

Approved: 2/22/95 ka
Date

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:00 a.m. on January 31, 1995 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Bev Adams, Committee Secretary

Conferees appearing before the committee:
Brandon L. Myers, Chief Legal Counsel, Kansas Human Rights Commission (KHRC)

Others attending: See attached list

Brandon Meyers appeared before the committee to give a presentation on the Kansas Act Against Discrimination (KAAD). The KHRC administers and enforces the KAAD. The KAAD prohibits discrimination in employment, public accommodations and housing on the basis of race, sex, national origin, ancestry, religion, color and disability, and further prohibits discrimination in housing on the additional basis of familial status. The KAAD was originally added to the law in 1953. Significant changes were made in 1991, which basically patterned upon the Federal Americans with Disabilities act of 1990 (ADA). One of the reasons that Mr. Meyers was invited to speak to the committee was to talk about some of the differences between KAAD and the ADA. Some of the differences are: The KAAD is administered by KHRC; Title I of ADA is administered by Federal Equal Employment Opportunity Commission (EEOC). KAAD covers employers of 4 or more employees, and ADA covers employers of 15 or more employees (effective July 26, 1994). The written testimony lists more differences (see Attachment 1).

Mr. Meyers also supplied the committee with the Kansas Human Rights Commission Annual Report of 1993, and a booklet with the statutes printed for The Kansas Act Against Discrimination and Kansas Age Discrimination in Employment Act. These are available from the Kansas Human Rights Commission, Landon State Office Building, 900 SW Jackson in Topeka.

Mr. Brandon was asked to return for our next meeting, February 1, to answer questions from the committee.

The meeting adjourned at 9:55 a.m.

The next meeting is scheduled for February 1, 1995.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE GUEST LIST

DATE January 31, 1995

| NAME | REPRESENTING |
|------------------------|---|
| Cheryl L. Stahl | SRS Civil Rights / EEO |
| John McDonald | KAC / <input checked="" type="checkbox"/> |
| Sharon Injira | SILCK |
| Ellen Hamilton, Toledo | KDOH |
| Leika D. Aldrich | KCIL |
| Jacquelyne Gordon | KCDD |
| R. S. Charlton, Jr. | KEPC, SUNFLOWER / VA |
| Kay Mettner | N.O.W. |
| Sharon Joseph | KESG |
| Martha Gabeheart | Ks Com. on Disability Concerns |
| Karen Lowery | Ks Assn of School Boards |
| Ann Carter Begovic | Ks Dept. - Human Resources |
| Karen Coulter | Sen. Janis Lee |
| John Kiss | Rep. Gary Boston - Leg. Intern |
| Blaine Mann | League of Women Voters of Ks |
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PRESENTATION TO THE HOUSE BUSINESS,
COMMERCE AND LABOR COMMITTEE BY
BRANDON L. MYERS, CHIEF LEGAL COUNSEL,
KANSAS HUMAN RIGHTS COMMISSION,
JANUARY 31, 1995

We were recently asked to brief the Committee on the Kansas Act Against Discrimination and Kansas Age Discrimination in Employment Act. My understanding is that this is to provide an overview of the Commission's enforcement and other activities for new members of the Committee, as well as provide information of interest to specific members of the Committee. We did not have a great deal of time to prepare this presentation, so I am going to utilize materials I have presented previously for the general overview. Attached is a briefing I gave to the House Labor and Industries Committee during the 1993 session, and an update I gave to the Kansas City Metropolitan Bar Association a little over a year ago. By and large this is basic, current information. I have penned in a couple of notes necessary to update data referred to within the KCMBBA handout.

Separately handed out to you by staff will be the following:

1. KHRC publication reprinting the Kansas Act Against Discrimination (KAAD) and the Kansas Age Discrimination in Employment Act (KADEA).

2. KHRC 1993 Annual Report. (Note: the 1994 Annual Report is nearing completion, and it will be distributed to the Governor and each member of the Legislature before the end of the current legislative session).

3. KHRC publication reprinting the Kansas Administrative Regulations adopted by the Commission is being revised to include the regulations regarding public accommodations adopted by KHRC in 1994, so I am not passing out the publication as it was prior to the revision. If anyone wishing to have a copy of this previous publication or wishing to have the updated booklet sent them will let me know, I will assure those materials are delivered.

