

SENATE BILL REPORT

SB 6782

As Reported By Senate Committee On:
Judiciary, February 08, 2008

Title: An act relating to violations of Washington's law against discrimination.

Brief Description: Regarding the impermissible motive element of a claim under chapter 49.60 RCW.

Sponsors: Senators Kline, Weinstein, Rasmussen and Brandland.

Brief History:

Committee Activity: Judiciary: 2/01/08, 2/08/08 [DPF].

SENATE COMMITTEE ON JUDICIARY

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination prohibits discrimination based on race, creed, color, national origin, sex, sexual orientation, or disability. State case law discusses to what extent a plaintiff must prove that a discriminatory motive played a role in an employer's allegedly discriminatory decision. In *Mackay v. Acorn Custom Cabinetry* (1995), the Washington Supreme Court stated that an employee need only prove that the discriminatory motive was a substantial factor in the employer's decision at issue, not that it was a determining factor.

This past November the court issued an opinion in *Hegwine v. Longview Fibre Company*. In considering whether the employer violated the law prohibiting inquiry regarding a prospective employee's pregnancy status, the court stated that the plaintiff need only prove that the discriminatory motive was a substantial factor in the decision not to hire the plaintiff. The court then went on to state that the employer could prove that it would have made the same decision regardless of the discriminatory motive.

Summary of Bill (Proposed Substitute): Where an impermissible motive is an element of a claim under the Washington Law Against Discrimination, a violation is established where the complaining party demonstrates that the motive was a substantial factor, thereby overcoming any asserted legitimate nondiscriminating reasons. It is not a defense or an affirmative defense to liability or relief that the complaining party would have been subject to the same treatment absent the impermissible motive.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Proposed Substitute): Clarifies that where the complaining party demonstrates that the impermissible

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motive was a substantial factor, the complaining party is thereby overcoming any asserted legitimate non-discriminatory reasons.

Also clarifies that it is not a defense or an affirmative defense to liability or relief that the complaining party would have been subject to the same treatment absent the impermissible motive.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: This bill corrects judicial activism, in which the court used a standard that had been previously rejected, and was not briefed or argued in this case. This test was previously rejected based on a policy in the Washington Law Against Discrimination to deter discrimination. The plaintiff still has to prove discrimination was a substantial factor in an adverse action. It does not deny to the employer the right to defend against the claim. What it does is prevent the possibility of an employer avoiding liability when another factor comes into play for the adverse decision. This bill restores pre-existing law.

CON: The problem with the bill is its inconsistency with existing law. The employee always bears the ultimate burden of persuasion that discrimination occurred. The second sentence doesn't allow for the employer to say that I would've taken the same action anyway, and removes the causal connection that the employee must prove. It is concerning that it applies to both liability and relief.

We have concerns that the bill extends beyond the employment context and into the fair housing arena.

Our concern is that this language suggests that the defense cannot even be raised, or that evidence of other motives would be inadmissible.

Persons Testifying: PRO: Kathleen Phair Barnard, Washington Employment Lawyers Association, Northwest Women's Law Center; Larry Shannon, Washington State Trial Lawyers Association; David Lord, Disability Rights Washington.

CON: Lisa Sutton, Attorney General's Office; Terri Hotvedt, Rental Housing Association of Puget Sound; Tom McBride, Washington Association of Prosecuting Attorneys.