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1991

PUBLIC HEARING

before

SENATE STATE GOVERNMENT AND FEDERAL  
AND INTERSTATE RELATIONS COMMITTEE

SENATE BILL No. 3047 AND ASSEMBLY BILL No. 3000

(Strengthens "Law Against Discrimination" in employment)

February 25, 1991  
Room 410  
State House Annex  
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Wynona M. Lipman, Chairman  
Senator Francis J. McManimon, Vice-Chairman  
Senator Gerald Cardinale

ALSO PRESENT:

Joseph P. Capalbo  
Office of Legislative Services  
Aide, Senate State Government and Federal  
and Interstate Relations Committee

New Jersey State Library

\* \* \* \* \*

Hearing Recorded and Transcribed by  
Office of Legislative Services  
Public Information Office  
Hearing Unit  
State House Annex  
CN 068  
Trenton, New Jersey 08625



New Jersey State Legislature

WYNONA M. LIPMAN  
CHAIRMAN  
FRANCIS J. McMANIMON  
VICE-CHAIRMAN  
LAURENCE S. WEISS  
GERALD CARDINALE  
C. William Haines

SENATE STATE GOVERNMENT AND FEDERAL  
AND INTERSTATE RELATIONS COMMITTEE  
STATE HOUSE ANNEX, CN-068  
TRENTON, NEW JERSEY 08625-0068  
(609) 292-9106

NOTICE OF PUBLIC HEARING

The Senate State Government and Federal and Interstate Relations Committee will hold a public hearing on the following legislation:

**S-3047**

Lipman Strengthens "Law Against Discrimination" in employment.

**A-3000**

Baer/Bryant

The hearing will be held on Monday, February 25, 1991 at 2:00 p.m. in Room 410, State House Annex, Trenton.

*The public may address comments and questions to Joseph P. Capalbo, Committee Aide, at (609) 292-9106. Persons wishing to testify should contact Phyllis Sheffield, secretary, at (609) 292-9106. Those persons presenting written testimony should provide 10 copies to the committee on the day of the hearing.*

Issued 2/19/91

SENATE, No. 3047

STATE OF NEW JERSEY

INTRODUCED OCTOBER 15, 1990

By Senators LIPMAN, RICE, FELDMAN, STOCKMAN,  
McMANIMON and CONTILLO

1 AN ACT concerning discrimination in employment and  
2 supplementing the "Law Against Discrimination," P.L.1945,  
3 c.169 (C.10:5-1 et seq.).  
4

5 BE IT ENACTED by the Senate and General Assembly of the  
6 State of New Jersey:

7 1. As used in this act:

8 a. "Act" means the "Law Against Discrimination," P.L.1945,  
9 c.169 (C.10:5-1 et seq.).

10 b. "Complaining party" means any person who may bring an  
11 action or proceeding under this act.

12 c. "Demonstrates" means meets the burdens of production and  
13 persuasion.

14 d. "Group of employment practices" means a combination of  
15 employment practices or an overall employment process.

16 e. "Required by business necessity" means essential to  
17 effective job performance.

18 f. "Respondent" means an employer, employment agency,  
19 labor organization, or joint labor-management committee.

20 2. Notwithstanding any other provision of law to the contrary,  
21 in any action alleging discrimination in employment, an unlawful  
22 employment practice shall be established if:

23 a. A complaining party demonstrates that race, color, religion,  
24 sex or national origin was a motivating factor for any  
25 employment practice even if that practice was also motivated by  
26 other factors; or

27 b. A complaining party demonstrates that an employment  
28 practice results in a disparate impact on the basis of race, color,  
29 religion, sex or national origin and the respondent fails to  
30 demonstrate that such practice is required by business necessity;  
31 or

32 c. A complaining party demonstrates that a group of  
33 employment practices results in a disparate impact on the basis  
34 of race, color, religion sex or national origin, and the respondent  
35 fails to demonstrate that such practices are required by business  
36 necessity, except that:

37 (1) If a complaining party demonstrates that a group of  
38 employment practices results in a disparate impact, such party  
39 shall not be required to demonstrate which specific practice or  
40 practices within the group results in such disparate impact; and

41 (2) If the respondent demonstrates that a specific employment  
42 practice

1 within such group of employment practices does not contribute to  
2 the disparate impact, the respondent shall not be required to  
3 demonstrate that such practice is required by business necessity.

4 3. With respect to an unlawful employment practice which  
5 constitutes intentional discrimination, compensatory damages  
6 may be awarded, which shall not affect any award of back pay. If  
7 the respondent engaged in the unlawful employment practice with  
8 malice, or with reckless or callous indifference to the rights  
9 protected by the act, punitive damages may be awarded.

10 4. a. Notwithstanding any other provision of law, and except  
11 as provided in subsection b. of this section, an employment  
12 practice that implements a litigated or consent judgment or order  
13 resolving a claim of employment discrimination under the act  
14 may not be challenged in a subsequent claim under the act:

15 (1) By a person who, prior to the entry of such judgment or  
16 order, had notice, from any source, of the proposed judgment or  
17 order sufficient to appraise him that such judgment or order  
18 might affect him; and, a reasonable opportunity to present  
19 objections to such judgment or order; or

20 (2) By a person with respect to whom the requirements of  
21 paragraph a. are not satisfied, if the court determines that the  
22 interests of such persons were adequately represented by another  
23 person who challenged such judgment or order prior to or after  
24 the entry of such judgment or order; or

25 (3) If the court that entered the judgment or order determines  
26 that reasonable efforts were made to provide notice to interested  
27 persons.

28 b. Nothing in this section shall be construed to:

29 (1) Alter the standards for intervention under Rule 4:33 of the  
30 Rules Governing the Courts of New Jersey;

31 (2) Apply to the rights of parties to the action in which the  
32 litigated or consent judgment or order was entered, or members  
33 of a class represented or sought to be represented in such action,  
34 or of members of a group on whose behalf relief was sought in  
35 such action; or

36 (3) Prevent challenges to a litigated or consent judgment or  
37 order on the ground that such judgment or order was obtained  
38 through collusion or fraud, or is transparently invalid or was  
39 entered by a court lacking subject matter jurisdiction.

40 c. Any action, not precluded under subsection a. of this  
41 section, which challenges an employment practice that  
42 implements a litigated or consent judgment or order resolving a  
43 claim of employment discrimination under the act shall be  
44 brought, if possible, before the judge that entered such judgment  
45 or order.

46 5. Where a seniority system or seniority practice is part of a  
47 collective bargaining agreement and that system or practice was  
48 included in the agreement with the intent to discriminate on the  
49 basis of race, color, religion, sex, or national origin, the

1 application of that system or practice during the period that such  
2 collective bargaining agreement is in effect shall be an unlawful  
3 employment practice.

4 6. a. A court shall not enter a consent order or judgment  
5 settling a claim alleging discrimination in employment unless the  
6 parties and their counsel attest that a waiver of all or  
7 substantially all attorneys' fees was not compelled as a condition  
8 of the settlement.

9 b. In any action or proceeding in which any judgment or order  
10 granting relief under this act is challenged, the court, in its  
11 discretion, may allow the prevailing party in the original action  
12 to recover from the party against whom relief was granted in the  
13 original action a reasonable attorney's fee, including experts'  
14 and other litigation expenses, and costs reasonably incurred in  
15 defending the order or judgment.

16 7. This act shall take effect immediately.

17

18

19

#### STATEMENT

20

21 The bill amends New Jersey's "Law Against Discrimination,"  
22 P.L.1945, c.169 (C.10:5-1 et seq.), to clarify certain issues  
23 involved in cases alleging discrimination in employment. This bill  
24 is modeled on legislation introduced in Congress which seeks to  
25 modify certain recent U.S. Supreme Court rulings in employment  
26 discrimination cases to ensure that the rights of those adversely  
27 affected by discriminatory employment practices are adequately  
28 protected.

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30 1. That an unlawful employment practice can be established by  
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36 2. That an unlawful employment practice is demonstrated  
37 when the complaining party establishes that an impermissible  
38 factor was a motivating factor for any employment practice,  
39 even though such practice was also motivated by other factors.

40 3. That in cases of intentional unlawful employment  
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8 part of a consent order or judgement, and that a prevailing party  
9 in an original action may be awarded attorney's fees incurred  
10 during the course of defending the judgment or order.

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13 CIVIL JUSTICE

14

15 Strengthens the "Law Against Discrimination" in cases involving  
16 discrimination in employment.

ASSEMBLY, No. 3000

STATE OF NEW JERSEY

INTRODUCED MARCH 8, 1990

By Assemblymen BAER, BRYANT, Brown, Mazur, Charles, Watson, Assemblywoman Bush, Assemblyman Mattison, Assemblywomen Ford, Kalik, Mullen, Assemblymen Doyle, Zangari, Mecca, Doria, Salmon, Gill, Menendez, Cohen, Duch, Scerni, Villapiano, Jacobson, Pascrell and Girgenti

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mjz: 1-54

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**SENATOR WYNONA M. LIPMAN (Chairman):** We are going to begin this hearing now. We are here today to take testimony on S-3047 and A-3000. These bills are identical, and are intended to strengthen the law against discrimination in cases involving employment. They are modeled on the Federal legislation introduced in the Congress, which seeks to modify certain United States Supreme Court decisions regarding employment discrimination.

Now I am going to depart. Instead of describing the bill myself, I am going to call Mr. Peter Van Schaick, who is from the New Jersey Employees Lawyers Association. Mr. Van Schaick has been sort of coordinating amendments from various agencies and persons on this bill -- S-3047. So I will now ask him to come forward to give the Senators a sort of briefing.

**P E T E R V A N S C H A I C K, ESQ.:** Okay. Thank you very much.

**SENATOR LIPMAN:** All right, sure.

**MR. VAN SCHAICK:** Are we ready?

**SENATOR LIPMAN:** Yes.

**MR. VAN SCHAICK:** Okay. The first thing that is really important to understand about this bill is a general kind of proposition about how the State laws fit into the Federal and State framework in this area. Justice Brennan, who recently retired from the U.S. Supreme Court, made a real big point about the fact that we can't just rely on our Federal remedies as a way of resolving issues of civil rights. We have to develop vigorous State remedies in this area. This is especially important now when we have had quite a few years of a fairly conservative rule in Congress that has led to very significant cutbacks in the civil rights area. It is in response to those cutbacks that the Federal legislation was initially proposed by Senator Kennedy and Congressman Hawkins.

Here in the State of New Jersey, I practice nothing but employment law. I worked for the EEOC as a trial attorney

for many years and then went into private practice. It is difficult to bring these cases into the Federal courts. The people who were appointed to the Federal courts were appointed, most of them, under Republican administrations and they are much more conservative about civil rights than the people who were there just 10 years ago.

So, Justice Brennan's admonition is what we have to really focus on on our State's rights. We have to improve our State bills. It is really important. This Assembly Bill No. 3000/Senate Bill No. 3047 does just that. It is a nice strong statement that takes the cutbacks in the civil rights that have happened in the U.S. Supreme Court in the past five years and legislates the reversal of those holdings.

Now, the first provision in this bill that is really important-- I want to take them one by one because as abstract propositions I think they kind of lose their meaning, but if you understand the stories they relate to and how they can cut back on rights, it will become apparent why this is really needed.

Section 2.a. of the bill reverses a case called Hopkins. Now the story in Hopkins was that the Supreme Court came out with a holding that allowed an employer two bites of the apple in an individual discrimination case. Unlike, say, the old labor law, where all you had to prove was that there was an unfair labor practice, and the owner might have had some other excuse, and then the employee still won, this kind of creates a situation where you've got the employer, once the employee has proved discrimination under the Supreme Court case of Hopkins -- the employer gets a second bite of the apple. The employer admits, "Oh, well, yeah, I may have discriminated, but I would have fired the person anyway," or, "I wouldn't have promoted the person anyway."

Well, that sounds kind of abstract. Let me bring it down to the nitty-gritty. I brought a case called Jackson v.

Conrail. It was up in Hudson County. It was tried by a jury. In that case there was a hangman's noose that had been hung up to intimidate this black man who had had the nerve to bid for a foreman's job after working for 20 years at a place. And there was testimony from three white coworkers about the conspiracy to fire the blankety blank blank because he had had the nerve to bid for this position. And yet in that case, under the Hopkins case he would have lost, because the employer went out and hired -- had a security force that followed his crew around and found him in a minor rule violation. They were driving back to the plant at the end of the day's work, and he let a group of guys in the car buy a six-pack of beer. This 20-year employee was fired on the basis of that, only because the Conrail police were following this guy as part of the conspiracy to fire him.

Well, under the Hopkins case, even though there was a hangman's noose, even though there was an obvious conspiracy to fire the guy, the employer got two bites of the apple, and got to win on that second ground because there was a rule violation. It just is not right. It is just not right. There was a conspiracy to fire the guy. You can't have a rule of law which allows somebody to get out of discrimination like that.

So, section 2.a. of your bill corrects that, and it does it very simply. It follows Hopkins. It reverses the language in Hopkins and makes discrimination a reason, in this legal test that I have just outlined.

Now, sections 2.b. and 2.c. are really important. Here you have a situation where there is a whole question about numerical standards in the area of employment law. In the debate down in Congress they have been talking a lot about quotas. Everybody is worried about quotas. The argument is that sections 2.b. and 2.c. would somehow create quotas. Well, it's just not true. The standard that is being corrected by sections 2.b. and 2.c. is the Ward's Cove case that the U.S. Supreme Court came out with. Ward's Cove was a case which--

Well, let me take a step back: There is a case Griggs you will hear talked about. Griggs was a case that Warren Burger decided. It was a unanimous case. On the basis of Griggs, the whole uniform of selection guidelines was set up. Now, what these guidelines did was-- These guidelines had all four major agencies of the U.S. government at the time get together and come up with standards for hiring. And that was the law of the land for 12 years before Ward's Cove came down. Then Ward's Cove came down and just completely threw out those standards and imposed a new intense standard, and basically ignored this well-established body of law.

The question is, with people talking about quotas-- The quota argument runs like this: If you hire by numerical standards and you allow proof of a discrimination case by numerical standards, then an employer-- He is just going to hire by numbers. He is not going to hire by qualifications. So, therefore, you should not allow that kind of a case to be brought.

Well, the truth is, you had 20 years, or 18 years since Griggs, and you didn't have people using quotas. So how come no quotas happened in the 18 years between the time Burger decided Griggs and the time that Ward's Cove reversed it. The reason is because it doesn't create quotas. There was a Supreme Court case that came along called Teal, that said you can't use numbers as a defense -- an employer cannot use numbers as a defense. That case meant that basically there was no possibility to use a quota defense by an employer.

