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Civil Rights-Employer Responsibility for Discriminatory Acts of Employees under the Missouri Discriminatory Employment Practices Act

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RECENT CASES

CIVIL RIGHTS—EMPLOYER RESPONSIBILITY FOR DISCRIMINATORY ACTS OF EMPLOYEES UNDER THE MISSOURI DISCRIMINATORY EMPLOYMENT PRACTICES ACT

Industrial Linens Supply Co., Inc. v. Missouri Commission on Human Rights[1]

On September 5, 1972, Kevin Jones, a Black, visited the Columbia, Missouri Job Center seeking employment. While Jones was present at the center, Truman Kay, route supervisor for Industrial Linens Supply Co. in Columbia phoned the center and requested an applicant for a truck route delivery salesman opening. Kay was informed that there was an applicant at the center's office who would be referred to Kay immediately. When Jones presented himself to Kay, he was informed that the position had just been filled. Jones filed a complaint with the Missouri Commission on Human Rights under Chapter 296 of the Missouri Revised Statutes—the Missouri Discriminatory Employment Practices Act.[2] The Commission held Industrial Linens responsible for the actions of its employee and found that the company had denied employment to Jones because of his race. The Commission ordered Industrial Linens to place Jones at the top of its hiring list and awarded Jones back pay. The Circuit Court of Cole County reversed and the Commission appealed. The Missouri Court of Appeals, Kansas City District, held Industrial Linens liable for the discriminatory acts of its route supervisor and remanded the case to the Commission to consider Jones' qualifications for the position and to reconsider the type of relief which should be granted.[3]

The Missouri Discriminatory Employment Practices Act is similar to Title VII of the Civil Rights Act of 1964 in that it affords a remedy to persons denied employment opportunities because of race, creed, color,

1. 539 S.W.2d 641 (Mo. App., D.K.C. 1976).
2. Ch. 296, RSMo 1969.
3. The court in *Industrial Linens* stated that the Missouri statute provides that back pay can be awarded *only* if the claimant under the statute is a former employee; it cannot be awarded where a claimant was denied employment by a Missouri employer. 539 S.W.2d at 646. This interpretation varies from actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), in which back pay *can* be awarded whether or not the complainant is a former employee.

religion, national origin, sex, or ancestry.[4] The Missouri statute applies to any person who employs six or more persons within the state and its provisions can be activated by the actions of employers or persons "acting in the interest of an employer directly."[5]

Employer responsibility for actions of employees that violate Title VII has been predicated on several theories. A few of the Title VII cases expressly adopt a regular agency theory by applying the definition of "agency" to the facts of the particular case.[6] Under this theory the usual defenses to employer responsibility for employees could be asserted. However, most of the cases under Title VII, while not expressly accepting or rejecting agency concepts, apply different tests in determining employer responsibility depending upon whether the employee who is discriminating is a *supervisor* or is a *lower level employee*. The Missouri court in *Industrial Linens* expressly rejected the application of "apparent agency" and "respondeat superior" tests to actions under the Missouri statute and stated that, in determining employer responsibility for actions of employees that violate the statute, an "employer is prima facie liable for the acts of its employee done *in the course of his duties* . . . ."[7] The Missouri court did not recognize a supervisor-employee distinction.

The cases and EEOC decisions[8] under Title VII that address employer responsibility for discrimination by *supervisors* adopt three different approaches. One line of cases holds the employer strictly liable for discrimination by supervisors, at least where such supervisor could be classified as a member of "upper management."[9] It is not clear from the decisions what type of employee would be considered upper management. A person in the management hierarchy with authority to hire, fire, or promote should

4. § 296.020(1), RSMo (Supp. 1976).

5. § 296.010(2), RSMo (Supp. 1976).

6. *See, e.g.*, Chastang v. Flynn & Emrich Co., 6 Empl. Prac. Dec. (CCH) 5588 (1973); Discharge for Associating with Negroes is Racial Discrimination, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4328 (1970). The district court in *Chastang* applied the definition of "agent" which appears in C.J.S.:

> [O]ne who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute [sic] or deputy [sic] appointed by his principal primarily to bring about business relations between the latter and third persons.

