Approved: 2-2-98
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Senator Lana Oleen at 11:10 a.m. on January 29, 1998, in Room 254-E of the Capitol.

All members were present except:
Senator Nancey Harrington, excused
Senator Keith Schraad, excused

Committee staff present: Mary Galligan, Legislative Research Department
Robin Kempf, Legislative Research Department
Theresa Kiernan, Office of the Revisor of Statutes
Midge Donohue, Committee Secretary

Conferees appearing before the committee:
Mr. Michael Byington, Director, Envision Governmental Affairs Office
Ms. Barbara J. Hinton, Legislative Post Auditor
Mr. Paul Wilson, Kansas Association of Public Employees
Mr. Ron Smith, Kansas Bar Association

Others attending: See attached list.

Senator Oleen recognized Mr. Michael Byington, Director, Envision Government Affairs Office, who appeared before the committee to request introduction of a bill concerning the Kansas Use Law. Mr. Byington explained that Envision was a state-wide, not-for-profit, organization serving individuals who are blind and visually impaired. He stated that the requested bill was a result of the efforts of a number of agencies that fall under the Kansas Use Law which provides certain preferences in state purchasing to agencies that employ individuals who are blind or severely disabled, provided they are not-for-profit organizations. Mr. Byington told the committee that, at one time, there was a Use Commission responsible for overseeing the Use Law, but it was abolished by a governor's initiative approximately ten years ago, and his group did not feel the law had performed as well since that time. He hastened to note this was no reflection on the State Purchases Director who had always been very cooperative. Mr. Byington related the difficulties his group has experienced since the Use Commission was abolished and requested introduction of a bill to create a Kansas Use Commission.

Senator Vidricksen moved for introduction of the bill. The motion was seconded by Senator Becker. The motion carried.

Senator Oleen recognized Senator Gooch who referenced a handout, (Attachment #1), provided by Senator Clark in response to a question raised in committee during the hearing on **SB 393**, relating to state agencies gathering or maintaining personal information. Senator Oleen expressed appreciation for the information and advised that the hearing on **SB 393** was scheduled to continue next week.

Senator Oleen recognized Senator Jones who introduced Brandon Fields and Temeka Kenney from Northwest Middle School in his district and who were serving as pages for the committee today.

Staff briefed the committee on **SB 428**, relating to certain communications by employees of state agencies, which is also known as the Kansas whistleblower act, by explaining provisions of the bill. Senator Oleen pointed out that the bill was prefiled and at the request of the Legislative Post Audit Committee, and Senator Vidricksen provided background information on the original whistleblower act in Kansas.

The hearing was opened on:

SB 428 An act relating to certain communications by employees of state agencies; prohibiting certain acts and providing remedies

Barb Hinton, Legislative Post Auditor, appearing on behalf of the Legislative Post Audit Committee, thanked the committee for the opportunity to speak and express strong support for **SB 428.** She explained the

purpose of the bill and the three changes proposed to the whistleblower act (Attachment #2), pointing out that the changes would make state employees feel freer to discuss problems they see in their respective agencies without fear of retaliation and that it would also send a signal to agency managers not to take retaliatory actions against those employees. She pointed out that the bill would treat employees in the classified and unclassified service more consistently, noting that the time classified employees have to appeal a disciplinary action to the Civil Service Board would be increased from 30 to 90 days after the action. Additionally, she said the bill would allow the Civil Service Board or the courts to award the prevailing party all or part of the costs of an appeal, including reasonable attorney and witness fees.

Paul K. Wilson, Executive Director of Labor Relations for the Kansas Association of Public Employees (KAPE), told the committee that KAPE strongly supports the principles of the whistleblower act, (Attachment #3). He said employees are generally reluctant to provide derogatory information about their workplace or employer for fear of retaliation. Mr. Wilson stated that KAPE is happy to support **SB 428** because it feels the bill encourages employee participation while discouraging employer coercion.