The New York Times, in an editorial -- they call it a "Political Memo" -- a couple of months ago, basically said the quota argument just seemed to be more politics, and it was being used by Duke, and this fellow down in North Carolina, Helms, used some of it in his campaign. It seems more like political rhetoric than reality. I think that what this bill does is, it does the proper thing. It goes back to the uniform

employee selection guidelines -- this is in sections 2.c. and 2.b. of the bill -- and it takes that well-established body of law and puts it back where it belongs to be, which is the law of the land. I think it is appropriate that this bill resurrects those standards.

Now, there are a lot of other details in the bill, but let me skip over a bit. The next section that is really important to me is-- I believe it is section 4. which is about a case called Martin v. Wilks. There you have a situation where there is a concern about reversed discrimination cases and about allowing people to see a piece of civil rights litigation go on for a few years and sit on the sidelines. And then when all of the testimony has been had and after the judge has written all of his opinions, then a person who is affected by the agreement -- by the consent decree -- has a right to go in and sue and start the litigation all over again.

Well, this makes no sense. I mean, we should have a policy of settling these cases. Once there has been a hearing on a civil rights dispute at a particular place of employment, everybody who is affected by it should be on notice, and anybody who doesn't participate in those proceedings should not be allowed to reopen the whole can of worms.

I think it follows the policy of New Jersey in the court system, which is: resolve the dispute once. This language does that very nicely.

The Lorraine case is referred to in section 5. That one, again, corrects an obvious injustice. There was a situation where some women who were in a collective bargaining unit-- They had a situation where they were hurt by a negotiation that their union had had with the employer in terms of establishing seniority rights, but they didn't sue when the bargaining happened. They sued six years later when they actually got hurt by the bargaining. This language corrects that. The person should not have to sue when he or she thinks

something may happen. They should only have to sue when there has actually been some harm which has occurred to them.

Finally, section 6. is on attorneys' fees. Now, this corrects a couple of important problems. One has been the perennial problem of experts' fees in this kind of litigation. It is appropriate that it be covered, and this bill does it. Another one is the Evans problem. Evans was a situation where the lawyer for the employee was forced to waive his fees as a condition for the settlement for his client. This has now been resolved.

But there are a couple of other things that I think are very important for this Committee to consider in the area of fees. Now, I am not alone in this. There is a fellow who used to be the -- was a regional attorney for the EEOC. He was looking around and trying to figure out how come nobody is bringing these cases, because the reality is, we've got this law on the books, but it is unenforced. He puts the blame -- some of the blame on the attorneys' fees provisions. And, while Senate Bill No. 3047 deals with some of these issues, it does not deal with two of his recommendations.

One of his recommendations is very simple. He says he thinks the purpose of the attorneys' fees provision of the law against discrimination was -- or, the Federal counterpart was to make sure that large, well-established firms would get involved in civil rights litigation. And the fact is, the large, well-established firms are not getting involved in this litigation. So he is scratching his head and wondering why. Why don't people bring these cases? Why don't they accept them?

His conclusion is that the attorneys do not get paid an economically realistic figure, and they take a risk-- Say the case is a 50/50 shot. If you have a choice between somebody who is going to pay you an hourly directly or somebody who is going to pay you only if you win, you are going to take the person who is going to pay cash on the barrel head. So,

the large firms continue to take paying clients, and they turn these cases away.

Well, if we are concerned with cutting back, if we are concerned about encouraging the private enforcement of these statutes and we are in an era when we want to cut back on -- when we are concerned about the State budget and spending money for State enforcement, I think if we want this law to be fairly enforced, we have to really seriously look at how-- What is it going to take to get competent lawyers to take these cases? The reality is, no one is doing it. I am one of very few lawyers in this State who handles these kinds of cases. The group I am in has 40 members, and there are many more cases than our members could ever possibly handle. But the cases are economically very difficult for us to bring, and it is because of the attorneys' fees provision.

We had a study commissioned. Basically the problem is, there has to be some kind of compensation given for attorneys who will give them-- They talk about a risk multiplier. That has to be done. There is another suggestion I could make to the staff people working on this having to do with the Eckhart case, which is another problem in the attorneys' fees area.

Finally, I would like to wind up by saying that there are many other suggestions that could be made to work on this bill that would make it track the Federal bill a little more closely. One of the main concerns, I think, that needs to be addressed is some language to deal with the concern about quotas. I think some of the Federal language that was proposed-- It just says that this bill is not a quota bill. That it is intended to resurrect the Griggs standard would be appropriate. I think there should be some rules introduced for allowing the introduction of an employer's affirmative action program by either the employer or the employee, as evidence is relevant to proof in these cases. Then we can come out with a

bill that is not a quota bill, but will genuinely strengthen the law against discrimination and make it more productive for the people who are hurt by these kinds of problems.

Do you have any questions?

SENATOR LIPMAN: Yes, I do. You mentioned the attorneys' fees.

MR. VAN SCHAICK: Yes.

SENATOR LIPMAN: And you mentioned the quota problem.

MR. VAN SCHAICK: Right.

SENATOR LIPMAN: Would you like to submit some language for us to consider about the attorneys' fees, because I don't think you actually made a suggestion about how to deal with it.

MR. VAN SCHAICK: Okay. Yes, I would be happy to. The two suggestions I think would be appropriate-- The D.C. Circuit Court of Appeals right now, this week, is hearing-- The whole group of justices -- I think there are 11 -- is all meeting in one hearing to discuss this very issue. There is a case called King v. Palmer. The concern there is how much of an incentive should be given to the private bar to take these kinds of cases. The initial hearing that they had -- the initial opinion-- I think it was written by Judge Buckley. I think he was a Republican appointee. He suggested that the multiplier should at least double the normal hourly rate for the lawyers. They are having hearings right now. I am in touch with lawyers who have been down there. I could report back to you what their standard is for that and submit some language. On the Eckhart problem-- I could submit some language on that. And on the issue of the quotas, I would be happy to do that as well.

SENATOR LIPMAN: On the attorneys' fees--

MR. VAN SCHAICK: Yes?

SENATOR LIPMAN: This doubling you think would greatly encourage large attorneys' groups to take more of these cases?

MR. VAN SCHAICK: Well, I am not sure if it is enough. My standard is, when I see the well-established hundred-lawyer firms in New Jersey setting up departments to take civil rights cases-- When they take this economically seriously, then I think we will have corrected the attorneys' fees problem to the point that is necessary. If that quality of firm is not interested in handling these cases because it is not economically productive, I think we have not set the standard high enough. And the "how much" question is a difficult economic judgment. I can just report that the D.C. Circuit said double, at least double; the Ninth Circuit in San Francisco in the Fadl case said at least double; and there were a couple of other circuits that have ruled on it, one of which said double, and one said, "Give a 75% multiplier."

The Third Circuit has not yet ruled on it, but they did have a commission. They had a blue-ribbon panel that included-- I think it was chaired by Judge Sarokin, and Professor Miller from Harvard was on it. They said it was necessary, but they didn't give a specific figure. But I would be happy to give you--

SENATOR LIPMAN: A recommendation.

MR. VAN SCHAICK: --language in a recommendation, yes.

SENATOR LIPMAN: Language in a recommendation, and the same goes for the quotas you spoke about.

MR. VAN SCHAICK: Okay. Will do.

SENATOR LIPMAN: Senator?

SENATOR McMANIMON: This legislation is modeled on legislation that was introduced in Congress?

MR. VAN SCHAICK: That is correct.

SENATOR McMANIMON: Is this the same legislation that was vetoed?

MR. VAN SCHAICK: No. This bill was modeled after an early version, and this language was watered down significantly in the bargaining process in Congress.

SENATOR McMANIMON: They they turned around and vetoed the--

MR. VAN SCHAICK: The weaker version.

SENATOR McMANIMON: --watered down section.

MR. VAN SCHAICK: Exactly.

SENATOR McMANIMON: And even though the watered down section was vetoed, now this is modeled after the more stringent--

MR. VAN SCHAICK: Exactly.

SENATOR McMANIMON: I think it is--

MR. VAN SCHAICK: So this is the early language before the compromises.

SENATOR McMANIMON: --imperative that we get a complete breakdown of what the amendments were that watered it down -- and you used that term literally, as well--

MR. VAN SCHAICK: Right.

SENATOR McMANIMON: --and then find out why he vetoed the watered down section. Maybe we can find a common ground to work with where we can come up with something concrete here.

MR. VAN SCHAICK: Right. My sense is that there is no disagreement over the need for the bill. I think what is going to be the area for controversy is over the fine-tuning of some of the clauses.

SENATOR McMANIMON: Well, the very fact that you mentioned quotas-- You know, that turns people off.

MR. VAN SCHAICK: Well, exactly. I'm saying that I think the bill should include an express statement saying that it is not a quota bill. I think everybody is in agreement on that.

SENATOR McMANIMON: I would appreciate that analysis, as long as he was going down to Washington to do the comparison, to find a common ground that we can work with to come up with something that will be beneficial to this State.

SENATOR LIPMAN: The Senator is going a little further than even I went.

MR. VAN SCHAICK: In what way, ma'am?

SENATOR LIPMAN: An analysis of the Federal, plus the State bill, to see where our differences are.

MR. VAN SCHAICK: Right. Well, I can work with the staff people on working that out. There is a lot of that work that has already been done.

SENATOR LIPMAN: Joe, that's for you. (speaking to Joseph Capalbo, Committee aide) Senator Cardinale, do you have a question?

MR. VAN SCHAICK: Senator Cardinale?

SENATOR CARDINALE: Thank you, Madam Chairman. In your testimony, you told us a few things about Hopkins.

MR. VAN SCHAICK: About? Excuse me.

SENATOR CARDINALE: About the Hopkins case.

MR. VAN SCHAICK: Yes.

SENATOR CARDINALE: In the Hopkins case, who was the employer?

MR. VAN SCHAICK: Price Waterhouse.

SENATOR CARDINALE: Price Waterhouse was the employer. And, was it Price Waterhouse which put up the--

MR. VAN SCHAICK: Oh, no, no, no, no. I was just describing an individual case, the Conrail case, where I had the same problem as was presented in Price Waterhouse.

Price Waterhouse was a case of an accountant, a woman, who was a very strong, effective ratemaker for the firm, but who was characterized -- in some of the trial testimony -- as "needing to go to charm school," and some other things. There was basically a male decision-making body in the firm. Despite the fact that she was an economically productive member of the firm, there was a judgment that she should not make partner. There was a question, once she had proved discrimination, as to whether or not they were allowed to come back and say, "Well,

we would not have made her a partner anyway because of her rough manner." I guess her argument was that if she had had this rough manner and she had been a male, it would have been accepted as appropriate behavior.

I read the case once. I did not read any of the trial transcript, so I don't know the extent of the testimony that was developed.

SENATOR CARDINALE: I see. Going back to the Conrail case you were telling us about--

MR. VAN SCHAICK: Yes?

SENATOR CARDINALE: --where the fellow was-- You talked about it as "two bites of the apple." He allowed people to buy alcohol, or something like that. Who hung up the noose? I am curious about that. Was it Conrail that hung up the noose?

MR. VAN SCHAICK: Who hung up the noose? Well, that is a good question. The jury concluded, yes, that some of the people--

SENATOR CARDINALE: That it was Conrail that hung up the noose.

MR. VAN SCHAICK: Not Conrail, but employees at Conrail, yes.

SENATOR CARDINALE: Employees at Conrail?

MR. VAN SCHAICK: Yes.

SENATOR CARDINALE: But the penalty would have been visited on Conrail, not on the employees in that case, would it not?

MR. VAN SCHAICK: Well, yeah. We have a aerial photograph of the yard where the noose was hung up, and it was a quarter of a mile from any public entrance. It was right near a supervisors' pathway. The supervisors walked there everyday to the main repair shed from the supervisors' office. We had testimony that the noose remained up there for two weeks. So there was what we call -- what we lawyers call --

"imputed knowledge" that the supervisors knew about the noose. They had to have seen it.

SENATOR CARDINALE: They may very well have.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: I mean, I think that is a logical conclusion.

MR. VAN SCHAICK: Well, the jury didn't know. They had no witness to a supervisor being there.

SENATOR CARDINALE: Well, but besides that--

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: --the penalty would have been visited on someone other than the person who hung up the noose. Is that not correct?

MR. VAN SCHAICK: Well, it depends on how the case is brought. In that particular case, it was brought against Conrail. But in the law against discrimination, the way it is written, the definition of person includes anybody who participates individually, as well as the employer. It is one of the good things about the way the law has been written; that the individuals who are responsible can be held responsible financially for the misconduct.

SENATOR CARDINALE: You brought that case, didn't you?

MR. VAN SCHAICK: I brought it, along with-- Oh, who brought it?

SENATOR CARDINALE: You told us that you brought this case.

MR. VAN SCHAICK: Well, together with another lawyer -- a fellow named Van Dorn.

SENATOR CARDINALE: Who were you seeking to recover the damages from?

MR. VAN SCHAICK: Conrail.

SENATOR CARDINALE: Conrail?

MR. VAN SCHAICK: Right -- in that case.

SENATOR CARDINALE: That is the point I am trying to make; that the penalty is probably-- The person who actually hung this noose -- which I will agree with you is a despicable act--

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: --would escape the penalty, under the way you brought that case, because Conrail is a big, quasi-governmental body that would have paid a penalty, and the person who hung up the noose -- the real evildoer -- would really walk away scot-free. The government would pay, and someone would get some money, but certainly the person who hung up the noose would really get away with it.

MR. VAN SCHAICK: There was more misconduct other than that. There was the person who formed the conspiracy, who may or may not have been the same person. This was a person who the jury, I believe, concluded was a division engineer. I don't know what happened to his career at Conrail after that case, but I think that Conrail might have made an inquiry as to how come he was involved in it as much as he was. There may have been some internal consequences for his career.

But, you're right. This brings up the whole question of corporate accountability, and should corporations-- How responsible should corporations be for the actions of people who are acting within the corporations? It is a complicated set of issues.

SENATOR CARDINALE: See, whenever you have-- This may not have occurred to you, but it occurs to me all the time. Whenever you have a large group of people-- Within any large group of people there are going to be varying consciences, you might say.

MR. VAN SCHAICK: Right, right.

