

Approved: February 28, 1992
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Senator Wint Winter Jr. at 10:05 a.m. on January 28, 1992 in room 514-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Paul Shelby, Office of Judicial Administration
Brandon Myers, Kansas Human Rights Commission
Gina McDonald, Kansas Association of Centers for Independent Living

Chairman Winter brought the meeting to order by reopening the hearing for SB 499.

SB 499 - county law libraries in Edwards, Hodgemann, Lane, Ness, Pawnee and Rush counties.

Paul Shelby, Office of Judicial Administration, rose to withdraw his amendment request. When asked for his reason, he stated they withdrew the request in recognition of the policy decision of shifting authority to assess higher fees from the legislature to local boards.

Senator Moran moved to recommend SB 499 favorable for passage. Senator Kerr seconded the motion.

Senator Rock made a substitute motion to amend SB 499 as suggested by Mr. Shelby. (see minutes of January 27, 1992, ATTACHMENT 3) Senator Morris seconded the motion. The substitute motion to amend carried.

Senator Moran moved to recommend SB 499 favorable for passage as amended. Senator Morris seconded the motion. The motion carried.

Chairman Winter turned the Committee's attention to the Kansas Civil Rights Law and the Kansas Disabilities Law. He reviewed the 1991 legislative action in passing 1991 HB 2541, prohibiting discrimination based on disability or familial status. He stated the purpose of this day's briefing was to become informed of how the Kansas law related to the federal Americans With Disabilities Act (ADA).

Mike Heim, Kansas Legislative Research Department, briefed the Committee on the status of Kansas law and how it relates to the federal law on civil rights and disabilities. (ATTACHMENT 1) Additional materials distributed were:

- 1991 Session Laws, Chapter 147 (House Bill No. 2541);
- Ryan, David L. "Americans With Disabilities: The Legal Revolution" *The Journal*, November 1991, pages 13-18;
- "The Disabilities Act" *CQ Researcher*, 27 December 1991, Volume 1 No. 32;
- "Americans With Disabilities Act Fact Sheet" (ATTACHMENT 2); and
- "Employment Law: From Classified Ad To Pink Slip" Kansas Bar Association (ATTACHMENT 3).

Brandon Myers, Kansas Human Rights Commission, reviewed the Kansas and federal law differences for the Committee. (ATTACHMENT 4) Mr. Brandon noted that the Kansas definition of "employer" has existed since 1972.

Gina McDonald, Kansas Association of Centers for Independent Living, presented their position on the enactment of the disabilities act and requested that no changes be made. (ATTACHMENT 5)

The meeting was adjourned at 11:03 a.m.

MEMORANDUM

Kansas Legislative Research Department

Room 545-N – Statehouse
Topeka, Kansas 66612-1586
(913) 296-3181

January 29, 1992

To: Senate Judiciary Committee
From: Mike Heim, Principal Analyst
Re: 1991 H.B. 2541

The following is a brief summary of key facts about 1991 H.B. 2541 in reference to the existing Kansas law regarding discrimination in employment and public accommodations.

1. The Kansas Act Against Discrimination prior to July 1, 1991, the effective date of H.B. 2541, applied to employers employing four or more persons. Further, the above Act contained a prohibition against discrimination on the basis of "physical handicap." Finally, Kansas law contained a provision which provided for the award for pain, suffering, and humiliation of not to exceed \$2,000. Restated, these three key provisions were built into the Kansas Act Against Discrimination prior to the passage of H.B. 2541. Note that the Kansas law did not permit the award of attorney fees and still does not permit this.

2. The federal Americans With Disabilities Act of 1990 (ADA) in regard to employment discrimination against persons with a "disability" takes effect July 26, 1992 for employers with 25 or more employees and on July 26, 1994 for employers with 15 or more employees. In regard to public accommodations, the federal Act took effect on January 26, 1992, for businesses with more than 25 employees; will take effect on July 26, 1992 for businesses with 25 or fewer employees and annual revenue of \$1 million or less; and on January 26, 1993 for companies with ten or fewer employees and annual revenue not exceeding \$500,000.

Remedies under the ADA of 1990 include back pay and lost benefits, reinstatement, front pay when reinstatement was not appropriate, injunctive relief, and attorney fees.

3. The 1991 federal Civil Rights Act affects remedies under the ADA by permitting the award of compensatory and punitive damages in ADA disability cases in different amounts according to the following schedule:

- a. more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year -- \$50,000;
- b. more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year -- \$100,000;

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- c. more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year -- \$200,000; and
- d. more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year -- \$300,000.

4. It is true that the Kansas Act Against Discrimination, as amended by 1991 H.B. 2541, covers more employers than the federal counterpart but that difference was built into the law prior to the passage of H.B. 2541. Further, Kansas law prohibited the discrimination in employment against persons with a "physical handicap" prior to the federal ADA prohibiting employment discrimination against persons with a "disability." The term "disability" which now appears in both the Kansas law and the federal law is broader than that of a person with a "physical handicap" contained in prior Kansas law.

In regard to remedies, federal law always has allowed the award of attorney fees. It is now broader also because it permits compensatory and punitive damages in some cases of not to exceed \$300,000. Kansas law does not permit punitive damages and caps pain, suffering, and humiliation at \$2,000.

