SENATE COMMITTEE ON LABOR

April 199 1991 Hearing Room 50 03:00 p.m. Tapes 66 - 67
MEMBERS PRESENT:SEN. GRATTAN KERANS, CHAIR SEN. LARRY HILL, VICE-CHAIR SEN. BOB KINTIGH SEN. BOB SHOEMAKER MEMBER EXCUSED: SEN. PETER BROCKMAN STAFF PRESENT: ANNETTE TALBOTT, COMMITTEE COUNSEL ROBERTA WHITE, COMMITTEE ASSISTANT MEASURES CONSIDERED: SB 741- EMPLOYMENT APPEALS BOARD - WORK SESSION SB 39 - FAMILY MEDICAL LEAVE - WORK SESSION

These minutes contain materials which paraphrase and/or summarize statements made during this session. Onlv text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 66, SIDE A

001 CHAIR KERANS calls the meeting to order at 3:14 p.m.

WITNESSES: RENEE MASON, CHAIR, EMPLOYEE APPEALS BOARD SB 741- EMPLOYMENT APPEALS BOARD - WORK SESSION

008 RENEE MASON, CHAIR, EMPLOYEE APPEALS BOARD > 0n line 18, after the word "fact", please include "or inference" since their findings of fact are also based on inferences. 046 MOTION: CHAIR KERANS moves the amendments be approved.

VOTE: Hearing no objections, the motion carries. Senator Brockman is excused.

MOTION: SENATOR SHOEMAKER moves the bill as amended to the floor with a "do pass" recommendation.

VOTE: Hearing no objections, the motion carries. Senator Brockman is excused TAPE 66, SIDE A Senate Commrttee on Labor April 19, 1991 Page 2

SB 39 - FAMILY MEDICAL LEAVE - WORK SESSION

WITNESSES: MARILYN COFFEL, ADMINISTRATOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF LABOR AND INDUSTRTES KELLY HAGAN, BUREAU OF LABOR AND INDUSTRIES FRANK BRAWNER, OREGON BANKERS' ASSOCIATION

067 ANNETTE TALBOTT, COMMITTEE COUNSEL: > 0utlines the amendments to the bill. > Presents definitions of care facilities. 087SENATOR SHOEMAKER: If health care facilities include hospitals and hospices, is it appropriate that we name them as well as health care facilities, or should we simply refer to health care facilities or talk about "or other" health care facilities? CHAIR KERANS: Let's say "or other". TALBOTT: > Continues to outline the changes made by the amendments. CHAIR KERANS: What we want to do is say that we get 12 weeks for any family member, but we may have 12 weeks for another family member. SENATOR SHOEMAKER: Well, it's 12 weeks for any family member or members. That's what you get for your family. TALBOTT: > It's no more than 12 weeks per two-year period. > Continues to outline the changes made by the amendments. 151 MOTION: CHAIR KERANS moves the adoption of the "-5" amendments as amended.

VOTE: Hearing no objections, the motion carries. Senator Brockman is excused.

159 MOTION: CHAIR KERANS moves the adoption of the "4" amendments.

VOTE: Hearing no objections, the motion carries. Senator Brockman is excused. 162 CHAIR KERANS: We took the position regarding sick leave for school employees that supersedes the statute regarding school employee sick leave. Is that correct? MARILYN COFFEL, DIRECTOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF LABOR AND INDUSTRIES > It's our opinion, and our rules interpret the statute, that a person may take sick leave or other paid leave during a leave of absence. We're going to treat this the way we did with parental leave, and that there is not difference between the two as to the authority of this statute if 39 is passed, in relationship to that. . . Theae minutes contain materials which paraphrase and/or summarize ataternenta made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceed ~gs, please refer to the tapes. . Senate Committee on Labor April 19, 1991 - P - e 3

