

**HOUSE COMMITTEE ON JUDICIARY**

**SUBCOMMITTEE ON CIVIL LAW**

**April 30, 1997 Hearing Room 357**

**1: 00 PM Tapes 72 - 73**

**MEMBERS PRESENT:**

**Rep. Lane Shetterly, Chair**

**Rep. Judy Uherbelau, Vice-Chair**

**Rep. Roger Beyer**

**Rep. Jo Ann Bowman**

**Rep. George Eighmey**

**Rep. Floyd Prozanski**

**Rep. Charles Starr**

**Rep. Larry Wells**

**MEMBER EXCUSED:**

**STAFF PRESENT:**

**William E. Taylor, Counsel**

**Gina Cross, Administrative Support**

**MEASURE/ISSUES HEARD:**

**HB 2327 - Work Session HB 3316 - Work Session**

**HB 3539 - Work Session HB 2674 - Work Session HB 2865 - 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.**

<b>Tape/#</b>	<b>Speaker</b>	<b>Comments</b>
<b>Tape 72, A</b>		
003	Chair Shetterly	Calls the meeting to order at 1:10.

<u>HB 2865 - WORK SESSION</u>		
014	Chair Shetterly	Opens the work session on HB 2865.
015	William Taylor	Committee Counsel >explains HB 2865
020	Rep. Eighmey	Submits -5 amendments to the committee <b>(EXHIBIT A)</b> .  >An employer may not knowingly falsify personnel records.  >An employer must keep records for a period of 120 days.  >If an employer fails to permit inspection or keeps the records for less than 120 days, he commits an unlawful employment practice.
029	Chair Shetterly	This measure changes the period of retention from 60 to 120 days.
035	Rep. Eighmey	We have reached agreement with the affected parties.
039	Betsy Earls	Associated Oregon Industries (AOI)  >Worked with Rep. Eighmey on the -5 amendments.  >If these amendments are adopted, AOI will be neutral on this measure.
043	Chair Shetterly	You were in opposition to this bill as it was originally drafted?
043	Earls	Yes.
044	Rep. Beyer	I believe that your choice of words is that you are neutral. You don't really support the bill.
045	Earls	AOI does not support or oppose the bill. We are neutral.
049	Chair Shetterly	Betsy, I appreciate your working with Rep. Eighmey on this bill, and Rep. Eighmey I appreciate your working with AOI.
051	Rep. Eighmey	We did not want to make this an adversarial situation.
057	Rep. Starr	Asks about the two separate remedies in sections 2 and 3.  >Does this give the employee two different avenues for remedying problems?
061	Rep. Eighmey	With regards to lines 14-20, the employee has the right to go to the Bureau of Labor and Industries (BOLI) or the employee can bring a civil action according to ORS 659.121.
069	Rep.	I see that BOLI is limited to aggrieved under subsection 1. Because there may be an allegation of falsification, there is another standard or remedy.

	Prozanski	
071	Rep. Eighmey	There are two options for an aggrieved employee: go to BOLI or take civil action. You cannot go to BOLI if records were knowingly falsified.
080	Chair Shetterly	Those alternate remedies are already in ORS 659.
083	Rep. Uherbelau	If there is any unfair or unlawful employment practice you can always go to BOLI.
096	Chair Shetterly	Are there any objections to moving the -5 amendments?
097	Rep. Beyer	It is already illegal to falsify personnel records. A person can go to BOLI or take civil action. This bill is not necessary.
105	Shetterly	It is my understanding that it is not fraud to falsify records.
107	Rep. Eighmey	This remedy doesn't exist under the law right now.
110	Rep. Eighmey	<b>MOTION: Moves to ADOPT HB 2865-5 amendments dated 4/16/97.</b>
110	Rep. Starr	<b>VOTE: 7-1</b> <b>AYE: 7 - Bowman, Eighmey, Prozanski, Shetterly, Starr, Uherbelau, Wells</b> <b>NAY: 1 - Beyer</b>
112	Chair Shetterly	<b>The motion CARRIES.</b>
117	Rep. Eighmey	<b>MOTION: Moves HB 2865 to the full committee with a DO PASS AS AMENDED recommendation.</b>
119	Chair Shetterly	<b>VOTE: 7-1</b> <b>AYE: 7 - Bowman, Eighmey, Prozanski, Shetterly, Starr, Uherbelau, Wells</b> <b>NAY: 1 - Beyer</b>
121	Chair Shetterly	<b>The motion CARRIES.</b>
<b><u>HB 2327 - WORK SESSION</u></b>		
122	Chair Shetterly	Opens the work session on HB 2327
123	William Taylor	Committee Counsel >explains HB 2327
		Special Counsel to the Attorney General

