MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on March 5, 1991, at 10:00 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: none

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion:

HEARING ON HOUSE BILL 389

Presentation and Opening Statement by Sponsor:

Representative Bud Gould, District 61, said HB 389 would change Montana law to comply with the passage of the Federal American Disabilities Act of 1990. He advised the Committee that the bill was drafted at the request of the Human Rights Commission, a "504 compliance agency".

Proponents' Testimony:

Anne MacIntyre, Administrator, Human Rights Commission (HRC), told the Committee that Title 7 (1974), did not prohibit discrimination on the basis of handicap, and that rehabilitation applied only to federal discrimination laws. She said Montana had to form its own handicapped legislation which is more broad than

the federal law. Ms. MacIntyre stated that mental and physical handicaps were deleted from Chapter 3, and federal language was used. She advised the Committee she did not propose to replace "handicap" with "disability", and explained that handicap applies to a situation affecting a major life activity.

Opponents' Testimony:

There were no opponents of HB 389.

Questions From Committee Members:

Chairman Pinsoneault asked why "major life activity" was not in the bill. Anne MacIntyre replied it is not in federal law either.

Chairman Pinsoneault commented that it would be helpful to define "major life activity" in the bill, and to amend page 5 to state "any accommodation resulting in undue hardship". Anne MacIntyre replied, "it would be expensive to put elevators in accommodations and that would present an undue hardship".

Chairman Pinsoneault asked how a landlord could assess mental handicap in renting to a person who might have a history of violence. Ms. MacIntyre replied that, in this example, it would be appropriate to check references. She said destruction of property could be a valid reason for not renting to someone in this instance.

Senator Towe asked about "impairment" language. Anne MacIntyre replied it pertains to those who have been impaired, and are no longer impaired, but may be discriminated against because of it. She cited an example of an employer who did not hire an applicant because of epilepsy which was brought under control.

Senator Towe asked if this same language were in federal law, and commented that it reads a little awkward.

Closing by Sponsor:

Representative Gould requested that Senator Yellowtail carry HB 389, and said he believes it is important to update the law in this area.

HEARING ON HOUSE BILL 388

Presentation and Opening Statement by Sponsor:

Representative Jessica Stickney, District 26, said HB 388 ensures that state and federal statutes prohibiting discrimination on the basis of sex are interpreted in the same manner with regard to pregnancy. She explained that Congress changed its language in

1978, and new language on pages 6 and 7 of the bill allows Montana to do the same.

Proponents' Testimony:

Anne MacIntyre, Administrator, Human Rights Commission, said the Commission is seeking legislative clarification of this issue, as it appears to be more expeditious then judicial clarification (Exhibit #1). Ms. MacIntyre provided testimony prepared by David Rusoff, Attorney, HRC (Exhibit #2), and a copy of Newport News Shipbuilding and Dry Dock Company v. Equal Employment Opportunity Commission (Exhibit #3).

Ms. MacIntyre told the committee that General Electric v. Gilbert (1976) caused Congress to enact its Pregnancy Discrimination Act. 42 U.S.C. S2000e(k) in 1978. She also provided testimony from Jan Hickman Hill, Helena, who could not be present to testify (Exhibit #4).

Dave Barnhill, Deputy Insurance Commissioner, representing State Auditor, Andrea Bennett, said he reviews policies for compliance with Title 33, and notifies insurers of compliance with Title 49. He told the committee his office has received controversial complaints concerning males paying for female pregnancy coverage, and said it is mostly a problem in group disability coverage. Mr. Barnhill explained that pregnancy is defined as a "disorder of the reproductive system."

Diane Sands, Executive Director, Montana Women's Lobby, stated her support of the bill. She said HB 388 is as important as action taken by the Legislature in 1983 concerning discrimination in insurance coverage. Ms. Sands explained that normal pregnancy costs are about $4,000, while caesarean section pregnancy costs are between $6,000 and $8,000. She said insurance companies have an expensive rider to cover more costly pregnancies, and that newborn care costs are about $15,000.

Ms. Sands advised the Committee that insurance companies complain about these costs, and said a Massachusetts study shows a cost of one percent per policy. She added that sex and pregnancy discrimination should not be allowed (Exhibit #5).

Linda Saul, Interdepartmental Coordinating Committee for Women (ICCW), read from prepared testimony in support of the bill (Exhibit #6).

Harley Warner, Montana Association of Churches, said he would encourage legislation to continue to prohibit discrimination against women.

Opponents' Testimony:

Tom Hopgood, Health Insurance Association of America, said "mandatory health insurance is legislatively enacted coverage". He stated all must have pregnancy coverage whether they want or need it, and said maternity riders are not cheap at about $40 to $60 per month. Mr. Hopgood commented that driving up costs drives people out of coverage. He estimated that about 134,000 people in Montana have no health insurance coverage, and that about 16,000 to 20,000 of these people have no insurance as a result of mandated laws.

Mr. Hopgood told the Committee that HB 388 will not help this problem. He said it affects only groups with 15 or fewer employees, and that it is common sense not to mandate pregnancy coverage for those who cannot become pregnant. Mr. Hopgood advised the Committee that federal pregnancy law is far different than HB 388. He asked that they consider amending the bill by exempting groups with fewer than 15 employees (Exhibit #7).

Larry Akey, Montana Association of Life Underwriters, (600-plus members), provided proposed amendments allowing conformity to federal statute, as stated in the title of the bill (Exhibit #8). He said that if the HRC is as certain as they say, the bill does not need a retroactive effective date. Mr. Akey stated the Insurance Commissioner does permit policies without mandatory maternity benefits.

Darlynn Nicholas, Helena, read from prepared testimony for Marie Deonier of Billings, who could not be present (Exhibit #9).

Doug Lowney, Insurance Underwriter, said HB 388 is mostly a small groups issue. He told the Committee that only one group of 20 small groups he insured wanted maternity coverage, and commented that it is great to be able to offer that coverage and not to offer it to those who don't want it.

Mr. Lowney said the new mandates would make maintenance of coverage more difficult. He urged the Committee to either amend HB 388 or vote no.

Riley Johnson, National Federal of Independent Business, asked the Committee to give the bill a do not pass recommendation.

Questions From Committee Members:

Chairman Pinsoneault commented that the issues were pretty well-focused with regard to cost, and asked Dave Barnhill to respond. Mr. Barnhill replied that no disability insurance company is required to file rates with the Insurance Commissioner, so he has no hard data on increasing costs.

Mr. Barnhill stated that Aetna sent a seven percent increase notice last year which, it said, was to conform with Montana's mandatory maternity insurance law. He said research revealed that

Aetna had paid only one claim in Montana, after which it rescinded that notice. Concerning Mr. Lowney's statement, Dave Barnhill stated this law is not mandatory. He said the Insurance Commissioner believes that where there is coverage of male reproductive organs, female reproductive organs should be covered, too.

Chairman Pinsoneault asked about retroactive application. Mr. Barnhill replied that the Insurance Commissioner does not enforce this and the HRC does, which has created confusion.

Senator Crippen asked about the retroactive provision. Anne MacIntyre replied that she requested retroactive applicability language, because she viewed the bill as codifying existing law as interpreted without the bill. She stated that the risk entailed in this is how it will be applied to claims already in existence. Ms. MacIntyre advised the Committee she was concerned that those claims might be dismissed.

Anne MacIntyre stated that the HRC has been forthright in advising people as to how it views the law at present, so there are no surprises.

