

Agency Update From The Executive Director

“Eternal vigilance is the price of freedom.” This saying is the Kansas Human Rights Commission’s motto and I bring it to your attention because of two milestones.

First, former KHRC Chair James E. Butler passed away on November 13, 2012 in Manhattan, Kansas. The Commission adopted our current motto at Mr. Butler’s recommendation many years ago. Mr. Butler’s service to Kansans and dedication to the KHRC are unmatched. Mr. Butler was first appointed to the Commission in 1979 as a Commissioner-at-Large. Mr. Butler owns the distinction of having served on the Commission under *five* different governors from both De-

mocratic and Republican political parties, having the longest tenure, over 25 years, of any Commissioner in the agency’s history, and serving until the age of 92. Mr. Butler is a role model who exemplifies outstanding support and service to the Commission.

In 1998, then-Chair Butler accepted on the Commission’s behalf an award from the International Association of Human Rights Agencies recognizing the agency’s success and effectiveness.

The Commission’s Board in celebration of the agency’s 55th anniversary, saw fit to establish the James E. Butler Civil Rights Award in 2008. The purpose of this award was to



William V. Minner
Executive Director

recognize individuals whose outstanding support and service to the Commission has contributed to the cause of civil rights and enforcement of Kansas laws prohibiting discrimination.

Second, the Commission will be celebrating its 60th anniversary in a few months. The Legislature established the

Kansas Anti-Discrimination Commission in 1953. There have been many changes in our enabling legislation, our name, and our operations throughout the decades. With the contributions of Chair Butler and countless other individuals, the Commission can look forward to its 60th anniversary with pride.

Demand for the Commission’s services remain strong, as evidenced by the 938 discrimination complaints filed in fiscal year 2012. Yet, the Commission’s performance also continues to be robust with 1,150 cases closed and more than \$800,000 in recoveries in the same time period.

Yes, eternal vigilance really is the price of freedom.

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Employment Law Seminar Registration

Registration for the Kansas Human Rights Commission’s 2012 Employment Law Seminar is now open. The seminar features seven sessions focusing on employment law and human resource practices. The units will cover timely issues and the most requested topics from the 2011 seminar evaluation.

Disability was one of the most requested subjects, resulting in two keynote sessions — one on the overlap of the Americans with Disabilities Act Amendments Act (ADAAA) with the Family Medical Leave Act and workers’ compensation and one on reasonable accommodations for disabilities.

The remaining keynote session will include an employment law update.

One highly anticipated break-out session is a review of the City of Wichita’s Employee Improvement Project, which is an internal mediation program to resolve workplace conflict. Other breakout sessions address the Affordable Care Act and its impact on Kansas employers and employees, EEO best management tips, including an update on age discrimination, and the dangers of social media in the workplace.

Stacia Boden, Wyatt Wright, and Kathy Perkins, are the keynote speakers. Speakers for the

break-out sessions include Susan Leiker, M. Suzanne Schrandt, Teresa Wilke, and Vaughn Burkholder.

The sessions were organized with employment attorneys, human resource professionals, legal assistants, paralegals and others in mind.

The seminar will be a one day event on December 10, 2012 at the Holiday Inn Holiday, 6th and Fairlawn, Topeka, Kansas.

Registration cost is \$78.00 and includes a seminar notebook with reference materials for all sessions, snacks and a luncheon.

See pages 2 and 3 for more information.

Register online for the KHRC Employment Law Seminar at www.khrc.net by Dec. 3rd!

This seminar has been approved for 6.00 CLE credits in Kansas and Missouri, and has been submitted to the HR Certification Institute for review.

