RECENT LEGISLATION

Discriminatory Employment Practices—Philadelphia Ordinance Prohibits Discrimination Because of Race, Creed, Color, National Origin, or Ancestry—After stating that discrimination because of race, color, religion, national origin, or ancestry adversely affects the health and safety as well as the gainful employment of large segments of the city's population, The Philadelphia Fair Employment Practices Ordinance [1] prohibits certain defined unfair practices [2] on the part of any employer, employment agency, or labor organization not specifically exempted by the provisions of the act.[3] The ordinance creates a five man commission with power not only to investigate all complaints of unfair employment practices duly brought by an aggrieved individual [4] but also, after notice and hearing, to enter such order "as the facts warrant." If any respondent fails to comply with such order the commission is directed to certify the record and its findings to the City Solicitor who is authorized to invoke the aid of a court of appropriate jurisdiction to impose the prescribed penalties.[5] The commission is also directed to carry out an educational program designed to eliminate prejudice and discrimination.

Empirical data obtained from war-time operations of the temporary national Committee on Fair Employment Practice [6] were utilized by both the framers of the pioneer New York statute [7] and the unsuccessful sponsors of Federal anti-discrimination laws; [8] the legislation they produced has served as a model for a majority of the subsequent state [9] and local en-

1. JOURNAL OF THE CITY OF PHILADELPHIA, app. 111, pp. 179-185 (March 11, 1948). For a general discussion of the field see Elson and Schanfield, *Local Regulation of Discriminatory Employment Practices,* 56 YALE L. J. 430 (1947).

2. Sec. 4. The eight subsections enumerate acts which constitute unfair employment practices on the part of employers, employment agencies, and labor organizations such as refusing to hire, discriminating in promotion or terms of employment, limiting employment or membership by means of a quota system, as well as making any inquiry or circulating any advertisement indicating any discrimination or preference because of race, color, religion, national origin, or ancestry. However, it is specifically provided in the absence of a violation of the enumerated prohibitions that it shall not be deemed an unfair employment practice to select any person whose experience, qualifications, and training best adapt him to further the interest and welfare of his employer. Also, the Commission is authorized to certify "bona fide occupational qualifications" which apparently gives it authority to make a declaratory order when so requested by an employer.

3. Sec. 3 exempts fraternal, sectarian, charitable, or religious organizations; also persons employed in domestic service or employees who serve in "personal and confidential positions."

4. Sec. 7(a) resolves a point of controversy in earlier legislation by permitting "an organization which has as one of its purposes the combatting of discrimination or of promoting full, free or equal opportunities" to make a charge of an unfair employment practice.

5. Sec. 8 provides a fine not exceeding One Hundred Dollars for each violation, or if such fine is not paid within ten days imprisonment not to exceed thirty days.

6. 3 CODE FED. REGS. Exec. Order No. 8802 (Cum. Supp. 1943) and as enlarged by 3 CODE FED. REGS. Exec. Order No. 9346 (Cum. Supp. 1943). For a summary of the activities of the Committee, see NAT. RELATIONS ADVISORY COUNCIL, F. E. P. C. REFERENCE MANUAL 34 (1948).

7. N. Y. EXEC. LAW §§ 125-36 (McKinney, Supp. 1947).

8. Typical bills are: S. 2048, 78th Cong., 2d Sess. (1944); S. 101, 79th Cong., 1st Sess. (1945); S. 984, 80th Cong., 1st Sess. (1947).

9. 18 N. J. STAT. ANN., c. 25-1 (West, Supp. 1946); 4 MASS. LAWS ANN., c. 151B (Michie, Supp. 1947); CONN. GEN. STAT., c. 279, § 1360i (Supp. 1947). Statutes in other states are little more than declarations of public policy: IND. STAT. ANN. § 40-2301 (Burns, Supp. 1947); WIS. LAWS 1945, c. 490; OREGON LAWS 1947, c. 508.