SENATOR CARDINALE: If you employ thousands of people, there are bound to be some people in that group who have a bad conscience and should the stockholders of a private

corporation, or the taxpayers, or someone other than the people actually doing--

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: --this act -- whether that person be a supervisor, the president of the company-- Should the company suffer because of--

MR. VAN SCHAICK: Well, that is a very good point. One of the things I did immediately-- I got called into the case late because I knew this area of law. One of the things we got was the affirmative action profile of the company. It turned out that there was a strong-- For about a six-year period before this incident happened with Jackson, they worked out of Elizabeth. Now, Elizabeth has a catchment area that has a fair number of minority people immediately around it. Within Conrail itself they had a large population of blacks in another department -- the Track Department. But they had, within this particular department where the people formed this conspiracy-- They had hired 60 people over the six-year period, and all of them were white.

The person who was up to his neck in this conspiracy was the person who signed off on the Affirmative Action Program, which certified that they were making good-faith efforts to improve and rectify the fact that they had internally recognized that they were not fairly hiring-- I think the word of art they use is "underutilizing." That is the phrase. They were underutilizing blacks. So there was a consistency between the institutional racism that was going on -- failing to hire a single black out of 60 over the six-year period -- and the individual act against this particular foreman.

So, one of the things that was very important in the trial of the case was to show that this was not just an isolated instance where there was one person who had run amuck. But this was something that was a deeper organizational

problem. This is what this whole section about the Griggs standard is all about.

SENATOR CARDINALE: I am going to get to the Griggs standard in a moment.

MR. VAN SCHAICK: Okay, okay.

SENATOR CARDINALE: But let me just make an observation so we can get to that.

MR. VAN SCHAICK: Yes, okay.

SENATOR CARDINALE: It seems to me that you didn't bring the case against that division or that department head. You brought the case against Conrail.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: And there were probably many, many divisions, and many department heads all over the country who were involved in Conrail.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: So that seems to me a basic injustice in the way the case was brought. I would have to agree with the court finding, not that these practices were good--

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: --but that perhaps the attorneys just brought the case against the wrong party. I would have no sympathy--

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: --for the party who actually did the wrongdoing, and I would support something that affected that. But you did mention that you were trying to resurrect the standards of Griggs. I am not an attorney.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: What are the standards of Griggs?

MR. VAN SCHAICK: Well, the best place to look for that is in the Uniform Employee Selection Guidelines, but basically what they require is the following: The Supreme

Court has said there are two classes of discrimination cases. You've got the intent cases, and you've got the Griggs cases, or the effects cases.

The intent cases are those where it is obvious somebody has a bad purpose. Somebody makes a statement that makes it clear that they have an attitude problem. Or, you look at a person's track record and you see that over a period of time the person favors one group over another group, maybe unconsciously, maybe not, but there is an inference of intent that is drawn from that. Those are the intent cases.

Then there are what are called the effects cases. In the effects cases what you do is look at the consequences of policies on groups of decisions on populations. You are looking at the institution and how it functions, as opposed to the individuals. So, for instance -- to make it nuts and bolts -- if you've got, say, in this particular department -- this Conrail department-- You look at the flow of applicants for positions and you look at the rate at which people are rejected given their group status. If it turns out that there is a higher rejection rate for, say, the women, and there is a lower rejection rate for the men, then once it hits a certain level, it throws the burden on the employer of justifying by a showing of job relatedness as to why the women are being rejected at the higher rate.

Now, the Griggs case was-- Let me give you an example -- a concrete example: Griggs was a case where-- (short consultation between Senator Lipman and Senator McManimon) What is it?

SENATOR McMANIMON: You are reaching for a quota system when you are going in that pattern.

MR. VAN SCHAICK: Well, you are using numerical standards, but you are not setting up a quota system. No way, no way, not at all.

SENATOR CARDINALE: I don't understand that.

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MR. VAN SCHAICK: Okay, Okay.

SENATOR CARDINALE: I understand a quota system to be something that relates to numerical standards. But you say that numerical standards do not relate to a quota system. Are we dealing with semantics, or are we dealing with a real--

MR. VAN SCHAICK: No, we're dealing with a real difference. We are not talking about quotas. The example I gave you-- If you've got a population of, say, 100 workers and you've got a turnover of 10 a year, and you've got a flow of, say, 10 men and 10 women making applications, and it turns out you are rejecting the women twice as often as the men, what the Griggs standard says is-- It doesn't say you have to do anything other than take a look at what you're doing. Try to figure out why you are rejecting them at a higher rate.

Now, in the Dothard case, the women were being rejected because they were shorter, and this was a corrections guard's case. What that did was-- It didn't say you had to take women. It said you had to take a look at why you had the height requirement. Why was it that you required women to be 5'4", or whatever it was to be a prison guard? Then there was an analysis of whether or not that was a sensible requirement. It didn't say you had to do anything other than take a look at what the requirement was.

So, for instance, in the police testing cases, one of the things that was interesting to me was when I talked to somebody about what they had done in Cleveland. They had a Civil Service test that if you scored higher, it didn't mean you were a better police officer. And they went out and they surveyed a bunch of police officers for who they liked to work with as a partner on the police force. Then they went out and rewrote the test, and they came out with a test that was fair, that selected better for what made an adequate police officer, than the test they had before, which actually had more to do with how well you read English than how well you responded to

an ambiguous situation where there was a threat of force, or whatever is required to make a good police officer.

So, the point of the whole Uniform Employee Selective Guidelines is not-- It says nothing about quotas. What it says is: "You use numbers to take a look at your practices, and when you've got a rejection rate that is high, you take a look at what is going on; you analyze it, and you figure out whether or not what you are doing makes sense." In the Griggs case, they had a high school requirement for shoveling coal. Well, it doesn't take a rocket scientist to know you don't need a high school--

SENATOR McMANIMON: Roll it back.

MR. VAN SCHAICK: Exactly, exactly. So the point is, if you've got a requirement like that and it turns out that minority people have a lower high school graduation rate, but they have strong backs and can shovel coal, why should you keep them out of those positions?

So, it is not a quota. It is not. And the bill should say that this is not a quota standard. But these Employee Selection Guidelines we are talking about are tools for taking a look at company policies. When you take a look at a policy, you analyze it as to whether or not it helps you to do the job. The purpose of the person who is hiring people is to hire people who are good at doing the job. When there is a rejection problem like this, all this does is force the person to look more closely at the requirements. Am I addressing your concern, or am I taking too long on it?

SENATOR CARDINALE: Yes, but no, no-- You are addressing it, but I think you are missing the point that I believe is in Senator McManimon's mind and in mine. I have in front of me something I would just like to read to you and see why you disagree with it, because I think you do. These are George Bush's words, not mine, and he was commenting on the bill which already had the amendments in.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: He said this was not a quota bill. He said: "Despite the use of the term 'civil rights' in the title of S-2104, the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our nation's employment system, primarily through provisions governing cases in which employment practices are alleged to have unintentionally caused the disproportionate exclusion of members of certain groups." He goes on to say a number of other things, among which is: "S-2104 creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation which will make it difficult for employers to defend the legitimate employment practices. Thus, unable to defend the legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability."

MR. VAN SCHAICK: Right, right.

SENATOR CARDINALE: Now, that's his analysis.

MR. VAN SCHAICK: Okay, just-- Okay.

SENATOR CARDINALE: His lawyers obviously analyzed this bill and came to these conclusions.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: Tell me where they went wrong.

MR. VAN SCHAICK: Okay, I will. I will. I must respectfully-- Obviously, you are quite correct in your surmise. I disagree. What that analysis assumes is that an employer is just going to hire by the numbers, because this gets so complicated there is no way by which he can rationally design Employee Selection Guidelines that are related to doing the job, although I think there are a lot of testing psychologists who would disagree with that. And that necessarily by default, he is just going to hire by the numbers, because it is the easiest thing to do.

SENATOR CARDINALE: Have you ever hired people?

MR. VAN SCHAICK: Yes, yes. It is difficult to do.

SENATOR CARDINALE: I have had to hire people, and you're right: It is a very difficult thing to do. A lot of it is very subjective. It is almost instinctive.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: I became aware at one point that you really shouldn't, or it was frowned upon, or maybe even illegal, to use certain kinds of standardized tests as a help, or a tool, so then you had to interview people, because those standardized tests might--

MR. VAN SCHAICK: Have bias.

SENATOR CARDINALE: --have a bias to them of some sort. It became very, very difficult to do. It is a function, sometimes, of who applies for the job.

MR. VAN SCHAICK: That is another issue. Okay, right.

SENATOR CARDINALE: You put an ad in the paper and you get "X" number of people applying. That is a function then of the location of the job and what newspaper you put the ad in. You have to then take a look at the end result and say, "All of the people who work in this particular office happen to be white," or, "All of the people in this office happen to be American Indians." Well, if you were on an Indian reservation and you put an ad in the newspaper there, the only people applying probably would be American Indians. But if you lived kind of in the area where I live, not very many people who are black apply for jobs that are put in the newspaper. In my experience of over 30 years, I don't think I have had one black person ever apply to work in my office. I have not rejected a black person, because no black person has ever applied for a job.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: So I think you run into some problems--

MR. VAN SCHAICK: No, no, no.

SENATOR CARDINALE: --when you use this numerical--

MR. VAN SCHAICK: If I may--

SENATOR CARDINALE: I had a Hispanic who came in, by the way, and I only found out she was Hispanic when I found out she could speak Spanish. And, she's great.

MR. VAN SCHAICK: Okay. There are a couple of ideas implicit in what you said, sir. May I take them one at a time?

SENATOR CARDINALE: Sure.

MR. VAN SCHAICK: The second notion you talked about is one that was kind of buried in something I said. It is something that in the Uniform Employee Selection Guidelines is talked about as being the "applicant flow." That is a way of looking at the stream of people who are actually applying for your positions. The Uniform Employee Selection Guidelines look at the applicant flow as a basis for analyzing these rejection rates.

Now, there may be a separate case about discriminatory recruiting. That is a separate issue. But we are talking simply about the standards, those subjective, difficult-to-administer standards you had for hiring in your office. Those, under these standards, would be assessed only on the basis of your applicant flow. If over the years you had had -- or over a year or two -- a flow of 20 applicants for five positions, and you hired all males, no females, and yet half of the applicants had been females, then under these standards you would be assessed in terms of the actual flow that came to your door.

So, we have to understand that the Uniform Employee Selection Guidelines we are talking about were the product of--

SENATOR CARDINALE: Do you mean I would have to keep a record of all the people who applied for jobs and what their racial background was, and so forth, in order to defend myself?

MR. VAN SCHAICK: The way the EEOC sets it up is, they have a standard--

SENATOR CARDINALE: I'll give you a job in my office in order to get out of this.

MR. VAN SCHAICK: Well, there is a set of graded sets of sizes for employers. Obviously, some employers -- mom and pop shops -- are less able to keep records than Fortune 500 companies. There is a different set of standards. And the EEOC has a set of record-keeping standards that look at that fact about the size of businesses. I don't happen to know the details of those coverage questions, but I do know they have a set of standards and it depends on the size of the shop.

But, going back to your initial question, which was, gee, President Bush has this real plausible-sounding criticism of this as leading to quotas-- I've got two things I can say to you in response to this: The first is, that argument assumes that an employer can come in and defend a discrimination case by saying, "I've got good numbers." That is called the bottom-line defense. I encounter it a lot in the cases I bring. The Supreme Court of the United States encountered it in a case called Connecticut v. Teal. In that case, they said the bottom line is no defense. And I think that President Bush's comment overlooks the fact that the Teal case expressly rejected that bottom-line defense as being a way of defending a discrimination case.

The bottom line is, if you kept those numbers, and if you had good numbers in terms of the composition, it would not be a legal defense if you happened to discriminate against somebody. It just wouldn't.

SENATOR CARDINALE: No, but you are not taking that as the exclusive avenue by which a suit can be brought. The avenue that we are discussing by which a suit can be brought is, if, in fact, all of the people who work in this particular division -- the 60 people you alluded to -- happened to be

white, that is prima facie evidence, barring some very difficult-to-prove defense.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: That there is, in fact, discrimination going on there.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: And I think you came to that conclusion yourself.

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: I would submit that that is exactly what President Bush is saying; that you shouldn't be able to bring a case based on the fact that there are not enough of various groups in the employment mix; that, in fact, alone should not be evidence, but if a particular applicant can show that he or she has been discriminated against--

Now, the law in New Jersey we presently have is pretty strong on this point. Let me read that to you. Maybe we can solve some of this more easily.

SENATOR LIPMAN: Senator, I would like to bring this to an end.

SENATOR CARDINALE: It's 10:5-4. It says: "Obtaining employment, accommodations, and privileges without discrimination, civil right: All persons shall have the opportunity to obtain employment and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property, without discrimination because of race, color, creed, national origin, ancestry, age, marital status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as, and declared to be a civil right."

MR. VAN SCHAICK: Right.

SENATOR CARDINALE: What's wrong with that?

SENATOR LIPMAN: Senator, I have to break this up because there are other people to testify. All I have to say to Senator Cardinale here is, the language of the law is beautiful. It does not discriminate, but it is not implemented or practiced in many instances. That is why we have to bring up other statutes to strengthen the law like this one.

It says there, but is it true--

MR. VAN SCHAICK: Well, Senator, I would be happy to continue our discussion after my testimony is concluded.

SENATOR LIPMAN: Thank you so much, Mr. Van Schaick.

MR. VAN SCHAICK: Okay. I will be in contact with your Committee aide. I will have some amendments for him.

SENATOR LIPMAN: Thank you very much. And help with the language that we requested?

MR. VAN SCHAICK: Yes, will do. Thank you very much, ma'am.

SENATOR LIPMAN: I think I am going to call the opposition now. I think the main opposing force is the New Jersey Business and Industry Association, which is being represented here by Mr. Phil Kirschner. Mr. Kirschner, you are not really against civil rights, are you?

PHILIP KIRSCHNER, ESQ.: No, we are not.

SENATOR McMANIMON: You're on tape.

MR. KIRSCHNER: Thank you very much. I do want to clarify, because this is a subject that engenders a lot of debate and heat and controversy and some emotionalism. We hope, as much as possible, to stay away from those types of things and just address this in a very calm way.

The feeling we have on this bill-- It is not a question of whether one is for civil rights or not. Obviously, in our society, civil rights and antidiscrimination protection are inalienable rights. This question is: What are the standards going to be employed to determine whether, in fact, an act of discrimination has taken place; whether those

standards are fair; and to what degree they should be considered? This is really a very complex technical and legal and certainly policy-driven issue that the Congress took over two years last time to develop a bill that did have broad bipartisan support.

