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A Conflict of Balances: The Adjudication of Missouri Human Rights Act Claims in Federal Court

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I. INTRODUCTION

Peggy Kimzey sued Wal-Mart Stores, Inc. under Title VII[1] and the Missouri Human Rights Act (MHRA)[2] for subjecting her to a sexually hostile work environment.[3] A Title VII claimant may seek compensatory and punitive damages[4] and is entitled to a jury trial on such claims,[5] but cannot recover compensatory and punitive damages exceeding $300,000.[6] The MHRA, on the other hand, provides for "uncapped" compensatory and punitive damages, but

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1. 42 U.S.C. § 2000e-5 (1994) [hereinafter Title VII].
2. MO. REV. STAT. §§ 213.010-213.137 (1996) [hereinafter MHRA].
3. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997).
4. 42 U.S.C. § 1981a(a) (1994).
5. 42 U.S.C. § 1981a(c) (1994).
6. 42 U.S.C. § 1981a(b)(3) (1994). The cap on compensatory and punitive damages depends on the size of the employer. Potential damages against an employer who has more than 14 but less than 101 employees for each of 20 or more calendar weeks in the current or preceding calendar year are capped at $50,000. 42 U.S.C. § 1981a(b)(3)(A) (1994). Potential damages against an employer who has more than 100 but less than 201 employees for each of 20 or more calendar weeks in the current or preceding calendar year are capped at $100,000. 42 U.S.C. § 1981a(b)(3)(B) (1994). Potential damages against an employer who has more than 200 but less than 501 employees for each of 20 or more calendar weeks in the current or preceding calendar year are capped at $200,000. 42 U.S.C. § 1981a(b)(3)(C) (1994). Potential damages against an employer who has more than 500 employees for each of 20 or more calendar weeks in the current or preceding calendar year are capped at $300,000. 42 U.S.C. § 1981a(b)(3)(D) (1994).

not a jury trial.[7] Nonetheless, a *jury* awarded Kimzey *$50,000,000 in punitive damages* on her MHRA claim.[8] How did this happen? The fundamental conclusion of this Article is that this anomaly clearly was not anticipated when the Missouri General Assembly provided for uncapped damages, and the General Assembly should consider amending the MHRA to prevent this anomaly from happening again.

The MHRA is a heavy presence in most employment discrimination lawsuits brought in Missouri. Unlike other state statutory schemes enacted to provide equal employment opportunity,[9] the MHRA provides substantial protections to employees that, in several instances, exceed the scope of parallel federal laws.[10] The purpose of this Article is to explore perhaps the most significant such aspect of the MHRA, its provision for uncapped damages, and the adjudication of MHRA claims in state and federal courts.

Part II of this Article describes the evolution of uncapped damages under the MHRA, including the Missouri General Assembly's requirement that a *judge*, not a *jury*, determine MHRA liability.[11] Part III of this Article illustrates how plaintiffs use the federal courts to allow juries to award uncapped damages under the MHRA, contrary to the inherent balance struck by the legislature in passing the MHRA.[12] Part IV of this Article proposes a legislative solution to this current imbalance: mandatory administrative adjudication of MHRA claims.[13] Because the Missouri General Assembly can create rights under the MHRA, it also should take the responsibility for ensuring that those rights are enforced by plaintiffs on a consistent (*i.e.*, balanced) basis, without regard to whether MHRA plaintiffs happen to file their claims in state or federal courts.

Although the Missouri General Assembly may not eliminate or narrow the scope of the right to a jury trial under federal law, it *may* narrow the manner in which the rights *it* has created are enforced.[14] By requiring MHRA claims to be

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7. MO. REV. STAT. § 213.111.2 (Supp. 1997). *See infra* note 18 and accompanying text.

8. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 570 (8th. Cir. 1997). While the trial court in *Kimzey* reduced the punitive damages award to $5,000,000 and the appellate court further reduced the award to $300,000, it is of critical importance to this Article that a jury was allowed to assess uncapped punitive damages under the MHRA, and assessed $50,000,000. *See id.* at 576-78 (reducing punitive damages awarded to Kimzey).

9. *See, e.g.*, KAN. STAT. ANN. §§ 44-1001-44-1044 (1993).

10. For example, while Title VII applies to employers of 15 or more employees, 42 U.S.C. § 2000e(b) (1994), the MHRA applies to employers of six or more employees. MO. REV. STAT. § 213.010(6) (Supp. 1997).

11. *See infra* notes 15-47 and accompanying text.

12. *See infra* notes 48-66 and accompanying text.

13. *See infra* notes 67-101 and accompanying text.

14. *See* State *ex rel.* Missouri Comm'n on Human Rights v. Lasky, 622 S.W.2d 762, 763 (Mo. Ct. App. 1981) (holding that the Missouri General Assembly was free to grant, and then take away, statutory rights).

administratively adjudicated, the Missouri General Assembly can restore the MHRA's delicate balance between uncapped damages and the right to a jury trial.

