

Approved March 23, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Mike O'Neal at
Vice Chairperson

3:30 ~~xxx~~ p.m. on March 17, 1987 in room 313-S of the Capitol.

All members were present except: Representatives Jenkins, Peterson, Roy, Sebelius and Wunsch

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes office
Mary Jane Holt, Secretary

Conferees appearing before the committee:

Senator Paul "Bud" Burke
John Koepke, Kansas Association of School Boards
Senator Jim Allen
Roy Moore, Kansas City Apparel Mart Sales, Shawnee
Paul Cloughley, Kansas City Apparel Mart Sales, Overland Park
Steve Queen, Independent Sales Representative, Ottawa
Jerry Powell, Kansas Department of Human Resources
Sherwyn Syna, Executive Director, Bureau of Wholesale Sales Representatives, Atlanta, Ga.
Karen McLain, Kansas Association of Realtors
Charles Henson, Trust Division, Kansas Bankers Association
Matt Lynch, Research Associate, Judicial Council

Hearing on S.B. 49-Crime of Hazing limited to student organizations

Senator Burke informed the Committee this bill is restricted to social and fraternal organizations of students attending school, and does not apply to other organizations.

John Koepke testified the Kansas Association of School Boards supports S.B. 49.

The hearing was closed on S.B. 49.

Hearing on S.B. 180-Prompt payment of commissions to commission salespersons when contractual relationship terminates

Senator Allen explained the bill was introduced last year. The bill had a hearing but was not passed out of Labor and Industry Committee. He submitted an amendment that he had received from the Amway Corporation that was supported by the Avon Company and Direct Selling Association. The amendment would insert "who is not covered by K.S.A. Chapter 50-640(c)(1)" in line 24 after the word "sales", (see Attachment I).

Roy Moore related how he had lost \$9,000 in commissions. He stated if this bill was passed it would assist the commission salesperson collect commissions that are due. He submitted a letter to the Committee which he stated explains what happens when a commission salesman is terminated, (see Attachment II).

Paul Cloughley testified he has been a wholesale sales representative for 18 years and as the result of his experiences he urged the passage of this bill to protect commission salesmen. He submitted testimony relating his experiences, (see Attachment III).

Steve Queen testified he is a sales representative for companies located all over the United States. He stated 12 other states have enacted legislation to protect the commission salesperson. This bill is needed to protect the commission salesperson in Kansas.

Jerry Powell stated when the rules and regulations of the Human Resources

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 313-S, Statehouse, at 3:30 ~~am~~ p.m. on March 17, 1987

were promulgated, legislation exempted independent contractors. He stated it was his interpretation that the bill addresses independent contractors and they should go to district court, not to Human Resources. He stated there would be no fiscal impact for the Department of Human Resources as independent contractors are currently exempted under 44-313.

Sherwyn Syna testified in support of S.B. 180. He stated the bill provides that a sales representative be paid commissions earned within 30 days or possibly 40 days of termination. The penalty is the possibility of paying up to 8% damages in accordance with K.S.A. 44-315 and the amendments thereto, plus reasonable attorney fees (see Attachment IV). He stated Illinois, Indiana, Minnesota, Florida, Georgia, Tennessee, Alabama, California and Iowa have passed similar legislation. Legislation passed by Louisiana, Massachusetts and Missouri is different from this bill.

Karen McClain explained the realtors have requested to be expempted from this bill.

Hearing on S.B. 97-Probate procedure, allowance of demand without hearing

Charles Henson recommended that the language in line 38 after the word otherwise through line 45, that was struck by the Senate, should be reinstated.

The hearing was closed on S.B. 97.

Hearing on S.B. 53-Amendments to rules of civil procedure

Matt Lynch submitted an amendment to S.B. 53 which would add in line 76 on page 2, after the word "hearing", "at which time the documents shall be filed", (see Attachment V). He also suggested since the Senate had restored the original language in Section 5, the entire section could be deleted.

The hearing was closed on S.B. 53.

The meeting was adjourned at 5:00 p.m.

