

SENATE BILL NO. 3

Special Session

Introduced: 12/12/83

Referred to Committee on Judiciary: 12/12/83

Hearing: 12/12/83

1                    SENATE    BILL NO.   3    
2    INTRODUCED BY   AKLESTAD    
3

4    A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A PREFERENCE  
5    IN PUBLIC EMPLOYMENT FOR DISABLED MILITARY VETERANS AND  
6    HANDICAPPED CIVILIANS; PROVIDING A MEANS OF ENFORCEMENT OF  
7    THE PREFERENCE; REQUIRING AND AUTHORIZING THE ADOPTION OF  
8    RULES BY CERTAIN STATE AGENCIES; RECONCILING THE PREFERENCE  
9    STATUTES WITH THE HUMAN RIGHTS STATUTES; AMENDING SECTIONS  
10  10-2-402, 49-1-102, 49-2-303, 49-2-308, 49-3-103, 49-3-201,  
11  AND 49-4-101, MCA; REPEALING RETROACTIVELY SECTIONS 10-2-201  
12  THROUGH 10-2-206, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE  
13  DATE AND AN APPLICABILITY DATE."

14  
15  BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16        NEW SECTION. Section 1. Short title. [Sections 1  
17  through 9] may be cited as the "Montana Disabled Veterans  
18  and Handicapped Persons Employment Preference Act".

19        NEW SECTION. Section 2. Purposes. The purposes of  
20  [sections 1 through 9] are to reward veterans for service to  
21  their country, recognize past employment discrimination  
22  against handicapped persons, and facilitate the  
23  habilitation, rehabilitation, and readjustment of disabled  
24  veterans and handicapped persons.

25        NEW SECTION. Section 3. Definitions. For the purposes

1    of [sections 1 through 9], the following definitions apply:

2            (1) "Active duty" means full-time duty other than for  
3    training in the regular components of the United States  
4    army, air force, navy, marine corps, or coast guard with  
5    full pay and allowances. The term does not include monthly  
6    drills, summer encampments, initial training, or other  
7    inactive or active duty for training in the national guard  
8    or reserves.

9            (2) "Applicable position" means a permanent position  
10  or a seasonal position as defined in 2-18-101 or for a state  
11  position or a similar permanent seasonal position with a  
12  public employer other than the state. However, the term does  
13  not include:

14            (a) a temporary position as defined in 2-18-101 for a  
15  state position or a similar temporary position with a public  
16  employer other than the state;

17            (b) a state or local elected official;

18            (c) employment as an elected official's immediate  
19  secretary, legal advisor, or administrative, legislative, or  
20  other immediate or first-line aide;

21            (d) appointment by an elected official to a body such  
22  as a board, commission, committee, or council;

23            (e) appointment by an elected official to a public  
24  office if the appointment is provided for by law;

25            (f) a department head appointment by the governor or

1 an executive department head appointment by a mayor, city  
2 manager, county commissioner, or other chief administrative  
3 or executive officer of a local government; or

4 (g) engagement as an independent contractor or  
5 employment by an independent contractor.

6 (j) "Disabled veteran" means any individual who:

7 (a) served on active duty;

8 (b) has been separated from service under honorable  
9 conditions; and

10 (c) suffers a service-connected disability determined  
11 by the United States veterans administration to be 30% or  
12 more disabling.

13 (k) "Handicapped person" means an individual certified  
14 by the department of social and rehabilitation services to  
15 have a physical impairment that substantially limits one or  
16 more major life activities, such as writing, seeing,  
17 hearing, speaking, or mobility, and which limits the  
18 individual's ability to obtain, retain, or advance in  
19 employment.

