

KANSAS HUMAN RIGHTS COMMISSION

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FROM THE EXECUTIVE DIRECTOR'S CHAIR "Seasons Greetings"



William V. Minner, Executive
Director

I would like to begin by wishing you all seasons greetings from the Kansas Human Rights Commission. It has certainly been a busy fall here at the Commission. Among other things, we held our agency's annual employment law seminar in September which featured many brilliant speakers in the field of employment law.

A contingency of employees from the Commission were honored to attend the 56th Annual State Conference of the NAACP (National Association for the Advancement of Colored People) in Bonner Springs. The meeting was of particular significance due to the banquet that we attended on the evening of October 22nd. This event was marked by honoring the State NAACP President, Mrs. Louisa Fletcher, who stepped down after twenty-two years of leadership to the organization.

Mrs. Fletcher has unselfishly toiled in this arena out of her quest for

justice, which is truly the hallmark of Louisa Fletcher. It was certainly not out of a desire for financial compensation that Mrs. Fletcher became involved in the field of civil rights but out of an overwhelming sense of responsibility and interest. These rare characteristics will not allow us to let her walk away without providing her with the proper recognition.

I was privileged to present Mrs. Fletcher with an engraved award that was in the image of a flame. It was with great gratification that I was able to congratulate Mrs. Fletcher on the stage where she was seated. During a conversation later in the evening, Mrs. Fletcher said something to me to the effect, "Keep doing the great work at the Commission. This is what I have been fighting for all these years. The way the agency is working now is the way we have always wanted it to

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COMMISSION MEETING

The Kansas Human Rights Commission meets monthly at various locations throughout the state. Commission meetings are open to the public and individuals interested in attending may obtain more information by contacting the Commission's main office.



The SPECTRUM is a publication of the Kansas Human Rights Commission. The SPECTRUM was created to inform the public of current civil rights issues and keep interested persons up-to-date on issues pertinent to KHRC. Topics to be addressed in this and future issues of the SPECTRUM include current legal decisions, commentaries, upcoming events of interest, educational updates on issues such as age discrimination, sexual harassment, wage discrimination, and unfair housing practices.

Free subscriptions are available. If you would like to be placed on our mailing list, please contact our main office at the above address. All comments and suggestions are appreciated, and should be addressed to the editor, Kyle Kessler, at the main office in Topeka: (785) 296-3206.

FROM THE DIRECTOR'S CHAIR

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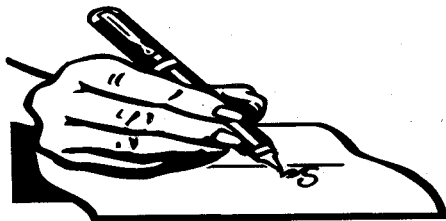
work.”

Mrs. Fletcher's statements are obviously in reference to the Commission's turnaround in the past several years. The success we have enjoyed is the result of initiatives such as the mediation agreement with Kansas Legal Services that has assisted in the drastic reduction in both backlog and processing time. The reduction in case processing time from twenty-two (22) months in 1995 to about six (6) months currently, increases the efficiency and effectiveness of the Commission. The end result is a greater opportunity for Kansans to achieve equal employment opportunities, fair housing, and equal access to public accommodations.

Mrs. Fletcher also stated that she knew there were some who did not want to accept this new success. She indicated that she was aware that I knew who they were, but told me not to let it bother me. She said, "You keep going down the same path that you are on."

Mrs. Fletcher has left the state organization in the more than capable hands of long-time civil rights activist, Jesse Milan, who was elected president at the meeting.

The intention of the Kansas Human Rights Commission is to "continue down the same path we are on" until we are successful in our agency mission of preventing and eliminating discrimination across the State of Kansas. This is not only a wish by a civil rights icon like Louisa Fletcher, it also describes our marching orders from the Kansas Legislature. Furthermore, it is the goal of every employee of the Kansas Human Rights Commission.



KHRC Holds 5th Annual Employment Law Seminar

By Kyle Kessler

The Kansas Human Rights Commission held its Fifth Annual Employment Law Seminar on September 29, 1999, at the Pozez Education Center at Stormont-Vail Regional Health Care Center in Topeka. The Seminar was attended by about 70 attorneys, small business owners, and human resource professionals from around the state.

