Approved: February 5, 1999
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 4, 1999 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: Lynne Holt, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Senator Anthony Hensley
Senator Marge Petty
Paul K. Wilson, Executive Director, Kansas Association of Public Employees (KAPE)
Robert North, Attorney, Department of Administration
Terry Leatherman, Kansas Chamber of Commerce and Industry
Ron Wilson, Kansas Bar Association
Melissa Ness, Kansas Children's Service League

Others attending: See attached list

SB 114 - Kansas Whistleblower Act Amended to Include Contractors of State Agencies

Senator Marge Petty, co-sponsor, testified that **SB 114**, extends to employees of public contractors, certain protections under the Whistleblower Act. Senator Petty stated it is critical to provide employees empowerment and rights of action.

Senator Anthony Hensley, co-sponsor, testified in support of **SB 114**, a bill which extends the provisions of the Kansas whistleblower act to employees of "public contractors" that have contracted with the State of Kansas. The Whistleblower Act provides certain rights and protections to employees who work for state government who go above and beyond their duty to report information to state legislators or to certain state agencies. The "foster care program" and privatization of other state functions provided the impetus for the provisions contained in **SB 114**. (Attachment 1)

Paul K. Wilson, Executive Director, KAPE, appeared in support of **SB 114**, stating state employees in a wide variety of classifications currently are protected by the Whistleblower Act. KAPE conducted a survey of individuals providing privatized public services for SRS in the "foster care program" and found the majority of those who responded expressed a fear of retaliation if the responding employee was ever identified. Passage of this legislation will provide a few employees reassurance to testify against their employers. (Attachment 2)

Mr. Wilson, in responding to a question from Senator Brownlee, stated KAPE received approximately 700 surveys, and a majority expressed fear of retaliation. The survey was initiated as a result of the number of telephone inquiries received by KAPE regarding employee concerns about the foster care program. Mr. Wilson further responded that KAPE had not previously initiated such a survey.

Robert North, Attorney, Department of Administration, stated the Governor's Office and the Department of Administration are neutral on **SB 114**. Protections are presently provided by common law, and remedies are in place. Mr. North stated **SB 114** creates a new cause of action for employees.

Terry Leatherman, Executive Director, Kansas Chamber of Commerce and Industry (KCCI) testified in opposition to **SB 114**, stating workers who work for a business that has contracted to do work for the state have protections through common law, as Kansas is an employment-at-will state. Public policy exception prohibits firing an employee for exercising a recognized legal right or duty .

Employers who are charged with a retaliatory discharge lawsuit face the possibility of paying the discharged worker lost pay as well as reinstatement of the worker and the potential of punitive damages. Mr. Leatherman stated there is a difference in the application of **SB 114**, inasmuch as state employees who have a grievance take such grievance to the civil service board which can then be appealed to the district court. The public contractor employee takes a like grievance directly to district court. KCCI questions the need for a new layer of legal protection as provided in **SB 114**, which grants legislative members and state auditing agencies the authority to question public contractor employees about matters of public concern. (Attachment 3)

Ron Smith, Kansas Bar Association (KBA), testified in opposition to **SB 114**, as the bill liberalizes the wrongful discharge law. There is ample wrongful discharge common law to provide protection for public contractor employees. Mr. Smith stated public policy requires reporting of infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare; and the whistle-blowing must have been done out of a good faith concern over the wrongful activity. The KBA submitted proposed amendments that would codify common law. The KBA also questions the requirement that the losing party of an action pays the attorney fees for the winning party, as it could be expensive for an employee who does not prevail. (Attachment 4)

Melissa Ness, Kansas Children's Service League, testified the proposed legislation will not improve the care of foster children, to whom **SB 114** is addressed. There is adequate protection for employees in common law, and the law does not need to be extended.

