Approved: February 4, 2010
Date

MINUTES OF THE HOUSE GOVERNMENT EFFICIENCY AND FISCAL OVERSIGHT COMMITTEE

The meeting was called to order by Chairman Jim Morrison at 3:40 p.m. on February 2, 2010, in Room 546-S of the Capitol.

All members were present except:
Representative Judy Loganbill- excused
Representative Melvin Neufeld- excused
Representative Tom Sloan- excused

Committee staff present:
Renae Jefferies, Office of the Revisor of Statutes
Gordon Self, Office of the Revisor of Statutes
Julian Efird, Kansas Legislative Research Department
Artur Bagyants, Intern, Kansas Legislative Research Department
Gary Deeter, Committee Assistant

Conferees appearing before the Committee:
Jane Carter, Executive Director, Kansas Organization of State Employees
Tom Krebs, Kansas Association of School Boards
Gavin Young, Legislative Liaison, Kansas Department of Administration

Others attending:
See attached list.

Staff Julian Efird introduced a new legislative intern, Artur Bagyants, from the University of Kansas.

The Minutes for the January 27 meeting were approved. (Motion, Representative Burgess; second, Representative McCray Miller)

Staff Renae Jefferies briefed the Committee on **HB 2249** - amendments to the Kansas Whistleblower Act (Attachment 1). She said the bill gives greater protections to state employees who report instances of fraud, abuse, or malfeasance. She noted several changes created by the bill, including amendments by the Committee during the 2009 session:

- Adding a definition of the word *threat;*
- Establishing certain restrictions on supervisors; and
- Distinguishing permitted actions by classified and unclassified employees.

In distinguishing classified and unclassified employees, Gavin Young, Legislative Liaison from the Kansas Department of Administration, explained that a classified employee is an hourly employee; an unclassified employee is a salaried employee.

Ms. Jefferies commented on a recent court case from the Kansas Appeals Court, *Shaw vs. Southwest Kansas Groundwater District,* which reversed a decision by a lower court against a hitherto exemplary employee, who was fired by his supervisor after he reported a violation by the president of the groundwater board (Attachment 2). Ms. Jefferies noted that, had the proposed bill been in effect, no action would have been available to Mr. Shaw.

Answering a question, Ms. Jefferies said that a school teacher was not statutorily considered to be a state employee.

Ms. Jefferies referenced Attachment 3, a technical amendment needed when the Committee works the proposed bill.

The Chair opened the hearing on HB 2249.

Jane Carter, Executive Director, Kansas Organization of State Employees, spoke as a proponent of the bill (Attachment 4). She said only 17 states offer full protection for a whistle-blower and that this bill, if passed, would move Kansas closer to the ideal to protect employees who report fraud or abuse and who suggest changes to promote efficiencies. She noted that **SB 294** in the Senate includes incentives to reward those who suggest ways to correct inefficiencies.

Tom Krebs, Kansas Association of School Boards, expressed neutrality regarding the bill (Attachment 5). He said that, since the word *threat* has been clearly defined, his association has no problem with the bill, since it now gives a supervisor freedom to evaluate an employee. He noted that the focus of the bill is state employees; public school employees are not under the purview of the bill.

Gavin Young, Legislative Liaison, Kansas Department of Administration (DofA), distributed copies of **SB 294** - amendments to the Kansas Whistle-blowers Act, employees' suggestion program. He said the DofA prefers the Senate bill, which better accomplishes the intent of the House bill, not only providing protection for state employees and guidance for supervisors, but also creating an incentive program to encourage employees to suggest additional efficiencies in agency operations.

Answering questions, Mr. Young said the Senate bill clearly defines a disciplinary action rather than defining a threat, making the bill more consistent with extant statutes. He replied that all state employees are covered in the Senate bill and that state employees are defined in the Kansas Civil Service Act.

The Chair invited comments from the audience. Susan Simmons, recently retired from Kansas Social and Rehabilitation Services, said that fear of reporting violations and abuse is widespread in various agencies.

The Chair closed the hearing on **HB 2249.**

Representative McCray Miller introduced her intern, Keith Tatum, from the University of Kansas.

Minutes of the House Government Efficiency and Fiscal Oversight Committee at 3:30 p.m. on February 2, 2010, in Room 546-S of the Capitol.

The Chair suggested meeting with the principals of the bill to work out differences.

The meeting was adjourned at 4:40 p.m. The next meeting is scheduled for Wednesday, February 3, 2010.

HOUSE
GOVERNMENT EFFICIENCY AND FISCAL OVERSIGHT COMMITTEE

GUEST LIST

DATE: FEBRUARY 2 2010

NAME	REPRESENTING
Tom KREBS	KASB
Jane Carter	KOSE
Dawn Fiedler	KOSE
Susan Simmons	KOSE
RJ Wilson	KOSE
Jackson Lindsey	Hein Law
Nancy Zoglman	Polsinelli
Kathy Catlan	KSNA
[illegible]	Rep. McCray-Miller's intern
Gavin Voum	Dept. of Admin.
Tracy Diel	OAH
[illegible]	Benchmark Communications

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MEMORANDUM

To: House Committee on Government Efficiency and Fiscal Oversight

From: Renae Jefferies, Assistant Revisor

Date: February 2, 2010

Subject: HB 2249 as amended by House Committee.

HB 2249 as amended by House Committee, amends the Kansas Whistleblower Act to give greater protections to those employees who blow the whistle on their agency and other statutes that require amendments because of the changes to the Kansas Whistleblower Act.

On pages 4, 5, and 6, the Kansas Whistleblower act is amended in section 4 of the bill. These changes were made after consideration of the Connecticut statute as directed by the committee.

