Approved: 2-22-99
Date

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

The meeting was called to order by Chairperson Al Lane at 9:12 a.m. on February 17, 1999 in Room 521-S of the Capitol.

All members were present except: Rep. Jerry Henry - excused

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

Conferees appearing before the committee: Rep. Gwen Welshimer
Barbara Girard, KHRC
John Ostrowski, AFL/CIO
L. J. Leatherman, KTLA
Terry Leatherman, KCCI
Pat Bush, KS Self-Insurers Association
Phil Harness, KDHR

Others attending: See attached list

**Hearing on: HB 2219 - Questions concerning workers compensation claims barred from employment applications.**

Rep. Gwen Welshimer, appeared as a supporter of **HB 2219.** The bill's purpose is to clear up whether you can be asked on an employment application, "Have you ever had a Workers Compensation claim?" (See Attachment 1)

Barbara Huffman, Legislative Liaison, Commission of Disability Concerns, waived giving testimony to Barbara Girard. However, she will work with Ms. Girard, Rep. Welshimer, and Martha Gabehart to work out language to amend **HB 2219**.

Barbara Girard, Staff Attorney, Kansas Human Rights Commission (KHRC), gave the committee some background on the 1991 Disability Amendments to Kansas Act Against Discrimination (KAAD). Her testimony contains a detailed explanation of how the law is interpreted by KHRC. (See Attachment 2)

John Ostrowski, AFL/CIO, appeared as a proponent of the bill. The AFL/CIO believes that asking potential employees on an employment application questions relating to previous workers' compensation claims serves no valid purpose, violates the Kansas Act Against Discrimination, as well as the Americans with Disabilities Act (ADA), and leads to litigation. (See Attachment 3)

L. J. Leatherman, Kansas Trial Lawyers Association (KTLA), testified in support of the bill which clarifies the prohibition of the Americans with Disabilities Act, in employment applications. (See Attachment 4)

Terry Leatherman, KCCI, appeared as an opponent of **HB 2219**. He explained to the committee why the Kansas Chamber opposes the bill. He states that there was a time when a workers compensation question was a standard inclusion on all job application forms. They are becoming rare because asking a blanket question on workers compensation exposed an employer to a violation of the ADA. (See Attachment 5)

Pat Bush, President, Kansas Self Insurers Association, appeared as an opponent of the bill. The association feels there is already protection in place for job applicants from answering questions about previous workers compensation claims. He stated that inquiries are made of job applicants only after an offer of employment is made and the information is used to place the applicant in a safe work environment. (See Attachment 6)

MINUTES OF THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE, Room 521-S Statehouse, at 9:12 a.m. on February 17, 1999.

Phil Harness, Director of the Division of Workers Compensation, Kansas Department of Human Resources, appeared to make a few comments about the bill. He pointed out several ambiguities and possible statutory conflicts with the proposed amending language of **HB 2219**. (See Attachment 7)

No others were present to testify for or against the bill and Chairman Lane closed the hearing on **HB 2219**.

**Final Action on: HB 2209 - Wage garnishment, assignment of account, benefit entitlement restriction.**

Rep. Ruff made a motion to pass out **HB 2209** favorably and to place it on the Consent Calendar. Rep. Grant seconded the motion. The motion carried.

The meeting was adjourned at 10:14 a.m. The next scheduled meeting will be on February 18, 1999.

# HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
# GUEST LIST

DATE February 17, 1999

| NAME | REPRESENTING |
|---|---|
| DICK CANTEK | KSIA |
| Pat Bush | Western Resources |
| David Shufelt | Div. Work Comp - KDHR |
| Richard Ellmaker | " " " " |
| Mike Hollar | Ks Human Rights Comm |
| RANDY VALDEZ | KAIA |
| BARBARA GIRARD | KHRC |
| JS Leat Kerman | KTLA |
| Allen Bradwell | KTLA |
| John Ostrowski | KS AFL-CIO |
| Terry Bon | Dept of Adm |
| Phil Harness | KDHR-Div. of Work. Comp. |
| Sharon Huffman | KCDC |
| Marsha Gabehart | KCDC |
| Terry Leatherman | KCCI |
| Reginald Puddle | Puddle & Associates |
| Jim McHuff | KS AFL-CIO |
| | |
| | |

STATE OF KANSAS

GWEN WELSHIMER
REPRESENTATIVE, EIGHTY-EIGHTH DISTRICT
SEDGWICK COUNTY
6103 CASTLE
WICHITA, KANSAS 67218
316-685-1930
DURING SESSION
LEGISLATIVE HOTLINE
1-800-432-3924
OFF: 785-296-7687

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: GOVERNMENTAL ORGANIZATION
& ELECTIONS, RANKING MINORITY MEMBER
BUSINESS, COMMERCE & LABOR
KANSAS 2000
LOCAL GOVERNMENT
REP., NATIONAL CONFERENCE OF
STATE LEGISLATURES

February 15, 1999

To: Al Lane, Chairman and Committee Members,
Business, Commerce and Labor

Subject: HB 2219

HB 2219 is a technical cleanup bill. Currently, I believe Kansas law now prohibits an employer from asking a prospective employee about medical problems they may have. However, it is unclear as to whether the question may be asked on an employment application, "Have you ever had a Workers Compensation claim?"