Bob Totten, Public Affairs Director for the Kansas Contractors Association, submitted written testimony in opposition to **SB 114**. (Attachment 5)

The Hearing was concluded

Upon motion by Senator Donovan, seconded by Senator Umbarger, the Minutes of the February 3, 1999 Meeting were unanimously approved.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for February 5, 1999.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: February 4, 1999

NAME	REPRESENTING
Jon Smith	Ks Bankers Assn
Rob Hodges	KTIA
Carl Dickinson	AARP
Bob North	DoA
Dorothy Tenney	SRS
Paul Wilson	KAPE
Martha Gabehart	KDHR/KCDC
Kraig Knowlton	DPS
Melissa L Ness	Ks. Children's Service League
David Scott	Ks Families for Kids
Duane Rechard	Kearney Law Office
Susan Duran	Issues Management Group
Terry Leatherman	KCCI
Bob Totten	Kcontractors Association

State of Kansas
Senate Chamber

ANTHONY HENSLEY
STATE SENATOR, NINETEENTH DISTRICT
SHAWNEE, DOUGLAS & OSAGE COUNTIES

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COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: CONFIRMATIONS OVERSIGHT
MEMBER: EDUCATION
HEALTH CARE REFORM OVERSIGHT COMMITTEE
INTERSTATE COOPERATION
LABOR EDUCATION CENTER ADVISORY COUNCIL
LEGIS. COORDINATING COUNCIL
LEGIS. POST AUDIT
STATE FINANCE COUNCIL
UTILITIES
WORKERS COMPENSATION FUND OVERSIGHT

Senate Commerce Committee

Senate Bill No. 114

February 4, 1999

Senator Salisbury and Committee Members:

I testify today in support of Senate Bill No. 114, a bill which would apply the provisions of the Kansas whistleblower act to employees of "public contractors" that have contracted with the State of Kansas.

As you know, the Kansas whistleblower act provides certain rights and protections to employees who work for state government who go above and beyond their duty to report information to state legislators or to certain state agencies. SB 114 would provide the same rights granted to state employees under the act to employees of "public contractors" who have a current contract with the State of Kansas.

Over the past summer there were several news media reports which highlighted the problems this bill intends to correct.

"Foster care critics fear being silenced," was the headline from an article in the August 30, 1998, *Lawrence Journal World*. The article went on to describe how many employees fear retaliation if they spoke out about problems or possible illegal activity they had seen in the workplace.

The article quoted Michelle Shelton, a representative of KAPE which represents about 700 Kansas social workers. Ms. Shelton said that many social workers, "have been told they are not to speak out against the problems having to do with foster care. In fact, in one SRS region, workers were told: You're either on the train or you're on the tracks."

Senate Commerce Committee
Date: 2-04-99
Attachment # 1-1 thru 1-2

While SRS did work this summer to provide a toll-free hotline for employees to report problems in the foster care system, the hotline was only in use for a little more than a month and several people I talked with questioned their job security if they called the hotline. Another news media source reported that the process established by SRS "required complainants to identify specific cases that were purportedly mishandled so they can be investigated." The way the process was set up it would have been quite easy for SRS supervisors to identify the people involved with a specific case.

While SRS and its privatized foster care system is the example in this case, there are other state agencies that have contracts with the private sector whose employees need whistleblower protection.

I urge you to support SB 114 and provide the employees of "public contractors" with the same ability to report problems as state employees currently have. I thank you for allowing me the time to testify and I am open to answer any of your questions.

The Kansas Association of Public Employees
1300 SW Topeka Blvd., Topeka, KS 66612
(785) 235-0262 or (800) 232-KAPE / Fax (785) 2353920
FPE / AFT / AFL-CIO

Testimony of
Paul K. Wilson, Executive Director
Kansas Association of Public Employees, KAPE
Before
The Senate Commerce Committee
On
Senate Bill 114

Good morning Madam Chair and members of the Committee. My name is Paul Wilson and I am the Executive Director of the Kansas Association of Public Employees. I am here this morning to speak in favor of Senate Bill 114.

As many of you know, KAPE represents many state employees in a wide variety of classifications who currently enjoy "Whistle Blower" protections. While this legislation would not expand those protections for state employees, KAPE supports the extension of those protections to employees of the private sector who are employed in providing privatized state services.

As many of you know, several months ago KAPE conducted a survey among the individuals providing those privatized public services for SRS in the Foster Care program. The majority of the surveys returned identified many problems within the privatized Foster Care program. Scores of those surveys were returned also expressing a fear of retaliation if the responding employee was ever identified, or if their comments were ever attributed to them. We also received phone calls from many other such employees expressing the same fears and concerns. Those employees were threatened with the loss of their jobs if they spoke out regarding the problems they experienced.

