

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairman Karin Brownlee at 8:30 A.M. on February 8, 2005 in Room 123-S of the Capitol.

Committee members absent:

Senator Susan Wagle-excused

Committee staff present:

Kathie Sparks, Legislative Research

Helen Pedigo, Revisor of Statutes

Jackie Lunn, Committee Secretary

Conferees appearing before the committee:

Marlee Carpenter, Kansas Chamber of Commerce

Greg Bernhardt, Attorney, Wichita

Richard Clinesmith, Employers Unity, Inc.

Chief Counsel A.J. Kotich, Department of Labor

Jim Edwards, Kansas Association of School Boards

Others attending:

See attached list

Chairperson Brownlee opened the meeting by introducing Kathie Sparks, Legislative Research to explain the **SB 55**. Ms. Sparks stated **SB 55** would amend the employment security laws with regard to breath alcohol testing and conclusive evidence of misconduct. The bill amends the law to include the condition that an employee's refusal to submit to a breath alcohol test is conclusive evidence of misconduct if the test meets the requirements. A positive breath alcohol test would be conclusive evidence to prove misconduct if the foundation evidence establishes, by a preponderance of the evidence, that the results are reliable. (Attachment 1)

Chairman Brownlee questioned Ms. Sparks regarding the wording, controlled substance asking if prescription medicine is considered to be a controlled substance. Ms. Sparks stated controlled substance means any substance which impairs ability to work. The definition was stated in current law.

Chairperson Brownlee opened the hearing on **SB 55** by introducing Marlee Carpenter with the Kansas Chamber of Commerce. Ms. Carpenter stated the Kansas Chamber of Commerce and its members support **SB 55**. She stated the last few weeks they have worked closely with the AFL-CIO and have come to an agreement on many items. She attached a balloon to her testimony with the changes. (Attachment 2) in closing she stated it was her understanding there was no opposition to this bill.

Ms. Carpenter introduced Mr. Ray Bernhardt, an attorney in private practice in Wichita. Mr. Bernhardt stated **SB 55** addresses two major concerns and submitted written testimony (Attachment 3) He stated the present statute as written has an unfair impact on small to medium size employers who discharge an employee for failing a random drug/alcohol test. He also stated the current statute fails to provide a distinction between breath alcohol tests and chemical tests and also fails to define chemical test.

Chairperson Brownlee introduced Richard Clinesmith, Vice President with Employers Unity, Inc. out of the Wichita office. Mr. Clinesmith is in support of **SB 55**. He stated **SB 55** would assist Kansas employers, in prevailing on an unemployment claim should they discharge an employee for violation of their drug and alcohol policy. (Attachment 4) Upon completion of his testimony, Mr. Clinesmith stood for questions.

Senator Emler asked Mr. Clinesmith if he was in support of **SB 55** as recommended by Ms. Carpenter and the Kansas Chamber of Commerce, including all the changes. Mr. Clinesmith stated he was in support of the bill including the changes.

There was some concern by the committee regarding the definition of employer and who would request

CONTINUATION SHEET

MINUTES OF THE Senate Commerce at 8:30 A.M. on February 8, 2005 in Room 123-S of the Capitol.

the test. Also there was discussion regarding employees having the right under law to request the employer or supervisor also be subject to testing. Ms. Carpenter stated if a company had a drug or alcohol policy in place it would cover all employees from bottom to top. Senator Barone asked Ms. Carpenter to verify her statement and provide the committee with a copy of an employers drug/alcohol policy for an example.

Chairperson Brownlee recognized Jim DeHoff, Kansas AFL-CIO. Mr. DeHoff stated he did not want to speak against the bill but there is a correction that needs to be made on page 2 to add a phrase or positive breath alcohol test. This phrase was left out in error.

Chairperson Brownlee introduced A.J. Kotich, Chief Counsel, Department of Labor. Chief Counsel Kotich provided written testimony (Attachment 5) His written testimony is his interpretation of the bill line by line. Chief Counsel Kotich stands for questions.

There was discussion on the proposed balloon and how it might the line by line interpretation of Chief Counsel Kotich because he had not seen the balloon. Committee members discussed random testing with Chief Counsel Kotich. Also there was discussion concerning page 6 of the bill striking language and adding certified or authorized.

