

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

HOUSE COMMITTEE ON LABOR

March 6, 1991Hearing Room D 8:30 a.m.Tapes 53 - 54

MEMBERS PRESENT:Rep. Gene Derfler, Chair Rep. Kevin Mannix, Vice-Chair Rep. Sam Dominy Rep. Jim Edmunson Rep. Rod Johnson Rep. Bob Repine Rep. John Watt

VISITING MEMBER:Rep. Jerry Barnes

STAFF PRESENT: Victoria Dozler, Committee Administrator Johanna Klarin, Committee Assistant

MEASURES CONSIDERED: HB 2091 - Work Session HB 2238-A - Work Session SB 38 - Public Hearing HB 2644 - Public Hearing and Work Session SB 99 - Public Hearing HB 2611 - Public Hearing and Work Session

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TAPE 53, SIDE A

003 CHAIR DERFLER: Calls the meeting to order at 8:31 A.M.

WORK SESSION, HB 2091

Witnesses:Art James, Executive Department Roger Auerbach, Executive Department

014 CHAIR DERFLER: Opens work session on HB 2091.

VICTORIA DOZLER: Summarizes the bill.

020 MOTION: MANNIX: Moves that HB 2091 be referred to the House floor with a "do pass" recommendation.

023 EDMUNSON: What is the Governor's position on this bill?

034 ART JAMES, Executive Department: I do not speak for Barbara Roberts.

REP. EDMUNSON: I am getting mixed signals on this bill. Has your office taken a position on this bill?

053 ROGER AUERBACH, Senior Policy Advisor to the Governor: We are very aware of this piece of legislation and have talked about it with the Executive Department.

-This bill closes the circle in the issue of comparability of the worth of work.

-This specific language is to be considered by arbitrators along with other factors.

-We work hard to create and maintain a system where we are looking at people's salaries based on the comparability of the value of their work.

-We believe that this bill addresses some major issues.

094 REP. DOMINY: Refers to AFCSME's opposition to the bill. The Hay system doesn't account for the risk and danger, or similar work conditions. How do you answer to that, how do we make the Hay system include the elements of risk? Can we include it in this bill or do we need to find some other vehicle to do that?

120 AUERBACH: I am aware of this argument. The Hay system is not a perfect system and the Hay system could be changed to reflect the value of working in a dangerous occupation.

-Market place values influence arbitrators' decisions.

148 REP. MANNIX: Do you want an emergency clause on this bill?

AUERBACH: That would be helpful.

MOTION: REP. MANNIX: Moves that an emergency clause be added to this bill.

The committee has no objections to this motion.

MOTION: REP. MANNIX: Moves that HB 2091, as amended, be referred to the House floor with a "do pass" recommendation.

162 VOTE: The motion carries 5-2.

AYS: Representatives Edmunson, Johnson, Mannix, Watt and Derfler.

NAYS: Representatives Dominy and Repine.

CARRIER: Rep. Edmunson.

WORK SESSION, HB 2238-A

CHAIR DERFLER: Opens work session on HB 2238-A.

179 MOTION: REP. MANNIX: Moves the HB 2238-A to the House floor with a "do pass" recommendation.

VOTE: The motion carries 7-0.

CARRIER: Rep. Dominy.

PUBLIC HEARING, SB 38 (Exhibits A & B)

Witnesses: Marilyn Coffel, Bureau of Labor and Industries. Susan Jordan, Bureau of Labor and Industries Karl Frederick, Association of Oregon Industries Kathy Peck, Attorney Joe Benninghoff, Federation of Oregon School Administrators

CHAIR DERFLER: Opens public hearing on SB 38.

195 DOZLER: Summarizes SB 38.

200 MARILYN COFFEL, Bureau of Labor and Industries: Testifies in favor of the bill (Exhibit A).

-She discusses the case of Bratcher v. Sky Chefs.

-The subjective intent test of the Bratcher case may make sense in the context of intentional tort law, but it is wholly inappropriate to civil rights cases.

-She discusses an example of sexual harassment.

-She discusses other forms of harassments based on race, religion or national origin.

-Even in cases of straightforward employment discrimination, the employer's intent is usually not to force a resignation; it is to discriminate. Applying Bratcher to these cases produces the same unjust results as in cases of sexual or racial harassment.

-This bill is necessary to ensure that we have the statutory remedies in place to guarantee Oregon citizens redress for serious civil rights violations.

