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Discrimination after Daugherty: Are Missouri Courts Contributing to or Motivated by the Number of Cases on the Discrimination Docket

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Discrimination After *Daugherty*: Are Missouri Courts "Contributing to" or "Motivated By" the Number of Cases on the Discrimination Docket?

Daugherty v. City of Maryland Heights[1]

I. INTRODUCTION

For more than twenty years, Missouri courts have applied the federal *McDonnell Douglas* burden-shifting analysis to determine the outcome of a defendant's motion for summary judgment in claims of employment discrimination.[2] However, the Missouri Supreme Court recently abandoned the *McDonnell Douglas* framework in favor of a new method of analysis derived from a Missouri Approved Jury Instruction. This new analysis has become known as the "contributing factor" test.

In the months since *Daugherty*, controversy has surrounded this standard.[3] Many defense attorneys claim that the "contributing factor" test significantly lowers the bar that a discrimination plaintiff must meet in order to defeat a defendant's motion for summary judgment.[4] Pre-*Daugherty*, plaintiffs had to prove the unlawful discrimination was a "motivating factor."[5] Among other procedural changes, plaintiffs in a post-*Daugherty* case must show the discrimination was a "contributing factor" in the challenged employment decision.[6] Employers argue that this perceived change puts them at a great disadvantage.[7]

While it is true that the shift to a new method of analysis has lessened the burden on plaintiffs who are trying to keep their claim alive, whether the language of the test refers to "contributing factors" or "motivating factors" should be of little concern. This note will argue that the true concern with the Missouri Supreme Court's decision in *Daugherty* lies in the fact that a plaintiff is no longer required to rebut a defendant's reasons for the alleged discrimination in order to survive summary judgment. This significantly lessens

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1. 231 S.W.3d 814 (Mo. 2007) (en banc).

2. *See, e.g.*, Midstate Oil Co. v. Mo. Comm'n on Human Rights, 679 S.W.2d 842 (Mo. 1984) (en banc).

3. See *infra notes* 113-115.

4. *Id.*

5. *See, e.g.*, Daugherty v. City of Maryland Heights, No. ED 86438, 2006 WL 1736348, at *7 (Mo. App. E.D. 2006), *rev'd*, 231 S.W.3d 814 (Mo. 2007) (en banc).

6. *Daugherty*, 231 S.W.3d at 820.

7. See *infra notes 113-115.*

the procedural burden placed on plaintiffs, which will likely result in more employment discrimination claims being heard in Missouri Courts.

II. FACTS AND HOLDING

After working as an officer with the police department of Maryland Heights, Missouri for eighteen years, Douglas Daugherty was terminated from his employment in November of 2002.[8] In firing Daugherty, the City of Maryland Heights maintained that Daugherty was unable to perform certain essential functions of his job after he began to suffer from complications resulting from an on-the-job accident. The City then gave Daugherty the option to take early disability retirement to avoid termination.[9] When Daugherty did not exercise that option, he was terminated.[10]

Daugherty's physical problems started shortly after he began working as an officer in Maryland Heights when he was struck by a drunk driver while supervising an accident scene.[11] As a result, he sustained serious back injuries which kept him from working for over a year; however, he eventually he returned to active duty.[12] Approximately twelve years later, Daugherty was promoted to the rank of captain.[13] Shortly after this promotion, Daugherty missed several months of work due to complications from his prior back injury.[14]

In 2002, after chronic absenteeism because of his injury, the City required Daugherty to undergo an examination by a physician to determine his "fitness for duty."[15] The Deputy Chief of Police for the City created a memorandum, to be used by the physician evaluating Daugherty, spelling out what the Deputy Chief believed were the essential functions of Daugherty's job.[16] In creating the memorandum the Deputy Chief used both the City's official position description,[17] as well as his own beliefs about what was required of

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8. *Id.* at 816-17. Daugherty began working as a police officer for the City in 1986, following employment as an officer elsewhere in the state of Missouri. *Id.*

9. *Id.* at 817. The City claimed that all officers, even captains such as Daugherty, must be able to perform front-line officer duties, such as chasing suspects and running up stairs. *Id.* at 823.

10. *Id.* at 817.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* The 1986 injury required Daugherty to undergo surgery for degenerative spine disease and to use narcotic prescription medications for pain relief. *Id.*

15. *Id.* The fact that the City could require officers to undergo "fitness for duty" exams was undisputed in this case. *Id.*

16. *Id.* at 822.

17. *Id.* at 822-23. The memorandum listed several requirements found in the City's official position description of the job, including "[c]onduct[ing] follow-up investigations of crimes committed . . . seek[ing] out and question[ing] victims . . . and arrest[ing] offenders." *Id.* at 823. The physical demands listed in the memoran-

an employee in Daugherty's position, many of which were significantly more demanding than those listed in the official description.[18] Despite the physical demands spelled out in the Deputy Chief's memorandum, other officers in the department testified that they viewed Daugherty's position as merely supervisory in nature,[19] making it highly unlikely that he would ever face a situation which would require such physical activities.