20 (5) (a) "Initial hiring" means a personnel action for  
21 which applications are solicited from outside the ranks of  
22 the current employees of:

23 (i) a department, as defined in 2-15-102, for a  
24 position within the executive branch;

25 (ii) a legislative agency, such as the consumer

1 counsel, environmental quality council, office of the  
2 legislative auditor, legislative council, or office of the  
3 legislative fiscal analyst, for a position within the  
4 legislative branch;

5 (iii) a judicial agency, such as the office of supreme  
6 court administrator, office of supreme court clerk, state  
7 law library, or similar office in a state district court for  
8 a position within the judicial branch;

9 (iv) a unit, as defined in 20-25-201, for a position  
10 within the Montana university system;

11 (v) the office of commissioner of higher education for  
12 a position within that office, a college for a position  
13 within that college, or a postsecondary vocational-technical  
14 center or program for a position within the state's  
15 postsecondary vocational-technical education system;

16 (vi) a city or town for a municipal position, including  
17 a city or municipal court position;

18 (vii) a county for a county position, including a  
19 justice's court position; and

20 (viii) any other political subdivision of the state not  
21 staffed by employees of a city, town, or county for a  
22 position with that political subdivisions and any special  
23 purpose district or authority for a position within that  
24 district or authority.

25 (b) A personnel action limited to current employees of

1 a specific public entity identified in subsections (a)(i)  
 2 through (a)(viii) of this subsection (5), current employees  
 3 in a reduction-in-force pool who have been laid off from a  
 4 specific public entity identified in subsections (a)(i)  
 5 through (a)(viii) of this subsection (5), or current  
 6 participants in a federally authorized employment program is  
 7 not an initial hiring.

8 (6) "Public employer" means:

9 (a) any department, office, board, bureau, commission,  
 10 agency, postsecondary vocational-technical center or  
 11 program, college, community college, university, or other  
 12 instrumentality of the executive, judicial, or legislative  
 13 branch of the government of the state of Montana; and

14 (b) any county, city, town, or other political  
 15 subdivision of the state, including a school district, or  
 16 any special purpose district or authority.

17 (7) "Substantially equal qualifications" means the  
 18 qualifications of two or more persons among whom the public  
 19 employer cannot make a reasonable determination that the  
 20 qualifications held by one person are significantly better  
 21 suited for the applicable position than the qualifications  
 22 held by the other persons.

23 (8) "Under honorable conditions" means a discharge or  
 24 separation from active duty characterized as under honorable  
 25 conditions. The term includes honorable discharges and

1 general discharges but does not include dishonorable  
 2 discharges or other administrative discharges characterized  
 3 as other than honorable.

4 NEW SECTION. Section 4. Employment preference in  
 5 initial hiring. (1) Except as provided in 10-2-402, in an  
 6 initial hiring for an applicable position, if a job  
 7 applicant who is a disabled veteran or handicapped person  
 8 meets the eligibility requirements contained in [section 5]  
 9 and claims a preference as required by [section 7], a public  
 10 employer shall hire the applicant over any other applicant  
 11 with substantially equal qualifications who is not a  
 12 disabled veteran or handicapped person.

13 (2) The employment preference provided for in  
 14 subsection (1) does not apply to a personnel action  
 15 described in subsection (5)(b) of [section 3] or to any  
 16 other personnel action that is not an initial hiring.

17 NEW SECTION. Section 5. Eligibility requirements. No  
 18 disabled veteran or handicapped person is entitled to  
 19 receive employment preference as provided in [section 4]  
 20 unless:

21 (1) he is a United States citizen;

22 (2) he has resided continuously in the state for at  
 23 least 1 year immediately before applying for employment;

24 (3) if applying for municipal or county employment, he  
 25 has resided for at least 30 days immediately before applying

1 for employment in the city, town, or county in which  
2 employment is sought; and

3 (4) he meets those requirements considered necessary  
4 by a public employer to successfully perform the essential  
5 duties of the applicable position for which he is applying.

6 NEW SECTION. Section 6. Duration of employment  
7 preference. Subject to [section 5]:

8 (1) a handicapped person qualifies for employment  
9 preference for no longer than 7 years following  
10 certification by the department of social and rehabilitation  
11 services or for 7 years following [the effective date of  
12 this act], whichever is later;

13 (2) a disabled veteran qualifies for employment  
14 preference for no longer than 7 years following separation  
15 from service or for no longer than 7 years following [the  
16 effective date of this act], whichever is later.