On page 4, lines 4 through 8 the definition of "Threat" was added to the bill by this committee. Subsection © was amended to broaden the persons an employee may talk to regarding agency matters or public concerns from a member of the legislature or any auditing agency to include the attorney general, an employee of the state agency where such employee is employed, and an employee of a state agency pursuant to a mandated reporter statute. This committee removed from the lists a person can talk to "an employee of the state agency where such employee is employed" In subsections (e) and (h) the committee also struck "an employee of a state agency pursuant to a mandated report statute. The committee needs to adopt an amendment when it works this bill to strike the same language in subsection © to make the subsections consistent.

Subsection (e) on that page in paragraph (1) prohibits any supervisor or appointing authority of any state agency from taking or threatening to take any disciplinary action against an employee who disclosed information to one of the permitted persons as in subsection ©. Paragraph (2) of subsection (e) allows an employee who alleges a disciplinary action has been taken against the employee or threatened to be taken against the employee for disclosure of

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information to appeal such violation to the state civil service board, if the person is a classified employee under the Kansas civil service act, or, if in the person is in the unclassified service under the state civil service, to a district court pursuant to the act for judicial review and civil enforcement of agency actions.

On page 5 of the bill, subsection (g), which deals with appeals by classified employees under the state civil service act, was amended by striking the words "and has permanent status" to allow any classified employee under the state civil service act to seek redress of any violation of the employee's rights as by a disciplinary action taken or threatened to be taken for disclosing information to a permitted person under the Kansas Whistleblower act. If the employee wins the appeal the state civil service board may grant such relief as the board considers appropriate, "including but not limited to, reinstatement to the employee's former position, back pay and reestablishment of any employee benefits for which the employee would have been eligible if such violation had not occurred." The board may also award reasonable attorney fees and witness fees to the prevailing party. If the board's decision is appealed to the district court, the court may award the same relief as the board could to the prevailing party.

The original subsection (h), on pages 5 to 6, created a rebuttable resumption that the disciplinary action taken or threatened against the employee was in retaliation for the disclosure of information by the employee if the disciplinary action taken or threatened to be taken occurs within one year after the employee disclosed information allowed under the act. That language was stricken by this committee.

Subsection (I), now subsection (h), on page 6, provides that an employee who in good faith "discusses the operations fo the state agency or other matters of public concern, including matters relating to public health, safety and welfare" to any of the persons permitted under the act, in accordance with the provisions of the act, shall not be liable for any civil damages resulting from such good faith disclosure. This was an amendment made by the committee.

Subsection (k), now subsection (j), on page 6, allows an unclassified employee under the Kansas civil service act who alleges that a disciplinary action has been taken or threatened to be taken against such an employee for discussing "the operations of the state agency or other matters of public concern, including matters relating to public health, safety and welfare" in accordance with this act, may appeal to a court for redress. Should the employee prevail, the employee may receive the same relief as a prevailing classified employee in subsection (g) may receive. A prevailing party may be awarded all or a portion of the costs of the action, including reasonable attorney fees and witness fees as the court sees fit to grant.

Sections 1, 2, 3 and 5 of the bill amends statutes that refer to the remedies available under

the Kansas Whistleblower Act. The amendments in those acts merely added the words "or threatened to be taken" after the language "against whom disciplinary action has been taken" to make those references to the Kansas Whistleblower Act consistent with the provisions of such act.

The act would become effective upon publication in the statute book.

The fiscal note on this bill indicates there would be a negligible fiscal effect on the Governmental Ethics Commission.

No. 101,416

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LELAND KENT SHAW,
Appellant,

v.

SOUTHWEST KANSAS GROUNDWATER
MANAGEMENT DISTRICT THREE,
Appellee.

SYLLABUS BY THE COURT

1.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

2.

Kansas follows the common-law employment-at-will doctrine, which allows an employer to terminate an employee for good cause, no cause, or even for wrongful cause. To prevail on a retaliatory discharge claim, an employee must demonstrate that he or she

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falls within one of the exceptions to the employment-at-will doctrine. One of those exceptions is termination for whistleblowing.

3.

Under Kansas law, the termination of an employee in retaliation for the good-faith reporting of a serious infraction of rules, regulations, or the law pertaining to public health and safety and the general welfare by a coworker or an employer to either company management or law enforcement officials is an actionable tort.

4.

A burden-shifting analysis is applied to whistleblowing retaliatory discharge claims. The employee must first make a prima facie case of retaliatory discharge based on his or her report of wrongdoing by providing clear and convincing evidence that (1) a reasonably prudent person would have concluded that the employer or a coworker was engaged in activities that violated rules, regulations, or the law pertaining to public health and safety and the general welfare; (2) the employer had knowledge that the employee reported the violation prior to his or her discharge; and (3) the employee was discharged in retaliation for making the report. In addition, the employee must prove that any whistleblowing was done in good faith based on concern regarding the wrongful activity reported rather than for a corrupt motive like malice, spite, jealousy, or personal gain. If the employee establishes a prima facie case, the burden shifts to the employer to present

evidence that the employee was terminated for a legitimate reason, at which point the burden shifts back to the employee to provide evidence that the reason given by the employer was pretextual.

5.

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.

Appeal from Finney District Court; PHILIP C. VIEUX, judge. Opinion filed November 20, 2009. Reversed and remanded.

Alan L. Rupe, *Stacia G. Boden,* and *Jason D. Stitt*, of Kutak Rock, LLP, of Wichita, for appellant.

Brian C. Wright, of Law Office of Brian C. Wright, of Great Bend, for appellee.

Before MALONE, P.J., GREEN and MARQUARDT, JJ.

MALONE, J.: Leland Kent Shaw appeals the district court's order granting summary judgment to Southwest Kansas Groundwater Management District Three (GMD) on Shaw's retaliatory discharge claim. For the reasons stated herein, we reverse the district court's order granting summary judgment and remand for further proceedings.

GMD is an organization created pursuant to K.S.A. 82a-1020 *et seq.* to ensure the proper management and conservation of Kansas' groundwater resources. Water users within GMD's district are not to allow "waste of water." K.A.R. 5-23-2. One of the definitions of "waste of water" is "the escaping and draining of water intended for irrigation use from the authorized place of use." K.A.R. 5-1-1(gggg)(3). Pursuant to K.A.R. 5-23-11, if a representative of a district finds that a water use violation exists, "the representative shall issue a written directive to the violator stating the nature of the violation and directing the violator to come into compliance with these rules and regulations."

