Approved: 4/30/97
Date

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

The meeting was called to order by Chairman Al Lane at 8:05 a.m. on March 25, 1997 in Room 526-S of the Capitol.

All members were present except: Rep. David Adkins - excused
Rep. Dennis Wilson - excused

Committee staff present: Bob Nugent, Revisor of Statutes
Bev Adams, Committee Secretary

Conferees appearing before the committee: Fred Lucky, Kansas Hospital Association
Phil Harness, KDHR
Gail Bright, Assistant Attorney General
Jeff Russell, Sprint
Elwaine Pomeroy, Kansas Collectors Association, Inc.
Mike Reecht, AT&T
Bob Storey, DeHart and Darr Associates, Inc.
Bud Grant, KCCI
Mike Oxford, Ks Assn. of Centers for Independent Living
JoAnn Donnell, Kansas ADAPT
Sharon Huffman, Ks Comm. on Disability Concerns
Bob Mikesic, Independence, Inc.
Shannon Jones, SILCK
Lori Davis, Topeka Independent Living

Others attending: See attached list

The minutes of March 6, 7, 10 and 11 were passed out to the committee. They will be considered approved as written if no changes or corrections are phoned into the office by March 28, 1997.

Continued Hearing on: **SB 346 - Supplemental workers compensation advisory council recommendations.**

Fred Lucky, Kansas Hospital Association, appeared as an opponent of the bill. They support most of the bill, but it contains language that they feel will be burdensome and costly not only to providers of health care services, but to the state as well. They ask for an amendment to strike this language. (see Attachment 1) He concluded his testimony by answering questions from the committee.

Phil Harness, Director of the Division of Workers Compensation, KDHR, returned to answer a question about attorney fees that was asked earlier in the hearings on the bill. (see Attachment 2)

A letter from Paula S. Greathouse, Kansas Insurance Department, was passed out to the committee explaining their position on the bill. (see Attachment 3)

No others were present to testify for or against the bill and the hearing was closed.

Hearing on: **SB 151 - Regulation of telephone solicitors.**

Gail Bright, Assistant Attorney General in the Consumer Protection Division, appeared before the committee in support of the bill. K.S.A. 50-670 was enacted in 1991, and provides privacy protection to Kansas citizens from unwanted telephone solicitations. The bill was written to eliminate interpretation questions that have arisen. In the testimony is included two amendments to the bill. (see Attachment 4) She finished her appearance by answering questions.

Jeff Russell, Director of Governmental and Public Affairs, Sprint Midwest Operations, appeared to support the bill as amended by the Senate Commerce Committee and the Senate Committee of the Whole. He had no problems with the amendments offered by the Attorney General. (see Attachment 5)

Elwaine Pomeroy, Kansas Collectors Association, Inc., voiced concerns about the bill as it was originally introduced. He requested that the words which were added back to the bill on page 1, lines 40 and 41 remain in the bill. He supports the current version of the bill. (see Attachment 6)

Mike Reecht, AT&T, supports the bill in its current form. He believes that the solution to many telemarketing concerns that face consumers today is education. (see Attachment 7)

The hearing on **SB 151** was suspended until after the hearing on **Sub SB 321**. The rest of the testimony on **SB 151** is placed here so as not to confuse the reader of these minutes.

Bob Storey, DeHart and Darr Associates, Inc., which represents the Direct Marketing Association (DMA), appeared before the committee in support of the bill as amended by the Senate Committee and Senate Committee of the Whole. DMA companies provide approximately 117,730 direct marketing related jobs in Kansas and generate approximately $11.645 million of sales revenue in the State. The bill in its current form will help the legitimate and honest telemarketers who do business in Kansas. He also believes that consumer education would be helpful to help people deal with telephone solicitors.

In his handouts to the committee were three booklets produced by the Federal Trade Commission: Mail or Telephone Order Merchandise Rule; Complying with the Telemarketing Sales Rule; and Playing by the Rule. Copies of the booklets can be found in Rep. Lane's office or you may obtain them from the Direct Marketing Association, 1120 Avenue of the Americas, New York, NY, 10036-6700. Included with the booklets are postcards that allows the consumer to request that their names be removed from lists used by the Direct Marketing Association. (see Attachment 8)

Bud Grant, Kansas Chamber of Commerce and Industry (KCCI), appeared before the committee to lend his support to the other conferees on the bill as passed by the Senate.

No others were present to testify for or against the bill and Chairman Lane closed the hearing on **SB 151**.

Hearing on: **Sub SB 321 by Committee on Commerce - Altering the formula for workers compensation fund assessments**

Phil Harness, Director of the Division of Workers Compensation, appeared before the committee to support the bill. It is a proposed amendment to the present open records statute within the Division of Workers Compensation to provide additional exceptions to the open records provisions of the Act. (see Attachment 9)

Mike Oxford, Kansas Association of Centers for Independent Living, appeared to support the bill as amended. The bill would protect the rights of people with disabilities and injured workers from illegal employment discrimination while respecting the legitimate purposes for retaining and reviewing the records. (see Attachment 10)

JoAnn Donnell of Kansas ADAPT appeared as a proponent of the bill. She is a counselor and an advocate of people with disabilities. She supports the bill to ensure the right to privacy and fairness for all citizens of the state. (see Attachment 11)

Sharon Huffman, Kansas Commission on Disability Concerns, provided the committee with material that shows how Kansas Statute may be violating sections of the Americans with Disabilities Act of 1990. Her commission feels that it is in the best interest of all employers, job-seekers, and the State of Kansas to pass **Sub SB 321** and begin restricting access to workers compensation records to those who truly have a need to know. (see Attachment 12)

Bob Mikesic, Independence, Inc., in Lawrence, appeared as a proponent of the bill. Their mission is to empower people with disabilities to control their own lives and advocate for an integrated and accessible community. In his testimony, he says by allowing employers access to workers compensation records only after a conditional offer of employment has been made, **Sub SB 321** will help prevent discrimination based on disability during the hiring process. It would help employers stay focused on making hiring decisions based on a person's current ability to do the job. (see Attachment 13)

Written testimony was provided by Susan Tabor, Independence, Inc. of Lawrence, in support of the bill. (see Attachment 14)

Shannon Jones, Statewide Independent Living Council of Kansas (SILCK), concurred with the other proponents of the bill. She stated that the bill would removes barrier for those who want to work. (see Attachment 15)

Lori Davis, Topeka Independent Living Resource Center, appeared as a proponent of the bill. By closing the records under the bill, we are causing no harm, and would correct the violation of the Americans with Disabilities Act. This bill will eliminate illegal, discriminatory practices and preempt costly and time consuming litigation. Included in her testimony is an informational sheet concerning the EEOC. (see Attachment 16)

No others were present to testify for or against the bill and the hearing on **Sub SB 321** was closed.

Action on: **SB 151 - Regulation of telephone solicitors.**
Rep. Lane read the fiscal note which stated that this bill would have no fiscal impact. Rep. Geringer made a motion to pass out the bill favorably. It was seconded by Rep. Storm. The motion carried.

A letter from Mary Darlene Barry, a workers Compensation claimant, was received by the committee to be read before final action on **SB 346**. (see Attachment 17)

Action on: **Sub SB 321 by Committee on Commerce - Altering the formula for workers compensation fund assessments**
Rep. Beggs made a motion to pass out the bill favorably. It was seconded by Rep. Swenson.

A substitute motion was made by Rep. Grant to combine **SB 137, SB 346, and Sub SB 321** into one bill. It was seconded by Rep. Swenson.

Rep. Mason made a substitute motion to combine only **SB 137** and **Sub SB 321**, and leave **SB 346** by itself. It was seconded by Rep. Geringer. The motion failed on a vote of 5-9.

The vote on the motion to combine the three bills passed.

Rep. Mason made a motion to amend the combined bills by striking Section 5 of **SB 346** referring to attorney fees. It was seconded by Rep. Geringer. The motion failed on a vote of 5-9.

Rep. Mason made a motion to table the bill. It was seconded by Rep. Geringer. It failed on a vote of 5-9.

Having reached no consensus on the bills, Chairman Lane adjourned the meeting at 9:50 a.m.

There are no more committee meetings scheduled at this time.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: March 25, 1997

NAME	REPRESENTING
Nancy Lindberg	Atty Gen.
Gail Bright	A.G.
Jeff Russell	Sprint
Greg Winkler	KCCI
Phil Harness	KDHR - Div. of Work. Comp.
Wayne Maichel	KS AFL-CIO
John M. Ostrowski	KS AFL-CIO
Bob Storey	DMA
Mike Reeche	ATCT
Bill Curtis	Ks Assoc of School Bds
Jeff Braun	MID-Am Lumbermens Assn
Rich McKee	Kansas Livestock Assoc.
Jim Wetteroff	KS AFL-CIO
Wayne	
Bill Jarred	Boeing
Steve Montgomery	MCI
Terry Leatherman	KCCI
Jackie Clark	Hallmark
Mike Oxford	KS Assn of Centers for Independent Living / Topeka Independent Living

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: March 25, 1997

NAME	REPRESENTING
Lori Davis	Topeka Independent Living
John Reinhart	Kansas Press Assn
Roy T. Ortman	Dept. Admin - Personnel
JoLynn Lopp	Kansas Insurance Department
Edwaine E Pomeroy	KCA + KCAA
Shannon Jones	SRCAR
Sharon Huffman	KCDC
Bob Nikkel	Independence Inc
Tessa L Lopez	TILRC
JoAnn Donnell	TILRC

KANSAS HOSPITAL ASSOCIATION

Donald A. Wilson
President

March 24, 1997

TO: House Committee on Commerce

FROM: Fred J. Lucky, Vice President
Kansas Hospital Association

SUBJECT: SENATE BILL 346

The Kansas Hospital Association appreciates the opportunity to comment on SB 346. While we support most of the provisions of the bill, it contains language that we feel will be burdensome and costly not only to providers of health care services, but to the state as well.

Page 16, lines 24 through 28 states: *"Each self-insured employer, group-funded workers compensation pool, insurance carrier, vocational rehabilitation provider, health care provider or health care facility shall submit medical information, by procedure, charge, and zip code of the provider in order to set the maximum medical fee schedule."* We support the concept of using data to assist in setting the medical fee schedule, however, this language causes Kansas hospitals some concerns.

First, the requirement that, in essence, requires all payers and providers to submit data by procedure would result in data that is at best duplicative, and at worse represents data that is either missing or excessive. This would occur since the data would not necessarily be tied to a specific provider other than by zip code. If the payer and the provider were to both submit this data some form of data matching would be required to match the two data sets.

Second, providers are never certain that a patient is eligible for coverage under workers' compensation until their claim is paid. In the case of workers' compensation, this can be as much as two years after the provision of services. Would a provider submit data when it is received or after it is paid? In either way, the data would be suspect and burdensome for KDHE to process.

Third, services provided by hospitals are not easily coded by procedure. While some hospital services can be coded by using the AMA's CPT procedure methodology, at least as many services cannot.

RECOMMENDATION

The Division can accomplish their goal by receiving the data from paid claims from the payers. It would be a complete data set which would not include duplicative or missing data. Therefore, the words *"vocational rehabilitation provider, health care provider or health care facility"* should be stricken.

Business, Commerce, & Labor Committee

215 S.E. 8th • P.O. Box 2308 • Topeka, Kansas 66601-2308 • (913) 233-7436 • FAX (913) 233-6955

3/25/97
Attachment 1

TESTIMONY BEFORE THE HOUSE COMMITTEE ON BUSINESS, COMMERCE AND LABOR

RE: SENATE BILL NO. 346

MARCH 25, 1997

BY PHILIP S. HARNESS, DIRECTOR, DIVISION OF WORKERS COMPENSATION

The Division of Workers Compensation was approached by a Kansas Trial Lawyers Association representative following the hearing in the House Business, Commerce and Labor Committee on Senate Bill No. 346 on March 24, 1997.

K.S.A. 44-536(c) provides:

> "No attorney fees shall be charged with respect to compensation for medical expenses, except where an allowance is made for proposed or future treatment as a part of a compromise settlement. No attorney fees shall be charged with respect to vocational rehabilitation benefits."

During the testimony of Terry Leatherman, Kansas Chamber of Commerce and Industry, he was asked what fee a claimant's attorney would receive where an allowance is made for proposed or future medical treatment as part of a compromise lump sum settlement. Mr. Leatherman deferred to the Director who responded that the fee would be the current graduated cap starting with 25 percent of the first $10,000.

The Kansas Trial Lawyers Association representative felt that the answer could be misleading because the broad issue being discussed was what percentage a claimant's attorney would receive if only medical treatment was being sought. As a point of clarification, K.S.A. 44-536(c) currently provides that the claimant's attorney cannot charge a fee for services rendered to secure medical expenses or treatment. However, where a dollar amount in a lump sum settlement is denominated for future medical treatment, that amount is included in the total recovery from which the claimant's attorney is entitled to recover a fee starting in an amount not to exceed 25 percent of the first $10,000.

Business, Commerce & Labor Committee
3/25/97
Attachment 2

Kathleen Sebelius
Commissioner of Insurance
Kansas Insurance Department

March 24, 1997

Representative Al Lane
Chairman
House Committee on Business,
Commerce, and Labor
Room 115-S
State Capitol
Topeka, Kansas 66612

Re: Senate Bill 346

Dear Chairman Lane:

The Kansas Insurance Department would like to clarify that the support for Senate Bill 346 was limited to the items listed in the letter to your committee dated 3-21-97.

The Department has taken no official position in regard to the other changes in the bill.

Sincerely,

Paula S. Greathouse
Staff Attorney
Workers' Compensation Fund

cc: Committee Members

Business, Commerce & Labor Committee
3/25/97
Attachment 3

420 SW 9th Street
Topeka, Kansas 66612-1678

913 296-3071
Fax 913 296-2283

☎ Consumer Assistance Hotline
1 800 432-2484 (Toll Free)

State of Kansas
Office of the Attorney General
CONSUMER PROTECTION DIVISION
301 S.W. 10TH, LOWER LEVEL, TOPEKA 66612-1597
PHONE: (913) 296-3751 FAX: 291-3699 TTY: 291-3767

CARLA J. STOVALL
ATTORNEY GENERAL

CONSUMER HOTLINE
1-800-432-2310

Testimony of
C. Steven Rarrick, Deputy Attorney General
Consumer Protection Division
Office of Attorney General Carla J. Stovall
Before the House Business, Commerce & Labor Committee
RE: SB 151
March 21, 1997

Chairperson Lane and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla J. Stovall to testify in support of Senate Bill 151. My name is Steve Rarrick and I am the Deputy Attorney General for Consumer Protection.

The Attorney General proposed the amendments to K.S.A. 50-670 which were contained in SB 151 prior to the amendments by the Senate Commerce Committee and the Senate Committee of the Whole. K.S.A. 50-670 was enacted in 1991, and provides privacy protections to Kansas citizens from unwanted telephone solicitations.

The privacy concerns that led to the passage of K.S.A. 50-670 in 1991 still hold true today. Kansas citizens should be entitled to privacy in their own homes. When the telephone rings at dinner time, all Kansas citizens should be able to say "no" once to a telemarketer and have the call terminate. A standard response and solution to this problem, for many of us, is to simply hang up on the offensive caller. Unfortunately, the targets for the majority of these types of calls are the elderly, who are not inclined to hang up the phone. In Kansas, no should mean no, and the call should end.

Over the past year, our office has discovered that many companies, large and small, are not complying with the privacy provisions of K.S.A. 50-670. Attorney General Stovall is supportive of the law as it is currently written, but has proposed some amendments to eliminate interpretation questions that have arisen. Some of these amendments were adopted by the Senate Commerce Committee and others were not.

One of our proposals not adopted by the Senate Commerce Committee was to remove the existing business relationship now available to businesses (page 1, lines 38-39). The Attorney General believes Kansas citizens should not be subjected to harassing telephone solicitations solely because they may have an existing business relationship with the business on whose behalf the

Business, Commerce & Labor Committee
3/25/97
Attachment 4

solicitation is being made, and that this statute should be applied evenly and fairly to all companies making telephone solicitations.

The Senate Commerce Committee also removed the requirement that a telemarketer ask, within thirty (30) seconds of beginning the conversation, if the consumer wishes to listen to a sales presentation (page 2, lines 32-34). While we are not necessarily advocating the specific thirty (30) second time limit, Attorney General Stovall believes telemarketers should be required to ask, at the beginning of the call, whether the consumer wishes to listen to a sales presentation.

The new language at page 2, lines 42-43, and page 3, lines 1-3, is a section aimed at preventing telemarketers from hiding behind call blocking to cloak their identity. Our office has found, in numerous investigations, that the numbers for telemarketers are blocked from appearing on a Caller ID service and/or are not available to a consumer with call-return service. In effect, if a telemarketer is operating illegally, this prevents consumers from tracking back calls which would assist our investigation of complaints filed with our office. We have complaints from many individuals who were called numerous times in the timespan of a few hours or days with no way of knowing from where or whom the call was coming. If a telemarketer knew their call could be traced, it would certainly work to lessen the numbers of offensive calls.

In our balloon amendment, in the new section (c), page 2, lines 33-34, we would ask that the words, "be able to" and "business" be removed. The intent of this provision is to prevent telemarketers from taking affirmative steps to withhold their telephone number rather than situations where their services or hardware prevent the display of their telephone number. Removal of the word "business" would apply this provision to telemarketers operating from their homes.

We have also submitted substitute language at page 3, lines 4-7, to strengthen the provision amended to this bill on the floor of the Senate. Unfortunately, the current language may allow a couple "loopholes" for businesses who want to avoid the requirements of the law. With the requirement that the telephone solicitor's "initial" contact with the consumer must be by facsimile, I believe unscrupulous telephone solicitors could avoid the requirements of the statute by simply calling the consumer first and sending subsequent solicitations by facsimile. In this situation, a consumer receiving numerous and unwanted facsimile transmissions would not have the protections of this law since the initial contact was by telephone. In addition, the use of the phrase "printed material," rather than "written material," would allow telephone solicitors to avoid the requirements of the statute by faxing hand-written materials. Finally, the inclusion of the word "computer" in our balloon amendment will cover faxes and communications via computer modems which are possible with current technology.

During 1996, our office received 490 telephone solicitation complaints and approximately 263 complaints in other categories estimated to be telephone-related. Previously, in 1995, our office had received only 188 telephone solicitation complaints and 272 telephone-related complaints. During recent investigations, we discovered one company had made 672,000 telemarketing calls into Kansas while another had made in excess of 2.4 million, both in a twelve month period of time.

4-2

These numbers demonstrate a dramatic increase in telephone solicitations and complaints. Unfortunately, with the deregulation of telephone and cable service, along with an increase in sweepstakes scams, our office anticipates a continuing increase in telephone solicitations to Kansas citizens. Attorney General Stovall certainly does not want these companies, legitimate or otherwise, to run roughshod over Kansas citizens.

I have provided for your review several samples of complaints which have been submitted to our office within the last twelve months. These detail how frustrating it can be for consumers to continually receive harassing telephone solicitations.

You may hear arguments that this law somehow infringes on constitutional rights. However, the U.S. Supreme Court has spoken quite clearly on this issue in numerous cases. I would like to read a section of one U.S. Supreme Court case in particular. Omitting the other legal citations referenced in this quote, the Supreme Court in Frisby v. Schultz, 108 S.Ct. 2495, 487 U.S. 474, 101 L.Ed.2d 420 (1988), said:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, and have recognized that preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.
>
> One important aspect of residential privacy is protection of an unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often captives outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.
>
> There simply is no right to force speech into the home of an unwilling listener.

It is difficult to believe that any business entity would oppose this consumer friendly bill. The requirements of the existing statute with the proposed amendments are not overly-burdensome,

but merely provide privacy protections from unwanted intrusions into the sanctity of the home. It is Attorney General Stovall's belief this is what Kansas citizens want, expect, and deserve.

On behalf of Attorney General Stovall, I urge your favorable consideration of Senate Bill 151. Thank you.

[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

Session of 1997

SENATE BILL No. 151

By Committee on Commerce

1-30

AN ACT concerning consumer protection; relating to telephone solicitation; amending K.S.A. 50-670 and repealing the existing section.

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

Section 1. K.S.A. 50-670 is hereby amended to read as follows: 50-670. (a) As used in this section:

(1) "Consumer telephone call" means a call made by a telephone solicitor *to the residence of a consumer* for the purpose of soliciting a sale of any ~~consumer~~ ~~goods~~ *property* or services to the person called, or for the purpose of soliciting an extension of credit for ~~consumer~~ ~~goods~~ *property* or services to the person called, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of ~~consumer~~ ~~goods~~ *property* or services to the person called or an extension of credit for such purposes;

~~(2) "consumer goods or services" means any tangible personal property which is normally used for personal, family or household purposes, including, without limitation, any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed, as well as cemetery lots and time-share estates, and any services related to such property;~~

~~(3)~~ *(2)* "unsolicited consumer telephone call" means a consumer telephone call other than a call made:

(A) In response to an express request of the person called;

(B) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call; ~~or~~

~~(C) to any person with whom the telephone solicitor has an existing business relationship; or~~

(C) to any person with whom the telephone solicitor has an existing business relationship; or

~~(D)~~ ~~(C)~~ ***(D)*** by a newspaper publisher or such publisher's agent or employee in connection with such publisher's business;

~~(4)~~ *(3)* "telephone solicitor" means any natural person, firm, organization, partnership, association or corporation who makes or causes to be made a consumer telephone call, including, but not limited to, calls made by use of automatic dialing-announcing device;

~~(5)~~ *(4)* "automatic dialing-announcing device" means any user terminal equipment which:

(A) When connected to a telephone line can dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or

(B) when connected to a telephone line can disseminate a recorded message to the telephone number called, either with or without manual assistance~~.~~*[;]*

(5) "negative response" means a statement from a consumer indicating the consumer does not wish to listen to the sales presentation or participate in the solicitation presented in the consumer telephone call.