Senator Crippen asked about the proposed amendment. Anne MacIntyre replied that she doesn't believe she characterized HB 388 as a federal conformity bill. She told the Committee she was only trying to make sure federal and state interpretations are done in the same manner. Ms. MacIntyre said the bill does provide that whenever employment discrimination is regulated by Title 7, pregnancy discrimination is prohibited. She explained that Montana law is broader in its application to employers of all sizes.

Senator Doherty asked about the arguments concerning increased costs in other states and/or reduction of health coverage, and whether or not this has actually happened. Diane Sands repeated her earlier statement that the Massachusetts Insurance Commission found there was an average cost increase of one percent.

Senator Doherty asked if the proposed amendment would allow discrimination for employers with fewer than 15 employees. Larry Akey replied that the Montana Life Underwriters does not support discrimination. He said the Association was surprised at the use of the term "disorder of the female reproductive system" in describing pregnancy, and commented that he believes pregnancy is a joy to families.

Senator Towe asked Larry Akey if he rejected the premise of designing an insurance policy without pregnancy coverage. Mr. Akey replied he did not, and said it would also not cover ovarian cancer, and other related disorders.

Senator Towe commented, "that does not follow". He asked why male reproductive problems could not be excluded. Mr. Akey replied that ovarian cancer can be catastrophic, while pregnancy usually is

not. He asked why women past child-bearing age should not be covered for ovarian cancer.

Senator Towe asked about the effective date. Anne MacIntyre replied that filing time with the HRC from complaints only goes back 180 days. She said she was trying to address complaints already filed or which can be timely filed.

Senator Towe asked Anne MacIntyre if she would accept amendments to the bill. Ms. MacIntyre replied she would.

Senator Grosfield asked if abortion were included in related medical conditions. Diane Sands replied she was not sure.

Senator Svrcek asked if a pregnant woman who stops working because of her health would be precluded by the bill. Anne MacIntyre replied she did not believe the bill addressed this situation. She said 49-2-310 and -311, MCA, have the specific provisions for this situation.

Senator Svrcek asked if the HRC has been upheld in its interpretation of current law. Anne MacIntyre replied that no cases have gone to court.

Senator Rye asked why an entire group should have to pay for a self-imposed situation (pregnancy) of one member. Dave Barnhill replied he could concede Senator Rye's point, but from a cost standpoint it is not different than any other condition.

Senator Brown asked if the agent gets an additional premium for an attached rider. Dave Barnhill replied the agent does.

Closing by Sponsor:

Representative Stickney advised the Committee that HB 388 is not a mandatory coverage bill. She said it simply seeks equal coverage for women, and that she would resist amendments. Representative Stickney said there is nothing wrong with Montana law being more stringent than federal law.

HEARING ON HOUSE BILL 493

Presentation and Opening Statement by Sponsor:

Representative Ben Cohen, District 3, said HB 493 deleted provision in HRC laws with regard to exclusive remedy for violation of law. He said the bill particularly addresses sexual harassment on the job. Representative Cohen explained that 49-2-509, MCA, addresses discrimination in the private workplace and 49-3-313, MCA, applies to the public workplace. He stated the bill would allow more than single remedy of HRC issues, and that it was brought by the Montana Chapter of the Civil Liberties Union.

Proponents' Testimony:

Scott Chricton, Director, American Civil Liberties Union of Montana, told the Committee he supports the bill as it is an important expansion of protection of workers facing sexual harassment on the job. He said the bill is an attempt to strengthen options for employees, and is not an attempt to weaken the HRC.

Opponents' Testimony:

Anne MacIntyre, Administrator, Human Rights Commission, said HB 493 would reverse the action of the 1977 legislation which was requested by Montana attorneys. She stated she believed it was highly unlikely that this is a common law cause of action, and said she was unclear about the procedures and remedy proposed in the bill (Exhibit #10).

Ms. MacIntyre stated that, in her experience, the HRC attempts to ensure discrimination will not recur. She said that if an individual pursues harassment in district court, there is no mechanism for protecting the public interest. Ms. MacIntyre further stated that the bill would establish bad public law, as there would be two separate systems for justice - one for those who can afford to pay and one for those who cannot. She said she believes there are other solutions such as adequate funding to ensure timely processing of complaints, rather than bottlenecking the district courts.

Ms. MacIntyre said the policy is not to deprive people of any tort claims, and provided proposed amendments to the bill (Exhibit #10a). She recommended that HB 493 not be concurred in.

Ken Toole, Montana Human Rights Network, said the Network was formed in response to white supremacist threats. He told the Committee he had the same concerns as those expressed by Anne MacIntyre, and that passage of the bill would undermine the work of the HRC. Mr. Toole explained that the HRC now orders employers to get behavior changed and to cease discriminatory practices. He commented that he believes this is a complex area of law (Exhibit #11).

Harley Warner, Montana Association of Churches, said the Association supports a fully-funded and strong HRC. He said he believes this bill will unintentionally weaken the Commission, and cited function of the State Tax Appeals Board as an example.

LeRoy Schramm, Legal Counsel, Montana University System, provided proposed amendments to HB 493 (Exhibit #12). He said the System gets 12 to 24 human rights complaints each year which it ends up defending. Mr. Schramm stated he was concerned about any change in enforcement, as it would affect the University System.

Mr. Schramm advised the Committee that HB 493 addresses the entire human rights act and creates an entirely new cause of action. He said he believed there would be a similar problem to the wrongful disclosure problem of a few years ago. Mr. Schramm further stated the bill would create confusion concerning dates, damages, attorney fees, punitive damages, and cumulative or contemporaneous suits. He said he is sympathetic with the time-frame problem, and that the bill deserves a good bit of thought.

John Fitzpatrick, Director of Community Affairs, Pegasus Gold Corporation, said he believes the intent of the bill is correct in its intent to create a less cumbersome process. He stated he believes there are several public policy considerations, and commented that Pegasus has no complaints pending before the HRC now.

Questions From Committee Members:

There were no questions from the Committee. Chairman Pinsoneault advised committee members questions could be addressed during executive action on the bill.

Closing by Sponsor:

Representative Cohen stated he was distressed to be in opposition to the Human Rights Commission and the Association of Churches. He agreed that the bill should be looked at in executive session, and said he hoped the Committee would find a proper way to focus on speedy redress of complaints.

HEARING ON HOUSE BILL 439

Presentation and Opening Statement by Sponsor:

Representative Joe Barnett, District 76, said the bill was requested by a Bozeman attorney, and requires that the court notify a defendant who is not a resident of the U.S. that a guilty plea could result in deportation. He said the bill affects 46-12, 202 and -204, MCA.

Proponents' Testimony:

Paul Frantz, Bozeman attorney, provided a written statement in support of HB 439 (Exhibit #13). He advised the Committee that a guilty plea could also mean denial of naturalization.

Mr. Frantz proposed a new subsection (6), and said the bill is not an attempt to change guilt or innocence. He further stated that nine other states have similar legislation.

Mr. Frantz provided a letter from District Judge Thomas A. Olson in support of the bill (Exhibit #14).

Mike Sherwood, Montana Trial Lawyers Association, said he believed the bill would promote fundamental fairness in the courts.

Opponents' Testimony:

There were no opponents of the bill.

Questions From Committee Members:

Chairman Pinsoneault asked if misdemeanors and felonies are the same. Mr. Frantz replied the bill could potentially affect misdemeanors, but each individual crime could have a different consequence.

Senator Doherty commented that he represented a person arrested for shoplifting who had it used against him "to the hilt" and was deported. He offered to carry the bill.

