

SECOND REGULAR SESSION

SENATE BILL NO. 852

95TH GENERAL ASSEMBLY

INTRODUCED BY SENATORS LAGER, LEMBKE AND RUPP.

Read 1st time January 28, 2010, and ordered printed.

TERRY L. SPIELER, Secretary.

4338S.011

AN ACT

To repeal sections 213.010, 213.070, 213.101, 213.111, and 287.780, RSMo, and to enact in lieu thereof five new sections relating to unlawful discriminatory practices in employment.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 213.010, 213.070, 213.101, 213.111, and 287.780, RSMo, are repealed and five new sections enacted in lieu thereof, to be known as sections 213.010, 213.070, 213.101, 213.111 and 287.780, to read as follows:

213.010. As used in this chapter, the following terms shall mean:

(1) "Age", an age of forty or more years but less than seventy years, except that it shall not be an unlawful employment practice for an employer to require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policy-making position, if such person is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars;

(2) **"Because of" or "because", as it relates to a decision or action, the protected criterion was the motivating factor; provided however, where the decision or action was allegedly premised upon age, "because of" or "because", as it relates to a decision or action, means the decision or action would not have occurred but for age;**

(3) "Commission", the Missouri commission on human rights;

~~[(3)]~~ (4) "Complainant", a person who has filed a complaint with the

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

18 commission alleging that another person has engaged in a prohibited
19 discriminatory practice;

20 [(4)] (5) "Disability", a physical or mental impairment which
21 substantially limits one or more of a person's major life activities, being regarded
22 as having such an impairment, or a record of having such an impairment, which
23 with or without reasonable accommodation does not interfere with performing the
24 job, utilizing the place of public accommodation, or occupying the dwelling in
25 question. For purposes of this chapter, the term "disability" does not include
26 current, illegal use of or addiction to a controlled substance as such term is
27 defined by section 195.010, RSMo; however, a person may be considered to have
28 a disability if that person:

29 (a) Has successfully completed a supervised drug rehabilitation program
30 and is no longer engaging in the illegal use of, and is not currently addicted to,
31 a controlled substance or has otherwise been rehabilitated successfully and is no
32 longer engaging in such use and is not currently addicted;

33 (b) Is participating in a supervised rehabilitation program and is no
34 longer engaging in illegal use of controlled substances; or

35 (c) Is erroneously regarded as currently illegally using, or being addicted
36 to, a controlled substance;

37 [(5)] (6) "Discrimination", any unfair treatment based on race, color,
38 religion, national origin, ancestry, sex, age as it relates to employment, disability,
39 or familial status as it relates to housing;

40 [(6)] (7) "Dwelling", any building, structure or portion thereof which is
41 occupied as, or designed or intended for occupancy as, a residence by one or more
42 families, and any vacant land which is offered for sale or lease for the
43 construction or location thereon of any such building, structure or portion thereof;

44 [(7)] (8) "Employer" [includes], **a person engaged in an industry**
45 **affecting commerce who has six or more employees for each working**
46 **day in each of twenty or more calendar weeks in the current or**
47 **preceding calendar year, and shall include** the state, or any political or civil
48 subdivision thereof, or any person employing six or more persons within the state,
49 [and any person directly acting in the interest of an employer, but does not
50 include corporations and associations owned and operated by religious or
51 sectarian groups]. **Employer shall not include the United States, a**
52 **corporation wholly owned by the government of the United States, an**
53 **individual employed by an employer, an Indian tribe, any department**

54 **or agency of the District of Columbia subject by statute to procedures**
55 **of the competitive service, as defined in 5 U.S.C. Section 2101, or a bona**
56 **fide private membership club (other than a labor organization) which**
57 **is exempt from taxation under 26 U.S.C. Section 501(c), and shall not**
58 **include corporations and associations owned and operated by religious**
59 **or sectarian groups;**

60 [(8)] (9) "Employment agency" includes any person or agency, public or
61 private, regularly undertaking with or without compensation to procure
62 employees for an employer or to procure for employees opportunities to work for
63 an employer and includes any person acting in the interest of such a person;

64 [(9)] (10) "Executive director", the executive director of the Missouri
65 commission on human rights;

66 [(10)] (11) "Familial status", one or more individuals who have not
67 attained the age of eighteen years being domiciled with:

68 (a) A parent or another person having legal custody of such individual; or

69 (b) The designee of such parent or other person having such custody, with
70 the written permission of such parent or other person. The protections afforded
71 against discrimination on the basis of familial status shall apply to any person
72 who is pregnant or is in the process of securing legal custody of any individual
73 who has not attained the age of eighteen years;

74 [(11)] (12) "Human rights fund", a fund established to receive civil
75 penalties as required by federal regulations and as set forth by subdivision (2) of
76 subsection 11 of section 213.075, and which will be disbursed to offset additional
77 expenses related to compliance with the Department of Housing and Urban
78 Development regulations;

79 [(12)] (13) "Labor organization" includes any organization which exists
80 for the purpose, in whole or in part, of collective bargaining or of dealing with
81 employers concerning grievances, terms or conditions of employment, or for other
82 mutual aid or protection in relation to employment;

83 [(13)] (14) "Local commissions", any commission or agency established
84 prior to August 13, 1986, by an ordinance or order adopted by the governing body
85 of any city, constitutional charter city, town, village, or county;

86 [(14)] (15) "Person" includes one or more individuals, corporations,
87 partnerships, associations, organizations, labor organizations, legal
88 representatives, mutual companies, joint stock companies, trusts, trustees,
89 trustees in bankruptcy, receivers, fiduciaries, or other organized groups of

90 persons;

91 [(15)] **(16)** "Places of public accommodation", all places or businesses
92 offering or holding out to the general public, goods, services, privileges, facilities,
93 advantages or accommodations for the peace, comfort, health, welfare and safety
94 of the general public or such public places providing food, shelter, recreation and
95 amusement, including, but not limited to:

96 (a) Any inn, hotel, motel, or other establishment which provides lodging
97 to transient guests, other than an establishment located within a building which
98 contains not more than five rooms for rent or hire and which is actually occupied
99 by the proprietor of such establishment as his residence;

100 (b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or
101 other facility principally engaged in selling food for consumption on the premises,
102 including, but not limited to, any such facility located on the premises of any
103 retail establishment;

104 (c) Any gasoline station, including all facilities located on the premises of
105 such gasoline station and made available to the patrons thereof;

106 (d) Any motion picture house, theater, concert hall, sports arena, stadium,
107 or other place of exhibition or entertainment;

108 (e) Any public facility owned, operated, or managed by or on behalf of this
109 state or any agency or subdivision thereof, or any public corporation; and any
110 such facility supported in whole or in part by public funds;

111 (f) Any establishment which is physically located within the premises of
112 any establishment otherwise covered by this section or within the premises of
113 which is physically located any such covered establishment, and which holds itself
114 out as serving patrons of such covered establishment;

115 [(16)] **(17)** "Rent" includes to lease, to sublease, to let and otherwise to
116 grant for consideration the right to occupy premises not owned by the occupant;

117 [(17)] **(18)** "Respondent", a person who is alleged to have engaged in a
118 prohibited discriminatory practice in a complaint filed with the commission;

119 [(18)] **(19)** "Unlawful discriminatory practice", any act that is unlawful
120 under this chapter.

213.070. 1. It shall be an unlawful discriminatory practice:

2 (1) To aid, abet, incite, compel, or coerce the commission of acts prohibited
3 under this chapter or to attempt to do so;

4 (2) To retaliate or discriminate in any manner against any other person
5 because such person has opposed any practice prohibited by this chapter or

6 because such person has filed a complaint, testified, assisted, or participated in
7 any manner in any investigation, proceeding or hearing conducted pursuant to
8 this chapter;

9 (3) For the state or any political subdivision of this state to discriminate
10 on the basis of race, color, religion, national origin, sex, ancestry, age, as it
11 relates to employment, disability, or familial status as it relates to housing; or

12 (4) To discriminate in any manner against any other person because of
13 such person's association with any person protected by this chapter.

14 **2. This chapter shall provide the exclusive remedy for any and**
15 **all unlawful employment practices articulated herein and hereby**
16 **abrogates any common law causes of action not specifically articulated**
17 **herein.**

213.101. 1. The provisions of this chapter shall be construed to
2 accomplish the purposes thereof and any law inconsistent with any provision of
3 this chapter shall not apply. Nothing contained in this chapter shall be deemed
4 to repeal any of the provisions of any law of this state relating to the
5 discrimination because of race, color, religion, national origin, sex, ancestry, age,
6 disability, or familial status.

