

SENATE COMMITTEE ON LABOR

February 13, 1991 Hearing Room 50 03:00 p.m.
MEMBERS PRESENT: SEN. GRATTAN KERANS, CHAIR SEN. LARRY HILL,
VICE-CHAIR SEN. PETER BROCKMAN SEN. BOB KINTIGH SEN. BOB SHOEMAKER

Tapes 14 -15

STAFF PRESENT: ANNETTE TALBOTT, COMMITTEE COUNSEL ROBERTA WHITE,
COMMITTEE ASSISTANT MEASURES CONSIDERED: SB 45 - MINIMUM WAGE (PUBLIC
HEARING) SB 37 - LIQUIDATED DAMAGES (PUBLIC HEARING)

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.

TAPE 14, SIDE A

001 CHAIR KERANS called the meeting to order at 3:05 p.m.

002 MOTION: CHAIR KERANS moved for reconsideration of vote which sent
SB 54. to the floor with a "do pass" recommendation. VOTE: Hearing no
objection, the motion carries. SENATOR KINTIGH: What is the reason?
KERANS: There were some conformity or clarification amendments from
Legislative Counsel, and then also some concern that we want to examine
in greater detail the prospects and liabilities of self-insurance for
SEBB and BUBB, and whether that's been thought out to its fullest.

SB 45 - MINIMUM WAGE, PUBLIC HEARING WITNESSES: MARILYN COFFEL,
DIRECTOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF LABOR AND INDUSTRIES
PAUL TIFFANY, ADMINISTRATOR, WAGE AND HOUR DIVISION, BUREAU OF LABOR AND
INDUSTRIES Senate Committee on Labor - February 13, 1991- Page 2

020 MARILYN COFFEL, DIRECTOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF
LABOR AND INDUSTRIES (EXHIBIT A) > Details Exhibit A.

ANNETTE TALBOTT, COUNSEL, SENATE COMMITTEE ON LABOR: For purposes of
clarification, the SMS had an error at the end of the first paragraph.
You should strike after "and violations of...." In addition, there is a
hand-engrossed version of SB 45 (EXHIBIT B) to make the language
consistent.

SB 37 - LIQUIDATED DAMAGES. PUBLIC HEARING

WITNESSES: MARILYN COFFEL, DIRECTOR, INTERGOVERNMENTAL RELATIONS,
BUREAU OF LABOR AND INDUSTRIES PAUL TIFFANY, ADMINISTRATOR, WAGE AND
HOUR DIVISION, BUREAU OF LABOR AND INDUSTRIES MIKE McCALLUM, OREGON
RESTAURANT ASSOCIATION

117 MARILYN COFFEL, DIRECTOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF
LABOR AND INDUSTRIES (EXHIBIT B) > Details Exhibit B.

168 CHAIR KERANS: Where do the civil penalties apply now?

PAUL TIFFANY, ADMINISTRATOR, WAGE AND HOUR DIVISION, BUREAU OF LABOR AND
INDUSTRIES: Under child labor law, the civil penalties go to agency to
cover the cost of enforcement, under the farm labor contractor act and
the private employment agencies and the radio/TV, they go to the general
fund. Under the farm worker camp, they go to the housing agency.

SENATOR HILL: Is there a standard definition for liquidated damages?

COFFEL: I'm not sure.

TIFFANY: I think we define it when we say that liquidated damages in an amount equal to the unpaid wages.

SENATOR HILL: Why not say a civil penalty or a penalty. Liquidated damages sounds like it has legal existence.

SENATOR SHOEMAKER: He is raising exactly the question that was in my mind. Liquidated damages as a legal concept is a computation of damages which is agreed by the parties or imposed as measuring the actual amount of damages suffered. It avoids the necessity of proving those damages. We provide that an employee who isn't paid should be paid. Now, has he suffered additional damages beyond that? If not, it's not really liquidated damages we're talking about. I guess I would be wondering if we would be setting this thing up for a legal challenge that might be successful? If we call it what it is, which is a civil penalty that is payable to the employee, in addition to which there is a civil penalty payable to the state, we may avoid that problem. Senate Committee on labor February 13, 1991 - e 3

