tribe; or

1 (B) a bona fide private membership club (other than a
2 labor organization) that is exempt from taxation under section 501(c) of the
3 Internal Revenue Code of 1986.

4 (k) "Employment agency" means any person regularly undertaking with or
5 without compensation to procure employees for an employer or to procure for
6 employees opportunities to work for an employer and includes an agent of such
7 a person.

8 (l) "Illegal use of drugs" means, in general, the use of drugs, the
9 possession or distribution of which is unlawful under the Uniform Controlled
10 Substance Act, found in Ark. Code Ann. § 5-64-101 et seq. Such term does not
11 include the use of a drug taken under supervision by a licensed health care
12 professional, or other uses authorized by the Controlled Substances Act or
13 other provisions of state or federal law.

14 (m) "Labor organization" means any labor organization and any agent of
15 such an organization, and includes any organization of any kind, any agency,
16 or employee representation committee, group, association, or plan in which
17 employees participate and which exists for the purpose, in whole or in part,
18 of dealing with employers concerning grievances, labor disputes, wages, rates
19 of pay, hours or other terms or conditions of employment, and any conference,
20 general committee, joint or system board, or joint council, which is
21 subordinate to a national or international labor organization.

22 (n) "Person", includes one or more individuals, governments, governmen-
23 tal agencies, political subdivisions, labor organizations, employment
24 agencies, businesses, partnerships, associations, corporations, legal
25 representatives, mutual companies, joint-stock companies, trusts, trustees,
26 unincorporated organizations, and receivers.

27 (o) "Qualified individual with a disability" means an individual with
28 a disability who, with or without reasonable accommodation, can perform the
29 essential functions of the employment position that such individual holds or
30 desires. For the purposes of this Act, consideration shall be given to the
31 employer's judgment as to what functions of a job are essential, and if an
32 employer has prepared a written description before advertising or interviewing
33 applicants for the job, this description shall be considered evidence of the
34 essential functions of the job.

35 (p) "Reasonable accommodation" may include:

1 (1) making existing facilities used by employees readily
2 accessible to and usable by individuals with disabilities; and

3 (2) job restructuring, part-time or modified work schedules,
4 reassignment to a vacant position, acquisition or modification of equipment or
5 devices, appropriate adjustment or modifications of examinations, training
6 materials or policies, the provision of qualified readers or interpreters, and
7 other similar accommodations for individuals with disabilities.

8 (q) "Respondent" means a person who is the subject of a complaint or
9 charge under this Act.

10 (r) (1) "Undue hardship" means, in general, an action requiring
11 significant difficulty or expense, when considered in light of the factors set
12 forth in subparagraph (2).

13 (2) Factors to be considered. In determining whether an
14 accommodation would impose an undue hardship on a covered entity, factors to
15 be considered include:

16 (A) the nature and cost of the accommodation needed under
17 this Act;

18 (B) the overall financial resources of the facility or
19 facilities involved in the provision of the reasonable accommodation; the
20 number of persons employed at such facility; the effect on expenses and
21 resources, or the impact otherwise of such accommodation upon the operation of
22 the facility;

23 (C) the overall financial resources of the covered entity;
24 the overall size of the business of a covered entity with respect to the
25 number of its employees; the number, type, and location of its facilities; and

26 (D) the type of operation or operations of the covered entity,
27 including the composition, structure, and functions of the work force of such
28 entity; the geographic separateness, administrative, or fiscal relationship of
29 the facility or facilities in question to the covered entity.

30 (3) "Undue Hardship" does not include:

31 (A) a disruption that is the result of employees' fears or
32 prejudices toward an individual's disability and not the result of the
33 provision of an accommodation; or

34 (B) a negative impact on the morale of other employees.

35

1 SECTION 4. DISCRIMINATION.

2 (a) General Rule. No covered entity shall discriminate against a
3 qualified individual with a disability because of the disability of such
4 individual in regard to job application procedures, the hiring, advancement,
5 or discharge of employees, employee compensation, job training, and other
6 terms, conditions, and privileges of employment.

7 (b) Construction. As used in subsection (a), the term
8 "discriminate" includes:

9 (1) limiting, segregating, or classifying a job applicant or
10 employee in a way that adversely affects the opportunities or status of such
11 applicant or employee because of the disability of such applicant or employee;

12 (2) participating in a contractual or other arrangement or
13 relationship that has the effect of subjecting a covered entity's qualified
14 applicant or employee with a disability to the discrimination prohibited by
15 this Act (such relationship includes a relationship with an employment or
16 referral agency, labor union, an organization providing fringe benefits to an
17 employee of the covered entity, or an organization providing training and
18 apprenticeship programs);

19 (3) utilizing standards, criteria, or methods of administration,
20 which are not demonstrated by the covered entity to be job-related and
21 consistent with business necessity, and:

22 (A) that have the effect of discrimination on the basis of
23 disability; or

24 (B) that perpetuate the discrimination of others who are
25 subject to common administrative control;

26 (4) excluding or otherwise denying equal jobs or benefits to a
27 qualified individual because of the known disability of an individual with
28 whom the qualified individual is known to have a relationship or association;

