

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

April 20, 2004

8:08 a.m.

**MEMBERS PRESENT**

Senator Ralph Seekins, Chair  
Senator Scott Ogan, Vice Chair  
Senator Gene Therriault  
Senator Hollis French

**MEMBERS ABSENT**

Senator Johnny Ellis

**COMMITTEE CALENDAR**

SENATE BILL NO. 354

"An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

MOVED CSSB 354(STA) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 447(JUD)

"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

MOVED CSHB 447(JUD) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 230(STA)

"An Act relating to political signs on private property."

SCHEDULED BUT NOT HEARD

CS FOR HOUSE BILL NO. 514(FIN) am

"An Act relating to child support modification and enforcement, to the establishment of paternity by the child support enforcement agency, and to the crimes of criminal nonsupport and aiding the nonpayment of child support; amending Rule 90.3, Alaska Rules of Civil Procedure; and providing for an effective date."

HEARD AND HELD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 354

SHORT TITLE: HUMAN RIGHTS COMMISSION PROCEDURES  
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/27/04 (S) READ THE FIRST TIME - REFERRALS  
02/27/04 (S) STA, JUD  
03/23/04 (S) STA AT 3:30 PM BELTZ 211  
03/23/04 (S) Heard & Held  
03/23/04 (S) MINUTE (STA)  
04/01/04 (S) STA AT 3:30 PM BELTZ 211  
04/01/04 (S) Moved CSSB 354(STA) Out of Committee  
04/01/04 (S) MINUTE (STA)  
04/02/04 (S) STA RPT CS FORTHCOMING 1DP 2NR  
04/02/04 (S) NR: STEVENS G, STEDMAN; DP: COWDERY  
04/05/04 (S) STA CS RECEIVED SAME TITLE  
04/14/04 (S) JUD AT 5:30 PM BUTROVICH 205  
04/14/04 (S) Scheduled But Not Heard  
04/20/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: HB 447

SHORT TITLE: 2004 REVISOR'S BILL

SPONSOR(s): RULES BY REQUEST OF LEGISLATIVE COUNCIL

02/09/04 (H) READ THE FIRST TIME - REFERRALS  
02/09/04 (H) STA, JUD  
02/24/04 (H) STA AT 8:00 AM CAPITOL 102  
02/24/04 (H) Moved CSHB 447(STA) Out of Committee  
02/24/04 (H) MINUTE (STA)  
02/26/04 (H) STA RPT CS (STA) 4DP 1NR  
02/26/04 (H) DP: HOLM, LYNN, COGHILL, WEYHRAUCH;  
02/26/04 (H) NR: BERKOWITZ  
03/18/04 (H) JUD AT 1:00 PM CAPITOL 120  
03/18/04 (H) Moved CSHB 447(JUD) Out of Committee  
03/18/04 (H) MINUTE (JUD)  
03/22/04 (H) JUD RPT CS (JUD) 5DP  
03/22/04 (H) DP: ANDERSON, GRUENBERG, SAMUELS,  
03/22/04 (H) GARA, MCGUIRE  
03/24/04 (H) TRANSMITTED TO (S)  
03/24/04 (H) VERSION: CSHB 447(JUD)  
03/26/04 (S) READ THE FIRST TIME - REFERRALS  
03/26/04 (S) STA, JUD  
04/06/04 (S) STA AT 3:30 PM BELTZ 211  
04/06/04 (S) Moved CSHB 447(JUD) Out of Committee  
04/06/04 (S) MINUTE (STA)  
04/07/04 (S) STA RPT 3DP  
04/07/04 (S) DP: STEVENS G, COWDERY, STEDMAN  
04/20/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: HB 514

