

Approved: 3/15/96 ha  
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 6, 1996 in Room 526-S of the Capitol.

All members were present except: Rep. Dale Swenson - excused

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 of Statutes  
Barb Hinton, Legislative Post Audit  
Dawn Reid, Kansas State Nurses Association  
Don Moler, League of Kansas Municipalities  
Senator Lana Oleen  
Ron Smith, Kansas Bar Association

Others attending: See attached list

A motion was made by Rep. Ballard to approve the minutes of 2/13, 2/14, 2/15, and 2/16. It was seconded by Rep. Pauls. The motion carried and the minutes were approved as read.

Hearing on:

**Sub SB 474 by Legislative Post Audit Committee---Kansas whistleblower act; employees of state and local governments and certain public contractors; communications with auditors.**

Bob Nugent, Revisor, gave a quick briefing on the bill. Under existing law, state employees are protected when they talk to the Legislature or their legislators about activities within their agencies. They are also protected if they report a violation in state or federal law from any kind of retaliatory disciplinary action by their employers. This bill extends the protection to private contractors and local government employees. It also extends the protection to employees who report activities to Legislative Post Audit during an audit.

Barb Hinton, Legislative Post Auditor, appeared as a proponent of the bill which was introduced through the Legislative Post Audit Committee. It would strengthen the Kansas Whistleblower Law. The bill is designed to shield from reprisal any State employee who reports illegal, inefficient, wasteful, or dangerous government action. Since introducing the bill, they have found weaknesses that needed to be changed and the bill was reworked and a substitute bill was passed in the Senate. Not all of the amendments were added by her agency. (See Attachment 1) She explained some of the amendments to the bill and who made them in the Senate committee and answered other questions from the committee.

Dawn Reid, Kansas State Nurses Association, appeared before the committee as a proponent of the bill. Nurses who see health care fraud are reluctant to report it for fear of retribution and retaliatory actions by their employees or providers. Fraud within the health care system is costing the State of Kansas a great deal of money. It is currently estimated that ten cents of every dollar is lost to fraud. They find that the need to provide adequate protection to those who report fraudulent activity is vital. (See Attachment 2)

Don Moler, League of Kansas Municipalities, appeared before the committee as a proponent for the bill but feels it needs a little strengthening. One of his concerns is false or fraudulent reporting of information. He offered several amendments. (See Attachment 3)

Senator Lana Oleen appeared as the chairperson of the Legislative Post Audit Committee and testified in support of the bill. She believes it is a good government bill. She believes that the way the legislation is fashioned will be very effective especially as we get more block grants from the federal government. She also gave some information about the changes that have been made since the bill was drafted.

Ron Smith, Kansas Bar Association, appeared as an opponent of **Sub SB 474**. The Bar Association feels

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR, Room 526-S  
Statehouse, at 9:07 a.m. on March 6, 1996.

that the bill expands the current law significantly. The whistle blower actions are very narrow causes of action and are now allowed by the courts only in very limited circumstances. He does not see enough limitations in the application of the law in the bill. In his handout are several amendments that the Bar Association feels are needed. (See Attachment 4) He will return tomorrow to answer questions from the committee.

The hearing on Sub SB 474 will be continued tomorrow, March 7, 1996.

The meeting was adjourned by Chairman Lane at 9:57 a.m.

The next meeting is scheduled for March 7, 1996.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE  
GUEST LIST

DATE March 6, 1996

NAME	REPRESENTING
Ron Smith	KS Bar Assn
Terry Leatherman	KCCI
Norm Wilks	KASB
Quinn Keel	KSNA
John Collins	DOA
Amy Henderson	DOA
Jerry Lopez	Quinnipack Chamber of Commerce
Bob Horton	Post Audit
Sandra Powell	A & A
DAN LEWIEN	SRS Audit Services
Bob North	DOA
Jeff Johnson	Intern, Kearney & Assoc.
Felix Ariznyfeller	Intern
Wm. Higgins	KREAB
JEFF SOXNICH	HEARTLAND COMMUNITY BANKERS ASSOC.
JASON PITSEBERGER	BRAD SMOUT
Gene M. [unclear]	KTRF
Don Moler	League of KS Mun.



LEGISLATURE OF KANSAS  
**LEGISLATIVE DIVISION OF POST AUDIT**

MERCANTILE BANK TOWER  
800 SOUTHWEST JACKSON STREET, SUITE 1200  
TOPEKA, KANSAS 66612-2212  
TELEPHONE (913) 296-3792  
FAX (913) 296-4482

March 6, 1996

Representative Al Lane, Chair  
House Business, Commerce and Labor Committee  
State Capitol  
Topeka, Kansas 66612

Dear Representative Lane:

As you know, the Legislative Post Audit Committee introduced the legislation (Sub SB 474) that you have before you today. This bill would strengthen the Kansas Whistleblower Law. I'm appearing before your Committee today on behalf of the Legislative Post Audit Committee and in support of this bill.

K.S.A. 1994 Supp. 75-2973 is designed to shield from reprisal any State employee who reports illegal, inefficient, wasteful, or dangerous government action. However, the Committee felt that the law, as written, has some significant weaknesses:

- **As it stands, Kansas' whistleblower law covers discussions of agency operations only with members of the Legislature.** The law states that "No supervisor or appointing authority of any state agency shall prohibit any employee of the agency from discussing the operations of the agency, either specifically or generally, with any member of the legislature." But that protection doesn't extend to Legislative Post Audit, which serves as the eyes and ears of legislators in monitoring agency operations.
- **Kansas' whistleblower law protects only State employees.** With the increased emphasis on privatization, more private-sector contractors are becoming involved in helping conduct the State's business. Yet such individuals have no protection if they want to expose problems related to that business.
- **Kansas law is more restrictive than similar laws elsewhere, and therefore potentially less effective.** The attachment to this letter shows that many states have whistleblower legislation that is much broader in its coverage of employees than is Kansas' law.

As part of its deliberations on the bill, the Legislative Post Audit Committee sought input from the Secretary of Administration on the proposed amendments. The Secretary made a number of other recommended changes, including extending coverage under the bill to local government employees. The Committee would support these changes.

