Approved: 3/20/95
Date

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

The meeting was called to order by Chairman Al Lane at 9:07 a.m. on March 15, 1995 in Room 526-S of the Capitol.

All members were present except: All Present

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

Conferees appearing before the committee: Bob Nugent, Revisor
Jackie Summerson, Manpower
Terry Leatherman, Kansas Chamber of Commerce & Industry
Wayne Maichel, AFL/CIO

Others attending: See attached list

After opening the meeting, Chairman Lane turned the meeting over to Rep. Pauls, Ranking Minority Member, to chair today's meeting.

The first order of business was to approve the minutes of March 7-10. Rep. Boston moved that the minutes be approved, Rep Ruff seconded, the minutes were approved as written.

The March 1995 Post Audit Report reviewing the progress of the Statewide Human Resource and Payroll System Project (SHARP) was passed out to the committee. This is the project that requires the changes to statutes contained in **SB175.** This is the report mentioned by Gloria Timmer, Director of Budget, at the March 9 committee meeting. (Report is available from Legislative Division of Post Audit or in Rep. Lane's office).

Continued Hearing on: **SB 106–Employment security, benefit disqualification for leaving work voluntarily or misconduct**

At the request of Rep. Pauls, Bob Nugent, Revisor, gave the committee a summary of **SB106** (see Attachment 1).

Jackie Summerson, Manpower Temporary Services, appeared as a proponent of **SB106**. They did have concerns that they often have to pay unemployment benefits to employees who have not called in to get a new work assignment after finishing a job. They asked that the added clause "[and if a work assignment is available]" be removed. They also ask for the removal of the other change made in the Senate, that a written notice be sent to an individual that future absence will result in discharge (see Attachment 2). Ms. Summerson ended her testimony by answering questions.

Terry Leatherman, KCCI, appeared as a proponent of **SB106**. He discussed some of the changes made to the bill by the Senate, concerning the definition of misconduct, absenteeism, drug abuse, and collateral estoppel. He stated that **SB 106** makes it easier for an employer to allege misconduct. However, the changes proposed in the bill do draw the line properly by allowing workers unemployed "though no fault of their own" to receive benefits, while denying benefits to employees who caused their job loss through "misconduct." As a result, KCCI would urge the committee's support of the bill (see Attachment 3). He concluded by answering questions.

Wayne Maichel, AFL/CIO, appeared as an opponent to parts of **SB106**. He provided a handout with two suggested amendments to the bill (see Attachment 4). Mr. Maichel was asked to return for questions tomorrow.

The hearing on **SB106** will be continued at tomorrow's meeting.

The committee adjourned at 9:59 a.m.

The next scheduled meeting will be held on March 16, 1995.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE March 15, 1995

NAME	REPRESENTING
Bill Curtis	Ks Assoc of School Bds
Jackie Hummerhorn	Manpower
Terry Leatherman	KCCI
James A Lodl	KSTA
Jon Newman	KS Governmental Consulting
Brenda Schnette	SRS
Bill Jarvis	BOEING
Tom Wilder	Kan Dept of Insurance
Scott Claassen	Post Audit
Allan Foster	Post Audit
A J Kotch	KDHR
Bill Layes	KDHR
Reggie Davis	KDHR
Linda Tierce	KDHR
Paul Bicknell	KDHR
Wayne Maichu	
Jim R Hoffa	K. AFL-CIO
Harry Nelson	

SB106 Bill Summary

The first change appears on page 9 in lines 13 and 14.

SB 106—Am by S on FA 9

exercise of duties:
(i) As an elected official;
(ii) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision;
(iii) as a member of the state national guard or air national guard;
(iv) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;
(v) in a position which, under or pursuant to the laws of this state, is designated as a major nontenured policymaking or advisory position or as a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week or is a position to which a person is appointed to serve a term of specific length;

This section was inserted in the Senate Commerce Committee at the request of Senator Salisbury. The amendment excludes from the definition of covered employment any individual appointed to a state position for a term of specific length. There are state officers who serve specified terms, but are not excluded by the language pertaining to "major nontenured policymaking or advisory" positions. One example might be the parole board. There were no specific examples of individuals in these positions applying for benefits. The amendment passed the Senate Committee without opposition.