The one point I want to bring out at the outset is, this bill that is before the Committee is not, in any way, shape, or form, the bill that passed and was approved by both Houses of Congress, and then vetoed by President Bush. That bill literally contained dozens -- dozens of amendments that addressed many of the areas that are of concern to those who oppose the standards employed in the bill.

This is the bill as it was in the version in which it was introduced, as most bills are introduced, and then they go through the process of compromise and amendment. So, I did want to bring that out; that that is not the same bill as the bill we are talking about today.

The second, I think, important point -- and you heard a tiny bit of it today, and I would like to clarify it-- This bill also goes beyond, well beyond merely returning the law to what it was prior to the five Supreme Court decisions that were handed down in 1989, that had reversed many years of employment law and antidiscrimination law. It does do some of that, but it goes well beyond that in many, many other areas, and in the one area we were talking about, and I think engendered some suspicion on the Federal level and, in fact, did not return to the Griggs language. In fact, the proponents urged the return to the language in Griggs, the exact same language. Until the end of the process when, in fact, that language was inserted, that was resisted by the proponents of the bill -- the exact same language we had been operating under for over a decade.

This bill does not contain many amendments. I just want to point out that some of them were onerous ones that we think need to be addressed.

There was talk of quotas. Kennedy-Hawkins only contained a statement that this bill should not be construed as a quota bill. That is nice language, but legally it means nothing. If the bill, in fact, by its terms, dictates that result, the fact that it is not intended to do so is nice language to have in the bill, but it doesn't mean anything legally. But it did go beyond that, and we are thankful that it did. It included language that said: "The mere existence of a statistical imbalance in an employer's work force on account of race, religion, sex, or national origin, is not alone sufficient to establish a prima facie case of disparate impact violation." That, in fact, is very, very important language. It is just not a saying that this is not a quota bill. That does help and goes a long, long way toward making sure that the bill is not, in fact, a quota bill. That says: "You can't look at the numbers alone to establish a prima facie case," and that is the standard. It would not be sufficient just to put a sentence in here saying, "The bill is not intended to establish quotas," without having that language, because an intention statement, again, is nice, but it means nothing legally.

The reason we think that is very, very important, and the reason the specter of quotas has been brought -- and I know that word brings a lot of devious implications that I think we want to avoid -- is, the standard this bill is using, in terms of shifting the burden of proof in proving discrimination or the lack of it. It used to be that one would have to show that there was a specific employment practice that was being used that was discriminatory. So, if you are suing someone, you have an obligation to say, "You discriminate, and the reason you discriminate is" -- either they use a kind of test, they have questions on an employment application, they ask questions during an interview, or they have an attitude which they exhibited during an interview that was completely

unacceptable. Whatever it is, some specific practice that occurred that the person suing believes shows discrimination.

This bill changes that, and says, "A group of employment practices, or the entire employment process can be used to show a violation," and then the burden shifts to the employer. That is just a nice way of saying-- A plaintiff can say, "Well, I can't really show you anything that you do that is discriminatory. I really can't point to any particular practice at all that is discriminatory. All I can tell you is, I went through the process like everybody else, and a particular group has gone through the process like everybody else, and the bottom line is that your work force does have a disparate impact in terms of the number of people that you hire in one group vis-a-vis another group."

We think that is fundamentally unfair, that as a minimum, as has been the case-- If you are going to sue someone for discrimination, point out what discriminatory acts you feel they are guilty of performing. Maybe they are guilty of performing them, maybe they are not, but there would be something specific to point to. This kind of thing -- shifting the burden of proof -- when you really can't point to any specific act, we think is very, very intolerable. It really is a numbers-don't-lie type of approach. It is very simplistic and it is very, very unfair.

The second thing the bill does is change the standard for business necessity. What had been previously the case in Griggs was, once the burden of proof did shift-- Let's say a plaintiff has made out a case -- a prima facie case of discrimination. A defendant-- Let's say a company can defend itself by saying there was what we call a "business necessity." There was a necessary business reason justifying this particular employment practice.

The language in the bill before us changes the words employed in the Griggs case, which was the case that was

overturned and the proponents say they hope just to go back to that, from a "job-relatedness test" to "essential to effective job performance." That is a whole different kettle of fish!

One can prove a number of things are job related and nondiscriminatory. There are very few qualifications of employment; most educational qualifications, for that matter, that you can prove are essential to effective job performance. There is a running debate always -- I mean, any of you who have hired -- on whether education, what you learned in school, means anything -- whether it is high school, whether it is college -- except for jobs where you have to have a license for which the education is a predicate. But, there is always a running debate that asks, does being educated in school mean anything one way or another? Is it predictive of job performance at all? That is a very good debate. That doesn't mean that if someone requires a high school or college education that they are being discriminatory. It is perfectly legitimate for one employer to believe a high school or college education for a particular job is necessary, and another to believe it is not necessary.

The question is whether that is being put up as a roadblock to keep people out. The language under this bill that is essential to effective job performance-- That is a test that very, very few employers could meet. Even a cashier in a supermarket, or a department store. It is legitimate, we believe, for an employer to say, "We want all of our cashiers to have a high school education. We think we should have an educated work force, and we believe, whether one agrees with it or not, that having a high school education supposes a minimum level of competence that one needs to do the job." We would think that that would pass the old Griggs test very, very easily. We do not believe it would pass the language in this bill that is essential to effective job performance, because a plaintiff could very easily show that there are hundreds, if

not thousands of people in the State of New Jersey and around this country who, in fact, perform the job of cashier without a high school education.

That is not the question. The question is not whether somebody could perform the job with or without a high school education. The question is, is it discriminatory to put that kind of a qualification in? Obviously, not that there aren't some people who can perform it well without having to meet this standard. The "essential to job performance--" You really cannot prove that in many jobs at all. Again, that was addressed in the Kennedy-Hawkins bill. That language was taken out and the Griggs language was put back in. Again, we would commend that language to you.

The third major area that I think is important is the area of damages once a case of discrimination has been proven. This bill makes a tremendous, tremendous expansion in the area of damages. In no way, shape, or form can it be related to Supreme Court cases, which did not address this at all. When the proponents were at it, they figured they would throw in some of the other stuff here on damages.

What this bill does-- For many, many years -- for the last 25 years -- the standard in antidiscrimination cases and damages has been what we call a "make whole" standard. If a person has been discriminated against-- For instance, let's say a person was denied a promotion on the basis of discrimination. We make that person whole as if they were never discriminated against. We give the person the promotion. We give the person all the back pay, seniority, benefits from the date they should have gotten that job in the first place. We try to put the person in the exact same position they would have been in had there not been any discrimination. They should have gotten that job two years ago on "X" date, and we try to put them in that same position.

This bill goes well beyond that. Not only do we give the person the promotion they deserve, and which they should have gotten in the first place -- all their back pay, all their benefits, all their seniority -- but we provide for unlimited pain and suffering damages and unlimited punitive damages on top of that. That is a tremendous, tremendous expansion of liability in terms of exposure than has ever, ever existed before, and it is a greater exposure than was in the final Kennedy-Hawkins bill, which at least put a cap on punitive damages.

What I think is fair in a situation like that is obviously the make whole; the person should be put in the position that he or she would have been in without the discrimination. We are even prepared to say that some pain and suffering damages are appropriate, but you don't want an unlimited pain and suffering element and punitive element to be a target and to be an open-ended kind of thing, where people sue not only to get their jobs back, which they have been wrongfully denied, and not only to get a molecule, or a measure of pain and suffering damages, but to make it so large that it becomes a target to shoot for and a windfall.

When you start talking figures like \$500,000 above what has been the traditional remedy, where you can quantify the damage in a case like this, and on top of that put an unlimited amount of punitive damages, you have really opened up, number one, the exposure, and number two, an incentive for litigation. That is really something that for-- Those defending cases do not mind being faced with legitimate cases, but they do not want to be in a scattershot position where attorneys will just shoot for a big score. You can bring a lot of cases but you only have to hit one, particularly now that our law in the State of New Jersey provides for jury trials, which is different, I think, from virtually every other state in the country.

These cases can now go to juries. They will not just be decided by a judge. They will be decided by juries. You have unlimited pain and suffering damages there. There is the potential for a skyrocketing award where it is not deserved, particularly in what we believe is a disparate impact case. You know, where there is intentional discrimination, that is one thing, but to provide for unlimited damages in a disparate impact case, where there is no intentional discrimination -- there may, in fact, have been discrimination because of the test used, but it wasn't intentional -- seems greatly excessive.

A few other things: One is in terms of what role the states have to play on this. We ask that the Committee view this very carefully and go slowly in this area.

Yes, we have our own State law against discrimination. In most respects -- in most respects -- it is very, very similar to Federal employment law. There are some procedural and a few substantive changes, but in most respects it is not wholly different. The reason for that is very, very important. Employers seeking to come into this State and invest in this State should not have to face a different standard here in New Jersey than they face in all of the other states.

Discrimination law should be uniform on the Federal level. Discrimination should be the same in every state. It doesn't really seem to make much sense to say, "Well, this particular act means you are discriminated against in New Jersey, but that same act means you are not discriminated against in Pennsylvania or New York." That really doesn't seem to make a whole lot of sense. That is why this area has been approached mostly federally, so it is uniform and there are uniform applications of discrimination laws. And again, it sends a terrible signal to people trying to come into the State that they will have to comply with a different law here in New Jersey than they do elsewhere.

A couple of the other areas that were hit upon in terms of attorneys' fees-- To think that there has to be an incentive to bring cases of this type, particularly when you have jury trials, escapes me. The incentive particularly is there, and to hear that big law firms -- that it is not attractive to big law firms-- Well, the reason it is not attractive to big law firms is, they have conflicts, in many cases -- or, in virtually all the cases-- The bigger law firms represent the very corporations that may be sued. That is why they do not take the cases -- they are in a conflict position -- not because there is not sufficient money to make it worth their while.

Last, but not least, is the mixed mode of cases that was talked about. Again, that was sort of superficially gone over; that, "Gee, it's terrible if a person discriminates. The fact that there are other valid legitimate reasons should not let them off the hook." That last part was sort of skipped over. When you are in a mixed mode case, you have proven -- you have proven -- that, in fact, there were other legitimate reasons, even absent the discrimination, that warranted dismissal. That in no way, shape, or form condones the discriminatory conduct. But the fact of the matter is, you have proven that even without the discriminatory conduct that there were sufficient reasons to terminate that employee, or discipline that employee anyway. That should not just be skated over. Someone said, "That is a convenient excuse." It is more than a convenient excuse. It is a fact that you have to be able to prove that there were other reasons absent the discrimination.

Kennedy-Hawkins did address that area by saying that the make whole remedy would be appropriate in mixed mode cases, but there would not be punitive damages or compensatory damages in those cases; that they recognized -- both the sponsors of the legislation recognized -- that that was legitimate.

We have given the Committee amendments, virtually all of which, all but one, were contained in the version that was approved by both Houses of Congress. We are not asking for anything other than what was approved by Kennedy-Hawkins. The one area we are asking about -- and it is only one -- is that we believe that pain and suffering damages should also be capped; that to have a unlimited target to shoot for is excessive.

All of the other language I have discussed in terms of the quota issue, in terms of the business necessity issue, in terms of the cap on punitive damages, in terms of the mixed mode of cases-- They are all contained in Kennedy-Hawkins as it was approved by Congress, and we ask you to look at that very seriously.

SENATOR LIPMAN: Mr. Kirschner, I would just point out one fact to you, and that is because we have to go on ahead with this hearing. You know, in the Federal law, there are laws we do not have, that they do not need to put in there -- in the Kennedy-Hawkins bill. I mean, they already have the laws about women in force, not in the statutes, so they don't need to include it. We need to include it because we don't have it in our State law. So that is the reason why there are additional points in our bill than there are in the Federal bill.

MR. KIRSCHNER: We understand to make State law consistent with Federal law. That is not a problem. It is a problem where State law exceeds the Federal law in real substantive areas. The bill, as it exists today, in fact does that, and I am aware of some amendments, particularly on sex discrimination--

SENATOR LIPMAN: Yeah, that is what I am saying. Congress already has that--

MR. KIRSCHNER: We believe that part of that, though, is excessive and that Congress does not have that--

SENATOR LIPMAN: --in their regular law.

MR. KIRSCHNER: Yeah, that particular language.

MR. CAPALBO: Do you want to submit additional language along with your statement?

MR. KIRSCHNER: Yes, I will give you a copy of the amendments.

SENATOR LIPMAN: Thank you very much, Mr. Kirschner.

I understand there is one person who wishes to give testimony who is extremely rushed. He is Professor Mark Denbeaux of Seton Hall Law School. He wants to testify in favor of the bill, I think -- I hope.

SENATOR McMANIMON: As long as he is from Seton Hall, we will hear him. (laughter)

PROFESSOR MARK DENBEAUX: Thank you very much. I am Mark Denbeaux, Professor at Seton Hall Law School. I teach constitutional law, and I have some practice experience in this area because I have represented individuals in Federal civil rights suits, but I have also been consulted by employers for advice in various regards also.

I think I came here expecting that this should be a fairly objective analytical experience, and I must say the hard part for me in doing that is because Mr. Kirschner's testimony really troubled me. I don't think it is appropriate to say that we are all in favor of civil rights, because I don't think everybody in the United States is. And I don't think it is appropriate to describe this process as a bill which is merely attempting to make a technical adjustment. I think saying something is so does not make it so. And I think there is a serious question in my mind about whether, in fact, the opposition to this bill that I have just heard is, in fact, based on merely technical and mechanical questions, or reflects opposition to the civil rights interests that I think we all claim we are supposed to believe in.

I would like to make my comments briefly in this regard, but there is a lot of reality that is missing from the

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criticism of this bill. The first problem I have with the criticism of the bill deals with the question of jury demands. You know, the assumption seems to be that lawyers are flocking to bring cases everytime somebody's employment rights have been violated, and that people are bringing them all the time, and we have to protect the employers from being burdened by suits which would be hard for them to defend.

But the truth is, most people who have employment rights problems don't get to bring their lawsuits; in an institution in which the black secretaries are never picked to be promoted to be the sort of administrative assistants over and over and over again, when the white secretaries are. The reason they are being selected -- are not being selected is because the process says, "We will allow the next supervisor up to participate in the process." And we consider it a legitimate business practice to be able to say, "Well, he needs to hire someone he will be comfortable with." That process actually incorporates, whether benignly or otherwise, the definition of comfort which often excludes diversity and often precludes inviting people to be assistants who might not be comfortable because they would be different.

