Bill as Introduced

HB 686 – AS INTRODUCED

2009 SESSION

09-0590
08/05

HOUSE BILL ***686***

AN ACT relative to complaint procedures in cases before the commission for human rights.

SPONSORS: Rep. Levesque, Hills 5; Rep. P. McMahon, Merr 3; Rep. Clemons, Hills 24; Rep. Kopka, Hills 26; Rep. Ulery, Hills 27; Sen. Lasky, Dist 13

COMMITTEE: Commerce and Consumer Affairs

ANALYSIS

This bill limits the complainant's right to remove the case for jury trial to superior court in a case before the human rights commission.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

09-0590
08/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT relative to complaint procedures in cases before the commission for human rights.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 State Commission for Human Rights; Complaint Procedures; Choice of Forum. Amend RSA 354-A:21-a, I-II to read as follows:

I. [~~Any party~~] ***A complainant*** alleging to be aggrieved by any practice made unlawful under this chapter may, at the expiration of 180 days after the timely filing of a complaint with the commission, or sooner if the commission assents in writing, but not later than 3 years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both, in the superior court for the county in which the alleged unlawful practice occurred or in the county of residence of the party. [~~Any party alleged to have committed any practice made unlawful under this chapter may, in any case in which a determination of probable cause has been made by the investigating commissioner, remove said complaint to superior court for trial.~~] A court in cases so removed may award all damages and relief which could have been awarded by the commission, except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when the court finds the respondent's discriminatory conduct to have been taken with willful or reckless disregard of the charging party's rights under this chapter. A superior court trial shall not be available to [~~any party~~] ***the complainant*** if a hearing before the commission has begun or has concluded pursuant to RSA 354-A:21, II(b), or to a complainant whose charge has been dismissed as lacking in probable cause who has not prevailed on an appeal to superior court pursuant to RSA 354-A:21, II(a). In superior court, either party is entitled to a trial by jury on any issue of fact in an action for damages regardless of whether the [~~complaining party~~] ***complainant*** seeks affirmative relief.

II. The charging party shall notify the commission of the filing of any superior court action[~~, and the respondent shall notify the commission of the removal to superior court after a finding of probable cause~~]. After such notice, the commission shall dismiss the complaint without prejudice. A [~~party~~] ***complainant*** electing to file a civil action with the superior court under paragraph I shall be barred from bringing any subsequent complaint before the commission based upon the same alleged unlawful discriminatory practice.

2 State Commission for Human Rights; Complaint Procedures; Choice of Forum. Amend RSA 354-A:21, II(a) to read as follows:

(a) After the filing of any complaint, one of the commissioners designated by the chair shall make, with the assistance of the commission's staff, prompt investigation in connection therewith; during the course of the investigation, the commission shall encourage the parties to

resolve their differences through settlement negotiations; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, the commissioner shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. When the investigating commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall be dismissed, subject to a right of appeal to superior court. To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them. If it reverses the finding of the investigating commissioner, the superior court shall remand the case for further proceedings in accordance with RSA 354-A:21, II, unless the complainant [~~or respondent~~] elects to proceed with a hearing in superior court pursuant to RSA 354-A:21-a.

3 Effective Date. This act shall take effect January 1, 2010.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 666 Date 3/3/09

Committee JUD

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
MO BAXLEY	96 WINTER LACONIA			X	
Rep CARLA SKINDER	SULL			✓	
Heather Burns	Concord		self	X	
Dave Juret	122 N. Main, Concord		BIA		X
Rep Angeline Kopka			# 686	X	
Beth A Deragon	9 Fox Meadow Dr	715-2257	self		X
Jami N. Experian	2 Chennel Dr.	271-6836	HRC		—

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 68~~4~~6 Date 3/3/09

Committee JUDICIARY

**** Please Print All Information ****

Name	Address	Phone	Representing	Pro	Con
Sally Davis	Thornton	726-3775	Self	✓	
Rep. Ed Butler	Carroll 1	~~225-0596~~			✓
June Lemeland	38 Auburn St Concord	225-0596	self		✓
Denise M...	180 ... St Contoocook NH 03229	746-2205	self		✓
Will Alberzi	9 Sandy Circle Pelham NH	508 7512		~~✓~~	✓
Rep. Timothy Horrigan	7A Faculty Rd				✓
Heather Burns	3 Lisa Lane Concord	225-8117	self	✓	
HB 684 Rep Carla Akinder					✓

HB 686 (margin note, bracketing rows 3–7)

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 686 Date 3/3/09

Committee Judiciary

**** Please Print All Information ****

Name	Address	Phone	Representing	Pro	Con
Cordell Johnston	P.O. Box 617, Concord	224-7447	NH Municipal Ass'n		✓
Senator Bette Lasky		Dist 13			

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 686

BILL TITLE: relative to complaint procedures in cases before the commission for human rights.

DATE: MARCH 3, 2009

LOB ROOM: 208 **Time Public Hearing Called to Order:** 2:15p

Time Adjourned:

(please circle if present)

Committee Members: Reps. D. Cote, Wall, Potter, Hackel, P. Preston, G. Richardson, L. Weber, B. Browne, Nixon, Thompson, Watrous, Rowe, N. Elliott, DiFruscia, W. O'Brien, Hagan, L. Perkins, Silva, W. Smith and Mead.

Bill Sponsors: Rep. Levesque, Hills 5; Rep. P. McMahon, Merr 3; Rep. Clemons, Hills 24; Rep. Kopka, Hills 26; Rep. Ulery, Hills 27; Sen. Lasky, Dist 13

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Levesque-reads testimony

Carol Holahan, Office of Legislation-Changes the analysis

Ricia MacMaher, Human Rights Commission, co-sponsor-supports
Believes Human Rights Commission in a very neutral vehicle to register a complaint, but in a case last year a complainant was at a disadvantage. If a probable cause was established, the respondent could move the case out of the Commission jurisdiction and subject the complainant to expenses he or she could not afford.

Rep. Rowe: comments that (page 1 line 24) the bill has taken a right away from the respondent.

Rep. O'Brien: Response from Ricia is that if probable cause is found, the Human Rights Commission's decision is final.

Rep. Kopka, co-sponsor, supports
The economic climate today will result in a need for case to be brought the Human Rights Commission. If a person is down and out (lost job, house etc) how does he or she defend themselves against an injustice when they cannot afford a lawyer.

Mike McGrathy, NH Association for Justice, supports
A person who brings a complaint chooses the forum in which he wishes to bring the claim. Discriminated employees should seek help in an accessible forum, and the Human Rights Commission is such a forum. This bill will ease the burden on the court system.

Rep. O'Brien-Will this survive a constitutional test because it takes away jury trial. Ans. Workman's Compensation is an example of another set of cases which do not have a jury trial. Is it true that the respondent never has right to jury trial? (no specific answer, so it is apparent that the respondent can't call for a jury trial.

Joni Esperian, NH Commission for Human Rights, neutral.
Many decisions not posted on website. Commission also deals with housing, mortgages, and commercial properties. Often, conciliation takes place before the public hearing.

Heather Burns, E. Concord, supports.
Why is important?
Now a respondent can force them into a forum they don't want to be.
Sites US Supreme Court case.

1.) If forced to court, complainant will need an attorney.
2.) Employment litigation is very complex
3.) Very high costs expert witness (economist), depositions
4.) The levels that playing field for prose complainant
5.) Delay in the court system-justice delayed is justice denied.
6.) State would save money

7 commissioners take turns being the 3 members on a panel, and this makes the outcomes balanced.

Respectfully submitted,

Rep. Philip Preston, Clerk

HOUSE COMMITTEE ON JUDICIARY

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Levesque HB 686-1

Human Rights Commission Hu R C

① Rep Levesque sponsor
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Reads testimony

② Changes the Analysis — legislative services drafter

③ Ricia McMahon — co-sponsor
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⑥ state would save money
7 commissioners take turns being the 3 members on a panel, and this makes the outcomes balanced.

Testimony

Law Offices of Nancy Richards-Stower

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Merrimack, NH 03054
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781-544-3637 fax
nrichardssto@igc.org

Bar memberships: VA, NH, MA

Advocating for Justice in the Workplace since 1976

Hon. David Cote
Chairman, House Judiciary Committee
96 West Hollis Street
Nashua, NH 03060-3146

February 16, 2009

Re: HB 686 - relative to complaint procedures in cases before the commission for human rights.

