

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<div style="border: 1px solid black; padding: 5px; text-align: center;"><p>FILED IN THE SUPREME COURT</p><div style="border: 1px solid black; padding: 5px; margin: 5px 0;"><p>APR 28 2008</p></div><p>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p></div>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2007) Appeal from Ballot Title Board</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007- 2008, #76 JOSEPH BLAKE, OBJECTOR,</p> <p>Petitioner,</p> <p>v.</p> <p>JOANNE KING AND LARRY ELLINGSON, PROponents; AND WILLIAM A. HOBBS, DANIEL L. CARTIN AND DANIEL DOMENICO, TITLE BOARD ,</p> <p>Respondents.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No.: 08SA120</p>
<p>JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record</p>	
<p>OPENING BRIEF OF TITLE BOARD</p>	

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William A. Hobbs, Daniel L. Cartin and Daniel Domenico, in their capacities as members of the Title Board (hereinafter "Board"), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

The Board adopts the statement of issues set forth in the Objector's Petition for Review.

STATEMENT OF THE CASE

On March 7, 2008 Joanne King and Larry Ellington, the proponents, filed Proposed Initiative #76 (#76) with the Secretary of State. The Board held a hearing to set the titles on March 19, 2008. The Board concluded that #76 had a single subject and set a title.

On March 26, 2008, Joseph Blake, the Objector, filed a motion for rehearing. He alleged that #76 contained multiple subjects; the text of the measure was unclear; and the titles were misleading, incomplete, confusing and inaccurate. On April 2, 2008, the Board granted the motion for rehearing in part and approved the titles as amended. The Objector filed this appeal.

STATEMENT OF THE FACTS

#76, if enacted, would amend the Colorado Constitution to establish standards and procedures to discharge or suspend employees. Under the proposal, an employee could not be discharged or suspended unless an employer establishes just cause for the discharge or suspension. The measure defines “just cause”. It defines “employee” to mean a natural person who “(I) has worked as a full-time employee for at least six months for a private sector employer and (II) is not covered by a bona fide collective bargaining agreement which contains a provision that requires just cause for discharge and suspension from employment.” An “employer” is a business entity that employs at least twenty full-time employees in Colorado. The definition of “employer” does not include a governmental entity or certain non-profits. The measure also defines “governmental entity.”

Substantively, the measure requires an employer to provide an employee who has been discharged or suspended with written documentation of the just cause used to justify the disciplinary action. An employee who believes he was fired without just cause may file an action in district court. If the employee is successful, he may be awarded reinstatement, back pay, damages or a combination of remedies. In addition, the court may award attorneys fees to the prevailing party.

SUMMARY OF THE ARGUMENT

#76 contains only one subject: just cause for discharge or suspension of employees.

The titles set by the Board are fair, clear and accurate. Although the titles do not describe all of the details of the proposed measure, they do state its central features.

The term “just cause” is not a catch phrase.

ARGUMENT

I. The measure includes only one subject: just cause for action against an employee by an employer.

The Objectors contend that the Board should not have set titles because #76 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it “relate[s] to more than one subject and ... [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2005-2006* #55, 138 P.3d 273, 277 (Colo. 2002)(Colo. 2006) (#55) A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000* #25, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. #55, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02* #43, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. #43, 46 P.3d at 443. However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2001-2002* #21 and #22, 44 P.3d 213, 216 Colo. 2002). The single subject rule must be liberally construed to avoid unduly restricting the right of initiative. *In re Title, Ballot Title and Submission*

Clause, and Summary for 1997-98 No. 74, 962 P.2d 927, 929 (Colo. 1998).

Sections of a measure that include “implementation or enforcement details directly tied to the single subject will not, in and of themselves, constitute a single subject.”

Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73, 135 P.3d 736, 739 (Colo. 2006).

#76 has only one subject: establishment of just cause for taking action against an employee. All of the sections of the measure relate to this subject. Section 1 establishes the principle that an employee may not be discharged or suspended without just cause. Section 2 defines “just cause,” “employee”, “employer” and “governmental entity.” Sections 3 and 4 describe the process for enforcement. Section 3 requires an employer to provide written documentation justifying the reasons for discharge or suspension. Section 4 states that the employee may seek redress in the courts. Section 5 authorizes the legislature to enact implementing legislation.