Senator Brownlee requested Ms. Carpenter to explain the balloon and asked her to get with Mr. DeHoff on the language he felt was left out in error. Ms. Carpenter explained the balloon referring to her written testimony. (Attachment 2)

During discussion with Mr. DeHoff, Senator Jordan asked if the AFL-CIO supported the bill with the balloon. Mr. DeHoff stated they were not in agreement but were close enough they would not oppose. There was more discussion on the language not making sense and the committee asked Ms. Carpenter and Mr. DeHoff to work on that and give an explanation to the committee. Chairperson Brownlee closed the hearing on **SB 55**.

Chairperson Brownlee introduced Helen Pedigo, Revisor of Status, to explain the bill **SB 107**. Ms. Pedigo stated that this bill would exempt charging of benefits to the account of a contributing employer if the employee is disqualified and meets the provisions of 24-796.

Chairperson Brownlee opened the hearing on **SB 107** by introducing Jim Edwards, Kansas Association of School Boards to give his testimony. (Attachment 6) Mr. Edwards explained the bill and stated the Kansas Association of School Boards was in support of this bill. He stated they visited with the Department of Labor yesterday and the Department of Labor had asked if the bill could be narrowed a little to add specific schools and they would like to work with the Association of School Boards to achieve that.

There was discussion by the committee on narrowing the bill. The committee would like for the bill to be written to cover more than schools. Chairperson Brownlee asked for a more comprehensive prospective other than just the schools. Chairperson Brownlee stated the hearing would stay open.

Written testimony was submitted by the Lenexa Chamber of Commerce (Attachment 7) in support of **SB 55** and **SB 107**.

Chairperson Brownlee announced the Department of Commerce would be giving a presentation the first part of the meeting tomorrow and then they would hearing **SB 108**. Meeting adjourned at 9:23 a.m. The next meeting scheduled for Wednesday, February 9, 2005 at 8:30 a.m. in room 123S.

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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February 7, 2005

TO: Senate Committee on Commerce
FROM: Kathie Sparks, Principal Analyst
RE: SB 55

SB 55 would amend the employment security laws with regard to breath alcohol testing and conclusive evidence of misconduct. The bill amends the law to include the condition that an employee's refusal to submit to a breath alcohol test is conclusive evidence of misconduct if the test required:

- the standards of The Drug Free Workplace Act;
- the test was administered as part of an employee assistance program; or other alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment;
- the test was otherwise required by law and the test constituted a required condition of employment for the individual's job;
- the test was requested pursuant to a written policy of the employer and was a required condition of employment; or
- there was probable cause to believe that the individual used, possessed, or was impaired by an alcoholic beverage, a cereal malt beverage, or a controlled substance while working.

A positive breath alcohol test would be conclusive evidence to prove misconduct if the foundation evidence establishes, by a preponderance of the evidence, that the results are reliable.

KS/kal

Kathie

40975--(2/5/5{12:18PM})

Senate Commerce Committee

2-8-05

Attachment 1-1



**THE KANSAS
CHAMBER**

The Force for Business

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Legislative Testimony

SB 55

February 8, 2005

**Testimony before the Kansas Senate Commerce Committee
By Marlee Carpenter, Vice President of Government Affairs**

Chairman Brownlee, Chairman Jordan and members of the committee;

The Kansas Chamber and its over 10,000 large, medium and small businesses support SB 55. This bill makes changes to the Kansas unemployment compensation system that helps clarify when and if an employee receives benefits when an employee is found to be on the job and under the influence of drugs or alcohol.

In the last few weeks, the Kansas Chamber has worked closely with the AFL-CIO and has come to an agreement on many items. I have attached to my testimony the language that we have worked on. It is my understanding that labor has withdrawn their oppositions to this bill at this time. I have with me today, an expert in the unemployment compensation field that can answer any specific questions on the bill.

Thank you for your time and I will be happy to answer any questions.

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Attachment 21

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

44-701. An individual shall be disqualified for benefits:

