

DISCLAIMER

Electronic versions of the exhibits in these minutes may not be complete.

This information is supplied as an informational service only and should not be relied upon as an official record.

Original exhibits are on file at the Legislative Counsel Bureau Research Library in Carson City.

Contact the Library at (775) 684-6827 or library@lcb.state.nv.us.

SENATE COMMITTEE ON JUDICIARY

OPENING REMARKS REGARDING

ASSEMBLY BILL 341

SUMMARY—EFFECTUATES SPECIFIC AND LIMITED WAIVER OF IMMUNITY OF STATE UNDER ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WITH REGARD TO CERTAIN FEDERAL LAWS REGULATING EMPLOYMENT PRACTICES.

BY

ASSEMBLYMAN JOHN OCEGUERA, VICE CHAIRMAN

MAY 6, 2003

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY. FOR THE RECORD, I AM JOHN OCEGUERA REPRESENTING ASSEMBLY DISTRICT NO. 16 IN CLARK COUNTY. I APPEAR BEFORE YOU THIS MORNING AS THE PRIMARY SPONSOR OF ASSEMBLY BILL 341, AND THANK YOU, MR. CHAIRMAN, FOR THIS OPPORTUNITY TO INTRODUCE THIS IMPORTANT PIECE OF LEGISLATION.

I DON'T USE THAT PHRASE NONCHALANTLY. ASSEMBLY BILL 341 IS A VERY IMPORTANT PIECE OF LEGISLATION. IN FACT, OF ALL THE BILLS I HAVE HAD THE PRIVILEGE OF PRESENTING TO THIS COMMITTEE, ASSEMBLY BILL 341 IS—HANDS DOWN—THE MOST DECISIVE.

MR. CHAIRMAN, I DON'T MIND ADMITTING TO YOU RIGHT NOW THAT A.B. 341 IS, **INDEED**, CONTROVERSIAL. I FREELY ADMIT THAT. BUT JUST BECAUSE A BILL IS CONTROVERSIAL DOESN'T MEAN IT SHOULDN'T BE INTRODUCED, OR THAT IT ISN'T WORTHY OF SUPPORT.

THE REASON A.B. 341 IS SO CONTROVERSIAL IS BECAUSE IT SEEKS TO INCLUDE AN ADDITIONAL, EXPRESS WAIVER TO THE STATE OF NEVADA'S EXISTING WAIVER OF SOVEREIGN IMMUNITY.

LET ME TRY AND EXPLAIN SOVEREIGN IMMUNITY.

UNDER THE ELEVENTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES*, A STATE IS ENTITLED TO CONSTITUTIONAL SOVEREIGN IMMUNITY IN FEDERAL COURTS AND IN THE STATE'S OWN COURTS AGAINST LAWSUITS BY PRIVATE INDIVIDUALS CLAIMING MONEY DAMAGES BASED UPON FEDERAL CAUSES OF ACTION.

THIS CONSTITUTIONAL SOVEREIGN IMMUNITY APPLIES TO THE STATE ITSELF, TO STATE AGENCIES AND OTHER ARMS OF THE

STATE, AND TO STATE OFFICERS AND EMPLOYEES ACTING IN AN OFFICIAL CAPACITY FOR THE STATE.

PERHAPS THE FOLLOWING EXAMPLE WILL ILLUSTRATE THE CONCEPT OF STATE SOVEREIGN IMMUNITY AND ITS LEGAL IMPLICATIONS:

IF AN INDIVIDUAL EMPLOYED BY THE STATE BELIEVED HE HAD BEEN WRONGFULLY DENIED HIS ENTITLEMENT UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA), THE STATE WOULD BE IMMUNE FROM ANY SUIT SEEKING MONEY DAMAGES IN FEDERAL COURT BASED UPON THE STATE'S ALLEGED VIOLATION OF FMLA.

THE ONLY WAY THE STATE EMPLOYEE IN THIS EXAMPLE WOULD BE ABLE TO SEEK MONEY DAMAGES FROM THE STATE IN FEDERAL COURT FOR ANY ALLEGED VIOLATION OF FMLA IS IF THE STATE HAD PREVIOUSLY, VOLUNTARILY WAIVED ITS SOVEREIGN IMMUNITY IN FEDERAL COURT. OR IF CONGRESS CONSTITUTIONALLY ABROGATED STATES ELEVENTH AMENDMENT IMMUNITY WHEN IT ENACTED FMLA IN 1993.