GMD is governed by a board of directors (Board). See K.S.A. 82a-1027. The Board employs an executive director to manage the day-to-day operations of the district. From 1994 to 2001, Steve Frost served as GMD's executive director. In June 2001, Steven C. "Hank" Hansen became GMD's executive director and was given a 3-year employment contract. On March 3, 2004, Hansen wrote a letter to the president of the

Board, Brant Peterson, asking for a pay raise and an extension of his employment contract for another 3 years.

Shaw was hired by GMD in 1990 and worked as a conservationist. One of Shaw's duties as a conservationist was to perform field investigations regarding alleged waste of water violations. From 1994 to 2001, Frost supervised Shaw. Without exception, Frost evaluated Shaw's performance as "exceptional" and routinely recommended Shaw for salary and position advancements. When Hansen replaced Frost as GMD's executive director in 2001, Hansen continued to evaluate Shaw as an exemplary employee. Hansen performed Shaw's last performance evaluation in November 2003. Hansen commented that "Kent [Shaw] continues to exceed my expectations in job performance in a very satisfactory manner. Kent manages his projects well and keeps me informed about anticipated problems." In that same evaluation, Hansen encouraged Shaw to continue his diligent efforts in policing water violations and wrote: "It's difficult to think of anything Kent needs improvement on . . . . Please continue to be passionate about truth and justice. Your efforts continue to have a positive impact on society." Finally, Hansen reassured Shaw that he expected Shaw to "enjoy a long and productive career with the District."

On March 17, 2004, Shaw observed evidence that he believed constituted a waste of water from farmland operated by Peterson, the Board's president. Shaw observed

water runoff from the field into the adjacent roadway caused by the field's irrigation system. No effort was made to prevent the waste of water or to retain the water on the land with a berm or a dike. Shaw called his office and notified Janet King, a GMD employee, of the violation and its location. King apparently informed Hansen of Shaw's finding because when Shaw returned to the office, Hansen told Shaw that he did not want Peterson to receive a formal notice about the violation. Hansen sent an e-mail to Shaw and King in which he explained that he had contacted Peterson about the water drainage problem. Hansen stated that because Peterson was aware of the situation and was on course to remedy the problem, Hansen did not want a legal notice filed against Peterson.

In early April 2004, Shaw told Shirley Spanier, a former GMD employee, about Hansen's order prohibiting him from sending notice to Peterson. Spanier contacted several members of the Board and told them she believed it was wrong for Hansen to refuse to issue a notice to Peterson. The Board decided to investigate and asked Shaw to meet with the Board's executive committee on April 30, 2004. At the meeting, the parties discussed Peterson's alleged waste of water violation and how Shaw did not agree with Hansen's handling of the situation. According to Shaw, Peterson admitted at the meeting that a violation had occurred and that he expected to receive a notice. The executive committee also met separately with two other GMD employees and with Hansen to discuss employee complaints. During the investigation, the Board suspended Hansen's ability to hire or fire employees because the Board was concerned Hansen might fire

Shaw over his complaint. According to Board member Clay Scott, after the investigation was completed the Board directed Hansen to correct his management style.

On June 30, 2004, soon after the Board lifted Hansen's ability to hire or fire employees, Hansen fired Shaw without warning, effective immediately. Hansen gave Shaw a termination letter and an evaluation documenting four deficient job performances or misconduct by Shaw and stating that Shaw had shown a disregard for the authority of the executive director. In the Board meeting following Shaw's termination, Board member Thomas Bogner requested an explanation for Shaw's termination and he wanted the reasons for Shaw's termination to be incorporated into the minutes. However, Bogner withdrew his request at the following meeting "for the sake of trying to have the Board get along again."

On October 21, 2005, Shaw filed a petition against GMD for retaliatory discharge. The petition alleged that Shaw was terminated in retaliation for his actions that constituted protected internal whistleblowing. Specifically, the petition alleged that Hansen fired Shaw because he had complained to the Board about Hansen's order prohibiting him from sending notice to Peterson about his waste of water violation. GMD filed a motion for summary judgment and argued that Shaw's actions were not whistleblowing, or if they were, Hansen did not violate clearly defined and applicable rules, regulations, or laws.

The district court granted GMD's motion for summary judgment, ruling that Shaw's complaint did not constitute whistleblowing. The district court found that under Kansas law "a report must be made to an outside agency in order to qualify as whistle blowing." The district court further found that Shaw's complaint "was never made to an outsider who had any capacity or authority to rectify the alleged wrongdoing." Shaw timely appealed.

On appeal, Shaw argues the district court erred in granting GMD's motion for summary judgment. Shaw argues that the district court erred in denying his claim based on his failure to report the alleged wrongdoing to an outside agency. He argues that internal whistleblowing is actionable under Kansas law. GMD concedes this point but urges this court to affirm the district court's decision as right for the wrong reason.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court is required to resolve all facts and inferences that reasonably may be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude

summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009).

Kansas follows the common-law employment-at-will doctrine, which allows an employer to terminate an employee for good cause, no cause, or even for wrongful cause. To prevail on a retaliatory discharge claim, an employee must demonstrate that he or she falls within one of the exceptions to the employment-at-will doctrine. One of those exceptions is termination for whistleblowing. *Goodman v. Wesley Med. Center*, 276 Kan. 586, 589, 78 P.3d 817 (2003). Our Supreme Court first recognized the whistleblower exception in *Palmer v. Brown*, 242 Kan. 893, 900, 752 P.2d 685 (1988), in which the court determined that termination of an employee in retaliation for the good-faith reporting of a serious infraction of rules, regulations, or the law pertaining to public health and safety and the general welfare by a coworker or an employer to either company management or law enforcement officials is an actionable tort.