The next change begins on page 20, in line 25.

Section 42. K.S.A. 44-706 is hereby amended to read as follows: 44-706. An individual shall be disqualified for benefits:
(a) If the individual left work voluntarily without good cause attributable to the work or the employer, subject to the other provisions of this subsection (a). *After a temporary job assignment, failure of an individual to affirmatively request an additional assignment on the next succeeding workday, if required by the employment agreement [and if a work assignment is available], after completion of a given work assignment, shall constitute leaving work voluntarily.* The disqualification shall begin the day following the separation and shall continue until after the individual has become reemployed and has had earnings from insured work of at least three times the individual's weekly benefit amount. An individual shall not be disqualified under this subsection (a) if:
(1) The individual was forced to leave work because of illness or injury upon the advice of a licensed and practicing health care provider and, upon learning of the necessity for absence, immediately notified the employer thereof, or the employer consented to the absence, and after recovery from the illness or injury, when recovery was certified by a practicing health care provider, the individual returned to the employer and

This amendment concerns temporary work assignments. The amendment requires temporary workers to specifically request a new assignment the day after completing a work assignment in order to be eligible for benefits. The Senate, on final action, added the requirement that a work assignment must actually be available (and presumably refused) for the disqualification to be effective.

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Attachment 1

The next amendment is found on page 22 in lines 34 through 38.

(1) For the purposes of this subsection (b), "misconduct" is defined as a violation of a duty or obligation reasonably owed the employer as a condition of employment. ~~In order to sustain a finding that such a duty or obligation has been violated, the facts must show: (A) Willful and intentional action which is substantially adverse to the employer's interests, or (B) carelessness or negligence of such degree or recurrence as to show wrongful intent or evil design.~~ The term "gross misconduct" as used in this subsection (b) shall be construed to mean conduct evincing extreme, willful or wanton misconduct as defined by this subsection (b).

(2) For the purposes of this subsection (b), the use of or impairment caused by an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be conclu-

This amendment concerns the definition of misconduct. An individual that is discharged for misconduct is disqualified from benefit eligibility. Under existing law, an employee must have committed a reckless or intentional act in order to be guilty of misconduct. The amendment lowers the standard to one of negligence. An employee who violates a specific duty or does not take reasonable care in the performance of job tasks would be guilty of misconduct.

A series of related changes are found on pages 23 and 24.

SB 106—Am. by S on FA 23

sive evidence of misconduct and the possession of an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be prima facie evidence of conduct which ~~was substantially adverse to the employer's interests~~ is *a violation of a duty or obligation reasonably owed to the employer as a condition of employment*. For purposes of this subsection (b), the disqualification of an individual from employment ~~because the individual refused to submit to or failed a chemical test which meets the standards of a federal or state government approved drug and alcohol free work force program or a written employer drug and alcohol free work force program which was made known to the employee~~, which disqualification is required by ***the provisions of the drug free workplace act, 41 U.S.C. 701 et seq. or is otherwise required by*** law because the individual refused to submit to or failed a chemical test which was required by law, shall be conclusive evidence of misconduct. ***Refusal to submit to a chemical test administered pursuant to an employee assistance program or other drug or alcohol treatment program in which the individual was participating voluntarily or as a condition of further employment shall also be conclusive evidence of misconduct.*** Alcoholic liquor shall be

The amendments found throughout pages 23 and twenty four are intended to clarify the admissability of drug tests to prove misconduct. Under existing law, drug test are not admissible unless probable cause existed to administer the test or the test was otherwise required by law. The Senate committee heard testimony that the tests taken pursuant to law and specifically the Drug Free Workplace Act were not being admitted. The amendment specifically allows random drug tests taken pursuant to the act to be admitted into evidence. The Drug Free Workplace Act requires random drug testing of certain employees of federal contractors and grant recipients.

