

# 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

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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.

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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

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

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

27 2 State Commission for Human Rights; Complaint Procedures; Choice of Forum. Amend  
28 RSA 354-A:21, II(a) to read as follows:

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

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

16 3 Effective Date. This act shall take effect January 1, 2010.

# Committee Minutes

**AMENDED  
SENATE CALENDAR NOTICE  
JUDICIARY**

Printed: 05/20/2009 at 9:40 am

- ✓ Senator Deborah Reynolds Chairman
- ✓ Senator Bette Lasky V Chairman
- ✓ Senator Matthew Houde
- ✓ Senator Sheila Roberge
- ✓ Senator Robert Letourneau

For Use by Senate Clerk's Office ONLY	
<input type="checkbox"/>	Bill Status
<input type="checkbox"/>	Docket
<input type="checkbox"/>	Calendar
Proof: <input type="checkbox"/>	Calendar <input type="checkbox"/> Bill Status

**Date: May 20, 2009**

**HEARINGS**

**Tuesday**

**5/26/2009**

JUDICIARY

SH 103

2:00 PM

(Name of Committee)

(Place)

(Time)

**EXECUTIVE SESSION MAY FOLLOW**

**Comments:** THE PURPOSE OF THIS AMENDED NOTICE IS TO ADD HB 504 WHICH WAS RECESSED ON 5/19/09

- |         |       |  |
|---------|-------|--|
| 2:00 PM | HB295 | relative to mental health treatment for members of the armed forces and veterans convicted of crimes.              |
| 2:15 PM | HB370 | relative to equality of treatment of victims of crime.   |
| 2:30 PM | HB438 | relative to admission into evidence of certain medical bills, reports, and records.                                |
| 2:45 PM | HB459 | relative to access to restorative justice programs by victims of crime.  |
| 3:00 PM | HB621 | (New Title) relative to establishing procedures for identifying criminal defendants who may have a mental illness. |
| 3:15 PM | HB686 | relative to complaint procedures in cases before the commission for human rights.                                  |
| 3:30 PM | HB504 | relative to the termination of guardianship of a minor.  |

9:05

**Sponsors:**

- |  |  |  |   |
|--|--|--|---|
| <b>HB295</b><br>Rep. Alfred Baldasaro<br>Rep. Moe Villeneuve   | Rep. David Welch<br>Sen. Sharon Carson     | Rep. Edith Hogan<br>Sen. Robert Letourneau | Rep. James Headd<br>Sen. John Barnes, Jr. |
| <b>HB370</b><br>Rep. Robert Cushing                            |  |  |   |
| <b>HB438</b><br>Rep. Anthony DiFruscia                         | Rep. Gary Richardson                       | Rep. Rip Holden                            | Rep. Franklin Bishop                      |
| <b>HB459</b><br>Rep. Robert Cushing                            |  |  |   |
| <b>HB621</b><br>Rep. Christine Hamm<br>Sen. Jacalyn Cilley     | Rep. Cindy Rosenwald<br>Rep. Gene Charron  | Rep. Joan Schulze                          | Rep. Peter Batula                         |
| <b>HB686</b><br>✓ Rep. Melanic Levesque<br>Rep. Angeline Kopka | Rep. Patricia McMahon<br>Rep. Jordan Ulery | Sen. Bette Lasky                           | Rep. Jane Clemons                         |
| <b>HB504</b><br>Rep. Fran Wendelboe                            |  |  |   |

Gail Brown 271-3076

Sen. Deborah Reynolds  
Chairman

# Judiciary Committee

## Hearing Report

**TO:** Members of the Senate

**FROM:** Susan Duncan, *Senior Legislative Aide*

**RE:** Hearing report on **HB 686** – *AN ACT relative to complaint procedures in cases before the commission for human rights.*

**HEARING DATE:** May 26, 2009

**MEMBERS OF THE COMMITTEE PRESENT:** Senators Reynolds, Lasky, Roberge, Letourneau and Houde

**MEMBERS OF THE COMMITTEE ABSENT:** No one

**Sponsor(s):** Representative Levesque with Representatives P. McMahon, Clemons, Kopka and Ulery with Senator Lasky

**What the bill does:** 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.

**Who supports the bill:** Representative Levesque; Representative McMahon; Representative Horrigan; Attorney Martha Richards-Stower; Attorney Heather Burns of Upton & Hatfield;

**Who opposes the bill:** Representative O'Brien; Representative Wendelboe; Teresa Rosenberger; Kevin Smith, CPR Action; Michael Licata of the BIA:

**Summary of testimony received:**

- Representative Levesque introduced the legislation and explained that this adds the choice of forum in which the complaint can be heard. She said that this would only affect maybe 4 to 6 cases per year and that individuals can be forced into a court against their will. She said that her parents had been denied housing when they first moved to NH because they were black. She said to imagine a waitress facing a sexual harassment charge and that it should be the person who is making the claim who makes the determination of where it is heard.
- She distributed a fact sheet which stated that when a case moves from the Human Rights Commission to the Superior Court, it can delay the case by one to two years.

- During 2002 to 2008, the Human Rights Commission had 2,214 cases filed. Most of these were resolved by administrative closure and many by negotiated settlement. Of the unresolved cases which had a full investigation, 528 received rulings of “no probable cause” which closed the case; and 127 received a “probable cause” determination which went on to a full hearing. Twenty-nine of those 127 probable cause cases were removed to court by respondents between 2002 and 2008.
- Representative William O’Brien testified in opposition. He commented that the bill is hidden in the “cloak of glorious rhetoric” but that it is slanted, unfair, biased and proposed to decide where cases can be held. He said that the employees or tenants who file cases can opt out at any time, but the employers or landlords cannot. He said that employers and landlords win only one case in four before the Human Rights Commission (HRC).
- He said that in some cases, the HRC awards back wages, front wages, re-employment and up to a \$50,000 fine. He said that they may not win at all at a jury trial.
- He reminded Committee members that most employers and landlords are small businesses.
- Representative McMahon testified in support and explained that the bill would affect around 130 cases that were heard in the last 9 years. She said that for those who are in a subordinate role, the impact is critical and the least onerous way to get it resolved.
- She said that too often the landlord or employer can move the case to court, prolonging the case and costing the employee or tenant great cost.
- She said that resolving these cases earlier saves money and emotional trauma.
- Senator Letourneau asked if individuals are sworn in at the HRC. Representative McMahon said that she’s not familiar with their process. Senator Letourneau commented: “but you’re supporting this bill.”
- Kevin Smith of CPR Action appeared in opposition and acknowledged that the intent has merit but it goes too far. He said that the respondent would have no choice and asked if this isn’t afoul of our basic due process requirements.
- He asked if someone with a threat of religious liberties could appear before the HRC and cited a recent *Valley News* article in which a wedding photographer whose studio was deemed to be a public accommodation could be subject to a \$10,000 fine.
- Senator Letourneau asked what the process is. Mr. Smith responded that he has never sat in on one of their proceedings. He commented that often mediation takes place to try to reach a settlement, but that either party has the right to take the case to court.
- Attorney Nancy Richards-Stower, a former Chair of the HRC back in the 1970’s, testified in support. She explained the procedure



that happens: within 180 days of a person being wronged, they file a complaint with the Commission. The file is assigned a staff person to investigate. If there is no probable cause, that is the end. If probable cause is found, it then goes to the full Commission for a hearing.