214 TIFFANY: In fact there are two different references that way. Wage Collection Law, 652.150, the penalty for failure to pay employees when they terminate, is called a civil penalty. In the Prevailing Wage Law for failing to pay the prevailing wage, I think it's 279 .356, and in 279.334, which is the overtime requirement under prevailing wage, they call those liquidated damages. And under the federal law they call them liquidated damages. So I'm not adverse to any wording we want to use. SENATOR SHOEMAKER: It may be that this verbiage has already been tested under the federal statute withstood the test. 228CHAIR KERANS: We're talking about liquidated damages, however, accrued to the injured party. Here the liquidated damages accrue first to the agency for the cost of collecting them, and then to the Common School Fund under your proposal, so the person damaged doesn't receive them. Don't you think we ought to call it a civil penalty. SENATOR SHOEMAKER: If I read this bill correctly, there are two different things. There are liquidated damages, which are paid to the employee, under sub (d), and there is in addition to that, a civil penalty to both. TIFFANY: Section 1 of the bill sets up a liquidated damages clause for accrued to the employee when the employer fails to pay minimum wage or overtime wages that are due that person. Section 3 of the bill sets up the civil penalty for failure to comply with certain sections of the minimum wage law itself, and the civil penalty actually would not accrue when the minimum wage provisions are violated. We're not proposing that because there's already a penalty. 275 CHAIR KERANS: You've got a narrow window of opportunity for civil penalty, what you are trying to do in Sub (d) is try to enlarge the window for everybody. All circumstances, no matter how situated, you want what you describe as liquidated damages could also be described as additional civil penalties. TIFFANY: That's correct. KERANS: As a hammer on them to say themselves - I've got a choice: I can stiff these people, and when BOLI catches up with me, I'll pay them. Or, I can stiff these people, and when BOLI catches up with me I'm going to pay 100% penalty. COFFEL: That's correct. KERANS: Plus, if some of them were already terminated, you might decide to assess a civil penalty for those cases. COFFEL: That's correct. 292 TIFFANY: In the case of X employees, there is the civil penalty of one day's wages up to 30 days that would accrue to them if they file a wage claim. If they don't file a wage claim those civil penalties don't accrue. The

liquidated damages would go to all employees who are currently working who have not filed wage claims. . Senate Committee on Labor February 13, 1991- P - e 4

300 KERANS: Now you've confused me. Wouldn't you have given them their back wages?

TIFFANY: We've given their back wages, and the employer would be liable to them in the amount equal to their unpaid wages as liquidated damages. What typically happens in an investigation that we do, we'll investigate an establishment and find 5 employees due wages. We'll calculate those wages and ask the employer to pay. Normally, as part of our regular process, if they pay the wages, and agree to comply in the future, we drop it. That's the end of it, we don't go any further. If we are required to go on and enforce it through legal action, then of course we would tack on all penalties the law allows. In this case, that would be the liquidated damages.

CHAIR KERANS: Now you're going to tell me that would go to the employee.

TIFFANY: That would go to the employee, that's correct.

CHAIR KERANS: What sums would go to the common school fund?

TIFFANY: None of the amounts suggested as penalties under Section 1 would go to the school fund, unless we couldn't find the employee.

329 CHAIR KERANS: Where are we going to send some money to the common school fund?

ANNETTE TALBOTT, COUNSEL, SENATE COMMITTEE ON LABOR: The sums collected under Section 3 on page 2, line 21, it says all sums collected to that Section. So, only those pursuant to sub 3, would go to the common school fund after their administrative expense.

378 CHAIR KERANS: You would also be paid your court costs in collecting this from the employer. If you are unable to locate the employee, the liquidated damages would go to the common school fund.

TIFFANY: That's right, along with the unpaid wages.

SENATOR HILL: A more likely scenario than employees who are deceased are employees you can't locate. You could still levy penalties for those two employees who were underpaid? Is that right?

TIFFANY: First we would have to prove that in fact wages are due. Once proven that the wages are due, we could then request liquidated damages under this section. Then the hearings officer, if Senate Bill 45 passes, or the Court would then award the wages or liquidated damages as they see fit.

414 COFFEL: ~ Continues to detail Exhibit B.

TAPE 15, SIDE A 009 SENATOR BROCKMAN: Under minimum wage law, what would be a non-monetary violation? . Senate Committee on Labor February 13, 1991- Page 5

COFFEL: If they didn't meet some employment conditions. If they disregarded discrimination prohibitions, or didn't meet posting requirements.

020 COFFEL: > Continues to detail Exhibit B. 035 MIKE McCALLUM, OREGON RESTAURANT ASSOCIATION (ORS) > Opposes the portion of the bill that extends additional civil penalties. It is not in line with 11 the federal government does regarding minimum wage law and overtime standards. > If the committee feels that the civil penalties are just, the ORA would request additional language be added which would encompass wilful violations. We think that in fact there are record-keeping violations that can occur that could be subject to sanctions civilly under the proposed law, and we don't believe that wouldn't be the intent of the law and might be too severe.

