Approved A W Douville 3-22-88
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:09 a.m./~~p.m.~~ on March 1, 1988 in room 526-S of the Capitol.

All members were present except:

Representative R.D. Miller

Committee staff present:

Jerry Ann Donaldson, Kansas Department of Legislative Research
Jim Wilson, Revisor of Statutes' Office
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

Larry Sanford, Coleman Company, Wichita
Patricia Baker, Senior Legal Counsel, Kansas Association of School Boards
Rob Hodges, Kansas Chamber of Commerce and Industry
Wayne Maichel, Executive Vice-President, Kansas AFL-CIO
Jim Kaup, League of Municipalities

Larry Sanford testified in support of H.B. 2927, attachment #1.

The chairman asked if non-severable had ever been written into law. Mr. Sanford's response was he believed the rule to be employees have been non-severable unless the rule said they were.

Representative Green cited the probationary period which at one period was 90 days, became 90 working days and then 120 days and stated the longer period of time must not be working for the employer. Mr. Sanford claimed no knowledge of other employers' situations but stated the case at Coleman seemed to involve employees not involved in a probationary period but of longer term employment, usually less than ten years.

Asserting his support for employment at-will, Representative Patrick asked the effect on small businesses e.g. "Mom and Pop" type businesses which do not keep written records such as job evaluations, progress reports and other documentary information. Mr. Sanford affirmed support for employment at will but believed the problem for businesses such as the above is the implied employment contract which, according to the Kansas Supreme Court, is law. The representative cited Section 6b of the bill which requires more written internal procedures and recognized its easy application to large businesses but contended litigation would increase rather than decrease for small businesses. Mr. Sanford acknowledged hearing the same concern, stated he did not see that in the bill but also stated Coleman Company does not want to burden small businesses.

Representative Roper referred to remarks on page two of the testimony and asked to which lawyers groups it referred. Mr. Sanford stated seeing at least one brochure from Kansas Trial Lawyers Association.

The lawsuit mentioned on page one of the testimony is referred to as the White-Morriss case. It was remanded back to the district court and has been settled (KAN 738 P2d 841).

The chairman asked if there was anything preventing Coleman from entering into all contracts as employment at will. Mr. Sanford responded that nothing prevented it but as legal counsel he could give no assurance to the company it would prevent future litigation.

Representative Gjerstad spoke to the definition of "due cause" saying it seemed to offer a great deal of latitude and stated concern that it would increase litigation. Mr. Sanford's response was anytime there is change that is a risk but the hope was to limit rather than increase litigation.

Patricia Baker, KASB, asked for amendments to the bill as it concerned public employees, otherwise KASB could not support it, attachment #2.

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.

Representative Green asked if a school superintendent became an independent contractor upon signature of a contract with a school board. The answer was, "No. He becomes an employee of the school district." An independent contractor would contract with the district to work autonomously. School districts would be required to establish some sort of probationary period for employees such as cooks and janitors, after which they would have to meet a good cause requirement and follow the procedures listed in the bill.

Larry Sanford explained H.B. 3020 deals with two issues.

1. The first is a restatement of the historic law called "blacklisting" and has minor differences to current Kansas law.
2. The second change relates to the giving of employment references.

He stated the second change may apply more to large employers than to small. As it regards those employers, many have adopted what are called no reference policies because of potential lawsuits over information given or withheld. Attachment #3 is Mr. Sanford's testimony in support of the bill.

Representative Acheson asked if the description of reason for termination used in line 0042 could be interpreted as blacklisting if it were not a good reference. Mr. Sanford concurred and stated it was the reason his company supports this addition to the blacklisting statute.

Representative Cribbs questioned what protection there would be from a previous employer altering a reference - example the reference given the employee is positive but the reference actually sent to the prospective employer is negative. Mr. Sanford responded the bill has provisions which require a reference to a subsequent employer also be furnished to the employee upon request giving the employee the opportunity to verify it. Additionally there are provisions relating to false statements and removes the protection the bill would give for the employer furnishing false information.