The Objector contended in his motion for rehearing before the Board that the measure contains at least three subjects: (1) elimination of at-will employer-employee relationships; (2) coverage of only full-time employees who have

worked for more than six months with a business entity; and (3) interference with the constitutional right to contract.

Objector's claim is without merit. Objector is asking the Court to determine the measure's efficacy, construction and future application, a task that the Court cannot perform until the voters have approved the proposal. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097-98 (Colo. 2000). The elimination or modification of the employment at will doctrine, any effect employee-employer contracts, or a failure to encompass all employees is immaterial to the single subject analysis. The measure's relationship to other constitutional provisions and its constitutionality cannot be determined at this phase of the process. *In re Proposed Initiative "1997-98 #10"*, 943 P.2d 897, 900 (Colo. 1997). The only question is whether the provisions of the measure are sufficiently related to a single subject.

Because all sections of the measure are related to its main subject, the Court must conclude that the measure meets the single subject requirement.

II. The titles are fair, clear and accurate.

Section 1-40-106(3), C.R.S. (2007) establishes the standard for setting titles.

It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000). However, the Board is not required to set out every detail. *#21*, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure’s efficacy, or its practical or legal effects. *#256*, 12 P.3d at 257; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e)*, 8 P.3d 1194, 1197

(Colo. 2000). The Court does not demand that the Board draft the best possible title. #256, at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board’s decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning “Automobile Insurance Coverage”*, 877 P.2d 853, 857 (Colo. 1994).

Objector asserts that the title is defective in two ways. First, Objector contends that the titles are misleading and confusing. Second, Objector asserts that the statement of the single subject is “overly general and does not unambiguously state the principles of the unrelated provisions to be added to the constitution.” The Court must reject Objector’s contentions.

The titles faithfully track the measure. The titles inform the voters that the measure “requir[es] an employer to establish and document just cause for the discharge or suspension of a full-time employee”. The titles state that the measure defines “just cause”, and they summarize the definition. The titles then tell the signors and voters that the measure exempts business entities that employ fewer than twenty employees, nonprofit organizations that employ fewer than one thousand employees, governmental entities, and employees who are covered by collective bargaining agreements that require just cause for discharge or

suspension. The titles inform the public that an employee may file an action in the state courts. If the employee succeeds, he may be entitled to reinstatement, back pay, damages or a combination thereof. Finally, the titles note that the court may award attorneys fees to the prevailing party.

The titles accurately summarize the measure. They contain all of the pertinent details, including the key operative words. Under these circumstances, the titles accurately reflect the measure.

III. The term “just cause” is not a catch phrase.

The Objectors contend that the term “just cause” and is a catch phrase. The Court must reject this argument.

“Catch phrases are words that work to a proposal’s favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase.” *In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). The existence of a catch phrase is determined in the context of contemporary political debate. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000). The person asserting the existence of a catch phrase must offer convincing evidence. *Id.*

The term “just cause” is nothing more than a statement of the legal standard commonly applied in employment cases:

“‘Issues of ‘just cause’, or ‘good cause,’ or simply ‘cause’ arise when an employee claims breach of the terms of an employment contracting providing that discharge will only be for just cause.”

Black’s Law Dictionary (8th ed. 2004) 235 (quoting A. Rothstein et al. *Employment Law* 9.7, at 539 (1994). “Just cause” is a legal standard for termination incorporated in Colorado law. *See*, § 22-63-301, C.R.S. (2007) (a teacher may be dismissed for “other good and just cause.”). The Court will not declare a legal standard that is incorporated into a measure to be a catch phrase. *In re Workers Compensation Initiative*, 850 P.2d 144, 147-48 (Colo. 1993); *cf. In re Title, Ballot Title and Submission Clause, and Summary for 2005-2006* #75, n. 4 (Colo. 2006) (phrase “term limits” used in prior court opinions not a slogan or catch phrase).

CONCLUSION

For the above-stated reasons, the Court must affirm the action of the Board.

