

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1084

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1084

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1084

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-5-05

Tape Number  
2

Side A  
x

Side B

Meter #  
29.8-end

Committee Clerk Signature



Minutes:

**Chairman Keiser:** Opened the hearing on **HB 1084**.

**Jo Zschomler, Director, Risk Management (OMB):** Appeared in support of HB 1084.

(See attached written testimony).

**Representative Ekstrom:** Are we in a sense indemnifying the employee who is being sued?

And secondly, does this somewhat water down a protection for an employee who is accusing a supervisor of sexual harassment.

**Jo Zschomler:** state employees are indemnified by the state as long as they are acting within the scope of employment, under the bill there still is a requirement for the definition scope of employment, what we are doing is trying to make it clear, so that it is not trying to determine what was there state of mind? It is not going to remove any protection.

**Representative Dosch:** How many claims are there in a year? Are the claims more employee related suing the state or outside source doing the suing?

**Jo Zschomler:** We average 300 claims a year that are administered by our office, the majority of them are not employment practices related, but I will tell you that the employment practices claims are the most expensive.

**Doug Barr, Director, Civil Litigation, Atty. Generals Office:** I am here on behalf of Attorney General, Wayne Stenejhem to answer questions and express his support of the bill. As of to date there has never been a state employee that has requested representation and was denied it, because he fully acted outside the scope of his employment. This just helps prevent a conflict of interest, and I can explain it a little better, if an employee is sued and the state is sued, they have a different interest arguable, because if the state can show that he is outside the scope of his employment, the state is off the hook, but if the employee wants to show that he was within the scope of employment, the state is on the hook. If we are defending both of them we have to hire two attorneys, and then we are paying twice. this simply means, if we say he is in the scope, and he is in the scope, it is covered and we can defend the state, and the employee together and have a unified defense, its a lot more cost efficient, and hopefully a lot more successful.

**Representative Amerman:** Let's say this suit came about and the Attorney General, ruled that he wasn't within the scope of employment, can the employee sue the state for that type of thing?

**Doug Barr:** The court can say yes, they do have a duty to defend you or no, they don't. That employee could seek a declaration to say, "I was within the scope of my employment" despite what the Attorney General says. If the court agreed we would fully defend and adennify, if the court agreed with the Attorney Generals position, then that employee would know what the out set is, he or she is on their own, and the state is not responsible for his defense.

No opposition presented. Meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1084

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-10-05

Tape Number	Side A	Side B	Meter #
1	x		24.5-37.7
1		x	4.5-19.5

Committee Clerk Signature



Minutes:

**Chairman Keiser:** Reconvened on HB 1084.

**Representative Dosch:** The nature of the bill was to change the definition or put it under the common law test of what exactly a state employee is, that is what the bill does, it clarifies that.

**Representative Ekstrom:** Are we in fact watering down law, that someone could be reckless and the state would be indemnified?

**Representative Keiser:** I don't think it changes the statute issue, what it really does is changes the order of that issue, as I understand this bill the current reads the state and the employee begin as advisories, we will determine first whether they were behaving properly.

**Representative Kasper:** I **MOVE** a **DO PASS** on HB 1084.

**Representative Nottestad:** I **SECOND** the motion on HB 1084.

**MOTION CARRIED. VOTE: 14-YES 0-NO 0-ABSENT.**

Meeting adjourned.

Date:

1-10-05

Roll Call Vote #:

1

## 2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. HB 1084

House

INDUSTRY, BUSINESS AND LABOR

Committee



Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Do Pass

Motion Made By

Rep. Kasper

Seconded By

Rep. Nottestad

Representatives	Yes	No
G. Keiser-Chairman	X	
N. Johnson-Vice Chairman	X	
Rep. D. Clark	X	
Rep. D. Dietrich	X	
Rep. M. Dosch	X	
Rep. G. Froseth	X	
Rep. J. Kasper	X	
Rep. D. Nottestad	X	
Rep. D. Ruby	X	
Rep. D. Vigasaa	X	

Representatives	Yes	No
Rep. B. Amerman	X	
Rep. T. Boe	X	
Rep. M. Ekstrom	X	
Rep. E. Thorpe	X	

Total (Yes)

14

No

0

Absent

-0-

Floor Assignment

Rep. Dosch

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
January 10, 2005 12:35 p.m.

**Module No: HR-05-0216**  
**Carrier: Dosch**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1084: Industry, Business and Labor Committee (Rep. Kelser, Chairman)**  
recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).  
HB 1084 was placed on the Eleventh order on the calendar.

2005 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1084

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1084**

**Senate Industry, Business and Labor**

☐ Conference Committee

Hearing Date February 14, 2005

Tape Number

1

Side A

x

Side B

Meter #

100-930

Committee Clerk Signature

*Lisa VanBerkon*

**Senator Klein** opens hearing on **HB 1084**

**Jo Zschomler** - Director of the Risk Management Division of OMB - In support of this bill.

See written testimony.