(b) Any telephone solicitor who makes an unsolicited consumer telephone call to a residential telephone number shall:

~~(1) Identify themselves and the business on whose behalf such person is soliciting and the purpose of the call immediately upon making contact by telephone with the person who is the object of the telephone solicitation;~~

~~(2) within 30 seconds after beginning the conversation, inquire whether the person being solicited is interested in listening to a sales presentation and immediately discontinue the solicitation if the person being solicited gives a negative response; and~~

(1) Identify themselves;

(2) identify the business on whose behalf such person is soliciting;

(3) identify the purpose of the call immediately upon making contact by telephone with the person who is the object of the telephone solicitation;

~~(4) within 30 seconds after beginning the conversation, inquire whether the person being solicited is interested in listening to a sales presentation;~~

~~(5)~~ *(4) immediately discontinue the solicitation if the person being solicited gives a negative response at any time during the consumer telephone call; and*

~~(3)~~ ~~(6)~~ *(5)* hang up the phone, or in the case of an automatic dialing-announcing device operator, disconnect the automatic dialing-announcing device from the telephone line within 25 seconds of the termination of the call by the person being called.

(c) A telephone solicitor shall not be able to withhold the display of the telephone solicitor's business telephone number from a caller identi-

(c) ~~*be able to*~~ *business*

fication service when that number is being used for telemarketing purposes and when the telephone solicitor's service or equipment is capable of allowing the display of such number.

[(d) A telephone solicitor whose initial contact with a consumer is through printed material transmitted by telefacsimile machine shall not transmit any additional printed information if the consumer requests orally or in writing that such transmissions cease.]

~~(c)~~ ~~(d)~~ *[(e)]* ~~Telephone companies~~ *Local exchange carriers and telecommunications carriers* shall not be responsible for the enforcement of the provisions of this section ~~and shall not be liable for any error or omission in the listings made pursuant hereto~~.

~~(d)~~ ~~(e)~~ *[(f)]* Any violation of this section is an unconscionable act or practice under the Kansas consumer protection act.

~~(e)~~ ~~(f)~~ *[(g)]* This section shall be part of and supplemental to the Kansas consumer protection act.

Sec. 2. K.S.A. 50-670 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

~~*[(d) A telephone solicitor whose initial contact with a consumer is through printed material transmitted by a facsimile machine shall not transmit any additional printed information if the consumer requests orally or in writing that such transmissions cease.]*~~

(d) A telephone solicitor shall not transmit any written information by facsimile machine or computer to a consumer after the consumer requests orally or in writing that such transmissions cease.

4-7

ACTION YOU HAVE TAKEN

HAVE YOU RETAINED AN ATTORNEY REGARDING THIS COMPLAINT? NO IF SO, PLEASE STATE THE NAME, ADDRESS, AND PHONE NUMBER OF YOUR ATTORNEY:

HAS LEGAL ACTION BEEN TAKEN BY YOU OR AGAINST YOU WITH REGARD TO THIS COMPLAINT? NO IF SO, PLEASE DESCRIBE THE CURRENT STATUS OF ANY LEGAL ACTION:

HAVE YOU FILED THIS COMPLAINT WITH ANY OTHER AGENCIES? NO IF SO, LIST NAME OF AGENCY AND STATUS OF COMPLAINT:

DESCRIPTION OF TRANSACTION

PLEASE DESCRIBE THE TRANSACTION IN CHRONOLOGICAL ORDER (ADD ADDITIONAL PAGES IF NECESSARY).

First call was approx. midday on 21st Second call was next day. Last call was Monday 27th – all during the day.

I specifically asked at the second call that they make a notation in their computer NOT to call again. The third through fifth calls were split between myself and my wife. Again, we asked them to stop.

Doesn't the FTC require companies to cease when asked? I believe it does.

DOCUMENTATION OF THE TRANSACTION

PLEASE PROVIDE COPIES OF ALL DOCUMENTS RELEVANT TO THIS COMPLAINT, INCLUDING ADVERTISING MATERIAL, CONTRACTS, WARRANTY INFORMATION, RECEIPTS, LETTERS, CHECKS (FRONT AND BACK), PHOTOGRAPHS, ETC. FAILURE TO PROVIDE ALL RELEVANT DOCUMENTS WILL CAUSE UNNECESSARY DELAY IN THE HANDLING OF YOUR COMPLAINT.

VERIFICATION

IN FILING THIS COMPLAINT, I UNDERSTAND AND AGREE THAT THE ATTORNEY GENERAL AND HER STAFF ARE NOT MY PRIVATE ATTORNEYS, BUT INSTEAD REPRESENT THE STATE OF KANSAS IN ENFORCING LAWS DESIGNED TO PROTECT THE PUBLIC FROM DECEPTIVE AND UNCONSCIONABLE BUSINESS ACTS AND PRACTICES. I UNDERSTAND THAT KANSAS LAW LIMITS THE PERIOD OF TIME DURING WHICH I MAY FILE ANY PRIVATE LEGAL ACTION(S), AND I HAVE BEEN ADVISED TO CONTACT A PRIVATE ATTORNEY IF I HAVE ANY QUESTIONS CONCERNING THOSE TIME LIMITATIONS AND MY LEGAL RIGHTS WITH REGARD TO ANY PRIVATE ACTION(S). I FURTHER UNDERSTAND AND AGREE THAT THE CONTENTS OF THIS COMPLAINT MAY BE FORWARDED TO THE BUSINESS OR PERSON THE COMPLAINT IS DIRECTED AGAINST OR TO OTHER APPROPRIATE AGENCIES. FINALLY, I VERIFY THAT THE INFORMATION CONTAINED IN THE ABOVE COMPLAINT IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

4-8

[redacted]

YOUR SIGNATURE
(REQUIRED)

1-31-97

DATE

(6-96COMP.FRM)

ACTION YOU HAVE TAKE

HAVE YOU RETAINED AN ATTORNEY REGARDING THIS COMPLAINT? NO IF SO, PLEASE STATE THE NAME, ADDRESS, AND PHONE NUMBER OF YOUR ATTORNEY:

HAS LEGAL ACTION BEEN TAKEN BY YOU OR AGAINST YOU WITH REGARD TO THIS COMPLAINT? NO IF SO, PLEASE DESCRIBE THE CURRENT STATUS OF ANY LEGAL ACTION:

HAVE YOU FILED THIS COMPLAINT WITH ANY OTHER AGENCIES? NO IF SO, LIST NAME OF AGENCY AND STATUS OF COMPLAINT:

DESCRIPTION OF TRANSACTION

PLEASE DESCRIBE THE TRANSACTION IN CHRONOLOGICAL ORDER (ADD ADDITIONAL PAGES IF NECESSARY).

DUE TO [redacted] CONSTANT HARRASSMENT NO TRANSACTION WILL EVER TAKE PLACE BETWEEN US. I WOULD JUST LIKE THEM OFF MY BACK. I AM ON TOTAL DISABILITY ~~[illegible]~~ WITH CHRONIC PULMANARY LUNG DISEASE AND ON OXYGEN FULL TIME. THESE PHONE CALLS DO NOT HELP MY CONDITION AS AGGRAVATION AND STRESS ONLY MAKE MY BREATHING MORE DIFFICULT. I HAVE ASKED THEM NUMEROUS TIMES NOT TO CALL ANYMORE BUT THE CALLS JUST CONTINUE TO GET MORE FREQUENT LAST WEEK FOUR TIMES IN THREE DAYS. IS THERE ANY WAY I CAN HAVE PHONE [redacted] REMOVED FROM THEIR CALLING LISTS?

THANK YOU

[redacted]

DOCUMENTATION OF THE TRANSACTION

PLEASE PROVIDE COPIES OF ALL DOCUMENTS RELEVANT TO THIS COMPLAINT, INCLUDING ADVERTISING MATERIAL, CONTRAC WARRANTY INFORMATION, RECEIPTS, LETTERS, CHECKS (FRONT AND BACK), PHOTOGRAPHS, ETC. FAILURE TO PROVIDE ALL RELEV DOCUMENTS WILL CAUSE UNNECESSARY DELAY IN THE HANDLING OF YOUR COMPLAINT.

VERIFICATION

IN FILING THIS COMPLAINT, I UNDERSTAND AND AGREE THAT THE ATTORNEY GENERAL AND HER STAFF ARE NOT MY PRIVATE ATTORN BUT INSTEAD REPRESENT THE STATE OF KANSAS IN ENFORCING LAWS DESIGNED TO PROTECT THE PUBLIC FROM DECEPTIVE UNCONSCIONABLE BUSINESS ACTS AND PRACTICES. I UNDERSTAND THAT KANSAS LAW LIMITS THE PERIOD OF TIME DURING WHI MAY FILE ANY PRIVATE LEGAL ACTION(S), AND I HAVE BEEN ADVISED TO CONTACT A PRIVATE ATTORNEY IF I HAVE ANY QUEST CONCERNING THOSE TIME LIMITATIONS AND MY LEGAL RIGHTS WITH REGARD TO ANY PRIVATE ACTION(S). I FURTHER UNDERSTAND AGREE THAT THE CONTENTS OF THIS COMPLAINT MAY BE FORWARDED TO THE BUSINESS OR PERSON THE COMPLAINT IS DIREC AGAINST OR TO OTHER APPROPRIATE AGENCIES. FINALLY, I VERIFY THAT THE INFORMATION CONTAINED IN THE ABOVE COMPLAI TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

4-9

[redacted]

YOUR SIGNATURE
(REQUIRED)

7-3-96
DATE

(5-96CON

ACTION YOU HAVE TAKE

HAVE YOU RETAINED AN ATTORNEY REGARDING THIS COMPLAINT? ____ IF SO, PLEASE STATE THE NAME, ADDRESS, AND PHONE NUMBER OF YOUR ATTORNEY:

[redacted]

HAS LEGAL ACTION BEEN TAKEN BY YOU OR AGAINST YOU WITH REGARD TO THIS COMPLAINT? NO IF SO, PLEASE DESCRIBE THE CURRENT STATUS OF ANY LEGAL ACTION:

HAVE YOU FILED THIS COMPLAINT WITH ANY OTHER AGENCIES? NO IF SO, LIST NAME OF AGENCY AND STATUS OF COMPLAINT:

DESCRIPTION OF TRANSACTION

PLEASE DESCRIBE THE TRANSACTION IN CHRONOLOGICAL ORDER (ADD ADDITIONAL PAGES IF NECESSARY).

[redacted] HAS CALLED WANTING TO SELL ME MUCH AS FOUR TIMES A WEEK AND AS MUCH AS FIVE TIMES A DAY. I BLEW MY STACK 3-13-96 WITH A CALLER NAMED MARK, AN CONSTRUCTION WORKER. I TOLD HIM I DID NOT WANT [redacted] SERVICE AND WANTED LEFT ALONE. HE SAID NOW THAT I KNOW HOW BAD ITS BOTHERING YOU, I GOING TO PUT YOU ON TOP PRIORITY TO BE CALLED. THAT AFTERNOON MARK CALLED THREE MORE TIMES JUST TO SEE HOW I LIKED BEING CALLED. HE GOT ME SO UP SET I THOUGHT I WAS HAVING A HEART ATTA [redacted] HAS CALLED THE 14TH 15TH AND TODAY THREE WORKIN DAYS IN A ROW. THE CALLER TODAY SAID ALL I HAVE TO DO IS BUY THE SERVICE AND [redacted] WOULD LEAVE ME ALONE. I FEEL THAT [redacted] SHOULD HAVE TO COMPENSATE ME $100,000.00 FOR ALL THE TROUBLE I'VE CAUSED THE LAST FOUR YEARS

DOCUMENTATION OF THE TRANSACTION

PLEASE PROVIDE COPIES OF ALL DOCUMENTS RELEVANT TO THIS COMPLAINT, INCLUDING ADVERTISING MATERIAL, CONTRACT WARRANTY INFORMATION, RECEIPTS, LETTERS, CHECKS (FRONT AND BACK), PHOTOGRAPHS, ETC. FAILURE TO PROVIDE ALL RELEVA DOCUMENTS WILL CAUSE UNNECESSARY DELAY IN THE HANDLING OF YOUR COMPLAINT.

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YOUR SIGNATURE

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DATE

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ACTION YOU HAVE TAKEN

HAVE YOU RETAINED AN ATTORNEY REGARDING THIS COMPLAINT? NO IF SO, PLEASE STATE THE NAME, ADDRESS, AND PHONE NUMBER OF YOUR ATTORNEY:

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HAVE YOU FILED THIS COMPLAINT WITH ANY OTHER AGENCIES? NO IF SO, LIST NAME OF AGENCY AND STATUS OF COMPLAINT:

DESCRIPTION OF TRANSACTION

PLEASE DESCRIBE THE TRANSACTION IN CHRONOLOGICAL ORDER (ADD ADDITIONAL PAGES IF NECESSARY).

ALMOST WEEKLY CALLS. WON'T TAKE "NO" FOR AN ANSWER. KEEP CALLING NO MATTER WHAT I SAY. I DON'T WANT TO DO BUSINESS WITH THEM

GET CALLS FROM THEM

GET MAIL FROM THEM

DOCUMENTATION OF THE TRANSACTION

PLEASE PROVIDE COPIES OF ALL DOCUMENTS RELEVANT TO THIS COMPLAINT, INCLUDING ADVERTISING MATERIAL, CONTRACTS, WARRANTY INFORMATION, RECEIPTS, LETTERS, CHECKS (FRONT AND BACK), PHOTOGRAPHS, ETC. FAILURE TO PROVIDE ALL RELEVANT DOCUMENTS WILL CAUSE UNNECESSARY DELAY IN THE HANDLING OF YOUR COMPLAINT. NONE EXISTED

VERIFICATION

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[redacted]

YOUR SIGNATURE
(REQUIRED)

2 Nov 96

DATE

HAVE YOU RETAINED AN ATTORNEY REGARDING THIS COMPLAINT? NO IF SO, PLEASE STATE THE NAME, ADDRESS, AND PHONE NUMBER OF YOUR ATTORNEY:

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PLEASE DESCRIBE THIS TRANSACTION IN CHRONOLOGICAL ORDER (ADD ADDITIONAL PAGES IF NECESSARY).

Over The Last 6 Weeks I Have Been Contacted Repeatedly By a Telemarketing Firm Representing [redacted] Long Distance Service. Who Were Contacted Most Recently on 1-7-97 & 1-8-97. During Every Call The Solicitor Has Told Us We Have Not Interested, And Not To Contact Us Again, & Please Remove This Number From Their Data Base. on 1-8-97 I Again Informed These People When They Called That I Was Not Interested & That They Had Been Told To Remove Us From Their List, & That They Were In Violation of The law. They Threatened Me No Request Had Been Made & Was going To Tell Them Again, & That The Conversation Would Be Taped. The Solicitor Told Me I Couldn't Do That, That It was Illegal & Began To Become Very Resistant. My Machine would Not Tape, Due To a Malfunction. However he was Told Not To Contact Me Again or legal Action would Result. When Asked To Put his Supervisor on The Line He Refused. I Hung up on him.

PLEASE PROVIDE COPIES OF ALL DOCUMENTS RELEVANT TO THIS COMPLAINT, INCLUDING ADVERTISING MATERIAL, CONTRACTS, WARRANTY INFORMATION, RECEIPTS, LETTERS, CHECKS (FRONT AND BACK), PHOTOGRAPHS, ETC. FAILURE TO PROVIDE ALL RELEVANT DOCUMENTS WILL CAUSE UNNECESSARY DELAY IN THE HANDLING OF YOUR COMPLAINT.

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[redacted]

YOUR SIGNATURE
(REQUIRED)

1-9-97
DATE

ronocom.mou

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TESTIMONY
House Business, Commerce, and Labor Committee
March 24,1997

Good morning Mr. Chairman and committee members. I am Jeff Russell, Director of Governmental and Public Affairs, Sprint Midwest Operations.

I am here today to offer Sprint's support for SB 151 as amended by the Senate Commerce Committee and the Senate Committee of the Whole.

Our recently announced Sprint Telecenter in Lawrence coupled with our National Residential Center in Lenexa will provide nearly 700 telemarketing jobs to fellow Kansans. Telemarketing is a huge business as you have already heard. SB 151 in its present form takes steps to balance consumer protection with free enterprise.

Sprint's support of this bill is driven primarily by the removal of the "30 second" language on page 2, lines 24-27. We found it nearly impossible to comply with the law and still establish initial rapport with the customer. Obviously it is not in our best interests to upset someone during a sales call, and we would not be adding 200 telemarketing jobs if we made a habit of leaving a negative impression with customers.

We salute the efforts of the Attorney General's office to protect Kansas consumers and feel SB 151 presents a reasonable reworking of the law to the benefit of all concerned.

Thank you for your time and I appreciate the opportunity to appear before the committee. Mr. Chairman, I would be happy to answer any questions at your convenience.

Business, Commerce & Labor Committee
3/25/97
Attachment 5

HEN NECESSARY — SAY GOODBYE AND HANG UP

If you're not interested in the product, if your questions aren't being answered by the salesperson or if intuition tells you that something isn't quite right, tell your caller goodbye and hang up.

If you decide that you don't want another call from a company, be sure to ask the salesperson to take your name off their list. Or if you want to reduce the number of telephone solicitation calls you receive from national companies, put your request in writing and send it to:

Telephone Preference Service
Direct Marketing Association
P.O. Box 9014
Farmingdale, NY 11735-9014

If you believe you have been victimized by a fraudulent telemarketer, report the facts to:

Your State Attorney General
(See back cover for address and telephone number) or

Federal Trade Commission
Telemarketing Fraud Project, Room 200
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Printed on recycled paper using soy-based inks

ADDRESS CONSUMER PROTECTION QUESTIONS TO YOUR ATTORNEY GENERAL'S OFFICE:

Office of the Attorney General
Judicial Center
Topeka, Kansas 66612
Toll-free: 1-800-432-2310

Office of the Attorney General
102 State Capitol
St. Paul, Minnesota 55155
Toll-free: 1-800-657-3787
Local callers: (612) 296-6196

Office of the Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Toll-free: 1-800-392-8222

Office of the Attorney General
Department of Justice
2115 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-2682

Texas Attorney General Regional Consumer Protection Offices

Austin P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2185

Dallas 714 Jackson, Suite 800
Dallas, Texas 75202-4506
(214) 742-8944

Houston 1019 Congress, Suite 1550
Houston, Texas 77002-1702
(713) 223-5886

Office of the Attorney General
State Capitol
Cheyenne, Wyoming 82002
(307) 777-7874

Protect yourself from TELEMARKETING Fraud

5-2

IT'S EASY TO BECOME A VICTIM

Anyone who has a telephone can become a victim of telemarketing fraud. Even though respectable telemarketing firms sold more than $100 billion in products and services in the last year, swindlers and con artists got away with at least $1 billion at the same time.

According to the Federal Trade Commission (FTC), telemarketing fraud is the use of telephone communications to fraudulently promote goods or services.

Different types of telemarketing scams pop up seemingly overnight. Fraudulent telemarketers are selling everything from water purifiers and vitamins to gemstones and rare coins. One Tulsa-based telemarketer even sold shares in a secret process for converting volcanic sand on Costa Rican beaches into gold. But one thing doesn't change overnight, and that is the susceptibility of all types of people to fall into the fraudulent telemarketing trap. Lawyers, doctors and police officers are only a few of the professionals who have been taken by fraudulent telemarketers.

The oldest advice is still most likely the best advice to use when dealing with telemarketers: "If it sounds too good to be true, then it probably is."

TAKE CONTROL—TO AVOID BEING TAKEN

As a local phone company, Sprint/United Telephone wants to help consumers avoid becoming victims of telemarketing fraud. Reputable telemarketing companies and the FTC agree it is in the industry's best interest to educate consumers about the potential for telemarketing fraud.

The following tips give some guidelines for avoiding deceptive telemarketing schemes. But remember that even when they are followed, there is no guarantee that the caller is honest.

1. Be extremely careful in giving your credit card number over the phone. Beware when a telemarketer asks for your credit card number for any purpose other than to make a purchase.

2. Be cautious if the caller says an investment, purchase or charitable donation must be made immediately. Ask that printed information be sent to you; this shouldn't be a problem for legitimate firms. Take your time when studying the printed materials; purchase decisions should never be made under pressure.

3. Get the name and number of the person calling you and a number you can call if you have questions. Also, ask who is in charge of the company or organization represented; be sure to get specific names and titles.

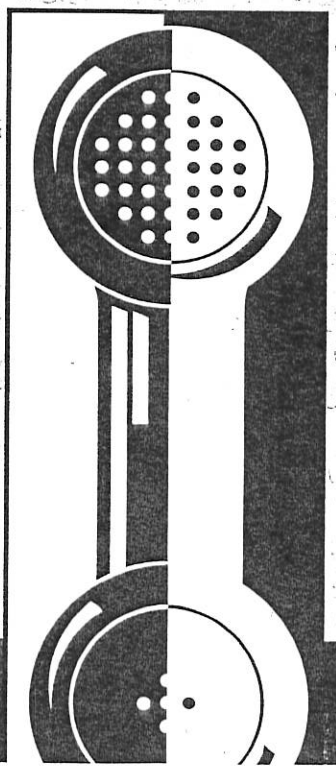
4. Ask for the street address and telephone number of the firm calling you, and be extremely cautious if the caller won't provide that information. Fraudulent callers often set up "boiler room" operations where they call long distance, involving several phone companies and legal jurisdictions.

5. Ask if it is possible to obtain the names and phone numbers of satisfied customers in your community.

6. Check with your state and local consumer protection offices and Better Business Bureau for information on the organization.

7. Be wary of offers for free merchandise and prizes. You may end up paying handling fees greater than the value of the gifts. Write down the prices quoted and ask whether prices include shipping and handling, taxes or any surcharges. Ask also about warranties, return or cancellation policies and repair of defective merchandise.

8. Know what you're buying. For example, many firms including your local telephone company publish telephone directories. Many times business owners purchase yellow-pages advertising without knowing in which directory the advertising will appear. To avoid this kind of misunderstanding, make positive identification of the representative calling, and ask where the advertising will appear.



