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## TESTIMONY ON BEHALF OF THE KANSAS HUMAN RIGHTS COMMISSION IN SUPPORT OF H.B. 2335

### BEFORE THE SENATE JUDICIARY COMMITTEE

March 2, 2012

#### Staff Attending:

William V. Minner, Executive Director  
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The Kansas Human Rights Commission (“KHRC”) urges the Committee to recommend passage of H.B. 2335 amending the disability discrimination provisions of the Kansas Act Against Discrimination (“KAAD”) as enforced and administered by the KHRC. As discussed in more detail below, H.B. 2335 would conform the KAAD to the Americans with Disabilities Act, as amended (“ADA”). However, this is not merely a case of “follow the leader.” Instead, H.B. 2335’s passage would (1) ensure the continued flow of vital federal money to support the KHRC’s operations, (2) eliminate confusion and reduce compliance costs for Kansas businesses, and (3) provide for consistent protection for Kansas employees from unlawful discrimination based on a disability.

#### I. Background

##### A. The KAAD was Modeled After the ADA.

Originally, the KAAD protected individuals from discrimination based on a “physical handicap.” However, in 1990 then-President George H.W. Bush signed into law the Americans with Disabilities Act. In relevant part, the ADA prohibited employer’s with 15 or more employees from discriminating against qualified individuals with disabilities. The ADA broadly defined an individual with a disability as a person who “has a physical or mental impairment that substantially limits one or more of such person’s major life activities, has a record of such impairment, or is regarded as having such an impairment.” 42 U.S.C. § 12102(2).

Those same broad definitions were brought into the KAAD in 1991 when the Kansas legislature amended it to conform to the then-newly adopted ADA. Those 1991 amendments changed the KAAD from prohibiting discrimination due to “physical handicap” to the more expansive prohibitions against disability-based discrimination found in the ADA. Those amendments were made with strong support and were integral in protecting Kansans with disabilities from discrimination.

**B. The U.S. Supreme Court Significantly Narrowed the ADA's Coverage by Limiting the Definition of Disability.**

Despite the original ADA's broad statutory language, the United States Supreme Court had issued several decisions restrictively interpreting and narrowing the definition of "disability." The result was confusion, a narrowing of the ADA's coverage, and the perception that the ADA's original intent had been undercut.

First, in a "trilogy" of cases, the U.S. Supreme Court severely restricted the original broad sweep of the ADA. Those cases were:

- Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999): In this case, the Court held that whether an individual has a disability must be determined with reference to any mitigating or corrective measures the individual uses to offset the effects of a physical or mental impairment. The Sutton plaintiffs, who were legally blind, were found to be not "disabled" under the ADA because they had corrected vision through the use of eyeglasses.
- Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999): In this case, the Court held that the mitigating measures rule articulated in Sutton applied not only to artificial measures, but to "measures undertaken, whether consciously or not, with the body's own systems[.]" so that a person's natural ability to compensate for the effects of an impairment must be considered when deciding whether the individual had a disability.
- Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999): In this case, the Court held the Plaintiff was not disabled under the ADA because his hypertension/high blood pressure was controlled by medication which was considered to be a mitigating measure.

Second, the Court further restricted the ADA's scope in Toyota Motor Mfg. of Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). In that case, the Court held that the ADA's definition of disability "needs to be interpreted strictly to create a demanding standard of qualifying as disabled." The Court further found that in order for an individual to meet the definition of disability by being substantially limited in the major life activity of working, an individual must be precluded from a class of jobs or a broad range of jobs.

These four cases severely hampered the ADA's reach and in a sense set the ADA apart from the nation's other civil rights laws by imposing a presumption of narrow, rather than broad, coverage.

**C. The U.S. Supreme Court's Cramped View of the ADA's Coverage was Imported Into the Kansas Court's Interpretation of the KAAD.**

In Seaman U.S.D No. 345 v. KCCR and Reed, 26 Kan. App. 2d 521 (1999)(review denied by the Kansas Supreme Court), the Kansas Court of Appeals adopted the U.S. Supreme Court's approach in interpreting the KAAD's disability provisions. In that case, the Complainant was an insulin-dependent diabetic and had other conditions related to his diabetes. The Court of Appeals found that corrective or

mitigating measures should be considered in determining whether the individual was disabled. The court first noted that “the KAAD is modeled after the ADA and, therefore, federal court decisions are persuasive authority” in interpreting the Kansas law. In finding that the plaintiff was not disabled because his diabetes was presently controlled by insulin, the court adopted the restrictive ADA rulings of the U.S. Supreme Court as the basic standards for interpreting the KAAD.

As a result of the U.S. Supreme Court’s decisions and the importation of those decisions into the interpretation of the KAAD, individuals claiming that they have been discriminated against based on their impairments have been unable to proceed with their claims because they could not meet the unintended and court-imposed demanding standards related to whether they had a covered disability. Accordingly, parties and courts spent much of their time and resources analyzing whether a person was technically disabled enough to warrant coverage under the ADA or the KAAD instead of analyzing whether the person was subjected to unlawful discrimination. This became a cause of frustration and prevented the legal and administrative systems from fully assessing whether the person was discriminated against despite being otherwise qualified, which is the real issue the federal and state laws were intended to address.

