**MINUTES**

**MONTANA SENATE**
**57th LEGISLATURE - REGULAR SESSION**
**COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN LORENTS GROSFIELD**, on January 8, 2001 at 10:04 A.M., in Room 303 Capitol.

## ROLL CALL

**Members Present:**
Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Valencia Lane, Legislative Branch
Cecile Tropila, Committee Secretary

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

**Committee Business Summary:**
Hearing(s) & Date(s) Posted: SB 63, SB 4, SB 1, SJR 2
Executive Action: SJR 2

## HEARING ON SB 63

**Sponsor: SEN. JON TESTER, SD45, BIG SANDY**

**Proponents:** **Riley Johnson, Northern Rockies Rental Assoc.**
**Kevin Pierson, Strobel's Rentals Great Falls, MT.**
**Dan Jacques, A-1 Rentals, Helena, MT.**
**Roland Schumaker, ABC Rental, Bozeman, MT.**

**Opponents: None**

**Opening Statement by Sponsor:**

**SEN. JON TESTER, SD 45, BIG SANDY** stated this bill would clarify criminal offenses related to theft of rented or leased personal property. Section one is a clarification, section two cuts the timeframe from forty eight hours to twelve business hours. On the second page section two clarification and section three puts more emphasis on the lesee. He said that folks in the rental business have described some definite problems in their business in getting material that they rented out not returned in a timely manner or even stolen. This bill would speed up the time-line and give some clarification, he said.

**Proponents' Testimony:**

**Riley Johnson, Northern Rockies Rental Association** pointed out that they are taking an existing law and adding 'failure to return' to 'will pay for'. Other proponents would explain why they need this in their business.

**Kevin Pierson, Strobels Rentals, Great Falls** explained that if a customer failed to return a piece of rented equipment either because they didn't have the money to pay, or because their friends failed to return it for them, the rental companies had no legal recourse other than small claims court to collect. They would prefer to have "failure to return" and "failure to pay" considered regular theft of service instead.

**Dan Jacques, A-1 Rentals, Helena** said that in the past one year period, his business had over $12,000 was not paid for equipment that has been returned.

**Roland Schumaker, ABC Rental, Bozeman** mentioned that the collections go through a civil case and there really is no deterrents for these people to pay their bill. He felt that if it was a criminal penalty there would be a better chance that they would pay. He said they often times try to go through collection agencies, but they lose at least thirty to fifty percent, if indeed they even collect. He has a case right now where a person owes about $5,000 and he has gone through the collection agency and the individual is now moving his checking account to various banks around the state in order to avoid the collection agency to try and get money from him. In his business he writes off about $30,000 a year of uncollectible funds and $30,000 a year would help him add another person to the payroll.

**Opponents' Testimony: None**

**Questions from Committee Members and Responses:**

**SEN. O'NEIL** asked on page two line four, does that mean failure to pay for the equipment if you fail to return the equipment or does it mean to pay for failure to pay for the use of the equipment when you return the equipment?

**Sen Tester** replied it meant if you did not pay for the service rendered.

**SEN. O'NEIl** questioned if you rent out a tractor or something and use if for a few days and you bring it back, and you do not have the money to pay the $100 rental on it then that makes that a crime?

**Sen. Tester** answered that is correct. This is important because when that tractor was rented the agreement was signed and the customer knew the conditions going in and one of the conditions was that you pay for the rental service of that piece of equipment and if you couldn't pay for the rental service for that piece of equipment you should not have rented it out the two days before. He does not think that is unreasonable, it is simply doing business in a manner that is reasonable and prudent.

**SEN. HALLIGAN** asked if there was a separate statute that applies to videos?

**Sen. Tester** answered if you look under section 45-6-309, it talks about the subsection where written notice of the date and time when the property must be returned and the penalty provided in this section stated in the rental agreement and he didn't know if that is necessarily true with videos. If it is, then maybe we need to make some amendment to this, but when he has rented videos that hasn't been the case.

**SEN. HALLIGAN** stated that families often do not know where the videos are for a day or two, but the rental places do get the videos back. He argued that with the notation "twelve business hours".

**Roland Schumaker** said their intent here is not to go after the $5 or $20 that don't get paid. They are primarily going after the larger amounts that they think warrant the time and effort put forth by people throughout the criminal system. The major deterrent is for the larger dollar volumes that can suck up a lot of money.

**CHAIRMAN GROSFIELD** asked Mr. Schumaker if he had a figure in mind as a threshold?

**Roland Schumaker** answered "not less than $500." He did not know any county attorney in the state would go after less than $500. As clogged as the court systems are now, he didn't think they would spend much time prosecuting it.