(2) For the purposes of this subsection (b), the use of or impairment caused by an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be conclusive evidence of misconduct and the possession of an alcoholic beverage, a cereal malt beverage or a nonprescribed controlled substance by an individual while working shall be prima facie evidence of conduct which is a violation of a duty or obligation reasonably owed to the employer as a condition of employment. ~~For purposes of this subsection (b), the disqualification of an individual from employment which disqualification is required by the provisions of the drug free workplace act, 41 U.S.C. 701 et seq. or is otherwise required by law because the individual refused to submit to or failed a chemical test which was required by law, shall be conclusive evidence of misconduct. Refusal to submit to a chemical test administered pursuant to an employee assistance program or other drug or alcohol treatment program in which the individual was participating voluntarily or as a condition of further employment shall also be conclusive evidence of misconduct.~~ Alcoholic liquor shall be defined as provided in K.S.A. 41-102 and amendments thereto. Cereal malt beverage shall be defined as provided in K.S.A. 41-2701 and amendments thereto. Controlled substance shall be defined as provided in K.S.A. 65-4101 and amendments thereto of the uniform controlled substances act. As used in this subsection (b)(2), "required by law" means required by a federal or state law, a federal or state rule or regulation having the force and effect of law, a county resolution or municipal ordinance, or a policy relating to public safety adopted in open meeting by the governing body of any special district or other local governmental entity. **Chemical test shall include, but is not limited to, tests of urine, blood, saliva, or hair. A positive chemical test shall mean a chemical result showing a concentration at or above the levels listed in K.S.A. 44-501 for the drugs or abuse listed therein.** An individual's refusal to submit to a chemical test **or breath alcohol test** shall not be admissible **conclusive** evidence to prove **of** misconduct unless **if** the test is required by and meets the standards of the drug free workplace act, 41 U.S.C. 701 et seq., **or** the test was administered as part of an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment **or** the test was otherwise required by law and the test constituted a required condition of employment for the individual's job, **or the test was requested pursuant to a written policy of the employer of which the employee had knowledge of and was a required condition of employment;** or, there was probable cause to believe that the individual

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used, possessed or was impaired by an alcoholic beverage, a cereal malt beverage or a controlled substance while working. ~~A positive breath alcohol test or a shall be conclusive evidence to prove misconduct if the foundation evidence establishes, by a preponderance of the evidence, that the results are reliable.~~ The results of a **positive** chemical test shall not be admissible **conclusive** evidence to prove misconduct unless **if** unless the following conditions were **are** met:

(A) Either (i) the test was required by law, ~~the test and~~ was administered pursuant to the drug free workplace act, 41 U.S.C. 701 et seq., (ii) the test was administered as part of an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment, (iii) **the test was requested pursuant to a written policy of the employer of which the employee had knowledge of and was a required condition of employment,** (iv) the test was required by law and the test constituted a required condition of employment for the individual's job, or (iv) (v) there was probable cause to believe that the individual used, had possession of, or was impaired by the alcoholic beverage, the cereal malt beverage or the controlled substance while working; **and;**

(B) the test sample was collected either (i) as prescribed by the drug free workplace act, 41 U.S.C. 701 et seq., (ii) as prescribed by an employee assistance program or other drug or alcohol treatment program in which the employee was participating voluntarily or as a condition of further employment, (iii) **as prescribed by the written policy of the employer of which the employee had knowledge of and which constituted a required condition of employment,** (iv) as prescribed by a test which was required by law and which constituted a required condition of employment for the individual's job, or (iv) (v) at a time contemporaneous with the events establishing probable cause; **and;**

(C) the collecting and labeling of the **a chemical** test sample was performed by a licensed health care professional or any other individual **certified or** authorized to collect or label test samples ~~by federal or state law, or a federal or state rule or regulation having the force and effect of law,~~ including law enforcement personnel. **and;** (D) the **chemical** test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies; (E) the test was confirmed by aas

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chromatography, gas chromatography- mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the individual.

Senate Commerce Committee

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Attachment

2-4

Date: February 8, 2005

Name: Gregory L. Bernhardt

Interest: Attorney in private practice in Wichita and presently employed part-time with Employer's Unity, Inc. Have represented claimants and employers in administrative hearings conducted by the Department of Labor and in appeals to District Court.

Substance of testimony:

- (a) K.S.A. 44-706(b) fails to provide a disqualification for employees who fail or refuse a random drug/alcohol test. The statute as written has a unfair impact on small to medium size employers who discharge an employee for failing a random drug/alcohol test.
 - i. If the employer does not have government contracts requiring compliance with the drug free workplace act, results of a random test are inadmissible.
 - ii. If an employer does not maintain an employee assistance program, results of a random test are inadmissible.

- (b) K.S.A. 44-706(b) currently fails to provide a distinction between breath alcohol tests and chemical tests. Statute also fails to define chemical test.
 - i. Unemployment appeal judges are applying K.S.A. 44-706(b)(2)(A) through (F) to results of a breath alcohol test even though compliance with those provisions is impossible:
 - 1. Cannot collect and label a breath sample;
 - 2. Breath tests are not customarily performed by laboratories;
 - 3. Breath test results are not subject to confirmation by gas chromatography, or gas chromatography-mass spectroscopy.
 - ii. See attached administrative decision reversed by the District Court in Saline County.