The next meeting will be Wednesday, March 18, 1987, at 3:30 p.m. in roon 313-S.



A M W A Y C O R P O R A T I O N

7575 EAST FULTON ROAD, ADA, MICHIGAN 49355

LEGAL DIVISION

March 5, 1987

The Honorable Jim Allen
Room 1285
State Capitol
Topeka, Kansas 66612

Subject: Senate Bill 180 / Payment of Commissions

Dear Senator Allen:

I write concerning Senate Bill 180, a bill under your sponsorship dealing with the payment of commissions to commission salespersons. Amway Corporation has a concern with the bill which I would like to share with you on behalf of hundreds of independent Kansas Amway distributors.

By way of background, Amway Corporation is a manufacturer and distributor of over 300 quality home care and personal care products which are sold by independent Amway distributors throughout the State of Kansas. Amway distributors are usually residents of the communities in which they conduct their businesses, selling products to their families, friends and neighbors. Generally speaking, over 80 percent of direct sellers are housewives who work an average of nine hours a week to earn about \$30.

SB 180 appears to be aimed at the sales representative who takes orders which are then filled by the manufacturer distributor, and who is paid primarily by commission. Unfortunately, the bill appears to inadvertently cover those direct sellers who purchase and sell products on a buy-sell basis while also earning money through a commission system. Many Amway distributors, in addition to making retail sales, will engage in wholesale-type transactions with distributors whom they have sponsored and receive a volume bonus for commission payment for such sales. Under such circumstances, it is conceivable that Amway Corporation and its distributors would be covered by SB 180.

Amway distributors, as well as other direct sellers such as Avon ladies, Mary Kay beauty consultants and Shaklee distributors, are independent contractors and are not employees or agents of their respective principals. They decide the hours during which they wish to pursue their opportunity and the amount of effort they wish to spend. They determine the price at which they sell their products, are responsible for the business expenses they incur, keep their own records and accounts, bear the risk of loss, and keep for themselves the fruits of their enterprise. As independent contractors, however, these independent businesspersons would technically be covered by the terms of SB 180.

Attachment I
House Judiciary 3/17/87

Senator Jim Allen
Senate Bill 180
March 5, 1987
Page Two

Amway Corporation and other multilevel distribution companies rarely terminate distributors who are the exclusive source of product sales. Amway distributors may leave the business voluntarily, however, and in that case Amway Corporation repurchases all unused and marketable Amway products, literature and merchandising and sponsoring aids. Due to the multilevel nature of the Corporation, however, and the varying factual nature of each individual case, it is impossible to predict the specific number of working days in which the former distributor will receive all commissions earned.

In view of the purpose of SB 180 to provide protection for salespersons who are paid primarily on the basis of commission for sales, I would like to suggest an amendment for your consideration. This amendment would clarify the bill's application to salespersons as they are popularly conceived, excluding those persons engaged in home solicitation sales. This amendment is also supported by Avon Products and the Direct Selling Association, whom I understand will also be submitting comment.

Thank you very much for your consideration. Please do not hesitate to contact me at (616) 676-7010 if I may be of further assistance in this matter.

Very truly yours,



Dirk C. Bloemendaal, Attorney
Corporate Government Affairs

DCB180:gt

Attachment

SUGGESTED AMENDMENT TO SENATE BILL 180

Section 1. As used in this act:

(a) "Commission salesperson" means a person who is paid on the basis of commissions for sales, who is not covered by K.S.A. Chapter 50-640 (c) (1) and who is not an employee subject to the provisions of K.S.A. 44-313 et seq., and amendments thereto;

March 16, 1987

Mr. Michael Coit
Manana Fashions
9840 Monroe Dr., Suite 101
Dallas, Texas 75220

Dear Mr. Coit:

I received a call March 14th from Paul Parrigin terminating my employment with Manana as their sales representative for Missouri, Kansas and Southern Illinois. His reason for termination was "lack of volume." My first order was written October 17, 1986, for Spring and since that period, I have opened fifty-two accounts for 2,387 dresses and \$43,603. There was no business in the territory before my employment, so this was done at my expense with Manana benefiting from my experience and account following. This was also accomplished during a serious economic period in the mid-west and without any advertising or promotion from the company.