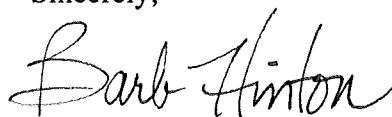
*House Business, Commerce  
& Labor Committee  
3/6/96  
Attachment 1*

Representative Al Lane  
March 6, 1996  
Page 2

In sum, the Legislative Post Audit Committee introduced SB 474 to improve the effectiveness of the Kansas whistleblower law, and to help ensure that our office, among others, can get the full cooperation of the staff of the audited agencies. This bill corrects the weaknesses the Committee identified.

I would be happy to try to answer any questions you may have on this bill.

Sincerely,

A handwritten signature in cursive script that reads "Barb Hinton".

Barbara J. Hinton  
Legislative Post Auditor

Attachment

## Whistleblower Laws in Other States

The table below reflects the weaknesses of Kansas' whistleblower law compared to those in other states. For example, laws in every state we reviewed, except those in Kansas and Washington, covers local public employees, not just state workers.

<u>State</u>	<u>Disclosures Protected</u>	<u>Agencies to Which Disclosures can be made</u>	<u>Employees Protected</u>
<b>Kansas</b>	a) Agency operations	Legislators	All State employees
	b) Violations of State law or rules and regulations	Any appropriate authority	All State employees
<b>Alaska</b>	"Matters of public concern" which include violations of any law, regulation, or ordinance; a danger to public health or safety; gross mismanagement, substantial waste of funds, or clear abuse of authority; or a matter accepted for investigation by the office of ombudsman	Any federal or state agency, or political subdivision	Any person who performs services for wages for a public employer (federal, state, or local)
<b>Hawaii</b>	Violation of law; participation in an investigation, hearing, or inquiry held by a public body; or court action	Any public body	Any public-sector or private-sector employee
<b>New Hampshire</b>	Violations of law, participation in an investigation or hearing (employee first must give violator opportunity to correct violation)	Any governmental entity	Any public-sector or private-sector employee, but not private contractors
<b>Oregon</b>	Agency operations; violations of any federal or state law, rule, or regulation by a state agency or a political subdivision; gross waste of funds; danger to public health and safety	Legislature and legislative staff	State and local government workers, those acting on behalf of the state, or employees of firms performing services for the state
<b>Pennsylvania</b>	Violations of federal or state statute or regulation, ordinance, or code of conduct or ethics; substantial abuse, misuse, destruction or loss of funds or resources belonging to a public body	Any appropriate federal, state, or local agency	State and local employees, or any person under contract to perform a service with the state or a political subdivision
<b>Washington</b>	"Improper government action," which includes any violation of any state law or rule, abuse of authority, gross waste of public funds, or danger to public health or safety	Office of the State Auditor	State employees



**BILL GRAVES**  
*Governor*

**SHEILA FRAHM**  
*Lt. Governor/Secretary*

**JEFF WAGAMAN**  
*Deputy Secretary*  
Room 263-E  
State Capitol  
Topeka, KS 66612-1572  
(913) 296-3011  
FAX (913) 296-2702

## DEPARTMENT OF ADMINISTRATION

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December 11, 1995

Ms. Barbara J. Hinton  
Legislative Division of Post Audit  
Mercantile Bank Tower  
800 S.W. Jackson, Ste. 1200  
Topeka, KS 66612-2212



Dear Ms. Hinton:

I appreciate your letter seeking input on the Kansas whistleblower law. The Department of Administration agrees that K.S.A. (1994 Supp.) 75-2973, the Kansas whistleblower law, could be improved. Below are some of our recommendations.

- Although the law protects classified and unclassified employees, it does make a distinction procedurally and substantively between both types of employees and should be changed. Classified employees are currently required to proceed through the Civil Service Board process pursuant to subsection (d). In that respect, the law does not create a new cause of action but requires an aggrieved employee to proceed with administrative remedies prior to being able to initiate litigation. Unsuccessful litigants at that level would then resort to District Court. However, unclassified employees, who were provided protection under subsection(g) of the Act in 1990, have the immediate right to initiate an action in District Court. One way to treat both types of employees the same is to require unclassified employees to also seek Civil Service Board remedies. This would treat both classified and unclassified employees similarly and may avoid additional litigation.
- Attorneys fees and costs should also be addressed. Subsection (g) allows the court to award an employee the costs of litigation, including reasonable attorney fees and witness fees, but does not allow the State/taxpayers to recover such costs in appropriate cases. The potential of being subjected to an excessive award of attorneys fees in relationship to the actual damages sustained by the employee inappropriately subjects the taxpayers to increased liability. The Department suggests that either the awarding of litigation costs be eliminated or the statute be amended so the awarding of litigation costs is a two-way street.

- The Department is not a strong advocate for amending the law to protect employees who disclose information related to agency operations or other matters of public concern to Legislative Post Audit or other state of federal oversight entities, as well as to legislators. Currently, employees who report violations of laws and regulations to any person or entity are already covered by subsection (b) of the whistleblower statute. Perhaps this issue should be discussed in a legislative committee.
- The Department does see merit in broadening the provisions of the Act to encompass local government employees. This is consistent with the public policy that led to the promulgation of the original law. However, we do not recommend amending the law to encompass employees of private sector entities that have a contractual relationship with the state. This appears to be an unnecessary government intrusion into the private sector. A common law cause of action already exists protecting private sector employees from whistleblowing incidents affecting the public health, safety and welfare.

In summary, the current whistleblower law, while a proper instrument of public policy, could be improved by removing the attorney's fees and costs provision and also by restricting it to state and local government employees. If you have questions regarding any of these matters or if we can help in creating legislation, please let me know.

Sincerely,



Sheila Frahm  
Lt. Governor/Secretary of Administration

SF:ah



DANIEL P. WESTMAN,

WHISTLE BLOWING: THE LAW OF RETALIATORY DISCHARGE (WASHINGTON, D.C.: BNA, 1991.)

Appendix A

State Statutes Protecting Public Sector Employees

This appendix summarizes the state statutes which protect whistleblowers employed in the public sector. These statutes may be found in the BNA Labor Relations Reporter Manual, State Laws, Volumes 4 and 4A.

