

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

June 13, 2005 Hearing Room 357

8:30 A.M. Tapes 100 - 102

MEMBERS PRESENT: Rep. Bob Ackerman, Chair

Rep. Linda Flores

MEMBERS EXCUSED: Rep. Bill Garrard

Rep. Kelley Wirth

GUEST MEMBERS: Rep. Wayne Krieger

Rep. Greg Macpherson

Rep. Andy Olson

STAFF PRESENT: Joe O’Leary, Counsel

Sam Sears, Counsel

William Taylor, Counsel

Louann Rahmig, Committee Assistant

MEASURES/ISSUES HEARD:

HB 2247 – Public Hearing and Work Session

HB 2693 – Public Hearing and Work Session

SB 181A – Work Session

SB 236 – Work Session

HB 2912 – Work Session

HB 2873 – Public Hearing

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 100, A		
004	Chair Ackerman	Calls the meeting to order at 8:48 a.m. Announces since there is no quorum, Rep. Krieger will serve as a voting member. Opens a public hearing on HB 2247.

HB 2247 – PUBLIC HEARING

012	Sam Sears	Counsel. Explains that HB 2247 and the -1 amendments (EXHIBIT A) modify regulations for manufactured dwelling parks, floating home moorages, mobile home parks, and recreational vehicle parks.
026	John VanLandingham	Lane County Law and Advocacy Center. Testifies and submits written testimony in support of HB 2247 with the -1 amendments (EXHIBIT B). Provides history of the residential landlord-tenant law and the process used to create amendments. Refers to EXHIBIT B which is the analysis of the bill.
060	Pat Schwoch	Executive Director, Manufactured Home Owners. Testifies in support of HB 2247.
067	Chuck Carpenter	Executive Director Manufactured Housing Communities of Oregon. Testifies in support of HB 2247.
077	Chair Ackerman	Extends appreciation for the work product.
082	Chair Ackerman	Closes the public hearing on HB 2247 and opens a public hearing on HB 2693.

HB 2693 – PUBLIC HEARING

- 090 Sam Sears Counsel. Explains HB 2693 and the -2 amendments (**EXHIBIT C**) provide that employers are not required to accommodate the use of medical marijuana, regardless where it is used; provide that employers are not required to either allow an employee or independent contractor to possess, consume, or be impaired by the use of marijuana during working hours, or allow any person who is impaired by use of marijuana to remain in the work place; and provide that nothing in the Oregon Medical Marijuana Act (OMMA) will preclude an employer from establishing or enforcing a policy to achieve or maintain a drug-free work place. Refers to recent Court of Appeals decision *Washburn v. Columbia Forest Products, Inc.* which allows an employer to treat an employee with a medical marijuana card similar to other employees.
- 108 Dale Rutledge Oregon State Police, Retired. Testifies and submits written testimony as neutral on HB 2693 (**EXHIBIT D**). Has done extensive teaching in the drug recognition program. Raises concern about impairment caused by marijuana which can last up to 24 hours without the person being aware that they are impaired.
- 152 Rutledge Points out that the body can build up a tolerance with long-term usage. Discusses marijuana testing. States that urine samples will test positive for chronic users up to 30 days following ingestion.
- 176 Rep. Flores Asks for the current potency of tetrahydrocannabinol (THC) compared to 10 or 20 years ago.
- 182 Rutledge Responds that the potency of marijuana is increasing and Oregon has some of the most potent in the country as the concentration in the buds is much higher. Advises that the potency is too great for the casual user.
- 204 Rep. Olson Refers to Dr. Robert Julien's book *A Primer of Drug Action*. Indicates that a portion of the book mentions, depending on the THC level, the effects seldom last longer than three to four hours. Asks about impairment lasting up to 24 hours. Seeks clarification.
- 218 Rutledge Answers that after the marijuana wears off, the high dissipates but the person is still impaired and has distance and time perception problems.