SENATOR LIPMAN: Right, a good point.

SENATOR McMANIMON: Exclusionary, too.

PROFESSOR DENBEAUX: I beg your pardon?

SENATOR McMANIMON: Exclusionary, too.

PROFESSOR DENBEAUX: Absolutely. But, of course, that is a business practice. This bill attempts to deal with the question of what legitimate business practices are. For instance, another question is about the money. If the compensatory dollars are not available there, one of the reasons that many clients choose not to sue-- If you are a secretary someplace and all you can get is back pay, and it is going to be a \$2500 or \$3000 raise because you didn't get that job, and you will only get that for the two or three years

that-- At the end of two or three years of litigation, you can bring that lawsuit and you will get \$8000 or \$9000 back, in the meantime having to live with the burdens of your employer being sued by you. Many secretaries fear for their jobs; often single women who have difficult circumstances, and they cannot possibly do that.

When they say, "Can I be blacklisted? Will I be blackballed? Will I have trouble with this?" any responsible lawyer has to say, "Listen, your bosses do not like being sued. While we can guarantee you officially that there will be no retaliation, that does not mean that we can, in good conscience, tell you, as our client, not to worry, that you will not suffer."

Most of the people don't bring those lawsuits. In fact, the times they bring them the most often, when they should, are when the conduct of the employer is the most evil. If you have a really bad boss who is really discriminating and hostile, that is exactly the boss who will not objectively tolerate your bringing a lawsuit to clear up the question. Employers have nothing to lose when they bring these lawsuits -- in being sued nowadays, because it turns out that all they are going to have to pay at the end of a period of time is the amount of dollars that they should have paid to begin with -- there is no deterrent to that -- and the so-called attorneys' fees. As a matter of fact, lawyers do not take cases from which their clients will suffer. There is no incentive to a lawyer in bringing a case for all of this time to get \$8000 or \$9000 from the employer, and then to hit them with attorneys' fees, when the judges are not very sympathetic because they believe small dollars mean small cases and, therefore, small injustices.

I am really concerned-- Not only do I support the bill, but I am especially concerned about the opposition to the bill because I think at best it is naive, and at worst it is

actually reflecting a policy that is not consistent with our commitment to civil rights in the United States.

Now, you know, the statistical question is simply not a valid question. I don't even want to use the word here if I can possibly not do so, because it has no bearing on this. Every single determination we are talking about, in deciding whether there have been violations of people's civil rights, is based on fact conclusions by rational people. The idea that you had four or five dental hygienists hired over a six-year period, and from that period of time eight or nine of them were white and you picked four or five of them-- There is no jury, and there is no judge, who is going to say that you were discriminating. They simply do not conclude that, because it is not a rational conclusion.

On the other hand, if it turns out that you have a period of time in which you will have an office in which there will be 75% of the lower paid jobs -- the clerical jobs -- being held by blacks, 25% whites, and they always seem to promote the whites-- We have to recognize that it says to those blacks, not just the ones who have applied, but to the rest, "Where I work I am not welcome. I don't really believe it is fair." And, they have to live with that.

I have spoken to these people. You know, one of the American principles of civil rights is to make people feel that they have a right to have fair treatment. What is underestimated about the most significant contribution of the civil rights movement-- For the last 35 years, there has been a debate in America about what freedom means. People may quarrel about how much freedom and when and what the procedure is, but for 35 years we have been debating the principles of freedom, all because of the civil rights movement. I think we have to recognize that otherwise there has been no real concern in America about freedom as an issue. It wasn't available in the '20s, the '10s, the 1890s, the 1880s. That has been our

rhetoric. It goes back to either the Civil War or the Revolution, and it has inspired us to spend some time looking into what freedom means.

I think the most serious problem with this bill is that it is disingenuous. The most serious problem with the criticism of this bill is that it is disingenuous to keep claiming that there is something funny about the fact that evidence of consistently turning down protected groups, is supposed to not be evidence of consistently turning down protected groups.

The second problem I have is, people do not want evidence of consistently turning down protected groups to prove that somebody has done something wrong. Why? Because we are all in favor of civil rights. We have to be rational. We have to be calm. We have to be analytical. And when we are all done, it turns out that the same people who have been rewarded before will, in fact, not be rewarded -- will continue to be rewarded, and those people who have been discriminated against will be discriminated against, and we will say, "Well, that is all right, because we are all in favor of civil rights. We just have to look at the technicalities of this bill." It makes no sense.

This is an awesome bill. I don't think I intended to speak quite this passionately about it, until I listened to some of the debate, or the presentations. I think it is very important that we recognize that New Jersey is attempting to do what it is supposed to do, and what every state is supposed to do under our Federal system, which is to attempt to reform and provide services.

I don't think there is any need to worry about the details and the technicalities of this bill. I think this bill addresses major reforms in ways that no one can honestly say should not happen, unless our position is-- If we have to choose between an employer who has a consistent record of

accidentally not hiring people, or not promoting protected groups -- protecting that person from the burdens of having to explain that -- as opposed to choosing to protect those people who have truly been discriminated against and been hurt, I think we have to decide where we put our money. Where are the people who need protection? From my experience, the people who need protection are not the ones who hire lawyers, not the ones who have decided to fend claims.

In the last five or six years, the Title VII practices disappeared to a large extent because the companies have decided that it is better to fight every case, every time, and never to settle, because by the time they are done the clients will be worn out, costs of litigation will take place, and statistical studies will not be there. It is exhausting for lawyers to take these cases. It is a burden every time you take one because you are taking somebody who is unemployed, who is going to call you up every month or two and say, "I am trying to get a job. Do you think I am being turned down for jobs because I am blacklisted?" The scariest thing is to represent somebody who has no job and becomes obsessed with this injustice, because you have nobody to deal with all the time but those people.

As far as suggestions on this, I would only like to suggest one other thing. I care a lot about this. I have studied both bills, and I have dealt with it. But probably the most experienced people this Committee might want to rely on are two of my colleagues at Seton Hall Law School, who have been the leading publishers in the area of employment discrimination. One is Professor Charles Sullivan, and the other is Michael Zimmer, currently the Associate Dean at the Law School. One of their major works is a three-volume treatise on employment discrimination published by Little Brown, which I have here. They have the leading textbook on employment rights in the field being used in law schools around

the country. That is what they teach. I, of course, know them well and have been following them very well. But I think that if you have any concerns about technicalities that are necessary to improve the legislation, they would understand them. I don't think you should be concerned about things that are denominated technicalities, because we would rather call them something else than what they truly are.

SENATOR McMANIMON: Are you ready to represent me on smokers' rights? (laughter)

PROFESSOR DENBEAUX: I have learned that I don't have to take cases that I don't support.

SENATOR McMANIMON: Just kidding.

SENATOR LIPMAN: Thank you so much for your comments. We agree with you wholeheartedly naturally. We are so glad you came today.

I am going to call now Mr. Michael Giles of the New Jersey Garden State Bar Association. Mr. Giles?

F. M I C H A E L G I L E S, E S Q.: Thank you, Senator Lipman. Senator Lipman, Mr. Vice-Chairman, members of the Committee: I will be brief and succinct.

SENATOR McMANIMON: Then I will wait.

MR. GILES: All right, thank you, sir. I appreciate this opportunity. As I said, I will be brief. As Senator Lipman indicated, I am the President of the Garden State Bar Association, which is the black bar association -- the black lawyers' association -- in the State of New Jersey, having at this time some 300 dues-paying members throughout the State.

We also coalesce most times on matters such as these with the Hispanic Bar Association, the Association of Black Women Lawyers, the South Jersey Lawyers Association, and the Asian Pacific Lawyers Association. Therefore, I am speaking today on behalf of all of the minority lawyers in the State of New Jersey.

I appreciate this opportunity, first of all, to commend this Committee for taking this time, and all of the time it has taken and will take, on this particular issue, because as the last speaker indicated -- Professor Denbeaux -- for various reasons this particular area, ladies and gentlemen, has fallen out of favor in terms of lawyers being concerned about pursuing it in the courts and in terms of community understanding and appreciation of the needs in these areas. So, it is certainly appreciated that you legislators are taking under consideration these very serious problems that need to be addressed, and I will not belabor that any further. I think Professor Denbeaux very capably addressed those kinds of questions.

I would like to echo some remarks that have been made. I found it interesting that Mr. Kirschner even acknowledged the retrenchment in terms of the United States Supreme Court decisions in this particular area. I would like to echo the point that has been made that there is a serious concern in terms of the present state of the Federal judiciary. So there is a great need, a dire need for our State Legislature to address these problems. We may not be able to control circumstances in the Federal arena, at least not at this particular time, but we certainly can control matters here in our State.

The second issue, or question I would like to echo is that of attorney fees. This is somewhat sensitive because I am an attorney. I do not like people to get the idea that attorneys are raising the issue so that they can get paid better. The fact of the matter is, as has been stated by Mr. Van Schaick, and as has been indicated to you by Professor Denbeaux, it is not economically feasible under the present state of the law for attorneys to take these kinds of cases. This legislation, at least with the amendments that have been suggested, will address that very serious problem. It will

raise the level of the dignity of this type of jurisprudence. It will bring it back to where it belongs.

I would respectfully ask you to strongly consider the amendments that have been, and will be submitted along the lines of attorney fee amendments to the present legislation.

I promised to be brief, and I have been brief. I thank you very much for this opportunity. I hope to see all of you down the line on this and other issues. Thank you.

SENATOR LIPMAN: Thank you very much for coming, Mr. Giles. I just want to tell you that your remarks are welcome. They have been recorded, so we will have your testimony. All right?

MR. GILES: Thank you very much, Senator. Thank you, sir.

SENATOR LIPMAN: We have four more speakers, but I have another one in opposition from the New Jersey State Chamber of Commerce. Is Mr. Donald McCambridge still here? (no response) He is opposed. Then we have Mr. Eisdorfer, from the Public Advocate's Office. We have Mr. Glazer, from the New Jersey Rainbow Coalition, and Ms. Melanie Griffin, from the Commission on Sex Discrimination in the Statutes.

SENATOR McMANIMON: I don't think they are here, are they?

SENATOR LIPMAN: Well, they might be. There are some people outside the door. We will see if Mr. McCambridge has left.

SENATOR McMANIMON: Senator, I am going to have to beg to be excused. I do have a meeting downstairs.

SENATOR LIPMAN: That's all right.

SENATOR McMANIMON: I've got to get down to that. (indiscernible comments from audience; no microphone)

SENATOR McMANIMON: Why don't you schedule another hearing?

SENATOR LIPMAN: We are being recorded. That is why I didn't know whether to break. (indiscernible comments from audience; no microphone) I don't know how far these people came. Mr. Glazer is not from a State . . . .

SENATOR McMANIMON: Bring the order back.

SENATOR LIPMAN: Oh, do you want to continue later? (indiscernible discussion here among Senators, aide, and unidentified person from audience)

All right, Mr. McCambridge will submit a written statement. Is there anyone else who would prefer to present-- I see Mr. Eisdorfer, and I see Ms. Griffin. Is Mr. Glazer still here? (affirmative response from audience) You're still here. Do you want to make a brief statement, or do you want to submit your testimony?

EUGENE GLAZER: I would like to make my statement.

SENATOR LIPMAN: All right, let's hear it.

SENATOR McMANIMON: I hope you will excuse me. I do have a very important meeting downstairs.

MR. GLAZER: You're excused.

SENATOR LIPMAN: The Senator will receive a transcript of your testimony.

MR. GLAZER: I think I might be a relief to you, because I am not a lawyer, and I can't speak to any of the nuances or any of the legalese language that appears in the bill.

SENATOR LIPMAN: Right.

MR. GLAZER: The Rainbow Coalition, however, would be remiss if it did not take this opportunity to support legislation which supplements the law against discrimination, in this particular case at the work site.

The Rainbow Coalition is committed and proud of the positions we take, because we feel we are the most vocal and respected grass-roots organization in the State. We represent a diversity of working people. We are of, and from the working people of this State.

I think the Rainbow Coalition and this Committee of the Legislature-- I think we are kind of working the same side of the street. Last summer we were quite proud when I appeared before the full Assembly -- and other members of the Rainbow Coalition came to the Senate -- and you presented us with a proclamation supporting our March Against Racist Violence, which was held in Newark. So, as I say, I think we think alike on this.

Overt discrimination is readily identified and remedial measures can be taken. But it is the subtle and the institutional prejudices that prey on working men and women, and these must be addressed. What I find alarming is that we are moving backwards. We are not moving ahead. We are not making progress. In my involvement with the Rainbow Coalition, with the Antiapartheid Coalition, as an appointee to the South Brunswick Human Relations Commission, and as a labor shop steward interrelating everyday with hundreds of workers and members of management, I can attest, without question, that racism and anti-Semitism are on the rise. Discrimination against Latinos is reprehensible. And, there are two new kids on the block -- Asian and Asian Indians. They are taking their place in the discrimination pecking order. If this exists on the street, if it exists in families, then surely it exists in the workplace.

This past Friday, Donald Payne, a New Jersey representative in the House of Representatives, spoke at the New Jersey Region of the National Conference of Christians and Jews. He said, "The Department of Labor estimates that by the year 2000" -- what's that, nine years from now? -- "80% of the people entering the work force will be women, minorities, and immigrants, and without the passage of this legislation" -- the Federal legislation he was referring to -- "these workers, who will soon be the majority, will not have sufficient protection against discrimination."

He called for the Federal government to get back on the path of progress toward a more fair society. But, unfortunately, we cannot depend on the Federal government. We had our moments of euphoria in '64, and again and again in '71 when the Supreme Court affirmed the civil rights legislation. But then we went downhill, as the Reagan and Bush administrations eroded what had been accomplished.

So, New Jersey, we feel, must accomplish on the State level that which the Federal government has miserably failed the American public on. As I say, I am not a lawyer. There is a lot of this stuff that is complex to someone like me. But as I read through it I can still comprehend that this is a good bill. It speaks to the issues. It is not sending a complicated message. Maybe the language is complex for someone like me, but the message itself is not complicated, and it should not summarily be dismissed as a mere quota bill.

