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Civil Rights: Race and Sex Discrimination in Refusal to Train Correctional Officer Is Not Excused by Contract under North Dakota Human Rights Act

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CIVIL RIGHTS: RACE AND SEX DISCRIMINATION IN REFUSAL TO TRAIN CORRECTIONAL OFFICER IS NOT EXCUSED BY CONTRACT UNDER NORTH DAKOTA HUMAN RIGHTS ACT

Burleigh County Sheriff Bob Harvey hired Leora Moses, a black woman, to work in the county jail in April 1983.[1] Burleigh County Sheriff's employees customarily began working in the jail but were given peace officer training in order to eventually be transferred to other police work.[2] Moses' requests for peace officer training, however, were denied and she remained working in the jail throughout her employment with the county.[3] Moses brought a suit against both Burleigh County and Sheriff Harvey, claiming that she had been discriminated against in her employment because of her race and sex in violation of the North Dakota Human Rights Act.[4] Moses also claimed that her employment con-

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1. Moses v. Burleigh County, 438 N.W.2d 186, 187 (N.D. 1989). The Burleigh County Sheriff testified he hired Moses to work in a women's detention section which was to be added to the county detention facility. *Id.* Moses testified that she understood her employment was to *begin* in the jail. *Id.* Moses also testified, however, that nothing was said that indicated to her that she would be precluded from training, transfer, or advancement. *Id.* Incidentally, the women's detention section has not yet been added to the county detention facility. Transcript of Trial, Court's Oral Memorandum Decision at 444, 513, Moses v. Burleigh County, District Court (No. 36847). The bond issue prepared to finance the construction of the women's detention building was defeated twice during Moses' employment at the jail. *Id.*

2. *Moses*, 438 N.W.2d at 187. White male deputies hired after Moses received peace officer training. *Id.*

3. *Id.* Moses made numerous oral requests for peace officer training while employed by the county, but her requests were denied. *Id.* Although Moses accepted employment in the jail, she wished to prepare herself for transfer to other duties. *Id.* Prior to her requests for training, Moses also had difficulty becoming qualified in the use of weapons, which was a requirement for all officers in detention facilities. Appellant's Opening Brief at 12-13, Moses v. Burleigh County, 438 N.W.2d 186 (N.D. 1989) (No. 880042). Moses' problem was that neither the Burleigh County Sheriff's Department nor any member of the department would provide her a weapon with which to qualify. *Id.* at 13. Ultimately, Moses had to borrow a weapon from a friend who was employed by the Bismarck Police Department. *Id.* Moses did receive sidearm training, however. *Moses*, 438 N.W.2d at 187. Moses also testified she was not allowed to use a patrol car in a manner similar to other deputies assigned to the detention division, and was not allowed to transport prisoners. Appellant's Opening Brief at 12, Moses v. Burleigh County, 438 N.W.2d 186 (N.D. 1989) (No. 880042).

4. *Moses*, 438 N.W.2d at 187. *See* N.D. CENT. CODE § 14-02.4-03 (Supp. 1989) (North Dakota Human Rights Act; refusal to accord training on basis of race or sex is a discriminatory practice in violation of North Dakota's policy against employment discrimination). Moses claimed the denial of her requests for peace officer training was a violation of section 14-02.4-03 of the North Dakota Century Code. *Moses*, 438 N.W.2d at 187. Section 14-02.4-03 of the North Dakota Century Code provides in relevant part:

> It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental handicap, or status with respect to marriage or public assistance.

N.D. CENT. CODE § 14-02.4-03 (Supp. 1989).

tract was broken by the failure to provide her peace officer training[5] and was statutorily entitled to peace officer training.[6] Burleigh County and Sheriff Harvey denied Moses' claims and asserted that Moses had received all training prescribed for "local correctional officers."[7] The Burleigh County District Court found that although Moses was not treated equally to similarly situated white males, the unequal treatment was justified because Moses had accepted her employment contract with the understanding that peace officer training would not be offered to her and would not be necessary for her employment in the county jail.[8] On

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5. *Moses*, 438 N.W.2d at 187. Moses claimed nothing was said in her employment interview with the Burleigh County Sheriff's Department which precluded future training, transfer, or advancement. *Id.*

6. *Id.* Moses claimed that the North Dakota Century Code, which prescribes basic officer training for every peace officer, provided her with a statutory entitlement to peace officer training. *Id.* *See* N.D. CENT. CODE § 12-62-08 (all peace officers are to attend course of training certified by the division, within the first year of employment). Moses claimed that she was denied due process because she was deprived of a property right to peace officer training which she had obtained by statute. *Moses*, 438 N.W.2d at 187.

7. *Id.* Burleigh County and Sheriff Harvey argued that Moses was merely a "local correctional officer" and, therefore, Moses' training requirements were governed by section 12-62-06 of the North Dakota Century Code. *Id.* at 192. *See* N.D. CENT. CODE § 12-62-06 (1987) (correctional officer training determined in cooperation with the sheriff's association). Section 12-62-06 of the North Dakota Century Code provides:

> Every newly appointed local correctional officer shall within the first year of employment attend a course of training conducted by the division. The curriculum, location, and dates of such sessions shall be determined by the peace officer standards and training board and in cooperation with the sheriff's association.

Id. Burleigh County and Sheriff Harvey argued that despite her title as an "appointed deputy sheriff," Moses' job title and job function did not create a requirement of peace officer training, as defined in section 12-62-08 of the North Dakota Century Code. *Moses*, 438 N.W.2d at 192. Section 12-62-08 of the North Dakota Century Code provides:

> Every newly elected or appointed peace officer, except prosecutors, shall within the first year of employment attend a course of training which is certified by the division as meeting the basic law enforcement training requirements. A peace officer who has met the basic training requirements shall be exempt from the provisions of this section.

N.D. CENT. CODE § 12-62-08 (1987). Burleigh County and Sheriff Harvey also submitted that Moses' employment contract did not grant her peace officer training. *Moses*, 438 N.W.2d at 193.

