

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY.

The meeting was called to order by Chairman David Heinemann at 9:00 a.m. on January 27, 1993, in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Jim Wilson, Revisor of Statutes
Kay Scarlett, Committee Secretary

Conferees appearing before the committee:

Martha Gabehart, Director of Kansas Commission on Disability Concerns
Brandon Myers, Kansas Human Rights Commission

Others attending: See attached list

Martha Gabehart, Director of Kansas Commission on Disability Concerns, addressed the committee on The Americans with Disabilities Act Employment Requirements. (Attachment 1)

She distributed a data sheet showing the number of employers and employees in Kansas. (Attachment 2) She also handed out three pamphlets on The Americans With Disabilities Act: "Your Employment Rights as an Individual With a Disability," "Your Responsibilities as an Employer," and "Questions and Answers." Copies of these pamphlets may be obtained from the Kansas Commission on Disability Concerns.

The Americans with Disabilities Act was signed into law in July, 1990, but was not put in force at that time. In the employment area it had a lead in time of two years or July, 1992. It was patterned after two laws, the Rehabilitation Act of 1973 and the Civil Rights Act of 1964.

In answer to Vice Chairman Lane's question on how the ADA tied in with workers compensation, she felt there was conflict. She thought the open records law in workers compensation was discriminatory. When the ADA act was passed, it was very clear that an employee's records were confidential; workers compensation information is not. Discrimination based on past histories for second injury coverage and having to know in advance are problems.

As time was limited, Chairman Heinemann asked Brandon Myers, Chief Legal Counsel for the Kansas Human Rights Commission, if we could reschedule his presentation regarding the disability provisions of The Kansas Act Against Discrimination. (Attachment 3) With his testimony he also provided a copy from the Kansas Register regarding KAAD. (Attachment 4)

The meeting adjourned at 9:58 a.m. The next meeting is scheduled for January 28, 1993.

GUEST LIST

COMMITTEE: HOUSE LABOR AND INDUSTRY

DATE: 1-27-93

NAME	ADDRESS	COMPANY/ORGANIZATION
Yelena Savage	734-S DSOB	KDOT
Larry L. Cowdin	716 DSOB	KDOT
Jane Kneiff	902-N LSAB	ADA
Brandon Myers	851-S LSAB	KHRC
Debbie Ayl	Topeka	KACC/ISTA
Tom Whitaker	Topeka	KS Motor Carriers Assn
Josie Torrez	Topeka	Families Together
Alyde Howard	902N-L SOB	Dept of Admin. ^{Division} Personnel
James A. Jack	Wichita	KSFA
Herb Ansellon Tied	122-S DSOB	KDOH
Mary Bruke	Topeka	KSNA
Larry Lysack	301 SW 10th	Kansas Attorney General
Sharon Huffman	Topeka	KCDC
Glen Ganscy	Topeka	SRS Rehabilitation Svcs
Terry Leatherman	Topeka	KCCI
Frances Kastner	Topeka	KS Food Dealers Assn
Jo Ann Hawley	Topeka	KMHC (Mental Health Interest)
Larry Larson	Topeka	Ko. MH Coalition Ko. Alliance For the MI
David Frankel	Lawrence	KTLA
Ann Golubski	Topeka	KDNR
Trudy Aron	"	Amer Inst of Architects
Mike Brunetti	Topeka	KHRC
Mike Toney	Topeka	KGFA

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NOTES

The Americans with Disabilities Act Employment Requirements

AMERICANS WITH DISABILITIES ACT - signed by President George Bush - JULY 26, 1990

The Kansas Act Against Discrimination (KAAD) passed July 1, 1991

ADA and KAAD prohibit discrimination

- . Employment
- . Public accommodations
- . Public services
- . Transportation
- . Telecommunications

Definition of disability

- . Physical or mental impairment
that limits major life activity

Physical -- any physiological disorder or condition, disfigurement or anatomical loss affecting a body system - nerves, muscles and bones, sense, breathing, blood circulation, digestive, genitourinary, blood, lymph, skin or endocrine glands

Mental or psychological disorder -- mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities

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Major life activities - caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, working

- . A record or history of impairment

History -- medical or employment records -- or misclassification

- . Perception of impairment

Perception by others, not self (stigmatic condition, burns)

- . Specific groups not protected

Those currently using illegal drugs, homosexuals, bisexuals, transvestites, transsexuals, compulsive gambling, kleptomania, pyromania, current psychoactive substance use disorders resulting from current use of illegal drugs

Title I, Employment

Employment

Who's covered?

