

# Practical and Economic Considerations in Assessing an Employment Case

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# What moves the needle?

- Purpose of this session – to examine some of the things that we consider in evaluating and handling an employment case.
  - Some are unique to employment cases, some aren't.
- The Process – an on-going assessment and reassessment of risk, exposure, and what the City wants.
- A balancing of various considerations
- Another purpose of this session – to provide an explanation for our rationale in our handling of some of these cases.

# Federal versus State Court

- Very common: Charge of Discrimination filed with both MCHR and EEOC.
- For example: race discrimination and retaliation claims filed under both.
- Two “Right to Sue” letters received from MCHR and EEOC.
- Any Plaintiff’s counsel who knows what they are doing will file that case in Missouri state court and will not make a claim under Title VII.

# Federal versus State Court

- Plaintiffs prefer MHRA Claims in Missouri state court.
- Historically this was because MHRA claims only required “contributing factor” (a very minimal causation standard) and no damage caps.
- Missouri legislature tightened this up in 2017 – “motivating factor” and damage caps
- Difference now:
  - Federal courts are perceived a far more inclined to grant summary judgment motions.
    - More federal precedent supporting the granting of a summary judgment motion.
  - Federal Courts have more rigid schedules and rules.
  - Many Missouri attorneys are less comfortable being in federal court.

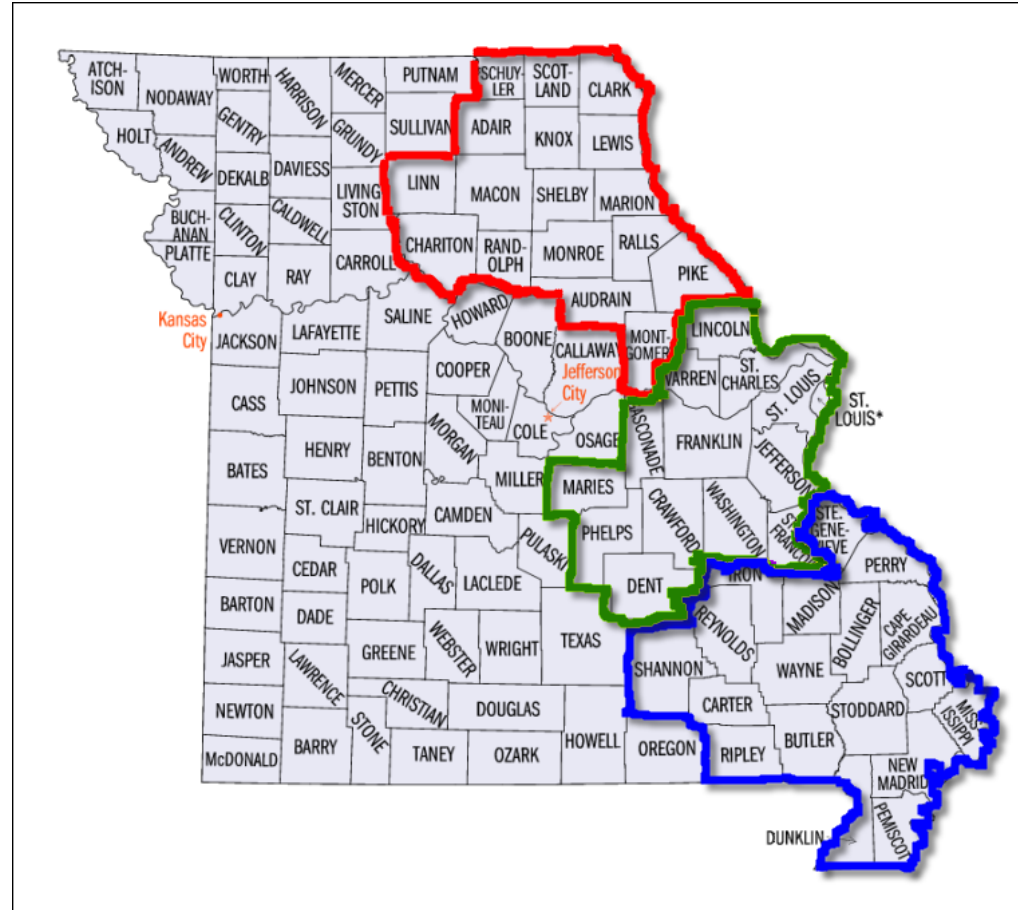
# Federal versus State Court

- Other side of the coin – these are reasons why I love federal court.
- Case Management Orders in federal court.
- Better staffing of federal courts. Judges have more help to examine, research, and rule on complex motions.
- Technology – much better in federal court.
  - A tale of two Courts...
    - June 2025 trial in US District Court (EDMO)
    - November 2025 jury trial in City of St. Louis (Missouri - Circuit Court)
- For this reason, we remove any case with a federal claim in it to federal court.