057 CHAIR KERANS: You're saying that you cannot find in the federal statute civil penalties for the areas which the Bureau is here asking for authority.

McCALLUM: For the additional penalties that's correct.

CHAIR KERANS: I'm worried about someone who does not put up publications that the produces.

McCALLUM: That's our exact concern.

102 CHAIR KERANS: (Requests BOLI personnel to return to stand for further questions.) How do you prove wilful?

COFFEL: I'll let Paul answer that. But first, I would like to say that we need to have all our facts in order. We're not concerned with harassing the employers, there is just that little segment out there.

128 SENATOR HILL: We've got this misdemeanor penalty, and you're proposing that the violation be treated as a civil violation with a civil penalty. There is a due process provided in the Oregon Statutes for civil penalties of this kind.

COFFEL: That's correct.

SENATOR HILL: For those sections you're arguing for the civil penalty, why don't we strip those sections from coverage with the misdemeanor violation penalty?

144 TIFFANY: I don't know. What's to keep some private attorney from doing that? Somebody we don't know about might have an egregious problem and decide to do that.

SENATOR HILL: But how could a private attorney initiate a DA's prosecution?

160 TIFFANY: I mean file a claim with the DA.

. . . Senate C_ oa L~bor February 13,1991- Page 6

CHAIR KERANS: Let's get back to the original question of wilful. Can we, and do you elsewhere, use the term of wilful, knowingly, or other kinds where it's overt and in fact intentional.

TIFFANY: For purposes of prevailing wage law and employment purposes and debarment purposes, we have to prove wilful failure or refusal to pay the prevailing wage.

163 CHAIR KERANS: But that's a civil process.

TIFFANY: That's a civil process, and I'm not sure what the actual wording is in the other statute, although you could look it up real fast. How we deal with wilfulness is in our rules. We will set up criteria, when we determine whether or not we are going to assess a civil penalty at all. One of the criteria that we have is whether or not the violation was "intentional and wilful". We have criteria that we set up that we follow in every case where we deliberate on a civil penalty.

170 TALBOTT: You use wilfully fails to pay wages in the Section 653.150 where we talk about discharged or quit. TIFFANY: That's right. We have to prove wilfully. CHAIR KERANS: I have problems with in record keeping, posting requirements, and your own administrative rules of letting somebody, not you, come along and hammer somebody for one of these things when it wasn't wilfull or deliberate. TIFFANY: Would you feel the same way about discharging and discriminating against employees? KERANS: No. There's active damage done to people. I would like to take a look at your language in your own OAR to see what that is as far as your case determination practice. We will have counsel take a look at that. I would like to go to the Chair of the Judiciary Committee and say, here's what we've done, and we've put this further threshold in front of that in statute, and ask if they still need to see it since two members of that committee give their seal of approval to it here, and then send it on. SENATOR HILL: I believe that any bill that calls for a civil penalty must go there. TALBOTT: I think this session that is particularly true because there is a large omnibus bill on trying to equalize civil penalties throughout. 307CHAIR KERANS: Introduces February 13 Memorandum which introduces new LC drafts (EXHIBIT E). MOTION: CHAIR KERANS moves the LC drafts in block as outlined in Exhibit E. VOTE: Hearing no objections, the motion carries.

These minukr contain nuteriels which perAph~se and/or - rnn~rue st~ :rnents made during this session. Only text enclosed in quo - don rarrke report a ~pehlcer'~ exect words. Por cornplete contents of the proceedi gs, please refer to d" tepes. Senate Committee on Labor February 13, 1991 Page 7

356 The meeting was adjourned at 4:00 p.m.

Submitted by: Reviewed by: Roberta White Annette Talbott
Assistant Committee Counsel

EXHIBIT LOG: A - Testimony on SB 45 - Marilyn Coffel - 6 pages B - Hand-Engrossed Version of SB 45 - Staff- 2 pages C - Amendments to SB 45 - Legislative Counsel - 1 page D - Testimony on SB 37 - Marilyn Coffel - 36 pages E - Introduction of Committee Bills - Staff - 1 page F - Staff Measure Summaries on SB 45 and SB 37 - Staff - 2 pages G - Fiscal Analysis on SB 37 - Legislative Fiscal Office - 1 page