SHORT TITLE: CHILD SUPPORT ENFORCEMENT/ CRIMES

SPONSOR(S): REPRESENTATIVE(S) KOTT

|          |     |                                      |
|----------|-----|--------------------------------------|
| 02/16/04 | (H) | READ THE FIRST TIME - REFERRALS      |
| 02/16/04 | (H) | JUD                                  |
| 02/23/04 | (H) | JUD AT 1:00 PM CAPITOL 120           |
| 02/23/04 | (H) | Heard & Held                         |
| 02/23/04 | (H) | MINUTE (JUD)                         |
| 02/27/04 | (H) | JUD AT 1:00 PM CAPITOL 120           |
| 02/27/04 | (H) | Moved CSHB 514(JUD) Out of Committee |
| 02/27/04 | (H) | MINUTE (JUD)                         |
| 03/03/04 | (H) | JUD RPT CS (JUD) 5DP                 |
| 03/03/04 | (H) | DP: GARA, SAMUELS, GRUENBERG, OGG,   |
| 03/03/04 | (H) | MCGUIRE                              |
| 03/03/04 | (H) | FIN REFERRAL ADDED AFTER JUD         |
| 03/08/04 | (H) | FIN AT 1:30 PM HOUSE FINANCE 519     |
| 03/08/04 | (H) | Heard & Held                         |
| 03/08/04 | (H) | MINUTE (FIN)                         |
| 03/23/04 | (H) | FIN AT 1:30 PM HOUSE FINANCE 519     |
| 03/23/04 | (H) | Moved CSHB 514(FIN) Out of Committee |
| 03/23/04 | (H) | MINUTE (FIN)                         |
| 03/24/04 | (H) | FIN RPT CS (FIN) 4DP 3NR 2AM         |
| 03/24/04 | (H) | DP: HAWKER, FOSTER, FATE, WILLIAMS;  |
| 03/24/04 | (H) | NR: JOULE, CHENAULT, HARRIS;         |
| 03/24/04 | (H) | AM: STOLTZE, CROFT                   |
| 03/31/04 | (H) | TRANSMITTED TO (S)                   |
| 03/31/04 | (H) | VERSION: CSHB 514(FIN) AM            |
| 04/01/04 | (S) | READ THE FIRST TIME - REFERRALS      |
| 04/01/04 | (S) | JUD, FIN                             |
| 04/16/04 | (S) | JUD AT 8:00 AM BUTROVICH 205         |
| 04/16/04 | (S) | Scheduled But Not Heard              |
| 04/19/04 | (S) | JUD AT 8:00 AM BUTROVICH 205         |
| 04/19/04 | (S) | Heard & Held                         |
| 04/19/04 | (S) | MINUTE (JUD)                         |
| 04/20/04 | (S) | JUD AT 8:00 AM BUTROVICH 205         |

**WITNESS REGISTER**

Mr. Scott Nordstrand  
Deputy Attorney General  
Department of Law  
PO Box 110300  
Juneau, AK 99811-0300

**POSITION STATEMENT:** Presented SB 354

Ms. Lisa Fitzpatrick  
Chair, Human Rights Commission  
**POSITION STATEMENT:** Expressed concerns about SB 354

Ms. Jan DeYoung  
Assistant Attorney General  
Department of Law  
PO Box 110300  
Juneau, AK 99811-0300  
**POSITION STATEMENT:** Answered questions about SB 354

Ms. Pamela Findley  
Legal and Research Services Division  
Legislative Affairs Agency  
Alaska State Capitol  
Juneau, AK 99801-1182  
**POSITION STATEMENT:** Presented HB 447

Mr. John Main  
Staff to Representative Kott  
Department of Law  
PO Box 110300  
Juneau, AK 99811-0300  
**POSITION STATEMENT:** Answered questions about HB 514

#### **ACTION NARRATIVE**

#### **TAPE 04-46, SIDE A**

**CHAIR RALPH SEEKINS** called the Senate Judiciary Standing Committee meeting to order at 8:08 a.m. Senators Therriault, Ogan, French and Chair Seekins were present. The committee took up SB 354.

#### **SB 354-HUMAN RIGHTS COMMISSION PROCEDURES**

MR. SCOTT NORDSTRAND, Deputy Attorney General, Civil Division, Department of Law (DOL), told members he spent about 15 years practicing in the employment field when in private practice. He practiced before the Human Rights Commission on many occasions and is familiar with its procedures. He maintained that the state has an interest in having an effective administrative procedure to root out discrimination and provide remedies, and to have a procedure that is fair to the state when the state is the defendant.

MR. NORDSTRAND explained that SB 354 is designed to rebalance some of the Human Rights Commission's (HRC's) procedures to provide more fairness in the process and more effective use of the HRC's resources. He gave the following synopsis of the measure:

The primary thing that this does is it gives the executive director of the commission the power to pick and choose those cases that are most deserving of proceeding to hearing. That power was essentially lost to the director in the case that's referenced here, *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995).

To understand this, you have to understand a little bit about what the procedure is when you go before the commission. Let's assume for a moment we're talking about an employer-employee situation, which is the most common kind of case that comes before the commission. There are housing cases and other cases but that's the most common and probably the most contentious. A question of whether there was discrimination based upon age in hiring comes before the commission. The way that happens is the person who didn't get the job would go down to the commission, would say that they felt they had been discriminated against based on age, and then the commission staff would assist them and prepare a complaint.... You can see that's AS 18.80.100, that process.

So the complaint is filed and it's sent to the employer. The employer has an opportunity to respond and generally that's the point at which the employer would hire an attorney if they choose to and the attorney would gather evidence about the circumstances and prepare...a response back to the commission saying why they didn't think there was discrimination or, on occasion, there may have been something wrong and they offer to remedy it in some way. And so, then the process begins for the commission to assign an investigator. The investigator is assigned to look into both sides of the matter and make a determination ...under AS 18.80.110 that there was substantial evidence of a discriminatory practice.

That still is the norm. That has not changed under here. So an investigator, if an investigator finds

there's substantial evidence of discriminatory practice, then the case is sent to something called conciliation. You might call it mediation, whatever you want to call it. It's a time when the employer and the employee and the commission staff sit down and see if they can work something out.