193 SENATOR SHOEMAKER: It seems to me that we had some discussion that as the bill lays it out, a serious health condition that includes any physical condition that requires constant home care could thus include flu. There was some thought that we weren't really trying to get at a mother staying home with her child who has some childhood ailment where you could hire someone else to be there. It doesn't really require the mother's attention. It was not intended that this reach that situation. COFFEL: This bill was drafted to respond to a serious health condition. We do not believe, nor was it our intent to provide leave for short term childhood illness care. That remedy is contained in a bill in the House. This is for an ongoing, chronic or terminal health condition. SENATOR SHOEMAKER: So we need to fix that so that we don't, by oversight, include that. CHAIR KERANS: I think we do it by definition. So what do we do in order to say that? 233 KELLY HAGAN, BUREAU OF LABOR AND INDUSTRIES > I think the senator's point is well taken. > Subsections 2 a, b, c and d are in the alternative, to the extent that "constant home care" could be interpreted to include a childhood disease, I suppose there is a problem. > With the addition of "or" at line 21, I believe it makes a, b, c and d alternative tests. SENATOR SHOEMAKER: Each to the other, and that is not what is intended. TALBOTT: I think that it is. On line 18 it's saying that a "serious health condition means", and the word "serious" is used there and would apply to both a, b, c and d. So "serious" would actually be one requirement of a, b, c or d. CHAIR KERANS: We do understand this to be four separate tests. COFFEL: Yes. CHAIR KERANS: "Serious health condition" - this is circular then. The a, b and c are clearly self-limiting, those are major situations. But d represents a circular problem. SENATOR SHOEMAKER: Let me suggest a way to get out of this. "Serious health condition" means that injury, disease or condition which either poses an eminent danger of death or is terminal in prognosis, and which requires in-patient care at a health care facility or requires constant home care. 281 CHAIR KERANS: Now you have danger of death, terminal in prognosis, where you've got to get a doctor to say that the meningitis is terminal in order to take care of the child under constant home care. SENATOR SHOEMAKER: I thought that's what they said they wanted. The in-patient care and the home care both were qualifiers of the eminent danger of death determiner. What you say is either eminent danger of death, terminal in prognosis, or requires in-patient care. The in patient care could be for a condition which is neither terminal or in eminent danger of death.

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TALBOTT: That's correct.

292 SENATOR SHOEMAKER: That could still be a serious health condition.

CHAIR KERANS: Why don't we split that out - d is "any serious health condition of a mental or physical nature which requires constant home care", would that do it?

TALBOTT: The biggest concern is that we want to make sure that "d" really relates to something that is serious, not like the common cold. So if you say "any serious mental or health condition, while it seems repetitive, it would make clear that "d" is still something that has to be serious.

COFFEL: It does seem a little circular, but if it would answer Senator Shoemaker's concerns, that would be acceptable to us because we want to tie that down.

321 CHAIR KERANS: What we need to talk about mental or physical conditions which require constant home care and define those as being serious, acute or chronic problems of a significant nature. Something that's bigger than a cold and lesser than terminal. COFFEL: Maybe if we said any mental or physical condition that requires constant medical home care, such as an assigned nurse. SENATOR KINTIGH: Is the word "grievous" a possibility? KELLY HAGAN: Perhaps the solution to the problem is already contained in the existing language. If the distinction we're trying to make here is between mere custodial, on-the premises, being home with the sick child situation, and one which requires constant home care, I think the original intent was to describe this condition as one which requires constant care, not one which requires someone to be home with the child. 392 SENATOR SHOEMAKER: Strike the word home. What difference does it make where the care is? TALBOTT: I would like to make clear for the record that it is the medical condition which necessitates the care, not the age of the ill person. CHAIR KERANS: Let's strike the word "home" on line 22 by consensus. That will give us both the record here and the words there to show that we are talking about something that is a "mental or physical condition that requires constant care, not mere custodial care, or some presence, but rather some constant medical or attention to someone who is suffering a grievous physical or mental condition". Is that your understanding? COFFEL: Yes.

TAPE 67, SIDE A 011 SENATOR SHOEMAKER: I'm a little uncomfortable with "c", which requires in-patient care at any health care facility. That could be a nursing home or intermediate care nursing home . . . These minutes contain materials which paraphrase and/or summanze statements made during this #ssion. Orlly text enclosed in quotation marks repon a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. Senate Committee on Labor April 19, 1991- Page 5

which doesn't really require the family be there, and those things can go on for a long time. I don't think you're trying to reach that either. COFFEL: Part of the purpose of the leave is not to turn the family member into an amateur nurse, but to allow them the time for such as placement in nursing homes or care facilities. That is one of the major

purposes to this bill. It's not a matter of whether they're spoon feeding or providing medication to this person, but whether or not they are going to be allowed the leave time to arrange for this sort of care in one of those placed. 023 SENATOR SHOLMAKER: That is reasonable, but what might not be reasonable is for someone to take advantage of this and use up to twelve weeks because your mother's in a nursing home.

COFFEL: This leave is unpaid unless you have some type of paid sick leave, etc.

