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Civil Rights in Colorado

CIVIL RIGHTS IN COLORADO

BY J. DAVID PENWELL*

In recent years there has been a heightened interest in the field of civil rights. The impact has been especially significant on the legal profession; nevertheless, many lawyers have limited working knowledge in this important field in that they are unfamiliar with the practices and procedures of the civil rights commissions and are unaware of the full ramifications of current civil rights legislation. In this timely and well documented article, Mr. Penwell examines civil rights law in Colorado. He discusses the development as well as the present state of Colorado law relating to the Public Accommodations Act, the Fair Employment Act, and the Fair Housing Act. He also compares Colorado law with federal civil rights law and with that of other states. Furthermore, he explains how the Colorado Civil Rights Commission administers the law and the procedures established by the commission for handling a civil rights case. Finally, Mr. Penwell notes the shortcomings of the existing civil rights laws and gives suggestions for their improvement.

INTRODUCTION

COLORADO has had a long, if perhaps sometimes undistinguished, history in civil rights. It is only in the last 10 years or so, however, that there has been any legal significance attached to this subject. It is presently receiving a great deal of attention and the purpose of this article is to explain the civil rights laws presently existing in Colorado.

Except for the larger employers, few clients of an attorney will have had much experience or contact with the Colorado Civil Rights Commission, the agency administering the state's civil rights laws. For this reason the number of lawyers who are familiar with the commission and its statutes is relatively small. However, the professional tools needed for civil rights cases are neither involved nor difficult, and it is hoped that the information contained in this article will save the attorney a certain amount of time in appraising and understanding a civil rights case if he should receive one.

Colorado presently has three civil rights statutes: a public accommodations act,¹ a fair employment act,² and a fair housing act.³ As with most regulatory and enforcement statutes, there are other

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¹ COLO. REV. STAT. ANN. §§ 25-1-1 *et seq.* (1963).

² *Id.* §§ 80-21-1 *et seq.*

³ *Id.* §§ 69-7-1 *et seq.*, as amended (Supp. 1965).

limitations, prohibitions, and restrictions relating to civil rights to be found in other laws. With one exception,⁴ however, these other laws exist and operate outside of the statutory jurisdiction of the Colorado Civil Rights Commission. This article will be limited, therefore, to a consideration of the three major laws administered by the commission and the procedures followed in carrying out its duties.

I. PUBLIC ACCOMMODATIONS LAWS

Early in Colorado's history a civil rights policy was built into the structure of the law. The Enabling Act laying the foundation for the adoption of a constitution, the creation of a state, and its admission to the Union provided that "the constitution should be republican in form, and shall make no distinction in civil or political rights on account of race or color . . . [and] that perfect toleration of religious sentiment shall be secured and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. . . ."⁵ These requirements were later incorporated in various forms into the Colorado Constitution.⁶

In 1885, only five years after the adoption of the constitution, the general assembly passed its first civil rights law—a public accommodations act.⁷ This law remained unchanged until 1895 when the initial act was repealed and reenacted in its present form.⁸ The 1895 law was substantially the same as the one it replaced, except that the later statute deleted churches as places of public accommodation. To the possibility of incurring a fine of \$300.00 upon being convicted for a misdemeanor,⁹ the 1895 law also added

⁴ The Proprietary School Act of 1966, *id.* § 146-3-5(1) (Supp. 1967), gives the Colorado Civil Rights Commission authority to investigate discriminatory practices in proprietary schools and report the same to the State Board for Community Colleges and Occupational Education. Most of the other civil rights laws involve a general prohibition against discrimination (*e.g.*, "There shall be no discrimination shown toward any teacher in the assignment or transfer of that teacher to a school, position, or grade because of sex, race, creed, color, or membership or nonmembership in any group or organization." COLO. REV. STAT. ANN. § 123-18-14(1)). But such laws do not provide for any penalties or enforcement measures in the event of a violation and are, therefore, in practical effect merely statements of policy.

Other such laws not pertaining to matters under the commission's jurisdiction (such as COLO. REV. STAT. ANN. § 80-11-61 (1963) — discrimination in discharging an employee because of his age) declare that a violation constitutes a misdemeanor, but offer no affirmative relief to the aggrieved person. Even if a complaint is filed under the statute, it is never prosecuted because of the different and heavier burden of proof for a criminal case.

⁵ Colo. Enabling Act §4, COLO. REV. STAT. ANN. Vol. 1 (1963).

⁶ COLO. CONST. art. II, §§ 1-28 (the Bill of Rights), with specific reference to Section 4 on religious freedom and Section 25 on due process; *see also* Article IX, Section 8, prohibiting discrimination in public education.

⁷ Colo. Sess. Laws of 1885, at 132.

⁸ Colo. Sess. Laws of 1895, Ch. 61, at 139.

⁹ *Id.* § 2.

a private remedy. An aggrieved person could file a private civil action, with damages of up to \$500.00 for each offense.¹⁰ The complainant was required to elect his remedies, and could not pursue more than one cause of action.¹¹

As with many Colorado statutes, this law was taken from an Illinois law,¹² which, in this case, had been copied from the Federal Civil Rights Act of 1875.¹³ The federal law was in substantially the same form as that subsequently adopted in Colorado and prohibited discrimination in the denial of the "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."¹⁴ Colorado's law reads exactly the same except that it also includes restaurants, eating houses, and barber shops and ends with "all" other places of public accommodation.¹⁵

Various states passed such laws in response to the decision of the United States Supreme Court in *Civil Rights Cases*.¹⁶ This decision, consolidating several lower court decisions on the same subject, held that the Federal Civil Rights Act of 1875 was unconstitutional. The Court held that Congress was legislating in areas reserved for state action by the 13th and 14th amendments to the United States Constitution. The effect of these state laws was, for the most part, annulled by the 1896 decision of the Supreme Court in *Plessy v. Ferguson*,¹⁷ which articulated the "separate but equal" doctrine. With the end of the Reconstruction Period, resulting from the election of President Hayes in 1877, and the *Plessy* decision, civil rights was retired as a legal concept for many years to come.

By 1964, 30 states in addition to Colorado had public accommodation laws, most of which are similar to Colorado's statute and most of which were passed in the period between 1880 and 1900.¹⁸ Of these 30, 13 have been considered by their respective state supreme courts and have been held to be constitutional.¹⁹ In Colorado the

¹⁰ *Id.*

¹¹ *Id.*

¹² COTHRON'S ANN. STATUTES, Ill. 449 (1887).

¹³ Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

¹⁴ *Id.* § 1.

¹⁵ COLO. REV. STAT. ANN. § 25-1-1 (1963).

¹⁶ 109 U.S. 3 (1883).

¹⁷ 163 U.S. 537 (1896).

¹⁸ *Bell v. Maryland*, 378 U.S. 226, 284 (Appendix V) (1964).

¹⁹ *Annot.*, 49 A.L.R. 505 (1927); *see also* *School Committee of Boston v. Board of Educ.*, 352 Mass. 693, 227 N.E.2d 729 (1967).

basic statute has been before the state supreme court six times.²⁰ Four of these decisions were decided on procedural grounds,²¹ but in *Crosswaith v. Bergin*, the court specifically found the law to be constitutional.²²

The case of *Darius v. Apostolos*²³ is particularly significant. The issue was whether a bootblack stand was a place of public accommodation since it was not specifically mentioned in the statute. The court reversed the trial judge's decision and held that a bootblack stand was included and was covered by the act. The court ruled that the principle of *ejusdem generis* did not apply in the interpretation of this statute and that the phrase "all other places of public accommodation" was not limited to other places similar or related to those places or establishments specifically mentioned earlier in the statute, *i.e.*, inns, restaurants, eating houses, barber shops, public conveyances, and theaters, and that the phrase "all other places" means exactly what it says.²⁴ It was on the strength of this case and Article IX, Section 8 of the Colorado Constitution that the Colorado Civil Rights Commission in 1967 issued a policy statement that public schools are places of public accommodation in Colorado and that the commission would therefore assume jurisdiction over cases of *de facto* segregation in Colorado public schools.²⁵

When the legislature passed the Anti-Discrimination Act of 1957,²⁶ Colorado's civil rights employment law, the public accommodations law was amended to bring the enforcement of public accommodations discrimination under the jurisdiction of the Civil Rights Commission,²⁷ providing a third remedy to an aggrieved person in addition to the civil action and misdemeanor prosecution already available. The law also continued the requirement that a complainant elect his remedies so that a choice of any one procedure would be

²⁰ *Jernigan v. Lakeside Park Co.*, 136 Colo. 141, 314 P.2d 693 (1957); *Johnson v. Westland Theatres, Inc.*, 117 Colo. 346, 187 P.2d 932 (1947); *Lueras v. Town of Lafayette*, 100 Colo. 124, 65 P.2d 1431 (1937); *State ex rel. McKinney v. Lowry*, 100 Colo. 144, 66 P.2d 334 (1937); *Crosswaith v. Bergin*, 95 Colo. 241, 35 P.2d 848 (1934); *Darius v. Apostolos*, 68 Colo. 323, 190 P. 510 (1920).