4. I also have with me for your examination EEOC's Technical Assistance Manual for the Americans with Disabilities Act, EEOC's ~~Resource Directory for the Americans with Disabilities Act~~, EEOC pamphlet entitled "The Americans with Disabilities Act, Your Responsibilities as an Employer," a copy of an ADA Handbook published by the Great Plains Disability Business Technical Assistance Center (which contains a reprint of the ADA Handbook published by EEOC and the US Department of Justice, including a copy of the ADA statute itself, supporting regulations adopted by the Federal government (with analysis and comment), the ADA Accessibility Guidelines (ADAAG), a Summary Chart of Coverage and Effective Dates of ADA (Appendix C), "ADA Questions and Answers"

*Business, Committee & Labor
Attachment 1*

1/31/95

(Appendix D) which lists offices/phone numbers for Federal government information and enforcement sources under the ADA, and information specific to major points regarding Titles II and III of the ADA). Because of similarities in the approach of the KAAD and the ADA on substantive issues regarding disability discrimination, these Federal ADA materials are helpful regarding Kansas issues. I previously made this handbook available to the Committee's Legislative Research staff.

5. KHRC has an active public education program regarding discrimination law. Our Education and Training Specialist, Monica Hill, is available to present educational seminars on discrimination issues throughout the state. If you have constituents wishing to avail themselves of such services or to receive materials from KHRC, Ms. Hill can be contacted through the Commission's main office in Topeka.

6. I also have available a copy of the grant proposal of Kansas Legal Services, Inc. seeking private, non-tax funding for a third-party mediation project to be made available to parties to KHRC complaints in an efforts to resolve complaints short of full investigation and to reduce our caseload of pending complaints.

PRESENTATION BY BRANDON L. MYERS,
CHIEF LEGAL COUNSEL, KANSAS HUMAN RIGHTS COMMISSION,
FOR KCMB LABOR LAW SEMINAR
NOVEMBER 8, 1993

INTRODUCTION

This presentation is intended primarily to provide an update as to issues in Kansas antidiscrimination law. Although a brief overview and background segment is provided, the premise of this presentation is that attendees at an employment law seminar such as this already have a basic, working knowledge of the Kansas Human Rights Commission, its procedures and the laws it administers.

BACKGROUND AND OVERVIEW

The Kansas Human Rights Commission (KHRC) formerly the Kansas Commission on Civil Rights (KCCR) administers and enforces the Kansas Act Against Discrimination ("KAAD", K.S.A. 44-1001, et seq) and the Kansas Age Discrimination in Employment Act ("KADEA", K.S.A. 44-1111, et seq).

The KAAD prohibits discrimination in employment, public accommodations and housing on the basis of race, sex, national origin, ancestry, religion, color and disability, and further prohibits discrimination in housing on the additional basis of familial status. Age discrimination in employment is prohibited by the KADEA, which defines "age" as over 18 years of age.

The Kansas Act Against Discrimination was originally added to the law in 1953. The prefatory note in the Commission's booklet containing a reprint of the KAAD and KADEA (provided as a handout to participants in this seminar) provides a chronology of the development and expansion of the statute and the Commission's

responsibilities.

The Commission consists of seven people appointed to four-year terms by the Governor, and they are subject to confirmation by the Senate.

The Commissioners are generally responsible for the conduct of the agency and its staff. A Commissioner is assigned to each complaint filed with KHRC to act as the Investigating Commissioner who will determine "probable cause" or "no probable cause" as to the allegations of the complaint, or determine whether other disposition of a complaint is appropriate. On any unconciliated, probable cause complaint which proceeds to public hearing, the Commissioners who were not assigned to the complaint as the investigating commissioner, will determine whether or not a violation of the law was proven and what, if any, remedies are appropriate.

The Commission's main office is in Topeka, with a branch office in Wichita. The agency staff is composed of 43 people, 21 of whom are investigators.* (Refer to Commission Annual Report provided for further organizational details.) * Currently 45 people

BASIC PROCEDURE

Any person claiming to be aggrieved by an alleged unlawful discriminatory employment practice may, personally or by an attorney-at-law, file a verified complaint with the Commission. (See K.S.A. 44-1005(b), K.S.A. 44-11 and K.A.R. 21-41-1.)

The Commission or the Attorney General may also initiate complaints (see K.S.A. 44-1005(b)). The Commission may initiate an

investigation without the filing of a complaint when it has reason to believe discriminatory practices are occurring.