A burden-shifting analysis is applied to whistleblowing retaliatory discharge claims. The employee must first make a prima facie case of retaliatory discharge based on his or her report of wrongdoing by providing clear and convincing evidence that (1) a reasonably prudent person would have concluded that the employer or a coworker was

engaged in activities that violated rules, regulations, or the law pertaining to public health and safety and the general welfare; (2) the employer had knowledge that the employee reported the violation prior to his or her discharge; and (3) the employee was discharged in retaliation for making the report. In addition, the employee must prove that any whistleblowing was done in good faith based on concern regarding the wrongful activity reported rather than for a corrupt motive like malice, spite, jealousy, or personal gain. If the employee establishes a prima facie case, the burden shifts to the employer to present evidence that the employee was terminated for a legitimate reason, at which point the burden shifts back to the employee to provide evidence that the reason given by the employer was pretextual. *Goodman*, 276 Kan. at 589-90.

Here, the district court did not reach the burden-shifting analysis because it ruled that Shaw's report did not constitute whistleblowing. The district court found that under *Palmer*, a report must be made to an outside agency in order to qualify as whistleblowing. The district court further found that Shaw's complaint was never made to an outsider who had any capacity or authority to rectify the alleged wrongdoing.

The district court's conclusion that under *Palmer*, a report must be made to an outside agency in order to qualify as whistleblowing is incorrect. *Palmer* does not say that a report must be made to an outside agency. In fact, *Palmer* states that "termination of an employee in retaliation for the good faith reporting of a serious infraction . . . by a

co-worker or an employer to either *company management* or law enforcement officials (whistle-blowing) is an actionable tort." (Emphasis added.) 242 Kan. at 900.

The question of whether internal whistleblowing can support a cause of action for retaliatory discharge was also addressed in *Moyer v. Allen Freight Lines, Inc.*, 20 Kan. App. 2d 203, 885 P.2d 391 (1994). In *Moyer*, the majority of the court determined that under *Palmer*, a retaliatory discharge claim could be brought on allegations of internal whistleblowing to company management. 20 Kan. App. 2d at 208. A petition for review was granted in *Moyer*; however, the case was settled and dismissed before the Kansas Supreme Court reached a decision on the merits. 20 Kan. App. 2d at 203.

Our Supreme Court addressed the issue of internal whistleblowing in *Connelly v. State Highway Patrol*, 271 Kan. 944, 969, 26 P.3d 1246 (2001), *cert. denied* 534 U.S. 1081 (2002). In *Connelly*, the plaintiffs were highway patrol troopers who claimed they were terminated in retaliation for whistleblowing after they openly protested within their chain of command about alleged illegal activity committed by the department. The *Connelly* court analyzed decisions from other jurisdictions to determine whether a claim for internal whistleblowing should be allowed. Ultimately, the court held that

> "[w]hile 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." 271 Kan. at 974.

Thus, internal whistleblowing is recognized as an actionable tort in Kansas at least in some circumstances. GMD concedes that the district court erred in ruling that a report must be made to an outside agency in order to qualify as whistleblowing. Nevertheless, GMD urges this court to affirm the district court's decision as right for the wrong reason. GMD provides three reasons why the district court was correct in granting summary judgment in GMD's favor: (1) the whistleblower must complain to a party with the authority to rectify the problem, and here the Board did not have the authority to force Hansen to rectify Shaw's complaint; (2) the subject matter of Shaw's waste of water report did not concern a serious infraction of a clearly defined public policy; and (3) Hansen's decision to withhold the written directive against Peterson was discretionary and, therefore, not a violation of K.A.R. 5-23-11. We will examine each argument in turn.

GMD states that *Fowler v. Criticare Home Health Services, Inc.*, 27 Kan. App. 2d 869, 10 P.3d 8 (2000), *aff'd* 271 Kan. 715, 26 P.3d 69 (2001), stands for the proposition that a whistleblower complaint must be made to someone with "the authority to rectify

the problem." In *Fowler*, the plaintiff worked for the defendant as its shipping manager. When the general manager of the company asked the plaintiff to ship two handguns and live ammunition to the owner of the company, the plaintiff refused stating that he believed it was unlawful to ship the guns. The plaintiff further stated that if the company shipped the guns, he would report the alleged violation to the United Parcel Service (UPS). While the plaintiff was gone from the building making deliveries, the manager shipped the guns and ammunition through UPS. The plaintiff later reported the alleged violation to UPS without telling anyone at the company that he had done so. The next day, the plaintiff was late to work, and the manager suspended him without pay and eventually terminated his employment. The plaintiff filed suit alleging retaliatory discharge, but the district court granted summary judgment in favor of the defendant.

On appeal, the court affirmed the district court's decision granting summary judgment. The court reasoned that not "every workplace dispute over the water cooler on company practices" equates to whistleblowing. 27 Kan. App. 2d at 876. Instead, the court held that only those employees who seek to stop unlawful conduct though the intervention of a higher authority, either inside or outside the company, are protected from retaliatory discharge for whistleblowing. 27 Kan. App. 2d at 876. The court also based its decision on the fact that the defendant was not aware that the plaintiff had reported the manager's conduct to UPS when the manager terminated the plaintiff, and

the court found that the mere threat of whistleblowing was insufficient to sustain a claim of retaliatory discharge. 27 Kan. App. 2d at 875-77.

Thus, contrary to GMD's assertion, *Fowler* does not provide that a whistleblower's report must be made to a party with the authority to rectify the problem. 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. 27 Kan. App. 2d at 876. 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.

Here, GMD's argument that Shaw's report to the Board was the same as complaining to a coworker at the water cooler ignores the obvious hierarchical relationship between the Board and Hansen. It is undisputed that the Board had the power to renew Hansen's employment contract. Shaw's complaint to the Board was made at the same time Hansen was renegotiating his employment contract and seeking a pay raise from the Board. The obvious inference is that Hansen did not want Shaw to report the violation while Hansen was renegotiating his employment contract. Shaw satisfied the requirements of *Fowler* by seeking to stop Hansen's alleged unlawful conduct through the intervention of a higher authority inside the company.

