

KANSAS

Thomas E. Rice, Esq.
BAKER STERCHI COWDEN & RICE, L.L.C.

Crown Center - Suite 500
2400 Pershing Road
Kansas City, Missouri 64108
Phone: (816) 417-2121
Fax: (816) 472-0288
Web: www.bscr-law.com
Email: Rice@bscr-law.com

I. AT-WILL EMPLOYMENT

A. Statutes

There is no statute on this issue in Kansas.

B. Case Law

Kansas adheres to the rule prevailing in most jurisdictions that in the absence of a contract, express or implied, between an employee and employer covering the duration of employment, the employment is terminable at the will of either party. *Johnston v. Farmers Alliance Mut. Ins. Co.*, 545 P.2d 312, 315, 218 Kan. 543, 546 (1976). *See also Flenker v. Willamette Indus.*, 967 P.2d 295, 298, 266 Kan. 198, 200 (1998).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

Kansas addressed contracts implied-in-fact in *Morriss v. Coleman Co., Inc.*, 738 P.2d 841, 241 Kan. 501 (1987). In *Morriss*, two employees sued their employer after they were discharged, admittedly without cause. The employer argued it was entitled to fire an employee for no cause, despite provisions in the supervisor's manual regarding termination for good cause. The Supreme Court of Kansas agreed. In its opinion, the Court quoted the Kansas Court of Appeals which stated:

Where it is alleged that an employment contract is one to be based upon the theory of 'implied-in-fact,' the understanding and intent of the parties is to be ascertained from several factors which include written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances

surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.

Morriss, 738 P.2d at 848-49, 241 Kan. at 513.

In *Morriss*, The Supreme Court of Kansas refused to find an implied-in-fact contract where only one of these elements, the handbook, was relied upon. However, the Court indicated that such an implied contract may be found given the proper combination of factors. *Id.*; see also *Clevenger v. Catholic Social Services*, 901 P.2d 529, 21 Kan. App. 2d 521 (1995); *Baxter v. Farm Bureau Mut. Ins. Co., Inc.*, No. 06-4038-RDR, 2008 U.S. Dist. LEXIS 17205, *18 (D. Kan. Mar. 4, 2008).

2. Provisions Regarding Fair Treatment

Kansas courts have declined to read a duty of good faith and fair dealing into at-will employment. See *Waste Connections of Kan., Inc. v. Ritchie Corp.*, 298 P.3d 250, 265, 296 Kan. 943, 965 (2013).

3. Disclaimers

Employers are well advised to include disclaimers in their employee handbooks. Employers should also be certain that these disclaimers are consistent with other written or unwritten policies and practices.

The fact that the employment manual contains a disclaimer is not dispositive of the issue of whether there was an implied contract, however. See *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149, 1164, 269 Kan. 194, 216 (2000) (employment manual not determinative of implied contract issue where certain provisions expressly or impliedly contradict disclaimer); see also *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 538 n.2 (10th Cir. 1995) (disclaimer only one factor in determining parties' intent to form implied contract); *Litton v. Maverick Paper Co.*, 354 F. Supp. 2d 1209, 1217 (D. Kan. 2005).

In *Wilkinson*, the employee handbook contained several disclaimers of any implied employment contract, and the employer also displayed a poster that stated that all employment was at will. 4 P.3d at 1163, 269 Kan. at 215. But the employer also provided employees with written policies regarding "fair treatment," progressive discipline, firing for cause, and of "not holding past employment problems against a rehired employee once the employee passed the Rehire Board." *Id.* Moreover, the actual practices of the employer's managers were inconsistent with the disclaimer of an employment contract. *Id.* This was sufficient showing to allow the issue of an implied contract to be presented to the jury. *Id.* at 1164, 269 Kan. at 216.

4. Implied Covenants of Good Faith and Fair Dealing

The implied covenant of good faith is not recognized in Kansas in the at-will employment context. *See Morriss v. Coleman Co., Inc.*, 738 P.2d 841, 241 Kan. 501 (1987) (“The principle of law stated in RESTATEMENT (SECOND) OF CONTRACTS, §205 (1979), that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement, is held to be overly broad and not applicable to employment-at-will contracts”), *accord See Ritchie Corp.*, 298 P.3d at 265, 296 Kan. at 965; *Kastner v. Blue Cross & Blue Shield of Kan., Inc.*, 894 P.2d 909, 919, 21 Kan. App. 2d 16, 30 (1995); *Williams v. Evogen, Inc.*, No. 12-2620-JWL, 2013 U.S. Dist. LEXIS 33678 (D. Kan. Mar. 12, 2013).

Note, however, that at least one federal court has found that Kansas law is silent as to whether a claim exists for an employer’s tortious (as opposed to contractual) breaches of good faith and fair dealing with respect to employees. *Litton v. Maverick Paper Co.*, 354 F. Supp. 2d 1209, 1218 (D. Kan. 2005).

B. Public Policy Exceptions

1. General

Kansas has recognized exceptions to the at-will employment relationship based on public policy. Various such exceptions are discussed below.

2. Exercising a Legal Right

Kansas recognized the public policy exception of exercising a legal right in *Murphy v. City of Topeka-Shawnee County Dep’t of Labor Serv.*, 630 P.2d 186, 6 Kan. App. 2d 488 (1981). In *Murphy*, an employee filed a workers’ compensation claim. He maintained he was offered further employment on the condition that he withdraw the claim. When he refused, he was terminated. A petition was then filed in the district court alleging he was discharged in retaliation for seeking workers’ compensation benefits. The trial court dismissed Murphy’s cause of action, but the Kansas Court of Appeals reversed, holding:

We believe the public policy argument has merit. The Workmen’s Compensation Act provides efficient remedies and protection for employees, and is designed to promote the welfare of the people in this state. It is the exclusive remedy afforded the injured employee, regardless of the nature of the employer’s negligence. To allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act.

Id. at 192.

The Court recognized a valid cause of action for retaliatory discharge of an at-will employee who filed for workers’ compensation benefits, adopting a limited public policy exception to the at-will doctrine.

The Court’s holding in *Murphy* was extended to all employees, not just at-will employees, by the Supreme Court in *Coleman v. Safeway Stores, Inc.*, 752 P.2d 645, 242 Kan. 804 (1988) (overruled in part on other grounds by *Gonzalez-Centeno v. North Central Kansas*

Regional Juvenile Detention Facility, 278 Kan. 427, 101 P.3d 1170 (2004)). Plaintiff, an employee covered by a collective bargaining agreement, brought a retaliatory discharge claim, alleging that she was assessed infractions for absences incurred due to work-related injuries, and that she had not accumulated enough infractions for discharge prior to her injuries. The trial court granted summary judgment in favor of the employer, finding that the employer's attendance policy was not arbitrary or capricious. Plaintiff appealed, alleging that the employer's actions were tantamount to wrongful discharge for exercising her rights under the Workers' Compensation Act. The employer argued that the public policy exception was only available to at-will employees, relying on *Cox v. United Techs*, 727 P.2d 456, 240 Kan. 95 (1986).

However, the Supreme Court of Kansas agreed with plaintiff and overturned *Cox*, stating that "[a]lthough the employee in *Murphy* was an at-will employee, the primary emphasis of the opinion was on the strong public policy of Kansas underlying the Workers' Compensation Act, applicable to all workers injured on the job." *Coleman*, 752 P.2d at 649, 242 Kan. at 809-10 (emphasis added). Further, the Court stated that "[a] state tort action for retaliatory discharge for filing a workers' compensation claim is a claim for a violation of state public policy independent of a collective bargaining agreement." Finally, the court noted that "*Cox* did not fully recognize the limited remedy afforded the injured employee through collective bargaining." *Id.* at 651, 242 Kan. at 813. Thus, the Court recognized a tort cause of action for all employees for retaliatory discharge.

To set forth a prima facie case of retaliatory discharge for filing a workers' compensation claim under Kansas law, plaintiff must show that (1) he or she filed a claim for workers' compensation benefits or sustained an injury for which he might assert a future claim for such benefits; (2) defendant knew of the claim or injury; (3) defendant terminated plaintiff's employment; and (4) a casual connection connects the protected activity and the termination of plaintiff's employment. *Robinson v. Wilson Concrete Co.*, 913 F. Supp. 1476, 1483 (D. Kan. 1996).

Additionally, when a married couple both work for the same employer and one exercises his or her rights under the Workers' Compensation Act, the employer may not retaliate against the non-injured spouse by terminating him or her from employment. *Marinhagen v. Boster, Inc.*, 840 P.2d 534, 17 Kan. App. 2d 532, 541 (1992).

In *Hysten v. Burlington N. Santa Fe Ry. Co.*, 108 P.3d 437, 277 Kan. 551 (2004), the Supreme Court of Kansas extended similar protection to employees exercising their rights pursuant to federal statute. In *Hysten*, the plaintiff began experiencing pain and declared his injury to be work-related to preserve his rights under the Federal Employer's Liability Act. Hysten was disciplined for failing to promptly report a work-related injury, and was subsequently terminated.

