

MINUTES OF THE MEETING
LABOR & EMPLOYMENT RELATIONS COMMITTEE
MONTANA STATE SENATE

March 8, 1983

The meeting of the Labor Committee was called to order by Chairman Gary C. Aklestad on March 8, 1983, at 1:00 p.m. in Room 404, State Capitol.

ROLL CALL: All members of the Committee were present.

CONSIDERATION OF HOUSE BILL NO. 525:

Chairman Aklestad introduced Representative Paul Darko, sponsor of House Bill No. 525, to the Committee and Representative Darko presented the bill to the Committee.

House Bill No. 525 is an act to establish a defense to a complaint of employment discrimination when an employer is observing the terms of a bona fide collective bargaining agreement, seniority system, or employee benefit plan.

PROPONENTS OF HOUSE BILL NO. 525:

Anne MacIntyre, Staff Attorney for the Human Rights Commission, gave the Committee background on the bill.

A. MacIntyre stated that this bill is viewed by the Human Rights Commission as a bill that benefits employers in some situations. She urged that House Bill 525 Do Pass.

A. MacIntyre presented a letter to the Committee from John Frankino, Chairman of the Montana Human Rights Commission, in support of House Bills 525 and 554. This letter is attached. (Exhibit No. 1)

LeRoy Schramm, representing the Montana University System, stated that they are in support of House Bill 525. They would like to have the same language inserted by the Senate that was inserted by the House--the collective bargaining agreement language.

OPPONENTS OF HOUSE BILL NO. 525:

George Allen, representing the Montana Retail Association, stated that they oppose House Bill No. 525. They feel this bill is unfair to a young management trainee because the anti-age discrimination provision prevents the natural advancement of young employees. Mr. Allen's printed testimony is attached. (Exhibit No. 2)

George Allen submitted a proposed amendment to House Bill 525. He stated that this amendment addresses just the Management Personnel, and, if this amendment is adopted, they could support the bill. This amendment is attached. (Exhibit No. 3)

Joe Thares, representing Mountain Bell, stated that they oppose House Bill No. 525. He stated that it creates problems for them with their management pension plan.

QUESTIONS FROM THE COMMITTEE ON HOUSE BILL NO. 525:

Senator Lynch: Hasn't the Supreme Court outlawed any discrimination because of age?

Anne MacIntyre: As the law exists, it prohibits mandatory retirement at any age.

Senator Keating: Why do we need this bill?

Anne MacIntyre: The language that is in this bill is in the government Fair Code Practices, but it is not in the Human Rights Act. The language is similar to language in the federal law.

At this point in the hearing, Anne MacIntyre presented a case involving Mary Dolan versus School District No. 10, Deer Lodge, Montana. This document is attached. (Exhibit No. 4)

Senator Lynch asked Mr. Allen if we weren't asking for a lot of court cases by putting this amendment in the bill.

Mr. Allen stated that everyone must retire at age 70 under federal law.

Staff Attorney, John MacMaster, orally submitted some suggested amendments at this point in the hearing.

LeRoy Schramm stated that the federal law is age 70, but the law does not force retirement--it allows it.

Representative Darko made closing comments in support of House Bill 525. She stated that the federal law and state law will never be the same, but will be more compatible if this bill makes it through the Committee.

If House Bill 525 passes Committee, Senator Chris Christiaens will carry the bill on the floor.

Chairman Aklestad called the hearing closed on House Bill No. 525.

CONSIDERATION OF HOUSE BILL NO. 554:

Chairman Aklestad introduced Representative Ramona Howe, sponsor of House Bill No. 554, to the Committee and Representative Howe presented the bill to the Committee.

House Bill No. 554 is an act to transfer functions regarding maternity leave from the Commissioner of Labor and Industry to the Commission for Human Rights.

Representative Howe stated that House Bill 525 was requested by the Human Rights Commission, and they are trying to eliminate the duplicate system for handling complaints, which would be a relief to taxpayers.

PROPONENTS OF HOUSE BILL NO. 554:

Anne MacIntyre, representing the Human Rights Commission, stated that they support House Bill No. 554. She feels that this bill provides benefit to employers.

OPPONENTS OF HOUSE BILL NO. 554: None were present at the hearing.

QUESTIONS FROM THE COMMITTEE:

Senator Keating: Do you want to delete the provisions for retaliation in section 4?

Anne MacIntyre: There is already a provision against retaliation in the Human Rights Commission so there would be a duplication.

Senator Gage asked about the repealed sections of the bill.

Dick Kane from the Labor Standards Division explained these sections to the Committee. They are procedural and the Human Rights Commission law has substantially the same procedure.