131	Mark Gardner	<p>&gt;Submits the -1 amendments to the committee (<b>EXHIBIT B</b>).</p> <p>&gt;unable to contact person before you sue</p> <p>&gt;In order to be awarded attorney fees, there needs to be a good faith effort made.</p>
170	Rep. Prozanski	What do you mean by direct communication and a good faith effort? Do you mean, if I call you and ask why don't we settle this, but nothing comes of it, that's good faith?
176	Gardner	Absolutely.
177	Rep. Eighmey	I still have some reservations. What if there is a message left on a machine? What about last minute calls? Wouldn't this be intentionally not communicating rather than a good faith effort?
190	Gardner	That is where good cause for not making the effort comes into play. If you have a legitimate reason for not communicating and are able to relay that to a judge who believes you, you're off the hook. If you don't take that effort, you won't get the attorney's fees.
206	Chair Shetterly	Will we waste our time communicating when there is no reason to?
207	Rep. Eighmey	I don't want to be questioned about my advice unless it is by my client. If I advise my client that it is strategically bad to communicate, now I must justify my legal advice to a judge.
232	Gardner	There is a distinction here. If you believe that everyone can use the court system, without control, then you are against this bill. There needs to be controls or incentives to not abuse the system.
250	Rep. Eighmey	I believe in your second premise, but I am against it.
253	Rep. Prozanski	Regarding lines 6 and 7, a good faith effort needs to be made before the complaint has been made or in an appearance made in the case. Are we saying a formal appearance before the court?
263	Gardner	An appearance can be made by filing a motion or by filing an answer.
270	Chair Shetterly	Gives example of a foreclosure of a mortgage. Asks about defenses that need to be raised in making a good faith effort.
280	Gardner	You would have to make the effort to contact the other party. Just the fact that you communicated may have impact.
288	Rep. Uherbelau	States that the amendment is better than the original bill. >This bill would discourage the Department of Justice from negotiating, because only the defendant is penalized.
312	Gardner	I don't see the word defendant in the amendments.
317	Chair Shetterly	Reads part of letter from Department of Justice ( <b>EXHIBIT C</b> ). This bill discourages the state from negotiating good faith, because the bill only penalizes the party bringing the action.

335	Gardner	I didn't follow what you were talking about.
337	Rep. Prozanski	The state is put on notice once the tort claim notice is filed. Why should the state go through more hoops and give more notice?
346	Gardner	The notice stating there is a problem is not direct communication. There still should be some requirement the parties go forward and discuss circumstances.
354	Rep. Prozanski	Can I get a refresher on why the department is bringing this. The state is putting out a lot of money on trying to resolve cases.
367	Greg Chemore	<p>Department of Justice</p> <ul style="list-style-type: none"> <li>&gt;suggestions which could save the state time and money</li> <li>&gt;The state does get notice of tort claims.</li> <li>&gt;Negotiations settle majority of cases.</li> <li>&gt;a statute may be invoked to claim attorneys' fees</li> <li>&gt;The Department of Justice handles cases in which the complaining party misreads law and sues the state.</li> </ul>
414	Shetterly	Did that case involve a claim for attorney fees as well?
416	Chemore	Yes.
417	Chair Shetterly	There is statutory authority for attorney fees in a billboard case?
419	Gardner	There is statutory authority for obtaining attorney fees when the agency acts unreasonably or maliciously.
425	Rep. Eighmey	Attorney fees?
426	Gardner	In this particular case, we called up the party and stated that they were misreading the law. The case went away.
432	Rep. Prozanski	It sounds like this person did not have a meritorious claim. How is this individual going to win if they have misread the law and is not supported by the law?
<b>TAPE 73, A</b>		
004	Gardner	The issue is, if there is a disincentive to bring the case by not talking to the other side, there will probably be more discussions. This will in turn bring less filed cases and no attorney fees incurred on our side.
011	Chemore	<p>This bill will encourage people to call the agency.</p> <ul style="list-style-type: none"> <li>&gt;The second kind of case the Department of Justice sees is where the state made a mistake.</li> <li>&gt;The third kind of case is where a complaining party may have a legitimate claim, but they have used the wrong procedure.</li> </ul>