Dear Representative Cote:

I ask for your enthusiastic support for HB 686 which would limit the right to remove a case from the Human Rights Commission to the alleged victim, the complainant. While this bill affects only a few cases per year, for those affected, a legislative correction is sorely needed.

PROBLEM: Current law allows the respondent (employer/landlord/proprietor) to force a complainant to court, even if the complainant prefers a more prompt, less formal and less expensive, administrative hearing before the N.H. Commission for Human Rights.

EXAMPLES: One of my clients filed her case in May 2005; she received a Probable Cause determination in May 2007; a hearing was scheduled for November 2007, but respondent notified the Commission that it was removing the case to court. Respondent filed in court in 2008. As of December 2008, a motion to dismiss was pending. Justice delayed is justice denied.

Another of my clients had a pregnancy case against one of the big box stores. She filed with the Commission in June 2006, the investigation was completed and a Probable Cause determination was issued in August 2008. Had the case not resolved, the anticipated trial date was in 2010, when her baby would have been 3 ½. Another client whose pregnancy case was removed to court by the employer planned to have her daughter sitting in the courtroom at age 4.

SOLUTION: Let the person with the claim decide if he/she wishes to stay in the Commission or go to court. The U.S. Supreme Court said that's the way it should be:

> ***"There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.*** *Panama R.R. v. Johnson, 264 U.S. 375, 392-393 (1924).* (Emphasis added)

BACKGROUND: The New Hampshire Commission for Human Rights is a state agency to which discrimination claims are directed for investigation and resolution. It is headed by seven political appointees, who serve without pay, and who have the power to award in employment cases: reinstatement, damages and attorney fees to a successful complainant who has alleged discrimination based on age, sex, race, color, marital status, physical or mental disability, religious creed, national origin or sexual orientation. The complaint must be filed within 180 days of the alleged discrimination. By contract with the federal Equal Employment Opportunity Commission (EEOC), the Commission also investigates cases with federal discrimination claims.

HISTORY: In 2000, with the support of the New Hampshire Commission for Human Rights, RSA 354-A was amended in order to give complainants the right to opt out of the Commission procedure and take their cases to superior court for jury trial, anytime with permission of the Commission, and after 180 days, as a matter of right. Only because of a state constitutional question in neighboring Massachusetts which was pending[1] at the time, the negotiators working on the bill provided that respondents (defendants) would also get the right to a jury trial, but only after the Commission's investigation was complete and resulted in a Probable Cause finding, and a scheduled Commission hearing.

RESULT: More powerful employers can yank a case out of the Commission to create delays and expense for the complainant, whose simple administrative hearing can become a full blown "federal case."

FFY 2001-1002	FFY 2002-2003	FFY 2003-2004
17 PCs of those 1 removed to court by Complainant 3 removed by Respondent	16 PCs of those 2 removed to court by Complainant 2 removed by Respondent	20 PCs of those 3 removed to court by Complainant 6 removed by Respondent
FFY 2004-2005	**FFY 2005-2006**	**FFY 2006-2007**
22 PCs of those 2 removed to court by Complainant 5 removed by Respondent 1 status of which side removed unclear	12 PCs of those 2 removed to court by Complainant 5 removed by Respondent 1 status of which side removed unclear	12 PCs of those 5 removed to court by Complainant 4 removed by Respondent
FFY 2007-2008	**FFY 2008-2009**	
27 PCs of those 3 removed to court by Complainant 4 removed by Respondent	2 PCs so far 0 removals	Note: This chart was provided i December, 2008, by the N.H. Commission for Human Rights, in response to an inquiry by the bill's sponsors.

[1] *Lavelle v. Mass. Commission Against Discrimination, 426 Mass 332, at 335 (1997).*

LEGAL CORRECTION: The Massachusetts case was reversed in 2002[2], with the SJC acknowledging the 1923 U. S. Supreme Court case cited above and noting that "*the Legislature has provided complainants, and not respondents, the right to choose the forum in which their claim will be heard does not pose an equal protection problem.*" *(emphasis added)*. When a legal right and procedure are created by statute, the constitution does not mandate a jury trial for one or both.

FISCAL IMPACT: There will be fewer jury trials in the superior court, which will save the court work and will save the state significant funds. Most employment law trials take a week or more.[3]

ADMINISTRATIVE IMPACT AT THE HUMAN RIGHTS COMMISSION: The agency's hearing docket will likely return to the prior level. The agency mediates to settlement many cases post-probable cause/pre-hearing. It is likely then, more cases will earlier resolve by settlement.

CONCLUSION

I wish with all my heart that I could be present to testify in favor of this bill on March 3 at 2:00, but I cannot. As you may recall, some thirty years ago (!) upon nomination by Governor Hugh Gallen, I first had the privilege of being a member and Chair of the Human Rights Commission (1979-1985). I continue to support the agency and its mission, and, over the years, have partnered with others to strengthen the statute and the ability of the Commission to "help the little gal/guy." Being dragged into court against their will only to have their cases prolonged another two years helps no "little gals/guys".

Unfortunately, the House Judiciary hearing schedule comes in the middle of my long-planned 3 week trip-of-a-lifetime to eastern Europe, where I will be privileged to meet with civil rights/political activists and elected officials, hopefully to result in an exchange between like-minded persons from Poland, Lithuania and Ukraine with counterparts here in New Hampshire and Boston. We will be discussing our respective countries' anti-discrimination laws.

I leave for Poland later today (to return on March 6) but will have email access, *and I ask you and any members of your committee to email questions or comments and I'll do my best to promptly reply.* Thank you for your kind attention and I ask that the Judiciary Committee vote favorably on HB 686.

Sincerely,

Nancy Richards-Stower

Nancy Richards-Stower

cc: Members of the N.H. House of Representatives
Judiciary Committee

---

[2] Stonehill College v. Mass. Commission Against Discrimination , 441 Mass 549 (2002).
[3] Most hearings at the N.H. Commission for Human Rights take 1-2 days.

History of Jury Trial Amendment to RSA 354-A and Why Limiting the Right to Select A Preferred Forum to the Discrimination Complainant is Constitutional

by Nancy Richards-Stower[1]

Background:

1. In 2000, with the support of the New Hampshire Commission for Human Rights, RSA 354-A was amended in order to give complainants the right to opt out of the Commission procedure and take their cases to superior court for jury trial.

2. The ONLY reason that the N.H. jury trial amendment also included a provision granting the employers the option to remove the case to court over the objections of the employee was a misunderstanding that this was required by equal protection concerns as articulated by the Mass. Supreme Judicial Court (*since reversed*), because RSA 354-A, originally enacted in the 1960's, had been modeled on a Massachusetts statute.[2]

---

[1] Nancy Richards-Stower, was inducted into the College of Labor and Employment Lawyers in 2003, and is a former member and chair of the New Hampshire Commission for Human Rights (1979-1985). She has operated her plaintiffs' employment law practice in Merrimack, New Hampshire, since 1989 and litigates before state and federal courts and agencies. Nancy serves as a mediator for the New Hampshire Superior courts. From October 1998- May 2002, she hosted a weekly radio program, "The Law Show", on WSMN AM-1590. In 1993, she founded the New Hampshire Chapter of the National Employment Lawyers Association (NELA) and served as its president 1993-1995. She has co-chaired and presented at national NELA conventions and each of the four New England regional NELA conventions. In her earlier years, after graduating from The George Washington University with a degree in political science (1973) and receiving her J.D. from Franklin Pierce Law Center (1976) she interned with the U.S. Senate Committee on Banking, Housing and Urban Affairs. Next she joined employment law expert, Robert B. Fitzpatrick, Esq. in his Washington, D.C. office representing both individuals and class action plaintiffs. Returning to New Hampshire, she joined Dr. Robert H. Rines, founder of Franklin Pierce Law Center, in both his commercial/patent law litigation practice and also in various business and scientific ventures. Nancy is admitted to practice in New Hampshire, Massachusetts, and Virginia. She is a member of the NHBA's Labor and Employment Law Section.