If there's a failure of consideration, as they say, at the commission, then the executive director certifies that fact and it's assigned forward to hearing. And at that point a human rights advocate, which is an attorney employed by the commission, is assigned to the case to represent the executive director. They don't technically represent the employee but they pursue their interests before the commission. They go through a formal discovery process...not unlike any lawsuit you're in - depositions, interrogatories, all of that kind of thing happens and all of the costs associated with that happen too. It may be somewhat quicker, but it is, by no means, a particularly inexpensive way to come to conclusion, and much more than a civil case.

And then at the end, if there's a hearing, a hearing officer is assigned. The case is not heard before the commission.... Generally a contract-hearing officer is hired. They hear the case, they write a recommended decision, an order, that's then recommended to the Human Rights Commission that it ultimately can adopt or not. The commission has remedial powers that are limited. They don't include, for example, the power to award punitive damages, the power to award non-economic damages, which is pain and suffering, that kind of - emotional stress kinds of things. Generally it's injunctive relief, like putting them back to work, back pay, benefits, that kind of thing - as they indicate, making the employee or the plaintiff whole.

Now what happened in this Meyer case that created the problem was that the Supreme Court determination of what is substantial evidence to require a hearing, that is, if you have substantial evidence, you have to have a hearing - that's what the Supreme Court says and that's what the law has said to date. Unfortunately...the standard is very low, according to the Supreme Court, and I'm not sure if that's because of the way the statute is written or because of the

Supreme Court's interpretation of it. Regardless, the standard is very low. In fact, the allegation has to be completely lacking in merit in order not to go to hearing. That's a very low standard. And so, as a result, essentially any case that's got any scrap of evidence at all of a discriminatory event goes to hearing. That's a problem for the commission because the commission really has no way to weed out the good cases from the bad and use its resources most effectively and to be the most effective agency it can.

Let me give you a comparison, for example, of what the Equal Employment Opportunity Commission - the feds do. The feds do the same thing. They have an investigation process but, in fact, they decide whether to take the case or not. The feds don't have, in fact, a commission or hearing process to go to. If they want to bring charges of discrimination under federal laws, civil rights laws, they have to go to the federal courts. They have to go downtown to the courthouse and file a lawsuit. That's not the case here. But in any case, they have the power to choose amongst the various cases. What this bill does is it gives the executive director the power to say no, that case really isn't a very good case. We're not going to win that case so we're not going to take that one forward. We'll use our resources somewhere else. That's the primary thing that this bill does.

MR. NORDSTRAND referred to the analysis section entitled "Improves commission procedures" and said it contains remedies to many small problems encountered by attorneys over the years. First, the HRC is not authorized to compromise claims during the conciliation process. Therefore, if a person didn't get a job on May 1 and the hearing is on December 1, the HRC would have no choice but to order back pay for seven months. Under the bill, the HRC would have the choice of ordering less back pay. The bill also requires the HRC to follow the Administrative Procedures Act, unless otherwise provided for in statute. It also allows a hearing officer to grant summary judgment, either for or against a case before him or her. Right now, commission regulations preclude a hearing officer from doing that. He told members that an attorney could file every case that goes before the HRC as a lawsuit in court and have access to more remedies, such as non-economic

damages. However, in the court system, if a case is very bad or very good, the amount the court must hear can be limited by a summary judgment ruling. Because that option does not exist with the HRC, the HRC must hear every case before it. SB 354 will address that issue.

SENATOR THERRIAULT asked why the HRC is precluded from summary judgments now.

MR. NORDSTRAND said he believes the HRC did not want to deal with summary judgment motions because of the workload of the human rights advocates. However, on the flip side, allowing those motions will potentially prevent a number of cases from going to a hearing. He said it is his understanding that summary judgment motions were specifically excluded from the HRC regulations.

He then said, regarding SB 354 enhancing fairness of the commission's procedures, in the example of an age discrimination case, if a finding of substantial evidence is made, the case would go forward to discovery. However, in the past, if the problem was determined to be sex discrimination rather than age discrimination, the HRC could go forward with a hearing on any claims it amended its complaint to include. He stated:

What we have found is that there are times when - I mean that's simply sort of sidestepping the requirement. If we're to believe that substantial evidence should be found for every claim that goes to hearing, then if a new issue comes up in discovery for which there has been no finding of substantial evidence, this simply provides that it goes back to that process. An investigator looks at it and determines if there's substantial evidence before that complaint can be amended and go forward so that the employer or the respondent can have the benefit of the informal process of going back through investigation, a response on the sex discrimination case, for example, and an opportunity to conciliate. And perhaps, in the face of the new evidence, conciliation might actually be more likely, who knows? But it's just a matter of fairness that that's the door that opens to hearing - substantial evidence. It should be there for every claim that's asserted.

MR. NORDSTRAND then said the commission has taken the view that it has a 10.5 percent interest rate available to it. The bill will tie that rate to the standard interest rate charged by other agencies.