**Kevin Pierson** added that personally he would not like to see a dollar figure threshold put on it, he would prefer to see that deterrent there for everybody and let the county attorneys worry about the prosecuting. The county attorneys are only going to prosecute whatever dollar figure they come up with anyway. "I don't think it is our job to set that dollar figure and if we unfortunately do set that dollar figure then the deterrent isn't going to be there for the people under that dollar figure."

**Sen. Tester** commented that we are not really talking about video tapes here, we are talking about major league equipment. We are talking about small businesses that are being put behind the eight ball, because when customers come in to do the initial renting they probably have no intentions to pay for it and they know the law isn't there to back them up to "hold their feet to the fire". He would like to leave it to the committee to make the appropriate changes to address those questions that you have in regard to the video, but urged the committee to pass a piece of legislation that will help these small businesses stay in business and not be getting stuck with major expenses that aren't being paid for.

**SEN. O'NEIL** asked under this law would this make it possible for a contractor who was renting a piece a equipment, and while he has his equipment rented out, he goes bankrupt and he brings the equipment back and then he is guilty of crime?

**Sen. Tester** answered yes.

**SEN. HALLIGAN** stated that new language is being inserted, which tempers the criminal penalty and "without good cause" on line twenty-five, page one and he is interested in whether this refers to if the customer returns it or does not return it.

**Kevin Pierson** mentioned 'without good cause' is if the customer is still using the piece of equipment then that is good cause for him to not be returning it within the time frames allotted to him.

**SEN. HALLIGAN** stated that they are not paying for it pursuant to the agreement that they originally signed at your business.

These customers have gone beyond that time frame, and if there has been no agreement extending that, signing anything, they could say they are still using it, and they may be filing for bankruptcy in a couple of days.

**Kevin Pierson** explained the customer could extend the contract if they wished.

**CHAIRMAN GROSFIELD** asked Mr. Pierson why he chose twelve hours from the original 48?

**Kevin Pierson** answered to try and reduce our time of not having our money as much as possible, in all honesty forty-eight hours gives a person a lot of time to go a long distance and unfortunately we are dealing with a lot of out-of-state contractors.

**CHAIRMAN GROSFIELD** asked if most of these businesses are open twelve hours a day?

**Kevin Pierson** answered seven days a week. He also added that for clarification, the twelve hours was twelve hours more to pay for it after it was returned. Not after it was due. He felt "failure to return within forty-eight hours" could be left in, but the "failure to pay for" doesn't need to be more than twelve hours after the actual return.

**Closing by Sponsor:**

**SEN. JON TESTER, SD 45, BIG SANDY** summarized by that the rental association folks are getting hit rather hard on non-payment and this bill it is to address that issue. He also commented that this is a problem that impacts businesses in the state that are trying to provide services, and are having a hard time retrieving the money.

## HEARING ON SB 4

**Sponsor: SEN. GRIMES, SD 20 CLANCY**

**Proponents:** **Jim Nys, Society for Human Resources**
**Al Smith, Trial Lawyers Association**
**Aidan Myhre, MT Chamber of Commerce**
**Mike Meloy, Member of Trial Lawyers Assoc.**
**Don Judge, AFL-CIO**
**Riley Johnson, Northern Rockies Rental Assoc.**

**Opponents:** **Leroy H. Schram, MT. University System**

**Opening Statement by Sponsor**:

**SEN. GRIMES, SD 20 CLANCY** stated that Senate Bill 4 is by request of the Law, Justice, and Indian Affairs Interim Committee. He added that this is referenced in the "whereas" section, which is the Whidden decision. The Montana Supreme Court held that the at-will employment statute had been impliedly repealed in 1987 by the Wrongful Discharge from Employment Act. There is some question to the efficiency of the Whidden decision and there may be some opponents to the bill who propose waiting to amend the law to see if it is overthrown.

The purpose of this bill is to clean up the language, clarify it, and make sure that someone with a superficial reading of the at-will employment statute, that we are deleting, doesn't take a cavalier attitude towards permanent employees.

**Proponents' Testimony**:

**James A Nys, Society for Human Resources EXHIBIT(jus05a01)** said that in the written testimony that is being circulated two italicized and indented paragraphs show the relevant portions of the Whidden decision that are reflected in the language of the bill. It simply points out that the conflict between the old at-will statute that has been on the books since the turn of last century and the Wrongful Discharge Act, which was adopted in 1987. Even though the legislature put language in the preamble to the Wrongful Discharge Act, to try and preserve some form of at-will employment, the court decided that there was an inherent conflict.

**Al Smith, Trial Lawyers Association** said that having worked both sides of it, the one being hired and the one hiring people,this bill would be fair for both sides for that initial probationary period.