- . Employers
- . Employment agencies
- . Labor organizations
- . Labor-management committees
- . Government agencies *no size limitation*
- . Agent of employer.

Employer -- people who are engaged in an industry affecting commerce. People work each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Information provided by the Kansas Commission on Disability Concerns and Kansas Rehabilitation Services.

Size of employer = 15 or more employees ADA
Size of employer = 4 or more employees KAAD

Exclusion (consistent with Title VII, Civil Rights Act of 1964) people working for a private membership club, certified by IRS, 501(c)3

Key time lines for employers

July 1, 1991: 4 or more employees for the KAAD
July 26, 1992: 25 or more employees for the ADA

According to Labor Market Information Statistics 12% (8,661) of the employers in Kansas in March of 1991 has 20 or more employees.

July 26, 1994: 15 or more employees for the ADA

According to LMIS an additional 11% (8,196) of the employers in Kansas have 10 or more employees.

LESS THAN 23% (16,857) OF THE EMPLOYERS IN KANSAS HAVE TO COMPLY WITH THE ADA (More than 77% do not have to comply)

Exemption: 14 or fewer employees for the ADA

The underlying premise of Title I -- People with disabilities should not be excluded from job opportunities unless they are unable to do the job.

- people should be judged on their qualifications, not on their disability. Those who are not qualified should not be given the job.

Qualified individuals with disabilities

. Applicants or employees are protected if they can, with or without reasonable accommodation, perform the essential functions of the job

Qualified means that all of the applicants have the same basic education and experience even the disabled applicants. The law does not require an employer to hire an individual with a disability who does not meet the basic education and experience requirements of the position.

Determining essential functions

Essential functions means job tasks that are fundamental and not marginal.

- A job task could be considered essential because
- . the position exists is to perform that function
 - . the limited number of employees available among whom the job function can be distributed
 - . the function may be highly specialized so that the incumbent in the position is hired for their expertise or ability to perform the particular function.

Evidence of whether a particular function is essential included, but is not limited to,

- . Employer's judgement
- . Written job descriptions

- . the amount of time spent on the job performing the function
- . the consequences of not requiring the incumbent to perform the function
- . terms of a collective bargaining agreement
- . work experience of past incumbents in the job and/or
- . current work experience of incumbents in similar jobs.

Reasonable accommodation

The individual with the disability has the most experience in accommodating their needs. They are the first person to ask.

People with disabilities must ask for an accommodation before it must be given. If the person with a disability doesn't ask, the employer is not required to give it.

- . Tailored to individual's needs and job requirements
- . Unnecessary or inferior accommodations may be rejected
- . Making existing facilities readily accessible
- . Acquiring or modifying equipment or devices
- . Job restructuring
- . Modifying work schedules
- . Adjusting training materials or exams
- . Providing readers or interpreters
- . Providing personal support

Undue hardship

- . Not required if it would pose undue hardship
Significant difficulty or expense

Factors used in determining undue hardship

Information provided by the Kansas Commission on Disability Concerns and Kansas Rehabilitation Services.