248	Rick Howell	Columbia Forest Products. Testifies in support of HB 2693. Reads from a prepared statement. Indicates that the OMMA was intended for those too sick to work. Goes on that marijuana is not a prescription drug, not given in measured doses on a regular time table. Raises concerns about employees in safety-sensitive occupations.
296	Howell	Expresses there is no predetermined level at which an employer can say an individual is under the influence. Urges prohibition of marijuana in the work place.
304	Tim Sylvester	Department of Justice. Testifies in support of the -2 amendments that clarify the scope of the OMMA. Advises that HB 2693 does not allow an employee or independent contractor “on the clock” to engage in the medical use of marijuana or be impaired by the use of marijuana.
347	Lisa Trussell	Associated Oregon Industries. Testifies and submits written testimony by Paula Barran in support of HB 2693 (EXHIBIT E) .
372	Sears	Asks how HB 2693 allows employers to deal with employees who test positive for marijuana.
381	Sylvester	Responds that does not fall within the exemptions. Doesn’t enable an employer to terminate someone not impaired but may be using marijuana off the job for medical reasons.

TAPE 101, A

014	Chair Ackerman	Asks if there would be random testing.
017	Howell	Answers that varies from employer to employer.
022	Chair Ackerman	Inquires if the same standard applies to employees under the effects of a prescription drug.
025	Howell	Replies yes.
027	Rep. Flores	Refers to Mr. Rutledge’s testimony that impairment can last up to 24 hours.

035	Sylvester	Reads from HB 2693. Continues that there may be a dispute whether someone is impaired or not and would probably need to be dealt with on a case by case basis.
054	Trussell	Understands that testing is not done for impairment and not sure what those tests would be. Continues that most tests are to see what level is detected. Supports the -1 amendments.
065	Howell	Advises that it is difficult for employers to determine level of impairment, and they rely on independent laboratories to establish the thresholds of the narcotic in the system.
080	Sylvester	Comments that a political decision needs to be made whether to have exemptions to allow employers to effectively discipline and terminate any employee who has a test result that shows continuing metabolites during working hours, regardless whether that person shows any impairment.
103	Chair Ackerman	Asks what is in the -2 amendments.
104	Sylvester	Believes the -2 amendments were drafted toward impairment rather than failure of a blood test.
111	Rep. Macpherson	Asks if the difference is that in the -1 amendments employers would be able to establish a drug-free work place, and any evidence of impairment or not, would be something they could establish a policy to preclude, and the intent of the -2 amendments would be to identify some level of impairment.
121	Sylvester	Believes that is correct. Discusses use of marijuana on the job during work hours and off the job outside of work hours.
133	Rep. Macpherson	Reads both amendments as avoiding an obligation on the part of the employer to accommodate but makes it permissive.
141	Sylvester	Answers correct. Goes on that individual employers can accommodate employees using medical marijuana but does not make it mandatory.
149	Sears	Seeks clarification of the scope of the -2 amendments.

- 169 Sylvester Indicates the new Section (2)(a) of HB 2693 is on accommodation but doesn't require anything specific. Reads the definition of medical use of marijuana under the OMMA.
- 229 Michael Glaze Oregon Resident. Reads and submits written testimony by Stormy Ray in opposition to HB 2693 (**EXHIBIT F**). Provides personal background and experience. Objects to the term "drug-free work place."
- 267 Clifford Spencer Stormy Ray Cardholders' Foundation. Reads and submits written testimony in opposition to HB 2693 (**EXHIBIT G**). Reports that urine testing for marijuana does not show impairment but only past use.
- 372 Spencer Continues reading from written testimony. Discusses cognitive reasoning studies. Advises that the OMMA is for people with severe debilitating conditions. Believes HB 2693 is discriminatory.

TAPE 100, B

- 004 Rep. Olson Asks what an employer should do with an impaired employee.
- 007 Spencer Doesn't want impairment in the work place but doesn't want discrimination either. Advises there are no accurate tests to determine impairment other than clinical observations, and current tests are for past use only.
- 030 Erin Hildebrandt Resident, Lafayette, Oregon. Testifies and submits written testimony in opposition to HB 2693 (**EXHIBIT H**). Discusses the possibility of field sobriety testing for impairment.
- 057 Chair Ackerman Refers to the phrase "accommodate medical use of marijuana." Asks if that means tolerate it or accommodate it within the terms of the Americans with Disabilities Act (ADA). Asks if "accommodation" means an application is denied because the individual tested positive for marijuana, or if it mean an employee is still subject to being employed but cannot use marijuana use as a claim that he/she is disabled.
- 072 Sylvester Responds the phrase is ambiguous and he construes it in a narrower sense, that the employer doesn't need to affirmatively do anything to allow the use of marijuana in a different location. Continues that the employer would not necessarily have the authority to terminate or

discipline an employee who, on his own time at a different location, was legitimately using marijuana and coming to work non-impaired. Suggests to the committee that perhaps the language needs to be clarified.