**Adian Myhre, MT Chamber of Commerce** stated that the probationary period is a very good management tool for businesses and again it allows the opportunity for both the employer and the employee to identify this is as a good employment fit. Whether that period be a three month, six month or twelve month period, again it helps them make sure the employee will work well within their organization, buy into their philosophies and management practices, and hopefully be a long term employee and contribute to that business.

**Mike Meloy, Member of Trial Lawyers Assoc.** pointed out that this bill does two things, the first is to correct the disparity that has been in the law since 1987 when this legislature passed a

"good cause" requirement for employment relationships and left the at-will statute intact.

***{Tape : 1; Side : B begins; Approx. Time Counter 25 minutes}***

Secondly, it makes it clear that it is still an at-will employment during the employment relationship, and this fixes the situation that existed so many times in the past when a probationary employee was not working out and the employer went to his or her lawyer and asked what can to do and the lawyer looks at the statute and the supreme court decisions and says you can terminate this person for any reason. This bill is a very good bill.

**Don Judge, AFL-CIO** stated that he believes this bill clarifies the probationary period as a time when both parties, the worker and the employer, are able to sit down and negotiate whether or not long term employment is right for either party, and to separate that employment relationship without any real retribution.

**Riley Johnson, Northern Rockies Rental Assoc.** represents the National Federation of Independent Businesses and mentioned that N.F.I.B has small employers, almost 8,000 in the state of Montana and they stand in support of this bill as fairness for both the worker and for the employer.

**Opponents' Testimony**:

**Leroy Schram, MT. University System** mentioned that he felt something needs to be done with response to the Whidden decision, and he is suggesting some amendments that are being handed out. **EXHIBIT(jus05a02)**

He added that the at-will employment would be wiped out and that over the years our employees were at-will and now they are no longer at-will employees. Because they do not have a probationary system and it is not that a probationary system is set up, even large groups of employees do not have that system.

Those employees are then, the minute they come in the door, can only be terminated for cause, and if you let them go that means before they could not go to the court and pursue a wrongful discharge under the Wrongful Discharge Statute unless they said it was against public policy. It can be tested and you have to convince a jury or a judge that yes it is not working out and that is a valid reason.

He added that this bill would bring more clarity to the law as the present language if people are looking for clarity and it preserves the right of the employers to hire at-will.

**Questions from Committee Members and Responses**:

**SEN. O'NEIL** asked as a small employer, if they hire someone for awhile and then their son comes back from college would they be allowed to lay off that employee and put their son on?

**Leroy Schram** answered if in fact you are hired for an indefinite term, if it really means an indefinite term, you can be terminated for any cause.

**SEN. HALLIGAN** asked what has been seen in practice with respect to the at-will issue for employees hired for indefinite terms? Has the confusion been out there with respect to non-covered areas?

**Mike Meloy** answered he couldn't think of any case in which an employer has defended a non-probationary firing on the basis that the person is at-will. He also said that the policy of ending at-will employment occurred in 1987 and when a person walks into an employment situation on day one, if there is no probationary period then termination of that employee is going to be for cause.

**SEN. HALLIGAN** asked if the industry believes that they have to fire for a cause and what are businesses doing and why not put that into law?

**Leroy Schram** answered there is always some reason for firing an employee.

**SEN. HALLIGAN** asked Mr. Nys to answer the question also, since he handles personnel work.

**Jim Nys** answered that in his experience, since the 1987 enactment of the Wrongful Discharge Act, he has been telling people they need to have a reason. Because when there is a termination it is not potentially subject to the Wrongful Discharge Act, you also have to be concerned about other potential causes such as discrimination laws.

**SEN. PEASE** asked how did this bill come out with the Law, Justice and Indian Affairs Interim Committee? Are you a part of that committee also?

**SEN. GRIMES** answered yes he was. He added that these bills typically come at the request of the code commissioner, Greg Petesch.

**Greg Petesch, Legislative Staff - Code Commissioner** remarked that historically for changes in the law, that are not appropriate for inclusion in the code commissioner bill, which is intended to be non-substantive technical corrections. He would appear at the first meeting of this committee and propose several pieces of legislation that were needed to clarify provisions in law that the court would either find in conflict with each other, invalid or something else.

**Closing by Sponsor**:

**SEN. GRIMES, SD 20 CLANCY** summarized by saying this bill obviously is needed because of this decision. The net effect could be that this would change the way university system and perhaps others view provisional employees, or at-will employees. Given the nature of those hirings, it does say in the bill that the probationary period can be defined by the employer.

