MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 25, 2001 at 9:10 A.M., in Room 152 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: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: HB 104, SB 266, 1/22/2001
Executive Action: None

HEARING ON HB 104

Sponsor: **REP. PAUL CLARK, HD 72, TROUT CREEK**

Proponents: **Diana Leibinger-Koch, Department of Corrections**
John Connor, Attorney General's Office, Montana County Attorneys Association

Opponents: **None**

Opening Statement by Sponsor:

REP. PAUL CLARK, HD 72, TROUT CREEK, opened on HB 104, a sentencing clarification bill requested by the Department of Corrections. The current procedures required the sentence to be pronounced directly to the defendant in his/her presence and also given in written form that was then forwarded to the Department of Corrections. The Department of Corrections did not hear the oral testimony nor were present to hear the oral sentencing. They relied solely upon the written sentence. If a discrepancy occurred between the written sentence and the oral pronouncement, that discrepancy needed to be corrected so the Department of Corrections could follow through with the sentence. These types of mistakes did happen. Through research, he found an example, **EXHIBIT(jus20a01).** The written sentence said one thing, but the oral pronouncement was understood to say something else. The word that caused the problem was "suspected". **REP. CLARK** said the most important part of the bill stated that the defendant had 120 days after filing of the written judgement to request that the court modify the judgment to conform to the oral pronouncement. He argued it didn't change the priority of the oral pronouncement over the written judgement, it simply provided a time line for the correction to be addressed.

Proponents' Testimony:

Diana Leibinger-Koch, Department of Corrections, provided written testimony regarding what happened when a judge sentenced a criminal defendant, **EXHIBIT(jus20a02).** The exhibit also included Supreme Court cases that illustrated the matter.

John Connor, Attorney General's Office, Montana County Attorneys Association, supported the bill for all the reasons stated before. He felt the intent of the House Judiciary Committee amendments on lines 20 and 21 of the bill could be carried out if at the time the judgement was entered on the record, or filed, the defendant should be served with a copy containing a statement of the defendants rights as stated in subsection 2. He argued it

was impractical to give the defendant a copy of the judgement when the judge on a circuit had already left that place and the judgement had not been filed. The second problem was in producing a piece of paper that said that the defendant needed a copy of sub 2 when it all could be done at once. He mentioned another question from the House on page 2 of the bill regarding 46-18-117. He didn't know what it meant, but didn't think it had any meaning in view of the amendments made on the first page. He felt it created confusion with respect to the changes on page one.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL asked how long a convicted person was on "fish row". **Diana Leibinger-Koch, Department of Corrections,** replied "fish row" was also referred to as "reception". A person stayed in reception anywhere from 30 to 120 days while they were being classified and given tests to find out where they belonged in the prison system.

SEN. O'NEIL asked if they were allowed to have legal papers with them in reception. **Ms. Leibinger-Koch** believed they were allowed to have legal papers. It was part of the requirement to allow them access to courts.

SEN. O'NEIL questioned if they would have access to the section referred to in the bill. **Ms. Leibinger-Koch** said they must have access to their legal documents because they were limited by time in order to file a repeal to the Supreme Court and ask for sentence review.

SEN. O'NEIL said the statute provided 120 days for the oral and written sentences to conform. He questioned if it would be possible for the defendant to make a request on the 115th day, giving the judge only 5 days to comply. **Ms. Leibinger-Koch** replied that it said 120 days after the written judgement was filed. Sometimes that took (dependent upon the jurisdiction) 30, 60, or 120 days to get the judgement reduced to writing and filed with the court. Then, the time began and 120 days after that the defendant could ask the court to modify the written judgement.

SEN. O'NEIL asked if it was the same 120 days the defendant had to ask for the correction of the judgment that the court had to modify the judgement. **Ms. Leibinger-Koch** believed that in 46-18-117 on page 2 that the court could correct an erroneous sentence

or sentence imposed in an illegal manner within 120 days after the sentence was imposed. That language implied it was 120 days after the judge pronounced the oral sentence. Therefore, it would not conform to the 120 days in subsection 46-18-116.

SEN. O'NEIL said that implied to him that the defendant could wait almost the entire 120 days leaving the court virtually no time to investigate and subsequently conform the oral and written sentences.

