

Overview of Frequently Encountered and Emerging Missouri Employment Claims

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Can't cover it all, but here goes...

- Overview of Federal Claims
- Missouri Human Rights Act
 - Discrimination
 - Retaliation
 - Hostile Work Environment
- Workers Compensation Retaliation
- Missouri Public Entity Whistleblower Act
- Law Enforcement Officers' Bills of Rights

Federal Statutes and Causes of Action

- Title VII (42 USC 2000e-2)
 - Unlawful to discriminate against an employee because of her “race, color, religion, sex, or national origin.” -- “Protected Class”
 - 15+ employees
 - Claimant file a Charge of Discrimination within 300 days from the day of conduct at issue.
 - Must file a lawsuit within 90 days of receiving a “Right to Sue” letter from the EEOC.
 - Protected Class status must be a motivating factor in an employee suffering an “adverse employment action.”
 - Damage Cap: \$300,000 (does not include attorneys’ fees)
 - Many similarities to the administrative process and legal protections under Missouri Human Rights Act, including hostile work environment claims and retaliation.
 - Vast majority of claims against Missouri cities for discrimination or retaliation will be brought under the Missouri Human Rights Act.

Federal Statutes and Causes of Action

- 42 U.S.C. 1981.
 - Intentional Discrimination on the basis of race in employment contracts and relationships (as well as contracts not in employment context)
 - Employers of all sizes
 - Individual liability allowed
 - No administrative process required
 - Longer Statute of Limitations (four years)
 - No cap on damages
 - Against cities, must be brought pursuant to Section 1983.
 - So, thankfully, no punitive damages. *City of Newport v. Fact Concerts*, 453 US 247 (1981)

Section 1983 – First Amendment Retaliation

- Different in Employee versus Non-employee contexts
- Employee Context - Elements:
 - Employee suffered an “adverse employment action” because he engaged in protected speech as a private citizen
 - Speech pursuant to official duties not protected under First Amendment. *Garcetti v. Ceballos*
 - Speech must involve “a matter of public concern.” *Connick v. Myers*
 - Balancing Test: Employee’s interest in speech versus the government’s interest in efficient operations. *Pickering v. Board of Education*.

Missouri Human Rights Act

- Mo. Rev. Stat. 213.010, et seq.
- Applies to Employers with at least six employees
- Claims: Discrimination, Retaliation, Public Accommodation
 - Discrete Acts versus Hostile Work Environment
- Amendments in 2017
 - No individual liability for supervisors
 - Damage Caps
 - Causation standard – now tracks federal standard
 - Was “contributing factor”
 - Now “motivating factor”
- Must file Charge of Discrimination within 180 days of alleged act of discrimination.
 - Exception: “Continuing Violations” – an on-going pattern or practice extending beyond the 180 days if at least one act occurred within the 180-day period.
- Must file lawsuit within 90 days of receiving “Right to Sue” letter.

Missouri Human Rights Act

- Discrimination (Mo. Rev. Stat. 213.055)
 - Employee's protected class ("Race, color, religion, national origin, sex, ancestry, age or disability of any individual...")
 - ... is the "motivating factor"...
 - ... in an "adverse employment action" taken against an employee by an employer.

“Adverse Employment Action”

- Generally, a tangible and discrete act, including:
 - Termination
 - Demotion
 - Suspension or Discipline
 - Failure to hire or promote
 - Pay disparities
 - Significant changes in job duties

“Burden-Shifting” Analysis

- Missouri Courts evaluate MHRA claims according to the US Supreme Court’s methodology (*McDonnell Douglas v. Green*):
 - (1) plaintiff must first establish by a preponderance of the evidence a *prima facie* case of discrimination;
 - (2) if the plaintiff carries the burden, then the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for its conduct; and
 - (3) if the employer satisfies this burden, then the burden shifts back to the plaintiff to show by a preponderance of the evidence that the employer’s articulated reasons are pretextual.

IN REALITY, HOW DOES THIS WORK? Trial versus pre-trial motion practice

Evidence – Direct or Circumstantial

- Direct evidence – less common. NOT GOOD.
- Most cases proven by circumstantial evidence. Required:
 - A “similarly situated” employee was treated more favorably
 - “... similarly situated in all relevant respects.” *Young v. American Airlines, Inc.*, 182 S.W.3d 647, 654 (Mo. App. E.D. 2005)
 - “In determining whether coworkers were ‘similarly situated,’ courts analyze factors including whether the same supervisor imposed the discipline, whether the coworkers were subject to the same standards, whether they engaged in conduct of similar seriousness, and similar factors.” *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 119 (Mo. banc 2015).
 - To be similarly situated, coworkers do not have to be “identical in every conceivable way.” *Id.*
 - OR, “some other evidence that would give rise to an inference of unlawful discrimination.” *Ruppel v. City of Valley Park*, 318 S.W.3d 179 (Mo. Ct. App. 2010).
 - Not helpful for us. One of many reasons why summary judgment is difficult to obtain.