Senate Commerce Committee

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Attachment 3-1

BEFORE THE UNEMPLOYMENT INSURANCE JUDGE:

In The Matter Of:

Docket Number: 200760

sac 310

Claimant: ROBERT H [REDACTED]
1926 [REDACTED]
[REDACTED]

Social Security #: [REDACTED]

Employer: ~~GREEN LEAF INC~~
EMPLOYERS UNITY
PO BOX 3606
WICHITA KS 67201-3606

Hearing: February 11, 2002
Conference Call

*Decision Mailed: February 13, 2002

DECISION

APPEARANCES: Robert [REDACTED] appeared for the claimant. Stuart [REDACTED], Manager of the car wash; Pat [REDACTED], Vice-President of Human Resources; and Anita [REDACTED], Coordinator of Drug and Alcohol Testing for Occupational Health Partners, appeared for the employer.

ISSUE(S): The employer filed a timely appeal from an examiner's determination which found the claimant not disqualified for benefits because the claimant was discharged, but not for misconduct connected with the work. The examiner further found that the employer's experience rating account will be charged. In support of that decision, the examiner made the following determination of fact: "The employer was contacted by an agency representative to provide information to establish that the separation was due to misconduct. The employer has chosen not to provide specific information regarding this separation. The claimant was discharged, but not for misconduct connected with the work."

The employer returned the Employer Notice, K-Ben 44/45 or Employer Report, K-Ben 321, but the information provided is insufficient or incomplete as required by K.S.A. 44-709(b). The employer, therefore is deemed to have waived their standing as a party to the proceedings arising from this claim, unless the employer establishes a timely and complete reply was impossible due to excusable neglect.

FINDINGS OF FACT: The claimant began working for this employer on November 24, 1995. At the time of separation, he earned \$8.50 per hour as a car wash attendant working full-time. His days and hours of work varied. November 13, 2001 was his last day of work.

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Throughout the course of the claimant's employment, the employer maintained a drug and alcohol policy. The policy provided of discharge of any employee who had a blood alcohol content while working which equaled or exceeded the legal limit for driving a vehicle in the state where the work was performed. The claimant was aware of the policy.

On November 13, 2001, the claimant reported to work as scheduled at approximately 8:00 a.m. and worked throughout his morning shift until 12:00 p.m. The claimant took his regularly scheduled lunch from 12:00 p.m. to 1:00 p.m. and returned from lunch in time to attend a "team meeting" which began at 1:30 p.m. The claimant remained in that meeting until approximately 3:00 p.m. and was sitting directly by his supervisor during the entire meeting.

During the course of that team meeting, the claimant was informed by his supervisor that he had been subject to random selection for drug testing. The claimant was given the necessary paperwork and directed by the supervisor to report to the testing site for the random test. The claimant complied with those instructions and went to the testing site as directed.

Some time after the claimant had reported to the testing site and already left, the person at the testing site who conducted the test contacted the employer's human resources department and advised the vice-president of human resources that she had smelled a "strong" smell of alcohol on the claimant's breath. The vice-president of human resources contacted the claimant's immediate supervisor, the manager of the car wash facility, and advised him of the situation and asked him to "check into it". The manager engaged the claimant in a conversation and noticed a "moderate" smell of alcohol on the claimant's breath. In accordance with instructions he had received from the vice-president of human resources, the manager directed the claimant to return to the testing site to submit to a breath alcohol test. The claimant returned to the site, submitted to the test and a second confirmation test and then was driven home by the manager of the car wash facility at the direction of the testing agent. During that conversation, the claimant inquired of the manager as to the conditions under which he could be placed in a drug treatment program.

The claimant had consumed an alcoholic beverage the previous night, with the last consumption occurring at about midnight on November 12, 2001. The claimant denied consuming any alcohol thereafter either before or during working hours for the employer in

this case on November 13, 2001. The claimant was subsequently discharged by the employer after the employer received the breathalyzer test results.