- She said that it is unfair to take away the right of an individual to have a hearing at the Commission.
- She noted that only a tiny percentage of the cases get a probable cause finding, citing the number of cases filed at 2,214 with 127 receiving a finding of probable cause.
- She explained that poor "little" people want to keep their cases at the HRC but that landlords and employers want to go to court in order to "squash the little guy."
- She said that over the years she has represented a fair number of waitresses and lower wage individuals who will be served by the HRC. She said that the individuals who serve are volunteers and that they sit on very few cases over the years.
- She said that she has had pregnant clients where the baby was in kindergarten before the court hearings were held.
- She said that of those that receive a hearing, only about one-half win and that it's not a biased body.
- Senator Letourneau in noting that 2,214 cases were filed and 528 had no probable cause and 127 had probable cause – asked what happened to the other cases. Attorney Richards-Stower responded that some are mediated and the employee may receive an apology and reinstatement. She said that the HRC is a wonderfully effective and efficient body.
- She said that those who have experienced it, "sing" their praises.
- Michael Licata representing the BIA testified that many of their concerns have already been raised. He said that the BIA believes that this will take away the respondent's right to a court trial. He said that there is no evidence to prove that a jury trial is unfair to complainants.
- Senator Reynolds asked if the Human Rights Commission is a creation of the Legislature, couldn't the Legislature change it. Mr. Licata responded that this is out of his purview.
- Attorney Heather Burns testified in support. She responded to Representative O'Brien's statement that most NH employers have only 1 or 2 employees but noted that our statute says that you have to have six employees or more in order to come to the HRC.
- Regarding the claim that this would motivate employers to go out of business, she said that actually, the HRC is a less expensive process.
- She said that moving to Superior Court is much more expensive and would actually take longer.
- She said that if an employer seeks to move a hearing from the HRC and they think they are saving money, actually it will cost

more because there are attorney's costs as well as the cost of depositions and other preparations.

- She said that it is virtually impossible to represent oneself before a jury trial.
- She said that this is a very simple statute without lofty goals and is merely meant to protect individuals.

**Fiscal Impact:**                      Not applicable

**Future Action:**    The Committee took the bill under advisement.

sfd

[file: HB 686]

Date: May 27, 2009

JMB

Date: May 26, 2009  
Time: 3:35 p.m.  
Room: State House Room 103

The Senate Committee on Judiciary held a hearing on the following:

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

Members of Committee present:            Senator Reynolds  
    Senator Lasky  
    Senator Houde  
    Senator Roberge  
    Senator Letourneau

The Chair, Senator Deborah R. Reynolds, opened the hearing on HB and invited the prime sponsor, Representative Melanie Levesque, to introduce the legislation.

Representative Levesque: Thank you, Madam Chairperson and Senate Judiciary members. My name is Representative Melanie Levesque from Hillsborough District 5. I am the primary sponsor and a supporter of HB 686, which addresses the choice of forum in which a human rights complaint can be heard.

The Human Rights Commission is 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.

HB 686 solves a problem. Right now, a company can force an employee out of the Human Rights Commission to court, delaying her discrimination hearing by years and causing her to incur thousands of dollars of attorney fees.

This bill would re-establish the normal rule. That is, it is the person with a case to prove who decides if she is in court or if she is in a state agency. The U.S. Supreme Court supports giving the choice of forum to the one with the claim and that's what this bill does. This bill will affect only four to six cases per year, but that is four to six fewer jury trials in an overburdened Superior

JWB

Court system. And, that is four to six victims of discrimination who are not forced into a court against their will.

I am very privileged to be a member of this Legislature. I have had the opportunity to have my own business, to live where I choose to live. In my parents' day, they were not as fortunate. When my parents came to New Hampshire looking for a good job and a place to bring up their children, when they tried to buy a house, they were denied housing because they were black. Now, had there been a Human Rights Commission, they could have brought this case to the Commission. But, under today's laws, they could have been forced to hear that complaint in court, which would have been a long and costly endeavor.

I gave the example of my parents, but imagine if it is a waitress who is working for minimum wage and facing sexual harassment at work. That waitress probably doesn't have the means to endure a costly or lengthy intimidating court process.

HB 686 ensures that if and when discrimination occurs and the case is brought to the Human Rights Commission, that it is the person who makes the claim that retains the right to choose where their case will be heard.

You may hear some numbers today based on our initial hearing that have been distorted. I passed out a green fact sheet which is actual data from the Human Rights Commission. We also have here today a principal author of the original bill who will give testimony of the importance of HB 686. I hope that you will support this bill. Thank you.

**Please see Representative Levesque's prepared testimony, attached hereto and referred to as Attachment #1.**

**Please see "Fact Sheet on HB 686" submitted by Representative Levesque, attached hereto and referred to as Attachment #2.**

Senator Deborah R. Reynolds, D. 2: Thank you very much, Representative. Any questions? Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Thank you. Can you tell me, and I appreciate you taking the question. You say that it affects four to six cases a year. How many cases does the Human Rights Commission hear? How many a year?

RJB

Representative Levesque: Well, we actually have a fact sheet. On the fact sheet, at the bottom of it, it shows a running total for the past seven years, I believe.

Senator Robert J. Letourneau, D. 19: Okay. 528?

Representative Levesque: Yes. More of the technical questions I am going to defer to some of the other attorneys.

Senator Robert J. Letourneau, D. 19: Gotcha. Thank you.

Representative Levesque: Thank you.

Senator Deborah R. Reynolds, D. 2: Thank you very much for your testimony.

Representative Levesque: You're welcome.

Senator Deborah R. Reynolds, D. 2: Is Representative William O'Brien here? You have signed in in opposition.

Representative O'Brien: I have and I would like to speak if I could.

Senator Deborah R. Reynolds, D. 2: Go right ahead.

Representative O'Brien: Again, thank you, Madam Chair and members of the Senate Judiciary. My name is William O'Brien. I represent Hillsborough County District 4.

Notwithstanding its cloak of glorious rhetoric or the anecdotes and references to past discrimination, HB 686 is one of the most slanted, unfair, biased bills you will see this session. It proposes an unbelievably unfair human rights commission, a human rights commission where employees and tenants can choose to have their discrimination cases heard there or not, but employers and landlords have no such choice. A human rights commission where employees and tenants can opt out at any time and get a jury trial, but employees and landlords can never opt out and never request a jury trial. A human rights commission whose judgments can be rejected by employees and tenants in favor of a jury trial in Superior Court, but employers and landlords have no such appellate rights.

Why such unfairness? Because employers and tenants have learned something that proponents of this bill do not want you to know. Employers and landlords win only one out of four cases in front of the Human Rights

Commission. So, they use the present removal procedures to allow them to escape to a neutral forum, the Superior Court, and a jury trial of their peers. You may ask yourselves, "So what? Let the Commission take care of this", but here is why, here is how they take care of it, excuse me.

Against employers, for example, they can award back wages, they can award front wages, wages that would have been earned, they can order reinstatement of employment, they can order promotion of employees. They can also, in addition, and this can't be done in court, impose up to a \$50,000 fine against a landlord or an employer if they just don't like what went on. Against this background, the proponents are basically saying to you Human Rights claimants, who they identify from the beginning as victims might not win if the defendants get a jury trial. That just isn't fair, they say. So, they say, let's stack the deck. Let's tilt the playing field. Let's make sure they don't win. Is that what American juris prudence has become - making sure that one side has a better chance of winning than another?

Now, should you need a reason beyond just constitutional tradition, if fundamental fairness to forego this bias, remember most employers and landlords are small operations themselves. These businesses with one or two employees or landlords with one or two apartments have no more ability than does an employee or a tenant to hire a lawyer. In some cases, less of an ability because there is no pay day or potential pay day at the end of the case in which a contingency fee arrangement can be based. By structuring these laws in such an unfair, pro employee, pro tenant fashion, the Legislature would be motivating employers and tenants to do something that none of us want. They would be motivating them to either go out of business, not rent apartments, or worse yet, not hire or rent to minorities to avoid these claims altogether.

Now, there has been a reference to a Supreme Court case in which the Supreme Court said you can choose the forum. That was a choice between, if I remember the case, in federal district court in Panama at the time that Panama was part of the US jurisdiction or a federal district court in New York, if I remember the case correctly. That was a choice where the laws were the same. It wasn't a choice between you, defendant, get a jury trial here, which you don't get it here. I get it both places if I want. So, you know what I'm going to do? I'm going to go here.