²¹ *Jernigan v. Lakeside Park Co.*, 136 Colo. 141, 314 P.2d 693 (1957); *Johnson v. Westland Theatres, Inc.*, 117 Colo. 346, 187 P.2d 932 (1947); *Lueras v. Town of Lafayette*, 100 Colo. 124, 65 P.2d 1431 (1937); *State ex rel. McKinney v. Lowry*, 100 Colo. 144, 66 P.2d 334 (1937).

²² 95 Colo. 241, 35 P.2d 848 (1934), wherein the court cited *Darius v. Apostolos*, 68 Colo. 323, 190 P. 510 (1920) for the proposition that the statute had been held constitutional; however this issue was not discussed in the *Darius* case.

²³ 68 Colo. 323, 190 P. 510 (1920).

²⁴ *Id.* at 327, 190 P. at 511.

²⁵ Policy Statement, Colorado Civil Rights Commission, Minutes of Commission Meeting, Dec. 22, 1967.

²⁶ COLO. REV. STAT. ANN. §§ 80-21-1 *et seq.* (1963).

²⁷ *Id.* §§ 25-3-3, 80-21-5 (1963). The Colorado Anti-Discrimination Commission referred to in this statute has been redesignated the Colorado Civil Rights Commission. COLO. REV. STAT. ANN. §§ 25-3-3, 80-21-5 (Supp. 1965).

a bar to any alternate action.²⁸ Under this amendment, the only relief the commission can grant is to issue cease and desist orders prohibiting further discriminatory conduct. If such an order were not obeyed, it would be enforceable in the district court through the district court's contempt powers.²⁹ As with other laws administered by the commission, such an administrative order can only be issued after an administrative hearing in which the complainant has proved a statutory violation,³⁰ unless the case was disposed of before a hearing through the conciliation powers of the commission to settle cases by agreement of the parties.³¹

The most unique portion of the amended public accommodations law is in the prohibition section setting forth the conduct forbidden. No reference is made to the familiar words "race, creed, color, national origin or ancestry;" the law instead refers to: "*All persons . . . shall be entitled to the . . . equal use of places of public accommodation.*"³² This would appear to be an admonition against any type of deferential conduct by a proprietor. The statute ends this particular provision with the phrase, "Subject only to the conditions and limitations established by law and applicable alike to all citizens."³³ For example, apparently the owner of a bar could, under this law, refuse to serve all drunks or those who appeared intoxicated or who were causing a disturbance; but he could not be selective and only throw out those against whom he had a particular aversion. If there is a policy therefore, it must be applied equally to all.

Under this provision, therefore, the posting of the signs frequently seen in places of public accommodation stating that "we reserve the right to refuse service to anyone" is highly questionable and probably unlawful. If a proprietor attempted to exercise this privilege he might find it necessary to show that he does so under the "conditions and limitations established by law and applicable alike to all citizens."³⁴ If the aggrieved person could submit any evidence showing that the proprietor's standards for such action did not meet the statutory test and were in any way arbitrary, and this evidence could not be rebutted by the proprietor, the complainant would be able to prove a statutory violation.

²⁸ COLO. REV. STAT. ANN. § 25-3-1 (1963).

²⁹ *Id.* §§ 25-3-5, 80-21-8.

³⁰ *Id.* §§ 25-3-4, 80-21-7.

³¹ *Id.* §§ 25-3-4, 80-21-7(3). The conciliation procedure is reviewed *infra* in this article.

³² *Id.* § 25-1-1 (Supp. 1969) (emphasis added).

³³ *Id.*

³⁴ *Id.* In this regard, the commission has promulgated General Regulation No. 4 which states that: "No person shall post, or permit to be posted in any place of public accommodation any sign which states or implies the following: 'We reserve the right to refuse service to anyone.'" LAWS, RULES AND REGULATIONS OF THE COLORADO CIVIL RIGHTS COMMISSION 36 (1968).

This law is a classic example of the uselessness of providing a criminal penalty for a civil rights violation. The author has not been able to find a single example of this law being enforced by a prosecutor in the 93 years of its existence. A district attorney just will not prosecute this kind of case for the very good reason that the burden of proving his case beyond a reasonable doubt is practically insurmountable.³⁵ The commission appreciates how difficult such prosecution would be from its own experience in hearing cases and from trying to determine if the complainant has proven his case under the easier test of proving a discriminatory act by a preponderance of the evidence.

Since 1957, when the commission was given the authority to administer this law, few private civil actions have been initiated, as most of the cases that do arise are filed with the commission. Fortunately, most respondents do not wish to engage in what could be a lengthy and costly proceeding and most public accommodations cases are conciliated amicably. This is really the best solution for all concerned, for even if the commission is finally forced to hold a hearing, the most it has the authority to do is issue a cease and desist order. Therefore, it is suggested that if a respondent refused to conciliate and the matter was taken to a hearing and the finding was against the respondent, the commission should have the authority to assess damages against the respondent for the complainant, especially since, as the law now reads, the complainant has given up any form of monetary relief in initially filing his case with the commission.³⁶

II. FAIR EMPLOYMENT LAWS

Colorado's civil rights law relating to employment is the Anti-Discrimination Act of 1957.³⁷ A 1965 amendment to this statute created the Civil Rights Commission as it is presently constituted.³⁸ As with most civil rights employment laws of other states, Colorado's law was copied from a 1945 New York statute,³⁹ which was the first to adopt a commission approach to the administration and enforcement of civil rights.⁴⁰

The structure of the New York commission and statute has since been more or less adopted by the other states who have legis-

³⁵ See M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 19-20 (1966). Mr. Sovern touches on the nature of such laws, and comes to a similar conclusion.

³⁶ COLO. REV. STAT. ANN. § 25-3-1 (Supp. 1965).

³⁷ *Id.* §§ 80-21-1 *et seq.* (1963).

³⁸ *Id.* §§ 80-21-2 *et seq.* (Supp. 1965).

³⁹ N.Y. Sess. Laws of 1945, ch. 118, §§ 1-3.

⁴⁰ SOVERN, *supra* note 35, at 19.

lated in this area.⁴¹ At the present time only 13 states do not have fair employment laws.⁴² Except for two curious exceptions, North and South Dakota, all of these states are from what might be considered the Deep South. Of the 37 states having fair employment laws — together with the District of Columbia and Puerto Rico — 33 administer and enforce the laws through commissions, boards, or departments similar to the Colorado commission.⁴³ The remaining states merely have statutory prohibitions against discrimination in employment, with either no provision for a remedy or with only the provision that such discrimination be treated as a misdemeanor,⁴⁴ considered to be of little or no value.

Colorado's law covers all employers in the State of Colorado and includes state agencies as well as all of Colorado's political subdivisions.⁴⁵ It also includes labor unions and employment agencies.⁴⁶ The law prohibits discrimination because of a person's race, creed, color, sex, national origin, or ancestry. This prohibition operates against:

- (1) Employers in;
 - a. hiring,
 - b. firing,
 - c. promotion,
 - d. demotion,
 - e. matters of compensation⁴⁷
- (2) Employment agencies in;
 - a. listing,
 - b. classifying,
 - c. referring,
 - d. complying with a discriminatory request from an employer⁴⁸
- (3) Labor unions in;
 - a. excluding from membership,
 - b. expulsion from membership,
 - c. denial of work opportunity.⁴⁹

In addition, it is unlawful for an employer to place an advertisement for employees which is discriminatory in its specifications.⁵⁰ An

⁴¹ *Id.* See also Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 527 (1961).

⁴² 6 BNA FAIR EMPLOYMENT PRACTICES 451:26-27 (1968).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ COLO. REV. STAT. ANN. §§ 80-21-2(5)(Supp. 1969), 80-21-6(1-2) (1963).

⁴⁶ *Id.* §§ 80-21-2(3-4) (1963), 80-21-6(1-4) (Supp. 1969).

⁴⁷ *Id.* §§ 80-21-6(1-2) (1969).

⁴⁸ *Id.* §§ 80-21-6(1-3).

⁴⁹ *Id.* §§ 80-21-6(1, 4).