Americans with Disabilities Act Fact Sheet

Accessibility Requirements	Effective Date	Regulations and Enforcement
<p><u>Title I - Employment</u></p> <p>Employers with 15 or more employees may not discriminate against qualified individuals with disabilities.</p> <p>Employers must reasonably accommodate the disabilities of qualified applicants or employees, including modifying work stations and equipment, unless undue hardship would result.</p>	<p>July 26, 1992 - for employers with 25 or more employees.</p> <p>July 26, 1994 - for employers with 15 to 24 employees.</p>	<p>EEOC to issue regulations by July 26, 1991.</p> <p>Individuals may file complaints with EEOC. Individuals may also file a private lawsuit after exhausting administrative remedies.</p> <p>Remedies are the same as available under Title VII of the Civil Rights Act of 1964. Court may order employer to hire or promote qualified individuals, reasonably accommodate their disabilities, and pay back wages and attorney's fees.</p>

<u>Abbreviations used in this chart:</u>			
ADA	Americans with Disabilities Act	EEOC	Equal Employment Opportunity Commission
ATBCB	Architectural and Transportation Barriers Compliance Board	FCC	Federal Communications Commission
DOJ	Department of Justice	MGRAD	Minimum Guidelines and Requirements for Accessible Design
DOT	Department of Transportation	UFAS	Uniform Federal Accessibility Standards

U.S. Architectural and Transportation Barriers Compliance Board
 Suite 501, 1111 18th Street, NW
 Washington, DC 20036-3894

TELEPHONE: 1-800-USA-ABLE (voice or TDD)

The Access Board will provide an Information package on the Americans with Disabilities Act.

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Accessibility Requirements	Effective Date	Regulations and Enforcement
<p><u>Title II - Public Services</u></p> <p>State and local governments may not discriminate against qualified individuals with disabilities.</p> <p>Newly constructed state and local government buildings, including transit facilities, must be accessible.</p> <p>Alterations to existing state and local government buildings must be done in an accessible manner. When alterations could affect accessibility to "primary function" areas of a facility, an accessible path of travel must be provided to the altered areas and the restrooms, drinking fountains, and telephone serving the altered areas must also be accessible, to the extent that the additional accessibility costs are not disproportionate to the overall alterations costs.</p> <p>New buses and rail vehicles for fixed route systems must be accessible.</p> <p>New vehicles for demand responsive systems must be accessible unless the system provides individuals with disabilities a level of service equivalent to that provided to the general public.</p> <p>One car per train must be accessible.</p> <p>Existing "key stations" in rapid rail, commuter rail, and light rail systems must be accessible.</p>	<p>January 26, 1992 - unless otherwise noted below. (Recipients of Federal financial assistance are presently required to comply with similar requirements under Section 504 of the Rehabilitation Act of 1973.)</p> <p>Ordered after August 25, 1990.</p> <p>Ordered after August 25, 1990.</p> <p>By July 26, 1995.</p> <p>By July 26, 1993. Extensions may be granted up to July 23, 2010 (commuter rail) and July 26, 2020 (rapid and light rail) for stations needing extraordinarily expensive structural changes.</p>	<p>DOJ to issue regulations except for public transportation by July 26, 1991.</p> <p>DOT to issue regulations for public transportation by July 26, 1991.</p> <p>ATBCB to supplement MGRAD by April 26, 1991. DOJ and DOT regulations must be consistent with supplemental MGRAD and may incorporate the supplemental MGRAD.</p> <p>UFAS to be used as interim accessibility standard if final regulations have not been issued and if a building permit has been obtained prior to issuance of final regulations, work begins within one year of receipt of permit, and is completed under the terms of the permit. If final regulations have not been issued one year after MGRAD has been supplemented, MGRAD to be used as interim accessibility standard.</p> <p>(Facilities constructed or altered with Federal funds are presently required to comply with UFAS under the Architectural Barriers Act of 1968. Facilities constructed or altered by recipients of Federal financial assistance are presently required to comply with UFAS or other applicable standards under Section 504 of the Rehabilitation Act of 1973.)</p> <p>Amtrak and commuter rail passenger cars must comply with MGRAD provisions for rail cars to the extent that they are in effect at the time the design of the cars is substantially completed, if final regulations have not been issued.</p>

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Accessibility Requirements	Effective Date	Regulations and Enforcement
<p>Comparable paratransit must be provided to individuals who cannot use fixed route bus service to the extent that an undue financial burden is not imposed.</p> <p>All existing Amtrak stations must be accessible.</p> <p>Amtrak trains must have same number of seating spaces for individuals who use wheelchairs as would available if every car in the train were accessible to such individuals.</p>	<p>By January 26, 1992.</p> <p>By July 2010.</p> <p>By July 26, 2000. Half of these seats must be available by July 26, 1995.</p>	<p>Individuals may file complaints with DOT concerning public transportation and with other designated Federal agencies concerning matters other than public transportation. Individuals may also file a private lawsuit.</p> <p>Remedies are the same as available as under Section 505 of the Rehabilitation Act of 1973. Court may order entity to make facilities accessible, provide auxiliary aids or services, modify policies, and pay attorneys' fees.</p>
<p><u>Title III - Public Accommodations</u></p> <p>Restaurants, hotels, theaters, shopping centers and malls, retail stores, museums, libraries parks, private schools, day care centers, and other similar places of public accommodation may not discriminate on the basis of disability.</p> <p>Physical barriers in existing public accommodations must be removed if readily achievable (i.e., easily accomplishable and able to be carried out without much difficulty or expense). If not, alternative methods of providing services must be offered, if those methods are readily achievable.</p> <p>New construction in public accommodations and commercial facilities (non-residential facilities affecting commerce) must be accessible.</p>	<p>January 26, 1992 - unless otherwise noted below.</p>	<p>DOJ to issue regulations except for privately operated transportation by July 26, 1991.</p> <p>DOT to issue regulations for privately operated transportation by July 26, 1991.</p> <p>ATBCB to supplement MGRAD by April 26, 1991. DOJ and DOT regulations must be consistent with supplemental MGRAD and may incorporate the supplemental MGRAD.</p> <p>UFAS to be used as interim accessibility standard if final regulations have not been issued and if a building permit has been obtained prior to issuance of final regulations, work begins within one year of receipt of permit, and is completed under the terms of the permit. If final regulations have not been issued one year after MGRAD has been supplemented, MGRAD to be used as interim accessibility standard.</p>