Ron Smith, General Counsel, Kansas Bar Association (KBA), appeared as neither a proponent nor opponent of **SB 428** but rather to express concerns of the Association; specifically, that the bill, as written, would be different from common law and there would still be two sets of whistleblower laws for different groups of employees, public and private (Attachment #4). Additionally, he said the fee shift rule could discourage disclosure by employees. Mr. Smith provided and discussed a handout (Attachment #5) setting out the concerns of the KBA in regard to **SB 428**.

The hearing was closed on **SB 428**.

Senator Becker moved to approve the minutes of the January 20, 22, and 27 meetings. Senator Jones seconded the motion. The motion carried.

The meeting adjourned at 11:50 a.m. The next meeting is scheduled for February 2.

SENATE FEDERAL & STATE AFFAIRS COMMITTEE
GUEST LIST

DATE: 1-29-98

NAME	REPRESENTING
Michael Byington	Envision
Karen Watney	Dept of Admin
Michael Geyer	Juvenile Justice Task
Dave K. Wilson	KAPE
Ron Seiber	D. Admin
Amy Campbell	KRPA

40TH DISTRICT

KANSAS SENATE

Stan Clark

COMMITTEE ASSIGNMENTS
VICE CHAIR: UTILITIES
COMPUTERS & TELECOMMUNICATIONS
MEMBER: AGRICULTURE
FINANCIAL INSTITUTIONS & INSURANCE
RULES & REGULATIONS

January 29, 1998

Sen. Rip Gooch
State Capitol, Room 404-N
Topeka, KS 66612

Dear Rip,

Tuesday you asked me why I objected to linking all of my records held by government agencies to my Social Security number. I am including an article on the trials and tribulations of Bronti Kelly from the, October 1, 1997, *Hays Daily News.* He was the victim of the theft of his wallet in 1990. He lost $4, his driver's license, Social Security card, and Military I.D. Bronti did not know that the thief used his ID when he was arrested for shoplifting, burglary and arson. After being rejected 100s of times for employment, bankrupt, eventually homeless, one of the businesses that he applied for a job told him of his tainted credit and criminal profile. He has sued the credit reporting service. The L.A. Police Department has given Bronti a "Certification of Clearance" which states that the police have determined that he wasn't the person arrested. But Bronti's tainted identity remains in police files because the imposture might be arrested for other crimes. Of course these police records have been accessed by other Internet vendors. Additionally, the police say if they would close this record then they could not prosecute the crimes. The article mentions the work being done by a national panel for court technology and a bill in the California Legislature which makes "identity theft" a punishable crime.

When we authorize a common link, we allow the whole world to know too much about us which creates the ability for criminals to easily assume the identity of another person. I think government should not only prosecute the criminals but should take preventive measures to protect law abiding citizens.

Sincerely,

Stan Clark

Stan Clark

Enclosure

205 U.S. 83
OAKLEY, KANSAS 67748
(785) 672-4280
FAX 785-672-4988
E-Mail sclark@ink.org

Sen. Federal & State Affairs Comm.
Date: 1-29-98
Attachment: # 1

A stolen-identity nightmare grows from hazards of computer age

Theft of identity turns into a nightmare after information enters computer database

By DAVID E. KALISH
ASSOCIATED PRESS

For four long years, Bronti Kelly couldn't figure out why no one wanted to hire him.

He handed department store managers across southern California a resume full of sales experience, but was rejected hundreds of times. Those rare times when he got a job, he'd be fired within days.

Along the way, Kelly filed for bankruptcy, lost his apartment and turned homeless. "For years as this went on, I blamed myself — for not being hired for employment, the conditions I went through," Kelly says.

But Kelly's self-blame turned to anger when he finally learned the cause of much of his trouble: A man had given Kelly's identity to authorities when arrested for shoplifting and other crimes, and the tainted profile found its way onto a range of computer databases used in background checks by employers.

Kelly's plight illuminates the growing threats to privacy in an age of ever-easier computer access to public information. An inaccurate black mark left on a person's profile can be duplicated again and again without the victim's knowledge. The personal details are easily and cheaply obtainable — and open to abuse by crooks trying to dodge the law or make a buck.