7 **2. In interpreting and applying chapter 213 in employment cases,**
8 **courts shall rely heavily upon judicial interpretations of Title VII of the**
9 **Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), as amended, the Age**
10 **Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), and**
11 **the Americans with Disabilities Act (42 U.S.C. 12101 et seq.), as**
12 **amended.**

13 **3. The legislature intends expressly to abrogate by this statute**
14 **the case of McBryde v. Ritenour School District, 207 S.W.3d 162 (Mo.**
15 **App. E.D.) and its progeny as it relates to the necessity and**
16 **appropriateness of the issuance of a business judgment instruction.**

17 **4. Rule 74.04 of the Missouri rules of civil procedure is an**
18 **integral part of the rules as a whole and can be a tool of great utility**
19 **in removing factually insubstantial chapter 213 cases from crowded**
20 **dockets. If an employer in a chapter 213 case files a Rule 74.04 motion,**
21 **there are two frameworks for analysis that should be considered highly**
22 **persuasive:**

23 (1) Plaintiff may submit direct evidence of discrimination, in
24 which case the analysis of *Prince Waterhouse v. Hopkins*, 490 U.S. 228,

25 **258 (1989) and its progeny are highly persuasive;**

26 **(2) If plaintiff submits no direct evidence of discrimination, then**
27 **the burden shifting analysis of McDonnell Douglas Corp. v. Green, 411**
28 **U.S. 792, 800-01 (1973) and its progeny present a highly persuasive**
29 **framework for analysis.**

30 **5. The legislature intends expressly to abrogate by this statute**
31 **the cases of Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo.**
32 **banc), Korando v. Mallinckrodt, Inc. 239 S.W.3d 647 (Mo. App. E.D.),**
33 **Lomax v. DaimlerChrysler Corp., 243 S.W.3d 474 (Mo. App. E.D.), and**
34 **Francin v. Mosby, Inc., 248 S.W.3d 619 (Mo. App. E.D.) and their progeny**
35 **as they relate to the contributing factor standard and abandonment of**
36 **the burden shifting framework established in McDonnell Douglas Corp.**
37 **v. Green, 411 U.S. 792, 800-01 (1973) and the mixed motive framework**
38 **established in Prince Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).**

39 **6. The legislature intends to abrogate MAI 31.24 and MAI 31.25.**

213.111. 1. If, after one hundred eighty days from the filing of a
2 complaint alleging an unlawful discriminatory practice pursuant to section
3 213.055, 213.065 or 213.070 to the extent that the alleged violation of section
4 213.070 relates to or involves a violation of section 213.055 or 213.065, or
5 subdivision (3) of section 213.070 as it relates to employment and public
6 accommodations, the commission has not completed its administrative processing
7 and the person aggrieved so requests in writing, the commission shall issue to the
8 person claiming to be aggrieved a letter indicating his or her right to bring a civil
9 action within ninety days of such notice against the respondent named in the
10 complaint. If, after the filing of a complaint pursuant to sections 213.040,
11 213.045, 213.050 and 213.070, to the extent that the alleged violation of section
12 213.070 relates to or involves a violation of sections 213.040, 213.045 and
13 213.050, or subdivision (3) of section 213.070 as it relates to housing, and the
14 person aggrieved so requests in writing, the commission shall issue to the person
15 claiming to be aggrieved a letter indicating his or her right to bring a civil action
16 within ninety days of such notice against the respondent named in the
17 complaint. Such an action may be brought in any circuit court in any county in
18 which the unlawful discriminatory practice is alleged to have [occurred] **been**
19 **committed**, either before a circuit or associate circuit judge. Upon issuance of
20 this notice, the commission shall terminate all proceedings relating to the
21 complaint. No person may file or reinstate a complaint with the commission after

22 the issuance of a notice under this section relating to the same practice or
23 act. Any action brought in court under this section shall be filed within ninety
24 days from the date of the commission's notification letter to the individual but no
25 later than two years after the alleged cause occurred or its reasonable discovery
26 by the alleged injured party.