Senator Rye asked if a traffic ticket could get a non-citizen deported. Mr. Frantz replied that was doubtful, as it usually is applied to crimes of moral turpitude.

Closing by Sponsor:

Representative Barnett commented that SB 51 revises the criminal code, and that this legislation could be inserted on page 112, following line 5.

EXECUTIVE ACTION ON HOUSE BILL 439

Motion:

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

Senator Doherty made a motion that HB 439 BE CONCURRED IN. The motion carried unanimously.

EXECUTIVE ACTION ON HOUSE BILL 389

Motion:

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

Senator Harp made a motion that HB 389 BE CONCURRED IN. The motion carried with all members voting aye except Senator Grosfield who voted no.

ADJOURNMENT

Adjournment At: 11:57 a.m.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 5 Mar 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

March 5, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 439 (third reading copy -- blue), respectfully report that House Bill No. 439 be concurred in.

Signed: _____
Richard Pinsoneault, Chairman

3-5-91
Amd. Coord.

3-5 12:40
Sec. of Senate

SENATE STANDING COMMITTEE REPORT

March 5, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No.389 (third reading copy -- blue), respectfully report that House Bill No.389 be concurred in.

Signed: _____
Richard Pinsoneault, Chairman

3-5-91
Amd. Coord.

SB 3-5 12:40
Sec. of Senate

Exhibit #1
HB 389
3-5-91

Testimony of Anne L. MacIntyre
Administrator, Human Rights Commission
In support of House Bill 389
Senate Judiciary Committee
March 5, 1991

The Human Rights Act was enacted in 1974 and was modelled after Title VII of the Civil Rights Act of 1964, as amended. In 1974, Title VII did not prohibit discrimination on the basis of handicap. In fact, the first major piece of federal legislation on the question of handicap discrimination, the Rehabilitation Act of 1973, had only just been enacted. The Rehabilitation Act, however, applied only to the federal government and contractors and grantees of the federal government. As a result, the Montana legislature in developing the Human Rights Act did not have any commonly accepted or developed definitions to look to in fashioning its prohibition against discrimination on the basis of handicap.

In the opinion of the Commission staff, the present statutory definitions are overbroad and inconsistent with federal law and should be amended to achieve consistency. Further, the statutes do not contain the specific statutory requirement of reasonable accommodation for handicaps contained in federal law. Although a reasonable accommodation requirement may be inferred from the present statutory language, the Commission believes a statutory clarification is appropriate.

The bill proposes to delete the statutory definitions of "mental handicap" and "physical handicap" in both chapters 2 and 3 of Title 49 and add definitions similar to the definitions contained in the Rehabilitation Act and the more recent federal enactments on handicap discrimination, the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. Even though the Americans with Disabilities Act uses the term "disability" instead of "handicap", the other federal laws use the term "handicap", as the Montana law has done since 1974. Thus, we have not proposed to replace the term "handicap" with "disability."

The new definition of physical or mental handicap provides that a handicap is "a physical or mental impairment that substantially limits one or more of a person's major life activities, a record of such an impairment, or a condition regarded as such an impairment." The term major life activities is used in the federal law to denote functions such as caring for oneself, walking, seeing, hearing, speaking, and working. Under the portions of the definition referring to "a record of such an impairment" or "a condition regarded as an impairment," a cured cancer victim or an individual with a disfigurement or a person who is erroneously regarded as having a condition like epilepsy would also be protected by the statute.

Ex. 1
HB 389
3-5-91

Finally, the bill includes a requirement of reasonable accommodation within the definition to insure that when discrimination on the basis of handicap is prohibited, the failure to make reasonable accommodation constitutes a discriminatory practice. In the employment context, reasonable accommodation can include making existing facilities readily accessible, modifying work schedules, job restructuring, reassigning to vacant positions, and so on.

EXHIBIT #2
HB388
3-5-91

HUMAN RIGHTS COMMISSION

STAN STEPHENS, GOVERNOR

P.O.BOX 1728

STATE OF MONTANA

(406) 444-2884

HELENA, MONTANA 59624

March 5, 1991

TO: Senate Judiciary Committee

FROM: David Rusoff, Attorney, Human Rights Commission

RE: HB 388

HB 388 amends the discrimination statutes within the Human Rights Act (HRA) and the Governmental Code of Fair Practices (GCFP) by adding a definition of the term "sex" as used in those statutes. HB 388 provides that "sex" means gender and includes but is not limited to pregnancy, childbirth, and related medical conditions."

The purpose of the amendment is to clarify the legislature's intent to prohibit discrimination because of pregnancy. While the Human Rights Commission has always interpreted the HRA and GCFP as prohibiting discrimination because of pregnancy, the amendment is necessary to clarify the law for employers, educational institutions, insurers and other persons who must comply with the law.

The Commission receives numerous discrimination complaints alleging discrimination because of pregnancy. Many of these complaints arise out of individual and employer sponsored comprehensive health insurance policies which exclude coverage for maternity while providing full coverage for all male-related medical conditions. Insurance companies operating in the state frequently include coverage for the expenses of normal maternity only as a rider at additional expense. Agents of several such insurance companies have informed the Commission staff that their companies will not treat maternity on an equal basis with other health conditions until either a court orders it or the legislature expressly provides that it is unlawful to discriminate because of pregnancy.

In 1978, Congress responded to a similar situation by enacting the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k). This act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., which prohibits discrimination in employment by employers with 15 or more employees, to specifically state, in relevant part, as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .

The PDA was Congress' response to a court case in which the United States Supreme Court ruled that an employer's failure to provide maternity coverage in a comprehensive health plan provided to employees did not constitute unlawful sex discrimination under Title VII. General Electric Co. v. Gilbert, 429 U.S. 125, 145-146 (1976). Proponents of the PDA emphasized that the amendment was intended to clarify Title VII and that the Supreme Court had made a mistake in Gilbert. H.R. Rep. 95-948, p.2 (1978); S. Rep. 95-331, pp. 2-3 (1977).

Since Congress enacted the PDA, approximately 15 states have provided by statute that discrimination because of sex includes discrimination because of pregnancy. See, e.g., Conn. Gen. Stat. § 46a-51(17) (1981); Hawaii Rev. Stat. § 378-1 (1981); and Maine Rev. Stat. Ann. title 5, § 4572-A(1) (1979).

The Supreme Court addressed the maternity insurance issue after the PDA in Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 667 (1983). In Newport News, the Court noted the enactment of the PDA and held that an employer's health insurance plan which provided fewer maternity benefits for the spouses of male employees than for female employees constituted unlawful sex discrimination against male employees. The Court noted that Congress had made it clear that "discrimination based upon a woman's pregnancy is on its face, discrimination because of her sex." Id. at 685. The Court ruled that the health plan in question in Newport News was unlawful because the protection it afforded to male employees was less comprehensive than the protection afforded to female employees. Id. at 676. The husbands of female employees received coverage for all conditions while the wives of male employees did not receive full coverage for pregnancy-related conditions. Id. at 683-684.

In Colorado Civil Rights Commission v. Traveler's Insurance Co., 759 P.2d 1358 (Colo. 1988), the Colorado Supreme Court ruled that Colorado's employment discrimination statute makes it unlawful for an employer who provides comprehensive health coverage for employees to fail to provide maternity coverage on an equal basis with other health conditions. Colorado's employment discrimination statute at the time, 24-34-402, 10 C.R.S., was very similar to § 49-2-303, M.C.A., of the Montana Human Rights Act, which prohibits discrimination in employment because of sex.