II. THE BALANCE STRUCK BY THE MHRA

A. Overview

The MHRA prohibits discrimination in housing, employment, or public accommodations on the basis of race, color, religion, national origin, sex, ancestry, age, or handicap.[15] This Article focuses on employment discrimination, and more specifically, an employee's ability to sue an employer for discrimination under the MHRA.[16] Section 213.111 of the MHRA, which dictates when and where an aggrieved employee may sue an employer, and the remedies available to the employee, is a critical provision of the MHRA. This portion of the Article highlights the balance struck by the Missouri General Assembly in Section 213.111 when it empowered circuit or associate circuit courts in Missouri, not juries, with the discretion to award uncapped damages in an employment discrimination lawsuit.[17]

B. The "Balance" Inherent in Section 213.111

There is a balance inherent in the employment provisions of the MHRA: MHRA plaintiffs may be entitled to recover unlimited compensatory and punitive damages for intentional discrimination, but only experienced fact finders (*i.e.*, judges) may award such damages. This balance is evident from the plain language of Section 213.111 of the MHRA, which states, in its entirety:

> 1. If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his right to bring a civil action within ninety days of such notice against the respondent named in the complaint. Such an action may be brought *in any circuit court* in any county in which the unlawful

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15. *See* MO. REV. STAT. § 213.010-213.137 (1994).

16. This Article does not address the technical exhaustion of administrative remedies requirements for an employment discrimination lawsuit, nor existing administrative remedies available to aggrieved employees under the MHRA. For a thorough discussion of these topics, see SANDRA L. SCHERMARHORN & WILLIAM C. MARTUCCI, 2 MO. ADMINISTRATIVE LAW, §§ 12-1-12-17 (2d ed. 1990).

17. *See* MO. REV. STAT. § 213.111 (1994). For a more detailed analysis of the plain language and judicial interpretations of this section of the MHRA, see *infra* notes 18-47 and accompanying text.

discriminatory practice is alleged to have occurred, *either before a circuit or associate circuit judge.* Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.

2. *The court* may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission; except that, a prevailing respondent may be awarded court costs and reasonable attorney fees only upon a showing that the case is without foundation.[18]

1. No Right to a Jury Trial Under the MHRA: *State ex rel. Tolbert v. Sweeney*

Missouri law requires courts to "give effect to [statutes] as [they are] written."[19] The MHRA plainly states that employees who have appropriately exhausted their administrative remedies may sue their employers "*in any circuit court* in any county in which the unlawful discriminatory practice is alleged to have occurred . . . ."[20] The MHRA does not say that aggrieved employees may sue in any court, state or federal. Federal trial courts are district courts, not "circuit courts," and many counties in the state of Missouri do not have federal district courts present within them.[21] The MHRA plainly states that aggrieved employees are to bring their claims "*either before a circuit or associate circuit*

18. MO. REV. STAT. § 213.111 (1994) (emphasis added).

19. Oberg v. American Recreational Products, 916 S.W.2d 304, 306 (Mo. Ct. App. 1995).

20. MO. REV. STAT. § 213.111.1 (1994) (emphasis added).

21. The amendments to the MHRA are particularly noteworthy regarding this issue of "circuit court" jurisdiction within particular counties. When the legislature amends a statute such as the MHRA, it is presumed to have intended the charge to have some effect. Holt v. Burlington Northern R.R. Co., 685 S.W.2d 851, 857 (Mo. Ct. App. 1984). The legislative amendments to the MHRA demonstrate that the Missouri General Assembly intended for civil actions to be tried in a particular county. For instance, in 1986, Senate Bill No. 513 repealed Missouri Revised Statute Section 213.127 and replaced it with Section 213.110. This change replaced language in (then) Missouri Revised Statute Section 213.127 stating that MHRA actions could be brought "in any circuit in this state. . . ," to the circuit courts in the county "in which the unlawful discriminatory practice is alleged to have occurred." MO. REV. STAT. § 231.110 (1994).

judge."[22] The MHRA does not say that aggrieved employees may present their MHRA claims to a jury. Finally, the MHRA plainly states that "*the court*" grants relief to the aggrieved party.[23] The MHRA does not say that either the court, *or a jury,* may grant the relief contemplated by the MHRA. The plain language of Section 213.111 of the MHRA reveals that the Missouri General Assembly never intended that MHRA claims would be adjudicated by federal juries, or, for that matter, juries of any kind.

Consistent with the plain language of the MHRA, Missouri's appellate courts determined that the Missouri General Assembly did not intend for MHRA plaintiffs to have a right to jury trial on their MHRA claims.[24] The leading case is *State ex rel. Tolbert v. Sweeny.*[25] In *Tolbert,* the plaintiff demanded a jury trial on an MHRA age discrimination claim, and the trial judge indicated that he intended to strike the jury demand because the plaintiff had no right to a jury trial under the MHRA.[26] The plaintiff asked the Southern District Court of Appeals to prohibit the trial judge from striking his jury demand.[27] The appellate court had to decide whether the plaintiff had a statutory or constitutional right to a jury trial on his MHRA claim.