Next, GMD argues that the subject matter of Shaw's waste of water report did not concern a serious infraction of a clearly defined public policy. GMD argues that Shaw exaggerated the significance of the water runoff on the farmland operated by Peterson. GMD maintains that nothing in the record indicates that the amount of the water runoff was significant or dangerous, except for Shaw's testimony that the runoff presented a safety hazard.

This argument fails for two reasons. First, GMD does not cite any evidence in the record that the water runoff did not constitute a safety hazard. Therefore, Shaw's testimony that it was a safety hazard is undisputed. In a motion for summary judgment, the district court is required to resolve all facts and inferences that reasonably may be drawn from the evidence in favor of the party against whom the ruling is sought, which in this case means that the district court must resolve the dispute in Shaw's favor or, alternatively, as a disputed matter of fact precluding summary judgment. *Miller*, 288 Kan. at 32.

Second, Kansas has a strong public interest in groundwater management and preventing groundwater waste in the form of runoff. In K.S.A. 82a-1020, the legislature declared that

"a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas."

Finally, GMD argues that K.A.R. 5-23-11, which sets forth the procedure for handling noncompliance with the groundwater rules and regulations, provided Hansen with the discretion to determine whether to file a written directive against Peterson concerning the waste of water violation. K.A.R. 5-23-11 states in relevant part:

"The district, its board or manager, any eligible voter within the district, or any person residing within the district that is at least eighteen (18) years of age, may file a written complaint with the district alleging a violation of these rules and regulations, the management program, the groundwater management district act (K.S.A. 82a-1020 *et seq.*), or the water appropriation act (K.S.A. 82a-701 *et seq.*). The written complaint shall be filed at the district office.

"Within thirty (30) days following the filing of the complaint, a representative of the district designated by the board shall investigate the

complaint. If the representative of the district finds that a violation has existed or presently exists, the representative *shall issue a written directive to the violator* stating the nature of the violation and directing the violator to come into compliance with these rules and regulations." (Emphasis added.)

While it is true that a party *may* filed a written complaint with the district alleging a water use violation, the plain language of the regulation clearly states that once the representative of the district finds a violation, the representative "shall issue a written directive to the violator." K.A.R. 5-23-11. Here, Shaw personally observed water runoff from Peterson's field into the adjacent roadway caused by the field's irrigation system. Shaw completed his investigation and reported the violation to the office. Once Hansen became aware that a violation existed, the decision whether to issue a written directive to Peterson was not discretionary. At that point, the regulation required either Hansen or Shaw to issue a written directive.

Alternatively, GMD contends that its employees had a legitimate disagreement about how to apply the rules and regulations. GMD points to the fact that Hansen sent an e-mail to Shaw and King in which he explained that he had contacted Peterson about the water drainage problem. Hansen stated that because Peterson was aware of the situation and was on course to remedy the problem, Hansen did not want a legal notice filed against Peterson about the violation.

This argument ignores the fact that once a representative of the district found that a violation existed, the representative was required to issue a written directive to the violator. Here, there appears to be no question that Shaw had found a waste of water violation on the farmland operated by Peterson. According to Shaw, Peterson admitted at the executive committee meeting that a violation had occurred and that he expected to receive a written notice. The record before the district court belies GMD's assertion that its employees had a legitimate disagreement about how to apply the rules and regulations.

In summary, the district court erred by concluding that under Kansas law, a report must be made to an outside agency in order to qualify as whistleblowing. Each of GMD's alternative arguments that the district court was right for the wrong reason in granting summary judgment is without merit. Accordingly, we reverse the district court's order granting summary judgment in GMD's favor and remand for further proceedings.

Reversed and remanded.

HB2244

Revisor's Technical Amendment. 1
February 3, 2010

2249insert

Sec. 5. K.S.A. 2009 Supp. 75-7427 is hereby amended to read as follows: 75-7427. (a) As used in this section:

(1) "Attorney general" means the attorney general, employees of the attorney general or authorized representatives of the attorney general.

(2) "Benefit" means the receipt of money, goods, items, facilities, accommodations or anything of pecuniary value.

(3) "Claim" means an electronic, electronic impulse, facsimile, magnetic, oral, telephonic or written communication that is utilized to identify any goods, service, item, facility or accommodation as reimbursable to the state medicaid program, or its fiscal agents, the state mediKan program or the state children's health insurance program or which states income or expense.

(4) "Client" means past or present beneficiaries or recipients of the state medicaid program, the state mediKan program or the state children's health insurance program.

(5) "Contractor" means any contractor, supplier, vendor or other person who, through a contract or other arrangement, has received, is to receive or is receiving public funds or in-kind contributions from the contracting agency as part of the state medicaid program, the state mediKan program or the state children's health insurance program, and shall include any sub-contractor.

(6) "Contractor files" means those records of contractors

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which relate to the state medicaid program, the state mediKan program or the state children's health insurance program.

(7) "Fiscal agent" means any corporation, firm, individual, organization, partnership, professional association or other legal entity which, through a contractual relationship with the state of Kansas receives, processes and pays claims under the state medicaid program, the state mediKan program or the state children's health insurance program.

(8) "Health care provider" means a health care provider as defined under K.S.A. 65-4921, and amendments thereto, who has applied to participate in, who currently participates in, or who has previously participated in the state medicaid program, the state mediKan program or the state children's health insurance program.

(9) "Kansas health policy authority" or "authority" means the Kansas health policy authority established under K.S.A. 2009 Supp. 75-7401, and amendments thereto, or its successor agency.

(10) "Managed care program" means a program which provides coordination, direction and provision of health services to an identified group of individuals by providers, agencies or organizations.

(11) "Medicaid program" means the Kansas program of medical assistance for which federal or state moneys, or any combination thereof, are expended, or any successor federal or state, or both, health insurance program or waiver granted thereunder.