294 REP. EDMUNSON: If an employee leaves a job because of intolerable conditions (sexual harassment) and brings a law suit against the employer; she must prove that the purpose of the harassment was to force her to quit?

COFFEL: Yes, if the Bratcher test is applied that would be true.

REP. EDMUNSON: Provides an example where the perpetrator does not want the employee to leave. You are saying that if this person left the job, she would be able to bring a lawsuit and prove it was an intolerable situation whether or not the supervisor wanted her to leave?

COFFEL: That is correct. If she leaves under our current background of law she has redress. If the Bratcher test were held to be true she would not have any redress, because she would have to prove that his intent was to force her to quit.

REP. EDMUNSON: If he testified he did not want her to leave but was enjoying harassing her, that would defeat her claim?

COFFEL: That is correct.

342 CHAIR DERFLER: The gender of these players could be the other way around.

REP. EDMUNSON: I have not seen many cases where the females were the perpetrators. I am not saying that it could not be possible.

COFFEL: We certainly want sex equity.

348 REP. MANNIX: I assume that we are not talking about constructive discharge with regard to any civil tort action other than which is a statutory action under chapter 659 .

COFFEL: That is correct.

REP. MANNIX: Aren't we talking about working conditions that are initiated, encouraged or allowed by the employer?

COFFEL: That is correct.

REP. MANNIX: Could we insert that phrase in here? He provides an example of a bank clerk.

COFFEL: I prefer to have Ms. Jordan answer your question.

378 JORDAN: The employer under the established case law is not going to be held liable if they have no control of that individual.

REP. MANNIX: We are talking about working conditions that are initiated, encouraged and allowed by the employer to exist. Is this fair to say?

COFFEL: That is correct.

400 REP. JOHNSON: What is the rule in the common law now?

-We are putting a statutory overlay over this case law which, in theory, erases the case law. We start interpreting these words. If the words in here don't completely capture the case law rule and all of its nuances, we need to make sure that we put it in here.

JORDAN: This interpretation of constructive discharge is well recognized by the Equal Employment Opportunity Commission (EEOC). Within the federal jurisdiction there is some split of authority on the interpretation.

442 REP. JOHNSON: He refers to the Oregon civil rights handbook with regard to constructive discharge.

TAPE 54, SIDE A

003 -We are going from case law to statutory law and we have to be careful in what we are doing.

-What are the items we need to consider to put in?

014 JORDAN: There is not a laundry list. It is a facts-specific, reasonable person test.

017 COFFEL: Those kind of fact-specific things are found during the investigative process. We can, by rule, delineate some of your concern.

REP. JOHNSON: I am not in the business to pass blank check laws. Before we reschedule this bill for a work session, could you provide us with the items that are in the case law already?

-I am not trying to change the case law. I need to be sure that what we put in the statute does not somehow erase the existing the case law.

COFFEL: We'll provide you that.

046 REP. EDMUNSON: Refers to the Senate staff measure analysis. Reiterates the three elements relating to the tort.

-Suggests inserting "working conditions which the employer deliberately created and maintained" on line 7.

COFFEL: That would be perfectly satisfactorily.

064 CHAIR DERFLER: Why didn't the court agree with the existing law.

COFFEL: The supreme court was dealing with the intentional tort of wrongful discharge. We have no idea why, in those two cases, the court of appeals applied intentional tort standard to a statutory civil rights case.

091 KARL FREDERICK, Vice President and Director, Associated Oregon Industries. Testifies in opposition of SB 38 (Exhibit B).

-The standard articulated by the Bratcher case is not unreasonable.

116 REP. EDMUNSON: Is it your testimony that this test requires that the employee needs to prove only that he/she believes these conditions were unreasonable? Do you disagree with the reasonable person test?

FREDERICK: I disagree with your interpretation of the reasonable person test.

130 KATHY PECK, Attorney: Proves comments with regard to the Seitz case.

-Circuit courts require some type of evidence that the employer intended to force a resignation before they will recognize a constructive discharge. The 3rd and 9th circuits are on the other side.

-This bill talks about whether an employee has the right, without any kind of proof of employer intent, to claim that the resignation was also a termination cause of action.

193 REP. MANNIX: We are talking about two different concepts here 1) tort of wrongful discharge and 2) statutory remedies for civil rights.