JOHN W. SUTHERS
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MAURICE G. KNAIZER, 05264*

Deputy Attorney General

Public Officials

State Services Section

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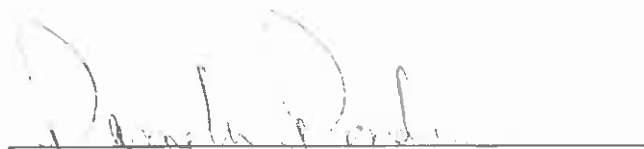
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same, overnight by DHL at Denver, Colorado, this 28th day of April 2008 addressed as follows:

Mark Grueskin, Esq.
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A handwritten signature in cursive script, appearing to read "Douglas Friednash", is written above a horizontal line.

Ballot Title Setting Board

Proposed Initiative 2007-2008 #76¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning cause for employee discharge or suspension, and, in connection therewith, requiring an employer to establish and document just cause for the discharge or suspension of a full-time employee; defining “just cause” to mean specified types of employee misconduct and substandard job performance, the filing of bankruptcy by the employer, or documented economic circumstances that directly and adversely affect the employer; exempting from the just cause requirement business entities that employ fewer than twenty employees, nonprofit organizations that employ fewer than one thousand employees, governmental entities, and employees who are covered by a collective bargaining agreement that requires just cause for discharge or suspension; allowing an employee who believes he or she was discharged or suspended without just cause to file a civil action in state district court; allowing a court that finds an employee’s discharge or suspension to be in violation of this amendment to award reinstatement in the employee’s former job, back wages, damages, or any combination thereof; and allowing the court to award attorneys fees to the prevailing party.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning cause for employee discharge or suspension, and, in connection therewith, requiring an employer to establish and document just cause for the discharge or suspension of a full-time employee; defining “just cause” to mean specified types of employee misconduct and substandard job performance, the filing of bankruptcy by the employer, or documented economic circumstances that directly and adversely affect the employer; exempting from the just cause requirement business entities that employ fewer than twenty employees, nonprofit organizations that employ fewer than one thousand employees, governmental entities, and employees who are covered by a collective bargaining agreement that requires just cause for discharge or suspension; allowing an employee who believes he or she was discharged or suspended without just cause to file a civil action in state district court; allowing a court that finds an employee’s discharge or suspension to be in violation of this amendment to award reinstatement in the employee’s former job, back wages, damages, or any combination thereof; and allowing the court to award attorneys fees to the prevailing party?

¹ Unofficially captioned “Just Cause for Employee Discharge or Suspension” by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Hearing March 19, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 4:36 p.m.

Hearing April 2, 2008:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 3:40 p.m.

RECEIVED

MAR 07 2008

ELECTIONS
SECRETARY OF STATE

Be it enacted by the People of the State of Colorado:

*Proposed Initiative
2007-2008*

76

FINAL

SECTION 1. Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section 13. Just cause for employee discharge or suspension. (1) AN EMPLOYEE MAY BE DISCHARGED OR SUSPENDED ONLY IF HIS OR HER EMPLOYER HAS FIRST ESTABLISHED JUST CAUSE FOR THE DISCHARGE OR SUSPENSION.

(2) FOR PURPOSES OF THIS SECTION:

(a) "JUST CAUSE" MEANS:

- (I) INCOMPETENCE;
- (II) SUBSTANDARD PERFORMANCE OF ASSIGNED JOB DUTIES;
- (III) NEGLIGENCE OF ASSIGNED JOB DUTIES;
- (IV) REPEATED VIOLATIONS OF THE EMPLOYER'S WRITTEN POLICIES AND PROCEDURES RELATING TO JOB PERFORMANCE;
- (V) GROSS INSUBORDINATION THAT AFFECTS JOB PERFORMANCE;
- (VI) WILLFUL MISCONDUCT THAT AFFECTS JOB PERFORMANCE;
- (VII) CONVICTION OF A CRIME INVOLVING MORAL TURPITUDE;
- (VIII) FILING OF BANKRUPTCY BY THE EMPLOYER; OR
- (IX) DISCHARGE OR SUSPENSION DUE TO SPECIFIC ECONOMIC CIRCUMSTANCES THAT DIRECTLY AND ADVERSELY AFFECT THE EMPLOYER AND ARE DOCUMENTED BY THE EMPLOYER, PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) "EMPLOYEE" MEANS ANY NATURAL PERSON WHO:

- (I) HAS WORKED AS A FULL-TIME EMPLOYEE FOR AT LEAST SIX CONSECUTIVE MONTHS FOR A PRIVATE SECTOR EMPLOYER; AND
- (II) IS NOT COVERED BY A BONA FIDE COLLECTIVE BARGAINING AGREEMENT WHICH CONTAINS A PROVISION THAT REQUIRES JUST CAUSE FOR DISCHARGE AND SUSPENSION FROM EMPLOYMENT.

