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Employees Beware: How SB 43 Takes Missouri Anti-Discrimination Law Too Far

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COMMENT

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ABSTRACT

SB 43 passed through the Missouri Legislature and was signed into law by Governor Eric Greitens on June 30, 2017. Ostensibly intended to bring Missouri's anti-discrimination law in line with analogous federal law, SB 43 amended the Missouri Human Rights Act and thereby improperly increased the legal burden on employment discrimination plaintiffs. This article examines the causation standards under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act and contrasts those with the newly-amended Missouri Human Rights Act to demonstrate just how far Missouri law has gone. In so doing, this article ultimately concludes that SB 43 has legalized employment discrimination in Missouri.

I. INTRODUCTION

On June 7, 2017, the National Association for the Advancement of Colored People ("NAACP") issued an unprecedented travel advisory for Missouri, warning citizens of the "looming danger" they face if spending time in, or traveling to the state.[1] The danger mentioned in the advisory stems from a variety of occurrences, including the recent racially-charged conflict at the University of Missouri and the fact that African Americans are 75% more likely than whites to be pulled over by police in the state.[2] The issue that ultimately precipitated the travel advisory, however, was the passage of Missouri Senate Bill 43 ("SB 43").[3] SB 43, dubbed a Jim Crow-style law by the NAACP,[4] significantly increases the burden of proof for plaintiffs in employment discrimination cases under the Missouri Human Rights Act ("MHRA") and makes it much more difficult for their claims to survive summary judgment.[5]

Prior to the passage of SB 43, the MHRA was harshly criticized as being too lenient on plaintiffs, and unfair to employers.[6] As such, supporters of the SB 43 insist that it provides necessary protection for businesses, and brings Missouri law in line with the legal standards under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA").[7] However, the new standard has taken Missouri law far beyond the federal standards identified by the Missouri legislature as the inspiration for their revision of Missouri employment discrimination law. A careful reading of state and federal anti-discrimination statutes reveals stark differences in language and interpretation between the current iteration of the MHRA and comparable federal laws, indicating an imbalance in the legal protections Missouri now provides to employers versus employees. Therefore, this article asserts that SB 43 has unjustly biased Missouri employment discrimination law in favor of employers, and in so doing has essentially legalized employment discrimination in Missouri.

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1.Nancy Coleman, *NAACP issues its first statewide travel advisory, for Missouri*, CNN (Aug. 3, 2017, 2:11 PM), https://www.cnn.com/2017/08/02/us/naacp-missouri-travel-advisory-trnd/index.html.

2. *Id.*

3. Ray Sanchez, *Here's why the NAACP says Missouri is unsafe for minorities*, CNN (Aug. 6, 2017, 4:24 PM), http://www.cnn.com/2017/08/06/us/missouri-naacp-travel-advisory/index.html; *see* S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).

4. *Travel Advisory for the State of Missouri*, NAT'L ASS'N FOR ADVANCEMENT COLORED PEOPLE (Aug. 2, 2017), http://www.naacp.org/latest/travel-advisory-state-missouri/.

5. Chris Tillery, *Employer friendly changes to Missouri employment laws: what you should know*, SEIGFREID BINGHAM, P.C., http://sb-kc.com/news/2017/05/changes-in-employer-friendly-laws-what-you-should-know/ (last visited Apr. 19, 2018) (noting that the MHRA is Missouri's primary anti-discrimination statute); *see* MO. REV. STAT. § 213.010 (2017).

6. Tillery, *supra* note 5 (noting that liability attaches under the Missouri standard if the protected class contributed even to the adverse employment decision even 1%); Amanda Stogsdill, *Discrimination after Daugherty: Are Missouri Courts "Contributing To" or "Motivated By" the Number of Cases on the Discrimination Docket?*, 73 MO. L. REV. 651, 651–52 (2008).

7. Rick Montgomery, *Greitens signs bill that raises standards for fired employees to win discrimination cases*, KAN. CITY STAR (June 30, 2017, 6:56 PM), http://www.kansascity.com/news/politics-government/article159183319.html.

To reach these points, section II of this article will begin by outlining the various causation standards in employment discrimination law. Section III of this article will then explain the nuances of language and interpretation standards under Title VII and the ADA by laying out the statutes and relevant federal case law. Next, Missouri courts' interpretation of the MHRA standard before and after SB 43 will be examined and compared to analogous federal law to demonstrate how far out of balance Missouri law has gone. Finally, this article will conclude by recommending that the "determinative influence" language added by SB 43 be struck from the MHRA and replaced with more equitable language in order to serve the interests of both employee-plaintiffs and employer-defendants.

II. LEGAL BACKGROUND

Under Title VII, the ADA, and the MHRA, employment discrimination occurs when an employer makes an adverse employment decision based on an individual's membership in a prescribed protected class.[8] Possible adverse employment decisions include (but are not limited to) failure to hire, discrimination related to compensation or terms of employment, or deprivation of employment opportunities.[9] In order to make a submissible case of employment discrimination under any statute, a plaintiff must show there was a causal connection between his or her membership in a protected class and the adverse employment decision.[10]

Differing judicial interpretations of the causation requirement have led to a spectrum of standards that employment discrimination plaintiffs must meet under the various anti-discrimination statutes.[11] At one end of the spectrum is the most plaintiff-friendly standard, known as the "contributing factor" standard.[12] To survive summary judgment in a contributing factor jurisdiction, a plaintiff must show (1) that he or she is a member of a protected class and (2) membership in that protected class *contributed to* the decision to terminate his or her employment.[13] Under this standard, liability attaches when the discriminatory factor contributed to the adverse employment decision *in any way* (e.g., even 1%).[14]

The middle ground of the spectrum, and the most commonly used, is known as the "motivating factor" standard.[15] Generally speaking, employment discrimination plaintiffs in a motivating factor jurisdiction must show (1) that he or she is a member of a protected class and (2) membership in that protected class was *a motivating factor* in the adverse employment decision, *even if other factors also motivated the decision*.[16] Thus, under the motivating factor standard, the discriminatory factor must do more than simply contribute to the decision, but need not have a determinative influence.