Passage of Senate Bill 114 will not suddenly instill courage in all of those employees to testify against their employers when they see problems. It may, however, give a few of them the reassurance they need to make those problems known. If so, the identification and resolution of those problems will make those programs more responsive to the needs of the citizens of Kansas. And that is, after all, what we all desire.

Thank you for the opportunity to appear in support of SB 114 and I'll try to answer any questions you may have.

Senate Commerce Committee
Date: 2-04-99
Attachment # 2

LEGISLATIVE TESTIMONY

the Kansas Chamber of Commerce and Industry
The Unified Voice of Business

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SB 114

February 4 1999

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Commerce

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. Thank you for the opportunity today to raise the concerns KCCI has regarding SB 114.

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.

SB 114 extends the protection of the "Kansas Whistleblowers Act" to private sector employees who work for a business that has contracted to do work for the state. While these workers are not protected by the state's whistleblowers act, there are protections else

Senate Commerce Committee
Date 2-04-99
Attachment # 3-1 thru 3-2

›loyment-at-will state, however, a stream of case law has created a public policy exceptio .he doctrine to protect workers from employer retaliation. This public policy exception prohibits firing an employee for exercising a recognized legal right or duty. Employers who are charged with a retaliatory discharge lawsuit face the possibility of paying the discharged worker lost pay, as well as reinstatement of the worker and the potential of punitive damages.

One question KCCI would raise regarding SB 144 would be the method of legal relief proposed. For state employees who feel they have a grievance under the Whistleblowers Act, they can take their case to the state civil service board. In essence, this board serves as a dispute resolution panel. The potential time and expense of litigation will only happen if an appeal of a board decision is pursued. However, a public contractor drawn into a Whistleblowers Act allegation will go directly to court, to defend themselves against a civil action.

Where SB 114 strikes new ground appears to be in granting legislative members and state auditing agencies to question public contractor employees about matters of public concern. A question KCCI would pose is the necessity of this new layer of legal protection. After all, by entering into a contract with the state to provide a good or perform a service, a public contractor is expressing its desire to do business with the state. It is logical to suggest a contractor would provide the state whatever information is needed to maintain their contract.

In conclusion, the Kansas Chamber questions the necessity of the protection proposed in SB 114, and would urge the Committee carefully consider the implications of extending the protections of the Whistleblowers Act. Thank you for the opportunity to comment on SB 114. I would be happy to answer any questions.

KANSAS BAR ASSOCIATION

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Legislative Testimony

TO: Members, Senate Commerce Committee

FROM: Kansas Bar Association

SUBJ: SB 114

DATE: February 4, 1999

This legislation is almost identical to 1997 legislation offered by the post audit committee. Given the trend of government to privatize government functions, by giving private employees whistle-blower protection, the intent of the bill is to encourage disclosure of information to government by employees of private entities and protection of such employees by giving them statutory whistle-blower status.

However, this bill makes major changes to the employment at will doctrine for SOME employees of the private sector but not others. Many law firms contract with state government by virtue of handling indigent defense cases. This bill has the potential of seriously interfering with the attorney-client privilege in our profession, as well as the employment at will practices in many Kansas businesses. The result will be that many law firms no longer will do business with the government. The major policy you must decide is whether to enhance your auditing function it is necessary to override the common law employment-at-will doctrines in order for the government to have access to the information from these private employees.

First, as with any legislation there are hidden minefields. Many of these minefields represent no problem to the private sector *so long as* the policy in KSA 75-2973 applied only to employees of state government. Civil servant employees are not the same as private sector employees.

Second, there are already common law whistleblowing case law that would cover all private sector employees, and this statute is not necessary for those protections to apply. The formula for application of those remedies is discussed in part with the information below.

Whistle-blower lawsuits are designed to protect any employee from retaliation by employers when the employee discloses to outside persons information necessary to protect the health, safety and general welfare of other citizens. For a long time, our courts did not recognize whistle-blower actions

for wrongful discharge as an exception to the employment-at-will doctrine. The basis of a whistle-blower action was first stated in the *Palmer* case:

> "Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. Thus, we have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a coworker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort. To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer
>
> 1. was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare;
> 2. the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee;
> 3. and the employee was discharged in retaliation for making the report.
>
> However, the whistle-blowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain." (emphasis added) *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988)

That is the common law whistle-blower cause of action. This bill goes much farther than case law. What I have done below is take the provisions of the act, divided them out, and discussed the policy ramifications and, where appropriate, suggested some amendments. ***KBA's recommended amendments are in bold face.*** Our amendments apply this act to the employees of public contractors, but in that regard limit the cause of action to mirror current common law.

