Missouri Law Review

Volume 75
Issue 4 *Fall 2010*

Article 7

Fall 2010

Employees' Decade: Recent Developments under the MHRA and the Employers' Potential Rebound, The

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LAW SUMMARY

The Employees' Decade: Recent Developments Under the MHRA and the Employers' Potential Rebound

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I. INTRODUCTION

The law of unintended consequences provides that any action by people or the government *will* have effects that are unanticipated and unintended.[1] Yet, a failure to recognize this principle is generally not the problem. The problem is the impossibility of determining the scope of those effects from the outset – *how much* will those unintended effects adversely impact the actual intended effects of the statute. This concept undoubtedly lingers in the minds of legislatures during the drafting of a bill and the enactment of law. How will the court interpret these provisions? How will that interpretation impact businesses in Missouri? In light of these hard, if not impossible, questions, it is likely the long-term reaction and adaptation to those inevitable unintended effects that matters the most.

Over the past decade, the Missouri Human Rights Act (MHRA) has been extensively subjected to the law of unintended consequences. Federal and state courts have disagreed about the Act's application, and its provisions have even clashed with Missouri's constitution.[2] The effects of these discrepancies have greatly expanded the protections afforded to employees as well as employees' ability to recover for actions invading those protections. This resulting expansion has exponentially increased the exposure of employers to liability, thus increasing the cost of doing business in Missouri. This, of course, is logically and inevitably passed to customers.[3] One could argue,

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1. Rob Norton, *Unintended Consequences*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2d ed. 2007), *available at* http://www.econlib.org/library/Enc/UnintendedConsequences.html (last visited Sept. 27, 2010).

2. *See* discussion *infra* Part II.B.

3. *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1252

however, that expense is not a factor in the Missouri legislature's efforts to reduce discrimination. But, since it ultimately appears that no amount of workplace training and selective hiring can fully eliminate the presence of workplace discrimination, properly balancing the competing interests of the employer in doing business with the public policy of reducing discrimination becomes exceedingly significant.

This Note will identify the considerable changes and varying interpretations of the MHRA over the last decade, analyze the optimal balance between the competing, important interests, and determine any potential need for amendment, including consideration of the various proposals currently before the legislature. Part II thus analyzes the four major areas of difficulty in the adjudication of MHRA claims in the last decade, including jury trials, available damages, the burden of proof, and individual liability. Next, Part III recognizes the most recent developments under the MHRA. And lastly, Part IV involves a two-part discussion beginning with the policy and effect behind each area of difficulty, and it concludes with an analysis of the Act as a whole, including its place among other relevant discrimination statutes such as Title VII.

II. LEGAL BACKGROUND

In 1961, the Missouri General Assembly enacted the MHRA with the general purpose of providing Missouri employees with a statutory right of action against employers concerning various forms of workplace discrimination.[4] Antedating the current prevailing federal discrimination statutory regime by three years, the MHRA is not merely a state-level counterpart to Title VII of the Civil Rights Act of 1964 (Title VII).[5] The two statutes have been described as "coextensive, but not identical," and the MHRA as "broader than Title VII, and in other ways . . . more restrictive."[6] However, because lower Missouri courts read Missouri law in conjunction with consistent federal employment discrimination case law during the interpretation and application of the Act, there is much overlap and similarity between the two.[7] Re-

(2003) ("[D]iscrimination[] claims are now like accidents – a cost of doing business, which necessarily implies that a certain level of discrimination will persist.").

4. Erin C. Hansen, State *ex rel.* Diehl v. O'Malley *Breaks Down the Wall: The Right to a Jury Trial in State Court Under the Missouri Human Rights Act*, 59 J. MO. B. 296, 297 (2003) (discussing the purpose of the Act); *see also* MO. REV. STAT. §§ 213.010-.137 (2000).

5. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2006) (proscribing employment discrimination based upon race, color, religion, sex, or national origin).

6. Brady v. Curators of Univ. of Mo., 213 S.W.3d 101, 112-13 (Mo. App. E.D. 2006) (emphasis omitted).

7. *See* Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. 2007) (en banc).

gardless of any such federal influence, the interpretive process always begins with an analysis of the Act itself.

A. The Relevant Provisions of the MHRA

Section 213.055.1 of the MHRA prohibits an employer from discriminating against an individual on the basis of "race, color, religion, national origin, sex, ancestry, age or disability."[8] This protection encompasses workplace actions concerning discharge, refusal to hire, compensation, employee or applicant classification, and any terms, conditions, or privileges of employment.[9] A separate provision also makes it unlawful to "aid, abet, incite, compel, or coerce the commission" of the prohibited acts and forbids retaliation or discrimination against those who oppose any proscribed actions or file complaints under the Act.[10] As with many statutes, the MHRA contains terms of art which are separately defined within the Act.[11]

By the clear language of the statute, liability for taking such actions under section 213.055.1 can be imposed on those considered to be an "employer."[12] The provision specifically defines an "employer" as "any person employing six or more persons within the state, and any person directly acting in the interest of an employer."[13] This definition includes the State of Missouri and any included civil or political subdivision, but expressly excludes religious or sectarian-owned and -operated corporations and associations.[14] Later identified within the definition of employer, a "person" is defined as "one or more individuals, corporations, partnerships, associations, organizations, . . . [and] other organized groups of persons."[15]

Beyond the substantive provisions granting employees statutory rights, the Act also has many procedural aspects. The basic framework of adjudicating claims is as follows. Upon a believed violation of the Act by an employer's actions, an employee must first file a verified complaint with the Missouri Commission on Human Rights (the Commission) within 180 days in order to pursue relief.[16] The employee is then presented with two possible

8. MO. REV. STAT. § 213.055.1(1) (2000).
9. *Id.* § 213.055.1(1)-(3).
10. *Id.* § 213.070(1)-(2).
11. *Id.* § 213.010.
12. *See id.* § 213.055.1(1).
13. *Id.* § 213.010(7).
14. *Id.*
15. *Id.* § 213.010(14).
16. *Id.* § 213.075.1. The complaint must state the particulars of the unlawful discriminatory practice as well as the name and address of the person(s) accused of committing such acts. *Id.* The Act also permits complaints to be filed with other commissions that are substantially equivalent to the Commission or with which the Commission has certain agreements, such as the Equal Employment Opportunity Commission (EEOC). *Id.* § 213.075.2.

options: (1) the claim can either be determined through the administrative process available through the Commission[17] or (2) the employee can wait 180 days after filing the complaint and request a right-to-sue letter, which is granted so long as a determination by the Commission is still pending.[18] If the employee chooses the latter route, the aggrieved employee has ninety days to bring suit under the Act against the relevant employer(s).[19] Reaching state or federal court, however, gives rise to a plethora of hurdles and considerations for the plaintiff-employee.

B. Procedural Aspects: Jury Trial and Damages

For the vast majority of the MHRA's existence, any claim brought under the Act was necessarily decided by bench trial while in state court; no jury trial was permitted.[20] The state court rule remained regardless of the fact that the right to a jury trial in federal court is wholly a matter of procedural law under the *Erie* doctrine and, therefore, federal law concerning a jury controlled in diversity actions or otherwise.[21] This disparity resulted in a common practice of employment attorneys bringing simultaneous actions under both the MHRA and an applicable federal discrimination act – such as Title VII,[22] the Americans with Disabilities Act of 1990,[23] or the Age Discrimination in Employment Act of 1967.[24] The federal question presented would provide supplemental jurisdiction for the MHRA action,[25] permitting initiation in or removal to federal court due to the inherent "same case or controversy" resulting from the identical instance of alleged discriminatory con-

17. *See id.* § 213.075.3.

18. *Id.* § 213.111.1.