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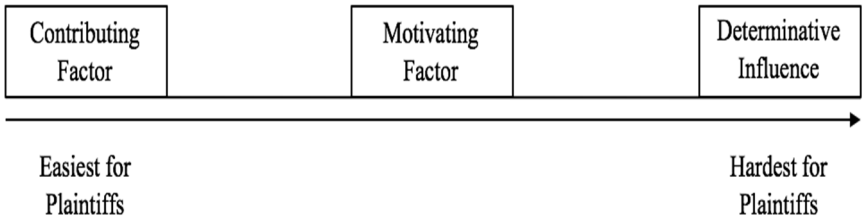
8. *See* 42 U.S.C. §§ 2000e-2, 12111 (2018); MO. REV. STAT. § 213.055.
9. *See* 42 U.S.C. §§ 2000e-2, 12111; MO. REV. STAT. § 213.055.
10. *See* 42 U.S.C. §§ 2000e-2, 12111; MO. REV. STAT. § 213.055.
11. *See* 42 U.S.C. §§ 2000e-2, 12111; MO. REV. STAT. § 213.055.
12. Stogsdill, *supra* note 6, at 663–64.
13. *Id.*; MO. APPROVED JURY INSTR. (Civil) 31.24 (6th ed.); Daugherty v. City of Md. Heights, 231 S.W.3d 814 (Mo. 2007) (emphasis added).
14. Tillery, *supra* note 5.
15. Note: As will be discussed in detail below, this is the standard used by Title VII, the ADA, and pre-*Daugherty* MHRA.
16. *See* 42 U.S.C. § 2000e.

The third, and least plaintiff-friendly standard is known either as the "determinative influence" or the "but-for causation" standard. Under the determinative influence standard, the plaintiff must show (1) that he or she is a member of a protected class and (2) the adverse employment decision *would not have been made without consideration of his or her protected class*.[17] In other words, the plaintiff must prove that the employer would not have made the adverse employment decision in the absence of discrimination. At this point, a visual representation of the standards may be helpful:



As will be discussed in detail below, Title VII and the ADA both sit in the middle of this spectrum by requiring that discrimination be a motivating factor in the adverse employment decision, but do not require the plaintiff's protected class to have a determinative influence.[18] On the other hand, for several years prior to the passage of SB 43, Missouri adhered to the contributing factor standard (the most plaintiff-friendly standard).[19] That standard made Missouri an outlier when compared to similar state and federal laws, and was criticized for protecting employees at the expense of employers.[20] Concern for business interests prompted legislative action — ultimately culminating in the passage of SB 43 and the elimination of the contributing factor test from the MHRA.[21]

However, despite ostensibly attempting to bring the state law in line with federal standards, Missouri lawmakers completely skipped the motivating factor standard, and instead opted to include determinative influence language in SB 43.[22] In other words, the new MHRA standard requires a plaintiff to prove that his or her protected class was the determining reason for the employer's adverse decision.[23] Thus, the MHRA went from one end of the spectrum (contributing factor) to the other (determinative influence), without consideration of the middle ground. As such, the MHRA is now severely biased in favor of employers and has maintained Missouri's status as an outlier in employment discrimination law.

17. 8TH CIR. CIVIL JURY INSTR. § 11.41 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

18. *Id.*; 42 U.S.C. § 12111.

19. *See* Daugherty v. City of Md. Heights, 231 S.W.3d 814 (Mo. 2007); Stogsdill, *supra* note 6, at 651–52.

20. Stogsdill, *supra* note 6, at 651–52.

21. MO. COMM. ON SMALL BUS. AND INDUS., SB 43 CURRENT BILL SUMMARY, No. 0524S.07T (2017).

22. S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); MO. REV. STAT. § 213.010 (2017).

23. Tillery, *supra* note 5.

In order to understand just how unjust Missouri law has become, consider a hypothetical. Employee is referred to Employer for discipline. It is Employee's second disciplinary infraction, and Employee is black. Employer takes both the policy violation and the Employee's race into account in his decision to fire Employee.

Under the contributing factor standard, Employer would be liable for discrimination because Employee's race contributed to its adverse employment decision. Similarly, Employer would likely be held liable for employment discrimination under the motivating factor standard, since Employee's race was a motivating factor in the adverse employment decision, even though a non-discriminatory factor also motivated the decision.

However, under the determinative influence standard created by SB 43, it would be legal for Employer to base its employment decision in part on Employee's race. Since Employer could have legally fired Employee for his infractions, Employer can claim that race did not have a determinative influence on the decision, despite it being one of the main considerations. Therefore, under the SB 43 standard, it is now legal for employers to discriminate against employees on the basis of protected characteristics, so long as the discriminatory factor was not determinative. Thus, SB 43 has essentially legalized employment discrimination under the MHRA.