		>Communication between the parties can keep expenses down in most of these cases.
041	Rep. Uherbelau	I want to add that only the cases in which the state has acted unreasonably can attorney fees be collected.
047	Chemore	I misspoke. I apologize.
049	Rep. Uherbelau	That may be where the letter from Mr. Lane is coming from.
053	Rep. Eighmey	I am confused as to why we are focusing on the attorney fee situation. People are filing suits unnecessarily. Who asks for attorney fees?
066	Chair Shetterly	Lines 13-18 address this to a large degree. These are already in the statute. Line 13 addresses the extent to which an attorney fee would deter others in meritless claims and defenses. This bill lifts out the criteria already in the statute and creates a mandatory test. Doesn't the court have discretion to consider all these factors?
085	Gardner	You would be surprised the number of cases in which parties haven't talked to each other. This would have the impact of forcing minimal contact between parties. This bill goes a step further.
105	Shetterly	I am concerned about forcing them to do this. This trap for parties costs money. Brings out letter for committee from Mr. Lane.
128	Gardner	The -1 amendment is better than the present situation. By not having a mandatory standard, you will not get what you want out of this bill. If you went with the original language, more of an impact would be made.
143	Chair Shetterly	I would like to get the others up to testify.
145	Rep. Bowman	It appears that this may be a disincentive for someone who has an actual case from hiring an attorney.
153	Gardner	This bill isn't any more of a disincentive. There just needs to some form of direct communication. This just requires there be one additional communication before you start the process.
160	Rep. Bowman	This only applies to civil cases?
162	Gardner	Yes, that is correct.
164	Rep. Uherbelau	We all communicate with each other. You're identifying a problem that we aren't familiar with.
174	Gardner	The problem is someone is not talking to someone else. People don't want to be trapped, this tells you there is a problem
187	Rep. Uherbelau	I see this as "big daddy" telling me what to do. I already know what to do. Your good cause exemption throws it back into the discretionary field.
199	Gardner	There is discretion. You are changing the emphasis from how much to award to not awarding fees unless this communication is done.
		Oregon Collectors Association

217	Jim Markee	<p>&gt;I never said I agreed with this bill in principle.</p> <p>&gt;If the bill is amended to not include collection agencies, I would not have a position.</p> <p>&gt;The original bill creates serious problems for my clients' monetary issues.</p> <p>&gt;We are prohibited by law to talk to a debtor who doesn't want to talk about it.</p> <p>&gt;Collection agencies may be under orders to just sue.</p>
253	Alan Tresidder	<p>Oregon Trial Lawyers Association</p> <p>&gt;The measure is not necessary to encourage counsel to talk with one another.</p> <p>&gt;concerned with chilling effect on people seeking counsel</p>
274	Bob Olsen	<p>Oregon State Bar</p> <p>&gt;There have been thorough discussions over this bill and the problems which may arise from it.</p> <p>&gt;This creates new hoops to go through.</p>
293	Rep. Wells	The problem I have is that attorneys don't want to talk with anyone except attorneys.
312	Taylor	You would incur a liability if you talked with someone after they have said not to talk with them.
317	Markee	We would have potentially serious problems with Federal Trade Commission. Even if contact is made, who is right in "good faith?"
333	Chair Shetterly	Asks if anyone wants to move the amendments.
342	Darrell Fuller	<p>Oregon Auto Dealers' Association</p> <p>&gt;Auto dealers do support the bill in concept with the amendments.</p> <p>&gt;It would be a good idea for someone to give an opportunity to resolve the situation before a trial.</p> <p>&gt;Parties should meet and have some form of communication.</p>
399	Fuller	<p>Continues testimony</p> <p>&gt;We are looking for ways to encourage people not to file lawsuits.</p>
406	Rep. Uherbelau	How does this apply to the usual case you have discussed?