-Refers to the testimony by the Department of Labor and Industries--they are not trying to fool around with the wrongful discharge definition in terms of tort actions where people sue employers. They are concerned that it is going to slop over into statutory actions under ORS 659 when someone goes to BOLI with a civil rights complaint. They are saying that for purposes of unlawful employment practices in BOLI, a different standard would apply where one doesn't get involved in figuring out what someone's state of mind is. Do you have a problem with that separate theory?

214 PECK: It is a simplification to say that the Bratcher case was a tort case and does not apply here. There are different theories of discrimination, some require a proof of evidence and some not. The ones we are talking about are generally intentional discrimination cases.

-She discusses workers' compensation and handicap discrimination.

247 REP. EDMUNSON: Is the reasonable person test different than the subjective belief employee test?

PECK: It would be.

REP. EDMUNSON: Please define the differences. I don't read this bill to be the employee's own perception.

PECK: If in a bench trial a judge were to decide that this person (the employee who decided to resign) was not reasonable, that person would not be declared constructively discharged under this bill.

REP. EDMUNSON: Even if they believed in their mind that this was the worst of the worst?

PECK: That is true.

270 EDMUNSON: Under the federal law, in Oregon, the employees need not prove the intent of the employer.

PECK: Correct.

281 Rep. Edmunson and Ms. Beck further discuss the Bratcher case.

301 REP. EDMUNSON: What about the employer who discriminates but doesn't want the employee to leave? I am not after any occasional, innocent, bad taste action. Shouldn't this law be extended to cover the really bad actors?

PECK: I don't share that concern.

346 REP. EDMUNSON: Discusses the Seitz case. You mentioned that it would be irrelevant for an employer to get up and testify whether or not they intended to discharge.

PECK: It would not be an effective defense.

REP. EDMUNSON: If the employer would testify having harassed the employee and having made conditions intolerable but not wanting her to go, that would be relevant and actually defeat the claim?

PECK: Yes if the jury believed that.

REP. EDMUNSON: They wouldn't be allowed to, wouldn't they?

PECK: If some type of evidence of intent is required and if they believed the employer, you are right.

374 REP. EDMUNSON: Doesn't that counter the whole idea that the policy of civil rights in employment is to prevent harassment on the job?

PECK: That woman would not give up the right to bring that claim. She maintains the right to bring a claim concerning the way she was treated, if she wasn't promoted, if she was subjected to sexual harassment. That is an independent statutory claim.

-We are just talking about whether damages for termination should flow

when the employer did not intend to force the person to resign.

REP. EDMUNSON: If the woman proves outrageous harassment and leaves her work as a result of it. Are you saying that there is another civil rights statute that allows her to bring a claim for the loss of her job?

394 PECK: There would be independent claims.

410 Rep. Edmunson and Ms. Peck continue their discussion with regard to the damages the employee would be allowed to recover.

TAPE 53, SIDE B

003 REP. JOHNSON: Refers to the two different scenarios that Rep. Edmunson presented. What are the differences in the damages?

010 PECK: In a case where there is evidence that the employer intended to force the person to resign, the person would be entitled to back wages, reinstatement and attorney fees.

-If the employer committed a violation but it did not consist of forcing the person to resign, there would not be back wages or reinstatement of pay.

028 JOE BENNINGHOFF, Federation of Oregon School Administrators and Oregon School Boards Association: Expresses concern about additional prolonged litigation for the employers which could stem from the passage of this bill.

041 REP. MANNIX: Expresses concern for the gray area in the unlawful employment practices. Have you considered applying a certain standard for civil rights purposes only?

BENNINGHOFF: We have not looked into it on that level.

PUBLIC HEARING, HB 2644 (EXHIBITS C & D)

Witnesses: Ronald Anderson, Department of Higher Education Bill Byrne, University of Oregon Rick Brooks, University of Oregon Mike Belotti, University of Oregon

CHAIR DERFLER: Opens public hearing on HB 2644.

060 VICTORIA DOZLER: Describes the bill.

078 RONALD ANDERSON, Assistant Vice Chancellor for Personnel Administration,

Department of Education: Testifies in favor of HB 2644 (Exhibit C).

-The administrative impact is negligible.