III. STATE LAW VS. FEDERAL LAW: WHY DOES THIS MATTER?

When comparing state and federal law, a concern often arises that renders the discussion moot: if the state law is unattractive, plaintiffs may simply bring their claims under federal law instead.[24] This conclusion is especially true in the realm of anti-discrimination law, as the process for bringing an employment discrimination action is nearly identical under both federal law and Missouri law.[25] However, there are a few key distinctions that warrant further discussion.

By definition, Title VII and the ADA only allow discrimination claims to be brought against employers with 15 or more employees.[26] On the other hand, the MHRA allows victims of discrimination to bring claims against employers with at least six employees.[27] Likewise, under Missouri law, a plaintiff has two years from the date of discrimination to file in state court,[28] while federal law only gives plaintiffs 180 days from the date of discrimination to file.[29] Additionally, Title VII does not prohibit discrimination on the basis of an individual's ancestry.[30] The MHRA,

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24. *See generally* Aryeh S. Pornoy, Katherin J. Nesbitt, & Beth I. Goldman, *Forum Selection and* Forum Non Conveniens*: A Plaintiff's Perspective*, CROWELL & MORING LLP, https://www.crowell.com/documents/Forum-Selection-and-Forum-Non-Conveniens-A-Plaintiffs-Perspective.pdf (last visited Nov. 8, 2017) (noting that plaintiffs can select the forum in which to litigate, but should consider a variety of factors first).

25. Employment discrimination plaintiffs bringing a claim under the MHRA or Title VII both must file an administrative claim first. Then, after a statutorily specified amount of time, plaintiffs may file a civil suit in the appropriate court. However, it is worth noting that state courts have concurrent jurisdiction over ADA claims. *See* 42 U.S.C. § 2000e-5 (2018); MO. REV. STAT. §§ 213.075, 213.111.

26. 42 U.S.C. §§ 2000e, 12111.

27. MO. REV. STAT. § 213.010.

28. *Notice of Right to Sue*, MO. DEP'T LAB. & INDUST. REL., https://labor.mo.gov/mohumanrights/File_Complaint/right_to_sue#time (last visited Apr. 2, 2018).

29. *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/timeliness.cfm (last visited Apr. 2, 2018).

30. 42 U.S.C. § 2000e.

on the other hand, includes ancestry as a protected classification.[31] Thus, SB 43's relegation of employment discrimination plaintiffs to only federal law entirely eliminates a cause of action previously available to those discriminated against by an employer with less than 15 employees and individuals discriminated against due to their ancestry, and gives those remaining plaintiffs less than one-quarter of the time to file that they would have under Missouri law.

Furthermore, even for plaintiffs whose cause of action remains covered by Title VII and the ADA, bringing a federal employment discrimination claim is a daunting task. For example, in a study of federal civil cases from 1970 through 2006, federal employment discrimination plaintiffs won only 19.26% of the time, while all other plaintiffs won 45.53% of their cases.[32] According to the Equal Employment Opportunity Commission ("EEOC"), only about 15% of federally-based employment discrimination complaints filed with the EEOC resulted in any form of relief for plaintiffs.[33] Additionally, even when federal employment discrimination plaintiffs do garner relief in court, their victories are significantly more likely to be reversed than defense victories.[34]

All of these factors combine to drive employment discrimination plaintiffs back to state courts and state causes of action,[35] which SB 43 has now severely limited in Missouri. Thus, as is shown below, it is necessary to contrast Missouri law with federal law to determine exactly where Missouri has gone astray, and to ultimately suggest changes that provide a better legal balance in Missouri.

IV. "A MOTIVATING FACTOR" STANDARD UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 is a federal statute that bars employers from discriminating against employees based on the employee's membership in a protected class.[36] The first important difference between Title VII and SB 43 lies in the language of Title VII itself. In order to prevail on a claim under § 2000e-2, a plaintiff must show that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*"[37] Federal courts have interpreted this standard as significantly less demanding than the determinative influence standard promulgated by the SB 43 language.[38]

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31. MO. REV. STAT. § 213.010.

32. *Id.* at n. 3 (citing Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 105–06 (2009)).

33. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001).

34. Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671 (2012–2013).

35. *Id.* at 672 (citing Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009)).

36. 42 U.S.C. § 2000e-2 (2018) (protected classes are "race, color, religion, sex, or national origin").

37. *Id.* § 2000e-2(m) (emphasis added).

38. *See* Woodson v. Scott Paper Co., 109 F.3d 913, 933–35 (3rd Cir. 1997) (distinguishing between a "motivating factor" standard for Title VII discrimination claims and a "determinative effect" standard for Title VII retaliation claims); Rawlinson v. Whitney Nat'l Bank, 416 F. Supp. 2d 1263, 1268 (M.D. Ala. 2005) (holding that "[P]laintiff need only show that race was 'a' motivating factor; the plaintiff need not show that race was 'the' motivating factor."); Costa v. Desert Palace, 299 F.3d 838, 848 (9th Cir. 2002) (holding that "[I]f the employee succeeds in proving only that a protected characteristic was

Jury instructions are excellent examples of how this standard is applied in practice. Generally, jury instructions help juries determine "how to find facts on the basis of the evidence presented, and how to apply the law to those facts in order to arrive at a verdict."[39] The most pertinent jury instructions are those given at the end of the trial, in which the judge informs the jury about applicable law, legal definitions, and appropriate methods to make factual determinations.[40]