Accessibility Requirements	Effective Date	Regulations and Enforcement
<p>Alterations to existing public accommodations and commercial facilities must be done in an accessible manner. When alterations could affect accessibility to "primary function" areas of a facility, an accessible path of travel must be provided to the altered areas and the rest rooms, telephones and drinking fountains serving the altered areas must also be accessible, to the extent that the additional accessibility costs are not disproportionate to the overall alterations costs.</p> <p>Elevators are not required in newly constructed or altered buildings under three stories or with less than 3,000 square feet per floor, unless the building is a shopping center, mall or health providers office. The Attorney General may determine that additional categories of such buildings require elevators.</p> <p>New buses and other vehicles (except automobiles) operated by private entities must be accessible or system in which vehicles are used must provide individuals with disabilities a level of service equivalent to that provided to the general public depending on whether entity is primarily engaged in business of transporting people; whether system is fixed route or demand responsive; and vehicle seating capacity.</p> <p>New over-the-road buses (buses with an elevated passenger deck located over a baggage compartment) must be accessible.</p>	<p>Ordered after August 25, 1990.</p> <p>Ordered after July 26, 1996 (July 26, 1997, for small companies). Date may be extended by one year after completion of a study.</p>	<p>On application by State or local government, Attorney General, in consultation with ATBCB, may certify that State or local building codes meet or exceed ADA accessibility requirements.</p> <p>Individuals may file complaints with the Attorney General. Individuals may also file a private lawsuit.</p> <p>Remedies are the same as available under Title II of the Civil Rights Act of 1964. Court may order an entity to make facilities accessible, provide auxiliary aides or services, modify policies, and pay attorneys' fees.</p> <p>Court may award money damages and impose civil penalties in lawsuit filed by Attorney General but not in private lawsuit by individuals.</p> <p>Small businesses with 25 or fewer employees and gross receipts of \$1 million or less may not be sued for violations occurring before July 26, 1992; and small businesses with 10 or fewer employees and gross receipts of \$.5 million or less may not be sued for violations occurring before January 26, 1993. However, such small businesses may be sued for violations relating to new construction and alterations to facilities occurring after the effective date.</p>
<p><u>Title IV - Telecommunications</u></p> <p>Telephone companies must provide telecommunications relay services for hearing-impaired and speech-impaired individuals 24 hours per day.</p>	<p>By July 26, 1993.</p>	<p>FCC to issue regulations by July 26, 1991.</p> <p>Individuals may file complaints with the FCC.</p>

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e. Remedies Under the ADA.

(1) Again, the potential remedies available in ADA cases parallel those available in Title VII cases pursuant to 42 U.S.C. S 2000e-5(g):

(a) Backpay and lost benefits.

(b) Reinstatement.

(c) Front pay (when reinstatement is not appropriate).

(d) Injunctive relief.

(e) Attorneys' fees. Note: Sec. 505 of the ADA goes beyond Title VII by permitting recovery of attorneys' fees incurred in agency proceedings.

(2) If Congress expands the remedies available under Title VII, as proposed under the Civil Rights Act of 1990, the expanded remedies would also apply in ADA cases. An amendment sponsored by Rep. Sensenbrenner (R-Wisconsin), which would have "locked in" the limited remedies currently available under Title VII, was overwhelmingly rejected by Congress.

F. 1991 Civil Rights Act

1. Historical Background. Motivation for the adoption of the 1991 Civil Rights Act is found in several recent decisions of the United States Supreme Court. These decisions cover the areas of coverage of civil rights protection, procedures, and remedies.

a. In Patterson v. McLean Credit Union, 491 U.S. 164, (1989), the Court held that coverage of 42 U.S.C. S 1981 was limited in employment cases to hiring and some promotion decisions, and did not extend to harassment, termination or most post-hiring decisions.

b. In Equal Employment Opportunity Commission v. Aramco, 111 S.Ct. 227, 59 USLW 4225, (1991) the court held that federal employment discrimination laws did not protect overseas employees of American firms.

c. In a disparate impact case, the employer was allowed to show a business justification for its action, rather than a business necessity, in Wards Cove Packing Company v. Atonio, 490 U.S. 642 (1989).

d. Challenge by white fireman to a consent decree entered years before the challenge was filed was allowed in Martin v. Wilks, 490 U.S. 755 (1989).

e. In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Supreme Court considered a mixed motive case, and allowed the employer to show that the employment decision would have been taken even without the discriminatory motive.

f. A suit challenging the adoption of an allegedly discriminatory seniority system was held time-barred in Lorance v. AT&T, 490 U.S. 900 (1989), based on a calculation of the time from the date the system was adopted by the employer, rather than from the time the plaintiff is first affected by the rule.

2. Provisions. (See S. 1745, 102d Cong., 1st Sess. (1991) appended hereto in its entirety.)

The most significant provisions of the Civil Rights Act of 1991 addressed and altered several decisions of the United States Supreme Court which have been made since 1989.