031 SENATOR SHOEMAKER: But it's using up accumulated sick leave and all kinds of things that you might not otherwise use, so it is subject to abuse it seems to me by those who want to take advantage of it. I think we have to do our best to try to protect against that. COFFEL: The abuse of those kinds of leaves is usually limited by the amount of leave that is accrued to these people. Individuals for the most part can't afford to take lengthy periods of unpaid leave, nor do most folks in the work place take undue advantage of these leaves. 058 CHAIR KERANS: The employer would have the rebuttal to say that it is not life threatening or terminal, but it is a serious medical condition. HAGAN: > The only purpose for having an explanation, a requirement for it to be contained in the notice, is to make sure that abuses are avoided. > If the employee is spending their time doing something other than providing care of the family member, assuming that includes things like arranging for custodial care, placement in a facility and so forth, then I think that's right. There may be disputes about what is necessary for the care of that family member. I don't know that we can screw this down any tighter. 089 SENATOR SHOEMAKER: I think we're okay. We have the legislative history. > Let me offer a broadening amendment. On line 17, add "parent-in-law", recognizing that very often we will have the wife taking care of father-in-law. 107 MOTION: SENATOR SHOEMAKER moves the additional amendment to the bill be adopted. VOTE: Hearing no objection, the motion carries. 113 SENATOR HILL: There is nothing in the bill that requires a continuation of health benefits that are not otherwise provided for under the benefit package. COFFEL: No, there is nothing in the bill that states that.

121 SENATOR HILL: I think that the bankers brought up a couple of issues that ought to be looked at again. One is that the ability to provide alternative/equivalent jobs that are within a certain distance. Twenty miles was the distance. I think that an equivalent job does not need to be at the same workplace. It could be at a workplace within reasonable distance.

COFFEL: We did discuss that amendment with the Oregon Banker's Association. Certainly there can be an accommodation as to job site within a reasonable distance. 136 CHAIR KERANS: What does that reasonable accommodation encompass? SENATOR SHOEMAKER: Between lines 24 and 29 on page 2.

SENATOR HILL: The language that the bankers provided was as used in this section: an equivalent job means an available position with the same compensation, terms, conditions, authority and status as the former job. The equivalent job must be located either at the same job site as the

former job, or if an equivalent job is not available at the former job site, at an alternative location within twenty miles of the former job site. The bill doesn't currently have a definition of "equivalent" job.

158 COFFEL: I didn't come prepared to discuss the issue of "equivalent" job. We've got definitions within the Rules already existing in parental leave and pregnancy leave. This would be quite different from the Administrative Rules.

SENATOR HILL: Quite different?

COFFEL: Quite different.

CHAIR KERANS: What do the Rules say?

168 HAGAN: Equivalency under the pregnancy and the parental leave statute has been defined by Rules since 1988 to include the same job site. And in addition to the criteria outlined in the banker's amendment, job shift is also included. So this would be a departure with use of the term "equivalent" as employed in those other two acts. CHAIR KERANS: The question is to consider the amendment of the job site within the radius of twenty miles, and BOLI is now telling us that the equivalent job definition in the Rules relative to pregnancy and parental leave, "equivalent" encompasses only at the same location and the same shift. That's not the case?

198 FRANK BRAWNER, OREGON BANKERS' ASSOCIATION > That is the case. The bill that is in the house addresses the to the same extent that we've proposed here. 212TALBOTT: There is a difference in the language that Mr. Brawner proposed, as opposed to the language that currently defines equivalent job in OAR 839-078-05 (15). The difference is that there are several terms used in the OAR that are not included in Mr. Brawner's. That includes "shift" and "job site" as the former job. Those are not in Mr. Brawner's amendment, so those could be added in order to make it parallel to the current language. I would suggest that we use _ . . These minutes contain materials which paraphrase and/or summarize atateracata made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceed ~gs, please refer to the tapes. . . . Senate Committee on Labor April 19,1991- Page 7

the OAR language, and just add the reference "or at an alternative location within 20 miles of the former job site". That would make sure that it paralleled.

CHAIR KERANS: Is that something you can live with?

236 COFFEL: I want to make sure that we are talking about the same compensation, the same shift. 243 HAGAN: As long as it is clear to the committee that the alternative job location is also equivalent in all respects.

COFFEL: That's satisfactory. 261MOTION: CHAIR KERANS moves the adoption of the amending language to SB 39.

VOTE: Hearing no objection, the motion carries.