The party at the test site location who administered the test to the claimant was not certified by either a federal or state agency to engage in that type of activity. Likewise, the company for which she works has no federal nor state certification for that purpose. The test sample collector is a licensed emergency medical service technician, but was not trained in that capacity to perform breathalyzer tests. The test collector received a manufacturers certification for the machine which he operated. On an occasional basis, the test collector does provide breathalyzer services for law enforcement agencies, but does not do so on a very frequent basis.

The employer's agent, Employers Unity, filed a timely written response to the employer's Notice of Claim indicating that the claimant was discharged for violation of the employer's random testing policy and providing of the test results. The agency did contact the employer's representative for further information and further information was supplied as requested.

OPINION: The Kansas Employment Security Law provides that "if a claim is determined to be valid, the examiner shall mail a notice to the last employing unit, who shall respond within 10 days by providing the examiner all requested information, including all information required for a decision under K.S.A. 44-706 and amendments thereto. The information may be submitted by the employing unit in person at an employment office of the secretary, or by mail, by telefacsimile machine or by electronic machine. If the required information is not submitted or postmarked within a response time limit of 10 days after the examiner's notice was sent, the employing unit shall be deemed to have waived its standing as a party to the proceedings arising from the claim and shall be barred from protesting any subsequent decisions about the claim by the secretary, a judge, the board of review or any court, except that the employing unit's response time limit may be waived or extended by the examiner or upon appeal, if timely response was impossible due to excusable neglect." [K.S.A. 44-709(b)]

In this case, it is the finding of the U.I. Judge that the employer has not waived its standing as a party nor is it barred from protesting subsequent decisions on the claim, because the employer did file a timely written response containing legally sufficient

information to constitute a proper response as required by law. Therefore, the employer is entitled to have the case adjudicated on its merits.

The Department must pay unemployment benefits to a claimant who was discharged unless the employer proves that the reason for discharge was misconduct connected with the work. The employment security law defines misconduct as "a violation of a duty or obligation reasonably owed the employer as a condition of employment." [K.S.A. 44-706(b)(1)] The employer has the burden of proving misconduct by a preponderance of the evidence. *Farmland Foods, Inc. v Board of Review*, 225 Kan. 742, 594 P.2d 194 (1979).

The use of or impairment caused by an alcoholic beverage, cereal malt beverage, or non-prescribed, controlled substances by an individual while working shall be conclusive evidence of misconduct. The possession of an alcoholic beverage, cereal malt beverage, or a non-prescribed controlled substance by an individual while working shall be prima facie evidence of conduct which is a violation of a duty or obligation reasonably owed to the employer as a condition of employment. Likewise, the disqualification of an individual from employment because such is required by the Drug Free Workplace Act 41 U.S.C. 701 et seq. or otherwise required by law because the individual failed a chemical test which was required by law is conclusive evidence of misconduct. [K.S.A. 44-706(b)(2)].

The results of a chemical test shall not be admissible evidence to prove misconduct unless six specific criteria are met. One of those criteria is:

{ The collecting and labeling of the test sample was performed by a licensed health care professional or any other individual authorized to collect or label test samples by federal or state law or a federal or state rule or regulation having the force and effect of law, including law enforcement personnel. [K.S.A. 44-706(b)(2)(C)].

Kansas law also provides that a contributing base period employer's account shall be charged when a claimant is discharged, unless there is a ruling that the claimant was discharged for misconduct connected with the work. [K.S.A. 44-710(c)]

In this case, it is the finding of the U.I. Judge that the claimant was discharged under circumstances which do not meet the statutory definition of misconduct connected with the work as outlined above. Although the claimant acknowledges consuming alcohol beverages up until midnight of November 12, 2001, and the testimony given by the employer does

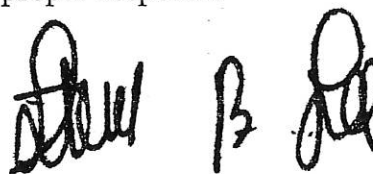
constitute "probable cause" for asking the claimant to submit to a breathalyzer test, the evidence presented by the employer does not establish that the claimant was "impaired while working" as required.

The only evidence the employer has in that regard is the test result supplied by the drug and alcohol collection agent working on behalf of the occupational health partners. The testimony establishes that individual is not certified by either federal or state agencies to engage in blood alcohol testing nor is the company for which he works authorized to engage in that type of activity. Although the individual is a health care provider, the capacity in which he works as an emergency medical technician itself does not qualify that individual to engage in the collection of test samples for the purpose of determining whether or not an individual is under the influence of drug and/or alcohol. Therefore, the employer has not met its burden of proof to establish that the alcohol test result is admissible into evidence due to the flaw in the methodology of collection of the test sample. As a result, the employer has no evidence to establish that the claimant was "impaired while working" as required by law. Therefore, the employer has not met its burden of proof in establishing that misconduct connected with the work did occur.