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<u>STATE</u>	<u>COVERAGE</u>	<u>PROTECTED CONDUCT</u>	<u>NATURE OF VIOLATION</u>	<u>REMEDY</u>	<u>OPPORTUNITY TO CORRECT</u>
ALASKA, Alaska Stat. §§39.90.100 et seq. (1989)	State or local government employees	Employee who reports, or is about to report, violation to a public body where employee has reasonable belief.	Violation of any law or regulation, danger to public health and safety, gross mismanagement, waste, abuse of authority, or a matter for investigation by the office of the ombudsman.	Civil action, damages including punitive damages; civil fine not to exceed \$10,000.	Employer may require employee to give notice prior to initiating a report; however, employee is not required to give prior notice if reasonably believes it would not result in prompt action; the activity is already known to the employer; an emergency is involved, or fears reprisal or discrimination.
ARIZONA, Ariz. Rev. Stat. Ann. §38-531 et seq. (1989)	State or local government employees	Employee who reports violation to attorney general, legislature, governor, county attorney, or federal, state or local law enforcement agency.	Violation of any law, or mismanagement, gross waste of monies, or abuse of authority.	Administrative hearing; violators shall be suspended up to 30 days or dismissed.	N/A
CALIFORNIA, Cal. Gov't Code §10540 et seq. (West 1989)	Employees of state government or state universities	Employee who reports violation to Joint Legislative Audit Committee, Auditor General, or university officers.	Violation of state or federal law or regulation, economic waste, or gross misconduct, incompetency, or inefficiency.	Administrative hearing before State Personnel Board, or if no action by Board, civil action for compensatory and punitive damages and attorneys' fees.	N/A

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<u>STATE</u>	<u>COVERAGE</u>	<u>PROTECTED CONDUCT</u>	<u>NATURE OF VIOLATION</u>	<u>REMEDY</u>	<u>OPPORTUNITY TO CORRECT</u>
COLORADO, Colo. Rev. Stat. §§24-50.5-101 et seq. (1989)	State employees	Employee who discloses information to any person or testifies before any committee of the general assembly.	Any practice, including waste of public funds, abuse of authority, or mismanagement.	Administrative hearing for employees in state personnel system; civil action for reinstatement, backpay, and other relief.	Employees must make good-faith effort to provide information to supervisor, member of general assembly, or appointing authority before disclosure.
DELAWARE, Del. Code Ann. tit. 29, §5115 (1989)	State employees	Employee who reports to state Office of Auditor of Accounts.	Violation of state or federal law or regulation.	Civil action within 90 days, damages available not specified.	N/A
FLORIDA, Fla. Stat. Ann. §112.3187 (West 1989)	State or local government employees, or employees of contractors with state or local government.	Employee who discloses violation to state or federal agency with authority to investigate the violation.	Violations of any federal, state, or local law or regulation that presents a substantial and specific danger to the public health, safety, or welfare; or malfeasance, misfeasance, or neglect of duty by an agency.	After exhausting administrative remedies, employees may bring civil actions for reinstatement, backpay and attorneys' fees.	N/A
ILLINOIS, Ill. Ann. Stat. ch. 127, para. 63b119c.1 (Smith-Hurd 1989)	State employees	Employee who discloses violation.	Violation of law, rule, or regulation; mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public health and safety.	Administrative hearing.	N/A
INDIANA, Ind. Code Ann. §4-16-10-4 (West 1989)	State employees	Employee who reports violation in writing, unless employee knows of falsity.	Violation of state or federal laws or regulations, misuse of public resources.	Administrative appeal.	Employee must disclose to supervisor and give reasonable time to correct.

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IOWA, Iowa Code §179.28 et seq. (1989)	State employees	Disclosure of information to member of General Assembly, legislative service bureau, legislative fiscal bureau, caucus staff of General Assembly, where employee has reasonable belief.	Violation of law or rule, mismanagement, gross abuse of funds, abuse of authority, or substantial and specific danger to public health and safety.	None provided.	N/A
KANSAS, Kan. Stat. Ann. §75-2973 (1988)	State employees	Reporting of violation to any person, agency, or organization, unless employee knows of falsity or recklessly disregards falsity.	Violation of state or federal law, rules or regulations.	None provided.	Statute specifically prohibits any requirement of prior disclosure to supervisor.
KENTUCKY, Ky. Rev. Stat. Ann. §51.101 et seq. (Baldwin 1989)	State employees	Employees who report violations to judicial, legislative, or enforcement agencies; employees bear burden of providing by clear and convincing evidence that they were about to make protected disclosures.	Violation of any state or federal law or regulation, or mismanagement, waste, fraud, or endangerment of public health or safety.	In addition to administrative remedies, employees may bring a civil action for reinstatement and punitive damages.	Employers may not require notice prior to disclosure of information.
MARYLAND, Maryland Ann. Code art. 64A, §112F et seq. (1983)	State employees	Disclosure of violation which employee reasonably believes to exist.	Violation of any law, rule, regulation; gross mismanagement; gross waste of funds; abuse of authority; substantial and specific danger to public health & safety.	None provided.	N/A
MISSOURI, Mo. Rev. Stat. §105.055 (1989)	State employees	Employees who disclose violations to state auditor or member of legislature.	Violation of any law or regulation, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.	Administrative hearing which may result in suspension up to 30 days, or forfeiture of position in cases of willful or repeated violations.	Employers may not require employees to give notice prior to disclosure of information.

App. A State Statutes for Public Sector Employees

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<u>STATE</u>	<u>COVERAGE</u>	<u>PROTECTED CONDUCT</u>	<u>NATURE OF VIOLATION</u>	<u>REMEDY</u>	<u>OPPORTUNITY TO CORRECT</u>
NEW HAMPSHIRE, N.H. Rev. Stat. Ann. §98-E:1 (1988)	State employees	Public discussion and giving of opinions on all matters concerning the state and its policies.	All matters concerning the state and its policies.	N/A	N/A
NORTH CAROLINA, N.C. Gen. Stat. §§126-84 et seq. (1985)	State employees	Employees who report, or are about to report, violations to supervisor or other appropriate authority, where employee has reasonable belief.	Violation of state or federal law or regulation, fraud, misappropriation of state funds, or a danger to public health and safety.	Civil action for injunction, reinstatement, back wages, actual damages, punitive damages for willful retaliation, and attorneys' fees.	Statute specifically provides that notice be given to supervisor or other appropriate authority.
OKLAHOMA, Okla. Stat. tit. 74, §841.7 et seq. (1989)	State employees	Disclosure of, or offer to disclose, information to any member of legislature, legislative committee, administrative hearing, or court of law.	Any information.	Administrative hearing and appeal before Ethics and Merit Commission, supervisor forfeits job and eligibility for state employment for five years.	N/A
OREGON, Or. Rev. Stat. §240.316(5) (1983)	State employees and employees of public corporations	Disclosure of violations.	Violation of laws, rules, or improper actions or inefficiency of superior officers or fellow employees; gross waste of funds, abuse of authority, specific danger to public health & safety.	Administrative hearing.	N/A

