

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

March 26, 1997 Hearing Room 357

1:00 P.M. Tapes 48 - 49

MEMBERS PRESENT:

Rep. Lane Shetterly, Chair

Rep. Judith Uherbelau, Vice-Chair

Rep. Roger Beyer

Rep. Jo Ann Bowman

Rep. George Eighmey

Rep. Floyd Prozanski

Rep. Charles Starr

Rep. Larry Wells

STAFF PRESENT:

Bill Taylor, Counsel

Lisa Fritz, Administrative Support

MEASURE/ISSUES HEARD:

HB 2865 - Public Hearing

HB 2350 - Work Session

HB 2948 - Work Session

HB 2428 - Work Session

HB 2078 - Work Session

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
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Tape 48, A		
007	Chair Shetterly	Calls the meeting to order at 1:20 p.m.
<u>OPENS PUBLIC HEARING ON HB 2865</u>		
012	Rep. Eighmey	District 14 Discusses letter written to him from Rick D. Klingbeil of Jolles, Bernstein & Garone, P.C. (EXHIBIT A). Discusses HB 2865 and -1 and -2 amendments to the bill (EXHIBITS B, C).
062	Rep. Eighmey	Continues testimony.
077	Chair Shetterly	On page two, lines one and two, falsifying is listed as a violation, under ORS 652.750. I'm not sure that I see ORS 652.750 as prohibiting falsification. It doesn't say that you can't falsify. It says you can't alter. I'm wondering if those need to, somehow, be tied together a little tighter.
095	Rep. Eighmey	I see exactly what you are saying. The intent, of course, is regarding improper altering, which is prohibited under ORS 652.750. I think you're right that we need to tie them together because the term "falsification" is not found in ORS 652.750.
106	Chair Shetterly	It's on line 23, but it only refers to a claim being brought for falsification, and that doesn't seem to create the liability.
110	Rep. Wells	Isn't falsifying in the "eye of the beholder?" How is "falsification" going to be decided? I'm looking at section three, which seems to differ from the rest of the bill.
118	Rep. Eighmey	Briefly, this bill has two parts. The first deals with access, notification, etc., regarding personnel records. Current law says records should be provided to employees, but I'm saying records should be provided to terminated employees as well. The second part deals with enforcement and says that, if the employer fails to provide records and he/she falsifies records, he/she is subject to the present statutes for not providing these to employees. Falsification will have to be directly tied back to ORS 652.750 (on page one) because it does not seem to be as clear as I would like it to be. You can determine falsification in several ways. Currently, attorneys, who handle these cases, determine it, normally, when the employee has kept records of their personnel files on an individual basis and then goes back to get his/her files and finds they have been altered, falsified, etc. That's the easiest way to prove it. There is a second way, if oral or visual observation takes place. That's the type of evidence that may not be

		sufficient. I'm saying that if you legitimately alter (e.g. there is a typo saying that leave was "sick leave" when it was actually "vacation"), all you have to do is notify.
156	Chair Shetterly	That raises a question in my mind. Looking at lines 17-18 of the first page, does it matter if the alteration is a true alteration or a falsification? If matter that is inserted is false, but one gives notification of that, does that purge the violation? Then, if the employee gives a written response, does that end it there, or have you already committed an unlawful employment practice because of intent, despite the notice and the employee's right to respond?
169	Rep. Eighmey	I believe that section three, page two, describes how we are going to address that. I think "knowingly" clears that up. If you knowingly do something and it's correct, then there is no violation. However, if you knowingly falsify or improperly alter, then you are subject to violation.
181	Chair Shetterly	Closes Public Hearing on HB 2865.
		<u>OPENS WORK SESSION ON HB 2350</u>
192	Bill Taylor	Committee Counsel Discusses HB 2350 and -1 amendments to the bill (EXHIBIT D).
203	Rep. Eighmey	Discusses HB 2350 and explains -1 amendments to the bill.
244	Chair Shetterly	Would you please walk us through the amendments?
246	Rep. Eighmey	Continues discussion of -1 amendments.
264	Chair Shetterly	So, we are changing the bold-printed \$5,000, on line 11, to \$3,500?
265	Rep. Eighmey	Right.
267	Rep. Bowman	Was this a request from someone (that you lower the fee)?
270	Rep. Eighmey	We have discussed this with numerous agencies, including legal services, and we discussed how they collect their funds. If I increase the limit of the amount, for which you can file a small claims, that means the number of fees collected at the (lower than circuit court) filing rate increases, but it also decreases the number of filing fees in the circuit court. So, they are going to receive less money. We tried to come up with an increase that