In Wards Cove Packing Company v. Atonio, 490 U.S. 642, (1989), the United States Supreme Court overturned the precedent set by Griggs v. Duke Power Company, 401 U.S. 424 (1971), regarding the burden of proof in cases alleging discrimination based upon the disparate impact of businesses hiring minorities. Prior to the ruling in Wards Cove, it was the plaintiff's burden to develop a prima facie case of discrimination. The burden of proof would then shift to the defendant who must then prove that its hiring practices, which had the disparate impact, constituted a business necessity.

In Wards Cove, the court shifted the burden of proof from the defendant to the plaintiff, requiring the plaintiff to both demonstrate that the employer's practices resulted in a disproportionate impact on members of a protected group and to isolate and identify the specific employment practice which caused the adverse impact. Wards Cove Packing Company, 490 U.S. 642.

Section 8 of the Civil Rights Act of 1991 restores the force and effect of the Griggs decision by reinstating the rule that the defendant has the burden of proving that the hiring practice in question was not related to the position and was not consistent with a business necessity or that there was not a less discriminatory alternative to the hiring practice.

Additionally, after much debate the Civil Rights Act of 1991, deletes the definition of the term "business necessity" which was defined as "manifest relationship to the employment in question", a direct quote from the Griggs case, and instead, specifies that the purpose of the act is to codify the concepts of "business necessity" and "job-related" enunciated by the Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971). Thus, the Civil Rights Act of 1991 does not specifically incorporate the language from Griggs, but nonetheless incorporates the concept of Griggs and the legislative history supports such a construction.

In Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), the United States Supreme Court ruled that Section 1981 of the Civil Rights Act of 1866 prohibited racial discrimination in hiring, but not in post-hiring employment. The Civil Rights Act of 1991 reverses the decision in Patterson and extends the coverage of Section 1981 to victims of racial harassment and in the job setting.

In Martin v. Wilks, 109 S.Ct. 2180 (1988), the United States Supreme Court ruling discouraged the use of consent decrees to settle a job discrimination suit by allowing numerous challenges to such consent decrees. As a result, consent decrees as a method of resolution as an alternative to litigation became less attractive since they were not a final decree. In order to address this problem, Section 11 of the Civil Rights Act of 1991, requires that notices be given to all persons who might be adversely affected by a court order, including consent decrees. An individual would then be given a reasonable opportunity to challenge the court

order or decree and after the passage of such time, subsequent lawsuits would be barred.

In Lorance v. AT&T Technologies, 109 S.Ct. 2261 (1989), the United States Supreme Court ruled that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the plan causes harm to an employee. As a result, it was felt that most employees would be barred from bringing suit for discriminatory promotion practices. The Civil Rights Act of 1991 permits a person to challenge discriminatory employment practices when the harm occurs to them, thus reversing the impact of the Lorance decision.

3. Retroactivity.

Courts disagreed on whether decisions such as Patterson v. McLean Credit Union, 491 U.S. 164 (1989) should be applied retroactively. Trujillo v. Grand Junction Regional Center, 928 F.2d 973 (10th Cir. 1991) applied Patterson retroactively. By contrast, an early draft of the 1991 Civil Rights Act provided for its retroactive application by stating in part:

Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment...shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made.

However, the recently passed 1991 Civil Rights Act contains no language which would indicate that it is to be applied retroactively. In fact, a spokesperson for Senator Dole's office stated that "in the opinion of the Senator and the Administration, the Act is not retroactive and it was not intended to be retroactive."

4. Remedies. The Act has unique features regarding attorneys fees, experts and damages.

a. Jury Trials. Section 102 of the Act by adopting Section 1977A(c) provides that if a complaining party is seeking compensatory or punitive damages, any party may demand a trial by jury.

b. Compensatory and Punitive Damages. Section 1977A(a)(1) provides that in Title VII cases a complainant can recover compensatory and punitive damages as allowed in subsection (b) if the respondent engaged in unlawful intentional discrimination. Section 1977A(a)(2) provides that under the Americans with Disability Act or Section 501 of the Rehabilitation Act 1973, that a complainant may recover compensatory and punitive damages as allowed in subsection (b) if the respondent engaged in unlawful intentional discrimination.

c. Determination of Punitive Damages. Section 1977A(b)(1) provides that a complaining party may recover punitive damages if the respondent engaged in a discriminatory practice with malice or reckless indifference to the rights of the aggrieved individual.

d. Limitations. Section 1977A(b)(3) provides that the sum of the amount of compensatory damages awarded for future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, coupled with the amount of punitive damages shall not exceed for each complaining party in the case of a respondent who has:

(1) More than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(2) More than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000;

(3) More than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000;

(4) More than 500 employees in each of 20 or

more calendar weeks in the current or preceding calendar year, \$300,000.

e. Expert Witness Fees. Section 113 of the Act provides that expert witness fees may be included as part of the attorneys' fees previously allowed under the Civil Rights Attorneys' Fees Act.

In West Virginia University Hospitals v. Casey, 111 S.Ct. 1138, 59 USLW 4180 (1991) the Supreme Court held that attorneys' fees awarded in a civil rights case do not include expert witness fees.

G. Other Federal Statutory and Constitutional Basis for EEO Claims.

1. The Rehabilitation Act of 1973 (Sections 503 and 504).
2. Title IX of the Education Amendments of 1972 -- Prohibition of sex discrimination in educational programs receiving federal financial assistance.
3. Executive Order 11246 -- Prohibition against discrimination by employers doing business with U.S. Government--generally held no private right of action.
4. Vietnam Era Veterans' Readjustment Act of 1972 [38 U.S.C. S 2011, et seq.] -- Prohibition against discrimination against qualified disabled veterans and veterans of Vietnam era.

