10-30-2017

Changes to the MHRA Raise Burden of Proof and Limit Damages for Plaintiffs

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By Megan Crowe*

On June 30, 2017, Missouri Governor Eric Greitens signed into law Missouri Senate Bill 43 amending the Missouri Human Rights Act ("MHRA"). The laws in this bill went into effect on August 28, 2017 and have significantly changed the way employment discrimination disputes will be handled in Missouri. The bill changed many aspects of employment discrimination litigation, including the way plaintiffs may bring claims, against whom such claims can be brought, the amount of money plaintiffs can recover, and the burden of proof.

There are two highly notable changes this legislation sets in place. The first is a cap on damages. The bill now limits plaintiffs' possible recovery to $50,000 in claims against employers with 100 or fewer employees and $500,000 in claims against employers with 500 or more employees. The second most notable change is a significant increase in the burden of proof a plaintiff must meet to prove her claim. The bill demonstrates significant departure from the way employment discrimination cases in Missouri state courts have recently been litigated.

For the past ten years, Missouri plaintiffs have enjoyed an extremely low burden of proof in employment discrimination cases. In 2007, the Missouri Supreme Court decided a case in which a police officer sued for age and disability discrimination when he was fired at age 59 after sustaining serious injuries resulting in his inability to perform duties on the front line but still allowed him to perform supervisory duties.[1] The court first noted that summary judgment should seldom be used in employment discrimination cases.[2] The court then analyzed the burden of proof a plaintiff must set forth to establish a claim under the Missouri Human Rights Act.[3] The court focused on the fact that the language in the statute states that discrimination includes any unfair treatment on the basis of

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[1] *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 816-17 (Mo. 2007).

[2] *Id.* at 818.

[3] *Id.* at 819.

any protected characteristic.[4] Nothing in the statute requires a plaintiff to prove discrimination was a substantial or determining factor in the employer's decision.[5] "If consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is enough."[6] The court also noted that Missouri Approved Instruction 31.24 uses similar "contributing factor" language.[7] The court ultimately held that the police officer's claims should have survived summary judgment because it was a genuine issue of material fact as to whether age or disability were contributing factors in the city's decision to fire him.[8]

Subsequently, this contributing factor test was applied widely in Missouri. In one case, the court upheld a jury instruction that "the conduct of the employer directly caused or directly contributed to cause damage to the plaintiff" was proper in an employment discrimination case under the MHRA.[9] Another case held that it juries should not be instructed on "but for" causation for employment discrimination cases.[10] The court reasoned that because of the language in the MHRA lacks any mention of employer conduct being the sole or dominant cause of a plaintiff's injury, it would be error to instruct the jury on proximate causation in these cases.[11]

While the new legislation seems harsh compared to this precedent, it is actually a reorientation, placing Missouri back in line with the federal standard and the standard of many other states. In fact, the statute explicitly abrogates the holding of Daugherty and other subsequent cases and directs courts to apply the burden shifting analysis set forth in McDonnell Douglas.

In McDonnell Douglas, the United States Supreme Court held that in an employment discrimination case, the plaintiff first must establish a prima

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[4] *Id.*
[5] *Id.*
[6] *Daugherty* 231 S.W.3d at 819.
[7] *Id.* at 820.
[8] *Id.*
[9] *Hurst v. Kansas City*, Missouri School Dist., 437 S.W.3d 327, 335-36 (Mo. Ct. App. W.D. 2014).
[10] *Thomas v. McKeever's Enterprises Inc.*, 388 S.W.3d 206, 216-17 (Mo. Ct. App. W.D. 2012).
[11] *Id.*

facie case of racial discrimination.[12] Then, the burden is on the employer to articulate non-discriminatory reasons for the employee's rejection.[13] Following that, the plaintiff must have an opportunity to show that the employer's stated reason was in fact pretext or discriminatory in its application.[14] The test that was derived from this case was called the motivating factor test – for a successful employment discrimination claim, there must be proof the conduct at issue was constitutionally protected and that it was a substantial or motivating factor in the termination.[15]

Missouri's reversion to the McDonnell Douglas motivating factor standard will greatly benefit employers. Not only will the new law limit the amount of damages employers are responsible for on an adverse judgment, but it also gives employers a higher level of protection against liability to plaintiffs who bring forward frivolous claims based on under-developed or illusory facts.

On the other hand, plaintiffs wishing to bring employment discrimination claims under the MHRA in Missouri state courts may find this change of legislation extremely negative. The high burden for proving an MHRA claim with the new motivating factor standard, coupled with a damages cap limiting recovery creates several problems that will likely have the effect of deterring plaintiffs from even pursuing these claims in the first place. First and foremost it will make it more difficult for a plaintiff to prove and prevail on her claim. While this won't deter zealous plaintiffs who are confident in their case and will go through every means to have it heard, it may deter the average individual who does not have the financial ability to litigate against a company if they are unsure whether or not they will be successful. The trouble and cost of litigating could well be more than the case is worth, especially considering the damages cap. Considering these factors, plaintiffs may see the legislation as creating an adverse legal environment for them.

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[12] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973).

[13] *Id.*

[14] *Id.*

[15] See *Wilkie v. Robbins*, 551 U.S. 537, 556 (2007); Board of Commissioners, *Wabaunsee County v. Umbehr,* 518 U.S. 668, 675 (1996).

However, the Missouri standard before the change in legislation was unique and not the standard practice for employment discrimination cases. Federal courts and most states have continued to use the motivating factor test since McDonnell Douglas since its inception. Missouri's change in law is not unfair; rather, it is advancing the important policy of uniformity in the law. Moreover, this change in law will help eliminate forum shopping. Because Missouri's law is now similar to the laws of other states, it will dissuade people from trying to establish jurisdiction in Missouri courts in order to increase their probability of a favorable judgment when perhaps their claim is not strong enough to prevail elsewhere. This not only will allow justice to be administered equally, it will help alleviate the ever-growing problem of clogged courts.

The passing of Senate Bill 43 will certainly have a great impact in the way employment discrimination cases under the MHRA are tried in Missouri. Whether this is a positive or negative impact depends on whether one is analyzing it from the employer or the employee perspective.

Edited by Luke Jackson