8. *Id.* at 187, 189; *see* Moses v. Burleigh County, Civil No. 36847, slip op. at 1-16 (Burleigh County Dist. Ct. 1988). The district court found that although Moses experienced unequal treatment by not receiving training, the unequal treatment was justified because of the nature and terms of the employment contract to which Moses had agreed. *Id.* at 2. Regarding whether Moses had a right to peace officer training because of her title "deputy sheriff," the district court decided that the title was not significant because there was not other appellation in use at the time Moses was hired. *Id.* at 6.

The court also examined the Burleigh County Sheriff's Policy Manual which stated that "members as empowered as peace officers," and determined that the manual was merely a guideline, not a contract. *Id.* at 7. The district court found that Moses held no contractual right to peace officer training and therefore had not due process right under the constitution. *Id.* at 10-11. The court held that Moses' employment was at-will and any unequal treatment arose from the terms of Moses' agreement. *Id.* at 10-11.

The district court also dismissed claims Moses had brought for breach of good faith and fair dealing, failure to compensate, intentional infliction of emotional distress, and

appeal, Moses asserted that the district court had erred in finding that the unequal treatment was justified because an employee can not contract away the right to be free from discrimination.[9] Burleigh County and Sheriff Harvey cross-appealed in order to obtain a ruling that, if the case was remanded, they might have a jury trial.[10] The North Dakota Supreme Court reversed the district court and remanded, *holding* that an employment contract cannot excuse unlawful discrimination and that Moses was a "peace officer" statutorily entitled to peace officer training; however, the court also held that where legal relief is requested, a jury trial should be accorded on demand under the North Dakota Human Rights Act.[11] *Moses v. Burleigh County*, 438 N.W.2d 186 (N.D. 1989).

Throughout the industrial revolution and into the 1900s, employees had almost no protection from employment discrimination under the common law because of the pervasiveness of the employment-at-will doctrine.[12] Employment-at-will is an employment relationship in which the employer has the freedom to hire and fire employees "at will."[13] The employment-at-will doctrine was fostered by the theory that economic goals are best served by granting businesses complete flexibility in their use of labor.[14]

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interference with contract. Defendant's Brief at 2, Moses v. Burleigh County, Civil No. 36847 (Burleigh County Dist. Ct. 1988).

9. *Moses*, 438 N.W.2d at 188. Moses focused on the defendants' refusal to promote women and Blacks from the jail division and asserted that an employee can not contract away her right to be free from discrimination under the North Dakota Human Rights Act. *Id.* *See* N.D. CENT. CODE § 14-02.4 (Supp. 1989) (North Dakota Human Rights Act; state's policy against discrimination). Moses also argued on appeal that she was statutorily entitled to peace officer training because she was an "appointed deputy sheriff." *Moses*, 438 N.W.2d at 188; *See* N.D. CENT. CODE § 12-62-08 (all peace officers are to attend course of training within first year of employment).

10. *Moses*, 438 N.W.2d at 188.

11. *Id.* at 192. *See* N.D. CENT. CODE § 14-02.4 (Supp. 1989) (North Dakota Human Rights Act; state's policy against discrimination); N.D. CENT. CODE § 12-62-08 (all peace officers are to attend course of training within first year of employment); N.D. CONST. Art. 1, § 3 (right to trial by jury shall be reserved for all).

12. *See* 14 C.J.S. CIVIL RIGHTS SUPP. § 59 (1974). Basically, the right to private employment without discrimination is protected by neither the United States Constitution nor the common law. *Id.* Thus, where there is no applicable state or federal statute or state constitutional provision there is no enforceable right to freedom from employment discrimination on the basis of race, sex, or other characteristic. *Id.*

13. M. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 3-5 (2d ed. 1981) [hereinafter M. PLAYER, FEDERAL LAW. Theoretically, the right to terminate the contract "at will" belongs to both the employer and the employee; naturally, this right has been exercised more often by the party with more power, the employer. *Id.* *See* N.D. CENT. CODE § 34-03-01 (1987) (employment contract with no specified term may be terminated at the will of either party on notice to the other). Employers have been free to establish the terms, conditions, and rules of employment, and have been allowed to discriminate for good reasons, bad reasons, or no reasons. M. PLAYER, FEDERAL LAW, *supra*, at 3-4 (citing Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir. 1964)).

14. Note, *Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 207-208 (1982) (laissez-faire social thought, which

Unfortunately, the employment-at-will doctrine permitted some employers to engage in employment discrimination as a lawful management practice.[15] Since the turn of the century, the employment-at-will doctrine has been partially eroded by the emergence of collective bargaining agreements,[16] the recognition of contract and tort claims for wrongful treatment,[17] and the enactment of federal and state anti-discrimination statutes.[18]

Federal statutes curtailing employers' power over their employees were put into effect beginning in the 1920s with laws protecting unions and children.[19] As to protecting members of

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dominated the nineteenth century period of industrial revolution, was devised to spearhead rapid economic growth by granting executives total power in the acquisition and disposition of labor).

15. *Id.*

16. M. PLAYER, FEDERAL LAW, *supra* note 13, at 6-7. As of 1981, collective bargaining agreements numbered approximately 175,000 and covered 26 million employees. *Id.* Most collective bargaining agreements permit employers to change terms or discharge employees only in situations where there is "just cause" for the action. *Id.* However, the effectiveness of collective bargaining agreements in preventing unfair treatment throughout the nation is minimal because over four fifths of the American work force are not members of unions that have collective bargaining agreements. *The World Almanac and Book of Facts* 162 (1989) (United States Bureau of Labor Statistics show 22.9% of men and 14.9% of women were members of labor unions in 1987). Courts are reluctant to imply limitations on an employer's common law rights to hire, promote, and discharge at will where no collective bargaining agreement exists. *See, e.g.,* McKinney v. Armco Steel Corp., 270 F.Supp. 360, 363 (W.D. Pa. 1967) (custom of providing employees with the true reasons for discharge shall not outweigh the employer's right to terminate at will); Justice v. Stanley Aviation Corp., 530 P.2d 984, 986 (1974) (when no specific duration is agreed to, the employment contract is deemed indefinite and terminable at will by either party).