⁵⁰ *Id.* §§ 80-21-6(1, 5).

additional paragraph covers persons who aid, abet, incite, compel, or coerce others into discriminating, or who obstruct or prevent others from complying with the law.⁵¹ In 1963, the Colorado law was amended to cover discrimination in apprenticeship, on-the-job training, or other vocational training or instruction programs.⁵²

Since 1963, sex discrimination has become an important issue under federal law. The first major piece of modern civil rights legislation by the United States Congress was the 1964 Civil Rights Act;⁵³ and one of the more important provisions in that law was Title VII,⁵⁴ the fair employment section, which included a prescription against sex discrimination as well as the usual categories of race, religion, color, and national origin.

In 1957, the first year of the Colorado commission's operation, Mr. Marlon Green, a Negro, filed a complaint charging Continental Air Lines with discrimination for failing to hire him as a pilot.⁵⁵ In 1957, the issue of whether a Negro could become an airline pilot was revolutionary in concept and the case was bitterly contested by Continental. Today, while it probably would be incorrect to say that discrimination does not exist in the airline industry, the question of whether a Negro could become a pilot is not out of the ordinary and is no longer the subject of tiresome racial jokes. Perhaps fair employment laws are effective, not only in eliminating discrimination in specific cases, but in changing the patterns and prejudices of our society.

The commission found that Mr. Green had been discriminated against and the decision was appealed to the Denver District Court, the Colorado Supreme Court, and the United States Supreme Court.⁵⁶ At every level of state court proceedings, the commission's finding of discrimination against the airline was held to be outside the scope of the jurisdiction of the state agency. The state courts held that Colorado had been pre-empted from legislation in the field of interstate commerce. The United States Supreme Court disagreed and ruled that Colorado did indeed have jurisdiction in this area and that the commission could regulate the hiring practices of interstate carriers within the state.⁵⁷ Civil rights in employment was thereby included as an area of concurrent jurisdiction between the states and the Federal Government.

⁵¹ *Id.* §§ 80-21-6(1, 6).

⁵² *Id.* §§ 80-21-6(1, 7).

⁵³ 42 U.S.C. §§ 1975(a-d), 2000(a-h) (1964).

⁵⁴ *Id.* §§ 2000e-2000e(15) (1964).

⁵⁵ *See* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 149 Colo. 259, 368 P.2d 970 (1962), *aff'd* 372 U.S. 714 (1963).

⁵⁶ *Id.*

⁵⁷ Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963).

Lawyers anguish or delight in fine legal points, but they tend to forget how the man in the street is affected by the evolution of the law. It is interesting how many persons, including nonminority group members, know of the *Green* decision and that Mr. Green finally got his job, as he was thereafter hired by Continental pursuant to the commission's original order. This case, as much as any other, served to "establish" the commission and put employers on notice that in Colorado fair employment is more than just a mere statement of policy.

State legislation, in the area of fair employment, has not been the subject of much litigation; certainly not to the extent found in the area of fair housing. Perhaps this is because most respondents do not wish to engage in a legal challenge of the commission and/or the complainant's allegations. This may be for several reasons, not the least of which are the cost, and the fact that adverse publicity is bad for business. Generally, employers prefer to explore the conciliation process and settle the case amicably.

As Schroeder and Smith state in their treatise, *Defacto Segregation and Civil Rights*,⁵⁸ the only case to come before the United States Supreme Court on the constitutionality of state fair employment laws is *Railway Mail Ass'n. v. Corsi*,⁵⁹ which held the New York law valid. The Court ruled that there is "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed by an organization, functioning under the protection of the state which holds itself out to represent the general business needs of its employees."⁶⁰ On the basis of this case, Schroeder and Smith have suggested that these fair employment practice laws are a valid exercise of state's police powers.⁶¹

While not dealing specifically with fair employment laws, there are some cases of interest which relate to discrimination in employment. These cases are class actions brought by Negroes against unions, employers, and governmental entities to invoke the injunctive powers of the courts to prohibit any continuance of a discriminatory pattern in employment and union membership.

One such decision is the case of *Todd v. Joint Apprenticeship Comm'n*⁶² where a suit was brought by three Negroes against a labor union, its joint apprenticeship committee, a steel company, a

⁵⁸ O. SCHROEDER & D. SMITH, *DEFACTO SEGREGATION AND CIVIL RIGHTS* 228 (1965) [hereinafter cited as SCHROEDER].

⁵⁹ 326 U.S. 88 (1945).

⁶⁰ *Id.* at 94.

⁶¹ SCHROEDER, *supra* note 57, at 229-30.

⁶² 223 F. Supp. 12 (N.D. Ill. 1963).

construction company, the United States General Services Administration, the United States Department of Labor and a local board of education. The court found that the plaintiffs were not admitted to the apprenticeship training program, were then refused membership in the union, and therefore not able to obtain a job on a federal construction project solely on the basis of their race and that there was no other remedy open to them to obtain relief. Interestingly enough, the defendants' counsel admitted the plaintiffs had a just grievance but alleged there was simply no remedy to their complaint. In response, Judge Campbell invoked the equitable doctrine "*ubi jus ibi remedium*" — where there is a right there should be a remedy.⁶³ While not citing any cases dealing directly with the issues before the court, the judge proceeded under the broad mandates of the fifth and 14th amendments of the Constitution and related cases,⁶⁴ and held that the plaintiffs were clearly being deprived of their constitutional rights.⁶⁵ Accordingly, the court ordered the various defendants respectively to train the plaintiffs, admit them to membership, and employ them.⁶⁶

Subsequently, the court of appeals stated that it could not consider the validity of the district court's findings as the case had by then become moot since the construction for which the plaintiffs sought employment had been completed and there was no longer a viable issue before the court. Judgment was therefore vacated because of mootness and the appeal dismissed.⁶⁷

In *Ethridge v. Rhodes*,⁶⁸ which, although very similar to *Todd*, does not cite the *Todd* decision, the judge foresaw the problem of a moot remedy and actually enjoined further construction on a state building until the plaintiffs were employed. The Negro complainants were denied a job by the contractor because they were not members of the union. On every occasion when they attempted to join the union the officials were conveniently "out" and "unavailable." The court found a clear pattern of discrimination because of race and further determined that no real remedy existed elsewhere for the complainants, in spite of the fact that there was a state fair employment practice law in Ohio⁶⁹ very similar to the law in Colorado.

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 20, wherein the Court quoted from the *Continental Air Lines* case, *supra*, then before the Supreme Court, and adopted the Court's statement that any law which denied applicants a job would be invalid under the due process clause of the fifth amendment and the due process and equal protection clauses of the 14th amendment.

⁶⁵ *Id.* at 22.

⁶⁶ *Id.* at 23.

⁶⁷ *Todd v. Joint Apprenticeship Comm'n*, 332 F.2d 243 (7th Cir. 1964).

⁶⁸ 268 F. Supp. 83 (S.D. Ohio 1967).

⁶⁹ OHIO REV. CODE § 4112.02 as amended (Anderson 1959).

The court ruled that the state "displayed a shocking lack of concern over the realities of the whole situation and the inevitable discrimination that will result from entering into and performing under the proposed contracts with the proposed contractors."⁷⁰ The court thereupon issued an injunction against the State of Ohio enjoining it from entering into or performing any contracts for the construction of the subject building and the employment of any individuals for such construction until the state, the contractor, and the labor union could show that the labor force was secured on a nondiscriminatory basis.⁷¹

The court was perhaps on somewhat stronger ground in *Ethridge* than in *Todd* in that in *Ethridge* a state was, under color of state law and state authority, contributing to discriminatory conduct and was therefore clearly in violation of the equal protection clause of the 14th amendment.

One of the most significant points about these cases is that the courts have assumed a responsibility which they believe the other branches of government have abrogated, or have been unable or unwilling to assume. These decisions go beyond a mere statement of a policy of the law and require the state and/or Federal Government to engage in affirmative action to correct the abuses inherent in a discriminatory pattern and insure that the pattern is eliminated. In addition, of course, the courts also make the point that public funds cannot *constitutionally* be used in any manner which follows or perpetuates a pattern of discrimination and *Ethridge* implies that these sums must be withheld until such discrimination ceases.⁷²

Both of these decisions, but particularly the *Ethridge* decision, indicate that an alternative remedy may be available in Colorado in a civil rights matter by alleging a violation of basic constitutional rights. This alternative remedy appears to be available whether or not the jurisdiction of the Colorado Civil Rights Commission has been invoked by filing a complaint.

