VOLUME NO. 40 OPINION NO. 40

EMPLOYEES, PUBLIC - Application of nepotism laws, Human Rights Act and Governmental Code of Fair Practices to employment involving relationships by marriage;
EMPLOYMENT DISCRIMINATION - Application of nepotism laws, Human Rights Act and Governmental Code of Fair Practices to employment involving relationships by marriage;
NEPOTISM - Implied repeal of nepotism provision by Human Rights Act and Governmental Code of Fair Practices;
MONTANA CODE ANNOTATED - Sections 1-2-207, 2-2-302, 2-2-303, 49-2-101 to 49-2-601, 49-2-303(1)(a), 49-2-303(1)(b), 49-3-101 to 49-3-312, 49-3-103(1);
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 67 (1982).

HELD: The 1983 amendments to the Montana Human Rights Act, §§ 49-2-101 to 601, MCA, and the Governmental Code of Fair Practices, §§ 49-3-101 to 312, MCA, did not revive the impliedly repealed portion of section 2-2-302, MCA, restricting employment on the basis of affinity.

13 March 1984

Donald Ranstrom
Blaine County Attorney
Blaine County Courthouse
Chinook MT 59523

Dear Mr. Ranstrom:

You have requested my opinion concerning the following question:

What is the effect of House Bill 501 on the holding in Thompson v. Board of Trustees and 39 Op. Att'y Gen. No. 67 as it regards "marital status" in the Human Rights Act and section 2-2-302, MCA?

During the 1983 session the Legislature amended sections 49-2-303(1)(a) and 49-2-303(1)(b), MCA, of the Montana Human Rights Act and section 49-3-103(1), MCA, of the Governmental Code of Fair Practices. The amended provisions read:

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental handicap, marital status, or sex distinction.... [Emphasis added.]

49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

> (1) from enforcing a differentiation based on marital status, age, or physical or mental handicap when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age.... [Emphasis added.]

The underlined portions of these statutes indicate the 1983 amendatory additions. These amendments permit assertion of the "reasonable demands" or "bona fide occupational qualification" defense to marital status discrimination; prior to the amendments such defense was not available. See Thompson v. Board of Trustees, 38 St. Rptr. 706, 708-09, 627 P.2d 1229, 1231-32 (1981).

In 39 Op. Att'y Gen. No. 67 (1982), I held that the affinity nepotism provision in section 2-2-302, MCA, was impliedly repealed by the enactment of the Human Rights Act and the Governmental Code of Fair Practices. Senate Bill 179 was introduced during the 1983 legislative session in an apparent attempt to eliminate any arguable conflict between those statutes' broad prohibition against marital status discrimination and the nepotism provisions in sections 2-2-302 and 2-2-303, MCA, by amending sections 49-2-303 and 49-3-201, MCA, to provide expressly that such sections were not intended to affect the nepotism prohibitions. In hearings before the Senate Committee on Judiciary, the sponsor of Senate Bill 179 explained "that it was requested by the Montana University System because of problems they were having with conflicts between the antidiscrimination and nepotism laws. He advised the Committee that HB501 was being introduced in the House which deals essentially with the same problem and requested that consideration of SB179 be deferred until passage of HB501." (January 27, 1983 Senate Committee on Judiciary Minutes.) Senate Bill 179 was never reported out of committee, presumably because House Bill 501 was favorably acted upon by the Committee. House Bill 501 contained those amendments to sections 49-2-303(1)(a), 49-2-303(1)(b), and 49-3-103(1), MCA, quoted above.

For those reasons stated in 39 Op. Att'y Gen. No. 67 (1982), it is my opinion that section 2-2-302, MCA, has been impliedly repealed, to the extent it imposes employment prohibitions on the basis of affinity, by the

Human Rights Act and the Governmental Code of Fair Practices. Even if it is assumed arguendo that the amendments to the Human Rights Act and the Governmental Code of Fair Practices effected by House Bill 501 were intended to revive the repealed aspects of section 2-2-302, MCA, the required specificity for revival was not present and, therefore, no revival has occurred. See § 1-2-207, MCA; State ex rel. Jenkins v. Carisch Theatres, Inc., 172 Mont. 453, 460, 564 P.2d 1316, 1320 (1977).

THEREFORE, IT IS MY OPINION:

> The 1983 amendments to the Montana Human Rights Act, §§ 49-2-101 to 601, MCA, and the Governmental Code of Fair Practices, §§ 49-3-101 to 312, MCA, did not revive the impliedly repealed portion of section 2-2-302, MCA, restricting employment on the basis of affinity.

Very truly yours,

MIKE GREELY
Attorney General