That's the choice that is presented by this bill. You're going to allow employees and tenants to basically choose whether a jury trial is going to be provided in any case and that just isn't fair.

Senator Deborah R. Reynolds, D. 2: Thank you very much for your testimony. Questions of Representative O'Brien? Thank you very much.

Representative O'Brien: Thank you.

Senator Deborah R. Reynolds, D. 2: I note that Representative Ricia McMahon, is Ricia here, has signed in in favor and would like to speak. Welcome.

Representative Ricia McMahon: Thank you, Madam Chair. Good afternoon members of the Committee. For the record, my name is Ricia McMahon. I am State Representative representing the towns of Newbury and Sutton in Merrimack County. I will be brief and I thank you for the opportunity.

This bill regarding the complaint procedures before the Commission for Human Rights would affect a small number of people. There are about a hundred and thirty cases in this topic area that have come to the Human Rights Commission in the last nine years. It is a small number of people, but for those individuals who experience the subordinate role, if you will, as either the person renting or the employee, for them this impact is critical in terms of their resources, whether it be time or money. This is the least onerous way for a person to get some resolve on situations that may be difficult for them as an employee, as a previous speaker mentioned, a waitress or perhaps an employee in a minimum wage job. This remedy would hopefully minimize the long-term costs.

What I understand happens is that if a complainant has a judgment then made by the Human Rights Commission, it can be over and done with at that time. But, it is very much like in other court situations where younger people are involved or someone who is disadvantaged, it is very difficult for them to explain in public in a large court setting what the problem has been. It can be very intimidating. This allows the person without a lot of means to go before the Commission and have it resolved.

What is unfortunate is the super ordinate entity, the employer or the landlord, often those with more resources, can remove that particular case and go to Superior Court and sometimes even to federal court, which prolongs this cost and prolongs the stress for the individual. I would like to suggest that justice delayed is justice denied and it would be very helpful if we could have these types of cases, of which there are only about twenty-nine that get into the situation now where it goes on to the Superior Court. 25% of the cases. It would be very helpful if it could be resolved early and save everyone the cost and the emotional trauma.

RB

Thank you very much.

Senator Deborah R. Reynolds, D. 2: Thank you very much, Representative. Any questions? Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Thank you. Tell me about the Commission process. Are you sworn in at the Commission to tell the truth, the whole truth and nothing but the truth?

Representative McMahon : Senator. I can't respond to that because I have never been before the Commission, but I believe that there are people here that will be able to respond to you on that.

Senator Robert J. Letourneau, D. 19: You're not familiar with the process that goes on at the Commission?

Representative McMahon: I have only heard from individuals about the process, so I couldn't actually...

Senator Robert J. Letourneau, D. 19: You're supporting this bill.

Representative McMahon: I'm supporting this bill because I think it is important for individuals to have speedy determinations and I don't know exactly about the process because I have not actually been sworn in as a witness in one of these cases.

Senator Deborah R. Reynolds, D. 2: Follow up?

Senator Robert J. Letourneau, D. 19: Follow up. Thank you. But, the person who is bringing the charges or the claim or whatever it is that you're speaking of, don't they have the option of also taking this to court under our laws?

Representative McMahon: I believe they do have the option.

Senator Robert J. Letourneau, D. 19: Thank you.

Senator Deborah R. Reynolds, D. 2: Any other questions? Thank you, Representative.

Representative Timothy Horrigan is signed in in support, does not wish to speak. Representative Fran Wendelboe has signed in in opposition, does not wish to speak. Claire Ebel has signed in in favor, does not wish to speak.



Melody on behalf of Teresa Rosenberger and the Nashua Chamber has signed in in opposition, does not wish to speak.

I have as my next witness Kevin Smith. Kevin, if you could come forward please. Thank you very much. If you could just state your full name and who you represent.

Kevin Smith: Thank you, Madam Chair and honorable members of the Senate Judiciary Committee. For the record, my name is Kevin Smith, representing CPR Action and I come to speak in opposition to HB 686.

HB 686 makes unnecessary changes to the hearings process for complaints brought before the Human Rights Commission. While the intent of the sponsors has merit, we fear the changes go too far in denying the respondents with their due process rights. Under the current process, if a complaint is brought before the Commission, the respondent to the complaint has the ability to remove the case to Superior Court to have the case heard before a judge and a jury of their peers. Under the proposed bill, only the complainant would not have that ability to remove the case at any time after the filing and during the investigative process. The respondent, on the other hand, would have no choice but to see the hearing process through to its entirety at the Human Rights Commission. At the very least, this Committee should look into whether such a proposed change would run afoul to basic procedural due process requirements.

Additionally, after the investigation and hearings are completed, if a finding of no probable cause is found, the complainant can appeal the decision to the Superior Court. However, under this proposed law, if a finding of probable cause is made, the respondent's only recourse at that point would be an appeal to Superior Court, but the hearing is not guaranteed.

Finally, I would respectfully appeal to the Committee that you be especially sensitive to making such changes in light of the recent testimony you have been privy to as it relates to the threat of religious liberties should the same sex marriage bill be signed into law. I'm going to digress for just one second, but I want to illustrate how the two are directly related. In a story reported in the *Valley News* over the weekend, it stated that the Governor's amendment was not designed to cover a wedding photographer who has her own business rather than being employed by a religious group. The Human Rights Commission Executive Director Joni Esperian then went on to say that the photographer cannot discriminate against these couples, especially if she has a studio that clients can visit since it would be deemed a public accommodation. A finding of probable cause against that photographer

JLB

would carry a first time fine not to exceed \$10,000 by the Human Rights Commission.

Should private individuals and business owners be brought before the Commission because they refuse to violate their conscience in matters of same sex marriage? For this reason alone, they ought to have the ability to remove such complaints to Superior Court and not have to put their fate entirely in the hands of the Human Rights Commission.

Thank you.

Senator Deborah R. Reynolds, D. 2: Thank you very much. Any questions? Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Thank you. Thank you, Kevin. Tell me what the process is at the Human Rights Commission. Are you familiar with it?

Mr. Smith: I have never sat in on a hearing. From my understanding, the process is that a complaint is brought before the Commission. There has been a person from the Commission who is assigned to investigate that complaint. In the meantime, there is a mediation that will go on between the commissioners of the Commission with both the complainants and the respondents who will try to mediate the process to come to a resolution, if you will, before it has to go through a full hearing and before a finding is made. They will try to come to some sort of a settlement. That's my understanding of the process. If a settlement cannot be agreed upon, then there will either be a finding of probable cause or no probable cause and then both parties have the right to appeal it to Superior Court after a finding is made. As it currently stands, both parties have the right at any time to remove it to Superior Court. Under this proposed law, only the complainant would have that ability.

Senator Robert J. Letourneau, D. 19: Thank you.

Senator Deborah R. Reynolds, D. 2: Thank you very much. Thank you for your testimony.

Mr. Smith: Thank you.

Senator Deborah R. Reynolds, D. 2: Nancy Richards-Stower. Welcome, Nancy. If you could come forward.

JMB

Attorney Nancy Richards-Stower: Thank you, Madam Chair. I understand time is brief and I will try to be brief.

Senator Deborah R. Reynolds, D. 2: Well, it is not your fault that time is brief. You go right ahead.

Attorney Richards-Stower: I am the grandmother of the law that we are here to amend and I am the mother of the proposed amendment.

Senator Deborah R. Reynolds, D. 2: Before you start, just state your full name for the record.

Attorney Richards-Stower: Grandmother and mother Nancy Richards-Stower.

Senator Deborah R. Reynolds, D. 2: Thank you.

Attorney Richards-Stower: I'm a civil rights attorney with an office at 32 D.W. Highway in Merrimack, New Hampshire. I have had the privilege of being Chair of the Human Rights Commission when I was much younger. From 1979 to 1985, I served and was Chair from '80 to '85 under Governor Gallen. I can answer any questions here at the hearing or after the hearing about the procedure because I have lived and breathed it for almost three decades. I do have another copy of the letter that I sent to each of you individually when this bill was first proposed and also another copy if you don't have the green fact sheet.