When it says -- or as I read it -- it is an unlawful employment practice -- that it exists if there is a failure by the employer to demonstrate that a disparate hiring practice is required by a business necessity, I understand that, and I understand it to be a rational statement. When you say in your bill that if race, color, religion, or sex can, indeed, be a motivating factor for unfair employment practices, then it, indeed, can become a motivating factor for malpractice. And both of these statements I feel, as I said, are rational. They make sense. They are to the point, and you sure as heck put me in the amen corner on them.

In conclusion, we must not reward discrimination, nor can we be silent. I feel New Jersey can set an example for the State and for the nation. We of the Rainbow Coalition are confident. We know what is required -- responsible legislation by responsible legislators. We are confident that you will vote favorably on this bill, and that you will bring your

influence to bear on the rest of the Assembly and the Senate to do likewise.

Thank you.

SENATOR LIPMAN: Thank you so much, Mr. Glazer. We appreciate the Rainbow Coalition's testimony. We are glad you came today and stayed so long.

MR. GLAZER: Thank you very much.

SENATOR LIPMAN: Thank you.

Melanie Griffin, Commission on Sex Discrimination in the Statutes, and after Ms. Griffin, Mr. Eisdorfer. Mr. Eisdorfer, you are going to sum up for us, aren't you?

S T E P H E N E I S D O R F E R: (speaking from audience) I don't know if I will sum up, but I will say something.

SENATOR LIPMAN: Thank you.

M E L A N I E S. G R I F F I N, E S Q.: Good afternoon.

SENATOR LIPMAN: Good afternoon.

MS. GRIFFIN: I am just here to kind of reenforce what everyone else has said. I think this is necessary legislation, and I think that New Jersey has to take a step beyond what the Federal government has done to correct some of the things that the Supreme Court has done to erode the rights that all of us thought we had before 1989 in employment; and also to suggest to the Committee that there are some ways in which New Jersey should go beyond even what the law does presently, or what the law would have done before 1989. I suggested those in the testimony that I submitted, and I won't read them to you, but the particular--

SENATOR LIPMAN: Melanie, excuse me. Would you, for the sake of the hearing reporter, identify where you come from? You didn't do that.

MS. GRIFFIN: Oh, I'm sorry.

SENATOR LIPMAN: That's all right.

MS. GRIFFIN: I am Melanie Griffin, from the Commission on Sex Discrimination in the Statutes.

One of the things that was left out, I think partly because this bill was drafted from the Federal legislation, were a few categories that are in our law against discrimination that the Commission is very concerned be retained in the supplementary legislation. Marital status is a protected status in this State. We think that should be included in the bill.

The other expansions we would like to see would be to include in the definition of sex discrimination, discrimination on the basis of pregnancy, which is in the Federal law in the pregnancy discrimination amendments of 1978, and to include in the definition of sex discrimination, discrimination that takes the form of sexual harassment. That is something that has never been included in the New Jersey law specifically, and we would like to see that written in the statutes.

The other area in which the Commission has an interest springs out of its concern with the-- Well, it came out of the study of the criminal justice system, in which the Commission found that New Jersey had greatly reduced the meaning, or expanded the meaning -- or whatever it is -- of the bona fide occupational qualification to make a greater exception, a greater number of jobs through in-state service restricted to one sex, particularly in prison guard positions.

I have gone through that in my testimony paper, but really what it is, is a very narrow interpretation of the Dothard case from the United States Supreme Court. We have suggested some language that would correct the bona fide occupational qualification provisions to make sure that bona fide occupational qualifications are only granted where there is a job that can be done only by members of one sex. The only example of that that came up during the congressional discussion on this topic was wet nurse. But it has been expanded to include positions which are dangerous -- perceived as dangerous for women, and thereby leaves them out of some

promotional tracks, particularly in the corrections institutions.

The Commission, in short, believes that this legislation can be important to the restoration of recently discarded civil rights in employment. It is also an opportunity for New Jersey to again define itself as a sovereign entity not bound by the Federal interpretation for citizens' rights.

I urge you to use this opportunity to expand upon the civil rights of the citizens of New Jersey. Thank you.

SENATOR LIPMAN: Did you mention age?

MS. GRIFFIN: No, I understood that another witness was going to. But, certainly, the other categories that have been left out here are age and disability. They should also be included.

SENATOR LIPMAN: Thank you very much, Melanie. Of course, I agree with your testimony, since I am a member of your Commission. Thanks very much for coming.

Mr. Eisdorfer, Department of the Public Advocate. Are you ready? (affirmative response from audience)

MR. EISDORFER: Madam Chairman, my name is Stephen Eisdorfer. I am with the Department of the Public Advocate. I am appearing today on behalf of Public Advocate Wilfredo Caraballo to testify on Senate Bill No. 3047. The hour is late. I have presented a written statement. I do not want to keep the Committee and its staff here longer than necessary, but I would like to do two things: One, I would like to talk a little bit about why we particularly need this bill in New Jersey; and secondly, I would like to talk about a few additional things that would be appropriate to add to the bill.

In New Jersey in 1980, the New Jersey Supreme Court, in a case called Peper v. Princeton University Board of Trustees, addressed the question of where should we find the standards we should use to implement the antidiscrimination

clause in the State Constitution and the law against discrimination? The New Jersey Supreme Court said that the best place for us to look was the place where we had lots of experience, which was in Federal law and what the Federal courts have done. The New Jersey Supreme Court said specifically: "You are familiar with Griggs. You are familiar with McDonnell-Douglas v. Green, the case dealing with disparate treatment, and that is where you should draw your standards." That is the law that has been applied in New Jersey for the past 10 years, and continues to be applied. It is still in the law of New Jersey, even though it is not the Federal law.

Our concern is, the Supreme Court, having said we should look to Federal law, maybe inadvertently, as the U.S. Supreme Court changes Federal law, it will also simultaneously twist the branch on New Jersey law too. What this bill seeks to do is to not have the U.S. Supreme Court dictate what New Jersey law should be. We have drawn wisdom from Federal law. It has worked. And the purpose of this bill, in its most important portion, is to keep it in place. This is a "preservation of the status quo" bill.

I want to comment very briefly on the points made by Mr. Kirschner, because in important respects it seems to me that he misconceives what New Jersey law is and how this bill will affect it. New Jersey law already provides for damages for pain and suffering. There was a case called Zohrian v. Russell Pitts more than 10 years ago. In fact, the Legislature passed a bill, Chapter 12 of the Laws of 1990, that specifically provided for pain and suffering in discrimination cases. What the Business and Industry Association is proposing is to roll back New Jersey law to a place where it never was before.

The suggestion is that this bill would not conform closely enough to Griggs; that in some way it wouldn't give

businesses the opportunity to pursue business practices that would have been legitimate under Griggs, and presumably would be legitimate under existing New Jersey law, but would be illegitimate under this bill. The example cited was the supermarket that requires a high school graduation to work as a cashier and has never, it turns out, hired minorities. That is a good example, because those are virtually the facts of Griggs. One could hardly pick an example that is closer to the facts of Griggs. If that is the kind of conduct that is sought to be defended, that we are concerned about this bill undoing, that is precisely the kind of conduct that is illegal now, and that is the kind of conduct we are trying to keep illegal. If you have job criteria that have the effect of discriminating against minorities, and you don't need them -- you can't explain why they really assist you in doing your business -- then they are illegal and discriminatory and they shouldn't be permitted.

That is the law of New Jersey, and this bill would preserve it. The suggestion that somehow this bill ought to be amended so that what was previously available is now forbidden -- should be permitted, certainly should be rejected.

Finally, the suggestion is that the problem with the bill is that it doesn't say you have to point to the specific employment practice that hurts you. That was a change worked in in Federal law by Ward's Cove Packing v. Antonio in 1989, which said that was what you had to do. It is a change from existing New Jersey law. The problem is it says you have to know who the wrongdoer is and what the wrongdoing is before you start. If somehow no minorities have ever been hired, then you don't know. Is there a vice president who blackballs all minorities? Is there a secret standard that is not announced? Yet, you cannot say in your complaint, "Here is what the wrongdoing is," and then you lose.

The reason for shifting the burden, for saying the burden is on the employer to justify his standards and the employee does not have to pinpoint exactly where the smoking gun is, is that the employee often doesn't know. The employer has that information; the employee does not.

For all of these reasons, it seems to me that this bill simply preserves existing law, and we ought to stick with it.

Now, I would like to make several suggestions on behalf of the Public Advocate on things we might well do with this law that would enhance its effectiveness:

First, when we talk about employment, when judges and lawyers read this legislation after it is passed -- as we hope it will be -- they are going to say, "Well, they made these changes in employment, not in housing and public accommodations. Surely they must have meant that these standards would only apply in employment and not in housing and public accommodations." Therefore, we urge that when the Committee releases this bill, it include a statement -- a line in its Committee statement saying: "We talked about employment because that was the subject we set about to take up, and we do not intend that there be any negative implications that we meant that different standards apply in the area of housing and public accommodations." The Committee will, in due course, have an opportunity to address the issue of housing because there are going to have to be housing amendments shortly. But let's not have this bill have negative consequences.

Secondly, we have an opportunity here while we are fixing things to fix a little piece of our law against discrimination dealing with discrimination in employment against the handicapped. Under Federal law, under the Rehabilitation Act of 1973 and the Americans Disability Act, there are three categories of handicapped -- of discrimination against the handicapped that are prohibited: persons who

presently have a mental or physical impairment; persons with a record of having such an impairment in the past; or persons who are regarded by others as having such an impairment.

We address the first two in our existing law against discrimination. There clearly are instances in which the people in the third category are also discriminated against, and although the courts in New Jersey are groping toward this point, it would be well to address this point and add that category specifically to section 4.1 of the New Jersey law against discrimination.

Finally, let me just echo the point made by Ms. Griffin, that while we are fixing it, we ought to add discrimination against women on the basis of pregnancy. We can simply pick up the language of the Federal law on this and add it to our own law.

I thank the Committee very much for its attention.

SENATOR LIPMAN: I would like to ask you about legislative intent. Naturally, we would have to write it in a statement about this bill: "Although we are presently discussing employment, this should not be construed to mean that we are ignoring transportation and housing." That would only be a legislative intent.

MR. EISDORFER: That's right. That is all we are interested in addressing. We don't want anyone to read this bill and say, "Oh, the Legislature intended to have stricter standards in employment than in housing or public accommodations, because they only talked about employment." So we just want to negate any such inference.

SENATOR LIPMAN: All right, okay. Thank you very much.

MR. EISDORFER: Thank you.

SENATOR LIPMAN: You have been very enlightening. We appreciate your testimony, and I am glad you came today.

I think this is the end of the hearing, unless there is someone in the audience who wishes to give further

testimony? (no response) I think this is the end of the people who wish to testify about this bill today. I want to say that I thank everyone for coming and for their serious consideration of the points in this bill. When our public transcript is ready, everyone is invited to have a copy.

Thank you very much for coming. I am now closing this hearing.

**(HEARING CONCLUDED)**

**APPENDIX**



**NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION**

**STATEMENT**

**OF THE**

**NEW JERSEY BUSINESS AND INDUSTRY ASSOCIATION**

**TO THE**

**SENATE STATE GOVERNMENT COMMITTEE**

**ON**

**S-3047/A-3000**

*(Amends the Law to Make it Easier to Sue for Discrimination)*

February 24, 1991

The New Jersey Business and Industry Association, representing 13,000 employers opposes S-3047/A-3000 (Lipman). The bill drastically amends the New Jersey Law Against Discrimination.

S-3047/A-3000 represents a massive restructuring and rewriting of our equal employment laws. Presented as a response to certain recent U.S. Supreme Court decisions, the bill in fact goes greatly beyond overturning these Supreme Court decisions. This bill is unfair in that a plaintiff doesn't have to show that an employer does anything in particular that discriminates but that its employment process as a whole is discriminatory if the numbers in the workforce don't match the numbers in the community. It is a simplistic "numbers don't lie" approach that doesn't require the showing of any discriminatory practice.

The business community in no way condones those employers that intentionally discriminate and supports efforts to deter such intentional violations. This bill however, allows plaintiffs to prevail without showing the employer has done anything wrong other than not having numerical balance.

The Kennedy-Hawkins bill that was approved by Congress took two years of work and contained amendments and protections that this bill doesn't contain. It stated that "the mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex or national origin is not alone sufficient to establish a prima facie of disparate impact violation." It also contained a cap on punitive damages. S-3047/A-3000 do not contain these amendments.

This is only the first discussion in this Committee of a bill that is extremely complex and which has been and is currently being debated in Congress. Equal employment law generally has been uniform at the Federal level so that discriminatory practices are defined the same in all 50 states. New Jersey would differentiate itself unfavorably in these tough economic times if it decided to have a law that was different than all other states. This would send a signal to businesses considering expanding in New Jersey that it has to comply with unfair requirements in New Jersey as opposed to other states.

It is ironic that at a time when business necessity dictates open, nondiscriminatory employment practices, the State Legislature is seeking to place greater rigidities on the labor market. Business is crying for qualified people whatever their race or gender. S-3047/A-3000, however, ignores these pressing

problems and focuses single-mindedly on narrow and technical litigation concerns of interest primarily to lawyers.

This legislation does not profess to create jobs or provide skills. It does, however, promise to vastly increase contentious litigation. This bill places employers in a position where they have no reasonable opportunity to effectively rebut challenged employment practices. Put into this position, employers will have little choice other than to assure numerical balance in their workforce, in effect a "quota system."

S-3047/A-3000 includes the term "group of employment practices." This definition, as applied to both disparate treatment and adverse impact cases, would place the entire range of an employer's employment practices under question without any specificity as to which practice is questionable. The legal inquiry would be changed from an examination of a single suspect practice into an open-ended inquisition of an employer if its total workforce did not reflect some idealized numerical balance suggested by a plaintiff.

To permit a lawsuit to be based on a "group of employment practices" — perhaps all practices used by a particular employer, and to have that lawsuit triggered because the "overall employment practice" results in a workforce that is numerically different — is a profound change in the standard used to review these cases. It assures that the overall employment practice results in a workforce that is measured by arbitrary numerical standards, and not by productivity or ability. This capricious approach to "balance" ignores the diversity of the various employment markets within New Jersey and fails to recognize the inherent competitiveness of the global marketplace.

The proposed new definition would find "business necessity" justifying a selection criterion only if that criterion were proven to be "essential to effective job performance." This new definition is a drastic change from the existing definition first set forth in Griggs v. Duke Power Company, by the United States Supreme Court, and has become well settled law during the past nineteen years. It is important to point out that the definition in S-3047/A-3000 does not return the law to what it was before the Supreme Court reversed the Griggs case. It far exceeds it.