Regarding the remedies available, MR. NORDSTRAND said AS 18.80.130(a) contains a list of possibilities the HRC can award and says it can award any appropriate relief. In DOL's estimation, it is simpler to list what the actual remedies are in a system that is designed to have limited remedies. DOL identified the injunctive relief reinstatement, training requirements, and financial remedies used by the HRC. The financial remedies consist of back pay and front pay, which is from the time of the hearing forward to remediate any difficulties in putting that person back into the workforce at the same pay level. DOL codified that.

MR. NORDSTRAND indicated the controversial part is the cap on the front pay. DOL's original cap in the bill was set at two years of wages. The Senate State Affairs Committee lowered that cap to one year. He pointed out the bill contains a standard of what a complainant must prove to be eligible for front pay [bottom of page 4]. He noted that DOL discussed this bill with the HRC and found the commission to be in agreement with the proposed changes with the exception of the front pay issue. DOL believes that in order to divine what economic damages are in an employment case, one has to determine how much the employee would have earned if he or she had not been discriminated against. The amount that person earned in alternative income is then subtracted. Front pay is a different animal, in that no one knows what income he or she will earn in the future and how far out into the future that money should be awarded.

AN UNIDENTIFIED SPEAKER asked how that number is determined.

MR. NORDSTRAND said the compromise was to cap that amount. DOL believes this system was designed to provide limited remedies by the government, rather than taking a case to court. He pointed out the language in the current version of the bill doesn't necessarily support an award of front pay. The HRC has interpreted that language to mean that front pay is available but that point could be argued.

SENATOR THERRIAULT asked Mr. Nordstrand for that citation.

MR. NORDSTRAND pointed to Section 6(a)(1).

SENATOR FRENCH referenced the word change in Sec. 18.80.100 and asked the difference between "practice" and "conduct."

MR. NORDSTRAND said that word change was made for the sake of consistency. He believes "practice" is the better word because the word "conduct" could be interpreted to mean an action. He noted the HRC did not object to that change.

SENATOR FRENCH responded that his "first blush" response is that a "conduct" is something a person does once, while a "practice" is something that is done more than once.

8:30 a.m.

SENATOR OGAN agreed with Senator French's interpretation.

MR. NORDSTRAND maintained that DOL was making no attempt to change the scope of what the HRC or act does; that change was simply an attempt to use better language.

SENATOR FRENCH asked if the EEOC does summary judgment motions and dismissals.

MR. NORDSTRAND replied, "Well certainly the EEOC, when they go to court, are subject to all of the federal rules of civil procedure."

SENATOR FRENCH asked if the EEOC has an in-house type of system, similar to the HRC.

MR. NORDSTRAND explained:

No, the EEOC itself doesn't - with rare exception. There are some very rare exceptions that involve political appointees where the EEOC has a hearing officer system that is then subject to appeal, I believe, to the Circuit Court. It's an odd system designed to take the political issues out of the local courts I think. Other than that, they don't have a commission that sits like the Human Rights Commission as an adjudicator that can award relief. They have to go downtown to the courthouse and so when they

get there, they would have the full benefit of Civil Rule 56 for summary judgment.

CHAIR SEEKINS asked Ms. Fitzpatrick to testify.

MS. LISA FITZPATRICK, chair of the HRC, told members the HRC consists of seven individuals. She noted, in response to a statement made by Mr. Nordstrand about remedies available to the HRC, the HRC believes that Section 6(a)(1) will not provide enough relief to make the complainant "whole." The HRC is involved in ongoing discussions with the Governor about its concerns and is hopeful that they can agree on language that addresses those concerns. The HRC believes the existing language is not comprehensive enough and would prefer to use a "catch-all" phrase or to use an enumerated list of remedies.

CHAIR SEEKINS asked if the HRC has a guideline for appropriate remedies.

MS. FITZPATRICK said the guidelines are set to allow the HRC to provide "whole" relief. The HRC has never awarded any non-economic damages, however, if an employee is ill, loses his job and medical insurance and incurs huge medical costs, the language in the bill would prevent the HRC from requiring that individual to be compensated for those medical costs.

MR. NORDSTRAND informed members that DOL met with the HRC and presented the bill. The HRC provided written comments, from which DOL made significant changes to the bill, for example removal of a provision that would allow payment of attorney's fees to the prevailing employer. Other changes were made in regard to mitigation of damages and amending complaints. The HRC asked for four specific changes and the only change DOL and the HRC could not agree on was front pay. He said he was unaware that the HRC met and decided to challenge the remedy section of the bill. His understanding was that the only issue that remained was that of front pay and the HRC's vote to cap front pay at two years failed with 4 against and 3 in favor.

CHAIR SEEKINS asked if the HRC pays all attorneys fees for the complainant.

MR. NORDSTRAND said it does.

CHAIR SEEKINS asked if the employer cannot recover any damages if the employer prevails.