- 092 Howell Reiterates that the level of impairment is difficult for an employer to decide. Suggests no use, no accommodation for medical marijuana in safety-sensitive jobs.
- 099 Chair Ackerman Asks Mr. Howell if an individual applies for work at his company and tests positive but is not impaired, if he/she would be considered for employment, or if an employee, be fired.
- 101 Howell Doesn't know what level of positive tests would have to be judged for impairment. Believes a positive test would yield no employment or termination of employment.
- 106 Trussell Advises that not every employer is obligated to comply with the drug-free work place, but many employers because of the safety-sensitive nature of their business implement such a policy. Thinks that "accommodate" is in current statute as well as the -2 amendments.
- 114 Howell Doesn't allow prescription drugs or alcohol, either. Continues that this is the only drug they cannot monitor or regulate because of the OMMA. Wants to treat everyone the same.
- 119 Rep. Macpherson Reads both the -1 and -2 amendments to allow an employer to establish a drug-free work place policy that would be "triggered" by a positive test for historic use of marijuana, whether or not there is current impairment. Continues that the policy question is if the law should be clarified so that employers are enabled to establish that kind of policy and enforce it, given that the statute doesn't require them to do so.

The following prepared testimony is submitted for the record without public testimony:

- Greg Byers Resident, Salem, Oregon. Submits written testimony in opposition to HB 2693 (**EXHIBIT I**).
- Melodie Silverwolf Resident, Portland, Oregon. Submits written testimony in opposition to HB 2693 (**EXHIBIT J**).

- Richard Bayer MD, Portland, Oregon. Submits written testimony in opposition to HB 2693 (**EXHIBIT K**).
- 142 Chair Ackerman Closes the public hearing on HB 2693 and opens a work session on HB 2247.

HB 2247 – WORK SESSION

- 150 Rep. Flores **MOTION: Moves to ADOPT HB 2247-1 amendments dated 6/3/05.**

VOTE: 3-0-2

EXCUSED: 2 - Garrard, Wirth

- 153 Chair Ackerman **Hearing no objection, declares the motion CARRIED.**

- 154 Rep. Flores **MOTION: Moves HB 2247 to the full committee with a DO PASS AS AMENDED recommendation.**

VOTE: 3-0-2

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 2 - Garrard, Wirth

- 163 Chair Ackerman **The motion CARRIES.**
REP. FLORES will lead discussion in the full committee.

- 165 Chair Ackerman Closes the work session on HB 2247.

- 171 Chair Ackerman Opens a work session on SB 181A.

HB 181A – WORK SESSION

- 173 Joe O’Leary Counsel. Explains that in response to concerns raised about the *Curtis v. Lampert* case making SB 181A unconstitutional, he reviewed the case and found it does not provide a legal basis to conclude that SB 181A would be impermissible. Explains the details of the case. Cites other cases reviewed that suggest under the Oregon Constitution there is a right to a fee waiver, but the U. S. Supreme

Court has ruled that due process requires an absolute fee waiver only in domestic relations matters. Continues that SB 181A provides that the court has the ability to decline to waive or defer the filing fees or court costs for an inmate who is a plaintiff in an action against a public body, if the court reviews the pleadings and finds that those pleadings fail to state a claim. Cites current ORS 30.643 and that SB 181A allows an additional criteria for the court to use in deciding whether or not to waive the filing fees.

