

**FOR EMPLOYMENT DISCRIMINATION LAWSUITS:  
MISSOURI IS THE NEW FRONTIER**

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Missouri school districts, colleges, and universities are facing the realities of a new era in employment law in Missouri under the Missouri Human Rights Act (MHRA), Chapter 213 RSMo. The MHRA is Missouri's state statute that governs and prohibits discrimination based on race, color, religion, national origin, ancestry, sex, age, and disability. As the statute is currently written by the state legislature and interpreted by the judiciary, there is no sovereign/governmental immunity or official immunity to protect public school districts, colleges, or universities, its administrators, or teachers. Unlike Title VII, the federal statute that prohibits certain forms of employment discrimination, *individuals* can be found liable for discrimination and retaliation under the MHRA, not just the employing entity. In further contrast to Title VII, under the MHRA, there are no caps on punitive damages – the jury is only limited by the confines of their imagination.

Therefore, under the current state of the law, a discrimination lawsuit can be filed against a school district, individual employees, or even volunteers (for example, the individual members of the school board) for actual and punitive damages. This has placed Missouri schools and their employees, as well as their families, at great financial risk. As it is currently written and interpreted, the MHRA may be one of the most anti-employer statutes in the country.

This shift in favor of filing suits in Missouri under the MHRA rather than in federal court under Title VII (or the other federal statutes such as ADEA, FMLA, or the ADA) began in 2003 with the Missouri Supreme Court decision in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003). The Missouri Supreme Court for the first time removed all road blocks for employees to have a jury trial in state court. And what has resulted is a dramatic shift of cases filed in Missouri to exploit the plaintiff-friendly MHRA.

This shift has revealed and highlighted the distinctive pro-plaintiff procedural differences in Missouri state court as compared to in federal court. In Missouri, the discovery process is much more expensive than in federal court. Under the federal rules, each side has a presumptive limit of 10 depositions and only 25 interrogatories. In contrast, under Missouri civil procedure rules, the amount of depositions is unlimited as well as the amount of interrogatories and requests for document production. This encourages plaintiff attorneys to instigate an abundant amount of discovery while being secure with the knowledge that if they obtain a plaintiff's verdict, they will recoup their attorneys' fees and costs.

Additionally, not only is the discovery more abundant and expensive in state court, it is simultaneously more restrictive for defendants. In 2005, the Missouri Supreme Court decided in *State ex rel. Dean v. Cunningham* that for purposes of discovery, if a plaintiff seeks damages for alleged emotional distress that she endured as a result of her employer's discriminatory conduct, and she chooses to not support her claim of damages with the use of expert testimony, the physician-patient privilege is not waived, and the defendant employer cannot obtain the plaintiff's previous medical records to rebut any claim of emotional distress. As a result, a plaintiff can assert she was emotionally damaged and her testimony alone would be sufficient to bring the issue to the jury. Simultaneously, a defendant employer is prohibited from discovering medical records that could mitigate or contradict the causal connection between her employment experiences and her emotional distress.

Just as there is a stark difference in discovery procedures between Missouri state court and federal court, there are also noteworthy differences in the legal standard for obtaining summary judgment. Under the federal standard, pursuant to Federal Rules of Civil Procedure 56, if the nonmoving party has the burden of proof on an issue at trial, then the moving party needs only to inform the district court of the basis for its motion. The burden is then on the *nonmoving party* to establish a question of material fact. This is in direct contrast to the standard of summary judgment in Missouri. The Missouri Supreme Court Rule 74.04 states that the moving party must always establish its undisputed right to summary judgment. Only when the moving party established its *prima facie* right to summary judgment, does the nonmoving party have any burden at all.

Furthermore, in *Daugherty v. The City of Maryland Heights*, the Missouri Supreme Court made the dramatic decision that the Missouri verdict-directing instruction for MHRA employment discrimination claims applies at the summary judgment stage as well as the jury stage. What this means is that for a plaintiff's to defeat summary judgment after the employer has proven an undisputed right to summary judgment, he need to only make the case that there is a material issue of fact in dispute as to whether the employee's protected status, such as race, was a contributing factor in the adverse employment decision against him. This is a much lower burden than prior to *Daugherty*.

Due to the higher burden in Missouri for the movant (i.e. the employer) to obtain summary judgment and the lack of judicial experience in deciding the often complex employment law issues, the recent cases filed in Missouri demonstrate that Missouri judges are not likely to grant defendant employers summary judgment, but chose to instead hand the case over to the jury to decide the issues.

Therefore, it is a reality that most employment discrimination cases will be decided by a jury, not a judge in state court. This is significant for plaintiffs because juries are considerably more willing than trial judges to award damages, including punitive damages in cases of discrimination. Furthermore, Missouri juries are guided by mandatory jury instructions for employment discrimination cases that are exceedingly pro-plaintiff. For the plaintiff to obtain a jury verdict in her favor, only 9 out of 12 jurors (compared to a unanimous decision in federal

court) must agree that the employee's protected status, such as race, was a *contributing factor* in the adverse employment action taken against her. Under the current law, jury instructions under the MHRA allow the jury to find for the plaintiff if the employment decision was based on 99.9% on a legitimate non-discriminatory reasons and a possible .01% on an illegitimate factor.

The following are examples of recent verdicts in Missouri. It is important to note that the plaintiff attorneys' fees awards are not included in these verdicts, but were awarded separately by the trial judge.

*Crudup v. Raytown R-2 School District*: a Kansas City, jury awarded \$50,000 in compensatory damages and \$250,000 in punitive damages to a basketball coach for race discrimination. When he was dismissed mid-season, the coach had a contract for only one basketball season and had been employed with the school district less than three months.

*Brady v. Curators of the University of Missouri, Patricia Dolan, Reinhard Schuster*: a St. Louis City jury awarded \$225,000 in compensatory damages and 1.05 million dollars in punitive damages in an age discrimination case. The punitive damage award was divided as follows: \$750,000 against the University, \$200,000 against Schuster, \$100,000 against Dolan

*Gorker v. Kansas City, School District*: a Kansas City, jury awarded approximately \$311,000 in compensatory and punitive damages to a Caucasian assistant principal of the school district for race discrimination.

In light of this new era of employment discrimination law in Missouri, it is more important than ever to properly document and record an employee's conduct that is in violation of the District's policies and regulations. If an employee claims discrimination after a dismissal, demotion, or even failure of promotion, and there is no clearly defined and documented reason, the employee's claim that reason was based on an impermissible factor, such as race, sex, age, religion etc. is strengthened and litigation will ensue. The time for engaging in inadequate employee evaluations and poor documentation of misconduct is over; if not, schools and their administrators and employees may be headed to court.