H. Kansas Statutory Fair Employment Laws.

It is the policy of Kansas to assure equal opportunities and encouragement to every citizen regardless of race, religion, color, sex, physical handicap, national origin or ancestry, in securing and holding, without discrimination, employment in any field of work or labor for which such person is properly qualified. The opportunity to secure and to hold employment is a civil right of every citizen. K.S.A. 44-1001.

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Presentation of the Kansas Human
Rights Commission to the Senate
Judiciary Committee Regarding
H.B. 2541, January 27, 1992.

The legal staff of the Kansas Human Rights Commission (KHRC) has been requested by the Committee to briefly review the differences between the employment discrimination provisions of the Kansas Act Against Discrimination (KAAD) as amended in 1991 by passage of H.B. 2541, and the employment discrimination provisions of the Federal Americans with Disabilities Act of 1990. Appearing for this purpose is Brandon L. Myers, KHRC Hearing Examiner.

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq., contains provisions designed to protect persons with disabilities from discrimination in employment, public services, public accommodations and services operated by private entities, and telecommunications. The Federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcement of Title I of the ADA, which prohibits employment discrimination on the basis of disability.

H.B. 2541, as regards discrimination on the basis of disability, was designed to amend the Kansas Act Against Discrimination so that state law would be in substantial conformity with the ADA. Prior to the adoption of H.B. 2541 the KAAD, which is administered by the KHRC, contained only provisions against discrimination on the basis of physical handicap. There are two differences between the ADA and the KAAD as amended by H.B. 2541 in which the KAAD would be considered broader or more extensive. The KAAD applies to employers who have four or more employees, and the H.B. 2541 changes to the KAAD became effective on July 1, 1991. In contrast, the ADA will become effective as to employers with 25 or more employees on July 26, 1992 and to employers with 15 or more employees on July 26, 1994.

The KAAD allows incidental awards of up to \$2,000.00 damages for pain, suffering and humiliation from an act of discrimination; at the time the ADA was initially passed, there was no such authority within the ADA for compensatory damages. However, the Federal Civil Rights Act of 1991 enhanced the remedies available for violations of the ADA, so that the damages awardable under the ADA outstrip those available under the KAAD. The KAAD does not provide for an award of attorneys fees, while such fees may be awarded under ADA. Other minor differences exist between the two laws which are similar to those existing between the KAAD and Federal Title VII of the Civil Rights Act of 1964. For example, the limitation period for filing a complaint with KHRC under the Kansas Act is 6 months; the period for filing an ADA complaint with EEOC is 180 days.

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KANSAS ASSOCIATION OF CENTERS FOR INDEPENDENT LIVING

3258 South Topeka Blvd. ~ Topeka, Kansas 66611 ~ (913) 267-7100 (Voice/TDD)

Gina McDonald
Executive Director

TESTIMONY TO
SENATE JUDICIARY COMMITTEE

WINT WINTER, CHAIR

01-27-92

Member agencies:

ILC of Southcentral Kansas
Wichita, Kansas
(316) 942-8079

Independence, Inc.
Lawrence, Kansas
(913) 841-0333

Independent Connection
Salina, Kansas
(913) 827-9383

LINK, Inc.
Hays, Kansas
(913) 625-2521

Resource Center for
Independent Living
Osage City, Kansas
(913) 528-3105

Resource Network
for the Disabled
Atchison, Kansas
(913) 367-6367

The WHOLE PERSON, Inc.
Kansas City, Missouri
(816) 361-0304

Three Rivers Independent
Living Resource Center
Wamego, Kansas
(913) 456-9915

Topeka Independent
Living Resource Center
Topeka, Kansas
(913) 267-7100

My name is Gina McDonald and I represent the Kansas Association of Centers for Independent Living (KACIL). I appreciate the opportunity to address this committee concerning the Kansas Act Against Discrimination (KAAD).

As you can see from the chart included with this testimony, the KAAD is comparable to the Americans With Disabilities Act of 1991 in all aspects except in the employment section regarding the number of employees a business has in order to be covered. The Kansas Act was changed a number of years ago to reflect that any business with four or more employees was covered by the act. Other federal civil rights legislation at the time the KAAD was passed covered those businesses with twenty five (25) or more employees in the first years of the laws. In the second or third years of the legislation the number of employees was reduced to fifteen (15) or more employees.

In determining the number of employees for covered entities in the KAAD when it was originally proposed, it was discovered that if the same numbers were used as in other federal civil rights legislation, approximately eighty eight percent (88%) of businesses in Kansas would be exempt from the law, thereby diminishing the purpose of equal access and nondiscrimination. In order to cover a larger number of businesses, it was decided to include businesses with four or more employees as covered entities under the act. This is in line with other states' legislation regarding employment as can be seen in chart number two (2).

Last year advocates for people with disabilities worked to add language to KAAD that would bring it into compliance with the Americans with Disabilities Act

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(A.D.A.) Many groups testified that the language changes were added for that purpose. We did not intend to shelter that fact that KAAD was more strict than ADA with regard to the number of employees for covered entities. KACIL believed that everyone was aware of this information since it was already in the law. KACIL respects this legislature and would do nothing to hide information or undermine it's process.

KACIL continues to support the KAAD in it's present form and requests that this body do nothing to weaken it. If KACIL can be of assistance in further clarifying our position, I would be happy to be of assistance.