It has been held in at least one unpublished appellate decision that the Commission has authority to investigate complaints filed by so-called "third parties" not necessarily directly harmed by alleged acts of discrimination. (See KCCR vs Champ Service Lines, Ks. Ct. App., 1987, unpublished.)

KHRC through its Intake Department assists in the filing of complaints and begins initial gathering of information needed to investigate a complaint. A complaint filed with KHRC will be forwarded to the U.S. Equal Employment Opportunity Commission (EEOC) unless the complainant requests that it not be so forwarded. (However, practitioners would be well-advised to closely monitor and make sure such dual-filings are accomplished.)

KHRC and EEOC maintain worksharing agreements which set out rights and responsibilities for processing dual-filed complaints. These agreements are intended to minimize duplicitous investigative work by the agencies. (Copies of these agreements are available to the public on request.)

Within seven days of the filing of a complaint the Commission must serve a copy of the complaint upon each party alleged to have violated the KAAD or KAEDA (K.S.A. 44-1005(d)). (The parties to a KHRC complaint are referred to as Complainant and Respondent.) Respondents are requested by the KHRC notice to provide an initial outline of their position on the complaint. Timeframes for the requested response are established in the notice, but are extended

administratively when necessary.

The Commission encourages the parties to voluntarily engage in a Preliminary Investigative Conference (PIC). At PIC the parties and a KHRC investigator meet and determine what issues exist in the complaint, what the areas of agreement are, and as much initial information is gathered as possible. Opportunities for early settlement are explored and basic jurisdictional information is procured. In some instances all necessary data is gathered at the PIC and a determination of probable cause or no probable cause can be made, or it may be determined the case is untimely-filed or beyond KHRC jurisdiction so as to require closure of the case. In other instances the Complainant may decide to withdraw the case. Often the cases settle at the PIC. If the case is not resolved or otherwise disposed of at PIC it is placed in the backlog of cases awaiting the assignment of a follow-up investigator.

Throughout the investigation the KHRC has subpoena power (K.S.A. 44-1004(5)) and anyone who willfully resists, prevents, impedes or interferes with the Commission's activities may be criminally prosecuted (K.S.A. 44-1013). We have a request for such prosecution currently pending with the Kansas Attorney General's office.

If a case is determined to be no probable cause, the case is closed and the Complainant has the right to file a "direct tort action" in Kansas District Court based upon the KAAD (Van Scoyck vs. St. Mary's Assumption Parochial School, 224 Kan. 304 (1978)). No probable cause decisions of the Commission are not appealable to

District Court (see, Bush vs. City of Wichita, 223 Kan. 851 (1978) and K.S.A. 1992 Supp. 44-1044).

There is no "right-to-sue letter" mechanism for employment cases under the KAAD/KADEA such as there is, for example, under Federal Title VII. However, if a case is filed in court upon the same matter as is in the KHRC complaint, the Commission's general policy under K.A.R. 21-41-10 is to dismiss, or administratively close, the case. An exception to this policy is utilized where it is established that the court case was filed to preserve statute of limitations rights under the former version of the Federal ADEA and the Court case is stayed until the KHRC complaint is fully processed. Also, in some instances where the matters in the KHRC complaint are not clearly to be before the court, the Commission may utilize the option of staying or suspending its investigation until the court action is finalized.

If a complaint is determined to be "probable cause," the Commission staff is required to attempt to conciliate (settle) the case. If conciliation is not effectuated, the case will be forwarded to the Commission's Office of Hearing Examiner for a public hearing. The public hearing is presided over by a Commission Hearing Examiner admissibility of evidence is governed by the rules of evidence in K.S.A. Chapter 60, and the hearing is an adjudicative proceeding subject to the provisions of the Kansas Administrative Procedures Act (K.S.A. 77-501, et seq). The burden of proof, burden of going forward with evidence, standards for establishment of a prima facie case and other methodologies and

procedures mirror those governing discrimination cases under comparable Federal laws such as Title VII. (See Woods vs. Midwest Conveyor, Co., 231 Kan. 762 (1982) and 235 Kan. 734 (1985), Reber vs. Mel Falley, Inc., 235 Kan. 562 (1984), Kansas State University vs. Kansas Commission on Civil Rights, 14 Kan. App. 2d. 428 (1990))

The Hearing Examiner issues an Initial Order under KAPA, which is reviewed by the Commission, which then issues a Final Order. Restitution for lost wages, damages for pain, suffering and humiliation up to \$2,000.00 per incident, cease and desist mandates, provisions requiring hire/rehire, and other such appropriate relief may be ordered.