Thank you.

Session of 1999

SENATE BILL No. 114

By Senators Hensley and Petty

1-21

AN ACT concerning the Kansas whistle-blower act; amending K.S.A. 1998 Supp. 75-2973 and repealing the existing section.

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

Section 1. K.S.A. 1998 Supp. 75-2973 is hereby amended to read as follows: 75-2973. (a) This section shall be known and may be cited as the Kansas whistle-blower 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 over-sight activities under authority of any provision of law authorizing such activities.

(2) "Disciplinary action" ***for state employees*** means any dismissal, demotion, transfer, reassignment, suspension, reprimand, warning of possible dismissal or withholding of work. ***"Disciplinary action" for employees of public contractors means a wrongful discharge or demotion from such employment;***

Historically, common law whistle-blower protections have arisen only in situations where the employee was wrongfully discharged (fired) from the job for what was said, written or reported, hence the name, "wrongful discharge" or "retaliatory discharge" lawsuits. Retaliatory demotion is now a recognized claim. *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 921 P.2d 837, (1997)

Indeed, one can argue that if a state employee who lawfully whistle-blows but is simply shifted to another work assignment without loss of pay or status, then the employee has not been significantly damaged. Without the suggested KBA amendment the employer can take no disciplinary action at all unless the employer fires the employee and then successfully defends itself in court that the employee divulged information he or she should not have divulged under the four areas of exceptions in subsection 1(c). Most employers may not have the financial ability to engage in such litigation in order to discharge an employee.

(3) "Public contractor" means any person, partnership, association, corporation or other private business entity that has entered into a contract with a state agency for the provision of any supplies, materials, equipment or other goods or for the performance of any services, including subcontractors thereof. ***This act shall not apply to public contractors or subcontractors the contracts to which a contractor is not a voluntary contracting party, or in the aggregate the payments by the state to such contractor do not result in at least $5,000 per calendar year.***

If we increase the liability of businesses to defend wrongful discharge lawsuits while at the same time impose that liability on businesses doing very small amounts of business with state and local governments, the result will be those businesses with small contracts will stop contracting with government altogether. For example, a lawyer who handles just a few indigent defense cases per year may not take on those cases if the Act makes him lose the protection of the at will doctrine of employment.

One solution is a *de minimus* threshold under which the law would not apply. Many times experienced lawyers in small counties are ordered by the court to take an indigent defense case, yet by doing so the court now puts that lawyer at risk of having to defend a whistle-blower lawsuit by a disgruntled employee. The proposed amendment would exempt smaller contracts and court-ordered situations.

By excluding such employers from the application of the law, we encourage small or intermittent contract employers to continue to take such cases and contracts. Otherwise, small employers or contractors will weigh the possible liability against the possible income and may avoid taking such cases altogether.

~~(3)~~ *(4)* "State agency" and "firm" have the meanings provided by K.S.A. 46-1112 and amendments thereto.

Under KSA 46-1112, "firm" includes CPA firms acting in an auditing capacity. The word "firm" is used only in the section defining "auditing agency." If these firms contract with the state to do audits, they are also Public Contractors. This will be very awkward if it is the employee of the CPA "firm" who is whistle-blowing, because at the same time the CPA firm is an "auditing agency" and at the same time a public contractor. This appears to be a conflict of interest. We have no solution for this problem.

(c) No supervisor or appointing authority of any state agency ~~*or public contractor*~~ shall prohibit any employee of the state agency ~~*or public contractor*~~ from discussing the operations of the state agency ~~*or public contractor, as the case may be*~~, or other matters of public concern, including matters relating to the public health, safety and welfare either specifically or generally, with any member of the legislature or any auditing agency. ***No supervisor of any public contractor shall prohibit any employee of such contractor from discussing in good faith serious infractions regarding matters relating to the public health, safety and welfare, with any member of the legislature or any auditing agency.***

Under old law, KSA 75-2973 applied only to employees in state agencies. This might be appropriate if the law only applied to state employees. This new language is very broad. What are "other matters of public concern?" "The operations" of a public agency or, even more broadly, a public *contractor*, is a wide-open phrase and has no limit to what part of the business can be divulged to legislators. Employees of a private business can discuss any operation of the business – regardless whether the wrongdoing is tied to the contract, so long as there is a "public concern." This sort of disclosure is typically not the basis for a wrongful discharge lawsuit under common law whistle-blower lawsuits. Note the *Palmer* case quote, above.