(12) "Person" means any agency, association, corporation,

firm, limited liability company, limited liability partnership, natural person, organization, partnership or other legal entity, the agents, employees, independent contractors, and subcontractors, thereof, and the legal successors thereto.

(13) "Provider" means a person who has applied to participate in, who currently participates in, who has previously participated in, who attempts or has attempted to participate in the state medicaid program, the state mediKan program or the state children's health insurance program, by providing or claiming to have provided goods, services, items, facilities or accommodations.

(14) "Recipient" means an individual, either real or fictitious, in whose behalf any person claimed or received any payment or payments from the state medicaid program, or its fiscal agent, the state mediKan program or the state children's health insurance program, whether or not any such individual was eligible for benefits under the state medicaid program, the state mediKan program or the state children's health insurance program.

(15) "Records" means all written documents and electronic or magnetic data, including, but not limited to, medical records, X-rays, professional, financial or business records relating to the treatment or care of any recipient; goods, services, items, facilities or accommodations provided to any such recipient; rates paid for such goods, services, items, facilities or accommodations; and goods, services, items, facilities or accommodations provided to nonmedicaid recipients to verify rates

or amounts of goods, services, items, facilities or accommodations provided to medicaid recipients, as well as any records that the state medicaid program, or its fiscal agents, the state mediKan program or the state children's health insurance program require providers to maintain. "Records" shall not include any report or record in any format which is made pursuant to K.S.A. 65-4922, 65-4923 or 65-4924, and amendments thereto, and which is privileged pursuant to K.S.A. 65-4915 or 65-4925, and amendments thereto.

(16) "State children's health insurance program" means the state children's health insurance program as provided in K.S.A. 38-2001 et seq., and amendments thereto.

(b) (1) There is hereby established within the Kansas health policy authority the office of inspector general. All budgeting, purchasing and related management functions of the office of inspector general shall be administered under the direction and supervision of the executive director of the Kansas health policy authority. The purpose of the office of inspector general is to establish a full-time program of audit, investigation and performance review to provide increased accountability, integrity and oversight of the state medicaid program, the state mediKan program and the state children's health insurance program within the jurisdiction of the Kansas health policy authority and to assist in improving agency and program operations and in deterring and identifying fraud, waste, abuse and illegal acts. The office of inspector general shall be independent and free

from political influence and in performing the duties of the office under this section shall conduct investigations, audits, evaluations, inspections and other reviews in accordance with professional standards that relate to the fields of investigation and auditing in government.

(2) (A) The inspector general shall be appointed by the Kansas health policy authority with the advice and consent of the senate and subject to confirmation by the senate as provided in K.S.A. 75-4315b, and amendments thereto. Except as provided in K.S.A. 46-2601, and amendments thereto, no person appointed to the position of inspector general shall exercise any power, duty or function of the inspector general until confirmed by the senate. The inspector general shall be selected without regard to political affiliation and on the basis of integrity and capacity for effectively carrying out the duties of the office of inspector general. The inspector general shall possess demonstrated knowledge, skills, abilities and experience in conducting audits or investigations and shall be familiar with the programs subject to oversight by the office of inspector general.

(B) No former or current executive or manager of any program or agency subject to oversight by the office of inspector general may be appointed inspector general within two years of that individual's period of service with such program or agency. The inspector general shall hold at time of appointment, or shall obtain within one year after appointment, certification as a

certified inspector general from a national organization that provides training to inspectors general.

(C) The term of the person first appointed to the position of inspector general shall expire on January 15, 2009. Thereafter, a person appointed to the position of inspector general shall serve for a term which shall expire on January 15 of each year in which the whole senate is sworn in for a new term.

(D) The inspector general shall be in the classified service and shall receive such compensation as is determined by law, except that such compensation may be increased but not diminished during the term of office of the inspector general. The inspector general may be removed from office prior to the expiration of the inspector general's term of office in accordance with the Kansas civil service act. The inspector general shall exercise independent judgment in carrying out the duties of the office of inspector general under subsection (b). Appropriations for the office of inspector general shall be made to the Kansas health policy authority by separate line item appropriations for the office of inspector general. The inspector general shall report to the Kansas health policy authority.

(E) The inspector general shall have general managerial control over the office of the inspector general and shall establish the organization structure of the office as the inspector general deems appropriate to carry out the responsibilities and functions of the office.

(3) Within the limits of appropriations therefor, the inspector general may hire such employees in the unclassified service as are necessary to administer the office of the inspector general. Such employees shall serve at the pleasure of the inspector general. Subject to appropriations, the inspector general may obtain the services of certified public accountants, qualified management consultants, professional auditors, or other professionals necessary to independently perform the functions of the office.

(c) (1) In accordance with the provisions of this section, the duties of the office of inspector general shall be to oversee, audit, investigate and make performance reviews of the state medicaid program, the state mediKan program and the state children's health insurance program, which programs are within the jurisdiction of the Kansas health policy authority.

(2) In order to carry out the duties of the office, the inspector general shall conduct independent and ongoing evaluation of the Kansas health policy authority and of such programs administered by the Kansas health policy authority, which oversight includes, but is not limited to, the following:

(A) Investigation of fraud, waste, abuse and illegal acts by the Kansas health policy authority and its agents, employees, vendors, contractors, consumers, clients and health care providers or other providers.

(B) Audits of the Kansas health policy authority, its employees, contractors, vendors and health care providers related

to ensuring that appropriate payments are made for services rendered and to the recovery of overpayments.

(C) Investigations of fraud, waste, abuse or illegal acts committed by clients of the Kansas health policy authority or by consumers of services administered by the Kansas health policy authority.

(D) Monitoring adherence to the terms of the contract between the Kansas health policy authority and an organization with which the authority has entered into a contract to make claims payments.

(3) Upon finding credible evidence of fraud, waste, abuse or illegal acts, the inspector general shall report its findings to the Kansas health policy authority and refer the findings to the attorney general.