This termination comes when all my Fall planning for markets and road has been completed. It gives me no time to find another dress resource to replace Manana. My reputation with my accounts suffers. My expense and time was not covered in making all the calls to establish Manana as a new manufacturer.

I sincerely hope you give more consideration to this serious problem before termination of your next sales representative.

Sincerely,



Roy Moore
6609 Garnett Drive
Shawnee Mission, KS 66203

MARCEA WTA

February 14, 1987

Mr. Chairman, Members of the Committee, my name is Paul Cloughley I reside in Overland Park, Kansas. I have been a wholesale sales representative for eighteen years. As a result of my experience I strongly urge the passage of this bill. I worked for Shaker Sport (Stanley M. Feil) in Cleveland, Ohio for fourteen years and was terminated in February, of 1983. When they terminated me they owed me commissions totalling \$ 2,500.00.

I spent my time and money generating business for Shaker Sport and was not paid any commission. They also took commissions from me on major accounts (i.e. Jones Store in Kansas City). My contract stated that I was to receive full commissions on any orders written in my territory or in New York. They changed the contract without my consent. At first they said I would receive only half commission and the New York representative would receive the other half. Then they cut the commission to one percent without my consent again and finally to no commission at all. I spent my time and money selling the account and keeping merchandise coming into the store and received no commissions for my efforts. For this reason, I feel this bill is needed to protect commissioned salesmen.

This occurrence is not unusual. Sales reps often find it difficult, if not impossible, to collect the commissions which they have earned. Again, for this reason, I feel commissioned salesmen need to be heard and I appreciate you listening.

Attachment III
House Judiciary 3/17/87

Before the
JUDICIARY COMMITTEE

HOUSE OF REPRESENTATIVES
LEGISLATURE OF KANSAS

Testimony in Support of
SB 180

Statement of

THE BUREAU OF WHOLESALE SALES REPRESENTATIVES

Presented by

Sherwyn E. Syna
Executive Director

March 17, 1987

Attachment IV
House Judiciary 3/17/87

Mr. Chairman and Members of the Judiciary Committee:

My name is Sherwyn E. Syna. I am a practicing attorney as well as Executive Director of the Bureau of Wholesale Sales Representatives. I am also authorized to speak on behalf of the Bureau of Salesmen's National Associations, an umbrella organization which consists of the Bureau of Wholesale Sales Representatives, the National Shoe Travelers Association, and the Southeastern Toy Travelers Association.

These organizations support SB 180.

Prior to being elected to my current position, I served for more than 20 years as legal counsel to various national and local sales representatives' organizations. I am intimately familiar with many of the legal problems encountered by sales representatives. In introduction, allow me to present background information to show why SB 180 is needed.

A wholesale sales representative is a person engaged in a small business who represents one or more principals. Generally a sales representative services the retail or industrial trade in a specified geographic territory which may be limited to part of a state or which may include several states.

Sales representatives are usually distinguished by the following characteristics:

- (1) They are compensated in whole or in part by commission;
- (2) They pay their own business, travel, entertainment, and other related expenses;

(3) They are assigned a certain geographical territory or specific accounts;

(4) They obtain orders which are subject to the acceptance of their employer or principal. (Technically, order taking is not a sale, but a process known as "inviting acceptance." The "sale" does not take place until or after the principal accepts the order.)¹

UNCERTAIN STATE OF COMMON LAW

At the most basic level, our courts have not devised a consistent scheme to classify traveling, wholesale sales representatives. Depending on the particular facts and court, a sales representative might be labeled a "sales agent," a "jobber," a "merchandiser," a "distributor," or an "employee." A particular label will carry with it particular rights and duties. Several inequities and uncertainties have resulted from this inconsistency.