19. *Id.* The action must also be brought within two years of the alleged discriminatory event's occurrence or reasonable discovery. *Id.* For a discussion of the remedies available under the MHRA, see discussion *infra* Part II.B.

20. *See, e.g.*, State *ex rel.* Tolbert v. Sweeney, 828 S.W.2d 929, 932 (Mo. App. S.D. 1992), *overruled by* State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003) (en banc). The original version of the MHRA provided that "[a]ny party" could request a jury trial. *Id.* at 930-31. But in 1965, the Missouri General Assembly removed the option for a jury trial from section 296.050. *Id.* at 931.

21. Sullivan v. Curators of Univ. of Mo., 808 F. Supp. 1420, 1424 (E.D. Mo. 1992); *see also* Simler v. Conner, 372 U.S. 221, 222 (1963) ("Only through a holding that the jurytrial [sic] right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.").

22. *See supra* notes 5-7 and accompanying text.

23. 42 U.S.C. §§ 12101-12117 (2006).

24. 29 U.S.C. §§ 621-634 (2006).

25. *See* 28 U.S.C. § 1367(a) (2006).

duct.[26] Of course, an out-of-state defendant could also obtain jurisdiction through diversity.[27] Since 2003, many of these procedural strategies are now unnecessary to accomplish the goals desired by the plaintiff.

In 2003, the Supreme Court of Missouri decided *State ex rel. Diehl v. O'Malley*,[28] which drastically altered the adjudication of MHRA actions in Missouri courts. In *Diehl*, the plaintiff filed a charge against NASD Regulation, Inc. for age and sex discrimination as well as retaliation for eventual termination due to those complaints.[29] After the 180-day waiting period, the plaintiff Diehl requested a "right to sue letter" and brought action in state court seeking a jury trial.[30] Following clear precedent, Judge O'Malley overruled the motion.[31] In response, Diehl sought a writ of prohibition, which the Supreme Court of Missouri granted and made absolute, requiring trial of the case before a jury.[32]

Before granting the writ, the court undertook an extensive historical analysis concerning the right to a jury trial in actions for damages.[33] Looking to the Missouri Constitution, the court interpreted the meaning of the constitutional right to a jury trial "as heretofore enjoyed."[34] Once the point of reference for the constitution was deemed to be 1820 – the date the Missouri Constitution was adopted – the sole issue centered on the extent of the right to a jury trial at that time.[35] Because the right was available for all actions seeking pecuniary damages in 1820, the same right was held to be constitutionally mandated for all claims that can be analogized to claims properly before a court at common law (distinguished from those in equity) in 1820.[36] Accordingly, the court held that claims under the MHRA for monetary damages provide a constitutional right to a jury trial.[37]

The *Diehl* decision, while encompassing the issue of the right to a jury trial for monetary damages, left many issues unanswered. One such issue concerned whether a plaintiff could seek equitable relief in the same action as that seeking legal relief before a jury. In *State ex rel. Leonardi v. Sherry*, the Supreme Court of Missouri resolved the issue in the affirmative.[38] The court

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26. Paul D. Seyferth & Joseph H. Knittig, *A Conflict of Balances: The Adjudication of Missouri Human Rights Act Claims in Federal Court*, 63 MO. L. REV. 307, 314-15 (1998) (providing a more in-depth analysis of the process).

27. *See* 28 U.S.C. § 1332.

28. 95 S.W.3d 82 (Mo. 2003) (en banc).

29. *Id.* at 84.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 84-89.

34. *Id.* at 84-85.

35. *Id.*

36. *Id.* at 85-86.

37. *Id.* at 88.

38. 137 S.W.3d 462, 473 (Mo. 2004) (en banc).

held that legal claims could be tried by jury while the court simultaneously determined those in equity, unless the circumstances required otherwise.[39]

Upon an exercise of the right to a jury trial, the full array of damages available under the Act[40] is available for jury consideration. Unlike the capped damages for discrimination under Title VII,[41] the MHRA permits the recovery of compensatory and punitive damages, without any caps.[42] This was not always the case. Before the 1986 amendment to the MHRA that limited adjudication to bench trials by removing the right to a jury, the Act did not allow punitive damages; a balance was struck between available damages and the availability of a jury trial in the new Act.[43] Beyond the issue of compensatory and punitive damages, however, the plaintiff can also recover the typical damages available in cases before a jury, such as damages for mental pain and suffering.[44] Similar to other discrimination statutes, potential relief under the MHRA includes that which is "deem[ed] appropriate," such as back pay, attorneys' fees and costs, and specific performance.[45] Just as the *Diehl* decision altered the balance of the Act, other changes in the last decade also altered the scales.

C. The Daugherty *Standard*

From 1984 to 2007, MHRA claims were litigated in a framework nearly identical to that used by federal courts for employment discrimination.[46] The federal approach varies depending upon a plaintiff's production of direct evidence or circumstantial evidence of discrimination.[47] If presented with direct evidence – that which establishes "a specific link between the [alleged] dis-

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39. *Id.*

40. MO. REV. STAT. § 213.111 (2000).

41. The available compensatory and punitive damages under Title VII are capped anywhere between $50,000 and $300,000, depending on the employer size. 42 U.S.C. § 1981a(b)(3) (2006). This cap effectively creates a balance: plaintiffs can bring their claims before a sympathetic jury, but that jury does not have unfettered discretion in awarding damages. *See* Seyferth & Knittig, *supra* note 26, at 313-14.

42. MO. REV. STAT. § 213.111.2.

43. *Compare* MO. REV. STAT. §§ 296.010-.070 (1978) (repealed 1986), *with* MO. REV. STAT. §§ 213.010-.070 (2000).

44. *See* H.S. v. Bd. of Regents, Se. Mo. State Univ., 967 S.W.2d 665, 673 (Mo. App. E.D. 1998) ("Cases interpreting [section 213.111.2] have repeatedly held that awards . . . may include damages for emotional distress.").

45. MO. REV. STAT. § 213.111.2.

46. *See, e.g.*, Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. 2007) (en banc); Midstate Oil Co. v. Mo. Comm'n on Human Rights, 679 S.W.2d 842, 845 (Mo. 1984) (en banc) (expressly adopting the federal employment discrimination analytical framework).

47. *See* Putman v. Unity Health Sys., 348 F.3d 732, 734 (8th Cir. 2003).

criminatory animus and the challenged decision"[48] – sufficient to show "that an illegitimate criterion was a motivating factor in the employer's decision to terminate [his or her] employment," the court will provide a mixed-motive instruction.[49] This mixed-motive instruction signals a shift in the burden of persuasion to the employer, who must then prove that it would have made the same adverse decision regardless of the illegitimate criterion.[50]

The presentation of evidence that is circumstantial, on the other hand, gives rise to the much-debated framework set out in *McDonnell Douglas Corp. v. Green*.[51] The burden-shifting analysis set out in *McDonnell Douglas Corp.* requires that a plaintiff first establish a prima facie case of discrimination, the elements of which vary depending on the claim.[52] Upon satisfying the first prong, which creates a presumption of discrimination, the burden of production shifts to the employer to proffer a legitimate, non-discriminatory reason behind the adverse action.[53] The burden of persuasion, however, remains with the plaintiff at all times; the court does not analyze credibility.[54] If the employer's production of evidence is sufficient, the presumption will fall away and the plaintiff will regain the full burden to show that the stated reasons are merely pretext for the discriminatory action.[55] Each of these steps, in order, occurs before the case can even reach a jury, and the single issue before the fact-finder is whether the employer discriminated against the employee.[56]

The use of the *McDonnell Douglas* framework to analyze MHRA claims in Missouri courts was widespread and frequently praised[57] until *State ex rel.*

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48. Philipp v. ANR Freight Sys., Inc., 61 F.3d 669, 673 (8th Cir. 1995) (citing Stacks v. Sw. Bell Yellow Pages, Inc., 996 F.2d 200, 202 n.1 (8th Cir. 1993)).