(d) The inspector general shall have access to all pertinent information, confidential or otherwise, and to all personnel and facilities of the Kansas health policy authority, their employees, vendors, contractors and health care providers and any federal, state or local governmental agency that are necessary to perform the duties of the office as directly related to such programs administered by the authority. Access to contractor or health care provider files shall be limited to those files necessary to verify the accuracy of the contractor's or health care provider's invoices or their compliance with the contract provisions or program requirements. No health care provider shall be compelled under the provisions of this section to provide

individual medical records of patients who are not clients of the state medicaid program, the state mediKan program or the state children's health insurance program. State and local governmental agencies are authorized and directed to provide to the inspector general requested information, assistance or cooperation.

(e) Except as otherwise provided in this section, the inspector general and all employees and former employees of the office of inspector general shall be subject to the same duty of confidentiality imposed by law on any such person or agency with regard to any such information, and shall be subject to any civil or criminal penalties imposed by law for violations of such duty of confidentiality. The duty of confidentiality imposed on the inspector general and all employees and former employees of the office of inspector general shall be subject to the provisions of subsection (f), and the inspector general may furnish all such information to the attorney general, Kansas bureau of investigation or office of the United States attorney in Kansas pursuant to subsection (f). Upon receipt thereof, the attorney general, Kansas bureau of investigation or office of the United States attorney in Kansas and all assistants and all other employees and former employees of such offices shall be subject to the same duty of confidentiality with the exceptions that any such information may be disclosed in criminal or other proceedings which may be instituted and prosecuted by the attorney general or the United States attorney in Kansas, and any such information furnished to the attorney general, the Kansas

bureau of investigation or the United States attorney in Kansas under subsection (f) may be entered into evidence in any such proceedings.

(f) All investigations conducted by the inspector general shall be conducted in a manner that ensures the preservation of evidence for use in criminal prosecutions or agency administrative actions. If the inspector general determines that a possible criminal act relating to fraud in the provision or administration of such programs administered by the Kansas health policy authority has been committed, the inspector general shall immediately notify the office of the Kansas attorney general. If the inspector general determines that a possible criminal act has been committed within the jurisdiction of the office, the inspector general may request the special expertise of the Kansas bureau of investigation. The inspector general may present for prosecution the findings of any criminal investigation to the office of the attorney general or the office of the United States attorney in Kansas.

(g) To carry out the duties as described in this section, the inspector general and the inspector general's designees shall have the power to compel by subpoena the attendance and testimony of witnesses and the production of books, electronic records and papers as directly related to such programs administered by the Kansas health policy authority. Access to contractor files shall be limited to those files necessary to verify the accuracy of the contractor's invoices or its compliance with the contract

provisions. No health care provider shall be compelled to provide individual medical records of patients who are not clients of the authority.

(h) The inspector general shall report all convictions, terminations and suspensions taken against vendors, contractors and health care providers to the Kansas health policy authority and to any agency responsible for licensing or regulating those persons or entities. If the inspector general determines reasonable suspicion exists that an act relating to the violation of an agency licensure or regulatory standard has been committed by a vendor, contractor or health care provider who is licensed or regulated by an agency, the inspector general shall immediately notify such agency of the possible violation.

(i) The inspector general shall make annual reports, findings and recommendations regarding the office's investigations into reports of fraud, waste, abuse and illegal acts relating to any such programs administered by the Kansas health policy authority to the executive director of the Kansas health policy authority, the legislative post auditor, the committee on ways and means of the senate, the committee on appropriations of the house of representatives, the joint committee on health policy oversight and the governor. These reports shall include, but not be limited to, the following information:

(1) Aggregate provider billing and payment information;

(2) the number of audits of such programs administered by

the Kansas health policy authority and the dollar savings, if any, resulting from those audits;

(3) health care provider sanctions, in the aggregate, including terminations and suspensions; and

(4) a detailed summary of the investigations undertaken in the previous fiscal year, which summaries shall comply with all laws and rules and regulations regarding maintaining confidentiality in such programs administered by the Kansas health policy authority.

(j) Based upon the inspector general's findings under subsection (c), the inspector general may make such recommendations to the Kansas health policy authority or the legislature for changes in law, rules and regulations, policy or procedures as the inspector general deems appropriate to carry out the provisions of law or to improve the efficiency of such programs administered by the Kansas health policy authority. The inspector general shall not be required to obtain permission or approval from any other official or authority prior to making any such recommendation.

(k) (1) The inspector general shall make provision to solicit and receive reports of fraud, waste, abuse and illegal acts in such programs administered by the Kansas health policy authority from any person or persons who shall possess such information. The inspector general shall not disclose or make public the identity of any person or persons who provide such reports pursuant to this subsection unless such person or persons

consent in writing to the disclosure of such person's identity. Disclosure of the identity of any person who makes a report pursuant to this subsection shall not be ordered as part of any administrative or judicial proceeding. Any information received by the inspector general from any person concerning fraud, waste, abuse or illegal acts in such programs administered by the Kansas health policy authority shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise, except such information may be disclosed if (A) release of the information would not result in the identification of the person who provided the information, (B) the person or persons who provided the information to be disclosed consent in writing prior to its disclosure, (C) the disclosure is necessary to protect the public health, or (D) the information to be disclosed is required in an administrative proceeding or court proceeding and appropriate provision has been made to allow disclosure of the information without disclosing to the public the identity of the person or persons who reported such information to the inspector general.

(2) No person shall:

(A) Prohibit any agent, employee, contractor or subcontractor from reporting any information under subsection (k)(1); or

(B) require any such agent, employee, contractor or subcontractor to give notice to the person prior to making any such report.