- . Nature and cost of accommodation
- . Employer size, type and financial resources
- . Nature and type of business

ADA requires equal treatment in:

- . Job application procedures
- . Hiring
- . Advancing
- . Discharging
- . Compensating
- . Training
- . Other terms conditions or privileges

ADA does not limit the ability of employers to select and maintain a QUALIFIED work force

Employment provisions

- . Use of the same pay scales, benefits or promotional opportunities for all employees
 - . Integrated work areas and break rooms
 - . Other business-related activities
 - . Equal access to health insurance coverage
- Pre-existing condition clauses are allowed

Pre-employment inquiries

- . Employers may not ask if an applicant has a disability
- . Employers may ask if the applicant can perform job-related duties
- . Employers may invite applicants to disclose disability information for affirmative action or safety

Pre-employment physicals

- . Job-related

- . Consistent with business necessity
- . Requested after an offer of employment
- . Required of all applicants for the position

Medical information

- . Confidential
- . Separate files
 - Supervisors and managers - for use in making accommodations
 - Safety personnel - for evacuation purposes
 - Enforcement officials - for compliance with the law
 - Workers Compensation for the purposes of access second injury funds

Alcohol and illegal drug use

Employers may:

- . Testing
- . Prohibit employees from using or being under the influence at the work place

Alcohol and drug use

Employers shall:

- . apply same job performance and behavior standards to all employees

Remedies allowed

- . Title VII of Civil Rights Act of 1964
- . Hiring or reinstatement
- . Back pay
- . Reasonable attorney's fees and costs

**. Enforcement by U.S. Equal Employment Opportunities
Commission**

KANSAS
UNITS AND EMPLOYMENT
BY SIZE CODE
MARCH 1991

SIZE CODE	EMPLOYMENT	UNITS	CUMULATIVE	
			EMPLOYMENT	UNITS
TOTAL	1,028,677	73,428		
0 EMP = 0	0	7,393	0	7,393
1 EMP = 1 - 4	73,005	35,081	73,005	42,474
2 EMP = 5 - 9	92,729	14,097	165,734	56,571
3 EMP = 10 - 19	109,892	8,196	275,626	64,767
4 EMP = 20 - 49	161,118	5,306	436,744	70,073
5 EMP = 50 - 99	126,987	1,848	563,731	71,921
6 EMP = 100 - 249	166,128	1,104	729,859	73,025
7 EMP = 250 - 499	80,095	237	809,954	73,262
8 EMP = 500 - 999	68,878	103	878,832	73,365
9 EMP = 1000+	149,845	63	1,028,677	73,428

Information from the Ks. Department of Human Resources Labor Market Information Services (LMIS)

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BRIEFING BY BRANDON L. MYERS, CHIEF LEGAL COUNSEL
KANSAS HUMAN RIGHTS COMMISSION, BEFORE
HOUSE LABOR AND INDUSTRY COMMITTEE,
JANUARY 27, 1993, REGARDING
DISABILITY PROVISIONS OF
THE KANSAS ACT AGAINST
DISCRIMINATION

The Kansas Human Rights Commission (KHRC, formerly the Kansas Commission on Civil Rights or KCCR) administers and enforces the Kansas Act Against Discrimination (KAAD, K.S.A. 44-1001, et seq) and the Kansas Age Discrimination in Employment Act (KADEA, K.S.A. 44-1111, et seq). We accept and investigate complaints filed under those laws, find probable cause or no probable cause, make efforts to resolve such complaints, and provide for public hearings on unconciliated probable cause cases wherein remedies may be ordered if violations of the laws are proven. Public hearing orders are appealable to State District Court and the Appellate Court system of Kansas.

The KAAD was amended in 1991 by H.B. 2541 to include provisions against employment discrimination and discrimination in places of public accommodations on the basis of disability (both mental and physical). The bill was essentially patterned upon the Federal Americans with Disability of 1990 (ADA) and was intended to effectuate the same basic public policy of assuring that otherwise qualified disabled individuals would be given the opportunity for employment and access accommodations. It utilizes ADA-type language and principles of "reasonable accommodation", "undue hardship," etc. to accomplish these purposes. It is intended to be much in substantial conformity with the ADA. (The bill also amended the KAAD's housing discrimination section to prohibit

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discrimination on the bases of disability and familial status in a manner similar to the Federal Fair Housing Amendments Act of 1988, and added provisions for access to public buildings, enforceable through the Kansas Attorney General's office.)

