Approved: 3/14/94
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 11, 1994 in Room 123-S of the Capitol.

Member present: Senators Burke, Downey, Gooch, Harris, Kerr, Petty, Ranson, Reynolds, Salisbury, Steffes and Vidricksen

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Ann Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee: Terry Leatherman, KCCI
Jeffrey A. Chanay, Attorney, Entz & Chanay
Christy Young, Greater Topeka Chamber of Commerce

Others attending: See attached list

Continuation of hearing on SB 692-Employment security, benefit disqualification for misconduct

Terry Leatherman, KCCI, testified in support of SB 692. He stated SB 692 proposes two changes in the current law by changing the definition of employee misconduct and amending the determination of when chronic absenteeism is considered misconduct. Unemployment benefits are intended for workers who have become unemployed "through no fault of their own", and an employee who is dismissed for misconduct is responsible for their unemployment. As a result, they are not unemployed "through no fault of their own" and should not qualify for unemployment compensation benefits, see attachment 1.

Jeffrey A. Chanay, Attorney, Entz & Chanay, testified in favor of SB 692. He said SB 692 contains two substantive amendments to the Employment Security Law. SB 692 eliminates the employer's burden of proving employee intent for purposes of determining employee misconduct, and modifies the misconduct test in the area of chronic absenteeism. Both of these amendments represent a significant improvement in the administration of the law. No properly qualified individual will be denied unemployment benefits under SB 692. Instead, SB 692 shifts the burden in regular misconduct cases to the employee. SB 692 also allows each employer the right to determine what absenteeism policy is best suited for its business, see attachment 2.

Christy Young, Greater Topeka Chamber of Commerce, presented prepared testimony to the Committee from McBiz Corporation, see attachment 3, and Mark Russell, President of LaSiesta Foods, Inc., see attachment 4, both of Topeka, Kansas. She explained that both companies are in favor of SB 692.

The Chairman announced the hearing on SB 692 will be continued next week since a representative of the AFL-CIO was not prepared to testify this week. The time and place will be announced.

Senator Burke moved to adopt the minutes of March 9 and March 10. Senator Steffes seconded the motion and the motion carried on a voice vote.

The Chairman adjourned the meeting at 9:00 a.m.

The next meeting is scheduled for March 14, 1994.

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE DATE: 3/11/94

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
BOB LORRANT	TOPEKA	KCCI
Jeff Chanay	Topeka	Entz & Chanay
Christy Young	Topeka	Topeka Chamber of Com
Roger Traylor	"	Ks Govt Consulting
Gena McFarland	Overland Park	OP Chamber
Mark Parcellina	Topeka	KDOC&H
Michelle Clum	Topeka	Atty. Jon Small
ROBERT LIEKE	TOPEKA	KDHR
PAUL BICKNELL	TOPEKA	KDHR
Bill Layes	Topeka	KDHR
Saul Orozco	Topeka	KDHR
Linda Tierce	Topeka	KDHR

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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SB 692

March 10, 1994

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Commerce

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

My name is Terry Leatherman. I am Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to explain why the Kansas Chamber supports passage of SB 692.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

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Attachment 1-1

The policy questions contained in SB 692 concern how Kansas should determine if employee misconduct exists, and therefore the employee should not qualify for unemployment compensation benefits. SB 692 proposes two changes in current law by changing the definition of employee misconduct and amending when chronic absenteeism is considered misconduct. KCCI feels both changes bring Kansas law in line with two fundamentals in unemployment compensation. The first fundamental is that unemployment benefits are intended for workers who have become unemployed "through no fault of their own." The second fundamental is that an employee dismissed for misconduct is responsible for their unemployment. As a result, they are not unemployed "through no fault of their own" and should not qualify for unemployment compensation benefits.

DEFINITION OF MISCONDUCT

Current law defines misconduct as "a violation of a duty or obligation reasonably owed the employer as a condition of employment." However, the current law reality is these are only words on a page. The real test an employer must meet in proving employee misconduct is to present facts that show:

(A) Willful and intentional action which is substantially adverse to the employer's interest;

or,

(B) Carelessness or negligence of such degree or recurrence as to show wrongful intent or evil design.

In the misconduct tests, an employer must show an employee's "willful intention" or "wrongful intent" in order to sustain a charge of misconduct. Please realize the challenge this places on employers to substantiate a charge of misconduct. Current law demands an employer present facts probing into what the employee was thinking when misconduct happened. In test (A), they must show the employee's action was calculated and deliberate. In test (B), they must demonstrate an employee's recurring negligence underscores an illicit and depraved plot.