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PENNSYLVANIA, 43 Pa. Cons. Stat. §1421 et seq. (1989)	State or local government employees	Employees who disclose violations to superiors, or appropriate federal, state or local agencies; employees must prove by preponderance of evidence that they were about to make disclosure.	Violations which are not technical or minimal of any federal or state law or regulation, or of code of ethics designed to protect interest of public or employer.	Civil action for reinstatement and actual damages, including attorneys' fees; civil fine not to exceed \$500; suspension of violator for up to six months.	N/A
SOUTH CAROLINA, S.C. Code Ann. §§8-27-10 et seq. (Law Co-op 1988)	State or local government employees	Employees who disclose violations to appropriate public bodies; rebuttable presumption that adverse action within one year of disclosure was motivated by intent to retaliate.	Violation of any federal or state law or regulation, or criminality, corruption, waste, fraud, gross negligence, or mismanagement.	Civil action for reinstatement and damages, including 25% of public funds saved up to \$2,000.	N/A
TENNESSEE, Tenn. Code Ann. §§49-50-1401 et seq. (1989)	State education employees	Employee who discloses violation to State Department of Education, legislator, or employee of the department or legislature, or testifies before any committee of the General Assembly.	Knowing or willful falsifications to state officials, law enforcement agencies, or judiciary; waste or mismanagement of public education funds.	Civil action for injunction, reinstatement, back wages, seniority rights, actual damages, and attorneys' fees.	N/A
TEXAS, Tex. Rev. Civ. Stat. Ann. art. 6252-15a (Vernon 1989)	State employees	Employee who reports violation to law enforcement agency in good faith; employee has burden; rebuttable presumption of violation if act of discrimination occurs within 90 days of report.	Violation of state or federal statute or rule, or local ordinance or rule.	Civil action within 90 days; reinstatement, backpay, costs, attorneys' fees, punitive damages, and actual damages.	N/A

App. A State Statutes for Public Sector Employees

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STATE	COVERAGE	PROTECTED CONDUCT	NATURE OF VIOLATION	REMEDY	OPPORTUNITY TO CORRECT
UTAH, Utah Code Ann. §67-21-1 (1986)	State or local government employees	Report in any fashion including verbal, written, broadcast or otherwise, of violation, unless employee has reason to know that report is false; employee has burden by clear and convincing evidence to show he was intending to make report.	Violation of federal, state, or local law or rule, or waste of public funds, property, or manpower.	Civil action within 90 days, reinstatement, backpay, costs, attorneys' fees, and civil fee.	Employee must give employer formal notice and allow reasonable time for correction, or conform with reasonable administration procedures for reports.
WASHINGTON, Wash. Rev. Code §42.40.010 (1989)	State employees	Report to State Auditor regarding violation, where employee has good-faith belief.	Violation of any state law or rule; abuse of authority; gross waste of public funds; or substantial and specific danger to public health and safety.	No exhaustion of administrative remedies required; civil action within two years; attorneys' fees, no other available damages specified.	N/A
WEST VIRGINIA, W. Va. Code §6C-1-1 et seq. (1989)	State or local government employees	Employers who report violations to superiors or to appropriate public bodies; employees must prove by preponderance of evidence that they were about to make disclosures.	Violations which are not technical or minimal of any federal or state law or regulation, or of code of ethics designed to protect interest of public or employer.	Civil action for reinstatement and actual damages, including attorneys' fees; civil fine not to exceed \$500; suspension of violator for up to six months.	N/A
WISCONSIN, Wis. Stat. Ann. §§230.80 et seq. (West 1988)	State employees	Disclosure of criminal activity to law enforcement agency; disclosure of violation to any person; unless employee anticipates that disclosure is likely to result in receipt of anything of value by employee's immediate family.	Violation of any state or federal statute, rule or regulation; mismanagement, abuse of authority, substantial waste of public funds, or a danger to public health and safety.	Administrative remedy or civil action; no available damages specified.	Employee must disclose information in writing to supervisor, or ask commission to which government agency report should be made.

Appendix B

State Statutes Protecting Private Sector, or Both Private and Public Sector Employees

This appendix summarizes the state statutes which protect whistleblowers employed in the private sector, or in both the private and public sectors. These statutes may be found in the BNA Labor Relations Reporter Manual, State Laws, Volumes 4 and 4A.

STATE	COVERAGE	PROTECTED CONDUCT	NATURE OF VIOLATION	REMEDY	OPPORTUNITY TO CORRECT
CALIFORNIA, Cal. Lab. Code §1102.5 (West 1989)	Private sector employees	Employee, with reasonable cause to believe violation has occurred, who makes report to government or law enforcement agency.	Violation of federal or state statute or regulation.	Misdemeanor penalty.	N/A
CONNECTICUT, Conn. Gen. Stat. Ann. §691-51m (West 1989)	Private sector employees	Employee reports or testimony to public body of violation unless employee knows it to be false.	Violation of federal, state, or local statutes, regulation, or ordinance.	After exhaustion of administrative remedies, civil action within 90 days; reinstatement, backpay, costs, and attorneys' fees.	N/A
	State or local government employees	Report of violation to public body unless employee knows it is false.	Corruption, unethical conduct, violation of state or federal law, gross waste, mismanagement, abuse of authority, danger to public health and safety.	Administrative complaint with state employee Review Board.	N/A
HAWAII, Haw. Rev. Stat. §§78-61 (1988)	Private and public sector employees	Employees who disclose violations to public bodies.	Violations of state or federal laws or rules.	Civil action for reinstatement, backpay, actual damages and attorneys' fees; civil fine of up to \$500.	N/A

