

# Missouri Human Rights Act and Whistleblower Statutes



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Every situation is fact-dependent. This presentation is not a substitute for individual legal advice specific to your situation.

# What will you learn today?

- Changes to the Missouri Human Rights Act that took effect August 28, 2017 (sometimes referred to as SB43).
- Substantial changes to Whistleblower Protection (105.055) for government employees (including municipalities) that took effect August 28, 2018.

# What is SB-43/MHRA?

- Missouri Human Rights Act (MHRA): Chapter 213—private cause of action for discriminatory actions in employment, public accommodations, and housing
  - Similar to federal laws: Title VII, ADA, etc.
- SB-43 is the bill which substantially amended the MHRA as of August 28, 2017.

# What led to SB-43?

- Contributing factor: *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. 2007).
  - Missouri Supreme Court announced that the new Missouri Approved Jury Instruction (MAI 31.24) was a correct statement of the law
    - Only required that a protected class was a *contributing factor*
    - Because MHRA defined discrimination as “*any* unfair treatment based on” protected class
    - Later applied to work comp retal and common law wrongful discharge

# What led to SB-43?

## Individual liability cases

- *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238 (Mo. App. E.D. 2006). Individual liability for CEO.
- *Hill v. Ford Motor Co.*, 277 S.W.3d 659 (Mo. 2009). “The statute is clear that the MHRA is intended to reach not just the corporate or public employer but any person acting directly in the interest of the employer. A supervisory employee clearly falls into that category.”

# What led to SB-43?

## Punitive damage cases

- *Brady v. Curators of Univ. of Missouri*, 213 S.W.3d 101 (Mo. App. 2006). “The MHRA includes...the definition of employer: ‘Employer includes the state, or any political or civil subdivision thereof...’ The MHRA also allows the court to award a plaintiff ‘actual and punitive damages’ against an employer.”
- *Hervey v. Missouri Dep't of Corr.*, 379 S.W.3d 156 (Mo. 2012). Under 510.265, “net amount of the judgment” includes attorneys’ fees prior to applying the multiplier limit of 5X the judgment

# What led to SB-43?

- Missouri's standard for proving discrimination was lower than the federal standard
- Legislature tried for years to pass MHRA reform that would raise the standard plaintiffs had to prove to *motivating factor* (the federal standard)-vetoed by Governor Nixon
- Wanted to prohibit individual liability (like Title VII)
- Wanted to limit damages, particularly punitive damages, and limit damages against the State

# Major Changes in SB-43

- **Standard of Proof**

- “Motivating factor” replaces “contributing factor”

- **Individual Responsibility**

- Employer no longer defined to include individual defendants

- **Damage Caps**

- Damages are limited based on number of employees



# Major Changes in SB-43 (Yes, more)

- **Exclusive Remedy**

- Discrimination, workers' compensation and misc. statutes in Chapter 285

- **Summary Judgment encouraged**

- Explicitly adopts burden-shifting

- **Timing of administrative process**

- Requires MCHR to wait at least 180 days before issuing a "right to sue" letter

- **Business judgment instruction**

# Standard of Proof

## ● Definitions

- "Because" or "because of", as it relates to the adverse decision or action, the protected criterion was the motivating factor
- "The motivating factor", the employee's protected classification actually played a role in the adverse action or decision and had a determinative influence on the adverse decision or action;

# Standard of Proof

- **Unlawful employment practice (213.055):**

- It shall be an unlawful employment practice:
  - For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
  - To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's race, color, religion, national origin, sex, ancestry, age or disability

# Standard of Proof

- **So what does this mean?**
  - Plaintiff has to demonstrate that the protected status “actually played a role” and
  - “had a determinative influence”
- Too soon to tell how this plays out in court
- Different than the federal “motivating factor” standard

# Individual Responsibility

- **Employer does not include an individual employed by the employer**
  - Previously, individuals accused of discrimination could be sued in individual capacity and held personally liable
  - Now, can only sue the business itself

# Damage Caps

- **Back pay + interest;**
- **Plus maximum for all other damages:**
  - 6-99 employees - \$50,000
  - 100-199 - \$100,000
  - 200-499 - \$200,000
  - 500+ - \$500,000
- **Attorneys' fees and costs**

# Exclusive Remedy

- “This chapter, in addition to chapter 285 and chapter 287, shall provide the exclusive remedy for any and all claims for injury or damages arising out of an employment relationship”
- Does this mean an employer can't bring claims against an employee?
  - Embezzlement? Trade secrets? Non-compete?
- Co-employee claims (e.g., battery) probably still okay

# Exclusive Remedy

- But see *Church & Dwight Co., Inc. v. Collins*, SC95976 (2018)
- “The remedies at common law are fully comprehended by the remedies provided by the MHRA”
- Dismissed claims for negligence and wrongful discharge.
- So, maybe claims for assault/battery are precluded – certainly worth raising



# Whistleblower Protection – 105.055

- Brand new law – took effect Aug. 28, 2018
- Covers state agencies, the general assembly, any legislative or governing body of the state, any unit or political subdivision of the state, or any other instrumentality of the state.
- Yes, cities are covered, as are other local governmental entities (counties, state universities, public schools)

# Whistleblower Protection – 105.055

- Broad coverage/broad prohibitions
- Specifically exempted from “exclusive remedy”
- No supervisor shall prohibit any employee from discussing the operations of the public employer, either specifically or generally, with any member of the legislature, state auditor, attorney general, a prosecuting or circuit attorney, law enforcement agency, **news media**, **the public**, or any state official or body charged with investigating any alleged misconduct

# Whistleblower Protection – 105.055

- No discipline whatsoever for disclosing:
  - Violation of law, rule, or regulation
  - Mismanagement, gross waste of funds or abuse of authority, violation of policy, waste of public resources, alteration of technical findings or communication of scientific opinion, breaches of professional ethical canons, or a substantial and specific danger to public health or safety, if the disclosure is not specifically prohibited by law
- Can discipline if the disclosure is related to the employee's own violation

# Whistleblower Protection – 105.055

## Remedies

- Employee can file an administrative appeal before the Administrative Hearing Commission (AHC)
- AHC can reverse discipline/reinstate employee
- For repeat violations, AHC may recommend suspension without pay of supervisor for up to 30 days, or even recommend termination/disbarment from government employment for up to two years

# Whistleblower Protection – 105.055

## Remedies

- Employee can also file for a jury trial in circuit court
- Can skip the AHC if the employee doesn't want reinstatement (or other equitable relief)
- Actual damages (e.g., back pay, emotional distress)
- Attorneys' fees and costs
- See *Hudson v. O'Brien*, 449 S.W.3d 87 (2014) – only reported case on 105.055 (prior version)

# Whistleblower Protection – 105.055

## Remedies

- If the disclosure related to receipt and expenditures of public funds....
- Employee may request the Auditor investigate
- If the Auditor investigates, the statute of limitations for filing before the AHC or in circuit court is tolled until 90 days after the auditor releases a report.

# Other tangentially-related claims

- MHRA includes:
  - Public Accommodations
  - Housing Discrimination
- Public Accommodations
  - Still allows for individual liability
  - Applies to state facilities explicitly
- BUT, public accommodations still subject to caps and newly-defined motivating factor standard

# Are employment discrimination claims a thing of the past?

- Probably not
  - The Weinstein effect
  - Juries are not as tolerant of this behavior and the standard is likely to not be as significant there
  - Reality of state court belies that summary judgment for state defendants (who can't remove to federal court based on diversity) will be as likely as it is in federal court



# Questions?



# Thank you.