Commission final orders are appealable to District Court and thereafter throughout the appellate court system. A timely-filed, issue-specific petition for reconsideration is a prerequisite to appeal (K.S.A. 44-1010). Appeals and actions by the Commission to enforce its subpoenas and remedial orders are pursuant to the Act for Judicial Review and Civil Enforcement of Agency Actions (see K.S.A. 44-1011 and K.S.A. 77-601 et seq).

NOTE: For a more complete overview of KHRC and the laws it administers, as well as reference to basic pertinent cases, see the Kansas Bar Association's Employment Law Handbook. The section on KHRC is written by KHRC Hearing Examiner Arthur W. Solis.

UPDATES AND CURRENT ISSUES:

DISABILITY LAW CHANGES:

1991 Legislature House Bill 2541 made significant changes to the KAAD which are basically patterned upon the Federal Americans

With Disabilities Act of 1990 (ADA), and adopt the definitions of disability and other terminology contained in Title I of ADA. Formerly the KAAD only prohibited discrimination on the basis of "physical handicap" and did not require construction or installation of any special fixtures or facilities for the "physically handicapped." H.B. 2541 amended "disability" (both mental and physical) discrimination protection into the law and requires "reasonable accommodation" for the disabled.

DIFFERENCES BETWEEN KAAD AND ADA:

1. The KAAD is administered by KHRC; Title I of ADA is administered by Federal Equal Employment Opportunity Commission (EEOC).

2. Coverage and effective date:

KAAD: Covers employers of 4 or more employees effective July 1, 1991;

ADA: Covers employers of 25 or more employees effective July 26, 1992 and employers of 15 or more employees effective July 26, 1994.

[In 1994, then, the size of employer covered will be similar between the KAAD and the ADA (4 v. 15) to the relation of KAAD and Title VII on other types of discrimination, and between the Kansas Age in Discrimination Act (KADEA) and the Federal Age Discrimination in Employment Act (FADEA) (4 v. 20).]

3. Awards, Damages, Restitution, Attorneys Fees, Recovery: ADA and KAAD both provide for restitution of lost wages, benefits, etc. when discrimination is proven. However, when H.B. 2541 was passed, the KAAD had authority for up to \$2,000.00

incidental awards for damages for pain, suffering and humiliation. When the ADA of 1990 was initially passed, it did not authorize such awards. With passage of the Federal Civil Rights Act of 1991, however, the ADA now authorizes awards (without a comparable \$2,000.00 cap) for pain, suffering and humiliation-type damages, as well as punitive damages (which the KAAD does not have). Attorney fees are awardable to prevailing parties under the ADA, but not, in this regard, under the KAAD.

[Note: Contrast these limited award provisions with those available under the KAAD in cases of housing discrimination. In housing cases, a person may file a lawsuit in District Court within a two-year limitations period without exhausting an administrative remedy by first filing with KHRC. Remedies available from that court proceeding may include actual and punitive damages (without a "cap"), reasonable attorneys fees and costs and other appropriate orders. (See K.S.A. 44-1021 (d)(1), et seq). If a person chooses to file a complaint with KHRC (there is a one-year limit within which to file a housing complaint with KHRC) and KHRC finds probable cause, but cannot conciliate the case, the parties and Commission have a 20-day "opt-out" period in which to have the Commission file the case in court. If that option is not invoked, the case can proceed to public hearing before the Commission and awards of actual damages, including damages for pain, suffering and humiliation, (without the \$2,000.00 "cap"), as well as

assessments of civil penalties payable to the state up to \$50,000.00, may be made, as well as other appropriate orders. (See K.S.a. 44-1019 (1)). The Commission may also seek temporary restraining orders in housing cases (K.S.A. 44-1020(c)), which is not an option available in employment discrimination cases under KAAD/KADEA.]

4. Other minor differences: These are also similar to those existing between the KAAD and Title VII. For example the limitation period for filing a complaint with the KHRC/EEOC:

KAAD: 6 months from date of incident

ADA: 180 days

The KAAD 6 months limitation may be slightly more or less than 180 days depending on which months are involved.