The Eighth Circuit (the federal circuit in which Missouri sits), provides clear jury instructions for Title VII cases. Eighth Circuit Civil Jury Instruction 5.21 is an excellent example of how the motivating factor standard is applied under Title VII.[41] As defined in that instruction, the plaintiff's protected classification is considered a motivating factor when it "played a part [or] a role"[42] in the employer's adverse decision, but does not have to be the only reason for the decision.[43] Additionally, in disparate treatment cases,[44] jurors are instructed to find for the plaintiff if (1) the defendant made an adverse employment decision regarding plaintiff and (2) the plaintiff's protected trait *played a part in the decision*.[45] Furthermore, the Eighth Circuit instructions formally differentiate between a determinative influence standard and the motivating factor standard used generally.[46] Overall, Eighth Circuit jury instructions indicate that liability generally attaches under a federal "motivating factor" standard when discrimination played into the adverse employment decision, but was not determinative.[47]

Furthermore, since 1991, Title VII holds an employer at least partially liable for discrimination even when it can prove that it would have made the same adverse employment decision in the absence of the discriminatory factor.[48] Prior to 1991, the "motivating factor" standard had its basis in *Price Waterhouse v. Hopkins*.[49] In *Price Waterhouse*, the Supreme Court crafted an exceedingly flexible notion of the

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one of several factors motivating the employment action, an employer cannot avoid liability altogether . . . .").

39. Christopher A. Young, *In Search of Consistency: Jury Instructions Under Rule 51 of the Federal Rules of Civil Procedure*, 83 IOWA L. REV. 471, 474 (1998).

40. *Id.*

41. 8TH CIR. CIVIL JURY INSTR. § 5.21 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

42. A note to this instruction cites to *Hazen Paper Co. v. Baggins* for the proposition that the protected trait must have had a determinative influence on the employer's decision. Hazen Paper Co. v. Baggins, 507 U.S. 604, 610 (1993). However, this is a misleading interpretation since *Hazen* is an age discrimination case under the ADEA, not a Title VII case. 8TH CIR. CIVIL JURY INSTR. § 5.21 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

43. 8TH CIR. CIVIL JURY INSTR. § 5.21 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

44. "Disparate treatment" includes discharge, failure to hire, failure to promote, and/or demotion. *See id.* § 5.40.

45. It is important to note that the Committee uses "played a part" and "motivating factor" interchangeably. *Id.* (emphasis added).

46. *Id.* (noting that a "determining factor" standard is only appropriate in pretext cases with indirect evidence).

47. *See generally id.*

48. 42 U.S.C. § 2000e-2 (2018).

49. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

term "motivating factor," defining it as any factor that "played a part in the employment decision."[50] On the other hand, the Court held that "when a plaintiff in a Title VII case proves that her [protected characteristic] played a motivating part in an employment decision," the defendant-employer can still escape liability by showing that it would have made the same decision even without considering the protected characteristic.[51] In other words, *Price Waterhouse* established a causation standard that required the discriminatory basis to have a determinative impact on the employment decision in order for liability to attach.[52]

In response to *Price Waterhouse*, Congress amended Title VII in 1991 to include (1) new motivating factor language and (2) a specific instruction that a court may grant limited relief where a defendant showed that it would have made the same decision in the absence of the discriminatory factor.[53] This amendment codified the flexible "motivating factor" definition set out in *Price Waterhouse* by indicating that the discriminatory basis *must be only one of many motivating factors* in order to be an impermissible employment action.[54] However, Congress also partially superseded *Price Waterhouse* by explicitly indicating that membership in a protected class need not be a determinative factor in the employment decision in order for liability to attach.[55] As a result, the motivating factor standard no longer necessitates a showing of determinative influence under Title VII.[56] Thus, although allegedly inciting the passage of SB 43, Title VII purposefully avoids imposing a determinative influence standard like the one now contained by the MHRA.

V. "ON THE BASIS OF" STANDARD UNDER THE AMERICANS WITH DISABILITIES ACT

The ADA is another federal anti-discrimination law cited by Missouri lawmakers as the inspiration behind SB 43.[57] The current language of the ADA makes it illegal to "discriminate against a qualified individual *on the basis of* disability . . . ."[58] An individual is considered to have a disability when, among other things, he or she has "a physical or mental impairment that substantially limits one or more major life activities."[59] Generally, the requisite standard under the ADA is analogous to the motivating factor standard in Title VII.[60] As such, the ADA standard

50. *Id.* at 241.
51. *Id.*
52. *Id.*
53. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (limiting plaintiff's relief under these circumstances to declaratory relief, attorneys' fees, and costs).
54. § 2000e-2(m).
55. Costa v. Desert Palace, 299 F.3d 838, 850–51 (9th Cir. 2002)
56. Note: Title VII retaliation claims still require a determinative, but-for causation standard. However, retaliation claims are not at issue in this article.
57. Montgomery, *supra* note 7.
58. 42 U.S.C. § 12112(a) (emphasis added).
59. *Id.* § 12102(1)(A). For the definition of "major life activities," *see* § 12102(2). For guidance regarding what "substantially limits" means, see *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www1.eeoc.gov//laws/regulations/adaaa_fact_sheet.cfm?renderforprint=1 (last visited Apr. 21, 2018).
60. *See* Pedigo v. P.A.M. Transp. Inc., 60 F.3d 1300 (8th Cir. 1995); Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); Tyndall v. Nat'l Educ. Ctrs., Inc. of California, 31 F.3d 209, 214 (4th Cir. 1994); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); Head v.

entitles an employee to some measure of relief "if he or she proves that his or her disability was a 'motivating factor' in the decision, 'even though other factors also motivated' the employer's decision."[61]