		was not so harmful to their overall budget and, at the same time, have an increase in the filing. The compromise was \$3,500, increasing to \$4,000 in the year 2002.
302	Dave Heynderickx	Legislative Counsel The primary reason these things look so confusing is court consolidation. A lot of the sections in this bill have to be doubly amended because they have to take into account that, as of January first of next year, there will no longer be district courts. Further explains the amendments.
341	Chair Shetterly	That's in section 11, and it says the amendments, in section two, become effective on that date.
343	Heynderickx	Correct. Then, the rest of the bill follows that same process -- to make the changes for small claims and district courts on the effective date and small claims and circuit courts in 2001. It is confusing, but it takes into account the changes, made last session, and the delayed operative date for the elimination of district courts.
354	Chair Shetterly	This is simpler than it looks. Explains, in his own words, the bill with -1 amendments.
367	Rep. Starr	You indicated that this reduction, from \$5,000, had been because of some negotiations (i.e. claims filed, loss of revenue, etc.). Do you have an estimate of the number of claims or amount of potential loss of revenue?
376	Rep. Eighmey	The corrections that I have (may be off by a few hundred) list 7,000 claims filed in small claims court and up to 3,000 more, presently in district or circuit court because they don't fall in small claims now. That would be pulled into the new levels, under this bill. Those 3,000 more would be charged less than what they're being charged under the circuit or district court presently, and that money adjustment is what we are talking about. It's approximately \$22 to file in small claims court and \$45 to file in a circuit or district court, but it has to deal with percentage.
TAPE 49, A		
002	Rep. Beyer	Would the 3,000 additional cases be with or without the amendments?
003	Rep. Eighmey	With the amendments.
004	Rep. Beyer	What would it have been without the amendments?
005	Rep. Eighmey	About 6,000.
006	Rep. Beyer	At \$23 a case, with 3,000 cases, that's \$66,000; 6,000 cases would be \$132,000 to legal aid.
008	Rep. Starr	That doesn't all go. Do you know the percentage we're talking about?
010	Rep. Eighmey	I don't know exactly the percentage. I don't have the new few schedule before me. We're going to be voting on that. It's coming out from, I believe, the Senate side.