285 SENATOR HILL: Mr. Brawner also suggested other amendments. One of the ones I underlined would make the family medical leave not allowable if another family member has a leave, it would also address the issue of

people who have a spouse at home, or family member at home already providing care. I don't think our intent is to extend the protection when it's not necessary for them to take leave. That's what we're trying to avoid by preventing the duplication of leave by the two spouses or two family members. 361 BRAWNER: We're attempting here to take care of the situation where one of the spouses is working for a company of 25 or more employees, and the other one is not covered. If two spouses are working for covered employers, there is a control as to how much family leave may be taken. We have that same circumstance with parental leave and pregnancy leave. The point is, should someone working for an uncovered employer be counted? Our contention is it should.
388 TALBOTT: The issue is if one party to the family works for a firm with more than 25 persons and the other one works for a firm with less than 25, that is the issue where he says there would be a difference. He doesn't see that there is a reason to make that distinction, whether they are covered or not covered. 405 BRAWNER: When one employee is covered and one is not, they have an advantage over the two spouses that are both covered.

TAPE 66, SIDE B

005 SENATOR HILL: If it's a two parent family, if we include the language "or is otherwise available to care for the family member", and the respite care is necessary and the housewife is burned out because she has been caring for the sick dependent for three weeks, and is therefore unavailable to care, then the protection kick in and the working spouse can take protected leave because the stay-at-home spouse is not available for a period of time, and there apparently would have to be determination of what is available and what is unavailable. In any case, I think we have to recognize the fact that in a case where there are two working partners, and a case where you have one working partner, the family with one working partner has an advantage under the language as we have it now. There is no limitation on the use of family leave by the working - These minutes conbin materials which paraphrase and/or summarize statemenb mate 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. Senate Committee on Labor April 19, 1991- Page 8

partner, even though the stay-at-home partner is constantly available or available much of the time for the care.

030 CHAIR KERANS: If in fact, there is someone giving care, and they become incapable of giving care, and then require the covered employee to come home and care for the ill member, that would be permitted wouldn't it?

BRAWNER: We would want it permitted under those circumstances.

048 SENATOR SHOEMAKER: On page 2, line 4, after subparagraph 3, it should read as follows: "where the family member suffers from a serious health condition which is not life threatening or terminal, the employer is not required to grant an employee family medical leave of absence during the period of time in which another family member is otherwise available to care for the family member." We don't need to make a separate reference to family medical leave of absence, it confuses things.

067 COFEEL: Are we going to be defining "available" in our rules?

CHAIR KERANS: Yes, and make sure it's sufficient. Counsel suggests that if we want to get to the uncovered as to the covered, then her earlier suggestion of taking out the four words on line 6, page 2, "pursuant to this section", is satisfactory to accomplish the end desire. If we want to go beyond that and have a more liberal approach, and adopt the language as we've suggested, using Mr. Brawner's language as amended by Senator Shoemaker which would allow for equality between the two spouse covered and the one spouse covered, with the exception that we would then be taking into consideration the availability of the uncovered spouse, or the person who is home as the homemaker. I would stick with what we've got because it seems more rational, and probably more humane, then to simply say you can't take it if there is someone else not pursuant to the subsection.

111 SENATOR SHOEMAKER: On line 28 of page 1, define "necessary care" to include the situation where a family member is needed to provide this kind of family care to somebody who is seriously ill. That would take care of this problem of having somebody else available or unavailable. CHAIR KERANS: Why don't we let them define "available" within the limits of what we decided we want to do, and we'll stand on "available" as easier to define, as opposed to "necessary", which I think is more cliffficult. 127MOTION: CHAIR KERANS moves the language just read be incorporated into the SB 39. VOTE: Hearing no objection, the motion carries. SENATOR SHOEMAKER: What about these amendments which are pretty reasonable. I don't think that they're moving us beyond what we're talking about - it permits the employer and employee to agree on a different job which may be a promotion or something different. It permits legitimate business reasons to be taken into account with explanations.

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139 SENATOR HILL: There's the broader ability in these amendments for the employer to adjust the return. It allows that the employer and employee may agree to a different job. In sub (b), it allows the employer, due to legitimate business reasons, to not restore the employee to the former job, but to an equivalent job. I'm not sure what that means. It might mean a lay-off occurred, I'm not sure and I would like to understand that better.