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

34 **3. Any party to any action initiated under this section may**
35 **demand a trial by jury.**

36 **4. The sum of the amount of actual damages, including damages**
37 **for future pecuniary losses, emotional pain, suffering, inconvenience,**
38 **mental anguish, loss of enjoyment of life, and other nonpecuniary**
39 **losses, and punitive damages awarded under this section shall not**
40 **exceed for each complaining party:**

41 **(1) Actual back pay and interest on back pay; and**

42 **(2) (a) In the case of a respondent who has more than five and**
43 **fewer than one hundred one employees in each of twenty or more**
44 **calendar weeks in the current or preceding calendar year, fifty**
45 **thousand dollars;**

46 **(b) In the case of a respondent who has more than one hundred**
47 **and fewer than two hundred one employees in each of twenty or more**
48 **calendar weeks in the current or preceding calendar year, one hundred**
49 **thousand dollars;**

50 **(c) In the case of a respondent who has more than two hundred**
51 **and fewer than five hundred one employees in each of twenty or more**
52 **calendar weeks in the current or preceding calendar year, two hundred**
53 **thousand dollars;**

54 **(d) In the case of a respondent who has more than five hundred**
55 **employees in each of twenty or more calendar weeks in the current or**
56 **preceding calendar year, three hundred thousand dollars.**

57 **5. Subsection 4 of this section shall not apply to actions filed for**
58 **violations of sections 213.040, 213.045, 213.050, and 213.070 to the extent**

59 that the alleged violation of section 213.070 relates to or involves a
60 violation of sections 213.040, 213.045, and 213.050, or subsection 3 of
61 section 213.070 as it relates to housing.

62 **6. In any employment-related civil action brought under this**
63 **chapter, the plaintiff shall bear the burden of proving that the**
64 **protected criterion was the motivating factor in the alleged unlawful**
65 **decision or action; provided, however, in an employment-related civil**
66 **action brought under this chapter, where the decision or action was**
67 **allegedly premised upon age, the plaintiff shall bear the burden of**
68 **proving that but for the plaintiff's age, the decision or action would not**
69 **have been made.**

70 **7. Notwithstanding subsection 4 of this section, punitive damages**
71 **shall not be awarded against the state of Missouri or any of its political**
72 **subdivisions.**

287.780. 1. No employer [or agent] shall discharge or in any way
2 discriminate against any employee for exercising any of his rights under this
3 chapter. Any employee who has been discharged or discriminated against shall
4 have a civil action for damages against his employer.

5 **2. It shall be unlawful:**

6 **(1) For an employer to retaliate or discriminate in any manner**
7 **against an employee exclusively as a result of the fact the employee**
8 **refused to violate a statute, regulation, constitutional provision,**
9 **ordinance, or common law at the request of someone employed by the**
10 **employer who has direct or indirect supervisory authority over the**
11 **employee; or**

12 **(2) For an employer to retaliate or discriminate in any manner**
13 **against an employee exclusively as a result of the fact the employee**
14 **reported to an authority of the federal, state, or local government a**
15 **violation by the employer of any statute, regulation, constitutional**
16 **provision, ordinance, or common law.**

17 **3. This chapter shall provide the exclusive remedy for any and**
18 **all unlawful employment practices articulated herein and hereby**
19 **abrogates any common law causes of action not specifically articulated**
20 **herein.**

21 **4. In any action for damages brought under subsection 1, 2, or 3**
22 **of this section, the plaintiff shall have the burden of proving the**
23 **employer's decision or action was motivated exclusively by the**

24 **employee's exercise of his or her rights under this chapter.**

25 **5. In an action brought under subsection 1 of this section by an**
26 **employee against an employer or former employer, the sum of the**
27 **amount of compensatory damages awarded and the amount of punitive**
28 **damages awarded shall not exceed, for each plaintiff, the following:**

29 **(1) In the case of a defendant who has fewer than one hundred**
30 **one employees in each of twenty or more calendar weeks in the current**
31 **or preceding calendar year, fifty thousand dollars;**

32 **(2) In the case of a defendant who has more than one hundred**
33 **and fewer than two hundred one employees in each of twenty or more**
34 **calendar weeks in the current or preceding calendar year, one hundred**
35 **thousand dollars;**

36 **(3) In the case of a defendant who has more than two hundred**
37 **and fewer than five hundred one employees in each of twenty or more**
38 **calendar weeks in the current or preceding calendar year, two hundred**
39 **thousand dollars;**

40 **(4) In the case of a defendant who has more than five hundred**
41 **employees in each of twenty or more calendar weeks in the current or**
42 **preceding calendar year, three hundred thousand dollars.**

43 **6. Compensatory damages within the meaning of this section**
44 **shall not include back pay and interest on back pay.**

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