Without these limiting amendments, businesses that contract with state or local government have a much broader liability for wrongful termination than other private sector employers. This broader liability will discourage contracting with government.

(d) No supervisor or appointing authority of any state agency *or public contractor* shall:

(1) Prohibit any employee of the state agency *or public contractor* from reporting ***in good faith*** any violation of state or federal law or rules and regulations ***affecting matters of public safety, health or general welfare*** to ~~any person, agency or organization~~; ***to the legislature or auditing agency;*** or

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

These amendments bring the law into conformity with whistle-blower case law. Without the amendments, employees could report their "hunches" about anything or any matter to anyone, even the press. This is not what happens in common law whistle-blower lawsuits. The reports should go to officials who can act on them, not the press. These amendments are in conformity to the similar amendments above. If the speech is to be protected, it should be made in good faith and relate only to matters of public safety, health or general welfare reported to appropriate government agency officials. Then it fits the definition of common law whistle-blowing.

By adding a "good faith" requirement, that would conform to case law. A bad faith report supported by no facts or evidence would require the employer to respond to an investigation and defend itself, and essentially prove the negative.

(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 public contractor* 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 *or public contractor*;

(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 public contractor*; 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 statute or court rule.

The phrase "or court rule" in line 65 is very important. It codifies the holding in the Kansas Supreme Court's case that interprets KSA 75-2973(c)(4)(C). This entire subsection (4) are a list of exceptions to the rule you are making. This subsection requires employees of a lawyer to keep the confidences of clients which they are required to do under the Model Rules. Under the case of *Crandon v. State of Kansas*, if they keep their obligations under the Model Rules, a wrongful discharge lawsuit will lie. If not, the public policy behind keeping client confidences was held to override the whistle-blower protections.

(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. The appeal shall be filed within 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 officer 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 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.

~~(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.~~

No comment on subsections (f) and old subsection (g).

(g) Any officer or employee of a public contractor who alleges that disciplinary action has been taken against such officer or employee in violation of this section may bring a civil action for appropriate injunctive relief within 90 days after the occurrence of the alleged violation. A court, in rendering a judgment in an action brought pursuant to this section, shall order, as the court considers appropriate, reinstatement of the officer or employee, the payment of back wages or full reinstatement of fringe benefits and seniority rights, or any combination of these remedies. The court may award the prevailing party in the action all or a portion of the costs of the action, including reasonable attorney fees and witness fees.

Subsection (f) above, for state employees, must use the civil service board as their hearing board. Private employees must use subsection (g).

When does the statute begin to run? Is it the "alleged violation" in line 95? Is it the time of the divulging of the information, or the time the disciplinary action is taken.

Usual whistle-blower lawsuits have two years to file the case, not 90 days.

This appears to indicate that only a COURT can "render a judgment." Do we mean to exclude juries from these decisions?

Regarding the attorney fee shift, whistle-blower employee that loses a lawsuit against the state agency or a wealthy corporate employer will have to pay the contractor's, legal bills. KBA does not care which way you go on this issue. It is a public policy choice. But you should be aware that the awarding of attorney fees to prevailing parties is contrary to common law whistle-blower lawsuits, where the parties pay their own attorneys. While one can argue such provisions encourage lawsuits, they also can discourage lawsuits if the employee feels they may lose the case. If the law discourages them, they will not divulge anything to auditing agencies.

(h) Any officer or employee *of a state agency* 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 an action pursuant to the act for judicial review and civil enforcement of agency actions within 90 days after the occurrence of the alleged violation. The court may award the prevailing party in the action all or a portion of the costs of 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.

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

Sec. 2. K.S.A. 1998 Supp. 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.

Other Issues concerning this Legislation not ballooned.