[2] At the time of New Hampshire's proposed discrimination law jury trial amendment, the Supreme Judicial Court of Massachusetts, in a case called Lavelle v. Mass. Commission Against Discrimination. had held that, under its similar law, it was a denial of equal protection to deny the employer a jury trial if the employee had the right to choose a jury trial:

We start with the fact that a complainant has the right under G. L. c. 151B, § 9, to terminate agency proceedings and obtain a judicial determination of her claim. If she asserts gender-based discrimination in a requested judicial proceeding, the Constitution of the Commonwealth grants her the right to a jury trial. Dalis, supra. On the other hand, a respondent has no right to elect a judicial determination of the claim, has only a right of a judicial review of agency action based on the record before the commission, and can only successfully claim a jury trial when a complainant elects a judicial determination of her claim. These differences have led Lavelle to assert that the statutory scheme denies him equal protection of the law. Lavelle v. Mass. Commission Against Discrimination, 426 Mass 332, at 335 (1997).

footnote 2 continued on next page

3. In New Hampshire, the result of the employers/respondents having been given the right to remove the complainant's HRC case to court has been devastating and costly to employees/ complainants who filed at the HRC seeking a simple administrative process to redress discrimination. Many such complainants are not represented by counsel, but following Probable Cause determinations and the setting of dates for the HRC hearing they are forced to hire attorneys (for employers can now yank the case out of the commission and plop it into superior court, costing the *always* less well off

---

footnote 2 continued:

...A right in a respondent to obtain a jury trial only after the commission has taken final action is the best available option. (Lavelle, 338).... Any other solution must be left to the Legislature. (Id 339).

After NH amended NHRSA 354-A, however, *Lavelle* was overturned in Stonehill College v. Mass. Commission Against Discrimination , 441 Mass 549 (2002), so that henceforth, only the victims of discrimination could choose where the discrimination claims would be heard and decided: the MCAD or Court:

" *We further conclude that the Dalis decision does not require, as matter of State constitutional law, the result reached by this court in Lavelle. That result is problematic, and, for reasons set forth in this opinion, we conclude that Lavelle must be overruled in part. Accordingly, as of the date of this opinion, respondents who have been determined by the commission in § 5 proceedings to have committed discriminatory acts in employment in violation of G. L. c. 151B, are entitled to administrative review, under G. L. c. 30A, of that decision only.*" (Id., 552)

***

*...The complainant in Lavelle (and the complainants in the four cases under review) chose not to proceed through the courts but opted instead for an administrative hearing and judicial review of the commission's decision on his claims. **That the Legislature has provided complainants, and not respondents, the right to choose the forum in which their claim will be heard does not pose an equal protection problem.(19) This point was resolved by this court in New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, 401 Mass. 566 (1988)**.* (Id., 564) (emphasis added)

***"It is reasonable, and constitutionally permissible, to provide a complainant with a choice of enforcement options**. The United States Supreme Court has long recognized:*

*'**There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought**. Panama R.R. v. Johnson, 264 U.S. 375, 392-393 (1924).'* " (Id, 565)

(emphasis added)

employee to incur attorney fees and expenses, and, thus, often forcing them to greatly compromise their rights to remedies before a trial because of the exorbitant litigation costs).

4. It is one thing if the employee can emotionally and or financially afford to go to court and chooses to do so; and quite another if she cannot. The employer is *always* in a superior economic position and forcing an employee (who wants an inexpensive, out of the limelight, simple administrative hearing) to hire an attorney and be willing to incur tens of thousands of dollars in attorney fees and costs is insane. RSA 354-a was enacted to prevent and redress discrimination, not to bankrupt victims of discrimination.

5. When I was on the Commission (1979-1985) we Commissioners sat on many hearings; thus, the Commissioners gained experience in the law and in the conducting of fair hearings. Since the enactment of RSA 354-A:21a, there have been only a handful of Commission hearings. Now, most Commissioners are very inexperienced in rendering decisions, since there are few, if any, hearings held in a given year.

6. Commission hearings are less formal and less expensive and more on a human scale than are jury trials.

7. In contrast, to get through a Superior Court jury trial in a typical employment discrimination case, the complainant's attorney fees will exceed $100,000, even if the damages at stake are less than $10,000. *In contrast*, to get through an HRC hearing, no attorney is required, and when the complainant is represented by counsel, the fees required are about 90% less than for trial.

8. Because most employees cannot afford any attorney fees and need to obtain attorneys on a contingent basis, many complainants in "small cases" removed to court by defendants are hard pressed to find attorneys to represent them. No sane attorney wants to incur and risk $100,000 of fees when her client's case is worth $10,000, and that is what the employers rely on when removing cases.

9. The recent trend of "**double removal**" is especially troubling. Some employers are removing a case TWICE! First they remove the case from the HRC to a superior court; then, they remove it again to federal court- which is vastly more expensive forum than state court and hugely anti-complainant. How? Under the federal removal statutes.

10. Under federal diversity of citizenship laws, in most cases, a defendant sued in state court can remove the case to federal court if the parties are citizens of different states or if the plaintiff has pleaded a federal law claim. That's the federal law to which plaintiffs in state court are subject. But why should a complainant who wants a simple, cheap administrative hearing in a N.H. agency be forced to litigate in any court, let alone federal court? That is what employers have been doing: removing twice. The Court of Appeals for the First Circuit has not yet been asked to rule on this (who can afford to appeal?), so the practice persists.

11. Besides the additional thousands of dollars of attorney fees and costs required by federal litigation over state court litigation, the federal courts shaft employment discrimination cases [3] and have

[3] See Clermont & Schwab: Employment Discrimination Plaintiffs in Federal Court: From Bad to

developed a procedure in "summary judgment" to dispense of many cases before trial - but not before the expenditure of tens of thousands of dollars of attorney fees by the employee who only wanted a simple, cheap administrative hearing at the HRC.

CONCLUSION

12. The purpose these proposed amendments to RSA 354-A is to allow *only the complainants* to control where their case is heard, and to remove the litigation cost hammer over the heads of victims of discrimination. It is to allow employees to choose which forum to enforce their rights under the discrimination statute and to end the ability of the more powerful and wealthier employers to force the employees into court against their will. It is insane to allow international Wal-Mart to force a minimum wage clerk with a pregnancy claim under N.H. state law into federal court when all she wants is a simple HRC hearing, but it is routinely done.

13. It is perfectly constitutional to allow only the complainant to choose where she wants her case heard. To quote the United States Supreme Court from footnote 1:

> ***"There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.*** *Panama R.R. v. Johnson, 264 U.S. 375, 392-393 (1924).* (Emphasis added)

Worse; Harvard Law & Policy Review, Winter 2009, Volume 3, No. 1:, which at p. 5 *notes" Our study of the federal district courts shows employment discrimination plaintiffs bringing many fewer cases now. Those cases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts."*

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COMMITTEE: Commerce and Consumer Affairs

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Be it Enacted by the Senate and House of Representatives in General Court convened:

1 State Commission for Human Rights; Complaint Procedures; Choice of Forum. Amend RSA 354-A:21-a, I-II to read as follows:

I. [~~Any party~~] ***A complainant*** alleging to be aggrieved by any practice made unlawful under this chapter may, at the expiration of 180 days after the timely filing of a complaint with the

commission, or sooner if the commission assents in writing, but not later than 3 years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both, in the superior court for the county in which the alleged unlawful practice occurred or in the county of residence of the party. [~~Any party alleged to have committed any practice made unlawful under this chapter may, in any case in which a determination of probable cause has been made by the investigating commissioner, remove said complaint to superior court for trial.~~] A court in cases so removed may award all damages and relief which could have been awarded by the commission, except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when the court finds the respondent's discriminatory conduct to have been taken with willful or reckless disregard of the charging party's rights under this chapter. A superior court trial shall not be available to [~~any party~~] ***the complainant*** if a hearing before the commission has begun or has concluded pursuant to RSA 354-A:21, II(b), or to a complainant whose charge has been dismissed as lacking in probable cause who has not prevailed on an appeal to superior court pursuant to RSA 354-A:21, II(a). In superior court, either party is entitled to a trial by jury on any issue of fact in an action for damages regardless of whether the [~~complaining party~~] ***complainant*** seeks affirmative relief.

II. The charging party shall notify the commission of the filing of any superior court action[~~; and the respondent shall notify the commission of the removal to superior court after a finding of probable cause~~]. After such notice, the commission shall dismiss the complaint without prejudice. A [~~party~~] ***complainant*** electing to file a civil action with the superior court under paragraph I shall be barred from bringing any subsequent complaint before the commission based upon the same alleged unlawful discriminatory practice.

