

HOUSE BILL No. 2049

By Representatives McCray-Miller and Faust-Goudeau

1-11

9 AN ACT concerning labor and employment; relating to wrongful
10 discharge.

11

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. For the purposes of sections 1 through 18, and amend-
14 ments thereto:

15 (a) “Discharge” means:

16 (1) An involuntary dismissal from employment. Discharge includes a
17 resignation that results from an improper or unreasonable action or in-
18 action of the employer;

19 (2) a suspension of an employee by an employer for more than four
20 consecutive months; or

21 (3) a quitting of employment or a retirement by an employee induced
22 by an act or omission of the employer, after notice to the employer of the
23 act or omission without appropriate relief by the employer, so intolerable
24 that under the circumstances a reasonable individual would quit or retire.

25 “Discharge” does not include termination of employment for economic
26 reasons such as layoffs, reductions in force or the closing or relocation of
27 all or part of a business.

28 (b) “Employee” means an individual who works for hire not less than
29 20 hours per week, including an individual employed in a supervisory,
30 managerial or confidential position, but not an independent contractor or
31 a person who is protected by civil service or tenure against unjust
32 discharge.

33 (c) “Employer” means a person that employs five or more employees
34 for each working day in each of 20 or more calendar weeks in the two-
35 year period next preceding a termination. Employer does not include this
36 state, a political subdivision thereof, a municipal corporation or any other
37 governmental subdivision, agency or instrumentality of the state.

38 (d) “Fringe benefit” means vacation leave, sick leave, medical insur-
39 ance plan, disability insurance plan, life insurance plan, pension benefit
40 plan or other benefit of economic value, to the extent the leave, plan or
41 benefit is paid for by the employer.

42 (e) “Good faith” means honesty in fact.

43 (f) “Just cause” means:

1 (1) A reasonable basis related to an individual employee for termi-
2 nation of the employee's employment in view of relevant factors and
3 circumstances, which may include the employee's duties, responsibilities,
4 conduct on the job or otherwise, job performance and employment rec-
5 ord; or

6 (2) the exercise of business judgement in good faith by the employer,
7 including setting its economic or institutional goals and determining
8 methods to achieve those goals, organizing or reorganizing operations,
9 discontinuing, consolidating or divesting operations or positions or parts
10 of operations or positions, determining the size of its work force and the
11 nature of the positions filled by its work force, and determining and
12 changing standards of performance for positions.

13 Just cause for termination shall not be found in instances where the
14 usage or application of policies such as usage of a progressive disciplinary
15 policy, including, but not limited to, a verbal warning and a written warn-
16 ing clearly delineating problems and deficiencies, required corrective ac-
17 tions and allotting a period of time for compliance and review are demon-
18 strably arbitrary or selective.

19 (g) "Pay" means hourly wages or periodic salary, including tips, reg-
20 ularly paid and nondiscretionary commissions and bonuses, and regularly
21 paid overtime, but not fringe benefits.

22 (h) "Person" means an individual, corporation, business trust, part-
23 nership, association, joint venture or any other legal or commercial entity,
24 excluding the government, a governmental subdivision, agency or
25 instrumentality.

26 Sec. 2. (a) Sections 1 through 18, and amendments thereto, apply
27 only to a discharge that occurs after the effective date of this act.

28 (b) This act does not apply to a termination at the expiration of an
29 express oral or written agreement of employment for a specified duration,
30 which was valid, subsisting and in effect on the effective date of this act.

31 (c) This act does not displace or extinguish rights or claims of a ter-
32 minated employee against an employer arising under state or federal stat-
33 utes nor does it prohibit any civil or legal action arising thereof. This act
34 does not displace or extinguish any administrative regulations having the
35 force of law or local ordinances valid under state law, collective-bargaining
36 agreements between an employer and a labor organization or provisions
37 of an express oral or written agreement relating to employment that do
38 not violate this act. Those rights and claims may not be asserted under
39 this act, except as otherwise provided in this act. The existence or adju-
40 dication of those rights or claims does not limit the employee's rights or
41 claims under this act.

42 Sec. 3. (a) An employer shall not discharge an employee except for
43 just cause. The following acts shall under no circumstances be considered

1 just cause: (1) Exercise of rights under the First Amendment to the
2 United States Constitution; (2) exercise of other legal rights or civic ob-
3 ligations; (3) revelation of what the employee in good faith believes to be
4 illegal conduct by the employer; and (4) good faith refusal to engage in
5 illegal conduct requested by the employer.

6 (b) An employer who discharges an employee shall notify the em-
7 ployee orally at the time of discharge, and in writing by registered mail
8 within 15 calendar days after the discharge, of all the reasons for the
9 discharge.