REMARKS CONCERNING SENATE BILL 151

HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE

MARCH 21, 1997

Thank you for giving me the opportunity to appear before your committee on behalf of Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas, and Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work.

The organizations I represent had concerns about the bill as it was originally introduced. We agree with the amendments made by the Senate Commerce Committee, and we have no objections to the amendment made by the Senate Committee of the Whole.

Our concerns with the original bill were with the striking of the language in the present statute which appear on page 1 lines 38 and 39 of the most recent version of the bill. Our concerns were relieved when the Senate Commerce Committee added those words back to the statute, as appears on page 1 lines 40 and 41 of the current version of the bill.

We would oppose any attempt to strike those two lines from the bill.

We urge the committee, if it decides to report this bill favorably, to retain the language which appears on page 1 in lines 40 and 41 of the current version of the bill.

ELWAINE F. POMEROY

Business, Commerce & Labor Committee
3/25/97
Attachment 6

Mike Reecht
Kansas Director
State Government Affairs

800 S.W. Jackson, Suite 1000
Topeka, KS 66612
Phone (913) 232-2128
Fax (913) 232-9537

TESTIMONY ON BEHALF OF AT&T
BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE
SENATE BILL 151
MARCH 25, 1997

Chairman Lane and members of the committee:

My name is Mike Reecht and I am State Director of Government Affairs for AT&T in Kansas.

AT&T supports Senate Bill 151 in its current form.

I believe the solution to many telemarketing concerns that face consumers today is education. It is important that customers let the telemarketer know that they are not interested, ask to be taken off that particular call list, ask to speak with a supervisor if they encounter a particularly offensive representative, or ultimately disconnect. Direct Marketing Association offers an address to write to be taken off of national call lists.

In addition, advances in technology such as caller ID and answering machines offer consumers possible solutions to unwanted phone calls. Both of which give the customer more flexibility in the use of the phone.

In closing, I believe it is essential that you not adopt legislation that will stifle or eliminate telemarketing as an important sales and solicitation channel that legitimate businesses and individuals are able to use. SB 151, as currently drafted, allows legitimate telemarketers to conduct business in Kansas. I believe the answer to unwanted telemarketing phone calls is consumer education, rather than a legislative solution that would do little to discourage unscrupulous telemarketers.

Thank you for your attention in this matter and I would be happy to answer any questions you might have.

Business, Commerce & Labor Committee
3/25/97
Attachment 7

TESTIMONY OF BOB W. STOREY

On Senate Bill 151

House Business, Commerce and Labor Committee - March 21, 1997

Mister Chairman and Members of the Committee:

I represent DeHart and Darr Associates, Inc., a public relations firm which in turn represents the Direct Marketing Association (DMA). The DMA has 3,600 member companies nationwide with 16 of those member companies headquartered in 8 Kansas cities. Thirty-nine of the member companies have operations in the state of Kansas.

These companies provide approximately 117,730 direct marketing related jobs in Kansas and generate approximately $11.645 million dollars of sales revenue in state of Kansas.

These are 1996 statistics provided by the WEFA Group, a leading economic and business forecasting and consulting firm with offices in 9 states and 9 foreign counties. If in addition to the above, the DMA represents a consortium of book and recording publishers and manufacturers, such as Reader's Digest, etc.; and magazine publishers of America,(MPA).

There are 40 telephone marketing service companies in Kansas with approximately 4,515 employees.

The purpose of our testimony today is to support Senate Bill 151 in it's present form as amended by the Senate Commerce Committee and the full Senate.

In Section 1, the Bill defines an "unsolicited consumer telephone call." In line 35 in section 1, this amended bill leaves the language which is currently in the law which states "to any person with whom the telephone solicitor has an existing relationship." We oppose striking this exemption.

The relationship between seller and consumer is a special one. No business can stay in business without retaining current and previous customers. Indeed, development and offering of goods and services are directly related to feedback and response from a seller's customer base.

For many of our companies, the relationship has been a long standing one. For example:

Business, Commerce & Labor Committee
3/25/97
Attachment 8

Subscriber's to Reader's Digest magazine
Patrons of Olan Mills Photo Studios
Readers of National Geographic books
Customers of Sears, J.C. Penney, Montgomery Ward
Passengers on American Airlines
Members of Book-of-the-Month Club
Guests of Holiday Inns
Drivers of Fords, or Chevrolets, or Pontiacs from the local dealer
Purchasers of the GE appliances
Customers of the Avon lady
Patrons of the local beauty shop
Depositors at the local bank

It is appropriate to exempt companies who are contacting current and previous customers from requirements which should apply to a new contact. There is precedent for such an exemption. The Telephone Consumer Protection Act exempts and "established business relationship."

Let us emphasize here that the exemption for customers, together with an exemption for debt contacts and newspapers, were in this Kansas law because the next provision we will discuss is very onerous.

In addition to the above, SB 151, as amended, repeals a requirement to identify the caller and purpose and within 30 seconds ask whether the person being solicited is interested in listening to a sales presentation.

We oppose the 30-second/ask-if-interested requirement.

This requirement puts Kansas businesses at a disadvantage, attempts to discriminate against telephone sales, and prohibits Kansas sellers from describing the offer. It defies the concept of persuasion as part of salesmanship - the act or process of urging another to try one's product or service.

This is key. To try
To preview
the product or service.

All of the sales which are proposed over the telephone are complete satisfaction guaranteed by the offerer. There are no exceptions to this rule.

We believe we have same right as a retail store to describe the offer in attempting to sell our products to the consumer.

The DMA fully understands that there are fly-by-night or unscrupulous telemarketers operating throughout the country, however, there are far more legitimate and honest telemarketers than the other side, and who are permanent in the business and who provide jobs, for not only Kansans but, others throughout the

United States. We do not think we have a right to annoy or harass the consumer. It wouldn't be good business. Moreover, the only or best contact we may have with a consumer is by telephone. Neither the DMA or any honest telemarketer objects to fully advising a consumer of the nature or product that they are attempting to sell, identifying who is selling a product, or asking the consumer objects to hearing the sales pitch, once the seller has identified himself or herself to the consumer and advised the consumer of what product he or she is promoting. If the consumer, at that point says, I am not interested, then the telemarketer shall hang up immediately.

It appears, however, that at some time, some type of responsibility must belong to the consumer, such as, telling the telemarketer "I'm not interested" or by simply hanging up the telephone without any conversation. Asking this to be done within 30 seconds, however, we believe is unreasonable.

If a telemarketer exceeds the 30 second rules, if even only by a few seconds, then the telemarketer is subject to a fine under the Kansas Consumer Protection Act. That fine can be substantial, at the discretion of the Attorney General.

As stated above, the telemarketers do not have the right to annoy or harass a customer and as a matter of fact, it is already against the law. The Federal Trade Commission, FTC, rules states:

> It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:
>
> Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

In addition, let's review the law as it is today.

A consumer only has to hear from a seller once. If the consumer tells the seller not to call again, the seller must enter the consumer's number on the seller's in-house "do not call" list and cannot call that consumer again for 10 years.

A consumer can decide of his or her own free will if he or she wants to hear from national sellers at all.

DMA has sponsored a free service to consumers for over 20 years. The consumer needs only to send his or her number to Telephone Preference Service (TPA) and the name is entered on the not-to-call list. The DMA makes quarterly lists of persons not-to-call available to member companies, list preparers, and non-member companies.

If you do not enroll in TPA and agree to receive calls, then there are 3 Federal Rules which apply:

1. The Telephone Consumer Protection Act (TCPA) adopted by the Federal Communications Commission (FCC); and

2. The Telemarketing Sales Rule; and

3. The Mail and Telephone Order Rule, both are adopted by the Federal Trade Commission (FTC).

What we are proposing gives consumer protection and is consistent with federal law.

We strongly urge this committee to adopt the approach we have outlined here. It protects the consumer by promptly identifying that the purpose of the call is to sell goods or services and the nature of the goods or services.

As outlined in the attachments, it would make good sense to have the state law consistent with federal law for the education of the consumer and the consumer's reliance on standards of good business.

I will be happy to attempt to answer any questions you may have.

Thank you for your consideration.

BOB W. STOREY

...e of birth or social security num-
...; or
...) Within three business days of the
...omer's request for a PIC change,
...IXC must send each new customer
...nformation package by first class
...l containing at least the following
...rmation concerning the requested
...ige:
... The information is being sent to
...irm a telemarketing order placed
...he customer within the previous
...;
... The name of the customer's cur-
...IXC;
... The name of the newly requested
...
... A description of any terms, condi-
...s, or charges that will be incurred;
... The name of the person ordering
...hange;
... The name, address, and telephone
...ber of both the customer and the
...iting IXC;
... A postpaid postcard which the
...omer can use to deny, cancel or
...irm a service order;
... A clear statement that if the cus-
...r does not return the postcard the
...omer's long distance service will
...witched within 14 days after the
... the information package was
...ed to [name of soliciting carrier];
... The name, address, and telephone
...ber of a contact point at the Com-
...ion for consumer complaints; and
... IXCs must wait 14 days after the
... is mailed to customers before sub-
...ing their PIC change orders to
.... If customers have cancelled
... orders during the waiting period,
... of course, cannot submit the cus-
...r's orders to LECs.

...4740, Feb. 7, 1992, as amended at 60 FR ... July 12, 1995]

...150 Letter of agency form and ...ontent.

... An interchange carrier shall ob-
... any necessary written authoriza-
... from a subscriber for a primary
...exchange carrier change by using
...er of agency as specified in this
...n. Any letter of agency that does
...onform with this section is in-
...

... The letter of agency shall be a
...ate document (an easily separable
...ment containing only the author-

izing language described in paragraph (e) of this section) whose sole purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary interexchange carrier change.

(c) The letter of agency shall not be combined with inducements of any kind on the same document.

(d) Notwithstanding paragraphs (b) and (c) of this section, the letter of agency may be combined with checks that contain only the required letter of agency language prescribed in paragraph (e) of this section and the necessary information to make the check a negotiable instrument. The letter of agency check shall not contain any promotional language or material. The letter of agency check shall contain, in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a primary interexchange carrier change by signing the check. The letter of agency language also shall be placed near the signature line on the back of the check.

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The subscriber's billing name and address and each telephone number to be covered by the primary interexchange carrier change order;

(2) The decision to change the primary interexchange carrier from the current interexchange carrier to the prospective interexchange carrier;

(3) That the subscriber designates the interexchange carrier to act as the subscriber's agent for the primary interexchange carrier change;

(4) That the subscriber understands that only one interexchange carrier may be designated as the subscriber's interstate primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary interexchange carriers (e.g., for intrastate or international calling), the letter of agency must contain separate statements regarding those choices. Any carrier designated as a primary interexchange carrier must be the carrier directly setting the rates for the subscriber. One interexchange carrier can be both a subscriber's interstate primary interexchange carrier and a subscriber's intrastate primary interexchange carrier; and

(5) That the subscriber understands that any primary interexchange carrier selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber's primary interexchange carrier.

(f) Letters of agency shall not suggest or require that a subscriber take some action in order to retain the subscriber's current interexchange carrier.

(g) If any portion of a letter of agency is translated into another language, then all portions of the letter of agency must be translated into that language.

[60 FR 35353, July 12, 1995]

Subpart L—Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

(a) No person may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes

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or is exempted by §64.1200(c) of this section.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of §64.1200(a) of this section, the term *emergency purposes* means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term *telephone call* in §64.1200(a)(2) of this section shall not include a call or message by, or on behalf of, a caller:

(1) That is not made for a commercial purpose,

(2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) To any person with whom the caller has an established business relationship at the time the call is made, or

(4) Which is a tax-exempt nonprofit organization.

(d) All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) or address of such business, other entity, or individual.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(1) Before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), and

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) *Written policy.* Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) *Training of personnel engaged in telephone solicitation.* Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) *Recording, disclosure of do-not-call requests.* If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) *Identification of telephone solicitor.* A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(v) *Affiliated persons or entities.* In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business

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entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) *Maintenance of do-not-call lists.* A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made.

(f) As used in this section:

(1) The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term *telephone facsimile machine* means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(4) The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term *unsolicited advertisement* means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

[57 FR 48335, Oct. 23, 1992; 57 FR 53293, Nov. 9, 1992, as amended at 60 FR 42069, Aug. 15, 1995]

§ 64.1201 Restrictions on billing name and address disclosure.

(a) As used in this section:

(1) The term *billing name and address* means the name and address provided to a local exchange company by each of its local exchange customers to which the local exchange company directs bills for its services.

(2) The term "telecommunications service provider" means interexchange carriers, operator service providers, enhanced service providers, and any other provider of interstate telecommunications services.

(3) The term *authorized billing agent* means a third party hired by a telecommunications service provider to perform billing and collection services for the telecommunications service provider.

(4) The term *bulk basis* means billing name and address information for all the local exchange service subscribers of a local exchange carrier.

(5) The term *LEC joint use card* means a calling card bearing an account number assigned by a local exchange carrier, used for the services of the local exchange carrier and a designated interexchange carrier, and validated by access to data maintained by the local exchange carrier.

(b) No local exchange carrier providing billing name and address shall disclose billing name and address information to any party other than a telecommunications service provider or an authorized billing and collection agent of a telecommunications service provider.

(c)(1) No telecommunications service provider or authorized billing and collection agent of a telecommunications service provider shall use billing name and address information for any purpose other than the following:

(i) Billing customers for using telecommunications services of that serv-

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TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE

SUBSTITUTE FOR SENATE BILL NO. 321
MARCH 20, 1997

BY PHILIP S. HARNESS, DIRECTOR, DIVISION OF WORKERS COMPENSATION

Chairman Lane and Committee persons:

Thank you for allowing me the opportunity to address you on the provisions of Senate Bill No. 321 which is, generically, a proposed amendment to the present open records statute within the Division of Workers Compensation.

Present law requires the workers compensation records to be open; the only exceptions being for financial data submitted by employers seeking to become self-insured and records relating to utilization review and peer review of medical care provider matters.

The Workers Compensation Advisory Council considered the question of open records at its November 21, 1996, meeting, as well as meetings held January 23, February 10, and March 10, 1997. Over the course of those meetings, several persons appeared and testified as to the wisdom of keeping the Workers Compensation Act records open in view of the federal Americans with Disabilities Act (ADA). An appointed subcommittee was able to propose a draft which is the basis for Substitute for Senate Bill No. 321.

Currently, the Division receives records requests in essentially the following forms: oral, telephone, walk-in, written requests, the dial-up research method (by computer), and, in addition, the Division releases its records to three (3) commercial entities for a fee.

There are legitimate, non-discriminatory reasons by some to view workers compensation records. For example, with the 1993 Legislative changes and the abolition of the Workers Compensation Fund's function as an incentive to hire handicapped workers, evidence of prior injury is a mitigating defense available to a subsequent employer. That evidence (of a prior injury) is available by examination of the records within the Division of Workers Compensation.

Substitute for Senate Bill No. 321 begins with the general theory that records are open with four (4) exceptions. The four (4) exceptions provide when the records are closed. However, the fourth exception contains further wording which would then open up the fourth exception records under circumstances which are elaborated in subparagraphs (A) through (G).

Walking through the bill then we start off with the proposition that all the records are open except:

Business, Commerce & Labor Committee
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1. Records relating to financial information submitted by an employer seeking to qualify as a self-insurer (these records have always been closed);

2. Records which relate to utilization review or peer review are closed except to the health care provider (present law closes those records); it was thought that it would be fair to disclose to the health care provider in question that the peer results came back good; if the peer results came back indicating an undesirable result, then the health care provider would find out about it anyway when the Division issues an order for the physician to show cause why he/she should not be required to pay back the monies collected;

3. Records relating to private premises safety inspection (these records are gathered under the Section 7 (c)(1) consultation program of OSHA and are closed pursuant to federal regulation); and,

4. Medical records, the old Form 88's, and accident reports would now be closed if they pertain to an identified individual except that even those three (3) types of records may be opened by meeting the criteria present in (A) through (G): (A) upon order of a court; (B) to the employer or insurance carrier from whom a worker seeks benefits; (C) to the Division for its own purposes; (D) for fraud and abuse investigations; (E) to a prospective employer or its insurance carrier providing that a conditional offer of employment has been made and the job identified and there is a signed release. This category of request is also a record which must be maintained and open to public inspection; (F) to the Workers Compensation Fund; and, (G) to the worker upon written release by the worker.

Thank you for your courtesy in receiving this testimony, and the Division is, of course, happy to answer any questions regarding it.

9-2

Kansas Association of
KACIL
Centers for Independent Living

Gina McDonald
Executive Director

Member Agencies:

ILC of Southcentral Kansas
Wichita, KS
316/942-6300 Voice/TT

Independence, Inc.
Lawrence, KS
913/841-0333 Voice
913/841-1046 TT

Independent Connection
Salina, KS
913/827-9383 Voice/TT

LINK, Inc.
Hays, KS
913/625-6942 Voice/TT

The WHOLE PERSON, Inc.
Kansas City, MO
816/561-0304 Voice
816/531-7749 TT

Topeka Independent Living Resource Center
Topeka, KS
913/233-4572 V/TT

Southeast Kansas Independent Living, Inc.
Parsons, KS
316/421-5502 Voice
316/421-6551 TT

Accessing Southwest Kansas (ASK), Inc.
Dodge City, KS
316/225-6070 Voice/TT
1-800/871-0297

March 22, 1996

Testimony in Support of Senate Bill 321
by Mike Oxford
Member of the Board
Kansas Association
of
Centers for Independent Living

The members of the Kansas Association of Centers for Independent Living support Senate Bill 321, as amended. There has been a need for this type of reform for a number of years. Senate Bill 321 protects the rights of people with disabilities and injured workers from illegal employment discrimination while respecting the legitimate purposes for retaining and reviewing the records. The proposed language is in keeping with Americans with Disabilities Act requirements and also conforms to most peoples' sense of privacy.

The Workers Compensation Advisory Council and the Senate Commerce Committee should be commended for their work in reaching compromise language which balances the rights of people with disabilities and injured workers with the needs of employers, investigators and researchers.

The current wide open use of the records is clearly not in the best interests of anyone involved. This point is best driven home by the scare tactics and fear mongering used in the ads on the internet in order to get employers to purchase the records. Employers who make use of the records prior to a job offer are violating state and federal law. Potential employees face anonymous discrimination and difficulty securing employment.

The Kansas Association of Centers for Independent Living asks that you concur with the work of the Senate Commerce Committee and the Workers Compensation Advisory Council and report Senate Bill 321, as amended by the Senate Commerce Committee, as favorable for passage.

Business, Commerce & Labor Committee
3/25/97

501 Jackson, Suite 450 · Topeka, KS 66603 · 913/233-4550 (Voice/TT) · 913/233-4231 (FAX)

Attachment 10

Testimony presented to House Committee on Business, Commerce & Labor

March 24, 1997

JoAnn Donnell of Kansas ADAPT

Hello, my name is JoAnn Donnell and I am here representing Kansas ADAPT. I have been a counselor and an advocate of people with disabilities for well over 10 years, and upon hearing about the fact that Worker's Compensation files were open in this state, an alarm went through my entire being. I strongly support passage of substitute Senate Bill 321 to ensure the right to privacy and fairness for all citizens of this state.

Even in the 90's, fear and prejudice directed towards people with disabilities still exists. However, I don't want and should not be subjected to possible discrimination by anyone, especially a possible employer. I have a Master's degree and am a talented counselor with varied experiential skills and am entitled to a fair shot in the employment marketplace. I, or anyone with a disability, need to go into an interview with the interviewers mind already made up before even talking to me. What is worse is when the company I apply to makes that decision before even granting me an interview because they have seen my medical records and have decided that if I've made one Worker's Comp. claim, I might make another one.

Allowing the Worker's Comp. records to remain open constitutes a gross last of concern for personal privacy, not to mention a violation of the intent of the American's with Disabilities Act, and should be stopped. Without a release of information signed by me, no one can walk into my doctor's office and look at my medical records, they should also not be able to look at my medical records at the Division of Worker's Compensation, or worse, over the Internet.

I strongly urge passage of substitute Senate Bill 321 and thank you for allowing me to speak my mind on this very important issue to the disability community.

Business, Commerce
& Labor Committee
3/25/97
Attachment 11

STATE OF KANSAS
DEPARTMENT OF HUMAN RESOURCES
Bill Graves, Governor
Wayne L. Franklin, Secretary

COMMISSION ON DISABILITY CONCERNS
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
VOICE: (913) 296-1722 • TTY: (913) 296-5044 • FAX: (913) 296-0466
Toll Free Outside Topeka (KCDC) 1-800-295-5232
ADA Information Center (BBS) ..... (913) 296-6529

HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE
SB 321
March 25, 1997

My name is Sharon Huffman and I represent the Kansas Commission on Disability Concerns, a State commission established by law to carry on a continuing program to promote a higher quality of life for people with disabilities. One of our responsibilities is to submit recommendations to the legislature believed necessary to promote the independence of people with disabilities. Thank you for this opportunity to testify in support of SB 321.

Our Commission began studying the issue of workers compensation records being open to the public after receiving numerous phone calls from individuals questioning the legality of potential employers making inquiries about their prior workers compensation claims. The study revealed several things which I will outline below. I have provided you with copies of some of my research material as well as historical documents regarding past attempts to close the records.

FACT:
The Kansas Division of Workers Compensation is required under K.S.A. 44-550b(a) to release the information contained within a claimant's file to the public without any prior authorization from the claimant.

PROBLEM:
The Americans with Disabilities Act of 1990 (ADA) prohibits employers from making medical inquiries prior to a conditional offer of employment (29 CFR Section 1630.13(a)). This includes using a third party, such as a previous employer, insurance company or the state workers compensation division to obtain the information. An inquiry about previous workers compensation claims or on-the-job injuries is considered to be a medical inquiry. Denying employment opportunities based on an individual's records or history of workers compensation claims could be a violation of the ADA, as is denying employment opportunities based on the perception of disability.