- 223 Chair Ackerman Asks for a summary of the -2 and -3 amendments.
- 225 O’Leary Describes the -2 amendments (**EXHIBIT L**) which create an extension of the statute of limitations and the -3 amendments (**EXHIBIT M**) which require the court findings be included in the judgment document.
- 248 Terry Leggert Marion County Judge. Testifies and submits written testimony in support of SB 181 (**EXHIBIT N**) but in opposition to the -2 and -3 amendments which grant inmates more rights than private citizens. Explains how inmates are already treated differently.
- 313 Leggert Has discussed this procedurally with the Court of Appeals. Adds that federal judges have many defendants where they review the pleadings of litigants and not let them be filed when determined to be frivolous.
- 327 Sybil Hebb Oregon Law Center. Responds to Judge Leggert’s testimony. Believes SB 181A will have a substantive impact on low-income inmates’ abilities to address their claims. Disagrees that the -2 and -3 amendments grant greater rights to inmates than to others. Cites some examples. Testifies and submits written testimony in support of SB 181A and the -2 and -3 amendments (**EXHIBIT O**).
- 378 Hebb Describes the process for federal court pre-screenings of pleadings before filing. Supports efforts to reduce frivolous claims.

TAPE 101, B

- 014 Rep. Olson Asks about the cost to file a claim.
- 016 Leggert Answers about \$100 which can be put on a payment plan.
- 022 Rep. Macpherson Asks if the -2 amendments extending the statute of limitations would be troublesome to the court.

029	Leggert	Responds that if it were made a one-time thing, it wouldn't be burdensome. Reiterates concern that other litigants don't have the same rights.
051	Rep. Macpherson	Offers that it seems the -3 amendments require the court to state why the pleading failed to state a claim and supports that. Believes that one-time extension language in the -2 amendments as suggested by Judge Leggert is good. Suggest moving SB 181A to the full committee in anticipation of an additional amendment.
067	Chair Ackerman	States that consensus seems to be to move SB 181A to the full committee without the -2 or -3 amendments.
071	Rep. Flores	Agrees to moving SB 181A without the amendments. Asks Rep. Macpherson about moving the -3 amendments but not the -2 amendments.
074	Rep. Macpherson	Responds that the -3 amendments require the court to make a finding on why the pleading fails to state a claim and is a different issue and don't deal with the statute of limitations issue.
088	Rep. Olson	Expresses concern that citizens are not given the same rights as what the -2 amendments grant.
091	Rep. Flores	States she is more inclined to support the -2 amendments with a limitation on the number of times a claim can be extended.
096	Chair Ackerman	States that the -2 amendments need further amendment so it appears that SB 181A should be passed to the full committee subject to one amendment.
097	Rep. Macpherson	Suggests moving without an amendment so there is an opportunity to discuss a further revised -2 amendment.
101	Chair Ackerman	Responds that there would be no amendment now but one would be considered in the full committee.
103	Rep. Macpherson	Agrees that should be done.
104	Chair Ackerman	MOTION: Moves SB 181A to the full committee with a DO PASS recommendation.

VOTE: 3-0-2

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 2 - Garrard, Wirth

110 Chair Ackerman **The motion CARRIES.**

REP. ACKERMAN will lead discussion in the full committee.

116 Chair Ackerman Closes the work session on SB 181A and opens a work session on SB 236.

SB 236 – WORK SESSION

119 Bill Taylor Counsel. Explains that SB 236 clarifies that a civil action for discrimination in a place of public accommodation or a civil action for aiding and abetting discrimination in a place of public accommodation must be commenced within one year of the occurrence of the unlawful practice.

127 Rep. Flores **MOTION: Moves SB 236 to the full committee with a DO PASS recommendation.**

VOTE: 3-0-2

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 2 - Garrard, Wirth

137 Chair Ackerman **The motion CARRIES.**

REP. FLORES will lead discussion on the floor.

141 Chair Ackerman Closes the work session on SB 236 and opens a work session on HB 2912.

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HB 2912 – WORK SESSION

142 Sam Sears Counsel. Describes HB 2912 which prohibits a public body from substantially burdening a person's free exercise of religion including

when the burden results from the application of a rule of general applicability unless the body meets the burden of providing evidence and persuading the trier of fact that the imposition of the burden furthers the compelling of the government interest and is the least restrictive means of furthering that compelling government interest; and provides that a prohibition does not apply to burdens imposed on persons due to application of certain land use statutes, goals or regulations. Cites details of a Supreme Court decision on how the Court analyzes free exercise claims.