Senator Goodover: Mr. Kane, were you in favor of transferring this from Labor to Human Rights two years ago?

Dick Kane: I don't believe we were in favor of it at that time.

Senator Goodover: What makes this bill more palatable now than two years ago?

Dick Kane: There should be a remedy, but there is a duplication of effort in some cases.

Senator Aklestad: How many of these cases of complaints do you have where you have had a duplication of effort?

Anne MacIntyre: We haven't been able to identify how many duplications of effort there have been. I would say approximately one-half are heard in the Department of Labor as well as in the Human Rights Commission.

Senator Goodover: This bill didn't pass two years ago. What real problems have you had in the past two years?

Dick Kane: I am aware of at least two cases and there may be more.

Anne MacIntyre: From a recent perspective at least one case is pending in both the Department and the Commission. The Department's decision is not binding on the Commission.

Senator Goodover: Would this bill have eliminated these cases if it had been in effect?

Anne MacIntyre: Yes, it would have.

Senator Gage: If your Department was investigating both maternity and sex discrimination allegations is there a possibility that the fact that you would be handling both of those have an effect on your decision on either claim?

Anne MacIntyre: I don't think it would, not usually.

Senator Goodover: If you don't have the Department of Labor to consider and the decision goes to you where does the employer stand?

Anne MacIntyre: We would conduct our own investigation of the allegation.

Representative Howe made closing comments in support of House Bill 554 and urged its passage by the Committee.

If House Bill 554 passes Committee, Senator Chris Christiaens will carry the bill on the floor.

Chairman Aklestad called the hearing closed on House Bill No. 554.

CONSIDERATION OF HOUSE BILL NO. 270:

Chairman Aklestad asked Representative Jerry Driscoll, sponsor of House Bill No. 270, to present the bill to the Committee.

House Bill No. 270 is an act allowing a person who is temporarily totally disabled under Workers' Compensation laws to use wage credits from employment prior to the disability for purposes of unemployment benefits eligibility.

PROPONENTS OF HOUSE BILL NO. 270:

Susan Mohr, representing the Department of Labor, stated that they are in support of House Bill No. 270. She stated that this bill does not affect a lot of people, but it is an important bill for those that it does affect. The bill gives an option of going back to using the base period of when their disability occurred. She stated that a few other states have this similar provision in their law.

Jim Murry, representing Montana State AFL-CIO, stated that they support House Bill 270. Mr. Murry's printed testimony is attached. (Exhibit No. 5)

Senator John Mohar, representing Senate District 11, Libby, Montana, spoke in support of House Bill 270.

OPPONENTS OF HOUSE BILL NO. 270: None were present at the hearing.

QUESTIONS FROM THE COMMITTEE ON HOUSE BILL NO. 270:

Senator Lynch: One line 6 of the title, is compensation supposed to be changed to benefits?

Senator Goodover: That was the unemployment benefits that such change is to be made in.

Senator Goodover: Was this same bill before us two years ago?

Representative Driscoll: I think you are referring to Senate Bill 64 which was total disability. (Note by MacMaster: It was Senate Bill 52)

Senator Galt: Is there any time limit he can have on total disability?

Representative Driscoll: The bill states 18 months.

Senator Keating: Was there no way to come up with a fiscal note on this bill?

S. Mohr: Just the study for seven people. I don't know how many people tried to apply for wage benefits.

Senator Aklestad: Under this bill you would be able to draw for 18 months?

Representative Driscoll: No. Within 18 months they must be healed or have filed for unemployment benefits.

Senator Keating: This bill really has to do not with whether they draw unemployment compensation, but how much they draw.

Representative Driscoll: No. It decides if they get unemployment or not and has nothing to do with how much.

Representative Driscoll stated that if House Bill 270 passes Committee, Senator Mohar will carry the bill on the floor.

Chairman Aklestad called the hearing closed on House Bill No. 270.

ACTION ON HOUSE BILL NO. 157:

Senator Lynch moved that House Bill No. 157 Be Concurred In. On a voice vote, the Committee voted unanimously with the exception of Senator Goodover who was excused, that HOUSE BILL NO. 157 BE CONCURRED IN.

Senator Manning will carry House Bill No. 157 on the floor.

ACTION ON HOUSE BILL NO. 201:

Senator Lynch moved that House Bill No. 201 Be Concurred In. On a voice vote, the Committee voted unanimously with the exception of Senator Goodover who was excused, that HOUSE BILL NO. 201 BE CONCURRED IN.

Senator Blaylock will carry House Bill No. 201 on the floor.