I would like to say that this is difficult for me to control my mouth and my anger at the misrepresentation that we heard at the House hearing and even after I provided the information that was accurate here again today.

The procedure at the Human Rights Commission, Senator Letourneau, if that is at issue in this complaint, it is a fairly complex, but can be boiled down to this. Within a hundred and eighty days of the perceived wrong, a person who claims discrimination files a written notarized complaint of discrimination at the state agency. That is assigned to a staff investigator. On paper, one of seven commissioners is assigned the case, but he or she really doesn't do anything until the investigation conducted by the staff investigator is over. As the result of reading that staff investigator's report, that investigating commissioner signs a document saying probable cause or no probable cause. If the investigating commissioner signs a document called no probable cause, the case, for all intents and purposes, is dead, but it is subject to appeal by the claimant if they choose to do so, to the Superior Court, which usually upholds what the Commission does. If the finding is probable cause, then if

JAB

the case is allowed to stay at the Commission, there is a hearing under oath with the right to cross examination to satisfy all the due process and equal protection rights.

Before my senile mind forgets it, isn't this unfair to take away the right to a jury trial? Isn't this a denial of equal protection which we have heard over and over? The answer is simply no. The Legislature created a brand new thing in the '60s called anti-discrimination law. They did not exist when the New Hampshire Constitution was written. The New Hampshire Supreme Court has only one of the cases that is in the green fact sheet, but there have been many, many cases. If the cause of action did not live at the time the New Hampshire Constitution was drafted, there is no constitutional right to a jury trial. The Legislature can make a law, can make the procedure that it thinks best to tell what the law is for and they have done this before. At the Department of Labor, the employee can have a wage claim before a hearing officer or the employee can bring the case to court. It has been approved and upheld and so those are false issues. The real moral issue, I think, would be that it seems unfair. Right now, the employers have a right to a jury trial and this bill would take it away and leave it up to the claimant to choose whether he or she has a hearing in front of the Human Rights Commission or not.

Let's first understand. A tiny, tiny, tiny percentage get a probable cause and are in this dilemma. If you look at the statistics at the last paragraph of the 2,214 cases filed between '02 and '08, only a hundred and twenty seven of those got a probable cause determination. So, for you to be misled that there is 20% of these cases get probable cause, it is less than 1%. Of those probable cause cases that we're talking about, the people who want to keep the cases at the Commission are poor, little people. Candidly, I represent them. The people who want to take them out of the Commission at that point and put them in court are the wealthier, more colorful employers and landlords because it delays the case, costs the claimant money and makes them squashed.

Now, why should the claimant have the choice? Why should the claimant have the ability to go to court or choose? The answer is because they already do. Most employees that are covered by our state law are also covered by federal law. They already have the right to go to court on these cases. They are covered by the wage laws. They ought to have the right to be in court. As an advocate and an officer of the court, I will say that every single case I have ever brought in court has more than one cause of action. So, you're already in court. So, prior to the bill that I originally authored, you were in court in three things and at the Human Rights Commission in one and it made a silly double-track thing for both parties.

JMB

So, why then did we feel it necessary to give the employer a say or a choice? Because the crummy timing of my legislative advocacy. At the time the original bill was proposed by Representative Daw from Nashua, New Hampshire in 1996 and 1997, there was a case pending in the Massachusetts court system which was a similar hearing, which ended up with a Massachusetts Supreme Court decision that said if you give only the person with the claim the right to a jury trial, under Massachusetts law, it denies constitutional equal protection and due process. Now, we advocates at the time in New Hampshire knew that that wasn't the New Hampshire law and we even knew it wasn't the Massachusetts law, but we also knew that nobody was going to believe a thirty-year-old lawyer compared to the Massachusetts Supreme Court.

So, we agreed to a compromise to see how it worked. Let's let the complainant take the case and go to court when she wants. Let's let the respondent have the right to go to court if there has been found probable cause between the time of probable cause and the hearing. Which means you can be preparing for a hearing for three months, and on the night before the hearing, find out that the employer or the landlord has taken it to court for another two years. Since that time, the Supreme Court of Massachusetts, as included in footnote 2 on the fact sheet, has reversed itself and said oops, we were wrong. Of course, it is not a denial of equal protection. Of course it is not a denial of the right to jury trial. This is a legislative made law and all throughout United States history, the one with the claim gets to choose where they go to bring it. If they could be forced someplace else, they are not going to want to bring it.

Now, I represent a fair amount of waitresses and small people, small wage people with small claims, who are wonderfully served by the Human Rights Commission, even if the case isn't resolved in the mediation process. When they get to the end, when they are able to have a hearing in front of the Commission, who is that hearing in front of under oath and under cross-examination? The Human Rights Commission is seven people. One would be the investigating commissioner. That person is out of the loop. Three of the remaining six, depending on, like you, they are volunteers, they have schedules, whoever is available for a hearing are assigned to the hearing to sit as administrative law judges. They are not wild-eyed liberals. They are people who have been nominated by whoever the Governor is and confirmed by the Executive Council.

They have had very few hearings since my original bill went through. Because why? Because it is taken away. The small number of cases heading to hearing at the Commission, four to six a year, are grabbed out of that and

JAB

brought to court by the landlord or the employer. I have been probably the lawyer in at least a third of those. I have had pregnancy cases where the baby is entering kindergarten by the time the jury trial has been scheduled. It is a way to quash.

The Human Rights Commission wasn't set up to give employers or landlords a place to hold their court. It was a place to give punitive victims of discrimination the place to go to complain about a powerful force that is holding them back because of the color of their skin or their gender or their religion. The Legislature made a simple procedure. Again, the only reason court entered into it at all is my fault, but I'm proud of it. It was because we are already in court under these others, let's put the Human Rights Commission thing with us too. It wasn't to give anyone an unfair advantage.

Speaking of the statistics that were misstated about how many people went, it is about 50/50 of those very few cases that get probable cause. Of the very few cases that get a Human Rights Commission hearing, half of them found in favor of the employer and half of them found in favor of the employee. I personally before all my cases are removed by the respondent, lost half my cases in front of the Commission and I'm pretty good at what I do. So, it is not a biased body that is front loaded to shaft our employers who we need to have jobs; it is a procedure that was made and modeled and has worked very well for almost fifty years now. This experiment with letting the landlords and the employers also choose a forum has not worked well. That's why I work very hard to try to fix it.

Senator Deborah R. Reynolds, D. 2: Thank you very much for your testimony. Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Thank you. 2,214 cases, 528 received a no probable, 127 received probable.

Attorney Richards-Stower: Yes, those are the statistics provided by the Human Rights Commission.

Senator Robert J. Letourneau, D. 19: What happened to the other 1,700?

Attorney Richards-Stower: They are administratively resolved either by mediation or the Human Rights Commission decides that it was brought too late or the Human Rights Commission decides that there wasn't the requisite number of employees so they are administratively dismissed. A lot of those the Human Rights Commission weeds out the cases that never, they don't have a right to be there. Not who is telling the truth and is not telling the truth, but the cases that don't meet the jurisdictional standards.

For example, if I file at the Human Rights Commission and say I was fired last year, they will close that case because I have to file within a hundred and eighty days. It is too late to be there, so those cases wouldn't get a probable cause or a no probable cause; they just get dismissed.

Senator Robert J. Letourneau, D. 19: Isn't it true that a number of those cases are mediated and paid off?

Attorney Richards-Stower: Well, a number of those cases are mediated. There is often not money involved in the mediated case. Sometimes it is apology; sometimes a letter of recommendation. The best scenario is possible reinstatement. If it was a disabled person and they couldn't work because they needed to have a sandwich at 11:00 and the employer wouldn't let them have a lunch break. If they can get reinstatement with being able to have the sandwich, that's best for everybody with no money unless the person had lost pay.