The employee filed suit in United States District Court, which granted the employer's motion to dismiss, relying on alternative rationales: (1) Kansas would not recognize a tort for wrongful discharge in retaliation for exercise of FELA rights, or (2) the adequate alternate remedy of the federal Railway Labor Act (RLA) would foreclose any such claim. The Tenth

Circuit Court of Appeals certified the two above stated questions to the Kansas Supreme Court. The court disagreed with the district court, holding that: “[t]he mere fact that plaintiff’s entitlement to compensation arises from a federal statute rather than a state statute should not, of itself, affect the importance of the public policy allowing injured employees to seek compensation or preclude plaintiff from asserting his claim of retaliatory discharge.” *Hysten*, 108 P.3d at 441, 277 Kan. at 556 (citation omitted).

The court in *Hysten* concluded that failure to recognize this exception “effectively releases an employer from the obligation of the statute.” *Id.* Further, the court held that the alternative remedies doctrine did not preclude a state tort claim, as arbitration under the RLA employed a different process, different level in claimant control, and differences in damages available. The court stated that “[w]e also do not regard the unavailability of compensatory damages for pain and suffering and punitive damages as trivial. As we recognized in *Coleman*, a retaliatory discharge action...is designed to redress a violation of state public policy.” *Hysten*, 108 P.3d at 445, 277 Kan. at 563 (citation omitted).

The Tenth Circuit Court of Appeals affirmed the district court’s order granting summary judgment in favor of the employer, finding that the employee failed to establish that his employer’s legitimate, non-retaliatory reason for termination was merely pretextual. *See Hysten v. Burlington N. Santa Fe Ry. Co.*, 415 Fed. Appx. 897 (10th Cir. 2011).

The public policy exception was further extended to protect an employee, who worked two jobs, from retaliatory discharge from one employer when he filed a workers’ compensation claim against the other employer. *Gonzalez-Centeno v. N. Cent. Kan. Reg’l Juvenile Det. Facility*, 101 P.3d 1170, 278 Kan. 427 (2004). In *Gonzalez-Centeno*, the plaintiff, while working at Venator and NCKRJDF, sustained a back injury at Venator. He subsequently filed for and received workers’ compensation benefits from Venator. Though injured, the plaintiff continued working for both employers. Occasionally, plaintiff’s injury would be aggravated, causing him to miss work. Though he was told by NCKRJDF that he must report absences to the director or assistant director, the plaintiff called the administrative secretary to report his absences on two separate occasions. As a result, the plaintiff was terminated from NCKRJDF for insubordination. The matter before the court was one of first impression, whether the public policy exception to the employment-at-will doctrine in *Murphy* should be extended to include a “cause of action for retaliatory discharge against an employer other than the employer against which a workers’ compensation claim was or might be asserted.” *Gonzalez-Centeno*, 101 P.3d at 1173, 278 Kan. at 430. The court found persuasive decisions from several other jurisdictions and applied them to the case at hand. The court “affirm[ed] the District Court’s ruling recognizing a retaliatory discharge cause of action against an employer other than the one against which the workers’ compensation claim was filed.” *Id.* at 433-34.

And in *Campbell v. Husky Hogs, L.L.C.*, 255 P.3d 1, 292 Kan. 225 (2011), the Supreme Court of Kansas held that a retaliatory discharge claim would lie, where an employee was terminated for filing a claim under the Kansas Wage Payment Act. The Court held that this claim involved matters of broad public policy similar to those raised in *Flenker v. Willamette Industries* (a whistleblower case discussed below) and *Hysten*, and that the Wage Payment Act

did not contain an adequate substitute remedy for a state retaliatory discharge claim based upon a wage claim filing.

In *Hall v. Kan. Farm Bureau*, 50 P.3d 495, 274 Kan. 263 (2002), the Supreme Court of Kansas declined plaintiff's attempt to expand the *Coleman* public policy exception to a termination that involved mainly private business interests, rather than matters of broad public policy. In *Hall*, the plaintiff was removed from his position as president of the Kansas Farm Bureau by the board of directors. The board of directors reasoned that the plaintiff was removed from his position because of his inability to work with management and staff and because he was presenting his own legislative policy instead of the Farm Bureau policy. The board also stated that plaintiff had failed to timely pay accounts payable. The plaintiff alleged that his termination as president constituted retaliatory discharge, relying on *Coleman*, stating that he was terminated despite his "attempting to act in the best interest of Farm Bureau's members before the legislature." The Supreme Court of Kansas found that the plaintiff had misread *Coleman*, in arguing that "Kansas courts recognize another exception where the termination *broadly* contravenes public interest." *Hall*, 274 Kan. at 272 (emphasis added). The court stated that "[e]ven if Kansas courts were to recognize such an exception, [Plaintiff]'s allegations fail to embrace any matters of public, as opposed to corporate, interest." *Id.*

Kansas law does not recognize "exercise of sound business judgment" as a public policy exception to employment at will for corporate directors. *Estate of Pingree v. Triple T Foods, Inc.*, 430 F. Supp. 2d 1226, 1240 (D. Kan. 2006). In *Pingree*, the president of the company terminated a director, on behalf of the company and the shareholders, because the director intended to vote in favor of the sale of a company asset. *Id.* at 1231. The federal district court found that Kansas law did not express a public policy of protecting corporate directors who exercise their best business judgment so as to prevent their discharge at will. *Id.* at 1241.

In *Litton v. Maverick Paper Co.*, 354 F. Supp. 2d 1209 (D. Kan. 2005), employees brought an action alleging retaliatory discharge by the defendants in violation of the public policy exception to employment at-will. The plaintiffs claimed the defendants violated public policy in Kansas for retaliatory discharge, contending that public policy favors the elimination of sexual harassment in the workplace. However, the plaintiffs cited no Kansas authority recognizing such claim was protected under the exception. To prevail on their retaliatory discharge claims, plaintiffs had to demonstrate either: (1) Kansas courts have recognized their retaliatory discharge claims as exceptions to the employment at will doctrine, or (2) that Kansas public policy protects the conduct on which their retaliatory discharge claims are based and that they have no alternative state or federal remedy. Applying Kansas employment law the district court held plaintiffs' claim did not fall within the public policy exception. Further, the court held no protection should exist because the plaintiffs had adequate alternative remedies under Title VII of the Civil Rights Act of 1964 and the Kansas Act Against Discrimination.

3. Refusing to Violate the Law

Kansas state employees cannot be discharged for reporting a violation of a federal or state law. K.S.A. § 75-2973. *See also* statutes generally cited in Section XV, below.

4. Exposing Illegal Activity (Whistleblowers)

In *Palmer v. Brown*, 752 P.2d 685, 242 Kan. 893 (1988), the Supreme Court of Kansas extended the public policy exception enunciated in *Murphy v. Topeka-Shawnee County Dep't of Labor Serv.*, 630 P.2d 186, 6 Kan. App. 2d 488 (1981) to include retaliation for blowing the whistle on illegal activities.

Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. Thus, we have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort....However, the whistle-blowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain.

Palmer, 752 P.2d at 689-90, 242 Kan. at 900.

In *Herman v. W. Fin. Corp.*, 869 P.2d 696, 254 Kan. 870, 881-83 (1994), the Kansas Supreme Court held that only reports of violations of rules, regulations or laws pertaining to public health, safety, and general welfare are protected. The employer was a savings and loan association. The Court held that an internal company report which indicated that a loan was made in violation of internal underwriting guidelines was not a protected activity since it did not report a violation of a rule, regulation or law involving public health, safety or welfare. *Id.* See also *Duffey v. Board of Commissioners of Butler County*, No. 08-1186-WEB, 2011 U.S. Dist. LEXIS 31860, at *16 (complaints for violation of workplace guidelines regarding conduct of prison guards insufficient to support a wrongful termination claim.)

In *Flenker v. Willamette Industries, Inc.*, 967 P.2d 295, 266 Kan. 198 (1998), the Kansas Supreme Court held that a “whistleblower” claim for wrongful termination could be asserted based on the employee’s good-faith reporting of federal OSHA violations.

Under Kansas law, the question of whether whistleblowing may be limited to reports made by an employee to governmental authorities is not fully settled. In its 1988 *Palmer* decision, the Supreme Court held that whistleblowing applies to the good faith reporting of a serious infraction of rules, regulations, or the law involving public health, safety and the general welfare “to either company management or law enforcement officials.” *Palmer*, 752 P.2d at 689-90, 242 Kan. at 900. (Emphasis added.) Six years later, in *Moyer v Allen Freight Lines, Inc.*, 20 Kan.App.2d 203, 885 P.2d 391 (1994), two of the three members of a Court of Appeals panel roundly criticized the recognition of a whistleblower claim where reports are only made “in house” to company management, but held that *Palmer* mandated the recognition of an “internal” whistleblower claim. 20 Kan.App.2d at 213-16, 885 P.2d at 398-400.