Hostile Work Environment Claims

Plaintiff must show:

- (1) she is a member of a group protected under the MHRA;
- (2) she was subjected to unwelcome harassment;
- (3) the plaintiff's membership in the protected group was a motivating factor in the harassment; and
- (4) a term, condition, or privilege of the plaintiff's employment was affected by the harassment.

McGaughy v. Laclede Gas Co., 604 S.W.3d 730, 748 (Mo. App. E.D. 2020)).

Hostile Work Environment – “Severe and Pervasive” Standard

- Missouri Courts – proving that harassment affected a term, condition, or privilege” of employment “is demanding.”
- “The discriminatory harassment additionally affects a term, condition, or privilege of employment when it is ‘sufficiently severe or pervasive enough to alter the conditions of the plaintiff's employment and create an abusive working environment.’” *McGaughy*, 604 S.W.3d at 748).
- “The harassing conduct must be ‘so intimidating, offensive, or hostile that it poisoned the work environment and that the workplace was permeated with discriminatory intimidation, ridicule, and insult,’ both viewed subjectively by the plaintiff and viewed objectively by a reasonable person.” *M.W. by and through K.W.*, 605 S.W.3d at 410.
- Missouri case law – many decisions of significant harassment that the Courts have found did not rise to this level.
- Because of this stringent standard, better chance at winning with a pre-trial motion.
 - PLEASE NOTE: I said “better chance”... not a “great chance”

Retaliation - Mo. Rev. Stat. 213.070

Employers are prohibited from taking adverse employment action against an employee because the employee engaged in “protected activity.”

1. **Protected activity:**

- Complaining about or opposing unlawful discrimination
 - Reasonable, good faith belief requirement.
- Participating in MHRA proceedings
 - Filing a Charge of Discrimination
 - Providing information or testimony in another person’s Charge.
 - No “reasonable, good faith belief” requirement.

2. **Adverse employment action taken.**

3. **Causal link between the two.** Protected activity was the “motivating factor” for the adverse employment action.

- *“actually played a role in and had a determinative influence on”* the employment action taken.

The Business Judgment Rule

Missouri Approved Instructions 38.08:

Defendant prevails if action was taken “as an exercise of sound business judgment without regard to Plaintiff’s [protected activity] even if you disagree with such decisions or believe them to be harsh.”

Helpful to combat the otherwise plaintiff-friendly instructions given to juries under Missouri law.

Practical Considerations - Retaliation Claims

- AVOIDING RETALIATION CLAIMS IS EASIER SAID THAN DONE.
- YOU CAN DO EVERYTHING CAREFULLY AND LAWFULLY AND STILL GET SUED.
- THESE ARE TRICKY.
- **TIMING IS CRUCIAL**
 - Temporal proximity between complaint and action, even if necessary, can be very difficult to overcome.
 - Even in a weaker case, can keep it alive at the dispositive motion phase.
 - SUGGESTION: Follow policies; demonstrate that decision-making was deliberate, went through any available “checks and balances,” and consistent with other similar situations.
- DECISIONS MADE PASS THE SMELL TEST.
- IF THIS IS THE FIRST TIME, THERE NEEDS TO BE A REALLY GOOD REASON FOR IT.
- Documentation of events and Investigation
 - Get counsel involved ASAP. Investigation (a whole other topic) done ASAP and consistent with prior investigations.
- Notices
 - That employees are given clear avenues and a process for reporting and/or being heard on complaints.
 - That supervisors are advised of claims and that retaliation is strictly prohibited by law.
- When disciplinary action taken...
 - Avoid arbitrarily cumulative discipline.
 - Continue to follow your disciplinary policies, practices, processes, and/or procedures.
 - Consider how discipline has been rendered against others.

Workers Compensation Retaliation

Mo. Rev. Stat. 287.780

- No employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under the Chapter 287 (Missouri Work Comp statutes) when the exercising of such rights is the motivating factor in the discharge or discrimination.
 - “Exercising rights” – includes filing a claim for compensation, reporting a workplace injury, pursuing benefits or medical treatment, participating in the process in most ways.
- No administrative exhaustion required. Otherwise, operates similar to a MHRA retaliation claim.
- Causation does not exist for purposes of workers’ compensation retaliation claim if the basis for the employee’s discharge is valid and non-pretextual; nothing in workers’ compensation law requires an employer to retain an injured employee when he has recovered from his injuries and is declared able to return to work but cannot or will not perform the duties required by his job. *Stephenson v. Raskas Dairy, Inc.*, 26 S.W.3d 209 (Mo. Ct. App. 2000).