FACT:
The State of Kansas, through the Division of Workers Compensation is providing significant assistance to employers that discriminate on the basis of a perceived disability by allowing indiscriminate access to the workers compensation case records.

Business, Commerce & Labor Committee
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PROBLEM:
By administering a program that provides access to workers compensation records without the signed consent of the claimant, being a party to the claim or having a court order, the Kansas Division of Workers Compensation may be violating 28 CFR Section 35-130(b)(1)(v). This section of the ADA states that aiding or perpetuating discrimination against a qualified individual with a disability is prohibited.

SOLUTION:
Restrict access to workers compensation records as proposed in SB 321. This would take away the temptation for employers to check out a potential employee's history of claims and therefore significantly reduce the discrimination against individuals with previous on-the-job injuries. It would also make a statement that the State of Kansas believes it is good public policy to avoid anything that even gives the appearance of aiding employers who deny employment opportunities based on a person's history or record of disability.

CONCLUSION:
As you are all aware, an income is one of the requirements for survival in this world for all people, not just people with disabilities. Employment is generally the means of obtaining an income unless a person is totally disabled and unable to work, at which time their income is derived from taxes collected from employed citizens. People with disabilities traditionally have had a tougher time finding a job than those without disabilities even after the implementation of Title I of the Americans with Disabilities Act of 1990. Many fully qualified individuals are being denied employment opportunities simply because they have been injured on the job at some time in their life. It would be in the best interest of all employers, job-seekers and the State of Kansas to pass SB 321 and begin restricting access to workers compensation records to those who truly have a need to know.

We have worked very hard to reach an agreement with representatives of both business and labor, the Workers Compensation Advisory Board, and the Division of Workers Compensation. The bill before you today is the end result of many meetings and has been given much thought by all parties involved in it's development.

Thank you for allowing me to speak before you today. I will gladly attempt to answer any questions you might have at this time.

STATE OF KANSAS

OFFICE OF THE GOVERNOR

JOAN FINNEY, *Governor*
State Capitol, 2nd Floor
Topeka, KS 66612-1590

913-296-3232
1-800-432-2487
TDD# 1-800-992-0152
FAX# (913) 296-7973

April 21, 1993

Message to the Senate and the House of Representatives of the State of Kansas:

Pursuant to Article 2, Section 14 of the Constitution of the State of Kansas, I am vetoing Senate Substitute for House Substitute for House Bill 2354.

Over the past year, and during the regular session of this Legislature, many dedicated people have worked with me to reform the Kansas' workers compensation system before the 1993 Legislature adjourns. Our mission is two-fold. On the one hand, we must protect our workers who have been, or might be, injured on the job. On the other hand, it is imperative that we reduce the excessive workers compensation costs which threaten a weakening of the Kansas economy.

I call upon the members of the Kansas Legislature to join with me in focusing on these two groups, business people and workers, and to disregard the pressures of special interest groups which represent the principal cost-driving forces in this system.

Earlier, the Kansas Chamber of Commerce and Industry laid 37 issues on the table for resolution. Thirty-six were resolved to represent a fair and meaningful reform package.

As a preface to the final wrap-up session, I am asking the members of the bill's conference committee to meet with me this week to discuss the merits of House Bill 2354 and its weaknesses.

I agree with the provisions of the bill as it was passed by the members of the House of Representatives. I commend the provisions adopted by the House members regarding the handling of second injury claims. This process would immediately save employers $4 million.

I support the $50,000 cap on permanent partial disability as stated in the House of Representatives' version of HB 2354.

I support the compromise language of HB 2354 aimed at containing medical costs. I concur with the curtailment of costly lump sum settlements in injury disputes.

I ask the Members of the Legislature to consider the following suggestions:

1) Give small businesses the opportunity to join self-insurance pools by expanding the present law, thus allowing a variety of small businesses to join in a pool so as to drive costs lower and provide higher quality services for their employees.

2) Limit rate increases for any business classification to 15 percent, rather than as high as 50 percent until the effect of changes in a new law can be accurately reviewed.

3) Strengthen the workplace safety measures in the bill so that employees will be protected and premium costs can be lowered.

4) Change the modification system so that implemented safety programs can be rewarded by insurance companies on a timely basis.

5) Consider implementing a small business competitive insurance fund to revive marketplace competition and provide a baseline for future premium rate increases.

6) To reduce litigation costs and to serve workers fairly, change the definition of "work disability" to the language proposed by the Director of Workers Compensation.

7) Provide for just representation for injured workers when they are negotiating their needs against highly trained attorneys and insurance professionals.

8) Streamline vocational rehabilitation measures to reduce costs.

* 9) Delete sections of this bill that would close certain records to public scrutiny. I have already directed the Division of Workers Compensation to take administrative steps to meet the disclosure protection needs of disabled persons under the law. But I cannot condone legislated secrecy in handling of workers compensation when the public has a right to know how public monies are being spent.

During its regular session, the Legislature made considerable effort and progress toward reforming the Kansas workers compensation system. For that, I commend those legislators who were directly involved, especially those who served on the conference committee. As with any major legislative reform issue, we inevitably come to the time for compromise. Now is such a time. We must reach a meaningful, reasoned compromise that will accomplish what we all desire -- reducing costs to employers while maintaining a basic fairness in the law for workers injured on the job. This process must begin immediately.

Accordingly, as I meet with legislators in the next few days in an effort to draft an acceptable reform package, I look forward to working with all legislative members upon their return on April 28th toward agreement on a bill they can support and one that I can sign into law.

Joan Finney, Governor

Date

12-5

Sharon

Kansas Department of Human Resources

Joan Finney, Governor
Joe Dick, Secretary

Commission on Disability Concerns
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
913-296-1722 (Voice) -- 913-296-5044 (TDD)
913-296-4065 (Fax)

April 27, 1993

The Honorable Joan Finney
State Capitol, 2nd Floor
Topeka KS 66612-1590

Dear Governor Finney,

Thank you for your consideration of the injured worker in your veto message of Senate Substitute for House Substitute for House Bill 2354, the Workers Compensation Reform Bill.

In response to your suggestion about not closing the records to the public I submit the following:

1. There is nothing that the Director of Workers Compensation can do under the current law to restrict access to the records. K.S.A. 44-550b mandates that all the records be open to public disclosure...period. It does not allow for any administrative requirement for release forms from the claimant, nor does it allow the Director to restrict access to certain employers (ie. only after conditional offer of employment has been made). At best, the only thing the Director can do is make a feeble attempt to slow down the process of discrimination and provide a means for the injured worker to prove that an employer accessed their files prior to offer of employment.

2. You say that you cannot condone legislated secrecy in handling of workers compensation when the public has a right to know how public monies are being spent. There are numerous programs operating within our state, using public monies (state and/or federal), that do not allow public access to client files. Unemployment Insurance, Social and Rehabilitation Services programs, and Medicaid patients, just to name a few. If the Federal Government can mandate that Unemployment Insurance files be kept so confidential that warning signs are posted on each claims examiner's computer, cannot we as a state also protect the files of the injured worker? Do we consider income information more confidential and "secret" than information regarding a person's mental or physical disabilities? It seems rather uncanny that once this same individual ends up on unemployment or welfare their records will be confidential within programs that are truly operating on public monies, not insurance premiums like the workers compensation system.

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I have attached a flow chart describing what happens when an injured worker applies for a job. This is not just mere speculation, but comes from numerous conversations with job applicants who have alleged employment discrimination based on their history of on-the-job injury. Please note that three of the outcomes result in the injured worker draining public monies from state agencies that are already operating on depleted budgets.

The ideal solution would be to amend K.S.A. 44-550b to allow access to workers compensation files to the following:

a. Parties to the claim.
b. Persons with written authorization from the injured worker.
c. To others that demonstrate that the public interest in allowing inspection and copying of such records outweighs the public or private interest in maintaining the confidentiality of such records, as determined by a civil court of competent jurisdiction. (taken from Idaho Code §9-340[(38)](37)).

There is not one person other than those listed above that has a legitimate need to know about an individual's record of on-the-job injury. If it's fraud and abuse that people are so concerned about, then that needs to be dealt with by writing stronger anti-abuse statutes, not by continuing to penalize the injured worker over and over again each time they apply for work and are denied because of their history of an injury (which we all know by now employers are not allowed to ask the applicant, so they must be finding out from the Division of Workers Compensation).

Please lend your support to this vital issue of closing the workers compensation records to the public. There are many injured workers yearning to be tax-paying citizens once again who are finding it difficult, if not impossible, to obtain employment.

Thank you for your thoughtful consideration of this matter.

Sincerely,

Martha K. Gabehart
Executive Director

attachment

cc: All members of the Senate
All members of the House of Representatives
Renee Gardner, Constituent Services
Joe Dick, Secretary, KS Dept of Human Resources
George Gomez, Director, Division of Workers Compensation
Ann Golubski, Special Assistant to the Secretary of KDHR
All members of the Kansas Commission on Disability Concerns

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Proposal targets discrimination

By JOHN HANNA
The Associated Press

A provision in the Legislature's comprehensive workers' compensation bill is designed to prevent discrimination against the disabled, but it also could close hundreds of state records to the public.

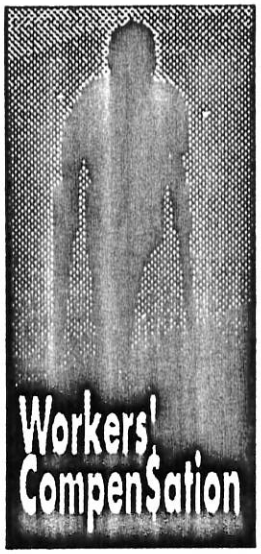
Gov. Joan Finney cited the "secrecy provision" when she promised publicly to veto the bill almost two weeks ago. She has planned the veto for Wednesday.

But others said the provision reflects concerns about discrimination. They said the goal is to prevent employers from routinely screening out disabled job applicants.

The five senators and five House members who drafted the final version of the workers' compensation bill added the provision during their last meeting, late at night. Some later admitted they did not know how far the provision could go.

The debate comes after reports about a $94,469 workers' compensation award to former Insurance Commissioner Fletcher Bell, who injured his back lifting his briefcase.

"It was past 11 o'clock at night," said George Gomez, director of the division of workers' compensation, recalling how the provision became part of the bill. "How could you hurt, doing something like that? I mean, who would have thought that would protect Fletch?"



A 1984 state law declared records in workers' compensation cases "open to public inspection." Those records are now accessible by computer through a telephone link, allowing anyone with the right equipment to search for information.

Basic information about Bell's case was available by computer, as well as information about cases involving Robert Anderson, a former division director, and Sen. Mike Harris, R-Wichita, who helped draft the bill's final version.

However, Richard Charlton, a Topeka attorney and an advocate for the disabled, said Kansans with disabilities or medical problems worry that employers can easily find out about their medical problems and reject their applications — without the potential employee finding out.

The federal Americans with Disabilities Act prohibits employers from discriminating against the disabled in hiring. It also prohibits public agencies from aiding or perpetuating that discrimination.

Charlton and the state Commission on Disability Concerns believe the Division of Workers' Compensation and the Department of Human Resources would be in violation of the law if the system isn't changed.

But Finney thinks the Legislature doesn't have to approve the provision to comply with federal law.

"That can be handled, and that will be handled administratively," Finney said. "I'll see that it's done."

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4/20/93 Capital-Topeka Journal

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Official Newspaper of
Shawnee County
and the
City of Topeka

THE TOPEKA
METRO NEWS

The Business, Community and Legal Newspaper of Topeka and Shawnee County
Volume 99.1, Number 71 Single Copy 50 cents Wednesday, September 8, 1993

Workers comp records allow employers to sidestep ADA regs

BY BILL CRAVEN
Metro News Staff

The interplay between the Americans with Disabilities Act (ADA) and the state workers compensation system is creating problems for job applicants, the House Labor and Industry committee learned late last week.

Highlighted at the hearing was the fact that unrestricted employer access to workers compensation records may mean that job applicants are not hired, even if they are otherwise qualified for the job. Such actions are violations of the ADA.

At the Sept. 2 hearing, Sharon Huffman, the legislative liasion for the Commission on Disability Concerns, an agency within the Kansas Department of Human Resources, told the committee that Kansas is in the unenviable position of leading the nation in the percentage of claims alleging disability-based discrimination. The data used by Huffman shows that as of mid-July, the federal Equal Employment Opportunity Commission has logged more than 11,500 complaints involving employers with 24 or more workers, and that Kansas, on a per capita basis, is the leading state of origin of these complaints.

Huffman said that .41 charges per 1,000 members of the state labor force have been accumulated.

It is illegal not to hire someone based only on the fact that previous workers compensation claims have been filed, Huffman told the committee.

The Division of Workers Compensation has a computerized system by which workers compensation records are open to the public, including prospective employers.

Statistics kept by the Kansas Human Rights Commission pursuant to a Kansas law similar to the ADA show that approximately 10 percent of the employment discrimination claims filed here are based on physical handicap and disability claims and this percentage of people directly mentioned workers compensation or an on-the-job injury as the basis for the alleged discrimination.

The ADA, which is still largely misunderstood in many parts of the business community, Huffman noted, strictly prohibits employers from making medical inquiries prior to an offer of employment.

The ADA now covers businesses with 25 or more employees, although next July, the act's coverage will drop to those with 15 or more employees. A parallel Kansas statute, however, covers businesses with four or more employees, Huffman said.

About 88 percent of Kansas businesses

please turn to page 2

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have less than 20 employees, according to federal statistics, she stated.

Her testimony pointed out that many employers have changed their application forms to eliminate medical inquiries, but that they still use the state's workers compensation computers to obtain the same information.

"Unfortunately, the job applicants are unaware of this illegal practice, so many of them don't file a complaint with the Kansas Human Rights Commission or the EEOC," Huffman testified.

The division of workers compensation refused to shut down the computer system, Huffman said, although it has agreed to install a tracking and notification system. This system would keep track of who accessed the system, what information was obtained, and those whose information was extracted from the database would be notified.

Last year, the legislature passed a measure which would have closed many of these records by making the computer system subject to the Open Records Act. Gov. Finney, however, vetoed the bill because she thought it was too restrictive and because she had ordered administration officials to take other steps to restrict access to these records.

Huffman said workers compensation records need to be private, analogizing to SRS (welfare) and unemployment records.

"The public doesn't have a right to know about someone's disability," she said. The public does have a right to statistical summaries of workers compensation data, however, she said.

The basic premise of the ADA, Huffman told the committee, is that employers don't have to hire unqualified workers for jobs, but that at the same time, employers can't refuse to hire if someone with a disability is otherwise qualified. Disabled workers have to be qualified and have to be able to perform, she said. She recommended that "help wanted" ads make it clear that certain qualifications attach to the jobs which are advertised.

"ADA has not closed a business down," Huffman said. "But there is a lot of educating that needs to be done."

Sharon Huffman, the legislative liaison for the Commission on Disability Concerns, an agency within the Kansas Department of Human Resources, told a legislative committee of problems in the workers compensation system that discriminate against injured or handicapped workers. Gary Reser, a legislative liaison for Gov. Finney, is standing behind her.

Kansas Department of Human Resources

Joan Finney, Governor
Joe Dick, Secretary

Commission on Disability Concerns
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September 2, 1993

TO: House Committee on Labor and Industry

FROM: Sharon Huffman
Legislative Liaison

SUBJECT: Workers Compensation and the Americans with Disabilities Act (ADA)

I. INTRODUCTION

Since the members of this committee received a briefing on the ADA at the beginning of the 1993 Legislative Session I will not linger on the basics of the Act. Attachment 1 contains excerpts from the Equal Employment Opportunity Commission (EEOC) Final Rule on Title I, the employment provisions of the ADA that specifically refer to workers compensation. What I have been asked to speak about are the problems associated with the workers compensation records being open to the public.

Approximately two years ago the Kansas Commission on Disability Concerns (KCDC) began investigating the Kansas laws regarding open records after we received numerous telephone inquiries from consumers about potential violation of the ADA when they were denied employment based on their prior workers compensation claim. (Several consumers indicated that they were not asked, or did not tell the potential employer about their history of on-the-job injury.) What we found was K.S.A. 44-550b which says that all the workers compensation records are open to the public. We also discovered that the Division of Workers Compensation operated a computer Dial-Up system that allowed unrestricted access to all claim files. This solved the mystery of how employers were finding out about previous claims without asking the applicant directly.

II. EEOC AND KHRC COMPLAINTS

Kansas Human Rights Commission (KHRC)

In the time period from July 1, 1991 (when the amendments to the Kansas Act Against Discrimination were implemented making it comparable to the ADA) to April 21, 1992 approximately 10% of the employment discrimination based on physical handicap and disability claims either directly mentioned workers compensation or on-the-job injury as the basis for the discrimination. Attachment 2 gives two examples of actual claims filed with KHRC along with copies of their workers compensation claims as found on the Dial-Up system.

Equal Employment Opportunity Commission (EEOC)

According to the August 1993 BNA's Americans With Disabilities Act Manual, as of July 13 the EEOC has reported over 11,500 charges alleging disability-based employment discrimination since July 26, 1992, the effective date of the ADA's employment provisions covering employers of 24 or more workers. BNA also reports that Kansans have filed the most Title I charges so far measured on a per capita basis -- 0.41 charges per 1,000 members of the state labor force. Back impairments continued to form the basis for the largest number of ADA charges, with 18.5 percent of the charging parties citing some sort of back problem as a disability, followed by mental illness, 9.8 percent; heart impairments a little over 4 percent; neurological disorders, 4 percent; and diabetes, 3.5 percent. Discharges were the employment actions most frequently complained about, with fully 50 percent of the charges alleging discriminatory termination. These were followed by failure to make reasonable accommodations, 20 percent; failure to hire, 13 percent; harassment, 10 percent; and discipline, 7.2 percent.

III. The ADA and Medical Inquiries

Title I of the ADA prohibits employers from making medical inquiries prior to offer of employment (29 CFR Section 1630.13(a)). This includes using a third party to obtain the information (ie. previous employer, insurance company or State Workers Compensation Division). An inquiry about previous workers compensation claims or on-the-job injuries is considered to be a medical inquiry.

Employers who obtain information about a job applicant's workers compensation history prior to offer of employment are breaking the law! Many employers have

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changed their application forms to eliminate any medical inquiries, but they continue to make use of Index Bureaus or the Division of Workers Compensation to obtain the same information that they recognize they cannot legally ask the applicant. Unfortunately the job applicants are unaware of this illegal practice, so many of them don't file a complaint with KHRC or EEOC.

IV. Title II

Title II of the ADA prohibits discrimination on the basis of disability by public entities. Specifically, 28 CFR Part 35, Section 35-130(b)(1)(v) states that a public entity, in providing any aid, benefit, or service, may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. Attachment 3 is a letter from Richard D. Charlton, Sr., Attorney at Law to Bruce Kent, General Counsel for Kansas Department of Human Resources requesting that the workers compensation records be closed to persons who do not have written consent or court order.

V. Open Records Laws in Other States

In February of 1993 KCDC sent a survey out to all 50 states asking about their policies regarding workers compensation records being released to the public. Attachment 4 includes a sample response letter summarizing the results, a table showing individual results, and excerpts from various state laws that were sent along with the survey replies. I have recently learned that Kentucky does not allow unrestricted access to their records, so that means only two out of 38 states allow unrestricted access.

VI. 1993 Session Activity

K.S.A. 44-550b was amended at the end of the session. The amendment would have made the workers compensation records subject to the Kansas Open Records Act providing for much more restriction than currently exists. In the Governor's veto message this restriction was specifically mentioned as something she did not agree with. She did, however, instruct the Director of Workers Compensation to restrict access to the records and he is currently in the process of developing the necessary programs to carry out this task.

VII. Conclusion

It is our understanding that the Division of Workers Compensation is currently undergoing some changes that will not only restrict access to claimant records, but will also provide a method whereby the claimant will be notified that his or her records were requested or viewed by someone. When the claimant is notified about the records being accessed, they will also be told about their rights under the KAAD and the ADA and give the telephone numbers for the KHRC and the EEOC. Consumers that KCDC has spoken with consider this to be somewhat of a band-aid approach because it only provides a method to catch the violators rather than a means of stopping them. Injured workers would prefer that their medical history be kept private until their is a legitimate need for someone to obtain them. The only way to stop access to workers compensation claim files is to repeal K.S.A. 44-550b or to amend it to require written authorization from the claimant prior to release of information.

Attachment 1

Excerpts from 29 CFR Part 1630 - Equal Employment Opportunity for Individuals With Disabilities; Final Rule (The Americans With Disabilities Act, Title I)

Overview of Regulations, p. 35726-35727

To assist us in the development of this guidance, the Commission requested comment in the NPRM from disability rights organizations, employers, unions, state agencies concerned with employment or workers compensation practices, and interested individuals on specific questions about insurance, workers' compensation, and collective bargaining agreements. Many commenters responded to these questions, and several commenters addressed other matters pertinent to these areas. The Commission has considered these comments in the development of the final rule and will continue to consider them as it develops further ADA guidance.

In the NPRM, the Commission raised questions about a number of insurance-related matters. Specifically, the Commission asked commenters to discuss risk assessment and classification, the relationship between "risk" and "cost," and whether employers should consider the effects that changes in insurance coverage will have on individuals with disabilities before making those changes. Many commenters provided information about insurance practices and explained some of the considerations that affect insurance decisions. In addition, some commenters discussed their experiences with insurance plans and coverage. The commenters presented a wide range of opinions on insurance-related matters, and the Commission will consider the comments as it continues to analyze these complex matters.

The Commission received a large number of comments concerning inquiries about an individual's workers' compensation history. Many employers asserted that such inquiries are job related and consistent with business necessity. Several individuals with disabilities and disability rights organizations, however, argued that such inquiries are prohibited pre-employment inquiries and are not job related and consistent with business necessity. The Commission has addressed this issue in the interpretive guidance accompanying section 1630.14(a) and will discuss the matter further in future guidance.