In *Fowler v. Criticare Home Health Serv., Inc.*, 10 P.3d 8, 27 Kan. App. 2d 869 (2000), the Kansas Court of Appeals, in an opinion that was affirmed and adopted by the Supreme Court

of Kansas, *Fowler*, 26 P.3d 69, 271 Kan. 715 (2001), declined to extend the “whistle-blowing” exception to a situation where an employee has merely threatened to blow the whistle prior to discharge. The plaintiff was asked by the general manager to ship two handguns and live ammunition to the owner of his employer, who was on vacation. The plaintiff told the general manager that he thought it was unlawful to ship the guns, refused to ship the guns, and threatened to report the activity to the United Parcel Service (UPS), the shipper customarily used by the employer. However, the general manager shipped the guns and ammunition using UPS, and when the plaintiff discovered this, he reported this action to UPS. The following day, the plaintiff was late to work and was fired. Several months later, the federal Bureau of Alcohol Tobacco and Firearms contacted the owner regarding the shipment of guns and ammunition. This was the first instance that either the owner or general manager knew of the plaintiff’s report to UPS.

The trial court granted summary judgment in favor of the employer, finding that the plaintiff’s discussion with the general manager was not the type of internal reporting contemplated in *Palmer*, and that the plaintiff’s report to UPS could not be a basis for a whistle-blower claim as there was no evidence that the owner or general manager knew that the plaintiff had carried out his threat. The court of appeals affirmed, stating that the plaintiff failed to present sufficient evidence to survive summary judgment. “[Plaintiff’s] disagreement with [the general manager] was just that; it did not qualify as an internal report to management of illegal coworker or company conduct.” *Fowler*, 10 P.3d at 15. *Palmer* simply was not meant to endow every workplace dispute over the water cooler on company practices and the effect of government regulation with whistle-blower overtones. A worker who wants to come under the protections of the *Palmer* decision must seek out the intervention of a higher authority, either inside or outside the company. *Id.*

The court also rejected the plaintiff’s contention that his report to UPS was sufficient to establish his claim, stating:

The evidence regarding [Plaintiff’s] report to UPS also does not meet the *Palmer* standard we have just recited and discussed. It does not qualify as a report to higher management at the company or to law enforcement. In addition, [Plaintiff] admitted he did not inform [the general manager or owner] that he had carried out his threat to report to UPS, and no whistle-blowing claim arises unless the discharged employer is aware of the discharged employee’s report prior to termination.

Fowler, 10 P.3d at 15.

In *Connelly v. State*, 271 Kan. 944, 26 P.3d 1246 (2001) – a case involving Kansas’ whistleblower statute (K.S.A. § 75-2973) that applies only to State employees – the Kansas Supreme Court took up the concerns expressed by the concurring and dissenting justices in *Moyer* (a private-sector case), and landed on the fence as to the viability of internal whistleblowing complaints. There, police officers had denounced and protested within their chain-of-command that laws designed for public safety were not being properly enforced, and they were allegedly terminated for having done so. After analyzing *Moyer* and decisions from

other jurisdictions at length, noting that some authorities favored and others disfavored a cause of action for “internal” whistleblowing, the *Connelly* court ruled as follows (271 Kan. at 974, 26 P.3d at 1266-67):

While there are good reasons to retreat from the broad language of *Palmer*, and certainly not every instance of internal complaint should be actionable whistleblowing, we hold here that the actions of the troopers in openly denouncing and protesting within their chain of command to other ‘law enforcement officials’ illegal activity in not enforcing laws designed for public safety may be protected internal whistleblowing and was correctly submitted to the jury for its determination.

There was contradictory evidence in this case. An administrative agency resolved the facts in favor of the State. A jury resolved the same evidence in favor of plaintiff Barrett. While this may appear to be a contradiction which we should resolve in only one way, based on our standards of review on appeal we will not reverse either result.

While the *Connolly* holding seems inconclusive as to the viability of “internal whistleblowing” claims, it can forcefully be argued that *Connolly* should be read narrowly, based on its unique facts. In *Connolly*, there was a sound reason for allowing the claims to go to a jury: the “internal” supervisors were also law enforcement officials, and thus plaintiffs’ protest to their superiors had a hybrid character of being an “external” complaint, as well. Thus, an employer facing a future whistleblower complaint based solely on “internal” whistleblowing should assert that *Palmer* has limited application, citing to the discussions in *Connelly* and *Moyer*.

However, in *Shaw v. Southwest Kansas Groundwater Mgmt. Dist. Three*, 219 P.3d 857, 42 Kan.App.2d 994 (2009), the Court of Appeals permitted a former employee’s retaliatory discharge claim to go forward, where the employee of a groundwater management district alleged he was terminated for having complained to the district’s Board of Directors that the district’s Executive Director violated state law by wasting water on farmland owned by the Executive Director. After reviewing and discussing the *Moyer*, *Palmer*, and *Connelly* cases, the Court held that Shaw could properly bring a claim for retaliatory discharge, concluding that: “The critical point in *Fowler* is that the whistleblower must seek to stop unlawful conduct through the intervention of a higher authority, either inside or outside the company. Stated differently, internal whistleblowing is recognized as an actionable tort in Kansas in circumstances where the employee seeks to stop unlawful conduct pertaining to public health and safety and the general welfare by a coworker or an employer through the intervention of a higher authority inside the company.” 219 P.3d at 1001 (internal citation omitted). The Supreme Court has not addressed this issue since it decided *Connolly* in 2001.

In *Goodman v. Wesley Med. Ctr., L.L.C.*, 78 P.3d 817, 276 Kan. 586 (2003), the Supreme Court of Kansas tightened the standard of what is to be considered actionable retaliatory discharge based upon “whistleblowing.” In this case, the plaintiff, who was a nurse, met with an attorney for a plaintiff in an action in which her employer was a defendant. The plaintiff

provided confidential documents to this attorney, and agreed to be a witness as to the employer's unsafe nursing practices. She was subsequently discharged.

The employer argued that the Kansas Nurse Practice Act did not establish clear public policy rules, regulations, or law so as to provide a basis for a retaliatory discharge claim. The Supreme Court of Kansas agreed, stating “[i]t would be both troublesome and unsettling to the state of the law if we were to allow a retaliatory discharge claim to be based on a personal opinion of wrongdoing. Such a holding, under these circumstances, would effectively do away with the employment-at-will doctrine, which has become a part of Kansas public policy.” *Goodman*, 78 P.3d at 822-23, 276 Kan. at 592.

Whistleblower claims must be proven by “clear and convincing evidence.” *See Goodman*. The Kansas Supreme Court has recently spoken at length on the meaning of the “clear and convincing evidence” standard, clarifying some earlier precedents and overruling others, in *In the Interest of B.D.-Y.*, 187 P.3d 594, 286 Kan. 686 (2008). The court held that this is an intermediate standard, falling between “preponderance of the evidence” and “beyond a reasonable doubt.” In brief, it is evidence “which shows that the truth of the facts asserted is highly probable.” *Id.* at 601-02.

Where a claim is brought under the Kansas Whistleblower Act applicable to State employees, by virtue of a 2005 amendment to the statute, attorney's fees may be awarded not only to a prevailing plaintiff in an action brought before the Civil Service Board, but to a prevailing state agency defendant, as well. K.S.A. § 75-2973(f). Thus, the Supreme Court of Kansas has held that it was reversible error for the Board to issue a blanket ruling against awarding attorney fees to prevailing State agency employers. *Kansas Dept. of Revenue v. Powell*, 232 P.3d 856, 290 Kan. 564 (2010).

III. CONSTRUCTIVE DISCHARGE

Under Kansas law, if the working environment becomes so hostile that a reasonable person would deem the conditions to be “intolerable”, and the employee quits because of that environment, the quitting will be treated and remedied as a discharge. Quitting as a reasonable response to illegal treatment is a “constructive discharge”. *Garvey Elevators, Inc. v. Kan. Human Rights Comm'n*, 961 P.2d 696, 703, 265 Kan. 484, 494 (1998). Whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 493 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)); *Cf. Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121 (10th Cir. 2013).

The Kansas Courts have further explained that “[i]n order to be actionable, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Labra v. Mid-Plains Constr., Inc.*, 90 P.3d 954, 960, 32 Kan. App. 2d 821, 829 (2004). Whether an environment is sufficiently hostile or abusive must be determined by looking at all

the circumstances, including frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.*

In *Whye v. City Council for the City of Topeka*, No. 90,762, 2004 Kan. App. Unpub. LEXIS 1031 (Kan. App. March 5, 2004), the Kansas Court of Appeals declined to extend the statute of limitations accrual date for constructive discharge. In this case, the mayor of Topeka demanded that the plaintiff, a police officer, be fired based upon criminal allegations. The plaintiff decided that he had no choice but to end his employment and accept early retirement to protect his friend who was the police chief. The plaintiff was subsequently found not guilty of the criminal charges against him, and filed suit against the city, claiming constructive discharge. The district court granted the city's motion to dismiss based upon the statute of limitations. The Supreme Court of Kansas affirmed, *Whye v. City Council for Topeka*, 102 P.3d 384, 278 Kan. 458 (2004), explaining, "the cause of action accrues and the statute of limitations begins to run when the plaintiff tenders his or her resignation or announces a plan to retire." *Id.* at 387, 278 Kan. at 464.

Kansas federal courts have found that neither "micro management" nor strained relationships with supervisors create the objectively unreasonable working conditions necessary to support a claim of constructive discharge. See *Turnwall v. Trust Co. of Am.*, 146 Fed. Appx. 983 (10th Cir. 2005); *Mahaffie v. Potter*, 434 F. Supp. 2d 1041, 1050 (D. Kan. 2006). Other conduct that has been found not to constitute intolerable working conditions include: scheduling changes from day to night shift, reduction of hours such that benefits are lost, scheduling with less than one day's notice, negative performance reviews, close supervision, and disciplinary actions. *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169, 1187 (D. Kan. 2006).