ACTION ON HOUSE BILL NO. 277:

Two amendments to House Bill No. 277 were submitted to the Committee by Staff Attorney, John MacMaster. These amendments are attached. (Exhibits No. 6 and 7)

Senator Lynch moved that the second set of amendments (Exhibit No. 7) Do Pass. On a voice vote, the Committee with the exception of Senator Goodover who was excused, voted unanimously to adopt the amendments.

Staff Attorney, John MacMaster, presented an amendment submitted by Representative Robert Ellerd at the hearing on March 3, 1983. J. MacMaster explained the change in the amendment to the Committee. This amendment is attached. (Exhibit No. 8)

Senator Galt asked about the signs required by the amendment.

Gary Blewett from the Workers' Compensation Division of the Department of Labor stated that they would have signs distributed through the insurer. They would work with each industrial group affected by it

Senator Keating made a substitute motion that on the last line of paragraph 4 the words, "is guilty of a misdemeanor" be deleted and insert the words, "subject to a fine of \$50 for each citation".

Senator Aklestad: Where does this sign have to be posted?

Gary Blewett: The language in the bill allows some discretion, but it says, "where employee notices are normally posted".

Mr. Blewett stated that he believes this can be accomplished within their present budget.

Senator Keating: What court would this be heard in?

Anne MacIntyre: Most misdemeanors can be charged in Justice of the Peace Courts.

Senator Lynch moved that the amendment to House Bill 277 proposed by Senator Keating be adopted. The Committee voted unanimously, with the exception of Senator Goodover who was excused, to adopt the amendment as amended.

Senator Lynch moved that the Statement of Intent be amended to reflect the language relating to signs. The motion carried unanimously, with the exception of Senator Goodover who was excused, to amend the Statement of Intent.

Senator Lynch moved that House Bill No. 277 Be Concurred In as Amended. On a Roll Call Vote, the Committee voted 6-1 that HOUSE BILL NO. 277 BE CONCURRED IN AS AMENDED. Senator Goodover was excused and not present for the vote. The Roll Call Vote is attached.

ADJOURN: There being no further business before the Committee, the meeting was adjourned at 2:30 p.m.



Senator Gary C. Aklestad, Chairman

ROLL CALL

LABOR

COMMITTEE

48th LEGISLATIVE SESSION -- 1983

Date 3/8/83

[illegible]

STANDING COMMITTEE REPORT

March 8, 1983

MR. **PRESIDENT:**

We, your committee on **LABOR & EMPLOYMENT RELATIONS**

having had under consideration **HOUSE** Bill No. **157**

Driscoll (Manning)

Respectfully report as follows: That **HOUSE** Bill No. **157**

BE CONCURRED IN

~~XXXXXX~~

STANDING COMMITTEE REPORT

March 8,

1983

MR. **PRESIDENT:**

We, your committee on **LABOR & EMPLOYMENT RELATIONS**

having had under consideration **HOUSE** Bill No. **201**

Addy (Blaylock)

Respectfully report as follows: That **HOUSE** Bill No. **201**

BE CONCURRED IN

~~XXXXXX~~

STANDING COMMITTEE REPORT

March 8

1983

MR. PRESIDENT

We, your committee on LABOR & EMPLOYMENT RELATIONS

having had under consideration HOUSE Bill No. 277

Smith (Lynch)

Respectfully report as follows: That HOUSE Bill No. 277

third reading, be amended as follows:

1. Title, line 8.

Following: line 8

Insert: "WHO ARE NOT CONTRACTING FOR AGRICULTURAL SERVICES TO BE
PERFORMED ON A FARM OR RANCH"

2. Title, line 9.

Following: line 9

Insert: "REQUIRING EMPLOYERS TO POST SIGNS GIVING NOTICE OF EMPLOYER'S
COVERAGE AND PROVIDING A FINE;"

3. Page 2, line 12.

Following: "contractors"

Delete: "."

Insert: "and who are not contracting for agricultural services to be
performed on a farm or ranch."

~~DOXWEX~~

(Continued)

HC

4. Page 2, line 23.

Following: "contractor"

Insert: "and ~~who is not~~ contracting for agricultural services to be performed on a farm or ranch"

5. Page 3, line 8.

Following: line 8

Insert: "(4) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment regardless of whether the location is temporary or permanent and includes the place of business or property of a third person while the employer has access to or control over such place of business or property for the purpose of carrying on his usual trade, business, or occupation. The sign will be provided by the division, distributed through insurers or directly by the division, and posted by employers in accordance with rules adopted by the division. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."