17. Smith, *Exceptions to the Employment-at-Will Doctrine*, 36 LAB. L.J., 875, 876 (1985) (hereinafter Smith). Employee protection from the employment-at-will doctrine in the form of contract and tort actions has existed since the 1960s. *Id.*

Regarding contract actions, courts have inferred the existence of implied-in-fact employment contracts from employee handbooks and manuals promising employment as long as employees performed satisfactorily. *Id.* Other courts have found that wrongful treatment or wrongful discharge breaches implied covenants of good faith and fair dealing. *Id.*

As to tort actions, one prominent claim is the "public policy exception," in which the employee alleges that the discharge was wrongful because it violated some important public policy. *Id. See, e.g.*, Petermann v. Teamsters Local 396, 344 P.2d 25, 27 (Cal. 1959) (public policy is principle under which freedom of contract is restricted by law for good morals or any established interests of society). For example, public policy tort actions may arise where the employee has been subjected to duress or coercion, or is the victim of retaliation. Smith, *supra*, at 876 (citing Monge v. Beebe Rubber Co., 316 A.2d 549 (1974) (male employer prohibited from discharging a female employee because she rejected sexual advances); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 270 (1984) (employer prohibited from discharging an employee who refused to take a polygraph test even after employee agreed to do so before employment, because employee has interest in privacy)).

Other significant common law claims of employees who have been wronged by employers are promissory estoppel, tortious interference with contract, intentional infliction of emotional distress, fraudulent misrepresentation, defamation, and invasion of privacy. C. RICHEY, FEDERAL JUDICIAL CENTER, MANUAL ON EMPLOYMENT DISCRIMINATION LAW & CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS 103 (Jan. 1988 ed.)

18. For a discussion of the erosion of the employment-at-will doctrine through the enactment of federal and state statutes see *infra* notes 12-17 and accompanying text.

19. M. PLAYER, FEDERAL LAW, *supra* note 13, at 8-9. Federal statutes were passed in the 1920s and 1930s limiting the employment-at-will doctrine. *Id. See* the National Labor

minorities and other groups from job prejudice, the most significant federal statute providing relief from employment discrimination is Title VII of the Civil Rights Act of 1964.[20] Title VII proscribes employment discrimination on the basis of race, color, religion, sex, and national origin in public and private employment.[21]

Relations Acts, 29 U.S.C. § 151 et seq. (1982) (ensuring employees the right to form unions and utilize collective bargaining agreements); the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-216, 217-219 (1978) (setting minimum wage and hour standards; child labor prohibited).

20. *See* 42 U.S.C. §§ 2000e—2000e-17 (1981). Although Title VII is foremost, other federal statutes provide substantial protection for employees. *See* the Equal Pay Act of 1963, 29 U.S.C. § 206 (1978) (discrimination in wages based on sex prohibited); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 206 (1978) (discrimination on the basis of age in employment prohibited); The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-795 (i) (1985 & Supp. 1987) (discrimination against the handicapped under the government contract proscribed).

21. 42 U.S.C. §§ 2000e—2000e-17 (1981). Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

Title VII claims are generally put forward and analyzed according to one of two forms; disparate treatment and disparate impact. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977).

Under disparate treatment analysis, Title VII is violated when an employer intentionally makes an adverse decision against the plaintiff because of his or her race, color, religion, sex or national origin. C. RICHEY, *supra* note 17, at A-1. To establish a disparate treatment violation of Title VII, a plaintiff must prove by a preponderance of the evidence that the employer intentionally discriminated on impermissible grounds. *Id.* at A-1. In a disparate treatment case a plaintiff must prove discriminatory *animus*, or intent. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

If the plaintiff has no direct evidence of intent, he or she may establish a case of individual disparate treatment by using indirect evidence under the three-step *McDonnell Douglas* model. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (*prima facie* disparate treatment may be established by indirect evidence).

The plaintiff may create a "McDonnell Douglas inference" of intentional discrimination by showing:

> i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

Once the plaintiff has established a prima facie case of disparate treatment, the burden of *production* shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Id.* If the employer can proffer such an explanation, the burden of production then shifts back to the plaintiff to show that the employer's proffered reason was in fact a pretext meaning the reason given was not the actual motivating factor in the employer's decision. *Id.* at 803-04. Although the burden of production shifts to the defendant employer after the plaintiff establishes a prima facie case, the burden of persuading the

State anti-discrimination laws complement the federal statutes.[22] In more than forty-five states, discrimination in employment on the basis of race, sex, age and other impermissible criteria is prohibited under state civil rights statutes.[23] Some state anti-discrimination statutes afford state citizens a broader range of protections than the federal statutes and require a simpler routine to commence a proceeding.[24] For example, the North Dakota

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trier of fact that the employer acted with discriminatory intent remains with the plaintiff at all times under the disparate treatment theory. *Id.* at 807.

In contrast to disparate treatment, under the disparate impact model, the plaintiff is not required to prove that the employer intended to discriminate. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977). The disparate impact concept extended Title VII coverage to apparently neutral employment practices that have an adverse impact on persons of a protected group. *See* Griggs v. Duke Power, 401 U.S. 424 (1971). Prior to 1989, if the plaintiff proved that a facially neutral employment practice, such as a test or policy, had a statistically significant disparate impact on members of a certain race, color, religion, sex or national origin, the burden of *persuasion* shifted to the defendant under the disparate impact model. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Thus, the defendant had the burden to prove that the disputed employment practice was justified by job relatedness or business necessity. *See* Griggs v. Duke Power, 401 U.S. 424 (1971). If the defendant could not justify the employment practice, the plaintiff prevailed. *Id.* at 431-432 (1971) (employer's requirement that employees have a high school diploma and a successful score on two aptitude tests violated Title VII because it operated to exclude Blacks and was shown not to be related to job performance).