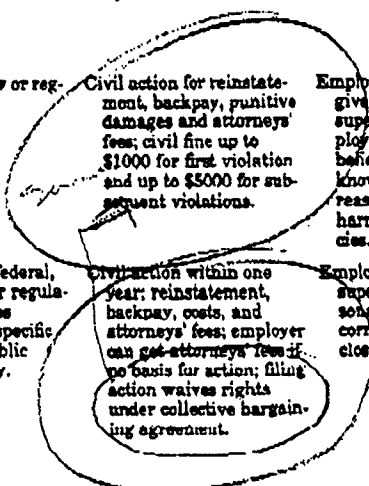
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STATE	COVERAGE	PROTECTED CONDUCT	NATURE OF VIOLATION	REMEDY	OPPORTUNITY TO CORRECT
LOUISIANA, La. Rev. Stat. Ann. §2027 (West 1989)	Private and public sector employees	Complaints or reports regarding violations of environmental laws of state, federal or local authorities, unless employee has deliberately violated environmental laws.	Environmental violations.	Civil action, treble damages, costs, attorneys' fees, backpay, and emotional distress damages.	N/A
MAINE, Me. Rev. Stat. Ann. tit. 26, §§831 et seq. (1989)	Private sector employees	Employee, with reasonable cause, who reports or gives information concerning violation; employee bears burden by a preponderance of evidence.	Violation of state or federal law or regulation.	After exhaustion of administrative remedies, civil action within 90 days, reinstatement, backpay, costs, attorneys' fees, and civil fine.	Employee unprotected unless first discloses to supervisor, and gives opportunity to correct, unless futile.
	State employees	Employee giving information to legislative committee.	Any information.	Civil action within 120 days, reinstatement, backpay, costs, attorneys' fees, and civil fine.	N/A
	Public utility employees	Employee giving information to legislative committee or Public Utilities Commission, unless it is a trade secret or corporate strategy.	Any information unless it is a trade secret or corporate strategy.	After exhaustion of administrative remedies, civil action within 90 days, reinstatement, backpay, costs, attorneys' fees, and civil fine.	N/A
MICHIGAN, Mich. Comp. Laws. Ann. §§15.361 et seq. (West 1989)	Private and public sector employees	Employee who reports, or is about to report, suspected violation, unless employee knows of falsity; employee has burden by clear and convincing evidence.	Violation of federal, state, or local statute or regulation.	Civil action within 90 days, reinstatement, backpay, costs, attorneys' fees, and civil fine.	N/A

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MINNESOTA, Minn. Stat. Ann. §§181.931 et seq. (West 1989)	Private and public sector employees	Employee who reports violation to employer or to any governmental body or law enforcement official; employee's identity shall not be disclosed without employee's consent; employer required to give written notice of reason for termination.	Violation of any federal or state law or rule.	Civil action for equitable relief and all damages recoverable at law, including attorneys' fees.	N/A
NEW HAMPSHIRE, N.H. Rev. Stat. Ann. §§275-B:1 et seq. (1988)	Private and public sector employees	Employee who reports violation in good faith, or who participates in an investigation by a governmental entity; employee may refuse to execute any directive which is a violation of a state or federal law or rule.	Violation of federal, state, or local law or rule.	After exhaustion of workplace remedies, hearing before the commissioner of labor for reinstatement, seniority rights, fringe benefits, and injunction.	Employee required to give prior notice to employer and reasonable opportunity to correct unless futile.
NEW JERSEY, N.J. Stat. Ann. §§34:19-1 et seq. (West 1987)	Private and public sector employees	Employee who reports violation to supervisor or to public body; employees may refuse to participate in violations of law, fraudulent activity, or conduct incompatible with clear mandate of public policy.	Violation of any law or regulation.	Civil action for reinstatement, backpay, punitive damages and attorneys' fees; civil fine up to \$1000 for first violation and up to \$3000 for subsequent violations.	Employees required to give written notice to supervisors, unless employees reasonably believe that violation is known to supervisors, reasonably fear physical harm, or in emergencies.
NEW YORK, N.Y. Lab. Law §740 (McKinney 1989)	Private sector employees	Employee who discloses or threatens to disclose violation, or gives information to a public body, or refuses to participate in violation.	Violation of state, federal, or local statute or regulation which creates substantial and specific danger to the public health and safety.	Civil action within one year; reinstatement, backpay, costs, and attorneys' fees; employer can get attorneys' fees if no basis for action; filing action waives rights under collective bargaining agreement.	Employee must disclose to supervisor and give reasonable opportunity to correct before disclosure.

App. B State Statutes for Private Sector Employees



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<u>STATE</u>	<u>COVERAGE</u>	<u>PROTECTED CONDUCT</u>	<u>NATURE OF VIOLATION</u>	<u>REMEDY</u>	<u>OPPORTUNITY TO CORRECT</u>
NEW YORK (cont'd)	Public sector employees	Employee who discloses violation to a government body in good faith.	Violation of federal, state or local law, rule or regulation, or danger to public safety or health.	Administrative hearing; reinstatement and backpay.	Employee must disclose to employer and allow reasonable opportunity to correct unless imminent threat to public safety.
OHIO, Ohio Rev. Code Ann. §§4113.51 et seq. (Baldwin 1989)	Private and public sector employees	Employees who disclose violations to supervisors or appropriate public officials.	Violation of any federal or state law or regulation which is either criminal or likely to cause imminent risk of physical harm to persons or a hazard to public safety.	Civil action for reinstatement, backpay and attorneys' fees.	Employees required to give immediate oral notice followed by written report, to which employers must respond within 24 hours; if violation is not corrected employees may report to appropriate public officials.
RHODE ISLAND, R.I. Gen. Laws §§36-15-1 et seq. (1989)	State or local government employees	Employee, with reasonable belief, who reports or is about to report violation, unless employee knows of falsity; providing information to public body; employee has burden by clear and convincing evidence.	Violation of state, federal or local statute or regulation.	Civil action within three years; reinstatement, backpay, costs.	N/A
RHODE ISLAND, R.I. Gen. Laws §§36-15-9 (1989)	Private and public sector employees		Violation of laws regarding toxic waste.		N/A