Thank you again, for the opportunity to speak to you today.

ISSUE	ADA	SECTION 504	KAAD
Coverage	<ol style="list-style-type: none">1. Covers <u>all</u> employers with 25 or more employees beginning July 26, 1992.2. Covers <u>all</u> employers with 15 to 24 employees beginning July 26, 1994.	Covers all recipients of Federal funds. (Section 503 of Rehabilitation Act covers only Federal contractors and sub-contractors with contracts over \$2,500)	An "employer" includes any person in Kansas employing four (4) or more persons; any person acting directly or indirectly for an employer, labor organizations, nonsectarian corporations, and organizations engaged in social service work; the state of Kansas and all political and municipal subdivisions in Kansas.
Exemptions from coverage	<ol style="list-style-type: none">1. U.S. Senate.2. Private clubs as defined by regulations in the Internal Revenue Code.3. Religious Institutions.	There are <u>no exemptions</u> from coverage by entities receiving Federal funds.	Non-profit fraternal or social associations or corporations are <u>not</u> included under the definition of "employer." "Employee" does <u>not</u> include any individual employed by such individual's parents, spouse, or child, or in the domestic service of any person. Religious or non-profit fraternal or social associations or corporations are not covered under KAAD's public accommodation requirements, but religious organizations are not specifically exempt from employment provisions.

DRAFT

CHART COMPARING EMPLOYMENT PROVISIONS OF ADA, SECTION 504 AND KANSAS ACT AGAINST DISCRIMINATION (KAAD)

ISSUE	ADA	SECTION 504	KAAD
Definition of "disability"	<p>Disability with respect to an individual, means:</p> <ol style="list-style-type: none"> 1) a physical or mental impairment which substantially limits one or more major life activities of such individual; 2) a record of having such an impairment; or 3) being regarded as having such an impairment. 	<p>"Handicapped individual" definition is similar to the ADA's definition of "disability."</p>	<p>Definition of "disability" is identical to the definition used by the ADA.</p>
"Qualified" individual with a disability	<p>Being "qualified" means that an individual with a disability can, with or without reasonable accommodation, perform the essential functions of the employment position that such an individual holds or desires.</p>	<p>"Qualified handicapped person" means a "handicapped" person who, with reasonable accommodation, can perform the essential functions of the job in question.</p>	<p>"Qualified individual with a disability" means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position the person holds or desires, or who, with or without reasonable accommodation, can perform the essential functions of the position. [21-34-1 (l) in KAAD guidelines.]</p>
"Reasonable accommodation"	<p>Reasonable accommodations are modifications or adjustments to a variety of job-related settings or issues which enable a qualified individual with a disability to compete equally for a desired position, affecting:</p> <ol style="list-style-type: none"> 1) the job application process; 2) the work environment or the manner or circumstances under which the position held or desired is customarily performed; and 3) equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities. 	<p>Making facilities used by employees readily accessible and usable by "handicapped" persons.</p>	<p>"Reasonable accommodation" means:</p> <ol style="list-style-type: none"> 1) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and 2) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials or policies; provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

ISSUE	ADA	SECTION 504	KAAD
Enforcement procedures or remedies	<p>1. Law incorporates the powers, remedies and procedures set forth in the Civil Rights Act of 1964 (Title VII); that is, enforcement for employment issues is through the EEOC.</p> <p>2. With passage of the Civil Rights Act of 1991, the ADA also incorporates remedies and procedures such as trial by jury, compensatory and punitive damages.</p>	<p>1. Enforcement is provided by the agency providing Federal funding to the covered entity.</p> <p>2. Individuals have a private right of action.</p> <p>3. Remedies include back pay and possible cancellation of the Federal grant or contract.</p>	<p>1. The Kansas Commission on Civil Rights is the responsible agency for enforcement.</p> <p>2. Individuals have a right to file a complaint with the commission within six (6) months of an alleged violation.</p> <p>3. The commission or attorney general may also make a complaint.</p>
Conciliation efforts	<p>ADA requires EEOC conciliation efforts after an administrative charge has been filed.</p>	<p>Section 504 promotes voluntary settlement by providing that enforcement action may not begin until an official of the responsible agency determines that compliance cannot be secured by voluntary means.</p>	<p>The commission makes a prompt investigation of any filed complaint. If a commissioner determines a probable cause exists for crediting the allegations in the complaint, a commissioner or someone designated by the commission immediately endeavors to eliminate the discriminatory practice through conference and conciliation. If this effort fails, the commission commences a hearing where any endeavors at conciliation are <u>not</u> permitted as evidence.</p>
Burden of proof selection criteria	<p>An employer must show that selection criteria are job-related and consistent with business necessary and that such performance cannot be accomplished even with provision of reasonable accommodation.</p>	<p>The burden of proof is on the recipient of Federal funds to show that selection criteria are job-related. The burden on the enforcement agency is to show the existence of alternative criteria.</p>	<p>The burden of proof in the KAAD is not as clearly stated as in the ADA, but it may be presumed to be on the employer based upon language in the KAAD guidelines.</p>