CHAIR KERANS: We've already said that the "employer's circumstances have so changed the employee cannot be reinstated to the former equivalent job, the employee should be reinstated to any other position that is available that is suitable". Does that not parallel track with the other legislation? 157COFFEL: That is correct. I would really have cliffficulty agreeing to these because sub (a) for instance, I know that most employers are responsible, but we do deal with some employers where coercion might enter into it. Certainly I have no idea exactly what, nor do we have legitimate business reasons - the language in the current bill as drafted parallels the language in parental leave and in the pregnancy discrimination law, and the test that we have going right now all relate to that, and I think would be confusing for us to administer, and confusing for employers to have very different tests in these sections of the statutes that are so similar. 171 SENATOR HILL: The employer and the employee could agree for the employee to return to a different job, even with the protection, isn't that correct? COFFEL:

That's certainly correct, especially if it was a better job. There is nothing in this law that would prohibit them from agreeing for the employee returning to a superior position. SENATOR HILL: My point is that you come back from caring for a sick child and you decide you don't want to work a full shift, you want to work a half shift, and you choose to take a different job, and you reach agreement with the employer to take a different job because that's your preference. It may not be equivalent to the job you left, but it may be what the employee wants. That could be done - that agreement could be reached, regardless of this protective legislation. 194 HAGAN: The law is not self-executing. There must be a complaint. These rights are personal to employees. They can be waived. SENATOR HILL: So the employee could waive these and agree with the employer to take a different job, to take an inferior job or reduced shift, or something. CHAIR KERANS: If they agreed to do that. A defense against a complaint would be that we agreed to do this by virtue of the conditions which were just stated. There's nothing to prevent them doing that is there? 208 HAGAN: No, there isn't. The wise employer will protect themselves with a written waiver, whatever rights the employee might somewhere down the line try to assert. But in theory, there's nothing to prevent people from waiving the statute. BRAWNER: A wise employer would ask counsel if they could come to such an agreement and review the statute and the rules and say, it is not permitted. That's our concern. If in fact you

can come to an agreement as we discussed, then can't we just say we can come to an agreement in statute. I understand that it takes a complaint, but the promotions aren't being offered because counsel will review the statute and review the rules and say, it's not there. 224 SENATOR SHOEMAKER: If they agreed to a different job, wouldn't that have caused the employer's circumstances to have changed so that the employee cannot be reinstated to his former job? BRAWNER: Not necessarily. The employee may be promoted, but the job is still there. There are all kinds of circumstances in our business that would change it. The job may still be there, and may still be held for that person to return. I'm saying that we have on the record now that you can come to agreement with the employee, and elsewhere, your coercion, if it did occur, they have all types of opportunities to respond to that. I'm saying that our employers are telling us that they will not reach an agreement with an employee, they will do everything they can to meet the letter of the law, and the rules, and that is not a possibility. HAGAN: The circumstances that are being addressed by Senator Hill, where the employee, because of changed life circumstance wants to make an adjustment in their work life, is a situation which naturally leads to changed job situation which is a demotion in some sense that accommodates employee situation. What has been a problem in the past, and perhaps the problem to which Mr. Brawner is so sensitive, is that it has been the experience of some employees that they will be approached with an alternative to their full rights within the statute, and to that extent are coerced into accepting less than their full rights under the statute. The situations are entirely different. In one case, the employee wants their old job back, and in the other case they want a different situation. If Mr. Brawner was correct that employees could not agree to waive their rights under the statute, some of the agreements would be impossible. SENATOR HILL: And some of the agreements are possible with this language. 264 HAGAN: The

Bureau currently recognizes waivers of statutory employment rights, in writing, and waiving all rights arising from employment. We encourage the private settlement of disputes, and it's done. SENATOR HILL: If that's the case, and there is a waiver, how do you know there wasn't coercion in that waiver? If the employer takes the record of this testimony on its face value and says, yes, we can negotiate something different, let's assume it's a good faith situation and there is an agreement, how do you know that wasn't coerced from your position? HAGAN: In order for a settlement agreement to be valid, there would have to be considerations supporting it. There would have to be an employment dispute of substance, in which both sides were giving up at least the possibility of some liability. SENATOR HILL: So, they can waive their rights. HAGAN: Yes, if the agreement is supported by consideration in writing, if there is not extraneous information about being coerced.

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SENATOR HILL: Then what difference would it make one way or the other if we say they can agree in statute, or we say it in record?

HAGAN: Because you have to have an employment dispute. What the recommended agreement does is invite a return to work at less than the full reinstatement rights otherwise afforded.

324 CHAIR KERANS: If a waiver is signed, what would it take to overcome this to demonstrate duress? I would assume a significant amount of evidence.

HAGAN: That is correct. . CHAIR KERANS: I would personally rather leave it there than to begin to deal with it in statute. > We will see how they do with the rules, see what relief you might get, and go from there. We certainly have the record of this committee without objection, my analysis of the circumstances.

384 MOTION: SENATOR HILL moves SB 39 as amended to the floor with a "do pass" recommendation. VOTE: In a roll call vote, the motion carries, with Senator Kintigh voting NAY, and Senator Brockman excused.
401 The meeting is adjourned at 4:35 p.m.

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

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