MR. NORDSTRAND said that is not specifically precluded. A provision at the end of the act says the HRC can award attorneys fees, however, the HRC does not do that. He explained:

In other words, if you go through a whole hearing and at the end there's a question should the commission award attorneys' fees, well they're not going to award attorneys' fees. They could theoretically seek attorneys' fees to cover their costs - I mean they have a human rights advocate who is proceeding. I don't know that they do that. And if they were to award, say if the employer were to win the case, the only party against whom they could award attorneys' fees would be the commission. In other words, they'd be awarding fees against themselves essentially because the control of the case going through hearing is with the executive director. It's not with the individual, the employee, per se, and they don't actually represent the employee in these hearings. They represent their interests. So, there's power in the statute to award attorneys' fees but they don't do it, so an employer gets nothing if they win.

CHAIR SEEKINS asked if the case was in court, the parties would be subject to Rule 82.

MR. NORDSTRAND said that is correct. If an attorney brought the case to court and the employer were to prevail, partial attorneys' fees would be awarded under Rule 82.

CHAIR SEEKINS asked Ms. DeYoung to address Senator French's concern about the word change from "conduct" to "practice."

MS. JAN DeYOUNG, Assistant Attorney General, DOL, said her recollection is that no one had a problem with the word "conduct," but several phrases were used throughout the bill so the purpose was to provide consistency. She said she had a particular concern with using the word "discrimination" by itself because only unlawful discrimination is problematic. Many differences are recognized in the law as valid discrimination. She said her

point is that no one was concerned that the word "conduct" was bad; the concern was with inconsistency throughout the statutes.

MR. NORDSTRAND said AS 18.80.110, the original substantial evidence language, says if the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination. He explained that parts of the act speak just to discrimination, yet people act discriminatorily all of the time and those acts may or may not be illegal. DOL was attempting to make the language more precise.

SENATOR FRENCH asked, for the record, if Mr. Nordstrand is saying it is his belief that nothing about that word change would prevent a person from bringing a complaint before the HRC based on a single act.

MR. NORDSTRAND responded, "Absolutely not, that is a practice."

MS. FITZPATRICK clarified, regarding the HRC's concern about the relief provision, the HRC did not pay sufficient attention to that provision during the first go-around and did not appreciate the gravity of it. Upon closer scrutiny, the HRC realized it will create a significant problem and decided to meet. The six commissioners present felt it needed to be addressed.

CHAIR SEEKINS asked if the HRC discussed that provision after it met with DOL.

MS. FITZPATRICK said it did. She furthered that Mr. Nordstrand was out of town at the time so she ended up speaking with Mr. Tibbles about the problem.

CHAIR SEEKINS announced that with no further participants, public testimony was closed.

SENATOR FRENCH asked Chair Seekins if it was his intent to move the bill from committee today or whether he planned to give the two parties time to work on the disputed topic.

CHAIR SEEKINS asked Mr. Nordstrand if DOL wished to have additional time to talk to the HRC.

MR. NORDSTRAND believed it was safe to say that DOL has agreed to disagree with the HRC on that issue. He explained that the general concept is that the bill will either contain a specific list of remedies that identify what can and cannot be done or it will have open-ended relief language, and that is precisely the issue that DOL is trying to solve. DOL believes that people who participate in a government-funded process should expect limited remedies from that process. He noted that unfettered remedies permit interesting settlement negotiations. For example, he learned in DOL's discussions with the HRC, that front pay has settlement implications because it can be calculated at any number and be used as a negotiating tool. Any good lawyer would have an economist try to maximize the front pay number. If the economist determined the front pay to be \$50,000 for 5 years, another \$250,000 would be on the negotiating table. DOL is saying that some level of certainty, in this case one year of front pay, is a fair balance and will create more certainty of outcome and encourage settlement. It will also give reasonable expectations to the claimants. He repeated that DOL simply disagrees that an appropriate list is limiting.

CHAIR SEEKINS asked, using Ms. Fitzpatrick's example of an employee who lost a job with medical benefits and incurred huge medical costs, whether an employer would be required to pay back pay and the loss of benefits.

MR. NORDSTRAND said, in general, part of the compensation package would be the benefit package. However, there is an ongoing debate about whether the employer would be liable for the cost of insurance versus the consequential damages. DOL falls on the side of the employer's benefits being the defining term. He noted that although consequential things can happen, many of those things are within the employee's control. He said there are people who have no job and not enough money to buy medical insurance and incur medical costs. If those costs are so consequential to that case, for example if a catastrophic medical injury occurs, then the case should be in court. He said his friends in the plaintiffs' employment bar often monitor the HRC's cases and take the good cases to court. He continued, "There is a limit. Yes. And in this case, we would not be funding a million dollars of medical costs that were uninsured. We would be funding, and our understanding would be, the benefit cost."

CHAIR SEEKINS asked if the [HRC] would be making the determination on whether the practice that caused the person to lose his job was discriminatory but the court system would determine the damages that resulted from the lost job because the HRC is not the proper venue for that kind of a claim.

MR. NORDSTRAND replied, "Any more than punitive damages is because they don't have the authority to award those damages."