ISSUE	ADA	SECTION 504	KAAD
<p>Drug and/or alcohol abuse</p>	<p>A covered business may hold an individual who is an alcoholic to the same qualification standards for employment or job performance as it holds for other employees, even if any unsatisfactory performance or behavior is related to the alcoholism. "Qualified individual with a disability" does <u>not</u> include an employee or applicant who is currently engaging in the use of illegal drugs. An individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs shall still be considered a "qualified individual with a disability."</p>	<p>Any individual who is an alcoholic whose current use of alcohol prevents the individual from performing the duties of the job in question or whose employment by reason of such current alcohol use would constitute a direct threat to the property or safety of others is excluded from 504 coverage. The ADA changed Section 504 to include similar language regarding individuals who are currently engaging in the illegal use of drugs – they are <u>not</u> "qualified individuals with handicaps" under Section 504.</p>	<p>KAAD language is similar to ADA and Section 504 language regarding coverage for people who are alcoholics and/or drug abusers. [See 21-34-7 of the guidelines.]</p>
<p>Contagious diseases and "Direct threat"</p>	<p>"Qualification standards" may include a requirement that an individual not pose a direct threat to the health and safety of him or herself or other individuals in the work place. People with HIV or AIDS are protected, however, under the definition of "qualified individual with a disability." Secretary of Health and Human Services publishes an annual list of contagious diseases which can be used by an employer to assess the appropriateness and impact of people working in the food handling industry.</p>	<p>There is no comparable provision under Section 504.</p>	<p>KAAD has no comparable section regarding contagious diseases. It does, however, describe "direct threat" criteria. A person with a disability may be determined to pose a direct threat if an assessment based upon a reasonable medical judgment, relying upon most current medical knowledge, or best available objective evidence, or both, determines such a threat. Factors to be considered include: duration of risk; nature and severity of potential harm; likelihood that the potential harm will occur; and the imminence of the potential harm. [21-34-13 of the guidelines.]</p>

ISSUE	ADA	SECTION 504	KAAD
Job application procedures	There must be <u>no</u> discrimination with regard to job application procedures. Do not use procedures to screen out people with disabilities or ask questions of an applicant or employee about their disabilities unless specifically job-related and of a business necessity.	Prohibits discrimination in recruitment, advertising and processing of applicants for employment.	Employers, employment agencies and labor organizations may not print or circulate (or cause to be printed or circulated) any statement, advertisement or publication, or to use any form of application for employment or membership or to make any inquiry in connection with prospective employment or membership, which expresses any limitation, specification or discrimination as to disability, unless based on a bona fide occupational qualification.
Pre-employment physical exams	Medical exams prior to an offer of a job are prohibited. Medical exams are permitted after a conditional offer of employment has been made as long as all other entering employees must take the same medical exam prior to entering their jobs.	Prohibits medical examinations prior to offer of employment, although the offer may be conditioned on the results of a physical exam prior to entrance on duty. Such medical exams cannot be used to screen out "handcapped" persons unless they are job-related.	A covered entity may not conduct a medical examination or make inquiries of a job applicant about a candidate's disability unless such inquiry is directly related to the candidate's ability to perform a job-related function. [21-34-3 and 21-34-4 of the guidelines.]
Employee medical exams	Medical examinations of employees are <u>not</u> permitted unless they can be shown to be job-related and consistent with business necessity.	There is no comparable provision under Section 504.	Employment entrance examinations and inquiries <u>are</u> permitted after an offer of employment has been made <u>if</u> all entering employees in the same job category are subjected to such an examination, information collected during the exam is maintained separately, and the results of such an examination are used only in accordance with KAAD regulations. A covered entity may conduct voluntary medical examinations as part of an employee health program available to employees at the work site. [21-34-4, 21-34-5 and 21-34-6 of the guidelines.]

ISSUE	ADA	SECTION 504	KAAD
<p>General rules against discrimination</p>	<p>The ADA prohibits discrimination because of disability in regard to application procedures, hiring, promotion, discharge, compensation, training and other terms, conditions, and privileges of employment. Discrimination on the basis of disability includes:</p> <ol style="list-style-type: none"> 1) limiting, segregating, or classifying a job applicant for employment; 2) discriminatory contractual relationships; 3) utilizing discriminatory standards, criteria or methods of administration; 4) denying equal job benefits because of known relationships or associations with people who have disabilities; 5) failing to make reasonable accommodations unless such accommodation would impose an undue hardship; 6) refusing to hire based upon the need to make reasonable accommodation; 7) using non-job related tests which screen out individuals with disabilities; and 8) using improper selecting and administering tests concerning employment. 	<p>Prohibits discrimination solely on the basis of "handicap." There is a broad prohibition of discriminatory actions by Federal grant recipients with respect to: recruitment, hiring, promotion, termination, rates of pay, job assignments, training and other terms, privileges or conditions of employment on the basis of unlawful discrimination because of a person's "handicap."</p> <p>Federal contractors covered by Section 503 must take affirmative action to employ individuals with "handicaps" and treat them without discrimination in all employment practices.</p>	<p>The KAAD prohibits discrimination against individuals in employment relations, in relation to free and public accommodations, in housing by reason of race, religion, color, sex, disability, national origin or ancestry. Its prohibitions against discrimination in employment relations includes:</p> <ol style="list-style-type: none"> 1) refusal to hire or employ; discharge; or otherwise discriminate in compensation, terms, conditions, or privileges of employment; 2) limit, segregate, separate, classify, or make any distinction in regards to employees; 3) follow any employment procedure or practice which results in discrimination, segregation or separation without a valid business necessity. <p>Similar to the ADA, the KAAD prohibits discrimination by labor organizations, employers or employment agencies in their employment or membership practices.</p>