10 Sec. 4. (a) A discharged employee who believes that such employee
11 has been discharged in violation of subsection (a) of section 3, and amend-
12 ments thereto, may file by registered mail a written complaint with the
13 Kansas human rights commission not later than 60 calendar days after
14 receipt of the employer's written notification of discharge as provided in
15 subsection (b) of section 3, and amendments thereto. The complaint shall
16 contain the names, addresses and telephone numbers of the employer
17 and of the employee, the date of the discharge of the employee and a
18 short statement of the reason for the filing of the complaint.

19 (b) If an employer fails to provide the discharged employee with a
20 written notification of such employee's discharge and the reason for it,
21 the discharged employee may file by registered mail a written complaint,
22 as described in subsection (a), with the Kansas human rights commission
23 not later than 90 calendar days after the discharge.

24 Sec. 5. (a) Upon receipt of a complaint from a discharged employee,
25 the Kansas human rights commission immediately shall appoint a medi-
26 ator to assist the employer and the discharged employee in attempting to
27 resolve their dispute.

28 (b) If the dispute is not resolved within 30 calendar days after the
29 commencement of mediation, the mediator shall explain to the employer
30 and the discharged employee the process and purpose of final and binding
31 arbitration and the optional methods of selecting and compensating an
32 arbitrator, as described in sections 6 and 7, and amendments thereto.

33 (c) After the option of arbitration is made available to the discharged
34 employee pursuant to subsection (b), the discharged employee may re-
35 quest a continuance of mediation if the discharged employee believes
36 that a mutual resolution of the dispute is possible. If a mutual resolution
37 is not likely, the discharged employee may file by registered mail a written
38 request with the Kansas human rights commission for arbitration of the
39 dispute, together with a statement of the method that the discharged
40 employee desires of selecting the arbitrator pursuant to section 6, and
41 amendments thereto.

42 Sec. 6. An arbitrator for a case brought under this act may be se-
43 lected from one of the following alternatives:

1 (a) Upon the request of a discharged employee, the Kansas human
2 rights commission immediately shall select from a list that it maintains of
3 impartial, competent and reputable arbitrators who are not employees of
4 this state, five persons as nominees for arbitrator. The list of five names
5 shall be sent to the employer and the discharged employee. Within 10
6 days after receipt of the names of the nominees, the employer and the
7 discharged employee may each strike peremptorily the name of two nom-
8 inees. If the employer or discharged employee does not return the list
9 within the 10-day period, then each person whose name appears on the
10 list shall be considered to be acceptable to that party. Within seven days
11 after this 10-day period, the Kansas human rights commission shall des-
12 ignate one of the remaining nominees as the arbitrator. If each nominee
13 who is considered to be acceptable by the employer and the discharged
14 employee declines or for any reason is not able to serve as arbitrator, then
15 the director of the Kansas human rights commission shall appoint an
16 arbitrator from other members of this panel of arbitrators without the
17 submission of any additional lists to the employer and the discharged
18 employee.

19 (b) The employer and the discharged employee may select as arbi-
20 trator any person who is acceptable to both parties.

21 Sec. 7. (a) The employer and discharged employee shall share
22 equally the fees and expenses of the arbitrator until the discharged em-
23 ployee has contributed a sum equal to one week's take home pay. All
24 additional expenses shall be paid by the employer.

25 (b) A party who produces a witness at the arbitration hearing shall
26 bear the expenses, if any, of that witness. Other expenses similarly shall
27 be borne by the party incurring them.

28 Sec. 8. (a) Within 60 calendar days after the arbitrator's appoint-
29 ment, or within further additional periods to which the parties may agree,
30 the arbitrator shall call a hearing and shall give reasonable notice of the
31 time and place of the hearing to the employer and the employee.

32 (b) The arbitration may proceed in the absence of an employer or
33 the employee, who, after due notice, fails to be present at the hearing
34 and who fails to obtain an adjournment of the hearing, as provided in
35 subsection (c). An arbitrator shall not grant or deny a grievance solely on
36 the default of a party. Rather, the arbitrator shall require the opposing
37 party to submit evidence, as necessary, for the rendering of an award.

38 (c) The arbitrator, for good cause shown, may adjourn the hearing
39 upon the request of a party or upon the arbitrator's own initiative, and
40 shall adjourn the hearing when both parties agree to the adjournment.