The *Tolbert* court determined that the Missouri General Assembly did not create a statutory right to jury trial on MHRA claims.[28] Under a predecessor statute to the current MHRA,[29] an employee dissatisfied with a ruling by the Missouri Human Rights Commission (MHRC) on an employment discrimination complaint was entitled to a trial *de novo* in circuit court "by a jury, upon written request therefor filed before the trial date."[30] In 1965, the Missouri General Assembly eliminated the right to a *de novo* jury trial.[31] In 1986, the legislature repealed Chapter 296, and replaced it with Chapter 213, the current MHRA.[32] Under the plain language of Chapter 213, the Missouri General Assembly made

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22. MO. REV. STAT. § 213.111.1 (1994) (emphasis added).

23. MO. REV. STAT. § 213.111.2 (1994) (emphasis added).

24. *See, e.g.*, State *ex rel.* Tolbert v. Sweeny, 828 S.W.2d 929, 929-32 (Mo. Ct. App. 1992); Pickett v. Emerson Elec. Co., 830 S.W.2d 459, 459-60 (Mo. Ct. App. 1992) (adopting the *Tolbert* analysis).

25. 828 S.W.2d 929 (Mo. Ct. App. 1992).

26. *Id.* at 929-30.

27. *Id.* at 929.

28. *Id.* at 930-32.

29. MO. REV. STAT. § 296.010 (1978) (repealed 1986). This anti-discrimination statute provided employees with an administrative remedy for discrimination issued by the MHRC and reviewed by a circuit court, *de novo,* but did not provide direct access to state court. *See* MO. REV. STAT. §§ 296.030, 296.040, 296.050 (1978) (repealed 1986); *Tolbert,* 828 S.W.2d at 931 (discussing the legislative history of the MHRA).

30. MO. REV. STAT. §§ 296.010-.296.070 (1978) (repealed 1996); *Tolbert,* 828 S.W.2d at 931.

31. MO. REV. STAT. § 296.050 (1978) (repealed 1996); *Tolbert,* 828 S.W.2d at 931.

32. *See Tolbert,* 828 S.W.2d at 931.

no mention of a right to jury trial on MHRA claims.[33] In 1989, the legislature proposed to amend Section 213.111 by adding the following sentence: "Such action shall be tried before a jury if one is requested by either party."[34] Governor Ashcroft vetoed the proposed amendment.[35] The legislative history and plain language of the MHRA persuaded the *Tolbert* court that the legislature knew how to create the right to jury trial, but intentionally did not do so in Chapter 213.[36]

The *Tolbert* court further determined that the Missouri Constitution does not guaranty the right to jury trial on MHRA claims.[37] The Missouri Constitution, adopted in 1945, holds inviolate the right to jury trial "as heretofore enjoyed."[38] The plaintiff in *Tolbert* sought as relief actual and punitive damages only, not equitable relief, and argued that a plaintiff claiming legal damages had a right to jury trial at common law that cannot be statutorily extinguished.[39] The court ruled that MHRA claims are not common law claims, and Chapter 213 was enacted *after* the adoption of Missouri's 1945 Constitution; therefore, the plaintiff had no right to jury trial that was "heretofore enjoyed."[40] Moreover, the MHRA's primary remedies are equitable,[41] and the damages remedies available under the MHRA are merely incidental to the MHRA's equitable thrust to eliminate unlawful discrimination.[42] Accordingly, MHRA plaintiffs have no constitutional right to a jury trial under the Missouri Constitution.[43]

The very thorough analysis and holding in *Tolbert* establishes a critical point: the Missouri General Assembly, without infringing on any constitutional rights, required that judges, not juries, determine MHRA liability, and the extent of damages flowing from that liability.

2. The Right to Uncapped Damages Under the MHRA

Courts interpreting the MHRA naturally emphasize its provision for uncapped compensatory and punitive damages when damage awards exceed the federal caps.[44] However, the same courts do not discuss *when* the Missouri

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33. *Id. See also supra* note 18 and accompanying text.

34. *Tolbert*, 828 S.W.2d at 931.

35. *Id.*

36. *Id.* at 931-32.

37. *Id.* at 934-35.

38. MO. CONST. art. I, § 22(a).

39. *Tolbert*, 828 S.W.2d at 929-30.

40. *Id.* at 933.

41. For example, the right to secure injunctive relief and recover back pay. *See* MO. REV. STAT. § 213.111(2) (1994).

42. *Tolbert*, 828 S.W.2d at 934.

43. *Id.* at 934-35.

44. *See, e.g.*, Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 575-76 (8th Cir. 1997) (clarifying that $50,000,000 punitive damages award was rendered under the

General Assembly provided for uncapped damages under the MHRA, which is important to understand the MHRA's balance. Before 1986, the MHRC determined what relief MHRA claimants deserved, subject to judicial review.[45] MHRA claimants had no direct access to state courts, and the MHRA did not provide for punitive damages.[46] In 1986, the Missouri General Assembly enacted the current MHRA, including Section 213.111.[47] At the same time that the Missouri General Assembly provided MHRA claimants access to the judiciary, the legislature provided for uncapped damages, but required that such damages be determined by a judge, not a jury. In 1986, the legislature increased the stakes under the MHRA, but not without balance.