In Traveler's, the court stated that "pregnancy is a natural incident of adult life requiring medical attention . . . ." Id. at 1364. The court noted that health plans do not normally

exclude coverage for other medical conditions resulting from voluntary activities and do not normally exclude coverage for male prostate conditions. Id.

HB 388 does not mandate maternity coverage in insurance policies and employers are not required by law to provide health coverage. However, the bill clarifies that, if an employer or insurer provides comprehensive coverage for all other short term health conditions, it is unlawful to fail to cover maternity expenses on an equal basis. The bill also makes it clear that it is unlawful to discriminate because of pregnancy in other areas such as hiring and education. The Montana Maternity Leave Act, § 49-2-310 and 311, M.C.A., makes it unlawful to terminate a female employee because of her pregnancy, but it does not make it unlawful to refuse to hire a female applicant because of pregnancy. The bill would also clarify that it is unlawful for an educational institution to discriminate against a female student because of her pregnancy.

Enclosures

DR

Exhibit #3
HB 388
3-5-91

more than one state rule may seem applicable. It is scarcely a desirable state of affairs for federal courts to spend their time deciding how state courts might decide state tolling rules operate. These concerns are particularly acute owing to the fact that the question at issue is what statute of limitations ought to be applied. Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations. A single, uniform federal rule of tolling would provide desirable certainty to both plaintiffs and defendants in § 1983 class actions.

Finally, it is useful to consider the application of the Court's analysis in a situation not far removed from the present case. If the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable. Having tolled the running of the ⌊668 applicable state statute of limitations, the federal court would be required to decide what effect denial of class certification would have. The logical source of law, of course, would be the general federal rule, expressed in *American Pipe* and applied to toll the running of the period in the first place. The Court, however, would apparently have the trial judge look to state law. Such a course would obviously be more than a little ironic—the inquiry would appear to be, if state law *did* have a class-action tolling rule, which it *does not*, what would state law say with respect to one aspect of that rule's effect? Such an inquiry would be more appropriate in *Alice in Wonderland* than as a serious judicial undertaking.

Because the Court partially rejects a rule of law that *American Pipe* plainly set forth, because it reaches a result that can only encourage needless litigation and uncertainty, and because its analysis leads to anomalous results, I respectfully dissent.

462 U.S. 669, 77 L.Ed.2d 89

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

No. 82–411.

Argued April 27, 1983.

Decided June 20, 1983.

Employer filed suit challenging the Equal Employment Opportunity Commission's guidelines interpreting the Pregnancy Discrimination Act. The EEOC in turn filed an action against the employer alleging discrimination on the basis of sex against male employees in the provision of hospitalization benefits. The United States District Court for the Eastern District of Virginia, 510 F.Supp. 66, upheld the lawfulness of employer's amended plan and dismissed the EEOC's complaint. On a consolidated appeal, the Court of Appeals, 682 F.2d 113, reversed, and certiorari was granted. The Supreme Court, Justice Stevens, held that the pregnancy limitation in petitioner employer's amended health insurance plan, which provides female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions but which provides less extensive pregnancy benefits for spouses of male employees, discriminates against male employees in violation of Title VII, as amended by the Pregnancy Discrimination Act.

Affirmed.

Justice Rehnquist filed a dissenting opinion in which Justice Powell joined.

1. Civil Rights ⇐9.14

Pregnancy limitation in petitioner employer's amended health insurance plan, which provides female employees with hospitalization benefits for pregnancy-related

EXHIBIT #4
5 Mar 91
HB 388

Testimony of: Jan Hickman Hill
1302 Wilder
Helena, MT 59601

Before: House Judiciary Committee

Re: H.B. 388

Members of the Judiciary Committee, my name is Jan Hill. I am a resident of Helena, am a homemaker and mother of a 2-year-old daughter, and am here today to speak in favor of H.B. 388.

Having had this child while holding an insurance policy which specifically excluded coverage for normal pregnancy and childbirth, I know firsthand the pressures and stresses being in such a circumstance places on similarly situated pregnant women in Montana.

A little over two years ago on a Friday afternoon, I checked into St. Peter's Community Hospital here in Helena. Imagine, if you will, the parents' high state of emotion and anticipation in the hours before birth, especially the birth of a first child. Compound that, then, with the strain of knowing that everything had better go smoothly so that you and the child could leave the hospital at the earliest possible moment so that the bill would not be any bigger than was absolutely necessary.

At 12:30 the following Saturday morning after several hours of exhausting hard labor, my daughter was born. This delivery did not go perfectly but required the calling in of a second physician to assist in a forceps delivery; the first doctor had considered a Caeserean section. My daughter was healthy, and I suffered no irreversible damage, but I was emotionally, physically, and mentally wrung out (I had not slept for over 24 hours). The nurses were attentive to my every need, and at that point, I honestly needed help to get to the bathroom and down the hall to the room with the wonderful sitz bath with its warm, restorative powers.

Later that Saturday when my physician came by to check on me and the baby, I asked him whether we could leave that day. I knew that I had to get up out of that bed and go home. He said that we could be discharged if that was what I wanted to do, but he also stated that, in his experience, women who did leave on the day of delivery did not do that again with subsequent children. I assure you that I will not repeat that mistake.

In order to avoid a hospital charge for an additional day, we had to be gone by midnight that Saturday, less than 24 hours after my baby's birth. We left that night at 11:45; I stalled the departure as long as we could so that I could take advantage of all the care and facilities the hospital offered. What I really wanted was one last soak in that sitz.

3-5-91
HB 388

After we got home, I was on my on, with a husband who was having to spend extended hours at work, and no family to call on for help in those first couple of days. For a full week, I could not sit and had difficulty walking; it was more of a hobble. Because we had left so soon after birth, my husband had to bundle the baby up and take her back to the hospital for a test which must be performed within a couple of days of birth. Normally, that would be done while mother and child are still hospitalized. A couple of weeks later, my husband and I had to go back to St. Peter's for an abbreviated CPR class, another service offered usually while the parents are still checked into the hospital.

The bottom line for the pregnancy and delivery broke down as follows: St.Peter's - $1,219.94; physician services for care during the nine months and delivery - $1,200.00; lab tests during pregnancy - $434.40; and prescription medicines - $463.48 for a grand total of about $2,900.00. Even though we had major medical coverage, all of these were out-of-pocket expenses.

We just now are pulling out of the financial black hole we have been in for the past two years. And while there have been other matters which added to our monetary woes, this large medical bill took its toll on our family. We were forced to take out a loan to pay the bills, and only recently did we pay that off.

Our health insurance policy denied coverage related to expenses which only a woman can incur but required us to pay in our premium for coverage of those related to male maladies. Women with insurance policies are forced to pay dearly for riders to cover childbirth, but I dare say that a rider for prostate cancer would be a rare bird. Maternity riders are prohibitively high, and my best recollection of what such a rider was charged by our insurance company at the time was about $100 per month. For those couples like me and my husband who after a prolonged period of infertility must resort to medical intervention, the bill for all of those months of rider coverage is staggering.

I urge the Committee to consider H.B. 388 favorably. Thank you for your time.

Exhibit #2
HB 388
3-5-91

MONTANA WOMEN'S LOBBY

P.O. Box 1099 Helena, MT 59624 406/449-7917

TESTIMONY OF DIANE SANDS, EXECUTIVE DIRECTOR, MONTANA WOMEN'S LOBBY

SENATE JUDICIARY, 3/5/91

IN SUPPORT OF HB 388, "TO CLARIFY THAT PREGNANCY DISCRIMINATION IS SEX DISCRIMINATION"

Mr. Chairman, members of the Judiciary Committee, the Montana Women's Lobby, representing 52 organizations and individual members, wishes to be on record as strongly supporting HB 388. In agreement with federal law which defines "sex" to include pregnancy, childbirth, and related medical conditions, we believe that HB 388 clarifies the intention of the Legislature and the state of Montana also to define "sex" as including pregnancy, childbirth, and related medical conditions.