1. What is the standard of proof for lawsuits brought? Under common law whistle-blower actions, the plaintiff must prove their claim by clear and convincing evidence. *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988) SB 114 is silent as to which standard of proof to use. Unless you want the courts to make this policy decision, you should clarify which burden – clear and convincing evidence or a preponderance of evidence standard – is to be used.

2. Who has the burden of proof? If the plaintiff must show by clear and convincing evidence that the disciplinary action was based on whistle-blowing information, if the employer wants to defend his actions by showing the plaintiff's actions were within the exceptions to the statute [Section (c)(4)(C)], must the employer prove this by clear and convincing evidence or some lesser standard?

3. Is there legislative intent that there be retroactive application of this new statute? For example, does the new law apply only to public contracting entities who contract after the effective date of the law or all existing entities? We suggest that the law cover all disciplinary actions taken on or after the effective date of the bill.

4. The "protection" afforded by the statute never decays. For example, how long does the whistle-blower protection against disciplinary action apply? Once the employee makes a lawful disclosure, the employer will be unable to prove that any subsequent discipline might be for some other activity such as insubordination *unrelated to the original whistle-blower disclosure.*

Appendix "A"

MRPC 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime; or

(2) to comply with requirements of law or orders of any tribunal;[1] or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment

* * *

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney -client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. *The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.* (emphasis added)

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[1] It can be argued that "other law" requires the lawyer to allow these disclosures outside the limitations of MRPC 1.6. Not necessarily. In *U.S. v. Monnat*, 853 F.Supp. 1304, (D.Kan. 1994), a case where Judge Kelly in Wichita federal district court ordered an attorney to divulge client identities where a federal statute required such disclosure, Judge Kelly wrote, "When an apparent conflict between Rule 1.6 and some other law cannot be satisfactorily mitigated or avoided, it is permissible to seek an interpretation or application of a law in good faith. It is also permissible to comply with the ultimate outcome. Model Rule 1.6(b)(2) provides that a lawyer may reveal confidential information relating to the representation of a client to the extent he reasonably believes necessary to comply with law or orders of a tribunal. The ABA committee comments to this rule state that: 'Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.' While the lawyer is permitted by ethics rules to disclose information based on a reasonable belief that disclosure is required, *a lawyer may take, and may well be obligated to take, reasonable steps to assert confidentiality and obtain a determination of whether the other law or Rule 1.6 prevails.* If disclosure is required by law, it is never unethical under Rule 1.6(b) to comply with the law." (emphasis added) 853 F.Supp. 1308-1309. This is doubly true when the issue is that an employee may be discussing confidential client information with unauthorized persons and auditing agencies.

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Testimony

By the Kansas Contractors Association before the Senate

Commerce Committee regarding SB 114

February 4, 1999

Madame Chairman and members of the Senate Commerce committee, I am Bob Totten, Public Affairs Director for the Kansas Contractors Association. Our organization represents over 400 companies who are involved in the construction of highways and water treatment facilities in Kansas and the Midwest.

Today, I wanted to visit with you about Senate Bill 114 and relay some of our concerns on this issue.

Our concern on this measure is we are not sure it is really necessary. It seems to many of our members that if this bill were passed it would be just another requirement that we would have to deal with and we are not at all sure it is necessary.

Senate Commerce Committee

Date: 2-04-99

Attachment # 5-1 thru 5-2

OSHA regulations and other federal requirements for example are already watching what our companies do and OSHA regulations already say that employers are prohibited from taking any retribution for reporting safety violations in and around a job site. At least in the area of safety concerns, it appears this requirement may already be under federal law.

The other concern voiced by many of our members is that some times there are conditions that some of our contractor's employees may not be familiar with.
If you look at our labor force; not all of them are as well educated as you are; and at times what may appear to be something incorrect on the job site, may be altogether something else. It seems to us that if some innocuous concern is turned in as a problem, we all could lose a lot of down time chasing after an issue that really isn't an issue. It would be unfortunate for the state or our contractors to waste job resources chasing a matter that was just a misunderstanding and costing us both a lot of money.

The other thing that that I have wondered: Is this a problem? The whistle blower act does gives some protection to employees who need a forum to point out concerns...but it seems in the 25 years that have been watching state government in Kansas if there ever been a problem, the information was readily made available to the media...and then it became a concern for those involved.

If you have any questions, I will be glad to try to answer them.