THE EXAMPLE I JUST PROVIDED YOU WITH IS ACTUALLY AN EXAMPLE FROM REAL LIFE. THE REAL LIFE EXPERIENCE OF WILLIAM HIBBS. IN FACT, IT WAS MR. HIBBS' OWN, PERSONAL EXPERIENCE THAT INSPIRED ME TO SPONSOR A.B. 341.

MR. CHAIRMAN, THERE ARE APPROXIMATELY 14,500 PEOPLE EMPLOYED WITH THE STATE OF NEVADA. WHEN YOU PROPERLY INCLUDE THE NUMBER OF PERSONS EMPLOYED WITH THE UNIVERSITY SYSTEM, THAT NUMBER INCREASES TO APPROXIMATELY 18,200.

MR. HIBBS WAS ONE OF THOSE THOUSANDS OF PEOPLE. HE WORKED AS A SOCIAL WORKER WITH THE NEVADA DEPARTMENT OF HUMAN RESOURCES.

IN 1996, MR. HIBBS' WIFE WAS INVOLVED IN A MOTOR VEHICLE ACCIDENT. THE INJURIES SHE SUSTAINED IN THE ACCIDENT REQUIRED NECK SURGERY. IN 1997, MR. HIBBS AND HIS WIFE WERE INFORMED BY HER DOCTORS THAT A SECOND SURGERY WAS NEEDED SINCE THE SCREWS IN THE METAL PLATE IN HER NECK HAD LOOSENED AND WERE WAS PRESSING AGAINST HER ESOPHAGUS. THIS REQUIRED HER TO BE EXTREMELY CAREFUL IN MOVING HER BODY SO AS TO AVOID A FATAL PUNCTURE TO HER ESOPHAGUS, AND MADE IT NECESSARY FOR MR. HIBBS TO CARE FOR HIS WIFE UNTIL THE TIME OF HER SECOND SURGERY.

ACCORDINGLY, MR. HIBBS SOUGHT AND OBTAINED APPROVAL FROM HIS EMPLOYER, THE NEVADA DEPARTMENT OF HUMAN RESOURCES, FOR 12 WEEKS OF UNPAID FMLA LEAVE.

MR. HIBBS ALSO REQUESTED "CATASTROPHIC LEAVE," WHICH IS PAID LEAVE AVAILABLE TO EVERY STATE EMPLOYEE AT THE

DISCRETION OF THE STATE. ALTHOUGH MR. HIBBS WAS APPROVED FOR CATASTROPHIC LEAVE, HE WAS INFORMED THAT THE LEAVE WOULD BE COUNTED AGAINST HIS ANNUAL FMLA ENTITLEMENT.

IN OTHER WORDS, THE STATE TOOK THE POSITION THAT MR. HIBBS' APPROVED CATASTROPHIC LEAVE WOULD RUN CONCURRENTLY, AND NOT CONSECUTIVELY, TO HIS PREVIOUSLY APPROVED FMLA LEAVE.

AS YOU CAN WELL UNDERSTAND, THE POSITION TAKEN BY THE STATE GAVE RISE TO A DISPUTE BETWEEN THE PARTIES.

THAT DISPUTE ULTIMATELY CULMINATED IN MR. HIBBS' TERMINATION, WHICH, IN TURN, PROMPTED MR. HIBBS TO FILE SUIT AGAINST THE STATE IN FEDERAL COURT.

MR. HIBBS CLAIMED THAT THE STATE VIOLATED FMLA BY RETALIATING AGAINST HIM WHEN HE OPPOSED THEIR EFFORTS TO COUNT HIS CATASTROPHIC LEAVE AGAINST HIS FMLA LEAVE, AND BY FIRING HIM WHILE HE WAS ON APPROVED, UNEXPIRED FMLA LEAVE. MR. HIBBS SOUGHT BACK PAY, REINSTATEMENT ~~AND~~ ^{AND} ~~MONEY DAMAGES~~

ON THE STATE'S MOTION FOR SUMMARY JUDGMENT, THE FEDERAL DISTRICT COURT RULED FROM THE BENCH THAT MR. HIBBS' FMLA CLAIM WAS BARRED BY THE STATE'S SOVEREIGN IMMUNITY.

