

Governor's Taskforce on Equality
Friday, June 30, 2006

Meeting Minutes

Location: Labor and Industries Building, Portland, Oregon

Attending:

Paul J. Kelly, Jr. (Chair)
Dan Bryant
Kenneth "Rick" Brissette
Eugene Ross
Sara S. Mason
Sho Dozono
Tiffany Telfer
Bruce Samson

Non-Voting Members:

David Reese, General Counsel to the Governor
Kelly Skye, Deputy General Counsel to the Governor
Teresa Miller, Legislative Director, Office of the Governor
David Hicks, Department of Justice, Attorney
Amy Klare, Bureau of Labor and Industries, Civil Rights Administrator
Marcia Ohlemiller, Bureau of Labor and Industries
Tiffany Harris, Attorney at Law, Schwabe, Williamson and Wyatt
Kim Boswell, Law Clerk, Office of the Governor
Stacy Ho, Law Clerk, Office of the Governor

Chair Kelly called the meeting to order at 9:05 a.m.

I. Administrative Business

- Minutes from May 25 meeting

II. Additional Background Information Requested by Task Force

- A. David Hicks, Department of Justice: Interface Between U.S. Constitution, Oregon Constitution, and Oregon Statutes
- There are two types of discrimination: Discrimination by state and local government, and discrimination by private parties
 - Discrimination by state and local government
 - Ways that government discriminates: Exclusion from same-sex marriage; deprivation of benefits
 - Four sources of law applicable to state and local governments regarding discrimination:

1. The U.S. Constitution: The question is whether the federal equal protection clause prohibits discrimination based on sexual orientation; it has not yet been interpreted so by the courts.
2. The Federal Civil Rights Act
3. The Oregon Constitution
 - As with the U.S. Constitution, the question is whether the Equal Privileges and Immunities Clause prohibits discrimination on the basis of sexual orientation.
 - Benefits
 - The Oregon Supreme Court says that a suspect class (against whom discrimination is prohibited) is defined in terms of immutable characteristics and can be suspected of reflecting prejudice or stereotypes. The question is whether immutability is an essential requirement for the protection to apply.
 - In the 1998 *Tanner v. OHSU* case, OHSU (a government entity) offered marriage benefits, which homosexuals could not claim. The Oregon Appeals Court held that a suspect class is a distinct, socially-recognized group that is the subject of adverse social and political stereotyping and prejudice, and that homosexuals are a suspect class. The court did not require immutability. We do not know how the Oregon Supreme Court would rule, since the state chose not to appeal the case. Today, OHSU is providing benefits to same-sex couples.
 - Marriage
 - In *Li v. Oregon*, the trial court held that the rights and benefits incident to marriage may not be denied on the basis of sexual orientation or gender and left it to the Legislature to craft an appropriate remedy. While the case was on appeal, voters approved Ballot Measure 36 (2004), which resolved the constitutional question regarding the extension of “marriage” in constraining marriage to “one man–one woman.” The Supreme Court did not reach the underlying constitutional question regarding the rights and benefits incident to marriage because that question was not properly before the Court. In addition, the *Li* decision did not address the ability of the Legislature to adopt a civil union system in Oregon.
 - In *Parman v. Oregon*, a suit filed this year in Multnomah County District Court, the question is whether a state statute granting parental rights to the husbands of mothers who conceive through artificial insemination unconstitutionally discriminates on the

basis of sex and sexual orientation because it only refers to heterosexual parents.

- The Oregon Legislature could pass a law (such as SB 1000) prohibiting government from discriminating on the basis of sexual orientation.
- Discrimination by Private Parties
 - No Oregon or federal law currently explicitly prohibits discrimination on the basis of sexual orientation by private parties, although Oregon cities and counties have adopted such laws. We may need a statutory change to address sexual orientation discrimination.
 - BOLI is enforcing current laws as if they prohibit discrimination on the basis of sexual orientation. In particular, they interpret ORS 659A.030's language "based on the sex with whom someone associates" as applicable to sexual orientation.
- Discussion
 - The Term "Immutable"
 - The term "immutable" has to do with a personal characteristic that cannot be changed. Race is immutable. Sex may not be immutable today. The question is whether sexual orientation is "immutable" for purposes of the law.
 - Religion is mutable, but discrimination on the basis of religion is covered in the Constitution separately, not by the privileges and immunities clause.
 - It may be better to enact a statute prohibiting sexual orientation discrimination rather than to define what "immutable" is.
 - Privileges and Immunities
 - Privileges and immunities are government-granted benefits, rights, or opportunities.
 - The question is whether statutes violate the Constitution when they discriminate in the provision of benefits.
 - Federal Defense of Marriage Act
 - This act is designed to eliminate the requirement that a state recognize marriages granted by other states to same-sex couples.

