



# THE MISSOURI BAR

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**DATE:** February 25, 2009  
**TO:** Representative Edgar G. H. Emery  
Representative Tim Jones  
**FROM:** The Missouri Bar  
**RE:** House Bill 227

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Recently, The Missouri Bar Executive Committee met to review legislation. The Executive Committee consists of the officers of the bar and three additional members annually elected by the Board of Governors. The members of this year's committee are Thomas M. Burke, President; H.A. "Skip" Walther, President-Elect; John S. Johnston, Vice-President; Charlie J. Harris, Jr., Immediate Past-President; Carol Chazen Friedman; Patrick B. Starke; and Deanna K. Scott. The committee has authority to act on behalf of the Board of Governors during the legislative session. In reviewing legislation, the Executive Committee considers comments received from various Missouri Bar legislative review subcommittees. All positions taken by the Executive Committee are communicated to the full Board as soon as possible after they are taken.

The Executive Committee reviewed House Bill 227, which changes laws regarding the Missouri Human Rights Act. The following aspects of the bill were found to be outside of the legislative scope of The Missouri Bar:

- Section 213.010 (5), which changes the definition of 'discrimination'
- Section 213.010 (7), which changes the definition of 'employer'
- Section 213.075.11 (2) (a) (b) and (c), which increase civil penalties
- Section 213.111.2., which limits punitive damages

Section 213.055, which provides that race, color, religion, national origin, sex, ancestry, age or disability of an individual must be "the factor motivating the employer's decision" in order to constitute an unlawful employment practice was found to be within the bar's legislative scope because it affects the burden of proof in employment discrimination cases. Comments submitted by bar legislative review subcommittee members reflect that this is an issue about which substantial constituencies of the bar may differ. Therefore, the Executive Committee voted to take no position on this part of the bill. Some of the comments received from bar members about the impact of this proposed change are enclosed for your information.

Section 1 of the bill, which rejects and abrogates the holdings of several Missouri appellate court cases, was also found to be within the legislative scope of The Missouri Bar. The Executive Committee opposed this section as drafted because of a concern that the impact of the provision is too broad. As suggested by Sara Rittman, a better approach would be to overrule specific holdings of those cases, rather than place many statements of law in those cases under a cloud of possibly having been legislatively overruled.

Thank you for considering the Bar's position in this matter.

Enclosure

## Comments Relating to House Bill 227

By amending the Act to define unlawful discrimination practice by an employer to require the act of discrimination to be “the factor motivating the employer’s decision,” the bill effectively guts the Act. In all but the perfect case of outright discrimination for which direct evidence is available, an employer could point to any other reason as a contributing factor, thus escaping liability under the Act. Though I believe the limitation of punitive damages to be reasonable, it would certainly limit attorneys willing to take such a case, and thus negatively affect the administration of justice. *Jeremiah Kidwell*

...[T]he bill would require that discrimination be the sole factor for the employment action. This would effectively gut the protection from employment discrimination... *Sara Rittman*

...[T]he proposed amendments to the Missouri Human Rights Act are in the best interests of both individual employees and Missouri employers. *Courtney Goddard*

This bill brings the MHRA in line with federal anti-discrimination laws and creates a more accurate causal standard relating to prohibiting intentional discrimination. It also provides for civil penalties, which were not previously available, following administrative hearing in the employment discrimination context. *Robert Orbals*

This amendment will protect citizens from punitive damages related to actions of elected officials. However, by allowing punitive damages against individual supervisors will put pressure on governments to insure against or to assume the liability of its employees and officials. Therefore, it may not fully eliminate punitive damage awards being satisfied with public funds. Additionally, the amendment will help eliminate the uncertainty created by Daugherty, et al., by allowing courts and parties in employment disputes to more readily look to federal law for guidance. *David Davis*

This bill is horrible. The amendments to the Missouri Human Rights Act which this bill would affect would create a special exception for public governments and other public entities (including school districts) which would encourage discrimination and raise the standard of proof necessary to show discrimination, which is already one of the most difficult claims to prove. This is a special interest bill of the worst kind. *Jeffrey W. Bruce*

I do not believe there is any reason for changing our discrimination law; the current language works well. In addition, I do not like the concept of changing case law by legislative fiat. *(name undisclosed)*

Supportive of taking the individual employee off of liability under the MHRA. We were one of the only states which allowed for such liability. Brings us more into line with national precedent. Do not support changing the standard for action to motivating factor--still believe should be any factor language. Allowing for some discrimination doesn't seem in line with the idea of this act. *(name undisclosed)*