After the evaluating physician determined that Daugherty was unable to perform the duties listed in the memorandum, the City terminated Daugherty's employment.[20] Upon learning of his termination, Daugherty met with his supervisor to discuss the decision.[21] Unknown to his supervisor, Daugherty made an audio recording of the conversation in which the supervisor stated "that the city administrator wanted to get rid of employees over the age of 55 because their salaries were costly to the City."[22] Daugherty told his supervisor that this was age discrimination, and the supervisor agreed.[23]

After receiving a right-to-sue letter from the Missouri Commission on Human Rights, Daugherty brought suit in the Circuit Court of St. Louis County, alleging that he was terminated due to his age and perceived disability in violation of the Missouri Human Rights Act (MHRA).[24] The City of Maryland Heights moved for, and was granted, summary judgment on the grounds that Daugherty's claim could not survive the *McDonnell Douglas* burden-shifting analysis, because he failed to establish a *prima facie* case on his claims for both age and disability discrimination.[25]

Daugherty appealed.[26] He claimed that the trial court erred in using the *McDonnell Douglas* burden-shifting analysis in light of the adoption of Missouri Approved Instruction 31.24 in 2005.[27] The Court of Appeals for the

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dum and the official description included: standing, sitting, walking, reaching, climbing, kneeling, and balancing. *Id.*

18. *Id.* The specifications added on this basis included: "chasing a suspect over fences, running up stairs, climbing over boxes or crawl[ing] under equipment stored in warehouses." *Id.* They also included activities such as climbing ladders, jumping out of windows, and dragging bodies. *Id.*

19. *Id.*

20. *Id.* at 817.

21. *Id.* The supervisor involved here, Chief Thomas O'Connor, is also Daugherty's brother-in-law. *Id.*

22. *Id.*

23. *Id.* The City argued that Chief O'Connor made the statements only to appease his brother-in-law, with regard to the termination. *Id.*

24. *Id.*

25. *Id.* at 817-18. See *infra* notes 41-44 and accompanying text for a discussion of the burden-shifting analysis.

26. Daugherty v. City of Maryland Heights, No. ED 86438, 2006 WL 176348, at *1 (Mo. App. E.D. 2006).

27. *Id.* at *3-*4. MAI 31.24 (2005) reads:

Your verdict must be for plaintiff if you believe: First, defendant (here insert the alleged discriminatory act . . .) plaintiff, and Second (here insert one or more protected

Eastern District of Missouri affirmed the lower court decision. Thus, the court upheld the application of the *McDonnell Douglas* burden-shifting analysis to determine whether Daugherty's claim should survive summary judgment.[28]

Daugherty then appealed to the Missouri Supreme Court, which reversed the decision of the lower courts.[29] The Missouri Supreme Court's decision effectively nullified the use of the *McDonnell Douglas* burden-shifting analysis for resolving motions for summary judgment in Missouri discrimination cases.[30] The court instead chose to employ the use of the language in the Missouri Approved Instruction to analyze the City's motion for summary judgment.[31] The court held that the standard used to evaluate motions for summary judgment should more closely reflect the language of the jury instruction and rely less on federal case law.[32]

III. LEGAL BACKGROUND

The Missouri Human Rights Act (MHRA) makes it unlawful for an employer to terminate the employment of an employee because of the worker's race, color, religion, national origin, sex, ancestry, age or disability.[33] An employee who believes her employer has acted in violation of the MHRA must file a complaint with the Missouri Commission on Human Rights (Commission).[34] Once the employee files her complaint with the Commission, she may choose to adjudicate her claim through the administrative procedures set forth by the Commission, or she may request a right-to-sue letter from the Commission.[35] Once the Commission issues a right-to-sue letter,

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classifications . . .) was a contributing factor in such (here, repeat alleged discriminatory act . . .), and Third, as a direct result of such conduct, plaintiff sustained damage.

28. *Daugherty*, 2006 WL 1736348, at *4. The court did not give a solid basis for its holding on this point, merely stating that "what a plaintiff needs to prove under an MAI instruction is very different from what a plaintiff needs to survive summary judgment." *Id.*

29. *Daugherty*, 231 S.W.3d 814.

30. *Id.* at 819.

31. *Id.* at 820 ("Analyzing summary judgment decisions under the standards set forth in MAI 31.24 is appropriate because a plaintiff has no higher standard to survive summary judgment than is required to submit a claim to a jury.").

32. *Id.* at 819.