In the Griggs decision, the Supreme Court first enunciated the theory of adverse impact, and imposed on employers the requirement of showing that a challenged practice was justified by "business necessity." The court said that the standard of business necessity meant "job relatedness," meaning a selection criterion

"having a manifest relationship to the employment in question." In the decision, Congressional intent was reemphasized to allow employers to set their employment standards as high as they wished as long as the business necessity test was met. Subsequent court rulings have made it clear that "business necessity" requires a showing that the challenged practice is predicative of job performance, correlates to important elements of work behavior, or more generally relates to the specific job function in question. The proposed new definition of business necessity, would overturn these long-standing precedents and impose an impossible burden on employers.

Under S-3047/A-3000, employers would have to show that the suspect practice, or the "overall employment process," are not only necessary but are essential. The judgement as to what is "essential" would not be made by the employer but by a judge or a jury, and then in the context of a numerical deficiency rather than actual business needs. S-3047/A-3000 would require employers to accept bare minimum qualifications or performance levels since they would be the only standard which could possibly meet the "essential" test. Therefore, the word "essential" which is neither defined, nor quantitative in nature is an unfair and unacceptable measurement. Furthermore, because the employer bears the burden of proving business necessity under the Act, how can it carry its burden and demonstrate "effective job performance" without knowing precisely what the term means?

S-3047/A-3000 would also abolish the requirement that a plaintiff identify the cause of a statistical disparity. It would permit a plaintiff's case to be based solely on the statistical "bottom line." That is, a plaintiff need not identify one specific employment practice causing adverse impact, but could complain generally about a group of practices or point to the overall "employment practice" to establish the numerical threshold necessary for a showing of adverse impact. An employer would then have the burden of showing that some or all of its practices — depending upon the scope of the complaint, are not causally related to the numerical deficiency. The employer would then be obliged to prove that each of these practices is "essential" to its business. Thus, an employer using a variety of employment practices would have to first parse all of its practices, identify which cause the numerical "discrimination," and then prove that the suspect practice was "essential" to its business.

This is a complete reversal of the burdens of proof obligations established in Wards Cove v. Antonio. Wards Cove held that plaintiffs may not attack an

employer's employment system merely by showing that the percentage of minority workers in one job is greater than in another job. Instead, the Court held that the plaintiff must identify a specific employment practice and demonstrate that there is a "causal connection" between the practice and the statistical disparity. Like most other aspects of the proposed legislation, the reversal of Wards Cove also will increase the costs and burdens associated with defending adverse impact cases, regardless of legitimate reasons such as force reductions or economic downturns, thereby establishing yet another reason for employers to expand or consolidate their operations outside of New Jersey.

Proving that some objective selection criterion is "essential" to success on a job is difficult enough. But in the context of subjective criteria the task becomes impossible. The proposed legislation is built on the faulty premise that every employment practice, including interviews, supervisory ratings and the like, can be reviewed with scientific precision. Unlike the accepted methodology for establishing the job relatedness of objective "pass-fail" instruments or practices such as standardized tests or height-weight standards, where business necessity has never been converted into the legal sine qua non which this legislation would mandate, the prospect of proving that it is "essential" to job performance for candidate to appear "bright" or "motivated" during an interview would be completely unmanageable, as would be the burden when reviewing the multistage hiring process for management trainees, first-line supervisors, public law enforcement positions or other such positions. The very complexity of the employer's burden when dealing with aggregated, subjective employment practices would require decision-making aimed at numerical balance, rather than business judgement, in order to avoid the crushing costs which would be required to even attempt to defend challenged criteria.

The bill also tremendously expands the damages awarded to a plaintiff. Currently, a person who is discriminated against is put back in the position he or she would have been in had there not been any discrimination. Therefore, if a person was denied a promotion he or she would receive the promotion and any back pay or benefits as if he or she got the job in the first place. This bill allows unlimited pain and suffering damages and unlimited punitive damages. This is a tremendous expansion of liability. It will encourage groundless litigation in the hopes of getting a big judgement. Such damages if allowed must be capped.

### Conclusion

Contrary to the representations of some proponents, S-3047/A-3000 far exceeds its professed aim of "simply" reversing certain U.S. Supreme Court decisions. Rather, this bill will affect a sea-change in the treatment of equal employment complaints, converting every charge into a court action, making the existing administrative process of mediation and conciliation an unused and forgotten option and building up a backlog of cases calling on scarce court resources.

S-3047/A-3000 also reverses the long-settled concept, embodied in state and federal law, of letting an employer set its standards as high as it wishes. This bill would present industry in New Jersey with the choice of boiling its legitimate employment criteria down to the very few essential elements which would result in a minimally competent workforce or facing lengthy and expensive litigation leading to extraordinarily relief in which the statutory deck is stacked overwhelmingly against it. The only other option left to employer is the distasteful one of insuring numerical balance through quotas.

The issues raised by S-3047/A-3000 deserves careful and thoughtful analysis. We urge this Committee to reflect upon the issues raised in this testimony and reject S-3047/A-3000.



NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION

PROPOSED AMENDMENTS TO S-3047/A-3000

Language to address Quotas and the intent that numbers alone do not constitute discrimination.

Substitute the following Section Pg. 1-2—Line 37—c(1)

1. [If a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and] "The mere existence of a statistical imbalance in an employer's work force on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation." (The language on statistical imbalance was contained in the Federal bill which was approved by Congress.)
2. Definition of Business Necessity

Substitute the following for Section 1(e) of the bill.

(e) The term "required by business necessity "means -- (1) in the case of employment practices involving selection such as tests, recruitments, evaluations, or requirements of education, experience, knowledge, skill, ability or physical characteristics, or practices primarily related to a measure of job performance, the practice or group of practices must bear a significant relationship to successful performance of the job; or (2) in the case of other employment decisions, not involving employment selection practices as covered by subparagraph (1) such as, but not limited to, a plant closing or bankruptcy, or that involve rules relating to methadone, alcohol or tobacco use, the practice or group of practices must bear a significant relationship to a manifest business objective of the employer.

In deciding whether the standards for business necessity have been met, the court may receive such evidence as statistical reports, validation studies, expert testimony, performance evaluations, written records or notes related to the practice or decision, testimony of

individuals with knowledge of the practice or decision involved, other evidence relevant to the employment decision, prior successful experience and other evidence as permitted by the rules of evidence, and the court shall give such weight, if any, to such evidence as is appropriate. (All the above language was included in Kennedy-Hawkins) which was approved by Congress.

3. Disparate Impact of Group of Employment Practices

The phrase "is not responsible in whole or in significant part for" should be substituted for "contribute to" in Section 2(c)(2) of the bill. In addition, the phrase "except as provided in subsection (3)" should be inserted in Section 2(c)(1) before the word "if" and the following paragraph should be added as Section 2(c)(3):

The complaining party shall be required to demonstrate which specific practices or practices are responsible for the disparate impact in all cases unless the court finds after discovery (a) that the respondent has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (b) that the respondent failed to keep such records; and except where the court makes such a finding, the respondent shall be required to demonstrate business necessity only as to those specific practices demonstrated by the complaining party to have been responsible in whole or in significant part for the disparate impact; except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent was well. (All the above language was included in Kennedy-Hawkins and approved by Congress.

4. Damages

The following language placing a cap on punitive damages should be added to Section 3:

The amount of punitive damages that may be awarded under this paragraph to an individual against a respondent shall not exceed the greater of (a) \$150,000, or (b) an amount equal to the sum of compensatory damages awarded and equitable monetary relief. It should also be clarified that compensatory and punitive damages shall be available only for claims of intentional discrimination. (All this was in Kennedy-Hawkins and approved by Congress.)

NJBIA believes that pain and suffering damages in Section (3) should also be capped at \$150,000. Currently the plaintiff receives all the backpay and benefits he or she would have received if they had not been discriminated against. This bill would permit unlimited pain and suffering damages and punitive damages which is a tremendous expansion of damages. Unlimited pain and suffering damages will invite needless litigation.

5. Mixed Motive Cases

On a claim where a violation is proven under section 2(a) and the respondent demonstrates that it would have taken the same action in the absence of any discrimination, the court may grant declaratory relief, injunctive relief, attorney's fees and costs, but it shall not award compensatory or punitive damages. (This was included in Kennedy-Hawkins and approved by Congress.)

6. Clarification/Quotas

The following language should be added to the bill to emphasize that the adoption of quotas is not an intended consequence of this bill:

Nothing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin: Provided, however, that nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law. (This language was approved by Congress)

7. Attorney Fees

The final version of the attorney's fees provision of the Civil Rights Act of 1990 emphasizes the court's discretion in making such an award and should be substituted for Section 6 (b):

In any action or proceeding in which any judgment or order granting relief under this Act is challenged, the court, in its discretion and in order to promote fairness, may allow the prevailing party in the original action to recover from either an unsuccessful party challenging such relief or a party against whom relief was granted in the original action or from more than one such party under an equitable allocation determined by the court, a reasonable attorney's fee including expert fees and other litigation expenses and costs reasonably incurred in defending as a party, intervenor or otherwise such judgment or order. In determining whether to allow recovery of fees

from the party challenging the initial judgment or order, the court should consider not only whether such challenge was unsuccessful, but also whether the award of fees against the challenging party promotes fairness, taking into consideration such factors as the reasonableness of the challenging party's legal and factual position and whether other special circumstances make an award unjust. (This language was approved by Congress)

8. Effective Date

As presently drafted, the Act would be effective immediately. The bill should be amended to provide for a period of employer education and adjustment before the effective date. At least 120 days is necessary.



State of New Jersey

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Testimony on behalf of the Commission on Sex Discrimination  
in the Statutes  
FEBRUARY 25, 1991

POSITION PAPER ON SENATE BILL 3047  
SPONSORED BY SENATOR WYNONA M. LIPMAN  
ASSEMBLY BILL 3000  
SPONSORED BY ASSEMBLYMEN BYRON BAER AND WAYNE BRYANT

Thank you, Senator Lipman and members of the State Government Committee, for taking testimony on these important bills.

The Commission on Sex Discrimination in the Statutes supports Senate Bill 3047/Assembly Bill 3000, sponsored by Senator Wynona M. Lipman and Assemblymen Byron Baer and Wayne Bryant. Mirroring federal legislation, it closes areas of vulnerability left by the United States Supreme Court's 1989 interpretations of Title VII in several key areas.

The bill provides for establishment of an unlawful employment practice if:

a. race, color, religion, sex or national origin was a factor in the practice even if there were other factors. This provision addresses issues raised in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) where the Court allowed the employer to claim that it might have arrived at the same decision if the acknowledged discriminatory act had not occurred.

b. the complainant can show that a practice has a disparate impact on members of the protected class. This section is in response to Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) in which the Court held that where the practice is discriminatory, the complainant must show that the employer had no additional, legal reason for its practice.

Other sections of the bill allow for compensatory damages in cases of intentional discrimination and disallow the practice of compelling the waiver of plaintiffs attorneys' fees in settlements.

Finally, the bill addresses a problem raised in Martin v. Wilks, 109 S. Ct. 2180 (1989) by requiring that people who might be adversely affected by the implementation of remedies for past discrimination be notified of the consent judgment or order. Those affected would be permitted an opportunity to be heard on the entry of the order but would then be barred from challenging the order in a subsequent action except under narrowly defined circumstances.

Senate Bill 3047/Assembly Bill 3000 adds several significant protections to the New Jersey Law Against Discrimination that would restore and expand the law's original intent of barring discriminatory practices. Accordingly, the Commission on Sex Discrimination in the Statutes recommends the adoption of an amendment that includes all of the classes protected by the Law Against Discrimination in its present form.

The Commission believes that these corrections are necessary to eliminate new, subtler forms of discrimination that particularly face women, and that are often the cause of "glass ceilings" in employment. The higher a position, the more subjective will be the hiring and promotion criteria, and, under recent court decisions, the better protected from scrutiny by a court. The law may adequately protect those plaintiffs who take a math test to qualify for employment, but in its current state, it places an inordinate burden on those plaintiffs whose promotions were denied because of a complex of subjective criteria which need not even be recorded by the employer, let alone disclosed to an applicant. The Commission would also like to bring to your attention a few other problems with state law that could be addressed in the context of this legislation.

The definition of sex discrimination should include discrimination on the basis of pregnancy and sexual harassment. Both of these areas have been addressed extensively in the federal amendments to the civil rights law, and should be addressed at the state level as well. The Commission therefore recommends amending the definitions section of S3047/A3000 to include the following:

"Discrimination because of sex" includes discrimination because of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other people not so

affected but similar in their ability or inability to work. "Discrimination because of sex" also includes sexual harassment, which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

- (1) submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations, or public services, education, or housing;
- (2) submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education or housing;
- (3) the conduct or communication has the purpose or effect of unreasonably interfering with an individual's employment, public accommodations or public services, education, or housing or creating an intimidating, hostile, or offensive employment, public accommodations, public services, education, or housing environment.

In its study of the criminal justice system, the Commission found that New Jersey has seriously misinterpreted the bona fide occupational qualification provisions in the Law Against Discrimination, particularly with regard to the assignment of women to work in prisons and jails. An opinion of the Attorney General from 1983 concluded, based on federal interpretations of the bfoq in Title VII of the Civil Rights Act of 1964. The legislative history of the bfoq provision in Congress shows that the provision was intended to be very narrowly interpreted, and the U.S. Supreme Court, in Dothard v. Rawlinson, said that a bfoq was only justified when "the essence of the business operation would be undermined by not hiring members of one sex exclusively." The interpretation of Dothard used by the New Jersey Department of Personnel to determine whether a specific position qualifies for restriction to one sex has allowed the Department of Corrections to grossly exceed the limits set by the case. The New Jersey Administrative code allows certifications to be issued for state and local competitive jobs that are limited to persons of a particular sex, religion, or national origin if that characteristic is "essential to successful job performance and the normal operation of the appointing authority." The Commission heard extensive testimony from women employed in the Department of Corrections that indicated that the regulations are manipulated to exclude women from supervisory jobs in the men's prisons and to exclude men who work at Edna Mahan from enjoying the same employment, transfer, and promotion rights as either their male counterparts at male institutions or their female colleagues.