Differences between State and Federal disability discrimination law (KAAD vs ADA):

1. The KAAD is administered by KHRC; Title I of ADA is administered by Federal Equal Employment Opportunity Commission (EEOC).

2. Coverage and effective date:

KAAD: covers employers of 4 or more employees effective July 1, 1991;

ADA: covers employers of 25 or more employees effective July 26, 1992 and employers of 15 or more employees effective July 26, 1994.

[In 1994, then, the size of employer covered will be similar between the KAAD and the ADA (4 v. 15) to the relation of KAAD and Title VII on other types of discrimination, and between the Kansas Age in Discrimination Act (KADEA) and the Federal Age Discrimination in Employment Act (FADEA) (4 v. 20).

3. Awards, Damages, Restitution, Attorneys Fees, Recovery:

ADA and KAAD both provide for restitution of lost wages, benefits, etc. when discrimination is proven. However, when H.B. 2541 was passed, the KAAD had authority for up to \$2,000.00 incidental awards for damages for pain, suffering and humiliation. When the ADA of 1990 was initially passed, it did not authorize such awards. With passage of the Civil Rights Act of 1991 however, the ADA now authorizes awards (without a comparable \$2,000.00 cap) for pain, suffering and humiliation-type damages, as well as punitive damages (which the KAAD does not have). Attorney fees are awardable to prevailing parties under the KAAD, but not, in this regard, under the KAAD.

4. Other minor differences:

These are also similar to those existing between the KAAD and Title VII. For example the limitation period for filing a complaint with the KHRC/EEOC:

KAAD: 6 months from date of incident

ADA: 180 days

The KAAD 6 months limitation may be slightly more or less than 180 days depending on which months are involved.

5. REGULATIONS:

EEOC was mandated to enact substantive regulations implementing the ADA, and has done so. The KAAD disability provisions became effective before interpretive regulations were proposed. Still, we have now adopted Kansas Administrative Regulations 21-34-1 through 21-34-21, captioned Guidelines on Discrimination Because of Disability.

These were patterned upon the EEOC regulations, and are substantially similar. They provide clarification of various key terminology ("reasonable accommodation," "undue hardship," "direct threat," etc). The temporary regulations were effective 3-27-92, and became permanent 4-27-92.

Highlights:

Drug testing allowed (not considered pre-employment medical exam) (21-34-8)

Smoking can be regulated in the workplace (21-34-12)

Voluntary medical exams which are part of employee health programs are allowable (21-34-6)

Illegal use of drugs and alcohol in workplace may be prohibited (21-34-7)

Must reasonably accommodate food handlers with communicable, infectious diseases. (21-34-16)

"Disability" does not include homosexuality, bisexuality, sexual identity or behavior disorder, compulsive gambling, kleptomania, pyromania, etc. (21-34-20)

Results of Amendments:

Under the physical handicap provisions of the KAAD before the 1991 disability amendments, we generally averaged about 75 employment complaints filed per year with KHRC alleging that kind of discrimination. In the fiscal year just completed, we had 238 disability complaints and 38 physical handicap complaints filed alleging employment discrimination. (Because of the six months filing limitation period, "physical handicap" complaints brought

under the previous version of the statute alleging incidents before the July 1, 1991 change in the statute were filed into the 1992 fiscal year which commenced also on July 1, 1991. We additionally had 13 disability complaints filed in the area of public accommodations which also constituted an increase over the average of physical handicap cases annually so filed). This quadrupling of complaints filed has prompted an increased need for resources from the KHRC. Our Federal EEOC/KHRC worksharing agreement and case processing contract has been expanded and increased as EEOC has gained ADA jurisdiction. (It should be noted that the phenomena of increased KHRC complaint-filing is not solely a result of the disability law changes. For example in FY 1992 we had a fairly drastic increase in the filing of sex discrimination complaints. For the first time ever the highest number of complaints were filed on the basis of sex discrimination (509 in employment, versus, for example, 364 on the basis of race, and 328 on the basis of age). This included a doubling of sexual harassment complaints from 75 to 150, which is an increase surmisably prompted in part by the publicity surrounding the Hill-Thomas hearings.)