012	Chair Shetterly	That's correct. There is a new bill in process, so whatever it might have been historically, would be under whatever we are going to be seeing this session.
014	Bill Taylor	Committee Counsel What happened, last session, with court consolidation is we had a lower fee for district court. These fees go to such things as legal services, county law libraries, etc., where we are abolishing district court in January, next year, that fee will have to go up. If you want to file a case, it will be in circuit court, where there is a higher filing fee. Last session, through that process, all these fees were increased. There is a bill on the Senate side, SB 276, where those fees will be adjusted downward, and how this impacts, I believe, is that when they created the circuit court, the small claims court was in the district court. As a result, all those small claims cases are now part of circuit court, and I believe that if things are not changed, they would have the circuit court filing fee.
030	Heynderickx	I think, in the bill that was passed last session, they left alone the filing fees for small claims, but I think all of that is being looked at right now, in the context of SB 276. There will probably substantial tinkering with fees.
035	Rep. Starr	I would like to know what dollar amounts we are talking about here, before I'd be willing to lower this. I like the \$5,000, personally, so I'm very interested in knowing what amount we're talking about.
039	Rep. Eighmey	I, of course, was very supportive of the original \$5,000 too, since that was how I drafted the bill. However, with negotiations, not only did the fee argument and differential persuade me to reduce it to \$4000 by the year 2000, I also had them run me a history of small claims. In 1979, we, the legislature, changed small claims from \$500 to \$700. In 1983, we changed it from \$700 to \$1,000. In 1985, we changed it from \$1,000 to \$1,500, so we got a 50 percent increase. In 1987, we changed it from \$1,500 to \$2,500, about a 60 percent change. Ten years later, we're going from \$2,500 to \$3,500, about a 50 percent change, and then by the year 2000, we move it up to \$4,000. I figure that by 2002, we will have increased (approximately) the average amount, since 1979, so it's a reasonable progression. My jumping at the \$5,000 was a bit premature. If legal services were getting 100 percent, it would be different, but they're not. It is my understanding that, with the new bill, they will only be getting about one-third: a two or three thousand dollar difference.
066	Rep. Beyer	I agree with Rep. Starr. I think we should hold this bill, until we see what's coming on the other one. You said that the court consolidation occurs next January, but I thought that Dave (Heynderickx) said that these amendments are so complex because we have to deal with issues before and after consolidation.
070	Heynderickx	I overspoke a bit. We did make this effective as of January 15 of next year, the same date. We still have to double amend, but the double amendments have to do with the fact that we have one change going into effect on January 15 (going to \$3,500), and the second change going into effect in January of 2002 (second increase occurs).

083	Rep. Eighmey	I hope that if we defer the bill, it will be because of confusion over what the bill is trying to do. With regard to the fee changes, I think it would be premature of us to decide if the Senate bill is going to pass, because we don't know what it is going to be, and this (HB 2350) is, in effect, now. If the major concern is the distribution formula, it is minuscule, but it also affects small claims courts. The operations of small claims get some of this money, and that's in the percentage as well. I can understand Rep. Beyer's and Rep. Starr's concerns, with regard to how much goes to legal services, but that's not going to be resolved by whether or not we know what the bill is going to do on the Senate side.
109	Rep. Starr	I want to go back to the reasoning for the increase. From 1979-1987, we increased 500 percent. We're looking at a period of ten years, from 1987-1997, with implementation put off for four or five years into the future, that would raise it 100 percent, if we went with the \$5,000 figure. I don't think that it's unreasonable at all if we raise that, and it certainly gives those debtors, who are trying to collect, a more reasonable means of going after funds they need to collect. I would really be opposed to going less than the \$5,000.
114	Chair Shetterly	Well, that makes it clear to me that there is an understanding of what the - 1 amendments do; it's just a question of whether we want to do that. In which case, a motion would be in order.
120	Rep. Bowman	MOTION: Moves to ADOPT HB 2350-1 amendments dated 2/18/97.
		VOTE: 6-2 AYE: 6 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Uherbelau, Rep. Wells, Chair Shetterly NAY: 2 - Rep. R. Beyer, Rep. Starr
128	Chair Shetterly	The motion Carries.
133	Rep. Bowman	MOTION: Moves HB 2350 to the full committee with a DO PASS AS AMENDED recommendation.
137	Rep. Beyer	I think it's premature to move the bill, at this time, without knowing what is happening with the Senate bill.
		This bill will not be before the full committee until a week from Friday. I can get you SB 276 with no problems. I do know that there was a hearing

143	Taylor	on SB 276, yesterday, in the Senate, and it took up, basically, two hours of the meeting. Substantial amendments are being made, not in the amount area, but there are some technical issues. I'd be very glad to get you the bill and any amendments made public.
		VOTE: 6-2 AYE: 6 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Uherbelau, Rep. Wells, Chair Shetterly NAY: 2 - Rep. R. Beyer, Rep. Starr
159	Chair Shetterly	The motion Carries. REP. EIGHMEY will lead discussion on the floor.
161	Chair Shetterly	Closes Work Session on 2350.
		<u>OPENS WORK SESSION ON HB 2948</u>
170	Chair Shetterly	My hope, today, is to deal with these amendments to build a bill, with some structure, that we could pass on, before taking any action on the bill itself, to Legislative Fiscal, for a fiscal analysis. I would then bring that back to the subcommittee, based on the fiscal report, with the full intention that nobody's vote one way or another, today, would commit them either way to the bill. It would give us a vehicle to put together a bill and assess costs.
182	Dave Heynderickx	Explains each of the amendments, -1 to -17, individually (EXHIBITS E THROUGH U).
224	Rep. Bowman	Would that not be the case anyway? If they changed location, they would no longer be represented.
226	Heynderickx	I think there may be an issue over whether or not there is a need to go through an election for purposes of representation. I know there was some concern, or the amendments would not have been asked for. Continues explaining amendments, individually.
276	Heynderickx	Continues testimony.