SEN. MIKE HALLIGAN followed up on that same question saying that it had to be filed within 120 days, but that the judge could take the necessary time to conform the sentences. **John Connor, Montana County Attorneys,** replied there was no specified time in which the judgement needed to be entered. The bill simply said after a judgment was entered, then the defendant had 120 days to correct any errors. He didn't recall a statute saying that a judgement had to be made within a specified amount of time. He thought **SEN. O'NEIL's** concern wouldn't occur because the judge was not limited by statute as to time frames for judgments.

SEN. HALLIGAN clarified that it was **Mr. Connor's** testimony that said 46-18-117 was not needed at all based on subsection 1. **Mr. Connor** confirmed that.

Closing by Sponsor:

REP. CLARK closed on HB 104 saying it was meant to be a clarification bill and that the Department of Corrections would like some finality in knowing that the sentence they were imposing was indeed the sentence the judge orally pronounced. He felt it was a reasonable request. He informed the committee that the bill passed the House 99-0, but wasn't beyond fixing. He clarified that when the written sentence was given to the convicted person, the person would also receive a copy of the judgment in subsection 2. This meant the person not only received the written judgement but was also forewarned to study the written judgment and consider the oral pronouncement and make sure the two coincided. At that point, the convicted person had recourse to basically appeal the written judgement if the two did not coincide. He felt the bill added certainty to the sentencing process which was good for the convicted as well as the Department of Corrections.

HEARING ON SB 266

Sponsor: **SEN. JON ELLINGSON, SD 33, MISSOULA**

Proponents:

Kris Marsh, representing herself
Karl Olsen, Pride
Daniel Casey, Montana Human Rights Network
Sandra Hale, representing herself
Patti Keebler, MT AFL-CIO
Colleen Murphy, National Association of Social Workers
Brenda Wahler, mother of gay daughter
Beth Brenneman, legal director of ACLU of Montana
Al Smith, Montana Trial Lawyers Association

Opponents:

Jenny Dodge, representing self
George Bennett, Montana Bankers
Julie Millam, Christian Coalition
Tom Rasmussen, representing self
Dr. William Wise, representing self
Dallas Erickson, Montana Citizens for Decency through Law
Lisa Lovell, representing self
Arlene Diehl, retired home educator
Gary Guthrie, representing self
Harris Himes, representing self
Phyllis Lamping, proxy for man from Bozeman

Opening Statement by Sponsor:

SEN. JON ELLINGSON, SD 33, MISSOULA, opened on SB 266. He argued that there was not any principle more fundamental to the character of the republic and society than quality of opportunity. He posed that economic status, gender, race, and religion were meaningless distinctions when measured against the uniquely American ideal that all were created equal and all were entitled to equality of opportunity. He proposed that each person should progress or fail in jobs and professions based upon the objective quality of the job performance. In fact, he said there could be no equality of opportunity if on-the-job success or failure did not flow from the quality of the job performance. SB 266 addressed a group of citizens and neighbors who could not yet benefit from full equality of opportunity. These people had a sexual orientation (gay, lesbian, or bisexual), which differed from the majority. He discussed how and to what extend this problem was addressed by this legislation. He requested amendments to the draft of the bill, **EXHIBIT(jus20a17)** and distributed a highlighted copy of Wrongful Discharge from Employment, **EXHIBIT(jus20a03)**. The bill would fit into the highlighted areas. He noted wrongful discharge did not apply to situations covered by collective bargaining agreements, which

used a written employment agreement, or those covered by the Montana Human Rights Act, or it's federal equivalent. However, if the employment situation was not covered by those exceptions, the Wrongful Discharge Act would apply. He referred attention to 39-2-904, of **exhibit (3).** It defined the elements of wrongful discharge. SB 266 addressed sub2 by not changing the existing law; an employer could discharge an employee within the probationary period for any reason, including sexual orientation. He noted it was almost an absolute right to discharge during the probationary period, and SB 266 did not touch that right. However, if the probationary period passed and there was no good cause for discharge, then the discharge following the probationary period would be wrongful. He defined good cause using subsection 5 of 39-2-903 of **exhibit (3).** SB 266 would add to that definition by including sexual orientation as stated at the bottom of **exhibit (3).** The effect of this passed legislation would be that an individual with a different sexual orientation from the majority, who successfully passed through the probationary period of employment and because the job performance was satisfactory and the employer had decided to retain the employee, then that employee could not be discharged for being gay, lesbian, or bisexual. He argued it balanced the rights of the employers during the probationary period.