2 State Commission for Human Rights; Complaint Procedures; Choice of Forum. Amend RSA 354-A:21, II(a) to read as follows:

(a) After the filing of any complaint, one of the commissioners designated by the chair shall make, with the assistance of the commission's staff, prompt investigation in connection therewith; during the course of the investigation, the commission shall encourage the parties to resolve their differences through settlement negotiations; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, the commissioner shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. When the investigating commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall be dismissed, subject to a right of appeal to superior court. To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them. If it reverses the finding of the investigating commissioner, the superior court shall remand the case for further proceedings in accordance

with RSA 354-A:21, II, unless the complainant [~~or respondent~~] elects to proceed with a hearing in superior court pursuant to RSA 354-A:21-a.

3 Effective Date. This act shall take effect January 1, 2010.

Federal Fiscal Years 2001-2008
Data on Number of PCs and Which Party Removed Cases to Court

probable cause determination that should be tested in a public forum.

FFY 2001-1002	FFY 2002-2003	FFY 2003-2004
17 PCs of those 1 removed to court by Complainant 3 removed by Respondent	16 PCs of those 2 removed to court by Complainant 2 removed by Respondent	20 PCs of those 3 removed to court by Complainant 6 removed by Respondent
FFY 2004-2005	**FFY 2005-2006**	**FFY 2006-2007**
22 PCs of those 2 removed to court by Complainant 5 removed by Respondent 1 status of which side removed unclear	12 PCs of those 2 removed to court by Complainant 5 removed by Respondent 1 status of which side removed unclear	12 PCs of those 5 removed to court by Complainant 4 removed by Respondent
FFY 2007-2008	**FFY 2008-2009**	
27 PCs of those 3 removed to court by Complainant 4 removed by Respondent	2 PCs so far 0 removals	

12/31/2008
JNE

HB 686

State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

Testimony of Representative Melanie Levesque
HB 686
February 3, 2009

The human rights Commission was founded as a result of the Civil Rights Act of 1964. Their mission as described on their website is as follows;

Welcome to the New Hampshire Commission for Human Rights web site.

We are a state agency established by RSA 354-A for the purpose of eliminating discrimination in employment, public accommodations and the sale or rental of housing or commercial property, because of age, sex, sexual orientation, race, creed, color, marital status, familial status, physical or mental disability or national origin. The commission has the power to receive, investigate and pass upon complaints of illegal discrimination and to engage in research and education designed to promote good will and prevent discrimination.

A person who feels they are the victim of discrimination can lodge a complaint have the case investigated, The investigations are impartial and focused on finding of fact.

Once the investigation is completed the case is heard and decided on by commissioners who are volunteers appointed by the governor and confirmed by the executive council. Either party can appeal the Commission's decision to Superior Court. Of the 16 decisions made since 1990 62% were in the favor of the complainant and 25% were in favor of the respondent.

HB 686 supports the process of the human rights commission and recognizes that a person who feels they are the victim of discrimination should choose the forum and not have the forum changed to a costly, lengthy, and public court process if that is not their choice

Imagine the waitress working for minimum wage that experiences sexual harassment. That waitress probably does not have the means to endure a costly or lengthy intimidating court process.

My parents Rupel and Betty Perkins came to New Hampshire in the late 50's looking for a quiet place to bring up their children. They were denied an opportunity to purchase a home because realtors did not want to sell to a black family.
Had the Civil Rights Commission been in place they would have been able to raise the concern of discrimination to the Commission. As the law stands today their case could be pulled out of the Commission process and into court resulting in a high profile, costly, and often lengthy process that a young family with 4 children might not have been able to endure.

I ask you to join me in support of HB 686 which rights a wrong and allows the person who is the victim of discriminations choose the forum.

Thank you,

Melanie Levesque

Rep. Melanie Levesque
Hillsborough District 5

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Please respond to the Concord office

March 6, 2009

SENT BY OVERNIGHT MAIL

Hon. David Cote
Chairman, House Judiciary Committee
96 West Hollis Street
Nashua, NH 03060-3146

Re: HB 686

Dear Representative Cote:

I write to follow up with regard to testimony I gave yesterday before the House Judiciary Committee in support of HB 686. During my testimony, I quoted from a U.S. Supreme Court case and Representative O'Brien asked that I provide the Committee with a copy of that opinion. In that regard, I enclose herewith a copy of the decision in the case of Panama Railroad Company v. Johnson, 264 U.S. 375 (1924).

In addition, during the hearing, I was also asked about whether I would be amenable to a statute that took away both a complainant's and a respondent's right to remove a claim from the New Hampshire Human Rights Commission to the superior court. I would like to emphasize that I would not support such legislation for the reasons outlined in the Johnson case noted above. I feel strongly that a complainant, as the party pursuing relief pursuant to RSA 354-A, ought to be able to choose the forum in which to litigate the case – be it the New Hampshire Human Rights Commission or the superior court.

I also wanted to note that near the end of the hearing, questions were raised concerning the impartiality of the Commissioners at the New Hampshire Human Rights Commission; in other words, whether the Commissioners were actually impartial and thereby fair to both complainants and respondents. I want to re-emphasize that there was never testimony by a single person at the hearing to suggest that the Commissioners are anything other than fair to both parties at hearings they conduct. Simply because the results from the Commission may not be 50% in favor of complainants and 50% in favor of respondents most certainly

does not mean that the Commission is not fair to both parties. All cases, particularly employment cases, are highly fact driven, and thus, it is impossible to draw any conclusions about "fairness" merely by looking at generic statistics about whether various panels of Commissioners held in favor of a complainants or a respondent.

As a final matter, please know that I would be happy to answer any questions you or any other member of the Committee might have concerning this important bill. Therefore, I would be happy to make myself available to appear before your Committee and/or take phone calls from any member of your Committee as HB 686 progresses through the House.

Thank you.

Very truly yours,

Heather M. Burns

HMB/mrs2
Enclosure
cc: Rep. Melanie Levesque
Joanie Esperian, Executive Director,
New Hampshire Human Rights Commission

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Citation: 264 U.S. 375

*264 U.S. 375, *; 44 S. Ct. 391, **;*
*68 L. Ed. 748, ***; 1924 U.S. LEXIS 2517*

PANAMA RAILROAD COMPANY v. JOHNSON.

No. 369.

SUPREME COURT OF THE UNITED STATES

264 U.S. 375; 44 S. Ct. 391; 68 L. Ed. 748; 1924 U.S. LEXIS 2517

Argued December 7, 1923.
April 7, 1924, Decided

PRIOR HISTORY: ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment entered in the District Court for the Eastern District of New York on a verdict recovered by the plaintiff, Johnson, as damages resulting from personal injuries sustained at sea in the course of his employment by the defendant railroad company as a seaman. The action was based on § 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, as amended by § 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant railroad company sought review of a judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a verdict in favor of plaintiff seaman for injuries suffered on ship and at sea pursuant to the Act of March 4, 1915, ch. 153 § 20, 38 Stat. 1185, amended by the Act of June 5, 1920, ch. 250 § 33, 41 Stat. 1007, which permitted plaintiff to elect to maintain an action under common law with the right of trial by jury.

OVERVIEW: The U. S. Supreme Court affirmed the verdict award to plaintiff seaman for his injuries sustained while on ship and at sea. Defendant argued that the jurisdiction of the courts of the United States over maritime matters was exclusive, and the court that tried the case was without jurisdiction, challenging the Act of March 4, 1915, ch. 153 § 20, 38 Stat. 1185, amended by Act of June 5, 1920 ch. 250 § 33, 41 Stat. 1007. On review, the United States Supreme Court found that the case arose under a law of the United States and was within the general jurisdiction conferred on the district court, and defendant's argument was really about venue. The Court held that defendant waived his venue privilege by making a general appearance without claiming the privilege, and it was within Congress's power to alter, qualify, or supplement the maritime rules to bring them into relative conformity to the common law rules so long as the change was country wide and uniform in operation. The Court rejected defendant's argument that the Act conflicted with due process, and found there was sufficient evidence of negligence to warrant submission to the jury.

OUTCOME: The verdict in plaintiff seaman's favor for injuries sustained while on ship and at sea was affirmed because it was within the power of Congress to alter the maritime rules to bring them into conformity with common law rules. The action arose under a law of the United States and was within the general jurisdiction of the district court, and defendant waived his venue privilege by failing to invoke it prior to or at his general appearance.