309	Rep. Uherbelau	I've noticed that we are deleting some people from the list of agencies. What was the criteria we used to decide who to delete?
324	Chair Shetterly	Actually, we'll get to that. My suggestion, for our purposes today, is to delete the Construction Contractors Board because their function, in the hearings process, is really to mediate between private parties. Gives example. The other agencies have come and said, for various reasons, that they don't use hearings officers, or they require certain expertise and are special exceptions. Those agencies have come forward to ask to have themselves exempted. My hope, if we can get through this, is that we not take action to exempt those other agencies (except the Construction Contractors Board) today. We should leave them in the bill because I will ask for a fiscal analysis, concerning each agency, in order to gauge the impact on each agency. We would then have that information before us, so we can decide who to add or delete for the final bill.
337	Rep. Beyer	If you remove the Construction Contractors Board, I think you should remove the Landscape Contractors Board.
347	Rep. Bowman	I would be concerned about removing the Construction Contractors Board because that particular board gets public contracts, and therefore, there may not always be a complaint between a residential homeowner and someone who is providing a service. There are cases where there are subcontractors, who have been hired by the contractor to work on public contracts, that need to have a third party intervene, in order to resolve whatever issues they are dealing with. I'm not compelled by the argument that that would be sufficient reasoning to remove the Construction Contractors Board.
357	Rep. Prozanski	Since we are going to be sending this down for an analysis, could we just leave everyone in at this point? That way, we can see what's going on, and we can have these discussions at that point.
360	Chair Shetterly	I would have no problem with that.
364	Heynderickx	Continues explaining the amendments.
TAPE 48, B		
010	Rep. Uherbelau	I'd like to know why we have an emergency clause.
015	John DiLorenzo, Jr.	Oregon Litigation Reform Coalition The -14 amendments are designed to cover the gap. The gap is between the date the bill passes (if it passes) and the operative date (January 1, 1998). The amendments provide for what happens to agency adjudication during the gap. In order to cover the gap, an emergency clause is needed because otherwise, the bill would not be effective until 90 days following sine die. The emergency clause makes the bill effective, yet not operative until January 1, 1998. The only portions of the bill that would be operative would be the coverage of the

		gap. Agencies can fully operate during the gap. All this does is provide that the party, who appeared before the agency, can require a rehearing, following the operative date (January 1, 1998). It does not, however, stay the effect of the order.
048	Rep. Prozanski	It seems to me that, even though you are putting something into effect, and it's not operative for some date, you're setting up for additional potential litigation or rehearings because, within that gap, they are still preserving the right. I think maybe we should stay with the existing structure we have now, until the effective date, and at that point, the transition goes completely across the board. Then, everyone is on the same rules, time-frame, etc. We wouldn't have to worry if something fell "within the gap," because there wouldn't be a gap.
064	DiLorenzo	That would defeat the purpose of the amendments. The purpose of the amendments is to discourage agencies from rushing parties through the existing process to beat the effective date. It seems that your concern has to do more with the amendments than the design.
072	Rep. Eighmey	What's going to happen to the (legitimate) work-in process?
074	DiLorenzo	I believe legitimate work-in process will go on. Agencies will be able to issue during the gap period. Gives a scenario to illustrate his point.
086	Rep. Uherbelau	If we are only going to be moving this to Legislative Fiscal today, I don't have a problem. I could never vote for the bill with an emergency clause, but if that's all we're doing, we can come back to it at another time.
089	Chair Shetterly	Do you see this as having a fiscal impact? If so, maybe we should move these into the bill today as well, so we can analyze it with the others.
094	Rep. Uherbelau	Would this really have a fiscal impact? I see it as stopping agencies in their tracks.
098	DiLorenzo	I believe there are fiscal considerations. Whether this will save agencies money or cost, in the gap, is an analysis that the fiscal office will have to make.
106	Heynderickx	Continues explaining amendments.
125	Chair Shetterly	So the -15 amendments replace the -9 amendments?
127	Heynderickx	If you adopt the -15 amendments, you would not have to adopt the -9 amendments. Continues explanation of amendments.
151	Rep. Prozanski	Would you entertain a motion to take all of the motions in, instead of doing them one at a time?
156	Rep. Starr	We can't do that. All the amendments are not active. Lists the ones that are active.
187	Rep. Bowman	Would the -15 amendments delete any of the agencies that are currently in the proposed bill?