Shortly after the *Ethridge* decision, Ohio amended its law to void exclusive hiring agreements between a public works contractor and a union unless the union includes procedures for referring qualified employees without regard to race, color, religion, national origin, or ancestry.⁷³ Also, the Ohio Governor issued a new Executive order prohibiting the waiving of a nondiscrimination clause in public works contracts and requiring all public works contractors

⁷⁰ *Ethridge v. Rhodes*, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

⁷¹ *Id.* at 89.

⁷² *Id.*

⁷³ OHIO REV. CODE §§ 153.581, 153.591 (Anderson 1967).

to obtain their labor forces from nondiscriminatory sources.⁷⁴ This Executive order, however, does not provide for the cancellation of a state contract where discrimination has occurred, which cancellation provision is the heart of Colorado Governor John A. Love's Executive Order of April 15, 1968.⁷⁵

Probably more than any other type of civil rights statute, fair employment practice laws illustrate one of the basic problems with the form of the civil rights statutes being administered by the states today. The *Green* case is an example. It took Green seven years to obtain the job he should have been entitled to at the outset. If a commission finds for the complainant and orders affirmative relief, the commission will have succeeded only in providing a remedy for a single act of discrimination as it affects one person. Obviously this is chipping away at the problem and does little to remedy the basic prejudice which was manifested in the act of discrimination. Also, in approaching the problem on a case-by-case basis, the law is subject to abuses by both the complainant and the respondent.⁷⁶ It allows for the filing of questionable charges by a complainant and provides a procedure for a respondent to protract the awarding of relief to a complainant who cannot afford to wait.⁷⁷

It is clear that the experiences of a decade or more have shown that the case-by-case approach utilized by the commission structure is not serving the purpose for which it was created. It is at the most a deterrent from continuing with a previous pattern of behavior. Something else is needed to not only require a halt to discriminatory actions but, beyond that, to change or alter the direction or pattern of the wrongful conduct. Perhaps the present type of enforcement should be retained as a last resort to force a discontinuance of unlawful actions, but only as a final step after some form of affirmative action encouraging voluntary action to benefit many individuals has first been attempted and has failed. It is this alternate method or type of approach which should be explored in detail as an adjunct

⁷⁴ Executive Order, Gov. James A. Rhodes, June 5, 1967, at 6 BNA FAIR EMPLOYMENT PRACTICES 451:951 (1967).

⁷⁵ Executive orders are of dubious value, but if you do have one it is best to have a good one. It is submitted that without some enforcement provisions (such as cancellation of a state contract upon a violation) executive orders are mere proclamations or statements of policy and have a nice sound but beyond that are of little meaning or importance.

⁷⁶ 2 T. EMERSON, D. HABER & N. DOOSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, at 1957-65 (3d ed. 1967) [hereinafter cited as EMERSON].

⁷⁷ One of the major criticisms which was leveled at the Colorado Civil Rights Commission in a recent survey was the delay involved in the handling of a case (a delay which is in many respects unavoidable because of the requirements of the statute and the delay inherent in the commission-type approach to civil rights laws). Comment, *Investigation Procedures of the Colorado Civil Rights Commission*, 40 U. of COLO. L. REV. 115 (1967).

to the system now employed — or possibly even to replace the present system.

III. FAIR HOUSING LAWS

Fair housing laws are relatively new as far as civil rights statutes are concerned — particularly in the area of private housing. The first contemporary fair housing statutes were limited to public housing and it was not until the late 1950's that legislation appeared affecting private housing and limiting a home owner in discriminating in the sale of his own property.⁷⁸

Colorado, in 1959, was one of the first states to adopt a fair housing law which had jurisdiction over the sale of private property.⁷⁹ It was one of the most comprehensive laws in the country and, with several major amendments in 1965,⁸⁰ it is now considered to be the strongest such law administered by any state. One of the first cases filed with the commission under the Colorado act, *Colorado Anti-Discrimination Comm'n v. Case*,⁸¹ established the constitutionality of the law and also pointed the way for subsequent amendments in 1965. In a 6 to 1 opinion, Justice O. Otto Moore of the Colorado Supreme Court wrote that the Colorado Legislature had accepted the challenge of the "forgotten Ninth Amendment"⁸² and that:

When, as at present, the entire world is engulfed in a struggle to determine whether the American concept of freedom with equality of opportunity shall survive; when tyrannical dictators arrayed against this nation in the struggle proclaim throughout the world, with some justification, that we do not practice what we preach, and that "equality of opportunity" is a sham and a pretense, a hollow shell without substance in this nation; we would be blind to stark realities if we should hold that the public safety and the welfare of this nation were not being protected by the Act in question. Indeed, whether the struggle is won or lost might well depend upon the ability of our people to attain the objectives which the Act in question is designed to serve.⁸³

However, the court in the *Case* decision found that a portion of the law was unconstitutional. That section which allowed the commission to enter an order requiring a respondent to take "such other action as in the judgment of the commission will effectuate the purposes of this article"⁸⁴ was an unlawful delegation of

⁷⁸ 2 EMERSON, *supra* note 76, at 2050.

⁷⁹ Colorado Fair Housing Act of 1959, Colo. Sess. Laws of 1959, at 489.

⁸⁰ COLO. REV. STAT. ANN. §§ 69-7-2 *et seq.* (Supp. 1965).

⁸¹ 151 Colo. 235, 380 P.2d 34 (1962).

⁸² *Id.* at 247-48, 380 P.2d at 41.

⁸³ *Id.* at 248, 380 P.2d at 42.

⁸⁴ COLO. REV. STAT. ANN. § 69-7-6(12) (Supp. 1960).

authority and improperly gave the commission "carte blanche" authority to do as it saw fit.⁸⁵

Various attempts were then made to define the commission's authority and in 1965 the law was substantially amended giving the commission authority to invoke the injunctive powers of the district court.⁸⁶ The law as presently written prohibits discrimination against persons because of their race, creed, color, sex, national origin, or ancestry in the:

- (1) a. refusal to show, rent, sell, lease, or transfer housing, or to transmit a bona fide offer to buy, sell, rent or lease housing,
b. denial of the terms, conditions, or privileges relating to housing,
c. refusal to furnish any facilities or services in connection with such housing,
d. making of any written or oral inquiry or record which is discriminatory of a person seeking to purchase, rent, or lease housing.⁸⁷
- (2) a. making of any written or oral inquiry which is discriminatory of an applicant for financial assistance for the purchase, construction, or repair of housing,
b. discrimination in the terms, conditions, or privileges relating to the obtaining of financial assistance for housing.⁸⁸
- (3) a. utilizing or respecting of any discriminatory restrictive covenants.⁸⁹
- (4) a. discrimination in the advertising of housing for sale, transfer, rental, or lease.⁹⁰
- (5) a. aiding, abetting, inciting, compelling, or coercing another to commit any unlawful housing or discriminatory practice,
b. obstruction of any person from compliance with the Act or attempting to commit directly or indirectly, a discriminatory practice.⁹¹

⁸⁵ Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 250, 380 P.2d 34, 43 (1962).

⁸⁶ COLO. REV. STAT. ANN. § 69-7-6(6)(b) (Supp. 1965).

⁸⁷ *Id.* § 69-7-5(1)(a,b) (Supp. 1965).

⁸⁸ *Id.* § 69-7-5(1)(a,c) (1963).

⁸⁹ *Id.* § 69-7-5(1)(a,d) (Supp. 1965).

⁹⁰ *Id.* § 69-7-5(1)(a,e) (Supp. 1965).

⁹¹ *Id.* § 69-7-5(1)(a,f) (1963).

- (6) a. discrimination against any employee or agent for obedience to the Act in matters of compensation, discharge, or demotion.⁹²

All property publicly advertised for sale, lease, or rent is covered by the act with the only exception being the "Mrs. Murphy's boarding house" situation where a single family home is occupied by an owner or lessee as a household and rooms are offered for lease or rental.⁹³ No logical reason exists for this exception and anyone interpreting it should take as restrictive a view as possible. The commission will adopt such restrictive position in handling a case involving this factor and presumably a court will also, since no public policy or benefit is served by such a limitation; and as the police power of the state has been invoked by the passage of such legislation, the provision should be strictly construed as being contrary to the general purpose and policy of the statute which was enacted to prohibit discrimination. Regardless of whatever motives may have prompted the legislature to create such an exception, it should be removed from the statute because such anomalies cannot stand the test of an independent evaluation and serve only to detract from the law as a whole while performing no purpose whatsoever when read in the context of the entire statute.