CORE TERMS: maritime law, seaman, common-law, new rules, personal injury, seamen, common law, admiralty jurisdiction, venue, admiralty, election, redress, maritime jurisdiction, right of action, constitutional provision, maritime, railway, general statute, principal office, modification, extending, accorded, ladder, maritime rules, general jurisdiction, general appearance, different purpose, injuries suffered, cases of admiralty, forms of action

LEXISNEXIS® HEADNOTES ⊟ Hide

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN1 Where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest of different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Venue > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Waiver & Preservation

HN2 A venue provision merely confers on the defendant a personal privilege which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege. More Like This Headnote | *Shepardize:* Restrict By Headnote

Admiralty Law > Personal Injuries > Maritime Workers' Claims > General Overview

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN3 The Act of March 4, 1915, ch. 153, § 20, 38 Stat. 1185, amended by the Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007, is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in non-maritime service. But, as Congress is empowered by the constitutional provision to alter, quality or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation. Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts, -- that is to say, through proceedings in personam according to the course of the common

law. This was permissible before the Constitution, and it is still permissible. U.S. Jud. Code §§ 24 and 256. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > General Overview
Governments > Legislation > Interpretation

HN4 A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon the score. More Like This Headnote | *Shepardize:* Restrict By Headnote

LAWYERS' EDITION DISPLAY ⊖ **Hide**

LAWYERS' EDITION HEADNOTES:

Venue -- effect of general appearance. --

Headnote:

A general appearance waives the provision of the Act of 1915, giving a common-law remedy to injured seamen, that jurisdiction shall be under the court of the district in which defendant resides or his principal office is located.

[For other cases, see Appearance, in Digest Sup. Ct. 1918 Supp.]

Statutes -- construction -- general statute. --

Headnote:

Generally, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose.

[For other cases, see Statutes, 302-311, in Digest Sup. Ct. 1908; 69, in 1923 Supp.]

Constitutional law -- admiralty jurisdiction -- giving jury trial. --

Headnote:

An act of Congress giving a seaman injured during the course of his employment a right to trial by jury and such rights and remedies as apply to railway employees does not violate the constitutional provision extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

[For other cases, see Admiralty, 6-91, in Digest Sup. Ct. 1908.]

Constitutional law -- statute construed to uphold validity. --

Headnote:

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.

[For other cases, see Statutes, 145-147, in Digest Sup. Ct. 1908; 100-102, in 1918 Supp.; 42-45, in 1923 Supp.]

Constitutional law -- validity of act giving seamen jury trial. --

Headnote:

The provision of 20 of the Act of 1915, giving injured seamen a right to trial by jury, and making applicable in such actions all statutes extending the common-law right or remedy in cases of injury to railway employees, does not restrict the enforcement of rights to actions at law, so as to infringe the constitutional provision extending the judicial power of the United States to all cases of admiralty jurisdiction, but the seaman may resort to the admiralty side of the court if he chooses to do so.

Statutes -- reference to other statute -- effect. --

Headnote:

The Act of Congress of 1915, giving injured seamen the benefit of all statutes of the United States modifying or extending the common-law right or remedy in case of injury to railway employees, is not invalid for failure to set out the rules applicable.

[For other cases, see Statutes, 104-106, in Digest Sup. Ct. 1918 Supp.]

Constitutional law -- uniform application of statute. --

Headnote:

The Act of Congress of 1915, giving injured seamen a right to trial by jury and the benefit of all statutes of the United States modifying or extending the common-law right or remedy in cases of injuries to railroad employees, is not invalid for lack of uniformity in operation.

Constitutional law -- due process -- giving election to plaintiff alone. --

Headnote:

A statute giving an injured seaman a right to jury trial does not deny the employers due process of law because they are not afforded a similar election.

Appeal -- denial of instructions -- absence of error. --

Headnote:

Refusal of a requested instruction is not reversible error where it might well have proved misleading.

[For other cases, see Appeal and Error, 5127-5141, in Digest Sup. Ct. 1908; 1119-1133, in 1918 Supp.; 379-393, in 1923 Supp.]

SYLLABUS

1. As a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. P. 383.

2. Section 20 of the Act of March 4, 1915, as amended June 5, 1920, which allows a seaman suffering personal injury in his employment to sue his employer for damages, declares that "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Held, that the quoted provision (construed with Jud. Code, §§ 24 and 51,) relates only to venue, conferring a personal privilege which a defendant may waive, if he enters a general appearance before or without claiming it. Id.

3. Section 2 of Art. III of the Constitution, in extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," by implication made the admiralty and maritime law the law of the United States, subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. P. 385.

4. This power of Congress extends to the entire subject, substantive and procedural, and permits of the exercise of a wide discretion, though subject to well recognized limitations, one of which is that there are boundaries to the maritime law and admiralty jurisdiction which cannot be altered by legislation, and another, that the enactments, when not relating to matters whose existence or influence is confined to a more limited field, shall be coextensive with and operate uniformly in the whole of the United States. P. 386.

5. The Act of March 4, 1915, § 20, as amended, provides that any seaman suffering personal injury in the course of his employment may, at his election, maintain an action at law, with the right of trial by jury, "and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

Held: (a) The statute is not objectionable as an attempted withdrawal of subject matter from the reach of the maritime law, but is a permissible addition to that law of new rules concerning the rights and obligations of seamen and their employers. P. 388.

(b) Congress has power to make maritime rules in relative conformity to the common law or its modifications, and to permit enforcement of rights thereunder through proceedings in personam, according to the course of the common law on the common law side of the courts. Id.

(c) The statute is not to be construed as restricting enforcement of the new rights to actions at law, (which might mean an unconstitutional encroachment on the maritime jurisdiction,) but as allowing the injured seaman to assert his right of action under it either on the common law side, with right of trial by jury, or on the admiralty side, with trial to the court. P. 389.

(d) A statute may adopt the provisions of other statutes by reference. P. 391.

(e) The reference in the above statute is to the Federal Employers' Liability Act and its amendments. Id.

(f) The statute, with the legislation it incorporates by reference, has the uniformity required of maritime enactments. P. 392.

(g) The statute does not conflict with the Fifth Amendment in permitting injured seamen to elect between varying measures of redress and different forms of action without according a corresponding right to their employers. Id.

289 Fed. 964, affirmed.

COUNSEL: Mr. Richard Reid Rogers for plaintiff in error.

I.The act is unconstitutional, inasmuch as it is destructive of the admiralty and maritime jurisdiction of the courts of the United States guaranteed by § 2, Art. III, of the Constitution.

The rights of seamen against the shipowner with respect to injuries sustained while in the service are well settled by the maritime law. They have remained virtually unchanged since the laws of Oleron, which provide (Art. VI) "that if a seaman in service of the ship happens to become wounded or otherwise hurt; in that case he shall be cured and provided for at the cost and charge of the said ship"; and (Art. VII) " that if sick he is to be set ashore and receive wages if the ship departs." As more specifically defined in The Osceola, 189 U.S. 158, they consist of a right to wages for the voyage and maintenance and cure, irrespective of fault on the part of the seaman; but to indemnity only in case of unseaworthiness or negligent medical treatment. The shipowner is not responsible for injuries to a seaman occasioned by the negligence of members of the crew, or ship's officers.

Under the railroad law there is of course no continuing obligation to pay wages or maintain and cure the employee, irrespective of the employer's fault; but upon the other hand the employer is responsible for the negligence of co-employees. There are other differences, as for example, the doctrine of comparative negligence, the non-assumption of the risk of appliances which fail to comply with statutory requirements, and the inability of the employer to limit his risk.

As the legal rights of the seaman under the act were construed below, the seaman alone is given the privilege of proceeding in admiralty for maintenance and cure if his case be one which would not justify a recovery under the railroad law, or upon the other hand, if his case be one which would not justify a recovery outside of maintenance and cure under the maritime law, of suing for full indemnity under the common law as modified by the railroad law; as, to illustrate, where his injuries are due to the negligence of a co-employee.In other words, one party to a maritime contract or arrangement is given the right under the act in question of taking his case wholly from the jurisdiction and principles of the maritime law, and of transferring it to the jurisdiction of a common law court there to be decided under the principles of common law as modified or extended in the irrelevant field of railroad legislation.