189	Chair Shetterly	No, these are non-covered agencies.
197	Rep. Starr	MOTION: Moves to ADOPT HB 2948-3 amendments dated 3/19/97.
		MOTION: Moves to ADOPT HB 2948-6 amendments dated 3/21/97.
		MOTION: Moves to ADOPT HB 2948-7 amendments dated 3/21/97.
		MOTION: Moves to ADOPT HB 2948-10 amendments dated 3/25/97.
		MOTION: Moves to ADOPT HB 2948-12 amendments dated 3/25/97.
		MOTION: Moves to ADOPT HB 2948-13 amendments dated 3/25/97.
		MOTION: Moves to ADOPT HB 2948-14 amendments dated 3/25/97.
		MOTION: Moves to ADOPT HB 2948-15 amendments dated 3/25/97.
		MOTION: Moves to ADOPT HB 2948-16 amendments dated 3/26/97.
		VOTE: 8-0
214	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
215	Chair Shetterly	Closes Work Session on 2948.
	<u>OPENS WORK SESSION ON HB 2428</u>	
226	Monique DeSpain	Discusses HB 2428.

231	Fred Avera	Polk County District Attorney Discusses HB 2428 and Oregon District Attorneys Association amendments (EXHIBIT V).
278	Rep. Bowman	If we are deleting the section that requires the court to look at the defendant's ability to pay, how will the judge make that determination?
283	Avera	We're deleting the language that requires the court to make that analysis in every case. Gives example to illustrate his point.
286	Chair Shetterly	You're saying that it's up to the defendant to raise the issue that he/she does not have the ability to pay.
288	Avera	Exactly.
290	Rep. Eighmey	That was the same point I was going to raise.
310	Rep. Uherbelau	Since we are amending it to read that the court has to make a finding of damages, are we somehow putting a burden on the court?
325	Avera	I don't really anticipate much of a change in the current process. The current law requires the District Attorney to complete the restitution and bring it to court. It doesn't require the court to do anything once we get it there. Explains how the bill and amendments would change the current situation.
360	Rep. Prozanski	Is there still going to have to be another finding by the court, or are you saying that, under this amendment, whatever number comes up as to the damage amount, automatically becomes the restitution amount?
375	Avera	I think the court would find the amount of damages to be \$x, and then that would be the potential amount of restitution. Probably, in most cases, the court would order that amount to be paid.
TAPE 49, B		
002	Chair Shetterly	Questions section one of the amendments.
012	Avera	As I see it, I think those provisions are in there to handle default type cases, where the defendant doesn't show up in court. The court can't decide if they have the ability to pay if they aren't there.
028	Chair Shetterly	The general rule is the defendant has the right to raise the issue. The language, proposed to be deleted, preserves that right, under the original. We may want to leave that in.
033	Avera	I have no problem with that. Makes an alternate suggestion.
044	Andy Simron	Oregon Criminal Defense Lawyers Association I have two points I would like to make. I would like to clear up a misconception. If a defendant fails to object to any matter regarding restitution, and the trial judge imposes restitution, the Court of Appeals is not authorized to correct any legal error that may have occurred in that process. The second proposed amendments, on this sheet (EXHIBIT V), do not solve the problem we discussed the last time I was here, with regard to whether this amendment