We have so far seen no significant skewing of complaint-filing against so-called smaller employers not otherwise covered by ADA.

The KAAD and ADA now basically require the employment of an otherwise qualified mentally or physically disabled individual who can perform at least the essential functions of a job, with or without reasonable accommodation. Removal of barriers to employment of otherwise qualified individuals is generally

required. The public policy focus of these provisions contrast markedly with the KAAD's previous limited prohibitions against "physical handicap" discrimination, and the provision in K.S.A. 44-1006 (now repealed in pertinent part) which stated: "Nothing in the Kansas Act Against Discrimination shall be construed to require the construction of any special facilities or fixtures for the physically handicapped."

Although the changes were significant, many employers had for many years either voluntarily, pursuant to contracts or collective bargaining agreements, or due to being covered under the Federal Rehabilitation Act (due to Federal contracts/funding) been operating under the system of reasonably accommodating disabled employees and making modifications which did not constitute undue hardships. In addition, since both ADA and KAAD also similarly prohibit disability-based "public accommodations" discrimination and require at least readily achievable modification in the provisions of services to customers and the public, many employers have been prompted to make adjustments in their stores, etc. to accommodate those they serve and to enhance their client base which satisfy the adjustments necessary to accommodate their employees. Studies previous to the adoption of the ADA established that the vast majority of reasonable accommodations necessitated by such laws cost little or nothing. Additionally, a variety of tax breaks and grants are available to businesses and entities to assist with any such costs incurred in making modifications. Federal EEOC has published its Technical Assistance Manual and an ADA Resource

Directory listing agencies and entities available to help implement these laws. Other Federal agencies such as the Department of Justice provide such assistance, and, of course, KCDC and KHRC, as well as other State of Kansas agencies are available for assistance and educational activities as to these laws.

Concerns exist over conflicts between the disability discrimination laws and workers compensation. However, both laws are designed to encourage employment of qualified disabled or previously injured workers. While the disability laws limit pre-employment medical inquiries and examinations and require a focus upon a person's ability to perform the tasks required of a job, they do not prohibit ascertaining the need to accommodate an employee's disability or reasonable post-employment information gathering to facilitate the preservation of an employer's rights to claims against the Workers Compensation fund with regard to previous injuries. For example, uniformly requiring post-conditional hiring offer medical exams or inquiries which are job-related and necessary for all new-hires in a job category, and subsequent confidential maintenance of such medical information (with filing of pre-existing handicap information on a Form 88) may properly serve such purpose without violating disability laws. The disability laws do not require the hiring of unqualified persons, or those who are a direct threat to health and safety in the workplace, and require only those accommodations which are reasonable and do not constitute an undue hardship are required. They do not require the discharge of qualified or competent

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personnel in this process. Additionally, qualification standards, employment tests or other selection criteria which tend to screen out the disabled may nonetheless be job-related if justified by business necessity. The KAAD specifically contains at K.S.A. 44-1009 the "valid business necessity" defense.

business in the United States could be subject to a branch profits tax imposed by Section 884 of the code; (v) passive investment income, including interest on the bonds, may be subject to federal income taxation under Section 1375 of the code for Subchapter S corporations that have Subchapter C earnings and profits at the close of the taxable year if greater than 25 percent of the gross receipts of such Subchapter S corporation is passive investment income; and (vi) Section 86 of the code requires recipients of certain Social Security and certain Railroad Retirement benefits to take into account in determining gross income, receipts or accruals of interest on the bonds. These categories of bondowners should consult their own tax advisers as to the applicability of these consequences.

Bond counsel expresses no opinion regarding other federal tax consequences arising with respect to the bonds.

The bonds are exempt from intangible personal property taxes levied by Kansas counties, cities or townships. Interest on the bonds is excluded from the computation of Kansas adjusted gross income for taxable years commencing after December 31, 1987.

Bonds Not to be Rated

The bonds will not be rated by Standard & Poor's Corporation or Moody's Investors Service, Inc., or by any other bond rating service.