It used to be that to get background information you had to trek down to a courthouse, ask the clerk to direct you to the proper records, and thumb through musty files. For another type of information, you had to visit yet another government agency.

But in recent years, more and more information vendors have signed deals with governments and businesses for computer access that enables them to compile virtual dossiers on Americans — from Social Security numbers to shopping preferences.

Crooks no longer have to look for crumpled credit card carbons to steal a person's account number. Now, for nominal fees, personal details such as Social Security numbers can be found over the Internet and used to create a whole new identity for opening an account — and sticking the fraud victim with the bills.

Consumers Union in San Francisco found that half of credit-bureau reports surveyed in 1991 contained errors, about 20 percent of which were big enough to prevent an individual from buying a home or a car.

"The information age permits the exchange of data so quickly with so few safeguards, that you really become a victim before you know it," says Edward Howard, head of the Los Angeles-based Center for Law in the Public Interest.

"Not only do you become a victim, you're constantly behind the curve when you're trying to clean it up."

Bronti Wayne Kelly, now 33, hardly foresaw the cyber-nightmare that would grow from what seemed an old-fashioned wallet-snatching in May 1990. He reported to police his wallet only contained $4 — along with his driver's license, Social Security card and military I.D. for the Air Force base in southern California where he served as a reservist.

But seven months later, Kelly, a salesman in the Robinson-May department store in Riverside, was ushered into the personnel director's office and told he'd been caught shoplifting by security guards in another Robinson's.

Kelly produced a letter from his commanding Air Force officer saying he was on duty when the crime occurred, but was fired anyway. He says he was equally confounded by the blur of job rejections that followed, usually with no explanation.

For two years he held on — Kelly's work as a mechanic at the local Air Force base earned him about $700 a month. But in June 1993, the six-year reserve stint was up.

With no job in sight, Kelly filed for bankruptcy to stave off bill collectors. He was evicted from his apartment in San Bernardino, Calif.

Kelly stayed with friends until he wore out his welcome. He turned to sleeping in his car, then the streets, using public parking garages downtown to shield him from the elements.

He tried to keep clean using a pool shower at his old apartment complex. He applied for food stamps and welfare but was rejected because he had no residence.

In August 1994, he finally landed a job selling clothes at Harris' department store in nearby Riverside, but the day before his first day of work was told his services weren't needed.

Kelly, crying at the news, tried to find out why. The personnel manager told him to contact Stores Protective Association, which exchanges information about employees with more than 100 member retail chains.

Kelly wrote to SPA, and received a written explanation in January 1995, pegging him for the same shoplifting offense he'd thought was purged from the records four years earlier.

"I couldn't believe the information was still on file," Kelly says. "I had never even heard of (SPA) before."

But the vast majority of employers Kelly had applied to were members of SPA. It took until the next month for the association to remove Kelly's misinformation from its files, and only after a local television station reported his woes.

A lawyer for SPA, which Kelly is suing in a defamation lawsuit that also names Robinson-May's parent, said that Kelly had never given it evidence other than his own statement that he wasn't the shoplifter. Kelly is seeking unspecified damages and a public apology from Robinson-May.

Robert Cornell, the SPA's lawyer, said he couldn't comment further ahead of the trial, set for Oct. 27 in Los Angeles County Superior Court. A spokeswoman for May Department Stores, the St. Louis, Mo.-based parent of Robinson-May, also declined to comment.

Kelly's problem was far more complicated than he suspected. When Kelly contacted the Los Angeles Police Department to try to straighten things out, he discovered their records

sho[illegible]'d been arrested five years ea[illegible]t only for shoplifting, but for bur[illegible] and arson as well.

Kelly submitted his fingerprints to prove to authorities he wasn't the accused culprit, another white male who'd given Bronti's identity to police. Police gave Kelly a "Certificate of Clearance," which states that the police determined he wasn't the person arrested.

But Kelly's tainted identity remains in police files — even though the most serious charges against the impersonator had been dismissed shortly after his arrest in July 1990. Los Angeles police officials say they need the charges on record in case the impostor is arrested for other crimes. Moreover, prosecuting agencies — including state courts in several California counties — maintain their own records that can be accessed by information vendors via the Internet.