49. *Id.* (citing Cram v. Lamson & Sessions, Co., 49 F.3d 466, 471 (8th Cir. 1995)).

50. *Id.*

51. 411 U.S. 792 (1973).

52. *Id.* at 802. Regardless of the type of discrimination alleged, each prima facie case includes common requirements: the plaintiff must suffer an adverse job action, the plaintiff must be a member of a protected group, and the employer's action must be based upon an illegal factor. *Id.*

53. *Id.*

54. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000).

55. *Id.*

56. Bowen v. Celotex Corp., 292 F.3d 565, 566 (8th Cir. 2002) ("A factfinder's Title VII verdict cannot be based upon a plaintiff's failure to produce evidence of a prima facie case or pretext because these burdens of production 'drop out' when a case is submitted for a verdict." (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983))).

57. *See, e.g.*, Midstate Oil Co. v. Mo. Comm'n on Human Rights, 679 S.W.2d 842, 845-46 (Mo. 1984) (en banc) ("[T]his approach offers 'a sensible, orderly way to evaluate the evidence . . . .'" (citation omitted)); H.S. v. Bd. of Regents, Se. Mo. State Univ., 967 S.W.2d 665, 670 (Mo. App. E.D. 1998) ("The framework is used to pro-

Diehl v. O'Malley, which, as discussed above, permitted jury trials under the MHRA.[58] This, in turn, led to the resulting promulgation of Missouri Approved Instruction (MAI) 31.24.[59] MAI 31.24 instructs the jury to find for the plaintiff if, first, the defendant committed the alleged action, second, the specific protected classification was a *contributing factor* in such action, and third, the conduct caused damage to the plaintiff.[60] Problematically, the federal approach to employment discrimination was focused on whether the disputed employment action was *motivated* by an illegitimate purpose.[61] The plaintiff essentially needed to prove that the adverse action was motivated by discrimination in order to survive summary judgment so that a jury could find that it was merely a contributing factor.

The contradiction and divergence between the standard provided in MAI 31.24 and that used in the federal discrimination framework resulted in the adoption of a new standard for Missouri in *Daugherty v. City of Maryland Heights*.[62] In *Daugherty*, the City of Maryland Heights (the City) terminated the plaintiff from his position as police captain at the age of fifty-nine.[63] Before his rise to police captain, plaintiff Daugherty suffered injuries on the job that eventually led to degenerative disk disease, resulting in his excessive use of sick leave.[64] The violation of the sick leave policy prompted the City to submit Daugherty to a doctor-administered examination to determine his physical capability of performing the job duties of police captain.[65] Despite the doctor's clearance of Daugherty to perform as police captain, the stated cause for termination was the doctor's finding of incapability to perform front-line officer duties.[66] After being terminated, Daugherty met with his supervisor – who was also his brother-in-law – to have a discussion.[67] During the taped discussion, the supervisor stated that the City wanted to make a reduction in employees over fifty-five years old to save money and agreed that this constituted age discrimination.[68] The supervisor later gave deposi-

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gressively sharpen the inquiry into the question of whether intentional discrimination has occurred.").

58. *See* discussion *supra* Part II.B.

59. *See* Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 (Mo. 2007) (en banc) ("[T]his Court's 2003 decision holding that jury trials are available under the MHRA, followed by the adoption of . . . MAI 31.24 . . . .").

60. MO. APPROVED JURY INSTRUCTIONS § 31.24 (2005).

61. *See, e.g.*, *Midstate Oil Co.*, 679 S.W.2d at 845.

62. 231 S.W.3d 814.

63. *Id.* at 816.

64. *Id.* at 817.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

tion testimony discounting his statements, characterizing them as attempts to pacify his brother-in-law.[69]

Daugherty brought claims against the City under the MHRA for age and disability discrimination.[70] When the City sought summary judgment on those claims, the trial court granted the motion and entered judgment in favor of the City, finding that the plaintiff "failed to establish a prima facie case."[71] Daugherty appealed the adverse judgment, arguing that genuine issues of material fact existed concerning whether age or disability were *contributing factors* in the cause of termination – the standard set out in MAI 31.24.[72] In analyzing the appeal, the Supreme Court of Missouri noted that the MHRA's definition of discrimination included "*any* unfair treatment" based upon a protected status.[73] By interpreting the plain meaning of the Act, the court found that it did not require that "discrimination [be] a substantial or determining factor in an employment decision;" the discrimination could merely contribute to the decision.[74] Since MAI 31.24 was consistent with this conclusion, the court agreed with Daugherty and held that claims under the MHRA will "survive summary judgment if there is a genuine issue of material fact as to whether [the protected status of the plaintiff] was a 'contributing factor'" to the defendant's adverse employment action.[75] The case was reversed and remanded for a trial on the merits.[76]

Since *Daugherty*, federal and state courts analyzing employment discrimination claims under the MHRA no longer use the federal *McDonnell Douglas* framework.[77] If the plaintiff presents sufficient evidence to create a genuine issue of material fact concerning whether discrimination was a contributing factor in the employment action, it will be submitted to the fact-finder in conjunction with MAI 31.24 for a verdict.[78] But the adoption of the *Daugherty* standard did not signal the end of significant change to the litigation of MHRA claims in the last decade.

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69. *Id.*

70. *Id.*

71. *Id.* at 817-18.

72. *Id.* at 819-20.

73. *Id.* at 819 (citing MO. REV. STAT. § 213.010(5) (2000)).

74. *Id.*

75. *Id.* at 820.

76. *Id.* at 825.

77. *See, e.g.*, Wallace v. DTG Operations, Inc., 563 F.3d 357, 360 (8th Cir. 2009) (recognizing and applying the *Daugherty* standard instead of the *McDonnell Douglas* framework for MHRA claims).

78. *See* ITT Commercial Fin. Corp. v. Mid-Am Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc) ("Summary judgment is [appropriate] . . . where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." (citing MO. SUP. CT. R. 74.04)).

D. Interpretations of "Employer": Individual Liability?

As described previously, section 213.010 of the MHRA defines an employer as "any person employing six or more persons within the state, and any person directly acting in the interest of an employer."[79] It is unquestionable and undisputed that the stereotypical corporation or organization is included in this definition; however, it has been less clear whether a supervisor or manager can be individually liable under the Act.[80] The first courts to address this question were federal, which could only attempt to predict what the Supreme Court of Missouri's decision on the issue might be.[81]

The U.S. Court of Appeals for the Eighth Circuit in *Lenhardt v. Basic Institute of Technology, Inc.* first decided the issue in 1995, holding that the Supreme Court of Missouri would likely interpret section 213.010 as not allowing recovery against individuals.[82] In making the decision, the court reasoned that the Supreme Court of Missouri would look to similar statutes for guidance, such as Title VII.[83] While recognizing that the definition of employer under Title VII[84] differs from that under the MHRA, the court reasoned that the interpretation by many federal courts for solely *respondeat superior* liability under Title VII's "any agent of such a person" would analogically preclude individual liability under MHRA's "any person directly acting in the interest of an employer."[85]

Most subsequent decisions by lower federal courts followed the holding of *Lenhardt* as binding precedent.[86] However, cases in both the U.S. District Courts for the Eastern and Western Districts of Missouri displayed some hesitancy. For example, in *Hill v. Ford Motor Co.*, the Eastern District refused to follow *Lenhardt* by downplaying its authoritativeness and determining that

79. MO. REV. STAT. § 213.010(7) (2000).

80. *See* Richard D. Worth, Note, *No "Free Pass" for Employees: Missouri Says "Yes" to Individual Liability Under the Missouri Human Rights Act*, 72 MO. L. REV. 947, 948 (2007).