The purpose of HB 2219 is to clear this up and reaffirm current law.

Gwen Welshimer

HOUSE BUSINESS, COMMERCE & LABOR COMM.
2-17-99
Attachment 1

**BILL GRAVES, GOVERNOR**
STATE OF KANSAS

**KANSAS HUMAN RIGHTS COMMISSION**
LANDON STATE OFFICE BLDG. - 8TH FLOOR
900 S.W. JACKSON ST. - SUITE 851-SOUTH
TOPEKA, KANSAS 66612-1258
(785) 296-3206



# WRITTEN TESTIMONY FOR HB 2219 BASED ON THE ORAL PRESENTATION TO THE HOUSE COMMITTEE ON BUSINESS, COMMERCE AND LABOR

**on February 17, 1999**

**by *BARBARA GIRARD, KHRC Staff Attorney***

I. Background on 1991 Disability Amendments to Kansas Act Against Discrimination (KAAD) and accompanying 1992 Kansas Administrative Regulations (K.A.R.'s)

A. The Americans with Disabilities Act (ADA) was passed by Congress in 1990 and its employment provisions (Title I) were to become effective on July 26, 1992 for employers with 25 or more employees and for employers with 15 or more employees on July 26, 1994.

B. KAAD amendments became effective July 1, 1991 for employers in Kansas with 4 or more employees. See K.S.A. 44-1009 (8). These amendments were based on the ADA.

1. Accompanying K.A.R.'s adopted in April, 1992. See Article 34, "Guidelines on Discrimination Because of Disability." K.A.R. 21-34 -1 through K.A.R. 21-34-21.

2. These K.A.R.'s were based on federal C.F.R.'s or the regulations adopted for ADA, which is enforced by the Equal Employment Opportunity Commission (EEOC). See 29 CFR 1630.13 and 29 CFR 1630.14. The EEOC issues Guidances regarding the interpretation of the ADA and its regulations..

3. The Kansas Human Rights Commission (KHRC) enforces KAAD and the K.A.R.'s under KAAD. EEOC guidelines and interpretation assist the KHRC in its enforcement of disability discrimination issues.

II. Proposed 1999 Amendment of K.S.A. 44-1009 (8) as found in HB 2219: It shall be an unlawful employment practice to "ask an applicant if the applicant has ever filed a workers compensation claim."

**Issues to Consider:**

A. It appears that HB 2219 addresses the first stage of hiring under KAAD and the ADA: the application stage, and inquiries at that stage about the filing of workers compensation claims.

1. The KHRC follows applicable K.A.R.'s and the EEOC's ADA Enforcement Guidance Preemployment Disability-Related Questions and Medical Examinations (10/10/95)(EEOC Preemployment Guidance) to interpret preemployment questioning of applicants about their workers compensation history.

2. At the application stage an employer cannot ask any disability-related questions or require any medical examinations to "ensure that an applicant's possible hidden disability (including a prior history of disability) is not considered before the employer evaluates an applicant's non-medical qualification." EEOC Preemployment Guidance, at p. 2. This includes situations where an employer does not even intend to look at the answers or results until the post-offer stage.

A disability-related question is one that is "likely to elicit information about a disability." EEOC Preemployment Guidance, at p. 4.

3. EEOC Enforcement Guidance is not binding law, but as a detailed analysis of the relevant ADA provisions, courts and administrative agencies such as the KHRC use it to aid in their interpretation of the ADA.

B. Kansas Administrative Regulations already address this issue in broader, and much less narrow terms, which are more consistent with the statutory scheme of KAAD and ADA. The following represents pertinent K.A.R.'s:

1. **K.A.R. 21-34-2. Medical examinations and inquiries; general prohibition.** The prohibition against discrimination as referred to in K.S.A. 44-1009(a)(1) and K.S.A. 44-1009(a)(8) shall include medical examinations and inquiries. See Also 29 C.F.R 1630.14.

a. **K.A.R. 21-34-8. Drug Testing.** (a) A test to determine the illegal use of drugs shall not considered a medical examination.

b. **K.A.R. 21-34-10. Information from a drug test.** Any information regarding the medical condition or history of any employee or applicant obtained from a drug test, except information regarding illegal use of drugs, is subject to the requirements of subsections (b) and ( c) of 21-34-4.