29 (5) (A) not making reasonable accommodations to the known physical
30 or mental limitations of an otherwise qualified individual with a disability
31 who is an applicant or employee, unless such covered entity can demonstrate
32 that the accommodation would impose an undue hardship on the operation of the
33 business of such covered entity; or

34 (B) denying employment opportunities to a job applicant or
35 employee who is an otherwise qualified individual with a disability, if such

1 denial is based on the need of such covered entity to make reasonable
2 accommodation to the physical or mental impairments of the employee or
3 applicant;

4 (6) using qualification standards, employment tests or other
5 selection criteria that screen out or tend to screen out an individual with a
6 disability or a class of individuals with disabilities, unless the covered
7 entity can demonstrate that the standard, test or other selection criteria, as
8 used by the covered entity, is job-related for the position in question and
9 consistent with business necessity; and

10 (7) failing to select and administer tests concerning employment
11 in the most effective manner to ensure that, when such test is administered to
12 a job applicant or employee who has a disability that impairs sensory, manual,
13 or speaking skills, such test results accurately reflect the skills, aptitude,
14 or whatever other factor of such applicant or employee that such test purports
15 to measure, rather than reflecting the impaired sensory, manual, or speaking
16 skills of such employee or applicant (except where such skills are the factors
17 that the test purports to measure).

18 (c) Mixed Motives. An unlawful employment practice is established when
19 the complaining party demonstrates that a disability was a motivating factor
20 for any employment practice, even though other factors also motivated the
21 practice.

22 (d) Medical Examinations and Inquiries.

23 (1) In general. The prohibition against discrimination as
24 referred to in subsection (a) shall include medical examinations and
25 inquiries.

26 (2) Pre-employment.

27 (A) Prohibited examination or inquiry. Except as provided
28 in paragraph (3), a covered entity shall not conduct a medical examination or
29 make inquiries of a job applicant as to whether such applicant is an
30 individual with a disability or as to the nature or severity of such
31 disability.

32 (B) Acceptable inquiry. A covered entity may make pre-
33 employment inquiries into the ability of an applicant to perform job-related
34 functions.

35 (3) Employment entrance examination. A covered entity may

1 require a medical examination after an offer of employment has been made to a
2 job applicant and prior to the commencement of the employment duties of such
3 applicant, and may condition an offer of employment on the results of such
4 examination, if:

5 (A) all entering employees are subjected to such an
6 examination regardless of disability;

7 (B) information obtained regarding the medical condition or
8 history of the applicant is collected and maintained on separate forms and in
9 separate medical files and is treated as a confidential medical record, except
10 that:

11 (i) supervisors and managers may be informed regarding
12 necessary restrictions on the work or duties of the employee and necessary
13 accommodations;

14 (ii) first aid and safety personnel may be informed,
15 when appropriate, if the disability might require emergency treatment; and

16 (iii) government officials investigating compliance
17 with this Act shall be provided relevant information on request; and

18 (C) the results of such examination are used only in
19 accordance with this Act.

20 (4) Examination and inquiry after employment has begun.

21 (A) Prohibited examinations and inquiries. A covered
22 entity shall not require a medical examination and shall not make inquiries of
23 an employee as to whether such employee is an individual with a disability or
24 as to the nature or severity of the disability, unless the covered entity can
25 demonstrate that such examination or inquiry is job-related and consistent
26 with business necessity.

27 (B) Acceptable examinations and inquiries. A covered entity
28 may conduct voluntary medical examinations, including voluntary medical
29 histories, which are part of an employee health program available to employees
30 at that work site. A covered entity may make inquiries into the ability of an
31 employee to perform job-related functions.

32 (C) Requirement. Information obtained under subparagraphs
33 (A) and (B) regarding the medical condition or history of any employee are
34 subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

35

1 SECTION 5. PROHIBITION AGAINST RETALIATION AND COERCION.

2 (a) Retaliation. No person shall discriminate against any individual
3 because such individual has opposed any act or practice made unlawful by this
4 Act or because such individual made a charge, testified, assisted, or
5 participated in any manner in an investigation, proceeding, or hearing under
6 this Act.

7 (b) Interference, Coercion, or Intimidation. It shall be unlawful to
8 coerce, intimidate, threaten, or interfere with any individual in the exercise
9 or enjoyment of, or on account of his or her having exercised or enjoyed, or
10 on account of his or her having aided or encouraged any other individual in
11 the exercise or enjoyment of, any right granted or protected by this Act.

12 (c) Remedies and Procedures. The remedies and procedures available for
13 violations of Section 4 shall be available to aggrieved persons for violations
14 of subsections (a) and (b) of this section.

15

16 SECTION 6. DEFENSES.

17 (a) Disparate Impact in General. It may be a defense to a charge of
18 discrimination under this Act that an alleged application of qualification
19 standards, tests, selection criteria, or methods of administration, etc., that
20 screen out or tend to screen out or otherwise deny a job or benefit to an
21 individual with a disability has been demonstrated by the covered entity to be
22 job-related and consistent with business necessity, and such performance
23 cannot be accomplished by reasonable accommodation, as required under this
24 Act.