5. Regulations:

EEOC was mandated to enact substantive regulations implementing the ADA, and has done so. The KAAD disability provisions became effective before interpretive regulations were proposed. Still, we have now adopted Kansas Administrative Regulations 21-34-1 through 21-34-21, captioned Guidelines on Discrimination Because of Disability.

These were patterned upon the EEOC regulations, and are substantially similar. They provide clarification of various key terminology ("essential functions," "undue hardship," "direct threat," etc). The temporary regulations were effective 3-27-92, and became permanent 4-27-92.

Highlights:

Drug testing allowed (not considered pre-employment medical exam). (21-34-7)

Smoking can be regulated in the workplace. (21-34-12)

Voluntary medical exams which are part of employee health programs are allowable. (21-34-7)

Illegal use of drugs and alcohol in workplace may be prohibited. (21-34-7)

Must reasonably accommodate food handlers with communicable, infectious diseases (21-34-16)

"Disability" does not include homosexuality, bisexuality, sexual identity or behavior disorder, compulsive gambling, kleptomania, pyromania, etc. (21-34-20)

RESULTS OF AMENDMENTS:

Under the physical handicap provisions of the KAAD before the 1991 disability amendments, we generally averaged about 75 employment complaints filed per year with KHRC alleging that kind of discrimination. In the 1992 fiscal year we had 238 disability complaints and 38 physical handicap complaints filed alleging employment discrimination. (Because of the six months filing limitation period, "physical handicap" complaints brought under the previous version of the statute alleging incidents before the July 1, 1991 change in the statute were filed into the 1992 fiscal year which commenced also on July 1, 1991. We additionally had 13 disability complaints filed in the area of public accommodations which also constituted an increase over the average of physical handicap cases annually so filed). This quadrupling of complaints filed has prompted an increased need for resources for the KHRC.

Our Federal EEOC/KHRC worksharing agreement and case processing contract has been expanded and increased as EEOC has gained ADA jurisdiction. (It should be noted that the phenomena of increased KHRC complaint-filing is not solely a result of the disability law changes. For example in FY 1992 we had a fairly drastic increase in the filing of sex discrimination complaints. For the first time ever the highest number of complaints were filed on the basis of sex discrimination (509 in employment, versus, for example, 384 on the basis of race, and 328 on the basis of age). This included a doubling of sexual harassment complaints from 75 to 150, which is an increase surmisably prompted in part by the publicity surrounding the Hill-Thomas hearings.)

We have so far seen no significant skewing of disability complaint-filing against so-called smaller employers not otherwise covered by ADA. However, as noted in the accompanying BNA article, Kansas has the largest concentration of disability complaints by workforce in the nation. KHRC has an increasing backlog of complaints.

The KAAD and ADA now basically require the employment of an otherwise qualified mentally or physically disabled individual who can perform at least the essential functions of a job, with or without reasonable accommodation. Removal of barriers to employment of otherwise qualified individuals is generally required. The public policy focus of these provisions contrast markedly with the KAAD's previous limited prohibitions against "physical handicap" discrimination, and the provision in K.S.A. 44-

1008 (now repealed in pertinent part) which stated: "Nothing in the Kansas Act Against Discrimination shall be construed to require the construction of any special facilities or fixtures for the physically handicapped."

Although the changes were significant, many employers had for many years either voluntarily, pursuant to contracts or collective bargaining agreements, or due to being covered under the Federal Rehabilitation Act (due to Federal contracts/funding) been operating under the system of reasonably accommodating disabled employees and making modifications which did not constitute undue hardships. In addition, since both ADA and KAAD also similarly prohibit disability-based "public accommodations" discrimination and require at least readily achievable modification in the provisions of services to customers and the public, many employers have been prompted to make adjustments in their stores, etc. to accommodate those they serve and to enhance their client base which satisfy the adjustments necessary to accommodate their employees. Studies previous to the adoption of the ADA established that the vast majority of reasonable accommodations necessitated by such laws cost little or nothing. Additionally, a variety of tax breaks and grants are available to businesses and entities to assist with any such costs incurred in making modifications. Federal EEOC has published its Technical Assistance Manual and an ADA Resource Manual.

