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MISSOURI MOVES TO THE FOREFRONT OF EXPANSIVE EMPLOYMENT PROTECTIONS

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While recent U.S. Supreme Court decisions about federal employment discrimination laws drew national media attention earlier this summer, a number of key decisions were passed down in Missouri, though with much less fanfare, concerning Missouri's own employment discrimination laws. The decisions in *Hill v. Ford, Wallace v. DTG Operations, Inc.,* and *Wallingsford v. City of Maplewood* have expanded liability for employers and some employees under the Missouri Human Rights Act (MHRA). Attention to these new cases is therefore crucial for any employer hoping to avoid costly litigation in Missouri.

Hill v. Ford: Distinguishing the MHRA from Title VII

In *Hill v. Ford Motor Co.*, 277 S.W.3d 659 (2009), available at http://www.courts.mo.gov/file.asp?id=29686, the Missouri Supreme Court continued its recent pattern of distinguishing the MHRA from federal law, making it more protective of plaintiff-employees than its federal counterparts.

The *Hill* court was called on to decide whether (1) sexual harassment and retaliation claims brought under the MHRA were to be analyzed under the federal *McDonnell Douglas* framework, or the state-law *Daugherty* "contributing factor" standard; (2) individuals could be liable for discrimination under the MHRA's definition of "employer"; and (3) failure to name an individual as a respondent in the charge of discrimination precludes a plaintiff from later naming that individual as a defendant in the lawsuit.

Factual and Procedural History

Plaintiff Cynthia Hill alleged that while working at a Ford assembly plant, she and other co-workers were subjected to sexual harassment by Kenny Hune, a supervisor for whom Hill occasionally worked. Hill and others reported this alleged harassment, and, a few months later, Hill was assigned to work directly under Hune. An eventual confrontation between the two in September 2002 resulted in a meeting with Hill, Hune and Paul Edds, a member of Ford's labor relations department.

Hill alleged that, during this meeting, Edds told her that she needed to seek psychiatric help and that she could not return to work until she had done so. A few days later, Hill called Ford's sexual harassment hotline and stated that, after reporting the harassment, she was told she was crazy,

needed psychiatric help and was sent home from work. One hour after her hotline call, Edds called Hill at home and rescinded his order to see a psychiatrist; still, he suspended Hill for three days for disrespecting her supervisor.

Hill filed a charge of discrimination in November 2002, alleging that she had been subjected to sexual harassment and retaliated against for reporting the harassment. The charge named Ford and Hune as parties, but not Edds. After receiving her right to sue letter, however, Hill filed a lawsuit in the Circuit Court for St. Louis County, naming all three parties. The circuit court granted summary judgment to Ford and Edds, and Hill appealed.

Expanding Daugherty *to Harassment and Retaliation Claims*

Reiterating its recent decisions, the Missouri Supreme Court stated that the protections available to workers under the MHRA were often greater than those under federal law, as the MHRA has a different definition of "discrimination." The court also said that its 2007 *Daugherty* decision, which adopted a "contributing factor" standard, applied to both plaintiff's sexual harassment claim and her retaliation claim.

Making clear that the Title VII *McDonnell Douglas* analysis does not control MHRA harassment claims, the *Hill* court stated that a plaintiff alleging sexual harassment must prove:

> (1) she is a member of a protected group;
> (2) she was subjected to unwelcome sexual harassment;
> (3) her gender was a contributing factor in the harassment; and
> (4) a term, condition or privilege of her employment was affected by the harassment.

Applying this standard, the court found that an issue of material fact existed as to whether Hill's suspension and referral to a psychiatrist constituted a tangible employment action. Thus, the court overturned the summary judgment award for defendants and remanded the case for further proceedings.

Similarly, the court overturned the summary judgment award on plaintiff's retaliation claim. The defendants had argued that retaliation claims "are and should be treated, under Missouri law, differently from other claims of discrimination." After analyzing the statutory language, the court rejected this notion, finding that retaliation constitutes discrimination under the MHRA.

Thus, the plaintiff must simply show the elements required by the MHRA—namely that the opposition to discrimination was a contributing factor in the complained of employment decision. Applying this *Daugherty* contributing factor standard, the court found that a question of material fact existed concerning whether plaintiff's opposition to the sexual harassment contributed to her suspension and psychiatric referral.