And, as so amended
BE CONCURRED IN
"STATEMENT OF INTENT ATTACHED"

STANDING COMMITTEE REPORT

March 8

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MR. PRESIDENT

We, your committee on LABOR & EMPLOYMENT RELATIONS COMMITTEE

having had under consideration Statement of Intent, HOUSE Bill No. 277

Respectfully report as follows: That Statement of Intent, House Bill No. 277
be amended as follows:

1. Statement of Intent, line 23.

Following: line 23

Insert: "It is also the intent of the Legislature that the Division will provide employers with signs and determine an economical and convenient method of distribution and disposal of such signs through insurers when the employer is properly covered under one of the three compensation plans or when a policy is cancelled in accordance with 39-71-2205, MCA, or through the Division directly when a policy is cancelled in accordance with 39-71-2307, MCA, when self-insurance status is revoked in accordance with 39-71-2105, MCA, when an employer is exempt from coverage under this chapter, or when an employer lacks coverage and has been ordered to cease operations in accordance with 39-71-507, MCA, and that the Division will maintain procedures to control the distribution and disposal of such signs to prevent their improper use and to accomodate the changing coverage employers may have from time to time."

And, as so amended,

~~DO NOT~~

BE CONCURRED IN

11C.

SENATE COMMITTEE LABOR

Date 3/8/83 House Bill No. 277 Time 2:30

NAME	YES	NO
TOM KEATING, VICE-CHAIRMAN	✓	
JACK GALT	✓	
PAT GOODOVER	absent for vote	
DELWYN GAGE	✓	
CHET BLAYLOCK	✓	
JOHN LYNCH	✓	
DICK MANNING	✓	
GARY AKLESTAD, CHAIRMAN		✓

Margaret Nichols
Secretary

Gary C. Aklestad
Chairman *mm*

Motion: Senator Lynch moved that House Bill 277
Be Concurred In as amended.

Motion passed 6-1.

(include enough information on motion--put with yellow copy of committee report.)

March 8, 1983

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

VISITORS' REGISTER

[illegible]

(Please leave prepared statement with Secretary)



HUMAN RIGHTS COMMISSION

STATE OF MONTANA

TED SCHWINDEN, GOVERNOR
(406) 449-2884

ROOM C-317, COGSWELL BUILDING
HELENA, MONTANA 59620

March 8, 1983

The Honorable Gary C. Aklestad, Chairman
Labor and Employment Relations Committee
Senate
Capitol Station
Helena, MT 59620

Dear Chairman Aklestad:

House Bills 525 and 554 are before this Committee today at the request of the Montana Human Rights Commission.

The Commission has requested Raymond D. Brown, Administrator and Anne L. MacIntyre, Staff Attorney to speak in support of these bills on behalf of the Commission.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "John Frankino".

John Frankino
Chairman
Montana Human Rights Commission

JLF/tg

Mr. Chairman and Members of the Committee:

My name is George Allen and I represent the Montana Retail Association. I am here today to oppose House Bill #525.

It appears to me that this bill is not needed. The age discrimination problem is already addressed in our existing Montana Law. Please refer to Montana code 49-2-303 in which it says:

(1) It is an unlawfull discriminatory practice for:

(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, marital status, color, or national origin or because of his age, physical or mental handicap, or sex when the reasonable demands of the position do not require an age, physical or mental handicap or sex distinction.

This seems to give the employee ample protection.

We have serious problems with this bill on line 22. It says , "no seniority system or employee benefit plan may require the retirement of an employee because of his age."

In other words, an employee could work to one hundred years of age if he chose to and the employer would have nothing to say about it. Yet the Federal law requires retirement at age 70.

Most companies have management retirement programs that are participated in by both management, management trainees, and the company. Their retirement programs are geared to a specific retirement date. This bill would prevent the company from implementing the retirement program.

We feel this bill is unfair to the management trainee who is looking for and working for advancement. If top management is allowed to stay in their jobs for ever, the opportunity to advance up the management ladder is seriously restrained.

We feel this is a bad bill and should not be concurred in.

Respectfully Submitted,

GEORGE E. ALLEN
Executive Vice President
Montana Retail Association

AMENDMENT TO H.B. 525 (3d Reading Copy)

At Page 1, Line 24, delete the "." after the word "age" and add the following:

, unless such employee has attained at least
* > seventy years of age or, in the case of an em-
ployee who is sixty-five years of age, has for
the two year period immediately before retire-
ment been employed in an executive or high policy
making position and is entitled to an immediate
non-forfeitable annual retirement benefit from a
pension, profit sharing, savings or deferred com-
pensation plan of an employer, or any combination
of these benefits, which totals in the aggregate
at least 27,000.00 Dollars.

S T A T E R E P O R T E R

Box 749
Helena, Montana

VOLUME 38

NO. 80-435

MARY DOLAN,

Plaintiff and Respondent,

v.