- 170 **Rep. Flores** **MOTION: Moves HB 2912 to the full committee with a DO PASS recommendation.**
- 176 Chair Ackerman Asks counsel if HB 2912 changes the current constitutional test on these issues.
- 178 Sears Replies yes. Explains that the federal Religions Freedom Restoration Act which brought back the pre-Smith standard was subsequently found unconstitutional as applied to the states. Continues that if states want to reinstate the pre-Smith standard, laws similar to HB 2912 have to be enacted.
- 196 Chair Ackerman Asks if HB 2912 changing the Smith decision is enacted, if the statute will be subject to Constitutional challenge.
- 198 Sears Replies no.
- 203 Rep. Flores Inquires how many other states have a state religious freedom restoration act.
- 205 Sears Answers 11 or 12.
- 207 Rep. Flores Asks if their laws were found to be Constitutional pursuant to the U. S. Supreme Court decision.
- 210 Sears Replies those challenges will probably not be made.
- 216 Rep. Macpherson Asks if the Smith case addresses the religious exercise provisions of both the federal and state constitutions.
- 219 Sears Believes just the federal constitution.

- 237 Rep. Macpherson Observes that there seems to be a lot of constitutionality uncertainties and concerns by local governments about potential impacts. Believes there is a potential for ramifications not fully understood. Comments there are not compelling arguments why HB 2912 is needed.
- 251 Chair Ackerman Indicates he will cast a courtesy vote to move to the full committee.
- 257 **VOTE: 3-0-2**
AYE: In a roll call vote, all members present vote Aye.
EXCUSED: 2 - Garrard, Wirth
- 259 Chair Ackerman **The motion CARRIES.**
REP. FLORES will lead discussion on the floor.
- 265 Chair Ackerman Closes the work session on HB 2912 and opens a work session on HB 2693.

HB 2693 – WORK SESSION

- 282 Rep. Macpherson Discusses the differences between the -1 and -2 amendments.
- 300 Sam Sears Counsel. Agrees with Rep. Macpherson’s assessment. Refers to the *Washburn v. Columbia Forest Products, Inc.* decision on the issue of whether the employer had to accommodate the use of medical marijuana in the work place. Explains the details of the case.
- 338 Rep. Macpherson Points to the -2 amendments where addition of the phrase “regardless of where the use occurs” are broader in allowing the employer to sanction against the use.
- 344 Sears Agrees. Explains possible conflicts between civil and criminal law.
- 375 Rep. Macpherson Recommends adoption of the -2 amendments.
- 379 Chair Ackerman Concurs with the -2 amendments. Is still concerned about the definition of “accommodate,” whether it is used within the context of the disability statutes or if a person can be fired at will for having marijuana in his/her system, even if not impaired or using the substance in the work place.

403 Rep. Flores **MOTION: Moves to ADOPT HB 2693-2 amendments dated 6/10/05.**

VOTE: 3-0-2

EXCUSED: 2 - Garrard, Wirth

405 Chair Ackerman **Hearing no objection, declares the motion CARRIED.**

410 Rep. Flores **MOTION: Moves HB 2693 to the full committee with a DO PASS AS AMENDED recommendation.**

411 Chair Ackerman Advises he will cast a courtesy vote now but may vote no on the merits later.

414 **VOTE: 3-0-2**

AYE: In a roll call vote, all members present vote Aye.

EXCUSED: 2 - Garrard, Wirth

424 Chair Ackerman **The motion CARRIES.**

REP. FLORES will lead discussion in the full committee.

425 Chair Ackerman Closes the work session on HB 2693.

TAPE 102, A

006 Chair Ackerman Opens a public hearing on HB 2873.

HB 2873 – PUBLIC HEARING

008 Sam Sears Counsel. Explains HB 2873 which provides that the definitions of the Oregon Disabilities Act shall be construed consistently, to the extent possible, with any similar provisions of the federal Americans with Disabilities Act (ADA). Explains the *Washburn v. Columbia Forest Products, Inc.* case. Distributes the -2 amendments (**EXHIBIT P**).