33. MO. REV. STAT. § 213.055(1)(1)(a) (2000).

34. *Id.* § 213.075(1). The complaint must be made within 180 days of the alleged unlawful act or its reasonable discovery. *Id.*

35. *See, e.g.*, Stuart v. General Motors Corp., 217 F.3d 621, 630 (8th Cir. 2000) ("To initiate a claim under the MHRA a party must timely file an administrative complaint with MCHR [Missouri Commission on Human Rights] and either adjudicate the claim through the MCHR or obtain a right-to-sue letter.").

the employee may bring suit against the employer in an attempt to get equitable relief (such as job reinstatement), monetary damages, or both.[36]

Several federal statutes also make discrimination in the workplace unlawful. Title VII of the Civil Rights Act (Title VII) makes it unlawful for an employer to terminate an employee because of the employee's race, color, sex, or national origin.[37] The Americans with Disabilities Act (ADA) makes it unlawful for an employer to terminate an employee on the basis of a disability,[38] while the Age Discrimination in Employment Act (ADEA) makes it unlawful to terminate an employee because of the employee's age.[39] When an employee believes she has been terminated unlawfully, pursuant to one of the above statutes she must file a complaint with the Equal Employment Opportunity Commission (EEOC).[40] Once the complaint has been made, the employee can choose to adjudicate her claim through the EEOC's procedures or she may request a right-to-sue letter and thus, bring her suit in court.[41]

An employee may, of course, bring claims under both the MHRA and one of the many federal statutes making discrimination in the workplace unlawful. Because both the federal and state statutes are closely related in interpretation and language, Missouri courts have often looked to federal case law to interpret the MHRA.[42]

A. Federal Case Law

One federal doctrine that the state courts consistently apply to cases under the MHRA is that which the United States Supreme Court announced in *McDonnell Douglas Corp. v. Green*.[43] Under what has become known as the *McDonnell Douglas* burden-shifting analysis, a plaintiff was first required to establish a *prima facie* case for discrimination.[44] After the plaintiff establish-

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36. MO. REV. STAT. § 213.111(1).

37. 42 U.S.C. § 2000(e)(2) (2000).

38. 42 U.S.C. § 12112.

39. 29 U.S.C. § 623.

40. *See, e.g.*, Stuart v. General Motors Corp., 217 F.3d 621, 630 (8th Cir. 2000) ("In order to initiate a claim under Title VII a party must timely file a charge of discrimination with the EEOC and receive a right-to-sue letter.").

41. *Id.*

42. Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 ("Past MHRA cases have followed a pattern of analysis articulated by the federal courts.").

43. 411 U.S. 792 (1973).

44. *Id.* at 802. The elements of a *prima facie* case may change depending on the type of discrimination alleged. In an age discrimination claim, to make a *prima facie* case the plaintiff must "show that: (1) he is a member of a protected age group, (2) he met the applicable job qualification, (3) he was discharged by his employer, and (4) he was replaced by a younger employee." Daugherty v. City of Maryland Heights, No. ED 86438, 2006 WL 176348, at *6 (Mo. App. E.D. 2006) (citing Schierhoff v. GlaxoSmithKline Consumer Healthcare, L.P., 444 F.3d 961, 965 (8th Cir. 2006)). In a disability discrimination claim the plaintiff must "show that: (1) he is a member of a

es a *prima facie* case, the burden then shifts to the defendant employer to rebut the plaintiff's claim by showing a non-discriminatory reason for the action taken.[45] Finally, the burden shifts back to the plaintiff to establish that the reason given by the defendant is merely a pretext for the discriminatory action.[46]

In *McDonnell Douglas*, the plaintiff brought suit against the McDonnell Douglas Corporation for alleged acts of racial discrimination.[47] The plaintiff claimed that the company had refused to rehire him "because of his race and color" and his participation in the civil rights movement, all in violation of Title VII.[48] The trial court dismissed the plaintiff's claims;[49] however, the Court of Appeals for the Eighth Circuit reversed and remanded the case.[50] In doing so, the Court of Appeals made an attempt to set forth guidelines for the lower court to follow in determining the outcome of the plaintiff's claim.[51] The United States Supreme Court granted certiorari, noting that the three Court of Appeals judges demonstrated a "lack of harmony" in their attempt to set forth guidelines to address the issue and thus, created the burden-shifting analysis mentioned above.[52]

The Supreme Court has returned to the decision in *McDonnell Douglas* on numerous occasions, often reversing the judgment of a lower court in order to make some clarification regarding the burden-shifting analysis. For example, in *Texas Department of Community Affairs v. Burdine*, the United States Supreme Court took pains to clarify the "evidentiary burden placed upon the defendant" under the *McDonnell Douglas* burden-shifting analysis.[53] In *Burdine*, an accounting clerk was denied a promotion and later terminated from her employment while her employer retained her male counterpart.[54] After a bench trial, the district court ruled in favor of the defendant.[55] The Court of Appeals for the Fifth Circuit reversed, holding that the defendant employer was required to prove by a preponderance of the evidence that

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protected class because he has a disability as defined by the MHRA, (2) he was discharged by his employer, and (3) there is evidence to infer that the disability was a factor in his discharge." *Id.* at *7 (citing Medley v. Valentine Radford Commc'ns, 173 S.W.3d 315, 321 (Mo. App. W.D. 2005)).

45. McDonnell Douglas, 411 U.S. at 802.

46. *Id.* at 804.

47. *Id.* at 797.

48. *Id.* at 801.

49. *Id.* at 797 ("The District Court . . . dismissed the latter claim or racial discrimination . . . [and] found that [McDonnell Douglass Corp.'s] refusal to rehire [Green] was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities.").

50. *Id.* at 797-98.