There was little controversy about the submission of medical information to workers' compensation offices. A number of employers and employer groups pointed out that the workers' compensation offices of many states request medical information in connection with the administration of second-injury funds. Further,

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they noted that the disclosure of medical information may be necessary to the defense of a workers' compensation claim. The Commission has responded to these comments by amending the interpretive guidance accompanying section 1630.14(b). This amendment, discussed below, notes that the submission of medical information to workers' compensation offices in accordance with state workers' compensation laws is not inconsistent with section 1630.14(b). The Commission will address this area in greater detail and will discuss other issues concerning workers' compensation matters in future guidances, including the policy guidance on pre-employment inquiries.

With respect to collective bargaining agreements, the Commission asked commenters to discuss the relationship between collective bargaining agreements and such matters as undue hardship, reassignment to a vacant position, the determination of what constitutes a "vacant" position, and the confidentiality requirements of the ADA. The comments that we received reflected a wide variety of views. For example, some commenters argued that it would always be an undue hardship for an employer to provide a reasonable accommodation that conflicted with the provisions of a collective bargaining agreement. Other commenters, however, argued that an accommodation's effect on an agreement should not be considered when assessing undue hardship. Similarly, some commenters stated that the appropriateness of reassignment to a vacant position should depend upon the provisions of a collective bargaining agreement while others asserted that an agreement cannot limit the right to reassignment. Many commenters discussed the relationship between an agreement's seniority provisions and an employer's reasonable accommodation obligations.

In response to comments, the Commission has amended section 1630.2(n)(3) to include "the terms of a collective bargaining agreement" in the types of evidence relevant to determining the essential functions of a position. The Commission has made a corresponding change to the interpretive guidance on section 1630.2(n)(3). In addition, the Commission has amended the interpretive guidance on section 1630.15(d) to note that the terms of a collective bargaining agreement may be relevant to determining whether an accommodation would pose an undue hardship on the operation of a covered entity's business.

The divergent views expressed in the public comments demonstrate the complexity of employment-related issues concerning insurance, workers' compensation, and collective bargaining agreement matters. These highly complex issues require extensive research and analysis and warrant further consideration. Accordingly, the Commission has decided to address the issues in depth in future Compliance Manual sections and policy guidances. The Commission will consider the public

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comments that it received in response to the NPRM as it develops further guidance on the application of title I of the ADA to these matters.

The Commission has also decided to address burdens-of-proof issues in future guidance documents, including the Compliance Manual section on the theories of discrimination. Many commenters discussed the allocation of the various burdens of proof under title I of the ADA and asked the Commission to clarify those burdens. The comments in this area addressed such matters as determining whether a person is a qualified individual with a disability, job relatedness and business necessity, and undue hardship. The Commission will consider these comments as it prepares further guidance in this area.

A discussion of other significant comments and an explanation of the changes made in part 1630 since publication of the NPRM follows.

Section-by-Section Analysis of Comments and Revisions

Section 1630.1 Purpose, applicability, and construction

The Commission has made a technical correction to section 1630.1(a) by adding section 506(e) to the list of statutory provisions implemented by this part. Section 506(e) of the ADA provides that the failure to receive technical assistance from the federal agencies that administer the ADA is not a defense to failing to meet the obligations of title I.

Some commenters asked the Commission to note that the ADA does not preempt state claims, such as state tort claims, that confer greater remedies than are available under the ADA. The Commission has added a paragraph to that effect in the Appendix discussion of sections 1630.1(b) and (c). This interpretation is consistent with the legislative history of the Act. See H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 69-70 (1990) [hereinafter referred to as House Judiciary Report].

In addition, the Commission has made a technical amendment to the Appendix discussion to note that the ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. The Commission has also amended the discussion to refer to a direct threat that cannot be eliminated "or reduced" through reasonable accommodation. This language is consistent with the regulatory definition of direct threat. (See section 1630.2(r), below.)

Section 1630.2 Definitions 12-17

Section 1630.2(h) Physical or mental impairment

The Commission has amended the interpretive guidance accompanying section 1630.2(h) to note that the definition of the term "impairment" does not include characteristic predisposition to illness or disease.

In addition, the Commission has specifically noted in the interpretive guidance that pregnancy is not an impairment. This change responds to the numerous questions that the Commission has received concerning whether pregnancy is a disability covered by the ADA. Pregnancy, by itself, is not an impairment and is therefore not a disability.

Section 1630.2(j) Substantially limits

The Commission has revised the interpretive guidance accompanying section 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989) [hereinafter referred to as Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 52 (1990) [hereinafter referred to as House Labor Report]; House Judiciary Report at 28. The Commission has also revised the examples in the third paragraph of this section's guidance. The examples now focus on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures. These revisions respond to comments from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

In an amendment to the paragraph concerning the factors to consider when determining whether an impairment is substantially limiting, the Commission has provided a second example of an impairment's "impact." This example notes that a traumatic head injury's affect on cognitive functions is the "impact" of that impairment.

Many commenters addressed the provisions concerning the definition of "substantially limits" with respect to the major life activity of working (section 1630.2(j)(3)). Some employers generally supported the definition but argued that it should be applied narrowly. Other employers argued that the definition is too broad. Disability rights groups and individuals with disabilities, on the other hand,

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argued that the definition is too narrow, unduly limits coverage, and places an onerous burden on individuals seeking to establish that they are covered by the ADA. The Commission has responded to these comments by making a number of clarifications in this area.

The Commission has revised section 1630.2(j)(3)(ii) and the accompanying interpretive guidance to note that the listed factors "may" be considered when determining whether an individual is substantially limited in working. This revision clarifies that the factors are relevant to, but are not required elements of, a showing of a substantial limitation in working.

Disability rights groups asked the Commission to clarify that "substantially limited in working" applies only when an individual is not substantially limited in any other major life activity. In addition, several other commenters indicated confusion about whether and when the ability to work should be considered when assessing if an individual has a disability. In response to these comments, the Commission has amended the interpretive guidance by adding a new paragraph clarifying the circumstances under which one should determine whether an individual is substantially limited in the major life activity of working. This paragraph makes clear that a determination of whether an individual is substantially limited in the ability to work should be made only when the individual is not disabled in any other major life activity. Thus, individuals need not establish that they are substantially limited in working if they already have established that they are, have a record of, or are regarded as being substantially limited in another major life activity.

The proposed interpretive guidance in this area provided an example concerning a surgeon with a slight hand impairment. Several commenters expressed concern about this example. Many of these comments indicated that the example confused, rather than clarified, the matter. The Commission, therefore, has deleted this example. To explain further the application of the "substantially limited in working" concept, the Commission has provided another example (concerning a commercial airline pilot) in the interpretive guidance.

In addition, the Commission has clarified that the terms "numbers and types of jobs" (see section 1630.2(j)(3)(ii)(B)) and "numbers and types of other jobs" (see section 1630.2(j)(3)(ii)(C)) do not require an onerous evidentiary showing.

In the proposed Appendix, after the interpretive guidance accompanying section 1630.2(l), the Commission included a discussion entitled "Frequently Disabling Impairments." Many commenters expressed concern about this discussion. In

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response to these comments, and to avoid confusion, the Commission has revised the discussion and has deleted the list of frequently disabling impairments. The revised discussion now appears in the interpretive guidance accompanying section 1630.2(j).

Section 1630.2(l) Is regarded as having such an impairment

Section 1630.2(l)(3) has been changed to refer to "a substantially limiting impairment" rather than "such an impairment." This change clarifies that an individual meets the definition of the term "disability" when a covered entity treats the individual as having a substantially limiting impairment. That is, section 1630.2(l)(3) refers to any substantially limiting impairment, rather than just to one of the impairments described in sections 1630.2(l)(1) or (2).

The proposed interpretive guidance on section 1630.2(l) stated that, when determining whether an individual is regarded as substantially limited in working, "it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used." The Commission specifically requested comment on this proposal, and many commenters addressed this issue. The Commission has decided to eliminate this assumption and to revise the interpretive guidance. The guidance now explains that an individual meets the "regarded as" part of the definition of disability if he or she can show that a covered entity made an employment decision because of a perception of a disability based on "myth, fear, or stereotype." This is consistent with the legislative history of the ADA. See House Judiciary Report at 30.

Many individuals with disabilities and disability rights groups asked the Commission to emphasize that the determination of whether a person is a qualified individual with a disability must be made at the time of the employment action in question and cannot be based on speculation that the individual will become unable to perform the job in the future or may cause increased health insurance or workers' compensation costs. The Commission has amended the interpretive guidance on section 1630.2(m) to reflect this point. This guidance is consistent with the legislative history of the Act. See Senate Report at 26, House Labor Report at 55, 136; House Judiciary Report at 34, 71.

1630.13 Prohibited medical examinations and inquiries

In response to the Commission's request for comment on certain workers' compensation matters, many commenters addressed whether a covered entity may

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ask applicants about their history of workers' compensation claims. Many employers and employer groups argued that an inquiry about an individual's workers' compensation history is job related and consistent with business necessity. Disability rights groups and individuals with disabilities, however, asserted that such an inquiry could disclose the existence of a disability. In response to comments and to clarify this matter, the Commission has amended the interpretive guidance accompanying section 1630.13(a). The amendment states that an employer may not inquire about an individual's workers' compensation history at the pre-offer stage.

The Commission has made a technical change to section 1630.13(b) by deleting the phrase "unless the examination or inquiry is shown to be job-related and consistent with business necessity" from the section. This change does not affect the substantive provisions of section 1630.13(b). The Commission has incorporated the job-relatedness and business-necessity requirement into a new section 1630.14(c), which clarifies the scope of permissible examinations or inquiries of employees. (See section 1630.14(c), below.)

Section 1630.14(b) Employment Entrance Examinations

Many commenters addressed the confidentiality provisions of this section. They noted that it may be necessary to disclose medical information in defense of workers' compensation claims or during the course of other legal proceedings. In addition, they pointed out that the workers' compensation offices of many states request such information for the administration of second-injury funds or for other administrative purposes.

The Commission has revised the last paragraph of the interpretive guidance on section 1630.14(b) to reflect that the information obtained during a permitted employment entrance examination or inquiry may be used only "in a manner not inconsistent with this part." In addition, the Commission has added language clarifying that it is permissible to submit the information to state workers' compensation offices.

Several commenters asked the Commission to clarify whether information obtained from employment entrance examinations and inquiries may be used for insurance purposes. In response to these comments, the Commission has noted in the interpretive guidance that such information may be used for insurance purposes described in section 1630.16(f).

1630.15 Defenses

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The Commission has added a sentence to the interpretive guidance on section 1630.15(a) to clarify that the assertion that an insurance plan does not cover an individual's disability or that the disability would cause increased insurance or workers' compensation costs does not constitute a legitimate, nondiscriminatory reason for disparate treatment of an individual with a disability. This clarification, made in response to many comments from individuals with disabilities and disability rights groups, is consistent with the legislative history of the ADA. See Senate Report at 85; House Labor Report at 136; House Judiciary Report at 71.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as"part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an interference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

Section 1630.13 Prohibited Medical Examinations and Inquiries
Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a

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visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part.

Consistent with this section and with section 1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in section 1630.16(f).

Section 1630.15(a) Disparate Treatment Defense

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate

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nondiscriminatory reason justifying disparate treatment of a individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15(b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, i.e., that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity.

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Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (e.g., no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at section 1630.5 Limiting, Segregating and Classifying, and section 1630.10 Qualification Standards, Tests, and Other Selection Criteria.

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Attachment 2

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION

DOCKET NO. B629-92W

On the complaint of

[redacted]

Complainant,

vs.

[redacted]
CORPORATION AND
ITS REPRESENTATIVES

Respondent,

I, [redacted]

residing at [redacted] Wichita, Kansas 67208

charge [redacted] Corporation and its representatives

whose address is [redacted] Wichita, Kansas 67206

With an unlawful practice within the meaning of:

[X] The Kansas Act Against Discrimination (Chapter 44, Art. 10, K.S.A.) and specifically within the meaning of subsection (a)(1) of Section 44-1009 of said Act, because of my RACE ( ), RELIGION( ) COLOR ( ), SEX ( ), NATIONAL ORIGIN ( ), ANCESTRY(X), DISABILITY(X), RETALIATION ( ).

[ ] The Kansas Age Discrimination in Employment Act (Chapter 44, Art. 11, K.S.A.) and specifically within the meaning of subsection _____ of Section _____ of said Act, because of my AGE.

Alleged Date of Incident, on or about September 11, 19 91 to September 30, 1991

The aforesaid charges are based on the following facts:

I. I am a Hispanic and am considered disabled by the Respondent.

A. I made application for a position in sheetmetal with the Respondent. On or about September 9, 1991, the Respondent's physician noted on my application that I had filed a previous workers compensation claim. We discussed the injury to my finger. He told me there was no real problem, and that all I needed to do was get the records of the previous injury from my physician. I did so. I was then required to get my complete medical records from my physician. After having done so I was denied employment on the basis that the Respondent felt my worki in sheetmetal would be detrimental to me.

12-26

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION DOCKET NO. 1362-92U

(Continued)

II. I feel this act on the part of the Respondent and its representatives is due to my ancestry and my being regarded as disabled.

III. I hereby charge [redacted] Corporation and its representatives with a violation of the Kansas Act Against Discrimination in that I was denied employment due to my ancestry, Hispanic, and my being regarded as disabled.

I have not commenced any action, civil or criminal, based upon the grievance set forth above, except

STATE OF KANSAS)
( ) ss:
COUNTY OF)

X [redacted]
(SIGNATURE OF COMPLAINANT)

[redacted], being duly sworn, deposes and says that: that ___he is the Complainant herein; that ___ he read the foregoing complaint and knows the contents thereof; that the same is true of h is own knowledge except as to the matters therein stated on information belief; that as to those matters ___he believes the same to be true.

Subscribed and sworn to before me

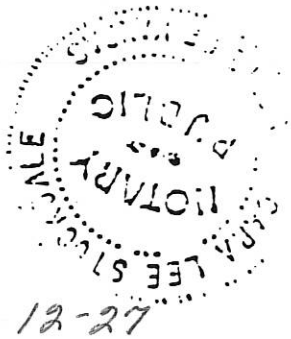
X [redacted]
(SIGNATURE OF COMPLAINANT)

this 27th day of November, 1991

Carol Lee Stokdale
(SIGNATURE OF NOTARY)

MY COMMISSION EXPIRES:

February 7, 1995



12-27

N

WORKERS COMPENSATION ACCIDENT REPORT — DATE - 10/22/92 — Ε 01

SSN: [redacted] MOD: 010 — DOA: 06/16/87 — CART NO: 334-965
CLAIMANT: [redacted] — FILED: 06/16/87 — SEX: N-N/A
AGE: 18
[redacted] KS 67801-0000

EMPLOYER: 0000000 SERIAL NOT IN FILE — SIC: 07000

INSUR NO: 00000-00 INSURANCE CO. UNKNOWN
CLAIM NO:

INJURY: YES — DISEASE: N - NO — REHAB: 0
SEVERITY: 1 - TIME LOSS — DEATH DATE: 00/00/00 — RTW: 00/00/00
CAUSE: 998 - NO EXPLANATION
SOURCE: 9800 - NONCLASSIFIABLE
NATURE: 210 - FRACTURE
MEMBER: 340 - FINGER(S)
COUNTY: 057 - [redacted] — DOCKET NO.:

PROC DATE: 06/16/87
SCREEN: AU

Alt-Z FOR HELP | VT102 | FDX | 1200 E71 | LOG CLOSED | PRINT OFF | ON-LINE

12-28

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION

DOCKET NO. 13736-92-W

On the complaint of

[redacted]

Complainant,

vs.

[redacted] INDUSTRIES AND ITS REPRESENTATIVES Respondent,

I, [redacted]

residing at [redacted] Wichita, Kansas 67213

charge [redacted] Industries and its representatives

whose address is [redacted] Wichita, Kansas 67219

With an unlawful practice within the meaning of:

[X] The Kansas Act Against Discrimination (Chapter 44, Art. 10, K.S.A.) and specifically within the meaning of subsection (a) (1) of Section 44-1009 of said Act, because of my RACE ( ), RELIGION( ) COLOR ( ), SEX ( ), NATIONAL ORIGIN ( ), ANCESTRY( ), DISABILITY(X), RETALIATION ( ).

[ ] The Kansas Age Discrimination in Employment Act (Chapter 44, Art. 11, K.S.A.) and specifically within the meaning of subsection _____ of Section _____ of said Act, because of my AGE.

Alleged Date of Incident, on or about November 1, 1991.

The aforesaid charges are based on the following facts:

I. I have a record of previous injuries which resulted in a crushed disc, and the Respondent percieves me to be disabled.

A. On or about November 1, 1991, I was informed I would not be hired on a full-time basis by the Respondent. I had been working for the Respondent through a temporary service for approximately two months. Through the fact that my name was not given to the clinic doing the employment physicals I was not allowed to take the physical. [redacted] then told me that it had come to the Respondent's attention that I had two previous back injuries, and that his supervisor did nc want me working there. However, the back injuries were five years ago.

II. I feel this act on the part of the Respondent and its representati is due to my being percieved as disabled.

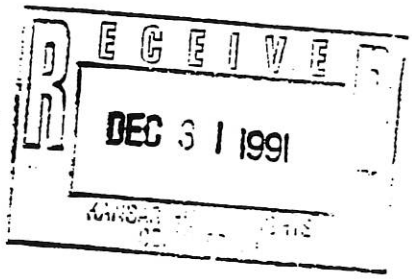
12-29

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION DOCKET NO. BBGPHW

(Continued)

III. I hereby charge [redacted] Industries and its representatives with a violation of the Kansas Act Against Discrimination in that I was denied full-time employment due to my being regarded as disabled.



I have not commenced any action, civil or criminal, based upon the grievance set forth above, except

STATE OF KANSAS)
) ss:
COUNTY OF)

X [redacted]
(SIGNATURE OF COMPLAINANT)

[redacted], being duly sworn, deposes and says that: that ___he is the Complainant herein: that ___ he read the foregoing complaint and knows the contents thereof; that the same is true of h is own knowledge except as to the matters therein stated on information belief: that as to those matters ___he believes the same to be true.

Subscribed and sworn to before me

X [redacted]
(SIGNATURE OF COMPLAINANT)

this 27 day of Dec, 1991

Donna J Waite
(SIGNATURE OF NOTARY)

MY COMMISSION EXPIRES:

DONNA J. WAITE
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 2-7-95

12-30

WORKERS COMPENSATION ACCIDENT REPORT DATE - 10/22/92

SSN: [redacted] MOD: 020 DOA: 01/04/87 CART NO: 321-492
CLAIMANT: [redacted] FILED: 01/04/87 SEX: N-N/A
[redacted] AGE: 22
[redacted] KS 66061-4804

EMPLOYER: 0000000 SERIAL NOT IN FILE SIC: 07000

INSUR NO: 00000-00 INSURANCE CO. UNKNOWN
CLAIM NO:

INJURY: YES DISEASE: N - NO REHAB: 0
SEVERITY: 1 - TIME LOSS DEATH DATE: 00/00/00 RTW: 00/00/00
CAUSE: 121 - LIFTING OBJECTS (LIFTING, PULLING, LOADING INVOLVED)
SOURCE: 9800 - NONCLASSIFIABLE
NATURE: 311 - NOT IN TABLE
MEMBER: 420 - BACK
COUNTY: 091 - [redacted] DOCKET NO.:

PROC DATE: 01/04/87
SCREEN: AU

Alt-Z FOR HELP| VT102 | FDX | 1200 E71 | LOG CLOSED | PRINT OFF | ON-LINE

WORKERS COMPENSATION ACCIDENT REPORT DATE - 10/22/92

SSN: [redacted] MOD: 010 DOA: 08/24/87 CART NO: 344-7
CLAIMANT: [redacted] FILED: 10/02/87 SEX: M-MALE
[redacted] AGE: 23
[redacted] KS 66061-4804

EMPLOYER: 2000430 [redacted] SIC: 07392
[redacted]
OVERLAND PARK KS 66214
INSUR NO: 11223-02 AETNA CASUALTY & SURETY CO
CLAIM NO:

INJURY: YES DISEASE: N - NO REHAB: 0
SEVERITY: 0 - NO TIME LOSS DEATH DATE: 00/00/00 RTW: 08/24/87
CAUSE: 121 - LIFTING OBJECTS (LIFTING, PULLING, LOADING INVOLVED)
SOURCE: 6020 - PERSON, OTHER THAN INJURED
NATURE: 310 - SPRAINS, STRAINS
MEMBER: 420 - BACK
COUNTY: 091 - [redacted] DOCKET NO.:

PROC DATE: 10/12/87
SCREEN: AU

Alt-Z FOR HELP| VT102 | FDX | 1200 E71 | LOG CLOSED | PRINT OFF | ON-LINE

12-31

Attachment 3

A.D.A.P.T. INC.

ADVOCATES FOR DISABLED ACCESS TO PROGRAMS AND TRAINING INC.

PRESIDENT

RICHARD D CHARLTON, SR
ATTORNEY AT LAW

OFFICE

1951 SW MISSION AVE
TOPEKA KS 66604-3371
(913)271-1213

April 5, 1993

Bruce Kent, General Counsel:
Department of Human Resources
401 SW Topeka Blvd
Topeka, KS 66603

RE:SENATE SUBSTITUTE FOR HOUSE SUBSTITUTE FOR HOUSE BILL NO. 2354 Sec. 46. K.S.A. 44-550b ("Open Records Provisions")

Dear Mr Kent:

On Friday March 26, 1993 in a meeting with Secretary Dick and his staff, the KANSAS COMMISSION ON DISABILITY CONCERNS (KCDC) Staff and Commissioners recommended closing the Workman's Compensation records. During the entire legislative hearings on this issue KCDC has stated that the open records provisions are in direct violation of "THE 1990 AMERICAN DISABILITIES ACT" (ADA). You requested a legal opinion regarding non-compliance with the ADA.