"It's kind of an Orwellian nightmare," acknowledges Clifford Weiss, assistant to the executive director of the Los Angeles Police Commission. "In spite of the fact that Mr. Kelly wanted to have the record sealed or closed, doing that would have prevented us from prosecuting the crime."

Since stores aren't required to tell an applicant that they're running a background check, Kelly knows with certainty of only seven May and Harris stores that found tainted information. He's not upset that background checks are part of the system, but wishes stores would have told him why he didn't get the job.

"Nobody really knows the extent of the damage until it is done," he says. "That infuriates me. Why not tell someone if they run a background check on them?"

After SPA removed Kelly's name from their files, he was still rejected from another 50 jobs — and he is still wondering why. One possibility is that the incorrect information continues to haunt him.

The problem was spelled out last month after The Associated Press hired an information search company, Forefront Inc. of Hattiesburg, Miss., to conduct a search of Kelly's background.

AP simply gave Forefront, a subcontractor to Informus Corp., Kelly's name, Social Security number and a $124 check to search state court records in three counties in southern California. Like other information vendors, Forefront is linked via the Internet to state courts.

The search came back showing Kelly was arrested in July 1990 for arson, theft and disturbing the peace.

Forefront owner Edward Fore was apologetic when told the search dug up inaccurate details on Kelly, but said as an information broker he was caught in the middle.

"That's horrible," he said of Kelly's plight. "The Internet can do as much damage to someone as it can help. The flow of information is so fast and furious."

Electronic access has benefited many — for instance, easier tracking of long-lost relatives and fugitives and faster background checks. But public officials are learning the limits of bringing their paper-based records into the computer age.

Last year, the Social Security Administration suspended an Internet service that let taxpayers see their records after being accused of putting America's privacy at risk. The agency plans to roll out a more modest and secure version later this year.

In Danville, Calif., a 14-year-old student was kicked out of high school after teachers checking his disciplinary file found four junior high drug busts. In fact, there were no arrests. The miscommunication was the result of two schools using different sets of computer code numbers for disciplinary offenses that could be as minor as gum chewing in class.

Americans overwhelmingly believe privacy is more important than unfettered access to public records, by 86 percent to 8 percent in a recent AP poll.

"The general public has a right to certain information," said Douglas Walker, of the National Center of State Courts in Williamsburg, Va. "But how do you draw the line?"

Although search companies say they make their information available only to those with legitimate needs to know — credit agencies and employers, for example — that isn't always the case. Forefront, for instance, asked no information about who was ordering the search or what it was being used for.

This lack of screening also makes the information easy to access for those with unscrupulous motives. And laws are just now catching up to the changes wrought by technology.

A bill in California, for instance, would for the first time make identity theft a punishable crime. It also would require retailers and banks to be more careful in giving out instant credit, and make it easier for fraud victims to correct bad information in a credit report.

But the bill, which is expected to become law this year, wouldn't help victims like Kelly fix records in background-check companies, and privacy advocates say stricter rules in the credit-reporting industry should apply more broadly.

"I was amazed that we don't seem have a precedent in this area," said David Brown, an attorney in Downey, Calif., who is representing Kelly in his lawsuit.

California and many oth[illegible]ates are struggling to devise uniform rules for publicizing such information as court records, which may go well beyond criminal histories. While current rules specify what courts should make public or keep private, lots of areas fall in the middle — like financial details disclosed in family cases — and are neither prohibited nor mandated to be disclosed, Walker says.

Technology is complicating things as courts step lightly. Records officials try to make it tougher for searchers trying to create dossiers on people. Instead of letting search outfits "mine" different databases for juicy details, courts simply supply information exactly as it appears on paper records.

But software technology enables information collectors to easily get around those restrictions.

"One of the things we're not supposed to do is provide a rap sheet — a compilation of a criminal history," said Victor Rowley, manager of technology, policy and planning for the administrative office of the California State Courts, based in San Francisco. "But with computers these companies can gather the pieces and create their own rap sheet."