The law makes no distinction between private homes offered for sale or rent by the owner himself or through a realtor; it means *any* real property, including vacant land and commercial space.⁹⁴ However, other limitations are an exclusion of nonprofit, fraternal, educational or social organizations or clubs,⁹⁵ and an allowance for religious or denominational institutions to give preference in housing to persons of the same religion or denomination.⁹⁶ In addition, there is a permissive clause for leasing premises to members of only one sex.⁹⁷

As will be subsequently discussed, the statute sets forth a procedure to be followed in the processing of a complaint before the commission.⁹⁸ This is inherently a time consuming process and allows for a respondent to dispose of the property or otherwise make it unavailable to the complainant by the time of a hearing.

⁹² *Id.* § 69-7-5 (1)(a,g) (Supp. 1965).

⁹³ *Id.* § 69-7-3(1)(d) (1963).

⁹⁴ *Id.* § 69-7-5(1)(a,b) (Supp. 1965).

⁹⁵ *Id.* § 69-7-3(1)(c) (Supp. 1965).

⁹⁶ *Id.* § 69-7-5(2) (1963).

⁹⁷ *Id.* § 69-7-5(3) (1963).

⁹⁸ *Id.* § 69-7-6 (1963).

One of the decided advantages of the Colorado law is that portion of the 1965 amendment which gives the commission the authority to seek an injunction from the district court holding the house in *status quo* until the complaint can be heard by the commission.⁹⁹ The injunction is an extraordinary remedy and is used by the commission only when it finds some evidence that the respondent is attempting to make the housing in question unavailable by transferring ownership or possession to a third party. Generally speaking, this becomes immediately evident to the commission's investigator and if an injunction is thought necessary by the commission coordinator he requests the assistant attorney general to commence injunctive proceedings within one or two days after a complaint has been filed and investigation initiated.

Because of the procedural requirements of the act, the commission must meet several prerequisites before an injunction can be obtained. There must be a preliminary investigation, a finding of probable cause, and a failure to settle the complaint by conference, conciliation or persuasion.¹⁰⁰ Also, the commission generally serves the respondent with a "Notice to Answer" either prior to the injunction proceedings or at the time of the service of the notice of the setting for the preliminary injunction.

Since only the Civil Rights Commission can find whether a discriminatory act has occurred,¹⁰¹ it is not the function of the court at the injunction hearing to try the issues raised in the complaint alleging discrimination. The only question for the district court to consider on the commission's motion for a preliminary injunction is whether there are sufficient grounds for the granting of the injunction, *e.g.*, irreparable harm, injury or loss, and no other adequate remedy at law. Since real property is by definition *sui generis* under the common law, it is only necessary to show to the court that the respondent is attempting to dispose of the property to another person in order to show irreparable harm, injury, or loss to the complainant because that particular parcel of property would then be unavailable to the complainant. This is a special, statutory remedy authorizing the commission to take action, on behalf of another, to obtain injunctive relief against a third party.

The complainant must, of course, put up a bond as security for damages to the respondent if he is not successful in eventually showing at a hearing before the commission that a violation of the

⁹⁹ *Id.* § 69-7-6(6)(b) (Supp. 1965).

¹⁰⁰ *Id.* § 69-7-6(6)(a) (Supp. 1965).

¹⁰¹ *Id.* § 69-7-6(6)(a,b) (Supp. 1965).

¹⁰² *Id.* § 69-7-6(6)(b) (Supp. 1965).

act has occurred.¹⁰² The act provides for an initial preliminary injunction for 60 days with an extension for another 60 days if necessary.¹⁰³

Since the power of injunction was added to the act, approximately 230 housing cases have been filed with the commission.¹⁰⁴ It has only been necessary to file for and obtain an injunction in eight of these cases.¹⁰⁵ The mere fact of the existence of the injunctive powers of the commission is usually the only deterrent needed to prevent a respondent from attempting to dispose of the property.

Should a respondent manage to dispose of the property to a bona fide third party (*i.e.*, no injunction has been obtained), and a hearing has been held before the commission and a violation of the act found, but the respondent has failed to comply with the orders of the commission, a complainant may file a civil action against the respondent. The complainant can then recover his actual damages, interest, and costs from the respondent, and the court may further order similar housing made available to the complainant if the circumstances warrant.¹⁰⁶ This provision is of little value as a deterrent as it does not provide for exemplary damages. Also, if similar housing were not available from the respondent at the time of the commission hearing, the only order the commission could issue under the Case decision would be a cease and desist order against the respondent and the complainant would then have to prove a violation of that order before he could initiate a civil action in court. Violation of the commission's cease and desist order would be for all practical purposes, impossible to prove, as the plaintiff would have to show subsequent acts of discrimination related to the initial charges filed with the commission.¹⁰⁷

Following a hearing, if the commission finds that an act of discrimination has occurred, it can enter an order requiring the respondent to sell, transfer, rent, or lease the housing to the complainant; to cease and desist from further acts of discrimination; or to grant financial assistance or to rehire and compensate an employee who has been discharged because of compliance with the act.¹⁰⁸ The specific remedy to be applied will depend upon the circumstances of the particular case.

In addition to Colorado, fair housing laws have been found to

¹⁰² *Id.* § 69-7-6(6)(e) (Supp. 1965).

¹⁰⁴ COLORADO CIVIL RIGHTS COMMISSION, A TIME FOR CHANGE AND CHALLENGE — CIVIL RIGHTS IN COLORADO 1966-1968.

¹⁰⁵ *Id.*

¹⁰⁶ COLO. REV. STAT. ANN. § 69-7-8 (Supp. 1965).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 69-7-6(12) (Supp. 1965).

be constitutional in five other states: California,¹⁰⁹ Connecticut,¹¹⁰ Massachusetts,¹¹¹ New Jersey,¹¹² and New York.¹¹³ Of these, all but the California decision related to fair housing laws covering private housing. California's case is applicable only to publicly-assisted housing. A Washington case holding the opposite is *O'Meara v. Washington State Board Against Discrimination*,¹¹⁴ which held that the law unconstitutionally classified housing by banning discrimination in publicly-assisted housing while not including private housing. The *O'Meara* decision was specifically considered and rejected in California¹¹⁵ and a previous New Jersey case.¹¹⁶

To date, 23 states have adopted fair housing statutes in various forms.¹¹⁷ In addition, Congress has recently passed a federal fair housing statute.¹¹⁸ The federal law, although not as broad as the Colorado statute, does cover all housing except private homes sold through a realtor.¹¹⁹ One of its weaknesses is lack of adequate enforcement powers. The only real affirmative remedy provides that an aggrieved person may file a civil suit to make the housing available, and/or for damages;¹²⁰ but there is no specific provision prohibiting the defendant from making the housing unavailable while the case is being prosecuted, and the administrative procedures required before a civil suit can be entertained will inevitably take a considerable period of time. If he can, the plaintiff will have to seek an early injunction in the district court if he is serious about having the property in question or it will surely become unavailable by the time he can obtain a court order requiring that it be made available to him and he will then only be entitled to damages. As far as Colorado is concerned, however, the federal law will have

¹⁰⁹ *Burkes v. Poppy Constr. Co.*, 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

¹¹⁰ *Swanson v. Commission on Civil Rights*, No. 94802 (Sup. Ct. New Haven Co., Conn. July 11, 1961).

¹¹¹ *Massachusetts Comm'n Against Discrimination v. Colangelo*, 344 Mass. 387, 182 N.E.2d 595 (1962).

¹¹² *David v. Vesta Co.*, 45 N.J. 301, 212 A.2d 345 (1965).

¹¹³ *Cooney v. Katsen*, 41 Misc. 2d 236, 245 N.Y.S.2d 548 (Sup. Ct. 1963).

¹¹⁴ 58 Wash. 2d 793, 365 P.2d 1 (1961), *cert. denied*, 369 U.S. 839 (1962).

¹¹⁵ *Burkes v. Poppy Constr. Co.*, 57 Cal. 2d 463, 470, 316 P.2d 313, 320, 20 Cal. Rptr. 609, 616 (1962).

¹¹⁶ *Jones v. Haridor Realty Co.*, 37 N.J. 384, 394, 181 A.2d 481, 486 (1962).

¹¹⁷ See EMERSON, *supra* note 76, at 2058. Note that this source only refers to 19 states. Subsequently, the following states have adopted housing statutes: Hawaii, Session Laws of Hawaii, 1967, Act 193, at 194; Iowa, IOWA CODE ANN. §§ 105 A.2, 105 A.9 (Supp. 1969); Maryland, MD. ANN. CODE art. 49B, §§ 21 *et seq.* (1968); Vermont, VT. STAT. ANN. tit. 13, § 1452 (Supp. 1968). EMERSON also includes a rather comprehensive list of other authorities on the general subject of fair housing.

