

**THE MISSOURI BAR
LABOR & EMPLOYMENT LAW COMMITTEE
SPRING COMMITTEE MEETING
May 11, 2007**

CASE LAW UPDATE

DISCRIMINATION/RETALIATION

Daugherty v. The City of Maryland Heights, 2006 WL 1736348 (Mo. App. E.D. 2006)

Daugherty sued the City of Maryland Heights for age and disability discrimination under the MHRA after his discharge from the police department. The trial court granted summary judgment for the City, and Daugherty appealed.

In his first point on appeal, Daugherty claimed the trial court applied the incorrect standard of law, arguing that the discrimination need only be a contributing factor to survive summary judgment. He argued that the court erred in applying the *McDonnell Douglas* burden shifting analysis, claiming that the 8th Circuit abrogated its use during summary judgment in *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2005). However, the court noted language in *Strate* directly upholding application of *McDonnell Douglas* in the wake of *Desert Palace*. Daugherty further relied on the plain text of MAI 31.24, which permits a verdict for the plaintiff if the discrimination is a contributing factor to the employment action. The court rejected this argument as well, noting that the burden of proof under a jury instruction "is very different" than that at summary judgment.

The court concluded that the standard elucidated in *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004) was the appropriate standard to apply to summary judgment claims in employment actions under the MHRA. Thus, a plaintiff may defeat the motion by either proving direct evidence of discrimination or an inference of unlawful discrimination per *McDonnell Douglas*.

The Supreme Court accepted transfer on this case in December 2006. Oral arguments were heard on April 25.

Brady v. The Curators of the Univ. of Mo, 213 S.W.3d 101, (Mo. App. E.D. 2006)

Brady prevailed in his claims of age discrimination and retaliation at trial, winning \$225,000 in actual damages and over \$1 million in punitives against UMSL and two supervisors. On appeal, UMSL claimed that the trial court erred in assessing punitives against a public entity. The court of appeals disagreed, noting that the MHRA

specifically included the state and any political subdivision in the definition of employer. Prior case law supported the proposition that such entities are subject to the provisions of the MHRA in the same manner as any other employer.

UMSL next claimed that the issue of punitive damages was improperly submitted to the jury. Citing evidence showing that younger employees of the Athletic Department received better pay, hours and benefits, that the university failed to maintain the baseball fields as required by the NCAA and awarded less scholarship money to the baseball program, despite its winning record, the court found sufficient evidence for the jury to assess punitive damages.

The court upheld the amount of the award on similar grounds. It found the university used “trickery and deceit” to disguise the discrimination as budgetary. It also criticized the decision to eliminate Brady’s health insurance after a battle with cancer, while other employees were allowed to work part time hours for full time pay and benefits. Moreover, the amount was deemed proportionate to his actual damages, and seemed to be the only means to deter the adverse conduct.

On the university’s remaining points, the court reiterated its holding in *Cooper v. Albacore Holdings, Inc.* that supervisors could be individually liable under the MHRA and upheld the award of front pay.

Brady cross-appealed on the denial of his motion for attorney’s fees as untimely. The court found that the thirty days for such application began to run on the date the court issued final judgment on Brady’s post-trial motion for equitable relief. Thus, his motion was timely and the issue was remanded.

***EEOC v. City of Independence*, 471 F.3d 891 (8th Cir. 2006)**

A City employee was disqualified from benefits under the City’s leave donation program because he was eligible for retirement. He sued for constructive discharge and age discrimination under the ADEA and MHRA. The district court granted summary judgment to the City on all counts.

The 8th Circuit reversed on the age discrimination claim. Applying *Hazen Paper Company v. Biggins*, 507 U.S. 604 (1993) to both his state and federal claims, the court found that the employee’s age “actually played a role” and had a “determinative influence” on the decision to deny him participation in the leave program.

The court found direct evidence of discrimination in the Human Resources director’s statement that she did not realize the employee was “that old,” and key administrators’ assertions that he was ineligible for the program “due to his age.” The City argued that age was not determinative of its decision because retirement eligibility was conditioned both on both age and years of service. However, the statements raised a genuine issue of fact as to the whether age was determinative in the decision.