The amendments also admit random drug tests taken pursuant to an employee assistance program or other substance abuse program entered into voluntarily by the employee or as a condition of further employment.

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Another amendment is found on page 25, beginning in line 4.

SB 106—Am. by S on FA 25

but not be limited to repeated absence, including lateness, from scheduled work if the facts show:

(A) The individual was absent without good cause;

(B) the absence was ~~substantially adverse to the employer's interests,~~ *in violation of the employer's written absenteeism policy, ~~and~~*

(C) the employer gave or sent written notice to the individual that future absence will result in discharge; and

~~(C)~~ ***(D)*** ~~the employer gave written notice to the individual that future absence may result in discharge; and~~

~~(D)~~ ~~the individual continued the pattern of absence without good cause~~ *the employee had knowledge of the employer's written absenteeism policy.*

(4) An individual shall not be disqualified under this subsection (b)

This amendment concerns absenteeism. Under existing law, absenteeism may constitute misconduct if the employee's absences meet four criteria. (1) the absence was without good cause; (2) the absence was substantially adverse to the employers interests; (3) the employer gave written notice that future absence would result in discharge; (4) the employee exhibited a pattern of absenteeism. As amended by the Senate, absenteeism would constitute misconduct if: (1) the absence violated the employer's absenteeism policy; (2) the employer gave or "sent" written notice to the employee indicating that future absence would result in discharge; and (3) the employee had knowledge of the employer's written absenteeism policy. The written notice requirement was inserted by the Senate Committee.

The final change is found on page 34, in lines 30 through 38

given precedence over all other civil cases except cases arising under the workers compensation act.

(j) Any finding of fact or law, judgment, determination, conclusion or final order made by the board of review or any examiner, special examiner, referee or other person with authority to make findings of fact or law pursuant to the employment security law is not admissible or binding in any separate or subsequent action or proceeding, between a person and a present or previous employer brought before an arbitrator, court or judge of the state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

Sec. ~~3~~ 4. K.S.A. ~~44-706~~ ~~is~~ ***and 44-709 and K.S.A. 1994 Supp. 44-703 are*** hereby repealed

Sec. ~~4~~ 5. This act shall take effect and be in force from and after its publication in the statute book.

This amendment provides for collateral estoppel rules to apply to employment security proceedings. Many states have a similar provision.

MANPOWER
TEMPORARY SERVICES

STATEMENT OF TESTIMONY
House Business, Commerce and Labor Committee

DATE: **March 14, 1995**

RE: **Senate Bill 106, relating to Employment Security Law**

FROM: **Jacki Summerson, Manpower Temporary Services (913/267-4060)**

My husband and I own and operate the Manpower Temporary Services franchise offices in Kansas. We have seventeen offices throughout the state. Our company is one of several employers in the State of Kansas that provide thousands of employment opportunities to people who are in the process of looking for permanent employment but need work or simply want limited employment. On the average, we employ approximately 3,000 people per week. In 1994, we sent out about 16,000 W-2s. Some of these people would otherwise be drawing unemployment benefits if we didn't provide them with work.

Senate Bill 106 (Page 20, Lines 29-33) is attempting to clarify unemployment benefits for temporary employees at the end of an assignment. Many of our temporary employees are sent on assignments that do not have a definite end date. Maybe it is a special project that our customer wants help on until it is finished but they aren't sure exactly how long it will take. Or maybe it is a replacement for someone who is sick and the customer isn't sure exactly when their permanent employee will return to work. Our employees bring us a time ticket each week that records their hours worked during the prior week. Sometimes when they bring us their time ticket, we discover that the job assignment ended during the prior week. It is our policy for all temporary employees that if their assignment has ended, they must call in and make themselves available for another job assignment. They sign a statement that they must call in for new work assignments both on their employment application and on our orientation procedures. It is also printed in bold letters on our weekly time tickets that they turn in each week. The time ticket even has a statement that we will assume that they are not available for work and that

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Osage City, Kansas 66523
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unemployment benefits may be denied if they do not call in available after an assignment is completed. We fill our job orders from the list of employees who have called in available.