{Tape : 1; Side : B}

Then following the probationary period, the employees merit should be based ONLY on his/her job related performance and not upon the character of his/her private life. He felt it was an element of simple, fundamental fairness. This bill retained the commitment of equality in opportunity in the work place. He noted SB 266 did not ask for special rights; it only asked that the rights and opportunities enjoyed by the rest of the population not be denied because of sexual orientation. He said that as much as senators differed on political points, the quality of the individuals in the Senate was one that constantly impressed him and made him feel good about the service they provided to the state. He doubted that anyone was comfortable with endorsing the notion of discrimination. However, he respectfully suggested that by rejecting SB 266, it enabled discrimination, and made it acceptable. He believed that no one truly believed it in their hearts. He said discrimination hurt not only the victim, but also the spirit of all when an individual was denied the fundamental and equal right to equality of opportunity simply because of a quality in that person, which most do not like. He posed a question: "Did taking a firm stance against discrimination in the workplace constitute an endorsement of homosexuality?" No. Questioning of that lifestyle did not disallow the belief that punitive discrimination based upon sexual orientation was not right and not acceptable in the state of Montana.

Proponents' Testimony:

Kristine Marsh, representing herself, provided her supportive testimony for SB 266; **EXHIBIT(jus20a04).**

Karl Olsen, Pride, presented his supportive testimony, **EXHIBIT(jus20a05).**

Daniel Casey, Montana Human Rights Network, provided his supportive testimony, **EXHIBIT(jus20a06).**

Sandra Hale, representing herself, announced she was a gainfully employed lesbian with Lewis and Clark County in the field of public health. She strongly supported SB 266. She said as a lesbian, she should be judged on whether or not she held her job based on the qualifications and the ability to competently perform the job, not on some trait or characteristic subject to her employer's whimsy or personal prejudices. She noted the economic and employment opportunities of Montana were dwindling, not burgeoning, so she urged them not to make it even less attractive for people to come to Montana to work based on possibilities of job discrimination. She reiterated that former **Governor Racicot** recommended to the Department of Administration to insert into the state personnel policies for employees non-discrimination language based on sexual orientation and equal employment opportunity clauses. She called herself a coward and remiss for not publicly thanking the former governor for his stance because she was afraid that if she thanked him publicly, then the legislature and the current administration would take back those basic rights that he enabled. Therefore, she went out on a limb to thank **Governor Racicot** and **SEN. ELLINGSON** for doing the right, fair, and just thing. She hoped that she would be able to come to the legislature at the end of the session to also thank them for granting basic rights, not special rights, to more of Montana's employees. She provided a written statement as well, **EXHIBIT(jus20a07).**

Patti Keebler, MT AFL-CIO, presented her testimony, **EXHIBIT(jus20a08).**

Colleen Murphy, National Association of Social Workers, presented her supportive testimony, **EXHIBIT(jus20a09).**

Brenda Wahler, mother of gay daughter, supported the bill because she feared her daughter would be treated negatively because of her sexual orientation. She emphasized that this bill did not ask for anything special, merely the same rights that everyone else enjoyed, which was the right to make a living. She felt it was important because young people could not remain dependent on

their parents forever, and they shouldn't go on welfare because they couldn't find work. She said her daughter had a job and had a supportive employer, but she couldn't know what the future would bring.
{Tape : 2; Side : A}
She urged a Do Pass on behalf of Montana parents of homosexual children.

Beth Brenneman, legal director of ACLU of Montana, supported the bill because they felt job decisions should be based upon an employees' job skills and job performance, not on their sexual orientation. They felt it was common sense, in fact, they believed it was good business practice. The majority of Americans agreed with that as **Ms. Murphy's** testimony pointed out. She said that so many people agreed with them that some people already thought it was illegal to fire someone for their sexual orientation only. Of course, people were shocked nationally when they heard about the story of a woman who had just a week before she was terminated for being a lesbian was offered a management position. It of course affected her ability to make a living and her income was very profoundly affected. However, one of the greatest effects that the termination had was that she began to believe that her job performance was irrelevant. She could be outstanding, but still be evaluated based upon her private life. The ACLU believed that job performance was relevant and that should be the basis of all job decisions.