(3) Subsection (k)(2) shall not be construed as:

(A) Prohibiting an employer from requiring that an employee inform the employer as to legislative or auditing agency requests for information or the substance of testimony made, or to be made, by the employee to legislators or the auditing agency, as the case may be, on behalf of the employer;

(B) permitting an employee to leave the employee's assigned work areas during normal work hours without following applicable rules and regulations and policies pertaining to leaves, unless the employee is requested by a legislator or legislative committee to appear before a legislative committee or by an auditing agency to appear at a meeting with officials of the auditing agency;

(C) authorizing an employee to represent the employee's personal opinions as the opinions of the employer; or

(D) prohibiting disciplinary action of an employee who discloses information which (A) the employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity, (B) the employee knows to be exempt from required disclosure under the open records act, or (C) is confidential or privileged under statute or court rule.

(4) Any agent, employee, contractor or subcontractor who alleges that disciplinary action has been taken against such agent, employee, contractor or subcontractor in violation of this section may bring an action for any damages caused by such violation in district court within 90 days after the occurrence of the alleged violation.

(5) Any disciplinary action taken or threatened to be taken against an employee of a state agency or firm as such terms are defined under subsection (b) of K.S.A. 75-2973, and amendments thereto, for making a report under subsection (k)(1) shall be governed by the provisions of K.S.A. 75-2973, and amendments thereto.

(l) The scope, timing and completion of any audit or investigation conducted by the inspector general shall be within the discretion of the inspector general. Any audit conducted by the inspector general's office shall adhere and comply with all provisions of generally accepted governmental auditing standards promulgated by the United States government accountability office.

(m) Nothing in this section shall limit investigations by any state department or agency that may otherwise be required by law or that may be necessary in carrying out the duties and functions of such agency.

(n) No contractor who has been convicted of fraud, waste, abuse or illegal acts or whose actions have caused the state of Kansas to pay fines to or reimburse the federal government more than $1,000,000 in the medicaid program shall be eligible for any state medicaid contracts subsequent to such conviction unless the Kansas health policy authority finds that the contractor is the sole source for such contracts, is the least expensive source for the contract, has reimbursed the state of Kansas for all losses caused by the contractor, or the removal of the contractor would

create a substantial loss of access for medicaid beneficiaries, in which case the authority after a specific finding to this effect may waive the prohibition of this subsection. Nothing in this section shall be construed to conflict with federal law, or to require or permit the use of federal funds where prohibited.

(o) The Kansas health policy authority, in accordance with K.S.A. 75-4319, and amendments thereto, may recess for a closed, executive meeting under the open meetings act, K.S.A. 75-4317 through 75-4320a, and amendments thereto, to discuss with the inspector general any information, records or other matters that are involved in any investigation or audit under this section. All information and records of the inspector general that are obtained or received under any investigation or audit under this section shall be confidential, except as required or authorized pursuant to this section.

Kansas Organization of State Employees AFT, AFSCME, AFL-CIO

A New Day... A Better Way... For State Employees

Testimony before the
Government Efficiency and Fiscal Oversight Committee
On
HB 2249
By
Jane Carter, Executive Director
Kansas Organization of State Employees

DATE: February 2, 2010

I am here today to speak on behalf of the 11,000 executive branch employees represented by the Kansas Organization of State Employees (KOSE) that support strengthening our state's whistleblower laws. As the only certified, State recognized employee organization for state employees in the executive branch, we appreciate this opportunity to address issues that affect our members.

According to the National Whistleblowers Center,[1] seventeen states have already strengthened their whistleblower protections beyond the piecemeal laws of Kansas. These strengthened protections encourage state employees to come forward with allegations of waste, fraud, and abuse in their state government free from any reprisal or threat of reprisal.

In Kansas we have been told again and again that we must cut the waste from our state agencies, especially now that we are facing a $400 million budget hole. So there is no better time for us to encourage state employees to identify waste and inefficiencies than the present. However, in doing so, we must recognize the hardship any employee would confront having to possibly go against a supervisor—someone that can discipline, make a performance evaluation, or even fire an employee.

We appreciate the committee's hard work on this bill. We would respectfully request that this Committee consider incorporating some of the ideas put forward in SB 294, including the state employee suggestion program with incentive funding. These changes to HB 2249 will make it far more likely that the program will be successful in implementation.

This Legislature must encourage state employees to come forward and tell their stories without fear of reprisal or the threat of reprisal. A web site should be established for state employees to identify waste and inefficiencies in our system. We would strongly recommend the Committee have language for a year of protection. Employees should be able to speak directly with the Attorney General's Office. Financial incentives for coming forward would be an amicable gesture as well.

We urge the Committee to support employees coming forward to root out waste, fraud, or any other inefficiency in state government.

[1] National Whistleblower Center: Statutes per state:
http://www.whistleblowers.org/index.php?option=com_content&task=view&id=742&Itemid=161

Kansas Organization of State Employees, AFT/AFSCME, AFL-CIO
1301 SW Topeka Boulevard • Topeka, KS 66612 • (785) 354-1174

Attachment #4
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KANSAS ASSOCIATION OF SCHOOL BOARDS
1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

Testimony before the
House Government Efficiency and Fiscal Oversight Committee
on
HB 2249

by
Tom Krebs, Governmental Relations Specialist
Kansas Association of School Boards

February 2, 2010

Mr. Chairman, Members of the Committee:

Last year, KASB stood in this committee as an opponent to **HB 2249**.

It appears a major revision has been made that allows KASB to testify as neutral on the bill this year.

We expressed two specific concerns last year. The first was the fact the evaluation process, in which constructive criticism of an employee's performance might be expressed by a supervisor, was not protected. We believed those conversations are meant to provide frank conversation, and last year's bill did not recognize that need. Embedded in that same section is a definition of the word "threat," which we felt was inadequately defined last year.

Our members realize an evaluation process that removes poorly performing employees is a necessity for well run schools. We are interested in the state having similar protection as it evaluates employee performance. As a result, we are not interested in seeing the "tail wag the dog," so to speak, by making supervisors fearful of honestly and productively assessing employee performance.

Thank you for allowing us some input in the discussion of this matter. Thank you for your consideration.

Attachment #5
GEFO 2-2-10