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The Idaho Human Rights Commission Celebrates Forty Years Of Service

by Sarah H. Arnett

Many Idaho employers have never had occasion to work with the Idaho Human Rights Commission. In fact, many Idahoans are probably unaware about what the Idaho Human Rights Commission is or what functions it performs.

The Idaho Human Rights Commission (“IHRC”) is an independent government agency, which was established by the Idaho legislature in 1969 as part of the Idaho Human Rights Act. The IHRC’s purpose is to enforce Federal and state law prohibiting discrimination on the basis of race, color, religion, national origin, sex, disability, and age in the areas of employment, hiring practices, housing, education, and public accommodations. The IHRC also enforces Federal and state laws prohibiting retaliation against people who complain about unlawful discrimination in the workplace and who file anti-discrimination claims.

Last year, the IHRC celebrated its fortieth anniversary. Throughout the last four decades, the IHRC has grown into an agency that plays a critical role in limiting employment lawsuits by assisting employers and employees with resolving employment discrimination claims before the employee files a lawsuit, thereby avoiding workplace discrimination. The IHRC is staffed by a number of long-term personnel who have acquired substantial expertise in the area of employment discrimination and who are also highly qualified, experienced mediators for disputes involving alleged employment discrimination. Consequently, the IHRC has become a resource for many employers and their attorneys seeking guidance about compliance with anti-discrimination laws and effective employer practices for avoiding employment discrimination claims.

Although the IHRC has undergone some significant changes during this past year due to Idaho’s state budget crisis, the Commission’s structure and statutorily mandated functions will remain essentially the same, and the Commission hopes the changes will ultimately increase its ability to provide more educational resources to Idaho employers.

The IHRC’s Relationship With The EEOC

The Equal Employment Opportunities Commission (“EEOC”) is the IHRC’s Federal counterpart, which was created by the U.S. Congress to enforce Federal civil rights laws prohibiting discrimination in employment and hiring. Federal law, however, provides that if a state has created its own fair employment practice agency, the state agency may share jurisdiction with the EEOC to receive, investigate, resolve, and to issue administrative determinations regarding employment discrimination complaints.

Under both Idaho and Federal civil rights laws, an employment discrimination complaint must be filed and go through the administrative process with the IHRC and the EEOC as a condition precedent to pursuing an employment discrimination lawsuit. The EEOC contracts with the IHRC to process employment discrimination claims brought under Federal law, subject to the claimant’s right to have the EEOC review the claim and the EEOC’s right to review and take over handling of the claim. Therefore, when bringing Federal discrimination

claims based on federal law, filing a complaint with the IHRC also satisfies the requirement for filing with the EEOC.

The EEOC compensates the IHRC \$550 for each Federal claim the Commission handles, which accounts for approximately twenty-seven percent of the funding the IHRC receives to handle claims, with the rest of its funding being provided by the state. The EEOC will occasionally chose to litigate discrimination claims in which the IHRC has found probable cause that employment discrimination has occurred, particularly if the agency concludes the claimant should be joined with other similarly situated plaintiffs in a class action lawsuit brought by the EEOC to enforce Federal anti-discrimination laws.

Structure & Functions of the IHRC

The IHRC, consists of nine commissioners appointed by the governor, with the advice and consent of the Idaho Senate. Each commissioner serves for a term of three years. One member of the Commission must be representative of industry, one member must be representative of labor, and the remaining seven members are to be appointed at large with the goal of obtaining, to the extent possible, “broad representation of the diversity of individuals who comprise the population of the state of Idaho.” The commissioners are compensated with a small stipend pursuant to Idaho law. The commissioners annually select a president and vice president and appoint a staff director, who serves at their pleasure. The staff director is the IHRC’s administrative officer in charge of operating the Commission’s offices and administrating enforcement of Federal and state civil rights laws.

The commissioners’ primary function is to review findings on discrimination complaints filed with the IHRC, which are prepared by an IHRC civil rights investigator, and to issue a decision finding whether or not there is “probable cause” that the discrimination alleged by the complaining party has occurred. In probable cause cases which are not ultimately resolved through the IHRC’s post-decision conciliation process, the commissioners must decide whether the IHRC will initiate litigation to seek judicial remediation for the discriminatory practice or leave it up to the complaining party to decide whether he or she will pursue a lawsuit.

According to the statutes creating the IHRC, the Commission’s director appointed by the commissioners must attend all meetings of the commissioners, serve as the Commission’s executive and administrative officer, be in charge of operating the Commission’s office and records, and generally be responsible for administrating enforcement of Federal and state civil rights laws as well as the policies and regulation adopted by the IHRC.