Al Smith, Montana Trial Lawyers Association, provided his supportive testimony, **EXHIBIT(jus20a10).**

Opponents' Testimony:

Jenny Dodge, representing self, provided testimony in opposition to SB 266, **EXHIBIT(jus20a11).**

George Bennett, attorney for the Montana Bankers Association, said that **Ms. Dodge** had made a better legal argument than he could. He said banks were vitally concerned about jobs, and they lived through the wrongful discharge nightmare when the Supreme Court took away the statute, which was probably unfair, that allowed discharge at will. It was a situation of conflicting Supreme Court decisions so that employers did not know where they stood. Employers were afraid to hire people they hadn't known all their lives and were afraid to discharge employees no matter how disruptive or how poor their performance. Montana adopted a uniform Wrongful Discharge Act in about 1987 and it worked very well. It was looked at by legal scholars as a model act. He emphasized the discussion was about wrongful discharge where some other federal or state statute did not apply. [left out his

references to the anonymous letter.] He reiterated that a non-probationary employee could not be discharged except for good cause, as stated in the statute. He went on to recall the elements of the statute for which a person could not be terminated; for being Irish, for being Lutheran, for being gay, or because they had big feet. He said those reasons were wrongful discharge and the employer would be liable. He felt that someone being terminated for being gay would be a wrongful discharge. However, he said that sexual orientation was not self-evident and asked how that would be proven. He brought up the military's "Don't Ask, Don't Tell" policy. He argued that this bill gave the unscrupulous, and their lawyers, a weapon, instead of a shield against discrimination. By opposing the bill, it could be viewed as intolerance. He resented that as a lawyer, because he believed that lesbians and homosexuals were brothers and sisters and were entitled to respect and equal protection of the law, but not unequal protection as this bill would do. He felt it would be a war of false claims against employers.

Julie Millam, Christian Coalition, provided opposing testimony, **EXHIBIT(jus20a12).**

Tom Rasmussen, representing self, abhorred any sort of discrimination and thought all people did. He said fortunately, the Founding Fathers felt that way too. He read Article 14 of the U.S. Constitution, and the Montana Constitution, Article 2, section 4. He felt those were clear enough, but that the world was imperfect and some people were discriminated against. He said it cut across all groups of people. However, the law was clear. He argued that thousands of people did change their sexual orientation to resume a normal sexual life. With the job situation in Montana, more jobs were needed. However, SB 266 adversely affected Montana employers. He stood strong that the law was clear enough already and there was no need for the bill.

Dr. William Wise, representing self, stated he was a retired doctor of internal medicine. He told a personal story about interviewing a secretary and asking her whether she was married. She reported him to the Human Rights Commission. He found it was illegal to ask about a person's marriage status, religion, and now, this would include sexual orientation. He felt employers should be able to discharge an employee if they were doing a poor job and not have to worry about the person's religion, race, or sexual status. He thought the bill would affect that. He said it was a poor bill that would bring controversy and trial lawyers would have a field day.

Dallas Erickson, Montana Citizens for Decency through Law, provided his testimony in opposition to SB 266 as well as a listing of sexual orientations, **EXHIBIT(jus20a13).**

Lisa Lovell, representing self, identified herself as a former attorney, former clerk to Chief Justice Turnage, former corporate attorney, and now was at home with her children. She said she had focused her attentions in the last 10 years to her family and children and saw a new religion coming up in the society, which she termed "humanism". She wouldn't refer to it as a school of thought, but as a religion because she was taught that if it was a science or a school of thought, it was put out as a theory to be scrutinized, debated, and proven by evidence. She argued the theory of evolution was one of the "religions of humanism" taught in schools. She said it was not set forth as a leading theory, it was not debated and scrutinized, the evidence was not put forth. It was presented as fact. She argued religion said, "this is the way it is, join us or not, but we won't debate it." She found this humanism religion took that stance in regard to sciences in the schools. She found SB 266 to be the next logical progression in the encroachment of government into the lives of children, families, and churches. She found it a violation of the establishment clause. Within the church, the Bible was upheld as the infallible word of God. It was not debated. If the law was imposed on the church people, the government would be substituting its beliefs, contrary to the Holy Bible and the members' beliefs, and establishing that as fact by which they must run their lives and houses of worship. The Judeo-Christian tradition was diametrically opposed to this being forced on them as law. She did not want the government intruding into peoples' lives to tell them what to think, feel, believe, and who to hire. ***{Tape : 2; Side : B}***
She did not agree with **SEN. ELLINGSON,** because discrimination could already be remedied by the existing laws. She concluded by preaching from 1 Corinthians chapter 6 verses 9-13. She did not want to cram her religious views into any employer's face. She did ask the committee to uphold the Constitution, and not put their views into the people's houses of worship as employment guidelines that they had to believe. She also provided a witness statement, **EXHIBIT(jus20a14).**

Arlene Diehl, retired home educator, said she home schooled her children because she wanted them to have a Christian education. She would guarantee the committee that passage of this bill would increase the exodus from public schools. She believed her children would consider this bill a danger to their children in terms of their education, their view of life, and their view of lifestyles.