2012 KHRC Employment Law Seminar

December 10, 2012

Holiday Inn Holidome, 625 S.W. Fairlawn, Topeka, KS

Time	Topic and Speaker	
8:30 am - 9:05 am	Registration	
9:05 am - 9:15 am	Welcome and Announcements	
9:15 am -10:15 am Main Session	<i>Navigating Through the ADAAA, FMLA, and Workers Compensation Maze</i> Stacia G. Boden General Counsel Mission Group Kansas, Inc.	
10:15 am - 10:30 am	Snack Break	
10:30 am - 11:30 am Breakout Session #1	<i>Employee Relations Improvement Program—The City of Wichita's Internal Mediation Program: A guide to resolving conflict in the workplace</i> Susan Leiker Human Resource Manager/ Diversity Manager City of Wichita	<i>What the Affordable Care Act and Healthcare Reforms Mean for Kansas Employers and Employees</i> M. Suzanne Schrandt Attorney Strategy Team Leader/Senior Analyst Kansas Health Institute
11:30 am -12:30 pm	Lunch	
12:30 pm -1:30 pm Breakout Session #2	<i>EEO Best Management Practices & Age Discrimination, including an update on the "but for" standard in age discrimination</i> Teresa Wilke Senior Investigator U.S. Equal Employment Opportunity Commission	<i>Too Much Information: The Dangers of Twitter, Facebook, and Other Social Media for the Workplace</i> Vaughn Burkholder Attorney Foulston Seifkin, LLP
1:30 pm - 1:45 pm	Break	
1:45 pm - 2:45 pm Main Session	<i>Employment Law Update</i> Wyatt M. Wright Attorney Foulston Siefkin, LLP	
2:45 pm -3:15 pm	Snack Break	
3:15 pm - 4:15 pm Main Session	<i>A Practical Guide for Accommodating Disabilities</i> Kathy Perkins Attorney Kathy Perkins LLC Workplace Law & Mediation	

Registration is Easy!

- Register online at www.khrc.net,
- Fax the registration to (785) 296-0589, or
- Mail the registration to the Kansas Human Rights, 900 S.W. Jackson, Suite 568S, Topeka, KS 66612.

Register by December 3rd!

This conference has been approved for 6.00 CLE credits through the Kansas Continuing Legal Education Commission and the Missouri Bar. This program has been submitted to the HR Certification Institute for review.



Seminar Sessions Focus on Employment Topics

Registration Deadline Nears

Navigating Through the ADAAA, FMLA, and Workers Compensation Maze

The ADAAA is confusing enough by itself, but then throw in the FMLA and/or workers compensation, and what's an employer to do?! Find your way out of the maze by learning the best approach when more than one of these laws apply.

Employee Relations Improvement Program—The City of Wichita's Internal Mediation Program: A guide to resolving conflict in the workplace

This presentation is a review of the City of Wichita's Employee Relations Improvement Program, an internal mediation program aimed at resolving workplace conflict. The program will include a history and an overview of the program, its process and success, based on the number of signed agreements. Real-life scenarios will be discussed.

What the Affordable Care Act and Healthcare Reforms Mean for Kansas Employers and Employees

With the results of the 2012 election now

known, full repeal of the Affordable Care Act (ACA) seems unlikely. However, the future of the law and its implementation remain uncertain. The ACA includes several employer-specific provisions ranging from tax credits for providing health insurance coverage to financial penalties for failing to provide health insurance coverage. This presentation will focus on the

tions, etc. Includes an update on the "but for" standard in age discrimination.

Too Much Information: The Dangers of Twitter, Facebook, and Other Social Media for the Workplace

Presentation will cover social media's proper place, if any, in the workplace, how to develop sound social media policies, and how to address misuse of social media in the workplace. Includes recent legal developments regarding social media.

Employment Law Update

An overview of the major labor and employment cases from the U. S. Supreme Court, U. S. District Courts, and Kansas courts. Includes federal and state regulatory updates.

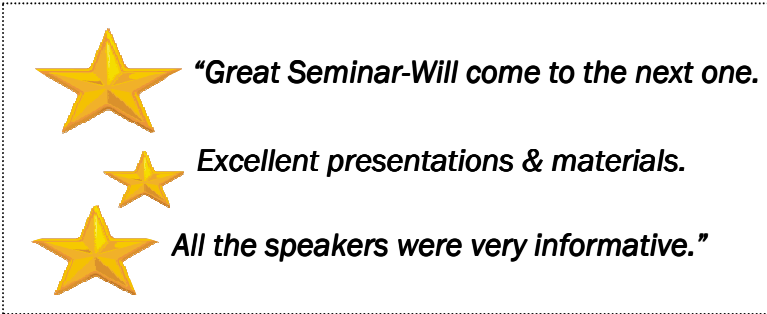
A Practical Guide for Accommodating Disabilities

With ADAAA regulations still fairly new, this session is a "Must See!" Amendments expanded the coverage to more individuals. Special emphasis on reasonable accommodations, the interactive process, accommodation options, and more!

employer-specific provisions contained in the ACA and how they are likely to affect Kansas employers.