However, a recent Supreme Court decision has limited or possibly reversed the effectiveness for plaintiffs of the disparate impact theory by mandating that the burden of *persuasion* remains with the *plaintiff* at all times. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (providing tougher standards for employees' prima facie case of statistical evidence of discrimination; intimating that employer may rebut inference of discrimination by merely articulating a legitimate business purpose for the allegedly discriminatory employment practice).

22. C. RICHEY, *supra* note 17, at H-1. Many state employment discrimination statutes generally parallel the protections of Title VII and the Age Discrimination in Employment Act. M. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 356, (2d ed. 1981) [hereinafter, M. PLAYER, FEDERAL LAW]. *Compare* N.D. CENT. CODE § 14-02.4 (Supp. 1989) (North Dakota Human Rights Act) *with* 42 U.S.C. §§ 20003—2000e-17 (1981) (Title VII of the Civil Rights Act of 1964). For the text of the North Dakota Human Rights Act, see *infra* note 25. For the text of Title VII of the Civil Rights Act of 1964, see *supra* note 21.

23. C. RICHEY, *supra* note 17, at H-4, H-4A. The civil rights statutes of all states except Alabama, Georgia, and Mississippi, prohibit employment discrimination on the basis of race and sex. *Id.* Forty-nine states now proscribe age discrimination although the scope of the protection varies. *Id.*

24. *Id.* at H-4, H-4A (survey of state employment discrimination law). North Dakota and 20 other states prohibit employment discrimination on the basis of "marital status." *Id.*; *see* N.D. CENT. CODE § 14-02.4-08 (Supp. 1989) (marital status generally protected against discrimination). Some states limit employers' use of lie detectors. M. PLAYER, FEDERAL LAW *supra* note 22, at 357. Four states, D.C., Ky., Texas, and W. Va., protect political affiliation. C. RICHEY, *supra* note 17, at H-4, H-4A. Three states, California, District of Columbia and Wisconsin, protect sexual orientation. *Id.* Two states, Kentucky and Wisconsin, regulate the use of conviction records. *Id.* One state, District of Columbia, allows no job bias because of personal appearance. *Id.*

State anti-discrimination statutes afford state citizens the right to advance employment discrimination cases in state courts. *State Bar Association of North Dakota, The North Dakota Human Rights Act and You* 1 (1985) [hereinafter *SBAND*]. An action is started under the North Dakota Human Rights Act by filing the complaint and serving the summons like any other civil matter. *Id.* Under Title VII, a private plaintiff is required to first file a charge with an Equal Employment Opportunity Commission, which must begin an investigation and attempt reconciliation. M. PLAYER, FEDERAL LAW, *supra* note 22, at 111. A private party must wait 180 days before filing suit to give the Equal Employment

Human Rights Act is broader in scope than Title VII.[25] The stated intent of the Act is "to prevent and eliminate discrimination in employment relations."[26] In addition to the categories of race, color, religion, sex or national origin, the North Dakota Human Rights Act prohibits discrimination on the basis of age, handicap, marital status, and receipt of public assistance.[27] The North Dakota Human Rights Act is also broader by comparison to federal law in that it prohibits an outside party aiding, abetting, inducing or coercing an employer in the employer's discriminatory practices.[28] Additionally, an employer in North Dakota is defined as one with ten employees, while Title VII only extends to employers with fifteen employees.[29]

State employment discrimination laws also have procedures different from Title VII. For example, a state statute might provide the right to a jury trial whereas Title VII provides claims are to heard by the court.[30] Some state statutes provide a longer stat-

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Opportunity Commission the opportunity to conciliate the charged violations after which she only receives a right to sue letter. *Id.* Thus, state claims are less complicated and allow immediate filing of a lawsuit. *Id.*

The United States Supreme Court has announced that it will decide the question of whether federal courts have exclusive jurisdiction over claims arising under Title VII. Yellow Freight Systems Inc. v. Donnelly, 51 Empl. Prac. Dec. (CCH) P39, 445 (state courts have concurrent jurisdiction with federal courts as to sex discrimination arising under Title VII of the 1964 Civil Rights Act), *cert. granted*, 89-431, 58 U.S.L.W. 3300 (1990).

25. *See* N.D. CENT. CODE § 14-02.4-01 *infra* note 26.

26. *Supra* note 26, *SBAND*, at 1. *See* N.D. CENT. CODE § 14-02.4-01 (Supp. 1989) (state policy against discrimination). Section 14-02.4-01 of the North Dakota Century Code provides:

> It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, or status with regard to marriage or public assistance; to prevent and eliminate discrimination in employment relations, public accommodations, housing, state and local government services, and credit transactions; and to deter those who aid, abet, or induce discrimination, or coerce others to discriminate.

Id.

27. N.D. CENT. CODE §§ 14.02.4-03.01 (prohibiting discrimination on the basis of age, handicap, marital status, and receipt of public assistance as well as on the basis of race, color, religion, sex, and national origin).

28. *Id.* Title VII does not prohibit third parties from activities which would aid an employer's discriminatory conduct. *See generally* 42 U.S.C. § 2000e(b) (1981) (employer defined, provision does not mention third parties); 42 U.S.C. § 2000e-5(f), (g) (1981) (provision does not mention third parties); 42 U.S.C. § 2000e(c) (1981) (provision does not mention third parties).

Thirty-one states in addition to North Dakota prohibit outside parties' aiding and abetting of acts declared illegal under the states' fair employment laws. *See C. Richey, supra* note 17, at H-4, H-4A. On grounds of aiding employers to continue discriminatory practices, courts may bar newspapers from publishing discriminatory advertisements. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

29. N.D. CENT. CODE § 14-02.4-02(5) (Supp. 1989) (providing that employer is a person employing ten or more employees for more than one quarter of the year). *See* 42 U.S.C. § 2000e(b) (1981) (Title VII employer is defined as one with fifteen or more employees).