Additional Information

Additional information regarding the bonds may be obtained from the City Clerk, 107 W. Commercial, Oberlin, KS 67749, (913) 475-2217; or from bond counsel, Fred W. Rausch, Jr., Suite 201, 220 S.W. 33rd, Topeka, KS 66611, (913) 267-3470.

Dated March 2, 1992.

The City Council of
The City of Oberlin
Decatur County, Kansas
By Martha Nemeth
Oberlin City Clerk
107 W. Commercial
Oberlin, KS 67749
(913) 475-2217

Doc. No. 011705

State of Kansas

Kansas Human Rights Commission

Permanent Administrative Regulations

Article 34.—GUIDELINES ON DISCRIMINATION BECAUSE OF DISABILITY

21-34-1. Definitions. (a) "Covered entity" means an employer, labor organization, employment agency, or joint labor-management committee.

(b) "Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

(c) "Essential function" means the fundamental job

duties of the employment position the individual with a disability holds or desires. The term "essential function" does not include the marginal functions of the position.

(d) "Has a record of such impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting a limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or

(3) Has none of the impairments defined in subsections (h)(1) or (2) of this section but is treated by a covered entity as having an impairment.

(f) "Illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by Controlled Substances Act or other provisions of Federal or Kansas law.

(g) "Major life activities" means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(h) "Physical or mental impairment" means:

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) "Qualified individual with a disability" means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position the person holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position.

(j) "Qualification standards" means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(k) "Substantially limits" means:

(1) unable to perform a major life activity that the average person in the general population can perform; or

(2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the con-

(continued)

dition, manner, or duration under which the average person in the general population can perform the same major life activity. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1991.)

21-34-2. Medical examinations and inquiries; general prohibition. The prohibition against discrimination as referred to in K.S.A. 44-1009(a)(1) and 44-1009(a)(8) shall include medical examinations and inquiries. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-3. Preemployment medical examinations and inquiries. (a) Prohibited examination or inquiry. A covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or severity of the applicant's disability, except as provided in 21-34-4.

(b) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-4. Employment entrance examinations and inquiries; exception. A covered entity may require a medical examination, inquiry, or both after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant, and may condition an offer of employment on the results of the examination, inquiry, or both if:

(a) all entering employees in the same job category are subjected to an examination, inquiry, or both regardless of disability;

(b) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:

(1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(3) government officials investigating compliance with this act shall be provided relevant information on request; and

(c) the results of such physical examination, inquiry, or both are used only in accordance with these regulations. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-5. Prohibited medical examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an em-

ployee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-6. Acceptable medical examinations and inquiries. (a) A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(b) Information obtained under subsection (a) regarding the medical condition or history of any employee is subject to the requirements of subsections (b) and (c) of 21-34-4. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-7. Regulation of alcohol and drugs. These regulations do not prohibit a covered entity from:

(a) prohibiting the illegal use of drugs and the use of alcohol at the workplace by all employees;

(b) requiring that employees not be under the influence of alcohol or drugs at the workplace;

(c) requiring that employees behave in conformance with the requirements established pursuant to the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(d) holding an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that the entity holds other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(e) requiring that its employees employed in an industry subject to federal regulations comply with the standards established in those regulations, if any, regarding alcohol and the illegal use of drugs; and

(f) requiring that employees employed in sensitive positions in an industry subject to federal regulations comply with those regulations, if any, that apply to employment in sensitive positions. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-8. Drug testing. (a) A test to determine the illegal use of drugs shall not be considered a medical examination.

(b) Nothing in this paragraph shall be construed to encourage, prohibit, or authorize the conducting of drug tests for the illegal use of drugs by job applicants or employees or making employment decisions based on the test results. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-9. Transportation employees. Nothing in

These regulations should be construed to encourage, prohibit, restrict or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the United States Department of Transportation of authority to:

(a) test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs and/or for on-duty impairment by alcohol; and

(b) remove persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to subsection (b)(1) of this regulation from safety-sensitive positions. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-10. Information from a drug test. Any information regarding the medical condition or history of any employee or applicant obtained from a drug test, except information regarding illegal use of drugs, is subject to the requirements of subsections (b) and (c) of 21-34-4. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-11. Illegal use of drugs and alcohol; exception to the definition of "qualified individuals with a disability"; policies and procedures. (a) The term "qualified individual with a disability" shall not include any employee or applicant who is engaging in the illegal use of drugs, when the covered entity acts on the basis of the illegal use of drugs.