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

When, either by contract or by statute, employment by a governmental entity continues until the employer shows "cause" for terminating the employment, discontinuing employment requires that the employer meet an explicitly defined legal standard and the employee be given a due process hearing, thus bringing the action into the realm of a quasi-judicial decision. *Brown v. Bd. of Educ.*, U.S.D. 333, 928 P.2d 57, 63, 261 Kan. 134 (1996). The *Brown* court cited *Will v. City of Herington*, 443 P.2d 667, 671, 201 Kan. 627 (1968), stating where discharge is "for cause," notice and hearing are required.

Cause is sometimes spoken of as legal cause or substantial, reasonable, or just cause, related to a matter of substantial nature pertaining to duties or obligations imposed. Cause carries with it the necessity of an appropriate charge or accusation, notice of the charge with an opportunity to present a defense, and a fair hearing before an official or tribunal authorized to conduct such a hearing and render a decision on the merits of the charge. *Wichita Council v. Sec. Benefit Ass'n*, 28 P.2d 976, 138 Kan. 841 (1934); see also *Plummer v. Humana of Kan., Inc.*, 715 F. Supp. 302 (D. Kan. 1988); *Allegrì v. Providence-St. Margaret Health Ctr.*, 684 P.2d 1031, 9 Kan. App. 2d 659 (1984).

B. Status of Arbitration Clauses

There is very little case law regarding arbitration clauses in employment contracts under Kansas law. Section 5-401 of the Kansas Uniform Arbitration Act (“K.U.A.A.”) which invalidated arbitration clauses contained in employment contracts, was repealed on July 1, 2018.

The judicial standard of review of an arbitration award is highly deferential and the court must affirm an award if the arbitrator acted with the scope of her or his authority. As long as errors are not in bad faith or so gross as to amount to affirmative misconduct, the court is bound by an arbitrator’s findings of fact and conclusions of law. *City of Coffeyville v. IBEW Local No. 1523*, 14 P.3d 1, 270 Kan. 322, 336 (2000). An arbitrator is not required to provide the reasons underlying the award. *Griffith v. McGovern*, 141 P.3d 516, 36 Kan.App.2d 494, 500 (2006). See also *Moreland v. Perkins, Smart & Boyd*, 240 P.3d 601, 606, 44 Kan.App.628 (2010). “Judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes.” *Jackson Trak Group, Inc. v. Mid States Port Authority*, 751 P.2d 122, 242 Kan. 683, 689 (1988).

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Lorson v. Falcon Coach Inc.*, 522 P.2d 449, 457, 214 Kan. 670 (1974), the Supreme Court held that damages resulting from plaintiff’s detrimental reliance on the defendant’s promise of employment are recoverable even where there is no employment contract for a definite period. See also *Chrisman v. Philips Indus., Inc.*, 751 P.2d 140, 145, 242 Kan. 772, 780 (1988). Additionally, the 10th Circuit Court of Appeals held in *Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065, 1067 (10th Cir. 1980), that promissory estoppel could apply to an otherwise unenforceable employment contract under Kansas law.

The doctrine of promissory estoppel may render enforceable any promise upon which the promisor intended, or should have known, that the promisee would act to his detriment, and upon which the promisee did act upon to his detriment. See *Decatur County Feed Yard, Inc. v. Fahey*, 974 P.2d 569, 577, 266 Kan. 999, 1010 (1999); *Marker v. Preferred Fire Ins.*, 506 P.2d 1163, 1169-70, 211 Kan. 427, 433-34 (1973). In such a situation, promissory estoppel is a substitute for consideration. See *Decatur County*, 974 P.2d at 577, 266 Kan. at 1010. This doctrine is not applicable where there is consideration on either side. *Id.*

B. Fraud

Actionable fraud includes (1) an untrue statement of fact, known to be untrue by the party making it, (2) which is made with the intent to deceive or recklessly made with disregard for the truth, (3) where another party justifiably relies on the statement, and (4) acts to his or her injury and damages. *Albers v. Nelson*, 809 P.2d 1194, 248 Kan. 575, 579 (1991). Whether the misrepresentations were of present facts, opinion or failure, intent is a question of law. See *Wilkinson v. Shoney’s Inc.*, 4 P.3d 1149, 1165, 269 Kan. 194, 217-19 (2000) (discussing negligent misrepresentations, but analysis is applicable to fraudulent misrepresentations).

C. Statute of Frauds

The Statute of Frauds requires certain agreements to be in writing and signed by the party to be charged in order to be actionable. K.S.A. § 33-106. Kansas law permits the doctrine of promissory estoppel to overcome a statute of frauds defense in certain factual situations, including partial performance of a contract. *Bittel v. Farm Credit Serv. of Cent. Kan.*, 962 P.2d 491, 265 Kan. 651 (1998).

VI. DEFAMATION

A. General Rule

The elements of defamation include: (1) false and defamatory words, (2) communication to a third party, and (3) resulting harm to the reputation of the person defamed. *See Batt v. Globe Eng'g Co. Inc.*, 774 P.2d 371, 13 Kan. App. 2d 500 (1989). The tort of defamation includes libel and slander. *Id.*

Damages recoverable for defamation may not be presumed; they must be established by proof, no matter the character of the libel. *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 232 Kan. 1 (1982).

1. Libel

See elements of defamation above.

2. Slander

See elements of defamation above.

B. References

In *Turner v. Halliburton Co.*, 722 P.2d 1106, 240 Kan. 1 (1986), defendant Halliburton terminated plaintiff Turner for stealing. Plaintiff then applied for a new job with Ark City Packing. On his application Turner wrote he had been “laid off” by Halliburton. Ark City considered him satisfactory for employment pending a reference check. When Ark City called Halliburton, it was informed that Turner had been terminated for “stealing company property.” A follow-up reference form was then completed by Halliburton verifying the telephone report in writing. Turner’s application was given no further consideration.

Turner brought a defamation claim against Halliburton for statements accusing him of theft. The Kansas Supreme Court found the communications to be qualifiedly privileged and held:

A qualified or limited privilege is granted to those with a special interest in the subject matter of the communication...The availability of the limited privilege is generally restricted to those situations where public policy is deemed to favor the free exchange of information over the individual’s interest in his or her good

reputation. One such qualified privilege exists with respect to business or employment communications made in good faith and between individuals with a corresponding interest or duty in the subject matter of the communication.

Turner, 722 P.2d at 1112-13, 240 Kan. at 7-8. The Court further stated that in the case of a qualifiedly privileged statement, the injured party has the burden of proving not only the statements were false, but also were made with actual malice, actual evil-mindedness or specific intent to injure. *Id.* at 1113, 240 Kan. at 8.

C. Privileges

Privilege is a defense to a defamation action. See *Lloyd v. Quorum Health Res., L.L.C.*, 77 P.3d 993, 31 Kan. App. 2d 943 (2003). In *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149, 1169, 269 Kan. 194 (2000), the Supreme Court held that statements made by a former employer and its representatives in state unemployment proceedings, in which the employer revealed that the terminated employee had been accused of sexually harassing a co-worker, were subject to absolute privilege for quasi-judicial administrative proceedings, and thus could not form the basis for a defamation claim against the employer. Similarly, see *Batt v. Globe Eng'g Co., Inc.*, 774 P.2d 371, 13 Kan. App. 2d 500 (1989), in which the Court of Appeals further held that the employee could not recover on the defamation claim for the termination of his employment where there was no evidence of publication or communication of the contents of the separation notice beyond management personnel. *Id.*

“Absolute privilege” in Kansas is “confined to a few situations where there is an obvious policy in favor of permitting complete freedom of expression, without inquiry as to the defendant’s motives.” *Purdum v. Purdum*, 301 P.3d 718, 48 Kan. App. 2d 946 (2013) – e.g., it has been applied to individuals serving in a legislative, executive or judicial capacity, *Turner v. Halliburton Co.*, 240 Kan. at 7; or witnesses in a judicial proceeding, *Weil v. Lynds*, 105 Kan. 440, 443, 185 P.51 (1919). See also *Sampson v. Rumsey*, 1 Kan. App. 2d 191, 194, 563 P.2d 506 (1977). In *Purdum*, the Court of Appeals declined to extend absolute privilege to statements made in an ecclesiastical administrative proceeding concerning a marital annulment, rejecting plaintiff’s argument that it was entitled to such privilege as part of a “quasi-judicial proceeding”. Kan. App.2d at 947.

D. Other Defenses

1. Truth

Truth is an absolute defense to a defamation action. *Wilkinson v. Shoney's, Inc.*, 4 P.3d at 1169; *Lloyd v. Quorum Health Res., L.L.C.*, 77 P.3d 993, 31 Kan. App. 2d 943 (2003).

2. No Publication

A lack of publication, or communication to a third person, will defeat a plaintiff’s claim for defamation. See *Dominguez v. Davidson*, 266 Kan. 926, 931, 974 P.2d 112, 117 (1999).