51. *Id.* at 798.

52. *Id.* at 801.

53. 450 U.S. 248, 249 (1981).

54. *Id.* at 250-51.

55. *Id.* at 251.

it had a legitimate, non-discriminatory reason for the decision.[56] The Supreme Court vacated this decision, holding that the burden placed on the defendant – to articulate a non-discriminatory reason for the decision – was merely a statement of the proper burden of proof. Therefore, the defendant has a burden of *production* at this stage, not a burden of persuasion.[57]

The United States Supreme Court again visited the *McDonnell Douglas* framework in *St. Mary's Honor Center v. Hicks*.[58] In *Hicks*, the plaintiff was employed as a corrections officer by St. Mary's Honor Center, a halfway house run by the State of Missouri.[59] After a demotion and subsequent termination of his employment, the plaintiff brought a claim under Title VII, alleging that he was discharged on the basis of race.[60] The issue before the Court was whether the plaintiff, after producing evidence to show that the reasons the employer gave for the alleged discriminatory action were pretextual, was entitled to judgment as a matter of law.[61] The trial court found in favor of the defendant employer, holding that the plaintiff had failed to show the "crusade to terminate him" was racially motivated,[62] even though, as the trier of fact, the court did not believe the reasons the defendant employer gave for the discharge.[63] The Court of Appeals for the Eighth Circuit reversed this decision, holding that the plaintiff had been successful in showing that the reasons the defendant gave for the discharge were pre-textual, and thus the plaintiff was entitled to a judgment in his favor as a matter of law.[64]

The Supreme Court reversed the Eighth Circuit's decision.[65] In holding that the plaintiff was not entitled to judgment as a matter of law, the Court reasoned that the defendant employer's burden of production was satisfied, even if the trier of fact did not believe the reasons given for the employment decision.[66] Further, the Court said, once the defendant employer has met its burden of production, the *McDonnell Douglas* framework no longer ap-

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56. *Id.* at 252.

57. *Id.* at 257 ("The Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.").

58. 509 U.S. 502 (1993).

59. *Id.* at 504.

60. *Id.* at 505.

61. *Id.* at 504 ("We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of . . . Title VII . . . the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.").

62. *Id.* at 508.

63. *Id.*

64. *Id.* at 508-09.

65. *Id.* at 525.

66. *Id.* at 509-10.

plied.[67] At this point, the ultimate issue of whether intentional discrimination occurred is up to the trier of fact.[68] *Hicks*, while controversial, was not the last time the Supreme Court of the United States revisited and refined *McDonnell Douglas*.[69] The burden-shifting framework continues to be the basis of significant controversy and change with regard to the federal system.[70]

B. Missouri Case Law

The *McDonnell Douglas* burden-shifting analysis was formally adopted as applying to claims made under the MHRA in *Midstate Oil Co. v. Missouri Commission on Human Rights*.[71] In *Midstate Oil*, an employee claimed that her employment was terminated in violation of the MHRA after her employer learned she was pregnant.[72] The Missouri Commission on Human Rights found that the employer did, in fact, commit unlawful discriminatory acts and found in favor of the employee.[73] The defendant, Midstate Oil Company, appealed.[74] The Missouri Supreme Court overruled the Commission's findings, holding that they were not supported by substantial evidence,[75] but affirming the Commission's use of the *McDonnell Douglas* framework in its findings.[76] The court then took the opportunity to formally recognize that the

67. *Id.* at 510 ("If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant.").

68. *Id.* at 511 ("The defendant's 'production' . . . having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race." (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981)).

69. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (clarifying whether direct evidence of discrimination is required in order to obtain a jury instruction in a mixed-motive case); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (clarifying the "kind and amount of evidence necessary to sustain a jury's verdict" using the *McDonnell Douglas* framework); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (clarifying the required burdens of proof and production on parties when using the *McDonnell Douglas* framework in mixed-motive situations).

70. *See, e.g.*, *infra* note 123.

71. 679 S.W.2d 842 (Mo. 1984) (en banc). The Missouri Supreme Court adopted the analysis first articulated in *McDonnell Douglas v. Green* and later clarified by *Burdine*, but did not adopt the subsequent revisions and clarification on the analysis. *Id.*

72. *Id.* at 844.

73. *Id.* at 844-45.

74. *Id.* at 846-47.

75. *Id.* at 847.

76. *Id.* at 845-46.

McDonnell Douglas burden-shifting analysis should apply in all cases in Missouri alleging disparate treatment under the MHRA.[77]

Missouri courts, until recently, continually applied the *McDonnell Douglas* burden-shifting analysis to other claims of discrimination brought under the MHRA. In *H.S. v. Board of Regents, Southeast Missouri State University*, the Missouri Court of Appeals, Eastern District, applied the analysis to a claim of alleged disability discrimination involving Southeast Missouri State University.[78] In *H.S.*, the plaintiff alleged he was unlawfully terminated once his supervisors found out he had HIV.[79] The Court of Appeals affirmed the trial court's use of the *McDonnell Douglas* burden-shifting analysis in determining that the University unlawfully discriminated against the plaintiff.[80]

A substantial change in Missouri's anti-discrimination law occurred in 2003 when the Missouri Supreme Court decided *Diehl v. O'Malley*,[81] which first gave plaintiffs the constitutional right to a jury trial under the MHRA. In *Diehl*, the plaintiff brought a petition for monetary damages against her employer, alleging she was discriminated against on the basis of her age and sex.[82] The plaintiff filed a motion for a jury trial, which the court subsequently denied.[83] The trial court based this decision on previous Missouri precedent which required claims brought under the MHRA be tried to the court, not to a jury.[84] The plaintiff then filed for a writ of prohibition, and a preliminary writ was granted which required the Missouri Supreme Court to further examine the issue.