For example, a principal may be able to take advantage of these ambiguities by classifying his sales representatives as "independent contractors" in order to avoid statutorily mandated "employer" obligations. The principal may, and usually does, however, exercise virtually complete control over sales representatives' activities regarding the extension of credit, shipping, samples, seasons, designs, and advertising. This has resulted in situations where sales representatives will be treated as "independent contractors" for social security, unemployment compensation, workers' compensation, and

collective bargaining purposes. By the common law "control test" the same sales representatives may be deemed "servants" for matters of management, performance and termination.

"WOOD'S RULE"

Under the terminable-at-will presumption in England, at common law, employment contracts were presumed to last for one year unless the agreement specifically provided otherwise.² In America in the 19th century, however, in the absence of particular terms regarding duration, courts generally dissolved disputes by looking to the intent of the parties, as indicated by a contract's language and by the surrounding circumstances.³

In 1877, the American law of contracts was drastically altered by the publication of H.G. Wood's treatise on master-servant relationships.⁴ Wood maintained that existing case law provided that when employment contracts failed to specify duration, a contract "at will" - one terminable by either party, at any time, for any reason - would be presumed:

With us the rule is inflexible that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even but only at the rate fixed for whatever time the party may serve.⁵

Wood offered no analysis to justify the assertion of this rule or his rejection of the English tradition. He cited only four

American cases as authority for his approach to general hirings, none of which supported him.⁶ Despite this lack of support, courts quickly embraced Wood's Rule and elevated it to the status of a legal maxim in contract law.⁷

THE IMPACT OF WOOD'S RULE

Verbal and indefinite hirings of sales representatives are commonplace and result in frequent abuses. Firings may be for good cause or simply to place a new son-in-law in a territory that was developed through the time, effort, talents, and investment of the terminated sales representative.

Further, being too successful is riddled with problems for the sales representative. It is often an invitation for cutting or reducing the sales representative's territory or having customers taken over by management as "house accounts." In these instances, the sales representative can ill afford to give up the remaining territory and productive accounts which he has developed. Unlike insurance salespeople, the wholesale sales representative has no residual benefit or vested commissions in an account which the sales representative obtained for the principal. This is true even where the sales representative is terminated and the principal continues to do business with the account secured by the sales representative. Additionally, the very nature of the undertaking excludes the building of an equity interest in the business developed by a sales representative.

Nevertheless, in good times or bad these are self-starting individuals who keep the wheels of our economy turning and the shelves of our retailers stocked. Their contribution to our local and national economic well-being has never been recognized or appreciated. They produce five percent of the Gross National Product for non-durable goods.

SB 180 does not address all the vices which may be attendant to the principal-sales representative relationship. It does encourage a written agreement and prompt payment of commissions due the sales representative.

In the present system, the principal traditionally enjoys a superior economic position which is greatly amplified by the principal's control of the relationship's purse strings. In the absence of a written contract, this disparity is further compounded by the right to a summary termination.

The sales representative expends time and money up front to secure orders which may or may not be accepted by the principal. Commissions are often not paid until goods are shipped by the principal; in other instances, commissions are paid only after the goods have been accepted and paid for by the customer. The time elapsing between obtaining an order and payment of commission is usually substantial. When there is an intervening termination, the drawn-out commission payment process is almost always further delayed.

THE PRACTICAL ISSUE

Sales representatives are motivated by risks and rewards. They undertake the risk of developing and working a territory at considerable expense. Work done this season or this year may not bring an order until next season or next year. The commissions or reward for their efforts may take even longer.

While the sales representative is engaged in this effort, it is in the principal's best interest to pay commissions promptly. Payment motivates the sales representative.

After termination, the principal's interest in the sales representative is far different. The need to provide the sales representative with an incentive no longer exists. To the contrary, there is a benefit to the principal - the cost of money - in delaying or withholding payment. Further, summarily terminating the sales representative often amounts to pulling the economic rug from under him and creates a very real financial bind.