And the government is tightening its ties with the Internet. One proposal being considered by courts around the country would enable people to simply click onto a World Wide Web site, with icons for courts and cases.

"If bad data gets out there, who's responsible for that?" asks Alan Slater, clerk for Orange County Superior Court in California and co-chairman of a national panel devoted to advancing court technology.

"It's a situation that nationally and internationally society is going to have to wrestle with."

But Kelly no longer has to. Seven years after his wallet was stolen, he has stopped seeking work among strangers. Today, he's employed part-time cleaning pools in a family business, and shares an apartment in Temecula, near San Diego, with a roommate who's helped him out financially.

Trying to rebuild his self-image, Kelly carries his police certificate clearing him of crimes wherever he goes. One look in the mirror confirms it wasn't he who dragged down his life.

Says Kelly: "A part of me feels very proud."

But just to be sure, he's thinking of changing his name.

TESTIMONY BEFORE THE
SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
SENATE BILL 428
Barb Hinton, Legislative Post Auditor
January 29, 1998 11 a.m. Room 254-E

Madame Chairman and Members of the Committee:

Thank you for giving me the opportunity to speak before you on Senate Bill 428, which expands the Kansas Whistleblowers Act. I'm appearing both on behalf of the Legislative Post Audit Committee, to express my strong support for this bill.

The current Whistleblowers Act is designed to protect State employees from retaliation when they discuss operational problems within their agencies (like inefficiencies or wastefulness) with any member of the Legislature. This bill proposes three changes to the Act.

First, the protections in the Act would be extended to State employees who discuss operational problems with any auditing agency—including Legislative Post Audit and auditors under contract with our office.

This change should make State employees feel freer to discuss problems with us that they see in the way their agencies are being operated, without fear of being retaliated against. Although it's not common, State employees sometimes tell us they are terrified of losing their jobs if they talk with us during an audit or provide us with information that's different from the "official" story. Just because an employee tells us something doesn't make it true. But this kind of information can help us decide where to direct our audit work, or what specific records to look at or questions to ask.

This change also sends a clear signal to agency managers not to take retaliatory actions against their employees for talking with us. I know of several instances where managers supposedly have made such threats.

Second, the bill treats classified and unclassified employees more consistently under the Act. Unclassified employees currently have 90 days to appeal a potential retaliatory disciplinary action through the court system. This bill increases the time classified employees have to appeal an alleged disciplinary action to the Civil Service Board from 30 days to 90 days after the alleged action.

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Attachment: # 2

Third, this bill would allow the Civil Service Board or the courts to award the prevailing party all or part of the costs of an appeal, including reasonable attorney and witness fees. This provision should help prevent the filing of frivilous appeals or lawsuits.

I believe this bill will help improve not only the level of accountability in State government, but also Legislative Post Audit's ability to provide sound and accurate information to the Legislature. It will help ensure that our office, among others, can get the full cooperation of the staff of the agencies we audit on behalf of the Kansas Legislature.

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

The Kansas Association of Public Employees
1300 SW Topeka Blvd., Topeka, KS 66612
(785)-235-0262 or (800) 232-KAPE
Fax (785)-232-3920

Testimony of Paul K. Wilson
Director of Labor Relations
Kansas Association of Public Employees before
The House Committee on Federal and State Affairs on
Senate Bill 428

Members if the committee, good morning and thank you for allowing me to come before you to offer testimony on Senate Bill 428.

My name is Paul Wilson and I am the Director of Labor Relations for the Kansas Association of Public Employees.

The bill under consideration deals with the Kansas Whistleblowers Act and KAPE strongly supports the principles upon which the idea of whistleblower protections are founded. That is, an employee should be extended protection to allow them to share information they have regarding the operations of state agencies with the legislature and other appropriate "auditing agencies". Further, they should be allowed and encouraged to do so without fear of personal loss because of that participation.