The Human Rights Commission is a wonderfully objective state agency that this State should be proud of. I practice in front of a number of Human Rights Commissions and this is by far the fairest and also my opposing counsel believe that as well. Those people that have actual experience. I have heard people say I don't know what it is doing because I have never been there. People who have experienced the Commission sing its praises. We don't always win there. It is just an excellent, excellent system.

**Please see Attorney Richards-Stower's prepared testimony, attached hereto and referred to as Attachment #3.**

Senator Deborah R. Reynolds, D. 2: Thank you. Any other questions? Thank you very much for your testimony.

Attorney Richards-Stower: Thank you.

Senator Deborah R. Reynolds, D. 2: Michael Licata from the BIA, please come forward. For those waiting for our final hearing, I apologize. We will try to get to that as soon as possible. Mike, if you could just state your full name for the record.

Michael Licata: Sure. My name is Michael Licata. I am the Director of Government Affairs at the Business Industry Association of New Hampshire and I will be exceedingly brief because many of our concerns have already been expressed by other speakers. I appreciate the opportunity to testify before you today, Madam Chair and members of the Committee. As you may

RUB

know, the BIA is the state's largest business advocacy group. We have over four hundred members throughout New Hampshire and we serve as the State's Chamber of Commerce.

Our concerns, as I said before, have been expressed previously. BIA believes that this bill will take away a respondent's fundamental right to a jury trial by only allowing the complainant the opportunity to move proceedings from the State's Human Rights Commission to Superior Court. This bill creates an unlevel playing field and disadvantages employers. We believe it is a simple matter of fairness and that both entities seeking recourse before the state's Commission on Human Rights should be able to move the proceedings to Superior Court if they so choose. There is no evidence to prove that a jury trial was unfair or weighted against a complainant or that employer seeks to have a case removed from the Human Rights Commission more often than complainants.

With that, I'm happy to answer whatever questions the Committee may have.

Senator Deborah R. Reynolds, D. 2: Thank you very much. I have a question for you. The lawyers in the room have a different level of understanding about this piece of it. I guess my question to you is that superficially I think is found correct, which you are arguing. However, I think the other part of that is more of a legal argument is that because of a creation of the Legislature which predated the New Hampshire Constitution is not unconstitutional because other incidents and other administrative hearings we do this. So, what's your response to that?

Mr. Licata: My response would be, if you look at the business climate in New Hampshire and where employers have the ability to expand or relocate, employers are very savvy. They don't just look at simple tax structure.

Senator Deborah R. Reynolds, D. 2: I understand the business argument. I'm asking for a legal issue. What is your response to the legal part of it?

Mr. Licata: That would be outside of my purview. I would be happy to supply you with a response later.

Senator Deborah R. Reynolds, D. 2: Okay. Thank you very much. Any other questions? Thank you very much.

The last person I have signed in in support of this is Attorney Heather Burns. Heather, please come forward. Thank you very much.



JTB

Attorney Heather Burns: Thank you very much. Good afternoon. My name is Heather Burns. I am an attorney with Upton & Hatfield here in Concord on Centre Street and I thank you for the opportunity to speak to you today. I think I can be very brief because it sounds like virtually everything I needed to cover has already been covered. But, I did want to talk about a couple of things that I heard in this hearing, just to correct a couple of misperceptions.

One comment that Representative O'Brien made was that most employers have one to two employees and that this would really work as a disadvantage against them because they are so small. I will tell you that, under our state statute, under RSA 354-A, you have to have six or more employees to be even covered under the statute. So, this is not going to have any affect on employers who employ one to two employees. The statute doesn't apply to those employers whatsoever. Just with six employees or more.

As to the notion that this would motivate employers to go out of business, I find that to be an interesting argument to be honest with you because I think, as Attorney Richards-Stower has mentioned to you, quite frankly a hearing going forward before the New Hampshire Human Rights Commission is a less costly alternative for all parties involved. I mean, if a respondent removes a case to Superior Court, then it creates a couple of additional years of litigation. It creates depositions and it creates a multi-day jury trial. So, it is difficult for me to imagine that employers are going to go out of business because they lose the right to take an action, which is really the most costly action that possibly be taken, and I really have to echo what Attorney Richards-Stower said, which is that honestly in these cases if an employer, as they do now, seeks to remove a case out of the Human Rights Commission on the eve of the hearing before the Commission, I think that really is simply to put an onerous burden on the complainant. I think that that is what it is motivated to do.

It makes it a more costly process for the complainant. The complainant then has to deal with the cost of depositions because really it is impossible to get to a jury trial without taking depositions. Those come at a very increased cost. It is very difficult for a complainant, quite frankly, to go to court and participate in a jury trial without the benefit of an attorney. And so, this will mean that a lot of times that a complainant, who could in some occasions, represent themselves alone before the Human Rights Commission, it is virtually impossible for them to represent themselves before a jury trial. So, they then have to incur the cost of an attorney and it will certainly mean that any of the smaller cases it will be much more difficult for them to be pursued at all and this will mean that they will not be able to vindicate their rights.

RUB

I can't emphasize enough that we are talking about a very important statute in this state which is our anti-discrimination statute. It is meant to offer protections to the least vulnerable, I mean the most vulnerable people in our society. It is a people who are pregnant and who need their job and are working for an employer who might make the decision to terminate them based on their pregnancy because it is inconvenient. We are talking about people who are employees who are disabled who it may be a burden for an employer to have to reasonably accommodate them and that when the employer learns of their need for accommodation, it is most cost-effective for the employer to simply terminate that employee's employment than to have to reasonably accommodate them. So, we are talking about a statute with very lofty goals that is meant to protect employees and employees really have so much less bargaining power than the employer.

Apart from the employers that Representative O'Brien talked about, those who have one or two employees, there are many large businesses in New Hampshire and there are certainly many, many, many businesses that have a number of employees that make the employer much more able to wage a battle in court than a small employee does and there are so many employees who would not be able to pursue their rights at all if their cases are bumped out of the Commission and go to court.

So, I would be happy to answer any questions you might have.

Senator Deborah R. Reynolds, D. 2: Thank you for your testimony. Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Thank you. You mention employees, but oftentimes landlords are just a single employer that settles. This also falls under housing, doesn't it?

Attorney Burns: It does. Unfortunately, I won't be able to speak to the housing aspect of it because I am really an employment attorney and my practice is limited to representing employees. I'm sorry, but I really can't answer your questions about the landlord piece of things.

Senator Deborah R. Reynolds, D. 2: Any other questions? Thank you very much.

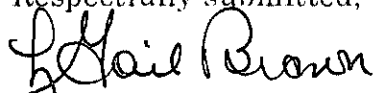
Attorney Burns: Thank you.

Senator Deborah R. Reynolds, D. 2: And, I'm seeing that I have managed to get us about forty-five minutes behind schedule and apologize. There is no

one else who is signed to speak in opposition or support of the bill. I'm going to close the hearing. Thank you very much.

Hearing concluded at 4:15 p.m.

Respectfully submitted,

A handwritten signature in black ink that reads "L. Gail Brown". The signature is written in a cursive, flowing style.

L. Gail Brown

Secretarial Supervisor

7/1/09

3 Attachments



# State of New Hampshire

Attachment #1

HOUSE OF REPRESENTATIVES

CONCORD

Testimony of Rep. Melanie Levesque  
Prime Sponsor HB 686  
May 26, 2009

Madame Chairperson and Senate Judiciary members my name is Representative Melanie Levesque Hillsborough District V. I am the primary sponsor and a supporter of HB 686 which addresses the choice of forum in which a Human Rights complaint can be heard.

The Human Rights commission is 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.

HB 686 solves a problem: right now a company can force an employee out of the Human Rights Commission to court, delaying her discrimination hearing by years, and causing her to incur thousands of dollars of attorney fees.

This bill would re-establish the normal rule: that it is the person with the case-to-prove who decides if she is in court, or if she is in a state agency. The U.S. Supreme Court supports giving the choice of forum to the one with the claim, and that's what this bill does.