## HEARING ON SB 1

**Sponsor**: **SEN. GRIMES, SD 20 CLANCY**

**Proponents**: **Jim Nys, Society for Human Resources**
**Riley Johnson, N.F.I.B**
**Adian Myhre, Montana Chamber of Commerce**

**Opponents**: **Mike Meloy, Member Trial Lawyers Assoc.**
**Don Judge, AFL-CIO**
**Al Smith, Montana Trial Lawyers Assoc.**
**Tom Bilodeau, Researcher for MEA-MFT**

**Opening Statement by Sponsor**:

**SEN. GRIMES, SD 20 CLANCY** stated this was a proposal in 1999 legislature and those bills in that legislature went through the business committees and they obviously had some technical legal issues. He added perhaps we can correct some of those deficiencies by working through the Judiciary Committee where they should be appropriately be considered.

The background on this bill includes employment reference information, which is often the most valuable source of information towards the background of individual employees you

can get. Obtaining reference information also has some benefits, it can prevent liability for negligent hiring.

A number of states (20 or more) have enacted shield laws for providing good faith disclosures.

***{Tape : 2; Side : A begins; Approx. Time Counter 1:05}***

He also mentioned elements that would have strengthen the law were removed and unfortunately they were removed not by opponents of the bill, but by the proponents of the bill. The experts agree that the current law is subject to constitutional challenge.

Some of the examples of the problems that were presented in the bill are for instance, the bill uses and refers to criminal code concepts such as "knowingly", "purposely" and uses those definitions as well as referring directly to it and this is one of the sections being struck from the bill. That really has the net effect of over throwing case law in the area of defamation in the defamation theory. The other issue is that people feel it could be constitutionally challenged because it only applies to non-public employees and that was, again the result of some consternation on the part of the proponents from the last legislative session.

One of the big issues is that the law applies to a person's employment related performance and that wording sounds legitimate.

Consent is also a result of our actions given a lower status. In other states they recognize it as an absolute privilege rather than qualified privilege. Qualified privilege is usually when only interested parties are allowed to interact with the information.

**Proponents' Testimony**:

**Jim Nys, Society for Human Resource** said that John Sullivan prepared some written testimony, which is part of the package is being handed out and also an email was sent to me by one of our members, Don Whitney, who is a private investigator - former district director for the immigration and naturalization service. **EXHIBIT(jus05a03) EXHIBIT(jus05a04) EXHIBIT(jus05a05)**

First of all, this bill addresses a number of technical legal issues. The simple issue here is wanting to be able to get the best information regarding future performance on an employee, which is past information in the form of reference checks. Most

employers have a policy of simply giving information such as dates of employment.

On one hand, employees who have done their jobs properly and have followed all the rules aren't able to have that information transferred to a potential new employer so that they can properly rise to the top of the pack. The other side is those who committed wrongly in the workplace, such as illegal conduct, such as theft or violence, that information doesn't follow them into the new workplace and allows them to have the potential to recommit those offenses.

**Riley Johnson, N.F.I.B.** stated that the standard response to somebody who asks how to handle an employee reference is don't ask, don't tell. As a result of that we are having movement of bad employees to other employers - getting rid of the problems, but that one employer who is getting the problem could be me, so it is a two-way street. We ask for a clear line of understanding, which we like about Sen. Bill 4.

**Adian Myhre, Montana Chamber of Commerce** mentioned that she is in support of this bill because as talked about in Sen. Bill 4, it is a good management tool. It allows employers to contact former employers, find out valuable information about people they are hiring. It also rewards those employees that are good employees and allows them to have employers give positive information and feedback to a perspective employer.

**Opponents' Testimony**:

**Mike Meloy, Member Trial Lawyers Assoc.** stated that since 1975 or thereabouts he has been defending defamation cases mostly for employers. He feels this bill deletes the protection people have for untrue statements made about them in the course of employment inquiry.

He asked, does anyone on the panel know the difference between an absolute and a qualified privilege? The section that is being amended is that section in Montana law that provides an absolute privilege for those communications that fall within its scope. Section 27-1-804 essentially immunizes any communication, which is made within the scope of the section even if it is false.

He questioned, does anybody know the difference between "per se" and "per quod" communications? Adding if anyone knew whether this amendment of this section for employment references would permit a retraction to be made or requested? Does anyone on this panel know what a "false light" defamation is? All of what you do when you provide, when you make the dispute about an

employment reference subject to defamation law is to bring in all of these provisions of defamation law in to play.

He said that unfortunately there aren't very many lawyers out there who do a lot of defamation law and if you are an employer and you have to go talk to your lawyer about this reference that you have given that someone is complaining about, chances are that lawyer is not going to be able to help you much because they do not know about defamation law. You will end up paying a lawyer a lot of money to figure out what the law is.