6 Empl. Prac. Dec. (CCH) at 5595 n.19.

7. 539 S.W.2d at 644 (emphasis added).

8. "EEOC" is the Equal Employment Opportunity Commission which is the administrative body responsible for hearing complaints under Title VII.

9. *See, e.g.*, Anderson v. Methodist Evangelical Hosp. Inc., 464 F.2d 723 (6th Cir. 1972); United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975); Vesting Veto Power over Promotions in Foremen Creates Vehicle for Discrimination, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4371 (1971). The district court in *United States Steel Corp.* said, "[i]t is easy enough to hold that policies established by the work's General Superintendent are those of 'of the company.'" 371 F. Supp. at 1054.

certainly be deemed a member of upper management. Under this theory of employer responsibility, there are no defenses available to shield the employer from the statutory remedies provided to a wronged employee.[10] The Missouri court's "in the course of duties" test does not hold the employer strictly liable for the actions of supervisors because certain defenses are available to the employer regardless of the wrongdoing employee's position in the management hierarchy.[11]

Corne v. Bausch & Lomb, Inc.[12] adopted a different theory of employer responsibility under Title VII, and decided that the employer would be liable for the supervisor's wrongful conduct only if the employer somehow "gained" from the supervisor's actions.[13] The district court in *Corne* held the employer was not responsible for the discriminatory actions of the supervisor because the employer in no way gained from the supervisor's sexual advances toward female employees.

The third approach taken by the decisions under Title VII is that the employer will only be liable for the actions of the supervisor when he is acting in his capacity as supervisor (hiring, firing, promoting, etc.).[14] Two defenses are available to the employer. Several decisions by the EEOC have asserted that the employer will not be responsible for the supervisor's discrimination where the employer takes steps to remedy the situation after the employer learns of the supervisor's conduct.[15] One decision indicated that a possible defense of the employer could be that the supervisor was disciplined for his discriminatory conduct.[16] Although it did not adopt the approach of the Title VII decisions on employer responsibility, the Missouri court in *Industrial Linens* mentioned the failure of Industrial Linens to discipline its route supervisor as a factor in its decision to impute the

10. Title VII allows a successful claimant to recover back pay, attorney's fees, and possibly other damages resulting from the discrimination. *See* Walker, *Title VII: Complaint and Enforcement Proceedings and Relief and Remedies*, 7 B.C. INDUS. & COM. L. REV. 495 (1966).

11. The Missouri court indicated the employer may avoid responsibility by expressly instructing his employees not to discriminate. 539 S.W.2d at 644.

12. 9 Empl. Prac. Dec. (CCH) 7461 (1975).

13. *Id.* at 7463.

14. *See, e.g.*, Failure to Discipline Employer's Officials for Civil Rights Violations Constitutes Unfair Employment Practice. [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4041 (1969); Vesting Veto Power over Promotions in Foremen Creates Vehicle for Discrimination, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4371 (1971).

15. In a 1969 EEOC decision, the Commission stated "that where an employer promptly undertakes measures calculated to remedy the complained of violation of Title VII, we will not impute a supervisor's unauthorized conduct to the employer." Disciplinary Suspension Because of Race Not Proved, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4118, 4119 (1969). *See also* Supervisor's Unauthorized Conduct Constituting Possible Sex Bias Not Imputed to Employer, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4229 (1970).

16. Failure to Discipline Employer's Officials for Civil Rights Violations Constitutes Unfair Employment Practice, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4041 (1969).

route supervisor's conduct to Industrial Linens.[17] It is not clear what weight that factor carried in the ultimate decision.

The Title VII cases that deal with employer responsibility for discrimination by *low level employees* hold the employer liable on two different theories. The first bases the employer's liability on his *knowledge* of discriminatory conduct and his failure to take steps to stop it.[18] This places an affirmative duty on the employer to end discrimination only *after* he has knowledge that discrimination is occurring. Thus, it is a defense to the employer that he was unaware that the unlawful conduct was occurring. One decision by the EEOC went further and imposed liability on an employer where he had *reason to believe* that racial discrimination was occurring although he did not have actual knowledge of the discrimination.[19]

The second theory upon which employers are held responsible for low level employees' discrimination is that the employer has failed to enforce a policy of non-discrimination.[20] This imposes an affirmative duty on the employer to see that discrimination is not occurring. The absence of knowledge of unlawful conduct is no defense.