# Federal versus State Court Jury pool considerations

- Federal Court – jury pool is from all areas within the federal district and division.
  - Number of jurors differs (6 or 8 is common), must be unanimous to render verdict.
- State Court, of course, is just the County in which the matter sits.
  - 12 jurors, 9 needed to render a verdict.
- Back to jury pools and jury selection a bit later...

# U.S. District Court for the Eastern District of Missouri Northern, Eastern, and Southern Divisions



# Case Assessment Considerations

## Merits of the Case

- The Evidence – good and bad
  - The “splattering” effect of bad facts.
- Bad Witnesses
  - Hostile witnesses
  - Former employees
    - Terms of departure?
- Evidentiary Issues
  - Spoliation problems
- Likelihood of prevailing with a Motion for Summary Judgment
  - Fact questions are for a jury to decide.
  - MHRA Cases almost always have fact questions preventing summary judgment.

# Case Assessment Considerations

## Potential Exposure

- MHRA – Damage Cap (2017)
- MO. REV. STAT. § 213.111 provides that the sum of actual damages (including future pecuniary damages, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and punitive damages) shall not exceed
  - Actual back pay (plus interest), plus
  - \$50,000 if employer has 5-99 employees
  - \$100,000 if employer has 100-200 employees
  - \$200,000 if employer has 101-499 employees
  - \$500,000 if employer has 500+ employees

# Case Assessment Considerations

## Potential Exposure

- Doesn't sound so bad, right?
- WRONG
- Attorneys' Fees recoverable for violation of MHRA.
- An "X Factor" in all of these cases
- Practical Impact:
  - Questionable cases over-litigated by Plaintiff's counsel.
  - Can make cases more difficult to settle.
  - BIG ISSUE: even though this could be the most significant exposure in a MHRA case, the jury does not get the hear about it.

# Case Assessment Considerations

## Potential Exposure

- Plaintiff's Attorneys' Fees (cont.)
- At the Court's discretion, but nearly every Missouri decision indicates that they should be awarded.
- Lodestar method – reasonably expended hours x “reasonable rate.”
- “Reasonable rate” – not so reasonable.
  - A recent list I received -- \$550 to \$750 per hour.
- Multiplier of 1.5 to 2 times, also the Judge's discretion, is commonplace.
  - Rationale in Missouri decisions for awarding a multiplier: the risk of not being paid, and the other cases that the attorney has theoretically passed over to handle the MHRA matter at issue.

# Case Assessment Considerations

## Potential Exposure

- EXAMPLE: November 2025 jury trial
- Race discrimination, retaliation, hostile work environment
- 20-year faculty member at a college was terminated after her Program was discontinued
- Employment marked with persistent problems, grievances made and dealt with, charges of race discrimination and retaliation
- PERJURY ADMITTED AT TRIAL
- Hostile work environment claim withdrawn.
- Closing argument – jurors did not write down any of Plaintiff's requested damage figures. Usually a very good sign.
- Gave case to jury around noon. Expected quick verdict. That did not happen.
- Jury found for Defendant on race discrimination claim.
- Jury found for Plaintiff on retaliation claim.
- Verdict very small in relation to ask. Telling.
- Want to guess the Plaintiff's attorney's hourly rate?
- Result

# Case Assessment Considerations

## Potential Exposure

- Other claims...
  - No damage caps and attorneys' fees may be awarded by the Court at its discretion:
    - Mo. Rev. Stat. 105.055 (Whistleblower)
    - Mo. Rev. Stat. 287.280 (Work Comp Retaliation)
  - No damage caps and attorneys' fees will be awarded:
    - Section 1983 claims