3. Self-Publication

The publication element of defamation may be satisfied where there is compelled self-publication. *Roles v. Boeing Military Airplanes*, No. 89-1330-K, 1990 U.S. Dist. LEXIS 9884, *22-24 (D. Kan. June 29, 1990). “Justice requires that the publication element of defamation is satisfied where the discharged employee can demonstrate that he was compelled to reveal the ostensible reason for the discharge to prospective employers, and that his former employer could have reasonably foreseen the need to reveal the information.” *Id.* at *23. “[A]n employee who is able to prove his employer terminated him for reasons which are not only false but maliciously intended, should not be denied recovery simply because the economic necessities of the real world forced the employee himself reveal the information to subsequent employers.” *Id.* at *23-24.

4. Invited Libel

“A publication of a libelous and slanderous nature is insufficient to support an action for defamation where it is invited and procured by the plaintiff, or a person acting for him in the matter.” *Munsell v. Ideal Food Stores*, 208 Kan. 909, 920, 494 P.2d 1063, 1072 (1972) (citing 50 Am. Jur. 2d, Libel and Slander, § 149, p. 655).

5. Opinion

A subjective statement “that no plaintiff can prove as factually true or false” cannot amount to defamation. *See Robinson v. Wichita State Univ.*, No. 16-2138-DDC-GLR, 2018 U.S. Dist. LEXIS 22983, *52-53 (D. Kan. Feb. 13, 2018).

E. Job References and Blacklisting Statutes

There are no Kansas statutes regarding blacklisting.

Although there is no Kansas case law discussing job references, the Tenth Circuit has consistently observed that for purposes of determining whether there has been an “adverse employment action” under an anti-discrimination statute, an employer’s action that causes “harm to future employment prospects”, such as a negative job reference, can be considered an adverse employment action. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028 (10th Cir. 2011); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996).

F. Non-Disparagement Clauses

An employer may not condition an employee's FLSA rights on his refraining from making disparaging comments about the employer. *See Christeson v. Amazon.com.ksdc, LLC*, No. 18-2043-KHV, 2019 U.S. Dist. LEXIS 13556, *21-23 (D. Kan. Jan. 29, 2019) (a non-disparagement clause in a settlement agreement was unenforceable).

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In order to establish a cause of action for intentional infliction of emotional distress, the following elements must be established:

- i) Defendant's conduct must be intentional or in reckless disregard of plaintiff;
- ii) Conduct must be extreme and outrageous;
- iii) There must be a causal connection between defendant's conduct and plaintiff's mental distress; and
- iv) Plaintiff's distress must be extreme and severe.

Roberts v. Saylor, 637 P.2d 1175, 230 Kan. 289, 292 (1981).

Additionally, there are two threshold considerations in an intentional infliction claim:

- i) Whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and
- ii) Whether the emotional distress suffered is in such an extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it.

Roberts, 637 P.2d at 1179, 230 Kan. at 292-93.

B. Negligent Infliction of Emotional Distress

The elements of negligent infliction of emotional distress are: (1) extreme and outrageous conduct by defendant and (2) plaintiff suffers severe emotional distress. *See Gomez v. Hug*, 7 Kan. App. 2d 603, 608, 645 P.2d 916, 920 (1982). A plaintiff must suffer physical injury to recover for the tort. *Hoard v. Shawnee Mission Medical Ctr.*, 662 P.2d 1214, 233 Kan. 267 (1983); *Humes v. Clinton*, 792 P.2d 1032, 1038, 246 Kan. 590, 598 (1990). The purpose of the physical injury requirement is to guard against fraudulent or exaggerated emotional distress claims. *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1534 (D. Kan. 1990). Recovery is thus available only in those cases involving severe emotional distress evidenced and substantiated by actual physical injury. *Freeman v. Kan. State Network Inc.*, 719 F. Supp. 995, 1001 (D. Kan. 1989).

In *Hopkins v. State*, 702 P.2d 311, 237 Kan. 601 (1985), the plaintiff's insomnia, headaches, weight gain and general physical upset were insufficient to constitute physical injury. *Id.* at 319-20, 237 Kan. 612-13.

An exception to the physical injury requirement in emotional distress claims exists where the plaintiff charges the defendant with acting in a willful or wanton manner, or with the intent to injure. *Reynolds v. Highland Manor*, 24 Kan. App. 2d 859, 864, 954 P.2d 11, 15 (1998).

If due to the lack of any physical injury the court concludes that a plaintiff's injuries would not be compensable under the Kansas Workers' Compensation Act, the plaintiff's tort claims for emotional injury are not barred by the exclusive remedy of the Act. *Parks v.*

Hayward's Pit, Inc., No. 93-2387-JWL, 1993 U.S. Dist. LEXIS 18529, *6-7 (D. Kan. Dec. 21, 1993); *see also* 2A LARSON'S WORKMEN'S COMPENSATION LAW § 68.30, pp. 13-85 (1989).

VIII. PRIVACY RIGHTS

A. Generally

An invasion of the right of privacy action is primarily comprised of four different distinctive kinds or torts: (1) intrusion upon seclusion, (2) appropriation of name and likeness, (3) publicity given to private life, and (4) publicity placing a person in a false light. *Rinsley v. Frydman*, 559 P.2d 334, 339, 221 Kan. 297 (1977).

Of the four torts comprising invasion of privacy, intrusion upon seclusion is most applicable to employment settings. One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person. *Froelich v. Werbin*, 548 P.2d 482, 219 Kan. 461 (1976), *citing* RESTATEMENT (SECOND) OF TORTS § 652B (1976).

The analysis of the RESTATEMENT (SECOND) OF TORTS § 652 was adopted in Kansas in *Dotson v. McLaughlin*, 531 P.2d 1, 216 Kan. 201 (1975). Comment b to § 652 B states that an invasion may occur:

By the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs window with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of photograph or information outlined.

RESTATEMENT (SECOND) OF TORTS §652B, cmt. b (1976); *see also* *Werner v. Kliever*, 710 P.2d 1250, 238 Kan. 289 (1985).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

In *Turner v. Halliburton Co.*, 722 P.2d 1106, 240 Kan. 1 (1986), plaintiff's former employer (Halliburton) told a prospective new employer that plaintiff had been terminated for stealing company property, and that he was not eligible for re-hire. The Supreme Court ruled in favor of Halliburton, holding that where the employee alleged that a former employer had defamed and/or tortiously interfered by communicating his alleged dishonest acts within the company (in the course of an investigation leading to his discharge), then in a later

communication to a prospective employer (who was reference checking), both types of communications fell within the qualified privilege for business or employment communications. Thus, to succeed on his claim, the plaintiff had to prove that the employer acted with actual malice, which plaintiff failed to do.

2. Background Checks

Prospective employers may obtain an applicant's credit report for employment purposes, subject to limitations. *See* K.S.A. § 50-703. Furthermore, an employer may require an applicant to execute a release allowing the employer access to the applicant's criminal history records for the purpose of determining the applicant's employment fitness. *See* K.S.A. § 22-4704; *see also* Kan. Admin. Reg. § 10-12-1.

See discussion in Section IX.A below, regarding *Schmidt v. HTG, Inc.*, 961 P.2d 677, 265 Kan. 372, 401 (1998), a negligent hiring case in which the employer had not performed a background check on a parolee, who raped and killed another employee at the restaurant.

C. Other Specific Issues

1. Workplace Searches

There is no statute regarding workplace searches in Kansas.

2. Electronic Monitoring

Employers have a legitimate interest in monitoring business calls to assist supervisors in training and instructing employees on how to deal with the public and to protect employees from abusive calls. *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979).

A personal call may not be intercepted in the ordinary course of business, except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal. In other words, a personal call may be intercepted in the ordinary course of business to determine its nature but never its content. Where employees' personal calls are surreptitiously recorded by the employer (i.e., the employees have not been told that personal calls may be recorded), this may give rise to an "intrusion upon seclusion" privacy claim. *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362, 1383 (D. Kan. 1996).

3. Social Media

There are no specific statutory provisions or reported Kansas cases regarding social media information for employees in Kansas.

4. Taping of Employees

See Section VIII.C.2 on Electronic Monitoring, above.

5. Release of Personal Information on Employees

There are no reported Kansas cases regarding private sector employees. For public sector employees, however, the Kansas Open Records Act may require the disclosure of the names, positions, salaries, and length of service of employees of public agencies. K.S.A. § 45-221(a)(4). Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of privacy are exempt from disclosure. K.S.A. § 45-221(a)(30). *See State, Dep't of Social & Rehabilitation Services, etc. v. Public Employee Relations Bd. of Kansas Dep't of Human Resources*, 249 Kan. 163, 815 P.2d 66 (1991).

6. Medical Information

There are no specific statutory provisions or reported Kansas cases regarding medical information for private sector employees.

7. Restrictions on Requesting Salary History

Kansas, and all cities therein, allows employers to inquire about an applicant's salary history.