A. Confusion After Gross Decision

In 2009, the U.S. Supreme Court handed down a decision in *Gross v. FBL Financial Services* that cast a shadow of uncertainty on the causation standard under the ADA.[62] In *Gross*, the plaintiff-employee sued his former employer under the Age Discrimination in Employment Act of 1967 ("ADEA") for allegedly demoting him due to his age (54 years old).[63] The trial court and the Eighth Circuit both applied a motivating factor standard in finding for the defendant, which the plaintiff appealed to the Supreme Court.[64]

In a 5-4 decision, the Court held that the statutory language (specifically the words "because of") indicated that the ADEA mandates but-for causation.[65] In a nutshell, but-for causation requires plaintiff to show that the adverse employment decision would not have been made but for the plaintiff's age.[66] Although this case interpreted the ADEA, *not the ADA*, the two acts are so similar that the *Gross* holding casts some doubt on the correct standard under the ADA.[67]

B. ADA Standard Remains Analogous to Title VII "Motivating Factor"

Despite confusion from *Gross*, many federal courts have retained their use of the Title VII motivating factor standard for ADA claims in conjunction with the Act's broad intent. For example, §§ 9.40 (Actual Disability), 9.41 (Perceived Disability), and 9.43 (Constructive Discharge) of the Eighth Circuit Civil Jury Instructions recommend giving juries in ADA cases the exact motivating factor instruction

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Glacier Nw., Inc., 413 F.3d 1053 (9th Cir. 2005); Seam Park, *Curing Causation: Justifying a "Motivating-Factor" Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257, 258 (2004).

61. *Pedigo*, 60 F.3d at 1301 (quoting Title VII language to explain analogous ADA liability standard).

62. Gross v. FBL Fin. Servs., 557 U.S. 167 (2009).

63. *Id.* at 170.

64. *Id.*

65. *Id.* at 173–77 (explaining that but-for causation requires a showing that the adverse employment decision would not have been made if the plaintiff's age had not been considered).

66. *Id.* It is important to note that a but-for causation requirement is a much more stringent standard than "motivating factor." While it is not as difficult for plaintiffs to meet as a "sole factor" standard, but-for causation by definition requires the discrimination to have a determinative influence on the adverse employment decision.

67. *See generally* Michael C. Subit, *One Year and Counting: How Wide an Impact has Gross v. FBL Financial Services Inc. Had on the Appellate Courts?*, AM. B. ASS'N, https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/am/subit.authcheckdam.pdf (last visited Apr. 22, 2018)..

given for Title VII actions.[68] Furthermore, the notes for each of those sections directly cite *Pedigo v. P.A.M. Transportation Inc.*[69] for the proposition that "'motivating factor' is the proper phrase to use in the [ADA] instruction[s]."[70]

The legislative history surrounding the ADA and Title VII also indicates that the Title VII motivating factor standard is proper in ADA cases. First, Congress's codification of motivating factor language in Title VII was a direct response to the Supreme Court's Title VII analysis in *Price Waterhouse*.[71] That explicit and discrete reaction does not indicate an intentional omission of similar language in other discrimination statutes (e.g., the ADA).[72] In fact, the Court previously held that Congress's failure to amend similar anti-discrimination statues when it amended Title VII indicated that pre-1991 statutory interpretations of other statutes (including the ADA) still control.[73] Thus, the ADA's traditional use of the Title VII motivating factor standard continues today.[74]

Furthermore, the ADA is considered the legislative "progeny" of Title VII.[75] This designation is due in large part to the fact that, when it enacted the ADA, Congress indicated that the ADA should be "interpreted in a manner consistent with . . . Title VII."[76] Specifically, Congress instructed that "mixed motive cases involving disability under the ADA should be interpreted consistent with . . . [§] 5 of this Act."[77] Section 5 states that "an unlawful employment practice is established when" a plaintiff shows that his or her protected trait played a role in the decision, even if the trait was not determinative.[78] Therefore, Congress demonstrated a clear intent for the ADA liability standard to be identical to the motivating factor standard found within Title VII.

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68. 8TH CIR. CIVIL JURY INSTR. §§ 9.40, 9.41, 9.43, 5.21 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

69. Pedigo v. P.A.M. Transp. Inc., 60 F.3d 1300 (8th Cir. 1995).

70. 8TH CIR. CIVIL JURY INSTR. §§ 9.40, 9.41, 9.43 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf. Unlike jury instructions in other circuits, no mention of *Gross* is made.

71. *Gross*, 557 U.S. at 185 (Stevens, J., dissenting); *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

72. *Gross*, 557 U.S. at 185 (Stevens, J., dissenting).

73. *Id.* (Stevens, J., dissenting) (citing Smith v. City of Jackson, 544 U.S. 228, 240 (2005)).

74. *See e.g.*, Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008); *Pedigo*, 60 F.3d 1300; Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); Tyndall v. Nat'l Educ. Ctrs., Inc. of California, 31 F.3d 209, 214 (4th Cir. 1994); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); Head v. Glacier Nw., Inc., 413 F.3d 1053 (9th Cir. 2005); *See also* Park, *supra* note 60, at 258.

75. Robert D. Dinerstein, *The Americans with Disabilities Act of 1990: Progeny of the Civil Rights Act of 1964*, AM. B. ASS'N: HUM. RTS. (2004), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_disable.html.