25 (b) Intentional Discrimination. A demonstration that an employment
26 practice is required by business necessity may not be used as a defense
27 against a claim of intentional discrimination under this Act.

28 (c) Qualification Standards. The term "qualification standards" may
29 include a requirement that an individual shall not pose a direct threat to the
30 health or safety of other individuals in the work place.

31 (d) Religious Entities.

32 (1) In general. This Act shall not prohibit a religious
33 corporation, association, educational institution, or society from giving
34 preference in employment to individuals of a particular religion to perform
35 work connected with the carrying on by such corporation, association,

1 educational institution, or society of its activities.

2 (2) Religious tenets requirement. Under this Act, a religious
3 organization may require that all applicants and employees conform to the
4 religious tenets of such organization.

5 (e) Infections and Communicable Diseases. In any case in which an
6 individual has an infectious or communicable disease that is transmitted to
7 others through the handling of food and that is included on the list
8 developed by the federal Secretary of Health and Human Services under the
9 Americans with Disabilities Act at 42 U.S.C. § 12113(d), and which cannot be
10 eliminated by reasonable accommodation, a covered entity may refuse to assign
11 or continue to assign such individual to a job involving food handling.

12

13 SECTION 7. ILLEGAL USE OF DRUGS AND ALCOHOL.

14 (a) Qualified Individual With a Disability. For purposes of this Act,
15 the term "qualified individual with a disability" shall not include any
16 employee or applicant who is currently engaging in the illegal use of drugs,
17 when the covered entity acts on the basis of such use.

18 (b) Health and Other Services. Notwithstanding subsection (a), an
19 individual should not be denied health services, or services provided in
20 connection with drug rehabilitation, on the basis of the current illegal use
21 of drugs if the individual is otherwise entitled to such services.

22 (c) Rules of Construction. Nothing in subsection (a) shall be construed
23 to exclude as a qualified individual with a disability an individual who:

24 (1) has successfully completed a supervised drug rehabilitation
25 program and is no longer engaging in the illegal use of drugs, or has
26 otherwise been rehabilitated successfully and is no longer engaging in such
27 use;

28 (2) is participating in a supervised rehabilitation program and
29 is no longer engaging in such use; or

30 (3) is erroneously regarded as engaging in such use, but is not
31 engaging in such use; except that it shall not be a violation of this Act for
32 a covered entity to adopt or administer reasonable policies or procedures,
33 including but not limited to drug testing, designed to ensure that an
34 individual described in paragraph (1) or (2) is no longer engaging in the
35 illegal use of drugs.

1 (d) Authority of Covered Entity. A covered entity:

2 (1) may prohibit the illegal use of drugs and the use of alcohol
3 at the work place by all employees;

4 (2) may require that employees shall not be under the influence
5 of alcohol or be engaging in the illegal use of drugs at the work place;

6 (3) may hold an employee who engages in the illegal use of drugs
7 or who is an alcoholic to the same qualification standards for employment or
8 job performance and behavior that such entity holds other employees, even if
9 any unsatisfactory performance or behavior is related to the drug use or
10 alcoholism of such employee.

11 (E) Drug Testing.

12 (1) In general. For purposes of this Act, a test to determine
13 the illegal use of drugs shall not be considered a medical examination.

14 (2) Construction. Nothing in this Act shall be construed to
15 encourage, prohibit, or authorize the conducting of drug testing for the
16 illegal use of drugs by job applicants or employees or making employment
17 decisions based on such test results.

18

19 SECTION 8. POSTING NOTICES.

20 (a) Every employer, employment agency, labor organization, or joint
21 labor-management committee covered under this Act shall post notices in an
22 accessible format to applicants, employees, and members describing the
23 applicable provisions of this Act.

24

25 SECTION 9. RECRUITMENT BY STATE AGENCIES.

26 Each state agency shall actively seek to recruit, retain, and advance
27 qualified individuals with a disability and shall submit a report to the
28 Division by the end of each calendar year describing the agency's efforts in
29 this regard.

30

31 SECTION 10. THE DIVISION.

32 (a) The Attorney General's office shall establish a Division on
33 Disability Rights which shall administer this Act.

34 (b) Powers and Duties. In the enforcement of this Act, the Division has
35 the power and duty to:

- 1 (1) Maintain an office in Pulaski County and such other offices
2 within the State as may be deemed necessary;
- 3 (2) Meet and exercise its powers within the State;
- 4 (3) Appoint an executive director, attorneys, hearing
5 examiner(s), clerks and other employees and agents as it may deem necessary,
6 and delegate any of its functions and duties to these agents or employees in
7 the interest of efficient management of the appropriations and resources of
8 the agency. The hearing examiner(s) are entitled to reimbursement for
9 expenses incurred in the performance of their duties and to reasonable fees
10 for each day of service as a hearing examiner;
- 11 (4) Promote the creation of local commissions on human rights, to
12 cooperate with State, local and other agencies both public and private, and
13 individuals, and to obtain upon request and utilize the services of all
14 governmental departments and agencies;
- 15 (5) Enter into cooperative working agreements with local
16 commissions which have enforceable ordinances, orders, or resolutions and
17 professional staff;
- 18 (6) Cooperate with federal agencies in enforcing and promoting
19 the Americans with Disabilities Act, compiled in 42 U.S.C. § 12101 et seq.,
20 and cooperate with other federal, state and local agencies in order to achieve
21 the purposes of this Act;
- 22 (7) Accept and disburse gifts and bequests, grants or other
23 payments, public or private, to help finance its activities;
- 24 (8) Receive, initiate, investigate, seek to conciliate, hold
25 hearings on and pass upon complaints alleging violations of this Act;
- 26 (9) Require answers to interrogatories, compel the attendance of
27 witnesses, examine witnesses under oath or affirmation in person by
28 deposition, and require the production of documents relevant to the complaint.
29 The Division may make rules authorizing or designating any member or
30 individual to exercise these powers in the performance of official duties;
- 31 (10) Furnish technical assistance requested by persons subject to
32 this Act to further their compliance with this Act or an order issued
33 thereunder;
- 34 (11) Make studies appropriate to effectuate the purposes and
35 policies of this Act and make the results thereof available to the public;

1 (12) Render, an annual written report. The report may contain
2 recommendations of the Division for legislative or other action to effectuate
3 the purpose and policies of this Act;

4 (13) Adopt, promulgate, amend and rescind rules and regulations
5 to effectuate the purposes and provisions of this Act using the process
6 prescribed in the Administrative Procedure Act in Ark. Code Ann. § 25-15-201
7 et seq.;

8 (14) Cooperate with community, professional, civic and religious
9 organizations, federal agencies and agencies from other states in the
10 development of public information programs, leadership and activities in the
11 interests of equal opportunity and treatment of all individuals;

12 (15) (A) Consult with the Governor's Commission on People with
13 Disabilities, which shall serve as an advisory agency. The Division may
14 empower this agency to:

15 (i) Study and report on problems of discrimination
16 because of disability;

17 (ii) Foster through community effort or otherwise,
18 goodwill toward individuals with disabilities among the groups and elements of
19 the populations of the State; and

20 (iii) Make recommendations to the Division for the
21 development of policies and practices that will aid in carrying out the
22 purposes of this Act.

23 (B) The Division may make provision for technical and
24 clerical assistance to the advisory agency.

25 (c) The Division shall have an official seal which shall be judicially
26 noticed.

27 (d) An employer or other entity covered under this Act shall not be
28 excused from compliance with the requirements of the Act because of any
29 failure to receive technical assistance under this section.

30 (e) When this Act and the Administrative Procedure Act, found in Ark.
31 Code Ann. § 25-15-101, et seq., are in conflict, this Act shall control.

32

33 SECTION 11. COMPLAINTS FILED WITH DIVISION.

34 (a) A person claiming to be aggrieved by a discriminatory practice, or
35 a member of the Division may file with the Division a written sworn complaint

1 stating that a discriminatory practice has been committed, setting forth the
2 facts sufficient to enable the Division to identify the persons charged
3 (hereinafter the respondent). Within ten (10) days after receipt of the
4 complaint, the Division shall serve on the complainant a notice acknowledging
5 the filing of the complaint and informing the complainant of the respondent's
6 time limits and choice of forums under this Act.

7 (b) The Division staff, or a person designated pursuant to its rules,
8 shall within (10) days furnish the respondent with a copy of the complaint and
9 notice advising the respondent of the respondent's procedural rights and
10 obligations under this Act.

11 (c) The complaint must be filed within one hundred eighty (180) days
12 after the alleged discriminatory practice ceases.

13 (d) (1) The Division staff, or a person designated pursuant to its rules,
14 shall commence an investigation of the complaint within thirty (30) days after
15 the filing of the complaint. The Division staff, or designee, shall promptly
16 investigate the matter to determine whether the discriminatory practice
17 exists.

18 (2) If it is determined that there is not reasonable cause to
19 believe that the respondent has engaged in a discriminatory practice, the
20 Division shall furnish a copy of the order to the complainant, the respondent,
21 and such public officers and persons as the Division deems proper.

22 (e) (1) The complainant, within thirty (30) days after receiving a copy
23 of the order dismissing the complaint, may file with the Division an
24 application for reconsideration of the order.

25 (2) Upon such application, the Division or an individual
26 designated pursuant to its rules shall make a new determination within thirty
27 (30) days whether there is reasonable cause to believe that the respondent has
28 engaged in a discriminatory practice.

29 (3) If it is determined that there is no reasonable cause to
30 believe that the respondent has engaged in a discriminatory practice, the
31 Division shall issue an order dismissing the complaint after reconsideration,
32 and furnishing a copy of the order to the complainant, the respondent, and
33 such public officers and persons as the Division deems proper.

34

35 SECTION 12. CONCILIATION AGREEMENTS; TEMPORARY RELIEF.

1 (a) If the staff determines after investigation, or if the Division or
2 its delegate determines after the review provided for in Section 11 that there
3 is reasonable cause to believe that the respondent has engaged in a
4 discriminatory practice, the Division staff shall endeavor to eliminate the
5 alleged discriminatory practices by conference, conciliation and persuasion.