420	Fuller	Those cases which deal with repair or service of automobiles would have nothing to do with this, but those which deal with installment contracts do.
<b>TAPE 72, B</b>		
008	Gardner	There are numerous lawsuits which don't rely on contract language. I thought I made the impression that everyone was in agreement that parties should talk. I apologize if I left the wrong impression.
019	Rep. Beyer	I think this a great idea. It makes a lot of sense that people should be required to talk before they file a lawsuit.
028	Chair Shetterly	I believe courts have this discretion already.
038	Rep. Eighmey	This is broader than the present situation. The judge takes into consideration whether or not there was contact as well as the form of contact made: demanding or arbitrary.
048	Rep. Beyer	This forces people to hire attorneys. Section f, subsection 1 of the bill is already in the statute. Rather than a new section, we should put in stronger language. It is an enforcement problem and not a statutory problem.
071	Chair Shetterly	Closes the work session on HB 2327
<b><u>HB 3539 - WORK SESSION</u></b>		
073	Chair Shetterly	Opens the work session on HB 3539
074	Chair Shetterly	<p>Reads the summary of HB 3539.</p> <ul style="list-style-type: none"> <li>&gt;provides for liability without fault</li> <li>&gt;-1 amendments change "suit" to "action"</li> <li>&gt;addresses tort claims</li> <li>&gt;lines 9-10 incorporates city officials and state officials</li> </ul>
103	Rep. Eighmey	States that the summary corresponds to his notes.
109	Rep. Bowman	I am concerned with "reasonable" and there being no limits set. There needs to be a limit on local governments.
129	Chair Shetterly	That would be easy to resolve by replacing "all" with "reasonable" in line 24.
135	Rep. Beyer	What does this bill do?
138	Chair Shetterly	This comes from Bend-Lapine school district where a school board member was sued individually.



144	Rep. Starr	School board members were named individually in a suit for their actions as school board members and had to come up with money for attorneys. This keeps people, while acting in their official capacity, from having to defend themselves.
160	Chair Shetterly	When they are ultimately upheld as acting reasonably.
162	Rep. Beyer	Would the school district pay attorney fees or would the person bringing the suit pay the fees?
164	Chair Shetterly	If the individual is sued in personal capacity and wins, the school district would reimburse them.
172	Rep. Prozanski	If you have an employee representing the district and he is sued, he will be held harmless individually for the representation they receive.
186	Chair Shetterly	Are we intentionally broadening this to cover state officials?
190	Rep. Prozanski	Yes, everyone who acts in their official capacity should be held harmless for their representation.
197	Rep. Uherbelau	Defines public officials for the purpose of tort actions.
205	Chair Shetterly	The functional definition would be the laundry list we have.
207	Rep. Prozanski	We should discuss whether or not to adopt that list.
209	Chair Shetterly	We are adopting this list but not limiting it to tort action.
210	Rep. Wells	On the boards I have served on there has been some kind of insurance for this type of thing.
214	Rep. Prozanski	Non-profits do carry insurance for this, but, at the state level, this is a problem. This is one way we safeguard against this happening.
229	Rep. Beyer	I am wondering why are we only reimbursing defendants for not being held liable while performing duties.
239	Chair Shetterly	If they lose, they are found to have spent the money beyond the scope of their authority. Line 23 states this is limited to reimbursing those found not to be liable.
253	Rep. Beyer	As long as they are in their official capacity, they could lose in the court and monetarily.
260	Rep. Uherbelau	If the court finds them liable, then they are found not to be acting in their official capacity.
268	Rep. Eighmey	They could appeal, and, if it is reversed, they could ask for attorney fees. You are arguing that attorney fees should not be awarded if one has a meritorious claim.
289	Chair Shetterly	Referring to lines 1-2 of the -1 amendments, "knowingly" needs to modify both expending money and excesses of amounts. The level of culpability needs to relate both to the expenditure and unauthorized use