Rob Hodges, KCCI, testified in support of legislation to clarify what is permissible in Kansas, attachment #4. Representative Green referred to information required on an application and asked if the restrictions come from federal law. He cited an instance of participating in a firm's interview. It was not permissible to ask the applicant's age. Mr. Hodges responsed anything which might be related to age discrimination is probably federal but would defer to attorneys on that point. However, he felt most employers were more interested in determining the person's work history, education, experience and training.

Regarding H.B. 3020 Wayne Maichel felt the term blacklisting to be outdated and did not feel it to be a major problem among the employers or employees in the state. He recognized the concern expressed in Mr. Sanford's testimony regarding the rape case but wondered where the exchange of information stopped. He stated being unaware of any major problem in this area.

Mr. Maichel related that in consultation with AFL-CIO's attorneys, there were many positive statements about the bill but since it is a large change in public policy, they would recommend study on the bill. He targeted Section 5 as it relates to restrictions on damages, pain and suffering, etc. He also expressed concern over Section 6 which excludes employees covered under collective bargaining agreements. He concluded by asking for more deliberation on both bills.

Jim Kaup, general counsel for the League of Municipalities, expressed mixed feelings about the bill and offered an amendment, attachment #5. It, in effect, removes all non-state and public employees in the State of Kansas from the bill. He disagreed with the consequence of the Morriss-White case and did not see it as removal of employment at will in the state but did see the elimination of employment at will for public and private sector employees in H.B. 2927.

Chairman Douville asked whether any boards or commissions not considered political or taxing subdivisions such as library or parks and recreations boards were included in the wording of Mr. Kaup's definition. The response was that to err on the side of caution language such as "any agency or municipality or agency solely thereof" could be added to the definition.

MINUTES OF THE House COMMITTEE ON Labor and Industry,

room 526-S, Statehouse, at 9:09 a.m./p.m. on March 1, 19 88

Representative Green moved, seconded by Representative Whiteman to approve minutes of the February 3, 10, 11, 17, 18, and 23 meetings. The motion carried.

The meeting was adjourned at 9:45 a.m. Next meeting of the committee will be March 2, 1988, 9:00 a.m., Room 526-S.

HOUSE COMMITTEE ON
LABOR AND INDUSTRY

Guest List Date March 1, 1988

Name	City	Representing
Rob Hodges	Topeka	KCCI
L. E. Sanford	Wichita	The Coleman Co Inc.
Pat Baker	Topeka	KASB
Ron Smith	Topeka	KBA
Tom S. Gattum	Topeka	AGC of Ks
[illegible]		PIR

HOUSE LABOR & INDUSTRY
Attachment #6
3/01/88

HOUSE BILL No. 2927

Chairman Douville, Members of the Committee, my name is Larry Sanford. I am the Director of the Legal Department of the Coleman Company, Inc.

I am appearing today in support of House Bill No. 2927. This bill deals with issues related to wrongful discharge from employment.

As I am sure many of you know, the historic legal rule that usually applied to the termination of an employee was referred to as "employment at will". The essence of this rule was that unless the employer and the employee had entered into some specific, written agreement providing otherwise, both the employer and the employee were entitled to end the relationship at any time either of them decided to do so. There was no requirement that any reason exist for ending the relationship, and neither party was liable to the other for any damage or inconvenience that might result.

In recent years the courts and the legislatures in a number of states, including Kansas, have created exceptions to this rule. The first exceptions related to "public policy" matters like terminations for filing workers compensation claims, terminations because of jury service, or terminations because of some unlawful discrimination. I think few would argue that terminating an employee for one of these kinds of reasons is wrong, and that some manner of relief should be available when it occurs.

As seems to often be the case, once exceptions started to be made to what had long been an established rule, the list of exceptions grew until it has virtually replaced the rule.

The last of these "exceptions" in Kansas is the one that resulted from a lawsuit filed against Coleman in Wichita by two former employees. The lawsuit had been dismissed by the trial court under the "employment at will" rule. In other words, the trial court found there was no express contract with the two employees, there was no public policy violation involved in their terminations, and therefore the terminations were not actionable. The matter was appealed and the Kansas Supreme Court ultimately found that the District Court was wrong when it dismissed the law suit, and remanded the matter for trial.