¹¹⁸ Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-19 (Supp. 1969).

¹¹⁹ *Id.* § 3603(b)(1). Private homes sold through a realtor will not be exempted after Dec. 31, 1969.

¹²⁰ *Id.* § 3612.

little, if any, effect since the Secretary of Housing and Urban Development will defer to the state because Colorado has a law which is "substantially equivalent" to the federal act.¹²¹

Considering their relatively recent appearance on the scene, fair housing laws seem to have generated more litigation than any other type of civil rights statute. The adoption of this type of statute is frequently bitterly opposed and such opposition is generally spear-headed by representatives of the real estate profession. In Colorado this was quite evident in 1959 when the state's fair housing act was before the general assembly. However, experience with fair housing has demonstrated to the real estate profession the desirable effects of a statewide prohibition against discrimination. The imagined fears of integrated housing have not materialized (*e.g.*, reduction in property values in areas where integrated housing occurs and a vitiation of real property rights). There has been a general reversal of attitude by the building and real estate industry in Colorado to the point where in 1965, when the fair housing act was again before the general assembly for amendment, the Colorado real estate and building industry generally supported the concept of fair housing. This was evidenced by the adoption by CAREB (Colorado Association of Real Estate Boards) on October 10, 1964, of a resolution endorsing fair housing, and rejecting any discriminatory practices by its members.¹²² This is not to say that discrimination does not exist in the profession, but it does demonstrate that responsible members of that group have seen the validity and benefit of such a law.

Other states, such as California, have experienced a different response. In that state, Proposition 14 was adopted by popular initiative to amend the state constitution.¹²³ This amendment prohibited the state legislature from interfering with a property owner's absolute discretion to sell, rent, or lease his property as he saw fit. The amendment to the state constitution was a direct assault against the Rumford Act,¹²⁴ California's fair housing statute. Following the passing of Proposition 14, the amendment was challenged. Both the California Supreme Court¹²⁵ and the United States Supreme Court¹²⁶ held that such a provision in a state constitution was a violation of the 14th amendment to the United States Constitution

¹²¹ *Id.* § 3610(c-d).

¹²² Resolution on file in office of Colorado Association of Real Estate Boards, Denver, Colorado.

¹²³ CAL. CONST. art 1, § 26 (1964).

¹²⁴ CAL. HEALTH & SAFETY CODE, §§ 35700-35744 (1962).

¹²⁵ *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

¹²⁶ *Reitman v. Mulkey*, 387 U.S. 369 (1967).

in that it was an attempt, by state action, to deny a segment of the citizens of the State of California equal protection of the state's laws. In effect, it was a constitutionally guaranteed license to discriminate.

Civil rights and a charge of discrimination generally cause a visceral reaction in people who are brought into contact with the issue through a civil rights complaint. In such cases, the response is almost totally emotional. In the experience of the Colorado Civil Rights Commission, this kind of reaction occurs to a far greater extent in housing cases filed with the commission than in any other type of case. It would seem that while some persons may not have a strong objection to working or eating next to a Negro, for example, the thought of actually living next to one as a neighbor is unacceptable.¹²⁷ This attitude is, of course, contrary to our philosophy of basic equality. Our system, as evidenced by the laws under which we live, means equal opportunities, advantages, and privileges for all and that the only limitations that a person should face are those of himself as an individual.

This precept is reflected in a case recently decided by the United States Supreme Court. In *Jones v. Alfred H. Mayer Company*,¹²⁸ suit was brought against the defendant home builder because of its refusal to sell a subdivision home to them because they are Negroes. The defendant was a private builder operating without the benefit of any state or federal funds. The suit claimed that this discrimination was unconstitutional and asked for special and exemplary damages and/or a mandatory injunction. The federal district court dismissed the case for failure to state a claim for which relief could be granted.¹²⁹ The court of appeals upheld the district court's action but at the same time noted constitutional justification for holding that the action of respondents constituted prohibited racial discrimination but felt itself bound by past Supreme Court decisions.¹³⁰ While a portion of the plaintiffs' case rested upon existing federal statutes, the plaintiffs also raised fundamental constitutional questions regarding the action of the defendant in refusing to sell to them because of their race. The Supreme Court ruled that the Federal Civil Rights Act of 1866,¹³¹ under which the case was filed and which prohibited racial discrimination in the sale or rental of real property was valid and constitutional under the provisions of the 13th amendment. Every citizen may buy or rent real property under

¹²⁷ G. MYRDAL, *AN AMERICAN DILEMMA* (1942).

¹²⁸ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

¹²⁹ *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966).

¹³⁰ *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967).

¹³¹ 42 U.S.C. § 1982 (1866).

the law without limitation by the offeror because of the race of that citizen.

The decision does not conflict with the pertinent provisions of the 1968 Civil Rights Act,¹³² as this new law, if anything, supplements the earlier statute by more carefully defining the manner in which Congress wishes to implement the 13th amendment.

Therefore, by federal statute, and by the *Jones* decision, fair housing has become the law of the land, but, as previously stated, it establishes a standard already set in Colorado. However, setting a standard does not solve the problem, it only serves to identify the problem and announce that one actually exists. The real work of its elimination is then only just beginning.

IV. PROCEDURE.

The final portion of this article is an explanation of how the Colorado Civil Rights Commission administers the law and the procedures established for the handling of a case.

Under the three statutes previously discussed, any person who feels that he has been discriminated against may file a complaint.¹³³ The commission does not have discretion to refuse to accept a complaint unless jurisdiction is clearly absent (*e.g.*, a complaint against the Federal Government or in an area outside of employment, housing or public accommodations). In addition to an aggrieved person, a complaint may also be filed by a commissioner, the commission, or the attorney general.¹³⁴ The various statutes require that a complaint must be filed within a specified period of time following the date the alleged act of discrimination occurred or the statutory right will lapse. These time limitations are as follows:

- (1) Employment 6 months.¹³⁵
- (2) Housing 90 days.¹³⁶
- (3) Public Accommodations 60 days.¹³⁷

Immediately upon filing, the case is assigned to a commission civil rights specialist who conducts an investigation of the charges of discrimination. Under commission rules of practice and procedure, the respondent must receive a copy of the complaint within 20 days of filing with the commission. Service may either be accomplished

¹³² P.L. 90.284, 82 Stat. 73 (1968).

¹³³ COLO. REV. STAT. ANN. §§ 25-3-1, 80-21-7(1) (1963); *Id.* § 69-7-6(1)(a) (Supp. 1965).

¹³⁴ COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 2F(3), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

¹³⁵ COLO. REV. STAT. ANN. § 80-21-7(15) (1963).

¹³⁶ *Id.* § 69-7-6(15).

¹³⁷ *Id.* § 69-7-6.

by the investigator personally or by certified mail.¹³⁸ Amendments may be, and frequently are, made to the complaint upon information gathered during the investigation.¹³⁹

It must be emphasized that at this stage of the proceedings, the commission staff is only attempting to determine the position of the respondent with respect to the charges of discrimination made by the complainant. In effect, the staff is only interested in getting the other side of the story, which the staff is required to do by law once a complaint has been filed.¹⁴⁰ If any difficulties are encountered by the staff in conducting their investigation, they will utilize subpoenas duces tecum and depositions to obtain the information thought to be necessary to properly investigate the case. These procedures are available throughout the handling of the case including, of course, the preparation of the case for a hearing.

Once the preliminary investigation is completed, the report of the investigator is prepared and submitted to the coordinator (director) of the commission for an evaluation. The coordinator will determine whether or not in his opinion "probable cause" exists to credit the allegations of discrimination made in the complaint.¹⁴¹ If he finds no probable cause, the case is summarily dismissed and the proceedings are terminated. If probable cause is found, the commission will continue with the case and attempt to resolve the issues amicably by conference, conciliation, or persuasion.¹⁴²

The concept of probable cause has proved difficult for some persons to understand. Since the commission must accept all cases that are filed except those which can be summarily rejected for lack of jurisdiction, some procedure must be established to weed out cases which are clearly spurious or which do not contain the needed element of discrimination on the basis of race, creed, color, national origin, or ancestry. Examples would be where the investigation reveals that the actions of the respondent were entirely justified or obviously were not motivated by discriminatory reasons, (*i.e.*, employment cases where the complainant was denied a job for clearly being unqualified for the position, or in housing cases where an applicant did not meet the requirements of the landlord, *e.g.*, having children where children were not allowed). Various attempts have

¹³⁸ COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 2F(3), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

¹³⁹ *Id.* Rule 2G.

¹⁴⁰ COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 3(A), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:186(a) (1967).