Gary Guthrie, representing self, provided his testimony in opposition to the bill, **EXHIBIT(jus20a15)**

Harris Himes, representing self, identified himself as both an attorney and a pastor. He referred to "expressive association" as it pertained to the Boy Scouts and other groups that held homosexuality as a sin or against their viewpoint. Because of this law, SB 266 could not withstand Constitutional challenge. He felt that many groups held homosexuality as a sin, and that SB 266 could open the door to many lawsuits. He admonished that passage of the bill would indicate that this Legislature and the state condoned what many considered to be sin.

Phyllis Lamping, proxy for man from Bozeman, read a letter of a person who could not be at the hearing, **EXHIBIT(jus20a16).**

Questions from Committee Members and Responses:

SEN. MIKE HALLIGAN asked if employers would be set up because it was difficult to determine a person's sexual orientation. **SEN. ELLINGSON** responded that the opposite result would come from the passage of the legislation. He didn't know of any Montana Supreme Court or District Court decision that had interpreted whether sexual orientation was or could be, or could not be a legitimate job related basis in and of itself. By placing it in statute, it would clarify that. For a discharge to be correct, a job related failure on the part of the employee must be present. The bill did not change job related termination in any way.

SEN. HALLIGAN questioned if an attempt was made to find job related issues, but it was a questionable case, would SB 266 give a special right for someone to come back and accuse the employer of discharging because of the person's sexual orientation and create a separate lawsuit. **SEN. ELLINGSON** replied people could always raise false claims. He practiced wrongful discharge law from the plaintiff and small business point of view. He had seen both sides of the issue and said that it was very helpful to have clarity in the law. He felt that the law as it stood lacked clarity. He argued someone could always claim they were terminated because of a violation of public policy. He said that wasn't allowed in Montana. Someone could also claim they were terminated because of race, gender, or age. They could always do that. Employer protection resided in maintaining a good employment file, and having a solid basis for a determination that the employee in question wasn't doing the job. With that solid basis for termination, termination could be done regardless of the sexual orientation.

SEN. RIC HOLDEN referred to exhibit 13, the list of sexual orientations, saying it raised concern that the bill was broad, allowing for those types of orientations. **SEN. ELLINGSON** said that if any sexual orientation had an impact on job performance, then this bill didn't protect that. A person could be terminated if the job performance was failing because of what was done on the job. If it happened to include something that was related to the listed sexual orientations, then the person didn't have a case and the discharge was not wrongful. However, private lives should be able to remain private and not be the basis for some sort of a discharge.

SEN. HOLDEN countered that essentially a person could raise this as a case because an employer would not ask the candidate if their sexual orientation centered around "toucherism" (from the list). **SEN. ELLINGSON** said it raised a couple of issues because there was some misinformation about what employers were and were not entitled to ask in the course of an employment interview. It was not allowed to ask an individual about his/her religion or marital status, or if the person planned to be pregnant or not during the employment period. Those questions weren't allowed because of protected categories under the Montana Human Rights Act. Sexual orientation was not a protected category under the Montana Human Rights Act. This bill would not make it a protected category under the Montana Human Rights Act and therefore, in the initial employment interview, the employer could ask questions about a person's sexual orientation. He rephrased **SEN. HOLDEN's** concern; suppose someone was being discharged from employment and accused the employer of firing him/her because they found out the person was an exhibitionist (from list in **exhibit (13)**). If the exhibitionism impeded the employment on the job, then the person could be fired. If the job was not done correctly based on job-related issues and not sexual orientation, and continued employment was not merited, then the person could be fired. This bill didn't protect someone who was on the job, but not doing the job, regardless of the sexual orientation.

SEN. HOLDEN followed up asking if an employer could be concerned with having an exhibitionist on the staff and the impact that would have on the company, its public image. **SEN. ELLINGSON** said if the employee engaged in exhibitionism on the job, then he felt that was a reasonably related job qualification that could be grounds for termination.

SEN. AL BISHOP asked if a very good employee was convicted of pedophilia during the term of employment, and didn't miss any work because of a suspended sentence, but customers refused to patronize the business, would that be grounds for dismissal.