I'm not going to try to tell you what the Supreme Court actually decided, because even after reading the decision a number of times, I'm not sure. I do know that some people think the case ended the "employment at will" rule in Kansas. The only thing I know for sure is that the case allows an employment contract to be "implied" out of things like written or oral negotiations, the conduct of the parties, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and <u>any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.</u>

HOUSE LABOR & INDUSTRY
Attachment #1
3/01/88

What this kind of a test means is that virtually every time an employee is terminated, a jury is going to have to decide whether or not an employment contract existed, what its terms were, whether it was breached, and what the damages were. The result can only be more and more litigation. As you might expect, various lawyers groups are already holding seminars on how to exploit this situation.

Kansas employers deserve better than this. What is needed are clear guidelines, not vague and undefinable standards that are impossible to comply with and that benefit no one.

The Coleman Company is supporting House Bill No. 2927 because we believe it does provide a set of rules that are fair and that are capable of being understood and followed. Further, it provides a mechanism that should keep most employment termination matters out of the courts. This mechanism provides that if the parties themselves can't agree on whether a termination was "wrongful", then either party can request arbitration. If a party refuses arbitration, and then loses in court, they are responsible for the payment of the other party's legal fees.

Another provision in this Bill that should keep many of these cases out of court is the requirement that the terminated employee use any internal complaint or appeal provision that may be available. This is another way to let the parties try to work out their disagreements without the need for litigation and should be very helpful in those situations where there is misunderstanding or a lack of communication.

House Bill No. 2927 is not all one sided. Employers will be giving up some things. If passed, this Bill will clearly mark the end of "employment at will" in Kansas for everyone except "probationary" employees. Under this bill, non-probationary employees may be discharged only for good cause. "Good Cause" is defined so everyone can know what it means.

In final analysis, telling everyone what the rules are is what is important about House Bill 2927. It tells everyone when an employee can be discharged, what the possible damages are if the discharge is wrongful, and then provides significant incentives to all parties to resolve their differences outside the court room.

Without this bill, it is impossible for a Kansas employer faced with the need to terminate an employee, to know for sure what rules will be applied. The employer is never going to know
whether there is an "implied contract" with an employee until after a jury makes that decision. Worse, if there is an "implied contract", no one knows what its terms are until after the jury sets them.

Both employers and employees deserve better. It seems as though the courts often prefer to establish the rules after the fact, instead of setting clear standards to which people can conform their behavior. Perhaps that is the reason changes in the law should come from the Legislature and not from the courts. When the Legislature passes a law, it gives all citizens of this State the opportunity to know what the law is and to comply with it. This

avoids one of the problems with laws made by the courts, which is the necessity of spending substantial sums of money and time just to find out what the rules are, and then only after it is too late to change the decisions that have been affected by what ever the law turned out to be.

We thank you for giving House Bill 2927 your serious consideration.

Larry E. Sanford

HOUSE LABOR & INDUSTRY
Attachment #1
3/01/88

KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

TESTIMONY ON HOUSE BILL NO. 2927
BEFORE HOUSE COMMITTEE ON LABOR AND INDUSTRY

By

PATRICIA E. BAKER, SENIOR LEGAL COUNSEL
Kansas Association of School Boards

March 1, 1988

Mr. Chairman, members of the committee, I appreciate the opportunity to appear before you regarding House Bill 2927. The concerns of our 303 member public school districts relate to sections of House Bill 2927 which, we believe, create a new cause of action for some public employees.

House Bill 2927 presupposes a given probationary period of employment by all employers in the state. This is not the case with non-certified employees of the state. Of greatest concern is Section 4, Subsection (b).

Presently under Kansas law, certain certificated public employees are afforded protection from arbitrary and capricious firing through the Kansas Teacher Due Process Act and the Kansas Continuing Contract Act. Also, as public employees, Federal and State Constitutions and statutes prohibit discriminatory and retaliatory dismissals from employment. The legislature and the courts have, through enactment of statutes and court decisions, protected public employees. For Kansas School districts, enactment of House Bill 2927 would amount to the granting of tenure to all school employees, regardless of the position that they may hold. The definition of employee is so broad that it includes all employees regardless of position. It does not allow a public school to make a decision to replace management personnel.