6 (b) The terms of a conciliation agreement reached with a respondent
7 shall require the respondent to refrain from discriminatory practices in the
8 future and shall make such further provisions as may be agreed upon between
9 the Division or its assigned staff and the respondent.

10 (c) If a conciliation agreement is entered into, the Division shall
11 issue and serve on the complainant an order stating its terms. A copy of the
12 order shall be delivered to the respondent, and such public officers and
13 persons as the Division deems proper.

14 (d) Except for the terms of the conciliation agreement, neither the
15 Division nor any officer or employee thereof shall make public, without the
16 written consent of the complainant and the respondent, information concerning
17 efforts in a particular case to eliminate discriminatory practice by
18 conference, conciliation or persuasion; whether or not there is a
19 determination of reasonable cause or a conciliation agreement. The
20 *conciliation agreement itself shall be made public.*

21 (e) At the expiration of one (1) year from the date of a conciliation
22 agreement, and at other times in its reasonable discretion, the Division staff
23 may investigate whether the terms of the agreement have been and are being
24 complied with by the respondent.

25 (f) Upon finding that the terms of the agreement are not being complied
26 with by the respondent, the Division shall take such action as it deems
27 appropriate to assure compliance.

28 (g) At any time after a complaint is filed, the Division may file an
29 action in the *appropriate* court in a county in which the subject of the
30 complaint occurs, or in a county in which a respondent resides or has the
31 respondent's principal place of business, seeking appropriate temporary
32 relief against the respondent, pending final determination of proceedings
33 under this Act, including an order or decree restraining such respondent from
34 doing or procuring any act seeking to render ineffectual any order the
35 Division may enter with respect to the complaint. The court has the power to

1 grant such temporary relief or restraining order as it deems just and proper.

2

3 SECTION 13. HEARINGS.

4 (a) In complaints involving discrimination in employment, within ninety
5 (90) days after an administrative determination of reasonable cause to believe
6 that discrimination took place, unless the Division has issued an order
7 stating the terms of a conciliation agreement, or in those cases in which the
8 terms of a conciliation agreement have been kept confidential has issued an
9 order stating that the case has been satisfactorily conciliated, the Division
10 shall serve on the respondent by mail or in person a written notice, together
11 with a copy of the complaint as it may have been amended, or a copy of the
12 letter of determination, requiring the respondent to answer the allegation of
13 the complaint at a hearing before a hearing examiner or hearing examiners, or
14 another individual pursuant to its rules, at a time and place specified by the
15 hearing examiner(s) after conference with the parties or their attorneys. A
16 copy of the notice shall be furnished to the complainant, and such public
17 officers and persons as the Division deems proper.

18 (b) A member of the Division who filed the complaint or endeavored to
19 eliminate the alleged discriminatory practice by conference, conciliation or
20 persuasion shall not participate in the hearing or in the subsequent
21 deliberation of the Division.

22 (c) The respondent may file an answer with the Division by registered
23 or certified mail in accordance with the rules of the Division before the
24 hearing date. The respondent may amend an answer at any time prior to the
25 issuance of an order based on the complaint, but no order shall be issued
26 unless the respondent has had an opportunity of a hearing on the complaint or
27 amendment on which the order is based.

28 (d) A respondent, who has filed an answer or whose default in answering
29 has been set aside for good cause shown, may appear at the hearing with or
30 without representation, may examine and cross-examine witnesses and the
31 complainant, and may offer evidence.

32 (e) The complainant and the complainant's private attorney, and, in the
33 discretion of the Division, any person, may intervene, examine, and cross-
34 examine witnesses, and present evidence.

35 (f) If the respondent fails to answer the complaint, the Division may

1 enter the respondent's default. Unless the default is set aside for good
2 cause shown, the hearing may proceed on the evidence in support of the
3 complaint.

4 (g) Efforts at conference, conciliation and persuasion shall not be
5 received in evidence.

6 (h) Testimony taken at the hearing shall be under oath and transcribed.
7 If the testimony is not taken before the Division, the record shall be
8 transmitted to the Division.

9 (i) In a proceeding under this Act, the production of a written, printed
10 or visual communication, advertisement or other form of publication, or a
11 written inquiry, or record, or other document purporting to have been made by
12 a person shall be prima facie evidence that it was authorized by the person.

13 (j) The Division shall not be bound by the strict rules of evidence
14 prevailing in courts of law or equity.

15

16 SECTION 14. FINDINGS AND ORDERS.

17 (a) If the Division determines that the respondent has not engaged in a
18 discriminatory practice, the Division shall state its findings of fact and
19 conclusions of law and shall issue an order dismissing the complaint. A copy
20 of the order shall be delivered to the complainant, the respondent, and such
21 public officers and persons as the Division deems proper.

22 (b) If the Division determines that the respondent has engaged in a
23 discriminatory practice, the Division shall state its findings of fact and
24 conclusions of law and shall issue an order requiring the respondent to cease
25 and desist from the discriminatory practice and to take such action in Section
26 15 as in the judgment of the Division will carry out the purposes of this Act.
27 A copy of the order shall be delivered to the respondent, the complainant,
28 and to such public officers and persons as the Division deems proper.