The seminar consisted of two keynote lectures, three workshop sessions, two books of seminar materials, and lunch. The speakers were from a variety of backgrounds including attorneys from private practice, officials from federal, state, and local regulatory agencies, non-profit agencies, and two members of the Kansas House of Representatives.

After a welcome from the Executive Director of the KHRC, William V. Minner, the conference commenced. The morning keynote presentation was given by Kirk W. Lowry and Brian J. Finucane with KHRC Staff Attorney, Barbara Girard, acting as the moderator. This presentation addressed the recent changes in disability law and will be further examined later in this issue of the *Spectrum*.

The first morning session provided three alternative workshops for participants to attend. "The Mediation Process" by Lloyd Swartz with Kansas Legal Services provided an overview of the mediation process and explained the benefits and successes of this form of alternative dispute resolution. "Title VII" by Latanya Thomas-Patton of the Kansas City, Missouri Human Relations Department provided an in-depth explanation of Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment on the bases of race, religion, sex, and national origin. "The Fair Labor Standards Act" by Jim Bachert with the U.S. Department of Labor provided expertise in the area of federal wage and hour information and employers' responsibilities in this realm.

The second morning session contained a selection of three more workshops for participants to

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KHRC Holds 5th Annual Employment Law Seminar (Cont.)

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choose from. State Representatives, Jim Garner, D-Coffeyville, and Phill Kline, R-Shawnee, presented "Prohibition of Genetic Testing and Screening in Kansas Law," which dealt with the amendment to the Kansas Act Against Discrimination that they co-sponsored. A lecture over the "Prevention of Sexual Harassment in Employment" was given by Ray Johnson of the Kansas City, Missouri Human Relations Department. This presentation focused on the recent case law surrounding sexual harassment, the investigation of complaints, and prevention of incidents. Randy Fisher of the Kansas Commission on Disability Concerns provided an information-filled hour surrounding "Reasonable Accommodations and Other Disability Related Issues."

After lunch, the afternoon keynote lecture was presented by Trisha A. Thelen, an attorney in the Wichita office of the law firm, Foulston & Siekin, L.L.P. Ms. Thelen's address, entitled

"Defending Age Discrimination and Retaliation Claims," provided employer strategies for dealing with two of the fastest rising bases for filing complaints. Ms. Thelen provided attendees with methods for addressing pending complaints and preventing future complaints.

The last session contained two workshops. One involved a presentation over "Workers' Compensation" by Carol Cast with the Division of Workers Compensation. This provided a thorough explanation over extremely complex subject matter. The last workshop, "Race Discrimination in the Workplace," by Clifford Hill of the Equal Employment Opportunity Commission completed the seminar's events.

Next year's seminar has been scheduled for September 27, 2000, to be held again at the Pozez Education Center. As the speakers and subject matter are determined, they will be reported in future issues of the *Spectrum*.

Lowry, Finucane Provide Insight Into Supreme Court Disability Decisions

By Kyle Kessler

The Kansas Human Rights Commission was honored to have Kirk Lowry and Brian Finucane as its two morning keynote speakers for its sixth annual employment law seminar. Mr. Lowry is an attorney with the law firm of Palmer, Lowry, Leatherman & White, L.L.P. in Topeka, while Mr. Finucane is an attorney with Bioff, Singer & Finucane, L.L.P. in Kansas City. Mr. Lowry and Mr. Finucane represented Vaughn Murphy and United Parcel Service respectively in the recent United States Supreme Court case, *Murphy vs. UPS*. *Murphy* involved a truck mechanic with severe high blood pressure that was controlled by medication. The case dealt with issues involving the Americans with Disabilities Act of 1990. The dialog was moderated by Barbara Girard, KHRC Staff Attorney.

The impact of *Murphy*, which was handed down in June of 1999, is that it will be much harder for an individual to show that they are covered by the law. If the individual uses medication to mitigate the effects of his or her disability, then they may not be covered. On the other hand, if the person is affected to the point that medication cannot mitigate the impact of the disability, they may not be a qualified individual with a disability. The effect of the decision is that the number of people who can bring a claim under the ADA is much lower than the previous interpretation of the law. The previous interpretation had been set forth by the guidelines of the Equal Employment Opportunity Commission (EEOC), who, under the ADA, had been authorized to implement and enforce them.

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GOVERNOR SELECTS TWO FOR HUMAN RIGHTS COMMISSION

Governor Bill Graves, announced the appointment of Dr. Beth Bradrick, Pittsburg, and Robert Lay, Hoyt, to the Kansas Human Rights Commission. The announcement came on August 25th of 1999.