IX. WORKPLACE SAFETY

A. Negligent Hiring

Negligent hiring/supervision is a recognized tort in Kansas. The negligent hiring doctrine recognizes that an employer has a duty to use reasonable care in the selection of employees. *Plains Resources v. Gable*, 235 Kan. 580, 590, 682 P.2d 653, 662 (1984). An employer breaches this duty when it hires employees that it knows or should know are incompetent. *Id.* (citing 29 Am. Jur. Trials, Negligent Hiring of Employee § 2, p. 276). There is no need to prove that the employee's act was committed within the scope of employment. *Id.*

In *Schmidt*, 266 Kan. at 410-02, a rapist on conditional release from prison by operation of law, was hired at a restaurant, and subsequently raped and killed a female employee of the restaurant. The restaurant did not run a background check on the assailant before hiring him, nor did they check his references or employment history; nor did the assailant's parole officer volunteer information to the restaurant about his past. Nonetheless, the Supreme Court held that summary judgment on the negligent hiring claim against the employer should have been granted:

In each of the Kansas cases upon which liability of the employer was predicated, the existence of a duty to the injured party was based on actions against a customer or co-worker which took place on the working premises during the time employment services were normally rendered. In none of such cases was the employee not acting in the course of employment, nor was the injurious action removed from the employer's premises or without any nexus to the employer's operations. None of the Kansas cases cited should be unduly extended to find that a duty comes into existence whereby an employer must ascertain the detailed history of every employee, whether criminal or not, and terminate the employment of an individual who is performing acceptable services and is clearly

not unfit or incompetent, but who does pose some degree of risk due to previous actions. This case involves a tragic set of circumstances, but if a duty is found to exist here, as a matter of law, the liability of employers is unrealistically increased and the obligations of an employer become virtually unlimited.

But see

To prevail on a negligent hiring claim, plaintiff must show:

[S]ome causal relationship between the dangerous propensity or quality of the employee, of which the employer has or should have knowledge, and the injuries suffered by the third person; the employer must, by virtue of knowledge of his employee's particular quality or propensity, have reason to believe that an undue risk of harm exists to others as a result of the continued employment of that employee; and the harm which results must be within the risk created by the known propensity for the employer to be liable.

Kurtz v. Unified Sch. Dist. No. 308, 197 F. Supp. 2d 1317, 1320 (D. Kan. 2002), quoting *Kan. State Bank & Trust Co. v. Specialized Transp. Serv., Inc.*, 819 P.2d 587, 249 Kan. 359 (1991).

B. Negligent Supervision/Retention

Kan. State Bank & Trust Co. v. Specialized Transp. Servs., 249 Kan. 348, 819 P.2d 587 (1991) was a tort action arising out of the alleged sexual molestation of a six-year old girl afflicted with Down's syndrome, by her school bus driver. There, the Supreme Court describe a plaintiff's burden of proving negligent retention/supervision, as follows:

When a third party asserts a negligent retention and supervision claim against an employer, liability results not because of the employer-employee relationship, but because the employer had reason to believe that an undue risk of harm to others would exist as a result of the employment of the alleged tortfeasor. The employer is subject to liability only for such harm as is within that risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee that the employer had reason to believe would be likely to cause harm. However, it is not necessary that the precise nature of the injury alleged by the third-party plaintiff would have been foreseen by the employer.

249 Kan. at 362, 819 P.2d at 598.

After reviewing a complex trial court record concerning the assault, and the extent of the School District's and bus company's knowledge, the Court, allowing plaintiff's jury verdict to stand, concluded that: "This is a close case. We are not requiring clairvoyance in employers; however, viewing the evidence and all inferences in favor of plaintiff, the foreseeability of the risk of harm was a jury question. The trial court did not err in denying the U.S.D.-S.T.S. motions for summary judgment and directed verdict on this issue." 249 Kan. at 359-63.

See also Commerce Bank of St. Joseph, N.A. v. State, 251 Kan. 207, 833 P.2d 996 (1992)(state not liable for negligent supervision/retention of a bribe-taking warehouse examiner).

C. Interplay with Worker's Compensation Bar

In *Douglas v. Ad Astra Info. Sys.*, 296 Kan. 552, 293 P.3d 723 (2013), Danny Douglas was awarded benefits under the Workers Compensation Act for an injury he sustained while operating a go-cart at an event sponsored by his employer, Ad Astra Information Systems, L.L.C. The Workers Compensation Board granted benefits to Douglas, and his employer and its insurer appealed, arguing that Douglas's injury was sustained during a recreational or social event that he was not required to attend, and that he was therefore not entitled to benefits.

The Court of Appeals upheld the award of benefits, citing to factors set forth in a well-known treatise (Larson's Workers' Compensation Law), for determining whether the injury arose out of and in the course of employment. The Kansas Supreme Court reversed and directed the Board to review the facts and reconsider its decision based upon the factors contained in the Kansas statute. The Supreme Court ruled that the language of the statute setting forth criteria for making this type of determination was plain and unambiguous, and that the court below erred in applying the factors set forth in Larson. "A legal treatise may be utilized to explain and interpret Kansas law, but it cannot serve to supplant or alter the actual text of a statute."

The Court ruled that K.S.A. 2006 Supp. 44-508(f) sets forth the circumstances in which an employee injury sustained during a recreational or social event will be held not to "arise out of and in the course of employment". An employee's injuries will be excluded from coverage under the Workers' Compensation Act where either (1) the employee was under no duty to attend the recreational or social event, or (2) the injury resulted neither from the performance of tasks related to the employee's normal job duties nor from performing tasks that he was specifically instructed to perform by his employer.

D. Firearms in the Workplace

Kansas state law does not generally prohibit the open carrying of a handgun. The attorney general can issue licenses to carry concealed weapons to qualified persons, which are valid for four years from the date of issuance.

Furthermore, Kansas law requires employers to post notices if they ban firearms and other weapons in the workplace. *See* K.S.A. § 75-7c10.

E. Use of Mobile Devices

There are no reported Kansas cases or statutes on this subject.

X. TORT LIABILITY

A. Respondeat Superior Liability

The common-law doctrine of vicarious liability has long been a part of Kansas negligence law. *Bair v. Peck*, 248 Kan. 824, 829, 811 P.2d 1176, 1181 (1991). The doctrine was explained in *Simpson v. Townsley*, 283 F.2d 743 (10th Cir. 1960), where the court stated:

Under the law of Kansas, there is no distinction between the liability of a principal for the tortious acts of his agents and the liability of a master for the tortious acts of his servant. In both relationships, the liability is grounded upon the doctrine of respondeat superior. Under that doctrine, the liability of the master to a third person for injuries inflicted by a servant in the course of his employment is derivative and secondary and that of the servant is primary.

The Kansas Supreme Court has stated:

An employee is acting within the scope of the employment if the employee is performing services for which the employee has been employed or is doing anything reasonably incidental to the employment. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been fairly foreseen from the nature of the employment and the duties relating to it.

Commerce Bank of St. Joseph v. State, 251 Kan. 207, 210, 833 P.2d 996 (1992).

The key element for the application of respondeat superior is the principal's or master's right to direct and control the activities of the agent or servant. *Gomez*, 7 Kan. App. 2d at 613.

In *Wayman v. Accor N. Am., Inc.*, 241 P.3d 640, 45 Kan. App. 2d 526 (2011), the Court held that a motel was not vicariously liable to a guest who was struck and injured in the motel parking lot by a car driven by the motel's on-call general manager, who was intoxicated. The manager was not acting within the scope of his employment because he was not performing services for which he had been employed or doing anything reasonably incidental to his employment the entire day of the accident. He was returning from a purely personal 6-hour drinking excursion.

The *Wayman* court made note of the Kansas Supreme Court's statement in *Bright v. Cargill, Inc.*, 251 Kan. 387, 407, 837 P.2d 348 (1992) that "the modern rationale for vicarious liability is the enterprise justification concept . . . Under such a justification, the losses caused by an employee's tort are placed on the enterprise as a cost of doing business and on the employer for having engaged in the enterprise." But it concluded that imposing vicarious liability on an employer for the negligent acts of an employee merely because the employee is on call does not serve this justification. Likewise, imposing blanket liability on an employer for any injury on business property caused by an employee who is required to live on the property as a condition of employment does not serve the enterprise justification concept for vicarious liability, unless the employee is performing services for which the employee has been employed or is doing anything reasonably incidental to the employment at the time of the injury. *Wayman*, 45 Kan. App. 2d at 538-39.

B. Tortious Interference with Business/Contractual Relations

Kansas law recognizes claims for both tortious interference with a contractual relationship and tortious interference with a business advantage. The elements of tortious interference with a contract are: (1) the contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. *Cohen v. Battaglia*, 296 Kan. 542, 293 P.3d 752 (2013) (citing *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 423, 77 P.3d 130 (2003)).

Similarly, the elements of tortious interference with a prospective business advantage or relationship are: (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) a reasonable certainty that, except for the conduct of the defendant, plaintiff would have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) incurrence of damages by plaintiff as a direct or proximate result of defendant's misconduct. *Burcham*, 276 Kan. at 424 77 P.3d at 151.

In *Cohen*, the Court held that there were triable issues of fact surrounding whether defendant Battaglia's earlier filing of a lawsuit against plaintiff, and then sending the legal papers to a company that did business with Cohen, constituted tortious interference. Thus, the lower courts' dismissal of the case for failure to state a claim was reversed, and the case was remanded to the trial court.