086 BILL BYRNE, Athletic Director, University of Oregon: Testifies in favor of HB 2264 (Exhibit D).

RICK BROOKS, Head Football Coach, University of Oregon: The problem with acquiring a retirement for most coaches is that they are not in any particular institution long enough to participate and accrue the benefits of a long-term retirement system. Relates this to his own experience.

-This bill would allow taking the same retirement plan from one university to another.

120 MIKE BELOTTI, Assistant Football Coach, University of Oregon: Reiterates the previous testimony.

-There are approximately 130 colleges participating in this plan nationwide.

140 BYRNE: This is an advantage to an Athletics Director when hiring people. We can attract new coaches since they can bring their funds with them. This plan would be an advantage to the university. It would not cost us anything.

150 REP. WATT: Why would there be opposition to this?

BELOTTI: We don't know of any.

152 BROOKS: We have encountered a lot of red tape.

REP. WATT: Is this being initiated in California now?

BROOKS: Yes.

169 REP. DOMINY: What would be the possible revenue impact?

BROOKS: The maximum allowed now by the IRS is the same as any 401K plan. Most coaches cannot contribute that much.

182 REP. REPINE: How does this relate to campus professors?

BROOKS: Discusses tenure track on the university campuses.

WORK SESSION, HB 2644

214 CHAIR DERFLER: Opens work session on HB 2644.

MOTION: REP. REPINE: Moves that HB 2644 be referred to the House floor with a "do pass" recommendation.

VOTE: The motion carries 7-0.

CARRIER: Rep. Peter Courtney.

PUBLIC HEARING, SB 99

Witnesses: Carolyn Smith, State Employees Benefit Board. Michael Ray, Commission for the Blind Jack Young, Commission for the Blind

238 CHAIR DERFLER: Opens public hearing on SB 99.

240 VICTORIA DOZLER: Describes the bill.

257 CAROLYN SMITH, State Employees Benefit Board: Testifies in opposition of SB 99.

-Discusses the impact that self-paid groups have on the state of Oregon benefits. The cost impact of this group is minimal but we are looking at a much bigger picture of all of the self-paid groups that are coming

into our plan and increasing the premiums as a result of that.

269 REP. REPINE: What are those other groups?

SMITH: OLCC Liquor Agents, the Foster Parents and COBRA continuers.

281 CHAIR DERFLER: So this increases the rate for everyone else?

SMITH: That is correct.

283 REP. EDMUNSON: You are concerned about a precedent. Is it true that these benefits are offered to persons who contract with the Oregon Liquor Control Commission?

SMITH: Yes.

REP. EDMUNSON: So the precedent has already been established.

SMITH: Yes.

REP. EDMUNSON: Since the precedent has already been established. Any suggestions what we should do about it?

SMITH: We have testified against it all along. I cannot address how to stop it at this point other than making our concerns known.

294 MICHAEL RAY, Commission for the Blind: Testifies in favor of the bill.

-This bill would extend medical coverage and retirement benefits to certain blind Oregonians associated with the state, so that they could have the equivalent benefits of their peer state worker.

-He outlines the functions of the Commission.

-If this bill fails, blind Oregonians will lose many of their employment options.

-This has no additional cost to the state.

345 REP. REPINE: By drawing the correlation between your Commission and the OLCC, are you trying to address the issue presented by Ms. Smith?

RAY: Yes.

360 CHAIR DERFLER: How would you address the opposition? It is going to cost somebody if more people are entering the system requiring more services.

RAY: I don't know what the records show as to what it might cost.

CHAIR DERFLER: Can one buy the same benefits, at the same price, on the open market?

RAY: I believe not.

375 JACK YOUNG, Administrator, Commission for the Blind: Offers possible compromising language by amending the bill to say "a percentage of the individuals concerned would have to participate in this program."

390 REP. DOMINY: Lets not assume that blind people have higher or more medical costs that other people.

YOUNG: Your assumption is correct.

418 REP. MANNIX: Are there any other groups who are similarly situated?

SMITH: Yes, foster parents and OLCC agents.

REP. MANNIX: Among the OLCC agents do we have a minimum percentage participation requirement?

SMITH: No we don't.

441 REP. MANNIX: With regard to the suggestion of having the percentage with the blind people, is it because of the size of the group or the nature of the group?

SMITH: Neither one. We concerned about adding a self-paid group at all.

TAPE 54, SIDE B

010 REP. MANNIX: Are the only reasons for the differentiation that this is a small and self- paid voluntary participation group. The reason is not being blind. You are concerned that people who buy into the group have greater medical needs. Is that correct?