Submitted: Sep. 16, 1981

Decided: Nov. 12, 1981

SCHOOL DISTRICT NO. 10, DEER LODGE
COUNTY, Anaconda, Montana et al.,

Defendants and Appellants.

SCHOOLS AND SCHOOL DISTRICTS, Appeal regarding Mandatory Retirement Provision for Teachers, Whether the Human Rights Act repealed the Mandatory Retirement Law for Teachers, Whether the District Court abused its Discretion by not reducing a Backpay award for Illegal Discrimination by payments received from Social Security, Montana Teachers' Retirement System and the Western Conference of Teamsters' Pension Fund--DISCRIMINATION

Appealed from the Third Judicial District Court, Deer Lodge County, Hon. Arnold Olsen, Judge

For Appellants: Radonich and Brolin, Anaconda

For Respondents: John Albrecht, Choteau
Mike Greely, Attorney General, Helena

For Amicus Curiae: Smith Law Firm, Helena

Mr. William Brolin argued the case orally for Appellants;
Mr. Albrecht for Respondent; Mr. Chadwick Smith for Amicus Curiae.

Opinion by Justice Morrison; Chief Justice Haswell and Justice Daly, Harrison, Sheehy, Shea and Weber concurred.

Reversed and remanded.

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School District No. 10, Defendant and Appellant
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Mr. Justice Morrison delivered the Opinion of the Court.

Appellant, School District No. 10 (hereafter School District), appeals from the findings of fact, conclusions of law and declaratory judgment entered by the Third Judicial District Court on July 16, 1980.

In 1971, the Montana Legislature enacted section 20-4-203, MCA, which provides that:

"Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher shall be deemed to be re-elected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of employment as that provided by the last executed contract with such teacher, unless:

". . . (2) the teacher will attain the age of 65 years before the ensuing September 1 and the trustees have notified the teacher in writing by April 1 that his services will not be needed in the ensuing school fiscal year, except that the trustees may continue to employ such a teacher from year to year until the school fiscal year following his 70th birthday."

In 1972, the Board of Trustees of the School District, Anaconda, Deer Lodge County, adopted Board Policy No. 405.4 which states:

"Retirement

"a. As prescribed by the School Laws of Montana.

"b. The Board of Trustees will exercise the option to require the retirement of all teachers at the age of sixty-five (65) as per School Laws of Montana (75-6103)."

Thereafter, the School District required the retirement of all teachers and principals when they reached the age of 65.

Mary Dolan, respondent, was a tenured principal at W. K. Dwyer Elementary School, of the School District. In March of 1977, Mary Dolan received notification that, as a result of her being age 65, her services in the ensuing school year would cease. This termination was accomplished by a majority vote of the Board of Trustees in accordance with section 20-4-203(2), MCA, and Board Policy No. 405.4.

Mary Dolan sought a redetermination by the Board of Trustees and also personally appealed to the school district superintendent. Neither action resulted in a reversal of the Boards' decision to retire Dolan. Dolan then filed a discrimination complaint with the Human Rights Commission on May 3, 1977. The Human Rights Commission determined that section 20-4-203(2), MCA, permitting mandatory retirement at age 65, was a statutory exception to the proscriptions against

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discrimination contained in Title 49, Chapters 2 and 3, popularly titled the Human Rights Act. Therefore, the Human Rights Commission determined that no age discrimination existed regarding the mandatory retirement of Mary Dolan.

On May 26, 1977, Dolan filed a "Complaint for Declaratory Relief and Injunctive Relief" against the Board of Trustees requesting that the Board be restrained from effecting her retirement; that she be given a contract for the ensuing year; that the District Court declare the rights and legal relations of Mary Dolan; that section 20-4-203(2), MCA, be declared unconstitutional.

The District Court, heard the request for injunctive relief on June 1, 1977. On June 8, 1977, the District Court denied the request based on the finding that Mary Dolan would not suffer irreparable harm, damage or injury.

The request for declaratory relief was heard by the District Court, on March 31, 1980. Three witnesses were called.

William Alexander, M.D. a psychiatrist whose qualifications were stipulated to, testified that people do not age at the same rate and that after examination, he determined that Mary Dolan was capable of performing her job. Alexander also testified that in his expert opinion mandatory retirement ages are arbitrary and that forced retirement often causes people severe emotional difficulties. During examination of Alexander, counsel for the School District stipulated that Mary Dolan's qualifications and capabilities were not contested.

Mary Dolan testified that she was capable of continuing to work as principal and capable of handling the job. She also testified, on cross-examination, that she received teachers' retirement benefits and teachers' union benefits. She also stated that following her termination in 1977, she had obtained employment, first as a teacher in Warm Springs and later as the director of Copper Village Art Center.