EEO Best Management Practices & Age Discrimination, including an update on the "but for" standard in age discrimination

Review the U.S. Equal Employment Opportunity Commission's recommended equal employment opportunity best management practices in all phases of employment, include recruiting, selection, promo-



Name: _____
 Organization: _____
 Address: _____
 City _____ State _____ Zip _____
 Phone: _____
 E-mail: _____

Professional Background /Check One:
 Attorney
 Human Resource Professional
 Other _____

If you are with a State of Kansas agency, KHRC will initiate the interfund voucher. Please provide:
 Fiscal contact name: _____
 Fiscal contact phone number: _____

Registration deadline is Dec. 3rd. Please send the registration fee of \$78 to the Kansas Human Rights Commission, 900 SW Jackson, 568-South, Topeka KS 66612-1258. .

There will be no "day of" registration. Registrations are transferrable. There will be no refunds for those unable to attend. Conference materials will be mailed to paid registrants unable to attend.

Please contact Beth Montgomery or Ruth Glover at 785-296-3206 or khrc@ink.org for any reasonable or dietary accommodations at the time of your registration.



Spotlight on.....

.....Job Applications



You Decide Case Study



Review the job application below and note any concerns.

Job Application for Billy's Bats

Name: _____ Today's Date: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone No. : _____

Social Security No. : _____ Birthdate: _____

Marital Status: Check one () Single () Married
() Divorced () Widowed

Number of Children: _____

Height: _____ Weight: _____

Hair Color: _____ Eye Color: _____

Position Desired: _____ Start Date: _____

Are you currently employed? () Yes () No

List current/past employers, position held, and dates of employment:

High School: _____

Graduated: () Yes () No Graduation Date: _____

College: _____

Degree: _____ Major: _____ Graduation Date: _____

Are you in the military or a member of the National Guard or Reserves? () Yes () No

Do you speak any foreign languages? () Yes () No

Language Spoken: _____

List Any Physical Defects: _____

Have you ever been injured? () Yes () No

Give details: _____

List Reference Names and Contact Information:

I hereby authorize Billie's Bats to contact the Background Check Company, Law Enforcement Division.

Signature _____

Did Billy's job application hit a homerun? Now that you have reviewed Billy's Bats' job application, what is your determination? Check any areas of concern that you noted:

- () Age Discrimination
- () Ancestry Discrimination
- () Color Discrimination
- () Disability Discrimination
- () Genetic Information Discrimination
- () National Origin Discrimination
- () Race Discrimination
- () Religious Discrimination
- () Sex Discrimination
- () Military Status Discrimination*
- () Other _____

* - Complaints of discrimination based on military status are not in the KHRC's jurisdiction.

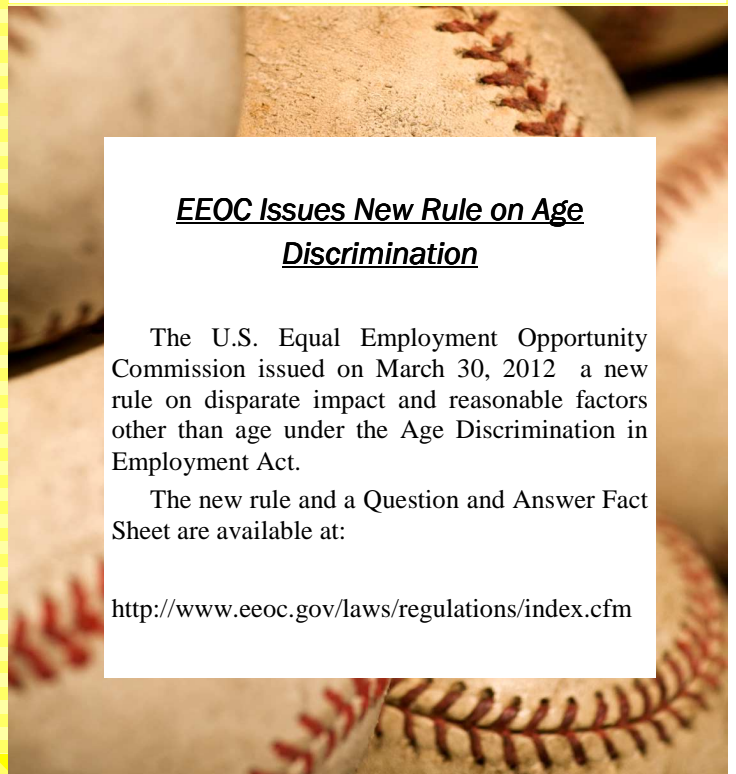
See page 7 for the KHRC's analysis.