But conceding that Congress may amend the maritime law by modifying the principle of The Osceola to the extent of holding the shipowner responsible for injuries received by one seaman through the negligence of another, nevertheless, in such a case it would be the maritime law itself, that was modified or amended. Under this act, however, the maritime law is not directly amended, but a cause of action essentially maritime in its nature is bodily removed, or, at the election of one of the parties, may be removed, to a common law court, there to be decided, not according to maritime principles, but according to the very different common law principles, as modified or extended, in the case of personal injuries to railway employees.

If Congress can take a cause of action essentially maritime and provide that it shall no longer be dealt with according to the principles of maritime law, but according to the principles of the common law, it could in the end destroy the entire constitutional jurisdiction of the courts of the United States over maritime causes of action. If Congress can authorize one party to remove his cause from the jurisdiction and principles of the maritime law, and have it treated

according to the conflicting principles and rights of the common law, it could undoubtedly do the same thing directly without extending an election to the litigant. In other words, Congress could provide that in all cases of injuries sustained by seamen, such cause of action should thereafter be tried in common law courts, according to common law principles, and there is no reason why it could not further provide that such causes could be tried according to common law principles in the courts of the several States. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 377.

Heretofore under the saving clause of the Judiciary Act of 1789, now Jud. Code, § 256, maritime rights could be prosecuted in common law courts where the common law gave an adequate remedy, but once there the litigant's rights would still be adjudicated according to the principles of the maritime law, Carlisle Packing Co. v. Sandanger, 259 U.S. 255; Chelentis v. Luckenbach, S.S. Co., 247 U.S. 372; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149; but under this act a common law procedure is not only authorized, but maritime rights are disregarded, and the very opposite common law rights or statutory modifications thereof, substituted in their place.

The Constitution is sufficiently broad to prevent the destruction in whole or in part of the maritime law and the jurisdiction of the courts of the United States with respect thereto. The Lottawanna, 21 Wall. 558; The St. Lawrence, 1 Black, 522; Butler v. Boston & Savannah S.S. Co., 130 U.S. 527; The Blackheath, 195 U.S. 361.

The constitutional jurisdiction of the courts of the United States in maritime matters is exclusive. The Moses Taylor, 4 Wall. 411; Martin v. Hunter's Lessee, 1 Wheat. 304; Claflin v. Houseman, 93 U.S. 130; Stevenson v. Fain, 195 U.S. 165; Farrell v. Waterma S.S. Co., 291 Fed. 604; Butler v. Boston & Savannah S.S. Co., 130 U.S. 527; Southern Pacific Co. v. Jensen, 244 U.S. 205; Chelentis v. Luckenbach S.S. Co., 247 U.S. 372; Hanrahan v. Pacific Transport Co., 262 Fed. 951.

The difference between the creation of a right and the exercise of a common law remedy under the saving clause is well set forth in Sudden & Christensor v. Industrial Accident Comm., 182 Cal. 437.

The argument against the statute is based not upon the lack of power of Congress to amend the maritime law, nor upon its lack of power to authorize a maritime right to be prosecuted in the common law courts, state or federal, but upon the right of Congress under the Constitution to destroy the substantive maritime law by substituting therefor the entirely distinct code of common law.

If the act be valid, it may be truly said that the judicial power of the United States no longer extends to all causes of admiralty and maritime jurisdiction, inasmuch as Congress has put it into the power of a seaman in a cause of action purely maritime in its nature, to take the case from out the jurisdiction of that law -- the substantive law regulating his rights -- and have it tried according to the principles of an entirely different system of law, in no sense maritime, and where the rights are quite diverse. State courts have assumed jurisdiction of seamen's actions brought under the act, Lynott v. Great Lakes Trans. Co., 202 App. Div. 613; 234 N.Y. 626.

II. The act is in conflict with the Fifth Amendment.

The arbitrary and irrational discrimination carried by this law is apparent upon its face. If a privilege is to be given the plaintiff to try his cause of action under either one of two diverse systems of law, where not only the remedies but the rights are different, no sound reasoning can be advanced why a similar privilege should not be extended to the defendant. The law is confined to seamen alone, and does not protect any other class of employees engaged in the service of the ship, as for example, stevedores.

III. The act is so vague and uncertain as not to constitute due process of law. Notwithstanding that the maritime law of the Constitution is universally recognized as an independent code with rights and remedies peculiar to itself, that law must now fluctuate accordingly as Congress may hereafter legislate with respect to employers and employees in the entirely alien field of railroad employment. From now on, whenever Congress legislates upon that subject, it will unconsciously modify the maritime code as well. There is nothing in the act which limits the railroad legislation which affects the rights of seamen to the railroad legislation in force when the act was enacted.

This is the first case, so far as we have been able to ascertain, which has ever arisen, where Congress has endeavored to legislate concerning a fundamental constitutional power, or indeed upon any other subject, by the vague and confusing method of adopting in solido the general law relating to an entirely separate branch of jurisprudence. Binghamton Bridge Case, 3 Wall. 51, distinguished.

The act says that "all" statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. But the Safety Appliance Act, the Boiler Inspection Act, and the Hours of Service Act are statutes affecting the rights of railroad employers and their employees, and the language of this act is certainly broad enough to make all of these apply in the case where a seaman has sustained injury. Many of the provisions of these acts could have no conceivable application to the case of seamen, but what does or does not apply must remain at the present time a matter of doubt, and neither the seaman nor the shipowner has any longer before him a definite standard of legal duty or liability. Perhaps an even greater confusion will grow out of the application of the law of limited liability.

It is a general rule of constitutional law that an act which is so indefinite as to prescribe an obligation and set up no standard by which such obligation can be measured by court or jury, is invalid. United States v. Cohen Grocery Co., 255 U.S. 81; Standard Corp. v. Waugh Corp., 231 N.Y. 51; Louisville & Nashville R.R. Co. v. Tennessee, 19 Fed. 679; Cook v. State, 26 Ind. 278; Succession of Pizzali, 141 La. 647.

IV. The District Court which tried the case was without jurisdiction.

V. The evidence did not establish legal negligence upon the part of the defendant, and the jury should have been instructed to find a verdict for the defendant.

VI. The court erred in charging the jury upon the assumption of risk.

Mr. Wade H. Ellis, with whom Mr. Silas Blake Axtell was on the brief, for defendant in error.

Mr. John M. Woolsey and Mr. Vernon S. Jones, by leave of Court, filed a brief as amici curiae.

OPINION BY: VAN DEVANTER

OPINION

[*382] [392] [***751]** MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action by a seaman against his employer, the owner of the ship on which he was serving, to recover damages for personal injuries suffered at sea while he was ascending a

ladder from the deck to the bridge in the course of his employment, -- the complaint charging that the injuries resulted from negligence of the employer in providing an inadequate ladder and negligence of the ship's officers in permitting a canvas dodger to be stretched and insecurely fastened across the top of the ladder and in ordering the seaman to go up the ladder. The employer was a New York corporation. The ship was a domestic merchant vessel which at the time of the injuries was returning from an Ecuadorian port. The action was brought on the common-law side of a District Court of the United States, and the right of recovery was based expressly on § 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, as amended by § 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007, which reads as follows:

[*383] "Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The defendant unsuccessfully demurred to the complaint and then answered. The issues were tried to the court and a jury; a verdict for the plaintiff was returned, and a judgment was entered thereon, which the Circuit Court of Appeals affirmed. 289 Fed. 964. The defendant prosecutes this writ of error.

1. Apparently the action was not brought in the district of the defendant's residence or principal office as provided in the act; and on this ground the defendant objected that the District Court could not entertain it. The objection was not made at the outset on a special appearance, but after the defendant had appeared generally and demurred to the complaint. The court thought the objection went to the venue only and was waived by the general appearance; so the objection was overruled. 277 Fed. 859. Error is assigned on the ruling; but we think it was right.