The employees "intent" is a very important issue in determining whether unemployment compensation should be awarded. However, to require an employer to prove an employee's

intentions, much less their "wrongful intent," "willful intent," or "evil design" is a very high burden.

SB 692 proposes to change the employer's burden in demonstrating employee misconduct. The two part test of misconduct is stricken. As a result, the employer's burden in demonstrating misconduct would be to show the employee "violated a duty or obligation reasonably owed the employer as a condition of employment."

The proposed change would clearly simplify the employer's responsibility to sustain a misconduct charge. However, it would be unfair if the case ended without considering conditions which led to a termination. Employee "intent" is important. That is why it is important to make clear that an employer meeting their burden of proof of misconduct, as proposed in SB 692 would not mean the case is closed, and an employee is denied benefits.

Current law would allow an employee to establish their rights for benefits through KSA 44-706(B)(4), found on page 5-line 13 of SB 692, where it states "an individual shall not be disqualified under this subsection (misconduct) if the individual is discharged under the following circumstances."

Especially important are the defenses an employee can show in section (B), beginning on page 5-line 18. They qualify an individual for unemployment benefits if they were making a good faith effort to perform their work, but were discharged for: (1) inefficiency; (2) unsatisfactory performance due to inability, incapacity or lack of training or experience; (3) isolated instances of ordinary negligence or inadvertence; (4) good faith errors in judgment or discretion; or, (5) unsatisfactory work or conduct due to circumstances beyond the individual's control.

The bottom line called for in SB 692 is a shift of responsibility in determining "misconduct." Instead of requiring employers to show the willful or wrongful intentions of their employee, they must show the employee did not live up to an employment obligation. It would then be the employee's challenge to demonstrate that reasons exists why they should qualify for unemployment benefits.

ABSENTEEISM

Current law requires a series of events to occur before an employee's absenteeism record is considered "misconduct."

1) the individual must be absent without good cause,

2) the absence must be substantially adverse to the employer's interest,

3) the employer must have given written notice to the individual that future absence may result in discharge, and,

4) the individual continued a pattern of absence without good cause.

Meeting current law requirements have been very challenging for businesses. The requirement that an employer show an absence is "substantially adverse" to their interest is a subjective standard which varies from employer to employer. Also, the written notice requirement has created unique problems. For instance, an employee who has not shown up to work for a week could be discharged, and then qualify for benefits, because the employer could not locate the employee to give them the written notice.

SB 692 proposes to make the employer's burden for showing misconduct a three-step process: 1) the individual was absent without good cause; 2) the absence was in violation of the employer's written absenteeism policy; and, 3) the employee had knowledge of the employer's written policy.

The proposed change is clear. If the employer has a written policy, the employee knows about the policy, and the employee violates the policy without good cause, they would be denied benefits due to chronic absenteeism. While the proposal is clear and understandable, it could raise a concern that it would encourage employers to adopt a very strict absenteeism policy, in order to win unemployment compensation hearings. However, such a conclusion denies a reality in the business world. Employers do not enjoy firing employees, and do not set up employment policies with a goal of having employees fail. Instead, employment policies are established to permit a business to operate efficiently and effectively.

Undeniably, SB 692 makes it easier for an employer to allege misconduct in an unemployment compensation case. The key question for this Committee to answer is are the

changes appropriate and fair. In the definition of misconduct, an employer will no longer be required to show an employee's intent, but an employee could still qualify for benefits by showing how their action should not be considered misconduct. In the change in the chronic absenteeism area, the simplicity of the proposal is one of its strengths. However, the proposal retains the "good cause" requirement in today's law and requires all parties know the company policy.

On behalf of the members of KCCI, I would urge you to support SB 692. I would be happy to answer any questions.

MEMORANDUM

TO: Senate Commerce Committee

FROM: Jeffrey A. Chanay, Entz & Chanay

RE: Kansas Employment Security Law/Senate Bill 692

DATE: March 10, 1994

My name is Jeff Chanay and I am an attorney in private practice with the Topeka law firm of Entz & Chanay. My practice principally involves the representation of employers in employment, labor, workers compensation and unemployment compensation matters. I thank you for the opportunity to testify in favor of Senate Bill 692.

Senate Bill 692 contains two substantive amendments to the Employment Security Law. First, SB 692 eliminates the employer's burden of proving employee intent for purposes of determining employee misconduct. Second, SB 692 modifies the misconduct test in the area of chronic absenteeism. It is submitted that both of these amendments represent a significant improvement in the administration of the law.

As a threshold matter it may be helpful to review current law.