This bill will affect only 4-6 cases per year, but that is 4-6 fewer jury trials in the overburdened superior court system. And that is 4-6 victims of discrimination who are not forced into a court against their will.

I am privileged to be a member of this legislature, and had the opportunity to own a business, to live where I choose to live, but my parents were not as fortunate.

My parents came to New Hampshire for a good job and a place to bring up their children. When they tried to buy a house, they were denied because they were Black. had there been a Human Rights Commission, they could have brought this claim to the Commission. Under today's laws, they could have been forced to hear the complaint in court, which would be a long and costly endeavor.

I gave an example of my parents experience 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.

HB 686 ensures that if, and when, discrimination occurs and the case is brought to the Human Rights Commission, that, it is person who makes the claim that retains the right to choose where their case will be heard.

**FACT SHEET HB 686**HB 686 Provides Human Rights Commission Filer (Complainant) With Choice of Forum<sup>1</sup>

**PROBLEM:** Current law allows the respondent (employer/landlord/proprietor) to force a complainant to court once a case has been scheduled for a hearing before the N.H. Commission for Human Rights (HRC), delaying the case resolution by 1-2 years, even when the complainant who brought the case has no attorney and wants to stay at the HRC for a less formal, inexpensive hearing.

**REASON:** In 2000, with the support of the HRC, RSA 354-A was amended so that complainants could opt out of the Commission and take their cases to superior court for jury trial. Why? Because employees *represented by counsel* were often already headed to court on other claims, including federal discrimination claims, wage claims and wrongful termination claims. It made/makes sense to let those employees add to their existing suits the state discrimination claims, instead of forcing them to litigate the same facts at the same time in two forums: court and the Commission. **Unfortunately, during the legislature's deliberations**, opponents raised a (since reversed!) Massachusetts Supreme Court case which had held that under Massachusetts law, it was unconstitutional to give only one of the two parties a jury trial option.<sup>2</sup> The N.H. legislature (mistakenly) concerned that there would be a similar ruling in N.H., felt it had to give *both* parties the right to opt out of the HRC for a jury trial, **and created the Problem described above.**

**PROBLEM EXAMPLE:** One pregnancy discrimination complainant filed her case in May 2005; she received a Probable Cause determination in May 2007; an HRC 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.

**SOLUTION: HB 686:** The person filing the case decides whether to stay at the HRC, or go to court.

**CONSTITUTIONALITY: HB 686 is constitutional giving that choice to only the claimant. Why?** Because there is no constitutional right to a jury trial under RSA 354-A for either party so it is constitutional to limit the forum choice to the claimant: Part I, Article 20 of our State Constitution extends the right to a trial by jury only to those "*cases for which the right existed when the constitution was adopted in 1784,*" **but not** "*to special, statutory or summary proceedings unknown to the common law*" [like discrimination cases under 354-A which did not exist at common law], Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 450 (1994).

**SOME NUMBERS:** This bill will affect only the 4-6 cases per year removed by respondents. Between 2002-2008, 2214 cases were filed at the HRC. Most cases were resolved by administrative closure, many of these by negotiated settlement. *Of the unresolved cases which received a full and fair investigation*, 528 received "No Probable Cause" (NPC) determinations; and 127 received "Probable Cause" (PC) determinations. Only PC cases are scheduled for a hearing. 29 of those 127 PC cases were removed to court by the respondents during 2002-2008 (4-6 per year).

<sup>1</sup> This fact sheet was created by Nancy Richards-Stower, former member and Chair of the N.H. Commission for Human Rights (1979-1985), Law Offices of Nancy Richards-Stower, 32 Daniel Webster Highway, Suite 7, Merrimack, NH.03054.

<sup>2</sup> The case causing the concern in 2000 was, *Lavelle v. Mass. Commission Against Discrimination*, 426 Mass 332, at 335 (1997), **reversed in 2002** by *Stonehill College v. Mass. Commission Against Discrimination*, 441 Mass 549 (2002). *Stonehill* cited the U.S. Supreme Court in support of limiting the jury trial option to the complainant before the Mass. Commission Against Discrimination: "*It is reasonable, and constitutionally permissible, to provide a complainant with a choice of enforcement options. The United States Supreme Court has long recognized that the right to choose the forum "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)." (*Stonehill College*, at 565). In Massachusetts, now, after an MCAD hearing, the losing party may appeal only on issues of law to court as can/will a losing party at the HRC.

Attachment #3

**Law Offices of Nancy Richards-Stower**

32 Daniel Webster Highway, Suite 7

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*

May 26, 2009

Re: HB 686: limiting to the employee with the claim the right to choose to stay at the Human Rights Commission or go to court.

Dear Members of the Senate Judiciary Committee:

Below is the text of the letter I sent to each of you individually back in April :

I ask for your enthusiastic support for HB 686, which is assigned to the Judiciary Committee after passing the House. HB 686 would let the person with a claim at the Human Rights Commission (HRC) choose whether to stay at the HRC or go to court. Since 2000, the respondent has been able to force a claimant into court against her will, resulting in a 2-year delay (in addition to the 1 ½ year process at the HRC) before a case is resolved. Justice delayed is justice denied. This bill will save the overburdened jury trial system 4-6 cases per year.

A one page fact sheet is attached which explains the history of the jury trial option, the problem a 2000 amendment created, and that it is constitutional to limit the jury trial option to the person with the claim to prove. I have provided the Constitutional case law for your convenience (and to counteract the contrary false assertions by opponents).

***Please take two minutes to review the attached fact sheet and call or email me with any questions.***

It has been thirty years since Governor Hugh Gallen nominated me to serve, first as a Commissioner, then as Chair of the HRC (1979-1985). I continue to support the HRC and its mission, and applaud its excellence. Over the past three decades, I have partnered with others to strengthen the HRC statute (RSA 354-A) 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". Please, please support HR 686.

Very truly yours,

Nancy Richards-Stower

**SENATE CALENDAR NOTICE  
JUDICIARY**

- ✓ Senator Deborah Reynolds Chairman
- ✓ Senator Bette Lasky V Chairman
- ✓ Senator Matthew Houde
- ✓ Senator Sheila Roberge
- ✓ Senator Robert Letourneau

For Use by Senate Clerk's Office ONLY	
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**Date: January 14, 2010**

**EXECUTIVE SESSIONS**

**Tuesday 1/19/2010**

JUDICIARY	SH 103	3:15 PM
(Name of Committee)	(Place)	(Time)

**EXECUTIVE SESSION ON PENDING LEGISLATION**

- |   |   |
|---|---|
| <p>HB230</p> <p>HB621</p> <p>✓ HB686</p> <p>SB120</p> | <p>relative to the burden of proof for a finding of abuse in domestic violence cases.</p> <p>(New Title) relative to establishing procedures for identifying criminal defendants who may have a mental illness.</p> <p>relative to complaint procedures in cases before the commission for human rights.</p> <p>relative to nonemergency involuntary admissions and permitted condition of conditional discharge from a mental health facility.</p> |
|---|---|

**Sponsors:**

**HB230**

Rep. David Nixon

**HB621**

Rep. Christine Hamm  
Sen. Jacalyn Cilley

**HB686**

Rep. Melanie Levesque  
Rep. Angeline Kopka

**SB120**

Sen. Bette Lasky

Rep. Cindy Rosenwald  
Rep. Gene Charron

Rep. Joan Schulze

Rep. Peter Batula

Rep. Patricia McMahon  
Rep. Jordan Ulery

Sen. Bette Lasky

Rep. Jane Clemons

Rep. Philip Preston

# Speakers



# SENATE JUDICIARY COMMITTEE

Date: 5/26/09

Time: 3:15 p.m. Public Hearing on HB 686

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

Please check box(es) that apply:

	SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
4	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	William O'Brien	Hillsborough Dist. 4
	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Claire Ebel	NHCLU
	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Timothy Horroga	Stafford #7
	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Melody for Teresa Rosenberger	Nashua Chamber
4	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Rep Melanie Levesque	Spencer Hills 7
4	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Rep Riccio McMaher	Co-sponsor Men # 3
4	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Kevin Smith	CPR-Action
4	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Nancy Richards-Stower	self-civil rights attorney
4	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	MICHAEL LICATA	BIA
	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Heather Burns	self-employment atty
	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Rep Fran Wendelboe	Belknap 1
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-would like to speak last

# Testimony

HB 686

**Please Support HB 686: It repairs a civil rights law problem.**

**The Problem:** 4-6 times per year since 2000, a person with an RSA 354-A discrimination claim pending at the N.H. Commission for Human Rights has been yanked out of the Commission and forced into court by the respondent. Not only does this force her to incur otherwise unnecessary costs and fees, but it delays the resolution of her case by 1-3 years, often with the result that she must severely compromise (or drop) her claims. Justice delayed is justice denied.