# Case Assessment Considerations

## Cost of Defense

- Always part of assessing the economics of a case
- This is highly variable depending on (1) the complexity of the case, and (2) usually more significantly, the litigation strategy and tactics of opposing counsel.
- Discovery and discovery disputes
  - Serious and dangerous case with streamlined prosecution
  - Questionable case in which twenty depositions are taken by Plaintiff's counsel.
  - Common discovery – notably corporate representative depositions – can be amazingly time consuming.
- My goal handling: efficient and appropriately aggressive.
- Considerations for MIRMA and the City:
  - Taking a stand
  - Drain of resources (both human and monetary)
  - Honoring City's wishes

# Case Assessment Considerations

## Cost of Defense

- Tactic seen in employment cases – hostile work environment claims
  - Again, tough standard to satisfy (“severe and pervasive harassment”)
  - Effect of claim: relevance is broadened, expanded scope of discovery
  - More defense cost
  - More drain on the City
  - Increase of Plaintiff’s attorneys’ fees
  - Even if Plaintiff does not prevail on hostile work environment claim (or abandons it), those incurred fees are difficult to parse out and are often considered by Missouri Courts to be part of the recoverable fees (if Plaintiff prevails on another claim).

# Case Assessment Considerations

## Jury Instructions

### INSTRUCTION NO. \_\_

Your verdict must be for Plaintiff on her claim of retaliation if you believe:

*First*, Plaintiff filed one or more Charges of Discrimination, and

*Second*,

Defendant did not allow Plaintiff to teach courses in the Biology department in 2022, or

Defendant did not renew Plaintiff's teaching contract in 2022, resulting in the termination of her employment in 2023,

*Third*, Plaintiff's Charges of Discrimination actually played a role in and had a determinative influence on one or more of the above actions, and

*Fourth*, such conduct directly caused damage to Plaintiff.

# Case Assessment Considerations

## Jury Instructions

### INSTRUCTION NO. \_\_

Your verdict must be for Defendant on Plaintiff's claim of retaliation if you

believe:

- (1) In 2022, Defendant refused to allow Plaintiff to teach courses in the Biology Department because Defendant would have had to pay Plaintiff overload on top of her base salary; and
- (2) In 2022, Defendant decided not to renew Plaintiff's teaching contract resulting in her termination in 2023 because there were no remaining classes to teach in the discipline she was hired for

as an exercise of sound business judgment without regard to Plaintiff's Charges of Discrimination even if you disagree with such decisions or believe them to be harsh.

# Returning to Federal versus State Court Jury Selection (Voir Dire)

- Federal Court
  - June 2025 trial
    - Questions submitted in advance; room for follow-up
    - 45 minutes per side
    - Had to call jurors by number only
- State Court
  - Different judges have different rules
  - Juror number versus juror name
  - Time allotted
  - Scope of questioning

# Case Assessment Considerations

## Jury Pools

- Notoriously conservative or liberal jury pool?
- Jefferson County – police excessive force case in February 2020.
  - Three peremptory strikes
  - Only used one.
- City of St. Louis
- St. Louis County
- More rural counties – not necessarily conservative in awarding damages.

# Case Assessment Considerations

## The Unpredictability of Juries

- Case Study: February 2022 trial
- St. Louis County
- Stephanie Wilson (White female officer) v. City of Ferguson
- Supervisor: black female police officer
- Claims: pregnancy discrimination (required fit for duty exam and changed schedule), race discrimination, and retaliation (for complaints related to a prior pregnancy discrimination claim and pending race discrimination)
- What types of things would you be considering in picking a jury?

# Case Assessment Considerations

## The Unpredictability of Juries

- Forgot to mention: Jury had masks on (COVID 19)
- Jury Selection
  - Plaintiff's counsel finished up at 4:40pm on Day 1. Then it's my turn.
  - If you were me, what would you do?
- Trial went as well as it could have.
- At the start of my closing argument, got a different gaze (albeit without facial expressions due to masks) from two jurors who appeared to be in our favor throughout the entire trial.
  - Internal thought: Uh oh.

# Case Assessment Considerations

## The Unpredictability of Juries

- Result: defense verdict – all counts.
- Pre-CAP case, so Plaintiff was looking for a lot of money.
- 9/12 jurors signed
- Later found out, the two jurors I mentioned fought hard to swing this during deliberations.
- The entire process, and especially the jury trial, is difficult to accurately predict.

Questions?