		of the money.
315	Chair Shetterly	There is a motion on the -1 amendments and in that motion a conceptual amendment to change "all" to "reasonable."
323	Rep. Prozanski	Did you not want me to suggest putting "knowingly" into the text?
326	Chair Shetterly	It is there.
328	Rep. Prozanski	Where "knowingly" is, it only modifies the expenditure of the money. I thought that "knowingly" needs to drop down to the next line.
334	Chair Shetterly	I just wanted it on the record that it is our intent that it modify both elements.
342	Rep. Starr	<b>MOTION: Moves to ADOPT HB 3539-1 amendments dated 4/11/97 and that the measure be FURTHER AMENDED on page 1, line 24, by changing "all" to "reasonable".</b>
347		<b>VOTE: 8-0</b>
348	Chair Shetterly	<b>Hearing no objection, declares the motion CARRIED.</b>
350	Rep. Starr	<b>MOTION: Moves HB 3539 to the full committee with a DO PASS AS AMENDED recommendation with a subsequent referral to Ways and Means.</b>
356		<b>VOTE: 8-0</b>
362	Chair Shetterly	<b>Hearing no objection, declares the motion CARRIED.</b>
<b><u>HB 2674 - WORK SESSION</u></b>		
367	Chair Shetterly	Opens the work session on HB 2674
371	Bill Taylor	Committee Counsel >explains HB 2674 >discusses collection costs > reads the -1 amendments ( <b>EXHIBIT D</b> )
391	Doug Bray	Deputy State Court Administrator >The -1 amendment addresses our concerns. >This is a compromise which takes the municipal courts out of the Department of Revenue.

		>Municipal or justice court can use a private collection agency to collect in criminal action.
446	Jim Markee	Oregon Collection Association >gets around the due process issues that there were concerns with >brings parties together and works for everyone
<b>TAPE 73, B</b>		
006	Rep. Beyer	I think this is a good bill. I move the -1 amendments into the bill.
009	Chair Shetterly	Is there any discussion?
011	Rep. Prozanski	With the new insertion after line 9, we will see a deferred payment with 20% being assessed. The court will then have the discretion, based on a time frame, whether or not have that as a surcharge.
019	Chair Shetterly	The surcharge is only for the cost of collection.
021	Rep. Prozanski	I just wanted to clarify that.
021	Bray	If you grant the defendant a deferred payment period which they meet, the court will waive the financing charge. If they don't meet the time period, the charge is already there.
026	Rep. Prozanski	We are setting up that if it has to go to collections, the 20% is there. They are going to allow for the 20% to be assessed, but it will be waived if the costs are paid in a timely manner.
039	Chair Shetterly	Maybe that should be "shall" instead of "may" in line 14.
047	Markee	That is a good addition. That was clearly our intention.
050	Rep. Eighmey	Conceptual?
050	Chair Shetterly	Is that agreeable to you, Rep. Beyer?
051	Rep. Beyer	Yes.
052	Rep. Bowman	Regarding the -1 amendment, lines 2-3 how will that decision be made by the court?
062	Rep. Prozanski	There are people who do this in Lane County. Money that should be going to municipalities is going to private collection agencies.
082	Rep. Wells	There will not be any loss to municipalities?
086	Chair Shetterly	That is probably true.
087	Markee	Most often the municipal court isn't going to get a contract that allows for 20%. This 20% is a sharing in the cost between the municipality and the collection agency.