Misconduct. Under K.S.A. 44-706(b), an employee is disqualified from receiving unemployment benefits chargeable to the account of the employer if the individual has been discharged for misconduct. However, under K.S.A. 44-706(b)(1), misconduct is defined as:

> [A] violation of a duty or obligation reasonably owed the employer as a condition of employment. In order to sustain a finding that such a duty or obligation has been violated, the facts must show: (A) willful and intentional action which is substantially adverse to the employer's interest, or (B) careless or negligence of such degree or recurrence as to show wrongful intent or evil design.

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Attachment 2-1

In order to prove misconduct, an employer is required to prove that the employee's action was "willful and intentional." The burden of proof always rests with the employer. Because intent is made a requirement for a finding of misconduct, employees have been cleared for benefits chargeable to the account of the employer for such occurrences as sleeping on the job, foul and abusive language, and sexual harassment, where the employer was unable to "prove" that the employee intended the result of his or her actions.

Chronic Absenteeism. Under K.S.A. 44-706(b)(3), absenteeism and lateness are not considered misconduct unless the employee was absent without good cause, the absence was substantially adverse to the employer's interest, the employer gave written notice to the individual that future absences may result in discharge, and the employee continued the pattern of absence without good cause. The Department has interpreted this provision to clear for benefits an individual with a history of absenteeism who goes to a personal appointment without notice to the employer. This provision has also been interpreted to require an employer to prove that it could not cover for an employee who was missing from work, and also that the employer had previously warned the employee in writing. But most problematic is the fact that the current law allows KDHR Referees the power to determine whether an absence is substantially adverse to the employer's interest.

Senate Bill 692 addresses these areas of the law in two significant ways. In the area of misconduct, SB 692 eliminates the employer's burden of proving employee intent. Instead, SB 692 requires that K.S.A. 44-706(b)(1) be read in pari materia with K.S.A. 44-706(b)(4). Under subsection (b)(4) the employee is afforded the opportunity to demonstrate seven reasons why his or her discharge is not for misconduct (K.S.A. 44-706(b)(4)(A), (B)(i) - (v),(C)). The result of SB 692 will be to shift the burden of proving "intent" from the employer to the employee, who is in reality the only person who can explain the action which led to the discharge.

The second substantive amendment found in SB 692 involves the misconduct test for chronic absenteeism and lateness. SB 692 significantly simplifies the misconduct test by focusing on the employer's written absenteeism policy and the employee's knowledge of that policy. SB 692 also removes a Referee's subjective ability to determine if an absence is "substantially adverse" to an employer's interest. Instead, the employer itself is given the right to establish what absenteeism policy is appropriate to the business. The employer is required, however, to put that policy in writing and prove that the employee had knowledge of the policy. Oral notification of the policy is insufficient and an employee will be cleared for benefits in those instances.

It is submitted that Senate Bill 692 is fair and restores a balance to the administration of the Employment Security Law. No properly qualified individual will be denied unemployment benefits under SB 692. Instead, SB 692 "shifts the burden" in regular misconduct cases to the employee. SB 692 also allows each employer the right to determine what absenteeism policy is best suited for its business.

Thank you for your consideration of this matter, and I would request that Senate Bill 692 be recommended favorably for passage by the Committee.

McBiz

McBiz Corporation

2231 SW Wanamaker · Topeka KS 66614-4298 · (913) 272-9004

3/4/94

Senator Alicia Salisbury
Senate Commerce Committee

Dear Madam Chairperson and Committee Members,

I am writing to you in regards to SB 692. I am unable to testify in person as I will be out of town during your hearings.

McBiz Corporation is a franchisee - owner of nineteen Chuck E. Cheese's restaurants in various states. In Kansas we own and operate restaurants in Topeka and Wichita, with over one hundred employees on our payroll in these two locations. Additionally our corporate office is located in Topeka and employs fifteen full time staff members.

Our company is very much in favor of the two proposed changes: Eliminating the obligation of the employer to show the employee's actions were substantially adverse to the employer's interests; and eliminating the obligation of the employer to give advance written notice that continued misconduct will result in discharge.

Our restaurants attempt to recruit and hire the very best employees possible. Restaurants, retailers, and other business operations all compete for employees and typically are always looking for new hires. When a decision is made to hire an employee, it is with the hope that the partnership will benefit both the employer and employee.

The employer desperately wants to retain the employee. Vast amounts of time and money are spent on recruiting, interviewing, orienting, training, and coaching and counseling the employee. Any time an employee terminates their employment, voluntarily or involuntarily, the employer has a void in their operation which can negatively affect the business, and in our case the satisfaction of our customers. When an employee leaves, the entire process starts again with the above - mentioned time and financial consequences. It is therefore obviously in the best interests of the employer to do everything in his power to retain the employee.