The Missouri Supreme Court then embarked on a careful historical analysis regarding whether, if such a cause of action had existed, a jury trial would have been available at the time of the Missouri Constitution's inception.[85] The court concluded that the claim in *Diehl* was analogous to actions which were granted a jury trial at the time of the State's original constitution

77. *Id.* ("We believe this approach offers a 'sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical questions of discrimination.' Accordingly, we hold that disparate treatment claims under § 296.020 should be tried and evaluated under the methodology set forth in McDonnell Douglas." (internal citation omitted)).

78. 967 S.W.2d 665 (Mo. App. E.D. 1998).

79. *Id.*

80. *Id.* at 670 ("A three-step burden-shifting framework for discrimination cases is set out in McDonnell Douglas Corp. v. Green; this framework also applies here. The framework is used to progressively sharpen the inquiry into the question of whether intentional discrimination has occurred." (internal citation omitted)).

81. 95 S.W.3d 82 (Mo. 2003) (en banc). Previously, Missouri courts had interpreted the MHRA as granting only the right to a bench trial. *Id.*

82. *Id.* at 84.

83. *Id.*

84. *See* State *ex rel.* Tolbert v. Sweeney, 828 S.W.2d 929 (Mo. App. S.D. 1992).

85. *Id.* at 85-89.

and therefore held that a jury trial should be granted to all plaintiffs bringing claims for monetary damages under the MHRA.[86]

Although the Missouri Supreme Court did not recognize a constitutional right to a jury trial pre-*Diehl*, federal courts had long held that plaintiffs in employment discrimination cases pending in federal court had the right to a jury trial under the Seventh Amendment.[87] Thus, prior to *Diehl*, plaintiffs were required to bring claims in federal court under both the MHRA and Title VII in order to assure access to a jury.[88] The Missouri Supreme Court recognized that this procedural requirement could lead to "forum-shopping," encouraging more plaintiffs to bring claims under both Title VII and the MHRA in federal court.[89] This appeared to be a major influential factor in the court's decision in *Diehl*, as the Missouri Supreme Court stated, "[w]hile there are differences between a federal and state court– including differences as to the composition and procedural rules related to juries– that may influence forum selection by either side, the presence or absence of a jury should not be one of them."[90]

The court's decision in *Diehl* led to the drafting and subsequent adoption of Missouri Approved Instruction 31.24, which requires a verdict for the plaintiff employee if the jury believes the employee's protected characteristic – race, color, religion, national origin, sex, ancestry, age, or disability – was a contributing factor in the employer's decision.[91] This instruction came under fire in 2006 when the Missouri Court of Appeals, Eastern District, was asked to consider whether the instruction misstates the substantive law of the MHRA in using the terms "contributing factor" rather than "motivating factor."[92]

In *McBryde v. Ritenour School District*, the plaintiff, an African-American high-school basketball coach, claimed he was disciplined more harshly than similarly situated white coaches at the school.[93] As a result, the

86. *Id.* at 92 ("Diehl's civil action for damages for a personal wrong is the kind of case triable by juries from the inception of the state's original constitution. The respondent judge's order overruling Diehl's request for a jury trial denied her constitutional right to a trial by jury under . . . the Missouri Constitution.").

87. *Id.* at 91; *see also* Gipson v. KAS Snacktime Co., 83 F.3d 225 (8th Cir. 1996) (holding that a MHRA claim in federal court (due to pendant jurisdiction) is subject to a jury trial under the Seventh Amendment).

88. *Diehl*, 95 S.W.3d at 91; *see, e.g.*, Sullivan v. Curators of the Univ. of Mo., 808 F. Supp. 1420 (E.D. Mo. 1992).

89. *Diehl*, 95 S.W.3d at n.18 ("The existence of the federal statute allowing claims to be removed to the federal court allows defendants a 'forum-shopping' option. The potential for federal court jurisdiction likewise influences a plaintiff's choice of claims and remedies.").