The School District called superintendent of the district, Daniel Marinkovich. He testified concerning implementation of mandatory retirement. Marinkovich testified that to his knowledge the policy had been administered without exception.

The cause was submitted and the District Court, after receipt of proposed findings from the parties, declared that section 20-4-203(2), MCA, violated the equal protection and due process clauses of the Montana and United States Constitution, and that the mandatory retirement provision, section 20-4-203(2), MCA, was repealed by the adoption of sections 49-2-303(1) and 49-3-201, MCA, (1979). The District Court found that Mary Dolan would have earned \$76,914.31 had she continued working as principal. She actually earned from other employment, the sum of \$25,688 in the period following her termination to the time of trial. The District Court offset these earnings but refused to offset amounts Mary Dolan received as retirement benefits. The court awarded Mary Dolan backpay in the amount of \$51,246.31, plus costs and

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interest at the rate of 10 percent.

Appellant raises the following issues for review:

1. Whether Title 49, the Human Rights Act, section 49-1-101, et seq., MCA, repealed the Mandatory Retirement Law for teachers, section 20-4-203(2), MCA?
2. What is the proper standard of review to be applied in assessing the constitutionality of section 20-4-203(2), MCA?
3. Whether the District Court erred in declaring that section 20-4-203(2), MCA, was unconstitutional?
4. Assuming section 20-4-203(2), MCA, does not abridge a fundamental right or affect a suspect classification, whether that statute bears a rational relationship to a legitimate state interest?
5. Whether section 20-4-203(2), MCA, violates the due process clauses of the 1972 Constitution of Montana and the Fourteenth Amendment to the United States Constitution because it creates an irrebuttable presumption that persons 65 years or older are not qualified as principals?
6. Whether the District Court abused its discretion by not reducing a backpay award for illegal discrimination by payments received from social security, Montana Teachers' Retirement System and the Western Conference of Teamsters' pension fund?

We find that disposition of issues one and six is determinative. This appeal can be decided, not on constitutional grounds, but rather through statutory construction. In reaching this conclusion, we are guided by the "... well-settled law that a court will not pass upon the constitutionality of any Act of the legislature unless it is absolutely necessary to a decision of the case". *State v. King* (1983), 28 Mont. 368, 277, 72 P. 657, 658. Such necessity is lacking in this case.

In 1971, the Montana legislature enacted section 20-4-203, MCA, dealing with teacher tenure and rehiring in the Montana school system. Pursuant to this statute, the Board of Trustees of the School District adopted Policy No. 405.4 mandating the retirement of all teachers and principals after their 65th birthday.

In 1974 and 1975, the legislature enacted Title 49, Chapters 1-3 (Human Rights Act). This legislation, comprehensive in scope, prohibits discrimination in many facets of the lives of Montana citizens. The format of the Human Rights Act establishes all-encompassing prohibitions against discrimination with extremely limited and specific exceptions to such prohibitions.

Regarding discrimination in employment, the subject of this appeal, section 49-2-303, MCA, provides that:

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"(1) It is an unlawful discriminatory practice for:

"(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his . . . age"

Additionally, section 49-3-201, MCA, pertaining specifically to state and local governmental agencies, provides that:

"(1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote personnel on the basis of merit and qualifications without regard to . . . age"

Respondent, Mary Dolan contends that section 20-4-203(2), MCA, the mandatory retirement provision, irreconcilably conflicts with sections 49-2-303(1)(a) and 49-3-201(1), MCA, the later-enacted statutes. Therefore, section 20-4-203(2), MCA, must be considered impliedly repealed.

At the outset, this Court recognizes that repeals by implication are not favored. *London Guaranty & Accident Co. v. Industrial Acc. Board* (1928), 82 Mont. 304, 266 P. 1103. We also note that Title 49 is general legislation, of which one facet concerns the area of employment whereas section 20-4-203(2), MCA, is a special statute which specifically deals with the area of employment for school teachers and principals. This Court also acknowledges the existence of conflicting rules of statutory construction with regard to this particular situation. Generally, where statutes irreconcilably conflict, the latest statute supersedes the prior enactment. *State v. State Board of Land Commissioners* (1960), 137 Mont. 510, 353 P.2d 311. However, where general statutes and special statutes are involved, special statutes normally prevail over general. *Teamsters, Etc., Local 45 v. Montana Liquor Con. Bd.* (1970), 155 Mont. 300, 471 P.2d 541.

After careful consideration, this Court finds that an irreconcilable conflict does exist between section 20-4-203(2), MCA and sections 49-2-303(1)(a), and 49-3-201(1), MCA. In determining which rule of statutory construction must be applied to resolve this irreconcilable conflict, we are guided by the following quotation from 50 AmJur., at 566-567, cited in *State v. Board of Examiners of State* (1948), 121 Mont. 402, 194 P.2d 633.