SMITH: Self-paying is the only issue.

025 REP. DOMINY: We'll later have other groups wanting to join.

031 REP. EDMUNSON: We are prohibited from granting privileges to a group of citizens that are not extended to other similarly situated groups. We have to provide access to this program to all similarly situated groups. If the proposal is that there be enough people in that group joined before anyone is allowed to take advantage of this program, would that satisfy your concern?

044 SMITH: It doesn't remove our concerns by any means but addresses it much better.

REP. EDMUNSON: We might actually do something to improve the situation that you have been objecting to all these years.

SMITH: That is correct.

048 REP. MANNIX: Any kind of health insurance program has a minimum participation requirement. I am surprised that the state doesn't. Have you thought how you would change the law to require minimum participation?

SMITH: Our current eligibility rules define what an eligible employee is. The groups who have come to us on a self-paid basis do not need that definition and have been given an exception to be treated as an employee for insurance purposes only.

REP. MANNIX: Concurs with Rep. Edmunson concerning the minimum participation requirement.

067 REP. REPINE: We need to assess the history of the participation level of those other groups so that we are not carving somebody out.

072 CHAIR DERFLER: Could you bring us information concerning greater costs for these individuals?

SMITH: Yes.

074 YOUNG: Suggests applying section 2 (1), language delineating the groups, to section 2 (2) also for retirement purposes.

PUBLIC HEARING, HB 2611 (EXHIBIT E)

Witnesses: Jerry Barnes, State Representative Walter Crews, Oregon State Deputy Legislative Affairs Representative for Non Commissioned Officers Association.

CHAIR DERFLER: Opens public hearing on HB 2611.

089 REP. JERRY BARNES, DISTRICT 62: Describes the bill.

-Discusses discrimination with regard to acquiring a state job.

-Provides historical background information.

-Discusses retainer pay.

-Discusses patriotism as it relates to this issue.

-Discusses the concept of what determines who is considered a veteran.

180 WALTER CREWS, Master Sergeant, United States Air Force Retired, Oregon State Deputy Legislative Affairs Representative for Non Commissioned Officers Association: Testifies in favor of HB 2611 (Exhibit E).

-Provides statistical information with regard to retired military personnel.

-Discusses his own personal experience.

-Who is more deserving--the one-term service person or the retiree who has served five or more terms.

-Passage of this bill would remove this unfair discrimination against a group of veterans.

228 REP. MANNIX: I don't understand this artificial separation. Should we, on a long term, eliminate the veterans preference altogether? I am referring to the modern military where everybody has quite a high education.

REP. BARNES: This would not be such a big problem in terms of discrimination.

-Oregon has not treated its veterans as well as other states, provides an example.

-We have two sets of veterans, one recognized by the federal government for their lengthy service, and another recognized by the state of

Oregon.

-I would have no problem in eliminating it.

REP. MANNIX: I am not talking about any immediate future. I agree that if we have a preference we should not discriminate.

WORK SESSION, HB 2611

296 CHAIR DERFLER: Opens work session on HB 2611.

MOTION: REP. REPINE: Moves that HB 2611 be moved to the House floor with a "do pass" recommendation.

CHAIR DERFLER: I have served in the military and twenty years in the reserves and I don't personally feel that I am owed anything.

BARNES: I agree with you. My point is lets not discriminate with what we have.

CHAIR DERFLER: I agree if we give it to one, we should give it to the other too.

VOTE: The motion carries 6-0. EXCUSED: Representative Johnson.

CARRIER: Representative Barnes.

316 REP. EDMUNSON: Does the federal law have this restriction in it?

BARNES: No.

REP. EDMUNSON: So this state law becomes consistent with the federal law.

330 CHAIR DERFLER: Adjourns the meeting at 10:30 a.m.

Submitted by: Reviewed by:

Johanna Klarin Victoria Dozler Assistant Administrator

EXHIBIT LOG:

A - Testimony on SB 38 - Marilyn Coffel - 3 pages.
B - Testimony on SB 38 - Karl Frederick - 5 pages.
C - Testimony on HB 2644 - Ronald Anderson - 15 pages.
D - Testimony on HB 2644 - Bill Byrne - 6 pages.
E - Testimony on HB 2611 - Walter Crews - 3 pages.