THE NINTH CIRCUIT COURT OF APPEALS REVERSED THE DECISION OF THE FEDERAL DISTRICT COURT. THE CIRCUIT COURT UNANIMOUSLY HELD THAT CONGRESS, IN ENACTING FMLA, HAD PROPERLY EXERCISED ITS AUTHORITY TO ABROGATE STATE SOVEREIGN IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

THE STATE, BY AND THROUGH THE ATTORNEY GENERAL'S OFFICE, REJECTED THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS, AND APPEALED TO THE UNITED STATES SUPREME COURT.

THERE IS NOW PENDING BEFORE THE UNITED STATES SUPREME COURT THE CASE OF *NEVADA DEPARTMENT OF HUMAN RESOURCES VS. HIBBS*.

THE HIBBS CASE WAS RECENTLY ARGUED TO THE UNITED STATES SUPREME COURT ON JANUARY 16, 2003. LEGAL SCHOLARS HAVE SPECULATED THAT THE COURT'S DECISION WILL BE ISSUED BY JUNE 30, 2003.

IT MIGHT INTEREST YOU TO KNOW THAT *AMICUS* BRIEFS WERE FILED ON BEHALF OF MR. HIBBS BY:

- THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MINNESOTA, NEW MEXICO, AND WASHINGTON

- BY U.S. SENATORS CHRISTOPHER DODD AND EDWARD KENNEDY, AND U.S. REPRESENTATIVES PATRICIA SCHROEDER, MARGE ROUKEMA, AND GEORGE MILLER
- BY THE NATIONAL WOMEN'S LAW CENTER
- BY VARIOUS WOMEN'S HISTORY SCHOLARS
- BY THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)
- AND BY THE UNITED STATE'S SOLICITOR GENERAL WITH THE DEPARTMENT OF JUSTICE.

I STRONGLY BELIEVE THAT PERSONS EMPLOYED BY THE STATE OF NEVADA SHOULD BE ALLOWED TO ENFORCE CERTAIN FEDERAL RIGHTS, INCLUDING THEIR FMLA RIGHTS, AGAINST THE STATE WITHOUT IMPEDIMENT OR RESTRICTION.

THE PROVISIONS OF A.B. 341 WERE DRAFTED TO EFFECTUATE A SPECIFIC AND LIMITED WAIVER OF NEVADA'S CONSTITUTIONAL SOVEREIGN IMMUNITY WITH REGARD TO THE FOLLOWING FEDERAL LAWS REGULATING EMPLOYMENT PRACTICES:

- THE FAIR LABORS STANDARDS ACT;
- THE AGE DISCRIMINATION IN EMPLOYMENT ACT;
- THE FAMILY AND MEDICAL LEAVE ACT;
- TITLE VII OF THE CIVIL RIGHTS ACT;
- AND THE AMERICANS WITH DISABILITIES ACT.

SINCE THE STATE OF NEVADA ENJOYS IMMUNITY IN FEDERAL COURTS WITH REGARD TO CLAIMS ARISING UNDER FEDERAL LAW AND CLAIMS ARISING UNDER STATE LAW, THE PROVISIONS OF A.B. 341 CONTAIN TWO SEPARATE AND DISTINCT WAIVERS OF NEVADA'S SOVEREIGN IMMUNITY TO ADDRESS THESE TWO TYPES OF CLAIMS.

I'D LIKE TO CONCLUDE MY PRESENTATION OF A.B. 341 WITH A FITTING QUOTE:

IN THE MIDDLE OF DIFFICULTY LIES OPPORTUNITY.

ALBERT EINSTEIN (1879-1955)

I ENCOURAGE EACH OF YOU, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, TO SIEZE THE OPPORTUNITY PRESENTED BY A.B. 341 TO ENSURE THAT THE EXPERIENCE OF MR. HIBBS IS NOT REPEATED WITH ANY OTHER STATE EMPLOYEE.

THANK YOU FOR YOUR CONSIDERATION OF THIS BILL. IF THERE ARE ANY QUESTIONS CONCERNING A.B. 341, I WOULD LIKE TO DEFER THOSE QUESTIONS TO THE EXPERT WITNESSES WHO ARE AVAILABLE TO TESTIFY IN SUPPORT OF THIS BILL.

W33474