III. ADJUDICATION OF MHRA CLAIMS IN FEDERAL COURTS: THE BALANCES COME INTO CONFLICT

A. Overview

The foregoing analysis of the balance between the right to a jury trial and the presence of uncapped damages under the MHRA was largely irrelevant until Congress passed federal laws substantively enlarging the scope of a plaintiff's rights under federal law.[48] In 1991, Congress created the right to jury trial for claimants seeking compensatory and punitive damages under federal anti-discrimination statutes,[49] but simultaneously capped recoverable compensatory and punitive damages to anywhere between $50,000 and $300,000, depending on the size of the employer.[50] Congress created a balance.

Under federal law, a jury may assess liability, but its ability to assess damages for intentional conduct is severely restricted. Federal juries may award no more than $300,000 to discrimination plaintiffs for compensatory and punitive damages, and that latitude depends upon the size of the employer-defendant.[51] Congress thus created a balance directly converse to that created by the Missouri General Assembly in the MHRA: juries may find liability and

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MHRA because the MHRA has no cap on punitive damages, while Title VII caps compensatory damages at a maximum of $300,000); Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1062 (8th Cir. 1993) (affirming $400,000 damages award under MHRA claim).

45. *See* MO. REV. STAT. §§ 296.010-.296.070 (1978) (repealed 1986).

46. MO. REV. STAT. §§ 296.010-296.070 (1978) (repealed 1986).

47. MO. REV. STAT. §§ 213.010-213.137 (1994).

48. *See* 42 U.S.C. § 1981a (1994).

49. 42 U.S.C. § 1981a(c) (1994).

50. 42 U.S.C. § 1981a(b)(3) (1994).

51. *See* Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 577 (8th Cir. 1997). (recognizing that jury's $50,000,000 punitive damages award, which was reduced to $5,000,000 by the trial court, could not have been awarded under Title VII because such liability was capped under federal law).

award damages, but they do not have unbridled discretion over the *amount* of such damages.

How, then, do verdicts like the *Kimzey* verdict arise in federal jury trials in the State of Missouri? The answer to this question lies in an examination of the power federal courts have over the right to jury trial on state law claims in federal courts, including MHRA claims.

Plaintiffs with claims under federal anti-discrimination statutes and pendent MHRA claims use the federal supplemental jurisdiction statute[52] to bring MHRA claims in federal court. Once in federal court, plaintiffs routinely demand a jury trial on all of their claims, including MHRA claims.[53] Despite the fact that no right to a jury trial exists on MHRA claims in Missouri state courts, the Eighth Circuit Court of Appeals determined that MHRA plaintiffs are entitled to jury trial in federal courts.[54] In so holding, the Eighth Circuit toppled the inherent balance created by the Missouri General Assembly in the MHRA.

B. How Plaintiffs Secure a Jury Trial on MHRA Claims

1. Supplemental Jurisdiction: The Procedural Path for MHRA Claims in Federal Court

Plaintiffs use the federal supplemental jurisdiction statute[55] to bring their MHRA claims in federal court. Federal district courts have original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States."[56] Federal anti-discrimination statutes are quite clearly "laws of the United States," so federal district courts have original jurisdiction over civil actions arising under these laws. The supplemental jurisdiction statute provides, in relevant part, as follows:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts *shall* have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.[57]

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52. 28 U.S.C. § 1367 (1994).

53. *See* Waldermeyer v. ITT Consumer Fin. Corp., 767 F. Supp. 989, 994-95 (E.D. Mo. 1991) (granting the plaintiff's request for a jury trial on claims under the MHRA and the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994)).

54. *See* Gipson v. KAS Snacktime Co., 83 F. 3d 225 (8th Cir. 1996). For a further discussion of *Gipson*, see notes 60-67 and accompanying text.

55. 28 U.S.C. § 1367 (1994).

56. 28 U.S.C. § 1331 (1994).

57. 28 U.S.C. § 1367(a) (1994) (emphasis added).

Under the supplemental jurisdiction statute, federal courts shall exercise jurisdiction to entertain state claims of a Title VII plaintiff, for example, so long as the state claims "form part of the same case or controversy" as the federal discrimination claims.[58] MHRA and Title VII claims based on the same alleged discriminatory conduct are logically part of the "same case or controversy." Accordingly, federal courts routinely entertain MHRA claims.

The practical effect of the supplemental jurisdiction statute in a discrimination lawsuit is that any plaintiff with the foresight to administratively pursue violations of federal anti-discrimination statutes *and* the MHRA may bring his MHRA claim in federal court.[59]

2. The Right to Jury Trial on MHRA Claims in Federal Court: *Gipson v. KAS Snacktime Co.*

By bringing MHRA claims in federal court, plaintiffs gain the right to a jury trial on these claims, despite the Missouri General Assembly's intent. This anomaly is the result of *Gipson v. KAS Snacktime Co.*[60]

In *Gipson*, the Eighth Circuit Court of Appeals recognized that Missouri courts do not allow jury trials of MHRA claims.[61] However, whether the right to a jury trial exists in federal court is another matter entirely.[62] "[T]he right to a jury trial in federal court is a question of federal law, even when the federal

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58. *See, e.g.*, Canada v. Thomas, 915 F. Supp. 145, 149-50 (W.D. Mo. 1996) (discussing plaintiff's state law claims after federal civil rights claims were dismissed).