41 Sec. 9. (a) The arbitration proceedings shall be informal. The arbi-
42 trator may conduct the hearing in whatever manner the arbitrator believes
43 will permit the full and most expeditious presentation of the evidence

1 and arguments of the employer and the employee. Technical rules of
2 evidence shall not apply and the competency of the evidence shall not be
3 considered to be impaired by the informality of the proceedings. The
4 employer and the discharged employee may not submit a new or different
5 claim to the arbitrator after the arbitrator's appointment without the con-
6 sent of the arbitrator and all other parties. The arbitrator may receive
7 into evidence any oral or documentary evidence or other data that the
8 arbitrator considers to be relevant to the issues under consideration at
9 the hearing, and the arbitrator shall request the submission of any evi-
10 dence that the arbitrator considers to be necessary for a proper under-
11 standing and determination of the issues in dispute.

12 (b) The arbitrator may administer oaths and require the attendance
13 of witnesses and the production of books, papers, contracts, agreements
14 and documents that the arbitrator considers to be material to a just de-
15 termination of the issues in dispute. For this purpose, the arbitrator may
16 issue subpoenas. If a person refuses to obey a subpoena, or to be sworn
17 or to testify, or if a witness, party or attorney is guilty of contempt while
18 in attendance at a hearing, the arbitrator may, or the attorney general if
19 requested shall, invoke the aid of the district court within the jurisdiction
20 in which the hearing is being held, which court shall issue an appropriate
21 order. The court may punish a failure to obey the order as contempt.

22 (c) Attendance at the hearing is limited. Both the employer and the
23 discharged employee have the right to be represented by counsel or other
24 representatives of their choice, or both. In addition, a person who has a
25 direct interest in the arbitration award is entitled to attend the hearing.
26 The arbitrator shall determine the propriety of the attendance of other
27 persons at the hearing. The arbitrator shall have the power to require the
28 sequestering of a witness during the testimony of another witness.

29 (d) The employer, the discharged employee, or both, may, before the
30 scheduled hearing date, request that the Kansas human rights commission
31 arrange for a verbatim record of the proceeding. If the employer and the
32 discharged employee agree that a transcript is to be the official record of
33 the proceeding, then a transcript shall be made available to the arbitrator,
34 and the arbitrator shall make the transcript available for inspection, at a
35 designated time and place, by the employer and the discharged employee.
36 The party that requests that a verbatim record of the proceedings be
37 made shall bear the total cost of the record. If the employer and the
38 discharged employee request that a verbatim record of the proceedings
39 be made, then the employer and the discharged employee shall share
40 equally the cost of the record.

41 (e) The burden of proof shall be upon the employer to show that the
42 discharge was for just cause. The discharged employee shall have the right
43 to confront and cross examine any witness against the discharged

1 employee.

2 Sec. 10. (a) Within 30 calendar days after the close of the hearing,
3 or within further additional periods to which the parties may agree, the
4 arbitrator, based upon the issues and evidence presented, shall render a
5 signed opinion and award. The arbitrator shall deliver by registered mail
6 a copy of the opinion and award to the employer, the discharged em-
7 ployee and the Kansas human rights commission.

8 (b) Some of the remedies from which the arbitrator may select are
9 the following:

- 10 (1) The sustainment of the discharge;
- 11 (2) reinstatement of the discharged employee with no back pay;
- 12 (3) reinstatement of the discharged employee with partial back pay;
- 13 (4) reinstatement of the discharged employee with full back pay; or
- 14 (5) a severance payment.

15 The severance payment should be calculated to equal, as closely as
16 possible, the employee's lost compensation and benefits until they can
17 obtain comparable new employment, unless there are special circum-
18 stances that justify a lesser amount. If possible, severance should be paid
19 in regular increments for the duration of unemployment, rather than a
20 lump sum.

21 (c) If the employer and the discharged employee settle their dispute
22 during the course of the arbitration proceeding, the arbitrator, upon their
23 request, may set forth the terms of the settlement in the award.

24 Sec. 11. An award of the arbitrator shall be final and binding upon
25 the employer and the discharged employee and may be enforced, at the
26 instance of either the employer or the discharged employee, in the district
27 court for the county in which the dispute arose or in which the discharged
28 employee resides.

29 Sec. 12. The district court for the county in which the dispute arose
30 or in which the discharged employee resides may review an award of the
31 arbitrator, but only for the reason that the arbitrator was without or ex-
32 ceeded such arbitrator's jurisdiction, or the award was procured by fraud,
33 collusion or other similar and unlawful means. The pendency of the pro-
34 ceeding for review shall not stay automatically the award of the arbitrator.

35 Sec. 13. If an employer willfully disobeys or willfully resists a lawful
36 order of enforcement issued by the district court, then the employer may
37 be held in contempt. The punishment for each day that the contempt
38 persists may be a fine, fixed at the discretion of the court, in an amount
39 not to exceed \$500 per day.