Sometimes in an unemployment benefit hearing, when an employee's temporary assignment ended during the middle of the week and we were not aware of it, they are awarded benefits because we didn't offer them another assignment. How could we? We didn't know their assignment ended. This is unfair to us since we didn't even get the opportunity to offer them another assignment and they made no attempt to contact us for work.

Please remember that the original purpose of unemployment benefits is to help those who lose their jobs through no fault of their own. If an employee calls us at the end of an assignment, and we don't have another assignment for them, then they should be eligible for benefits. However, if an employee is not attempting to work, then they should not be eligible for benefits.

Senate Bill 106 was amended on the floor of the Senate. They added a clause on lines 31-32 to specify that a work assignment must be available even if they didn't call in. If they didn't call in available, why should we have to prove that a job was available if they had called in? Having to prove that work was available raises many other issues in an unemployment hearing such as:

- Was similar work available?
- Was the work available at a comparable wage?
- If jobs were available, how can we guarantee that the employee would have been given that assignment?
- If more people called in than there were assignments available, how can we guarantee that the employee would have been given an assignment?

Researching all of these issues places an undue burden on us. The question should simply be "Did they attempt to find work?" Please amend this bill to remove the added clause "[and if a work assignment is available]." If they made no attempt to get a work assignment, they did not lose their job through no fault of their own.

One other change was made to this bill in the Senate that creates a problem for us. On page 25, lines 6-7, an additional requirement was added to require employers to give written notice to an individual that future absence will result in discharge. We already have the requirement on lines 11-12 that the employee must have knowledge of the employer's written absenteeism policy. It seems burdensome to employers to place this additional requirement on them for written notice.

I agree with all other aspects of this bill except for the items I have discussed. I would appreciate your support.

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LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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SB 106

March 14, 1995

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Business, Commerce and Labor

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairperson and members of the Committee:

I am Terry Leatherman representing the members of the Kansas Chamber of Commerce and Industry. Thank you very much for this opportunity to explain why the Kansas Chamber supports SB 106.

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

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

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

When unemployment issues are discussed, this Committee often hears that benefits are intended for workers who become unemployed "through no fault of their own." Conversely, unemployment benefits are not intended for workers who cause their unemployment. The subject for

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consideration today asks you where to draw the line when an employee causes their unemployment, due to misconduct, and therefore should be denied unemployment benefits.

DEFINITION OF MISCONDUCT

Current law defines misconduct as "a violation of a duty or obligation reasonably owed the employer as a condition of employment." However, the current law reality is these are only words on a page. The real test an employer must meet in proving misconduct is:

(A) Willful and intentional action which is substantially adverse to the employer's interest; or,

(B) Carelessness or negligence of such degree or recurrence as to show wrongful intent or evil design.

In these tests, an employer must show an employee's "willful intention" or "wrongful intent" in order to sustain a charge of misconduct. These tests demand an employer present facts probing into what an employee was thinking when misconduct occurred.

SB 106 proposes to change the employer's burden in demonstrating employee misconduct. The two part test of misconduct is stricken. As a result, the employer's burden in demonstrating misconduct would be to show an employee "violated a duty or obligation reasonably owed the employer as a condition of employment."

The proposed change would clearly simplify the employer's responsibility to sustain a misconduct charge. However, it would be unfair if the case ended without considering conditions which led to a termination. Employee "intent" is important. That is why it is important to make clear that an employer meeting their burden of proof of misconduct does not mean a case is closed and benefits are denied.

Current law would allow an employee to establish their rights for benefits through KSA 44-706(B)(4), which can be found on page 5, line 23 of SB 106. Especially important are the defenses an employee can show in section (B). They qualify an individual for benefits if they were making a good faith effort to perform work, but were discharged for: (1) inefficiency; (2) unsatisfactory 3-2

ıary negligence or inadvertence; (4) good faith errors in judgment or discretion; or, (5) unsatisfactory work or conduct due to circumstances beyond the individual's control.