Standridge v. Union Pacific Railroad Co., 479 F.3d 936 (8th Cir. 2007)

Plaintiffs represented a class of female employees who claimed Union Pacific's policy of covering contraception only when medically necessary violated the Pregnancy Discrimination Act and constituted gender discrimination under Title VII. Plaintiffs argued that contraception is related to the condition of pregnancy and thus covered by the PDA. The district court granted partial summary judgment to Plaintiffs, finding such failure was discriminatory in treating medical care for women to prevent pregnancy less favorably than prevention of other conditions.

The court applied its decision in *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996) that the PDA does not extend to infertility treatments in holding that contraception was not related to pregnancy under the PDA. Much like infertility treatments, contraception occurs prior to pregnancy and is gender-neutral. Moreover, the plain language of the PDA makes no reference to contraception.

The court found unpersuasive the EEOC's interpretation that the PDA requires coverage of prescription contraception if other prescriptions used to prevent other medical conditions are covered. Union Pacific's policy excluded coverage of all contraception for men and women, both medical and surgical.

With regard to the plaintiffs' Title VII claim, the 8th Circuit found the district court applied too broad a standard in comparing contraception to other preventive medical care. Rather, the proper analysis is whether the decision to deny contraception was applied disparately to women. As the policy did not afford such benefit to women or men, there was no gender discrimination under Title VII.

Arnold v. Nursing and Rehabilitation Ctr. at Good Shepherd, LLC, 471 F.3d 843 (8th Cir. 2006)

Arnold was dismissed from the defendant long-term care facility based on a resident's allegation of verbal abuse. The Arkansas Office of Long Term Care subsequently found the allegation unfounded. Arnold filed a § 1981 claim for race discrimination. The district court granted summary judgment for the employer on the grounds that she failed to show she performed her duties satisfactorily and that she failed to show its reason for firing her was pretext.

The district court found that Arnold failed to establish a prima facie case under *McDonnell Douglas* because there was no evidence that Good Shepherd believed she was performing her duties satisfactorily. The 8th Circuit found this standard in error, as *McDonnell Douglas* merely required that she show she was qualified.

However, the grant of summary judgment based on Arnold's failure to show pretext was proper. Although Good Shepherd discharged her on the mistaken belief that she had verbally abused a resident, she failed to show racial animus in the decision to fire her.

PUBLIC EMPLOYEES

Service Employees Int'l Union Local 2000 v. State of Mo, 214 S.W.3d 368, (Mo. App. W.D. 2007)

In December 2003, certain Probation and Parole employees were given a pay increase averaging \$1,200 per agreement of the State Office of Administration, the Department of Corrections and the Personnel Advisory Board. SEIU represented the employees in negotiations related to the increase.

The state budget for fiscal year 2005 included a cost-of-living pay increase for state employees, but excluded the Probation and Parole employees who had been given the December 2003 raise. The Probation and Parole officers alleged that the State had illegally retaliated against them for engaging in union activity and violated state law regarding the uniform pay system. The trial court found in favor of the employees on their retaliation claim but denied claims that the State violated uniform pay laws. The State appealed.

The Western District upheld the finding of retaliation, based on evidence that the Senate and House budget chairs had expressly indicated an intention to “roll back” the December 2003 pay increase. The court also pointed to evidence that for the ten years prior, employees who received pay increases due to adjustments in the pay plan were eligible for cost-of-living increases granted all state employees. Acknowledging that these facts did not “mandate” a finding of discriminatory intent, the court found that they “could support” such a finding.

The State argued that the trial court improperly shifted the burden of proof in finding that it failed to offer evidence that its actions were motivated by legitimate, non-discriminatory reasons. The court found that plaintiffs “presented a more plausible explanation” for the conduct than the State, which the State’s evidence did not negate.

Hodges v. City of St. Louis, 217 S.W.3d (Mo. 2007)

Plaintiff sued the City, the Board of Police Commissioners and a police officer for injuries suffered when a police car struck her. She settled with the officer and the Board and was awarded \$1.2 million in damages against the City at trial. The judgment was reduced per the statutory cap in section 537.600.1(1). Both parties appealed.