29

30 SECTION 15. REMEDIES.

31 (a) Equitable Relief. If the Division finds that the respondent has
32 engaged in a discriminatory practice, the Division may enjoin the respondent
33 from engaging in such unlawful employment practices, and order such
34 affirmative action as may be appropriate, which may include, but is not
35 limited to, reinstatement or hiring of employees, with or without back pay,

1 and any other equitable relief the Division deems appropriate. Back pay
2 liability shall not accrue from a date more than two years prior to the filing
3 of the complaint. Interim earnings or amounts earnable with reasonable
4 diligence by the person or persons discriminated against shall operate to
5 reduce the back pay otherwise allowable.

6 (b) Damages.

7 (1) If the Division finds that a respondent engaged in a
8 discriminatory practice other than an employment practice that is unlawful
9 because of its disparate impact, the complaining party may recover
10 compensatory and punitive damages as allowed in subsection (c), in addition to
11 any other relief authorized by this Act, from the respondent.

12 (2) Reasonable accommodation and good faith effort.
13 In any case where a discriminatory practice involves the provision of a
14 reasonable accommodation, damages may not be awarded under this section where
15 the covered entity demonstrates good faith efforts, in consultation with the
16 person with the disability who has informed the covered entity that
17 accommodation is needed, to identify and make a reasonable accommodation that
18 would provide such individual with an equally effective opportunity and would
19 not cause an undue hardship on the operation of the business.

20 (c) Compensatory and Punitive Damages.

21 (1) Determination of punitive damages. The complaining party
22 may recover punitive damages under this section against a respondent (other
23 than a government agency or political subdivision) if the complaining party
24 demonstrates that the respondent engaged in a discriminatory practice or
25 discriminatory practices with malice or with reckless indifference to the
26 state-protected rights of an aggrieved individual.

27 (2) Exclusions from compensatory damages. Compensatory damages
28 awarded under this section shall not include back pay, interest on back pay,
29 or any other type of relief authorized under Subsection (a).

30 (3) Damages Caps. The sum of the amount of compensatory damages
31 awarded under this section for future pecuniary losses, emotional pain,
32 suffering, inconvenience, mental anguish, loss of enjoyment of life, and other
33 nonpecuniary losses, and the amount of punitive damages awarded under this
34 section, shall not exceed, for each complaining party:

35 (A) In the case of a respondent who has more than four (4)

1 and fewer than fifteen (15) employees in each of twenty (20) or more calendar
2 weeks in the current or preceding calendar year, twenty-five thousand dollars
3 (\$25,000);

4 (B) In the case of a respondent who has more than fourteen
5 (14) and fewer than one hundred one (101) employees in each of twenty (20) or
6 more calendar weeks in the current or preceding calendar year, fifty thousand
7 dollars (\$50,000);

8 (C) In the case of a respondent who has more than one
9 hundred (100) and fewer than two hundred one (201) employees in each of twenty
10 (20) or more calendar weeks in the current or preceding calendar year, one
11 hundred thousand dollars (\$100,000);

12 (D) In the case of a respondent who has more than two
13 hundred (200) and fewer than five hundred one (501) employees in each of
14 twenty (20) or more calendar weeks in the current or preceding calendar year,
15 two hundred thousand dollars (\$200,000);

16 (E) In the case of a respondent who has more than five
17 hundred (500) employees in each of twenty (20) or more calendar weeks in the
18 current or preceding calendar year, three hundred thousand dollars (\$300,000).

19 (d) Attorneys' Fees. In any action commenced pursuant to this Act, if
20 the Division finds for the complainant, it shall, in addition to any other
21 relief, award the complainant reasonable attorneys' fees, and costs, including
22 expert witness fees and other litigation expenses, unless special
23 circumstances would render an award of fees or costs unjust. The State shall
24 be liable for fees and costs the same as a private individual.

25 (e) Mixed Motives. On a claim in which an individual proves a violation
26 and a respondent demonstrates that the respondent would have taken the same
27 action in the absence of the impermissible motivating factor, the Division:

28 (1) may grant declaratory relief, injunctive relief (except as
29 provided in Subparagraph (2)), and attorneys' fees and costs demonstrated to
30 be directly attributable only to the pursuit of a claim under this Act; and

31 (2) shall not award damages or issue an order requiring any
32 admission, reinstatement, hiring, promotion, or payment of back pay.

33 (f) Publication. The Division may publish, or cause to be published,
34 the names of persons who have been determined to have engaged in a
35 discriminatory practice.

1

2 SECTION 16. JUDICIAL REVIEW.

3 (a) A complainant, respondent or intervenor aggrieved by an order of the
4 Division, including an order dismissing a complaint or stating the terms of a
5 conciliation agreement, may obtain judicial review, and the Division may
6 obtain an order of the court for enforcement of its order, in a proceeding
7 brought in the *appropriate* court in the county in which the alleged
8 discriminatory practice, which is the subject of the order, occurred or in
9 which a respondent resides or transacts business.

10 (b) (1) The proceeding for review or enforcement is initiated by filing
11 a petition in court.

12 (2) Copies of the appeal shall be served upon all parties of
13 record.