The New Jersey Law Against Discrimination added sex as a protected class in 1970, after the enactment of Title VII but before Dothard was decided. The Commission therefore assumes that the legislature intended to enact the same narrow bfoq envisioned by Congress. Congress's original intent was clearly to exclude only the very few jobs for which all or substantially all persons of one gender would be unable to perform that job. (The position of wetnurse was mentioned as an appropriate job to be held only by women; no other jobs were specifically mentioned.) (See, for a full discussion and references to source material, the Commission's 1989 report, "Sex Discrimination in Corrections.")

The Commission believes that this legislation can be important to the restoration of recently discarded civil rights in employment. It is also an opportunity for New Jersey to again define itself as a sovereign entity, not bound by the federal interpretations of her citizens' rights. I urge you to use that opportunity, and to accept the challenge of assuring equal rights for employees in New Jersey, regardless of race, creed, color, national origin, ancestry, age, marital status, or sex of those employees.

TESTIMONY  
OF  
THE DEPARTMENT OF THE PUBLIC ADVOCATE  
ON S-3047 BEFORE THE  
SENATE STATE GOVERNMENT COMMITTEE  
AND FEDERAL AND INTERSTATE RELATIONS COMMITTEE

WILFREDO CARABALLO  
PUBLIC ADVOCATE OF NEW JERSEY

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DIVISION OF PUBLIC INTEREST  
ADVOCACY

CHAIRMAN LIPMAN AND MEMBERS OF THE SENATE STATE GOVERNMENT COMMITTEE AND FEDERAL AND INTERSTATE RELATIONS COMMITTEE. THE PUBLIC ADVOCATE, THROUGH THE DIVISION OF PUBLIC INTEREST ADVOCACY, STRONGLY SUPPORTS THE AMENDMENTS TO THE LAW AGAINST DISCRIMINATION PROPOSED IN S-3047. THESE AMENDMENTS WOULD CODIFY VARIOUS JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF THE LAD'S PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION THAT ENSURE VULNERABLE PERSONS ARE FULLY PROTECTED FROM EMPLOYMENT DISCRIMINATION UNDER NEW JERSEY LAW. THIS CODIFICATION IS PARTICULARLY IMPORTANT AT THE PRESENT TIME, BECAUSE RECENT DECISIONS OF THE UNITED STATES SUPREME COURT HAVE BEGUN TO CUT BACK ON EMPLOYMENT DISCRIMINATION PROTECTIONS THAT WERE UNDERSTOOD AND APPLIED BY THE FEDERAL COURTS FOR YEARS. IN CONSTRUING THE NEW JERSEY LAW AGAINST DISCRIMINATION, OUR STATE COURTS HAVE FOLLOWED THE DECISIONS OF THE FEDERAL COURTS IN TITLE VII CASES IN THE PAST.\* S-3047 WILL MAKE IT CLEAR THAT THE NEW JERSEY LEGISLATURE DOES NOT INTEND THE STATE LAW AGAINST EMPLOYMENT DISCRIMINATION TO BE SIMILARLY NARROWED OR WEAKENED. THEREFORE, S-3047 REAFFIRMS THE CLEAR PUBLIC POLICY OF THIS STATE TO ABOLISH DISCRIMINATION IN THE WORKPLACE. FUCHILLA V. LAYMAN, 109 N.J. 319, 334 (1988).

THE ARGUMENT OF THE BUSINESS COMMUNITY THAT S-3047 WILL FORCE BUSINESSES TO ESTABLISH QUOTAS FOR HIRING AND PROMOTION OF PROTECTED GROUPS IS ENTIRELY SPECULATIVE. NOT ONE WORD OF S-3047

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\* The courts have followed federal Title VII decisions "where those decisions are appropriate and fair."

SUPPORTS QUOTAS OF ANY KIND. THE BILL'S INTENT IS SIMPLY TO RESTORE THE STANDARD OF PROOF THAT EXISTED UNDER FEDERAL LAW FOR 18 YEARS UNDER A UNANIMOUS 1971 UNITED STATES SUPREME COURT DECISION, GRIGGS V. DUKE POWER COMPANY. \* THERE HAS BEEN ABSOLUTELY NO EVIDENCE OFFERED THAT THE GRIGGS DECISION LED TO QUOTAS DURING THE 18 YEARS THAT IT WAS THE APPLICABLE STANDARD, AND THERE IS NO REASON WHY RESTORING THAT KIND OF STANDARD SHOULD LEAD TO QUOTAS NOW. RATHER, S-3047 SIMPLY REESTABLISHES THE BALANCE THAT EXISTED UNDER PRIOR FEDERAL LAW. IT WILL ENCOURAGE EMPLOYERS TO LOOK CLOSELY AT THEIR HIRING AND PROMOTION PRACTICES TO DETERMINE WHETHER THEY ARE, INTENTIONALLY OR UNINTENTIONALLY, HAVING A DISPARATE IMPACT ON PROTECTED GROUPS. IN THIS WAY, THE AMENDMENTS IN S-3047 WILL SERVE AS A STRONG IMPETUS FOR THE ELIMINATION OF EMPLOYMENT PRACTICES THAT HAVE A DISPARATE IMPACT ON PROTECTED GROUPS, AND WILL ENSURE THAT EMPLOYEES ARE PROVIDED WITH REAL, NOT JUST ILLUSORY, PROTECTIONS FROM DISCRIMINATORY EMPLOYMENT PRACTICES, REGARDLESS OF THE FORM THOSE PRACTICES MAY TAKE.

WE HAVE SEVERAL SUGGESTIONS, HOWEVER, FOR LANGUAGE THAT WILL FURTHER STRENGTHEN AND/OR CLARIFY NEW JERSEY'S LAW AGAINST EMPLOYMENT DISCRIMINATION. FIRST, AND MOST IMPORTANTLY, THE SPONSOR'S STATEMENT ACCOMPANYING THE BILL SHOULD STATE CLEARLY THAT S-3047 SEEKS ONLY TO CLARIFY AND CODIFY THE STATUTORY PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION, AND THAT THE LEGISLATURE'S FAILURE TO MAKE SIMILAR CHANGES SIMULTANEOUSLY IN

\* 401 U.S. 424 (1971).

THE LAW AGAINST DISCRIMINATION WITH RESPECT TO OTHER FORMS OF DISCRIMINATION (E.G., DISCRIMINATION IN HOUSING OR PUBLIC ACCOMMODATIONS) SHOULD NOT CARRY ANY NEGATIVE IMPLICATIONS WITH RESPECT TO THE LEGISLATURE'S INTENT REGARDING OTHER STATUTORY PROTECTIONS IN THE LAD.

SECOND, WE RECOMMEND THAT THE PROTECTIONS AFFORDED TO PERSONS ON THE BASIS OF DISABILITY BE BROADENED SOMEWHAT, CONSISTENT WITH THE DEFINITIONS FOUND IN BOTH SECTION 504 OF THE FEDERAL REHABILITATION ACT OF 1973 \* AND THE AMERICANS WITH DISABILITIES ACT OF 1990.\*\* THE FEDERAL DEFINITION OF DISABLED PERSONS ENCOMPASSES THREE GENERAL CATEGORIES:

- 1) PERSONS WHO PRESENTLY HAVE A PHYSICAL OR MENTAL IMPAIRMENT;
- 2) PERSONS WITH A RECORD OF HAVING SUCH AN IMPAIRMENT; OR
- 3) PERSONS WHO ARE REGARDED AS HAVING SUCH AN IMPAIRMENT.

NEW JERSEY'S LAD CURRENTLY ENCOMPASSES THE FIRST TWO OF THESE CATEGORIES EXPLICITLY. SEE N.J.S.A. 10:5-4.1. WE SUGGEST THAT THE LAD BE AMENDED TO INCLUDE THE THIRD, AS WELL, TO CODIFY THE WELL-ESTABLISHED JUDICIAL INTERPRETATION THAT THE LAD PROTECTS PERSONS ON THE BASIS OF A PERCEIVED DISABILITY AS WELL AS AN ACTUAL DISABILITY.\*\*\* THIS LANGUAGE WOULD ENCOMPASS SITUATIONS WHERE A PERSON DOES NOT ACTUALLY HAVE A DISABILITY

\*. 29 U.S.C. SEC. 706.

\*\* . P.L. 101-336.

\*\*\* . See Poff v. Caro, 228 N.J. Super. 370, 377-378 (Law Div. 1987), and cases cited therein.

WITHIN THE MEANING OF THE STATUTE, BUT IS WRONGLY PERCEIVED AS HAVING SUCH A DISABILITY. FOR EXAMPLE, IT WOULD PROTECT FROM DISCRIMINATION INDIVIDUAL MEMBERS OF CERTAIN RACIAL OR OTHER GROUPS THAT MAY BE STATISTICALLY MORE LIKELY TO HAVE A PARTICULAR ILLNESS OR INFIRMITY, WHERE THOSE INDIVIDUALS ARE NOT ACTUALLY ILL OR DISABLED IN ANY WAY, BUT ARE NEVERTHELESS BEING SUBJECTED TO DISCRIMINATION BASED ON THE PERCEPTION OF THEIR LIKELIHOOD OF CONTRACTING THE ILLNESS OR INFIRMITY IN QUESTION. IT WOULD ALSO PROTECT THE CARETAKER OF SOMEONE WHO IS SERIOUSLY ILL AGAINST UNJUSTIFIED DISCRIMINATION BASED SOLELY ON THE CLOSE ASSOCIATION BETWEEN THE CARETAKER AND THE DISABLED PERSON. IN SUCH CASES, THE CARETAKER MAY NOT BE PERSONALLY DISABLED AS DEFINED IN THE ACT, BUT MAY BE WRONGFULLY PERCEIVED TO BE AFFECTED BY A DISEASE, ILLNESS OR DISABILITY, AND DISCRIMINATED AGAINST ON THAT BASIS-- SOLELY BECAUSE OF SOCIETAL FEARS CONCERNING THE ILLNESS IN QUESTION. THE ACT SHOULD MAKE IT CLEAR THAT SUCH PERSONS ARE ALSO PROTECTED FROM DISCRIMINATION.

SIMILAR LANGUAGE HAS BEEN INCORPORATED INTO THE CIVIL RIGHTS LAWS OF OTHER STATES. FOR EXAMPLE, NEW YORK STATE'S HUMAN RIGHTS LAW, WHICH WAS THE MODEL FOR THE NEW JERSEY LAD, WAS AMENDED IN 1983 TO INCLUDE CONDITIONS WHICH ARE "REGARDED BY OTHERS AS SUCH AN IMPAIRMENT." WISCONSIN AND MISSOURI, TO NAME TWO OTHERS, LIKEWISE PROTECT FROM EMPLOYMENT DISCRIMINATION PERSONS WHO ARE PERCEIVED AS HAVING A PHYSICAL OR MENTAL IMPAIRMENT. A SIMILAR AMENDMENT TO NEW JERSEY'S LAD WOULD CODIFY THE PROTECTIONS NOW RECOGNIZED IN OUR CASE LAW FOR PERSONS WHO ARE THE VICTIMS OF

EMPLOYMENT DISCRIMINATION SOLELY ON THE BASIS OF A PERCEPTION THAT THEY ARE DISABLED WITHIN THE MEANING OF THE ACT.

THIRD, WE RECOMMEND THAT LANGUAGE SIMILAR TO THE FEDERAL PREGNANCY DISCRIMINATION ACT, 42 U.S.C. 2000e(k), BE ADDED TO THE LAW AGAINST DISCRIMINATION TO MAKE IT CLEAR THAT THE LAD PROTECTS WOMEN FROM DISCRIMINATORY EMPLOYMENT POLICIES WHETHER THESE POLICIES AFFECT ALL WOMEN OR ONLY THOSE WOMEN WHO ARE PREGNANT OR CAPABLE OF BECOMING PREGNANT. PREGNANCY DISCRIMINATION IS STILL A SIGNIFICANT AND PERVASIVE PROBLEM IN THE WORKPLACE, AS IS REFLECTED IN THE RECENT RISE IN CONTROVERSIES INVOLVING EMPLOYERS' ADOPTION OF FETAL PROTECTION POLICIES. THE NEW JERSEY LAD SHOULD BE CLARIFIED IN ORDER TO ENSURE THAT FEMALE WORKERS IN THIS STATE DO NOT EXPERIENCE DISCRIMINATION IN THE WORKPLACE SIMPLY BECAUSE OF THEIR CAPACITY TO BEAR CHILDREN.

THE PREGNANCY DISCRIMINATION ACT PROVIDES, IN PERTINENT PART,

(k) THE TERMS "BECAUSE OF SEX" OR "ON THE BASIS OF SEX" INCLUDE, BUT ARE NOT LIMITED TO, BECAUSE OF OR ON THE BASIS OF PREGNANCY, CHILDBIRTH, OR RELATED MEDICAL CONDITIONS; AND WOMEN AFFECTED BY PREGNANCY, CHILDBIRTH, OR RELATED MEDICAL CONDITIONS SHALL BE TREATED THE SAME FOR ALL EMPLOYMENT-RELATED PURPOSES, INCLUDING RECEIPT OF BENEFITS UNDER FRINGE BENEFIT PROGRAMS, AS OTHER PERSONS NOT SO AFFECTED BUT SIMILAR IN THEIR ABILITY OR INABILITY TO WORK, ...

IT WAS NECESSARY FOR CONGRESS TO ADOPT THE PREGNANCY DISCRIMINATION ACT IN ORDER TO CORRECT A DECISION OF THE UNITED STATES SUPREME COURT THAT REFUSED TO RECOGNIZE DISPARATE

TREATMENT ON THE BASIS OF PREGNANCY AS PROTECTED UNDER TITLE VII.\* ADOPTING LANGUAGE SIMILAR TO THE PREGNANCY DISCRIMINATION ACT IN THE NEW JERSEY LAD WILL AVOID THE POSSIBILITY OF A SIMILAR JUDICIAL MISCONCEPTION OF THE NEW JERSEY LEGISLATURE'S INTENT IN PROTECTING PERSONS FROM DISCRIMINATION ON THE BASIS OF SEX.

THE NEW JERSEY LEGISLATURE HAS TAKEN A LEADING ROLE IN ENACTING STRONG MEASURES TO ERADICATE THE "CANCER OF DISCRIMINATION" FROM THE WORKPLACE. S-3047 REPRESENTS ANOTHER IMPORTANT STEP IN THIS ESTABLISHED TRADITION OF ACTING AGGRESSIVELY TO INSURE THAT OUR STATE STATUTE PROVIDES STRINGENT PROTECTIONS FROM DISCRIMINATORY EMPLOYMENT PRACTICES.

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\*. See General Electric v. Gilbert, 429 U.S. 125 (1976).