098	Chair Shetterly	Since that is in addition to the fine, there should not be any revenue lost.
101	Markee	Nothing in this bill limits the amount that can be collected. Depending upon the collectability of the fine, the contract may be for more than 20%.
112	Chair Shetterly	The loss will not be 20% of the fine, it will be smaller.
117	Rep. Bowman	I assume the collection of 20% additional charge will not be added until it goes to a collection agency.
122	Bray	No, it will be done at the time of sentencing. Our concern was with adding the amount later.
134	Markee	The judge would impose a fine along with a surcharge, but the surcharge would be waived if the charge was paid on time.
141	Chair Shetterly	The court has no discretion if the fine was paid on time. The surcharge would go away.
142	Markee	The defendant would know that.
144	Rep. Prozanski	The courts will work with the individual in setting the payments. The contract between the court and the defendant is the incentive to stay on the flexible schedule.
161	Chair Shetterly	This bill won't affect Rep. Bowman's constituents, because there are no justice courts.
166	Bray	Actually, that is incorrect.
167	Chair Shetterly	I was wrong. Section 2 applies to everyone.
171	Rep. Bowman	My only concern is with someone trying to make scheduled payments and the courts using this to collect more money.
183	Chair Shetterly	This is only tied to collection costs.
185	Rep. Starr	I understood this as saying collection costs may be incurred by both the court and the collection agencies.
189	Chair Shetterly	Theoretically that could happen.
191	Bray	The state court system uses outside collection agencies. Once payments have been missed and the schedule broken down, the 20% will be collectable.
206	Chair Shetterly	There is a motion on the -1 amendment as conceptually amended.
212	Rep. Beyer	<b>MOTION: Moves to ADOPT HB 2674-1 amendments dated 4/24/97 and that the measure be FURTHER AMENDED on page 1, line 14, by changing "may" to "shall".</b>
213		<b>VOTE: 8-0</b>
214	Chair	<b>Hearing no objection, declares the motion CARRIED.</b>

	Shetterly	
215	Rep. Beyer	<b>MOTION: Moves HB 2674 to the full committee with a DO PASS AS AMENDED recommendation.</b>
217		<b>VOTE: 8-0</b>
218	Chair Shetterly	<b>Hearing no objection, declares the motion CARRIED.</b>
<b><u>HB 2947 - WORK SESSION</u></b>		
225	Chair Shetterly	Opens the work session on HB 2947.
226	Chair Shetterly	Closes the work session on HB 2947.
<b><u>HB 3316 - PUBLIC HEARING</u></b>		
247	Chair Shetterly	Opens the public hearing on HB 3316.
248	Rep. Jo Ann Bowman	<p>State Representative, District 19</p> <p>&gt;This bill creates a civil penalty for falsely registering as a Minority Woman and Emerging Small Business (MWESB).</p> <p>&gt;People certifying as a MWESB without being one dilutes the effectiveness of affirmative action programs.</p> <p>&gt;fines would be additional revenue to expand this program</p>
299	Rep. Uherbelau	Is there some standard or test to determine who is not a minority?
309	Rep. Bowman	One of the best tools is a birth certificate.
313	Chair Shetterly	There are definitions in ORS 200. There is no indication of percentage needed for lineage. Maybe we need to talk with Legislative Counsel (LC).
349	Rep. Bowman	I was not aware of the fraudulent conduct.
350	Chair Shetterly	ORS 200.065 and 200.075 states there are penalties for fraud.
357	Rep. Beyer	This bill is intended to go above and beyond current law.
364	Chair Shetterly	That would be hard to do. Was it your intent to duplicate an already existing law?
365	Rep.	That was not my intent. By working with LC and MWESB we came up with this language. It was my understanding that it is currently not illegal

	Bowman	to register as a MWESB.
377	Chair Shetterly	Reads subsection 1 of ORS 200.
385	Rep. Beyer	Is that speaking of a civil penalty?
387	Chair Shetterly	This bill is speaking of civil.
388	Rep. Eighmey	There is a statement box you sign which subjects you to penalties for falsifying.
400	Rep. Prozanski	It would be nice to know what type of percentage should be used.
407	Rep. Eighmey	I have applied and received status for Hawaiians.
421	Chair Shetterly	Closes the work session on HB 3316.
427	Chair Shetterly	Adjourns the subcommittee at 3:01 p.m.

Submitted by, Reviewed by,

Gina Cross, Sarah Watson,

Administrative Support Office Manager

**EXHIBIT SUMMARY**

**A - HB 2865, proposed amendments (-5 dated 4/16/97), Rep. George Eighmey, 2 pp.**

**B - HB 2327, proposed amendments (-1 dated 4/24/97), Mark Gardner, 1 p.**

**C - HB 2327, written material, staff, 4 pp.**

**D - HB 2674, proposed amendments (-1, dated 4/24/97), staff, 1 p.**

**E - HB 2674, written testimony, James Torrey, 1 p.**