EEOC Issues New Rule on Age Discrimination

The U.S. Equal Employment Opportunity Commission issued on March 30, 2012 a new rule on disparate impact and reasonable factors other than age under the Age Discrimination in Employment Act.

The new rule and a Question and Answer Fact Sheet are available at:

<http://www.eeoc.gov/laws/regulations/index.cfm>



EEOC Issues New Guidance on the Use of Arrest & Conviction Records in Employment Decisions

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin (disparate impact discrimination). If the employer does not show that such an exclusion is job related and consistent with business necessity for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal his-

tory inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969,¹ and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority*² decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public

meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners Project.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent

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with business necessity and therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the job related and consistent with business necessity standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
- There are two circumstances in which the Commission believes employers may consistently meet the job related and consistent with business necessity defense:
 - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is

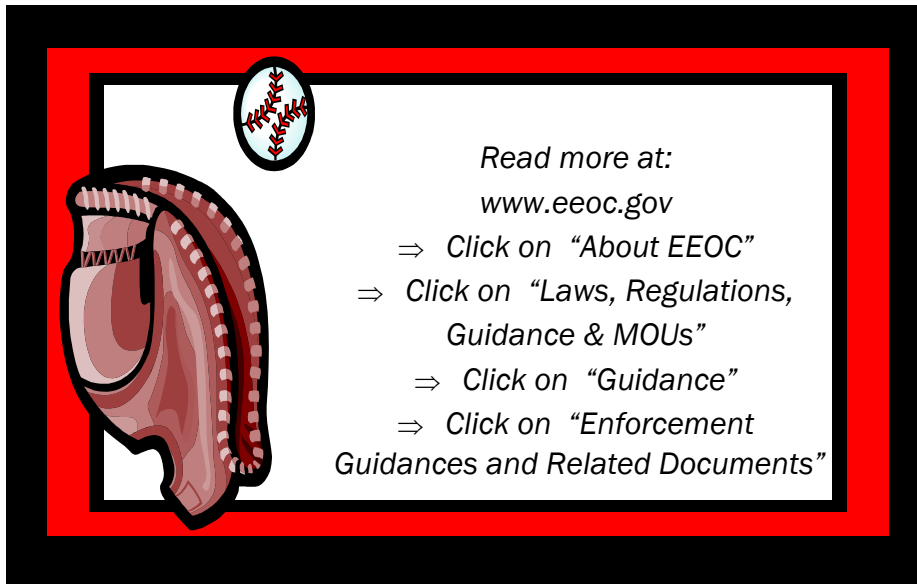
data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

¹ See, e.g., EEOC Decision No. 70-43 (1969) (concluding that an employee's discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on serious crimes); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978)

(concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recency of his criminal conduct).

² 479 F.3d 232 (3d Cir. 2007).

Source: www.eeoc.gov



Read more at:
www.eeoc.gov

- ⇒ Click on "About EEOC"
- ⇒ Click on "Laws, Regulations, Guidance & MOUs"
- ⇒ Click on "Guidance"
- ⇒ Click on "Enforcement Guidances and Related Documents"

• The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.)

• The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.

• The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they purport to require or permit the doing of any act which would be an unlawful employment practice under Title VII. 42 U.S.C. § 2000e-7.

• The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.



Pat Hill Appointed KHRC Commissioner

Governor Sam Brownback appointed Pat Hill, Overland Park, as the Commissioner representing Real Estate in January 2012. Commissioner Hill's appointment was confirmed by the Senate on January 25, 2012.

Commissioner Hill emigrated from England in 1976. She has been a successful real estate agent in Kansas City since 1997. Commissioner Hill has also been an active member of the Overland Park Rotary Club and the Kansas City Regional Association of Realtors.



Job Application for Billy's Bats: KHRC Analysis

Read the KHRC's review of the Job Application for Billy's Bats

Understanding employment law is crucial for the employee selection process, including job applications, because it is the goal of the employer to select the most qualified individual in the most equitable manner.

The Kansas Act Against Discrimination prohibits discrimination in employment on the basis of race, religion, color, sex, disability, national origin or ancestry. K.S.A. 44-1001 et seq. (the Kansas Act Against Discrimination). The Kansas Age Discrimination in Employment Act also prohibits employment discrimination on the basis of age, with "age" being defined as 40 or more years. K.S.A. 44-1101 et seq.; K.S.A. 44-1112.