59. Federal courts may, in their discretion, decline to exercise supplemental jurisdiction over state law MHRA claims. 28 U.S.C. § 1367(c) (1994). In *U.S. Financial Corp. v. Warfield*, 839 F. Supp. 684 (D. Ariz. 1993), the court refused to exercise supplemental jurisdiction over a state statutory claim that was specifically restricted to the state courts of Arizona. Employers facing MHRA claims in federal court can make an even more compelling case that federal courts in Missouri should decline to exercise supplemental jurisdiction over MHRA claims than the defendant in *Warfield*. Like the statute at issue in *Warfield*, the MHRA restricts a claimant's access to state circuit courts. *See* MO. REV. STAT. § 213.111(1) (1994) ("[S]uch an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge."). In addition, for the reasons articulated in this Article, exercising supplemental jurisdiction over MHRA claims upsets the "uncapped damages, but no jury trial" balance created by the Missouri General Assembly. *See supra* notes 15-47 and accompanying text. There is, however, no reported case law reaching a conclusion similar to *Warfield* for claims brought under the MHRA.

60. 83 F.3d 225 (8th Cir. 1996).

61. *Id.* at 230 (citing State *ex rel.* Tolbert v. Sweeney, 828 S.W.2d 929, 930-35 (Mo. Ct. App. 1992)).

62. *Id.*

court is enforcing state-created rights and obligations, indeed, even when a state statute or state constitution would preclude a jury trial in state court."[63]

The Seventh Amendment of the United States Constitution preserves the right to jury trial in federal court for plaintiffs seeking damages, even if those damages "are merely 'incidental' to equitable relief."[64] Further, "[t]he Seventh Amendment right to jury trial extends to statutory causes of action, so long as the statute allows, and the plaintiff seeks, at least in part a legal remedy."[65] Within this framework, the *Gipson* court held that because the MHRA authorizes recovery of damages, even though merely incidental to equitable remedies, MHRA plaintiffs have the right to a jury trial on MHRA claims in federal court.[66]

After *Gipson*, the right to a jury trial for MHRA claims in federal courts is fairly secure. Interestingly, the anomaly created by the supplemental jurisdiction statute and *Gipson* creates a direct conflict between the intent of Congress and that of the Missouri General Assembly, as manifested in federal and state anti-discrimination statutes. But the legislative policy of neither is served by this anomaly. Congress permits a jury to assess liability, but not beyond the damages caps of 42 U.S.C. § 1981a. Under *Gipson*, juries can assess damages well in excess of Congress' caps. The Missouri General Assembly permits a MHRA claimant to recover potentially unlimited damages, based on a judge's discretion. Under *Gipson*, juries, not judges, will assess uncapped MHRA damages.

IV. RESTORING BALANCE TO THE MHRA: A LEGISLATIVE PROPOSAL

A. Overview

The Missouri General Assembly could avoid the disruption of balance in MHRA claims litigated in federal court by taking the drastic measure of abandoning the MHRA's balance altogether. First, the legislature could amend

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63. *Id.* (citing Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 538-39 (1958); Herron v. Southern Pac. Co., 283 U.S. 91 (1931)).

64. *Id.* (quoting Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470 (1962)).

65. *Id.* at 231 (citing Curtis v. Loether, 415 U.S. 189, 194 (1974)).

66. *Id. See also* Sullivan v. Curators of the Univ. of Mo., 808 F. Supp. 1420, 1424 (E.D. Mo. 1992); Steward v. Yellow Freight Sys., Inc., 702 F. Supp. 230, 231 (E.D. Mo. 1988).

The *Gipson* decision has implications stretching far beyond the right to jury trial on MHRA claims in federal court, and beyond the scope of this Article. It can certainly be argued that under *Gipson*, a state legislature can never effectively require a judge to assess damages under a statutory cause of action, so long as the plaintiff can find a way into federal court. For example, under *Gipson*, do plaintiffs alleging state statutory consumer protection violations have the right to a jury trial on such claims if they can satisfy diversity jurisdiction under 28 U.S.C. § 1332 (1994).

the MHRA by creating the right to a jury trial on MHRA claims; however, this would place employers at risk of completely unreasonable damages verdicts, like the *Kimzey* verdict. Second, the legislature could amend the MHRA by capping damages commensurate with the damages caps in 42 U.S.C. § 1981a; however, this would strip plaintiffs who truly deserve more than the applicable cap amount of their ability to secure an appropriate verdict.

The purpose of this Part of the Article is to demonstrate that the Missouri General Assembly need not abandon the delicate balance it created in the MHRA; it can restore and preserve that balance. State legislatures use various schemes to implement their anti-discrimination policies, and many have created common-sensical statutory provisions to protect the unique balance of their schemes. By borrowing ideas from other Missouri statutes and from anti-discrimination laws of other states, the Missouri General Assembly *can* protect the unique balance inherent in the MHRA.

