Civil Rights Work Group:

DISCRIMINATION AGAINST DISABLED PERSONS BY PLACES OF PUBLIC ACCOMODATION

SB 235

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Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Civil Rights Work Group proposes this bill with the following objective:

> To require places of public accommodation to remove barriers and provide auxiliary aids and services when necessary to provide disabled persons access to goods, services, facilities, privileges, advantages, and accommodations offered by places of public accommodation.

History of Reform Efforts

In 2001, the Oregon legislature enacted legislation recommended by the Oregon Law Commission's Civil Rights Work Group to reorganize ORS Chapter 659 and amend other statutes outside Chapter 659 relating to unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the reorganization bill. HB 2275 (2003) restored "age" as a protected class in the public

accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Right Work Group[1] in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

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[1] The Work Group included the following members:

Jeffrey Chicoine	Newcomb, Sabine, Schwartz, and Landsverk LLP
Barbara Diamond	Smith, Diamond & Olney
Corbett Gordon	Fisher & Phillips LLP
Bob Joondeph	Oregon Law Center
David Nebel	OSB
Marcia Ohlemiller	BOLI
Louis Savage	DCBS

Interested Participants:

Patricia Altenhofen	Cascade Employers
Leslie Bottomly	Ater Wynne LLP
Barbara Brainard	Stoel Rives LLP
Clay Creps	Bullivant, Houser, Bailey PC
Patricia Haim	Amburgey & Rubin PC
Sandra Hansberger	Lewis & Clark Clinic
Victor Kisch	Tonkon Torp LLP
Stacey Mark	Ater Wynne LLP
Andrea Meyer	ACLU
Karen O'Kasey	Hoffman, Hart & Wagner LLP
Kathy Peck	Williams, Zografos & Peck PC
Edward Reeves	Stoel Rives LLP
Dennis Steinman	Kell, Alterman & Runstein LLP
Diana Stuart	Goldberg, Mechanic, Stuart & Gibson LLP
Nathan Sykes	Schwabe, Williamson & Wyatt PC
Annette Talbott	BOLI
Jerry Watson	Oregon Law Commission

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

Statement of the Problem Area

The Americans with Disability Act, 42 U.S.C. §§ 12101 et seq., prohibits discrimination on the basis of disability in employment, activities of state and local government, public accommodations, commercial facilities, transportation, and telecommunications. Title III covers specifically businesses and nonprofit service providers that are public accommodations. Public accommodations are entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs.

The ADA requires that public accommodations comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.

Oregon has a corollary state statutory provision that is found in ORS 659A.142. But, Oregon's public accommodation statute has been construed to provide less protection from disability discrimination than the federal statute. Oregon's Bureau of Labor and Industries' administrative rules, however, do provide for more protections; these administrative rules were designed to more closely match the federal standards.

The Federal District Court of Oregon, however, has consistently held that Oregon state law (specifically ORS 659A.142(3)) does not mandate the "reasonable accommodation" requirements that the ADA requires. The Court seems to have ignored or discounted the BOLI rules altogether. See e.g. Sellick v. Denny's , Inc., 884 F. Supp. 388, 393 (D. Or. 1995); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 773 (D. Or. 1997); Alford v. City of Cannon Beach, 2000 WL 33200554, 14-15 (D. Or. Jan. 17, 2000); Oregon Paralyzed Veteran of America v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293 (2001), rev'd on other grounds 339 F. 3d 1126 (2003). The District Court has reasoned that ORS 659A.142 "was not intended to provide a right to recover damages for deficiencies in the design of a structure and that 'the language of the statute . . . suggests active conduct of some sort, especially conduct that is targeted at a specific individual." Independent Living Resources, 982 F.Supp. at 773. Likewise, the Honorable Robert E. Jones has ruled that the statute does not impose a "reasonable accommodation" requirement for public accommodations. Sellick v. Denny's Incorporated, 884 F.Supp. 388, 393 (D.Or.1995). There has been no appellate analysis of the statute in the Oregon state courts. There is very little legislative history on the statute.

These opinions point out the need to amend the state statute to not only prohibit overt discrimination against disabled persons but also to clearly require places of public accommodation to actively provide reasonable accommodations, so as to truly make such places and services accessible. One of the reasons for reform is that it would be better for places of public accommodation to need to comply with one standard—that is, it isn't logical for the actions of a place of public accommodation to meet the state standard but fail the federal standard. Amending the ORS will also assure that BOLI's administrative rules detailing public accommodation requirements and exceptions are within the scope of the authorizing statute.

Objective of the Proposed Bill

The objective is to amend ORS 649A.142 to more closely parallel the federal ADA public accommodation requirements. Oregon's present statute does not clearly mandate what is often referred to as "reasonable accommodation" requirements. Protection from disability discrimination is not truly meaningful without such a requirement.