¹⁴¹ COLO. REV. STAT. ANN. §§ 25-3-4, 80-21-7(3) (1963); *Id.* § 69-7-6(3) (Supp. 1965).

¹⁴² COLO. REV. STAT. ANN. §§ 25-3-4, 80-21-7(3) (1963); *Id.* § 69-7-6(3) (Supp. 1965).

been made to define probable cause, including an attempt by the Colorado legislature in the Fair Housing Act.¹⁴³

The only case found which specifically defines probable cause as the same as set forth in a civil rights statute is *Barnes v. Goldberg*,¹⁴⁴ where a New York Supreme Court quoting an earlier decision stated: "Probable cause exists when there is reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated. . . ."¹⁴⁵ This was a housing situation, but the application would apply in any civil rights case requiring an administrative finding of probable cause. The authority quoted in the *Barnes* case was another New York decision which dealt with an entirely different matter—the probable cause which must be found by a magistrate for the issuance of a search warrant.¹⁴⁶ It is submitted that this test is far too restrictive and will encourage the finder of probable cause to be too critical of his evidence and cause him to require that the quantum of evidence to make such a finding be too high.

The problems encountered in proving a case of discrimination are difficult enough, and it is too much to expect that *every* case in which probable cause is found will proceed to a public hearing. The official who makes this finding of probable cause cannot use as his criteria whether the case would stand up to the level of proof required at a hearing. If he did, very few cases would be accepted and he cannot be that demanding for the additional reason that before a case proceeds to a hearing generally further investigation is conducted. Therefore, he is really in no position to judge the case on its hearing merits at that point.

Generally speaking, *any* evidence which indicates a discriminatory motive for the respondent's conduct should be enough to

¹⁴³ COLO. REV. STAT. ANN. § 69-7-3(1)(k) (Supp. 1965):

Probable cause shall exist if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that the transaction would have proceeded to completion except that an unfair housing practice of refusal to sell, transfer, rent, or lease had been committed. As to all other unfair housing practices, probable cause shall exist if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that an unfair housing practice has been committed.

This definition reflects the trepidation of the Legislature in its attempt to explain probable cause. Since the first sentence defines probable cause as it relates to a refusal to "sell, transfer, rent, or lease," it covers most of the acts set forth elsewhere as unfair housing practices. The only unlawful practice not covered is a refusal to show, so, presumably, this is the unlawful act covered by the second sentence as it is the only act left, although the second definition is supposed to refer to all other unfair housing practices.

¹⁴⁴ 54 Misc. 2d 676, 283 N.Y.S.2d 347 (Sup. Ct. 1966).

¹⁴⁵ *Id.* at 352.

¹⁴⁶ *People v. Marshall*, 13 N.Y.2d 28, 191 N.E.2d 798, 241 N.Y.S.2d 417 (1963).

satisfy the official that probable cause exists. What is *evidence* is another question. A pattern may appear in the investigation not related to the case at all, such as an insignificant or negligible percentage of minority people employed at a plant and those few who are employed occupying positions of menial work or as laborers. In such a case, if there is a complete absence of evidence pointing to discrimination against the particular complainant and an acceptable reason for the action of the respondent, it is hard to see how the official can justify a finding of probable cause on such evidence alone. In another circumstance, such a pattern of employment may give considerable weight to an otherwise relatively weak case. Evidence as used in this context therefore, means evidence directly related to the case in point before the official. There are some good reasons for suggesting that even a scintilla of evidence should be sufficient for a finding of probable cause. One of the most frequent criticisms leveled against civil rights commissions is that they dismiss far too many cases for a failure to find probable cause.¹⁴⁷ Proceeding with the case wherever possible gives the commission the opportunity to obtain some affirmative relief for the complainant by conciliation. If the finding is unsubstantiated, the respondent can challenge it at the point of conciliation without having to defend himself at a hearing. A case can always be dismissed at a later date if the commission staff finds the case is deficient for a hearing. Furthermore, since one of the Colorado commission's statutory functions is the elimination of discrimination by education,¹⁴⁸ the commission performs an important educational function at conciliation conferences.

The process of conciliation is misunderstood by some. It is not an adversary proceeding, although it frequently takes that form. It is an attempt to resolve the issue by the process of bargaining or negotiating for a settlement. On the basis of long experience, the commission staff has a policy of not having both the complainant and respondent together at the same conference except in the most unusual of circumstances. In its best form, a conciliation conference is a quiet, deliberate study of the case, and an attempt to work out a resolution of the issues which is acceptable to all of the parties. At its worst, a conciliation may degenerate into personal attacks on each other by the participants, and accusations, challenges, and thinly veiled threats of political or legal action against the commission, its staff, or the complainant.

The usual procedure is for the commission staff to present the

¹⁴⁷ See SOVERN, *supra* note 35, at 46-47; EMERSON, *supra* note 76, at 11.

¹⁴⁸ COLO. REV. STAT. ANN. §§ 25-3-3, 69-7-4 (1)(f), 80-21-5(5) (1963).

evidence gathered in the investigation to the respondent, together with a suggested solution of the case, and then ask for a response. The respondent then points out what his position is and either accepts the proposal, makes a counter proposal, or rejects any possibility of conciliation. In a successful conciliation there is usually a withdrawal by both parties from their original position to a mutually acceptable middle ground. In employment cases, for example, the commission staff may not pursue the issue of back pay but may discuss some form of reinstatement or hiring. A great deal of the flexibility of the commission's position depends upon the strength of the case. If the evidence of discrimination is rather clear cut, the staff will usually take the position of obtaining for the complainant everything he could realize if the case were taken to a hearing and there was a ruling in favor of the complainant.

Approximately 45 percent of the cases filed with the commission are dismissed because of a failure to find probable cause, or because the case is dropped by the complainant before a finding is made. Approximately 96 percent of the remaining cases are disposed of by conciliation or conference affording some form of affirmative relief to the complainant. Very few cases, therefore, actually proceed all the way to a public hearing.¹⁴⁹

The commission attempts to resolve as many cases as possible by the process of conciliation or conference. If unsuccessful, however, the case can then proceed to a public hearing.¹⁵⁰ At the time of the hearing, great care is taken to insure that none of the hearing commissioners or the examiner have any prior knowledge of the case. If there has been any prior contact or knowledge by an individual commissioner with a particular case, that commissioner will usually disqualify himself from sitting at a hearing. Such contact or information may occur where a complainant wishes to appeal a dismissal by the coordinator of his case because of a finding of no probable cause. Such appeals are always allowed to be presented to the commissioners; however, when one is brought before them, they appoint a single commissioner to hear and consider the complainant's argument, separate and apart from the other commissioners. This appointed commissioner will then report his suggested course of action to the other commissioners, and his suggestion is generally followed. That commissioner then disqualifies himself from sitting should the case eventually end in a hearing.

¹⁴⁹ These figures were taken from a report prepared by the commission of its operations since it began functioning in its present form in 1957. This report was included, in part, in a study conducted of the Commission and printed in Comment, *Investigation Procedures of the Colorado Civil Rights Commission*, 40 U. OF COLO. L. REV. 119-21 (1967).

¹⁵⁰ COLO. REV. STAT. ANN. §§ 25-3-4, 80-21-7(6) (1963); *Id.* § 69-7-6(6)(a) (Supp. 1965).

Prior to a hearing, the commission must issue a notice to answer requiring that the respondent file a verified answer within 10 days of the service of the notice, or not less than five days prior to the hearing.¹⁵¹ Thereafter, the commission serves the respondent with a notice of hearing, advising him that the case has been set for formal hearing. This notice must be served at least 15 days in advance of the hearing.¹⁵² At the public hearing, the case for the complainant is presented by the assistant attorney general assigned to the commission as legal counsel. The statute provides that the commission "shall not be bound by strict rules of evidence prevailing in courts of law or equity, but the right of cross-examination shall be preserved."¹⁵³ In its rules, the commission has gone one step further and provided that "such rules and requirements of proof shall conform to the extent practical, with those in civil noninjury cases in the district courts."¹⁵⁴ The hearing is conducted by either a hearing examiner appointed for that purpose or by a commissioner or a number of commissioners.¹⁵⁵ There has generally been at least one commissioner who is an attorney to act as a hearing officer and rule on motions, the admissibility of evidence, etc. Only commissioners or a specifically appointed hearing examiner hear cases and the investigative staff and the coordinator do not participate at the hearings except to give evidence through testimony as a witness.¹⁵⁶ Before the commencement of the hearing, either party may move for the exclusion of witnesses.¹⁵⁷

All pertinent matters relevant to the hearing are considered in advance. No provision is made either in the rules or in the statutes for motion practice prior to the actual hearing. The only way a party could have a motion heard, either on substantive or procedural grounds, would be to ask for a special hearing before the commissioners or to take such matters up at the time the hearing itself is convened. Except for their regular monthly meetings which include a rather lengthy agenda, the only time commissioners meet

¹⁵¹ COLO. REV. STAT. ANN. §§ 25-3-4, 69-7-6(6), 80-21-7(6) (1963). In addition, 69-7-6(8) states that the respondent shall file his answer within five days of the hearing. Possible conflicting provisions have been resolved by commission rules (COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 6A(3) (1965) which state that if a respondent has answered once, his answer will be deemed by the commission to be the respondent's answer for all purposes).