Not all interference in present or future contract relationships is tortious because a "person may be privileged or justified to interfere with contractual relations in certain situations." *Cohen*, 296 Kan. at 548. To determine whether a party is justified in interfering, Kansas courts look at various factors including the (1) nature of the interferer's conduct; (2) the character of the expectancy with which the conduct interfered; (3) the relationship between the various parties; (4) the interest sought to be advanced by the interferer; and (5) the social desirability of protecting the expectancy or the interferer's freedom of action. *Id.*

In *Turner v. Halliburton Co.*, 722 P.2d 1106, 240 Kan. 1 (1986), the Supreme Court held that where an employee alleged that his former employer tortiously interfered first by communicating his alleged dishonest acts within the company (in the course of an investigation leading to his discharge), then in a later communication to a prospective employer (who was reference-checking), both types of communications fell within the "qualified privilege" for business or employment communications. Thus, to succeed on his claim, the plaintiff had to prove that the employer acted with actual malice, which plaintiff failed to do. *Id.*

An employer is privileged, under Kansas law, to interfere with an employee's concurrent secondary employment by refusing to allow the employee to use the equipment or facilities of the employer in connection with the secondary employment. *Henry v. Unified Sch. Dist. No. 503*, 328 F. Supp. 2d 1130, 1160 (D. Kan. 2004). In *Henry*, a high school teacher had secondary employment teaching courses for the local community college. *Id.* The high school refused to allow the teacher to use the school's facilities for the college classes. The teacher alleged that

this refusal was part of a pattern of harassment and constituted tortious interference with the teacher's contractual relationship with the community college. The federal district court, relying on *Turner* and RESTATEMENT (SECOND) OF TORTS §767, found that the high school, which had a policy that secondary employment could not interfere with the primary employment, did nothing improper in denying the teacher the use of the facilities for his secondary employment. *Henry*, 328 F. Supp. 2d at 1159-60.

In *Wolfe Electric, Inc. v. Duckworth*, 266 P.3d 516, 533, 293 Kan. 375 (2011), the Supreme Court cautioned that a claim seeking recovery for loss of trade secrets, brought under the rubric of "tortious interference", is preempted by the Kansas Uniform Trade Secrets Act, as a matter of law.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

In *Idbeis v. Wichita Surgical Specialists P.A.*, 112 P.3d 81, 279 Kan. 755 (2005), the Supreme Court of Kansas, reaffirming its earlier holding in *Weber v. Tillman*, 913 P.2d 84, 259 Kan. 457 (1996), set forth the following rules on enforcement of covenants not to compete:

1. A noncompetition covenant ancillary to an employment contract is valid and enforceable if the restraint is reasonable under the circumstances and not adverse to the public welfare.
2. The rationale for enforcing a noncompetition covenant is based on the freedom of contract.
3. Only a legitimate business interest may be protected by a noncompetition covenant, and if the sole purpose of the covenant is to avoid ordinary competition, it is unreasonable and unenforceable.
4. Noncompetition covenants included in employment contracts are strictly construed against the employer.

The Court in *Idbeis* also identified the following four factors that are to be considered in analyzing whether a noncompetition clause is reasonable:

1. Does the covenant protect a legitimate business interest of the employer?
2. Does the covenant create an undue burden on the employee?
3. Is the covenant injurious to the public welfare?
4. Are the time and territorial limitations contained in the covenant reasonable based on the particular facts and circumstances of each case?

Protection of trade secrets and customer contacts, and maintaining continuity of client relationships have long been viewed by the courts as interests that may properly be protected in noncompete agreements. Other protectable interests include special training of employees, referral sources, goodwill, and reputation. *Weber*, 913 P.2d at 91, 259 Kan. at 467.

In *Wolfe Electric*, 293 Kan. at 389, the Supreme Court held that the “simple act” of defendant forming a company to compete with his former employer did not violate a restrictive covenant which provided that the employee “shall not solicit, seek or obtain from any active or inactive customers of Employer, any business or trade on his own behalf or on the behalf of any further employer, which said business or trade activity would be competitive of Employer for a period of one (1) year commencing from the date of Employee’s termination.”

B. Blue Penciling

In Kansas, it is well recognized that a restrictive covenant in an employment contract will only be applied to the extent it is reasonably necessary under the facts and circumstances of a particular case. *Puritan-Bennet Corp. v. Richter*, 679 P.2d 206, 235 Kan. 251, 254 (1984); *Graham v. Cirocco*, 69 P.3d 194, 31 Kan.App.2d 563 (2003).

In *Foltz v. Struxness*, 215 P.2d 133, 168 Kan. 714 (1950), defendant Struxness was a young doctor. He contacted Foltz, a physician and surgeon with a well-established practice in the city of Hutchinson, about working with him. Foltz and Struxness entered a contract containing a covenant not to compete which restrained Struxness, upon termination of employment, from practicing within a 100-mile radius of Hutchinson.

Struxness then left Foltz and began his own practice in Hutchinson. Foltz brought an action to enjoin Struxness’ practice. The trial court believed Foltz could be reasonably protected in his practice by reducing the restricted territory from 100 miles. The court limited the non-competition restriction to within five miles from Hutchinson. The Supreme Court of Kansas affirmed. *Foltz*, 215 P.2d at 137, 168 Kan. at 718-19.

In *Graham*, the court upheld a 2-year, 150-mile non-solicitation provision that prevented a colorectal surgeon from soliciting business from the patients or referral sources of his former employer, but struck down a restriction against the surgeon opening an office or practicing at a hospital within 25 miles of his former workplace. The court emphasized the adverse affect on public welfare of this latter restriction, in that it would leave a large area of northeast Kansas with only one physician specializing in colorectal surgery. 69 P.3d at 200, 31 Kan.App.2d at 572.

C. Confidentiality Agreements

Kansas law recognizes the validity of confidentiality agreements. *Sturgis Newport Group v. Gladson*, No. 87-2610, 1988 U.S. Dist. LEXIS 909 *12 (D. Kan. Jan. 5, 1988)(citing *Morrison v. Woodbury*, 105 Kan. 617, 185 P.735 (1919)). An employee “confidentiality and non-disclosure agreement,” signed at the time of hire, is neither lacking in consideration nor is it an adhesion contract, and may be enforced to protect the company’s proprietary information. *Prof’l Software Consultants, Inc. v. Hill*, 1994 WL 481659 (D. Kan. Aug. 30, 1994).

D. Trade Secrets Statute

“Trade secret”, K.S.A. § 60–3320(4), means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent

economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

“Misappropriation”, K.S.A. § 60–3320(2), means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.”

Trade secrets are protected under the Kansas Uniform Trade Secrets Act (KUTSA), K.S.A. § 60-3320 *et seq.* KUTSA does not require a particular means of protecting a secret; rather, it requires only that the secret is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *Progressive Products, Inc. v. Swartz*, 258 P.3d 969, 978, 292 Kan. 947, 957 (2011). The purpose and operation of KUTSA are discussed at length by the Supreme Court of Kansas in *Progressive Products, Inc. v. Swartz*.

KUTSA only prohibits misappropriation of “trade secrets”. Remedies concerning nontrade secrets, e.g., mere confidential information, cannot be obtained through a KUTSA cause of action. *Wolfe Electric*, 293 Kan. at 384. Tort claims seeking recovery for loss of trade secrets, under the rubric of “breach of fiduciary duty” or “tortious interference”, are preempted by KUTSA as a matter of law. *Id.* at 399-400.

Under KUTSA, misappropriation of trade secrets can serve as the basis for recovery of compensatory and exemplary damages, including lost profits (K.S.A. § 60-3322), injunctive relief (K.S.A. 60-3321), and attorney fees (K.S.A. § 60-3323). In addition to the more traditional “prohibitive” injunction, the statute also permits entry of a “royalty injunction” (directing payment to Plaintiff of royalties on future sales), upon a showing of “exceptional circumstances”. *Progressive Products*, 292 Kan. at 559.

E. Fiduciary Duty and their Considerations

There are no reported cases on fiduciary duty in the context of restrictive covenants and non-compete agreements.

XII. DRUG TESTING LAWS

A. Public Employers

The State Drug Screening Program, K.S.A. § 75-4362, provides that drug testing can be implemented for persons taking office as Governor, Lieutenant Governor, Attorney General and for applicants for safety sensitive positions in state government. Applicants are not required to submit to tests prior to an offer of employment. No termination shall be based solely on the results of the test administered if: (1) the individual has no prior positive test results and (2) the employee completes the recommended drug education or treatment program. *Id.* at (d).

B. Private Employers

In past years, the Kansas courts have grappled with the Workers' Compensation Act's provision that the results of drug testing are inadmissible unless there is, among other things, "probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working" and "the test sample was collected at a time contemporaneous with the events establishing the probable cause." *See, e.g., Foos v. Terminix*, 89 P.3d 546, 277 Kan. 687 (2004); *Kent v. Summit Drilling*, 88 P.3d 1257 (Kan. App. 2004) (unpublished).