DECISION: The examiner's determination is affirmed. The claimant is qualified for benefits beginning November 14, 2001, because the claimant was discharged, but not for misconduct connected with the work. The employer's experience rating account is charged.

The employer did not waive its standing as a party nor is it barred from protesting the claim, because the employer did file a timely written response to the employer's notice of claim containing legally sufficient information to constitute a proper response.

IT IS SO ORDERED.



Steven B. Lee,
Judge

***NOTICE: Appeal rights if you disagree with this decision:** You have 16 days after the "Decision Mailed" date to file an appeal to the Employment Security Board of Review. You may file by letter and mail your appeal to the Employment Security Board of Review, 1430 SW Topeka Blvd, Topeka KS 66612, postmarked on or before the final date. (If the 16th day falls on a Sunday or a Holiday, the next working date is the final date.) The Board will affirm or reverse this decision after reviewing the evidence presented at the referee's hearing.

Senate Commerce Committee

SB 55

Good Morning Chairman Brownlee, Chairman Jordan and members of the committee; My name is Richard Clinesmith; I am a Vice President with Employers Unity, Inc., and work in our Wichita, Kansas office. Employers Unity, is an Unemployment Cost Control Company, and we represent hundreds of Kansas Employers in their unemployment matters. Our experiences are that Kansas employers strive to provide a safe, and pleasant work environment for their employees. Part of this safe environment would include providing a workplace free of illegal drugs and alcohol. Maintaining this type of environment is paramount to providing safe durable products and/or services, for use by the general public. In an effort to provide this type of environment, most employers have in place, drug, and alcohol policies, and testing procedures, that allow them to maintain a drug and alcohol free workplace. For the most part Kansas Employers are motivated by the Drug Free Workplace Act and strive to meet its parameters to maintain a safe environment for their hard working Kansas employees. Unfortunately, the Kansas Unemployment Statutes that address discharges due to violation of an employers Drug or Alcohol policy, cater primarily to businesses that have governmental contracts. The Kansas Employment Security Law as written will allow, claimants unemployment benefits should they be discharged for violation of an employers Drug or Alcohol policy, due to a random drug test. The changes that we have suggested for K.S.A. 44-706 (b)(2) would assist Kansas employers, in prevailing on an unemployment claim, should they

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Attachment 4-1

discharge an employee for violation of their drug and alcohol policy. I would request that the committee adopt the recommended changes as written. Thank you for your consideration.

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Attachment

4-2

**Testimony before the
Senate Commerce Committee
Senate Bill 55
A. J. Kotich, Chief Counsel
Kansas Department of Labor
February 8, 2005**

Chairperson Brownlee, Vice-Chairperson Jordan and Members of the Committee:

Thank you for the opportunity to appear before this Honorable Committee concerning Senate Bill 55.

Senate Bill 55 proposes amendments to K.S.A. 44-706(b)(2) relating to disqualification of Unemployment Insurance (UI) claimants for refusing or failing a drug/alcohol test. While the Department takes no position on the Bill, I do want to take this opportunity to provide the Committee with our observations.

The proposed language would substantially change the disqualification provisions of the Employment Security Law as it relates to the use of, or impairment caused by, alcohol, cereal malt beverages or nonprescription controlled substances. If enacted, this provision would make it easier for an employer to prove misconduct through the admission of the results of a drug test. However, in our opinion, it also increases the potential for civil actions against employers.

Current Status of K.S.A. 44-706(b)(2):

The current interpretation given to the Employment Security Law by the appeals referees is that to prove misconduct through failure to pass or refusal to take a drug test the test must be one required by law or given as a result of probable cause. This is supported by a literal reading of the statutes. However, there are very few instances where drug tests are required by law — outside of Department of Transportation (DOT) requirements for truck drivers. Even the Drug Free Workplace Act does not require drug testing.

Senate Bill 55:

The substantial changes provided by Senate Bill 55 are as follows:

Some of the “required by law” language found at page 4, lines 30 - 39 would be deleted.

At page 5, line 6, the refusal to submit to a breath alcohol test is added as a means to meet the evidentiary standard to prove misconduct.

