Recent Missouri Employment Litigation: Key Takeaways for In-House Counsel

By Andrew L. Metcalf, Employment Law Counsel, Human Interest, Inc.
and James M. Paul, Shareholder, Ogletree Deakins

In recent years, Missouri appellate courts have issued a number of opinions that elucidate unique aspects of workplace law in the Show-Me State. Missouri's employment law statutes share key similarities with various federal laws with which many in-house counsel may already be familiar. But, Missouri laws are phrased in their own unique terms, and our state courts sometimes interpret that language differently from similarly worded federal employment laws.[i]

Here are four things about Missouri employment law that in-house counsel should be aware of when litigating a workplace legal dispute:

1. **The timeliness of an administrative complaint or lawsuit can be a key issue.**

   There are limitations periods by which employees must bring claims arising under Missouri statutes or the common law. For example, the Missouri Human Rights Act requires an employee to file an administrative complaint with the Missouri Commission on Human Rights within 180 days of the alleged unlawful act.[ii] Then, any civil action brought by the employee must be filed within 90 days of a "notice of right to sue" and – in any event – within two years of the alleged illegal act.[iii]

   Limitations periods can provide a key defense against stale claims. Just recently, a Missouri appellate court affirmed the dismissal of an MHRA case, based on the employee's pleadings, because those pleadings showed the employee failed to file her administrative complaint within 180 days of the job transfer decision that was at issue in her lawsuit.[iv] The employee argued that each reduced paycheck issued after the decision established a "continuing violation" that made her claim timely, but the Court of Appeals rejected that position and affirmed the dismissal, holding that experiencing the continuing effects of alleged discrimination would not re-start the limitations period with regard to the employer's decision being challenged by the employee.[v]

   In-house counsel handling employment claims may want to keep an eye out for timeliness issues. Personnel documentation and communications may help establish a timeline of events and confirm which ones happened within the limitations period, and which did not.

2. **The Missouri Commission on Human Rights may dismiss administrative complaints for lack of probable cause.**

   Missouri has detailed regulations interpreting the Missouri Human Rights Act and establishing procedures for how the Missouri Commission on Human Rights handles complaints.[vi] The regulations establish seven different reasons why the Commission may dismiss an employee's complaint without issuing a right-to-sue letter that would otherwise allow the employee to bring a civil action in Court. The Commission may dismiss a complaint if (i) the Commission determines that the complaint lacks probable cause; (ii) the complainant does not cooperate with the Commission; (iii) the Commission

cannot locate the complainant; (iv) the Commission lacks jurisdiction; (v) no remedy is available to the complaint; (vi) the complainant files a suit in federal court on the same issues against the respondent named in the Commission complaint; or (vii) the Commission's executive director deems closure appropriate.

If a complainant is aggrieved by the dismissal of a complaint, and believes the MCHR had a ministerial duty to issue a right-to-sue letter, the employee may bring an action for judicial review under section 536.150, RSMo, to ask a court to issue a writ of mandamus ordering the agency to give the employee a right-to-sue letter. In a recent case, the Court of Appeals held an employee does not have a due process right to receive a right-to-sue letter from the MCHR.[vii] Missouri has special rules of civil procedure that apply to mandamus actions and that employees must follow in order to pursue such a claim against the MCHR.[viii]

In-house counsel handling complaints before the MCHR may want to keep in mind the different reasons why it might be appropriate for the MCHR to close a complaint. Raising applicable defenses may lead to the dismissal of the complaint by the MCHR, which forecloses the possibility that the employee can bring a private civil action pursuant to the state anti-discrimination law.

3. The Whistleblower Protection Act protects some employees from being discharged for certain protected activities.

In 2017, the Missouri legislature codified in its Whistleblower's Protection Act certain wrongful discharge-type claims that Missouri courts had previously recognized as common law causes of action.[ix] The WPA protects employees from being discharged if they (i) report to the proper authorities an unlawful act of his or her employer; (ii) report to his or her employer serious misconduct of the employer that violates a clear mandate of public policy as articulated in a constitutional provision, statute, or regulation; (iii) or who refused to carry out a directive of the employer that, if completed, would violate the law.[x] An employee who prevails in a civil action under the statute may recover back pay, reimbursement of certain medical bills, and liquidated damages (i.e., "double damages" in lieu of punitive damages) for employer conduct that is outrageous due to evil motive or reckless indifference to the rights of others.[xi] Attorneys' fees for a prevailing party also available.

A few WPA claims already have made their way to Missouri's appellate courts. In one, an employee alleged that he was discharged for reporting co-employee theft from the employer.[xii] The trial court had dismissed the case, reasoning that whistleblower protection did not extend to employees who report unlawful acts or serious misconduct of co-workers.[xiii] The Court of Appeals disagreed, reversed, and remanded, thereby interpreting broadly the types of activities on which employees can based whistleblowing claims.[xiv]

In assessing the legal risk of a decision to terminate an employee's employment for legitimate reasons, in-house counsel may want to be mindful of the WPA. If the company is aware of a report or complaint that makes the employee a protected person under the

WPA, the company may want to make sure the legitimate reasons for its decision are well-founded so they can be clearly presented and thoroughly explained later in litigation.