In overview, the legislature should: (1) create an adjudicative hearing division of the MHRC;[67] (2) require MHRA claimants to litigate their claims before an administrative judge in the MHRC hearing division;[68] (3) require claimants who have potential MHRA *and* federal anti-discrimination statutory claims to either administratively pursue their MHRA claims, or pursue their federal claims in federal court;[69] and (4) create a framework for adjudication of MHRA claims before the MHRC hearing division, including the right to limited appeal in circuit courts.[70] This can be fairly accomplished without eliminating or reducing the remedies available under the MHRA, and without violating the Missouri Constitution.

B. The Proposal: A Modified Approach to MHRA Adjudication

1. Background: How Do Other States Adjudicate State Employment Discrimination Claims?

Different states take different approaches in implementing how claimants may seek relief under their respective anti-discrimination laws. Some states require claimants to use commissions like the MHRC to seek relief *for* them administratively, and provide access to state courts for administrative appeals only.[71] Other states do not provide for administrative proceedings to secure relief under their anti-discrimination laws, and require claimants to seek relief through the courts only.[72] In short, legislative mechanisms to secure relief

67. *See infra* notes 86-88 and accompanying text.
68. *See infra* note 89 and accompanying text.
69. *See infra* note 90 and accompanying text.
70. *See infra* notes 91-93 and accompanying text.
71. *See, e.g.*, KAN. STAT. ANN. §§ 44-1001-44-1044 (1993).
72. *See* N.D. CENT. CODE §§ 14-02.4-01-14-02.4-21 (1997).

provided by state statutes are critical components of a legislature's overall strategy to eliminate unlawful employment discrimination.

Under the Minnesota Human Rights Act,[73] for instance, if Minnesota's equivalent of the MHRC does not complete its investigation within 180 days after an aggrieved party files an administrative complaint, the aggrieved party can institute a trial-type hearing before an administrative law judge (ALJ).[74] In addition to equitable relief, the ALJ can award the aggrieved party compensatory damages capped at three times the amount of actual damages, and punitive damages not to exceed $8500.[75] Alternatively, the aggrieved party can elect to sue under the state anti-discrimination statute in state court, without the right to a jury trial.[76] In Minnesota, while the *Gipson*-supplemental jurisdiction phenomenon could sweep such civil actions before a jury in federal court, the aggrieved employee could not recover more than the capped damages noted above.[77] The Minnesota scheme has balance, with no risk that a jury will assess uncapped damages.

Similar to the Minnesota legislature, the Utah legislature has created a "Division of Adjudication" within its equivalent of the MHRC to administratively adjudicate employment discrimination claims.[78] The judge in these hearings has broad power to "provide relief to the complaining party, including reinstatement, back pay and benefits, and attorneys' fees and costs."[79] Unlike the Minnesota legislature, however, the Utah legislature did not provide aggrieved parties with direct access to courts. To avoid having state claims which are intended to be administratively adjudicated from being raised before a jury in federal court, and to deter aggrieved parties from contemporaneously pursuing federal claims in federal court and state claims in an administrative proceeding, the Utah anti-discrimination law provides as follows: "The commencement of an action under federal law for relief based upon any act prohibited by this chapter bars the commencement or continuation of any adjudicative proceeding before the commission in connection with the same claims under this chapter."[80] The Utah scheme preserves the legislature's contemplated balance by providing administrative trial-type proceedings leading to potentially broad remedial orders, and blocking access to federal juries.

Finally, under the Maine Human Rights Act, the Maine legislature authorized an aggrieved party to file suit in state court to seek the relief allowed

73. MINN. STAT. ANN. §§ 363.01-363.15 (West 1997).
74. MINN. STAT. ANN. § 363.071 (West 1997).
75. MINN. STAT. ANN. § 363.071 (West 1997).
76. MINN. STAT. ANN. § 363.14 (West 1997).
77. MINN. STAT. ANN. § 363.14 (West 1997).
78. UTAH CODE ANN. § 34A-5-107 (1997).
79. UTAH CODE ANN. § 34A-5-107(a) (1997).
80. UTAH CODE ANN. § 34A-5-107(16) (1997).

under Maine's anti-discrimination statute.[81] The Maine statute provides for the same equitable relief and capped compensatory and punitive damages contemplated by federal law,[82] and the right to a jury trial in state court,[83] but also provides for a civil penalty payable to an aggrieved party up to $50,000.[84] Accordingly, the Maine legislature created a different anti-discrimination policy than Congress created. To avoid friction between its legislative strategy and that of Congress, the Maine legislature provided that claimants seeking relief under federal law and Maine's anti-discrimination statute can only recover under Maine law if the claimants' federal claims fail.[85]

All of the above legislative schemes share one common denominator—the legislatures created anti-discrimination plans different than Congress' plan, and then created safeguards to preserve the inherent interests sought to be balanced by those statutory schemes.