81. *See* Hazen v. Pasley, 768 F.2d 226, 228 (8th Cir. 1985) ("Where neither the legislature nor the highest court in a state has addressed an issue, the federal court must determine what the highest state court would probably hold were it called upon to decide the issue.").

82. 55 F.3d 377, 381 (8th Cir. 1995).

83. *Id.* at 380-81.

84. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (2006).

85. *Lenhardt*, 55 F.3d at 379-80.

86. *See* Worth, *supra* note 80, at 947 n.2 (compiling a non-exhaustive list of federal courts following the decision in *Lenhardt*).

the Supreme Court of Missouri would hold in favor of individual liability.[87] Moreover, the Western District, although ultimately following *Lenhardt*, displayed reluctance in *Baines v. Missouri Gaming Co.* by explicitly pointing out that any agreement or disagreement with the Eighth Circuit was immaterial due to stare decisis.[88]

The Missouri Court of Appeals, Eastern District was the first Missouri state court to rule on the issue of individual liability in *Cooper v. Albacore Holdings, Inc.*[89] In *Cooper*, the plaintiff brought MHRA claims for sexual harassment and retaliation against the defendants Albacore Holdings, Inc. and Gordon Quick, the CEO of the company.[90] The trial court granted the motion for summary judgment brought by the defendants, and the plaintiff appealed.[91] On appeal, the court rejected the holding of *Lenhardt* and allowed individual liability to be pursued against defendant Quick.[92] In making this decision, the court looked to the Family and Medical Leave Act (FMLA) instead of Title VII, because the FMLA directly mirrors the definition of employer under the MHRA.[93] By making comparisons under the FMLA, the court joined other courts to hold that the language "in the interest of an employer" plainly includes individual liability.[94] Ultimately, this decision was reaffirmed by the Missouri Court of Appeals, Eastern District in *Brady v. Curators of University of Missouri.*[95]

III. RECENT DEVELOPMENTS

Despite the considerable amount of changes that occurred to the adjudication of MHRA claims in the early part of the decade, many interpretations of the Act had yet to be conclusively settled or even discovered. Several recent decisions from the Supreme Court of Missouri have provided additional certainty and clarity for those bringing claims under the Act.[96] However, it is impossible to predict all of the potential changes to the Act resulting from the interpretive process in the federal and state judiciary, let alone the legislature.

87. 324 F. Supp. 2d 1028, 1032 (E.D. Mo. 2004). This case is not to be conflated with the Supreme Court of Missouri case of *Hill v. Ford Motor Co.*, 277 S.W.3d 659 (Mo. 2009) (en banc), which is discussed in Part III.A, *infra*.

88. No. 05-6031-CV-SJ-FJG, 2006 WL 506184, at *2 (W.D. Mo. Feb. 28, 2006).

89. 204 S.W.3d 238 (Mo. App. E.D. 2006).

90. *Id.* at 240.

91. *Id.* at 241-42.

92. *Id.* at 244.

93. *Id.*

94. *Id.*

95. 213 S.W.3d 101, 113 (Mo. App. E.D. 2006).

96. *See* discussion *infra* Part III.A-C.

A. Individual Liability: Employers Under the Act

In light of the *Cooper* holding, much of the discrepancy between the federal courts was resolved because federal courts are generally required to follow the decisions of state intermediate appellate courts when applying state law.[97] However, federal courts are not absolutely bound by state intermediate appellate decisions – the decisions can be disregarded if the court is convinced by persuasive data that the Supreme Court of Missouri would hold otherwise.[98] In addition, there was always the possibility that the Missouri Court of Appeals, Western District would hold oppositely, recreating and escalating the once-existing debacle. The Supreme Court of Missouri's holding in *Hill v. Ford Motor Co.* avoided these possibilities.[99]

In *Hill*, the plaintiff was a "floater"[100] for the Ford Motor Company (Ford) and was at times under the supervision of Kenny Hune.[101] During these periods, Hune would ask the plaintiff, Hill, sexually related questions such as whether she wore zebra prints to reflect her animal instincts and about the details of her bra.[102] In addition, Hune would make various sexual advances towards Hill and other female employees.[103] When Hill and other female employees presented this activity to their group leader, the group leader informed Hune's supervisor, Maurice Woods.[104] Hill was asked by Woods to identify permanent positions that were available and Woods ultimately assigned her to a position under Hune.[105] This created great tension between Hune and Hill, and Hune initially refused to permit her to work.[106]

According to Hill, Hune approached her aggressively when she began to work, causing her to raise up her safety glasses, to which Hune responded by hostilely reprimanding her for violating a safety precaution.[107] When discussions about the incident began within labor relations, the labor relations supervisor, Edds, required Hill to seek psychiatric help and ordered a three-day suspension, during which Hune was terminated.[108] Hill eventually filed complaints with the EEOC and the Commission for a hostile work environment resulting from sexual harassment and retaliation for reporting the discrimina-

97. Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967).

98. *See id.*

99. 277 S.W.3d 659 (Mo. 2009) (en banc).

100. "Floater" is a term referring to an employee who moves from job to job within a department. *Id.* at 662.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 663.

106. *Id.*

107. *Id.*

108. *Id.*

tion and previously filing discrimination complaints.[109] The complaint, as filed, was only against Ford.[110]

Upon receiving a right to sue letter, Hill brought claims against Ford, Hune, and Edds.[111] The trial court granted summary judgment in favor of Ford and Edds on each of their purported violations, and Hill appealed.[112] The Supreme Court of Missouri first determined that *Daugherty* was indeed the standard for sexual harassment and retaliation claims.[113] Under the *Daugherty* standard, the court determined that issues of material fact existed and therefore reversed and remanded the case.[114]

Next, the court addressed whether Edds, as the labor relations supervisor, could be individually liable under the Act.[115] The court analyzed how the lower appellate courts in *Cooper* and *Brady* decided the individual liability issue.[116] Agreeing with *Cooper* and *Brady*, the court found the "plain and unambiguous" definition of employer to include individual liability.[117] In essence, the "statute is clear" that the MHRA reaches "*any person* acting directly in the interest of the employer," including a supervisory employee.[118] Lastly, the court entertained Edds' argument that he was precluded from liability due to the failure to include him in the complaint filed with the EEOC or the Commission.[119] Since no state decision was on point, analogous federal law provided guidance.[120] Federal decisions on the matter generally required individuals to be named in the original charge in order to later be sued.[121] This requirement gives notice to the party as well as provides an opportunity for the party to voluntarily comply with the proceedings; however, some cases have permitted claims when these considerations are absent.[122] Since the trial court did not weigh these considerations in its grant of summary judgment, the court remanded the issue for determination.[123]

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109. *Id.* at 664.
110. *Id.*
111. *Id.*
112. *Id.* at 661 & n.1.
113. *Id.* at 664-65.
114. *Id.* at 662.
115. *Id.* at 669.
116. *Id.*
117. *Id.* (quoting Cooper v. Albacore Holdings Inc., 204 S.W.3d 238, 244 (Mo. App. E.D. 2006); Brady v. Curators of Univ. of Mo., 213 S.W.3d 101, 113 (Mo. App. E.D. 2006)).
118. *Id.* (emphasis added) (citing *Brady*, 213 S.W.3d at 113).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 670.