4. **The likelihood of liability in a workplace trial may depend on the jury instructions and verdict director.**

   Trial courts in Missouri must use *Missouri Approved Instructions* ("the MAI"), when applicable. Missouri has published approved instructions for discrimination claims under the MHRA, but not for retaliation claims, overtime cases, or whistleblower cases. Notably, a defendant in an MHRA case is entitled to submit ***both*** a "true converse" instruction (e.g., "Your verdict must be for the defendant unless you believe" it discriminated in violation of the MHRA) ***and*** an "affirmative converse" instruction supporting an employer's defense that there was a lawful justification for its decision ("Your verdict must be for the defendant if you believe" the employer's legitimate reason for the decision, and that illegal conduct was not the motive).[xv]

   Missouri in-house counsel also may want to be aware that, in workplace trials, disputes can arise about the appropriate "adverse actions" that should be included in the verdict director, i.e., the key instruction that tells the jury the circumstances under which it should find for the plaintiff.

   In 2019, the Missouri Supreme Court reversed a $2.5 million jury verdict in favor of an employee because the trial court instructed the jury to find for the employee if it found that, due to the plaintiff's national origin, the employer declined to appeal a denial of the employee's visa petition.[xvi] The Court recognized that the MHRA prohibits employers from denying a "privilege of employment" to an employee based on his or her national origin, but concluded that having the employer appeal the visa petition denial was a not a "privilege" of the plaintiff's employment.[xvii]

   In contrast, in 2020, an employee won an MHRA case with a verdict totaling nearly $1 million in damages and attorneys' fees.[xviii] The verdict director jury instruction had nine different alleged "adverse actions," accusing the employer of violating the law by, among other things, "[a]ccusing plaintiff of sleeping on the job," "[s]ubjecting plaintiff to unfair discipline," and "[d]enying plaintiff an impartial and fair investigation."[xix] The employer challenged the instructions on various grounds, but the Court of Appeals affirmed the verdict. The case illustrates how in-house counsel may want to be aware that, at a workplace trial, a plaintiff's proposed jury instructions may attempt to hold employers liable for acts that are not typically considered to be "adverse actions" under the law – especially when compared to similar federal laws.

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Missouri's body of workplace law continues to develop with each decision issued by appellate courts. And, the frequency of employment claim related opinions is increasing. In-house counsel should become familiar with how those opinions affect the course of litigation, particularly when the factors, tests, jury instructions and analysis used pursuant to Missouri state law claims may deviate from the corresponding authority used in claims brought under federal law. Familiarity

with how Missouri regulates the work environment can help employers raise appropriate defenses to claims and to assess risk in preparing claims for trial.

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[i] In most circumstances, steering or removing a lawsuit into federal court will result in procedural and substantive law advantages (or at least an even playing field) for employers. For a variety of reasons, however, a state law claim may have to be litigated in a state circuit court rather than a federal district court, e.g., lack of complete diversity between/among the parties, damages below the jurisdictional threshold, non-removability of a workers' compensation retaliation claim, failure to remove within the statutory time period for doing so, differing coverage of employers based on their size or entity type, etc.).

[ii] § 213.075.1, RSMo.

[iii] § 213.111.1, RSMo.

[iv] *Gill v. City of St. Peters,* __ S.W.3d __, 2022 WL 598985 (Mo. App. E.D. March 1, 2022)

[v] *Id.*

[vi] 8 C.S.R. 60-2.010, *et seq.*

[vii] *State ex rel. Dalton v. Missouri Commission on Human Rights*, 618 S.W.3d 640, 651 (Mo. App. W.D. 2020).

[viii] *Vinson v. Missouri Commission on Human Rights*, 622 S.W.3d 218 (Mo. App. E.D. 2021).

[ix] § 285.575, RSMo.

[x] § 285.575.2(4), RSMo.

[xi] § 285.575.7, RSMo.

[xii] *Yount v. Keller Motors, Inc.*, 639 S.W.3d 458 (Mo. App. E.D. 2021).

[xiii] *Id.*

[xiv] *Id.*

[xv] *Gaal v. BJC Health Sys.*, 597 S.W.3d 277, 289 (Mo. App. E.D. 2019) ("While a defendant is entitled to only one converse instruction for each of plaintiff's verdict directing instructions, where a defendant has presented an affirmative defense at trial, the defendant is entitled both a converse instruction and an instruction on the affirmative defense.").

[xvi] *Kader v. Bd. of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 187 (Mo. 2019).

[xvii] *Id.*

[xviii] Williams v. City of Kansas City, 2021 WL 6049902 (Mo. App. W.D. Dec. 21, 2021).

[xix] *Id.*