The other problem is the problem the bill faced in the last session when it attempted to distinquish against public employment references and private employment references. That is a question of immunity that you are going to have to deal with. The problem when you amend the defamation statute with the eroding the distinction between public and private employment is that there is a substantial difference in the existing First Amendment Law Defamation between what a private employer can say about a person and what a public employer can say about a person and how defamation law affects those two separate entities.

He then asked to please take out the language connecting this to defamation law and put some protection in there for untrue statements made in an employee reference. If this bill passes, it will completely eliminate any protections that an employee has when an employer says something untrue. This is a significant change in eliminating the protections of employees that they now have for untrue statements being made about their prior employment.

**Don Judge, AFL-CIO** stated that he is an employer and has employees who leave his business. He has had employees who have left that may not be employees that he would not recommend to somebody. When he receives a reference check for those workers, one question is asked - would you rehire? All that is marked in the box is no, I would not rehire.

He added the concern that we are eliminating the blacklisting laws of the state of Montana - weakening them to the point where they really don't apply anymore in this state. People think of blacklisting as something from the past. When they tore down the old offices at the Anaconda Corporation over in Butte, Montana and started digging through the old desks, they found cards of employees who were being blacklisted. These were references that the employer, the Anaconda Company, the little cards saying if these workers apply to jobs somewhere else tell that employer not to hire them. In the case of that situation it was because they were union workers, and they didn't want any other employers for their own self interest having union workers organizing their

workforce. It provided competition for a workforce that was relatively cheap to get. They had a self interest in that and they also had a self interest in battling the issue of workers who were trying to get wages and benefits, and making sure that they got even for the actions of these workers.

He commented that blacklisting is as prevalent today as it was when the old Anaconda Corporation worked. Today there are firms in this country, operating four of them in this country and one in Canada that purchase, wherever they can, lists and names and addresses of workers who have been injured on the job and then they sell that information to perspective employers. That is blacklisting and literally millions of workers have their name on those lists.

As you notice on page two "a corporation is a person etc...," this signifies the elimination on line eighteen of any company or corporation in this state and inserted as a person in this state may provide some limits on liability for the company or corporation. Making the individual the liable person in the event that they have said something that constitutes blacklisting.

He defined blacklisting from line twenty-nine that is to prepare a list of persons, but then on the following page it does not include individual employment references.

**Al Smith, Montana Trial Lawyers Assoc.** stated that the intent from his organization is to insure that everyone is accountable and responsible for their actions. He is here to oppose this bill because this allows employers to escape accountability and responsibility for their actions. He believes that what is being set up here is an absolute immunity.

He said that if you are going to give the state any immunity or liability the bill needs to pass by a two-thirds vote and that provision is not here in this bill. **EXHIBIT(jus05a06)** What this bill does is get rid of protection of discharged employees.

He also said that blacklisting is preventing a person from being able to have employment. Whether you do it by keeping a list, whether you do it for a whole group of people or whether you do it for an individual, it is still blacklisting. It is the preventing of somebody being able to get employment. But that is what this bill allows employers to do, presenting someone to be able to receive employment and it leaves no recourse due to the absolute immunity that is being put in here.

He continued that under this bill you could have an employer who is giving a reference, who tells a perspective employer - this

person has a child support obligation and there are all these changes going on and if I were you I wouldn't hire him. It has nothing to do about whether the person could be a good employee or not, it is not whether or not they have done their job or not. It is something that is outside of their job and that could be the reason and an employee wouldn't know that. If you look at page two of the bill, where the employees be furnished on demand with reason for discharge. There is nothing that actually requires that the reason for discharge has to be given. There is no mechanism to force an employer to give a reason for discharge. An employee who doesn't get a job, doesn't know - was it because my previous employer said he wasn't doing a good job, was it because his previous employer said it was his child support obligations. For instance, if you have an employee who is a good employee - willing to work extra shifts, willing to fill in for co-workers, but they won't work on Sundays because that is the day they spend with their families in church and that is a day they set aside for their family. If that employee decides to seek out another job and the reference comes back and says this person wasn't working out for us because he wouldn't work overtime and he was not flexible about schedules.

***{Tape : 2; Side : B; Approx. Time Counter 30:02 - 11:30a.m.}***

If the employee was flexible and did do his job, but the employer says no he wasn't a team player and did not help out - untrue statements protected under this act doesn't make sense. You have heard all of the people get up here and testify on Sen. Bill 4 and they all testified that they were for that bill, with one exception, because it was fair to both the employer and the employee, this bill is not fair to employees. At some point we are all employees, members of our families are employees. Under this bill, those employers can make untrue statements that would prevent you from getting a job and that simply is not fair to the employees.

He also added that if you tell the truth as an employer in making an employment reference that will stand up. If the truth is that employee was late for all of their shifts, that person did not ever help out with co-workers - those things you will not get into trouble for that. We need some protection here to make sure that the statements that are made have to be truthful. Under this bill, they do not.

