

Governor's Taskforce on Equality
Thursday, May 25, 2006

Meeting Minutes

Location: Labor and Industries Building, Salem, Oregon

Attending:

Paul J. Kelly, Jr. (Chair)
Annabelle Jaramillo (by phone)
Bruce Samson
Calvin O. L. Henry, Ph.D.
Dan Bryant
Eugene Ross
Kenneth "Rick" Brissette
Sara S. Mason
Tiffany Telfer

Non-Voting Members:

David Reese, General Counsel to the Governor
Kelly Skye, Deputy General Counsel to the Governor
Dave Hicks, Department of Justice
Marcia Ohlemiller, Bureau of Labor and Industries
Tiffany Harris, Attorney at Law, Schwabe, Williamson and Wyatt
Kim Boswell, Law Clerk, Office of the Governor

Chair Kelly called the meeting to order at 9:10 am.

Administrative Business

- Minutes from April 12 meeting
- Task Force Website: it is now up and can be accessed at http://www.oregon.gov/Gov/taskforce_on_equality/gtoe_index.shtml, or by link from the Governor's webpage. Notice and agendas of future meetings and minutes of past meetings will be posted there.
- Open Meetings Guidelines, Dave Hicks, Department of Justice, provided summary points of issues discussed at the last meeting.

Current Anti-Discrimination Law and Enforcement: Marcia Ohlemiller

Marcia Ohlemiller, Bureau of Labor and Industries Policy Advisor, presented a synopsis of current Oregon anti-discrimination laws and how statutes and regulations may interrelate on the topic.

Oregon has no state statutory protection from discrimination on the basis of sexual orientation or gender identity. Many municipalities and counties have such laws, and BOLI has contracts with many of them to administer/enforce their ordinances.

- Portland was the first local code. Beaverton, Lake Oswego, etc. have followed.
- Descriptions of gender identity and sexual orientation are similar (the cities seem to have copied from each other).
- BOLI has enforcement ability. It has not had a contested case hearing under any of these ordinances.
- Oregon Revised Statutes (ORS) 659A is Oregon's version of the federal Title VII. Recites "garden variety" protected classes. ORS 659A.030 is where "sexual orientation" would be inserted if an amendment were to be made to the Oregon Revised Statutes. By amending this one section, the rest of 659A would be affected accordingly.
- Federal ADA was used as basis for modeling 659A several legislative sessions ago. But "baggage" came along, too. A provision was added that excluded certain provisions as not being disabilities. See 659A.130. Many of the listed items are mental health diagnoses, but homosexuality or bisexuality was included. As a note of history, transsexuals were taken out of the listing, although there was a concern on insurance issues (found not to be a valid concern), and 659A.118(2) was inserted to exclude reasonable accommodation liability to employers arising out of transsexualism.
- 659A.150; Oregon Family Leave Act: Has definition for family members. BOLI has made changes internally to enforce compliance consistently with *Tanner*.
- ORS 659A.400 covers unlawful discrimination in public accommodations, real property, and other areas. Public accommodations covers commercial transactions – not necessarily government action.
- ORS 659A.800 Provides the authority for BOLI to take all steps necessary to eliminate and prevent unlawful practices and the effects of unlawful discrimination. Provides the enforcement mechanism for protections in 659A. A potential claimant can go straight to state court; they are not required to exhaust their remedies through BOLI first.
- Gender is not mentioned in ORS 659A.030 – the term "sex" covers gender.

Tanner v. OHSU

First, the Court found that OHSU is sufficiently a government entity, despite its "quasi" government status. The Ct of Appeals found that OHSU's practice of providing medical benefits to married persons and not to same sex domestic partners violated Art. I, Sec. 20 of the Oregon Constitution, the equal privileges and immunities clause.

When BOLI receives a complaint of discrimination on the basis of sexual orientation, it can investigate it under an applicable local ordinance or under state law if the complaint relates to "association," i.e., something the employer thinks about you or knows about you because of your association. Some discrimination complaints may be investigated as complaints of gender discrimination or sexual harassment.