**The History:** Back in the late 1990's, with the backing of the HRC, the civil rights community urged that RSA 354-A be amended so that claimants with attorneys could bring their discrimination claims in court in the same suit as all their other pending legal claims, rather than having to proceed in two forums (HRC and Court) at the same time. *Very unfortunately*, during the amendment process, respondents (employers) incorrectly, but persuasively, argued that it would be unconstitutional to give only the claimant the option to go to court, citing a (since reversed) 1997 Massachusetts Supreme Judicial Court (SJC) decision ("Lavelle"). Thus, the resultant 2000 compromise amendment, as passed, gave the "court option" to both parties, resulting in "The Problem" described above.

**The constitutional law supports giving the "choice of forum" to only the claimant:<sup>1</sup>**

Part I, Article 20 of our State Constitution extends the right to a trial by jury "to all cases for which the right existed when the constitution was adopted in 1784," but not "to special, statutory or summary proceedings unknown to the common law." (emphasis added) Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 450 (1994). Thus, N.H. wage claimants can choose either an administrative hearing at NH DOL under RSA 275:51(V) or, they can bring their wage claims in court under RSA 275:53. Simply put: there is no "constitutional right to a jury trial" for respondents under RSA 354-A.

**The solution:** HB 686, which limits to the claimant the right to remove a case from the Commission. This will eliminate 5-7 jury trial filings per year, resulting in significant cost and time savings to the superior court system.

---

<sup>1</sup>Note: the above-referenced Massachusetts SJC "Lavelle" decision was wrong and has since been reversed by (Stonehill College v. Mass. Commission Against Discrimination, 441 Mass 549 (2002) which reads:

*"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 (Id., at 564, emphasis added)...It is reasonable and constitutionally permissible, to provide a complainant with a choice of enforcement options [as the] United States Supreme Court has long recognized." (Id., at 565).*

## Cote, Marty

---

**From:** Nancy Richards-Stower [nrichardssto@igc.org]  
**Sent:** Friday, September 11, 2009 8:50 PM  
**To:** Reynolds, Deborah  
**Cc:** Lasky, Bette; Levesque Melanie; Nancy Richards-Stower  
**Subject:** HB 686: to limit choice of forum to victim of discrimination

**Attachments:** why HB 686.pdf; ATT9158019.txt; Removal to federal court from state court Hernandez v. Osram removal.pdf; ATT9158020.txt; federal court order .pdf; ATT9158021.txt; Federal Court docket Hernandez case.pdf; ATT9158022.txt



why HB 686.pdf  
(145 KB)



ATT9158019.txt  
(68 B)



Removal to federal  
court from ...



ATT9158020.txt  
(70 B)



federal court order  
.pdf (190 ...



ATT9158021.txt  
(66 B)



Federal Court  
docket Hernandez...



ATT9158022.txt  
(72 B)

Dear Senators Reynolds and Lasky:

I'm following up on HB 686 and to you, as Chair and Vice-Chair of Senate Judiciary which will be taking up the bill again sometime in the future. I write at this time because I have just been made aware of an outrageous miscarriage of justice caused by the present law (aimed to be fixed by HB 686). Here is the evidence you requested.

Attached are:

1. a one page description of the problem to be solved by the bill which passed the House (which I had provided during the hearings last session) "why HB 686".
2. An actual example of a removal petition to federal court from state court filed by Osram Sylvania which petition tells the procedural nightmare created by Osram under present law : removal from Human Rights Commission by the employer first to state court and then (because of federal diversity laws) to federal court.
3. Federal court order: acknowledging the shabby treatment this unrepresented/Pro Se employee (no lawyer) got from the corporate counsel representing Osram Sylvania.
4. Federal docket sheet showing all federal court activity to date

Had Respondent not been able to remove, the employee would have had a simple administrative hearing at the Human Rights Commission in 2008. Instead, he is thrashing around in federal court, still without an attorney, a year later. It is outrageous that an hourly employee who speaks little English and has no lawyer can be yanked from our stage agency by a giant corporation to federal court.

I so want to assist the Senate Judiciary Committee to find its voice to support HB 686 and return to the employee the choice of where to have her/his claim heard.

No other state in the country grants the right to an employer to dictate where an employee's discrimination case will be held. Neither should New Hampshire. It was a legislative mistake to have ever done so and we should have the courage to admit it and fix that mistake with HB 686.

Dates in this case: March 2006 discrimination occurs; employee

files at HRC w/o an attorney as the agency is set up to do  
May 2006  
March 2008

Human Rights Commission filing:  
Probable Cause Determination (which, but for

the  
removal would have = agency hearing)

June 2008

Corporate Respondent Removed Case to state

court:

July 2008

Corporate Respondent Removed Case from

state court to federal court

October 2009

Future federal court trial date

Thank you for your attention this civil rights justice matter.

Nancy Richards-Stower  
Law Offices of Nancy Richards-Stower  
32 Daniel Webster Highway, Suite 7  
Merrimack, NH 03054  
cell: 617-877-4781  
office: 603-881-3312  
office fax: 781-544-3637  
nrichardssto@igc.org  
www.jobsandjustice.com

# Voting Sheets

# Senate Judiciary Committee

## EXECUTIVE SESSION

Bill # HB686

Hearing date: 5/26/09

Executive session date: 5/28/09

Motion of: refer

VOTE: 5-0

Made by Reynolds   
Senator: Lasky   
 Houde   
 Letourneau   
 Roberge

Seconded Reynolds   
by Senator: Lasky   
 Houde   
 Letourneau   
 Roberge

Reported Reynolds   
by Senator: Lasky   
 Houde   
 Letourneau   
 Roberge

Motion of: \_\_\_\_\_

VOTE: \_\_\_\_\_

Made by Reynolds   
Senator: Lasky   
 Houde   
 Letourneau   
 Roberge

Seconded Reynolds   
by Senator: Lasky   
 Houde   
 Letourneau   
 Roberge

Reported Reynolds   
by Senator: Lasky   
 Houde   
 Letourneau   
 Roberge

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Reynolds, Chairman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Senator Lasky, Vice-Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Houde	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Letourneau	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Roberge	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

\*Amendments: \_\_\_\_\_

Notes: \_\_\_\_\_

# Senate Judiciary Committee

## EXECUTIVE SESSION

Bill # HB686

Hearing date: 5/26/09

Executive session date: 1/19/10

Motion of: ITL

VOTE: 4-1 Lasky

**Made by** Reynolds   
**Senator:** Lasky   
 Houde   
 Letourneau   
 Roberge

**Seconded** Reynolds   
**by Senator:** Lasky   
 Houde   
 Letourneau   
 Roberge

**Reported** Reynolds   
**by Senator:** Lasky   
 Houde   
 Letourneau   
 Roberge

Motion of: \_\_\_\_\_

VOTE: \_\_\_\_\_

**Made by** Reynolds   
**Senator:** Lasky   
 Houde   
 Letourneau   
 Roberge

**Seconded** Reynolds   
**by Senator:** Lasky   
 Houde   
 Letourneau   
 Roberge

**Reported** Reynolds   
**by Senator:** Lasky   
 Houde   
 Letourneau   
 Roberge

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Reynolds, Chairman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Lasky, Vice-Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Houde	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Letourneau	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Roberge	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