A possible rationale for the supervisor-employee distinction is that the potential for harm from discrimination by these two groups is different. Employers are held more responsible for the actions of supervisors because discrimination by a *supervisor* can result in a complete denial of employment while discrimination by *employees* only results in an unpleasant working environment.

Several New York cases have discussed employer responsibility for discrimination by employees under state civil rights statutes. None of these decisions recognized a supervisor-employee distinction. *Hubert v. Jose*[21] held that the employer would not be responsible for employee actions where the employee was acting contrary to the employer's orders *and*

17. The Missouri court said that "even after the complaint was filed in the case, Kay [the employee] received no reprimand or any other disciplinary action." 539 S.W.2d at 645.

18. *See, e.g.*, Anderson v. Methodist Evangelical Hosp., 3 Empl. Prac. Dec. (CCH) 6944 (1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972); Subjecting Worker to Racial Insults and Subsequently Terminating Him is Unlawful, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4056 (1969); Permitting Harassment of Employee Because of His National Origin Constitutes Unlawful Discrimination, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4131 (1969).

19. Management is Required to Insure that Nondiscrimination Policy is Observed by Employees, [1973] Equal Empl. Opp. Comm'n Dec. (CCH) 4033 (1969).

20. *Id. See also* United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975), where the district court said: "[W]hen such [discriminatory] actions are contrary to established policy of the company, a policy which upper management attempts to enforce within means reasonably available, these should not, it seems, be taken as company action . . . ." *Id.* at 1054.

21. 148 App. Div. 718, 132 N.Y.S. 811 (1912).

without the employer's knowledge. *Jackson v. Imburgia*[22] stated that the employer would not be responsible for employee discrimination where the employer had in good faith instructed the employees not to discriminate. There was no requirement that the employer be unaware of the discrimination. *Hobson v. York Studios*[23] only required that the employer instruct employees not to discriminate in order to avoid liability. The warning did not have to be in good faith as in *Jackson*, nor did the employer have to be unaware of the discrimination as in *Hubert*. In none of these decisions is there an affirmative obligation on the part of the employer to see that discrimination is not occurring as there is under some of the Title VII cases.[24] The Missouri court in *Industrial Linens* cited with approval these New York decisions. The court adopted the *Hobson* approach and stated that it would be a defense to the employer that there were "express instructions not to discriminate."[25] The Missouri court imposed no good faith requirement on those instructions, imposed no lack of knowledge requirement, and imposed no affirmative duty on the employer to see that discrimination is not occurring.

Application of the test adopted by the court in *Industrial Linens* will reach the same result as the supervisor-employee decisions under Title VII when the supervisor is discriminating in his hiring, firing, and promoting activities. Under the Missouri test the employer will be held responsible for such actions because they are in the course of the supervisor's duty. However, the employer probably would not be held liable under the test of *Industrial Linens* when a *low level employee* is discriminating against or harassing a fellow employee, because the employee is not within the course of his duties while engaged in such conduct. The Title VII decisions would hold the employer liable for such actions if the employer knew of such employee conduct[26] or failed to take steps to insure a discrimination-free working environment.[27]

In lieu of this gap in liability, the Missouri courts should adopt a different approach to employer responsibility for employee actions that violate the Missouri statute. The Title VII supervisor-employee distinction should be recognized in Missouri, but employer liability should be extended even further than the federal Title VII decisions. Stricter liability will encourage greater efforts to comply with the statutory requirements. The employer should be held strictly accountable for the actions of his *supervisors* when they are acting in their capacity as supervisors. It should be a defense to the employer that the supervisor was acting personally only if the employer has taken reasonable steps to insure that such "personal"

22. 184 Misc. 1063, 55 N.Y.S.2d 549 (1945).
23. 208 Misc. 888, 145 N.Y.S.2d 162 (1955).
24. *See* note 20 and accompanying text *supra*.
25. 539 S.W.2d at 644.
26. *See* cases cited note 18 and accompanying text *supra*.
27. *See* note 20 and accompanying text *supra*.