14 (3) Within thirty (30) days after the service of the petition for
15 appeal upon the Division or its filing by the Division, or within such further
16 time as the court may allow, the Division shall transmit to the court the
17 original or a certified copy of the entire record upon which the order is
18 based, including a transcript of testimony, which need not be printed.

19 (4) By stipulation of all parties to the review proceeding, the
20 record may be shortened.

21 (5) *The standard of review shall be in accordance with the*
22 *provisions for judicial review with the Administrative Procedures Act,*
23 *Arkansas Code Annotated §25-15-101 et seq.*

24 (6) The court shall have the power to grant such temporary relief
25 or restraining order as it deems just and to enter an order enforcing,
26 modifying and enforcing as modified, or setting aside in whole or in part the
27 order of the Division, or remanding the case to the Division for further
28 proceedings.

29 (7) All such proceedings shall be heard and determined by the
30 *court and appellate court upon subsequent appeal as expeditiously as possible.*

31 (c) If the Division has failed to schedule a hearing in accordance with
32 Section 13 or has failed to issue an order within one hundred eighty (180)
33 days after the complaint is filed, the complainant, respondent or an
34 intervenor may petition the *appropriate* court in a county in which the alleged
35 discriminatory practice set forth in the complaint occurred or in which the

1 respondent resides or transacts business for an order directing the Division
2 to take such action. The court shall follow the procedure set forth in
3 subsection (b) so far as applicable.

4 (d) (1) *The judicial review shall be on the record from the division.*
5 *The court shall not consider any matter not considered by, nor any objection*
6 *not raised before, the hearing examiner(s) unless the failure of a party to*
7 *present such matter to or raise such objection before the hearing examiner(s)*
8 *is excused because of good cause shown.*

9 (2) A party may move the court to remand the case to the Division
10 in the interest of justice for the purpose of adducing additional specified
11 material evidence and seeking findings thereon, provided, that the party shows
12 good cause for the failure to adduce such evidence before the Division.

13 (e) (1) The jurisdiction of the court shall be exclusive and its final
14 judgment or decree shall be subject to review by an *appellate court* as
15 provided by the rules of civil procedure.

16 (2) The Division's copy of the testimony shall be available to
17 all parties for examination without cost during business hours at the
18 Division's office.

19 (f) (1) A proceeding under this section must be initiated within thirty
20 (30) days after issuance of the final order by the Division.

21 (2) If no proceeding is so initiated, the Division may obtain a
22 decree of the court of enforcement of its order upon showing that a copy of
23 the petition for enforcement was served on the respondent and the respondent
24 is subject to the jurisdiction of the court.

25

26 SECTION 17. ACCESS TO RECORDS.

27 (a) In connection with an investigation of a complaint filed under this
28 Act, the Division or its designated representative at any reasonable time may
29 request access to premises, records and documents relevant to the complaint
30 and the right to examine, photograph and copy evidence.

31 (b) Every person subject to this Act shall:

32 (1) Make and keep records relevant to the determination of
33 whether discriminatory practices have been or are being committed;

34 (2) Preserve such records for such periods; and

35 (3) Make such reports therefrom, as the Division shall prescribe

1 by regulation or order, as reasonably necessary, or appropriate for the
2 enforcement of this Act or the regulation or orders thereunder.

3 (c) So as to avoid undue burdens on persons subject to this Act,
4 records and reports required by the Division under the Act shall conform as
5 near as may be to similar records and reports required by federal law and the
6 laws of other states and to customary record-keeping practice.

7 (d) If a person fails to permit access, examination, photographing or
8 copying or fails to make, keep or preserve records or make reports in
9 accordance with this section, the *appropriate* court for the county in which
10 such person is found, resides, or has such person's principal place of
11 business, upon application of the Division, may issue an order requiring
12 compliance.

13 (e) The Division, by regulation, shall require each person subject to
14 this Act who controls an apprenticeship or other training program to keep all
15 records reasonably necessary to carry out the purpose of the Act, including,
16 but not limited to, a list of applicants who wish to participate in such
17 program, including the chronological order in which applications were
18 received, and shall furnish to the Division upon request, a detailed
19 description of the manner in which persons are selected to participate in the
20 apprenticeship or other training programs.

21 (f) A person who believes that the application to it of a regulation or
22 order issued under this section would result in undue hardship may apply to
23 the Division for an exemption from the application of the regulation or order.
24 If the Division finds the application of the regulation or order to the
25 person in question would impose an undue hardship, the Division may grant
26 appropriate relief.

27

28 SECTION 18. SUBPOENAS.

29 (a) (1) Upon written application to the Division, a party to a
30 proceeding is entitled as of right to the issuance of subpoenas designated
31 pursuant to its rules requiring attendance and the giving of testimony by
32 witnesses and the production of documents.

33 (b) A subpoena so issued shall show on its face the name and address of
34 the party at whose request the subpoena is directed.

35 (c) On petition of the person to whom the subpoena is directed and

1 notice to the requesting party, the Division or an individual designated
2 pursuant to its rules may vacate or modify the subpoena.

3 (d) Depositions of witnesses may be taken as prescribed by the Arkansas
4 Rules of Civil Procedure.