**Questions about work-related injuries or workers compensation history cannot be asked of applicants because they are considered a medical inquiry and/or designed to elicit information about the person's disability status. EEOC Preemployment Guidance, at p. 10.**

2. **K.A.R. 21-34-3. Preemployment medical examinations and inquiries.** (a) Prohibited examination or inquiry. A covered entity shall not conduct a medical examination or make inquiries of a **job applicant** as to whether **the applicant** is an individual with a disability or as to the nature or severity of **the applicant's disability**, except as provided in 21-34-4. See Also 29 C.F.R. 1630.14(a).

(b) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of **an applicant** to perform job-related functions.

3. **K.A.R. 21-34-4. Employment entrance examinations and queries; exception.** A covered entity may require a medical examination, inquiry, or both after an offer of employment has been made to a job applicant and prior to the commencement of employment duties of the applicant, and may condition an offer of employment on the results of the examination, inquiry, or both if:

(a) All entering employees in the same job category are subjected to an examination, inquiry, or both regardless of disability;

(b) information obtained regarding the medical condition or history of the applicant is collected and maintained in separate forms and in separate medical files and is treated as a confidential medical record, except that:

(1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(3) government officials investigating compliance with this act shall be provided relevant information on request; and

( c) the results of such physical examination, inquiry, or both are used only in accordance with these regulations.

4. **K.A.R. 21-34-5. Prohibited medical examinations and inquiries.** A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

5. **K.A.R. 21-34-6. Acceptable medical examinations and inquiries.** (a) A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(b) Information obtained under subsection (a) regarding the medical condition or history of any employee is subject to the requirements of subsections (b) and ( c) of 21-34-4.

C. **ADA and KAAD THREE STAGE HIRING/EMPLOYMENT PROCESS**

| APPLICATION/PRE OFFER | CONDITIONAL OFFER | EMPLOYMENT |
|---|---|---|
| No medical exams/inquiries, but drug tests are not medical exams | All disability-related questions and medical exams, as long as all entering employees in the job category are asked the questions or given the examination | Disability-related questions allowed if job-related and consistent with business necessity |
| No disability-related questions but can ask applicant about his/her ability to perform job-related functions | Offer is conditioned on collecting more information before hiring, but all requests for such information must be job-related | Fitness for Duty Examinations |
| Employers may state physical requirements of a job and ask applicant if he/she can satisfy the requirements and essential functions | Employer is not entitled to medical records that are unnecessary to the request for reasonable accommodation | |
| No questioning about work-related injuries or workers comp. history. because this is a disability-related question. | | |
| Employers may ask applicant if he/she can perform job functions "with or without reasonable accommodation." | | |

D. Three definitions of disability

1. Person has a mental or physical impairment which substantially limits a major life activity; and/or

2. Person has a record of having such an impairment, and/or

3. Person is regarded as having such an impairment.

E. History in Kansas of Workers Compensation law and KAAD/ADA

Workers Compensation Second Injury Fund allowed some questioning about workers compensation, at least at conditional offer stage. However, after 1993 amendment to Kansas workers compensation law, the Fund was phased out and the justification for such questions was more difficult. Questions about workers compensation history would arise at conditional offer stage and probably in the context of whether the prospective employee needed a reasonable accommodation.

Workers compensation law covered physical work related injuries in the course and scope of employment, but may only cover mental impairments if they arise out of a physical work related injury.

F. ADA case law has not been favorable to employees who claim that they have disabilities based on their workers compensation history or based on a current work related injury for some of the following reasons:

1. Condition did not substantially limit the major life activity of working (prohibited from working a particular job, but not a class of jobs) ; and/or

2. Condition was temporary.

3. Applicant or conditional offeree was substantially limited and could not perform the essential functions of the job with or without a reasonable accommodation.

G. Workers compensation claims can be denied, so just the filing of the claim itself does not establish a valid work related injury incurred in the course and scope of one's employment. There are cases of fraudulent workers compensation claims, so the mere filing of such a claim does not begin to establish a disability or a history of a disability.

H. If KAAD is interpreted as the ADA has been by the courts, based on the law and accompanying regulations, then all work related injury inquiries are banned, not just questions about the filing of a workers compensation claim. HB 2219 could provide an argument to employers that they could ask about work related injuries for which applicant or prospective employee never filed a workers compensation claim.