Bradrick works for R&B Associates in Pittsburg as a research and grant writer. She received a bachelor's degree in vocational home economics, a master's degree in vocational technical education, an industrial education degree from Pittsburg State University and a doctorate from Kansas State University. Bradrick is a member of the American Association of Women, and served on the board of directors for International Friends of Pittsburg and Friends of the Pittsburg Public Library. Commissioner Bradrick stated that her observations of the growing incidents of sex and age discrimination combined with her exposure to great diversity when she was growing up in the Central Sacramento Valley of California were motivating factors in acceptance of the Governor's appointment to the Commission.

Lay is an adjunct instructor for Highland Community College. He graduated with a bachelor's degree in education and a master's in communication from Pittsburg State University. Lay also attended the U.S. Marine Corps Personnel Administration School. Lay served as the executive director for the Kansas Human Rights Commission from August 1995 to September 1997 and as assistant director for 9 years before that. He is a member of the Kansas Association of Public Employees and the American Legion. When asked of his feelings on returning to the Kansas Human Rights Commission, Commissioner Lay said, "I am very pleased to again be actively involved in the Commission's efforts to eliminate unlawful discrimination."

Bradrick will serve a four year term expiring January 2003, as the labor representative. Lay will fulfill an un-expired term ending January 2000, and then serve a four-year term expiring January 2004, as the industry representative.



Back Row left to right: State Senators, Sherman Jones; Lana Oleen, Chair; Alicia Salsbury; Tim Emert; and Ben Vidrickson. *Front Row left to right:* Assistant Director, Mike Hollar; Executive Director, Bill Minner; Commissioner Robert Wesley, Chair; Commissioner Bob Lay; Commissioner Beth Bradrick; Commissioner James Butler, Vice-Chair; and Chief Legal Counsel, Brandon Myers

Lowry, Finucane Provide Insight Into Supreme Court Disability Decisions (Continued)

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Mr. Lowry and Ms. Girard agreed on the damage that has been done to the ADA with the three most recent U.S. Supreme Court decisions. *Murphy*, along with *Sutton vs. United Airlines* and *Albertson's vs. Kirkinburg*, provide what Lowry referred to as the equivalent of "judicial nullification of a congressional enacted statute." *Sutton* is the case in which the twin female airline pilots who suffered from severe myopia brought suit against their employer, while *Kirkinburg* involved a truck driver with monocular vision who was terminated by his employer for his inability to meet federal vision standards.

Mr. Finucane stated that he believed the Supreme Court correctly interpreted the ADA, but he recognized there could be a hole in the law for the rare cases of "employers who would viciously terminate employees who suffer from diseases such as epilepsy and diabetes." He said his experience is that employers do not do that and, instead, devote a great deal of money and effort to compliance with the ADA. He expressed the view that lawsuits almost always result in a waste of time, money and effort, and one of the positive results of the Supreme Court decisions will be fewer lawsuits. He stated that even if there are rare occasions where an employer secretly terminates someone because of a disease and escapes ADA liability, the trade-off of significantly fewer wasteful and unproductive lawsuits still would be a good one.

Mr. Lowry was obviously discouraged by the Court's decisions. He explained that a testimony to how good of a lawyer Mr. Finucane is comes in the fact that the only way he could win the case was by convincing the Justices that the statute (ADA) is crystal clear on the face of the statute. He added that Mr. Finucane was able to do it despite having nine of the eleven U.S. Circuit Courts of Appeal going Mr. Lowry's way, the EEOC with their regulations going his way, and the Department of Justice and Department of Transportation going his way.



Mr. Finucane stated that he found it ironic that when the Americans with Disabilities Act was first passed by Congress, the statutory construction cited 43 million people with disabilities that could benefit from the law. He said that he recalled thinking, "Oh my gosh, that's a lot of people." He added that the number really frightened employers. He explained that in the end, he thinks that number ended up helping them because the number of people who would have benefited from the coverage of eyeglass wearers would have been much higher, so this may have contributed to the much narrower interpretation.

Mr. Lowry agreed that the 43 million number probably caused both Justice Ginsburg and Justice Souter to vote with the majority on the decision. He added that now if an employer says, "You're deaf, I don't like your hearing aid, you're fired", it will be legal conduct."