90. *Id.*

91. MAI 31.24 (2005).

92. McBryde v. Ritenour Sch. Dist., 207 S.W.3d 162, 169 (Mo. App. E.D. 2006).

93. *Id.* at 165, 167.

plaintiff filed a petition for damages under the MHRA.[94] The defendant school district argued that MAI 31.24 should not have been submitted to the jury because it used the "contributing factor" language while the previous case precedent used the "motivating factor" language.[95] In determining that the trial court did not err in submitting MAI 31.24 to the jury, the court held that "motivating factors" and "contributing factors" were essentially the same.[96] The court looked to the plain meaning of the language used in the instruction to determine that "motivating" is defined as "playing a part" or having a role in the decision and "contributing" is defined as "that [which] contributes a share in anything or has a part in producing the effect."[97] Because the two terms were so similar, the court upheld the use of MAI 31.24 and affirmed the trial court's decision.[98]

IV. INSTANT DECISION

In *Daugherty v. City of Maryland Heights*, the Missouri Supreme Court was asked to determine the appropriate standard for determining when a plaintiff bringing a MHRA claim can survive a defendant's motion for summary judgment.[99] In deciding this question, the court held that in order to survive summary judgment, the plaintiff must only show that that a genuine issue of fact exists as to whether the alleged discrimination was a contributing factor in the decision to terminate the employment of the plaintiff.[100]

The court noted that in prior decisions under the MHRA, the pertinent analysis focused on whether the employment decision was *motivated* by a discriminatory purpose.[101] To determine whether an employment decision was in fact motivated by such a purpose, Missouri courts had previously applied the *McDonnell Douglas* burden-shifting analysis.[102] In fact, both the trial and appellate level courts in the instant case used this analysis to grant summary judgment in favor of the defendant.[103] However, the Missouri Supreme Court abolished the use of this analysis in *Daugherty*.[104] It noted that

94. *Id.* at 167.
95. *Id.* at 169-70.
96. *Id.* at 170.
97. *Id.*
98. *Id.*
99. 231 S.W.3d 814, 817-18 (Mo. 2007) (en banc).
100. *Id.* at 820.
101. *Id.* at 819 ("Previously, MHRA discrimination analysis has focused on determining if a challenged employment decision was 'motivated' by an illegitimate purpose.").
102. *See, e.g.*, Midstate Oil v. Mo. Comm'n on Human Rights, 679 S.W.2d 842, 846 (Mo. 1984) (en banc).
103. Daugherty v. City of Maryland Heights, No. ED 86438, 2006 WL 1736348, *3-*4 (Mo. App. E.D. June 27, 2006).
104. *Daugherty*, 231 S.W.3d at 819.

the 2003 decision to allow jury trials in MHRA claims paved the way for the adoption of a MAI 31.24, which required that a plaintiff show the protected class status was a *contributing* factor in the employment decision.[105] Explaining that a plaintiff should not have to meet a higher burden to survive summary judgment than to succeed on a claim under the MHRA, the court adopted the jury instruction as the applicable test for analyzing claims for summary judgment.[106]

In supporting this proposition, the Missouri Supreme Court cited the Missouri Court of Appeals' decision,[107] stating that the language of the MHRA did not require a plaintiff to prove the discrimination was the only or determining factor in the decision to terminate the plaintiff's employment.[108] The Missouri Supreme Court also took pains to establish that they were not obligated to follow federal case law with regard to MHRA claims, noting that the MHRA differed in some respects from Title VII.[109] Finally, the court suggested that the language of the jury instruction more closely matched the language of the MHRA, and as a result, it was a better framework for deciding motions for summary judgment than the previously employed *McDonnell Douglas* burden-shifting analysis.[110]

After determining that the "contributing factor test" should be used to decide motions of summary judgment, the State Supreme Court went on to apply the test to the instant case. The court held that, with regard to Daugherty's age discrimination claim, the audio recording – in which Daugherty's supervisor told him the City was terminating the employment of older employees – established a genuine issue of material fact as to whether Daugherty's age was a contributing factor in the decision to terminate his employment.[111] With regard to Daugherty's claim of disability discrimination, the Court held that there was also a genuine issue of material fact as to whether perceived disability played a part in the City's decision to terminate Daugher-

105. *Id.* ("[T]his Court's 2003 decision holding that jury trials are available under the MHRA, followed by the adoption of a pattern verdict-directing instruction . . . in 2005, signals an opportunity to review the analysis applied in MHRA cases").

106. *Id.* at 820 ("Analyzing summary judgment decisions under the standards set forth in MAI 31.24 is appropriate because a plaintiff has no higher standard to survive summary judgment than is required to submit a claim to a jury.").

107. *Id.* at 819 (citing McBryde v. Ritenour Sch. Dist., 207 S.W.3d 162 (Mo. App. E.D. 2006)).

108. *Id.* ("[I]f consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient.").

109. *Id.* at 818-19 ("Missouri's discrimination safeguards under the MHRA, however, are not identical to the federal standards and can offer greater discrimination protection.").

110. *Id.* at 819 ("Missouri employment discrimination law in a post-MAI 31.24 environment should more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 and rely less on analysis developed through federal caselaw.").

111. *Id.* at 821.

ty's employment.[112] The Court noted that no other similarly situated officers were required to undergo "fitness for duty" examinations and that the memorandum listing the "essential functions" of Daugherty's job were not the official job functions of that position.[113] These issues, combined with the fact that Daugherty's own experts concluded he was capable of performing all the functions listed in the memorandum,[114] led the Court to determine that several issues of material fact existed as to whether perceived disability contributed to the decision to fire Daugherty.