SENATOR FRENCH thought the HRC exists because many cases are for perhaps \$5,000 and, although that amount might be a crushing amount for the plaintiff, it is not worth an attorney's time.

MR. NORDSTRAND said that is certainly true and the small cases are the business of the HRC to some degree, but the director will be given discretion. He noted there is a point where one has to consider whether the cost of litigating such a case is worth the HRC's time to go through the entire proceeding. He said the EEOC is very good at getting the big cases where it tackles class action suits or cases that will set things right for a lot of employees. But the HRC has been bogged down with a lot of cases that perhaps shouldn't go to hearing and it would be more advantageous to use its resources for investigations. He offered that a person with \$5,000 in medical costs could also file a claim in small claims court.

CHAIR SEEKINS agreed that small claims court is very effective and efficient but expressed concern that the financial limit for that court is too low.

SENATOR THERRIAULT asked if a plaintiff could take the HRC's determination as fact before the court.

MR. NORDSTRAND said that is an interesting question. He commented:

It would be subject to review, like any administrative agency finding, but it would go up through that process and, for example, if you - theoretically, I haven't seen it done but theoretically, if you had a finding here of discriminatory conduct, you might be able to go forward in court and seek other remedies too.

SENATOR THERRIAULT said a person without the money to go to court who went through the HRC process first and was successful would be getting something of tremendous value without going to court.

MR. NORDSTRAND said DOL discussed whether to include an opt-out provision so that a person who went through the HRC process would be opting out [of court].

MS. DEYOUNG stated that provision was not included in the bill.

**TAPE 04-46, SIDE B**

CHAIR SEEKINS said his concern was that this bill would not give a person who was collaterally damaged recourse within the system but his concern has been addressed.

MS. DEYOUNG informed members that regarding the substitution of the word "practice" for "conduct," discriminatory practices are defined in the human rights law, which is why the word "practice" was chosen.

CHAIR SEEKINS noted he saw no reason to hold the bill in committee.

SENATOR THERRIAULT moved SB 354 from committee with individual recommendations and its zero fiscal note.

CHAIR SEEKINS announced that with no objection, the motion carried. He then announced a 5-minute recess.

**CSHB 447(JUD)-2004 REVISOR'S BILL**

MS. PAMELA FINLEY, Revisor of Statutes, Legislative Legal and Research Services, reminded members that a revisor's bill is produced every year to clean up the statutes without making any policy changes. She told members that a good deal of CSHB 447(JUD) addresses the executive orders that were implemented last year. In addition, the attorney general requested that HB 447 include a provision to update a statute to match the Carlson case. She said she does not normally include changes in the revisor's bill to conform to court cases but, in this particular case, that change seemed reasonable.

SENATOR FRENCH asked for an explanation of the Carlson case.

MS. FINLEY said it pertained to the resident and non-resident fee differential in limited entry permits.

CHAIR SEEKINS asked where that provision is in CSHB 447(JUD).

MS. FINLEY cited Section 6 on page 7 and 8 of the bill and explained that the court essentially said that (C) will not pass constitutional muster, (D) sort of will, and that (3) will not. The changes in the bill will change the statute to say what the court found acceptable. She added that some of the changes in Section 11 pertain to conforming changes that were not made in the executive order.

CHAIR SEEKINS noted that no one signed up to testify and there were no further questions or discussion.

SENATOR OGAN moved CSHB 447(JUD) from committee with its zero fiscal note and asked for unanimous consent.

CHAIR SEEKINS announced that without objection, the motion carried.

**HB 514-CHILD SUPPORT ENFORCEMENT/CRIMES**

MR. JOHN MAIN, staff to Representative Pete Kott, reminded members that at the last meeting, Senator French had asked for an amendment [to clarify the language in Section 5 (2)(A)-(C) on pages 3 and 4].

CHAIR SEEKINS confirmed that amendment is now labeled XA.1 and entertained a motion to consider the amendment as Amendment [2].

SENATOR OGAN so moved.

SENATOR FRENCH asked for an explanation.

MR. MAIN said it basically specifies that the standard is "intentionally" in subsections (A)-(C) and renumbered those sections.

CHAIR SEEKINS and SENATOR FRENCH felt that Amendment [2] reads better than the original language.

SENATOR FRENCH asked what lines 6 through 15 on page 2 of Amendment 1 would do.

CHAIR SEEKINS clarified that the amendment should be referred to as Amendment 2.

MR. MAIN explained that provision has been in the statute and CSED has had no problem with that language in the prosecution of cases.

CHAIR SEEKINS questioned whether the only change is to correct the numbering sequence to conform to the changes made in the first part of Amendment 2.

MR. MAIN said that is correct.

SENATOR FRENCH removed his objection to the adoption of Amendment 2 so it was adopted. He then asked Mr. Main the theory behind revoking sport hunting and fishing licenses for non-payment of child support in Section 9 on page 4.