**Senator Klein** - Asked if we are trying to create an easier way for the state to get out from underneath something.

**Zschomler** - Stated no, they trying to create more protection for state employees. She says currently the terminology in the statute as it is it is very difficult to represent the employee and the state, we have the employee close to losing their personal assets because of the way it is written. We want to say that is official capacity and give more protection to state employees.

**Doug Bar** - Office of the Attorney General, Director of Civil Litigation, General Council for

Risk Management Fund - In support of this bill. In regard to second amendment, the change of the amount from \$5,000 to \$10,000. Attorney General is comfortable with the changes. He also said this does not provide a new method for the state to get out of law suits, if anything it provides additional protection for state employees by broadening the definition of scope of employment.

**Senator Nething** - Understands there hasn't been a problem.

**Bar** - The problem has been not that we denied coverage but that we have had lawsuits where the employee is named individual and the state is named. Under the current definition under certain types of civil rights actions in order to find liability they would find the term that the person acted in gross negligence, then at the end of the trial if the jury used that term this employee would be personally liable.

**Senator Nething** - Asked how many times this has come up.

**Bar** - Replied one but there is always the potential concern.

**Senator Nething** - moved for a do pass on 1084

**Senator Heitkamp** - seconded

**Senator Nething** will carry.

(meter #1020)

Date: 2-14-05  
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1084

Senate Industry, Business, and Labor

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Motion Made By

Seconded By

Senators  
Chairman Mutch  
Senator Klein  
Senator Krebsbach  
Senator Espegard  
Senator Nething

Yes No  
A  
X  
X  
X  
X

Senators  
Senator Fairfield  
Senator Heitkamp

Yes No  
X  
X

Total (Yes)

No

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
February 23, 2005 2:52 p.m.

**Module No: SR-33-3515**  
**Carrier: Nethling**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1084: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1084 was placed on the Fourteenth order on the calendar.**

2005 TESTIMONY

HB 1084

**TESTIMONY BY JO ZSCHOMLER, DIRECTOR  
OMB Risk Management Division  
Industry, Business and Labor  
January 5, 2005**

Chairman Kaiser, members of the Industry, Business and Labor Committee, my name is Jo Zschomler. I am the Director of the Risk Management Division of OMB. I appear today to ask your support for House Bill 1084, revisions to N.D.C.C. ch. 32.12-2.

The 1995 Legislature established ch. 32-12.2 and assigned the responsibility of administering the risk management program to OMB. The day-to-day activities of the Risk Management Division include administering tort claims and lawsuits filed against the State and state employees and providing for the defense of the State or an employee of the State.

The first amendment to ch. 32-12.2 contained in HB 1084 deals with the definition of scope of employment. The proposed changes will make the definition of scope of employment in ch. 32-12.2 more in line with what is often referred to as the common law test. The change will treat the State in a manner similar to private employers. Under the current definition, the focus is almost exclusively on the subjective state of mind of the state employee to the exclusion of such questions as whether the conduct of the employee was authorized by the employer, whether it occurred substantially inside the time and space limits established by the employer, or if it was motivated to serve the employer.

The current definition, and its almost exclusive focus on the employee's subjective state of mind, has created some difficulties in representing the interests of a state employee sued for actions he or she took in an official capacity when the State is separately named in the same lawsuit. Most state employees that are sued are managerial or supervisory level employees that are sued for official decisions they have had to make. In fact, not infrequently, a lawsuit will be brought by a fellow or former

state employee against his or her supervisor challenging the difficult decisions supervisory level employees are responsible for making every day. The current language may place the State in a position where it must provide very costly separate representation to the named state employee even if the State's review of the allegations indicate the named state employee was, in fact, acting within the scope of employment. There is greater potential that a named state employee and the State would be placed in an adversarial situation under the current language. In addition, plaintiff attorneys have used the current definition and its almost exclusive focus on the employee's state of mind as a means to circumvent the requirement to give 180 day notice of bringing a claim against the State.

The proposed amendment would not require the State to represent a state employee if, pursuant to N.D.C.C. 32-12.2-03(6), the Attorney General makes the determination that the employee was not acting within the scope of employment.

The second amendment to ch. 32-12.2 contained in HB 1084 deals with the Attorney General's approval of claims settled by the Risk Management Division. Currently the Attorney General must approve and sign all settlements for more than \$5,000.00. We are requesting that amount be raised to \$10,000.00; and that the requirement that the authorization for settlement for more than \$10,000 to be "signed" by the Attorney General be waived. We would still be required to document the Attorney General's approval of settlement for more than \$10,000 but, in this era of electronic communication, a copy of an e-mail could be sufficient documentation of that approval.

**TESTIMONY BY JO ZSCHOMLER, DIRECTOR  
OMB Risk Management Division  
Industry, Business and Labor  
February 14, 2005**

Chairman Mutch, members of the Industry, Business and Labor Committee, my name is Jo Zschomler. I am the Director of the Risk Management Division of OMB. I appear today to ask your support for House Bill 1084, revisions to N.D.C.C. ch. 32.12-2.

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