I. What if the applicant is asked whether he/she filed a workers compensation claim, but employer proceeds to hire the person? HB 2219 would allow an employee to charge the employer with discrimination, even after he/she was hired? This would be *per se* violation of KAAD, and not based on the employer's use of such information in a discriminatory fashion. A person could file a charge on this basis and trigger the investigative process at the KHRC.

What if the application itself does not list any questions about a person's workers compensation history or ask any disability-related questions, but an applicant claims that he/she was asked orally, and not in writing about his/her workers compensation history? Then you have a he said/she said situation which will require a more lengthy investigation which may be inconclusive in the final analysis, while significant administrative resources have been expended.

J. HB 2219 would amend KAAD by adding a new category of protected class: individuals who had filed a workers compensation claim and such individuals would have a claim of discrimination and/or retaliation based on their status as a past worker who just filed a workers compensation claim.

New amendment does not require an adverse action such as a refusal to hire.

K. It would be beneficial to define more clearly the intent of HB 2219 and then ask if KAAD or its accompanying regulations already address or cover the intent of HB 2219. If not, then HB 2219 should be reworded to reflect the intent. Any rewording of language of amended in Hb 2219 should tract the language of the regulations already in existence.

L. The KHRC takes no position on HB 2219, other than to provide the Legislature with information and input regarding amendment. The KHRC Intake Department and its personnel who handled its educational functions, have not received many inquiries about workers compensation questions at the application stage.

M. Courts have stated that the spirit and intent of the ADA is that an individualized inquiry be made under a totality of circumstances and case by case bases. Courts have refused to apply a *per se* approach to ADA cases.

N. Language of HB 2219 Amendment:

Applicant is asked if ever *filed* a workers compensation claim, and not asked if ever had a work related injury, so this amendment focusing only on just one type of preemployment inquiry. However, a preemployment inquiry is much broader.

O. Retaliation outside KAAD based on the public policy that an employee should not be retaliated against based on his/her having filing or asserted a workers compensation claim.

Under Kansas law a person can sue in tort for retaliatory discharge and/or retaliatory demotion in a civil lawsuit. The person does not have to go through an administrative process first and his/her damages are not capped.

The first tort case and a subsequent line of cases alleging retaliatory discharge deal with the issue of an employee who exercised his/her right to assert/file, etc. a workers compensation claim. Therefore, under Kansas law, there is separate body of law which addresses retaliation arising out of a workers compensation claim.

Any attempt to link retaliation and a workers compensation claim with a retaliatory hiring practice may be better left to this body of law, which requires an actual adverse action by the employer such as failure to hire before the employee can assert a claim. HB 2219 does not require an adverse employment action.

P. KAAD Retaliation

Provision for retaliation under KAAD is based on a complainant's having exercised his/her rights as covered by KAAD, such as filing a complaint of discrimination under KAAD. KAAD already covers violations based on a failure to hire because of one of the protected categories, which includes disability.

Q. Proposal To Address Issue of Concern in HB 2219: Education, not amendment

KAAD.216

**TESTIMONY OF KANSAS AFL-CIO**
**HB 2219**
**February 17, 1999**
**JOHN M. OSTROWSKI**

The Kansas AFL-CIO strongly **supports** the provisions of HB 2219. It is believed that asking potential employees on an employment application questions relating to previous workers' compensation claims serves no valid purpose, violates the Kansas Act Against Discrimination, as well as the ADA, and leads to litigation.

First and foremost, it is readily apparent that under current law the sole purpose of asking a job applicant about "previous workers' compensation claims" is:

a) to "screen out" perceived undesirable employees; or

b) to lay a trap for employees who are hired.

It is well known that the business community considers employees who have had one or more workers' compensation claims a serious risk. Employers, given the choice, will generally hire employees who have not filed claims against previous employers.[1] No matter how minor, or insignificant, "having had claims" is a black mark against the employee. An employee's explanation about the seriousness of the injury, or that the accidents were unpreventable (or caused by the employer's negligence), will generally fall on deaf ears.

Thus, faced with this question on an employment application, they will often deny the existence of any claims. To the employee, it is considered at the time a "no risk" proposition. They need the job. If they disclose the claims, they will not be hired. (Otherwise, why would the potential employer be asking the question!?) If they do not disclose the claim, hopefully the employer will not check, and they will get the job. Little do they realize that after months or years of service, the employer can still exercise a right of termination over this question should some conflict arise within the workplace. This can be used to cut

HOUSE BUSINESS, COMMERCE & LABOR COMM.
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Attachment 3

[1] It is interesting to recall that two years ago when this Committee was considering closing medical records of the Workers Compensation Division, the Committee was shown multiple ads from nationwide companies who warned employers not to hire anyone until their company performed a "background search." A major promise of those companies was to search out, on a nationwide basis, employees who had filed workers' compensation claims in the past.