(b) Nothing in subsection (a) of this regulation shall be construed to exclude as a "qualified individual with a disability" an individual who:

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

(2) is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs; or

(3) is erroneously regarded as engaging in the illegal use of drugs, but is not engaging in the illegal use of drugs.

(c) It shall not be a violation of this act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b)(1) or (2) of this section is no longer engaging in the illegal use of drugs. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-12. Regulation of smoking. A covered entity may prohibit or impose restrictions on smoking in places of employment. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-13. Direct threat; criteria for determination.

(a) The determination that an individual with a disability poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge, on the best available objective evidence, or both.

(b) In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) the duration of the risk;

(2) the nature and severity of the potential harm;

(3) the likelihood that the potential harm will occur; and

(4) the imminence of the potential harm. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-14. Essential function; criteria for determination. (a) A job function may be considered essential for any of several reasons, including but not limited to the following:

(1) the function may be essential because the reason the position exists is to perform that function;

(2) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and

(3) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(b) Evidence of whether a particular function is essential includes, but is not limited to:

(1) the employer's judgment as to which functions are essential;

(2) written job descriptions prepared before advertising or interviewing applicants for the job;

(3) the amount of time spent on the job performing the function;

(4) the consequences of not requiring the incumbent to perform the function;

(5) the terms of a collective bargaining agreement;

(6) the work experience of past incumbents in the job; and

(7) the current work experience of incumbents in similar jobs. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-15. Direct threat as qualification standard. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of that individual or others in the workplace. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-16. Infectious and communicable diseases; food handling jobs. (a) If an individual with a disa-

(continued)

bility is disabled by an infectious or communicable disease and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign the individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(b) This regulation does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(1) provide greater or equal protection for the rights of individuals with disabilities disabled by an infectious or communicable disease that are afforded by the Americans with Disabilities Act of 1990; and

(2) is designed to protect the public from individuals who pose a significant health risk to the health and safety of others, where that risk cannot be eliminated by reasonable accommodation. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-17. Substantially limit; criteria for determination. (a) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

- (1) the nature and severity of the impairment;
- (2) the duration or expected duration of the impairment; and
- (3) the permanent or long term impact of the impairment, or the expected permanent or long term impact of the impairment. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-18. Substantially limit; definition with respect to the major life activity of "working"; criteria for determination. (a) With respect to the major life activity of "working," the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(b) In addition to the factors listed in paragraph (a) of 21-34-17, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working";

- (1) the geographical area to which the individual has reasonable access;
- (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and
- (3) the job from which the individual has been dis-

qualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-19. Undue hardship; definition; criteria for determination. (a) "Undue hardship" means an action requiring significant difficulty or expense.

(b) Criteria for determination. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(1) the nature and net cost of the accommodation needed under this act, taking into consideration the availability of tax credits and deductions, outside funding, or both;

(2)(A) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation;

(B) the number of persons employed at the facility;

(C) the effect on expenses and resources, or any other impact of the accommodation upon the operation, of the facility;

(3)(A) the overall financial resources of the covered entity;

(B) the overall size of the business of a covered entity with respect to the number of its employees;

(C) the number, type, and location of its facilities; and

(4)(A) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of the entity;

(B) the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-20. Exceptions to the definitions of "disability." (a) The term "disability" does not include:

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

(b) Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this act. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T____, ____; effective April 27, 1992.)

21-34-21. Health insurance, life insurance, and other benefit plans. (a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans,

or similar organizations, may underwrite risks, classify risks, or administer risks that are based on or not inconsistent with State law.