1. My understanding is that your agency has a toll free computer dial up system without any tracking mechanism in place. There is also a written access system which does not keep on file any inquiries which were made about a workers' compensation case records. Therefore, anyone can access the workers' compensation records of any individual without any permanent record or trace, of who, when, or what was accessed.

12-32

2. UNITED STATES DEPARTMENT OF JUSTICE rule 28 CFR Part 35 which implements subtitle A of title II of the Americans with Disabilities Act (ADA), Public Law 101-336, which prohibits discrimination on the basis of disability by public entities became effective January 26, 1992. Subtitle A protects qualified individuals with disabilities on the basis of disability in the services, programs, or activities of all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance, and incorporates specific prohibitions of discrimination on the basis of disability from titles I, III, and V of the ADA.
3. The following applicable Rules and Regulations are found in 28CFR Part 35, Subpart B- General Requirements.

Section 35-130 General Prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability ---

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration;

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities;

4. Since January 26, 1992, your agency has been in violation of 28CFR; 35-130(b)(1)(v) in aiding or perpetuating discrimination against a qualified individual with a disability by providing significant assistance to an employer that discriminates on the basis of a perceived disability by allowing indiscriminate access to the workers' compensation case records.

5. Since January 26, 1992, your agency has been in violation of 28CFR; 35-130(b)(3) by utilizing criteria or methods of administration that perpetuate the discrimination by employers in their hiring practices.

6. Therefore, it is recommended that workers' compensation cases be closed except when a written release is signed by the claimant or when ordered by the court. Procedures should be initiated immediately, under the current regulations, by installing a tracking system to process and record all requests for information from the workers' compensation case records.

It is requested that your agency immediately discontinue the practice of supplying information via the toll free number and accept only written requests for information concerning workers' compensation cases. Your assistance in bringing Kansas in compliance with ADA would be appreciated.

Sincerely,

Richard D. Charlton

Richard D. Charlton, Sr
Attorney At Law

12-34

Cc:Senate and House Conference Committee Members Including:
Senator Alicia Salisbury, Chairperson
Senator Mike Harris
Senator David Kerr
Senator Anthony Hensley
Senator Marge Petty
Representative David Heinemann
Representative Al Lane
Representative Tim Carmody
Representative Darrell Webb
Representative Janice Pauls
Other Senators and Representatives
Joan Finney, Governor
Joe Dick, Secretary Human Resources
George Gomez, Director Workers Compensation
Martha Gabehart, Executive Director KCDC
Paralyzed Veterans of America
Mid-America PVA
SunFlower/Mid-America PVA
Director National Rehabilitation Assn
Kansas Rehabilitation Assn
Topeka Rehabilitation Assn
Kansas Trial Lawyers Association
Kansas AFL-CIO

Attachment 4

Kansas Department of Human Resources

Joan Finney, Governor
Joe Dick, Secretary

Commission on Disability Concerns
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
913-296-1722 (Voice) -- 913-296-5044 (TDD)
913-296-4065 (Fax)

July 22, 1993

SAMPLE

Ms. Valerie Salven
General Counsel
Department of Workers' Claims
Perimeter Park West, Building C
1270 Louisville Road
Frankfort, KY 40601

Dear Ms. Salven;

Thank you for your response to my Workers Compensation Survey. The results have been compiled and are enclosed with this letter. The following is a brief summary:

Of the 38 states responding to the survey, 10 indicated that their records were open to public inspection. Out of those 10 states the following 7 states indicated that restrictions apply:

Alabama: Release form required
Alaska: Penalty for illegal use. Tracking system used.
California: Only legal proceedings released, not medical records.
Florida: Release form required for medical records. Tracking system used.
Louisiana: Only trial records open to the public with unnamed limitations.
Maryland: Release required for medical records.
Minnesota: Medical and accident reports require specific authorization.
Tracking system used.

In conclusion, in addition to Kansas, only 3 states indicated total unrestricted access to workers compensation records: Iowa, Kentucky and Maine.

As a result of the efforts of our Commission the Workers Compensation Bill that went to the Governor for signature contained an amendment that would subject all workers compensation records to the Kansas Open Records Act. This change would have restricted access considerably and would have significantly benefitted job seekers with workers compensation histories. Unfortunately, the original bill was vetoed. The following statement was made in the Governor's

veto message, "Delete sections of this bill that would close certain records to public scrutiny. I have already directed the Division of Workers Compensation to take administrative steps to meet the disclosure protection needs of disabled persons under the law. But I cannot condone legislated secrecy in handling of workers compensation when the public has a right to know how public monies are being spent."

At present, a program is being developed to track usage of our computer dial-up link to workers compensation records. In addition to tracking who accesses claimant's files a letter will be mailed to all claimants whose files are accessed informing them of the inquiry. The letter will indicate who made the inquiry, the date of the inquiry, and inform the individual of their rights under the Americans With Disabilities Act.

Thank you for your help with this matter. Please contact me if you desire additional information.

Sincerely,

Sharon Huffman

Sharon Huffman
Legislative Liaison

encl

cc: Joe Dick, Secretary, KDHR
Ann Golubski, Special Assistant
Martha Gabehart, Executive Director, KCDC
George Gomez, Director, Div of Workers Compensation
KCDC Commissioners

C:\WP51\WORKCOMP\SVYRSLT.PRI

12-37

	LAW THAT REQUIRES ALL WC RECORDS BE OPEN TO THE PUBLIC?	WHICH RECORDS ARE OPEN TO THE PUBLIC?	DO YOU REQUIRE A RELEASE FROM THE CLAIMANT?	IS THERE A PENALTY FOR ILLEGAL USE OF INFORMATION?	HOW ARE THE RECORDS MADE AVAILABLE TO THE PUBLIC?*	NUMBER OF REQUESTS PROCESSED ANNUALLY?	ANNUAL COST TO PROCESS REQUESTS?	DO YOU USE A TRACKING SYSTEM?	ARE RECORDS AVAILABLE TO OTHER ENTITIES?
ALABAMA	YES	BLANK	YES	BLANK	W		$4 per req	NO	NO
ALASKA	YES	ALL	NO	YES	WCP	1,000		YES	YES
ARKANSAS	NO	ALL	NO	NO	W		25¢/page	NO	NO
CALIFORNIA	YES(NOT MED)	LEGAL[1]	NO	BLANK	BLANK			BLANK	BLANK
D.C.	NO	NONE	YES	NO	N/A			YES	NO
FLORIDA	YES	ACC & LEGAL	FOR MEDICAL	NO	WP	4,900	$21,000	YES	YES[2]
GEORGIA	NO	NONE	N/A	NO	W	9,500		NO	NO
IDAHO	NO	NONE[3]	YES	NO	W	1,700-1,800		YES	NO
ILLINOIS	NO	MED & LEGAL	NO	NO	TWP	75-100/day		YES	NO
IOWA	YES	ALL	NO	NO	TWP	T250,W30,P30		NO	NO
KENTUCKY	YES	ALL	NO[4]	BLANK	TWP			NO	BLANK
LOUISIANA	YES(W/LIMITS)	TRIAL RCDS	NO	NO	WP		$14,000	NO	UNKNOWN
MAINE	YES	ALL	NO	NO	TWP	SEVERAL THOU		NO	NO
MARYLAND	YES	ACC & LEG[5]	FOR MEDICAL	NO	TWP	[6]	$75,000	NO	NO
MASS.	NO	ACC & LEGAL	YES	NO	TWP	[7]		NO	NO
MICHIGAN	NO	LEGAL	NO	NO	W[8]	500/mo		YES	YES[9]
MINNESOTA	YES	LEGAL[10]	YES	YES	W	600/mo	$132,000	YES	NO
MISS.	NO	MED[11],AC,LG	NO	NO	W	5		NO	YES[12]
NEBRASKA	NO[13]	ACC & LEGAL	FOR MEDICAL	NO	WP	5,000	$5 per req	NO	YES[14]
NEVADA	NO	NONE	YES	YES	N/A			N/A	NO
N. HAMPSHIRE	NO	ACC & LEG[15]	YES	NO	W	2,500		YES	NO
NEW JERSEY	NO	ALL[16]	NO	NO	W			NO	NO
NEW MEXICO	NO	EVIDENCE[17]	YES	NO	W	1,500	25¢/page	YES	NO
N. DAKOTA	NO	GENERIC[18]	YES	NO	TWP			NO	NO
OHIO	NO	ACC & LEGAL	NO[19]	NO	WP	HUNDREDS		YES	NO
[illegible]	NO[20]	DECISIONS[21]	YES	NO	W	2,600		YES	NO
RHODE ISLAND	NO	LEGAL	YES	YES	N/A	N/A		YES	YES-NCCI

	LAW THAT REQUIRES ALL WC RECORDS BE OPEN TO THE PUBLIC?	WHICH RECORDS ARE OPEN TO THE PUBLIC?	DO YOU REQUIRE A RELEASE FROM THE CLAIMANT?	IS THERE A PENALTY FOR ILLEGAL USE OF INFORMATION?	HOW ARE THE RECORDS MADE AVAILABLE TO THE PUBLIC?[a]	NUMBER OF REQUESTS PROCESSED ANNUALLY?	ANNUAL COST TO PROCESS REQUESTS?	DO YOU USE A TRACKING SYSTEM?	ARE RECORDS AVAILABLE TO OTHER ENTITIES?
S. CAROLINA	NO	LEGAL	YES[22]	NO	W			NO	NO
S. DAKOTA	NO	LEGAL	YES	NO	W			NO	NO
TENNESSEE	NO	LEGAL	YES	NO	W	5,500	$1,980	NO	YES
TEXAS	NO	NONE	YES	YES	BLANK			NO	BLANK
UTAH	NO	LEGAL	YES	NO	WP	1,200	$8,500	NO	NO
VERMONT	NO	NONE[23]	YES[24]	BLANK	BLANK			NO	NO
/IRGINIA	NO	LEGAL[25]	YES	NO	WP			NO	NO
VIRGIN ISL.	NO	NONE	YES	NO	N/A			NO	NO
WASHINGTON	NO	NONE	YES	NO	N/A			NO	NO
WISCONSIN	NO	ALL[26]	YES	NO	TWP[27]			YES	NO
WYOMING	NO	NONE	YES	YES	N/A			YES	NO

a. T = Telephone, W = Written, C = Computer, P = In person

1. Except working papers of the judge and certain medical records that the judge has ordered sealed

2. Private research companies purchase microfiche records from the Division of Workers Compensation

3. Unless authorized by §9-340[(38)](37) Idaho Code

4. After "formal application for adjustment of claim" has been filed

All records/documents except medical

6. T=50,880; W=7,200; P=12,000

7. T=5,000-10,000; W=1,000; P=2,000-3,000

8. With the following information on bureau responses, "The users of this information should be aware of prohibitions against covered entities using this information for pre-employment inquiries as described in Title I of Public Law 101-336, The Americans with Disabilities Act of 1990".

9. Bureau of Safety & Regulation (MIOSHA)

10. Minn Statute, Section 176.231, subds 8 and 9 make medical and accident reports private and therefor only available to parties or those with specific authorization

ntroverted cases only

12. Mississippi Business Information, Inc. which is pre-employment screening service

13. Subject to general public records statutes

14. Information from our data base is provided to a company called Avert in Colorado. They, in turn, provide information to employers and have also apparently sold the data to at least one other company in Oklahoma.

15. With the exception of medical reference

16. Open for employer inspection in pending cases only (NJSA 34:15-128)

17. Evidence submitted at a hearing is open to public inspection

18. Under the provisions of NDCC 65-05-32(5) unless requestor is the claimant, the employer, claimant's attorney or authorized medical provider, the following generic information is available: The claimant's name, social security number; date of birth; injury date; employer name; type of injury; whether the claim is accepted, denied, or pending; and whether the claim is in active or inactive pay status.

19. Medical not released

20. Except that "all hearings before a referee shall be public"

21. Referee decisions, Workers Compensation Appeal Board and Appellate Court decisions are considered public records.

22. Any party to the action may release

23. We confirm or deny the existence of a cliam upon presentation of a signed release. Otherwise the contents of files are available only to employee and employer (carrier) unless a court subpoenas same.

24. Only confirm or deny the existence of a claim

25. Only transcript of hearings and judicial opinions

26. Except claims files

27. Only public (non claim) records

19-40

STATE LAWS REGARDING WORKERS COMPENSATION RECORDS

ALASKA - Sec. 23.30.107. **Release of information.** Upon request, *an employee shall provide written authority to the employer, carrier, rehabilitation provider, or rehabilitation administrator to obtain medical and rehabilitation information relative to the employee's injury.*

Sec. 23.30.247. **Discrimination prohibited.** (a) An employer may not discriminate in hiring, promotion, or retention policies or practices against an employee who has in good faith filed a claim for or received benefits under this chapter. An employer who violates this section is liable to the employee for damages to be assessed by the court in a private civil action.

(b) This section may not be construed to prevent an employer from basing hiring, promotion or retention policies or practices on considerations of the employee's safety practices or the employee's physical and mental abilities; or may this section be construed so as to create employment rights not otherwise in existence.

(c) This section may not be construed to prohibit an employer from requiring a prospective employee to fill out a preemployment questionnaire or application regarding the person's prior health or disability history as long as it is meant to either document written notice for second injury fund reimbursement under AS 23.30.205(c) or determine whether the employee has the physical or mental capacity to meet the documented physical or mental demands of the work. (§ 40 ch 79 SLA 1988)

Effective date - July 1, 1988 *(Please note that this law pre-dates the ADA)*

GEORGIA - 34-9-12. Employer's record of injuries; availability of board records...

(b) *The records of the board, insofar as they refer to accidents, injuries, and settlements, shall not be open to the public but only to the parties satisfying the board of their interest in such records and their right to inspect them.* Under such reasonable rules and regulations as the board may adopt, the records of the board as to any employee in any previous case in which such employee was a claimant shall be open to and made available to such claimant, to an employer or its insurance carrier which is called upon to pay compensation, medical expenses, or funeral expenses, and to any party at interest, except that the board may make such reasonable charge as it deems proper for furnishing information by mail and for copies of records.

AG letter, dated January 25, 1991, RE: All records of the State Board of Workers' Compensation pertaining to accidents, injuries, and settlements are confidential, unless a party can meet the statutory requirements for access or has authority pursuant to the Child Support Recovery Act.

The parties to the claim are the employee, the employer, and the insurer.

FARRELL et al. v. DUNN. Plaintiff's (Farrell) car was struck by Defendant's (Dunn) car. Defendant attempted to obtain certified copies of Plaintiff's workers compensation records but was denied. Defendant filed a motion to compel the Board to produce the records, but was denied based upon OCGA § 34-9-12 because Defendant was not a party in the workers compensation claim.

Idaho - ***(A very good example of what we could do here in Kansas!)*** The following information sheet must accompany all certification forms (requests for information from workers compensation records):

Idaho Code §9-340[(38)](37) exempts from mandatory disclosure under the Idaho Public Records Act "worker's compensation records of the Idaho Industrial Commission" except:

(a) To the parties in any worker's compensation claim and to the industrial special indemnity fund of the state of Idaho; or

(b) To employers and prospective employers subject to the provisions of the Americans with Disabilities Act, 42 U.S.C. 12112, or other statutory limitations who certify that the information is being requested with respect to a worker to whom the employer has extended an offer of employment and will be used in accordance with the provisions of the Americans with Disabilities Act, 42 U.S.C. 12112, or other statutory limitation; or

(c) To employers and prospective employers not subject to the provisions of the Americans with Disabilities Act, 42 U.S.C. 12112, or other statutory limitations, provided the employer presents a written authorization from the person to whom the records pertain; or

(d) To others who demonstrate that the public interest in allowing inspection and copying of such records outweighs the public or private interest in maintaining the confidentiality of such records, as determined by a civil court of competent jurisdiction.

If you or your business employ five or more persons or do business with the federal government or receive federal funding, you or your business may be subject to the Americans with Disabilities (42 U.S.C. 12112), the Rehabilitation Act of 1973 (29 U.S.C. 701), or the Idaho Human Rights Act (§67-5901), Idaho

Code. If you have any questions as to whether you are subject to these laws, please consult your attorney.

MARYLAND - AG Letter, dated April 25, 1990, RE: Disclosure of Medical Records concludes that *medical records should be placed in a sealed envelope within the claim file,* or access thereto otherwise restricted, so that these records will not be impermissibly redisclosed when public access to the file is allowed.

The Annotated Code of Maryland, health General Article, §4-302(d), as amended by Senate Bill 584, provides as follows:

A person to whom a medical record is disclosed may not redisclose the medical record to any other person unless the redisclosure is:

(1) authorized by the person in interest;
(2) otherwise permitted by this subtitle;
(3) permitted under Article 88A, §6B of the Code; or
(4) directory information

A claimant's consent to disclosure of medical records by a health care provider is not authorization for redisclosure by any person, including the Commission, to whom the records are disclosed. Thus, medical records within a workers' compensation claim file, under this revised law, are not to be open to public inspection.

MICHIGAN - Letter from Douglas Langham, Administrator, Vocational Rehabilitation Division, Michigan Bureau of Workers Disability Compensation, February 8, 1993

Since July 1992, as a result of the ADA, bureau responses to requests for information include the following information:

> *"The users of this information should be aware of prohibitions against covered entities using this information for pre-employment inquires as described in Title I of Public Law 101-336, The Americans with Disabilities Act of 1990".*

The number of responses to requests from employers for workers compensation information decreased by 71% within the first year.

MINNESOTA - Workers Compensation 176.231 Subd. 8. **No public inspection of reports.** Subject to subdivision 9, *a report or its copy which has been filed with the commissioner of the department of labor and industry under this section is not*

available to public inspection. Any person who has access to such a report shall not disclose its contents to anyone in any manner.

**A person who unauthorizedly discloses a report or its contents to another is guilty of a misdemeanor.*

Subd. 9 **Uses which may be made of reports**. Reports filed with the commissioner under this section may be used in hearings held under this chapter, and for the purpose of state investigations and for statistics. These reports are available to the department of revenue for use in enforcing Minnesota income tax and property tax refund laws, and the information shall be protected as provided in chapter 270B.

The division or office of administrative hearings or workers' compensation court of appeals may permit the examination of its file by the employer, insurer, employee, or dependent of a deceased employee or any person who furnishes written authorization to do so from the employer, insurer, employee, or dependent of a deceased employee.

> ***The following is contained on the Authorization Form:***
> ***"Information concerning disability may not be used to make a job decision unless state or federal law requires use of this information. Any use or distribution of this information beyond that authorized by the subject of this data unless authorized by state or federal law is prohibited. Questions concerning use of disability information may be directed to the Minnesota Department of Human Rights at (612) 296-5663, or toll free in greater Minnesota at 1-800-652-9747."***

NEVADA - NRS 616.192 **Confidentiality and disclosure of information; penalty for use of information for political purposes; privileged communications.**

1. Except as otherwise provided in this section and in NRS 616-193 and 616-550, information obtained from any employer or employee is confidential and may not be disclosed or be open to public inspection in any manner which would reveal the person's identity.

2. Any claimant or his legal representative is entitled to information from the records of the insurer, to the extent necessary for the proper presentation of a claim in any proceeding under this chapter.

*6. If any employee or member of the board of directors or manager or any employee of the manager, in violation of this section, discloses information obtained from the files of claimants or policyholders, or if any person who has

obtained a list of claimants or policyholders under this chapter uses or permits the use of the list for any political purposes, he is guilty of a gross misdemeanor.

NORTH DAKOTA - North Dakota Century Code, Chapter 65-05-32. **Privacy of records and hearings.** *Information contained in the claim files and records of injured employees is confidential and is not open to public inspection,* other than to bureau employees or agents in the performance of their official duties. Providing further that:

1. Representatives of a claimant, whether an individual or an organization, may review a claim file or receive specific information from the file upon the presentation of the signed authorization of the claimant.

2. Employers or their duly authorized representatives may review and have access to any files of their own injured workers.

3. Physicians or health care providers treating or examining workers claiming benefits under this title, or physicians giving medical advice to the bureau regarding any claim may, at the discretion of the bureau, inspect the claim files and records of injured workers.

4. Other persons may have access to and make inspections of the files, if such persons are rendering assistance to the bureau at any stage of the proceedings on any matter pertaining to the administration of this title.

5. The claimant's name; social security number; date of birth; injury date; employer name; type of injury; whether the claim is accepted, denied, or pending; and whether the claim is in active or inactive pay status will be available to the public.

6. At the request of a claimant, the bureau may close the medical portion of a hearing to the public.

NEW JERSEY - Article 9. Inspection of Records. §34:15-128. **Limited right to inspect or copy records**. Notwithstanding any other provision of the chapter to which this act is a supplement or of any other law, *no records maintained by the Division of Workmen's Compensation shall be open to inspection or copying by or on behalf of any person who seeks such inspection or copying for the purpose of selling or furnishing for a consideration to others reports or abstracts or workmen's compensation records or work-injury records pertaining to any individual, except in the case of an investigation by or on behalf of an employer in connection with any pending workmen's compensation case.*

§34:15-59. **Docket; records.** The secretary of the bureau shall keep a docket in which shall be entered the title of each cause, the date of the determination thereof, the date of appeal, if any, and the date on which the record in case of

appeal was transmitted to the appellant. The secretary shall also file the record of each case left with him by the official conducting the hearing, and shall keep a card index of such record in such manner as to afford ready reference thereto. such records shall be open to the inspection of the public.

NEW MEXICO - 52-5-21. **Administration records confidentiality; authorized use.** Unless introduced as evidence in an administrative or judicial proceeding, all records of the administration shall be confidential, provided, however, that, once an accident or disablement occurs, any person who is a party to a claim upon that accident or disablement is entitled to access to all files relating to that accident or disablement and to all files relating to any prior accident, injury or disablement of the worker.
Effective date: January 1, 1991.