17 NEW SECTION. Section 7. Enforcement of preference.

18 (1) A public employer shall give notice of the preferences  
19 that [sections 1 through 9] provide in public employment  
20 either by posting or on the application form.

21 (2) A job applicant who believes he has an employment  
22 preference shall claim the preference in writing before the  
23 time for filing applications for the applicable position  
24 involved has passed. Failure to make a timely employment  
25 preference claim is a complete defense to an action under

1 subsection (4) of this section.

2 (3) If an applicant for an applicable position makes a  
3 timely written employment preference claim, the public  
4 employer shall give written notice of its hiring decision to  
5 each applicant claiming preference.

6 (4) (a) An applicant who believes he has not been  
7 accorded his rights under [sections 1 through 9] may, within  
8 30 days of receipt of the notice of the hiring decision,  
9 submit to the public employer a written request for an  
10 explanation of the public employer's hiring decision. Within  
11 15 days of receipt of the request, the public employer shall  
12 give the applicant a written explanation.

13 (b) The applicant may, within 90 days after receipt of  
14 notice of the hiring decision, file a petition in the  
15 district court in either the county in which the applicant  
16 resides or in the county in which his application was  
17 received by the public employer. The petition must state  
18 facts which on their face entitle the applicant to an  
19 employment preference.

20 (c) (i) Upon filing of the petition, the court shall  
21 order the public employer to appear in court at a specified  
22 time not less than 10 or more than 30 days after the day the  
23 petition was filed and show cause why the applicant was not  
24 hired for the applicable position. The public employer has  
25 the burden of making a clear showing that the applicant was

1 not substantially equally qualified with the person hired.

2 (ii) The time to appear provided in subsection  
3 (4)(c)(i) of this section may be waived by stipulation of  
4 the parties. If a time to appear has been specified pursuant  
5 to subsection (4)(c)(i), the court may, on motion of one of  
6 the parties or on stipulation of all of the parties, grant a  
7 continuance.

8 (iii) If the public employer does not carry its burden  
9 of proof under subsection (4)(c)(i), the court shall order  
10 the public employer to reopen the selection process for the  
11 applicable position involved and shall grant the applicant  
12 reasonable attorney fees and costs. The remedy provided by  
13 this section is the only remedy for a violation of [sections  
14 1 through 9], and a court may not grant any other relief in  
15 an action for violation of [sections 1 through 9].

16 (d) Failure of an applicant to file a petition under  
17 subsection (4)(b) within 90 days bars the filing of a  
18 petition. If a public employer fails to provide an  
19 explanation under subsection (4)(a) within 15 days and a  
20 petition is filed under subsection (4)(b), the court shall  
21 order the public employer to reopen the selection process.

22 (e) The Montana Rules of Civil Procedure apply to a  
23 proceeding under this subsection (4) to the extent that they  
24 do not conflict with this subsection (4).

25 NEW SECTION. Section 8. Adoption of rules. The

1 department of administration shall adopt rules implementing  
2 [sections 1 through 9] and shall consult with the department  
3 of social and rehabilitation services in adopting rules  
4 governing certification of handicapped persons for purposes  
5 of [sections 1 through 9]. The department of  
6 administration's rules apply to all public employers, local  
7 as well as state.

8 NEW SECTION. Section 9. Conflicts with federal law.  
9 [Sections 1 through 9] do not apply to work or positions  
10 subject to federal laws or regulations if application of the  
11 employment preference conflicts with those laws or  
12 regulations.

13 Section 10. Section 10-2-402, MCA, is amended to read:  
14 "10-2-402. Superintendent to be given veteran's  
15 preference. In the selection of the superintendent of the  
16 Montana veterans' home, the department of institutions shall  
17 apply the employment preference provided in [sections 1  
18 through 9], except that the department shall give preference  
19 only to disabled veterans as defined in ~~10-2-202~~ [section  
20 3]."