5-9/13

ISSUE	ADA	SECTION 504	KAAD
"Undue hardship"	<p>"Undue hardship" means an action requiring significant difficulty or expense. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:</p> <ol style="list-style-type: none">1) nature and cost;2) overall financial resources of the facility or facilities involved (including the number of persons employed at such facility and the effect or impact on expenses and resources;3) overall financial resources of entire business; and4) type of operation, including the structure and functions of the work force, administrative and fiscal relationship of the facility in question to the covered business.	<p>The recipient must make reasonable accommodations unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Factors to be considered include:</p> <ol style="list-style-type: none">1) size of the program and its budget;2) type of operation; and3) the nature of the cost of the accommodation. <p>Denial of employment based upon the need to make accommodation is prohibited.</p>	<p>"Undue hardship" means an action requiring significant difficulty or expense [identical to ADA language]. KAAD takes into consideration factors similar to those under the ADA. Under "nature and net cost of the accommodation needed," the availability of tax credits and deductions, outside funding, or both will also be taken into consideration. In addition to the composition, structure, and functions of the workforce of the covered entity, the "geographic separateness, administrative, or fiscal relationship of the facility or facilities in question" will be examined in determining "undue hardship." [21-34-19 (b)(1)(B) of the KAAD guidelines]</p>

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5-10/83

State	Disability/Handicap Discrimination Law Applies to Private Employers?	Definition of Disability/Handicap Includes A History Of, And A Perceived Disability	Reasonable Accommodation Required?	Drug Addiction or Alcoholism Protected?	Minimum Number of Employees for Coverage
Alabama	No	***	***	***	***
Alaska	Yes	Yes	Yes	No	1
Arizona	Yes	Yes	Yes /1	No	15
Arkansas	Only public funded employment covered	***	***	***	***
California	Yes	No /2	Yes	No	5
Colorado	Yes	Yes /2	Yes /3	Yes	1
Connecticut	Yes	Yes	Yes	Yes	3
Delaware	Yes	Yes	Yes /4	No	20
District of Columbia	Yes	No	Yes	Yes	1
Florida	Yes	Yes	Yes	Yes	15
Georgia	Yes	Yes	No	No	15
Hawaii	Yes	Yes	No	No	1
Idaho	Yes	Yes	Yes /1	Yes	10
Illinois	Yes	Yes	Yes /5	No	1
Indiana	Yes	Yes	No	Yes	6
Iowa	Yes	Yes	Yes	Yes	4

State	Disability/Handicap Discrimination Law Applies to Private Employers?	Definition of Disability/Handicap Includes A History Of, And A Perceived Disability	Reasonable Accommodation Required?	Drug Addiction or Alcoholism Protected?	Minimum Number of Employees for Coverage
Kansas	Yes	No	No	Yes	4
Kentucky	Yes	No	No	No	8
Louisiana	Only public funded employment covered	***	***	***	***
Maine	Yes	Yes	Yes	Yes	15
Maryland	Yes	Yes	Yes	No	15
Massachusetts	Yes	Yes	Yes	Yes	6
Michigan	Yes	Yes	Yes	No	4
Minnesota	Yes	Yes	Yes	No	1
Mississippi	Only public funded employment covered	***	***	***	***
Missouri	Yes	Yes	Yes	Yes	6
Montana	Yes	Yes	No	No	1
Nebraska	Yes	No	Yes	No	15
Nevada	Yes	No	Yes	No	15
New Hampshire	Yes	Yes	No	Yes	6
New Jersey	Yes	Yes	Yes	Alcohol-Yes; Drugs-No	1
New Mexico	Yes	Yes	Yes	No	4

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State	Disability/Handicap Discrimination Law Applies to Private Employers?	Definition of Disability/Handicap Includes A History Of, And A Perceived Disability	Reasonable Accommodation Required?	Drug Addiction or Alcoholism Protected?	Minimum Number of Employees for Coverage
New York	Yes	Yes	Yes	Yes	4
North Carolina	Yes	Yes	Yes /4	No	15
North Dakota	Yes	Yes	Yes	No	10
Ohio	Yes	Yes	Yes	Yes	4
Oklahoma	Yes	Yes	Yes	No	15
Oregon	Yes	Yes	Yes	Yes	6
Pennsylvania	Yes	Yes	Yes	Yes	4
Puerto Rico	No	---	---	---	---
Rhode Island	Yes	Yes	Yes	Yes	4
South Carolina	Yes	No	No	No	15
South Dakota	Yes	No	Yes	Yes	1
Tennessee	Yes	Yes	No	Yes	8
Texas	Yes	Yes	Yes	No	15
Utah	Yes	Yes	No	No	15
Vermont	Yes	Yes	Yes	No	1
Virginia	Yes	No	Yes	No	1
Washington	Yes	Yes	Yes	Yes	8

5-12/13

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5-13/13

State	Disability/Handicap Discrimination Law Applies to Private Employers?	Definition of Disability/Handicap Includes A History Of, And A Perceived Disability	Reasonable Accommodation Required?	Drug Addiction or Alcoholism Protected?	Minimum Number of Employees for Coverage
West Virginia	Yes	Yes	Yes	Yes	12
Wyoming	Yes	Yes	Yes	Yes	2
Wisconsin	Yes	Yes	Yes	Yes	1

Footnotes:

- /1 A reasonable accommodation cannot unduly disrupt or interfere with the business's normal operations, threaten the health or safety of others, contradict a business necessity or impose an undue hardship.
- /2 Mental handicaps are not covered.
- /3 A reasonable accommodation is not required where it would pose an undue hardship or would require any additional expense that would not otherwise be incurred.
- /4 A reasonable accommodation is not required if the cost exceeds five percent of the applicant's or employee's annual salary.
- /5 A reasonable accommodation is not required where it would be "prohibitively expensive or unduly disrupt the ordinary conduct of business."