

Memorandum

To: J. L. Wilson
Associated Oregon Industries

From: James N. Gardner, Esq.
Gardner & Gardner, Attorneys, PC

Date: May 11, 2009

Re: Analysis of the Constitutionality of Oregon Senate Bill 519 (A-Eng.)
Under Article I, Section 8 of the Oregon Constitution

Question Presented: Would Oregon Senate Bill 519 (A-Eng.), if enacted, be constitutional under Article I, section 8 of the Oregon Constitution?

Answer: No, because the bill selectively restricts certain employer/employee communications but not other employer/employee communications, based solely on the content of the communication.

Analysis

I Senate Bill 519 (A-Eng.)

SB 519 (A-Eng.) provides in pertinent part as follows:

SECTION 2. (1) An employer or the employer's agent, representative or designee may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee: (a) Who declines to attend or participate in an employer-sponsored meeting or communication with the employer or the agent, representative or designee of the employer if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters.

The bill defines "political matters" as follows:

SECTION 1. (5) "Political matters" includes political party affiliation, campaigns for legislation or candidates for political office and the decision to join, not join, support or not support any lawful political or constituent group or activity.

The term "constituent group" is defined as follows:

SECTION 1. (1) "Constituent group" includes, but is not limited to, civic associations, community groups, social clubs and mutual benefit alliances, including labor organizations.

II Article I, Section 8 of the Oregon Constitution

Article I, section 8 of the Oregon Constitution provides as follows:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever; but every person shall be responsible for the abuse of this right.

III SB 519 (A-Eng.) Would, If Enacted, Violate Article I, Section 8

In a long line of decisions beginning with *State v. Robertson*, 293 Or 402 (1982), and culminating most recently with *Outdoor Media Dimensions, Inc. v. Department of Transportation*, 340 Or 275 (2006), the Oregon Supreme Court has ruled consistently that Article I, section 8 “prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.” *State v. Robertson, supra*, 293 Or at 416.

In the recent *Outdoor Media Dimensions, Inc.* decision, the Supreme Court applied this rule to invalidate a restriction on outdoor advertising on the ground that “[t]he legislature’s decision to limit one of those types of expression [off-premises signs] more stringently than the other [on-premises signs] because of its content is an impermissible restriction on the ‘subject’ of expression under Article I, section 8.” 340 Or at 297.

In an earlier case, the Oregon Supreme Court invalidated a statute that prohibited the use of an automatic telephone dialing and announcing device to solicit the purchase of any realty, goods, or services because the law was applicable only to those messages soliciting commercial services or goods and was inapplicable to any other type of message. Because of this limitation, the court ruled that the law “restricts expression [in violation of Article I, section 8] because it is directed at a specific subject of communication, excluding some speech based on the content of the message.” *Moser v. Frohnmayer*, 315 Or 372, 376 (1993).

Under the principles of *Robertson* and its progeny, SB 519 (A-Eng.) would, in enacted, violate Article I, section 8. In the words of the Supreme Court’s opinion in *Outdoor Media Dimensions, Inc.*, SB 519 (A-Eng.) would “distinguish between messages on the basis of what they say” and permit an employer to require attendance at certain types of meetings that are intended to communicate a message but not at other types of meetings intended to communicate a message “solely because of the content of the message.” 340 Or at 298-299.

For instance, while SB 519 (A-Eng.) would prohibit an employer from requiring employees to attend a meeting the primary purpose of which was to communicate the employer’s opinion regarding *political* aspects of the global warming debate, nothing in the bill would prohibit an employer from requiring employees to attend a meeting the primary purpose of which was to communicate the employer’s opinion regarding *scientific, economic or environmental* aspects of the global warming debate.

IV Conclusion

Because SB 519 (A-Eng.) selectively restricts certain employer/employee communications based solely on their content, the bill would, if enacted, violate Article I, section 8 of the Oregon Constitution.