21 Section 11. Section 49-1-102, MCA, is amended to read:  
22 "49-1-102. Freedom from discrimination. The right to  
23 be free from discrimination because of race, creed,  
24 religion, color, sex, physical or mental handicap, age, or  
25 national origin is recognized as and declared to be a civil

1 right. This right shall include but not be limited to:

2 (1) the right to obtain and hold employment without  
3 discrimination, except as provided by [sections 1 through 9]  
4 and 10-2-402; and

5 (2) the right to the full enjoyment of any of the  
6 accommodation facilities or privileges of any place of  
7 public resort, accommodation, assemblage, or amusement."

8 Section 12. Section 49-2-303, MCA, is amended to read:

9 "49-2-303. Discrimination in employment. (1) It is an  
10 unlawful discriminatory practice for:

11 (a) an employer to refuse employment to a person, to  
12 bar him from employment, or to discriminate against him in  
13 compensation or in a term, condition, or privilege of  
14 employment because of his race, creed, religion, color, or  
15 national origin or because of his age, physical or mental  
16 handicap, marital status, or sex when the reasonable demands  
17 of the position ~~do~~ or the preference granted by [sections 1  
18 through 9] or 10-2-402 does not require an age, physical or  
19 mental handicap, marital status, or sex distinction;

20 (b) a labor organization or joint labor management  
21 committee controlling apprenticeship to exclude or expel any  
22 person from its membership or from an apprenticeship or  
23 training program or to discriminate in any way against a  
24 member of or an applicant to the labor organization or an  
25 employer or employee because of race, creed, religion,

1 color, or national origin or because of his age, physical or  
2 mental handicap, marital status, or sex when the reasonable  
3 demands of the program do not require an age, physical or  
4 mental handicap, marital status, or sex distinction;

5 (c) an employer or employment agency to print or  
6 circulate or cause to be printed or circulated a statement,  
7 advertisement, or publication or to use an employment  
8 application which expresses, directly or indirectly, a  
9 limitation, specification, or discrimination as to sex,  
10 marital status, age, physical or mental handicap, race,  
11 creed, religion, color, or national origin or an intent to  
12 make the limitation, unless based upon a bona fide  
13 occupational qualification;

14 (d) an employment agency to fail or refuse to refer  
15 for employment, to classify, or otherwise to discriminate  
16 against any individual because of sex, marital status, age,  
17 physical or mental handicap, race, creed, religion, color,  
18 or national origin, unless based upon a bona fide  
19 occupational qualification.

20 (2) The exceptions permitted in subsection (1) based  
21 on bona fide occupational qualifications shall be strictly  
22 construed."

23 Section 13. Section 49-2-308, MCA, is amended to read:

24 "49-2-308. Discrimination by the state. It is an  
25 unlawful discriminatory practice for the state or any of its

1 political subdivisions:

2 (1) to refuse, withhold from, or deny to a person any  
3 local, state, or federal funds, services, goods, facilities,  
4 advantages, or privileges because of race, creed, religion,  
5 sex, marital status, color, age, physical or mental  
6 handicap, or national origin, unless based on reasonable  
7 grounds or on the preference provided by [sections 1 through  
8 9] or 10-2-402;

9 (2) to publish, circulate, issue, display, post, or  
10 mail a written or printed communication, notice, or  
11 advertisement which states or implies that any local, state,  
12 or federal funds, services, goods, facilities, advantages,  
13 or privileges of the office or agency will be refused,  
14 withheld from, or denied to a person of a certain race,  
15 creed, religion, sex, marital status, color, age, physical  
16 or mental handicap, or national origin or that the patronage  
17 of a person of a particular race, creed, religion, sex,  
18 marital status, color, age, or national origin or possessing  
19 a physical or mental handicap is unwelcome or not desired or  
20 solicited, unless based on reasonable grounds;

21 (3) to refuse employment to a person, to bar him from  
22 employment, or to discriminate against him in compensation  
23 or in a term, condition, or privilege of employment because  
24 of his political beliefs. However, this prohibition does not  
25 apply to policymaking positions on the immediate staff of an

1 elected officer of the executive branch provided for in  
2 Article VI, section 1, of the Montana constitution, to the  
3 appointment by the governor of a director of a principal  
4 department provided for in Article VI, section 7, of the  
5 Montana constitution, or to the immediate staff of the  
6 majority and minority leadership of the Montana  
7 legislature."