Individuals May Be Sued—Even if Not Named in the Charge

Next, to determine which parties could be liable for discriminatory conduct under the MHRA, the court looked to the plain language of the governing statute to hold that supervisory employees could qualify as employers under the MHRA and, thus, could be sued. While defendant Edds argued that individual employees were outside the scope of the MHRA, the court rejected this argument in light of Mo. Rev. Stat. § 213.010(7), which defines "employer" to include any person directly acting in the employer's interest.

The court noted that a supervisory employee like Edds clearly falls into the category of a person directly acting in the interest of his employer. Edds also asserted that Hill could not sue him, since she never named him as a

party, as required by Mo. Rev. Stat. § 213.075(1), when she filed her charge of discrimination. Because no Missouri case had considered the effect of failing to name a person in a charge who is later included in the civil lawsuit, the court looked to federal precedent.

The court first noted that the requirement that an individual be named in an administrative charge to be included in a subsequent civil lawsuit serves two purposes: to give notice to the charged party and to provide an avenue for voluntary compliance without resorting to litigation. Federal courts have forgiven the failure to name an individual in the initial charge, when allowing the suit is not inconsistent with these purposes.

The court also discussed federal case law, stating that these purposes would be met where there "is a substantial identity of interest between the parties sued and those charged." Whether a sufficient identity of interest exists depends on several factors, including:

> (1) whether the role of the unnamed party could, through reasonable effort by the complainant, be ascertained when the charge is filed;
> (2) whether, under the circumstances, the named party's interests are so similar to the unnamed party's that, for the purpose of obtaining voluntary conciliation and compliance, it would be unnecessary to include the unnamed party in the administrative proceedings;
> (3) whether its absence from the administrative proceedings resulted in actual prejudice to the interests of the unnamed party; and
> (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Finding that the trial court had not considered these factors before granting summary judgment, the court vacated the summary judgment award and remanded to the trial court.

Under *Hill*, then, in some circumstances, an individual employee can be liable as an "employer" under the MHRA, even if not named in the charge. This holding, combined with the expansion of the *Daugherty* contributing factor holding, makes Missouri state court ever friendlier to the employee plaintiff. The *Hill* decision, along with other state court decisions in the last five years, also makes it increasingly unlikely that an employer will obtain summary judgment in a state court venue. While it had become all the more common for plaintiffs to name individual supervisors in MHRA cases, it is expected that, after *Hill*, individual defendants will almost certainly be named, often in an attempt to defeat an employer's ability to remove a case to federal court.

Missouri employers and supervisors wishing to avoid such liability should be aware of the increasing ease with which employees can sustain discrimination claims and, thus, increase training, monitoring and compliance accordingly.

Wallace v. DTG – Acceptance of _Hill_ at the federal level

In *Wallace v. DTG Operations, Inc.*, 563 F.3d 357 (8th Cir. 2009), *available at* http://www.ca8.uscourts.gov/opndir/06/03/043345P.pdf, plaintiff Terri Wallace, who had initially brought both federal and state claims against defendant DTG, won a jury verdict on her state law retaliation claims.

DTG argued that the retaliation claim should not be decided under the *Daugherty* "contributing factor." Instead, DTG argued for the federal "determinative factor" standard. On the contrary, plaintiff argued that *Daugherty* controlled. Because *Hill* was decided between the end of Wallace's initial trial and DTG's appeal, the Eighth Circuit held that *Hill* was new controlling authority and that the "contributing factor" test of *Daugherty* applies to retaliation claims as well as discrimination claims.

Wallace is significant because the Eighth Circuit recognized that a previously unsettled question in employment discrimination litigation under the MHRA had now been conclusively determined. Just as with *Hill, Wallace* stands for the proposition that state law retaliation claims are to be decided under the same standards as other discrimination and harassment claims under the newly expanded holding of *Daugherty*. Thus, plaintiffs need only meet the "contributing factor" test to prove their case.

