yes

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Marion E. Martin, Commissioner — Labor and Industry

Phillip M. Kilmister, Assistant — Attorney General

Pre-employment inquiry and discriminatory employment practices.

FACTS:

The Fair Employment Practice Act, 26 M.R.S.A. § 861-864 provides, inter alia, that there shall be no discrimination based upon national origin.

QUESTION #1:

Does this mean that an employer when employing anyone cannot ask whether he is a citizen of the United States, and if not, whether he has a visa or visitor's permit, or is in this country under bond?

ANSWER:

No.

OPINION:

Under our Fair Employment Practice Act it does not appear that mere inquiry of a job applicant's national origin or citizenship constitutes a discriminatory employment practice per se. An employer is not prohibited from asking irrelevant questions of a potential employee, but rather, is prohibited from discriminating against the potential employee on the basis of any information derived from such questions.

Where the employment sought is not affected with a public interest, and where citizenship is plainly of no consequence, it would be wise for an employer not to inquire into a job applicant's citizenship. By refraining from such inquiry, an employer greatly reduces the possibility of being charged with carrying out unfair hiring techniques.

QUESTION #2:

Do we have two sets of standards -- one for private employment and the other, public? If there are not two sets of standards, does the contractor holding a contract for the state, county, city, town, or charitable or educational institution come under Chapter 394, P. L. 1965 or under section 1301, Chapter 15, Title 26 as far as hiring practices are concerned?

ANSWER:

See opinion.

OPINION:

26 M.R.S.A. § 1301 simply provides for the preferential awarding of contracts to "workmen and bidders who are residents of the state." We do not believe that this statutory section in any manner provides for the preferential hiring of citizens over aliens by contractors, once contracts have been awarded.

In general, it is a denial of the equal protection of the laws when the government, in its capacity as lawmaker, bars the alien from the right to trade and labor. However, there are certain exceptions to this principle of law and where a statute such as 26 M.R.S.A. § 1303 exists, there can be no doubt that an employer may justifiably preclude aliens from employment.

Section 1303 provides in part:

> "In the employment of laborers in the construction of public works, including state highways, by the State or by persons contracting therewith for such construction, preference shall first be given to citizens of the State who are qualified to perform the work to which the employment relates, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States. . . ." (Emphasis supplied.)

There is substantial authority upholding the constitutionality of statutes similar in language to 26 N.R.S.A. § 1303 quoted supra. The landmark case of People v. Crane held that:

> "The moneys of the state belong to the people thereof who are citizens and aliens are not members of the state as a body corporate, and a statute prohibiting the employment of aliens on public work by a state, municipality, or contractor does not unconstitutionally discriminate against aliens; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state." People v. Crane, 214 N. Y. 154, 108 N. E. 427 (1915), aff'd, 239 U. S. 195 (1915).

It is also well established that there is no distinction between the right of a state to exclude aliens from its own employment and the right to prohibit their employment by independent contractors on public works. People v. Crane, Id.

It should be emphasized that section 1303 does not bar aliens from employment on public works of the State. The section does make clear however that in hiring workers for public works projects of the state, employers must first give preference to Nevada citizens, and secondly, to citizens of the United States, before hiring aliens.

QUESTION #3:

Does anyone in the state have authority to give directions as to the course of action which a prospective employer must, or may take in interviewing a prospective employee?

ANSWER:

No.

OPINION:

Employers should be free to exercise their own discretion in conducting pre-employment inquiry provided that such inquiry does not result in a discriminatory employment practice as established in 26 M.R.S.A. § 662.

26 M.R.S.A. § 663 gives both the Commissioner of Labor and Industry and the Attorney General the power to institute action against an employer when there is evidence to indicate that the employer has violated the provisions of § 852.

There is great merit to the theory that the power to prosecute a violation implies the power to prevent said violation in the first instance. However, in the absence of a legislative enactment so providing, we do not believe that the Commissioner of Labor and Industry may promulgate rules and regulations which in effect, dictate the methods or guidelines which an employer must follow in conducting pre-employment inquiry.

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PMG/sll