In 2014, the Kansas legislature enacted amendments to the Workers' Compensation Act that clarify when results of a chemical test shall be admissible evidence to prove impairment. The new law states that chemical evidence of intoxication is admissible if done under any of the following circumstances:

- (A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;
- (B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;
- (C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;
- (D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

See K.S.A. § 44-501(e). The new law also clarifies that a positive post-accident drug test performed in accordance with federal and state laws constitutes conclusive evidence of impairment. *Id.* at (a)(2)(C). See also *Wiehe v. Kissick Constr. Co.*, 43 Kan. App. 2d 732, 232 P.3d 866 (2010) (where injured employee's drug test revealed a level of marijuana that demonstrated a conclusive presumption of impairment under K.S.A. § 44-501(d)(2), the employer met its burden to prove the impairment exception applied to relieve the employer of liability for workers compensation benefits).

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

The Kansas Act Against Discrimination prohibits discrimination based on a broad range of factors and covers most employers in the state. K.S.A. § 44-1001, *et seq.* Because of the limited damages available to employees under this statute (*see* section D, below), it is virtually unheard of for an employee to sue solely under the KAAD; rather, plaintiffs always sue under the federal counterpart statute, and may add the Kansas statute as an additional count to their complaint.

A. Employers/Employees Covered

An employer is defined as any person employing four or more persons and any person acting directly or indirectly for an employer, labor organization, non-sectarian corporation, organization engaged in social services work, and the state of Kansas and political or municipal subdivisions thereof, but shall not include a nonprofit fraternal or social organization or corporation. K.S.A. § 44-1002(b).

B. Types of Conduct Prohibited

It is unlawful for an employer, because of race, religion, color, sex, disability, national origin or ancestry to refuse to hire or employ such person, to bar or discharge such person from employment, or to otherwise discriminate against such person in compensation or in terms, conditions or privileges of employment; to limit, segregate, separate, classify or make any distinction in regards to employees; or to follow any employment procedure or practice which, in fact, results in discrimination, segregation or separation without a valid business necessity. K.S.A. § 44-1009(a)(1).

It shall not be an unlawful employment practice to fill vacancies in such a way as to eliminate or reduce imbalance with respect to race, religion, color, sex, discrimination, national origin or ancestry. K.S.A. § 44-1009(b).

C. Administrative Requirements

Any person claiming to be aggrieved by an alleged unlawful or discriminatory employment practice may, make, sign, and file with the Kansas Commission on Civil Rights a verified complaint in writing, stating the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of and setting forth the particulars thereof and contain such other information as may be required by the Commission. K.S.A. § 44-1005.

D. Remedies Available

Employers must cease and desist from unlawful employment practices and take such affirmative action including, but not limited to, the hiring, reinstatement or upgrading of the employee, with or without back pay, admission or restoration in any organization or equal enjoyment of the goods, services, facilities and accommodations offered. K.S.A. § 44-1005(k). Awards for damages for pain and suffering and humiliation which are incidental to the act of discrimination may also be included. No award for pain and suffering may exceed \$2,000. *Id.* See also *Labra v. Mid-Plains Constr., Inc.*, 90 P.3d 954, 956, 32 Kan. App. 2d 821, 822-23 (2004) (holding that the damage limitations of § 44-1005(k) applicable to administrative proceedings are also applicable to independent civil actions).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Under K.S.A. § 43-173, no employee may be discharged by reason of the employee's jury service.

B. Voting

Under K.S.A. § 25-418, no employee may be discharged for taking time off to vote.

C. Family/Medical Leave

There is no state family/medical leave act law for private employers in Kansas.

D. Pregnancy/Maternity/Paternity Leave

As authorized by K.S.A. § 44-1004(3), K.A.R. § 21-32-6 provides that childbearing must be considered by an employer to be a justification for a leave of absence for female employees for a reasonable period of time. Following childbearing, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay without loss of service, credits, seniority, or other benefits. See K.A.R. § 21-32-6.

There are no separate state leave statutes for private employers in Kansas.

E. Day of Rest Statutes

There is no day of rest statute in Kansas.

F. Military Leave

Under K.S.A. § 48-222, no employee may be discharged for reporting for National Guard duty.

G. Sick Leave

Sick leave is not included in the computation of average weekly wages. The only way that sick leave can be included in an employee's average weekly wage is if it constitutes "additional compensation." Under K.S.A. § 44-511(a)(2), additional compensation includes only the items listed in the statute, and sick leave is not listed and does not constitute remuneration for services in any medium other than cash. *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

H. Domestic Violence Leave

Under K.S.A. § 44-1132(a), an employer may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to:

- (1) Obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order or other injunctive relief to help ensure the health, safety or welfare of the victim or the victim's child or children;
- (2) seek medical attention for injuries caused by domestic violence or sexual assault;
- (3) obtain services from a domestic violence shelter, domestic violence program or rape crisis center as a result of domestic violence or sexual assault; or
- (4) make court appearances in the aftermath of domestic violence or sexual assault.

An employee should give the employer reasonable advance notice of the employee's intention to take time off, unless such advance notice is not feasible. *See* K.S.A. § 44-1132(b).

I. Other Leave Laws

Under K.S.A. § 75-5548, an employee of a state agency who is a certified disaster service volunteer of the American Red Cross may be granted leave from work to participate in specialized relief services.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

The current minimum wage in Kansas is \$7.25, the same as the current Federal Minimum Wage rate. K.S.A. § 44-1203. The State law excludes from coverage any employment that is subject to the Federal Fair Labor Standards Act. K.S.A. § 44-1202(d).

B. Deductions from Pay

Kansas limits the circumstances under which employers may take deductions from employees' wages, and regulates when and the manner in which wages are paid, touching on various wage payment issues that are not covered by the Fair Labor Standards Act. *See* K.S.A. §§ 44-312 to 44-327.

C. Overtime Rules

For employees not covered by the FLSA, time-and-a-half premium pay must be paid after 46 hours of work in a work week. K.S.A. § 44-1204.

D. Time for Payment Upon Termination

Wages must be paid no later than the next regular payday, Failure to do so can result in penalties of 1% per day late, up to a maximum of 100% of the unpaid amount. K.S.A. § 44-315.

E. Breaks and Meal Periods

There are no statutes governing breaks or meal periods in Kansas.

F. Employee Scheduling Laws

Although they are on the rise, Kansas has not enacted predictive scheduling laws.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

The Kansas Indoor Clean Air Act, K.S.A. §§ 21-6109 through 21-6116, bans smoking statewide in all enclosed, indoor workplaces in Kansas. The law exempts only (1) outdoor areas of any building or facility beyond the access points of such building or facility; (2) private homes or residences, unless used as a day care home; (3) designated hotel and motel smoking rooms; (4) casino and racetrack gaming floors; (5) designated smoking areas in nursing homes and healthcare facilities; (6) tobacco shops; (7) private clubs that were in existence on January 1, 2009; and (8) charity cigar dinners. *See* K.S.A. § 21-6110. Kansas law does not preempt the passage of more stringent local smoke-free laws, and Kansas local smoke-free workplace laws have been enacted in Topeka, Salina, Lawrence, Prairie Village, Olathe, Overland Park, and Manhattan. *See* K.S.A. § 21-6114.

B. Health Benefit Mandates for Employers

There are no state laws mandating the offer of health care benefits by employers.

C. Immigration Laws

There are no state laws regarding immigration in the employment context. The federal Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. § 1324a(a)(1)(A), (a)(2). IRCA also requires every employer to verify the employment authorization status of prospective employees. A recent Supreme Court case made it clear that the IRCA provides a comprehensive framework for combating the employment of illegal aliens. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012). However, employers must follow the federal employment eligibility rules including the completion of a Form I-9 for every new hire.

D. Right to Work Laws

Kansas is a right to work state. Kan. Const. art. 15, § 12, titled “Membership or nonmembership in labor organizations”, states that “[n]o person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization.”

Furthermore, “[a]ny person who is aggrieved by any violation of the provisions of section 12 of article 15 of the constitution of the state of Kansas shall have a cause of action against the person committing such violation for the actual damages sustained by the aggrieved person.” K.S.A. § 44-831. The prevailing party may recover reasonable attorneys’ fees in some instances. *Id.*

E. Lawful Off-duty conduct (including lawful marijuana use)

There are no state laws regulating or prohibiting lawful off-duty conduct. Furthermore, marijuana use is illegal in Kansas.

F. Gender/Transgender Expression

The Kansas Act Against Discrimination does not prohibit discrimination based on sexual orientation or gender identity for private or public sector employees. K.S.A. § 44-1001, *et seq.*

Executive Order No. 07-24, signed August 21, 2007, prohibited the discrimination against state employees based on sexual orientation or gender identity. However, recently, Kansas Governor Sam Brownback rescinded Executive Order 07-24 by issuing Executive Order No. 15-01. Thus, Kansas state law provides no protection against discrimination based on sexual orientation or gender identity in the public and private employment contexts.

However, certain municipalities ban discrimination based on sexual orientation. *See, e.g.*, Lawrence Kan. Code § 10-109.1 (2013); Wyandotte County, KS., Code of Ordinances Ch. 18, Art. III, § 18-138 (2018); Manhattan, KS., Code of Ordinances Ch. 10, Art. III, § 10.17 (2019); Roeland Park, KS., Code of Ordinances Ch. 5, Art. 12, § 5-1202 (2018).

G. Other Key State Statutes

There are no other key Kansas statutes in the employment context.