The IHRC is staffed with (1) civil rights investigators who conduct investigations of the discrimination claims filed with the Commission; (2) an intake officer who fields inquiries and complaints; and (3) an administrative assistant. For several years, the IHRC has had eleven full-time staff members, including the director, six civil rights investigators, two senior civil rights investigators who work primarily as mediators, an intake officer, and an administrative assistant. A deputy attorney general from the Idaho Attorney General’s Office is assigned to review all of the civil rights investigators’ reports and recommendations for factual and legal sufficiency and to provide the Commission guidance about legal issues involved in discrimination claims.

The IHRC has a history of attracting long-term dedicated staff members. Marilyn Shuler spent twenty years as the Commission’s Director from 1978 until 1998. Leslie Goddard, who spent ten years as IHRC Director from 1998 through 2008, began working with the Commission in 1978 as a deputy attorney general. The IHRC’s current Director, Pamela Parks, began her career with the Commission fifteen years ago as an intake officer. Ms. Parks then spent ten years as a civil rights investigator before being appointed as the Commission’s Director in 2008. Senior Civil Rights Investigator and IHRC Mediator, Sarah Mae Fisher, first joined the IHRC in 1985 as an intern, and Senior Civil Rights Investigator and Mediator Linda Goodman joined the IHRC in 1988 as an investigator. Ms. Fisher and Ms. Goodman have a combined experience of more than forty years in investigating, mediating, and resolving discrimination complaints, and between them they have handled

approximately ten thousand cases. Through the years, Ms. Parks, Ms. Fisher, and Ms. Goodman have worked with numerous Idaho employers and their attorneys and have developed very productive working relationships with a number of them.

Originally, the IHRC had its offices in the Towers Building, on State Street in Boise, sharing those premises with the Idaho Department of Health and Welfare. Since 1995, however, the IHRC has maintained its offices on the fourth floor of the Owhyee Plaza building in downtown Boise.

Idaho Employers Covered By Federal & State Anti-Discrimination Civil Rights Laws

Idaho's anti-discrimination laws apply to employers with five or more employees if those employees' services are to be partially or wholly performed within the state of Idaho. There is an exception for domestic staff hired to work in and about a person's household. Most private employers with fifteen or more employees are covered by Federal anti-discrimination civil rights laws, although the Age Discrimination in Employment Act covers employers with twenty or more employees.

The IHRC's Administrative Process For Handling Employment Discrimination Claims

Because filing a complaint with the IHRC is a condition precedent to pursuing an employment discrimination lawsuit, the Commission receives a number of complaints annually, submitted on behalf of the complaining employee by his or her attorney. In many cases, however, the employee initiates direct contact with the Commission in order to inquire about filing a charge of discrimination against his/her employer. These inquiries are handled by the IHRC's intake officer and civil rights investigators. The staff member handling the intake call asks questions about the facts of the caller's complaint in order to determine whether the complaint would in fact fall under state and Federal anti-discrimination civil rights laws. The Commission staff member handling an intake call often concludes that the complaining party is actually expressing a complaint covered by another area of law, such as wage and hour regulations or health and safety regulations, in which case the caller is referred to the appropriate agency.

From the outset, callers are advised that the IHRC cannot provide them with legal advice or legal opinions, but is acting as an impartial agency which must have the opportunity to consider both sides of the story before making any determination as to whether discrimination has occurred. Callers who persist in attempting to obtain legal advice are simply advised to contact an attorney. The callers are also advised, however, that by law they have the right to file a complaint with the IHRC if they choose to do so and that the statute of limitations applicable to filing discrimination complaints with the IHRC runs within one year after the alleged unlawful discrimination has occurred, or within one year of the most recent incident of continuing unlawful discrimination. The IHRC also takes calls from employers, or their attorneys, seeking guidance about maintaining compliance with anti-discrimination laws and suggestions about how to resolve situations with their employees before situations deteriorate into a full-blown employment dispute. The IHRC receives thousands of intake calls each year. For example, from April of 2008 through July of 2009, the Commission handled 3,286 intake calls.

During 2008, a total of 497 discrimination complaints were filed with the IHRC, and a total of 512 discrimination complaints were filed during 2009. For the past four years, approximately seventy percent of the complaints filed annually have involved discharge from employment. During the past four years, approximately one-fourth of the complaints filed have involved sexual harassment claims. In 2009, twenty-four percent of the complaints filed involved sexual harassment claims, seventeen percent involved race or national origin discrimination claims, thirty percent involved disability discrimination claims (primarily failure to make reasonable accommodation for disabled persons), and eighteen and a half percent of the complaints filed involved claims that employers had engaged in unlawful discrimination in applying terms and conditions of employment.