V. COMMENT

The decision in *Daugherty* has created a fair amount of controversy, especially among defense attorneys.[115] Most of this controversy has centered on what it means for an illegitimate purpose to "motivate" an employment decision, as opposed to what it means for an illegitimate purpose to "contribute to" an employment decision.[116] Many believe Missouri courts are already biased in favor of plaintiffs and that the "contributing factor test" takes this bias a step further by granting an advantage to plaintiffs in these types of cases.[117] Such an analysis of the instant case is too simplistic and overlooks the true impact of *Daugherty* on MHRA claims.

Missouri courts, in *McBryde v. Rienour School District*,[118] had already established that the difference between "motivation" and "contribution" was merely a distinction without a difference.[119] The more accurate depiction of the change in Missouri discrimination law post-*Daugherty* is that, in order to survive summary judgment, plaintiffs no longer have the burden of producing evidence to show that any reason given by the defendant employer is merely a pretext for the discriminatory action. Once a plaintiff has established that there is at least a genuine issue of material fact as to whether he belongs to

112. *Id.* at 824.

113. *Id.*

114. *Id.* ("Daugherty's experts concluded that he was physically capable of performing his daily captain's duties and limited heavy work load duties.").

115. *See Judges Gone Wild – McDonnell Douglas Analysis Overruled in MHRA Discrimination Cases*, MMAA NEWSLETTER (Missouri Municipal League, Jefferson City, Mo.), Aug. 2007, *available at* http://mml.citycentralonline.com (follow "Attorneys Newsletters" hyperlink; then follow "2007 Newsletters" hyperlink; then follow "08-07 Newsletter" hyperlink). The editor comments, "This case drives another dagger into the hearts of employers in a climate that is already tilted to the extreme against employers in Missouri." *Id.*

116. *Id.*

117. *Id.*; *see also* Allison Retka, *Chief's Firing Creates a New Standard for Discrimination*, MO. LAW. WKLY., Aug. 20, 2007, at 10 ("It really gives a huge advantage to the employee side of the argument . . . . Employers' hands are tied.").

118. 207 S.W.3d 162 (Mo. App. E.D. 2006).

119. *Id.* at 170.

one of the classes of people protected under the MHRA,[120] the plaintiff must only establish that a genuine issue of material fact exists as to whether the class status played a role in the decision to terminate his employment.[121]

In eliminating this burden for plaintiffs, the Missouri Supreme Court has certainly changed the framework used to determine the outcome of summary judgment motions and lowered the burden of production placed on plaintiffs who want to keep their employment discrimination claim alive. As a result, it is not a stretch to believe that more cases brought under the MHRA will make it to trial and be heard by a jury and that Missouri courts are quickly becoming the forum of choice for plaintiff employees.

Prior to 2003, an employee who had suffered unlawful discrimination by her employer was required to bring claims under both federal and Missouri law in order to get her case before a jury. After the 2003 decision in *Diehl*, this was no longer the case.[122] An employee can now bring her claim solely under the MHRA and have the right to be heard by a jury. Post-*Diehl*, many speculated that MHRA claims would skyrocket, filling the Missouri dockets the way federal discrimination claims do in federal district courts.[123] This led to speculation that Missouri courts would begin to grant summary judgment more frequently, in order to deal with "junk cases" that could be clogging up the docket.[124]

Daugherty makes it clear that Missouri courts are not planning to use summary judgment more frequently as a tool to lessen the load on their dockets. In fact, it appears as though the Missouri Supreme Court is purposefully making state courts an attractive forum for employees who believe they have

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120. The MHRA creates eight protected classes: race, color, religion, national origin, sex, ancestry, age, and disability (which includes those incorrectly perceived as being disabled). MO. REV. STAT. § 213.055 (2000).

121. In *Daugherty*, the Missouri Supreme Court first found that there were genuine issues of material fact as to whether Daugherty was protected under the MHRA (as being incorrectly perceived as disabled by the City). Once this was established, the court went on to assess whether the perceived disability was a "contributing factor" in the City's decision to fire Daugherty. Daugherty v. City of Maryland Heights, 213 S.W.3d 814, 824 (Mo. 2007) (en banc).

122. *See supra* notes 78-88 and accompanying text.

123. Erin C. Hansen, State ex rel Diehl v. O'Malley *Breaks Down the Wall: The Right to Jury Trial in State Court Under the Missouri Human Rights Act*, 59 J. MO. B. 296, 304 (2003) ("[P]rior to *Diehl*, employment discrimination cases constituted 'more than a third of all federal civil cases,' the biggest chunk 'of claims on the federal civil docket.'" (quoting Dan Margolies, *Ruling Expected to Lead to More Employment Cases in Missouri Courts,* KANSAS CITY STAR, Feb. 4, 2003, at B1)).