**Tom Biladeau, Researcher for MEA-MFT** said that often people coming into the public sector, either into teaching positions, other professional positions or into classified positions are coming into the private sector. Those employers in the public sector do need references. It is expected by his organization, by the members and by the employers of the public sector that

those references that are provided to those individuals will be fully true and honest. Untrue statements are the basis for defamation claims. This law eliminates that protection for all employees in respect to employment references.

Similarly many of our employees for purposes of wage advancement or other personal career, professional reasons leave public employment to go to private employment. It has been their expectation that any public employer making a reference on behalf of one of their employees, one of their members, would limit their comments not only to the employment history of that individual, but also limit their comments to the true and defensible reasons for termination of employment. This is a serious problem in professional positions in particular, affecting teachers and healthcare workers. Those rather vague, indiscriminate comments about someone's willingness to work different shifts, the willingness to work in a team atmosphere. Those often unknown statements regarding a person's morale fitness are very difficult to deal with and significantly undermine that individual's ability to continue to practice in their profession of choice. That is not in the best interest of public policy in this state.

**Questions from Committee Members and Responses**:

**SEN. HALLIGAN** asked if this bill leaves the ability to be able to say untrue things have immunity?

**Sen. Grimes** answered that with a number of overwhelming court cases that have come out that have caused employers to be very cautious and fearful in this area, himself included. Most of the time when you go for reference checks the last statistic is around 70% of people who are contacted will not make any reference. In addition, the old phrase 'eligible or ineligible for rehire' has been tested in the courts and people have been slapped significantly as a result. Many personnel professionals are advising people not to use that saying nothing more than hiring dates.

Referring to the third section of the handout by Mr. Sullivan that describes going back to common interest applications of privilege. There are a number of other occasions upon which the common interest privilege could be lost as well so this is not the absolute privilege that was alleged by the opponents, but also it includes qualified privilege, common interest privilege as it is described here. These include by way of an example situations in which the defamatory information is published for some purpose other than that for which the privilege is given.

There is a difference in thought over how this bill would apply in those cases. In most of these other states this is exactly where this language is being applied - in the defamation applications of the particular statutes.

**SEN. HALLIGAN** questioned if this was a qualified privilege or an absolute privilege and do we have some ability with malice or reckless disregard for the truth to be able to have some plaintiffs or employees opportunity for redress?

**Mike Meloy** answered by using an example of Mr. Pistoria, who was having an on-going dispute with a police officer in Great Falls. Rep. Pistoria went to a city council meeting in Great Falls and said some very bad, untrue things about this police officer. The police officer sued him and Rep. Pistoria defended the claim and in the course of discovery, admitted that what he said was false and he also essentially admitted that he did not like the guy and he was trying to get even with him. During the course of that proceeding, Rep. Pistoria relied on 27-1-804, which is now section two, on line nineteen of the bill, and the supreme court construed that section as an absolute privilege.

He added that if the provisions of this section are added and applied to employment references to 27-1-804, than an absolute privilege is being made.

**SEN. DOHERTY** asked if you believe that you are adopting a qualified immunity, then do you believe that you are adopting the qualified immunity in that subsection?

**Sen. Grimes** answered that is not the intention of this bill.

**SEN. DOHERTY** then asked why is it a good idea to repeal 27.1.737?

**Sen. Grimes** answered that it refers back to criminal law in 45-2-101 in that section - "knowingly" and "purposefully" and "negligently", which negates the application in these cases of defamation law that normally is applied.

**SEN. DOHERTY** questioned that for purposes of trying to understand what blacklisting is, would you concede that blacklisting might also include preparing a list of persons or an individual employment reference - may be a form of blacklisting?

**Sen. Grimes** answered this is important for the committee to consider. If you write it one way you will see the evils on one side and if you write it the other way, blacklisting will be so broadly construed that we would never be able to give employment references.

**Closing by Sponsor:**

**SEN. GRIMES, SD 20 CLANCY** summarized that there was a great deal of thought and energy put into this bill and even though he respects greatly the credentials of the opponents he said there is a need to be cautious. He added that yes there are lawsuits over good references because it is easy to give a good reference and leave something out of the reference and that can imply a negative reference. With regard to injuries we have human rights law and ADA law that fully applies and basically it is an issue of semantics here. At the same time we need employers to provide work related information.