B. Amy Klare – Summary of BOLI Sexual Orientation Discrimination Complaints

- Amy Klare read aloud some of the details of the complaints.
- Case types include discrimination based on perceived sexual orientation or discrimination based on sexual orientation, alone or combined with harassment, termination, or physical violence.
- Specific intent cases require a protected class, a harm, and a link between the cause of the harm and discrimination on the basis of class. In the majority of BOLI cases, there has not been sufficient evidence of a link. The "cause rate" is less than ten percent in discrimination cases filed with BOLI, meaning that in less than ten percent of the cases BOLI is able to establish sufficient evidence of a link between the cause of the harm and discrimination on the basis of sexual orientation. Part of the reason

the percentage is so low is because cases are often taken to court after being filed with BOLI, so BOLI does not complete the investigation.

- In terms of complaints nationwide, David Reese showed Taskforce members a GAO report describing the number of complaints filed in states since adoption of sexual orientation discrimination laws. There has been a modest and stable number of complaints. Taskforce members expressed an interest in knowing more about costs and benefits that states and localities have experienced related to adoption of such laws.

C. Tiffany Harris

- Review of SB 1000
 - SB 1000, as originally drafted, was a two-part bill containing anti-discrimination provisions as well as civil union provisions. The anti-discrimination provisions of SB 1000 add sexual orientation to existing laws prohibiting discrimination on the basis of race, religion, ethnicity, etc.
 - The civil union language of SB 1000 was modeled on the Vermont statute. Some of the common elements of civil union laws and legislation in various states include the following: prohibition of civil unions between family members, minimum age requirements, requirement that civil union be between two people, establishment of a legal process for initiating or dissolving a civil union, and language establishing that civil unions provide the same rights, benefits, and responsibilities as marriage.
 - Specific discussion points:
 - SB 1000 would not apply to Boy Scout scoutmasters because the Boy Scouts are not a “place of public accommodation” and scoutmasters are volunteers.
 - SB 1000 acknowledged that religious employers may discriminate in hiring on the basis of sexual orientation within limited parameters.
 - SB 1000 also included conditional language regarding schools.
- The legislature can enact an antidiscrimination law on the basis of sexual orientation.
 - In SB 1000 debates, some opposition to the bill was based on the idea that the law only protects discrimination against immutable traits.
 - The law, however, currently prohibits discrimination on the basis of mutable characteristics or learned behavior. For example, the law prohibits discrimination based on someone having a juvenile criminal record that has been expunged, on whether someone is a smoker, and on marital status.
- Voters can repeal a law prohibiting discrimination on the basis of gender identity and sexual orientation in employment, housing, and places of public accommodation.
 - Need enough votes to repeal.
 - Voters’ action must be constitutional, e.g., may not bar future ordinances prohibiting discrimination, as Colorado’s Measure 2 did.
- There do not appear to be any constitutional barriers to enacting civil union legislation in Oregon.
 - *Li v. Oregon* does not throw up any roadblocks because the court never reached the question.

- *Knight v. Superior Court*: This California Court of Appeals opinion is nonbinding authority on Oregon but has compelling reasons for civil unions.
 - Notes on other states' legislation:
 - Vermont's civil union law resulted from a Supreme Court case in which the court held that the Constitution requires that same-sex couples receive the same rights and benefits as married people do and that the remedy was to either issue marriage licenses or extend the same rights. David Reese showed the Taskforce a 2002 report by the Vermont Civil Union Review Commission which summarized information about the implementation, operation, and effect of the civil union law in its first six months, including the number of couples who obtained licenses, and the couples' home states and ages. Thus far, there is no information indicating that the law has had either a positive or negative impact on Vermont's economy or government.
 - The California and Connecticut legislatures passed civil union laws.
 - Massachusetts' marriage law resulted from a court case that held that it is a violation to deny marriage to same-sex couples and that marriage, not civil unions, is the remedy.

III. Follow-Up

- Research for more information on the experiences of other states and eight Oregon local governments on any negative impacts on business or positive impacts on recreation and tourism caused by sexual orientation antidiscrimination laws.
- Tiffany Harris will send an email containing various clarifications and explanations.
- Tiffany Telfer will share with the Taskforce public comments that the Bend Council receives when it considers their ordinance.
- Public Input
 - Aim for opportunity for public comment at September meeting, as well as possibly several public meetings outside of Portland.
 - Compile names of specific invitees.
 - Post notice on website to invite the general public.
 - Develop a process for public input.
 - The Taskforce would like to understand opposition to SB 1000 in order to maximize the viability of proposed legislation. For example, in terms of marriage, Measure 36 may represent people's opposition to gay "marriage" by another name. In terms of nondiscrimination, opposition is reported to be based on the various following notions: that discrimination does not exist, that a nondiscrimination law will result in frivolous lawsuits and bankruptcy of business, and that it will have negative impacts on churches and schools.

Meeting adjourned at 12:15 p.m.

The next meeting will be held in Salem on August 3 from 1:00 to 5:00 p.m.