124. *Id.* ("[W]hile summary judgment is granted much more frequently in federal court than in state court . . . state court judges will begin to grant summary judgment more liberally once they realize that it is the best way to deal with junk cases filed under the MHRA." (citing Judge Dean Whipple, Speech at Kansas City Missouri Bar Association Continuing Legal Education Seminar: New Venue for Employment Lawsuits: What Every Employment Litigator Should Know (Apr. 4, 2003))).

suffered unlawful discrimination. A plaintiff will have little, if any, incentive to bring a claim under federal law because (a) the federal claim is no longer necessary to get a jury trial and (b) her procedural burden to survive summary judgment is lower in state than in federal court.

It seems counter-intuitive for a court to take steps to make its forum more attractive than others. However, three explanations seem plausible in this situation. The first is that the decisions in *Diehl* and *Daugherty* together are an unacknowledged answer to the chaotic and muddled jurisprudence of the federal courts employing the *McDonnell Douglas* burden-shifting analysis.[125] It is no secret that the United States Supreme Court has revisited the burden-shifting framework numerous times in the years since its inception[126] and has revised the framework in ways that are more favorable to defendants rather than plaintiffs. If Missouri courts are looking to simplify the process of determining the outcome of an employment discrimination claim, following federal case law is certainly not the way to go.

The *Daugherty* framework is simpler in its application to claims of employment discrimination, giving both the parties to the suit and the courts a clearer picture of the burdens faced by the employee and the employer. In the end, this simpler framework may actually lead to fewer reversals of trial court decisions– if the lower courts are clear in their application of the law, there is less opportunity for mistakes to be made. Thus, while not apparent on its face, the *Daugherty* decision may actually serve to lessen the number of cases on the Missouri docket by creating a simpler application of the law, which will lead to fewer retrials of employment discrimination claims.

The second, and somewhat less plausible, argument for the Missouri Supreme Court's decision in *Daugherty* is that the Missouri Commission on Human Rights serves as an adequate buffer for getting rid of "junk cases" brought under the MHRA. One might hypothesize that if the Commission is able to quickly and efficiently make determinations on probable cause and conciliate discrimination claims to the satisfaction of both parties, the need for a stringent framework at summary judgment is unnecessary because fewer claims will be brought to court. In fact, in recent years the Commission has granted fewer right-to-sue letters to plaintiffs in discrimination claims,[127]

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125. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2229-31 (1995) ("It is no secret that the Supreme Court's Title VII jurisprudence cloaks substance in the 'curious garb' of procedure. When the Supreme Court talks about employment discrimination . . . it generally does so by creating and refining special proof structures. . . . This emphasis on procedure comes at the expense of discussions of what one naively might call 'substance.' . . . [T]he Supreme Court has taught us little in the past twenty-five years about what discrimination is, how pervasive it is, and how we are to recognize it in the world.").

126. *See supra* notes 50-67 and accompanying text.

127. Mo. Comm'n on Human Rights Case Statistics by Fiscal Year, available from the Commission by request. (From the years 2000 to 2005, approximately 25-30% of all discrimination claims brought before the Commission resulted in a right-

which may be one indication that the courts are counting on the Commission to be sure "junk" claims do not make it to the docket. However, if more employees feel that their claim will survive summary judgment and make it to a jury, more may opt to request right-to-sue letters rather than go through the administrative procedures of the Commission.

Finally, it may be that the State Supreme Court's sole purpose in deciding *Daugherty* was to bring the respective burdens of both parties in line with the law, as set forth by MAI 31.24. Making Missouri a significantly more attractive forum for plaintiffs than federal courts would merely be a collateral consequence of this purpose. If this is the case, Missouri courts may have to deal with a clogged docket until there is legislative reform to the MHRA and the applicable instruction. This legislation would necessarily make it more difficult for plaintiffs' claims to make it to trial and is already being advocated by some members of the defense bar.[128] In the meantime, lower courts may attempt to create nuances to the "contributing factor test" that will end in more grants of summary judgment. Some would argue that this is exactly what has happened to the *McDonnell Douglas* burden-shifting analysis in federal courts. So, while it appears for the time being that Missouri is moving away from federal case law in discrimination claims, we may soon find ourselves mirroring the chaos of the federal system.

VI. CONCLUSION

The Missouri Supreme Court's recent decision in *Daugherty* has certainly changed the framework used in determining the outcome of summary judgment motions in employment discrimination cases. This shift in analysis is one that clearly benefits the employee plaintiff and is likely to make Missouri a significantly more attractive forum for discrimination claims than federal courts. Whether the decision was a deliberate attempt to simplify the law and leave room for less error at the trial court level, a reliance on the Missouri Commission on Human Rights to adequately determine the outcome of cases, or an inadvertent means of attracting more litigation to the courts is yet to be determined.

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to-sue letter. In 2006 and 2007 this number significantly dropped to 11-12% of cases.).

128. Retka, *supra* note 117, at 10 ("This solidifies the need for legislative reform ...The problem for employers is that Missouri law hasn't been amended substantially in decades."); *see also* H.B. 1144, 94th Gen. Assem., Reg. Sess. (Mo. 2007) (which would change the definition of discrimination to "adverse actions motivated by [protected class] factors").