Position regarding proposed amendments to Missouri Human Rights Act, as set forth in H. 227 Section 213.010(5) “changing the definition of ‘discrimination’ from ‘any unfair treatment based on’ race, sex, etc. to ‘an adverse action motivated by’ race, sex, etc. This particular amendment incorporates two changes: 1) changing “any unfair treatment” to “an adverse action;” and 2) changing “based on” to “motivated by.” My concern with the proposed amendment focuses primarily on the adoption of the “adverse action” requirement. A change in the statute to increase the quantity of discriminatory conduct to an “adverse action” appears to be an attempt to codify some federal case law which requires proof of an “adverse action” for an employee to have a discrimination claim. The adverse action requirement does not appear in the federal discrimination laws such as Title VII of the Civil Rights Act or the Age Discrimination in Employment Act, so there is no hard and fast rule as to what the term means. Thus, instead of focusing on whether the employer has an unlawful motive in some cases the focus becomes whether the action is sufficiently bad to be unlawful, even if the employer’s motive is unlawful. A change in the law to base the Human Rights Act language on a phrase used in federal courts and which means different things to different federal courts will create confusion and turn what should be straightforward cases into cases involving multiple appeals until the Missouri courts can work out their own body of case law as to what is bad enough to be “adverse.” The current phrase leaves no room for doubt and allows a jury to sort out whether the action is bad enough to warrant damages. Changing the law at this point appears to be an effort to make lawful some conduct which is now unlawful. If the amendment will not broaden the actions employers may take against employees based on race, sex, religion, and age, then the amendment is unnecessary. If the amendment will make previously discriminatory conduct legal, then amending the law is sending the message the Missouri Legislature believes some employer conduct based on race, sex, etc. is acceptable. Section 213.010(7) changing the definition of “Employer” to remove language holding individuals liable for their discriminatory conduct. If one of the goals of the Human Rights Act is to prevent unlawful conduct, then amending the Act to remove individual responsibility for discrimination and harassment is counterproductive. The potential for liability is a deterrent to individual decision-makers in the position to discriminate and harass (such as in the case of serial sexual harassers). Instead of holding the bad actor accountable for his conduct, he will be able to pass the consequences of his conduct on to a corporation and its owners/shareholders and he will consequently lack the economic incentive to conform his behavior to what is expected under the statute. There is no sensible basis for immunizing the individual bad actor from liability for his conduct and forcing the company to shoulder all responsibility. Section 213.055 “changing the language of the statute to require the employee to prove that the employer’s decision was “the factor motivating” the employer’s decision. Presently, if an employee’s race, sex, or other protected factor contributed to the employer’s decision at issue in the case, the employer is liable under the MHRA. For example, if an applicant’s race contributed to the employer’s decision not to hire the applicant, then the employer will have violated the Human Rights Act. Under the proposed amendment, if the employer decided not to hire an applicant because the applicant was African American and because he went to Mizzou, the Human Rights Act would not prohibit the employer’s decision “even if the employer admitted the applicant’s race was 99% behind his hiring decision. As a practical matter, decisions are not usually made in a 100% environment. An employer could have several reasons for deciding not to hire someone: we do not want to make it lawful when race is one of those reasons. “The factor motivating” the employer’s decision is not the standard used under any analogous federal anti-discrimination statute because the standard makes it too easy for employers to discriminate with impunity. Section 213.070 changes the language of the statute to remove individual liability and to limit the possible type of retaliation to retaliation in “an employment context,” an undefined term. For the reasons stated above, in connection with Section 213.010(7), I oppose removing individual liability for retaliatory conduct. I also oppose adding the language “in an employment context” because it is so vague and could legitimize acts taken in retaliation for protected activity which are presently unlawful.

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As the U.S. Supreme Court recently held in *Burlington Northern v. White*, 548 U.S. 53, 63 (2006), a Title VII retaliation case, “An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. See, e.g., *Rochon v. Gonzales*, 438 F.3d, at 1213 (FBI retaliation against employee “took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (C.A.10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's “primary purpose,” namely, “[m]aintaining unfettered access to statutory remedial mechanisms.” Section 213.075.11(2) changes civil penalties provisions. I support the change. Section 213.111(2) relieves governmental entities from liability for punitive damages. Under the proposed amendment, even if a governmental entity’s conduct is willful and malicious, the entity will not have to be concerned about the imposition of punitive damages. If one of the goals of the Act is to prevent employers from making decisions based on race, sex, religion, age, and so forth, then relieving any group of employers (particularly a group as large as the government, including schools) from punitive damage liability for making decisions based on race, sex, age, and so forth with an evil, willful, or malicious motive is counterproductive. Compensatory damages simply compensate the victim for his or her actual loss, which might not be large if the employee is able to find a job elsewhere in a short period of time. Depending on the case, the governmental employer will have learned nothing from a finding that it refused to hire an applicant because of his race if the applicant happened to find another job quickly, even where the employer decided as a matter of policy to put a sign on the door, “Blacks Need Not Apply.” The absence of punitive damages, over the long haul, could prove more costly to the taxpayers than an early award of punitive damages because an award of punitive damages for malicious conduct makes the employer “smart,” i.e., more vigilant about preventing further discrimination, a goal of the Human Rights Act. Moreover, government agencies are not only major employers in the State, but they exist to carry out the political will of the citizens; the political will of the people of Missouri is that employment discrimination should not be tolerated as expressed in the Human Rights Act...