2. Amending the MHRA to Preserve the Intent of the Missouri General Assembly

The Missouri General Assembly clearly intended to have experienced fact finders (*i.e.*, judges) determine MHRA liability and the potentially uncapped damages flowing from MHRA liability. By borrowing from existing Missouri statutes and other state anti-discrimination statutes, the legislature can protect its intent from the *Gipson*-supplemental jurisdiction anomaly. The Missouri General Assembly should retain its uncapped damages provision, but require MHRA claimants to litigate their claims before an experienced ALJ without direct access to state courts. This can easily be accomplished as follows:

a. Create a Hearing Division of the MHRC

First, the Missouri General Assembly should create a separate hearing division of the MHRC, much like the administrative adjudication divisions in Minnesota and Utah.[86] The legislature could use the Administrative Hearing Commission under Chapter 621 of the Missouri Revised Statutes as a model to create a formal hearing division of the MHRC.[87] For example, Section 213.020 of the MHRA can be amended by adding the following paragraph, by reference to Chapter 621:

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81. ME. REV. STAT. ANN. tit. 5, § 4613(1) (West Supp. 1997).
82. ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(8)(e) (West Supp. 1997).
83. ME. REV. STAT. ANN. tit 5, § 4613(2)(b)(8)(g) (West Supp. 1997).
84. ME. REV. STAT. ANN. § 4613.2.B(7) (West 1997).
85. ME. REV. STAT. ANN. § 4613.2.B(8)(A) (West 1997).
86. *See supra* notes 73-80 and accompanying text.
87. *See* MO. REV. STAT. §§ 621.015-621.205 (1994).

> There is hereby created a "Human Rights Hearing Division" of the commission. It shall consist of no more than three hearing commissioners. The hearing commissioners shall be appointed by the governor with the advice and consent of the senate. The term of each hearing commissioner shall be for six years and until his successor is appointed, qualified and sworn. The hearing commissioners shall be attorneys at law admitted to practice before the supreme court of Missouri, but shall not practice law during the term of office. Each hearing commissioner shall receive annual compensation of fifty-one thousand dollars plus any salary adjustment provided pursuant to section 105.005, RSMo. Each hearing commissioner shall also be entitled to actual and necessary expenses in the performance of his duties.[88]

This amendment would create a body of ALJs, experienced fact finders, to adjudicate MHRA claims currently adjudicated in court.

b. Direct Cases to the Hearing Division

Second, the legislature should amend Section 213.111 of the MHRA to direct litigants to the hearing division of the MHRC, not to circuit courts. For example, that section of the MHRA could be amended as follows:

> 1. If, after one hundred eighty days from the filing of a complaint alleging discriminatory practice, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his right to institute a contested administrative hearing, on the record, before the hearing division of the commission. Upon issuance of this notice, all proceedings relating to the complaint before the commission, other than the contested administrative hearing before the hearing division, shall terminate. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in the hearing division of the commission shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.
>
> 2. The hearing division may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award costs to bring the contested hearing and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission; except that a prevailing respondent may be awarded costs and reasonable attorney fees only upon a showing that the case is without foundation.[89]

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88. *See* MO. REV. STAT. § 621.015 (1994).

89. *See* MO. REV. STAT. § 213.111 (1994).

By keeping MHRA plaintiffs within the administrative framework, the legislature would prevent plaintiffs from using the *Gipson*-supplemental jurisdiction anomaly to avoid its requirement that juries shall not assess uncapped damages under the MHRA. At the same time, the legislature would retain the same remedies MHRA claimants currently seek in courts, including uncapped compensatory and punitive damages.

c. Require an Election of Remedies

Third, the legislature should preclude alleged victims of employment discrimination from seeking relief in two separate adjudicative proceedings arising out of the same wrong: one before the MHRC hearing division under the MHRA, and another in federal court under federal anti-discrimination statutes. Following the guidance of the Utah legislature, the Missouri General Assembly could add a third paragraph to Section 213.111 of the MHRA that states:

> 3. The commencement of an action under federal law for relief based upon any act prohibited by this chapter bars the commencement or continuation of any adjudicative proceeding before the hearing division in connection with the same claims under this chapter.[90]

This amendment guarantees that the very different balances of the MHRA and federal anti-discrimination statutes remain distinct. Plaintiffs will make a choice: (1) seek uncapped damages under the MHRA, without the jury wildcard; or (2) bring their claims before a jury in federal court, without the uncapped damages wildcard. This amendment also promotes efficiency. Plaintiffs will not be able to simultaneously pursue two separate proceedings arising out of the same wrong.

d. Implement Contested Case Procedures

Fourth, and finally, the legislature should create a procedural framework for adjudication of MHRA claims before the MHRC hearing division, including the right to limited appeal in circuit courts. Such a framework for contested administrative hearings already exists in Missouri under Chapter 536 of the Missouri Revised Statutes.[91] The Missouri General Assembly simply could require the hearing division of the MHRC to comply with Missouri's adjudicative administrative procedures by adding a fourth paragraph to Section 213.111 of the MHRA:

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90. UTAH CODE ANN. § 34A-5-107(16) (1997).