8 Section 14. Section 49-3-103, MCA, is amended to read:  
9 "49-3-103. Permitted distinctions. Nothing in this  
10 chapter shall prohibit any public or private employer:

11 (1) from enforcing a differentiation based on marital  
12 status, age, or physical or mental handicap;

13 (a) when based on the preference provided in [sections  
14 1 through 9] or 10-2-402;

15 (b) when based on a bona fide occupational  
16 qualification reasonably necessary to the normal operation  
17 of the particular business; or

18 (c) where the differentiation is based on reasonable  
19 factors other than age;

20 (2) from observing the terms of a bona fide seniority  
21 system or any bona fide employee benefit plan, such as a  
22 retirement, pension, or insurance plan, which is not a  
23 subterfuge to evade the purposes of this chapter, except  
24 that no such employee benefit plan shall excuse the failure  
25 to hire any individual; or



1 (3) from discharging or otherwise disciplining an  
2 individual for good cause."

3 Section 15. Section 49-3-201, MCA, is amended to read:

4 "49-3-201. Employment of state and local government  
5 personnel. (1) ~~State~~ Except as provided in [sections 1  
6 through 9] and 10-2-402, state and local government  
7 officials and supervisory personnel shall recruit, appoint,  
8 assign, train, evaluate, and promote personnel on the basis  
9 of merit and qualifications without regard to race, color,  
10 religion, creed, political ideas, sex, age, marital status,  
11 physical or mental handicap, or national origin.

12 (2) All state and local governmental agencies shall:

13 (a) promulgate written directives to carry out this  
14 policy and to guarantee equal employment opportunities at  
15 all levels of state and local government;

16 (b) regularly review their personnel practices to  
17 assure compliance; and

18 (c) conduct continuing orientation and training  
19 programs with emphasis on human relations and fair  
20 employment practices.

21 (3) The department of administration shall insure that  
22 the entire examination process, including appraisal of  
23 qualifications, is free from bias.

24 (4) Appointing authorities shall exercise care to  
25 insure utilization of minority group persons."

1 Section 16. Section 49-4-101, MCA, is amended to read:

2 "49-4-101. Discrimination prohibited. ~~It~~ Except as  
3 provided in [sections 1 through 9] and 10-2-402, it is  
4 unlawful to discriminate, in hiring or employment, against a  
5 person because of the physical handicap of such person.  
6 There is no discrimination where the nature or extent of the  
7 handicap reasonably precludes the performance of the  
8 particular employment or where the particular employment may  
9 subject the handicapped or his fellow employees to physical  
10 harm."

11 NEW SECTION. Section 17. Extension of authority. Any  
12 existing authority of the department of administration or  
13 the commission for human rights to make rules on the subject  
14 of the provisions of this act is extended to the provisions  
15 of this act.

16 NEW SECTION. Section 18. Repealer. Sections 10-2-201  
17 through 10-2-206, MCA, are repealed. This repeal applies  
18 retroactively to bar any claim under 10-2-201 through  
19 10-2-206 that has not been reduced to judgment on [the  
20 effective date of this act]. Claims under 10-2-201 through  
21 10-2-206 that have been reduced to judgment on [the  
22 effective date of this act] are enforceable. No claim for a  
23 violation of 10-2-201 through 10-2-206 may be made under  
24 [section 7] of this act.

25 NEW SECTION. Section 19. Effective date —

1 applicability. (1) This act is effective on passage and  
2 approval.

3 (2) This act, except section 18, applies only to  
4 applicable positions as defined in section 3 that are filled  
5 after the effective date of this act.

6 NEW SECTION. Section 20. Severability. If a part of  
7 this act is invalid, all valid parts that are severable from  
8 the invalid part remain in effect. If a part of this act is  
9 invalid in one or more of its applications, the part remains  
10 in effect in all valid applications that are severable from  
11 the invalid applications.

-End-