This issue is important to the MWL because of our long history of association with Montana's landmark 1983 law prohibiting discrimination in insurance based on sex or marital status. It has been the interpretation of the Human Rights Commission and the Insurance Commissioner that this prohibition against sex discrimination in health insurance included pregnancy, childbirth and related conditions.

Unfortunately, a recent survey of major providers in Montana revealed that approximately 70% are out of compliance and continue to sell unnecessary and expensive maternity riders at an average cost of about $900. The cost of a single uncomplicated pregnancy runs about $4,000 currently, although a c-section can run up a bill of $6-8,000 very quickly. Not only are many insurance providers refusing to include pregnancy routinely in individual health policies, but, according to an insurance agent I spoke with yesterday, some companies have told prospective women clients that they will not pay for c-sections at all unless the woman buys the expensive maternity rider.

Allowing insurance companies to exclude pregnancy coverage from their standard policies creates yet another obstacle between women, access to prenatal care, and healthy babies. This despite the correlation between lack of prenatal care and infant mortality, infant morbidity and low-birth weight babies. Many national studies have confirmed that women with no health insurance are less likely to obtain adequate prenatal care and more likely to have a poor pregnancy outcome than women with health insurance which includes pregnancy coverage. The average cost of caring for a low birthweight infant in the newborn

intensive care unit is $15,000. Excluding normal pregnancy coverage in health insurance policies will add to the numbers of women who have no means to pay for prenatal care that is so critical to a healthy outcome to pregnancy and will increase the state's burden for providing for medical expenses related to low birthweight.

The insurance industry has often claimed that having to provide maternity coverage will be expensive, drive up insurance costs and drive insurance providers from Montana. The non-gender insurance law caused a significant reduction in annual health insurance premiums for young families, an average of $222 or 14% for a single mother with two children, according to a study of the economic impacts of the law conducted by the Women's Lobby and the Insurance Department.

To share another state's experience, Massachusetts eliminated maternity coverage discrimination several years ago, separately from a general non-gender insurance law. According to the Massachusetts Division of Insurance's study on implementation the average increase in cost was 1% in most affected policies.

Since Montana has one of the lowest percentages of employer-provided health insurance, and less than half of those insured are women, affordable health insurance for individuals which includes pregnancy coverage is an important public policy goal with an important pro-family impact.

In summary, the public policy of the state of Montana is that sex discrimination - including pregnancy discrimination - should not be tolerated. There is no valid justification for treating one medical condition experienced by only one sex, pregnancy, differently from others. HB 388 will make that policy perfectly clear. We urge your support for this bill.

EXHIBIT #6
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TESTIMONY PRESENTED TO THE
SENATE JUDICIARY COMMITTEE
HOUSE BILL 388

March 5, 1991

Chairman Yellowtail, Members of the Committee:

My name is Lynda Saul. I represent the Interdepartmental Coordinating Committee for Women, known as ICCW. ICCW was established in 1977 and was re-established in 1990 by Governor Stephens, through Executive Order. Our main purpose is to promote the full participation of women at all levels of state government.

House Bill 388 clarifies existing law to provide protection against discrimination in employment because of pregnancy, childbirth and related medical conditions. Under statute 49-2-310, MCA, it is unlawful to terminate a woman's employment because of her pregnancy. However, under current law it is not clear that it is unlawful to base a hiring decision on whether or not a woman is pregnant. It is the policy of the State of Montana to remove discriminatory barriers to employment in state government based on race, color, religion, creed, sex, national origin, age, handicap, marital status or political belief.

ICCW supports House Bill 388 and urges you to vote in favor of this bill.

5 Mar 91
HB 388

SENATE
~~HOUSE~~ COMMITTEE

ON

JUDICIARY
~~HUMAN SERVICES AND AGING~~

HOUSE BILL 388

LEGAL ISSUES

PRESENTED BY THE HEALTH INSURANCE ASSOCIATION OF AMERICA

In 1972, a new Constitution was adopted by Montana. In pertinent part, by way of the "equal dignities clause," it provides:

> **Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.**

(Emphasis supplied) Mont. Const. art. II, § 4 (1972).

The provision is unique among the 16 states which, by constitutional provision, prohibit discrimination on the basis of sex in that it is the only one which explicitly prohibits such discrimination by nonpublic entities. Annot. Construction and Application of State Equal Rights Amendments Forbidding Determination Rights Based on Sex, 90 A.L.R.3d 164-65.

In 1983, the Legislature enacted Montana's unisex insurance law. It states:

> **It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.**

Section 49-2-309(1), MCA.

Ex. 1
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HB 388

The law was codified as part of the anti-discrimination statutes. Sec. 2, Ch. 532, L. 1983. As such, the law is under the auspices of the Montana Human Rights Commission. The law applies only to policies issued on or after October 1, 1985. Sec. 3, Ch. 531, L. 1983.

In 1985, the Human Rights Commission promulgated administrative rules implementing the statute. Significantly, the rules provide:

> [C]overages . . . issued, delivered, or issued for delivery in the state of Montana shall not be based on sex or marital status.

ARM § 24.9.1303(1).

The Human Rights Commission has consistently interpreted this constitutional, statutory, and regulatory framework as requiring mandatory coverage for normal pregnancy and childbirth expenses under individual (non-group) health insurance policies.

[redacted] Company's Major Medical Expense Policy [redacted] contains the following exception:

> This policy doesn't cover expenses for:
>
> . . . .
>
> (13) Normal pregnancy and childbirth. Complications of pregnancy expenses are covered as a sickness.

Additionally, [redacted] offers a Maternity Benefit Rider [redacted] which provides coverage for normal pregnancy and childbirth expenses.

In the typical case in controversy the insured declines the Maternity Benefit Rider but later files a claim for normal pregnancy and childbirth expenses under the Major Medical Policy. Under the relevant policy provisions, coverage is denied. This leads to the insured filing a complaint before the Human Rights Commission accusing [redacted] of unlawful discrimination on the basis of sex under the unisex law, § 49-2-309, MCA. As noted, the Human Rights Commission invariably agrees. However, because of the relative small amounts of the claims, [redacted] has simply paid the claims and avoided the threat of an adverse precedent which would be set by formal decision of the Human Rights Commission.

EX. 1
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d. Legal challenge. The Human Rights Commission interpretation of the unisex statute is open to legal challenge. Neither the statute nor the Human Rights Commission interpretation has been tested in court. However, we may look for guidance to interpretations of federal civil rights statutes.

Language similar to that used in the unisex statute and the Human Rights Commission administrative rules appears in Title VII of the 1964 Civil Rights Act which prohibits employment practices which "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin"; 42 U.S.C.S. § 2000e-2.

We turn first to the United States Supreme Court opinion in General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L. Ed. 2d 343 (1976). There, an employee benefit plan excluded payment for pregnancy related disability. In the face of the provisions of Title VII, cited above, the Court held that discrimination did not occur.