SEN. ELLINGSON said if the model employee was a convicted pedophile and worked as a janitor in the business, the person couldn't be fired for being a pedophile. However, if the person was a manager and dealt with the public daily, then a reasonable job qualification was to keep a clean criminal record. Therefore, that manager could be terminated.

{Tape : 3; Side : A}

SEN. STEVE DOHERTY questioned his argument regarding frivolous claims by employees because sexual orientation was not evident. He noted religion also was not evident. Therefore, were there many claims because of religion? **George Bennett, attorney for the Montana Bankers Association,** said he didn't agree that sexual orientation and religion were comparable. He referenced the numerous types of orientations from **exhibit (13)** and said he felt sheltered and naive because he never considered them. He didn't realize the state didn't have a workable definition of sexual orientation, and that the bill would open up lawsuits, maybe even a narrow area, but the trial lawyers would feast.

SEN. DOHERTY wondered if including a definition of sexual orientation would be helpful. **SEN. ELLINGSON** said it was a good idea. He wasn't holding any banner in favor of the pedophiles or others listed. He offered a concise definition: "same sex, consensual relation between adults". He felt that dealt with most if not all the problems **Mr. Erickson** and **Mr. Bennett** addressed.

SEN. DUANE GRIMES asked about the implications and impacts on organizations such as churches with belief systems that were diametrically opposed to sexual deviancy. **SEN. ELLINGSON** said it was addressed by the case authority throughout the U.S. that churches had the right to inquire into the orientation of its employees. He felt it was a legitimate job-related requirement if employed by that sort of organization to adopt the tenants of that place. If the tenants could not be adopted, than that was not the place to seek employment. He acknowledged he was sensitive to that and respected the deeply held beliefs of the different religions on this question and he didn't want to infringe on their right in this particular area. He believed the bill would not interfere.

SEN. GRIMES asked if it would result in a cause of action or an attempted pressing of this issue; in regard to churches. **SEN. ELLINGSON** said no. He understood it to be settled law that a church had the right to ask these sorts of questions and could expect to have that information and obedience on the job. He wished to refer to **Beth Brenneman.**

SEN. GRIMES redirected to the former attorney and asked her if national level case law provided sufficient protection. **Lisa Lovell, representing self,** said absolutely not. She gave an example of a youth director in her church who told the youth she was lesbian. The church was up in arms and didn't know how they could release her from her duties.

SEN. GRIMES used her example and asked if the proposed legislation could be used against the church and would establish case law. **SEN. ELLINGSON** said he wanted to address one aspect of it, then he wanted to refer to **Beth Brenneman** to speak specifically about national case law. He believed that the youth director could be fired under federal law, current state law, and state law after the passage of the bill. He addressed the youth director's job-related performance issue. He thought it was incumbent upon an employer to define what an employee would do. After that definition of responsibilities, if the employee did not meet those, then it became a job-related reason to terminate. From the example, the youth director was providing a different philosophy on the issue of homosexuality than that which was part of the tenants of the church. That was a conflict and it would be easy for the employer to require adherence to the tenants of Christianity. If not, then the person could be fired and not protected by a claim of sexual orientation.

SEN. GRIMES asked if this statute could result in a testing of that protection and said it could be addressed in the close.

Beth Brennaman, legal director of ACLU of Montana, explained the establishment clause in the U.S. Constitution that forbid the courts from interfering with the internal decisions, including employment decisions, of churches. Under federal law, if employees (ministers or teachers) were hired to teach about religion, then employers could discriminate for any reason at all, including religion, race, gender, and sexual orientation. For janitors, the question was open under federal law, but a janitor in a Catholic Church could fall under those same rules. Under Montana law, there was a greater ability for a church or a private school to discriminate on the basis of those protected classes. She was adamant that if someone violated the religious tenants of a work place, even if they weren't a member of the church, that they could be terminated on that basis. She mentioned a Montana Supreme Court case, Parker Bigbag vs. Saint Labray, affirming that a district court should give summary judgment to any church or religious school defendant on the grounds of a violation of a religious tenant. She acknowledged that some baseless litigation could be brought forward for discrimination on the part of the church, but it would be a waste of time.

SEN. GRIMES recalled difficulties in writing a definition for sexual orientation in past sessions and wanted another perspective on that. **Dallas Erickson, Montana Citizens for Decency through Law,** agreed that it would be a great task to write a specific definition of sexual orientation.