## HEARING ON SJR. 2

**Sponsor: SEN. WATERMAN SD 26 HELENA**

**Proponents:** **Donald Harve, Physician & Psychiatrist - Billings**
**Randy Polsen, Chief of Mental Health Services Bureau Dept. Public Health and Human Services**
**Jani McCall A.W.A.R.E.**
**Sandra Mahilish, Mental Health Oversight Committee**
**Winnie Ore, Department of Corrections**
**Gloria Paladichek, Self**
**Jonelle McFadden, Mental Health Advocate**
**Bonnie Adee, Mental Health State of Montana**
**Betty Whiting, Montana Assoc. of Churches**
**Gene Haire, Executive Director of Mental Disabilities Board of Visitors**
**Al Davis, Mental Health Assoc. of Montana**
**Kathy McGowan, Community Medical Health Centers of Montana**
**Sharon Hoff-Broadaway, Executive Director of Montana Catholic Conference**
**Jim Smith, Montana Sheriffs and Police Officers Association**

**Opponents:** **None**

**Opening Statement by Sponsor:**

**Sen. Waterman SD 26 HELENA** stated that this is introduced at the request of the Legislative Finance Committee, it also was brought by the Mental Health Oversight Advisory Council. This is a resolution that directs the Department of Public Health and Corrections to coordinate and collaborate with a variety of state agencies to provide training and education programs concerning

people with mental illness and how they interact with the criminal justice system and corrections.

This issue arose repeatedly in the both the oversight and finance committee as they tried to address a number of sticky issues with mental health. Corrections officers are crying for training on mental illness. At the beginning, they actually received one hour of basic training out at the law enforcement academy - that has been doubled now to two hours. The training, at least, is minimal and we have officers in the field, who everyday interact with people in crisis with a serious mental illness and they need training, not only in how to recognize those mental illnesses, but how to appropriately deal with them to de-escalate the situation. The areas where family members and consumers and providers have been providing training has been appreciated and it needs to be expanded and that is the purpose of this resolution.

**Proponents' Testimony**:

**Donald Harve, Physician & Psychiatrist** said that there are specific clinical reasons as to why it is very important for the individuals having to deal with individuals who are incarcerated in detention centers as to potential mental illness or mental disorder that is present. From the information in the resolution proposed here, the number of individuals who are incarcerated who actually have the mental illness and mental disorders - various types. We know from clinical practice that the sooner the individual is recognized as having a problem and the sooner some approach to treatment is carried out the more efficient it is, as far as the individual's illness is concerned, in helping them get control over the illness and it is also fiscally important, as far as the correctional facilities are concerned. It decreases the complications, it decreases the problems not only in behavior, but we know from considerable research it also decreases the number of other medical complaints that the individual may have.

***{Tape : 3; Side : A; Approx. Time Counter : 0}***

**Randy Polsen, Chief of Mental Health Services** said that within the department it is essential for the mental health community and the justice system to have a common understanding of persons with mental illness and their treatment needs. He added that they have had discussions with the Department of Corrections and begun some planning on joint training. He said they have also included a position that would facilitate this kind of training in the budget request, which they would like to accomplish in terms of both liaison with law enforcement agencies and the

training. He believes that it is important to pass this resolution because it expresses to all components, not only the Departments of Public Health and Human Services and not just the Department of Corrections, but all of the various agencies that are mentioned in the resolution and emphasizes the importance that the legislature places upon this.

**Jani McCall, A.W.A.R.E.** mentioned that this coordination and collaboration is long overdue. It is incredibly important and is very good.

**Sandra Mahilish, Mental Health Oversight Committee**
**EXHIBIT(jus05a07)** see testimony.

**Winnie Ore, Department of Corrections** stated that the Department of Corrections supports this proposal with one concern and that has to do with our current financial crisis in the Department of Corrections and because most of the staff needing this training will be staff requiring staff replacement and that causes overtime. It is a concern for the department, otherwise we fully support this bill.

**Gloria Paliaichek, Self** said that she knows from personal experience how important mental health training is. She has a sister who suffers from schizophrenia and bipolar manic depression. Stating that it hit her sister later in life when she was a college graduate, a teacher, married with two teenage children before it struck her. When her sister could no longer care for herself she had to move back to Montana. The family took her to a doctor in Miles City who took her totally off medications. Her family knew absolutely nothing about mental illness and she expressed that in no time it became a real crisis situation.

Another time when she was serving as Richmond County Commissioner several citizens came to our board reporting inappropriate behavior of gentlemen who had hitchhiked into our area. From the descriptions, it was her belief that this person suffered from a mental illness. He was evaluated and indeed found to be suffering from mental illness and put on medication. She would have never recognized his behavior to possibly be from mental illness if she had not been educated of the symptoms.

She added that she believes this to be cost effective, when you have a person who gets into a crisis situation it is very expensive and they can be in the hospital for a considerable length of time to bring them back down.