30. C. RICHEY, *supra* note 17, at H-2. Generally, state statutes do not always specify, expressly or by clear implication, whether claimant has the right to be heard by a jury. *Id.*

ute of limitations than Title VII.[31] Also, state employment discrimination laws sometimes allow monetary relief whereas such relief is not provided by federal law.[32] Also, under Title VII a private plaintiff must file a charge with the Equal Employment Opportunity Commission and wait 180 days before filing federal suit to give the Equal Employment Opportunity Commission the opportunity to conciliate the charged violations.[33] An action is started under the North Dakota Human Rights Act by filing a complaint and serving a summons as in any other civil matter.[34] Thus, state claims are often less complicated and more efficient than Title VII claims.

Generally, state agencies and courts are guided in interpreting state anti-discrimination statutes by the judicial and administrative interpretations of similar federal statutes such as Title VII.[35] Federal interpretations, however, do not control state law; state supreme courts are free to interpret state statutory language differently than identical federal language is interpreted.[36]

In *Moses v. Burleigh County*,[37] which was the North Dakota Supreme Court's first opportunity to interpret the North Dakota Human Rights Act,[38] the court relied on Title VII precedent to determine whether a plaintiff can contract away the statutory

31. B. SMITH, C. CRAVER, & L. CLARK, EMPLOYMENT DISCRIMINATION LAW 152 (3d ed. 1988). In North Dakota, an aggrieved person may bring an action within three years of his alleged injury. *See* N.D. CENT. CODE § 14-02.4-19 (Supp. 1989) (providing a three year statute of limitation on employment discrimination claims). Under Title VII a private party must wait 180 days before filing suit in order to give the Equal Employment Opportunity Commission the opportunity to try to conciliate the matter. 42 U.S.C. § 2000(e)-(5) (1981). Following this period, the party will receive a right to sue letter. *Id.* Following receipt of the right to sue letter, the party has 90 days to file a suit in federal district court. *Id.*

32. C. RICHEY, *supra* note 17, at H-1; *See* N.D. CENT. CODE § 14-02.4-20 (Supp. 1989) (claim for relief under the North Dakota Human Rights Act may include injunctions, equitable relief, and backpay).

33. M. PLAYER, FEDERAL LAW, *supra* note 22, at 111. Under certain situations, Title VII requires a plaintiff to file with an existing state or local deferral agency, prior to filing suit in federal district court. 42 U.S.C. § 2000e-5 (c) (1981) (charge cannot be filed with Equal Employment Opportunity Commission until filed with local agency). If there exists an appropriate state or local agency, the charge *must* be filed within the state-imposed time requirement with that agency to enable a plaintiff to file a Title VII claim. *Id.*

34. N.D. CENT. CODE § 14-02.4 (Supp. 1989) (North Dakota Human Rights Act; state's policy against discrimination).

35. M. PLAYER, FEDERAL LAW, *supra* note 22, at 356.

36. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963). State statutes that actually conflict with federal statutes and are inconsistent in that they approve of practices proscribed by a federal statute such as Title VII, do not sanction or legitimize discriminatory practices. *Id.*

37. 438 N.W.2d 186 (N.D. 1989).

38. Moses v. Burleigh County, 438 N.W.2d 186 (N.D. 1989). *Cf.* Krein v. Marion Manor Nursing Home 415 N.W.2d 793 (N.D. 1987) (court confirms basis of wrongful discharge action on public policy grounds only); Hillesland v. Federal Land Bank Association of Grand Forks, 407 N.W.2d 206 (N.D. 1987) (replacement of former president by younger man did not create a prima facie case under the North Dakota Human Rights Act where former president was fired because of a conflict of interest).

right to be free from unlawful employment discrimination.[39] The trial court made a factual finding that Moses agreed to unequal treatment because she knew peace officer training would not be required for continued employment under her contract.[40] The North Dakota Supreme Court, however, reasoning consistently with federal case law, concluded that a contract can not excuse later unlawful discrimination.[41]

The North Dakota Supreme Court reasoned that there is an important public policy in the North Dakota Legislature's passage of the broad Human Rights Act, and that contract rights must be balanced with public policy.[42] The court found that the important policy of preventing and eliminating discrimination must outweigh enforcement of a contract which would frustrate that important public policy.[43] Thus, Moses' implied waiver of training

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39. *Moses*, 438 N.W.2d at 189-91 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). *See also* Driessen v. Freborg, 431 F.Supp. 1191 (1977) (employee can not waive due process rights in employment contract that limited those rights).

In *Driessen v. Freborg*, employees' rights were analyzed, although the North Dakota Human Rights Act had not yet been enacted in the United States District Court of North Dakota. Mrs. Driessen, the plaintiff, was a junior high teacher. *Id.* at 1191, 1193. The teachers' contract with the school board had a clause that "required" teachers "to take a leave of absence after the seventh month of pregnancy and not return until the month after childbirth." *Id.* When Mrs. Driessen became pregnant, she was ordered to leave on the date under the contract, but she asked to teach an extra 19 days. *Id.* Because her request was denied, she sued for wages for the 19 days and requested an injunction because the clause violated her 14th amendment rights. *Id.* Judge Van Sickle granted the injunction, concluding that enforcement of the challenged three-month maternity leave clause would be contrary to public policy because it violated constitutional rights. *Id.* at 1196. Justice Van Sickle found that there is a "paramount right" for a pregnant woman to retain her job while she is able to perform it competently because procreation is a fundamental right. *Id.* at 1195.

The court noted that Driessen accepted employment with knowledge of the contract, and also noted that the right to make private agreements is to be protected. *Id.* at 1196. Enforceability, however, will be denied when the provision in question "gravely violate[s] paramount requirements of public interest." *Id.*

40. *Moses*, 438 N.W.2d at 187, 189. The trial court inferred from fragmentary testimony on the initial hiring interview and the employment manual that there was a contractual term which justified the defendants' unequal treatment of Moses. *Id.* at 189. The North Dakota Supreme Court, therefore, framed the issue as whether unlawful discrimination can be justified by a prior contract. *Id.*

41. *Id.* at 191. The court stated that Moses' employment contract was not a legitimate, nondiscriminatory reason to refuse Moses training and transfer if she was equally qualified as later hired white males who did receive the training in question. *Id.*

42. *Id.* at 190.