SEN. DOHERTY said **Ms. Brenneman** clearly outlined federal and state law, federal Constitutional decisions and state Constitutional decisions were even more restrictive. He felt it was strongly settled law. In order to remove any doubt if the bill would pass and to assuage the fears that the bill would open up a litigation against the state's churches, would it be possible to add a clause recognizing the establishment clause? **SEN. ELLINGSON** said he would be comfortable with that type of an amendment.

SEN. JERRY O'NEIL wondered if it would behoove banks to change their employment questioning to ask about a potential employees sexual orientation if the bill passed. **Mr. Bennett** said the issue wasn't employment, it was discharge. The present law allowed a very narrow area of discharge; based on good cause, failure to satisfactorily do the job. He said an employer couldn't discharge an employee for being Irish, Lutheran, or gay without having reasonable cause. He said if an employer terminated on the basis of a person being gay, it was a wrongful discharge. He felt by passing the bill, even to get more jobs, it would make Montana appear to be the businessman's worst nightmare. He thought potential employers would be frightened off by the bill. He reiterated that the issue wasn't about denying someone a job in the first place for being gay.

SEN. O'NEIL restated his question. If the employee was asked about being gay in the interview, denied it, then it turned out it was true, couldn't the bank fire the person for lying? Wouldn't the bill encourage discrimination during the probationary period to avoid problems after the probationary period? **Mr. Bennett** agreed with the law that these sensitive questions should not be asked. The question that should be asked was whether they could do the job and avoid the other areas that would not relate to the job. He said there were many homosexuals who performed beautifully. He restated his manta, "Don't ask, don't tell." He emphasized again that a gay could not be discharged currently without it being a wrongful discharge.

SEN. DOHERTY noted that **Mr. Bennett** felt businesses would flock away from Montana because of the law. However, **exhibit (9)** from the National Association of Social Workers, listed several major companies that had endorsed non-discriminatory employment practices. He thought that if those organizations had managed to

take this step, and were in the business to make money, then maybe if Montana took this step, the state would get these big companies to come to Montana. **Mr. Bennett** clarified that he didn't mean that the bill would dampen the Montana economy. Employers wanted to hire the best employees and would hire gays and lesbians. He said that one of the wrongful discharge criteria cited failure to follow their own personnel policies. He felt those policies were part of the free market system and could contain the language of this bill. However, when getting into the area of lawsuits, that was the danger.

CHAIRMAN LORENTS GROSFIELD asked if the establishment clause only applied to churches. What about non-profit groups that were not religious in nature? **Ms. Brenneman** said the clause did not apply to non-religious organizations.

CHAIRMAN GROSFIELD asked about the Boy Scouts. **Ms. Brenneman** said that group was found to be a private association, which were not governed by public accommodations law, the law that governed employers who hired from the public. An organization had to employ a certain number of people and have a certain status for the public accommodation laws to apply.

CHAIRMAN GROSFIELD clarified that some thresholds had to be met. **Ms. Brenneman** agreed, but said that she was not a wrongful discharge lawyer, but that **SEN. ELLINGSON** might be able to answer it better. **SEN. ELLINGSON** said an employer had the right to define the kind of job that the employee would perform. If in the definition it included certain values that the employee had to honor, maintain, and exemplify, then those could be spelled out. If the employee did not follow those values, then there would be a legitimate ground to terminate regardless of sexual orientation.

{Tape : 3; Side : B}

CHAIRMAN GROSFIELD brought up the issue of small Montana and the retailer in that little town. He guessed that those small retailers did not have a very thorough personnel policy with express provisions. In the absence of that, where were we? **SEN. ELLINGSON** replied that in the absence of a thorough personnel policy and in the absence of a probationary period, when a hire was made, the presumptive probationary period was one year. If in that time, the employer found out something that he/she did not particularly care for, then they could terminate for whatever reason. After that probationary time, the person could not be terminated if it came to light that the person was homosexual. He acknowledged that it could be uncomfortable, but he suggested that some discomfort was OK. If that individual did

a good job, just as he/she did during the probationary period, then that person should be allowed to live his/her private life just as anyone else.

CHAIRMAN GROSFIELD complicated the scenario by saying there were two drugstores in small town Montana. An employee of one of them came out as gay. The townspeople didn't agree with that lifestyle and refused to do business at the drugstore with the gay employee. What then? **SEN. ELLINGSON** had two comments. 1) it was not a wrongful discharge if there was a reasonable, legitimate business reason for the termination. In that scenario, there would be reasonable business reason to terminate. However, 2) he likened that scenario to white merchants of the south 20 years ago. The merchant who took a risk and hired the hard-working black person, but then the town turned against the business. He proposed that those were tough moral questions. He felt it was easy now to say to the retailer in the south that they needed to stick to their guns and do the right thing although that imposed a cost upon that person. He believed it would be best for the small town to hold a town meeting to discuss that dilemma together to develop a reasonable resolution.