" . . . a later statute general in its terms and not expressly repealing a prior special or specific statute, will be considered as not intended to affect the special or specific provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal." 121 Mont. at 417, 194 P.2d 641. (Emphasis added.)

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summary of the Western Conference of Teamsters Pension Plan, a copy of the negotiated principal's contract and a copy of a decision rendered by the Human Rights Commission finding no discrimination by the School Board with regard to Mary Dolan's retirement.

The School District asserts that this evidence establishes the necessity of a mandatory retirement policy. The District Court determined that the School District had presented no evidence establishing such a necessity. After a review of the record, this Court is in complete agreement with the District Court.

The interrogatory answers filed by the Attorney General are mere conclusions lifted from a decision rendered by the Second Circuit Federal Court in *Palmer v. Ticcione* (2d Cir. 1978), 576 F.2d 759. No evidence was adduced which connects these conclusions to the need for mandatory retirement in the Montana school system.

The School District asserts that the negotiated contract between the School District and the principals necessitates retirement at age 65. The same assertion is made with regard to the Teamsters Union pension plan. However, nothing in the contract mentions required retirement at age 65 and the pension plan speaks only of age 65 as the "normal retirement age".

The School District relies heavily on the decision of the Human Rights Commission finding no discrimination in the mandatory retirement of Mary Dolan. The Commission based its decision on the grounds that the legislature intended to maintain a statutory exception (section 20-4-203(2), MCA) to the provisions of Title 49, Human Rights Act. The Commission gleaned this intent from the fact that in 1977, the legislature killed House Bill 519, which had been introduced to eliminate all mandatory retirement ages required or permitted by Montana law. This bill was comprehensive in nature covering many areas other than age for retirement. Such evidence of intent is unpersuasive and inconclusive. A fair reading of the "Human Rights Act" indicates an intention to prohibit age discrimination unless age is related to job performance. A mandatory retirement age could seldom, if ever, relate to job performance because of the variation in individuals. The statutes are therefore irreconcilably in conflict and the one later enacted must necessarily work a repeal of the former. *State v. State Board of Land Commissioners*, *supra*.

This decision does not affect pension plans nor seniority systems whereby an employee has agreed, as part of the employment, to retire at a certain age. Such arrangements are exempted under section 49-3-103(2), MCA.

Finding unlawful discrimination in this case entitles Mary Dolan to a backpay award. The purpose of this backpay award is to make Mary Dolan whole. The District Court determined that she would have earned \$76,914.31 up to the time of trial had she continued working as a principal. The District Court found that during the same time period Mary Dolan had earned from other employment the sum of \$25,668. The

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District No. 10, Defendant and Appellant
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District Court concluded that she was entitled to an award of \$51,246.32, refusing to reduce this backpay award by any amounts received from the Social Security Administration, Montana Teachers Retirement System, or the Western Conference of Teamsters Pension Fund.

This Court concludes that it does not matter whether the benefits received from the Social Security, Retirement System, or Pension funds were funded wholly or in part by contributions made by Mary Dolan. Mary Dolan would not have received these benefits had she continued as principal at W. K. Dwyer Elementary. Thus, to make Mary Dolan whole, these benefits must be considered in establishing a backpay award. To hold otherwise would grant Mary Dolan a windfall.

In conclusion, we hold that section 20-4-203(2), MCA, was impliedly repealed by the enactment of Title 49. We reverse the District Court's award of backpay which failed to offset retirement benefits and remand for proceedings in conformance with this opinion.



Box 1176, Helena, Montana

JAMES W. MURRY
EXECUTIVE SECRETARY

ZIP CODE 59624
406/442-1708

TESTIMONY OF JIM MURRY ON HOUSE BILL 270, BEFORE THE SENATE LABOR AND EMPLOYMENT RELATIONS COMMITTEE, MARCH 8, 1983

I am Jim Murry, representing the Montana State AFL-CIO in support of House Bill 270.

The intent of this bill is to provide that people who have had the double misfortune of having been temporarily totally disabled, and then when able to return to the job market, not able to find work will be eligible to receive unemployment insurance benefits.

Currently, to qualify for unemployment insurance the law provides that: "an individual must have been paid wages for insured work in the first four quarters of the last five completed quarters, immediately preceeding the first day of the benefit year." A few workers do not meet that qualification because of temporary total disability, which is by definition, "a condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence." (39-71-116)

With the economy going through tough times as it is, the injured worker's former job or even other jobs may not be available when a worker with such a disability is able to return to work. Having received no wages during the base period, the worker would not qualify for unemployment benefits.