(b) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(c) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(d) The activities described in paragraphs (a), (b), and (c) are permitted unless these activities are a subterfuge to evade the purposes of this act. (Authorized by K.S.A. 44-1004; implementing K.S.A. 44-1009, as amended by L. 1991, Chapter 147, Section 6; effective T—, —; effective April 27, 1992.)

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Executive Director

Doc. No. 011697

State of Kansas

Board of Agriculture Division of Water Resources

Permanent Administrative Regulations

Article 42.—DESIGN OF STREAM OBSTRUCTIONS

5-42-1. Stream obstruction; plans and specifications. Plans for a stream obstruction shall include: (a) A general location map or aerial photograph showing the stream, location of the proposed obstruction, section lines, a bar scale, a north arrow, property lines with names and addresses of adjoining landowners, and any other landowners who may be hydraulically affected by the proposed stream obstruction, drainage area and any other prominent features;

(b) a detailed plan view fully describing the obstruction and the site;

(c) a profile showing the present elevation of the stream bed and both banks, extending upstream to the point where the stream bed elevation is equal to or higher than the top of the obstruction and extending downstream an equivalent distance from the project site;

(d) an elevation view showing the obstruction on a cross section of the stream and the valley up to the post project design flood elevation at the site;

(e) at least one permanent bench mark shall be conveniently located for use after construction. The location, description and elevation of the permanent bench mark, to which all elevations are referred, shall be shown on the plans. Reference to the national geodetic vertical datum of 1988, or other acceptable national vertical datum, to a tolerance of plus or minus one half foot is required for all stream obstructions on perennial streams and where detailed floodplain data

are available. Project datum is acceptable on all other stream obstruction projects;

(f) details of the manner in which the obstruction is to be tied into the bed and banks of the stream; and

(g) the land for which easements or rights-of-way are to be acquired if the proposed obstruction affects land other than that owned by the applicant; and

(h) unless it is clear that the impacts of the proposed project will be contained within the channel or limited to property under the control of the applicant, a hydraulic analysis determining the pre-project and post-project water surface elevations for the two-year flood and the 100-year flood shall be prepared and submitted to the chief engineer. (Authorized by K.S.A. 82a-303a; implementing K.S.A. 82a-302; effective May 1, 1987; amended, T-5-12-30-91, Dec. 30, 1991; amended April 27, 1992.)

5-42-3. Stream obstruction; pipeline crossings.

(a) All pipeline and buried cable crossings of streams having 50 or more square miles of drainage area above the proposed project site require a permit from the chief engineer. The chief engineer reserves the right to require a permit for a pipeline or buried cable crossing on a stream having less than 50 square miles of drainage area, if necessary, to protect the public interest, public safety or the environment.

(b) Underground pipelines and cables shall be buried at a sufficient depth below stream bed to prevent exposure. On navigable streams underground pipelines and cables shall be buried at a minimum depth of seven feet beneath the stream bed. On all other streams, underground pipelines and cables shall be buried at a minimum depth of five feet beneath the stream bed. Pipelines and cables shall be buried sufficiently into the banks to allow for a moderate amount of stream meander without exposure. The minimum depth may be waived if it can be shown by the applicant that the underground pipeline or cables are adequately protected against erosion.

(c) After installation, the channel and banks shall be restored to the natural elevations and configurations as nearly as possible. Armoring devices shall be installed when necessary to ensure bank stability. Surplus excavated material shall be disposed of in a manner which will not obstruct the channel or act as a levee. (Authorized by K.S.A. 82a-303a; implementing K.S.A. 82a-303; effective May 1, 1987; amended April 27, 1992.)

Article 45.—DESIGN OF LEVEES

5-45-1. Levees and floodplain fills; definitions. As used in these rules and regulations, K.S.A. 24-126, and by the division of water resources in administering K.S.A. 24-126, unless the context clearly requires otherwise, the following words and phrases shall have the meaning ascribed to them in this section: (a) "Approval" means the written approval of plans and specifications by the chief engineer authorizing the applicant to proceed with the construction and maintenance of a levee or floodplain fill project.

(b) "Authorized representative" means any staff em-

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