

FIRST REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 188
96TH GENERAL ASSEMBLY

Reported from the Committee on Commerce, Consumer Protection, Energy and the Environment, February 24, 2011, with recommendation that the Senate Committee Substitute do pass.

0790S.03C

TERRY L. SPIELER, Secretary.

AN ACT

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

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

Section A. Sections 213.010, 213.070, 213.101, and 213.111, RSMo, are
2 repealed and five new sections enacted in lieu thereof, to be known as sections
3 213.010, 213.070, 213.101, 213.111, and 1, to read as follows:

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

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

11 (2) **"Because" or "because of", as it relates to a decision or action,**
12 **the protected criterion was a motivating factor;**

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

14 [(3)] (4) "Complainant", a person who has filed a complaint with the
15 commission alleging that another person has engaged in a prohibited
16 discriminatory practice;

17 [(4)] (5) "Disability", a physical or mental impairment which

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

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

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

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

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

34 [(5)] (6) "Discrimination", any unfair treatment based on race, color,
35 religion, national origin, ancestry, sex, age as it relates to employment, disability,
36 or familial status as it relates to housing;

37 [(6)] (7) "Dwelling", any building, structure or portion thereof which is
38 occupied as, or designed or intended for occupancy as, a residence by one or more
39 families, and any vacant land which is offered for sale or lease for the
40 construction or location thereon of any such building, structure or portion thereof;

41 [(7)] (8) "Employer" [includes], **a person engaged in an industry**
42 **affecting commerce who has six or more employees for each working**
43 **day in each of twenty or more calendar weeks in the current or**
44 **preceding calendar year, and shall include** the state, or any political or civil
45 subdivision thereof[, or any person employing six or more persons within the
46 state, and any person directly acting in the interest of an employer, but does not
47 include corporations and associations owned and operated by religious or
48 sectarian groups]. **"Employer" shall not include the United States, a**
49 **corporation wholly owned by the government of the United States, an**
50 **individual employed by an employer, an Indian tribe, or any**
51 **department or agency of the District of Columbia subject by statute to**
52 **procedures of the competitive service, as defined in 5 U.S.C. Section**
53 **2101, or a bona fide private membership club (other than a labor**

54 **organization) which is exempt from taxation under 26 U.S.C. Section**
55 **501(c), and shall not include corporations and associations owned and**
56 **operated by religious or sectarian groups;**

57 [(8)] (9) "Employment agency" includes any person or agency, public or
58 private, regularly undertaking with or without compensation to procure
59 employees for an employer or to procure for employees opportunities to work for
60 an employer and includes any person acting in the interest of such a person;

61 [(9)] (10) "Executive director", the executive director of the Missouri
62 commission on human rights;

63 [(10)] (11) "Familial status", one or more individuals who have not
64 attained the age of eighteen years being domiciled with:

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

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

71 [(11)] (12) "Human rights fund", a fund established to receive civil
72 penalties as required by federal regulations and as set forth by subdivision (2) of
73 subsection 11 of section 213.075, and which will be disbursed to offset additional
74 expenses related to compliance with the Department of Housing and Urban
75 Development regulations;

76 [(12)] (13) "Labor organization" includes any organization which exists
77 for the purpose, in whole or in part, of collective bargaining or of dealing with
78 employers concerning grievances, terms or conditions of employment, or for other
79 mutual aid or protection in relation to employment;

80 [(13)] (14) "Local commissions", any commission or agency established
81 prior to August 13, 1986, by an ordinance or order adopted by the governing body
82 of any city, constitutional charter city, town, village, or county;

83 [(14)] (15) "Person" includes one or more individuals, corporations,
84 partnerships, associations, organizations, labor organizations, legal
85 representatives, mutual companies, joint stock companies, trusts, trustees,
86 trustees in bankruptcy, receivers, fiduciaries, or other organized groups of
87 persons;

88 [(15)] (16) "Places of public accommodation", all places or businesses
89 offering or holding out to the general public, goods, services, privileges, facilities,

90 advantages or accommodations for the peace, comfort, health, welfare and safety
91 of the general public or such public places providing food, shelter, recreation and
92 amusement, including, but not limited to:

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

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

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

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

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

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

112 [(16)] (17) "Rent" includes to lease, to sublease, to let and otherwise to
113 grant for consideration the right to occupy premises not owned by the occupant;

114 [(17)] (18) "Respondent", a person who is alleged to have engaged in a
115 prohibited discriminatory practice in a complaint filed with the commission;

116 [(18)] (19) "Unlawful discriminatory practice", any act that is unlawful
117 under this chapter.