#### **D. Congress Amended the ADA to Restore its Original Broad Protections.**

The frustration surrounding the narrow view of the ADA’s coverage led directly to Congress’ passage of bipartisan legislation to amend the ADA to restore its original broad coverage. The Americans with Disabilities Act Amendments Act (“ADAAA”) became effective January 1, 2009. The ADAAA effectively overruled, by statute, the federal court cases narrowly interpreting the ADA and replaced the focus of the analysis on whether unlawful discrimination had taken place. However, Congress could not, and cannot, overrule by statute the interpretation of the KAAD. Accordingly, while the federal statute has been restored to its original intent, the Kansas Act Against Discrimination remains constricted by the Kansas Court of Appeals decision in Seaman. Like the ADAAA, the only way to effectively restore the KAAD to its original broad promise of protection from discrimination based on an otherwise qualified individual’s disabilities is by statutory amendment.

#### **II. H.B. 2335 Seeks to Restore the KAAD’s Original Broad Protection Assisting the KHRC Achieve its Mission of Eradicating Discrimination, Assisting Kansas Employers to Comply, and Protecting Nearly All Kansans From Unlawful Discrimination on Account of a Disability.**

Like the ADAAA, H.B. 2335 seeks to amend the KAAD to clarify key definitions. Consistent with the ADAAA, the bill eliminates consideration of mitigating measures (except for ordinary eyeglasses or contact lenses), favors broad interpretation of “disability,” recognizes that an impairment that is episodic or in remission remains a disability if it would substantially limit a major life activity when active, provides a non-exhaustive list of what can be considered major life activities, provides clarification regarding the terminology about major bodily functions, provides clarification as to the “regarded as” disabled provisions, and is otherwise intended make the KAAD and the ADAAA provisions similar. Bringing the two statutes into conformity will assist each of the KAAD’s three constituents – the KHRC, Kansas employers, and Kansas employees.

**a. H.B. 2335 is Vital to the KHRC Continuing its Mission to Eradicate Discrimination in the State of Kansas.**

Passage of H.B. 2335 assures the continued receipt of significant federal funds associated with the investigation of disability complaints and the KHRC's operations. The KHRC is party to a work sharing agreement with the U.S. Equal Employment Opportunity Commission (EEOC) to investigate allegations of discrimination arising under both the federal and Kansas anti-discrimination statutes. That agreement is premised on a finding that the state law is in substantial conformance with the federal law. Because the two statutes now have widely different definitions and coverage, the KHRC has made special arrangements with the EEOC to continue to receive payment for investigating disability cases that fall within the jurisdiction of both the KHRC and the EEOC. However, the special arrangement could be unilaterally revoked at any time and the federal funds that flow to the KHRC for the investigation of those cases would cease.

In State Fiscal year 2011, the KHRC received 986 discrimination complaints in the areas of employment, housing, public accommodations, and profiling in conjunction with traffic stops. For all complaints received, 256 complaints cited alleged disability discrimination. Disability was the second highest basis cited. 236 employment complaints alleged discrimination on the basis of disability.

Of the 236 alleged employment discrimination complaints filed on the basis of disability, an estimated 159 were jointly filed with the EEOC and investigated by the KHRC. At a rate of \$600 per case, the EEOC will pay the KHRC an estimated \$95,400 for the investigation of these cases.

The remaining disability discrimination complaints were either first-filed with the EEOC or filed only with the KHRC, for which we would not have received a payment from the EEOC.

**b. H.B. 2335 Will Assist Kansas Employers By Clarifying the Law and Reducing Compliance Costs.**

Presently, most Kansas employers are subject to either the broad definitions under the ADA or the more narrowly construed definitions of the KAAD depending on the number of employees they retain. Trying to comply with two different laws with two different sets of requirements and definitions adds unnecessary and costly confusion for employers seeking to comply with their responsibilities. Bringing the KAAD into conformity with the ADA will eliminate that confusion and apply the same rules to all covered Kansas employers. That consistency and ease of application will assist in securing compliance with the laws and lower the associated compliance costs.

Further, H.B. 2335 is not controversial legislation as it contains precisely the same compromises that won the ADA wide-spread and bipartisan support. The ADA was supported by the entire Kansas Congressional delegation, was signed into law by then-President Bush, and was supported by many employer and industry advocacy groups such as the U.S. Chamber of Commerce and the National Association of Manufacturers.

Finally, H.B. 2335 will allow the KHRC to continue to investigate disability claims arising from Kansas workplaces. Having Kansans, appointed by the Kansas Governor, approved by the Kansas Legislature, investigate and remedy Kansas problems provides a more convenient forum for the parties and a better public policy for the State.

**c. H.B. 2335 Will Assist Kansas Employees By Offering Broad Protections from Unlawful Discrimination.**

Last, but certainly not least, H.B. 2335 will continue Kansas' longstanding tradition of ensuring equality to all of its citizens. Whether a Kansan is protected from unlawful discrimination and can have that claim resolved by the Kansas Commission on Human Rights should not depend on the continued reliance on a line of discredited and discontinued federal court cases. Whether the employer is covered by only the KAAD or by both the KAAD and the ADA, employees should be provided with the same basic freedom from unlawful discrimination.

**III. Conclusion**

The bottom line is that the KHRC believes that H.B. 2335 would help effectuate the original intent behind the 1991 amendments to the KAAD, help the KHRC continue its mission during times of significantly reduced state resources and funding levels, assist employers in complying with the law's requirements, and assist employees by extending broad protection from disability-based discrimination. Accordingly, we urge the Committee's favorable action on the bill.

Credits:

Joseph F. Mastro Simone, former KHRC Chief Legal Counsel