off benefits if they are wrongfully terminated,[2] or can even be used to deny them unemployment benefits.[3]

Secondly, the question, if asked on an employment application, most likely violates the KADA and the ADA. It is well known that employers cannot ask health related questions until a conditional offer of employment has been made. This question merely skirts the issue. It would be similar to asking have you ever been in a car accident, have you ever hurt yourself hunting or water skiing. In reality, these are health related questions over which the employer can be sued. Passage of HB 2219 will make it clear to employers that they cannot ask these questions, thereby reducing their potential liability. It will also avoid litigation over whether or not this question can be asked, as some employer is likely to challenge this in court.

Nor can it be said that the question serves a useful purpose for an employer. Once the conditional offer of employment is made, the employer is then free to inquire as to previous claims. If the employee has previous claims which the employer seeks to accommodate, all of this can be handled as a health issue. Employers are familiar with the "ground rules" under the KADA/ADA for making "conditional offers of employment."

HB 2219 represents good legislation. Asking employees about previous workers' compensation claims serves no valid purpose on an employment application. The passage of this bill into law would avoid potential litigation by clarifying what is permissible and prohibited under the KADA/ADA.

Thank you for this opportunity to appear on behalf of the Kansas AFL-CIO on this issue.

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[2] This is the so-called "after acquired evidence rule." The theory is that the employer would have fired the individual if they had known about the false employment application, even though they never got around to checking the application until <u>after</u> they terminated the employee for an improper or retaliatory reason.

[3] In *Pouncil v. Kansas Employment Security Board, et al.*, Kansas Court of Appeals Case No. 78,601 (decided 12/18/98), claimant was denied unemployment because she denied previous workers' compensation claims. Judge Royce in her dissent stated the following: "While Pouncil did report that she had sustained a partial amputation of a finger, it is true that she failed to indicate on the Grede questionnaire that she had received compensation benefits in connection with that injury. What is not clear, however, is how her receipt of benefits would be material to the employer. To borrow a phrase, once Grede knew about the partial amputation, what independent significance does the fact that Pouncil received compensation for that injury have for Grede?"

House Business Commerce & Labor Committee
Tuesday, February 17, 1999

Testimony of LJ Leatherman
Kansas Trial Lawyers Association
House Bill 2219

Thank you for this opportunity to testify before you this morning. I am LJ Leatherman and I am here representing the Kansas Trial Lawyers Association. KTLA is pleased to testify in support of HB 2219 which clarifies the prohibition of the Americans with Disabilities Act, in employment applications.

The ADA prohibits the use of medical inquires by employers regarding confidential medical records. Some employers believe that this does not cover prior workers compensation claims. The EEOC has clarified this and addresses it in the ADA *Title I Technical Assistance Manual, II-11*.

The simple analysis, is that the ADA is intended to not only protect the individual with a disability, but also the individual who is perceived as being disabled. (42 U.S.C. 12101). 29 CFR 1630.2 M. I have attached to my testimony, a copy of the relevant portions of Ruth Colker's *The Law of Disability Discrimination Handbook.* The book addresses why an employer should not ask about prior medical treatment. The only appropriate questions for employers to ask a worker is what can you do.

This change to K.S.A. 44-1009, Mr. Chairman, would help employees avoid the situation of placing her/him in the uncomfortable position of either admitting a prior workers compensation claim, or refusing to provide information. KTLA encourages the committee to support the bill. Thank you.

HOUSE BUSINESS, COMMERCE & LABOR COMM.
2-17-99
Attachment 4

# THE LAW OF DISABILITY DISCRIMINATION HANDBOOK

# STATUTES AND REGULATORY GUIDANCE

SECOND EDITION

RUTH COLKER
BONNIE POITRAS TUCKER

4-2

returns to his heavy labor job, he will severely injure his back and be totally incapacitated. The employer regards the employee as having an impairment that disqualifies him from a class of jobs (heavy labor) and therefore as substantially limited in the major life activity of working. The employee has a disability as defined by the ADA.

## QUESTIONS AND EXAMINATIONS

The Commission has provided general guidance on disability-related questions and medical examinations in ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, 8 FEP Manual (BNA) 405:7191 (1995). The guidance provided here pertains particularly to disability-related questions and medical examinations related to workers' compensation and occupational injuries.

4. When may an employer ask questions about an applicant's prior workers' compensation claims or occupational injuries?

An employer may ask questions about an applicant's prior workers' compensation claims or occupational injuries after it has made a conditional offer of employment, but before employment has begun, as long as it asks the same questions of all entering employees in the same job category.