***Wallingsford:* Constructive Discharge and Untimely Claims**

Finally, the Missouri Supreme Court recently ruled in *Wallingsford v. City of Maplewood,* __ S.W.3d __, 2009 WL 1872110 (June 30, 2009), *available at* http://www.courts.mo.gov/file.asp?id=33032, held that a constructive discharge stemming from acts of unlawful discrimination can constitute an alleged act of discrimination sufficient to satisfy the 180-day requirement for filing a charge of discrimination.

Plaintiff Wallingsford, a female police officer, filed a charge of discrimination against the city on January 20, 2005, alleging, among other things, a hostile work environment and retaliation based on discriminatory actions such as abusive treatment by male colleagues, "baseless internal investigations," failure to promote, and "sham evaluations."

Specifically, Wallingsford claimed that the alleged discrimination continued throughout the course of her employment, up to and including her "constructive discharge" on August 30, 2004. Based on the date of her MHRC complaint, the court reasoned that she would have to allege some discriminatory act occurring after July 24, 2004, to meet the requirement that complainants file within 180 days of an alleged act of discrimination under Mo. Rev. Stat. § 213.075(1).

The City ultimately argued that the only act of discrimination that plaintiff alleged occurred June 15, 2004, when the City informed her that her termination appeared inevitable based on the results of an internal investigation. Therefore, it filed a motion to dismiss Wallingsford's claim as untimely in light of the 180-day requirement. The lower court treated the motion to dismiss as a motion for summary judgment, which it granted in favor of the City. The Missouri Supreme Court disagreed and remanded the case.

First, the court noted that the 180-day filing requirement under the act is subject to the "continuing violation" exception, where a plaintiff can recover for acts occurring before the 180-day period if the discrimination is part of a series of interrelated events. The court reasoned that constructive discharge resulting from unlawful discrimination could constitute an alleged act of discrimination sufficient to satisfy the 180-day filing period required by the MHRA. According to the court, a constructive discharge claim, by its very nature, requires proof of not just a single incident, but rather a continuous pattern of discrimination. Such a pattern would be a "series of interrelated events," which would allow for the constructive discharge to constitute part of a continuing violation. Thus, a plaintiff may be able to recover for discriminatory acts outside of the 180-day filing period, so long as she has filed her charge within 180 days of the constructive discharge.

While technical elements of Missouri summary judgment procedure outside the scope of this summary underlie this decision, the court did note that constructive discharge claims are fact intensive and thus not readily amenable to summary judgment disposition. Although different from *Hill* and *Wallace*, this case arguably expands employees' ability to recover under the MHRA by expanding the definition of a timely claim. The case also reiterates the notion that an employee's voluntary resignation can constitute an act of discrimination under the MHRA.

Conclusion

In sum, these recent MHRA cases have made plaintiffs' job in employment discrimination litigation substantially easier—hostile work environment claims, retaliation claims and other similar forms of discrimination will be considered under the same *Daugherty* standard. As a result, plaintiffs need to prove only that the discrimination was a contributing factor in the employment action and was not necessarily determinative. And it is now clear that plaintiffs can sue individual employees so long as those employees were directly acting in the employer's interest, as is often the case with supervisors. Individuals can also be named in the civil lawsuit even when not named in the initial administrative charge, where allowing the suit is not contrary to the purposes of the naming requirement. Finally, if an employee alleges discrimination which made work conditions intolerable to the reasonable person, that employee can voluntarily resign and then file a claim within 180 days of that resignation based on conduct pre-dating the statutory time period.

Employers wishing to minimize their liability under the MHRA should therefore be vigilant not only in maintaining a comprehensive sexual harassment policy, but also in training and enforcing that policy at all organization levels. Prompt and thorough investigations of sexual harassment claims are critical, as are employment actions that do not punish employees for filing claims or for making complaints to supervisory personnel other than the alleged harasser.

The MHRA's "contributing factor" test will make claims easier for plaintiff-employees to bring, so employment decisions should be made based on clear, facially-neutral factors. Non-discriminatory reasons for adverse employment actions should be provided and consistently asserted.

Finally, continuing patterns of behavior can expand the time frame during which discrimination claims can be filed. While the filing of a claim is somewhat outside employers' control, the continuing patterns which can expand this window are not. Thorough claims investigation and enforcement of sexual harassment and equal employment opportunity policies remain crucial in minimizing liability.