Page 5, lines 6 - 7 raise the refusal to take a test from an admissibility of evidence requirement to a conclusive evidence standard.

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Attachment 5-1

Page 5, lines 13 - 15, reflects the most substantial change by allowing a test "requested pursuant to a written policy of the employer." This would further do away with the "required by law" interpretation and would allow a drug test allowed by an employer's own policy without regard to any legal or statutory requirement.

Page 5, lines 18 - 20, provides that a positive breath test shall be conclusive evidence of misconduct as long as the "foundation evidence establishes by a preponderance of the evidence that the results are reliable."

Page 5, lines 20 - 22, changes the standard from a question of admissibility to conclusive evidence of misconduct for positive chemical test results. However, unlike the breath test results, there are specific requirements that must be met, including confirmation. These requirements are essentially the same as in the present statute, with the one significant change allowing a test pursuant to the employer's policy without regard to being required by law (Page 5, lines 27 - 29; page 5, lines 38 - 39).


Page 6, lines 1 - 3, drops the requirement that the collecting and labeling of the chemical test sample be performed by an individual authorized to do so by law or regulation and adds the additional term "certified." There is no indication as to who certifies or by what standard.

Summary:

As drafted, Senate Bill 55 allows testing pursuant to a drug testing policy of the employer without any reference to standards for that policy. It also provides vague standards as to testing, including the lack of standards for those collecting and labeling samples. In its present form, it could potentially expose employers to wrongful discharge claims.

Again, thank you for the opportunity to submit my thoughts and observations. I am pleased to be available for any questions you may have.

Respectfully,



A. J. Kotich
Chief Counsel
Kansas Department of Labor

Senate Commerce Committee

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Attachment 5-2

VITAE

A. J. (Anthony John) KOTICH

A.J. Kotich currently serves as Chief Legal Counsel for the Kansas Department of Labor and as Special Assistant Attorney General for the State of Kansas.

Previous assignments within the Department include Assistant Secretary of Human Resources, Director of Administration and Legal Services/Chief Counsel, and Deputy Chief Counsel. In addition, he has served as Vice-Chairman of the Employment Security Advisory Council, which is composed of members from Labor, Industry and the private sector. Mr. Kotich has also served in the United States Marine Corps. While in the military, Mr. Kotich served as Judge Advocate, Administrative Law Officer, Chief Prosecutor, Chief Defense Counsel, and as Acting Law Center Director. He was also an instructor for military police personnel.

Mr. Kotich is a graduate of the Moravian Academy and Northwestern Oklahoma State University. He received his Juris Doctor degree from Washburn University School of Law, Topeka, Kansas; is a graduate of the Naval Justice School, Newport, Rhode Island; and the Prosecutor's School at Northwestern University in Chicago. Mr. Kotich serves as an Adjunct Instructor at Washburn University School of Business, where he has taught Labor and Employment Law, Labor Relations, Labor Economics and Legal Business Associations; and at Baker University, where he has taught Human Resource Management, Business Ethics and Leadership, Principles of Organizational Management, and Legal Environment of Business.

Mr. Kotich is a recipient of the annual Ned N. Fleming Excellence in Teaching Award awarded by Washburn University and its regents for consistent excellence in teaching, and he is also the recipient of the Outstanding Graduate Award for Business/Professional from Northwestern Oklahoma State University Foundation. In addition, Mr. Kotich was selected to appear in the year 2000 edition of *Who's Who Among American Teachers*.

Mr. Kotich is admitted to practice before the Kansas District and Appellate Courts, the United States District Court for the District of Kansas, United States District Court for the Western District of Missouri; Tenth Circuit Court of Appeals, Court of Military Appeals, United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. He was the first Kansas governmental attorney admitted to practice before the Tribal District Court of the Prairie Band Potawatomi Nation. He has also appeared before administrative agencies, both state and federal, including the National Labor Relations Board and the National Association of Security Dealers. He is a past President of the Employment Law Section of the Kansas Bar Association and is the author of two articles, *What Employers Need to Know About Substance Abuse Policies* and *An Unemployment Insurance Primer*. He is the author of the publication *Supervision: Ladder to Success or Slide to Failure*.