40 Sec. 14. The protections provided to employees by this act are in
41 addition to any other legal rights they may have in connection with a loss
42 of employment.

43 Sec. 15. (a) A right of an employee under sections 1 through 18, and

1 amendments thereto, may not be waived by agreement except as provided
2 in this section.

3 (b) By express written agreement, an employer and an employee may
4 provide that the employee's failure to meet specified business-related
5 standards of performance or the employee's commission or omission of
6 specified business-related acts will constitute just cause for termination
7 in proceedings under sections 1 through 18, and amendments thereto.
8 Those standards or prohibitions are effective only if they have been con-
9 sistently enforced and they have not been applied to a particular employee
10 in a disparate manner without justification. If the agreement authorizes
11 changes by the employer in the standards or prohibitions, the changes
12 must be clearly communicated to the employee.

13 (c) By express written agreement, an employer and an employee may
14 mutually waive the requirement of just cause for termination, if the em-
15 ployer agrees that upon the termination of the employee for any reason
16 other than the willful misconduct of the employee, the employer will
17 provide severance pay in an amount equal to at least one-month's pay for
18 each period of employment totaling one year, up to a maximum total
19 payment equal to 30-months' pay at the employee's rate of pay in effect
20 immediately before the termination. The employer shall make the pay-
21 ment in a lump-sum or a series of monthly installments, none of which
22 may be less than one-month's pay plus interest on the principal balance.
23 The lump-sum payment must be made or the monthly payments must
24 begin within 30 days after the employee's termination. An agreement
25 under this subsection constitutes a waiver by the employer and the em-
26 ployee of the right to civil trial, including jury trial, concerning disputes
27 over the nature of the termination and the employee's entitlement to
28 severance pay, and constitutes a stipulation by the parties that those dis-
29 putes will be subject to the procedures and remedies of sections 1 through
30 18, and amendments thereto.

31 (d) The requirement of just-cause for termination does not apply to
32 the termination of an employee at the expiration of an express oral or
33 written agreement of employment for a specified duration related to the
34 completion of a specified task, project, undertaking or assignment. If the
35 employment continues after the expiration of the agreement, sections 1
36 through 18, and amendments thereto, apply to its termination unless the
37 parties enter into a new express oral or written agreement under this
38 subsection.

39 (e) An employer may provide substantive and procedural rights in
40 addition to those provided by sections 1 through 18, and amendments
41 thereto, either to one or more specific employees by express oral or writ-
42 ten agreement, or to employees generally by a written personnel policy
43 or statement, and may provide that those rights are enforceable under

- 1 the procedures of sections 1 through 18, and amendments thereto.
- 2 (f) An employing person and an employee not otherwise subject to
3 sections 1 through 18, and amendments thereto, may become subject to
4 its provisions to the extent provided by express written agreement, in
5 which case the employing person is deemed to be an employer.
- 6 (g) An agreement between an employer and an employee subject to
7 sections 1 through 18, and amendments thereto, imposes a duty of good
8 faith in its formation, performance and enforcement.
- 9 (h) By express written agreement, an employer and an employee may
10 settle at any time a claim arising under sections 1 through 18, and amend-
11 ments thereto.
- 12 (i) By express written agreement before or after a dispute or claim
13 arises under sections 1 through 18, and amendments thereto, an employer
14 and an employee may agree to private arbitration or other alternate dis-
15 pute-resolution procedures for resolving the dispute or claim.
- 16 (j) By express written agreement after a dispute or claim arises under
17 sections 1 through 18, and amendments thereto, an employer and an
18 employee may agree to judicial resolution of the dispute or claim.
- 19 (k) The substantive provisions of sections 1 through 18, and amend-
20 ments thereto, apply under any agreement authorized by subsections (i)
21 and (j).
- 22 Sec. 16. An employer shall post a copy of this act in a prominent
23 place in the work area.
- 24 Sec. 17. For the purposes of sections 1 through 18, and amendments
25 thereto, the Kansas human rights commission shall maintain a list of im-
26 partial, competent and reputable arbitrators who are not employees of
27 the state of Kansas; shall pursuant to subsection (a) of section 6, and
28 amendments thereto, provide a list of arbitrators names to the employer
29 and the discharged employee upon such discharged employee's request;
30 and if the need arises, shall, pursuant to subsection (a) of section 6, and
31 amendments thereto, appoint an arbitrator to resolve the dispute.
- 32 Sec. 18. Sections 1 through 17 shall be known and may be cited as
33 the Kansas employee termination act.
- 34 Sec. 19. This act shall take effect and be in force from and after its
35 publication in the statute book.