Proposal

See SB 235 (2005) and Proposed Amendment, SB 235-1.

Section 1

Section 1 of the bill amends ORS 659A.142.

The changes in subsections (1) and (2) reflect Legislative Counsel drafting style changes to ORS 659A.142.

Deletion of the phrase "resort or amusement" in subsection (3)(a) reflects the fact that the term "public accommodation" include resorts and amusement places and is thus redundant and confusing. See ORS 659A.400;[2] §12181(7), 42 USC 126 (1994)(ADA definition of "public accommodation").

The new provisions provided for in subsections (3)(b), (c), (d), are intended to codify what is commonly referred to as the ADA's reasonable accommodation requirements. The actual text of this section of the bill is derived from a blending of the ADA, the ADA implementing regulations, and Oregon Bureau of Labor and Industries

[2] **659A.400. Place of public accommodation, defined**
(1) A place of public accommodation, subject to the exclusion in subsection (2) of this section, means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.

(2) However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private.

(BOLI) administrative rule wording.[3] Note though that the phrase "reasonable accommodation" is not used in the bill because that phrase is not used in Title III of the ADA, but is a term used in speaking about the area of law by those who practice ADA law. Regarding the list of things offered by a public accommodation, the bill uses the ADA list of "goods, services, facilities, privileges, advantages, and accommodations" for consistency.

Specifically, subsection (3)(b) requires the removal of physical barriers to enter and use facilities. This subsection is modeled after §12182(b)(2)(A)(iv), 42 USC 126 (1994) of the ADA and OAR 839-006-0310(1).

Subsection (3)(c) requires places of public accommodation to provide auxiliary aids and services to ensure equal access to goods, services, facilities, privileges, advantages, and accommodations. This subsection is modeled after §12182(b)(2)(A)(iii), 42 USC 126 (1994) of the ADA and OAR 839-006-0320(1),(2).

Subsection (3)(d) requires the removal of physical and administrative barriers to accessing goods and services.

Subsection (3)(d)(A) is modeled after §12182(b)(1)(D), 42 USC 126 (1994) of the ADA (regarding administrative barriers), §12182(b)(2)(A)(iv), 42 USC 126 (1994) of the ADA (regarding structural barriers), and OAR 839-006-0330(1).

Subsection (3)(d)(B) is modeled after §12182(b)(2)(A)(iv), (v), 42 USC 126 (1994) of the ADA (regarding required alternative steps if removal is not readily achievable) and OAR 839-006-0330(2).

The examples listed in (3)(d)(B)(i)-(v) come largely from 28 CFR § 36.305 (2004) and OAR 839-006-0330(2).

Subsection (3)(d)(C) is modeled after 28 CFR § 36.301(c) and OAR 839-006-0330(3) which provide that a place of public accommodation may not impose charges on disabled persons for the recovery of costs of barrier removal. Also, the ADA definition of "readily achievable" implies that the costs will be paid by the facility because the factors to be considered in determining whether removal is readily achievable include the cost of the needed action, the financial resources of the facility, and the overall financial resources of the entity. §12181(9), 42 USC 126 (1994).

Subsection (3)(e) provides the "direct threat" exception to the reasonable accommodation requirements. This subsection is modeled after §12182(b)(3), 42 USC 126 (1994) and OAR 839-006-0335(1).

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[3] See Americans with Disability Act, § 12181-12182, 42 USC 126 (1994); 28 CFR § 36.301 (2004); 28 CFR § 36.305 (2004); and OAR 839-006-0300 through OAR 839-006-0335 (all attached).

Subsection (4)(a) provides BOLI with authority to adopt administrative rules necessary for the administrative and enforcement of subsection (3). The Civil Rights Work Group decided to leave the details of the reasonable accommodation requirements to administrative rule. Thus, subsection (3) provides the essential elements and protections but does not provide a lot of details. This was done because this area of law changes often and BOLI is able to keep up with case law and federal law advances more expeditiously than the legislature. Also, BOLI has already developed rules in this area.

Subsection (4)(b) provides that subsection (3) of the bill is to be construed to the extent possible in the manner that is consistent with the ADA. The Civil Rights Work Group's goal was to have the statute parallel the federal ADA. This section helps ensure that questions of statutory construction will be resolved to follow the ADA.

Section 2

This section deletes "resort or amusement" because the term "public accommodation" includes resorts and amusement placement and is thus redundant and confusing. See ORS 659A.400; §12181(7), 42 USC 126 (1994)(ADA definition of "public accommodation").

Section 3

Section 3 provides that amendments to the ORS made by this bill apply only to conduct occurring on or after the effective date of the Act. An emergency clause is provided and thus the Act will become effective upon passage.

Amendment Note

Amendments to the bill were made in the Senate. These amendments were approved by the Work Group and the Law Commission. The amendments simply were finalized after the bill was pre-session filed. The amendments were incorporated into the above report discussion.