042 Lisa Trussell

Associated Oregon Industries. Testifies and submits written testimony by Paula Barran in support of HB 2873 (**EXHIBIT Q**). Notes that the Associated General Contractors also support HB 2873.

- 050 Stephaine Parrish Taylor Administrator, Office of Vocational Rehabilitation Services, Department of Human Services. Testifies and submits written testimony in opposition to the -1 amendments to HB 2873 and expresses concerns about the -2 amendments (**EXHIBIT R**). Believes HB 2873 lowers the current threshold and prohibits employment discrimination against persons with disabilities to employers who have 15 or more persons, rather than the current provision of six or more persons.
- 094 Kevin O'Reilly Oregon Paralyzed Veterans of America. Testifies in opposition to the -1 and -2 amendments to HB 2873. Suggests that the Associated Oregon Industries and others get together to work out the issues.
- 117 Tina Treasure Executive Director, State Independent Living Council. Testifies and submits written testimony in opposition to HB 2873 and the -2 and -3 amendments (**EXHIBIT S**). Reads from her written testimony.
- 169 Jacqueline Zimmer Oregon Association of Area Agencies on Aging and Disabilities. Testifies in opposition to HB 2873. Expresses that they are uncomfortable with an issue this complex becoming a "gut and stuff" this late in the session and believes it merits much more discussion.
- 183 Catherine White Oregon Developmental Disabilities Coalition. Testifies on concerns with HB 2873 and the wide-ranging implications that it will have on people with disabilities without more discussion.

The following prepared testimony is submitted for the record without public testimony:

- Lucy Baker Executive Director, Oregon Business Leadership Network. Submits written testimony as neutral on HB 2873 (**EXHIBIT T**).
- Jerry Gjesvold Serenity Lane Treatment Centers. Submits written testimony in support of HB 2873 (**EXHIBIT U**).
- Denise Spielman Oregon Disabilities Commission. Submits written testimony in opposition of HB 2873 (**EXHIBIT V**).
- 193 Chair Ackerman Closes the public hearing on HB 2873.

197 Rep. Krieger Prefers to hold off on a work session to allow time for discussion.

203 Chair Ackerman Adjourns the meeting at 10:50 a.m.

EXHIBIT SUMMARY

- A. **HB 2247, -1 amendments, staff, 97 pp**
- B. **HB 2247, written testimony, John VanLandingham, 15 pp**
- C. **HB 2693, -2 amendments, staff, 1 p**
- D. **HB 2693, written testimony, Dale Rutledge, 2 pp**
- E. **HB 2693, written testimony by Paula Barran, Lisa Trussell, 3 pp**
- F. **HB 2693, written testimony by Stormy Ray, Michael Glaze, 1 p**
- G. **HB 2693, written testimony, Clifford Spencer, 3 pp**
- H. **HB 2693, written testimony, Erin Hildebrandt, 3 pp**
 - I. **HB 2693, written testimony, Greg Byers, 4 pp**
 - J. **HB 2693, written testimony, Melodie Silverwolf, 1 p**
 - K. **HB 2693, written testimony, Richard Bayer, 10 pp**
- L. **SB 181, A2 amendments, staff, 1 p**
- M. **SB 181, A3 amendments, staff 1 p**
- N. **SB 181, written testimony, Terry Leggert, 1 p**
- O. **SB 181, written testimony, Sybil Hebb, 6 pp**
- P. **HB 2873, -2 amendments, staff, 1 p**
- Q. **HB 2873, written testimony by Paula Barran, Lisa Trussell, 1 p**
- R. **HB 2873, written testimony, Stephaine Parrish Taylor, 4 pp**
- S. **HB 2873, written testimony, Tina Treasure, 2 pp**
- T. **HB 2873, written testimony, Lucy Baker, 6 pp**
- U. **HB 2873, written testimony, Jerry Gjesvold, 3 pp**
- V. **HB 2873, written testimony, Denise Spielman, 6 pp**