Mr. Finucane closed the lecture by alluding to the U.S. Supreme Court's decisions in the sexual harassment cases of 1998. He stated that in those decisions, the Court encourages employers to actively train employees and inform supervisors of emphasis on EEO practices. He added that, "This is something that the Kansas Human Rights Commission has always wanted employers to do." Employers can escape liability for punitive damages if they are aggressive in their training and act in good faith in making sure all of their managers know of their commitment to equal employment opportunity. Employers should look at their EEO programs and sexual harassment programs and make sure that all employees are trained that sexual harassment will not be tolerated.

Mr. Lowry conveyed an important final thought of the presentation when he stated, "I guess we will all have to live with Murphy's Law now."

Genetic Testing Prohibition added to Kansas Law

By Jeremy Robert Hall, KHRC Legal Clerk

The Kansas Legislature passed a bill that went into effect on July 1, 1999, that changed the discrimination laws of Kansas. The Kansas Legislature added a section to the current law that makes it illegal for an employer to: "seek to obtain, to obtain or to use genetic screening or testing information of an employee or a prospective employee to distinguish between or discriminate against or restrict any right or benefit otherwise due or available to an employee or a prospective employee; or subject, directly or indirectly, any employee or prospective employee to any genetic screening or test."

This new section of the Kansas Act Against Discrimination is a preventative measure. At this time the use of genetic testing as a discriminatory tool is relatively rare, but as technology changes so could the use of genetic testing. As technology progresses and genetic testing becomes more commonplace it would be realistic to believe that employers could base hiring or promotion decisions on the information gathered from genetic testing. If an employer knows, through genetic test results, that an employee has a predisposition to a certain disease then that employer may overlook that employee for promotion because of the possibility of that employee contracting that disease and possibly missing work. The legislature took a progressive step to prevent employers from engaging in that type of behavior.

Genetics and genetic tests have been in the news a great deal in recent times. With this mainstream media coverage, many people have become concerned with what may be in their genetic make up, referred to as one's "genetic code". It has also made them stop to consider what their genetic code may tell about them, and what others may know about them based on their genetic code. The genetic information

that we all have does many things for us. The color of our skin, eyes, hair, and other outward bodily features are based on our genetic code. Our height is a result of our genetic code. The area of height, however, is a prime example of how a genetic code could give false results. At birth, each of us, in our genetic code, has a height that we should become, but it does not mean we will be that height. This is just one area of the genetic code that may be influenced by outside factors. A person's diet or lack of nutrition is an easy way to see that without the right nutrients, one may not reach that height that was in their genetic code. It follows the same for a person that has a family history of cancer. The person may change his or her diet, or other life factors and will overcome the predisposition of their genetic code. Even if their genetic code shows that they will have a disease, people may be able to control factors that negate that genetic predisposition. The genetic code is valuable, as there are some things that cannot be changed, and therefore the information provided from the code can be used as a tool to check for possibility of disease or genetic disposition to a disease.

One specific example of using genetic information could be in the area of employment. If employers are able to use the genetic information in hiring decisions, then they could test a specific applicant, and hire or not hire based on the information provided from the test.

Hypothetically, let us say, an African-American man applies for a job with a Kansas employer. This employer asks for all applicants to take a genetic test for screening purposes. When the employer gets the test results, he tells the man that he will not hire him because he has a genetic predisposition to having the disease, Sickle-Cell Anemia. The employer does not want to hire this applicant, he says, because of the added costs of training an employee who would miss work if he becomes ill; however, an employer may not want to hire him because this applicant is an African-American. An employer may be able to exclude African-American applicants

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Outside the realm: Understanding the Family and Medical Leave Act

By Jim Bachert, Investigator U.S. Dept. of Labor

The Family and Medical Leave Act (FMLA) of 1993 provides certain employees with up to 12 work-weeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during leave as if employees continued to work instead of taking leave.

The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division administers and enforces the FMLA for all private, state, and local government employees, and some federal employees.

Like other programs, FMLA has requirements an employer must meet in order to be subject to its provisions. Public agencies, including state, local and federal employers, and local education agencies (schools) are subject to FMLA provisions. Private sector employers who employ 50 or more employees for at least 20 work-weeks in the current or preceding calendar year are also covered. This includes employers and successors of covered employers.