Missouri Public Employee Whistleblower Act

Mo. Rev. Stat. 105.055

- Creates a civil action for public employees alleging violations against governmental entities to encourage employees to disclose government wrongdoing to persons who may be in a position to remedy the problem without fearing retaliatory action by their supervisors. *Hudson v. O'Brien*, 449 S.W.3d 87, 93 (Mo. Ct. W.D. 2014).
- Unlawful to retaliate against an employee for making such a covered disclosure.
- The statute defines a “Public employee” as any employee, volunteer, intern, or other individual performing work or services for a public employer.

Missouri Public Entity Whistleblower Act

Mo. Rev. Stat. 105.055

- Under §105.055.7(3), “a public employee shall show by **clear and convincing evidence** that he or she or a person acting on his or her behalf *has reported or was to report* verbally or in writing, a prohibited activity or a suspected prohibited activity.” *Id.* (emphasis added).
 - “Clear and convincing” as opposed to “preponderance of the evidence”
 - Helpful for dispositive motion phase.
- To be entitled to relief under the statute, the employee must disclose information he or she reasonably believes evidences: (1) a violation of any law, rule, or regulation, (2) mismanagement, (3) a gross waste of funds, (4) a gross abuse of authority, or (5) a substantial and specific danger to public health or safety. *Hudson*, at 94.
- Once such conduct is established, the burden then shifts to the public employer to demonstrate that the disciplinary action was not the result of the plaintiff’s report. See §105.055.7(3).
- One year statute of limitations.
- Damages available: actual damages and attorneys’ fees.

Law Enforcement Officers Bill of Rights

Mo. Rev. Stat. 590.502

- Sets a series of procedures and standards that a law enforcement agency now must follow whenever an officer is “under administrative investigation,” subject to “administrative questioning,” or when “the officer reasonably believes [such questioning] could lead to disciplinary action, demotion, dismissal, transfer, or placement on a status that could lead to economic loss[.]”
- Problems:
 - Unclear application.
 - Little guidance by Courts so far.
 - Onerous Requirements and potential liability (including attorneys’ fees) for deviation.
 - Triggered by officer’s subjective belief.
 - Defense/Indemnification requirement.

Law Enforcement Officers Bill of Rights

Mo. Rev. Stat. 590.502

- Detailed requirements and timelines for investigations that could lead to disciplinary action.
 - Notice requirements
 - Procedural requirements
 - Related to questioning, representation, breaks, etc.
 - Must complete investigation within 90 days from receipt of a citizen complaint, which may be extended under certain circumstances.
 - Recordkeeping requirements. Must maintain complete record of investigation. produce entire record to officer within five business days of request after completion of investigation.
 - No guidance from Courts yet, but appears that agency cannot redact a witness's identity without a protective order.
 - Hearing requirements.
 - Conduct a "full due process hearing" for any officer "suspended without pay, demoted, terminated, transferred, or placed on status resulting in an economic loss."
 - Prepare, at the end of the hearing, a written final decision including findings of fact upon each issue involved in the case.

Law Enforcement Officers Bill of Rights

Mo. Rev. Stat. 590.502

- Must compensate the officer for any economic loss incurred during an investigation if the officer is found to have committed no misconduct.
 - Defined to include any economic loss including but not limited to loss of overtime accrual, overtime income, sick time accrual, sick time, secondary employment income, holiday pay, and vacation pay.

Law Enforcement Officers Bill of Rights

Mo. Rev. Stat. 590.502

- Defense and Indemnification Obligation.
- Section 590.502 requires that the police agency defend and indemnify law enforcement officers against civil claims made against an officer while the officer was acting “within the scope of his/her official duties.”
- No such obligation if the officer pleads guilty to or is convicted of criminal charges arising from the same conduct.
- No Missouri case law governing uncertainties behind this.

Law Enforcement Officers Bill of Rights

Mo. Rev. Stat. 590.502

- Section 590.502 gives police officers the right to bring a lawsuit for enforcement of these provisions and, if a court finds that a law enforcement agency has “purposely” violated the statute, it is instructed to declare any such action taken in violation of the statute to be void. The court “may also award” the officer the costs of bringing the suit including attorneys’ fees.
- Statute of limitations – one year from time the violation is ascertainable. *Rumpsa v. Jefferson County*.

QUESTIONS?