5. When may an employer require a medical examination of an applicant to obtain information about the existence or nature of prior occupational injuries?

An employer may require a medical examination to obtain information about the existence or nature of an applicant's prior occupational injuries, after it has made a conditional offer of employment, but before employment has begun, as long as it requires all entering employees in the same job category to have a medical examination. Where an employer has already obtained basic medical information from all entering employees in a job category, it may require specific individuals to have follow-up medical examinations only if they are medically related to the previously obtained medical information.

6. Before making a conditional offer of employment, may an employer obtain information about an applicant's prior workers' compensation claims or occupational injuries from third parties, such as former employers, state workers' compensation offices, or a service that provides workers' compensation information?

No. At the pre-offer stage, as at any other time, an employer may not obtain from third parties any information that it could not lawfully obtain directly from the applicant.

7. May an employer ask disability-related questions or require a medical examination of an employee either at the time s/he experiences an occupational injury or when s/he seeks to return to the job following such an injury?

Yes, in both instances, provided that the disability-related questions or medical examinations are job-related and consistent with business necessity. This requirement is met where an employer reasonably believes that the occupational injury will impair the employee's ability to perform essential job functions or raises legitimate concerns about direct threat. However, the questions and examinations must not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.[7]

8. May an employer ask disability-related questions or require a medical examination of an employee with an occupational injury in order to ascertain the extent of its workers' compensation liability?

Yes. The ADA does not prohibit an employer or its agent from asking disability-related questions or requiring medical examinations that are

[7] If, as a result of an examination or inquiry, an employer refuses to return an employee to work because of a disability, the reason for doing so must be job-related and consistent with business necessity. See 29 C.F.R. § 1630.10 and Appendix (1995). Where safety considerations are implicated, the employer can only refuse to return the employee to work where his/her employment in the position would pose a "direct threat." Direct threat is discussed in questions 11, 12, 14, and 15, below.

necessary to ascertain the extent of its workers' compensation liability.[8]

However, the questions and examinations must be consistent with the state law's intended purpose of determining an employee's eligibility for workers' compensation benefits. An employer may not use an employee's occupational injury as an opportunity to ask far-ranging disability-related questions or to require unrelated medical examinations. Examinations and questions must be limited in scope to the specific occupational injury and its impact on the individual and may not be required more often than is necessary to determine an individual's initial or continued eligibility for workers' compensation benefits. Excessive questioning or imposition of medical examinations may constitute disability-based harassment which is prohibited by the ADA.

9. If an employee with a disability-related occupational injury requests a reasonable accommodation, may the employer ask for documentation of his/her disability?

Yes. If an employee with a disability-related occupational injury[9] requests reasonable accommodation and the need for accommodation is not obvious, the employer may require reasonable documentation of the employee's entitlement to reasonable accommodation. While the employer may require documentation showing that the employee has a covered disability and stating his/her functional limitations, it is not entitled to medical records that are unnecessary to the request for reasonable accommodation.

## CONFIDENTIALITY OF MEDICAL INFORMATION

10. Do the ADA's confidentiality requirements apply to medical information regarding an applicant's or employee's occupational injury or workers' compensation claim?

Yes. Medical information regarding an applicant's or employee's occupational injury or workers' compensation claim must be collected and maintained on separate forms and kept in a separate medical file along with other information required to be kept confidential under the ADA. An employer must keep medical information confidential even if someone is no longer an applicant or an employee.

The ADA allows disclosure of this information only in the following circumstances:

* supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;[10]
* first aid and safety personnel may be told, when appropriate, if the disability might require emergency treatment;[11]
* government officials investigating compliance with the ADA must be given relevant information on request;[12]
* employers may give information to state workers' compensation offices, state second injury funds, and workers' compensation insurance carriers in accordance with state workers' compensation laws;[13] and
* employers may use the information for insurance purposes.[14]

---

[8] This is because the ADA does not invalidate the procedures of any federal, state, or local law "that provides greater or equal protection for the rights of individuals with disabilities" than is provided by the ADA. 42 U.S.C. § 12201(b) (1994). Those portions of state workers' compensation laws that protect the rights of individuals to be compensated for work-related injury provide such greater or equal protection. The same is true for the analogous portions of the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101-8193 (1994).

[9] An individual with a disability may have an occupational injury that has nothing to do with the disability. The term "disability-related occupational injury" is used herein when the ADA and workers' compensation statutes apply simultaneously, *i.e.*, where there is a connection between an occupational injury and a disability as defined by the ADA.

[10] 42 U.S.C. § 12112(d)(3)(B)(i) (1994); 29 C.F.R. § 1630.14(b)(1)(i), (c)(1)(i) (1995).