¹⁵² COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE 6A(3), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

¹⁵³ COLO. REV. STAT. ANN. §§ 69-7-6(11), 80-21-7(11) (1963).

¹⁵⁴ COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 7D(2), at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

¹⁵⁵ COLO. REV. STAT. ANN. § 80-21-7(6) (1963); *Id.* § 69-7-6(6)(a) (Supp. 1965).

¹⁵⁶ COLO. REV. STAT. ANN. §§ 25-3-4, 69-7-6(7), 80-21-7(7) (1963).

¹⁵⁷ COLO. CIVIL RIGHTS COMM'N RULES OF PRACTICE AND PROCEDURE Rule 7L, at 6 BNA FAIR EMPLOYMENT PRACTICES 451:185 (1965).

is for a hearing. Therefore, motions are generally argued at the time of the hearing.

The hearing itself, of course, is very much an adversary proceeding. The proceedings are conducted in the same manner as a trial before a court without a jury. The complainant's case is presented first, generally by the assistant attorney general assigned to the commission, followed by the presentation of the case for the respondent. Opening and closing statements, motions, objections, and the introduction of exhibits are the same as in a trial court. The examination of witnesses is also the same; direct and cross, followed by redirect, etc., if desired. The admissibility of evidence both as testimony and as exhibits is somewhat more relaxed than in a trial court, particularly since the evidence is frequently subjective in nature. However, the degree of such relaxation or deviation from normal trial practice is not very great. The commissioners or hearing examiner generally do not admit hearsay evidence. Opinion testimony is limited and, when allowed, is only considered and weighed on the basis of who is giving such testimony and the circumstances associated with such statements and, although admitted, may be given little or no probative value.

As with any administrative hearing, the proceedings are recorded by a reporter and a transcript can be prepared if the case is appealed. Either party may appeal the final decision of the commission but must do so within 30 days of the date of the final order.¹⁵⁸ Orders of the commission are enforceable through the Colorado district courts. If a respondent has not appealed, but has refused to comply with a commission order, the decision will be certified to the district court and an order of the court issued requiring compliance with the commission's order.¹⁵⁹

As with any judicial or quasi-judicial proceeding, objections not raised at the hearing cannot be raised to the court on appeal unless the failure to object can be attributed to extraordinary circumstances.¹⁶⁰ Under the statutes, only the Civil Rights Commission can make the determination of whether an unlawful act of discrimination has occurred and the findings of the commission are binding on the court so long as they are supported by adequate evidence.¹⁶¹ Based upon the evidence presented at the commission hearing and set forth in the transcript, however, the court can enter an order on appeal enforcing, modifying, or reversing the decision of the commission.¹⁶²

¹⁵⁸ COLO. REV. STAT. ANN. §§ 25-3-5, 69-7-7, 80-21-8 (1963).

¹⁵⁹ *Id.* §§ 25-3-5, 69-7-7(12), 80-21-8(12).

¹⁶⁰ *Id.* §§ 25-3-5, 69-7-7(4), 80-21-8(12).

¹⁶¹ *Id.* §§ 25-3-5, 69-7-7(6), 80-21-8(6).

¹⁶² *Id.* §§ 25-3-5, 69-7-7(3), 80-21-8(3).

CONCLUSION

Having had the benefit of 12 years of operation, we can now look back on the manner in which the commission has been carrying out its duties and assess its performance. It was charged with the responsibility or objective of achieving a more favorable climate for human relations and to come as close as possible to eliminating discrimination in Colorado. No one could realistically believe that, by itself, the commission will ever realize this goal. It is in reality, a very limited attempt to realize some success in a specifically defined area.

Nevertheless, the commission is effective in performing its statutory duties — it has been doing its job. The question then arises as to whether these duties should be changed, enlarged, or expanded; and if so, how much and in what manner? Admittedly there is work to be done, but can the commission, no matter how it is structured or no matter what powers and authority it is given, completely eliminate discrimination? Clearly, the answer is no. For Colorado, something else is certainly needed. Additionally, the problems and the types of discrimination for which the commission was created in 1957 are not the same today.

This does not mean, however, that the commission should be abandoned. Since the state has gone on record as having a definite position on civil rights, there must be some manifestation of that policy. The government as an entity must give some formal recognition to its declaration, and there should exist some means of enforcement of this policy when necessary. The present method to enforce compliance with the statutes' objectives is through the police powers of the state, and work should be undertaken to improve its enabling laws to allow the commission to perform that function more easily and more efficiently.

This still leaves unanswered the much larger question of what else should be done. The work of the commission is after the fact, and therefore only treats the symptoms of the disease; it does nothing to effect a cure of the malady itself. A new approach which deals with the situation on a different basis than a piecemeal or case-by-case basis is necessary. The current concept is one of reaction rather than action. The state waits for others to initiate the process or start up the machinery and then it only solves, or partially solves, that particular incident, having done nothing about the reasons or causes which gave rise to the incident initially. The concept of affirmative action, *i.e.*, action which is initiated by the state or Federal Government, without waiting to

be asked to react, or being forced to, is now the byword of civil rights and human rights dialogue.

Recognizing this, the commission has recently created a study group of educators and lawyers to examine Colorado's civil rights statutes and: (1) determine what should be done to the laws under which the commission operates to allow it to more effectively accomplish its basic purpose of administration and enforcement, and (2) make some attempt to articulate what new approaches can be undertaken by the State to implement an affirmative action civil rights program. No one program will be a panacea and no single idea will be a complete remedy, but the commission hopes to draft a new focus or approach to the work it is doing, and to be able to suggest a program to the state which will impart a new direction to the manner in which civil rights or human rights are handled in Colorado.

Periodic examination of state civil rights laws will inevitably result in a patchwork of statutes with overlapping provisions and troublesome omissions. The effect is also that of losing sight of the basic purpose of such laws and whether such purpose is being realized. Hopefully, by taking an objective look at what can be done and what is not being done, some significant steps can be made to achieve the ultimate goal of putting the Civil Rights Commission out of business.

The commission study group did produce an omnibus civil or human rights statute¹⁶³ which brings the present structure and

¹⁶³ The proposed bill's declaration of purpose reads as follows:

The legislature hereby finds and declares that the state and all persons within it have the responsibility to act affirmatively to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life. Failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance, indifference or inadequate education, training, housing or health care threatens the rights, privileges and personal dignity of all individuals and menaces the institutions and foundations necessary for a productive, open and democratic society.

To implement this finding and declaration, in fulfillment of the provisions of the constitution of this state concerning civil rights and in exercise of the police power of the state to preserve and further public welfare, health and peace, a commission shall be created in the executive department. This commission shall have general jurisdiction and power to develop, coordinate and execute programs designed to ensure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state, and it shall encourage and promote the development and execution by all persons within the state of such programs, including programs to reduce community-wide or state-wide imbalances in employment, education or housing opportunities with respect to certain racial, religious and ethnic groups. The commission shall eliminate and prevent discriminatory practices as herein provided, including discrimination because of race, creed, color, or national origin in employment, public accommodations, educational institutions, public services and real estate transactions; discrimination because of sex in employment, public accommodations, public services and real estate transactions; and discrimination because of age in employment.

Proposed bill on file at the office of The Colo. Civil Rights Comm'n, Denver, Colo.

approach of the commission up-to-date and does give it some of the tools needed to cope with the problems of discrimination today. This bill, or a portion of it, will be introduced for consideration in forthcoming sessions of the Colorado General Assembly.

This omnibus bill does not attempt, nor was it so drafted, to solve the larger problem of attacking discrimination on a broader front. Hopefully, through the cooperation of other agencies (*i.e.*, the law schools, the bar associations, or in conjunction with private or governmental agencies), a plan or proposal can be worked out to implement such an alternative plan of action. Without such an approach it is difficult to see how any progress can be made. The present laws only serve to prevent a worsening of the present condition, and do nothing to improve or correct the situation facing us today.