NEW YORK - Workers' Compensation Law §125. **Job discrimination prohibited based on prior receipt of benefits.**
1. It shall be unlawful for any employer to inquire into, or to consider for the purpose of assessing fitness or capability for employment, whether a job applicant has filed for or received benefits under this chapter, or to discriminate against a job applicant with regard to employment on the basis of that claimant having filed for or received benefits under this chapter. An individual aggrieved under this subdivision may initiate proceedings in a court of competent jurisdiction seeking damages, including reasonable attorney fees, for violation of this subdivision.
*2. An employer who violates the provisions of subdivision one of this section shall be guilty of a misdemeanor, and upon conviction shall be punished, except as in this chapter or in the penal law otherwise provided, by a fine of not more than one thousand dollars.
3. In addition to the criminal penalty set forth herein, where the chair has determined that an employer has violated the provisions of subdivision one of this section, the chair may, after a hearing, impose a penalty against such employer in an amount not exceeding twenty-five hundred dollars.
Effective date Jan 1, 1992.

OHIO - BWC Internal Memorandum from Law Director to BWC Administrator, Subject: Release of Information to the General Public, Dated November 12, 1992.

"The Bureau's obligation to disclose public information is set forth in Ohio Revised Code §149.43(B) which states the following, in relevant part:

> All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular

business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.

More specifically, Ohio Revised Code §4123.88 restricts the public availability of information contained in workers' compensation claim files. Section 4123.88 states, in pertinent part:

> *No person shall, without prior authority from the bureau, a member of the commission, the claimant, or the employer, examine or directly or indirectly cause or employ another person to examine any claim file or any other file pertaining thereto ... No employee of the bureau or commission ... shall divulge any information in respect of any claim which is or may be filed with the bureau or commission to any person other than members of the commission or to the superior of the employee except upon authorization of the administrator of workers' compensation or a member of the commission or upon authorization of the claimant or employer.*

TEXAS - Texas Workers' Compensation Act, Article 2, Chapter C, §2.31. **Injury information confidential.** (a) *Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this Act.*

(b) Information concerning an employee who has been finally adjudicated of wrongfully obtaining payment under Section 10.04 of this Act or Section 32.51, penal Code, is not confidential.

(c) The commission shall perform and release a record check on an employee, including current or prior injury information, to the parties listed in Subsection (d) of this section if:

(1) the claim is open or pending before the commission, on appeal to a court of competent jurisdiction, or the subject of a subsequent suit where the insurance carrier or the subsequent injury fund is subrogated to the rights of the named claimant; and

(2) the requesting party requests the release on a form developed by the commission for this purpose and provides all required information.

(d) Information on a claim may be released as provided in Subsection (c) of this section to:

(1) the employee or the employee's legal beneficiary;

(2) the employee's or the legal beneficiary's representative;

(3) the employer at the time of injury;

(4) the insurance carrier;

(5) the Texas Certified Self-Insurer Guaranty Association, if established by law and if that association has assumed the obligations of an impaired worker;

(6) the Texas and Casualty Insurance Guaranty Association, if that association has assumed the obligations of an impaired insurance company; or

(7) a third party litigant in a lawsuit in which the cause of action arises from the incident which gave rise to the injury, in which case Subsection (c)(1) of this section does not apply.

§2.33. **Information available to prospective employers.** (a) When a person applies for employment, the prospective employer who has workers' compensation insurance coverage is entitled, on compliance with this chapter, to obtain information on the applicant's prior injuries.

(b) The employer must make the request by telephone or file the request in writing not more than 14 days after the date on which the application for employment is made.

(c) The request must include the applicant's name, address, and social security number.

(d) the employer must obtain written authorization from the applicant before making the request.

(e) If the request is made in writing, the authorization shall be filed simultaneously. If the request is made over the telephone, the employer shall file the authorization not later than the 10th day after the date on which the request is made.

VIRGINIA - §65.2-903. **Records not public.** *The records of the Commission, insofar as they refer to accidents, injuries and settlements, shall not be open to the public but only to the parties satisfying the Commission of their interest in such records and their right to inspect them.*

WASHINGTON - RCW 51.28.070. **Claim files and records confidential.** *Information contained in the claim files and records of injured workers, under the provisions of this title, shall be deemed confidential and shall not be open to public inspection* (other than to public employees in the performance of their official duties), but representatives of a claimant, be it an individual or an organization, may review a claim file or receive specific information therefrom upon the presentation of the signed authorization of the claimant. A claimant may review his or her claim file if the director determines, pursuant to criteria adopted by rule,

that the review is in the claimant's interest. Employers or their duly authorized representatives may review any files of their own injured workers in connection with any pending claims. Physicians tr3eating or examining workers claiming benefits under this title, or physicians giving medical advice to the department regarding any claim may, at the discretion of the department, inspect the claim files and records of injured workers, and other persons may make such inspection, at the department's discretion, when such persons are rendering assistance to the department at any stage of the proceedings on any matter pertaining to the administration of this title.

WISCONSIN - §102.33(2)(a) Except as provided in par. (b), the records of the department related to the administration of this chapter are subject to inspection and copying under s. 19.35(1).

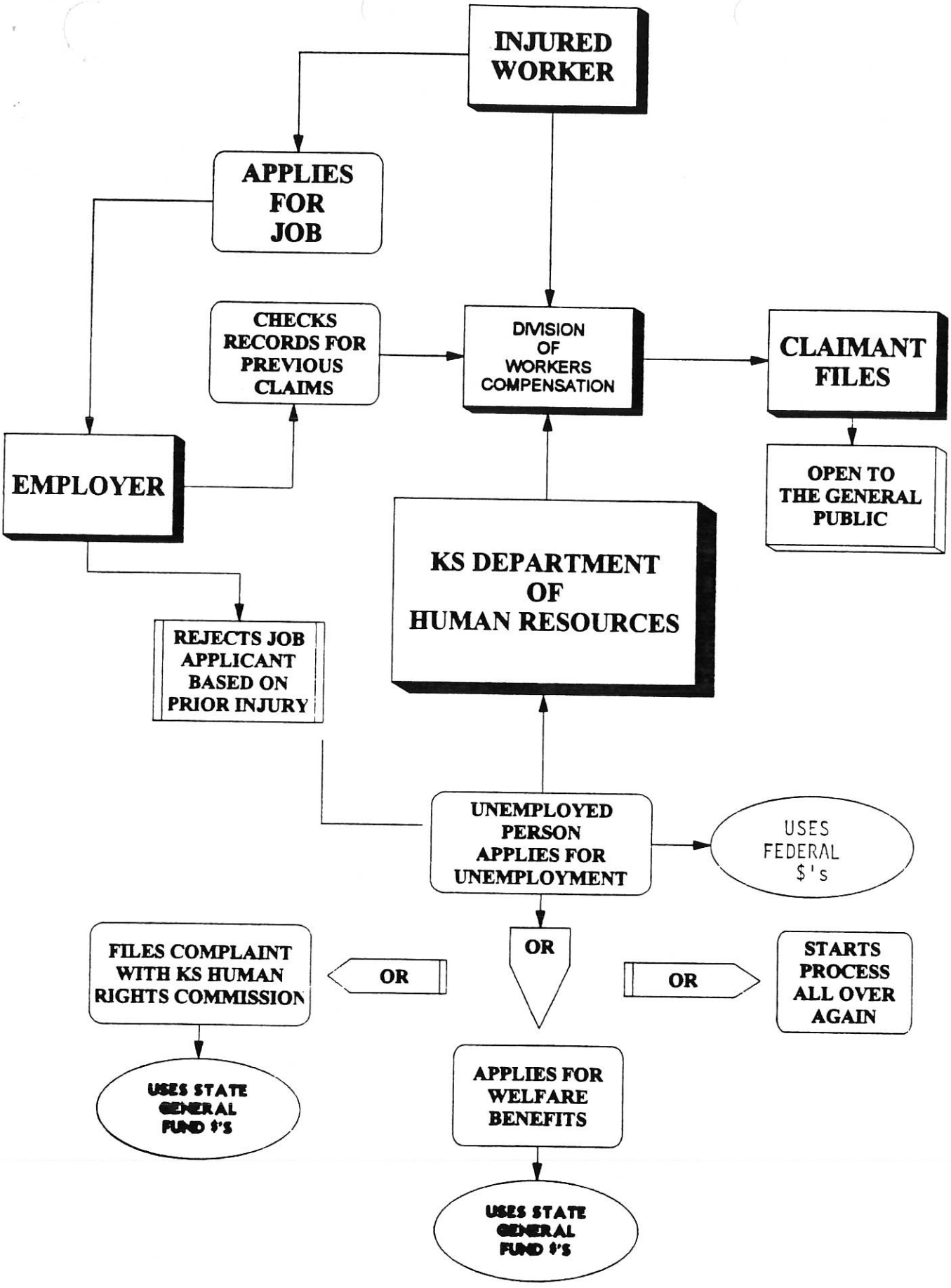
102.33(2)(b), Stats., Notwithstanding par. (a), a record maintained by the department that reveals the identity of an employee who claims worker's compensation benefits, the nature of the employee's claimed injury, the employee's amount, type or duration of benefits paid to the employee or any financial information provided to the department by a self insured employer or by an applicant for exemption under s. 102.28(2)(b) is confidential and not open to public inspection or copying under s. 19.35(1). The department may deny a request made under s. 19.35(1) to inspect and copy a record that is confidential under this paragraph, unless one of the following applies:

1. The requester is the employee who is the subject of the record or an attorney or authorized agent of that employee. an attorney or authorized agent of an employee who is the subject of a record shall provide a written authorization for inspection and copying from the employee if requested by the department.

2. The record that is requested contains confidential information concerning a worker's compensation claim and the requester is an insurance carrier or employer that is a party to the claim or an attorney or authorized agent of that insurance carrier or employer. an attorney or authorized agent of an insurance carrier or employer that is a party to an employee's worker's compensation claim shall provide written authorization for inspection and copying from the insurance carrier or employer if requested by the department.

***WYOMING** - §27-14-805. **Confidentiality of information**. Except as otherwise provided by this act, *information obtained from any employer or covered employee pursuant to reporting requirements under this act shall not be disclosed in a manner which reveals the identity of the employer or employee* except to the employer, the employee, legal counsel for an employer, legal counsel for an

employee or in situations necessary for the division to enforce any of the provisions of this act. The confidentiality limitations of this section do not apply to transfers of information between the divisions of the department of employment so long as the transfer of information is not restricted by federal law, rule or contract. Any employee who discloses information outside of the department in violation of federal or state law may be terminated without progressive discipline.


INJURED WORKER
APPLIES FOR JOB
CHECKS RECORDS FOR PREVIOUS CLAIMS
DIVISION OF WORKERS COMPENSATION
CLAIMANT FILES
EMPLOYER
OPEN TO THE GENERAL PUBLIC
KS DEPARTMENT OF HUMAN RESOURCES
REJECTS JOB APPLICANT BASED ON PRIOR INJURY
UNEMPLOYED PERSON APPLIES FOR UNEMPLOYMENT
USES FEDERAL $'s
FILES COMPLAINT WITH KS HUMAN RIGHTS COMMISSION
OR
OR
OR
STARTS PROCESS ALL OVER AGAIN
USES STATE GENERAL FUND $'S
APPLIES FOR WELFARE BENEFITS
USES STATE GENERAL FUND $'S

Testimony to:
House Committee on Business, Commerce & Labor
Rep. Al Lane, Chair
March 25, 1997

My name is Bob Mikesic. I am the Advocacy Coordinator/ADA Specialist at Independence, Inc. a Center for Independent Living in Lawrence serving people with disabilities in Douglas, Franklin and Jefferson counties. Our mission is to empower people with disabilities to control their own lives and advocate for an integrated and accessible community.

Thank you for the opportunity to testify in support of Senate Bill 321. This bill places appropriate restrictions on the current, open public access to workers compensation records that are consistent with the Americans with Disabilities Act (ADA) and the Kansas Act Against Discrimination (KAAD). The current open public access to workers compensation records provides a ready basis for employment discrimination against qualified individuals with disabilities who have been injured on the job at some point in their life.

Under the ADA and KAAD, an employer may not conduct medical examinations, ask disability-related questions or questions about an applicant's prior workers' compensation claims or occupational injuries until *after* a conditional job offer has been made to the applicant. After a conditional offer of employment has been made, such questions may then be asked before employment begins as long as the employer asks the same questions of all entering employees in the same job category.[1]

During the pre-offer stage, "an employer may also not ask a third party (such as a service that provides information about workers' compensation claims, a state agency, or an applicant's friends, family, or former employers) any [disability-related] questions that it could not directly ask the applicant."[2] The U.S Equal Employment Opportunity Commission (EEOC) has further stated that "an employer

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[1] See attached pp. 1-3 from "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," U.S. Equal Employment Opportunity Commission, Washington, D.C., 10/10/95.

[2] EEOC Guidance, 10/10/95, p.13.

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may not ask disability-related questions, or require a medical examination pre-offer *even if* it intends to look at the answers or results only at the post-offer stage."[3] These requirements exist in the ADA and Kansas Act to help ensure that an applicant's disability, including a prior history of a disability, is not considered before the employer evaluates an applicant's actual job qualifications.

By allowing employers access to workers compensation records only after a conditional offer of employment has been made, Senate Bill 321 will help prevent discrimination based on disability during the hiring process. It will remind and/or re-direct employers to make hiring decisions based on an applicant's education, work history, and ability to do the job. Employers are allowed by the ADA and KAAD to ask about an applicant's ability to perform specific job functions, and to describe or demonstrate how they would perform job tasks.[4]

Like most everyone else in this country, people with disabilities want to work and we accept the fact that hiring decisions should be based on an individual's ability to do the job. We just don't want to be refused a job because of fears and stereotypes about people with disabilities, including fears about some increased risk of occupational injury. The ADA and Kansas Act Against Discrimination prohibit discrimination of this type, discrimination based on disability against qualified individuals with disabilities.

Please help employers stay focused on making hiring decisions based on a person's current ability to do the job by voting favorably for Senate Bill 321. Thank you.

The board, staff and the consumer advocacy group, the Access Task Force, all support Senate Bill 321 and respectfully ask that you vote for this bill. Thank you.

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[3] EEOC Guidance, 10/10/95, p.2.

[4] EEOC Guidance, 10/10/95, p.2.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations

Introduction

Under the Americans with Disabilities Act of 1990 (the "ADA"),[1] an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer. This Enforcement Guidance explains these ADA provisions.[2]

Background

In the past, some employment applications and interviews requested information about an applicant's physical and/or mental condition. This information was often used to exclude applicants with disabilities before their ability to perform the job was even evaluated.

For example, applicants may have been asked about their medical conditions at the same time that they were engaging in other parts of the application process, such as completing a written job application or having references checked. If an applicant was then rejected, s/he did not necessarily know whether s/he was rejected because of disability, or because of insufficient skills or experience or a bad report from a reference.

As a result, Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.

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[1] Codified as amended at 42 U.S.C. §§ 12101-17, 12201-13 (Supp. V 1994).

[2] The analysis in this guidance also applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 791(g) (West Supp. 1994). In addition, the analysis applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C.A. §§ 793(d), 794(d) (West Supp. 1994).

The Statutory and Regulatory Framework

Under the law, an employer may not ask disability-related questions and may not conduct medical examinations until *after* it makes a conditional job offer to the applicant.[3] This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications. An employer may not ask disability-related questions or require a medical examination pre-offer *even if* it intends to look at the answers or results only at the post-offer stage.

Although employers may not ask disability-related questions or require medical examinations at the pre-offer stage, they *may* do a wide variety of things to evaluate whether an applicant is qualified for the job, including the following:

- Employers *may* ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.

- Employers *may* ask about an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses.

- Employers *may* ask applicants to describe or demonstrate how they would perform job tasks.

Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category. If the employer rejects the applicant after a disability-related question or medical examination, investigators will closely scrutinize whether the rejection was based on the results of that question or examination.

If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity."[4]

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[3] 42 U.S.C. § 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a),(b).

[4] 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.10, 1630.14(b)(3).

In addition, if the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a "direct threat." This means that the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.[5]

Medical information must be kept confidential.[6] The ADA contains narrow exceptions for disclosing specific, limited information to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the ADA. Employers may also disclose medical information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws[7] and may use the medical information for insurance purposes.[8]

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[5] 42 U.S.C. § 12113(b); See 29 C.F.R. pt. 1630 app. § 1630.2(r).

[6] 29 C.F.R. § 1630.14(b)(1)(i-iii).

[7] See 42 U.S.C. § 12201(b); 29 C.F.R. pt. 1630 app. § 1630.14(b).

[8] See 42 U.S.C. § 12201(c); 29 C.F.R. pt. 1630 app. § 1630.14(b). For example, an employer may submit medical information to the company's health insurance carrier if the information is needed to administer a health insurance plan in accordance with § 501(c) of the ADA.

job functions.

- May an employer ask applicants about their workers' compensation history?

  No. An employer may not ask applicants about job-related injuries or workers' compensation history. These questions relate directly to the *severity of an applicant's impairments.* Therefore, these questions are likely to elicit information about disability.

- May an employer ask applicants about their current illegal use of drugs?

  Yes. An employer may ask applicants about current illegal use of drugs[14] because an individual who currently illegally uses drugs is not protected under the ADA (when the employer acts on the basis of the drug use).[15]

- May an employer ask applicants about their lawful drug use?

  No, if the question is likely to elicit information about disability. Employers should know that many questions about current or prior lawful drug use *are* likely to elicit information about a disability, and are therefore impermissible at the pre-offer stage. For example, questions like, "What medications are you currently taking?" or "Have you ever taken AZT?" certainly elicit information about whether an applicant has a disability.

  - However, some innocuous questions about lawful drug use are not likely to elicit information about disability.

    Example: During her interview, an applicant volunteers to the interviewer that she is coughing and wheezing because her allergies are acting up as a result of pollen in the air. The interviewer, who also has allergies, tells the applicant that he finds "Lemebreathe" (an over-the-counter antihistamine) to be effective, and asks the applicant if she has tried it. There are many reasons why someone might have tried "Lemebreathe" which have nothing to do with disability. Therefore, this question is not

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[14] "Drug" means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. § 812). 29 C.F.R. § 1630.3(a)(1).

[15] 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

In order to ensure that the self-identification information is kept confidential, the information must be on a form that is kept separate from the application.

• May an employer ask **third parties questions it could not ask the applicant directly?**

No. An employer may not ask a third party (such as a service that provides information about workers' compensation claims, a state agency, or an applicant's friends, family, or former employers) any questions that it could not directly ask the applicant.

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The Post-Offer Stage

After giving a job offer to an applicant, an employer may ask disability-related questions and perform medical examinations. The job offer may be conditioned on the results of post-offer disability-related questions or medical examinations.

At the "post-offer" stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illnesses/diseases/impairments, and general physical and mental health. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job.[19]

If an employer asks post-offer disability-related questions, or requires post-offer medical examinations, it must make sure that it follows certain procedures:

- all entering employees in the same job category must be subjected to the examination/inquiry, regardless of disability;[20] and

- medical information obtained must be kept confidential.[21]

Below are some commonly asked questions about the post-offer stage.

- What is considered a *real* job offer?

  Since an employer can ask disability-related questions and require medical examinations after a job offer, it is important that the job offer be *real*. A job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. Of course, there are times when an employer cannot reasonably obtain and evaluate *all* non-medical information at the pre-offer stage. If an employer can show that is the case, the offer would still be considered a real offer.

  Example: It may be too costly for a law enforcement employer wishing to administer a polygraph examination to administer a pre-offer examination asking non-disability-related questions, and a post-offer examination asking

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[19] But, if an individual is screened out because of disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity. 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.10, 1630.14(b)(3).

[20] 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b)(1),(2).

[21] Id.

Confidentiality

An employer must keep *any* medical information on applicants or employees confidential, with the following limited exceptions:

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first aid and safety personnel may be told *if* the disability might require emergency treatment;
- government officials investigating compliance with the ADA must be given relevant information on request;[23]
- employers may give information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws;[24] and
- employers may use the information for insurance purposes.[25]

Below are some commonly asked questions about the ADA's confidentiality requirements.

- May medical information be given to decision-makers involved in the hiring process?

Yes. Medical information may be given to -- and used by -- appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the ADA. In addition, the employer may use the information to determine reasonable accommodations for the individual. For example, the employer may share the information with a third party, such as a health care professional, to determine whether a reasonable accommodation is possible for a particular individual. The information certainly must be kept confidential.

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[23] 29 C.F.R. § 1630.14(b)(1)(i-iii).

[24] See 42 U.S.C. § 12201(b); 29 C.F.R. pt. 1630 app. § 1630.14(b).

[25] See 42 U.S.C. § 12201(c); 29 C.F.R. pt. 1630 app. § 1630.14(b). For example, an employer may submit medical information to the company's health insurance carrier if the information is needed to administer a health insurance plan in accordance with § 501(c) of the ADA.

APPENDIX TO ENFORCEMENT GUIDANCE

1. SUBJECT: Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

2. PURPOSE: This document provides the EEOC's position under the Americans with Disabilities Act of 1990, on preemployment disability-related questions and medical examinations.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: ADA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

10/10/95
Date

Gilbert F. Casellas
Chairman

DISTRIBUTION: CM Holders

13-10

March 24, 1997

Kansas House of Representatives
Business, Labor and Commerce Committee

Regarding: the substitute for Senate Bill 321

From: Susan E. Tabor, L.S.C.S.W.,
Benefits Advocate
Independence, Inc.
1910 Haskell Avenue
Lawrence, Kansas 66046

I appreciate the opportunity to come before you today in support of Senate Bill 321. In my work, I assist people in applying for Social Security and other benefits for which they may be eligible, in appealing denials of benefits, and with representation in administrative hearings. I also assist people who can work with referrals and support in their return-to-work efforts.

Frequently, people for whom I provide representation in Social Security matters are currently receiving or have received Worker's Compensation benefits. In addition to these, there areothers with whom I work who are receiving or have received Worker's Compensation benefits.

Open Worker's Compensation records have presented unnecessary and illegal barriers to employment for many people with disabilities. Despite changes in our Federal and state laws to protect people with disabilities, the fact that records for Worker's Compensation are open still sets up opportunities for information to be misused and abused by employers.