B. Constructive Discharge and Continuing Violations

As identified in Part II.A, the MHRA specifically requires that a charge be filed "within [180] days of the alleged act of discrimination."[124] Yet, there may not always be a clear point when the discrimination culminates into a well-defined adverse employment action. Moreover, the provision provides no insight into situations where the employee is effectively forced out due to discriminatory practices – i.e., a "constructive discharge." The recent case of *Wallingsford v. City of Maplewood* provides valuable insight on both.[125]

In *Wallingsford*, the plaintiff was a police officer for the City of Maplewood from 1986 until 2004, when she resigned.[126] In 2005, Wallingsford filed a charge of discrimination with the Commission, alleging retaliation, hostile work environment, gender discrimination, and intentional infliction of emotional distress, and she eventually received a right-to-sue letter.[127] As part of the allegations, Wallingsford claimed that she experienced abusive behavior, promotion denials, sham evaluations, and baseless internal investigations throughout her employment until her constructive discharge.[128] Upon Maplewood's motion, the trial court granted summary judgment in favor of Maplewood on the ground that the charge was not filed within 180 days of an alleged act of discrimination.[129] Wallingsford appealed the ruling.[130]

On appeal, the Supreme Court of Missouri detailed the "continuing violation" exception to the 180-day filing requirement, stating that the plaintiff can recover for discriminatory acts prior to the 180-day requirement if they are part of a series of interrelated events.[131] Therefore, the only issue was whether Wallingsford alleged a single discriminatory event occurring less than 180 days before her complaint and not whether *all* events occurred within the 180-day period.[132] Since constructive discharge[133] is recognized as a discriminatory action under the Act, Wallingsford did allege a discriminatory event that occurred less than 180 days before filing her charge.[134] The judgment was reversed and the case remanded for the trial court to consider the

124. MO. REV. STAT. § 213.075.1 (2000).
125. 287 S.W.3d 682 (Mo. 2009) (en banc).
126. *Id.* at 684.
127. *Id.* at 684-85.
128. *Id.* at 685.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. An employee is constructively discharged when "an employer deliberately renders an employee's working conditions so intolerable that the employee is forced to quit his or her job." *Id.* at 686.
134. *Id.* at 685-86.

genuine issue of material fact: whether Wallingsford was constructively discharged in violation of the Act.[135]

C. Potential Changes to the MHRA

While changes from the judiciary can be both swift and cumulative, it can all be undone in an instant. The legislature is the ever-looming branch in our tripartite system that can refine, rework, or repeal any statute or act that is not effectuating results as intended. With numerous legislative proposals and amendments occurring in the last decade, this legislative process is no stranger to the MHRA, and support for potential amendments is gaining renewed strength in light of the most recent applications of the Act.[136] Therefore, understanding the proposals to the MHRA before the Missouri House of Representatives and the Missouri Senate is important.[137]

For the years 2009 and 2010, three bills arose before the Senate[138] and six before the House of Representatives[139] that proposed changes to the MHRA. Some of the bills focused solely on specific claims under the Act, such as sexual orientation discrimination,[140] while others proposed a more comprehensive change to the statutory framework.[141] While none of these proposed amendments passed, they are indicative of the continual efforts to amend the Act, some of which have been successful in the past. As referred

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135. *Id.* at 687.

136. *See infra* notes 138-50 and accompanying text.

137. Equally important is an understanding of the legislative process in Missouri. All laws initially begin as proposed bills in either the House or the Senate. *See* How a Bill Becomes a Law, http://www.senate.mo.gov/bill-law.htm (last visited Oct. 1, 2010). These bills, drafted by or at the request of a legislator, are "introduced" and read before the applicable governmental body. *Id.* Following the reading, each bill is sent to a committee, which can take a variety of actions. *Id.* If a favorable action is taken by the committee, the bill is placed on a "perfection calendar" that can include amendments, eventually leading to a perfected and printed bill. *Id.* The perfected bill is then presented before the originating house. *Id.* It requires a constitutional majority (eighteen for the Senate, eighty-two for the House) to pass. *Id.* If passed, it is sent to the other house for a similar process; if the bill is "truly agreed to and finally passed," it is signed and sent to the Governor for signing or veto. *Id.*

138. *See* S. 852, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); S. 626, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); S. 109, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

139. *See* H.R. 1850, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); H.R. 1488, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); H.R. 799, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); H.R. 701, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); H.R. 582, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); H.R. 227, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

140. *See* H.R. 1850; S. 626; H.R. 701; H.R. 582; S. 109 (identical to S. 626).

141. *See, e.g.*, S. 852 (seeking to repeal and reenact sections concerning employee definitions, the analytical standards, damages, and interpretive standards).

to previously, the Act was amended in 1986 to remove the right to a jury trial and to provide for the possibility of punitive damages.[142] Without discussing the proposals to amend specific discrimination claims under the Act, each remaining bill is relatively comprehensive and provides a different perspective on the various balances that are possible.

House Bill 1488 removes from the section 213.010 definition of employer "any person . . . acting in the interest of the employer," which was interpreted to give rise to individual liability.[143] In addition, the bill expressly abrogates *Daugherty* and its progeny as well as eliminates MAI 31.24 and 31.25, which provide for the motivating standard analysis.[144] The bill, if enacted, would direct courts to again look at the *McDonnell Douglas* framework as a "highly persuasive framework for analysis."[145] The bill, in stark contrast to the uncapped damages available under the current Act, also provides for capped compensatory and punitive damages varying from $50,000 to $300,000, depending on the size of the employer.[146] Senate Bill 852 and House Bill 799 provide similar changes.[147]

On the other hand, House Bill 227 presents a different package of change. As with each comprehensive bill presented, the bill does not attempt to modify the availability of jury trials under the MHRA.[148] Similar to the bills previously introduced, Bill 227 abrogates *Daugherty* in favor of a motivating standard as well as removes the provision in the definition of employer that provides individual liability.[149] However, Bill 227 departs from each of the other bills because it does not mandate a cap for compensatory or punitive damages.[150]

As evident, each of the bills provides a slight variance on what the balance should be concerning discrimination claims under the MHRA. The main difference between the bills is that House Bill 227 does not provide for capped compensatory and punitive damages – a big factor when deciding to adjudicate claims in court. It becomes apparent, however, that while *Daugherty* may be abrogated in the future, jury trials are likely here to stay.

142. *See* MO. REV. STAT. §§ 296.010-.070 (1978) (repealed 1986).

143. *See* H.R. 1488.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* S. 852, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); H.R. 799, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

148. *See* H.R. 227, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

149. *Id.*

150. *Id.*

IV. DISCUSSION

As any historian would surely approve, the analysis of the proper future for employment discrimination in Missouri begins with a detailed look into its past. This process inherently requires a critique of the propriety of each speed bump in time – whether the commendable decisions of the past have come to be the errors of today. Particularly, a lack of judicial error in the application of the Act would logically point to the legislature for resolution of any problems that may exist. Determining any potential error or problem is best made through separate analysis of the parts, culminating into an examination of the whole.

A. The Pieces of the Pie

1. The Right to a Jury Trial

The first major change to the MHRA within the last decade arose from the Supreme Court of Missouri's determination in *State ex rel. Diehl v. O'Malley* that a right to a jury trial exists for claims under the MHRA for monetary damages.[151] As described above, this involved an analysis of the Missouri Constitution's provision that states, "[T]he right of trial by jury as heretofore enjoyed shall remain inviolate . . . ."[152] This provision has been interpreted as providing the same right to a jury trial to "the class of cases to which it was then applicable" under common law at the time of the 1820 adoption of the Missouri Constitution.[153] Because equitable actions did not include a constitutional right to a jury at common law, there is no comparable constitutional right today.[154] On the other hand, actions at law, such as claims for pecuniary relief, included a right to a jury trial under common law and, therefore, include such a constitutional right today.[155] Accordingly, it is proper for claims for monetary damages under the MHRA to have a right to a jury trial in Missouri.

Since a jury is available for claims of monetary relief under the MHRA by constitutional mandate,[156] it is important to understand the impact of such a right. This inquiry can be broken down into two questions. First, what

151. 95 S.W.3d 82, 84 (Mo. 2003) (en banc).