43. *Id.* at 190. A principle of statutory and contractual interpretation accredits a paramount purpose to a declaration of public policy; the policy outweighs enforcement of a contractual promise. *Id.* at 190. *See Restatement (Second) of Contracts* § 178 (1981). Section 178 of the Restatement (Second) of Contracts reads:

> (1) A promise . . . is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of

could not justify later discrimination as to training.[44] The court noted that it would be impossible to enforce employment discrimination statutes if employers were allowed to require employees to contract away their rights to be free from discrimination.[45]

In *Alexander v. Gardner-Denver Co.*,[46] a disparate treatment wrongful discharge case, the Supreme Court held that prior submission of a claim to an arbitrator did not destroy the plaintiff's statutory right to a new trial on the same factual issue in a later Title VII hearing.[47] In holding that submitting a claim to an arbitrator is not an election of a remedy to the exclusion of Title VII, the Court disposed of a deeper issue: whether an employer and an employee can waive statutory rights.[48] The Court held there can be no such waiver.[49] The Court based its rationale on taking notice that vindication of an employee's contractual rights is different from vindication of his statutory rights; the two are independent.[50] The contract, and the interpretation thereof, reflect the law of the shop; Title VII, in contrast, is the law of the land.[51] The reasoning in *Alexander* appears to have been extended to other cases where the bargaining process might subvert the purposes of employment regulation statutes or the constitution.[52]

(a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

Id. *See also* N.D. CENT. CODE § 1-02-28 (Supp. 1989) (no waiver if against public policy). Section 1-02-28 of the North Dakota Century Code provides: "The benefit [of the provisions of the North Dakota Century Code] may be waived by any party entitled thereto, unless such waiver would be against public policy." *Id.* For definition of public policy see *supra* note 17.

See also Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987) (holding that discharge of an employee for seeking workmen's compensation benefits profanes public policy and may be the basis of a tort action against the employer).

44. *Moses*, 438 N.W.2d at 190.

45. *Id.*

46. 415 U.S. 36 (1974). The principle that a contract cannot justify later discrimination has become well-known in parallel civil rights litigation. *Id.* (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52). The North Dakota Supreme Court found that there clearly can be no prospective waiver of an employee's rights to equal employment opportunities. *Id.*

47. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52.

48. *Id.*

49. *Id.*

50. *Id.* at 49-50.

51. *Id.* at 50.

52. *See* Driessen v. Freborg, 431 F. Supp. 1191 (D.N.D. 1977) (clause requiring teacher to take maternity leave violated due process); Kewin v. Board of Educ. of Melvindale, 65

Justice VandeWalle, in his dissent in *Moses*, interpreted the majority's "near-total" reliance on federal precedent as a cause for concern, saying that the North Dakota Human Rights Act must be tailored for North Dakota's individual needs.[53] The majority had referred to unsettled issues of allocations of proof under the North Dakota Human Rights Act, alluding to the *McDonnell Douglas* burden-shifting procedure.[54] Justice VandeWalle cautioned that if North Dakota began to adopt rationales of federal civil rights cases indiscriminately, North Dakota, with its small minority population, could run into problems.[55] Justice VandeWalle focused on the unsettled issue of adopting the *McDonnell Douglas* burden-shifting procedure, contending that plaintiffs could too easily establish a prima facie case by showing little more than that they were turned down for a job.[56]

The North Dakota Supreme Court then addressed Moses' second claim, that her employment contract was breached by the failure to provide her peace officer training as required by statute.[57] Moses asserted that because she had held the title of appointed deputy sheriff throughout her employment, she was entitled to the training afforded all North Dakota peace officers by statute.[58] Moses argued that she was truly a deputy sheriff, that a deputy sheriff is truly a peace officer, and that Section 12-62-08 of the North Dakota Century Code commands that every peace officer receive law enforcement training.[59] Burleigh County and Sheriff Harvey disputed Moses' claims and asserted that Moses was, in

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Mich. App. 472, 237 N.W.2d 514 (1975) (a four-month maternity leave mandated by a collective-bargaining agreement held violative of due process, citing *Alexander*).

53. *Moses*, 438 N.W.2d at 195 (VandeWalle, J., concurring and dissenting in part). Justice VandeWalle concurred with the majority's holding that public policy requires that terms of an employment contract cannot constitute a waiver of or excuse for unlawful discrimination. *Id.* at 196. North Dakota jurisprudence, however, would be the preferable grounds for that conclusion. *Id.* (citing Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).

54. *Moses*, 438 N.W.2d at 195-96.

55. *Id.* Additionally, Justice VandeWalle observed that race did not play a part in the decision of the defendants to deny Moses training. *Id.* at 194, 195.

56. *Id.* at 194. Justice VandeWalle expressed concern that, by adopting the *McDonnell Douglas* inference, plaintiffs will be able to establish a prima facie case too easily and will shift the burden to the employer. *Id. But cf.* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (the defendant may rebut the presumption and satisfy the burden of production by merely articulating a legitimate, nondiscriminatory reason for the plaintiff's treatment).

57. *Moses*, 438 N.W.2d at 192-93.

58. *Id.* at 192. Moses' plastic name badge had been introduced as evidence that she was an "appointed deputy sheriff" at trial. Appellant's Brief at 4, app. at 10, Moses v. Burleigh County, 438 N.W.2d 186 (N.D. 1989) (No. 880042).