H.B. 2541 also amended the KAAD's public accommodation section to include disability protection (and added the "Block amendment"

in the public accommodations section of the KAAD so as to prohibit organizations such as country clubs from discriminating on the basis of race, religion, disability, etc. in regards to membership), added disability and familial status discrimination protection into the housing section of the KAAD, and amended K.S.A. 58-1301 et seq adding provisions requiring access to public buildings by the disabled which is overseen by the Attorney General's office. Employment discrimination law practitioners need to be familiar with the public accommodations and fair housing sections of the KAAD, as well as requirements of other statutes (such as to the Chapter 58 accessibility requirements, the requirements for interpreters at K.S.A. 75-4351 and 1992 interpreter law amendments, disability accommodations requirements in K.S.A. Chapter 8-1, etc.) all of which may contain requirements and accommodations for buildings and businesses which are helpful to the employees of such places. Also, the 1991 amendments modified the provision of K.S.A. 44-1009(a)(1) which indicated it was unlawful to take certain employment actions "without a valid business motive" to "without a valid business necessity." Whether this increases any burden of proof in a particular case has yet to be tested.

CASELAW ISSUES:

1. The U.S. Supreme Court in U.S. vs. Burke, 112 S. CT. 1867 U.S. (1992), 58 FEP 1323 (1992), held that settlements in Title VII cases are taxable. This calls into question the practice of lump sum settlements describing such settlements as nontaxable damages. Various strategies exist on this issue, and the Burke decision implies that the issue may be different under cases arising after the effective date of the Federal

1991 Civil Rights Act.

2. St. Mary's Honor Society vs. Hicks; No. 92-602 decision rendered June 25, 1993. Establishes so-called "pretext-plus" requirements of proof in disparate treatment cases.
3. There are several pivotal cases currently before the U.S. Supreme Court. For example, Harris vs. Forklift Systems, Inc., (etc. granted 113 S. Ct. 1382 (1993) is one case which will give further guidance as to the parameters of what constitutes sexual harassment. In February, 1993 the Supreme Court granted certiorari in Landgraff vs. USI Film Products and Rivers vs. Roadway Express, Inc. which may determine the issue of retroactive application of the 1991 Civil Rights Act.
4. United Steelworkers of American Local No. 4706 vs. Kansas Commission on Civil Rights, Ks. Ct. App. No. 92-68248-A, decision rendered January 22, 1993. The Court of appeals held that the union's attempt to appeal a KCCR (KHRC) final Order to District Court was untimely and jurisdictionally-barred, having been filed one day late. The case addressed the issues of timely attempts to exhaust administrative remedies tolling, suspension or extension of appeal times during such attempts, extensions of timeliness for filings based upon service of Commission orders by mail, etc. under the Act for Judicial Review. On Petition for Review the Kansas Supreme Court held the appeal to district court was timely, and that the time for filing the appeal began to run only when an order denying a petition for reconsideration is filed, or when the agency fails to file an order within the time set forth in K.S.A. 1992 Supp. 77-529(b). [253 Kan. 327 (1993)]
5. Zion Lutheran Church of Prairie Village, Ks. vs. Kansas Commission on Civil Rights, 251 Kan. 206, (1992): This case holds that "sectarian" corporations are exempt as employers covered by the KAAD (even though covered by Title VII and the State and Federal ADEA). This case has prompted KHRC to close or decline approximately 50 cases since the ruling was issued.
6. Kansas Human Rights Commission vs. Topeka Golf Association; Shawnee County District Court No. 91 CV 1357, pending appeal at Kansas Court App. No. 92-69029-A: District Court held K.A.R. 21-46-2, which sets out requirements to establish that an employer or place of public accommodation is exempt from KAAD coverage, is void as not authorized by the Statute. The Court of Appeals affirmed (#69,029). Kansas Supreme Court has granted review and case is pending.
7. Simmons vs. Vliets Farmers Cooperative Association, et al, Ks. Ct. App. No. 68,278, unpublished decision rendered January 29, 1993. Not precedentially binding, but held that a case "administratively closed" by KHRC may not be filed in District

Court under Van Scoyck decision unless a Complainant first files a petition for reconsideration with KHRC.

8. Snyder vs. Excel Corp., Ks. Ct. App. No. 88,081, May 21, 1993. (Unpublished, but KHRC intends to request publication). First Appellate Court ruling affirming finding of age discrimination in employment under KADEA. Petition for Review to Supreme Court denied.
9. Beech Aircraft Corp. et al vs. KHRC: Just argued case pending with the Kansas Supreme Court. first case under the KADEA heard by the Kansas Supreme Court. No.