152. MO. CONST. art. I, § 22(a).

153. De May v. Liberty Foundry Co., 37 S.W.2d 640, 648 (Mo. 1931).

154. Wolf v. Hartford Fire Ins. Co., 263 S.W. 846, 847 (Mo. 1924) (en banc).

155. Meadowbrook Country Club v. Davis, 421 S.W.2d 769, 772 (Mo. 1967) (en banc) ("The only relief sought in the instant case was the recovery of a money judgment so that it was an action at law and, therefore, fell within the scope of the constitutional guarantee of the right of trial by jury.").

156. As identified previously, this right still exists when simultaneously seeking equitable relief. *See* State *ex rel.* Leonardi v. Sherry, 137 S.W.3d 462, 673 (Mo. 2004) (en banc).

impact does a jury have on the likelihood of a plaintiff succeeding on the merits? And second, if the plaintiff is successful, how does a jury impact the relief granted? Each question will be discussed in turn.

Sources suggest that the "popular" view among legal professionals and the public in general is that juries tend to be pro-plaintiff in that they are more likely to find liability for claims than a more experienced, less empathetic judge.[157] Of course, this general view varies depending on the type of claims involved; many believe personal injury actions with large and powerful defendants will find less sympathy in a jury than other actions with more relatable defendants.[158] However, studies show that this view is only sound in theory. According to one comprehensive study by Kevin M. Clermont and Theodore Eisenberg, plaintiffs as a whole do not fare better before juries, with any variance in the win rate resulting from considerations beyond a judge or jury trial, such as the average win rate for a given type of case.[159] Essentially, those cases that do well before a jury also do well before a judge, and vice versa.[160] A synthesis of multiple studies also determined that although juries may be more willing to find liability for corporate giants over family-owned shops, juries may actually have an anti-plaintiff bias due to a strong cautiousness about frivolous lawsuits and a general belief of over-litigiousness in our society.[161]

The same general belief exists for juries' treatment of compensatory and punitive awards: juries become emotionally involved and award outrageous damages.[162] This belief is also unsupported by empirical evidence. A study between jurors and experienced legal professionals (including arbitrators, lawyers, and past judges) determined that there is no significant difference in the calculation of damages between jurors and those who have considerable legal experience.[163] Other studies further support this conclusion.[164] Howev-

157. *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127 (1992).

158. *See id.* at 1128.

159. *Id.* at 1134.

160. *Id.* at 1138.

161. Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1507 (2003).

162. *See id.* at 1512 (pointing out that the media plays an important role in this belief, as only the most extreme jury awards generally reach the public eye).

163. Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 896 (1993). While this study involves medical malpractice, which presents numerous considerations, it is indicative of a lack of juror bias. *See id.*

164. *See, e.g.*, Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 200 (2002) ("[I]t is not clear that decisions by juries differ dramatically from those of judges.").

er, occasional cases such as *Kimzey v. Wal-Mart Stores, Inc.*, where a jury awarded $50,000,000 in punitive damages, tend to skew public perception.[165]

Regardless of any disparity between popular beliefs and actual practice, the stereotypical personal belief among attorneys plays a direct role in their settlement efforts. In fact, an analysis of approximately 700,000 cases determined that of the general settlement rate of 26.6% for trials, cases in which a jury trial is demanded are 5.5% more likely to settle than those without a jury.[166] Considering all of the elements involved in a settlement, the popular belief concerning the judge-jury distinction is undoubtedly a subliminal factor that directly correlates with the probability of receiving relief.

With all of these factors, it is clear that the option for a jury trial in MHRA monetary claims is a significant benefit for plaintiffs. Regardless of generalized empirical studies that negate widely held beliefs, plaintiffs may still find an impartial jury more attractive than a seasoned judge. Whether the specific claim is shaky or the particular litigator has an uncanny ability to connect with jurors, the availability of a jury is an important factor in any trial strategy. This is especially true when the common belief that juries are more willing than judges to award damages in discrimination cases – whether actually supported or not – will have a direct impact on settlement efforts.[167] Other changes in the past decade have further impacted MHRA adjudication.

2. The *Daugherty* Standard: Discrimination's Contribution

The plain and unambiguous language of the provision defining discrimination as "*any* unfair treatment based on [a protected status]"[168] clearly suggests that the legislature did not intend to require that an employment action be completely motivated by a discriminatory animus. Instead, consistent with the holding in *Daugherty v. City of Maryland Heights*,[169] it plainly appears only to require a showing that discrimination was present in (or contributed to) the employment decision. What, though, does the distinction between motivating and contributing actually mean?

One possibility is displayed in an example by Ferne P. Wolf in the legislative review subcommittee of the Missouri Bar.[170] In this example, Ms. Wolf points out that the motivating factor standard may preclude liability

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165. 107 F.3d 568, 570 (8th Cir. 1997).

166. Joni Hersch, *Demand for a Jury Trial and the Selection of Cases for Trial*, 35 J. LEGAL STUD. 119, 127-28, 140 (2006). While this study involves cases from the federal docket, its display concerning the effect of jury trials on settlement efforts in the minds of litigators is likely analogous to civil disputes. *See id.* at 138.

167. *See* Hansen, *supra* note 4, at 304 (identifying why plaintiffs prefer jury trials).

168. MO. REV. STAT. § 213.010(5) (2000) (emphasis added).

169. 231 S.W.3d 814, 819 (Mo. 2007) (en banc).

170. Memorandum from The Missouri Bar to Representative Edgar G. H. Emery & Representative Tim Jones 3-4 (Feb. 25, 2009) (statement of Ferne P. Wolf).

under the MHRA if an African American was denied employment because of his race *and* because he went to the University of Missouri.[171] While it can be argued that the person's race may not have purely motivated the decision not to hire, it surely contributed to it. However, at least one Missouri court held that the change in terminology is a distinction without a difference.[172] In doing so, the court looked to Title VII's definition of "motivating" as "playing a part or playing a role in the decision"[173] for persuasive guidance.[174] Since the definition of "motivating" and the plain meaning of "contributing" are synonymous according to the court, each standard has the same threshold inquiry.[175]

Nonetheless, the abolishment of the *McDonnell Douglas* analytical framework has a clear implication: plaintiffs have a lower burden of production to survive summary judgment. As an initial matter, moving away from a burden-shifting analysis makes sense. Under the contributing factor standard, once the burden shifts to the employer to proffer the reason, or determinative factor, behind the employment decision, that proffered reason does not itself resolve the issue of whether there was a discriminatory contributing factor. If anything, it merely determines what the employer considered *most* in its decision, not the absence of a contributing discriminatory factor. The federal framework is thus a possible source of confusion and a waste of resources. Yet, the federal framework does have merit. It ultimately serves to flush out the issues for the case and provides additional clarity in the process of evidence production. Due to an employer's fear of various tort actions such as defamation, many plaintiffs are provided with little to no reason for their ultimate termination;[176] shifting the burden to the defendant provides this reason, even though it may be pretextual.

Beyond the initial threshold of a motion to dismiss and summary judgment, the promulgated MAI 31.24 may also have an impact on the jury. For instance, even though Title VII defines "motivating" in a similar fashion as "contributing," this may conflict with the typical understanding of jurors. In fact, motive is generally defined as "[s]omething, esp[ecially] willful desire, that *leads* one to act."[177] This definition suggests that motivation is about the determinative factor that brings about an action. Motivation in an employment law context, however, is concerned with whether discrimination merely played a part in the action. Labeling the standard as "contributing" provides

171. *Id.*

172. *See* McBryde v. Ritenour Sch. Dist., 207 S.W.3d 162, 170 (Mo. App. E.D. 2006).

173. 8TH CIR. MODEL CIVIL JURY INSTR. § 5.96.

174. *McBryde*, 207 S.W.3d at 170 (emphasis omitted).