> Whatever the ultimate probative value of the evidence introduced before the District court . . . at the very least it tends to illustrate that the selection of risks covered by the Plan did not operate, in fact, to discriminate against women. . . . We need not disturb the findings of the District Court to note that neither is there a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." (Citations omitted.) The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others. (Citations omitted.) The "package" going to relevant identifiable groups we are presently concerned with--General Electric's male and female employees--covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." (Citations omitted.) As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not

> result simply because an employer's disability-benefits plan is less than all-inclusive. For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here.

50 L. Ed. 2d at 355-57.

Similarly, we may turn to the United States Supreme Court's opinion in Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485, 41 L. Ed. 2d 256 (1974) which was heavily relied upon by the court in Gilbert. In the Geduldig case, the state-run California disability insurance program paid benefits to workers disabled for any reason except normal pregnancy. 41 L. Ed. 2d at 261. The court framed the issue as whether the exclusion of normal pregnancy from the benefits resulted in an invidious discrimination against women under the equal protection clause of the Fourteenth Amendment to the United States Constitution. 41 L. Ed. 2d at 262. It ruled that no invidious discrimination occurred.

> These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.
>
> The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. For the reasons we have stated, we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment.

41 L. Ed. 2d at 264-265.

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In another Title VII case, the landmark decision of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L. Ed. 2d 657 (1978), the court held the practice of an employer's practice of requiring higher pension contributions from women (because they live longer than men) constituted unlawful discrimination. The court carefully distinguished Gilbert and Geduldig, 55 L. Ed. 2d at 669-670.

In yet another Title VII case, Arizona Governing Committee v. Norris, 463 U.S. 1073, 103 S.Ct. 3492, 77 L. Ed. 2d 1236 (1983), the court extended the Manhart rationale to the payout phase of an employee benefit plan, holding the use of gender-based mortality tables to calculate differing payouts for women and men was unlawfully discriminatory. The court did not distinguish Gilbert and Geduldig as it had in Manhart, noting the Pregnancy Discrimination Act had eliminated the tension between the court's decisions. 77 L. Ed. 2d at 1248-1249, fn. 14.

The Pregnancy Discrimination Act was enacted in direct response to the Gilbert decision. 77 L. Ed. 2d at 1248-1249, fn. 14. It amended Title VII to provide:

> The terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions. . . .

42 U.S.C.S. § 2000e(k).

As such, women affected by the enumerated conditions must, under employer-sponsored benefit programs, be treated the same as individuals not so affected.

The key to our analysis is that Montana has not specifically added language like that in the Pregnancy Discrimination Act to its unisex insurance law. As such, we are free to argue that Gilbert and Geduldig, interpreting roughly the same anti-discrimination language in Title VII (without the additions of the Pregnancy Discrimination Act) provide the proper interpretation of the unisex statute. In short, because the exclusion of pregnancy benefits is not discriminatory, the Human Rights Commission interpretation of the unisex statute, based as it is on discrimination, is erroneous.

EXHIBIT 5
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HB 388

AMENDMENTS TO HB 388
Prepared by the Montana Association of Life Underwriters

1. Title, line 8.
   Following: "49-2-101"
   Insert: ", 49-2-309"

2. Title, lines 9 and 10.
   Following: "EFFECTIVE DATE"
   Strike: "AND A RETROACTIVE APPLICABILITY DATE"

3. Page 6, following line 11.
   Insert: "**Section 2.** Section 49-2-309, MCA, is amended to read:

   "**49-2-309. Discrimination in insurance and retirement plans.** (1) It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

   (2) This section does not apply to any insurance policy, plan,coverage,or any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

   (3) This section does not require any individual policy of disability insurance delivered or issued for delivery to any person in this state under Title 33, Chapter 22, Part 2 to contain coverage for normal maternity or childbirth.

   (4) This section does not require any group policy of disability insurance delivered or issued for delivery in this state under Title 33, Chapter 22, Part 5 to contain coverage for normal maternity or childbirth if the group consists of less than 15 employees as defined in 33-22-501."

   Renumber subsequent sections.

4. Page 7, line 24.
   Strike Section 3 in its entirety.
   Renumber subsequent sections.

Exhibit #9
3-5-91
HB388

MARIE DEONIER & Associates

MARIE DEONIER, RHU

P.O. Box 31197-152 (406) 245-7063 Billings, MT 59107-119

TESTIMONY RE: HB 388 Mandated Maternity Benefits on all Health Insurance Policies

OPPOSE HB 388

I am appearing today as a registered, concerned voter and as a member of the Montana Association of Life Underwriters.

My insurance business is primarily in the small group and individual health insurance market. I represent many companies in order to be able to serve my clients specific insurance needs specifically for health and disability income insurance.

My concern is with the **"mandating of benefits"** on health insurance plans, and as this relates to HB388 dealing specifically with the **"mandated maternity benefit"**.

Currently health insurance policies in Montana all cover "complications of pregnancy" the same as any other illness. Therefore, the high costs relating to unplanned expenses are covered. BUT, normal maternity benefits, a budgetable amount, are optional or not included at all on some plans currently being offered in Montana. The cost of a normal delivery including pre-natal care is between $2000 to $3000.

With the rising cost of medical care which also is reflected in the rising cost of health insurance premiums, it is more important than ever for us to be able to offer the consumer an insurance plan to meet their specific needs, and at a premium they can afford. The addition of "normal maternity coverage" **increases the premium by $40 to $50 per policy, an addition that many individuals and small businesses simply cannot afford!** Any "mandated benefit" also affects premiums.

I agree, it would be nice if all companies could offer not only this maternity benefit, but all other benefits as well. However, in reality, people simply cannot afford it! And, with the increased premiums many people are dropping their insurance simply because they cannot pay the premiums and put food on the table! Simply put, everyone cannot afford a Cadillac, some have to settle for a "basic low cost model" to protect themselves from high "catastrophic medical costs". This type of plan is being requested more and more as premiums continue to increase. We simply must be able to continue to offer this choice!

The majority of my individual policyholders carry a $1000 deductible or higher.

TESTIMONY RE: HB 388 - MANDATED MATERNITY BENEFITS
PREPARED BY: MARIE DEONIER, RHU

At a time when Federal Legislators are looking at options to "preempt state mandates" - providing for an ERISA preemption to reduce the cost of providing basic health coverage, why are Montana people now trying to increase "mandates" and increase cost of health insurance coverage? In todays economy it doesn't make sense!

Another point for consideration is **"PREMIUM TAX"**. If this mandate goes into effect, we could see more companies setting up Trusts outside the state, in which case any premium tax would go to the domicile state, and not to Montana. A loss of income to the State of Montana. This would result in affordable health insurance for Montanans, but at a revenue loss to the state.

It is my recommendation that you **"VOTE NO" ON HOUSE BILL 388.**

The only way this bill should pass is IF it is amended to follow the Federal Mandate Guideline of mandating maternity coverage on employer groups with 15 or more employees.

Thank you for this consideration for the people of Montana. Give them the right to have a choice! Freedom of Choice is what this country was founded on.

Respectfully submitted by:

MARIE DEONIER, RHU
(Registered Health Underwriter)
Member Montana Association of Life Underwriters
Co-Chairman - Health Committee
Health Advisor - Legislative Committee
Past President Montana Association of Health Underwriters

Exhibit #10
HB 493
3-5-91

Testimony of Anne L. MacIntyre
Administrator, Human Rights Commission
In opposition to House Bill 493
Senate Judiciary Committee
March 5, 1991

The Human Rights Commission opposes HB493 for several reasons.