This bill would allow a disqualification of this sort to be remedied by substituting wage credits from employment prior to the disability for unemployment benefit qualifications.

Very few people would be affected by this bill, according to the State Labor Department, probably only six or seven a quarter, at the most. Yet it is a necessary measure to prevent those few people from having had to suffer, not only from a disability, and then loss of employment, but also disqualification for unemployment benefits.

We ask your support of House Bill 270.

Thank you.

PROPOSED AMENDMENTS TO HB 277, HOUSE 3rd READING COPY

1. Title, line 9.

Following: line 9

Insert: "PROVIDING THAT THE WORKERS' COMPENSATION ACT DOES NOT APPLY TO
EMPLOYMENT IN AGRICULTURAL LABOR;"

2. Page 2, line 20.

Following: "chapter"

Delete: "."

Insert: ";

3. Page 2, line 20.

Following: line 20

Insert: "(h) employment in agricultural labor, as defined in 15-30-201."

NOTE: The 15-30-201 definition of agricultural labor reads as follows:

Agricultural labor includes all services performed on a farm or ranch in connection with cultivating the soil or in connection ;with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

PROPOSED AMENDMENTS TO HB 277, HOUSE 3rd READING COPY

1. Title, line 8.

Following: line 8

Insert: "WHO ARE NOT CONTRACTING FOR AGRICULTURAL SERVICES TO BE PERFORMED
ON A FARM OR RANCH

2. Page 2, line 12

Following: "contractors"

Delete: "."

Insert: "and who are not contracting for agricultural services to be performed
on a farm or ranch."

3. Page 2, line 23.

Following: "contractor"

Insert: "and who is not contracting for agricultural services to be performed on
a farm or ranch"

reads
mental state
AMENDMENT TO HOUSE BILL 277 *proposed by Rep. Ellard*

A BILL FOR AN ACT ENTITLED: "AN ACT MAKING WORKERS' COMPENSATION COVERAGE MANDATORY FOR INDEPENDENT CONTRACTORS AND PROVIDING FOR AN OPTIONAL EXEMPTION FROM COVERAGE AND REQUIRING EMPLOYERS TO POST THE STATUS OF THEIR COVERAGE IN THE WORKPLACE: AMENDING SECTION 39-71-401, MCA."

(4) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment regardless of whether the location is temporary or permanent and includes the place of business or property of a third person while the employer has access to or control over such place of business or property for the purpose of carrying on his usual trade, business, or occupation. The sign will be provided by the division, distributed through insurers or directly by the division, and posted by employers in accordance with rules adopted by the division. An employer who ~~does not properly post such a sign~~ is guilty of a misdemeanor.

purposely or knowingly fails to post a sign as provided in this subsection

amend statement of intent by adding at the end:

It is also the intent of the Legislature that the Division will provide employers with signs and determine an economical and convenient method of distribution and disposal of such signs through insurers when the employer is properly covered under one of the three compensation plans or when a policy is cancelled in accordance with 39-71-2205, MCA, or through the Division directly when a policy is cancelled in accordance with 39-71-2307, MCA, when self-insurance status is revoked in accordance with 39-71-2105, MCA, when an employer is exempt from coverage under this chapter, or when an employer lacks coverage and has been ordered to cease operations in accordance with 39-71-507, MCA, and that the Division will maintain procedures to control the distribution and disposal of such signs to prevent their improper use and to accommodate the changing coverage employers may have from time to time.

(This sheet to be used by those testifying on a bill.)

NAME: Anne MacIntyre DATE: 3/8/83

ADDRESS: Room C-317, Cogswell Building, Helena

PHONE: 449-2884

REPRESENTING WHOM? Human Rights Comm.

APPEARING ON WHICH PROPOSAL: HB 525

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: LeRoy H. Schramm DATE: 3-8-83

ADDRESS: 1000 9th Ave.

PHONE: 443-7358

REPRESENTING WHOM? Mt. Univ. System

APPEARING ON WHICH PROPOSAL: H.B. 525

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: JOE THARES DATE: 3-8-83

ADDRESS: 560 No. PARK AV.

PHONE: 449-4300

REPRESENTING WHOM? MTN BELL

APPEARING ON WHICH PROPOSAL: A.B. 525

DO YOU: SUPPORT? AMEND? OPPOSE? X

COMMENTS: Creates problems for us with our
Management Pension Plan.
Presently top level executives
are required to retire at age 65.
All other employees covered by
the pension plan must retire at
age 70

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Dick Kane DATE: March 8, 1983

ADDRESS: Helena

PHONE: 449-5600

REPRESENTING WHOM? Labor Standards Division

APPEARING ON WHICH PROPOSAL: HB-554

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