175. *Id.*

176. *See* Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 209, 225 (1987).

177. BLACK'S LAW DICTIONARY 1039 (8th ed. 2004) (emphasis added).

additional clarity by bringing the substantive effect of the standard in line with its plain, literal meaning.

As a whole, it appears that the Missouri General Assembly intended to provide a right of action for a greater amount of discriminatory actions under the MHRA. By implementing a contributing factor standard and instruction, clarity is provided to the adjudication of claims in Missouri. Furthermore, the abandonment of the *McDonnell Douglas* framework provides additional clarity and makes the summary judgment threshold easier to survive. The plaintiff need only produce sufficient evidence – whether direct or circumstantial – to show a genuine issue of material fact in order to survive summary judgment; there is no shift in the burden of production.[178]

3. Individual Liability

The provision defining an employer to include "any person directly acting in the interest of an employer"[179] plainly indicates that the Missouri legislature intended to extend liability beyond the organizational level. The Supreme Court of Missouri's holding in *Hill v. Ford Motor Co.*[180] definitively affirmed this observation. This is more apparent when recognizing that the MHRA does not make reference to agency law, which led federal courts to imply solely *respondeat superior* liability under Title VII.[181] Therefore, unlike Title VII, it is clear that supervisors,[182] chief executive officers,[183] and similar positions are subject to liability under the MHRA. While the Supreme Court of Missouri's holding of individual liability is a matter of statutory interpretation, the underlying issue remains whether it is good policy to hold individuals directly liable.

Most commentators do not doubt the necessity of vicarious liability, under the doctrine of *respondeat superior*, to hold principals (employers) liable for the acts of their agents (employees).[184] Such liability typically provides plaintiffs access to deeper pockets, with many organizations holding greater

178. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc) ("Summary judgment is [appropriate] . . . where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." (citing MO. SUP. CT. R. 74.04)).

179. *See* MO. REV. STAT. § 213.010(7) (2000).

180. 277 S.W.3d 659 (Mo. 2009) (en banc).

181. *See, e.g.*, Gastinaeu v. Fleet Mortgage Corp., 137 F.3d 490, 494 (7th Cir. 1998).

182. *Hill*, 277 S.W.3d at 662 (holding that a supervisor can be liable under the MHRA).

183. *See* Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 244 (Mo. App. E.D. 2006).

184. Tammi J. Lees, Note, *The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L. REV. 861, 878-79 (2004) (identifying common arguments).

wealth than their individual agents.[185] In addition, it is the organization that delegates authority to its agents and is, therefore, the most effective entity for deterrence.[186] It alone has the ability to provide relief such as reinstatement or promotion. However, in the end, these arguments provide little value for the determination of whether individual liability itself is warranted.

Proponents of individual liability universally argue that individual liability provides further deterrence of discrimination to those who actually commit the improper actions.[187] In effect, the personal fear of liability – a direct cause and effect – is the only real way to achieve significant steps toward eliminating discrimination. Directly holding the individual responsible for the improper action[188] similarly serves to vindicate the victims of discrimination by punishing the actual wrongdoers and increases the likelihood that victims will bring legal action, further fortifying deterrence principles.[189] And while plaintiffs are entitled to only one "satisfaction" in that they cannot recover twice from both an employer and individual for one discriminatory act, suits against both parties provides additional protection against an insolvent defendant.[190]

Opponents, however, downplay many of these arguments. In essence, opponents state that many of the above concerns are adequately represented by solely providing vicarious liability.[191] In particular, employers that are held liable will logically discipline those employees that caused such liability, providing deterrence to both parties as well as eventual retribution. Further, many courts find the minimum employee requirements for organizations inconsistent with the concept of individual liability: why require organizations to have six or more employees when individuals can be liable?[192] Lastly, it is possible, and even likely, that the benefits of individual liability could be moot, as many employers may ultimately indemnify the liable employees. In some cases, the employer may even be legally required to do so out of the principles of agency.[193]

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185. *Id.* at 878.

186. Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 544 (1996).

187. *See* Worth, *supra* note 80, at 960-61.

188. As noted in Part II.A, *supra*, this action can include actions that "aid, abet, incite, compel, or coerce the commission" of the prohibited acts. MO. REV. STAT. § 213.070(1) (2000).

189. Lees, *supra* note 184, at 880-81.

190. *See id.* at 886-87.

191. *See* Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995); Worth, *supra* note 80, at 959-60.

192. *See, e.g.*, Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (finding such inconsistency to make individual liability "inconceivable").

193. *See* RESTATEMENT (SECOND) OF AGENCY § 438 (1958) (identifying situations in which a principle must indemnify an agent).

Regardless of the various arguments surrounding individual liability, an important issue is whether Missouri truly wishes to impose liability on individuals. Saying, "It won't happen to me; I'm not racist or sexist" is not entirely convincing. For instance, a study into "attribute substitution" by Christine Jolls at Yale Law School displayed how people make unconscious heuristic decisions based not on cognitive thought, but upon familiarity and what most easily comes to mind.[194] The study revealed that even people fully committed to diversity take actions showing implicit and automatic bias towards various groups.[195] In essence, discriminatory actions are not always out of maliciousness but instead can result from heuristics – mental shortcuts developed over time.[196] If a person associates more with persons of his or her particular race, his or her heuristic mental process subconsciously associates a favorable view of that race over other races.[197] Interestingly, however, the study also revealed that those people in highly diverse environments showed the least amount of implicit bias.[198] With these concepts in mind, the possibility of liability attaching to individuals applies to every person, regardless of his or her conscious views.

In sum, each of these arguments for and against individual liability has merit. If the intended effect of the MHRA is the reduction of as much discriminatory behavior as possible regardless of cost, including individual liability is likely warranted. However, these costs may be significant, especially when considering that punitive damages may be a consequence of subconscious, not malicious, heuristic behavior. Perhaps this determination is best made through analysis of the Act as a whole.[199]

4. Constructive Discharge and Continuing Violations

The application of the "continuing violation" doctrine to MHRA claims ultimately serves to expand the total amount of claims recoverable in Missouri. The doctrine essentially allows the aggregation of continuing misconduct by a defendant, thereby tolling the applicable statute of limitations and allowing recovery for actions that otherwise would be barred.[200] This doctrine has achieved widespread acceptance – and confusion – in federal

194. *See* Christine Jolls, *Behavioral Economics Analysis of Employment Law* 30 (Oct. 2007) (unpublished manuscript), *available at* http://www.law.yale.edu/documents/pdf/Faculty/Jolls_BehavioralEconomicsAnalysisofEmploymentLaw1-18-10.pdf.

195. *Id.* at 31.

196. *Id.* at 29.

197. *See id.* at 30-33.

198. *Id.* at 32-33.

199. *See* discussion *infra*, Part IV.B.

200. Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 272-73 (2008).

courts.[201] Because MHRA claims look to consistent federal law for guidance, it is likely that many of these federal principles will be applicable.[202]

While the equitable nature of the continuing violation doctrine appears to make fundamental sense in that not all discriminatory behaviors culminate in employment actions, the actual application of the doctrine is difficult. It is widely regarded as "one of the most confusing and inconsistent areas of employment discrimination law."[203] Due to this, many scholars argue between the relative merit of the doctrine and other approaches that are available, such as simply extending the statute of limitations for the claims.[204] While the full debate is beyond the scope of this Note, the implications of the doctrine are clear: more employment discrimination claims reach Missouri courts.[205]

B. Putting It Together: The Optimal Balance

With the analysis of the individual aspects and changes of the last decade complete, it is possible to fully examine the Act as a whole and determine what may be the optimal balance. Because each part of the whole is interconnected in the adjudication of MHRA claims, the parts as a whole can create more complexity than if separate. Furthermore, since the proposed amendments currently before the House or Senate are potential changes recommended by legislators, they will be a common theme throughout this inquiry. This is especially important because, as previously discussed, the judicial interpretations of the Act have been proper. Change, if desired, must come from the legislature.