SB 106 shifts the responsibility in "misconduct" cases. An employer must show an employee did not live up to an employment obligation. It would then be up to the employee to demonstrate that there are reasons why they should qualify for unemployment benefits.

ABSENTEEISM

Current law demands an employer clear many hurdles to show how an employee's absenteeism shows misconduct, and denies the employee benefits. Today's test requires showing an employee was absent without good cause, the absence was substantially adverse to the employer's interest, the employer warned the worker in writing that further absence would lead to dismissal, and the employee continued to have a pattern of absence without good cause. Several of those tests are subjective, and serve to qualify employees for benefits who did cause their unemployment through misconduct.

The original SB 106 proposed to make the employer's burden for showing that an employee's repeated absence constitutes "misconduct" to a three-step process. If the employer had a written policy, the employee violated the policy, and the absences were without good cause, they would be denied benefits due to chronic absenteeism.

The Senate Commerce Committee lengthened this test by reinserting the current law requirement that written notice be given that future absence would result in a dismissal. KCCI contends that a business informing a worker, in writing, that they are missing too much work and will face disciplinary action if they continue to miss work, is a smart business practice. However, KCCI feels this should not be part of the test to determine "employee misconduct," because it qualifies workers who should not receive benefits simply because an employer did not, or could not, provide written notice.

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While the proposed change would make the absenteeism test more objective, it has been criticized as encouraging employers to adopt a strict absenteeism policy, in order to win unemployment compensation cases. However, such a conclusion denies a reality of the business world. Employers do not set up a policy to have employees fail. Instead, employment policies are established to permit a business to operate effectively.

DRUG ABUSE

A vexing problem appears to remain in cases where drug use constitutes misconduct. If an employer orders a drug test for an employee where there is probable cause there has been drug use, if there is a positive test result and the employee is fired, then the employee will be denied benefits because of misconduct. However, if the employer extends the worker the chance for drug rehabilitation, the employee later fails a random drug test given to assure they are no longer a drug user, and the employee is then fired, that employer will lose an unemployment compensation case. The reason for this is Kansas requires any drug abuse dismissals to be related to work, which does not exist in a random drug test.

The Senate amendment to this provision appears to address this particular concern, and is supported by KCCI.

COLLATERAL ESTOPPEL

At KCCI's request, the Senate Commerce Committee amended SB 106 concerning the concept of "collateral estoppel." The amendment is on page 34 of the bill. The amendment would make clear that any rulings by unemployment compensation examiner, referee or the Board of Review would not be admissible in a separate court action.

Unemployment compensation cases are supposed to be held in non-legal settings, where an employer and employee can present their facts and receive a prompt decision. However, if unemployment hearing decisions can carry weight in a separate court action, such as a wrongful discharge lawsuit, both employers and employees must prepare for that possibility in their 3-4

nployment compensation case. This means injecting more lawyers into the unemployment compensation process.

Currently 34 states have language similar to the SB 106 proposal in their employment security laws.

This committee clearly understands that Kansas employers bear total responsibility for financing the millions of dollars needed to pay unemployment compensation benefits. Providing benefits to workers "unemployed through no fault of their own" is a burden Kansas business readily accepts. However, the system was never intended to provide money to workers who caused their unemployment.

Undeniably, SB 106 makes it easier for an employee to allege misconduct. However, the changes proposed in SB 106 do draw the line properly by allowing workers unemployed "through no fault of their own" to receive benefits, while denying benefits to employees who caused their job loss through "misconduct." As a result, KCCI would urge your support for SB 106.

Thank you for this opportunity to comment on SB 106 today. I would be happy to attempt to answer any questions.

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SUGGESTED AMENDMENTS TO

SENATE BILL No. 106

(Submitted by the Kansas AFL-CIO)

1. Pg. 22, Lines 34 through 38:

   Strike all of (A) and (B). Insert "action which is adverse to the employers interest."

2. Pg. 25, Line 5: Amend to read:

   in violation of the employer's reasonable written absenteeism policy.

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Attachment 4