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TENNESSEE, Tenn. Code Ann. §50-1-304 (Supp. 1990)	Private sector employees	Employee who refuses to participate in, or remain silent about, illegal activities; employees' off-duty use of non-regulated agricultural products.	Violation of state or federal civil or criminal code, or regulation intended to protect public health and safety.	Civil action for wrongful discharge; if employee files frivolous or abusive lawsuit, court may impose sanctions including attorneys' fees.	N/A
WISCONSIN, Wis. Stat. Ann. §§101.01 et seq. (Wast 1990)	Private sector employees	Employees who complain or report violations to Department of Industry, Labor and Human Resources.	Violations of state laws regarding wages, hours, child labor, workplace safety and discrimination.	Administrative hearing, (30 days to file complaint), back pay, reinstatement, or compensation in lieu of reinstatement, and education or training programs.	N/A

App. B State Statutes for Private Sector Employees

1-11

SB 474  
3/11/16

08/14/1991 10:42

FROM GAP

TO

P. 02

MODEL STATE WHISTLEBLOWER PROTECTION ACT

(Cause of action) 1. An employer or agent of an employer shall not discharge, demote, suspend, threaten, harass, blacklist, or in any other manner discriminate against an applicant, employee or former employee, because the employee contributed or was about to contribute to public policy, through any disclosure of information not prohibited by statute, by ~~and specific danger to public order~~ or in any other manner not

(Statute of limitations) 2. A cause of action must be filed within two years after a prohibited act occurs or a pattern of prohibited activity ends.

(Jurisdiction) 3. The employee may file a complaint in state court and may elect to have a jury trial.

(Stays) 4. Upon motion of the complainant, the court may order a stay of any alleged discrimination if the court determines that there are reasonable grounds to believe that a violation of this Act has occurred, exists or is about to take place.

(Burden of proof) 5. In all proceedings under this Act for permanent relief, once the complainant has established by a preponderance of the evidence that an activity protected by this Act was a contributing factor in the alleged discrimination, the burden of proof shall be on the respondent to prove by clear and

convincing evidence that the alleged discrimination would have occurred on legitimate, independent grounds even if the employee had not engaged in activities protected by this Act.

(Costs and fees) 6. If an employee acting under this statute substantially prevails or significantly contributes to the public interest through the cause of action, the employer shall pay all reasonable costs and attorney fees.

(Remedy) 7. Relief available to an employee under this statute includes compensation to be made whole, including but not limited to reinstatement, backpay, interest and seniority rights, compensatory damages including but not limited to medical or any other special costs incurred due to prohibited activity, and punitive damages. An award of punitive damages shall be based on the nature of the employer's prohibited activity, its chilling effect on other employees and the significance for the public of the challenged underlying conduct challenged by the employee.

(Non-preclusion) 8. The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual rights and remedies of the employees, and are not intended to alter, supercede or in any other way effect those rights and remedies.

(Posting) Each employer subject to this Act shall post and keep posted in conspicuous places on its premises a notice to be prepared or approved by the Attorney General containing the provisions of this Act and such information as the Attorney General considers appropriate to achieve its purposes.





700 SW Jackson, Suite 601  
Topeka, Kansas 66603-3731

913/233-8638 \* FAX 913/233-5222

the Voice of Nursing in Kansas

Betty Smith-Campbell, M.N., R.N., C.N.P.  
President

Terri Roberts, J.D., R.N.  
Executive Director

For more information:  
Dawn L. Reid, LLM, JD, RN  
Assistant Director  
700 SW Jackson, Suite 601  
913.233.8638  
Topeka, KS 66603-3731  
March 6, 1996

**Substitute SB 474  
"The Whistleblower Act"**

Chairperson Lane and members of the Business, Commerce and Labor Committee:

My name is Dawn Reid, LLM, JD, RN, and I am the Assistant Director of the Kansas State Nurses Association (KSNA). I am here to testify in support of SB 474. I recently testified on behalf of KSNA in support of SB 660, which would establish a state Medicaid Fraud Task Force. We feel that in order to more effectively investigate Medicaid fraud, protection must be in place for those reporting the fraud.

KSNA represents the interests of 29,000 registered nurses in the state of Kansas. Of these 29,000, 1,079 are advanced practice nurses, such as Nurse Practitioners, Nurse Anesthetists, Clinical Nurse Specialists, and Certified Nurse Midwives. Thus, the majority of registered nurses in the state who practice nursing, practice at a staff nurse level; these may include those who work in hospitals, offices, community health agencies or home health arenas. Because they work with providers and patients on a daily basis, they have access to knowing when fraudulent billing practices may be occurring and how it is being practiced.

Examples of health care fraud being practiced on a daily basis abound. One example of fraud encountered by nurses was a physician known as the "minute man". This was a psychiatrist who would demand that his charts and patients be lined up at the nurses station when he made his rounds. He would spend approximately 60-90 seconds (as timed) with each patient (including writing orders and notes in the patient's chart), but bill for a 30 minute session costing \$150 dollars. This is just one example of the many types of fraud that nurses are aware of and encounter on a daily basis. Nurses are very knowledgeable about how the system is manipulated, as well as how a patients illness can be used to profit from. Nurses have the potential for being very powerful oversights.

However, because most nurses may be dependent on their jobs in order to support themselves and their families, they hesitate to

The mission of the Kansas State Nurses Association is to promote professional nursing, to provide a unified voice for nursing in Kansas and to advocate for the health and well-being of all people.

Constituent of The American Nurses Association

*House Business, Commerce  
& Labor Committee  
3/6/96  
Attachment 2*

report fraud for fear of retribution and retaliatory actions by their employers or providers. If a nurse is working in a rural area, there may be only one or two facilities where work is available. Reporting fraud may end finding any work within that geographic area or that specialty of nursing due to blacklisting. Thus, because of this very real fear, much fraud that occurs goes unreported.

Fraud within the health care system is real and is costing the state of Kansas a great deal of money. It is currently estimated that ten cents on every dollar is lost to fraud. Health care services are being cut due to the increased cost of providing care. The money that can be saved by controlling fraudulent practices could ultimately go towards keeping our public health offices operating.