These laws make it illegal to discriminate in the application and hiring process. As stated in K.S.A. 44-1009(a)(3), it is unlawful

For any employer. . . to use any form of application for employment . . . or to make any inquiry in connection with prospective employment . . ., which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, sex, disability, national origin or ancestry, or any intent to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

K.S.A. 44-1113 (a)(4) likewise makes it unlawful for an employer to use a form of application for employment or to make inquiry in connection with prospective employment, which directly or indirectly expresses any intent to make any limitation or discrimination as to age.

The social security number and date of

birth are not necessary inquiries at a pre-employment stage. The combination of these, especially with other information on the application form, provides identity theft opportunities.

Moreover, the birthdate (or age) inquiry is inadvisable because both state and federal law prohibit age discrimination (for those 40 or over). A general age inquiry for all applicants indicates the potential employer cares about the age of the applicants, and tends to show an intent to illegally discriminate on the basis of age. There may be some instances in which the age of a younger applicant is relevant, due to a bona fide occupational qualification. For example, certain jobs restrictions apply to minors, and the question of whether an applicant is old enough to be legally allowed to perform a particular job (i.e., without violating child labor laws) would be a proper inquiry for that particular job. Age or date of birth should not be a routine question on an employment application, however.

Other questions on the application are also inadvisable. Questions about marital status and/or children tend to adversely affect female applicants; in particular because of stereotypes that women would be more likely to miss work due to family or childcare issues. Height and weight also tend to adversely affect women and should not be asked unless there is a par-

ticular, specific and bona fide reason why this matters to performing the specific job. Hair color and eye color may be indirect inquiries into race, color, national origin or ancestry.

The questions about current military service and being in The Guard or Reserves are unwise. They tend to indicate an intent to discriminate against persons who serve in the armed forces. Such discrimination violates both Kansas law (K.S.A.44-1125 et seq.) and the federal Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. §4301 et seq.). Refusal to hire an applicant because of his or her military service is prohibited. 38 U.S.C. §4311; K.S.A. 44-1126(a)(3). Complaints regarding alleged discrimination based on military service are not within the jurisdiction of the Kansas Human Rights Commission.

Unless speaking a foreign language is a requirement of the particular job position or considered an asset because of the nature of the particular job, questions about speaking foreign languages are inadvisable. There may be instances where bi-lingual abilities would be preferred, for example in a job where the employee would be dealing with the public, and speaks the languages spoken by the population in the general area. However, a question about speaking foreign languages generally, without any specific pertinence to the particular job, may be considered an indirect inquiry as to race, national origin or ancestry, and evidence of intent to discriminate based on race, national origin or ancestry.

The questions about physical defects and injuries show intent to discriminate based on disability, or perceived disability. Questions like this are unlawful in a pre-employment application; and severely

(Continued on page 8)



restricted to bona-fide job-related reasons for inquiry, even after employment. The law expressly prohibits employers from making pre-employment inquiries about disabilities. See, e.g., Americans with Disabilities Act Sec. 102 (d) (2), 42 U.S.C. § 12112.

The application form authorizes the employer to seek information from files of the "Background Check Company, Law Enforcement Division." This is also problematic. These files would include arrest and conviction records. In some instances, specific to a particular job, conviction records may be pertinent. However, conviction records with no connection to the job requirements, and in particular arrest records when there has been no conviction, may show discriminatory intent on the basis of race, national origin or ancestry. This is because historically and statistically, minorities are more likely to be arrested than those with a Caucasian background; and an arrest record is only an accusation, and does not necessarily mean that the individual did anything illegal or wrong. If there is a bona fide occupational qualification for a particular job, an inquiry about convictions that would disqualify the individual (but not about arrests) may be made after a conditional job offer, rather than in a pre-offer job application.

In short, an employment application should only seek information essential for determining whether a person is in fact qualified for a particular job. Information about race, religion, color, sex, disability, national origin, or ancestry is not pertinent. Information about age is only pertinent if a person is too young to legally qualify to perform the particular job.

KHRC Commissioners

Melvin Neufeld

Chair

Industry, Garden City

Terry Crowder

Labor, Topeka

Pat Hill

Real Estate, Overland Park

Joshua Ney

Legal, Lawrence

Anthony Villegas, Sr.

Labor, Kansas City

Jerome Williams

Industry, Wichita

By law, the Commission must represent particular areas of the workforce and community. In addition, no more than four Commissioners may belong to one particular political party. The Governor of the State of Kansas appoints all seven Commissioners to serve the Kansas Human Rights Commission.

KANSAS HUMAN RIGHTS COMMISSION AREA OFFICES

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