The Court of Appeals has not spoken since Tanner. Even though the statute is arguably deficient, BOLI cannot take complaints under ORS 659A.030 on the basis of sexual orientation. How does the state define “domestic partner” for same sex partners versus opposite sex partners?

Tanner drew a distinction: you can get married if you are opposite sex partners, but if you are same sex partners, you cannot. OHSU had responded by offering same benefits to *all* domestic partners. BOLI technical assistance people, by talking to employers, found that many employers are extending benefits to all domestic partners, not to just same sex partners. They may have requirements for employee to demonstrate. But Tanner does have distinction.

- Under *Tanner*, BOLI has jurisdiction to take complaints with association components, and has expanded Oregon’s version of FMLA guidelines to reflect same-sex medical leave issues.

Page 56 of the BOLI handout: Multnomah County: there were more sexual orientation discrimination complaints after the same sex marriage question came up, but we are not sure why. Portland has always been the area with the most complaints.

Page 56 of the BOLI handout, statistics: BOLI does not keep track of what happens outside of claims addressed through BOLI. A lot happens through private bar and through courts for which statistics are not kept. Also, many people call for advice and do not pursue a claim, for which we do not keep statistics.

Page 58 of the BOLI handout: Many discrimination complaints have a number of theories, i.e., discrimination on the basis of sexual orientation, gender and race. If BOLI investigates a case on the issue of sexual orientation and finds “no substantial evidence” on that ground, it doesn’t necessarily mean the entire claim is without merit. There may be grounds for the other claims.

Gender identity usually comes up through harassment: if an employee is harassing another employee and employer knows about it and does nothing. But it could also come up if a person chooses to dress or act in a manner they believe to be essential to their gender identity, and are discriminated against because of that, this would be addressed by these ordinances, too.

Substantial evidence is the standard for evaluation of discrimination complaints. BOLI either makes a substantial evidence finding or closes the case. Procedurally, the case can go through the BOLI system and not get to court.

BOLI doesn’t typically give the level of damages that courts might; BOLI’s top level ranges between \$50-75K. Courts may award higher damages. An attorney may suggest to their client to go to BOLI and see what happens, and if BOLI finds substantial evidence, the complainant might withdraw to court.

The 2005 Oregon Legislative Session, Proposed Legislation and the Results: Tiffany Harris

Tiffany Harris, Attorney at Law, Schwabe, Williamson and Wyatt, served as committee staff for the Senate Rules Committee during the 2005 legislative session and staffed SB 1000 and a couple of companion bills.

- SB 1000. This bill that takes existing law and inserts “and sexual orientation. The bill prohibits discrimination in 1) *employment*, which includes hiring, firing, membership in labor unions, ability to use job referral services, etc; 2) *housing*, including sales and lending; 3) *public accommodations*, concerns entities that do business in sale of goods to the public.
- SB 1000 defines sexual orientation to include gender identity. A lot of the language is similar to the city/county local ordinances. The definition is on page one of SB 1000.
- The second portion of SB 1000 would have created a system of civil unions (defined on page 26 of the bill). That language came from Vermont and California statutes. This essentially delivers tangible legal and administrative rights and benefits of marriage to civil unions. Connecticut also has a similar law.

Timeline:

- **Opening day 2005 session:** Governor Kulongoski gave his state of the state address and committed to pushing through some sort of antidiscrimination law as applied to sexual orientation.
- The Governor first introduced sexual orientation non-discrimination legislation as early as 1978 as a legislator.
- Other bills were less comprehensive – dealt exclusively with non-discrimination; didn’t touch all areas of public life. The only other bill to have a hearing was SB 1073, which dealt solely with civil unions.
- **April, 2005:** *Li v. State*. The Oregon Supreme Court heard this appeal regarding the same sex marriage licenses from Multnomah County. Over 3,000 marriage licenses were not registered at the state level, and a named couple sued to get the licenses registered.
 - Measure 36 was approved by voters after the marriage licenses were granted.
 - The Supreme Court indicated it was not going to give legal effect to marriages, but it did not address Art. I, Sec. 20 on its face.
- **May, 2005:** First public hearing of SB 1000. The first time that the Oregon legislature openly debated civil unions. The hearing lasted 6.5 hours – everyone was included.
- **June 7, 2005:** Hearing on SB 1073. It was less of a showcase hearing, held during the day, it didn’t involve so much of the public. After this hearing, the Senate decided to pursue SB 1000, and let SB 1073 drop.
 - Subsequently, the Senate made amendments to SB 1000 to address some concerns raised at this hearing. Notable amendment to bill: religious exemption on pages 4 and 5 of SB 1000.