actments [10] including the instant ordinance. However, there are certain provisions of the Philadelphia act which differ somewhat from those of earlier laws. Thus, avoiding arbitrary classifications [11] apparently thought to be justified on administrative grounds, the draftsmen have wisely subjected to its processes all those who employ "one or more persons." [12] They also saw fit to exempt employees who stand in a "personal and confidential" relationship [13] to their employers; it will call for enlightened interpretation on the part of both commission and courts to prevent this provision from becoming a serious threat to effective operation of the act. Another striking difference arises out of the absence of direction to the commission or its staff to observe secrecy during the initial persuasive proceedings.[14] In fact, after investigating and seeking to adjust any complaint of an unfair employment practice, the commission is specifically directed to "make and publish appropriate findings as a result of its investigations." [15] Judicious use of its rule making power [16] should enable the commission not only to adopt confidential procedures which have been highly successful in other jurisdictions [17] but also to utilize to the fullest possible extent the inherent flexibility of the administrative process.

Although no court of last resort has ruled on the constitutionality of anti-discrimination laws as applicable to the private employer, the unanimous decision of the United States Supreme Court in upholding the validity of a statute forbidding discrimination in a labor union [18] should leave little doubt that such regulations are a valid exercise of the police power.[19] The authority of local governments to enact such prohibitory

10. Minneapolis has already passed an ordinance which is a counterpart of the New York law while similar ordinances have been proposed in Cleveland, Detroit, and many other cities. Chicago and Milwaukee acts leave enforcement up to the individual.

11. Typical is the New York law, *supra* note 8, which exempts any employer who employs less than six persons. Such classification might prove troublesome in the equal protection test of constitutionality.

12. Sec. 3.

13. Sec. 3. Proponents of the ordinance made vigorous attempts to procure the deletion of this clause, but they had to content themselves with the substitution of the present wording in lieu of "personal or confidential."

14. Under the language of section 6(a) it is clear that the commission must seek to adjust by conciliation and mediation all complaints of unfair employment practices. Experience has shown that informal preliminary conferences which are confidential create an atmosphere favorable to amicable and satisfactory settlement of differences. The necessity of retreat from a publicly-expressed position, which has stalemated many attempts to settle disputes by persuasive methods, is obviated. The realization on the part of both sides that the discussions are "off the record" leads to a candid and searching exploration of the controversy with a consequent greater appreciation of the problems confronting the opposite party.

15. Sec. 6(b).

16. Sec. 6(e). In this regard a satisfactory result might be obtained either by proper control of the time of release of such information or by limiting the scope of the phrase "appropriate findings" embodied in § 6(b).

17. Notably New York and New Jersey. Following the mandates of their statutes, these two states have maintained the strictest confidence during all phases of the investigative and persuasive processes, and according to their current reports have handled no fewer than 1603 complaints without resorting in a single instance to a public hearing. But for a criticism of this policy when it is carried too far, see Note, 56 YALE L. J. 837, 857 (1947).

18. Railway Mail Ass'n. v. Corsi, 326 U. S. 88 (1945). Note especially the strong concurring opinion of Mr. Justice Frankfurter.

19. See Waite, *Constitutionality of the Proposed Minnesota Fair Employment Practices Act*, 32 MINN. L. REV. 349 (1948). Analogies based upon cases sustaining the constitutionality of the Wagner Act's prohibitions against discrimination because of union activity should be very helpful in this regard. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937); Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177 (1941).

measures, however, depends upon the extent of the power delegated to them by the state legislature.[20] While comprehensive Federal legislation aimed at unfair employment practices would be highly desirable, it seems extremely unlikely that such treatment will be achieved on the national level within the foreseeable future. Despite these uncertainties, widespread activity on the part of groups interested in broadening the area of coverage [21] and the gratifying results already obtained in pioneer jurisdictions [22] presage favorable action by an increasing number of state and local governments.

20. In Pennsylvania the state legislature has delegated broad powers to the local governments. PA. STAT. ANN., tit. 53, § 6364 (Purdon, 1931). This difficulty may be obviated in some states by means of enabling acts which will make adoption of unfair practices laws discretionary with local governments.

21. This is demonstrated by the large number of states, including Pennsylvania, which will be called upon to consider such bills at their next legislative sessions.

22. See N. Y. STATE COMM'N AGAINST DISCRIMINATION ANN. REP. (1947) and NAT. RELATIONS ADVISORY COUNCIL, F. E. P. C. REFERENCE MANUAL 43 (1948).