76. Park, *supra* note 60, at 269 (quoting H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 696–97).

77. *Id.* at 270. *See* Adeleke v. Dall. Area Rapid Transit, No. 11-10987, 2012 WL 3655341, at *902 (5th Cir. Aug. 27, 2012); 8TH CIR. CIVIL JURY INSTR. §§ 9.40, 9.41, 9.43, 5.21 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

78. Park, *supra* note 60, at 270 (quoting H.R. REP. NO. 102-40, pt. 2, at 16–17 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 696–97).

Although *Gross* caused mild confusion, the ADA's "on the basis of" standard remains identical to Title VII's motivating factor standard due to (1) its interpretation by federal circuits[79] and (2) its clear legislative history.[80] Consequently, much like Title VII, the ADA does not require a plaintiff's disability to have a determinative influence on the adverse employment decision in order for liability to attach. Therefore, despite being cited as a key inspiration for SB 43,[81] the ADA stops far short of the determinative influence standard required under the MHRA.

VI. MISSOURI EMPLOYMENT DISCRIMINATION LAW UNDER THE MHRA

The MHRA is a Missouri statute that prevents discrimination in housing, employment, and places of public accommodations "based on race, color, religion, national origin, ancestry, sex, disability, age (in employment only), and familial status (in housing only)."[82] The MHRA became law in 1961, with the intent of providing employees with a cause of action for workplace discrimination.[83] Accordingly, in 2003 two Supreme Court of Missouri cases paved the way for the adoption of the "contributing factor" standard established in *Daugherty v. City of Maryland Heights*.[84] First, in *State ex rel. Diehl v. O'Malley*, the Supreme Court of Missouri held that plaintiffs are entitled to a jury trial under the MHRA.[85] Second, in 2005, Missouri adopted a new pattern jury instruction for MHRA claims (Instruction 31.24).[86] Missouri Approved Instruction 31.24 ("MAI 31.24") indicated that MHRA plaintiffs should prevail if the jury finds that the protected classification was a *contributing factor* in the employment decision.[87]

As a result of those two developments, the case of *Daugherty v. City of Maryland Heights* reached the Supreme Court of Missouri in 2007.[88] In its holding, the court severed the relationship between Missouri law and Title VII, and instead held that the appropriate MHRA standard was the one created by Missouri Approved Instruction 31.24 — essentially a contributing factor standard.[89] *Daugherty* specif-

79. *See Adeleke*, 2012 WL 3655341, at *902; 8TH CIR. CIVIL JURY INSTR. §§ 9.40, 9.41, 9.43, 5.21 (2017), *available at* http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

80. Park, *supra* note 60, at 270.

81. Montgomery, *supra* note 7.

82. *Discrimination*, MO. DEP'T LAB. & INDUS. REL., https://labor.mo.gov/discrimination (last visited Apr. 22, 2018).

83. Dane C. Martin, *The Employees' Decade: Recent Developments Under the MHRA and the Employers' Potential Rebound*, 75 MO. L. REV. 1349, 1350 (2010).

84. Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41, 111 (2012); *see also* Daugherty v. City of Md. Heights, 231 S.W.3d 814 (Mo. 2007).

85. Henson, *supra* note 84, at 111; State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 92 (Mo. 2003). Before the decision in *O'Malley*, Missouri did not recognize MHRA plaintiffs' constitutional right to a jury trial.

86. Henson, *supra* note 84, at 112 (citing MO. APPROVED JURY INSTR. (Civil) 31.24 (6th ed.)).

87. *Id.*

88. Stogsdill, *supra* note 6, at 661; *Daugherty*, 231 S.W.3d at 814.

89. Stogsdill, *supra* note 6, at 654; *Daugherty*, 231 S.W.3d at 820; MO. APPROVED JURY INSTR. (Civil) 31.24 (6th ed.).

ically stated that "MHRA plaintiffs need not prove 'that discrimination was a substantial or determining factor in [a discriminatory] employment decision.'"[90] Consequently, Missouri courts interpreted *Daugherty* as requiring a contributing factor standard under the MHRA.[91] Thus, from 2007 to 2017, an employment discrimination plaintiff simply had to show that the discriminatory factor contributed to the adverse employment decision at all in order to make a submissible case under the MHRA.[92]

A. Senate Bill 43: Intent, Circumstances, and Implications

The *Daugherty* decision was almost immediately criticized by employers.[93] The contributing factor standard made Missouri an outlier, and lowered the bar for plaintiffs below similar federal standards.[94] Employers claimed that the contributing factor standard was too easy for plaintiffs to meet and thus allowed even weak claims to make it to trial.[95] When *Daugherty* abolished the motivating factor standard in Missouri, employers felt they "lost an important defense tool" and now bore an unfair burden to litigate frivolous claims.[96]

In response to heavy backlash from employers (and the attorneys who represent them), the Missouri Legislature introduced several bills to amend the MHRA.[97] However, none of the proposed changes were successful until SB 43.[98] SB 43 was introduced on December 1, 2016 by Senator Gary Romine.[99] As introduced, SB 43 contained "because of" and "motivating factor" language mirroring the language in the ADA and Title VII.[100] However, when it came out of the Senate Committee on Small Business and Industry, SB 43's motivating factor language had been replaced by a but-for causation standard.[101] Specifically, the bill defined "because of" as "the adverse decision or action would not have been made or taken *but for* the employee's protected classification."[102]

Although the but-for language was eventually abandoned in favor of the term "motivating factor," the enacted version of the bill retained the intended but-for

90. Walsh v. City of Kan. City, 481 S.W.3d 97, 106 n. 3 (Mo. Ct. App. 2016) (quoting Daugherty v. City of Md. Heights, 231 S.W.3d 814, 819 (Mo. 2007) (noting that the MHRA may provide greater protection and a lower procedural standard that Title VII).