After an employee files a discrimination complaint with the IHRC, the employer must respond within thirty days of receipt. An employer may, however, raise affirmative defenses in its response, including an assertion that the employer does not qualify as an employer covered by either Federal or state anti-discrimination laws or an assertion that the statute of limitations for filing the complaint has passed. The Commission considers such affirmative defenses when investigating and deciding whether a discrimination complaint is viable.

After the IHRC has received an employee's discrimination complaint and the employer's response, the parties are offered an opportunity to mediate the case with one of the Commission's Senior Civil Rights Investigators, who are also certified mediators. In addition to having more than forty years of combined experience in handling thousands of employment discrimination cases, the IHRC's Senior Civil Rights Investigators, Sarah Mae Fisher and Linda Goodman are both certified professional mediators who undergo regular intensive mediation training and participate in national conferences with judges, members of other fair employment practice agencies, and members of human rights organizations. Ms. Fisher and Ms. Goodman have been responsible for developing the Commission's mediation program over the past twenty years and have mediated more than a thousand cases. Although they once encountered more resistance to the idea of mediation, Ms. Fisher and Ms. Goodman now find that employers and their attorneys are increasingly agreeable to mediation as a means of salvaging on-going employer-employee relationships and avoiding rising litigation costs. Some parties choose to submit mediation statements prior to their IHRC mediation, however, parties are not required to do so, and the mediators often work from the complaint, answer, and key case-related documents provided by the parties.

The mediation process is appealing to employers and employees because it allows parties to take control of resolving their own disputes and to arrive at creative and, sometimes, non-monetary remedies. Although many mediated settlements include some form of compensation for the employee, non-monetary remedies have included employer policy changes, employers agreeing to implement more effective training programs preventing workplace discrimination, and employers apologizing to the aggrieved employee. Of the 464 cases which the IHRC handled to a conclusion during 2009, twenty-six percent were resolved either in mediations prior to the IHRC commencing an investigation or through later settlements and post-investigation conciliation agreements.

If an employment discrimination complaint cannot be resolved during mediation, the IHRC commences an investigation into the complaint. Upon commencing an investigation, the civil rights investigator may request that the parties provide key documents and conduct fact finding interviews of the parties and other witnesses. The IHRC's administrative regulations also permit the investigator to serve the parties with interrogatories. If the employer fails to answer the interrogatories, the IHRC may issue an order compelling a response or transfer the case to the EEOC, which will then subpoena the requested information. The IHRC may also find probable cause that the employer has engaged in the alleged discrimination if the employer fails to provide requested information supporting the employer's position. Parties are generally strongly encouraged to cooperate by furnishing any information necessary for the investigator to conduct a complete, fair investigation before reaching a conclusion about the discrimination claim. It may take up to a year for the Commission to conclude its investigation and issue its findings in a case.

After completing an investigation, the civil rights investigator prepares a written summary of the evidence, which is submitted to the IHRC commissioners to make a determination based on the report. The commissioners then issue their finding as to whether there is "probable cause" to believe that the employer "has been or continues to be engaged in any unlawful discriminatory practices." If the commissioners find there is no probable cause, the IHRC will issue to the parties a statement of no probable cause, an order of administrative dismissal, and a notice that the employee has a right to proceed with filing a lawsuit. This closes the case before the Commission. The employee then has ninety days from the date of the notice of the right to file an employment discrimination lawsuit.

If the commissioners find there is “probable cause to credit allegations of the employee’s complaint,” the IHRC will issue a statement of probable cause to the parties. At that point, the Commission becomes a potential litigant to advocate for enforcement of the anti-discrimination laws which the employer has allegedly violated. After issuance of the probable cause finding, a senior civil rights investigator tries to engage in conciliation conferences with the parties in order to assist the employer with eliminating the alleged discriminatory practice and to resolve the case short of litigation. Mediation by one of the IHRC certified mediators or by an outside mediator may also be suggested. If a conciliation agreement cannot be reached, the Commission assigns the case to its legal counsel at the Idaho Attorney General’s Office for review. If the IHRC decides to pursue a lawsuit against the employer, the suit must be filed within one year after the discrimination complaint was filed with the Commission. If the IHRC decides not to file suit, the Commission will notify the parties, close the IHRC case, and notify the employee of his or her right to sue. The employee has ninety days from the date of that notice to file an employment discrimination lawsuit.