First, although the bill would eliminate the requirement that parties exhaust their administrative remedy before the Commission before bringing a discrimination complaint in the district court, the bill does not indicate what the alternative procedure or remedies would be. As the proponents have indicated, the intent of this legislation is to reverse action of the Legislature taken in 1987, in response to a Supreme Court decision in a case called Drinkwalter v. Shipton Supply. The Supreme Court held in Drinkwalter that the Human Rights Act did not provide the exclusive remedy for an employee's claims arising out of sexual harassment in the workplace. Prior to the Drinkwalter decision, I believe it was generally assumed that the discrimination laws did establish the exclusive remedy for employment discrimination claims under state law in Montana. The language proposed to be deleted here was added to the statute at the request of attorneys who were concerned about having to defend the same claim in two forums. The Supreme Court has reversed its holding in Drinkwalter, based upon the statutory change. The holding in Drinkwalter was premised on the theory that a common law cause of action existed for complaints of sexual harassment. It is highly unlikely that a court would hold that a common law cause of action existed for other types of discrimination complaints prior to the enactment of the Human Rights Act. Therefore, because the effects of Drinkwalter were never completely clear, I do not believe it is at all clear what procedures and remedies the proponents of HB493 are advocating should be applied to discrimination complaints filed directly in district court.

The absence of clear procedures and remedies concerns me particularly because I believe that one of the primary reasons the legislature established an administrative agency for processing complaints of discrimination was so that a mechanism would exist to insure that the interest of the public in eliminating discrimination would be addressed in the resolution of discrimination complaints. In my experience, individual complainants to cases are primarily interested in obtaining their own individual relief, such as damages and back pay. The Commission, when it finds discrimination occurred in a case, attempts to make sure that the discrimination will not recur by requiring affirmative relief in conciliation agreements and Commission orders, in addition to individual relief. If individuals can pursue their complaints directly in district court, there is no mechanism for protecting the public interest.

Further, if the Commission does not provide the exclusive remedy for addressing discrimination claims which arise under the act,

then it is not at all clear that a complainant could not pursue complaints for the same alleged violation both with the Commission and in the district court. I believe that it establishes bad public policy for state law to allow complaints concerning the same violation to be pursued in two forums at the same time.

In addition, if HB493 is enacted, it will establish two separate systems of justice, one for those who can afford an attorney to pursue a complaint of discrimination and one for those who cannot. In addition to being unfair for those who cannot afford attorneys, I think such a system undermines the effectiveness of the Commission by trivializing the Commission's work. Inevitably, if discrimination complainants are not required to file with the Commission, the more clear cut, significant complaints will be filed in court and the less clear cut complaints will be filed with the Commission. I do not believe this is a desirable result.

In reply to the arguments of the proponents that the existence of the Commission as an exclusive process creates a bottleneck for those complaints which will ultimately end up in court anyway and that cases take too long before the Commission, there are other solutions to these problems, like adequately funding the operation of the Commission. I do not believe that we solve the problem of cases taking too long by transferring the bottleneck to the district courts.

Regarding the claim that the current situation creates a disparity in the procedures and remedies for sexual assaults which occur on versus off the job, I believe there is, or should be, a difference between having an intentional tort claim against an individual who commits an assault and having a sexual harassment claim against one's employer. Recognizing that there is some confusion in this area stemming from the Supreme Court's decision in Harrison v. Chance, the solution is to develop language to the effect that the existence of a claim for sexual harassment against a person's employer does not deprive that person of any tort claim the person might have against an individual who actually committed an intentional tort. I have prepared an amendment which I think accomplishes that objective.

In closing, I would like to state that I think the enactment of HB493 in its present form will create serious confusion about what procedures and remedies are required to be followed in complaints of discrimination under state law. Thus, I think the best course of action is to recommend that the bill not be concurred in. If the committee believes the elimination of the exclusive remedy is the appropriate course, then I believe the bill should be substantially amended to outline what the procedures and remedies are, rather than creating the procedural "never never land" this bill creates. I have attempted to prepare amendments to achieve that objective and would be happy to share them with the committee.

EXHIBIT - 10
HB 493
3-5-91

Amendments to House Bill No. 493
First Reading Copy (white)

Prepared by Anne L. MacIntyre
March 4, 1991

1. Page 1, line 4.
Following: "ACT"
Strike: "DELETING"
Insert: "REVISING"

2. Page 1, line 7.
Following: "LAWS"
Insert: "TO CLARIFY THAT CERTAIN TORT CLAIMS ARE NOT SUBJECT TO THE EXCLUSIVE REMEDY PROVISIONS OF THOSE LAWS"

3. Page 4.
Following: line 2
Insert: "(7) Except as provided in this section, the provisions of this chapter establish the exclusive remedy for claims arising under state law for acts constituting an alleged violation of this chapter, including claims of sexual harassment against an employer and including claims for acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana Constitution or 49-1-102. No other claim or request for relief based upon such acts may be entertained by a district court under state law other than by the procedures specified in this chapter.
(8) The provisions of subsection (7) do not limit the authority of a district court to consider claims against an individual tortfeasor. Claims alleging a violation of this chapter, including sexual harassment claims, filed against an employer in its capacity as employer are subject to the remedies established by this chapter."

4. Page 6.
Following: line 19
Insert: "(7) Except as provided in this section, the provisions of this chapter establish the exclusive remedy for claims arising under state law for acts constituting an alleged violation of this chapter, including claims of sexual harassment against an employer and including claims for acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana Constitution or 49-1-102. No other claim or request for relief based upon such acts may be entertained by a district court under state law other than by the procedures specified in this chapter.

Ex. 10a
HB 493
3-5-91

(8) The provisions of subsection (7) do not limit the authority of a district court to consider tort claims against an individual tortfeasor. Claims alleging a violation of this chapter, including sexual harassment claims, filed against an employer in its capacity as employer are subject to the administrative requirements of this chapter."

EXhibit #11
5 Mar 91
HB493

Testimony From The Montana Human Rights Network

Opposing HB 493

Mr. Chairman, members of the Committee, my name is Ken Toole. I am here today to offer testimony on behalf of the Montana Human Rights Network. The Network in a coalition of groups from around the state which work to further the cause of civil rights in Montana. We have participating organizations in Helena, Missoula, Billings, Bozeman, Great Falls, Arlee, Ronan, Noxon and Libby. Most of the participating organizations formed in response to white supremist threats in their community.

The Network believes that one of the best ways to counter hatred and bigotry in Montana is to have a strong Human Rights Commission dedicated to enforcing civil rights laws. We are opposed to this bill because of our belief that it will weaken the Commission and, consequently, the activities of this agency in fighting illegal discrimination.

Our first area of concern is that of equal access. Some individuals have portrayed this bill as allowing victims of discrimination to opt for the Commission or for the courts. The fact of the matter is that many individuals will not have any option. Individual's who lack the resources to obtain an attorney will not be able to opt for the court route. And, attorneys will only take the most blatant cases of discrimination on a contingency fee. This will relegate those without resources and those whose cases involve subtle and complex discrimination to the Commission's process. We are concerned about any system which creates two separate systems for redress. We are particularly concerned about this proposal because we can see access being denied because of economic status.

Our second area of concern is representation of public policy. Currently the Commission orders those found to be discriminating to change their behavior to assure that the discriminatory behavior stops. Even in settlement discussions between the parties where there has been a preliminary finding of discrimination, the commission staff participates, representing the public interest in assuring that discriminatory practices do not continue. We are concerned that the District Courts will not act to protect the public interest in stopping discrimination. We are sure that settlements entered between the parties will rarely address the public interest.