REGULATIONS:

KHRC adopted new permanent regulations in 1992 pertaining to disability in employment, age discrimination, and housing discrimination. New regulations on disability as to public accommodations issues are in process. These regulations are in addition to those already in existence in section 21 of the Kansas Administrative Regulations. Since the regulations adopted in 1992 will not be available in the K.A.R. volume until July or August, 1993, copies of those regulations as printed in the Kansas Register will be handed out at this seminar with a copy of KHRC's pre-existing regulations. The new regulations are:

K.A.R. 21-60-1, et seq, Discriminatory Housing Practices;

K.A.R. 21-34-1, et seq, Guidelines on Discrimination Because of Disability;

K.A.R. 21-80-1, et seq, Guidelines on Age Discrimination in Employment.

K.A.R.'s when adopted have the force and effect of law.

(Harder vs. Kansas Commission on Civil Rights, 225 Kan. 556 (1979).)

* K.A.R. 21-70-1, et seq, Nondiscrimination on the Basis of Disability by Public Accommodations. 1-17

BRIEFING BY BRANDON L. MYERS, CHIEF LEGAL COUNSEL,
KANSAS HUMAN RIGHTS COMMISSION, BEFORE
HOUSE LABOR AND INDUSTRY COMMITTEE,
JANUARY 27, 1993, REGARDING
DISABILITY PROVISIONS OF
THE KANSAS ACT AGAINST
DISCRIMINATION

The Kansas Human Rights Commission (KHRC, formerly the Kansas Commission on Civil Rights or KCCR) administers and enforces the Kansas Act Against Discrimination (KAAD, K.S.A. 44-1001, et seq) and the Kansas Age Discrimination in Employment Act (KADEA, K.S.A. 44-1111, et seq). We accept and investigate complaints filed under those laws, find probable cause or no probable cause, make efforts to resolve such complaints, and provide for public hearings on unconciliated probable cause cases wherein remedies may be ordered if violations of the laws are proven. Public hearing orders are appealable to State District Court and the Appellate Court system of Kansas.

The KAAD was amended in 1991 by H.B. 2541 to include provisions against employment discrimination and discrimination in places of public accommodations on the basis of disability (both mental and physical). The bill was essentially patterned upon the Federal Americans with Disability of 1990 (ADA) and was intended to effectuate the same basic public policy of assuring that otherwise qualified disabled individuals would be given the opportunity for employment and access accommodations. It utilizes ADA-type language and principles of "reasonable accommodation", "undue hardship," etc. to accomplish these purposes. It is intended to be much in substantial conformity with the ADA. (The bill also amended the KAAD's housing discrimination section to prohibit

discrimination on the bases of disability and familial status in a manner similar to the Federal Fair Housing Amendments Act of 1988, and added provisions for access to public buildings, enforceable through the Kansas Attorney General's office.)

Differences between State and Federal disability discrimination law (KAAD vs ADA):

1. The KAAD is administered by KHRC; Title I of ADA is administered by Federal Equal Employment Opportunity Commission (EEOC).

2. Coverage and effective date:

KAAD: covers employers of 4 or more employees effective July 1, 1991;

ADA: covers employers of 25 or more employees effective July 26, 1992 and employers of 15 or more employees effective July 26, 1994.

[In 1994, then, the size of employer covered will be similar between the KAAD and the ADA (4 v. 15) to the relation of KAAD and Title VII on other types of discrimination, and between the Kansas Age in Discrimination Act (KADEA) and the Federal Age Discrimination in Employment Act (FADEA) (4 v. 20).

3. Awards, Damages, Restitution, Attorneys Fees, Recovery:

ADA and KAAD both provide for restitution of lost wages, benefits, etc. when discrimination is proven. However, when H.B. 2541 was passed, the KAAD had authority for up to \$2,000.00 incidental awards for damages for pain, suffering and humiliation. When the ADA of 1990 was initially passed, it did not authorize such awards. With passage of the Civil Rights Act of 1991 however, the ADA now authorizes awards (without a comparable \$2,000.00 cap) for pain, suffering and humiliation-type damages, as well as punitive damages (which the KAAD does not have). Attorney fees are awardable to prevailing parties under the KAAD, but not, in this regard, under the KAAD.