91. Stogsdill, *supra* note 6, at 651.

92. *Id.* at 654; *see also* Templemire v. W & M Welding, Inc., 433 S.W.3d 371, 383 (Mo. 2014); *Walsh*, 481 S.W.3d at 106.

93. Brain P. Pezza, Anne R. Kerns & Michael Armstrong, *Relief for Missouri Employers with New Discrimination Legislation*, LEXOLOGY (May 10, 2017), https://www.lexology.com/library/detail.aspx?g=136a44a6-43b2-4ef7-bfa2-bc9082860ab1.

94. *Id.*

95. *Id.*

96. *Id.*

97. Martin, *supra* note 83, at 1363–64 (noting that from 2009-2010 alone "three bills arose before the Senate and six before the House of Representatives that proposed changes to the MHRA").

98. *Id.*

99. S. 43, 99th Gen. Assemb., Reg. Sess. (as introduced by Senate, Dec. 1, 2016); *Bills Sponsored by Senator Romine*, MO. SENATE, http://www.senate.mo.gov/17info/bts_web/sponsoredby.aspx?SessionType=R&legislatorid=400 (last visited Apr. 22, 2018).

100. S. 43, 99th Gen. Assemb., Reg. Sess. (as introduced by Senate, Dec. 1, 2016).

101. S. 43, 99th Gen. Assemb., Reg. Sess. (as reported by S. Comm. on Small Bus. & Indus., Feb. 2, 2017).

102. *Id.* (emphasis added).

causation standard.[103] As discussed above, but-for causation means that the adverse employment decision would not have been made in the absence of the plaintiff's protected classification.[104] As amended by SB 43, the MHRA now requires the protected classification to have a *determinative influence* on the adverse employment decision.[105] Since the concepts of but-for causation and determinative influence are used interchangeably, the MHRA now requires plaintiffs to show that the adverse employment decision would not have been made *but for* his or her protected characteristic.[106] Thus, the determinative influence language added to the MHRA by SB 43 creates a but-for causation standard not seen in analogous law.[107]

B. But-For Causation and Determinative Influence are Inappropriate in Discrimination Cases

SB 43's reliance on but-for causation has made the MHRA an outlier when compared to Title VII and the ADA.[108] But-for causation, a concept borrowed from tort law, was developed as a way to hold individuals liable for negligent conduct.[109] Because defendants accused of negligence did not *intend* to cause the harm, legal policy as stated in tort law protects them by requiring plaintiffs to meet the stringent standard of but-for causation.[110]

In contrast, for intentional harm, courts are satisfied with a less substantial relationship between the conduct and the harm.[111] The justification behind the imposition of a lighter burden in cases of intentional conduct stems from the idea that intentionally causing harm is morally blameworthy and thus must be protected against as a matter of policy.[112] Because the discrimination statutes discussed in Sections IV, V, and VI require some level of conscious discriminatory decision-making, employment discrimination involves intent, rather than negligence.[113] As such, a causal relationship between the defendant's discriminatory conduct and the harm to plaintiff is established as soon as the plaintiff demonstrates "the operation

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103. S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).

104. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009). In other words, but for the plainff's race/color/religion/national origin/ancestry/sex/age/disability, the defendant would not have taken the adverse employment action.

105. S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).

106. Hilde v. City of Eveleth, 777 F.3d 998, 1003–04 (8th Cir. 2015) (holding that "determinative influence" requirement necessarily implicates a but-for causation analysis); Wright v. Murray Guard, Inc., 455 F.3d 702, 718 (6th Cir. 2006) (discussing various federal circuits' interpretation of "determinative influence" to mean "but-for causation"); Wagner v. Dillard Dep't Stores, Inc., No. 00-2109, 2001 WL 967495, at *148 (4th Cir. Aug. 27, 2001) (equating "determinative influence" with "but-for causation"); S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).

107. S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).

108. Howard Wright, *Court adopts "contributing factor" test to determine discrimination against employee for filing Workers Compensations claim*, MO. PUB. POL'Y & L. (May 11, 2014), https://momunicipallaw.com/2014/05/11/court-adopts-contributing-factor-test-to-determine-discrimination-against-employee-for-filing-workers-compensation-claim/.

109. Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 315–20 (1982).

110. *Id.* at 313.

111. *Id.* at 315.

112. *Id.* at 315 n. 98.

113. *See* MO. REV. STAT. § 213.010 (2017); 42 U.S.C. §§ 2000e-2, 12112(a) (2018). Note that "disparate impact" discrimination cases may include an element of negligence, but that is not at issue here.

of an unlawful motivating factor."[114] In contrast, negligence cases require the plaintiff to establish that the conduct was *the determining factor* (but-for factor) in causing plaintiff's harm.[115] Thus, since employment discrimination is an intentional act, but-for causation is an overall inappropriate standard for liability to attach in discrimination cases.[116]

Furthermore, the determinative influence or but-for standard enacted by SB 43 strays far beyond what is required under Title VII and ADA, discussed in Sections IV and V.[117] The motivating factor standard under Title VII and the ADA conforms with the concept of liability for intentional conduct (i.e., discrimination); liability attaches as soon as the plaintiff establishes the defendant's consideration of plaintiff's protected classification.[118] In contrast, the MHRA now requires plaintiffs to establish the protected classification was *the determining factor* in the defendant's adverse decision.[119] The codification of a but-for causation standard suggests that the intent of Missouri lawmakers was not to bring the state's standard in line with analogous federal law, but instead to heavily restrict plaintiffs' ability to bring successful employment discrimination claims.