As an employee, you must pass certain tests to be eligible for FMLA. The employee must work for a covered employer, and have worked for that employer for at least 12 months. The employee must have worked at least 1250 hours during the 12 months prior to the start of the FMLA leave. The employee must also work at a location where at least 50 employees are employed at the location, or within 75 miles of the location.

Employees are entitled to take FMLA for a variety of reasons. Employees may take leave for the birth of a son or daughter and to care for the newborn child. An employee may also take leave for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child. Leave may also be taken for the care of an immediate family member (spouse, child, or parent— but not a parent “in-law”) with a serious health condition. Leave may be given if the employee

is unable to work because of a serious health condition. These are the reasons that a qualified employee, at a qualified employer will be granted leave under FMLA.

To clear up the definition of “serious health condition” there are several criteria that describe what such a condition may be. Any absence for in-patient care (overnight stay) in a medical care facility and subsequent related treatment. An incapacity of more than three days that involves treatment two or more times by a health care provider, or an incapacity of more than three days that involves at least one treatment by a health care provider and a regimen of continuing treatment (e.g. prescription medicine.) A “serious health condition” would also be any incapacity due to pregnancy or for prenatal care. Any incapacity or treatment for a chronic serious health condition (e.g. asthma, diabetes, epilepsy, etc.) Any incapacity which is permanent or long term due to a condition for which treatment may not be effective (e.g. Alzheimer's, severe stroke, etc). Also a “serious health condition” is any incapacity to receive multiple treatments for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity for more than three days in the absence of medical intervention, such as cancer (chemotherapy, radiation, etc.) or kidney disease (dialysis.) These are some brief descriptions of what a “serious health condition”

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Genetic Testing Prohibition Added Under Kansas Law

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without ever seeing them or having them identify their race on an application form. If they are aware that an applicant has the sickle-cell trait, the employer can deduce the applicants race, in order to exclude them. The reason that Sickle-Cell Anemia was used in this example was because well over 50% of African-Americans have a genetic predisposition to develop Sickle-Cell Anemia, although a much smaller percentage actually acquires the disease.

It may seem far-fetched at this time to believe that an employer would use this information negatively in employment decisions, but the technology is there. The KHRC has not received complaints of employers using this type of testing as a discriminatory practice, but that could change. The Kansas Legislature's forethought helps to keep Kansas on the edge to prevent discrimination by keeping law current to both deter and provide possible violations.

KHRC New and Improved on the World Wide Web

The KHRC now has a new and improved home on the World Wide Web. The web site is packed full of useful information. There is information on the site, including over seventy links to other Human Rights web resources. The site has biographies of the Commissioners, and contact information for the KHRC.

There are copies of older issues of the *Spectrum*, and copies of some KHRC publications. Some of the forms needed to file a complaint with the KHRC are also available to download from the site.

Next time you are bouncing around the web stop by the KHRC site and spend some time getting to know the agency. The address is: "<http://www.ink.org/public/khrc/>".

Understanding the Family and Medical Leave Act (Continued)

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is according to the FMLA.

It has now been established that a qualified employee, with a qualified condition, working at a qualified employer may take FMLA leave, but how much leave may one take? Under FMLA an employee can take up to 12 weeks of unpaid leave during a 12 month period. Intermittent FMLA leave may be taken under some circumstances. This means taking leave in blocks of time, or by reducing a normal weekly or daily work schedule.

Some other information on FMLA is Federal Regulations Part 825 are the FMLA regulations that set out requirements concerning maintenance of employee health benefits and employee job restoration. Both employers and employees have specific notice requirements regarding FMLA leave that must be followed, they are specified in Part 825.300 through 825.311. Under certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. The FMLA does not affect any other Federal or State law which prohibits discrimination, nor supersede any state or local law which provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan.

This article is for general information and is not to be considered in the same light as official statements of position contained in the regulations and other such releases formally adopted and published in the Federal Register. Wage and Hour publications and further information may be obtained by visiting the Wage and Hour publications Page at "http://www.dol.gov/dol/esa/public/whd_org.htm" or by contacting the nearest office of the Wage and Hour Division listed in most telephone directories U.S. Government, Department of Labor.

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UPCOMING EVENTS:

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SEPTEMBER 27, 2000
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**Hispanic Heritage Month will be
celebrated in September and
October of 2000.**

EMPLOYMENT DISCRIMINATION SEMINAR
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DODGE CITY, KANSAS

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