**Jonell McFadden, Mental Health Advocate** said that law enforcement officers are often the first responders. The Mental Health Oversight Committee on criminal justice studied this recommendation very throughly and this was their conclusion of what was needed. Also last year in the Surgeon General's report on mental health they stated that many people with mental disorders do not seek treatment. Her point is that when individuals are picked up by law enforcement it would be helpful in the beginning to be able to have knowledge of some of the symptoms of mental disorders.

**Bonnie Adee, Mental Health State of Montana** stated that from the consumers' perspective they have heard often from their dealings with officers, jailers, judge, county attorneys or public defenders, eventually sometimes correctional officers or probation officers who have not understood the person's mental illness symptoms and so on. She wanted to add the word effective training because she thought by hearing about it or reading about it, it may not be the kind of training that would make a difference and translate into the understanding that she would hope for.

**Betty Whiting, Montana Assoc. of Churches** said that the concern is that all people are made in the image of God and should be treated with dignity and respect. There have been newspaper articles where this has not happened in our prisons. She holds a PH.D. in experimental psychology and has spent ten years teaching psychology at Rocky Mountain College. She mentioned that she has worked with Warm Springs in the years 1967 to 1968 and was hired to do testing of prisoners that were brought over from Deer Lodge.

She added that as citizens we really do not understand mental illness or recognize it. It is a hidden disease, people do not talk about it and from that point of view people can't point out and recognize it. However, we do have psychological testing assessments that can rather quickly find out different aspects of a person - are they brain damaged, mentally disabled, do they have an effective disorder or a mental need. We are not using these in our jails, it would be very possible to have some screening devices to help everyone.

She continued to mention that often times medications are withdrawn and it takes a long time for medications of this nature to go through the entire system. It may take six months for a person to get over the medical use or six months to get back on. Because if you take them off the medication it disrupts the person's life for many months. Secondly, we have a problem with costs in medications. Our departments need to be talking about how we are going to be able to afford the costs. In the last

twenty-five, thirty years we have receive tremendous research that has been done. People can be brought into normal behavior again by using medications and we are not doing that in this state in a coordinated way.

She also said that there needs to be communication about how to make treatment plans specific to the individuals and particularly then we could easily set up treatment plans in certain areas so that prisoners with a particular illness could be treated in one prison. All the professionals for that particular illness could then be there.

Mentally ill people are sometimes put into isolation. People who are mentally disabled do not understand sometimes a consequence of punishment.

**Gene Haire,Executive Director of Mental Disabilities Board of Visitors** said that the board's experience over the last twenty-five years in close contact with providers of mental health services and people with mental illnesses, all of our experiences are consistent with all of the testimony that you have heard today.

**Al Davis, Mental Health Assoc. of Montana** mentioned that in his thirty-two years working law enforcement and the private sector of behavioral health he could think of, with rare exception, the most difficult times throughout the term of that career resulted from those situations where lack of early identification, early recognizing of individuals with mental health symptoms were the cause of those major incidents.

**Kathy McGowan, Community Medical Health Centers of Montana** said that they have done some informal training with law enforcement in various places around the state. It has been informal, when both parties have wanted it to happen and I think we need more direction and cohesiveness across the state.

**Sharon Hoff-Broadaway, Executive Director of Montana Catholic Conference** said that by listening to the panel from the law enforcement people who came to present to the group of HJR 35, it struck her how much they were asking for this type of assistance in the field, not knowing how to deal with some of the issues that they were confronted with.

**Jim Smith, Montana Sheriffs and Police Officers Association** said that sheriffs did come before the interim HJR 35 committee and did ask for this very kind of training. Law enforcement officers are usually the first responders and that is very true. In addition, the training is needed in other facilities such as

prisons, jails - they are effective by the interactions of persons with mental illness and also with the transportation of persons with mental illness. From his perspective the very last two lines in the resolution are probably the most important - "Be it resolved that the training be delivered in home communities or regionally to the extent possible". He said they don't need to be devising a separate course at the academy where the interaction needs to happen between mental health professionals, families, advocates and law enforcement at the local level - community level.

**EXHIBIT(jus05a08)** Witness Statement

**Opponents' Testimony: None**

**Questions from Committee Members and Responses**: None

**Closing by Sponsor**:

**SEN. WATERMAN SD 26 HELENA** summarized that this is pretty straightforward so she closed with that.

## EXECUTIVE ACTION ON SJR 2

**Motion/Vote**: **SEN. HALLIGAN** moved that **SJR 2 DO PASS.**

**Discussion**: None

**Motion/Vote**: **Motion carried unanimously.**

**ADJOURNMENT**

Adjournment: 12:25 P.M.

_____
SEN. LORENTS GROSFIELD, Chairman

_____
CECILE TROPILA, Secretary

LG/CT

**EXHIBIT(jus05aad)**