HOUSE LABOR & INDUSTRY
Attachment #2
3/01/88

House Bill 2927 has some potentially beneficial provisions for public employment in that it limits the types of tort and contract actions which may be brought. It also provides a clear statement on the question of "employment at will". However, it also statutorily creates a tenure system for public employees which is not expressly stated in other areas of the law.

The limitations on liability provided for do not outweigh the stranglehold placed on public school districts in hiring the best possible staff for each and every job.

We ask for serious amendments to the bill or no recommendation for passage.

HOUSE LABOR & INDUSTRY
Attachment #2
3/01/88

HOUSE BILL No. 3020

Chairman Douville, Members of the Committee, my name is Larry Sanford. I am the Director of the Legal Department of The Coleman Company, Inc.

I am appearing today in support of House Bill No. 3032. This bill deals with "Blacklisting" and the furnishing of employment related information.

The part of House Bill No. 3032 that is of interest to Coleman is the portion dealing with the furnishing of employment related information to prospective employers.

Because of concerns about lawsuits and potential liability resulting from the giving of employment references, many employers have adopted what is referred to as a "no reference" policy. In other words, instead of providing prospective employers relevant information about a former employee's job performance and reasons for termination, many companies will only give information such as dates of service and job classifications held. As a result, reference checking and other pre-employment screening can become virtually meaningless.

Although at first glance it may seem that there is nothing wrong with this development, there are in fact several serious problems that can result.

The first involves situations where an employer knows something about the previous history of an employee that is relevant to the new employer, but it is not disclosed. As an example, one recent reported case involved an employee who raped a co-worker. That employee's previous employer knew that the employee had been previously convicted of rape, but did not tell the new employer. Both employers were found negligent in the lawsuit that followed. I don't know whether the failure to tell the new employer about the dangerous propensities of the employee resulted from a fear of liability or not. I do know that this was a "no win" situation for both employers, and for the employee who was assaulted, and that it might have been avoided with a more candid exchange of information between the two employers.

Another serious problem results when a prospective employee gives false information on an employment application. If previous employers refuse to cooperate in verifying the information, then the new employer has little alternative to taking the information at face value. In some instances, the information may relate to matters that can be corrected by terminating the employee when the discrepancies are discovered, usually because of poor performance on the new job. Even here, the new employer may incur substantial expenses that could have been avoided. But worse are those situations where the lives and safety of others may have been jeopardized.

I was personally involved in a situation were an applicant for a commercialpilots job made multiple misrepresentations in a job application. Had the previous employers been unwilling to participate in the reference checking process which was used, this unqualified pilot might well have ended

HOUSE LABOR & INDUSTRY
Attachment #3
3/01/88

up flying passengers who would never have suspected the danger in which they were being placed, until some tragedy occurred.

Another problem with discouraging candid employment references, is that it deprives good employees of something they have earned and should get the benefit of. If you work for someone and do a good job and stay with that same employer, then you usually get the benefits that result from having been a good employee. But, what if you have to change jobs for some reason? It doesn't matter whether it is a matter of choice, or a matter of necessity. If your old employer is afraid to give valid and comprehensive employment references, then you will lose much of the benefit of your previous efforts. No matter what you tell a new employer about how well you did your prior job, it will never have the same impact as a good reference from your previous employer.

Unless the Legislature speaks to this issue, knowledgeable Kansas employers are going to continue trying to chart a course between being sued for disclosing information, or being sued for not disclosing the same information. This really doesn't benefit anyone except employees with bad work records, false resumes, or misrepresentations on their employment applications.

Thank you for giving House Bill No. 3032 your consideration and support.