MR. MAIN told members that deal was brokered between the federal government and the State of Alaska. The federal government requires that hunting and fishing licenses be revocable but Alaska does not track hunting and fishing licenses in the same way that other states do. Other states have an updated database; in Alaska, that information is turned in to the state in February or May. The legislature did not want to make the revocation of fish and game sport licenses part of the earlier bill that provided for revocation of occupational and drivers' licenses. Therefore, the best remedy was to revoke the sport hunting or fishing license at the time of a criminal conviction for non-support. He explained:

There are two ways that it can be taken that way, one is civil, which is to be held in contempt - the court can take at that time or if the individual is convicted of failure to pay child support, criminal non-support misdemeanor, as it presently is, and that satisfied the federal government. They're not happy about it but they're satisfied that at least there is a provision with which to be able to remove the hunting/fishing license. Basically, it's the privilege of hunting and fishing as a sport

compared to subsistence, and that was one of the issues that was placed under [AS]09.50.020. It lists out what is considered a recreational license and what is considered to be subsistence and personal. Recreational is only considered to be sports fishing and sport hunting. The personal use fishing - dipnetting, that kind of stuff that is exempted, subsistence fishing and subsistence hunting is also exempted.

CHAIR SEEKINS said every resident in the state is considered by state law to be a subsistence hunter, which is why the state has tier 2 permits that anyone can apply for. That is not the case under Alaska law for fishing and there is no license for subsistence fishing. However, for personal use fishing, a person must have a license. He was not sure whether Alaska law differentiates between recreational fishing and personal use fishing to feed one's family.

MR. MAIN responded that personal use fishing under AS 16.05.940 is described as:

'personal use fishing' means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

MR. MAIN added that sport fishing is different than personal use fishing.

CHAIR SEEKINS said the same license exists for sport and personal use fishing.

MR. MAIN noted that sport fishing is described under AS 16.04.940(29); while personal use fishing is described under AS 16.04.940(24). Sport fishing is described as:

...means the taking of or attempting to take for personal use and not for sale or barter any fresh water, marine, or [anadromous] fish by hook or line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

CHAIR SEEKINS referred to his own fishing license and noted it did not contain a category for personal use. He questioned how a person could personal use fish to feed his family but not recreational fish.

SENATOR OGAN indicated that a person must buy a sport fish license to personal use fish.

CHAIR SEEKINS expressed confusion about whether or not a sport fish license could be revoked if it is not being used as a recreational license.

MR. MAIN pointed out the language in the present law says "the court may" and in the 24 cases in which individuals were convicted of criminal non-support, CSED did not request the revocation of recreational fishing licenses and the court did not order any such revocations.

CHAIR SEEKINS suggested, for the sake of accuracy, putting language in the bill to explain that a recreational license does not mean a license necessary to participate in personal use or subsistence hunting and fishing.

MR. MAIN noted that Senator Ogan said he wrote most of that statute and that it doesn't apply to those items that are not considered to be recreational licenses.

CHAIR SEEKINS announced a brief recess.

9:30 a.m.

Upon reconvening, Senator Therriault rejoined the committee.

CHAIR SEEKINS commented that the key word in the penalty for aiding and abetting in the non-payment of child support is to "restrict" a recreational fishing or hunting license for a period not to exceed one year, as defined in AS 09.50.020(c). He said that subsection refers to a sport fishing license unless it is required to participate in personal use or subsistence fishing. He said this is a toothless law except that the court could order a person to only use a hunting or fishing license for the purpose of personal use or subsistence, and not for recreation.

SENATOR FRENCH questioned whether the law should read, "the court may restrict" and not address suspend or revoke because the court cannot suspend a license.

MR. MAIN repeated this was a way to comply with the federal mandate but not require the Alaska Department of Fish and Game (ADF&G) to create a database that was accessible by others.

CHAIR SEEKINS said it just seems that all an offender would have to say is that he or she needs the license for a personal use fishery. He said he feels comfortable with that because he did not want a person's personal use or subsistence license to be affected.

Members then updated Senator Therriault on the issue they were discussing.

SENATOR THERRIAULT asked if that penalty has been imposed on people for non-support and this bill will now impose it on those who aid and abet the offender.

MR. MAIN said that is correct.

SENATOR FRENCH questioned how an ADF&G officer would look at a sportfishing license, know the difference, and enforce that provision.

CHAIR SEEKINS said he couldn't imagine.

SENATOR OGAN recalled that requiring social security numbers on fishing licenses was very controversial several years ago and he believed that law was amended to remove that requirement. He stated, "I suppose we may hear that they have to wear a scarlet letter or other things as well, since we do all this stuff to them."

CHAIR SEEKINS noted that fishing and hunting licenses have been very useful in terms of finding people.

SENATOR OGAN told members he heard from a man last night on this topic who did not want to go on record, which he thinks is common because of the scarlet letter factor. He said as a legislator, he has heard many constituents complain about CSED and he relayed some of their stories to members. He expressed concern that those people who lose jobs or have other problems and get behind with child

support payments will now become felons and that there is a whole contingent of people who do not testify and are not being represented. He said he does not like people who will not help support their children but he cannot support the bill as is because it will make some people felons who are trying to support their kids but cannot.