CHAIRMAN GROSFIELD spoke about the amendment that changed good cause, #5 on **exhibit (17).** He said the new language to sub5 was a specific exclusion. By stating it that way, it did not provide an exception for a legitimate business concern. **SEN. ELLINGSON** said he did not want this language to interfere with churches or other organizations who would legitimately want to discriminate for sexual orientation.

CHAIRMAN GROSFIELD questioned the testimony that people would pull their children out of public school. The policy that was adopted by the former governor, did that apply only to state government or did it apply to schools as well? Also, where did it leave school boards in making decisions on the local level? **SEN. ELLINGSON** believed that the directive dealt only with state employees and not other public employees within the state. In regard to the school board the bill would pretty much leave them as they were. Another proposed bill wanted fingerprinting of teachers to protect the children against heterosexual predators. He felt the principle that people didn't want teachers making sexual advances on the children applied whether it was a homosexual or heterosexual. He stated SB 266 gave no special protection to gays nor lesbians, over and above the protection provided to heterosexuals.

CHAIRMAN GROSFIELD asked for comment on the implications on sex education. **SEN. ELLINGSON** said that the sex ed issue was determined locally by the local school boards. Those local boards

should determine the content of sexual education programs and the individual hired to teach that program had an obligation to teach the curriculum; not teach what he/she thought was OK in his/her private life. It didn't matter whether the teacher was a homosexual or a heterosexual.

SEN. GRIMES mentioned progressive discipline and that when that was started, many times claims would occur. This further complicated the matter. He wondered if that would also happen in this case. **SEN. ELLINGSON** acknowledged there was always the possibility of frivolous litigation and claims. The line of protection against that would be the lawyer. Hopefully the lawyer would make an objective evaluation of the claim and if it was unfounded, then the lawyer would not file a suit. He wouldn't say that frivolous claims would not be made, because people were ingenious. However, employers should keep track of the employee during the probationary period, and could let them go if it didn't work. After that, documentation needed to be kept on what was good and bad about the employee before termination could correctly take place.

Closing by Sponsor:

SEN. ELLINGSON closed on SB 266. He addressed the concerns of the opponents beginning by quoting, "no law can change a person with a vengeful heart." He respectfully disagreed because laws were a secular guidepost in how to run a moral and equitable society. He said he recalled the Declaration of Independence that said, "we are all created equal and entitled to certain inalienable rights." He said those were guideposts to him and most people. He said the Constitution, and the Bill of Rights also served as guideposts. He argued that everyone was entitled to equal treatment under the law and it should not be denied. He felt these were teaching guideposts that laws could help to change a vengeful heart. He challenged the point that currently people could prosecute for discharge over being gay or lesbian, but he countered that the history of the court today said that was not the case. Successful actions had not been brought on behalf of discharge because of sexual orientation. If such a case did go, he thought the judge would be required to determine whether sexual orientation fell within the scope of good cause. He felt SB 266 would clarify the law. On the other hand, some people felt SB 266 would interfere with private employment relations. He respectfully disagreed with that too. He felt the bill was narrow. If a defined probationary period did not exist, an employer had one year to terminate for any reasons, and after that, then the prohibitions of this bill would take affect. He gave the committee the ability to include a definition of sexual orientation and provide a specific recognition that churches and

private organizations could retain their abilities to discriminate as they could now. SB 266 protected only those employees who did a good job, surpassed the probationary period, fell into the narrowly defined definition of sexual orientation from termination based on their sexual orientation alone. Qualities of private lives unrelated to job performance or merit should not be grounds for termination. He closed saying Martin Luther King Jr. was once discounted and it took courage to stand with him then. He felt it took courage to stand with those with a different sexual orientation than most, but it was not alright to discriminate against them in the workplace just because of their private lives. He said it was controversial to end the discrimination and he asked the committee to be courageous in the face of the facts.

CHAIRMAN GROSFIELD expressed his thanks and appreciation for all the witnesses in dealing with a difficult issue. He felt mutual respect was shown and maintained.

ADJOURNMENT

Adjournment: 11:53 A.M.

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SEN. LORENTS GROSFIELD, Chairman

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ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT(jus20aad)