

To: Representative Les Mason, Chairperson
Members of the House Commerce Labor and Economic Development Committee
SW 8th & SW Van Buren, Topeka, KS 66612

From: Matthew McGivern
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Testifying in person

RE: HB 2461; KWPA Fee Shift Proposed Amendment

I attended the hearing to support my brother Sean, not to testify. However I decided to testify as neutral because I felt I had some experiences that the Committee might find value in. I am a carpenter and attorney, formerly in private practice and now as general counsel for Senne & Company, Inc. I have prosecuted and defended KWPA claims. Call me loyal to Sean (sure it's true), but do not call me biased – I testified based on my personal experience, on my own analyses of the issue, and coming from a way different viewpoint than Sean.

People identify different issues drawing on different life experiences. I believe the true issue here is that our system burdens the KDOL with prosecuting small dollar wage claims. Why is that? Are they in the best position to 1) protect low income earners from wrongful withholdings and 2) protect employers from wage claims that lack merit? The Committee shouldn't get lost in analyzing whether the KDOL is doing a good job or not filling in the cracks on low dollar wage claims. Presumably they are doing a fine job. Rather, the Committee should ask why the KDOL has this obligation. Would the people of Kansas be better off with the status quo, or better off with additional encouragement for private resolution of wage claims.

The analyses here not complicated or complex; it's simple and practical. Just weigh the positives and negatives. In doing so, I believe the Committee should consider all surrounding facts and circumstances, such as the economic realities of the KWPA. I don't have any answers or conclusions on the analyses, and consequently testified as neutral. All I have are my personal experiences and thoughtful opinions based on those experiences.

Although I did not specialize in employment law, in private practice invariably friends and family brought legal problems to me. I bet the attorneys on the Committee can relate. I analyzed many wage claims from both an employer and employee perspective. On the employee side, I was only able to take action on two – one for a family member (I would have done it for free) and one for a doctor (big wages so it made economic sense). Although many may have had merit, the economics didn't allow me to take action.

This brings up the question on the KDOL – are they sufficiently handling the small dollar KWPA claims? The Committee heard testimony on the case load and volume of recovery the KDOL has achieved through their diligent and hard work. However, nobody was able to articulate answers to these two questions: what is the downside of the proposed amendment; and why is the KDOL the proper party to bring private civil actions. If the Committee feels the State can achieve

the objectives of the KWPA better and more efficiently than private practitioners, the status quo should prevail. If not, the Committee should consider the proposed amendment.

Representative(s) expressed concern over a hypothetical downside to the amendment - an employee that damages the employer's property and later files a wage claim. I agree with the concern, so I testified on this. A wage owed is not subject to setoff. It is a bargained for exchange - time and labor in exchange for money. If an employee gives time and labor, agreed upon wages are owed regardless of employee negligence. In the event an employee leaves the scope of employment and engages in intentional damage or theft, the employer has both civil and criminal remedies; civil conversion, trespass, criminal damage to property, criminal theft, etc. The two issues should not be intermingled, they are distinct for employers with proper guidance. Consequently, the bad employee hypo is probably not a negative on this issue.

Another perceived downside is that the amendment will encourage bad and/or unethical lawyers to prosecute frivolous claims. This argument is not unique to the KWPA - we always need to be concerned with bad and/or unethical lawyers' misuse of the Courts in all contexts. Our State and Federal rules of civil procedure (KSA 60-211 / FRCP 11) take care of this and would require the frivolous claimant and/or the claimant's attorney to pay the employer's attorneys' fees. There really is no basis to believe the proposed fee shift will give rise to any more bad and/or unethical practice than we already see.

The only perceivable employer downside I could think of is this: One of our District Court Judges requires an employer to pay a former employee's attorney's fees. This would only happen in the event the employer is found to have wrongfully withheld agreed upon wages. As general counsel of a small business I don't view this as a downside. No responsible business should view this as a downside. My testimony is that proper enforcement of the KWPA will help responsible small businesses, not hurt them.

It could be said that a downside is that plaintiff's lawyers will make more money off of small businesses. My experience tells me this will not happen. What will happen is that claims will settle very early on when an undisputed wage is owed, and no attorneys' fees would be awarded by a Court. When a legitimate dispute arises, the parties will be in a position to choose their litigation strategy and make a business decision. Litigation increases the risk, however when the employer prevails the attorney fee issue is moot.

As for whether the KDOL is the proper party to bring private civil actions, my opinion is no. The reason is that no one has been able to articulate a downside to encouraging private prosecute of the civil claims through the proposed amendment. Why carve out one small segment of civil law for the State to prosecute? Leave State prosecution for what it was designed for - criminal matters.

Thank you for your time and allowing me to speak. I wish the Committee luck on its analyses of the proposed KWPA proposed amendment!

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew J. McGivern". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

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