The current law under Title VII serves as one example of a potential statutory framework for discrimination. The essential aspects are as follows. Claims for pecuniary relief such as compensatory and punitive damages are entitled to a right to jury trial.[206] Yet, the right provided by Title VII comes with a drawback in that damages are capped from $50,000 to $300,000, depending on the employer size.[207] The federal claims are also subject to the *McDonnell Douglas* framework under a motivating standard.[208] Thus, Congress found it beneficial to counter the availability of a jury with a limit on its

201. *See id.* at 273.

202. *See* Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. 2007) (en banc).

203. Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531, 531 (2000).

204. *See id.* at 559.

205. For further insight into this debate, see *supra* note 200 and accompanying text.

206. 42 U.S.C. § 1981a(c) (2006).

207. 42 U.S.C. § 1981a(b)(3).

208. *See supra* Part II.C.

discretion to impose damages. House Bills 1488 and 799 as well as Senate Bill 852 provide a similar framework to Title VII.[209]

Early commentary about the post-amendment MHRA suggested that it was amended to provide an additional option to plaintiffs' attorneys beyond that of Title VII.[210] The option was to provide an alternative from Title VII's jury trial and capped damages: a plaintiff can escape capped damages by sacrificing the ability to present factual issues before a jury.[211] The underlying theory, consistent with the common perceptions identified earlier,[212] is that some situations call for additional compensatory or punitive damages and judges are the most capable parties to make such a determination. This approach, if true, would negate any belief that amending the MHRA was to extend protection to employees beyond that already afforded under existing federal counterparts. Instead, it was to provide a different package of costs and benefits for a plaintiff's consideration.

Consequently, it is not surprising that many people called for amendment after the determination that the right to a jury trial was constitutionally required.[213] Two attorneys in particular, Paul Seyferth and Joseph Knittig, made a proposal for amendment.[214] Their basic argument called for the general assembly to maintain the structure of the prior act (bench trial without caps) via the creation of an administrative adjudicatory body in which plaintiffs could elect to pursue remedy under the MHRA.[215] In doing so, plaintiffs would not have a constitutional right to a jury, and would have limited options for appeal to circuit courts.[216] This approach, according to the attorneys, would neither change the adjudication of claims under the MHRA, nor be unconstitutional.[217]

Yet, it is not clear whether the original balance of a bench trial without caps is necessarily warranted in Missouri. For instance, the major concern against a jury awarding excessive damages is mitigated by the empirical data identified above suggesting that juries are capable of properly determining damages, as well as judicial adjustments on appeal for outliers.[218] This eventually happened in the *Kimzey* case when the $50 million punitive damage

209. *See* H.R. 1488, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); S. 852, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); H.R. 799, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

210. *See* Seyferth & Knittig, *supra* note 26, at 308. While the original MHRA was enacted before Title VII, this discussion is considering the 1986 amendments. *Id.* at 312-13.

211. *See id.* at 307-08.

212. *See* discussion *supra* Part IV.A.1.

213. *See, e.g.*, Seyferth & Knittig, *supra* note 26, at 315-16.

214. *Id.* at 316-22.

215. *Id.* at 317.

216. *Id.*

217. *Id.*

218. *See supra* notes 162-65 and accompanying text.

award was reduced to $350,000 on appeal.[219] In fact, any lower court award of damages can be reviewed for an abuse of discretion on appeal, providing a safety mechanism against egregious awards beyond trial-level protections such as remittitur.[220]

These same mitigating principles equally apply to damages against individuals. Simply replacing a judge with a jury for factual determination and the award of damages does not take away a judge's power to prevent erroneous behavior. Allowing claims against individuals does, however, provide an additional procedural detriment to defendants. Plaintiffs will be able to strategically destroy complete diversity by adding in-state individuals – those that actually work within the state – as defendants in conjunction with the out-of-state corporations.[221] Actions once freely removable to federal court can now be easily pinned in state courts. This is of great concern for national corporations with a small local presence seeking to escape potential local bias by tapping a federal venire. Even with this concern, most states have nonetheless found individual liability beneficial enough to expressly provide for it.[222] It is simply the most effective deterrence against discrimination – it attacks the source. Furthermore, any existence of heuristic bias may even support individual liability in that both the organization and the individual will be compelled to ensure that all employment actions lack potential intrinsic discrimination.

Considering all of the factors, it appears that many of the commonly cited fears and concerns about the MHRA's aggressive assault on employment discrimination are uncertain and likely overstated. While the infrequent outliers touted by the media support the perception that juries will lead to excessive liability and damages, extensive studies suggest that juries serve as effective adjudicators.[223] Accordingly, any exorbitant award of damages that survives review by the trial judge and a subsequent abuse of discretion determination by an appellate court could logically be awarded by a judge in the first place. In addition, public policy supports the more recent changes such as continuing violations and individual liability, as described above.[224] These principles require that individuals be cautious of their actions, which is consistent with many areas of the law.

Since a variety of factors mitigate many of the concerns posed by the current MHRA, a remaining issue is whether the MHRA should be a state-level counterpart of Title VII or whether it should go above and beyond that offered by other statutory regimes in order to deter discrimination. As a whole, many scholars have increasingly been dissatisfied with the anti-

219. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 577-78 (8th Cir. 1997).

220. *See id.* at 577.

221. *See* 28 U.S.C. § 1332 (2006) (outlining the federal diversity requirements).

222. Lees, *supra* note 184, at 866-67.

223. *See supra* notes 157-65 and accompanying text.

224. *See supra* Part IV.A.3-4.

discriminatory effect and relief of Title VII.[225] Whether due to the empirical showings that the standards of Title VII result in a surprising amount of dismissals or because of the inherent difficulty of proving discriminatory actions, the additional protection against discrimination is beneficial with minor additional cost. The Missouri General Assembly was thus proper in rejecting the recent proposed amendments that sought to mirror Title VII.[226]

Of course, if the legislature subsequently determines that the Act creates consequences beyond those intended, amendment may be necessary in the future. If individuals consistently face excessive damages, the legislature may consider providing damage caps for individual liability. If corporations consistently face excessive damages under the *Daugherty* standard, the legislature may provide both security and additional benefit by capping damages above the Title VII amounts. If the continuing violation doctrine creates incomprehensible confusion, the legislature may expressly abrogate its use and extend the statutory time limit. These are all for time to tell. At this point, the current *acts* of discrimination simply outweigh the current *concerns* in Missouri.

V. CONCLUSION

Absent specific evidence of an unknown societal detriment, amending the MHRA would only serve to weaken Missouri's stance against employment discrimination. There is no doubt that the changes in the last decade, including the right to a jury trial, the *Daugherty* contributing standard, individual liability, and continuing violations have greatly expanded the scope of protection provided by the MHRA. As with any other employment-related act, the Missouri legislature must be diligent in analyzing its effects on the interests of the employer and the employees, whether intended or not. Without evidence suggesting that a flux of unsubstantiated and frivolous claims is overwhelming employers, the employees' strong interest against discrimination supports the current balance of the MHRA. In the end, employers have protection in their ability to implement a strong and comprehensive policy

225. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104-05 (2009) (detailing how the low rate of success for employment discrimination suits is deterring the use of the court systems for relief); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 547-48 (2003) (study showing that employment-discrimination plaintiffs "swim against the tide," compared to the typical plaintiff); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556-57 (2001) (arguing that plaintiffs are unsuccessful due to misperception and bias about employment discrimination).

226. *See* H.R. 1488, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); S. 852, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); H.R. 799, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

against discrimination; employees only have the extra protections of the MHRA.