VII. CONCLUDING WITH A RECOMMENDATION

The previous contributing factor standard for MHRA cases made Missouri an outlier, and tipped the scale too far in favor of employment discrimination plaintiffs.[120] However, SB 43 has now improperly taken Missouri law beyond any analogous standard.[121] Title VII and the ADA, the alleged inspirations for SB 43,[122] purposefully stop short of burdening discrimination plaintiffs with a determinative, but-for standard of proof.[123] By adding the requirement that the unlawful factor have a determinative influence on the employment decision, SB 43 has created a legal disparity in favor of employers and essentially removed a state cause of action previously available to plaintiffs.[124]

State and federal laws have long recognized that discrimination is a social ill that must be protected against.[125] However, that protection cannot come at the expense of employers.[126] Similarly, protection of business interests cannot come at the expense of employees' civil rights.[127] The interests of both employers and employees must be balanced in a way not achieved by either SB 43 or the contributing

114. Brodin, *supra* note 109, at 320.
115. *Id.* at 326.
116. *Id.*
117. *See* discussion *supra* Parts II & III.
118. Brodin, *supra* note 109, at 320; 42 U.S.C. §§ 2000e-2(m), 12112(a); *see also* discussion *supra* Parts II & III.
119. S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).
120. Austin Huguelet, *Missouri lawmakers continue battle over discrimination bill*, ST. LOUIS POST-DISPATCH (Apr. 3, 2017), http://www.stltoday.com/news/local/govt-and-politics/missouri-lawmakers-continue-battle-over-discrimination-bill/article_608d6170-ab57-5f3a-ba9b-397edd7d8c56.html (noting that "with the contributing factor standard's low bar, there's almost nothing an employer can do.").
121. Montgomery, *supra* note 7.
122. *Id.*
123. *See* 42 U.S.C. §§ 2000e-2, 12112.
124. S. 43, 99th Gen. Assemb., Reg. Sess. (Mo. 2017).
125. Henson, *supra* note 84, at 111.
126. Montgomery, *supra* note 7.
127. Sanchez, *supra* note 3.

factor standard. Thus, the easiest way to begin balancing these interests is to strike the offending language from the MHRA, namely the phrase "and had a determinative influence on the adverse decision or action[.]"[128]

Additionally, since federal anti-discrimination law inspired SB 43,[129] Missouri should define motivating factor in the same way that Title VII and the Eighth Circuit do: discrimination played a part or a role in the adverse employment action, but does not have to be the only reason for the action.[130] However, this proposed definition requires some additional protection against reverting to a contributing factor standard. As such, the MHRA's definition of motivating factor should also include the requirement that the unlawful consideration be more than a remote or trivial factor.[131]

In light of the forgoing discussion, this article proposes that the term "motivating factor" in the MHRA be defined as the following: "a factor that plays a part or a role in the adverse employment decision. The unlawful factor must be more than a remote or trivial factor but need not be the only factor or have a determinative influence on the decision." Striking the determinative influence language and allowing liability to attach even where non-discriminatory factors also motivated the decision protects employee-plaintiffs. Employer-defendants, on the other hand, are protected by the requirement that discrimination be more than a remote or trivial factor.

One thing is clear about Missouri employment discrimination law: a change must be made. Policy decisions such as this require a delicate balancing act, and SB 43 is a clumsy, insufficient solution. By allowing employers to consider a person's protected characteristic in their employment decisions, SB 43 has essentially legalized employment discrimination in Missouri.[132] Furthermore, the change in the MHRA has taken Missouri law out of compliance with federal standards, costing the state half a million dollars in federal funding.[133] However, that is just the beginning of the potential consequences brought on by SB 43.[134] The bill also gutted whistleblower protections in the MHRA, allowing employers to retaliate against employees who raise concerns about workplace discrimination, therefore discouraging victims from seeking internal administrative solutions.[135] The removal of administrative remedies is in addition to the disproportionately large legal burden now placed on discrimination plaintiffs by SB 43. Overall, the message sent by Missouri lawmakers is clear: ending employment discrimination is not a priority. SB 43 may be good for politics, but it is bad for Missouri.

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128. MO. REV. STAT. § 213.010(19) (2017).
129. Montgomery, *supra* note 7.
130. *See supra* Part IV (discussing Title VII and Eighth Circuit jury instructions).
131. This "remote or trivial" portion of this definition was roughly inspired by California Civil Jury Instructions. CACI No. 430 (2007).
132. *See supra* Part II.
133. Bryan Lowry, *Weakening of anti-discrimination law could cost Missouri $500,000 in federal funds*, KAN. CITY STAR (Oct. 12, 2017, 2:35 PM), http://www.kansascity.com/news/politics-government/article178512716.html.
134. Sarah Fenske, *The Dirty Little Secret of Missouri's SB 43*, RIVERFRONT TIMES (May 11, 2017, 7:16 AM), https://www.riverfronttimes.com/newsblog/2017/05/11/the-dirty-little-secret-of-missouris-sb-43-whistleblowers-would-get-screwed.
135. Benjamin Peters, *Auditor, MATA urge Greitens to veto SB 43 over 'Whistleblower Protection Act'*, MO. TIMES (May 19, 2017), https://themissouritimes.com/41035/auditor-mata-urge-greitens-veto-sb-43-whistleblower-protection-act/.