91. Chapter 536 sets forth statutory procedure and review requirements for administrative hearings. *See* MO. REV. STAT. §§ 536.010-536.215 (1994).

> 4. Proceedings before the hearing division of the commission shall be instituted and adjudicated as provided by the contested case procedures of chapter 536 RSMo., and any party aggrieved by a final decision of the hearing division shall be entitled to judicial review thereof, as provided by chapter 536 RSMo.

The provisions of Chapter 536 provide for a trial-type procedure in a contested case before an administrative agency,[92] much like a trial before a circuit or associate circuit judge, as contemplated by the MHRA.[93] In addition, cross-referencing the limited judicial review provisions of Chapter 536, as opposed to *de novo* review of administrative rulings, will streamline final adjudication of MHRA claims.

C. Net Effect of the Legislative Proposal

By establishing a board of ALJs within the MHRC, the Missouri General Assembly would create a panel of judges with expertise in determining MHRA liability and damages. By forcing plaintiffs either to administratively pursue a potentially uncapped damages award under the MHRA, or pursue a jury trial with capped damages under federal anti-discrimination statutes, the Missouri General Assembly would prevent friction between its unique plan and Congress' plan. The net effect of the proposal is that through the MHRC hearing division, the Missouri General Assembly can efficiently restore the balance it intended to create in state courts, without interference. Thus, the Missouri General Assembly can protect Missouri's anti-discrimination policy.

D. Constitutional Criticism of the Proposal Requiring Administrative Adjudication

Requiring MHRA claimants to adjudicate their claims before a hearing division of the MHRC, instead of in court, presents no constitutional dilemma. Critics of the above legislative proposal might argue that by allowing an administrative agency to make findings of fact and conclusions of law, *and assess damages* against an employer, all historically judicial functions, the proposal violates the separation of powers provision of the Missouri Constitution.[94] This criticism is invalid.

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92. MO. REV. STAT. § 536.010 (1994).

93. MO. REV. STAT. § 213.111(1) (1994).

94. MO. CONST., art. II, §1, states as follows:
The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the

According to the Missouri Supreme Court, the purpose of the separation of powers provision is "to keep the several departments of our state government separate and independent in the spheres allotted to each," not to totally separate the three branches of government.[95] "Within this framework, delegation of administrative and decisional authority to executive agencies is not only possible, but desirable. The complexities of a modern government, economy and technology, as well as the need for expertise, continuity and monitoring, necessarily demand delegation to such bodies."[96]

An agency's performance of adjudicative functions does not violate the Missouri Constitution, provided the agency's final decision is "subject to direct review by the courts."[97] The legislative proposal set forth in this Article provides for judicial review of the MHRC's hearing division decisions, pursuant to Chapter 536 of the Missouri Revised Statutes.[98] In *Percy Kent Bag Co. v. Missouri Commission*,[99] the Missouri Supreme Court held that such judicial review is sufficient to uphold the quasi-judicial determinations of the MHRC, including administrative awards of back pay and compensatory damages.[100] Perhaps more importantly than providing an avenue of judicial review, the proposal does not in any way seek to preclude judicial review, which *would* render the proposal unconstitutional.[101]

In suggesting that ALJs with expertise in MHRA matters should determine MHRA liability, subject to limited review by the circuit courts of Missouri, this proposal not only restores the balance created by the Missouri General Assembly in the MHRA, it is constitutionally sound.

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others, except in instances in this constitution expressly directed or prohibited.

95. Asbury v. Lombardi, 846 S.W.2d 196, 199 (Mo. 1993) (quoting Rhodes v. Bell, 130 S.W. 465 (Mo. Ct. App. 1910)).

96. *Id.* at 200 (citing State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 74 (Mo. 1982)).

97. *Id.* (citing MO. CONST. art. V, § 18; *In re* St. Joseph Lead Co., 352 S.W.2d 656, 659-60 (Mo. 1961); St. Louis Pub. Serv. Co. v. Public Serv. Comm'n, 291 S.W.2d 95, 101 (Mo. 1946); Wood v. Wagner Elec. Corp., 197 S.W.2d 647, 649 (Mo. 1946); Farmer's Bank v. Kostman, 577 S.W.2d 915, 921 (Mo. Ct. App. 1979); Harris v. Pine Cleaners, 274 S.W.2d 328, 333 (Mo. Ct. App. 1954), *aff'd*, 296 S.W.2d 27 (Mo. 1956)).

98. *See supra* notes 91-93 and accompanying text.

99. 632 S.W.2d 480 (Mo. 1982).

100. *Id.* at 485.

101. Asbury v. Lombardi, 846 S.W.2d 196, 200-02 (Mo. 1993) (finding statute precluding judicial review of final agency decision unconstitutional because separation of powers requires direct judicial review of such decisions).

V. CONCLUSION

Right now, the MHRA is not working the way it was meant to work. The anomaly manifested in the *Kimzey* verdict need not, however, be set in stone. The prospect of federal juries awarding unlimited damages under the MHRA was never meant to be, and it has upset the delicate balance inherent within the MHRA. The above proposal is one way to restore that balance.