A principal may induce a sales representative to settle or compromise a claim by delaying or withholding payment of earned commissions. Consequently, many post-termination claims for earned commissions are either settled for far less than due or go unprosecuted. Therefore, termination may result in an economic advantage to manufacturers.

SB 180 merely provides that a sales representative be paid commissions earned within 30 or possibly 40 days of the termination, or suffer the possibility of paying up to eight

percent damages in accordance with the provisions of K.S.A. 44-315 and the amendments thereto, plus reasonable attorney fees.

Please note that SB 180 will require no addition to the bureaucracy, funding, or involvement of any state agency or personnel. Additionally, there is an interest to the State that its citizens be properly remunerated by corporations who benefit from the time, effort, and money expended by Kansas citizens. The state may also have an interest in the tax revenues that will be generated by its citizens being paid their due.

I thank the Judiciary Committee for the opportunity to submit this statement in support of SB 180.

Respectfully submitted,

BUREAU OF WHOLESALE SALES
REPRESENTATIVES

By: s/Sherwyn E. Syna
Sherwyn E. Syna
Executive Director

Bureau of Wholesale Sales Representatives
Suite 600, 1718 Peachtree Street, N.W.
Atlanta, GA 30309
(404) 881-0933

END NOTES

1. Uniform Commercial Code, §2-206.
2. 1 W. Blackstone, Commentaries 413.
3. Blumerosen, Employer Discipline: U.S. Report, 18 Rut. L. Rev. 428, 432 (1964).
4. H. Wood, Master and Servant (1877).
5. Id. at §134.
6. Note, Implied Contract Rights to Job Security, 26 Stan L. Rev. 335, 341 (1974).
7. Id. at 342.

0046 copy to ~~him~~ *the attorney or a party* or by mailing it to ~~him~~ *the*
 0047 *attorney or a party* at ~~his~~ *the* last known address or, if no address
 0048 is known, by leaving it with the clerk of the court. *For the*
 0049 *purposes of this subsection, "Delivery of a copy" within this*
 0050 ~~subsection (b)~~ means: Handing it to the attorney or to the party;
 0051 ~~or~~ leaving it at ~~his~~ *the attorney's or party's* office with ~~his~~ *the*
 0052 clerk or other person in charge thereof; or, if there is no one in
 0053 charge, leaving it in a conspicuous place therein; or, if the
 0054 *attorney's or party's* office is closed or the person to be served
 0055 has no office, leaving it at ~~his~~ *the attorney's or party's* dwelling
 0056 house or usual place of abode with some person of suitable age
 0057 and discretion then residing therein. Service by mail is complete
 0058 upon mailing.

0059 (c) *Numerous defendants.* In any action in which there are
 0060 unusually large numbers of defendants, the court, upon motion
 0061 or of its own initiative, may order that services of the pleadings of
 0062 the defendants and replies thereto need not be made as between
 0063 the defendants and that any cross-claim, counterclaim, or matter
 0064 constituting an avoidance or affirmative defense contained
 0065 therein shall be deemed to be denied or avoided by all other
 0066 parties and that the filing of any such pleading and service
 0067 thereof upon the plaintiff constitutes due notice of it to the
 0068 parties. A copy of every such order shall be served upon the
 0069 parties in such manner and form as the court directs.

0070 (d) *Filing.* ~~Interrogatories need not be filed until answered.~~
 0071 (1) *Interrogatories, depositions other than those taken under*
 0072 *K.S.A. 60-227 and amendments thereto and discovery requests*
 0073 *or responses under K.S.A. 60-234 or 60-236, and amendments*
 0074 *thereto, shall not be filed except on order of the court or until*
 0075 *used in a trial or hearing.*

, at which time the documents shall be filed

0076 (2) *A party serving discovery requests or responses under*
 0077 *K.S.A. 60-233, 60-234 or 60-236, and amendments thereto, shall*
 0078 *file with the court a certificate stating what document was*
 0079 *served, when and upon whom.*

0080 (3) All other papers filed after the petition and required to be
 0081 served upon a party, shall be filed with the court either before
 0082 service or within a reasonable time thereafter.