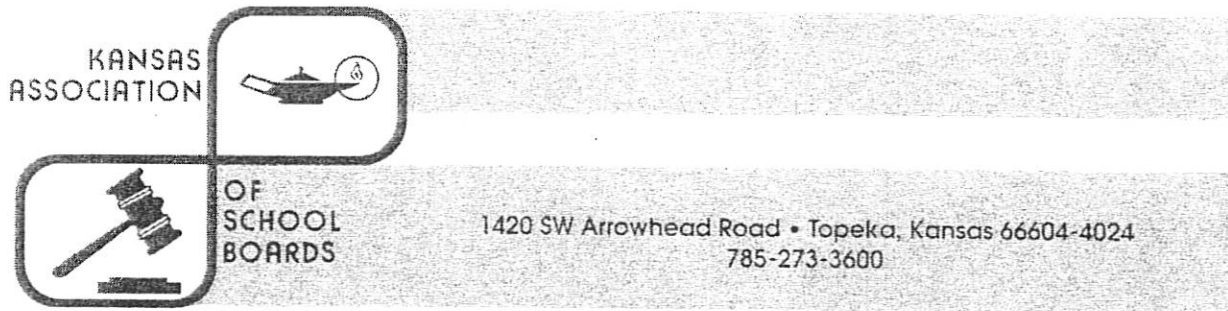
Recognized as a distinguished speaker on issues of employment law and management, A.J. has been a speaker/presenter before numerous public and private organizations, including the Society for Human Resource Management, the Kansas Women's Business Center, Mid-America Labor Management Conferences, various civic and educational organizations, employer institutes/seminars, and was the Centennial Commencement Speaker at his alma mater, Northwestern Oklahoma State University.

In addition, A.J. has coached both boys and girls basketball and baseball teams for many seasons.

Mr. A.J. Kotich
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Senate Commerce Committee

2-8-09
Attachment 5-3



Testimony on **SB 107**
before the
Senate Commerce Committee

by

Jim Edwards, Governmental Relations Specialist
Kansas Association of School Boards

February 8, 2005

Chairs Brownlee and Jordan and Members of the Committee:

Thank you for allowing me the opportunity to appear today to express KASB's support for **SB 107**, a measure which would prohibit charging an employer's account unless an employee is found to be eligible for benefits. Specifically, the employees we are talking about are classified as temporary and/or part-time employees and would be best recognized as substitute teachers or Rule 10 coaches.

In some recent unemployment decisions from administrative law judges (ALJ), the ALJ's have separated the question of qualifications for benefits from the question of whether an employer's account should be charged. As a result, schools are being charged for unemployment benefits in these cases unless an employee is fired for engaging in misconduct. Apparently, being ignored is the *USD 500 v. Womack* decision which suggests the individual must qualify for benefits before an employer's account can be charged. It appears legislative clarification is necessary.

Thank you for the opportunity to offer our thoughts on this important measure and I would be happy to answer questions.

Senate Commerce Committee

2-8-05

Attachment 6-1



The Historic Lackman-Thompson Estate

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TO: Senator Karin Brownlee, Co-Chairperson
Senator Nick Jordan, Co-Chairperson
Members, Senate Commerce Committee

FROM: Ashley Sherard, Vice-President
Lenexa Chamber of Commerce

DATE: February 8, 2005

RE: **SB 55 and SB 107 -- Unemployment Compensation
Benefit Eligibility and Charging of Benefits**

The Lenexa Chamber of Commerce would like to express its support for the concepts addressed in SB 55 and SB 107, bills that promote fairness and acknowledge the spiraling costs of unemployment compensation for employers.

The costs of doing business are an important factor in the attraction, retention, and expansion of business in our state. Since the unemployment compensation moratorium ended in 1999, Kansas employers have experienced significant annual increases in unemployment compensation costs. **Unemployment compensation taxes paid by employers in FY 2004 increased more than \$60 million over collections in FY 2003 – a year-to-year increase of more than 28%. Collections have increased by a total of nearly \$100 million since FY 2002 and around \$175 million since FY 2000** – a very significant increase and one of the business community's fastest growing expenses in recent years!

A portion of these increases is attributable to circumstances such as those addressed by SB 55 and SB 107 – circumstances in which discharged workers may receive and employers may be charged with benefits for which the unemployment compensation system was not intended to pay. Saving Kansas employers these costs sends a positive message, promotes fairness, and encourages the economic and business recovery that actually provides jobs – the only long-term solution to unemployment.

For these reasons, the Lenexa Chamber of Commerce urges the committee to consider SB 55 and SB 107 favorable for passage. Thank you for your time and attention to this critical business issue.

Senate Commerce Committee

2-8-05

Attachment 7-1