It should come as no surprise, however, that employees are generally reluctant to be called upon to provide information about their workplace which could be viewed as derogatory toward their employer. The primary reason for this condition is a fear of retaliation up to and including the loss of their employment. Quite recently that point was driven home by the televised hearings conducted by the U.S. Congress relative to the Internal Revenue Service. In those hearings, Federal IRS employees would only participate in the sharing of their knowledge if their voices as well as their faces were hidden from their workplace supervisors.

KAPE is happy to support the Kansas Whistleblowers Act, and any efforts to insure the protection of employees who seek to remedy wrongs in the internal workings of their agencies. Employees need to know and be reassured that their open participation in agency reviews is valued, encouraged and protected by the legislature. KAPE is of the opinion that this bill does encourage employee participation while discouraging employer coercion, and is, therefore, happy to support the bill.

Sen. Federal & State Affairs Comm.
Date: 1-29-98
Attachment: # 3

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
Email: ksbar@ink.org

Legislative Testimony

TO: Members, Senate Federal and State Affairs Committee:

FROM: Ron Smith, General Counsel, KBA

SUBJ: SB 428

DATE: January 29, 1998

Members of the Committee:

The Kansas Bar Association is concerned that this bill sets up two sets of whistle-blowing law – one from the common law which protects workers in the private sector, and the state employees covered under this bill.

There are things about this bill that are more liberal than common law, and there are things about the common law that are more liberal than this bill.

This bill has removed some of the more egregious issues that were in the 1996 bill. The 1996 bill reached down and affected all employees of private entities who in any way contracted with state government. I believe that provision is not in this bill, and that improves the bill considerably. But there are still issues to be resolved.

You still have the problem of two sets of whistle-blower law for different groups of employees.

Finally, with the fee shift rule, you may discourage disclosure from the very employees you desire to encourage.

Our comments are set forth more fully in Arial text.

Best regards,
Ron Smith
General Counsel

Sen. Federal & State Affairs Comm.
Date: 1-29-98
Attachment: #4

SENATE BILL No. 428
By Legislative Post Audit Committee
1-14

AN ACT relating to certain communications by employees of state agencies; prohibiting certain acts and providing remedies; amending K.S.A. 75-2973 and repealing the existing section. *Be it enacted by the Legislature of the State of Kansas:*

Section 1. K.S.A. 75-2973 is hereby amended to read as follows: 75-2973. (a) *This section shall be known and may be cited as the Kansas whistleblower act.*

(b) As used in this section:

(1) "Auditing agency" means the (A) legislative post auditor, (B) any employee of the division of post audit, (C) any firm performing audit services pursuant to a contract with the post auditor, or (D) any state agency or federal agency or authority performing auditing or other oversight activities under authority of any provision of law authorizing such activities.

Ironically, if the whistle-blower blows the whistle to the attorney general, and the attorney general is not covered by this phrase, then the whistleblower protections of this bill do not apply. This may limit the application of the act, and its protections. The common law allows the whistle blowing to go to any state or federal agency whose purpose is health, safety or welfare.

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

Kansas common law allows whistle-blower "wrongful discharge" lawsuits to be brought only in two instances – when there has been a "firing" due to the whistle-blowing. The disciplinary actions for these state employees which triggers actionable tort is quite lengthy, and far exceeds the common law. (I realize this is a restatement of existing law. But the point is still valid.) On the other hand, your fee shift rule, infra, may limit application of the entire statute. See infra.

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

(c) No supervisor or appointing authority of any state agency shall prohibit any employee of the *state* agency from discussing the operations of the *state* agency *or other matters of public concern*, either specifically or generally, with any member of the legislature *or any auditing agency*.

The common law protects employees when they blow the whistle on matters pertaining to the public health, safety or welfare. If "other matters" are divulged, the whistle-blower protections do not apply. What are "other matters of public concern?" Do we want

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Attachment: #5

policy makers at the legislature deciding what that term means, or do we want attorneys for litigants who have been disciplined to decide which actions to bring?