The case arose under a law of the United States and involved the requisite amount, if any was requisite; [1] so **[*384]** there can be no doubt that the case was within the general jurisdiction conferred on the District Courts by § 24 of the Judicial Code, unless, as the defendant contends, it **[**393]** was excluded by the concluding provision of the act, which says: "Jurisdiction of such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Although not happily worded, the provision, taken alone, gives color to the contention. But as a general rule, ***HN1*** where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest of different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed. See United States v. Barnes, 222 U.S. 513, 520; United States v. Sweet, 245 U.S. 563, 572. The rule is specially pertinent here. Beginning with the Judiciary Act of 1789, Congress has pursued the policy of investing the federal courts -- at first the Circuit Courts, and later the District **[***752]** Courts -- with a general jurisdiction expressed in terms applicable alike to all of them and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant or in which he has a place of business, -- the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in §§ 24 and 51, one embodying

general jurisdictional provisions applicable to right under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provision now before us with those sections, and in the light of the policy carried into **[*385]** them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the District Courts as defined in § 24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word "jurisdiction" seems inapt, and therefore not of special significance. The words "shall be" are stressed by the defendant, but as they are found also in the earlier provisions which uniformly have been held to relate to venue only, they afford no ground for a distinction.

FOOTNOTES

1 See the first and third subdivisions of § 24 of the Judicial Code.

By a long line of decisions, recently reaffirmed, it is settled that HN2 such a provision merely confers on the defendant a personal privilege which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege. Interior Construction & Improvement Co. v. Gibney, 160 U.S. 217; United States v. Hvoslef, 237 U.S. 1, 11; General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., 260 U.S. 261, 272, 275; Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653, 655.

2. The defendant objects that the statute whereon the plaintiff based his right of action is in conflict with § 2 of Article III of the Constitution, which extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." Before coming to the particular grounds of the objection, it will be helpful to refer briefly to the purpose and scope of the constitutional provision as reflected in prior decisions.

As there could be no cases of "admiralty and maritime jurisdiction" in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and **[*386]** during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject -- its substantive as well as its procedural features -- under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States but as having become the law of the United States, -- subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire **[**394]** subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the

constitutional provision require that **[*387]** the enactments, -- when not relating to matters whose existence or influence is **[***753]** confined to a more restricted field, as in Cooley v. Board of Wardens, 12 How. 299, 319, -- shall be coextensive with and operate uniformly in the whole of the United States. Waring v. Clarke, 5 How. 441, 457; The Lottawanna, 21 Wall. 558, 574; Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 556, 557; In re Garnett, 141 U.S. 1, 12; Southern Pacific Co. v. Jensen, 244 U.S. 205, 215; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164; Washington v. Dawson & Co., ante, 219; 2 Story Const., 5th ed., §§ 1663, 1664, 1672.

In this connection it is well to recall that the Constitution, by § 1 of Article III, declares that the judicial power of the United States shall be vested in one Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," and, by § 8 of Article I, empowers the Congress to make all laws which shall be necessary and proper for carrying into execution the several powers vested in the government of the United States. Mention should also be made of the enactment by the first Congress, now embodied in §§ 24 and 256 of the Judicial Code, whereby the District Courts are given exclusive original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

The particular grounds on which a conflict with § 2 of Article III is asserted are that the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field, and also disregards the restriction in respect of uniformity. For reasons which will be stated we think neither ground can be sustained.

HN3↑The statute is concerned with the relative rights and obligations of seamen and their employers arising out of **[*388]** personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in nonmaritime service. But, as Congress is empowered by the constitutional provision to alter, quality or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation. Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts, -- that is to say, through proceedings in personam according to the course of the common law. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 159. This was permissible before the Constitution, and it is still permissible. Judicial Code, §§ 24 and 256; Waring v. Clarke, 5 How. 441, 460; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 390; Leon v. Galceran, 11 Wall. 185, 188, 191; Schoonmaker v. Gilmore, 102 U.S. 118; Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 646; Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259; Red Cross Line v. Atlantic Fruit Co., ante, 109.

Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as **[*389]** modofied, and not between that law and some nonmaritime system.

The source from which the new rules are drawn contributes nothing to their **[***754]** force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the maritime law. Louisville & Nashville R.R. Co. **[**395]**

v. Western Union Telegraph Co., 237 U.S. 300, 303. True, they are not in so many words made part of that law; but an express declaration is not essential to make them such. As originally enacted, § 20 was part of an act the declared purpose of which was "to promote the welfare of American seamen." It then provided that in suits to recover damages for personal injuries "seamen having command shall not be held to be fellow-servants with those under their authority," and in Chelentis v. Luckenbach S.S. Co., supra, p. 384, this Court treated it as part of the maritime law, but held it did not disclose a purpose "to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore." After that decision the section was reenacted in the amended form hereinbefore set forth as part of an act the expressed object of which was "to provide for the promotion and maintenance of the American merchant marine." In that form it makes applicable to personal injuries suffered by seamen in the course of their employment "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees." Thus its origin, environment and subject-matter show that it is intended to, and does, bring the rules to which it refers into the maritime law.

But it is insisted that, even if the statute brings those rules into that law, it is still invalid in that it restricts the enforcement of rights founded on them to actions at law, **[*390]** and thereby encroaches on the admiralty jurisdiction intended by the Constitution. It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also that if it be so construed a grave question will arise respecting its constitutional validity. But, as this Court often has held, HN4"a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon the score." United States v. Jin Fuey Moy, 241 U.S. 394, 401; United States v. Delaware & Hudson Co., 213 U.S. 366, 407-408; Baender v. Barnett, 255 U.S. 224. The question arises, therefore, whether the statute is fairly open to such a construction. There may be room for diverging opinions about the answer, but we think the better view is that it should be in the affirmative.

The course of legislation, as exemplified in § 9 of the Judiciary Act of 1789, §§ 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and §§ 24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings in personam as a matter of admissible grace. It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure, -- that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible.But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says "may maintain" an action at law "with the right of trial by **[*391]** jury," the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words "in such action" in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of "an action to recover damages for such injuries," the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and **[***755]** cure. See The Osceola, 189 U.S. 158; The Iroquois, 194 U.S. 240; Chelentis v. Luckenbach S.S. Co., 247 U.S. 372. In this view the statute leaves the injured seaman free under the general law -- §§

24 (par. 3) and 256 (par. 3) of the Judicial Code -- to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, but if he sues on the common-law side there will be a right of trial by jury. So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning.

Criticism is made of the statute because it does not set forth the new rules but merely adopts them by a generic reference. **[**396]** But the criticism is without merit. The reference, as is readily understood, is to the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its **[*392]** amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference. Kendall v. United States, 12 Pet. 524, 625; In re Heath, 144 U.S. 92; Corry v. Baltimore, 196 U.S. 466, 477; Interstate Ry. Co. v. Massachusetts, 207 U.S. 79, 84.

The asserted departure from the restriction respecting uniformity in operation is without any basis.The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform.The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules. Second Employers' Liability Cases, 223 U.S. 1, 51, 55; Baltimore & Ohio R.R. Co. v. Baygh, 149 U.S. 368, 378. Of course that legislation will have a like operation as part of this statute.

A further objection urged against the statute is that if conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. The complaint is not directed against either measure of redress or either form of action but only against the right of election as given. Of course the objection must fail. There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, not thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation **[*393]** of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.

At the trial the defendant requested a directed verdict in its favor on the ground that no actionable negligence was shown, but the request was denied. Although approved by the Circuit Court of Appeals, the ruling is complained of here. In view of the concurring action of the two courts, we deem it enough to say that the record discloses sufficient evidence of negligence to warrant its submission to the jury.

The defendant also complains that two requests which it preferred on the subject of assumption of risk were denied. The requests were so framed that, considering the state of the evidence, they would not have conveyed a right understanding of the subject and might well have proved misleading. Their refusal was not error.

Judgment affirmed.

MR. JUSTICE SUTHERLAND did not hear the argument or participate in the decision.

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Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 686

BILL TITLE: **relative to complaint procedures in cases before the commission for human rights.**

DATE: **March 9, 2009**

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, (ITL) Interim Study (Please circle one.)

Moved by Rep. O'Brien

Seconded by Rep. Smith

Vote: 5-8 (Please attach record of roll call vote.)

Motions: (OTP) OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Nixon

Seconded by Rep. Thompson

Vote: 8-5 (Please attach record of roll call vote.)

REGULAR or CONSENT CALENDAR (please circle one):

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Philip Preston, Clerk

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 686

BILL TITLE: **relative to complaint procedures in cases before the commission for human rights.**

DATE: 3/9/09

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, (ITL) Interim Study (Please circle one.)

Moved by Rep. O'Brien

Seconded by Rep. Smith

Vote: 5/8 (Please attach record of roll call vote.)