		is going to be constitutional. I would change, in the second amendment, "may" to "shall," so it will pass constitutional muster.
079	Rep. Bowman	Has it been your experience that defendants are willing to jump up and say, "I can't do this?"
083	Simron	Defendants often don't know the process, and many lawyers don't raise the issue for them.
093	Jim Arneson	Oregon Criminal Defense Lawyers Association These deletions would amend the defendant's ability to come in within one year after a default judgment.
099	Chair Shetterly	I think that we decided to put that back in.
101	Rep. Prozanski	That was page three, lines 29-37?
103	Chair Shetterly	Actually, it occurs in several different places (page two, lines 17-23; page three, lines 31-37; page five, etc.); so we would put that language back in, except for in the first sentence.
117	Arneson	An additional provision would be removed at the top of page three, line two, where it deals with the Post-prison Supervision Board. Makes suggestions to improve language.
128	Rep. Eighmey	Should that be considered "the" factor, specified?
130	Arneson	If the concern is that the total amount of damage be entered as a finding in the judgment, you may do that, including number one of Mr. Avera's amendments. Explains what would happen under Avera's suggestions and continues to expand on suggestions of his own.
185	Chair Shetterly	Closes work session on HB 2428.
		<u>OPENS WORK SESSION ON HB 2078</u>
200	Taylor	Discusses HB 2078.
210	Rep. Prozanski	MOTION: Moves HB 2078 to the full committee with a DO PASS recommendation.
		VOTE: 8-0
215	Chair Shetterly	Hearing no objection, declares the motion CARRIED.

		REP. BOWMAN will lead discussion on the floor.
224	Chair Shetterly	Adjourns at 3:01 p.m.

Submitted by, Reviewed by,

Lisa Fritz, Sarah Watson,

Administrative Support Office Manager

EXHIBIT SUMMARY

A - HB 2865, written testimony, from Rick D. Klingbeil of Jolles, Bernstein & Garone, P.C. to Rep. Eighmey, 2 pages.

B - HB 2865, proposed amendments (-1), Legislative Counsel, 1 page.

C - HB 2865, proposed amendments (-2), Legislative Counsel, 1 page.

D - HB 2350, proposed amendments (-1), Legislative Counsel, 4 pages.

E - HB 2948, proposed amendments (-1), Legislative Counsel, 1 page.

F - HB 2948, proposed amendments (-2), Legislative Counsel, 2 pages.

G - HB 2948, proposed amendments (-3), Legislative Counsel, 4 pages.

H - HB 2948, proposed amendments (-4), Legislative Counsel, 1 page.

I - HB 2948, proposed amendments (-5), Legislative Counsel, 1 page.

J - HB 2948, proposed amendments (-6), Legislative Counsel, 1 page.

K - HB 2948, proposed amendments (-7), Legislative Counsel, 7 pages.

L - HB 2948, proposed amendments (-8), Legislative Counsel, 2 pages.

M - HB 2948, proposed amendments (-9), Legislative Counsel, 2 pages.

N - HB 2948, proposed amendments (-10), Legislative Counsel, 1 page.

O - HB 2948, proposed amendments (-11), Legislative Counsel, 2 pages.

P - HB 2948, proposed amendments (-12), Legislative Counsel, 1 page.

Q - HB 2948, proposed amendments (-13), Legislative Counsel, 1 page.

R - HB 2948, proposed amendments (-14), Legislative Counsel, 2 pages.

S - HB 2948, proposed amendments (-15), Legislative Counsel, 2 pages.

T - HB 2948, proposed amendments (-16), Legislative Counsel, 1 page.

U - HB 2948, proposed amendments (-17), Legislative Counsel, 2 pages.

V - HB 2428, proposed amendments, Fred Avera, Oregon District Attorneys Association, 1 page.