59. *Moses*, 438 N.W.2d at 192. *See* N.D. CENT. CODE § 12-62-08 (Supp. 1989) (providing that all peace officers shall attend course of training). *Id.* For the text of section 12-62-08 of the North Dakota Century Code see *supra* note 7.

spite of the title, merely a member of the jail staff, and had received all training prescribed by statute for local jail staff.[60]

The North Dakota Supreme Court appeared to agree with Moses and held that Moses was in name and function a peace officer entitled to training.[61] Although the statute commanding training does not define "peace officer," another section of the North Dakota Century Code does define "peace officer."[62] The court concluded that the definition certainly included law enforcement officers other than detectives and did not exclude officers who worked in jails or detention facilities.[63] Therefore, the statute mandating training for peace officers may apply to an appointed deputy sheriff like Moses.[64]

The third and final issue the North Dakota Supreme Court decided was whether the defendants were entitled to a jury trial on remand, as they contended.[65] The court acknowledged that the North Dakota Human Rights Act specifically provides relief in the form of injunctions, back pay, equitable relief, and attorney's fees.[66] However, the court noted that relief under the North

60. *Moses*, 438 N.W.2d at 192. The defendants, Burleigh County and Sheriff Harvey, first attempted to explain Moses' assertion that she was a peace officer. *Id.* They stated that although Moses had been given the title, "appointed Deputy Sheriff," she was a "correctional officer" under section 12-44.1-01(6) of the North Dakota Century Code. 438 N.W.2d at 192. *See* N.D. CENT. CODE § 12-44.1-01(6) (Supp. 1989) (defining jail staff as custodial personnel with designations such as deputy). The defendants asserted Moses was not a peace officer because her job function was that of jail staff. *Moses*, 438 N.W.2d at 192. *See also supra* note 7 (discussing defendants' other contentions).

61. *Moses*, 438 N.W.2d at 193.

62. *Id.* at 192-93 (citing N.D. CENT. CODE § 12-62-08 (Supp. 1989) (basic training for every police officer is prescribed; peace officer not defined). *See* N.D. CENT. CODE § 12.1-01-04 (17) (Supp. 1989). Section 12.1-01-04 (17) of the North Dakota Century Code provides:

> "Law enforcement officer" or "peace officer" means a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigation or prosecutions for violations of law.

Id.

63. *Moses*, 438 N.W.2d at 193. The court stated that the legislative history of the training program statute provided no guidance as to whether the training requirements would apply to an officer such as Moses. *Id.* However, section 1-02-02 of the North Dakota Century Code provides: "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." N.D. CENT. CODE § 1-02-02 (Supp. 1989). Therefore, the court held that the meaning of the term "peace officer," as defined in section 12.1-01-04 (17) of the North Dakota Century Code applies to chapter 12-62 of the North Dakota Century Code. *Moses*, 438 N.W.2d at 193.

64. *See id.* at 193.

65. *Id.* at 193, 194.

66. *Id.* *See* N.D. CENT. CODE § 14-02.4-20 (Supp. 1989). Section 14-02.4-20 of the North Dakota Century Code provides:

> If the court determines that the respondent has engaged in or is engaging in an unlawful practice, the court may enjoin the respondent from engaging in such unlawful practice and order such appropriate relief as will be appropriate which *may include, but is not limited to*, temporary or permanent injunctions,

Dakota Human Rights Act is expressly "not limited to" forms of equitable relief.[67] Thus, legal remedies are not excluded.[68] The court stated that money damages are traditionally legal relief and the right to trial by jury for legal claims is secured by the North Dakota Constitution.[69] The court noted that if money damages were sought incidental to equitable relief, a jury trial might not be accorded.[70] However, the court stated that where money damages alone were requested, trial by jury should be accorded on demand.[71] Moses argued, however, that her claim for backpay was triable without a jury because it was analogous to relief under Title VII, which generally provides for bench trials.[72]

Moses pointed out that under Title VII, backpay is discretionary and is considered equitable in nature, and, therefore, is triable before the court.[73] Responding to Moses' contention that her claim for relief was analogous to Title VII, the North Dakota Supreme Court noted that other federal discrimination statutes do recognize the right to a jury trial.[74] The court also noted where claims are brought under several statutes, as here where Moses sued both under employment discrimination and peace officer training statutes, the right to a jury trial under one of the statutes

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> equitable relief, and back pay limited to no more than two years from the date the complainant has filed a sworn charge with the Equal Employment Opportunity Commission or filed the complaint in the state court. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. In any action or proceeding under this chapter the court may grant, in its discretion, the prevailing party a reasonable attorney's fee as part of the costs.

Id. (emphasis added).

67. *Moses*, 438 N.W.2d at 193-94. *See* N.D. CENT. CODE § 14-02.4-20 (Supp. 1989). For the text of section 14-02.4-20 of the North Dakota Century Code, see *supra* note 66.

68. *Id.*

69. *Id.* at 194. *See* N.D. CONST., Art. I, § 13 (the right of trial by jury shall be reserved by all and remain inviolate).

70. *Moses*, 438 N.W.2d at 194.

71. *Id.* Although Moses sought some injunctive relief in the first stages of her case, her final amended complaint sought only money damages. *Id.* The court advised that where only legal relief is requested, a trial by jury should be accorded on demand. *Id.* (citing General Elec. Credit Corp. v. Richman, 338 N.W.2d 814 (N.D. 1983).

72. *Moses*, 438 N.W.2d at 194.

73. *Id.*

74. *Id.* (citing C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, & 9.9(b) at 577 (1980). The treatise states in part:

> The [U.S.] Supreme Court has said that [the Seventh Amendment of the U.S. Constitution preserving the right of trial by jury] means that there is a right to a jury trial on an issue that is "legal" but no such right on an issue that is "equitable." . . . It is not significant that the cause of action derives from a statute as opposed to the common law. Moreover, the right to a jury cannot be avoided on the theory that the legal relief is merely incidental to the equitable relief or by trying the equitable issue before the legal issue and then invoking the doctrine of collateral estoppel.