(c) "EMPLOYER" MEANS ANY BUSINESS ENTITY THAT EMPLOYS AT LEAST TWENTY FULL-TIME EMPLOYEES IN COLORADO. "EMPLOYER" EXCLUDES:

- (I) ANY GOVERNMENTAL ENTITY; OR
- (II) ANY NONPROFIT UNINCORPORATED ASSOCIATION OR ANY NONPROFIT CORPORATION, INCLUDING ANY CHARITABLE ORGANIZATION OR FOUNDATION EXEMPT FROM FEDERAL TAXATION UNDER SECTION 501(C) OF THE "INTERNAL REVENUE CODE OF 1986", AS AMENDED, THAT EMPLOYS LESS THAN ONE THOUSAND EMPLOYEES.

(d) "GOVERNMENTAL ENTITY" MEANS ANY AGENCY OR DEPARTMENT OF FEDERAL, STATE, OR LOCAL GOVERNMENT, INCLUDING BUT NOT LIMITED TO ANY BOARD, COMMISSION, BUREAU, COMMITTEE, COUNCIL, AUTHORITY, INSTITUTION OF HIGHER EDUCATION, POLITICAL SUBDIVISION, OR OTHER UNIT OF THE EXECUTIVE, LEGISLATIVE, OR JUDICIAL BRANCHES OF THE STATE; ANY CITY, COUNTY, CITY AND COUNTY, TOWN, OR OTHER UNIT OF THE EXECUTIVE, LEGISLATIVE, OR JUDICIAL BRANCHES THEREOF; ANY SPECIAL DISTRICT, SCHOOL DISTRICT, LOCAL IMPROVEMENT DISTRICT, OR SPECIAL TAXING DISTRICT AT THE STATE OR LOCAL LEVELS OF GOVERNMENT; ANY "ENTERPRISE" AS DEFINED IN SECTION 20 OF ARTICLE X OF THE COLORADO CONSTITUTION; OR ANY OTHER KIND OF MUNICIPAL, PUBLIC, OR QUASI-PUBLIC CORPORATION.

(3) AN EMPLOYER SHALL PROVIDE AN EMPLOYEE WHO HAS BEEN DISCHARGED OR SUSPENDED WITH THE EMPLOYER'S WRITTEN DOCUMENTATION OF THE JUST CAUSE USED TO JUSTIFY SUCH DISCHARGE OR SUSPENSION.

(4) (a) ANY EMPLOYEE WHO BELIEVES HE OR SHE WAS DISCHARGED OR SUSPENDED WITHOUT JUST CAUSE MAY, WITHIN ONE HUNDRED EIGHTY DAYS AFTER NOTIFICATION OF THE DISCHARGE OR SUSPENSION, FILE A CIVIL ACTION IN STATE DISTRICT COURT. IF THE DISCHARGE OR SUSPENSION IS HELD TO HAVE BEEN WRONGFUL UNDER THE PROVISIONS OF THIS SECTION, THE COURT SHALL, AT ITS DISCRETION, AWARD THE EMPLOYEE REINSTATEMENT IN HIS OR HER FORMER JOB, BACK WAGES, DAMAGES, OR ANY COMBINATION THEREOF.

(b) IN ADDITION TO ANY AWARD MADE PURSUANT TO THIS SUBSECTION (4), THE COURT MAY ALSO AWARD ATTORNEY FEES TO THE PREVAILING PARTY.

(c) THE DECISION OF THE DISTRICT COURT MAY BE APPEALED TO THE COLORADO COURT OF APPEALS AND THE COLORADO SUPREME COURT AS PERMITTED UNDER THE COLORADO RULES OF CIVIL PROCEDURE.

(5) THE GENERAL ASSEMBLY MAY ENACT LEGISLATION TO FACILITATE THE PURPOSES OF THIS SECTION.

(6) THIS SECTION SHALL BECOME EFFECTIVE UPON PROCLAMATION OF THE GOVERNOR REGARDING THE VOTES CAST ON THIS AMENDMENT.