~~(b)~~ *(d)* No supervisor or appointing authority of any state agency shall:

(1) Prohibit any employee of the *state* agency from reporting any violation of state or federal law or rules and regulations to any person, agency or organization; or

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

~~(c)~~ *(e)* This section shall not be construed as:

(1) Prohibiting a supervisor or appointing authority from requiring that an employee inform the supervisor or appointing authority as to legislative *or auditing agency* requests for information to the *state* agency or the substance of testimony made, or to be made, by the employee to legislators *or the auditing agency, as the case may be,* on behalf of the *state* agency;

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

(3) authorizing an employee to represent the employee's personal opinions as the opinions of a state agency; or

(4) prohibiting disciplinary action of an employee who discloses information which: (A) The employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity, (B) the employee knows to be exempt from required disclosure under the open records act or (C) is confidential *or privileged* under ~~any other provision of law~~ *statute or court rule*.

This is a good amendment if you must have this legislation. It codifies existing court rules. In *Crandon v. State of Kansas*, an attorney was NOT given whistle-blower status when she violated the confidentiality rules of the Model Rules of Professional Conduct. In order to gain such status, the court ruled you must first follow the confidentiality rules.

~~(d)~~ *(f)* Any officer or employee *of a state agency* who is in the classified service and has permanent status under the Kansas civil service act may appeal to the state civil service board whenever the officer or employee alleges that disciplinary action was taken against the officer or employee in violation of this act or in any court of law or administrative hearing. The appeal shall be filed within ~~30 days of~~ *90 days after* the alleged disciplinary action. Procedures governing the appeal shall be in accordance with subsections (f) and (g) of K.S.A. 75-2949 and amendments thereto and K.S.A. 75-2929d through 75-2929g and amendments thereto. If the board finds that disciplinary action taken was unreasonable, the board shall modify or reverse the agency's action and order such relief for the employee as the board considers appropriate. If the board finds a violation of this act, it may require as a penalty that the violator be suspended on leave without pay for not more than 30 days or, in cases of willful or repeated violations, may require that the violator forfeit the violator's position as a state officer or employee and disqualify the violator for appointment to or employment as a state offi-

cer or employee for a period of not more than two years. *The board may award the prevailing party all or a portion of the costs of the proceedings before the board, including reasonable attorney fees and witness fees.* The decision of the board ;~~in such cases~~ *pursuant to this subsection* may be appealed by any party pursuant to law. *On appeal, the court may award the prevailing party all or a portion of the costs of the appeal, including reasonable attorney fees and witness fees.*

The prevailing party fee rule (a) will be hard to enforce – who is going to decide what the reasonable fee is? -- and (b) will do exactly the opposite of what you want to encourage with this bill. It will, more than likely, discourage employees from filing actions. The way this bill works is that the employee divulges something, the state "disciplines" them, and the employee files an action against the state under this statute. With the knowledge that if they lose they may pay large fees to the state, employees will have reluctance to file the actions. Thus they will be reluctant to whistleblow in the first place, which defeats the purpose of the bill. The common law does not shift fees unless federal law comes into play, such as a whistleblowing claim based on racial bias filed under the Federal Civil Rights Act. Very rare. In whistleblower actions, most likely the state will hire private counsel with employment law experience to defend the state. In most common law actions both sides pay their own attorneys.

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

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

(~~g~~) *(h)* Any officer or employee who is in the unclassified service *under the Kansas civil service act* who alleges that disciplinary action has been taken against such officer or employee in violation of this section may bring ~~a civil~~ *an* action ~~for appropriate injunctive relief, or actual damages, or both~~ *pursuant to the act for judicial review and civil enforcement of agency actions* within 90 days after the occurrence of the alleged violation. ~~A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the officer or employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A~~ *The* court may ~~also award such officer or employee~~ *award the prevailing party in the action* all or a portion of the costs of ~~litigation~~ *the action*, including reasonable attorney fees and witness fees.

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

5-3

Since the whistle-blower action for UNCLASSIFIED employees is now the same as classified employees, and since the action can be filed based on divulging "other matters" and are not limited to health, safety and welfare issues, [See Section 1(c)], an unclassified employee could be fired for a variety of political reasons and claim whistle-blower status. Is that what you want?

Sec. 2. K.S.A. 75-2973 is hereby repealed.

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