[11] 42 U.S.C. § 12112(d)(3)(B)(ii); 29 C.F.R. § 1630.14(b)(1)(ii), (c)(1)(ii).

[12] 42 U.S.C. § 12112(d)(3)(B)(iii); 29 C.F.R. § 1630.14(b)(1)(iii), (c)(1)(iii).

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

[14] See 42 U.S.C. § 12201(c); 29 C.F.R. pt. 1630 app. §§ 1630.14(b) and 1630.16(f). 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.

## HIRING DECISIONS

11. May an employer refuse to hire a person with a disability simply because it assumes, correctly or incorrectly, that s/he poses some increased risk of occupational injury and increased workers' compensation costs?

No, unless the employer can show that employment of the person in the position poses a "direct threat." In enacting the ADA, Congress sought to address stereotypes regarding disability, including assumptions about workers' compensation costs.[15] Where an employer refuses to hire a person because it assumes, correctly or incorrectly, that, because of a disability, s/he poses merely some increased risk of occupational injury (and, therefore, increased workers' compensation costs), the employer discriminates against that person on the basis of disability. The employer can refuse to hire the person only if it can show that his/her employment in the position poses a "direct threat." This means that an employer may not "err on the side of safety" simply because of a potential health or safety risk. Rather, the employer must demonstrate that the risk rises to the level of a direct threat.

"Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.[16] The determination that a direct threat exists must be the result of a fact-based, individualized inquiry that takes into account the specific circumstances of the individual with a disability.

In determining whether employment of a person in a particular position poses a direct threat, the factors to be considered are:

* the duration of the risk;
* the nature and severity of the potential harm;
* the likelihood that the potential harm will occur; and
* the imminence of the potential harm.[17]

Some state health or safety laws may permit or require an employer to exclude a person with a disability from employment in cases where the ADA would not permit exclusion because employment of the person in the position does not pose a direct threat. Because the ADA supersedes such state laws, an employer may not defend its exclusion of a person with a disability on the basis of such a law.

12. May an employer refuse to hire a person with a disability simply because s/he sustained a prior occupational injury?

No. The mere fact that a person with a disability experienced an occupational injury in the past does not, by itself, establish that his/her current employment in the position in question poses a direct threat, i.e., a significant risk of substantial harm that cannot be lowered or eliminated by a reasonable accommodation. However, evidence about a person's prior occupational injury, in some circumstances, may be relevant to the direct threat analysis discussed in question 11, above.

An investigator should consider the following factors regarding a prior occupational injury in applying the direct threat analysis set forth in question 11, above:

* whether the prior injury is related to the person's disability (e.g., if employees without disabilities in the person's prior job had similar injuries, this may indicate that the injury is not related to the disability and, thus, is irrelevant to the direct threat inquiry);
* the circumstances surrounding the prior injury (e.g., the actions of others in the workplace or the lack of appropriate safety devices or procedures may have caused or contributed to the injury);
* the similarities and differences between the position in question and the position in which the prior injury occurred (e.g., the prior position may have involved hazards not present in the position under consideration);

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15 H.R. Rep. No. 485 pt. 3, 101st Cong., 2d Sess. 31 (1990).

16 29 C.F.R. § 1630.2(r) (1995).

17 "Direct threat" is discussed more fully in the Commission's ADA regulations and interpretive guidance, 29 C.F.R. § 1630.2(r) and Appendix (1995), and in the Technical Assistance Manual at 4.5, 8 FEP Manual (BNA) 405:7022-405:7026 (1992).

# LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry
web: www.kansaschamber.org
835 SW Topeka Blvd. Topeka, KS 66612-1671 (785) 357-6321 FAX (785) 357-4732 e-mail: kcci@kansaschamber.org

HB 2219

February 17, 1999

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Business, Commerce and Labor

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for this opportunity to explain why the Kansas Chamber opposes HB 2219, which proposes to make it an unlawful employment practice for an employer to ask a job applicant if the applicant has ever filed a workers compensation claim.

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

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 47% of KCCI's members having less than 25 employees, and 77% having less than 100 employees. KCCI receives no government funding.

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

First and foremost, the Kansas Chamber respectfully suggests that the law change is not needed. There was a time when a workers compensation history question was a standard inclusion

1 b application forms. However, on the advice of labor law attorneys, they are becor a
The reason for the change is asking a blanket question on workers compensation exposes an employer to a violation of the Americans With Disabilities Act (ADA).

Under the ADA, an employer is required to view an applicant without regard to any disability that applicant might have. The only time disability may be considered by an employer is determining the applicant's ability to perform the essential functions of an available job. Even then, the employer must explore reasonable accommodations they could make to permit the applicant to perform the work. The personnel manager who asks about workers compensation history would be exploring an applicant's disabilities, without consideration of the essential functions of a job.

