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Testimony in Support of SB 378

Hon. Jeff King, Chair
Senate Judiciary Committee
Kansas Statehouse, 346-S
300 SW 10th Street
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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present testimony in support of SB 378, a bill that seeks to strengthen K.S.A. 44-1131 through K.S.A. 44-1133, which is the Kansas law that prohibits employment discrimination against victims of domestic violence and sexual assault. Under the current version of the law, the Secretary of Labor is required to enforce the law, but the legislature has not specifically empowered the Secretary of Labor any enforcement tools. SB 378 amends the definition section of the law to bring it into conformity with similar definitions existing under Kansas law and it transfers enforcement authority of the law to the Kansas Human Rights Commission, an agency with authority, expertise, and resources to enforce anti-discrimination measures.

First, it is important to note that K.S.A. 44-1132, which is the statute that prohibits employment discrimination against victims of domestic violence and sexual assault, will remain unchanged with this bill. Only the definitions section of the law found at K.S.A. 44-1131, will be amended to bring those definitions into conformity with current state law, and the enforcement provisions of the law found at K.S.A. 44-1133, will be

amended by transferring enforcement authority from the Secretary of Labor to the Kansas Human Rights Commission in order to facilitate enforcement of the law.

The heart of the law, K.S.A. 44-1132, which will remain unchanged states:

(a) An employer may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to:

- (1) Obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order or other injunctive relief to help ensure the health, safety or welfare of the victim or the victim's child or children;
- (2) seek medical attention for injuries caused by domestic violence or sexual assault;
- (3) obtain services from a domestic violence shelter, domestic violence program or rape crisis center as a result of domestic violence or sexual assault; or
- (4) make court appearances in the aftermath of domestic violence or sexual assault.

(b)(1) As a condition of taking time off for a purpose set forth in subsection (a), the employee shall give the employer reasonable advance notice of the employee's intention to take time off, unless such advance notice is not feasible. Within 48 hours after returning from the requested time off, the employee shall provide documentation which may include, but is not limited to, that described in subsection (b)(2) to support taking time off for a purpose set forth in subsection (a).

(2) When an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within 48 hours after the beginning of the unscheduled absence, provides a certification to the employer in the form of any of the following:

- (A) A police report indicating that the employee was a victim of domestic violence or sexual assault;
- (B) a court order protecting or separating the employee from the perpetrator of an act of domestic violence or sexual assault, or other evidence from the court or prosecuting attorney that the employee has appeared in court; or
- (C) documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence or sexual assault.

(c) To the extent allowed by law, the employer shall maintain the confidentiality of any employee requesting leave under subsection (a), as well as the confidentiality of any supporting documentation provided by the employee to the employer relating to a purpose set forth in subsection (a).

(d) An employee may use any accrued paid leave or, if paid leave is unavailable to the employee, unpaid leave, not to exceed a total of eight days per calendar year, as time off for a purpose specified in subsection (a), unless a longer period of time is otherwise available to an employee under the applicable terms of employment or is provided by a collective bargaining agreement. The entitlement of any employee under this section shall not be diminished by any collective bargaining agreement term or condition.

This statute will remain unchanged under SB 378.

The substantive change brought by SB 378, however, is that it will amend the enforcement provisions of this law, which are set forth in K.S.A. 44-1133: "The secretary of labor shall enforce K.S.A. 44-1131 and 44-1132, and amendments thereto, and may adopt rules and regulations necessary to implement the provisions of K.S.A. 44-1132, and amendments thereto." There are no other specific enforcement provisions provided to the Secretary of Labor under this law, and the law does not create a private cause of action against an employer.

Since the law does not grant the Secretary of Labor specific authority to fine an employer for violating K.S.A. 44-1131 *et seq.*, or the authority to issue injunctive relief or other specific performance under this law, the Department of Labor has been unable to meaningfully enforce the provisions of K.S.A. 44-1131 *et seq.* The absence of authority for remedial action under K.S.A. 44-1133, is in stark contrast to the remedies that are available under the Kansas Act Against Discrimination, which specifically grant the Kansas Human Rights Commission the authority to order specific remedial action:

"including but not limited to the hiring, reinstatement, or upgrading of employees, with or without back pay, and the admission or restoration to membership in any respondent labor organizations; the admission to and full and equal enjoyment of the goods, services, facilities, and accommodations offered by any respondent place of public accommodation denied in violation of this act, as, in the judgment of the presiding officer, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance. Such order may also include an award of damages for pain, suffering and humiliation which are incidental to the act of discrimination..." K.S.A. 44-1005.

Key to this issue is the Kansas Supreme Court's opinion that: "Kansas administrative agencies have no common-law powers. Any authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express powers granted." *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 455, 228 P.3d 403, 410 (2010).

Since the Secretary of Labor does not have specific statutory authority or common law powers to enforce the provisions of K.S.A. 44-1131 *et seq.*, the legislature should transfer the enforcement of K.S.A. 44-1131 through 44-1133 to the Kansas Human Rights Commission by passing SB 378. This will strengthen the policy decision made to provide anti-discrimination protection to victims of domestic violence or sexual assault. Alternatively, the legislature could grant the Secretary of Labor the same enforcement powers and investigative resources that already exist within the jurisdiction of the Kansas Human Rights Commission, K.S.A. 44-1003 *et seq.*, which would be duplicative of the existing Kansas Human Rights Commission compliance structure.

With annual complaints ranging between zero complaints to two complaints a year, the burden on the Kansas Human Rights Commission should be *de minimis*, whereas creating an enforcement system at the Department of Labor that mirrors the existing structure at the Kansas Human Rights Commission would be a costly endeavor.

CONCLUSION

SB 378, as drafted, maintains the prohibition of employment discrimination against victims of domestic violence and sexual assault, and strengthens the law by providing the specific statutory authority that is necessary to enforce the law when a violation occurs. Therefore, passage of SB 378, as drafted is recommended.

Respectfully submitted,



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