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Employer / employee relations in our service based economy are and need to be very different from the old style of heavy handed management. Current management methods involve extensive, ongoing coaching and counseling, cross training, positive reinforcement, and regular evaluations. Positive reinforcement, praise, and personal development are 1994 management philosophies. The dictatorial "written warning" and "threatening" postures by managers have been abandoned as they have been proven to be ineffective in improving performance in today's work environment.

Most companies, including ours, practice a "partnership relationship" between managers and employees. We fully recognize that the greater the degree of success of the employee on the job the more the business will prosper. Involuntary termination is always the last resort after exhausting all other options to get the employee's performance up to an acceptable level.

Our restaurant in Topeka recently had a case which specifically pertains to SB 692. We rehired a former employee that had previously voluntarily resigned. The employee had been a good worker and we were glad to have her back. However, her personal situation had changed between employment periods and during the seven weeks she worked for us she was late for work at least six times due to personal problems.

We coached and counseled this employee, impressing upon her the necessity of her arriving on time. Our managers felt that specifically threatening her with the loss off her job would have a negative effect on her overall attitude and would adversely affect her dealings with our customers. When she continued her tardiness after our discussions and mutual understandings, we felt that for the good of our business we were left with no choice other than involuntarily termination.

In a subsequent letter that she wrote to us in which she complained about her termination, she admitted that she was always late, that she was well aware of our policy on tardiness, and even referred to a conversation we had with her discussing the importance of her arriving on time.

When she filed for unemployment benefits, we presented these facts; but the ruling was in her favor as we had not specifically warned her that termination was eminent. We have filed an appeal as we believe the employee knew of our written policy and violated it on numerous occasions in a short period of time. We counseled the employee that her performance was not acceptable and did everything reasonably possible to retain her as an employee.

We strongly support SB 692 as we feel it still adequately protects the rights of the employee while enforcing the reasonable responsibilities of the employer. It eliminates the necessity of the employer proving absolute adverse business consequences, and it eliminates the need of the employer to negatively threaten the employee.

We would also like to suggest that the proposed wording of "absent without good cause" is too vague. As an example, if an employee's car always breaks down, or they don't set their alarm clock, or they forgot when they were supposed to work, and they are absent or tardy, this may seem like "good cause" to them but obviously the business cannot function under these conditions. These are the most frequent reasons given by employees.

The employee has a responsibility to the employer to do everything reasonable within their power to arrive for work as scheduled and on time. We would respectfully suggest that wording similar to "causes or circumstances beyond the direct control of the employee" would be very helpful to employers, employees and hearing examiners.

Thank you for your time and consideration. We hope that you will pass this bill as it mutually protects the rights of the individual employee while considering the legitimate concerns of the employer.

Respectfully submitted,

Alan D. Bakaitis
District Manager

TESTIMONY OF MARK B. RUSSELL TO THE SENATE COMMERCE COMMITTEE

SENATE BILL 692

My name is Mark B. Russell, and I am the President of La Siesta Foods, Inc. in Topeka, Kansas. I appreciate the opportunity to address this committee regarding Senate Bill 692 which classifies absenteeism as misconduct connected with work for the purposes of awarding unemployment insurance. We support this bill.

Currently, our experiences are that employees that are terminated for excessive work absences are granted unemployment insurance benefits. The rationale that comes to us in the decision by the referee in unemployment hearings is that the one employee's absence is not "substantially adverse to the employer's interests". We have found over the years that if we are lax about applying our attendance policies, that eventually employees become lax about their attendance. It is a cumulative effect. Employees begin to call in an absence when it is inconvenient for them to come to work. As this becomes a common practice, eventually we have trouble running our production lines because of the number of employees that call in an absence. If we cannot run our production lines, we cannot meet our customer's orders. While one employee's absence does not adversely affect the company's operations, the inability to meet customer orders does.

We have a progressive disciplinary policy, and constantly explain to our employees the consequence of further absences. We allow 5 excused absences within a 6 month period before the employee's absences are considered excessive and warnings begin to be issued. Unexcused absences result in a warning the first time, however an excused absence is granted when the employee calls the company to report their absence within 30 minutes of the start of their shift. Our employees are given a policy manual that explains our attendance policy to them. An employer has to be able to count on an employee to come to work regularly. When former employees that have poor attendance records win an unemployment hearing, they view that as vindication that they were treated unfairly. The way this law is currently being administered sends them the wrong message. Employers need to have the law recognize that the inability to enforce attendance policies is substantially adverse to the Employer's interests.

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Attachment 4