Motions: (OTP), OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Nixon

Seconded by Rep. Thompson

Vote: 8/5 (Please attach record of roll call vote.)

REGULAR or CONSENT CALENDAR (please circle one):

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Philip Preston, Clerk

JUDICIARY

Bill #: HB 686 Title: Relative to complaint procedures in cases before the commission for human rights

PH Date: 3/3/09 Exec Session Date: 3/9/09

Motion: ITL Amendment #:

MEMBER	YEAS	NAYS
Cote, David E, Chairman		N
Wall, Janet G, V Chairman a		
Potter, Frances D	~~Y~~	N
Hackel, Paul L		N
Preston, Philip, Clerk		N
Richardson, Gary B a		
Weber, Lucy M		N
Browne, Brendon S a		
Nixon, David L		N
Thompson, Robert B		N
Watrous, Rick H		N
Rowe, Robert H	Y	
Elliott, Nancy J a		
DiFruscia, Anthony R a		
Mead, Robert D	Y	
O'Brien, William L	Y	
Hagan, Joseph M a		
Perkins, Lawrence B a		
Silva, Peter L	Y	
Smith, William B	Y	
TOTAL VOTE:	5	8

Printed: 2/11/2009

OFFICE OF THE HOUSE CLERK 2009 SESSION

JUDICIARY

Bill #: HB 686 Title: Re

PH Date: 3/3/09 Exec Session Date: 3/9/09

Motion: OTP Amendment #:

MEMBER		YEAS	NAYS
Cote, David E, Chairman		Y	
Wall, Janet G, V Chairman	a		
Potter, Frances D		Y	
Hackel, Paul L		Y	
Preston, Philip, Clerk		Y	
Richardson, Gary B	a		
Weber, Lucy M		Y	
Browne, Brendon S	a		
Nixon, David L		Y	
Thompson, Robert B		Y	
Watrous, Rick H		Y	
Rowe, Robert H			N
Elliott, Nancy J	a		
DiFruscia, Anthony R	a		
Mead, Robert D			N
O'Brien, William L			N
Hagan, Joseph M	a		
Perkins, Lawrence B	a		
Silva, Peter L			N
Smith, William B			N
TOTAL VOTE:		8	5

Printed: 2/11/2009

Committee Report

REGULAR CALENDAR

March 19, 2009

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Majority of the Committee on JUDICIARY to which was referred HB686,

AN ACT relative to complaint procedures in cases before the commission for human rights. Having considered the same, report the same with the recommendation that the bill OUGHT TO PASS.

Rep. Lucy M Weber

FOR THE MAJORITY OF THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

MAJORITY
COMMITTEE REPORT

Committee:	**JUDICIARY**
Bill Number:	**HB686**
Title:	**relative to complaint procedures in cases before the commission for human rights.**
Date:	**March 19, 2009**
Consent Calendar:	**NO**
Recommendation:	**OUGHT TO PASS**

STATEMENT OF INTENT

Currently, a person alleging discrimination can file an action before the Human Rights Commission. Under certain circumstances, the person alleged to have committed the discrimination has the right to force the injured party into the superior court to pursue their claim.

This allows an oppressive landlord or employer to force the person discriminated against into a civil suit, thus imposing both significant delay and added costs. The practical effect can be to foreclose all remedies to the injured party. This bill levels the playing field by allowing the person discriminated against the choice of forum, allowing them to continue their case under the more informal procedures of the Human Rights Commission.

Vote 8-5

Rep. Lucy M Weber
FOR THE MAJORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

JUDICIARY

HB686, relative to complaint procedures in cases before the commission for human rights. **OUGHT TO PASS.**

Rep. Lucy M Weber for the **Majority** of JUDICIARY. Currently, a person alleging discrimination can file an action before the Human Rights Commission. Under certain circumstances, the person alleged to have committed the discrimination has the right to force the injured party into the superior court to pursue their claim.

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Vote 8-5.

Original: House Clerk
Cc: Committee Bill File

HB 686 relative to complaint procedures in cases before the commission for human rights.

OTP 8-5 MAJ

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Rep. Lucy Weber

OK-GL

HB 1686 - Relative to complaint procedures in cases before the commission for human rights.

OTP 8-5

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L. Weber

OK - RQ

REGULAR CALENDAR

March 19, 2009

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Minority of the Committee on JUDICIARY to which was referred HB686,

AN ACT relative to complaint procedures in cases before the commission for human rights. Having considered the same, and being unable to agree with the Majority, report with the following Resolution:

RESOLVED, That it is INEXPEDIENT TO LEGISLATE.

Rep. William L O'Brien

FOR THE MINORITY OF THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

MINORITY
COMMITTEE REPORT

Committee:	**JUDICIARY**
Bill Number:	**HB686**
Title:	**relative to complaint procedures in cases before the commission for human rights.**
Date:	**March 19, 2009**
Consent Calendar:	**NO**
Recommendation:	**INEXPEDIENT TO LEGISLATE**

STATEMENT OF INTENT

To the majority, taking away the right to a jury trial from defendants, but leaving plaintiffs with a right to obtain a jury trial at all stages of the proceedings before the Human Rights Commission (HRC) and later on appeal in the superior court is warranted, because, you see, employers and landlords have too much money to defend cases and they hire clever lawyers who make it hard to win those cases, particularly if the defendants get to defend them in court rather then before the HRC. And employers and landlords should want to stay in the HRC for these cases and not slyly remove them to the superior court because the HRC is so very fair that employers and landlords lose only 60% of the HRC cases, while employees and tenants lose a whopping 25%.

To the minority, committing such a constitutional violation for any reason, let alone based on such flimsy and biased reasoning, can never be justified. They believe the House should not be a party to such a miscarriage of justice.

For those who need reasoning beyond constitutionality and fundamental fairness to forego anti-employer bias, it should be noted further that defendants in many HRC discrimination cases are small businesses having one or two employees. These businesses can no more afford to hire an attorney than can many (but certainly, not all) employees and are also at a disadvantage before the courts. Further, by structuring the enforcement of discrimination laws in such an unbalanced, pro-complainant manner, our state would be motivating employers and landlords to do what none of us want: not hire or rent to minorities and thereby avoid being subjected to such a system. Finally, in their apparent rush to report out this bill before the business community caught wind of it, the bill was passed by the majority of the committee voting on it (which was not a majority of the committee) even before the sponsor and HRC's representative provided documents that were requested and promised during its hearing.

Original: House Clerk
Cc: Committee Bill File

Rep. William L O'Brien
FOR THE MINORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

JUDICIARY

HB686, relative to complaint procedures in cases before the commission for human rights.
INEXPEDIENT TO LEGISLATE.
Rep. William L O'Brien for the **Minority** of JUDICIARY.
To the majority, taking away the right to a jury trial from defendants, but leaving plaintiffs with a right to obtain a jury trial at all stages of the proceedings before the Human Rights Commission (HRC) and later on appeal in the superior court is warranted, because, you see, employers and landlords have too much money to defend cases and they hire clever lawyers who make it hard to win those cases, particularly if the defendants get to defend them in court rather then before the HRC. And employers and landlords should want to stay in the HRC for these cases and not slyly remove them to the superior court because the HRC is so very fair that employers and landlords lose only 60% of the HRC cases, while employees and tenants lose a whopping 25%.

To the minority, committing such a constitutional violation for any reason, let alone based on such flimsy and biased reasoning, can never be justified. They believe the House should not be a party to such a miscarriage of justice.

For those who need reasoning beyond constitutionality and fundamental fairness to forego anti-employer bias, it should be noted further that defendants in many HRC discrimination cases are small businesses having one or two employees. These businesses can no more afford to hire an attorney than can many (but certainly, not all) employees and are also at a disadvantage before the courts. Further, by structuring the enforcement of discrimination laws in such an unbalanced, pro-complainant manner, our state would be motivating employers and landlords to do what none of us want: not hire or rent to minorities and thereby avoid being subjected to such a system. Finally, in their apparent rush to report out this bill before the business community caught wind of it, the bill was passed by the majority of the committee voting on it (which was not a majority of the committee) even before the sponsor and HRC's representative provided documents that were requested and promised during its hearing.

Original: House Clerk
Cc: Committee Bill File

Addendum to March 10, 2009 Minority Report on HB 686

Statement of Intent:

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Rep. William O'Brien