Larry E. Sanford

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

HB 2927 & HB 3020

March 1, 1988

Testimony Before the

House Committee on Labor and Industry

by

Rob Hodges
Executive Director
Kansas Industrial Council

Mr. Chairman, members of the Committee, I appreciate the opportunity to appear today to present the Chamber's positions on the issues of wrongful discharge and employment history information. We believe those to be the root matters of HB 2927 and HB 3020, respectively.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

While the two bills being considered by your committee today deal with separate issues, they are related in one very important way: The bills address problems for

Kansas employers which exist because of an uncertainty on the part of employers about what can and cannot be done in their employment practices.

In talking with KCCI members, and with other organizations across the nation which represent employers in the legislative process, it is clear that there is a growing question about how employment can be terminated. This is addressed in HB 2927. For years, both employers and employees worked under the employment-at-will doctrine which permitted either the employer or the employee to terminate employment "at will." An employee could not be forced to continue working a job and an employer could not be compelled to employ someone on a job. Either party could originate an employment termination "at will."

In recent years, there has begun a trend toward lawsuits charging "wrongful discharge." Those suits seek to undo the "employment-at-will" concept and limit the circumstances under which an employee may be legally terminated. Wrongful discharge suits have been successful in many areas and have created for employers a great uncertainty about what can and cannot be done regarding termination of an employee.

KCCI, on behalf of its members, supports legislative action to clarify what is permissible in Kansas. As to the specifics of HB 2927, our membership is somewhat divided. While agreeing something needs to be done, the membership is not united on whether HB 2927 is exactly what should be done. Specifically, members have questioned whether Section 5 of the bill would stand a court challenge.

Without the limitations on damages contained in Section 5, the bill offers little help to employers in dealing with wrongful discharge litigation. We suggest the Committee consider making that part of the bill unseverable from the rest. That way, if Section 5 is struck down in court, the whole law is stricken, and the legislature will know that a new approach must be found to address the issue.

Turning attention now to HB 3020, our members basically support this bill as an attempt to clarify what a previous employer may tell a prospective employer about a person's employment history. As in our testimony on HB 2927, our members have voiced

HOUSE LABOR & INDUSTRY
Attachment #4
3/01/88

a concern about the lack of understanding of what can and cannot be said in responding to a request for employment history information. The term "blacklisting" is unfortunate in addressing this problem, although it seems to be necessary. It's unfortunate because it raises the spectre of an employer out to "get" a previous employee by attempting to deny that person a job with another employer. In fact, very few if any employers seek such information for that purpose or even have time to engage in such practices. There is nothing sinister about an employer wanting to know about a potential employee's work history. The costs of hiring and training an employee, combined with the costs of salaries or wages and fringe benefits, create for employers a need to make the right hiring decision. Mistakes are too costly from an emotional standpoint as well as from a financial standpoint. HB 3020 could go a long way toward making sure a prospective employer can receive information about a job applicant. Our members have also pointed out that the bill would help employees in seeking a good job reference. Many such employees deserve to be given words of praise from a former employer but don't get them because that former employer has adopted a "no comment" philosophy out of fear of reprisal from disgruntled former employees who would not receive a good recommendation. Rather than do wrong, those employers do nothing -- which in turn does wrong to good employees. Our membership supports the attempt to solve this problem as contained in HB 3020.

Thank you, Mr. Chairman, for the opportunity to present our members' views on these bills. I'll attempt to answer questions.

HOUSE LABOR & INDUSTRY
Attachment #4
3/01/88

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

March 1, 1988

Session of 1988

HOUSE BILL No. 2927

By Representative Ott

(By request)

2-10

AN ACT enacting the wrongful discharge from employment act; providing a cause of action for wrongful discharge under certain conditions; defining terms; prescribing damages for certain purposes; providing certain limitations and exemptions.

Be it enacted by the Legislature of the State of Kansas:

Section 1. This act shall be known and may be cited as the "wrongful discharge from employment act."

Sec. 2. As used in this act:

(a) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities or other terms and conditions of employment.

(b) "Discharge" includes a constructive discharge as defined in subsection (a) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire and any other cutback in the number of employees for a legitimate business reason.

(c) "Employee" means a person who works for another for hire and does not include a person who is an independent contractor or a person who works for a political or taxing subdivision of the state.

(d) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan and pension or retirement

HOUSE LABOR & INDUSTRY
Attachment #5
3/01/88