A final area of concern is that the District court system is ill equipped to handle this additional case load. These cases are highly complex and have a very specialized body of precedent which is specific to discrimination. We believe that the Commission and its staff has the training and experience to deal with these cases in an efficient manner if they are properly funded.

EXHIBIT #16
3-5-91
HB493

Amend H.B. 493 as follows:

Pages 3 and 4, reinstate all the stricken language except the last nine words. Then add a new clause so that the amended subsection reads as follows:

"(7) The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. No other claim or request for relief based upon such acts may be entertained by a district court ~~other than by the procedures specified in this chapter~~ and any claim or request for relief under this chapter brought directly to a district court must be filed within the time limits specified in this chapter."

Page 6, reinstate all the stricken language except the last nine words. Then add a new clause so that the amended subsection reads as follows:

"(7) The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. No other claim or request for relief based upon such acts may be entertained by a district court ~~other than by the procedures specified in this chapter~~ and any claim or request for relief under this chapter brought directly to a district court must be filed within the time limits specified in this chapter."

Amend the title as follows:

Page 1, line 6, strike "remedy" and insert "exclusive procedure for remedying"

This amendment makes clear that the legislature is not establishing a new common law action for discrimination with statutes of limitations and remedies different than those laid out in the Human Rights Act. However, the amendment would still allow plaintiffs to choose their forum (either the Human Rights Commission or district court), but in both cases they would be governed by the time limits and remedies specified in the Human Rights Act.

Exhibit 13
3-5-91
HB 439

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 5th day of March, 1991.

Name: Paul L. Frantz

Address: PO Box 1168, Bozeman, MT 59771-116

Telephone Number: 586-4311

Representing whom?

Appearing on which proposal?
HB 439

Do you: Support? / Amend?_____ Oppose?_____

Comments:
See written statement.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

Exhibit 13
3-5-91
HB439

COMMENTS IN SUPPORT OF HOUSE BILL 439

BEFORE THE SENATE JUDICIARY COMMITTEE

STATE OF MONTANA

March 5, 1991

By Paul L. Frantz

I appear before you today to testify in support of House Bill 439. I am an attorney in private practice in Bozeman. Part of my practice involves immigration law.

House Bill 439 would require courts in Montana to inform criminal defendants, at the time of entering a plea, that if the criminal defendant is not a citizen of the United States, a guilty plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law. This bill would amend MCA Sections 46-12-202 and 46-12-204 by adding this obligation to the list of information required to be given by a judge before accepting a plea of guilty. If the Legislature approves Senate Bill 51, House Bill 439 would add this obligation in the appropriate place, probably as a new subsection 6 to MCA Section 46-12-202.

This proposed legislation in House Bill 439 would ensure that non-citizens have the opportunity to seek legal advice regarding potential immigration consequences of their pleas prior to the time of entering the pleas. This procedural safeguard is needed because cases may arise in which non-citizens enter pleas for offenses completely unaware that they may be deported, be excluded from admission to the United States, or be denied naturalization as a result of their plea. This is especially important because some criminal offenses may appear minor, yet still may have immigration consequences.

No matter what the nature of a criminal conviction, a non-citizen should not face the harsh penalty of deportation, exclusion from admission, or denial of naturalization without the benefit of adequate legal advice. In Montana, since we have a small non-citizen population, many criminal defense attorneys may be unaware of the immigration consequences of the entry of a guilty plea by a non-citizen.

In many situations involving minor criminal charges, many individuals may not seek the advice and aid of an attorney. Rather, they simply appear in court on an appointed day and enter their plea without counsel. These individuals are especially at

Exhibit 13
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risk if the courts do not advise them that there may be immigration consequences of their plea.

Deportation, exclusion from admission to the United States, or denial of naturalization are all such harsh results potentially stemming from entry of a guilty plea that non-citizens should be made aware that certain immigration consequences may result. While there exist several consequences that result from entry of a guilty plea, no consequence is as harsh as permanent exclusion from the United States.

This legislation is necessary to guarantee constitutional protection for those non-citizens appearing in our Montana courts. It would promote fundamental fairness and justice with little burden placed on judges.

Similar provisions are now part of the law in at least nine other states, including California (California Penal Code Section 1016.5); Connecticut (Connecticut General Statutes Section 54-1j); Hawaii (Hawaii Revised Statutes Sections 802E-1 through E-3); Massachusetts (Massachusetts General Laws Chapter 278 Section 29D); North Carolina (North Carolina General Statutes Section 15A-1022(a)); Ohio (Ohio Revised Code Annotated Section 2943.03.1), Oregon (Oregon Revised Statutes, Section 135.385); Texas (Texas Code of Criminal Procedure Article 26.13(a)(4)); and Washington (Washington Revised Code Section 10.40.200).

Thank you very much for your consideration.

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EXHIBIT 14
HB 439
3-5-91

THOMAS A. OLSON
DISTRICT JUDGE

STATE OF MONTANA

COLLEEN EAYRS-JOHNSON
CSR, RPR COURT REPORTER

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
DEPT. NO. 1

March 4, 1991

Senate Judiciary Committee
State Capitol Building
Helena, MT 59620

RE: House Bill 439

Dear Members of the Senate Judiciary Committee:

I support HB 439 which would amend §§ 46-12-202 and 46-12-204, M.C.A. It would require a judge to advise a criminal defendant who is not a U.S. citizen that a consequence of a guilty plea might be his/her deportation. This requirement is not an unreasonable burden on a judge, and is only fair.

I applaud the individuals who introduced this bill for taking an active interest in safeguarding and clarifying an accused's fundamental right to due process.

Very truly yours,

Thomas A. Olson
District Judge

TAO/sat

(406) 585-1380
LAW AND JUSTICE CENTER • 615 SOUTH 16TH
BOZEMAN, MONTANA 59715

DATE 3/5/91

COMMITTEE ON Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Support	Oppose
[illegible] Nicholas	Mont Assn Life Undw	HB388		✓
LARRY AKEY	MT ASSOC OF LIFE UNDERWRITERS	HB388		✓
HARLEY WARNER	MT. ASS OF CHURCHES	HB388 HB493	✓	✓
R Budd Gould	Self	HB389	✓	
Dave Barnhill	Insurance dept.	HB388	✓	
Paul Frantz		HB439	✓	
Lynda Saul	ICCW	HB388	✓	
Anne MacIntyre	Human Rights Comm	HB 388, HB 389,	✓	HB 493
Michael Sherwood	MTLA	HB439	✓	
Tom Hopgood	Health Ins Assoc America	HB388		✓
Diane Sands	Mt Womens Lobby	HB388	✓	
John Fitzpatrick	Pegasus Gold Corp	HB493		✓
Doug Lowney	Mt Assoc Life Underwriters/self	388		✓
Leonard O. Sanders	Nat'l Assoc. Life Underwriters	HB 388		✓
Ken Toole	mt Human Rights network	HB 493		✓
Riley Johnson	NFIB	388		✓
Dennis Lopach	US WEST Comm	493		✓
LeRoy H. Schramm	Mt. Univ System	HB 493		✓
Scott Crichton	ACLU	HB493	✓	
Scott Crichton	ACLU	HB 388	✓	
~~Connie Strebe~~	~~Mt. Bar Assoc~~	#1		
Bryan Asay	Mt Biblical-Legal Found.	HB391		X
Ken [illegible]	Church of Jesus Christ of LDS	HB391		✓
Candy Wimmer	Youth Service Adv. Coun.	HB109	✓	
Jim Smith	Blue Sky Schools	H212		✓
GEORGE OCHENSKI	SELF	Karla Gray	✓	