The IHRC reports that during 2009, one hundred percent of the complainants and respondents who answered the Commission’s satisfaction survey stated that they were satisfied with the Commission’s handling of their cases during the administrative process.

Resources For Employers

The IHRC provides pamphlets and postings on its Website, www.humanrights.idaho.gov, generally explaining anti-discrimination civil rights laws, providing examples of conduct constituting violations of those laws, and offering guidance to employers about how to avoid violating those law. In past years, the Commission was able to offer more educational resources to employers, including seminars. But as the Commission’s workload has increased, the funds available for providing additional resources to employers have decreased, and the recent budget problems faced by the IHRC together with many other of Idaho’s government agencies have made providing additional educational resources to employers more challenging. The Commission’s experienced civil rights investigators are, however, always available to assist employers by providing general guidance about anti-discrimination civil rights laws and by helping employers to come up with workable solutions for avoiding potential discrimination claims.

2010 Legislative Changes Impacting The IHRC

The IHRC has been significantly impacted by a shortage of available state funding resulting from the current economic downturn. The Commission’s workload nevertheless continues to increase, and the agency must still satisfy its statutory mandates to investigate discrimination complaints and to enforce anti-discrimination civil rights laws. Faced with the drastic funding cuts, in addition to the mandatory furloughs implemented for state employees, the IHRC and the Idaho legislature arrived at a solution to preserve the Commission’s existence. This spring the Idaho legislature passed amendments to the Idaho Human Rights Act whereby the IHRC will merge with the Idaho Department of Labor effective July 1, 2010. The Commission will continue functioning as an independent government agency and carrying out its mandated functions. The Commission’s staff and protocol for handling civil rights discrimination cases will not change. Under the new legislation, however, the IHRC will relocate to the Department of Labor’s offices and will share administrative resources and support with the Department of Labor. The title of IHRC Staff Director has been changed to “Administrator,” and although the administrator’s duties will not differ from those of the IHRC Director, the Administrator will be appointed by, and serve at the pleasure of, the director of the Department of Labor with the advice and consent of the IHRC commissioners. Other IHRC staff members will become employees of the Department of Labor. Three of the IHRC’s long-term personnel, Pamela Parks, Sarah Mae Fisher, and Linda Goodman, express hope that the Commission’s move into the Department of Labor will ultimately increase the Commission’s resources over time, thereby enabling the Commission to offer more educational resources to Idaho employers.

Some Practical Advice For Employers

Based on their extensive experience in handling thousands of employment discrimination disputes, IHRC Director Pamela Parks and Senior Civil Rights Investigators Sarah Mae Fisher and Linda Goodman offer some valuable practical advice to help employers avoid employment discrimination litigation:

- *Clear, communication with employees is critical. Employers should clearly identify their business or performance-related reasons for taking an adverse employment action at the time the action is taken. When employers fail to clearly explain why they are taking a particular adverse employment action, albeit a lawful non-discriminatory action, employees often suspect the employer is trying to hide a discriminatory reason for taking the action;*
- *Clearly identify and explain duties, terms, and conditions of employment so that employees will know what performance expectations they are required to meet and understand the employment benefits to which they are entitled;*
- *Thoroughly document an employee's performance issues, discipline issues, and disciplinary actions by noting the date, exactly what occurred, who was present, and the reasons for any disciplinary or adverse employment actions taken. By doing so, the employer establishes a record of what occurred, which can be used to back up the employer's position if the employee raises a discrimination charge;*
- *Clearly communicate with employees about any concerns or performance issues as those matters arise and thoroughly document the communications. By doing so, the employer establishes a record showing legitimate non-discriminatory reasons for terminating the employee if termination becomes necessary;*
- *In these difficult economic times, widespread layoffs are commonplace and even expected, but employers should nevertheless ensure that their layoff plans do not lead to a disparate impact constituting unlawful discrimination against a certain group of employees such as, for example, women of childbearing years or persons over the age of forty;*
- *When implementing layoffs during these difficult economic times, continue to communicate with employees and to treat them with dignity and respect. Avoid unnecessary practices like having security escort a long-term, loyal employee off the premises after she has been issued a layoff notice. Treating laid off employees with respect will help to minimize misunderstandings and outrage that often gives rise to employment litigation;*
- *Remember that IHRC personnel are a resource for employers and are always available to brainstorm about workable solutions to avoid employment disputes.*

More information about the Idaho Human Rights Commission can be found in Idaho Code Sections 67-5901, *et seq*, in the Administrative Rules of the Idaho Human Rights Commission, IDAPA 45.01.01, *et seq*, and at the Commission's Website at humanrights.idaho.gov.

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