5 (e) Witnesses whose depositions are taken, or who are summoned before
6 the Division or its agents, will be entitled to the same witness and mileage
7 fees as are paid to the witnesses subpoenaed in courts of the State.

8 (f) If a person fails to comply with a subpoena issued by the Division,
9 the *appropriate* court of the county in which the person is found, resides, or
10 transacts business, upon application of the Division or the party requesting
11 the subpoena, may issue an order requiring compliance. In any proceeding
12 brought under this section, the court may modify or set aside the subpoena.

13

14 SECTION 19. RESISTANCE, OBSTRUCTION, ETC.

15 Any person who willfully resists, prevents, impedes or interferes with
16 the performance of a duty or the exercise of a power by the Division or one of
17 its members or representatives commits a Class C misdemeanor.

18

19 SECTION 20. ADDITIONAL REMEDIES PRESERVED.

20 Any person injured by any action in violation of the provisions of this
21 Act shall have a civil cause of action in a *court of appropriate jurisdiction*
22 in a county in which the alleged discriminatory practice set forth in the
23 complaint occurs or in which the respondent resides or transacts business.
24 All remedies in Section 15, including attorneys' fees, shall be available in
25 any lawsuit filed pursuant to this section. A civil cause of action under
26 this section shall be filed in *the* court within one year after the alleged
27 discriminatory practice ceases, and any such action shall supersede any
28 complaint or hearing before the Division concerning the same alleged
29 violations, and any such administrative action shall be closed upon such
30 filing. Upon application by the complainant in such circumstances as the
31 court may deem just the court may authorize commencement of the action without
32 the payment of court costs or security. Upon timely application, the court
33 may, in its discretion, permit the Division in a case involving a government,
34 governmental agency, or political subdivision or in a case involving an
35 alleged pattern or practice of discrimination, to intervene in such civil

1 action upon certification that the case is of general public importance. *The*
2 *rights available under this section shall not be dependent upon the existence*
3 *or funding of the division.*

4

5 SECTION 21. CONSTRUCTION. Relationship to Other Laws.

6 (a) Nothing in this act shall be construed to invalidate or limit the
7 remedies, rights, and procedures of any Federal law or law of this State or
8 political subdivision of this State that provides greater or equal protection
9 for the rights of individuals with disabilities than are afforded by this
10 Act. Nothing in this Act shall be construed to preclude the prohibition of, or
11 the imposition of restrictions on, smoking in places of employment.

12 (b) Insurance. This Act shall not be construed to prohibit or restrict:

13 (1) an insurer, hospital or medical service company, health
14 maintenance organization, or any agent, or entity that administers benefit
15 plans, or similar organizations from underwriting risks, classifying risks, or
16 administering such risks that are based on or not inconsistent with State law;
17 or

18 (2) a person or organization covered by this Act from
19 establishing, sponsoring, observing or administering the terms of a bona fide
20 benefit plan that are based on underwriting risks, classifying risks, or
21 administering such risks that are based on or not inconsistent with State law;
22 or

23 (3) a person or organization covered by this Act from
24 establishing, sponsoring, observing or administering the terms of a bona fide
25 benefit plan that is not subject to State laws that regulate insurance.

26 Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the
27 purposes of this Act.

28 (c) Accommodations and Services. Nothing in this Act shall be construed
29 to require an individual with a disability to accept an accommodation, aid,
30 service, opportunity, or benefit which such individual chooses not to accept.

31

32 SECTION 22. SUITS AGAINST THE STATE.

33 *In any action against the state or a political subdivision for a*
34 *violation of the requirements of this act, remedies are available for such a*
35 *violation to the same extent as such remedies are available for such a*

1 violation in an action against any public or private entity other than the
2 state, except that punitive damages may not be awarded against the state or
3 any political subdivision. Proceedings against the state shall be allowed to
4 the extent not forbidden by law, including the Arkansas Constitution.

5

6 SECTION 23. ALTERNATIVE MEANS OF DISPUTE RESOLUTION. Where
7 appropriate and to the extent authorized by law, the use of alternative means
8 of dispute resolution, including settlement negotiations, conciliation,
9 facilitation, mediation, fact finding, mini-trials, and arbitration, is
10 encouraged to resolve disputes arising under this Act.

11

12 SECTION 24. All provisions of this Act of a general and permanent
13 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
14 Code Revision Commission shall incorporate the same in the Code.

15

16 SECTION 25. If any provision of this Act or the application thereof to
17 any person or circumstance is held invalid, such invalidity shall not affect
18 other provisions or applications of the Act which can be given effect without
19 the invalid provision or applications, and to this end the provisions of this
20 Act are declared to be severable.

21

22 SECTION 26. All laws and parts of laws in conflict with this Act are
23 hereby repealed.

24

25 SECTION 27. EMERGENCY. It is hereby found and determined by the
26 General Assembly that people with disabilities suffer discrimination because
27 of their disabilities; that this legislation is needed immediately to address
28 these problems and to remedy discrimination based on disabilities. Therefore,
29 an emergency is hereby declared to exist and this Act being necessary for the
30 preservation of the public peace, health and safety shall be in full force and
31 effect from and after its passage and approval.

32

/s/ Senator Chaffin

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