213.070. 1. **Except as provided in subsection 2 of this section,** it
2 shall be an unlawful discriminatory practice:

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

5 (2) To retaliate or discriminate in any manner against any other person
6 because such person has opposed any practice prohibited by this chapter or
7 because such person has filed a complaint, testified, assisted, or participated in
8 any manner in any investigation, proceeding or hearing conducted pursuant to

9 this chapter;

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

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

15 **2. In an employment action alleging a violation of section**
16 **213.055, subdivisions (1), (2), and (4) of subsection 1 of this section shall**
17 **only apply when an employer commits the proscribed acts as stated in**
18 **those subdivisions.**

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. **This chapter is intended to be consistent with**
7 **Title VII of the Civil Rights Act of 1964, (42 U.S.C Section 2000e, et seq.)**
8 **as amended, in accordance with the work sharing agreement between**
9 **the Missouri commission on human rights and the United States Equal**
10 **Employment Opportunity Commission.**

11 **2. In interpreting and applying this chapter in employment**
12 **cases, courts shall rely heavily upon judicial interpretations of Title VII**
13 **of the Civil Rights Act of 1964, (42 U.S.C. Section 2000e, et seq.) as**
14 **amended, the Age Discrimination in Employment Act of 1967, (29 U.S.C.**
15 **Section 621, et seq.) as amended, and the Americans With Disabilities**
16 **Act, (42 U.S.C. Section 12101, et seq.) as amended.**

17 **3. The general assembly intends expressly to abrogate by this**
18 **statute the case of McBryde v. Ritenour School District, 207 S.W.3d 162**
19 **(Mo. App. E.D. 2006), and its progeny as it relates to the necessity and**
20 **appropriateness of the issuance of a business judgment instruction.**

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

27 **(1) Plaintiff may submit direct evidence of discrimination, in**

28 which case the analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228,
29 258 (1989) and its progeny are highly persuasive;

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

34 5. The general assembly intends expressly to abrogate by this
35 statute the cases of *Daugherty v. City of Maryland Heights*, 231 S.W.3d
36 814(Mo. banc 2007), *Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647 (Mo.
37 App. E.D. 2007), *Lomax v. Daimler Chrysler Corp.*, 243 S.W.3d 474 (Mo.
38 App. E.D. 2008), and their progeny, as they relate to the contributing
39 factor standard and abandonment of the burden shifting framework
40 established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01
41 (1973) and the mixed motive framework established in *Price*
42 *Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). The general assembly
43 also intends to abrogate MAI 31.24, MAI 31.25, MAI 31.27.

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 employees in each of twenty or more calendar
44 weeks in the current or preceding calendar year, fifty thousand dollars;

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

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

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

56 5. Subsection 4 of this section shall not apply to actions filed for

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

61 6. In any employment-related civil action brought under this
62 chapter, the plaintiff shall bear the burden of proving that the
63 protected criterion was a motivating factor in the alleged unlawful
64 decision or action.

65 7. Notwithstanding subsection 4 of this section, punitive damages
66 shall not be awarded against the state of Missouri or any of its political
67 subdivisions.

 Section 1. 1. This section shall be known and may be cited as the
2 "Whistleblower's Protection Act".

3 2. As used in this section, the following terms shall mean:

4 (1) "Because" or "because of", as it relates to a decision or action,
5 the person's status as a protected person was a motivating factor;

6 (2) "Proper authorities", a governmental or law enforcement
7 agency, or an officer or the employee's human resources representative
8 employed by the employer;

9 (3) "Protected person", a person who has reported to the proper
10 authorities an unlawful act of the employer or its agent or who reports
11 to an employer serious misconduct of the employer or its agent that
12 violates a clear mandate of public policy as articulated in a
13 constitutional provision, statute, regulation promulgated under statute,
14 or rule created by a governmental body, or a person who has refused
15 to carry out a directive issued by an employer or its agent that if
16 completed would be a violation of the law. Additionally, a person who
17 engages in conduct otherwise protected by statute or regulation is a
18 protected person.

19 3. This section is intended to codify the existing common law
20 exceptions to the at-will employment doctrine, and to limit their future
21 expansion by the courts. This section shall provide the exclusive
22 remedy for any and all unlawful employment practices articulated
23 herein and hereby abrogates any common law causes of action to the
24 contrary.

25 4. It shall be an unlawful employment practice for an employer,
26 as defined in section 213.010, to discharge or retaliate against an

27 individual defined as a protected person in this section, because of that
28 person's status as a protected person.

29 5. A protected person aggrieved by a violation of this section
30 shall have a private right of action for damages for violations of this
31 section. The court may grant as relief, as it deems appropriate, any
32 permanent or temporary injunction, temporary restraining order, or
33 other order, and may award to the plaintiff actual and punitive
34 damages.

35 6. Any party to any action initiated under this section may
36 demand a trial by jury.

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

42 (1) Actual back pay and interest on back pay; and

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

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

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

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

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