In order to promote that end, we find that the need to provide adequate protection to those who report fraudulent activity is vital. Those who abuse the protection offered by this act, (fraudently report their employers) will not profit from their actions, as this amendment will not cover them. The protection offered are those that are needed by nurses who suffer the consequences of reporting fraudulent activities of their employers.

Thank you.

b:dlr/green/sb474



**League  
of Kansas  
Municipalities**

LEGAL DEPARTMENT • 300 S.W. 8TH TOPEKA, KS 66603 • TELEPHONE (913) 354-9565 • FAX (913) 354-4186

**LEGISLATIVE TESTIMONY**

**TO:** House Business, Commerce and Labor Committee  
**FROM:** Don Moler, General Counsel  
**RE:** Support for Sub. SB 474  
**DATE:** March 6, 1996

First I would like to thank the Committee for allowing the League to testify today concerning Sub. SB 474. Overall, the League has no problem with this bill and is therefore appearing today simply to suggest to the Committee that modest strengthening will help to improve this act and help to protect the state and local governments. Specifically under the redress sections found in subsections (g) and (h) specific causes of action are given to officers or employees of local governments, public contractors or state agencies who alleged that disciplinary action has been unlawfully taken against such officer or employee. We would suggest a statement similar to that found in subsection (e)(4) which would explicitly prohibit causes of actions to be brought when an employee: (a) discloses information which the employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity; (b) discloses information the employee knows to be exempt from required disclosure under the open records act; or (c) discloses information which is confidential or privileged under statute or court rule. We would also suggest that any of these factors could be used as an affirmative defense by the state or a local government in any action brought under this act.

This would then explicitly state that causes of action could not be maintained if the employee or officer were disciplined as a result of false or reckless statements made under this act.

Thank you very much for allowing the League to testify today and I would be happy to answer any questions the Committee may have.

*House Business, Commerce  
& Labor Committee  
3/6/96  
Attachment 3*

1 **Substitute for SENATE BILL No. 474**  
2 **By Legislative Post Audit Committee**  
3 **2-14**

4 \_\_\_\_\_  
5 AN ACT relating to certain communications by employees  
6 of state agencies, local governments and certain  
7 public contractors; prohibiting certain acts by  
8 supervisors and appointing authorities; providing  
9 remedies for violations; amending K.S.A. 1995 Supp.  
10 75-2973 and repealing the existing section.

11 *Be It Enacted by the Legislature of the State of Kansas:*

13  
14  
15 Section 1. K.S.A. 1995 Supp. 75-2973 is hereby  
16 amended to read as follows: 75-2973.

17 (a) *This section shall be known and may be cited as the Kansas*  
18 *whistleblower act.*

19 (b) *As used in this section:*

20 (1) *"Auditing agency" means the legislative post*  
21 *auditor, any employee of the division of post audit,*  
22 *any firm performing audit services pursuant to a*  
23 *contract with the post auditor, or any state agency,*  
24 *agency of a local government or federal agency or*  
25 *authority performing auditing or other oversight*  
26 *activities under authority of any provision of law*  
27 *authorizing such activities.*

28 (2) *"Disciplinary*  
29 *action" means any dismissal, demotion, transfer,*  
30 *reassignment, suspension, reprimand, warning of*  
31 *possible dismissal or withholding of work.*

32 (3) *"Local government" means any county, township, city,*  
33 *municipal university, school district, community*  
34 *college, drainage district and any other special*  
35 *district, taxing district or political subdivision of*  
36 *Kansas that is supported by tax funds and includes*  
37 *any board, commission, committee, bureau, department,*  
38 *division or agency thereof.*

*Suggested KBA Amendments*

*House Business, Commerce & Labor*  
*3-6-96*  
*Attachment 4*

*House Business, Commerce*  
*& Labor Committee*  
*3/6/96*  
*Attachment 4*

40 (4) "Public agency"  
41 means any state agency or local government.

42 (5) "Public contractor" means any person, partnership,  
43 association, corporation or other private business  
44 entity that has entered into a contract with a state  
45 agency for any supplies, materials, equipment or  
46 other goods or for performance of any services.  
47 "Public contractor" does not include any public  
48 agency.

49 (6) "State agency" and "firm" have the  
50 meanings provided by K.S.A. 46-1112 and amendments  
51 thereto.

52 (c) No supervisor or appointing authority  
53 of any state-public agency or public contractor  
54 shall prohibit any employee of the agency or  
55 contractor from discussing the operations ~~of the~~ \_\_\_\_\_ **in good faith matters of public safety, health or general welfare**  
56 agency or contractor, as the case may be, or other  
57 matters of public concern, either specifically or  
58 generally, with any member of the legislature or any  
59 auditing agency.

60 (b)-(d) No supervisor or  
61 appointing authority of any state-public agency or  
62 public contractor shall:

63 (1) Prohibit any employee  
64 of the agency or contractor from reporting ~~any~~ \_\_\_\_\_  
65 violation of state or federal law or rules and  
66 regulations ~~to any person, agency or organization; or~~ \_\_\_\_\_ [ **in good faith**  
67 \_\_\_\_\_ ] **[ affecting matters of public safety, health or general welfare**

68 (2) require any such employee to give notice to the  
69 supervisor or appointing authority prior to making  
70 any such report.

71 (e)-(e) This section shall not be  
72 construed as: (1) Prohibiting a supervisor or  
73 appointing authority from requiring that an employee  
74 reporting  
75 inform the supervisor or appointing authority as to  
76 legislative or auditing agency requests for  
77 information to the public agency or public contractor

COMMENT: This amendment limits the application of the law to situations of case law in Kansas in previous whistleblower cases. The "operations" is a phrase that is wide-open, especially since we now, through this bill include private contractors. Without this limiting language, private entities that contract with government have a much broader ("the operations of the ... contractor") liability than if they remain in the private sector only. It will discourage public contracting.

Comment: A "bad faith" report not supported by evidence requires the employer to defend itself by trying to prove the negative. We realize subsection (b) is current law. However, prohibiting "any reporting" of any violation "to any person" would mean an agency cannot prohibit even to persons with no legitimate state regulatory interest, e.g. the press. Protected speech should be limited to that affecting the public's health, safety and general welfare.