CHAIR SEEKINS said he shares some of Senator Ogan's concerns but two things on page 2 give him comfort. The first is on line 2, which is the phrase, "without lawful excuse," to provide the support. That phrase is defined on lines 23, 24, and 25 as having the financial ability or the capacity to acquire that ability through the exercise of reasonable efforts. He said if the person Senator Ogan referred to does not have the financial capacity, that would be a lawful excuse unless the person has the capacity to acquire that ability and refuses to do so.

MR. MAIN confirmed that is true.

CHAIR SEEKINS said someone who has fallen on hard times and cannot support their child would not fall under this statute.

MR. MAIN said given that CSED has only four investigators and has been able to prosecute only 24 cases in 4 years, this bill will not increase its caseload but it will allow CSED to negotiate deals with people because the law will have more teeth. He noted there will always be people who refuse to pay, no matter what, and people who cannot afford to pay, no matter what.

CHAIR SEEKINS asked what process CSED would have to go through to prosecute a person with a class C felony.

MR. MAIN said a supervisor would review a case. If the amount owed is significant (at least \$15,000), and there has been no record of payment, except perhaps a permanent fund dividend, all civil remedies have been exhausted, and no data shows the individual is earning wages or has assets, the supervisor would refer the case to the investigations unit. That unit would gather evidence through subpoenas and interviews, and present findings to an assistant attorney general. The assistant attorney general would then review the case to determine whether it meets the criteria. If it appears the case will be successful, she will take that case to a grand jury. If the

grand jury give the go ahead, the DOL would proceed with prosecution. He pointed out that red flags could be raised at many points along the way to where the case would not be pursued as a felony.

MS. WENDLANDT added that the requirement that a person have lawful excuse comes down to, in most cases, that person's ability to pay. She said Mr. Main's description of the process is absolutely correct.

CHAIR SEEKINS asked if DOL is looking for the person who is living large on their children and refusing to pay any child support.

MS. WENDLANDT said that is correct.

SENATOR OGAN said although the lawful excuse language is in the bill, the policy is to not let people in arrears drive or to have an occupational license. Therefore, that person cannot work, hire a lawyer, or get the support order modified. He expressed concern that the policy creates a death spiral and is counterproductive to the children, as they will get no support. He said he has talked to a lot of men who see no way out and ultimately the children are hurt.

SENATOR THERRIault said he has heard from people over the years that they can pay their child support obligation under Rule 90.3 but to do so would disenfranchise their current families. He questioned how to balance the possibility that a person might have to move his current family out on to the street to pay a child support obligation from a previous family.

MR. MAIN said if that individual will struggle to pay, he can request a hearing before a revenue hearing officer. He indicated he is aware of more than one case in which the hearing officer reduced the child support obligation. In addition, CSED has reduced payments when establishing modifications when a second family is involved.

SENATOR FRENCH asked at what stage of the process would a person lose a driving license.

MR. MAIN said a person does not have to be convicted of criminal non-support to lose a driver's license or occupational license. CSED is asking the individual to come

to the table at that point because the individual owes a lot of money. If the person comes to the table and sets up a payment agreement, the person can have his driver's and occupational licenses back. In most of those cases, the individuals have not paid any support for quite some time. He repeated that a person could be in arrears for 11 months before losing the ability to drive. He said that CSED is setting up programs to outreach to rural areas to help people understand the process and to help people pay their obligation on an ongoing basis. He said if the person has a hardship issue, CSED will reduce payments until the person is back on his feet.

CHAIR SEEKINS asked how CSED would deal with an obligor who says he cannot even begin to pay until he gets his driver's license back.

MR. MAIN said it does.

SENATOR OGAN stated:

Part of my argument, [indisc.] is that we've given into the federal mandates to suck up the federal money and we've given judicial powers to bureaucrats. Okay - you lose your license. Okay - you can't operate your business anymore just because, you know, then go for a hearing - there might be some hearing process in the department but...[END OF TAPE].

**TAPE 04-47, SIDE A**

CHAIR SEEKINS agreed with Senator Ogan but said, at this point, he is questioning what to do with the person who owes over \$10,000 in child support or has not made a single payment for 24 months and has been previously convicted under this section or a similar provision in another jurisdiction and the aggregate amount accrued is more than \$5,000 and has no lawful excuse.

SENATOR OGAN said the second offense would be a misdemeanor. He noted a person would lose his or her ability to own a weapon if convicted with a class C felony. He pointed out these people are not violent and the idea behind a felony is that it is a crime committed with evil intent. He repeated that the constitution bans putting

people into prison for debt. He suggested that the judge would come down harder on a second misdemeanor conviction.

SENATOR THERRIAULT commented that this is the worst part of a legislator's job - trying to legislate people's lives.

CHAIR SEEKINS announced that HB 514 would be the first bill heard at the committee's next meeting. He then adjourned the meeting at 10:00 a.m.