- **July 8, 2005:** SB 1000 passed in the Senate: 19/10. It never got a hearing on the House side. Intelligence indicates that there were sufficient votes in House. The Speaker of House used her discretion/power to disallow a hearing on the bill.
 - The House then amended the bill to address reciprocal benefits, and supporters did not want that version to move to the House floor.
- The California Court of Appeals case *Knight v. Superior Court*, 128 Cal. App. 4th 14 (2005)- A California initiative defined marriage as between one man and one woman. The California legislature subsequently passed a civil union law. Objectors filed a lawsuit claiming the two contradicted each other. The Court held that the initiative did not prohibit civil unions, stating that if drafters of the initiative had intended to prohibit civil unions, they could have explicitly said so, but they didn't. Laws passed in other states were very explicit. The legislature had plenty of templates it could have used if it wanted to prohibit civil unions. The court saw no intention to touch legal relationships between same sex partners. The CA Supreme Court affirmed w/o opinion.
- Religion. Entities with a religious mission were concerned the bill may require them to associate with people with whom they choose not to associate. The religious exemption language in SB 1000 is rather broad, and was a response to these concerns. There is no explicit exemption in Title VII – but the SB 1000 religious exemption was pretty broad in order to be clear that no one is trying to regulate religious communities. In actuality, such complaints don't come up that often.
- Reciprocal benefits concept: falls somewhere between the different approaches taken in SB 1000 and SB 1073. Provides that two people living together (they can be related) can file proper documentation and be entitled to certain rights and benefits. Modeled after Hawaii's provisions, which seem to be fairly comprehensive. A dramatic difference between SB 1000 and SB 1073 is that there were only about 11 rights delivered by SB 1073. For example, if one beneficiary dies, then the surviving beneficiary can gain access to safe deposit box.
- Defining difference between the reciprocal benefits bill and the civil unions bill: Civil union provides that *all rights* inured to marriage will inure to those in civil unions. But with the reciprocal benefits bill, *unless specifically listed*, reciprocal benefits parties do not get these rights.
- The difference between civil unions and marriage? You can't take your civil union status with you if you move from the state, and none of the benefits at the federal level can apply – ex: federal taxes, social security, immigration status, etc.
- Can you accomplish CU without mentioning marriage? It would be difficult. There are 800+ statutes that deal with the benefits of marriage. You would need to amend them all. Vermont handled it by creating discrete statutes, rather than amending marriage statutes.
- Faith communities are not all same; some religious communities have defended rights and others have not.

Discussion of Additional Research and Information Needed

1. Presentation on interface between US Constitution and Oregon Constitution as it relates to statutory and regulatory scheme. – privileges and immunities, right of association, freedom of religion (Example: Tanner is based on Oregon's Art I, Sec, 20, not on Fed. Title VII or 14th Amendment Privileges and Immunities).
2. Copy of *Li v. Oregon*
3. Vermont / California civil union laws
4. California Court of Appeals Case regarding civil unions
5. Legislation that has passed in other states and its impact on business (see the Human Rights Commission 2004 material in notebook).
6. Vermont study
7. BOLI summary of complaints – illustrative of the types, degrees and amount of discrimination on the basis of sexual orientation
8. Research on immutable characteristics
9. Walk through SB 1000

Task Force Work Plan

- Public Testimony: Task Force will take public testimony once it is finished with background education

Future Meetings

- Next meeting June 30, 9am to 12pm. City: Portland. BOLI office.
- By next week, Paul Kelly will propose dates for July, August, and September. Asked that all members send info about personal conflicts.

Meeting adjourned 12:00 pm.