78 or the substance of testimony made, or to be made, by  
79 the employee to legislators *or the auditing agency,*  
80 *as the case may be,* on behalf of the agency *or*  
81 *contractor;*

82 (2) permitting an employee to leave the  
83 employee's assigned work areas during normal work  
84 hours without following applicable rules and  
85 regulations and policies pertaining to leaves, unless  
86 the employee is requested by a legislator or  
87 legislative committee to appear before a legislative  
88 committee *or by an auditing agency to appear at a*  
*meeting with officials of the auditing agency;*

89 (3) authorizing an employee to represent the employee's  
90 personal opinions as the opinions of a *state-public*  
91 *agency or public contractor;* or

92 (4) prohibiting disciplinary action of an employee who discloses  
93 information which:

94 (A) The employee knows to be false or which the employee  
95 discloses with reckless disregard for its truth or falsity,

96 (B) the employee knows to be exempt from required disclosure  
97 under the open records act or

98 (C) is confidential *or privileged* under ~~any other provision of law-statute~~  
99 *or court rule.*

100 (d)-(f) Any officer or employee of a  
101 *state agency* who is in the classified service and has  
102 permanent status under the Kansas civil service act  
103 may appeal to the state civil service board whenever  
104 the officer or employee alleges that disciplinary  
105 action was taken against the officer or employee in  
106 violation of this act or in any court of law or  
107 administrative hearing. The appeal shall be filed  
108 within ~~30 days of~~ *45 days after* the alleged  
109 disciplinary action. Procedures governing the appeal  
110 shall be in accordance with subsection (f) and (g) of  
111 K.S.A. 75-2949 and amendments thereto and K.S.A.  
112 75-2929d through 75-2929g and amendments thereto. If  
113 the board finds that disciplinary action taken was  
114 unreasonable, the board shall modify or reverse the  
115 agency's action and order such relief for the  
116

117 employee as the board considers appropriate. If the  
 118 board finds a violation of this act, it may require  
 119 as a penalty that the violator be suspended on leave  
 120 without pay for not more than 30 days or, in cases of  
 121 willful or repeated violations, may require that the  
 122 violator forfeit the violator's position as a state  
 123 officer or employee and disqualify the violator for  
 124 appointment to or employment as a state officer or  
 125 employee for a period of not more than two years. *The*  
 126 *board may award the prevailing party all or a portion*  
 127 *of the costs of the proceedings before the board,*  
 1' *including reasonable attorney fees and witness fees.*

128 The decision of the board ~~in such cases pursuant to~~  
 130 *this subsection* may be appealed by any party pursuant  
 131 to law. *On appeal, the court may award the prevailing*  
 132 *party all or a portion of the costs of the appeal,*  
 133 *including reasonable attorney fees and witness fees.*

134 (e) ~~Each state agency shall prominently post a copy~~  
 135 ~~of this act in locations where it can reasonably be~~  
 136 ~~expected to come to the attention of all employees of~~  
 137 ~~the agency.~~

138 (f) ~~As used in this section "disciplinary action" means~~  
 139 ~~any dismissal, demotion, transfer, reassignment, suspension,~~  
 140 ~~reprimand, warning of possible dismissal or withholding of work.~~

141 (g) Any officer or employee ~~who is in the~~  
 142 ~~unclassified service of a local government or public~~  
 143 ~~contractor~~ who alleges that disciplinary action has  
 144 been taken against such officer or employee in  
 145 violation of this section may bring a civil action  
 146 for appropriate injunctive relief, ~~or actual damages,~~  
 147 ~~or both~~ within 90 days after the occurrence of the  
 148 alleged violation. A court, in rendering a judgment  
 149 in an action brought pursuant to this ~~act~~ *section,*  
 150 shall order, as the court considers appropriate,  
 151 reinstatement of the officer or employee, the payment  
 152 of back wages, ~~or full reinstatement of fringe~~  
 153 ~~benefits and seniority rights, actual damages,~~ or any  
 154 combination of these remedies. ~~A~~ *The court may also*  
 155 ~~award such officer or employee~~ *award the prevailing*

155 party in the action all or a portion of the costs of  
156 litigation the action, including reasonable attorney  
157 fees and witness fees.

158 (h) Any officer or employee  
159 of a state agency who is in the unclassified service  
160 under the Kansas civil service act who alleges that  
161 disciplinary action has been taken against such  
162 officer or employee in violation of this section may  
163 bring an action pursuant to the act for judicial  
164 review and civil enforcement of agency actions within  
165 90 days after the occurrence of the alleged  
166 violation. The court may award the prevailing party  
167 in the action all or a portion of the costs of the  
168 action, including reasonable attorney fees and  
169 witness fees.

170 (i) Nothing in this section shall be  
171 construed to authorize disclosure of any information  
172 or communication that is confidential or privileged  
173 under statute or court rule.

174 (j) Each public agency and public contractor  
175 shall post prominently a copy of this section in locations where  
176 it can reasonably be expected to come to the attention  
177 of all employees of the agency or contractor, as the case may be.

178 Sec. 2. K.S.A. 1995 Supp. 75-2973 is hereby  
179 repealed.

180 Sec. 3. This act shall take effect and be in force  
181 from and after its publication in the Kansas register.

COMMENT: (I) is a good provision. Lawyer and client communications are strictly controlled by MRPC 1.6 and MRPC 5.3 in state Supreme court rules. The Executive Branch should not otherwise compel otherwise privileged communications.



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Also for discussion:

1. The bill is silent as to who has the burden of proof and the level of proof. Does that mean the standard is preponderance of evidence? In common law whistle-blowing cases, the standard is clear and convincing evidence. You need to decide whether the proof needed in these cases will be less than that required in private industry whistle-blower cases. A clear and convincing evidence standard is the Kansas standard, found in *Stuart v. Beech Aircraft Corp.* , 753 F.Supp. 317, 324 (D. Kan. 1990).
2. Case law limits whistle-blower retaliatory lawsuits to instances where there has been termination of employment. This bill considers remedies for all other "disciplinary actions" some not amounting to termination. The legislature should decide whether by extending the law to public contractors they want to extend these remedies, too. Such extension, in our judgment, will make discerning businesses shy about contracting with the state.

Ron Smith  
General Counsel  
Kansas Bar Association  
March 6, 1996

4-6