4. Other minor differences:

~~These are also similar to those existing between the KAAD and Title VII. For example the limitation period for filing a complaint with the KHRC/EEOC:~~

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5. REGULATIONS:

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"Disability" does not include homosexuality, bisexuality, sexual identity or behavior disorder, compulsive gambling, kleptomania, pyromania, etc. (21-34-20)

Results of Amendments:

Under the physical handicap provisions of the KAAD before the 1991 disability amendments, we generally averaged about 75 employment complaints filed per year with KHRC alleging that kind of discrimination. In the fiscal year just completed, we had 238 disability complaints and 38 physical handicap complaints filed alleging employment discrimination. (Because of the six months filing limitation period, "physical handicap" complaints brought

under the previous version of the statute alleging incidents before the July 1, 1991 change in the statute were filed into the 1992 fiscal year which commenced also on July 1, 1991. We additionally had 13 disability complaints filed in the area of public accommodations which also constituted an increase over the average of physical handicap cases annually so filed). This quadrupling of complaints filed has prompted an increased need for resources from the KHRC. Our Federal EEOC/KHRC worksharing agreement and case processing contract has been expanded and increased as EEOC has gained ADA jurisdiction. (It should be noted that the phenomena of increased KHRC complaint-filing is not solely a result of the disability law changes. For example in FY 1992 we had a fairly drastic increase in the filing of sex discrimination complaints. For the first time ever the highest number of complaints were filed on the basis of sex discrimination (509 in employment, versus, for example, 364 on the basis of race, and 328 on the basis of age). This included a doubling of sexual harassment complaints from 75 to 150, which is an increase surmisably prompted in part by the publicity surrounding the Hill-Thomas hearings.)

We have so far seen no significant skewing of complaint-filing against so-called smaller employers not otherwise covered by ADA.

The KAAD and ADA now basically require the employment of an otherwise qualified mentally or physically disabled individual who can perform at least the essential functions of a job, with or without reasonable accommodation. Removal of barriers to employment of otherwise qualified individuals is generally

required. The public policy focus of these provisions contrast markedly with the KAAD's previous limited prohibitions against "physical handicap" discrimination, and the provision in K.S.A. 44-1006 (now repealed in pertinent part) which stated: "Nothing in the Kansas Act Against Discrimination shall be construed to require the construction of any special facilities or fixtures for the physically handicapped."

Although the changes were significant, many employers had for many years either voluntarily, pursuant to contracts or collective bargaining agreements, or due to being covered under the Federal Rehabilitation Act (due to Federal contracts/funding) been operating under the system of reasonably accommodating disabled employees and making modifications which did not constitute undue hardships. In addition, since both ADA and KAAD also similarly prohibit disability-based "public accommodations" discrimination and require at least readily achievable modification in the provisions of services to customers and the public, many employers have been prompted to make adjustments in their stores, etc. to accommodate those they serve and to enhance their client base which satisfy the adjustments necessary to accommodate their employees. Studies previous to the adoption of the ADA established that the vast majority of reasonable accommodations necessitated by such laws cost little or nothing. Additionally, a variety of tax breaks and grants are available to businesses and entities to assist with any such costs incurred in making modifications. Federal EEOC has published its Technical Assistance Manual and an ADA Resource

Directory listing agencies and entities available to help implement these laws. Other Federal agencies such as the Department of Justice provide such assistance, and, of course, KCDC and KHRC, as well as other State of Kansas agencies are available for assistance and educational activities as to these laws.

Concerns exist over conflicts between the disability discrimination laws and workers compensation. However, both laws are designed to encourage employment of qualified disabled or previously injured workers. While the disability laws limit pre-employment medical inquiries and examinations and require a focus upon a person's ability to perform the tasks required of a job, they do not prohibit ascertaining the need to accommodate an employee's disability or reasonable post-employment information gathering to facilitate the preservation of an employer's rights to claims against the Workers Compensation fund with regard to previous injuries. For example, uniformly requiring post-conditional hiring offer medical exams or inquiries which are job-related and necessary for all new-hires in a job category, and subsequent confidential maintenance of such medical information (with filing of pre-existing handicap information on a Form 88) may properly serve such purpose without violating disability laws. The disability laws do not require the hiring of unqualified persons, or those who are a direct threat to health and safety in the workplace, and require only those accommodations which are reasonable and do not constitute an undue hardship are required. They do not require the discharge of qualified or competent

personnel in this process. Additionally, qualification standards, employment tests or other selection criteria which tend to screen out the disabled may nonetheless be job-related if justified by business necessity. The KAAD specifically contains at K.S.A. 44-1009 the "valid business necessity" defense.