The City claimed that because the Board, not the City, employed the officer it could not be held vicariously liable for his conduct. The court reaffirmed its century-old decision in *Carrington v. City of St. Louis*, 1 S.W. 240 (1886) holding that section 84.330 expressly renders St. Louis and Kansas City police officers agents of their respective cities. The majority acknowledged the dissent’s contention that respondeat superior cannot lie absent control by the master, and that the statute placed control of the force with the Board. However, the statute also expressly created dual agency and thus superseded application of the common law principle.

FEDERAL EMPLOYERS' LIABILITY ACT

Norfolk Southern Railway Co. v. Sorrell, 127 S.Ct. 799 (2007)

Sorrell filed suit under FELA in Missouri court for injuries sustained while working for Norfolk Southern. Damages awarded under FELA may be reduced in proportion to the employee's negligence. Missouri's jury instructions apply different causation standards to railroad and employee contributory negligence in assessing liability under FELA. The railroad's negligence is measured by whether it "contributed in whole or in part" to the injury (MAI 24.01), while the employee's negligence must "directly contribute to cause" the injury (MAI 32.07). The trial court overruled Norfolk's objection to the differing standards, and the Court of Appeals affirmed. The Missouri Supreme Court declined review, and Norfolk sought certiorari from the United States Supreme Court.

Noting that Missouri was the only jurisdiction to apply disparate causation standards, the Court found no intent expressed in FELA to depart from the common law principle that both plaintiff and defendant be held to the same causation standard.

The case was remanded to the Missouri Court of Appeals to address Sorrell's argument that any evidence of his negligence credited by the jury would have been a direct cause of his injury, so that revised instructions would not alter the result. The Court declined to entertain Norfolk's invitation to establish what the common causal standard should be.

PREVAILING WAGE

Bonney v. Environmental Engineering, Inc., 2007 WL 942192 (Mo. App. S.D.)

The Missouri Division of Labor Standards investigated a complaint of violations of the Missouri Prevailing Wage Act and prepared a report containing its findings and calculations of underpaid wages and fringe benefits. Defendants entered the report into evidence at the workers' trial for claims brought under section 290.300, RSMo, arguing that it was entitled to the same deference as an administrative decision in a contested case. The Court of Appeals found this reversible error and remanded the case.

The court also found that the trial court erred in failing to double underpaid fringe benefits, as those benefits are included in the definition of prevailing hourly rate of wages found in section 290.210(5), RSMo. While defendants argued that the reference to "stipulated rates for work done under the contract" in section 290.300 applied only to hourly, overtime or holiday rates established by the Wage Order, the appellate court concluded that the term "rates" included all aspects of the prevailing wage.

Because Defendants had paid Plaintiffs the underpaid amounts prior to trial, the trial court found they had reimbursed Plaintiffs in full. Plaintiffs claimed they were entitled to

statutory doubling. Defendants argued that the statute is penal and would not require doubling when the underpayments are remitted upon discovery. However, the court found the purpose of the penalty was not to deter contractors from delaying payments owed to workers, but to prevent them from failing to pay such wages at the time they are owed. Therefore, the amount awarded Plaintiffs at trial should have been doubled and the pre-trial payment subtracted from that award.

WORKERS' COMPENSATION

Schoemehl v. Treasurer of the State of Mo., 2007 WL 58370 (Mo.)

Plaintiff was the wife of a workers' compensation claimant. Her husband was awarded TTD and medical benefits for a work-related injury. A month later, he died of unrelated causes. He was subsequently determined to have been permanently and totally disabled as a result of the injury, for which Plaintiff was awarded benefits up to the time of his death. She appealed the Commission's decision that as the claimant's dependent, she was not an employee for the purposes of workers' compensation law.

The court found that section 287.230.2, RSMo entitled her to benefits in providing that an employee entitled to benefits who dies from an unrelated cause shall not be paid "unless there are surviving dependents at the time of death." The State contended that section 287.200.1, specifically addressing PTD benefits, limited such payments to the lifetime of the employee. However, section 287.020.1 defines an employee to include dependents of a deceased employee. Moreover, the State's position would permit surviving dependents to receive PPD but not PTD benefits upon an employee's death, which the court deemed an unreasonable result.

The dissent argued that section 287.200.1 requires PTD benefits are contingent on both a continued permanent total disability and continued life of the employee. As the disability ceases at death, one prerequisite to continued payments is no longer met.