A second objection to HB 2219 is it might close the door on legitimate employer inquiries about workers compensation. An employer's pursuit of information on an applicant's ability to perform the essential functions of a job could lead to discussions of workers compensation history.

An employer's desire for information leads to a third objection to HB 2219. From KCCI's perspective, the asking of the question regarding workers compensation is not the problem. The problem is what an employer does with the information they uncover. If an employer learns about an applicant's bad back, for instance, hires the individual and accommodates the individual, then the process has worked. If the employer uses the information to rule out an applicant, they have violated the ADA.

A few years ago, the Kansas Legislature, acting on a recommendation from the Kansas Workers Compensation Advisory Council, amended the workers compensation law to protect the privacy of workers compensation claims and medical information. Coupled with the ADA, there are adequate safeguards. As a result, the Kansas Chamber would urge the Committee to reject HB 2219.

Thank you for this opportunity to comment on the bill before you today. I would be happy to answer any questions.

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Testimony On Behalf Of
Kansas Self - Insurers Association
In Opposition Of House Bill No. 2219

Chairman Lane, members of the committee, good morning. My name is Patrick Bush. I am the Senior Manager of Safety & Workers Compensation for Western Resources, Inc. I am here before you today as President of the Kansas Self - Insurers Association and would like to take this opportunity to express the Association's opposition to House Bill No. 2219.

As proposed, House Bill No. 2219 would not allow an employer to inquire of a job applicant if he/she has ever filed a workers compensation claim. I am assuming this proposed language is aimed at preventing discrimination against an applicant for having filed previous workers compensation claims. If this is the case, there is already protection in place for such applicants. The Americans With Disabilities Law prohibits such acts against anyone with a disability and further requires any inquiries about medical conditions to made post job offer. Currently employers cannot inquire about previous workers compensation information without a signed consent form from the employee or applicant. Again, this inquiry is made of job applicants only after an offer of employment is made and in most cases,

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the inquiry is made by a medical professional during a post offer medical history questionnaire or exam.

Members of this association often use information obtained from medical exams and questionnaires to assist them in placing an applicant in a safe work environment. For instance, if it is learned that an applicant has a prior history of carpal tunnel syndrome, an employer can utilize this information to make adjustments to the work area to prevent or at least reduce the chances of aggravating the preexisting conditions. This results in a win - win situation for the employer and the employee.

As a representative of the Kansas Self - Insurers Association, I thank you for allowing me this opportunity to state our opposition to House Bill No. 2219.

Thank you!

Patrick Bush, President
Kansas Self - Insurers Association

**TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE**

**By Philip S. Harness, Director of Workers Compensation**
**Wednesday, February 17, 1999 - On House Bill 2219**

From an administrative standpoint, the Director of the Division of Workers Compensation would point out the following ambiguities and possible statutory conflicts with the proposed amending language of 1999 House Bill No. 2219:

1. **Conflicts with K.S.A. 44-550b** - First, K.S.A. 44-550b allows the Division of Workers Compensation to grant access to the workers compensation docket files, which consist of litigated cases and settled cases which are given a docket number. While the proposed statute would preclude requesting such information from a job applicant (directly), the information is available from the Division of Workers Compensation (indirectly).

   Second, K.S.A. 44-550b allows the disclosure of accident reports upon a written release, signed by the worker, after a conditional offer of employment has been made. However, the proposed statutory amendment would preclude the employer from even asking (for a release); therefore, how will the employer ever find out about accident reports? The request for a written release for such information means that the employer has asked.

2. **What does "if the applicant has ever filed a workers compensation claim" mean?** There are two hurdles before a person may litigate a workers compensation claim (litigating more commonly known as filing an application for benefits with the Director). The first is a notice of the injury by the employee to the employer within ten (10) days (extended to 75 days for just cause); the second is the K.S.A. 44-520a service upon the employer of a written claim within 200 days.

   It is unclear whether the bill attempts to address the "written claim upon the employer" or the "application for benefits filed before the Director." The K.S.A. 44-520a written claim upon the employer is not filed with the Division; the first thing filed with the Division is an application for hearing, which triggers the opening of a docket file and docket files are open records.

   Outside of the context of this bill, dealing with job applications, the business reasons for having the workers compensation dockets open are so that employers may learn about and calculate financial credits for preexisting impairments under K.S.A. 44-501; learn about and calculate credits for overlapping payments pursuant to K.S.A. 44-510a; and developing the record upon appeal for cases that are appealed to the Kansas Court of Appeals and/or the Kansas Supreme Court.

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