In the current system, medical records and other information about prior Worker's Compensation claims is easily accessible by employers. Even if access were made more difficult, as in requiring a signature from an employer for accountability purposes, how the records are used can't be controlled or monitored. Whether people do what they say they will do with the information would be impossible to document.

The best way to demonstrate to you the far-reaching and tragic effects this injustice can have on people's lives is best done through sharing stories of a couple of people with whom I have worked regarding their disability-related benefits. (Names have

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been changed to protect confidentiality, at my their request.)

Cheryl, aged 39, had held a variety of factory and other unskilled work since her middle teenage years. She was a single mother in her mid-twenties, and was solely responsible for the support of her four children. Though she worked hard, she loved her work and was good at it.

Cheryl experienced a work-related injury that left her in chronic pain and with other residual ongoing symptoms. She applied for Social Security and was denied benefits, even after a hearing. Despite her many restrictions, she really wanted to work, and despite her application for Social Security, looked for work. She noticed a pattern of rejections despite very positive interviews.

As she followed up with and befriended some of the employers with whom she had applied, she learned, much to her horror, that information regarding her prior Worker's Compensation history and medical records had been obtained by these people, which in effect eliminated her from being considered. She learned that their fear of re-injury or of their Worker's Compensation rate increasing transcended their knowledge of or regard for the current disability rights laws.

As time passes, she becomes harder to re-employ because she has more unemployed time to account for on her resume. She is not a candidate for formal schooling because she has a learning disability, which was not a problem when she did manual labor. She is terrified about her future.

Steve has another story to tell. He had worked for a number of years for the same business in a job that required work with chemicals. He developed a condition because of this work that made it impossible for him to continue working.

His condition improved after a few years, and though he could not return to the same specialized work, he wanted to begin working again. He had gone to school to learn a new skill and was anxious to return to the work force. In addition to his medical condition improving, thanks to progress in medicine, he had also learned that he had been at least partially misdiagnosed earlier, again thanks to progress in medicine.

When he began looking for work, he too was surprised and dismayed by constant rejections after positive interviews. Again, he learned after networking with potential employers, that they had grave concerns about hiring him because of information gleaned from prior Worker's Compensation records, some of which was grossly inaccurate now because of changes in his situation which were not accurately reflected in that information.

He too is frightened about what his future may hold for him and his family.

Both of these people would have and could have happily provided documentation of disability post-offer, for purposes of establishing the legitimacy of their request for reasonable accommodation, within the scope of the law.

And others have found that even though their conditions have radically improved and in some cases have almost totally healed, that employers are so afraid of additional claims being filed that the fact that people have used that benefit to which they were entitled is an unnecessary barrier. Despite its illegality, people report that they are told by employers that they do not hire people with prior Worker's Compensation claims, current health notwithstanding.

Since we are not in the business of legislating the morality of employers and employees (nor do we have the capability), I submit to you that the most sensible way to protect employees and employers from inaccurate information or use of information is toclose Worker's Compensation records.

I support the current version of the substitute bill for S.B.321 with the amendments that were drafted into the current bill before you. This will do a lot to prevent unnecessary use of records, and for preventing discrimination against persons with disabilities who want to contribute to their society as productive work force participants. We will appreciate your support of Sub.S.B.321 as well, and thank you in advance for your support.

Statewide Independent Living Council of Kansas **SILCK**

700 S.W. Jackson, Suite 1003, Topeka, KS 66603 ☎ (913) 234-6990 voice / tdd ☎ (913) 234-6651 fax

Testimony to
Business, Commerce and Labor Committee
on Sub SB 321
by
Shannon M. Jones
Statewide Independent Living Council of Kansas
March 24, 1997

Thank you for the opportunity to present testimony in support of Sub SB 321. My name is Shannon M. Jones and I am the director of the Statewide Independent Living Council of Kansas (SILCK). The SILCK is a federally mandated Council responsible for ensuring that community options are available for Kansans with disabilities who want to live independently in the community of their choice.

The SILCK is concerned that at this time workers compensation records are completely open. Currently, there are three methods used to access these records: by phone call, 'walk-in', or written request. There is absolutely no monitoring or restriction on looking at workers comp records. In addition there is no record kept of when the workers comp records are accessed AND more importantly, no reason of why an individual needs to access these workers comp records.

The SILCK believes that by running a program that provides access to workers compensation records without being a party to the claim, or a court order, that the state of Kansas is quite possibly violating the Americans with Disabilities Act (ADA), Title I Sec. 102 and the state law, the Kansas Act Against Discrimination (KAAD). We believe the state of Kansas could be found to be aiding and perpetuating discrimination against qualified individuals with disabilities by providing significant assistance to an employer that discriminates on the basis of a perceived disability by allowing access to the workers compensation case records.

The SILCK believes that Sub SB 321 would provide a safeguard for protected individuals and their right to privacy, otherwise workers comp records are open to abuse.

Another issue for this committee to consider as the state of Kansas works towards implementing welfare reform, if this abuse is allowed to continue, this only creates another barrier to employment for those people who want to work.

Business, Commerce & Labor Committee
3/25/97
Attachment 15

The state of Kansas spends millions educating people with disabilities and rehabilitating people with disabilities in order for them to become taxpaying citizens. We certainly do not need another roadblock to getting people off the welfare rolls and into a job.

Therefore, The SILCK respectfully requests this committee to support passage of Sub SB 321 in order to protect the state of Kansas and its citizens who simply want to work.

Offices located in
the Historic Crawford Building

Topeka Independent Living Resource Center

(913) 233-4572 V/TDD • Fax 913-233-1561 • Toll Free 1-800-443-2207
501 SW Jackson Street • Suite 100 • Topeka, KS 66603-3300

March 25, 1997

Testimony presented to the House Committee on Business, Commerce & Labor
in support of substitute Senate Bill 321

by Lori Davis
Staff Attorney

Thank you for the opportunity to present my views on this important piece of legislation. This testimony will outline for you why this bill needs to be passed into law.

People with disabilities face rampant discrimination, despite great strides forward since the passage of the Americans with Disabilities Act in 1990. People with disabilities face a 70 percent unemployment rate nationwide. In Kansas, we have identified a practice, carried out under existing law providing for worker's compensation files to be open records, which exacerbates discrimination in employment.

It is illegal under federal law to make pre-employment inquiries about a job applicants' disability or medical condition. This happens everyday in Kansas because worker compensation files are available to anyone under current law. People should have a reasonable expectation of privacy related to medical information. If one receives an injury on the job, however, their medical records are available to anyone who asks and can even be obtained over the internet.

Employers are illegally using workers compensation information to discriminate and deny employment opportunities to people with disabilities every day in our state. We sent a staff member down to the Division of Workers Comp. to see how easy it really was to obtain the information. All she had to do was give the name and social security number to the clerk who promptly gave her the file. She was never asked her name, for any ID, etc. The information was provided completely anonymously. (attachment 1) The information she received is attached with identifying information blacked out. I have also attached a copy of the informational sheet provided along with the record by the State of Kansas. The guidance it provides is, at its best insufficient and at worst very misleading. Employers following its guidance are in danger of violating the civil rights of people with disabilities.

Business, Commerce
& Labor Committee
3/25/97
Attachment 16

The informational sheet warns employers they MAY NOT inquire into a person's worker's compensation history prior to a conditional job offer. At the same time, the practice warned against is encouraged by state law and policy thereunder.

The full interpretive guidance from the EEOC, which is referred to in the informational sheet but not included on the sheet, is attached. (attachment 2).

What this boils down to is that it is illegal to use worker's compensation records alone to disqualify an applicant AFTER the offer of a job. It must be demonstrated that the individual cannot perform the job after accommodations are made. This is obviously a much highe standard than is currently in place. Substitute Senate Bill 321 rectifies this egregious practice of discrimination.

Senate Bill 321 allows appropriate business related access to the records, including research efforts to uncover fraud. The exceptions within the bill provide the records for legitimate business purposes only. Any use of the records that are not already provided for in the amendments is probably illegal.

By closing the records under Senate Bill 321, we are causing no harm. By keeping the records open we are not only causing harm, but allowing the violation of the Americans with Disabilities Act.

We, the disability community, have worked with the Worker's Compensation Advisory Board and are in agreement with this compromise. The substitute bill was passed unanimously by the board and we urge its passage by this committee also. This bill will eliminate illegal, discriminatory practices and preempt costly and time consuming litigation.

I thank the members of the committee for allowing me to testify on this important issue and urge you to pass substitute Senate Bill 321 out of committee. Thank you.

Attachment 1

STATE OF KANSAS

DEPARTMENT OF HUMAN RESOURCES

Bill Graves, Governor

Wayne L. Franklin, Secretary

DIVISION OF WORKERS COMPENSATION
800 S.W. Jackson Street, Suite 600, Topeka, KS 66612-1227
PHONE ..... (913) 296-3441
FAX ..... (913) 296-0839

TO: Recipient

FROM: Phil Harness
Director, Workers Compensation

IMPORTANT INFORMATION--PLEASE READ

Enclosed is the information you recently requested. The Division of Workers Compensation is glad to have been able to assist you in your research. However, you should be aware of the following prohibitions regarding when and how such data may be obtained and how it may be used.

DISABILITY DISCRIMINATION LAW: 29 CFR 1630.13(a) (appendix) states that an employer may not inquire into an applicant's workers compensation history PRIOR to making a conditional offer of employment to the individual. In addition, 29 CFR 1630.6(a) provides that it is an unlawful discriminatory practice to enter into a contractual relationship or other arrangment that has the effect of subjecting a covered employer's employees or applicants to the discrimination prohibited by the ADA. Therefore, the use of a third party to make inquiries about workers compensation histories prior to an offer of employment is prohibited.

According to the Equal Employment Opportunity Commission (EEOC) Guidance on the Americans With Disabilities Act (ADA), AFTER making a conditional job offer, employers may ask about a person's workers compensation history in a medical inquiry or examination, as long as it is required of all applicants in the same job category. 42 USC 12112(d)(3) provides that information obtained regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate files and be treated as a confidential medical record.

If you have questions, regarding the permissible or impermissible uses of information obtained from the Division of Workers Compensation, you are strongly urged to seek legal counsel.

16-3

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WORKERS COMPENSATION STATISTICS

SSN: [redacted] NAME: [redacted]

FILE	COUNT
ACCIDENT FILE	5
FORM D FILE	0
DOCKET FILE	1
REHABILITATION FILE	0
ELECTION FILE	0
FORM 88 FILE	1

Bf a
FT
PC N

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WORKERS COMPENSATION ACCIDENT REPORT

PAGE 01
DATE - 02/17/97

SSN: [redacted] MOD: 010
CLAIMANT: [redacted]
KS [redacted]

DOA: 08/12/92 CART NO: 532-446
FILED: 08/21/92 SEX: F-FEMALE
AGE: 30

EMPLOYER: 0780036 STATE OF KANSAS
LANDON OFFICE BLDG RM 951S
TOPEKA KS 66612
SIC: 09199
INSUR NO: 80851-02 STATE SELF INSURANCE FUND
CLAIM NO:

16-4

INJURY: YES
SEVERITY: 0 - NO TIME LOSS
CAUSE: 998 - NO EXPLANATION
SOURCE: 9998 - NO EXPLANATION
NATURE: 840 - CARPOL TUNNEL SYNDROME, GANGLIA (BELL) PALSEY)
MEMBER: 997 - MULTIPLE MEMBERS INJURED
COUNTY: 177 - SHAWNEE

DISEASE: N - NO
DEATH DATE: 00/00/00
REHAB: 0
RTW: 00/00/00

DOCKET NO.

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FT
PC

PROC DATE: 09/01/9
SCREEN: AU
D 70

WORKERS COMPENSATION ACCIDENT REPORT

PAGE 02
DATE - 02/17/97

SSN: [redacted] MOD: 020
CLAIMANT: [redacted]
KS [redacted]

DOA: 01/23/91 CART NO: 467-192
FILED: 02/05/91 SEX: F-FEMALE
AGE: 29

EMPLOYER: 0427161 SRS
DSO8 RM 625 SOUTH
TOPEKA KS 66612
INSUR NO: 80851-02 STATE SELF INSURANCE FUND
CLAIM NO:

SIC: 09441

INJURY: YES
SEVERITY: 1 - TIME LOSS
CAUSE: 052 - FALL, ONTO OR AGAINST OBJECTS
SOURCE: 1900 - FURNITURE, FIXTURES, FURNISHINGS ETC
NATURE: 998 - NO EXPANATION
MEMBER: 997 - MULTIPLE MEMBERS INJURED
COUNTY: 177 - SHAWNEE

DISEASE: N - NO
DEATH DATE: 00/00/00
REHAB: 0
RTW: 00/00/00

DOCKET NO.:

48[a X ()
FT
PC N

PROC DATE: 02/08/91
SCREEN: AU
D 70

WORKERS COMPENSATION ACCIDENT REPORT

PAGE 03
DATE - 02/17/97

SSN: [redacted] MOD: 030
CLAIMANT: [redacted]
KS 66604-1252

DOA: 09/01/89 CART NO: 434-416
FILED: 04/04/90 SEX: F-FEMALE
AGE: 28

EMPLOYER: 0427161 SRS
DSO8 RM 625 SOUTH
TOPEKA KS 66612
INSUR NO: 80851-02 STATE SELF INSURANCE FUND
CLAIM NO:

SIC: 09441

INJURY: YES
SEVERITY: 0 - NO TIME LOSS
CAUSE: 100 - BODILY REACTION (IMPOSED STRESS, STRAIN ON PART OF BODY)
SOURCE: 0400 - BODILY MOTION
NATURE: 562 - CARPOL TUNNEL SYNDROME, GANGLIA (BELLS PALSEY)
MEMBER: 320 - WRIST
COUNTY: 177 - SHAWNEE

DISEASE: N - NO
DEATH DATE: 00/00/00
REHAB: 0
RTW: 09/01/89

DOCKET NO.:

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PC N

PROC DATE: 04/09/90
SCREEN: AU
D 70

WORKERS COMPENSATION ACCIDENT REPORT

PAGE 04
DATE - 02/17/97

[redacted] MOD: 010
CLAIMANT: [redacted]
KS 66604-1252

DOA: 03/17/86 CART NO: 293-1328
FILED: 03/17/86 SEX: N-N/A
AGE: 34

16-5

EMPLOYER: 0000000 SERIAL NOT IN FILE

DIV: 09000

INSUR NO: 00000-00 INSURANCE CO. UNKNOWN
AIM NO:

INJURY: YES
SEVERITY: 1 - TIME LOSS
CAUSE: 121 - LIFTING OBJECTS (LIFTING, PULLING, LOADING INVOLVED)
SOURCE: 9800 - NONCLASSIFIABLE
NATURE: 160 - BRUISE, CONTUSION, CRUSHING
MEMBER: 330 - HAND
COUNTY: 177 - SHAWNEE

DISEASE: N - NO
DEATH DATE: 00/00/00
REHAB: 0
RTW: 00/00/

DOCKET NO.:

PROC DATE: 03/17/8
SCREEN: AU
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WORKERS COMPENSATION ACCIDENT REPORT

PAGE 05
DATE - 02/17/97

SSN: [redacted] MOD: 050
CLAIMANT: [redacted]

DOA: 09/28/82
FILED: 09/28/82
CART NO: 178-134
SEX: N-N/A
AGE: 21

[redacted] KS

EMPLOYER: 0000000 SERIAL NOT IN FILE

SIC: 05000

INSUR NO: 00000-00 INSURANCE CO. UNKNOWN
CLAIM NO:

INJURY: YES
SEVERITY: 1 - TIME LOSS
CAUSE: 998 - NO EXPLANATION
SOURCE: 9800 - NONCLASSIFIABLE
NATURE: 160 - BRUISE, CONTUSION, CRUSHING
MEMBER: 320 - WRIST
COUNTY: 177 - SHAWNEE

DISEASE: N - NO
DEATH DATE: 00/00/00
REHAB: 0
RTW: 00/00/00

DOCKET NO.:

PROC DATE: 09/28/82
SCREEN: AU
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WORKERS COMPENSATION FORM 88 RECORD

PAGE 01
DATE - 02/17/97

SSN: [redacted] MOD: 001
EMPLOYEE: [redacted]

FILED DATE: 01/02/85
CARTRIDGE NO.: 35-964

SERIAL: 0000000
EMPLOYER:

SIC: 00000
DATE EMPLOYED: 00/00/00

CATEGORY: 180 N.E.C.

STATUS: A - ACTIVE ENTRY: XX PROC DATE: 01/02/85

16-6

PC N

WORKERS COMPENSATION DOCKET RECORD

02/1.,97

SSN: [redacted] MOD: 0100 DOCKET NO: 144879 SERIES:

CLAIMANT: [redacted] LOCATOR: SSS DOA: 05/03/9(

KS [redacted] CART-NO-1:

CART-NO-2:

EMPLOYER: 0427161 SRS

SIC: 09441

INSURANCE: 8085102 STATE SELF INSURANCE FUND ADDTL DATA: NO

VENUE COUNTY: 177 SHAWNEE HEARING COUNTY: 177 SHAWNEE

ALJ: 020 WARD, JAMES R. REG. TERRITORY: 06

INJURY CAUSE: 085 REPITITION OF PRESSURE

SOURCE: 3400 OFFICE MACHINES

MEMBER: 398 UPPER EXTREMITIES, MULTIPLE FATAL: NO

FILED DATE: 05/18/90

STATUS: INACTIVE

PROC: 05/23/9(

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SCREEN: DU

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SSN: [redacted] MOD: 0102 NAME: [redacted]

DOCKET NO: 14487

ACTIONS AND COMPENSATIONS

401	STLMT (DKT)	BY RUCKER, ERIC K	09/26/91	LS
	COMMENTS: WCF DISMSD			
	TEMP TOTAL IN THE SUM OF	$5,374.74		
	MED. & HOSP. IN THE SUM OF	$2,750.94		
	UNAUTH. MED. IN THE SUM OF	$350.00		
	LUMP SUM IN THE SUM OF	$5,374.74		
410	COURT REPORTER FEES	TO NORA LYON & ASSOC.	09/26/91	LS
602	PRELIM HEARING CANCELLD	BY CLAIMANT	12/27/90	DA
	COMMENTS: BY PHONE (AM)			
600	PRELIM HEARING SET	BY WARD, JAMES R.	11/26/90	DA
	COMMENTS: TOPEKA/12-27-90			
102	APP PRELIM HEAR (E-3)	BY CLAIMANT	10/17/90	MK
309	MOT IMPLD WCF-2ND INJRY	BY RESPONDENT	07/27/90	DA
100	APP HEAR (E-1)	BY CLAIMANT	05/18/90	MP
304	MOT PROD OR INSP RECOS	BY CLAIMANT	05/18/90	MP
992	SERIES ACCIDENTS FROM	00/00/00 THRU 05/03/90		MP

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16-7

Attachment 2

eI

REGULATION

1630.13 Prohibited medical examinations and inquiries.

(a) Pre-employment examination or inquiry. Except as permitted by section 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) Examination or inquiry of employees. Except as permitted by section 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

INTERPRETIVE GUIDANCE

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 39; House Labor Report at 75; House Judiciary Report at 44.

16-8

REGULATION

1630.12 Retaliation and coercion.

(a) Retaliation. It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) Coercion, interference or intimidation. It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

INTERPRETIVE GUIDANCE

16-9

REGULATION

1630.14 Medical examinations and inquiries specifically permitted.

(a) Acceptable pre-employment inquiry. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

INTERPRETIVE GUIDANCE

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation. For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category. So, for example, it would not be permitted for an employer to request that an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration. 16-10

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function

must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function. If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Rather, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

An employer is permitted to ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer within a reasonable established time period prior to the administration of the test. The employer may also request that documentation of the need for the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats. (See section 1630.11 Administration of Tests).

Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. (See section 1630.9 Not Making Reasonable Accommodation: Process of Determining the Appropriate Reasonable Accommodation).

16-11

REGULATION

(b) Employment entrance examination. A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(1) Information obtained under paragraph (b) of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require

INTERPRETIVE GUIDANCE

As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act is not restricted by this part. (See section 1630.1(b) and (c) Applicability and Construction).

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59-60; Senate Report at 39; House Labor Report at 73-74; House Judiciary Report at 43.

16-12

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance

REGULATION

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

(d) Other acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program

INTERPRETIVE GUIDANCE

required by medical standards or requirements established by Federal, state, or local law that are consistent with the ADA and this part (or in the case of a federal standard, with Section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74-75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription

REGULATION

available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

INTERPRETIVE GUIDANCE

drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 75; House Judiciary Report at 43-44.

16-15

REGULATION

1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) Disparate treatment charges. It may be a defense to a charge of disparate treatment brought under sections 1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) Charges of discriminatory application of selection criteria. -- (1) In general. It may be a defense to a charge of discrimination, as described in section 1630.10, that an alleged application of

INTERPRETIVE GUIDANCE

Section 1630.15 Defenses

The section on defenses in part 1630 is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of a individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15(b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, i.e., that

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qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See section 1630.2(r) defining direct threat).

(c) Other disparate impact charges. It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

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screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

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March 24, 1997

TO THE MEMBERS OF
THE HOUSE BUSINESS,
COMMERCE AND LABOR COMMITTEE

Dear Committee Members:

I understand that on today's date, testimony was given that the present attorney fee law had no effect on my case.

In rebuttal, I contacted over five (5) lawyers, trying to find one that would handle my case. All the attorneys had been represented to me to be workers' compensation attorneys and all declined. The reason given, that based upon 1993 changes to the workers' compensation law, they were not economically able to go forward in representing me in the case. I found this extremely frustrating, since I have a son graduating from Kansas University Law School this year and another son in the Jackson County Prosecutor's office. All of the attorneys were very apologetic that they could not help.

I ask that this testimony be submitted in support of Senate Bill 346.

Sincerely,

Mary Darlene Berry

Mary Darlene Berry

Business, Commerce
& Labor Committee
3/25/97
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