\*Amendments: \_\_\_\_\_  
 \_\_\_\_\_

Notes: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_



# Committee Report

STATE OF NEW HAMPSHIRE  
SENATE  
REPORT OF THE COMMITTEE

Date: May 28, 2009

THE COMMITTEE ON Judiciary  
to which was referred House Bill 686

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

Having considered the same, the committee recommends that the Bill:

**BE RE-REFERRED TO COMMITTEE**

BY A VOTE OF:    5-0

AMENDMENT #        s

Senator Deborah R. Reynolds  
For the Committee

L. Gail Brown 271-3076

## New Hampshire General Court - Bill Status System

**Docket of HB686**

Docket Abbreviations

**Bill Title:** relative to complaint procedures in cases before the commission for human rights.*Official Docket of HB686:*

<b>Date</b>	<b>Body</b>	<b>Description</b>
01/08/2009	H	Introduced and Referred to Commerce and Consumer Affairs; <b>HJ 12</b> , PG.238
02/04/2009	H	Vacated from Commerce & Consumer Affairs and Referred to Judiciary; <b>HJ 13</b> , PG.240
02/04/2009	H	Public Hearing: 3/3/2009 2:00 PM LOB 208
03/04/2009	H	Executive Session: 3/9/2009 11:00 AM LOB 208
03/19/2009	H	Majority Committee Report: Ought to Pass for Mar 24 <b>RC</b> (vote 8-5); <b>HC 22</b> , PG.686
03/19/2009	H	Minority Committee Report: Inexpedient to Legislate; <b>HC 22</b> , PG.686
03/24/2009	H	Special Ordered to Mar 25 Without Objection; <b>HJ 25</b> , PG.914
03/25/2009	H	Ought to Pass: MA <b>RC</b> 172-152; <b>HJ 27</b> , PG.1127-1129
03/25/2009	H	Reconsideration (Rep Levesque): MF DIV 138-180; <b>HJ 27</b> , PG.1129
04/08/2009	S	Introduced and Referred to Judiciary
05/14/2009	S	Hearing; === Time Change === May 26, 2009, Room 103, State House, 3:15 p.m.; <b>SC25</b>
05/28/2009	S	Committee Report; Rereferred to Committee [06/03/09]; <b>SC26</b>
06/03/2009	S	Without Objection, Chair moved to Special-Order HB 686 to the front of the Calendar
06/03/2009	S	Rereferred to Committee, MA, VV

NH House

NH Senate

Contact Us

*New Hampshire General Court Information Systems*  
 107 North Main Street - State House Room 31, Concord NH 03301

STATE OF NEW HAMPSHIRE  
SENATE  
REPORT OF THE COMMITTEE

Date: January 20, 2010

THE COMMITTEE ON Judiciary

to which was referred House Bill 686

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

Having considered the same, the committee recommends that the Bill:

**IS INEXPEDIENT TO LEGISLATE**

BY A VOTE OF:   4-1

AMENDMENT #        s

Senator Robert J. Letourneau  
For the Committee

L. Gail Brown 271-3076

STATE OF NEW HAMPSHIRE  
SENATE  
REPORT OF THE COMMITTEE

Date: January 20, 2010

THE COMMITTEE ON Ways and Means  
to which was referred House Bill 686

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

Having considered the same, the committee recommends that the Bill:

**IS INEXPEDIENT TO LEGISLATE**

BY A VOTE OF:    4-1

AMENDMENT #        s

Senator Robert J. Letourneau  
For the Committee

L. Gail Brown 271-3076

## New Hampshire General Court - Bill Status System

**Docket of HB686**

Docket Abbreviations

**Bill Title:** relative to complaint procedures in cases before the commission for human rights.*Official Docket of HB686:*

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05/28/2009	S	Committee Report; Rereferred to Committee [06/03/09]; <b>SC26</b>
06/03/2009	S	Without Objection, Chair moved to Special-Order HB 686 to the front of the Calendar; <b>SJ 18</b> , Pg.398
06/03/2009	S	Rereferred to Committee, MA, VV; <b>SJ 18</b> , Pg.505

NH House

NH Senate

Contact Us

*New Hampshire General Court Information Systems*  
 107 North Main Street - State House Room 31, Concord NH 03301

## New Hampshire General Court - Bill Status System

**Docket of HB686**

Docket Abbreviations

**Bill Title:** relative to complaint procedures in cases before the commission for human rights.*Official Docket of HB686:*

<b>Date</b>	<b>Body</b>	<b>Description</b>
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02/04/2009	H	Vacated from Commerce & Consumer Affairs and Referred to Judiciary; <b>HJ 13</b> , PG.240
02/04/2009	H	Public Hearing: 3/3/2009 2:00 PM LOB 208
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05/14/2009	S	Hearing; === Time Change === May 26, 2009, Room 103, State House, 3:15 p.m.; <b>SC25</b>
05/28/2009	S	Committee Report; Rereferred to Committee [06/03/09]; <b>SC26</b>
06/03/2009	S	Without Objection, Chair moved to Special-Order HB 686 to the front of the Calendar; <b>SJ 18</b> , Pg.398
06/03/2009	S	Rereferred to Committee, MA, VV; <b>SJ 18</b> , Pg.505
01/20/2010	S	Committee Report; Inexpedient to Legislate 1/27/10; <b>SC4</b>
01/27/2010	S	Inexpedient to Legislate, MA, VV === BILL KILLED ===; <b>SJ 4</b> , Pg.52

NH House

NH Senate

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*New Hampshire General Court Information Systems*  
 107 North Main Street - State House Room 31, Concord NH 03301

# Other Referrals



# COMMITTEE REPORT FILE INVENTORY

HB686 ORIGINAL REFERRAL

\_\_\_\_\_ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

- DOCKET (Submit only the latest docket found in Bill Status)
- COMMITTEE REPORT
- CALENDAR NOTICE on which you have taken attendance
- HEARING REPORT (written summary of hearing testimony)
- HEARING TRANSCRIPT (verbatim transcript of hearing)  
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: 1-3
- SIGN-UP SHEET

**ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:**

\_\_\_\_\_ - AMENDMENT # \_\_\_\_\_      \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_  
\_\_\_\_\_ - AMENDMENT # \_\_\_\_\_      \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_

**ALL AVAILABLE VERSIONS OF THE BILL:**

AS INTRODUCED      \_\_\_\_\_ AS AMENDED BY THE HOUSE  
\_\_\_\_\_ FINAL VERSION      \_\_\_\_\_ AS AMENDED BY THE SENATE

**PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)**

List by letter [ a thru g or a, b, c, d] here: \_\_\_\_\_

EXECUTIVE SESSION REPORT

\_\_\_\_\_ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):  
\_\_\_\_\_

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 7/7/09

Neil Brown  
COMMITTEE SECRETARY

# COMMITTEE REPORT FILE INVENTORY

\_\_\_\_\_ ORIGINAL REFERRAL

HB686 RE-REFERRAL

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\_\_\_\_\_ SIGN-UP SHEET

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\_\_\_\_\_ - AMENDMENT # \_\_\_\_\_      \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_  
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\_\_\_\_\_ FINAL VERSION      \_\_\_\_\_ AS AMENDED BY THE SENATE

\_\_\_\_\_ PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)

List by letter [ a thru g or a, b, c, d] here: \_\_\_\_\_

EXECUTIVE SESSION REPORT

OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK

1/20/10

D. Gail Brown

COMMITTEE SECRETARY

# COMMITTEE REPORT FILE INVENTORY

\_\_\_\_\_ ORIGINAL REFERRAL

HB686 RE-REFERRAL

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List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: \_\_\_\_\_

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ALL AVAILABLE VERSIONS OF THE BILL:

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\_\_\_\_\_

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 10/13/10

D. Blair Brown  
COMMITTEE SECRETARY