Id. at 577. *See generally id.* at 577-78 (whether a jury trial should be granted in a Title VII case).

determines that a jury trial will be accorded if demanded.[75] Thus, the court concluded that the reference to federal law supported the "strong North Dakota tradition" according a jury trial on legal claims for money damages.[76]

The question of how much the North Dakota Supreme Court should rely on federal civil rights interpretations is an important, ongoing concern.[77] Whether the allocation of burdens articulated in *McDonnell Douglas Corp. v. Green*[78] and applied in Title VII litigation will be adopted by the North Dakota Supreme Court and adhered to in North Dakota Human Rights Act litigation is one of the areas of interest.[79] Under the *McDonnell Douglas* framework, once the plaintiff establishes a prima facie case of discrimination, the burden of producing a legitimate, non-discriminatory reason for the employee's rejection shifts to the employer.[80] However, the ultimate burden of *proving* the discrimination would appear to remain on the plaintiff at all times.[81] The North Dakota Supreme Court did not specifically address the issue of the allocation of bur-

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75. *Moses*, 438 N.W.2d at 194 (citing Molthan v. Temple Univ. Comm. Sys. of Higher Educ., 778 F.2d 955, 961 (sex discrimination actions under both 42 U.S.C.A. § 1983 and Title VII must be jury trials because a jury is available under § 1983). Moses' claim was brought under the Human Rights Act, North Dakota officer training statutes, and under contract law. *Moses*, 438 N.W.2d at 187-88.

76. *Id.* at 194. In her dissent in *Moses*, Justice Levine argued that Moses should have been allowed to have had her relief decided by the court without having to resort to a local jury. *Id.* at 196 (Levine, J. concurring and dissenting). In arguing that Moses should have had her claim for money damages heard by a judge, Justice Levine first apprised the reader that the North Dakota Human Rights Act makes reference only to "the court." *Id.* at 197. The Justice concluded the legislature intended only the court to award relief under the Act. *Moses*, 438 N.W.2d at 197. Justice Levine next reiterated the common law maxim on equitable relief requiring adjudication by the court, going on to interpret two North Dakota cases as holding that a jury trial is mandated only where the request for legal, or monetary relief is the primary claim. *Id.* at 196-97. In *Moses*, Justice Levine protests the contract claim for money damages arose out of a harm that was clearly primarily the result of unlawful discrimination — an equitable claim, not a legal one. *Id.* And because claims primarily for relief from such unlawful discrimination are actions in equity to be heard by the court, the claims of Moses are not triable before a jury. *Id.* at 197.

In sum, Justice Levine focused her argument to deny the defendants a jury on three points: (1) that a party is entitled to a jury only if the issue is one from common law, and human rights actions did not exist at common law, (2) the plaintiff's claim for damages is secondary to the primary claim in equity arising from unlawful discrimination, therefore the no-jury rule for equitable claims must apply, and (3) the legislature has specifically decreed that a claim for relief under chapter 14-02.4 of the North Dakota Century Code is to be heard only by "the court." *Id.* at 197.

77. *Moses*, 438 N.W.2d at 195 (VandeWalle J., concurring in part and dissenting in part). *See also Id.* at 197 (Levine, J., concurring and dissenting).

78. 411 U.S. 792, 802-803.

79. *See Moses*, 438 N.W.2d 195 (VandeWalle, J., concurring in part and dissenting in part). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (providing allocation of burdens in Title VII litigation under the disparate treatment theory).

80. *Id.* at 803. Once the employer proffers a legitimate, non-discriminatory reason for the employee's rejection, the employee has the opportunity to show "pretext" by showing that the proffered reason is not the true reason. *Id.* at 804.

81. *See id.* at 803.

dens of proof in *Moses v. Burleigh County*.[82] However, the court remanded, noting that on remand the defendant might be able to "show a legitimate and nondiscriminatory reason" for providing training.[83] Thus, by adopting the language of *McDonnell Douglas*, the court may have been signalling its approval of the *McDonnell Douglas* allocation of burdens.[84]

The court in *Moses* looked to the federal employment discrimination case law regarding the issue of whether an employee could waive the right to freedom from discrimination by agreement.[85] On this issue the federal law was already in line with North Dakota case law.[86] The North Dakota Supreme Court, however, resisted the temptation to indiscriminately follow the apparent course of the federal courts when it held that a jury trial must be accorded on demand under the North Dakota Human Rights Act when legal relief is sought.[87] Therefore, unlike Title VII and most other federal anti-discrimination statutes, the North Dakota Human Rights Act provides litigants an opportunity for trial by jury.[88]

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82. *See Moses*, 438 N.W.2d at 189 n. 3. (the trial court found that Moses would have failed to prove her case regardless of the allocation of burdens and thus, avoided making a decision in this regard).

83. *Id.* at 191. *Compare Id.* (the defendant may be able to "show a legitimate and nondiscriminatory reason" for not providing training) *with McDonnell Douglas*, 411 U.S. at 802 ("the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection"). The North Dakota Supreme Court also stated that on remand Moses would have the opportunity to show "pretext." *Moses*, 438 N.W.2d at 192. *cf. McDonnell Douglas*, 411 U.S. at 804 ("respondent must, . . . be afforded a fair opportunity to show that the petitioner's stated reason for respondent's rejection was in fact pretext").

84. *Moses*, 438 N.W.2d at 195 (VandeWalle, J., concurring in part an dissenting in part) ("the majority appears to adopt" the allocation of burdens set out in *McDonnell Douglas*).

85. *Id.* at 190-91.

86. *Id.* (citing Driessen v. Freborg, 431 F. Supp. 1191 (1977) (employee can not waive due process rights by agreeing to employment contract which limits those rights).

87. *Id.* at 193-94.

88. *Id.* Leora Moses did pursue relief in Burleigh County District Court after the North Dakota Supreme Court's decision. A jury on March 30, 1990 returned answers to interrogatories formulated by the court and rendered a verdict for the defendants, Burleigh County and Sheriff Bob Harvey, and judgment was entered by the court. Leora Moses was awarded nothing. Costs and disbursements of $346 were awarded to the defendants.