

HCS HB 320 -- UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES

SPONSOR: Elmer

COMMITTEE ACTION: Voted "Do Pass" by the Committee on Workforce Development and Workplace Safety by a vote of 6 to 3.

This substitute changes the laws regarding unlawful discriminatory employment practices under the human rights laws and establishes the Whistleblower's Protection Act.

UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES UNDER THE HUMAN RIGHTS LAWS

The substitute:

(1) Specifies that the term "because" or "because of," as it relates to a decision or action, means that the protected criterion was a motivating factor unless the decision or action has an adverse impact on the protected criterion, in which case, courts must rely heavily on judicial interpretation of specified federal civil rights and employment discrimination laws;

(2) Revises the term "employer" by specifying that it is a person engaged in an industry affecting commerce who has six or more employees for each working day in each of 20 or more weeks in the current or preceding year and does not include corporations and associations owned and operated by religious or sectarian groups;

(3) Specifies that any party to specified unlawful discriminatory practice actions may demand a trial by jury;

(4) Specifies that an award of noneconomic damages may include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses;

(5) Specifies that the total amount of noneconomic damages awarded for each plaintiff cannot exceed the greater of \$500,000 or five times the amount of economic damages awarded by the court;

(6) Prohibits punitive damages from being awarded against the state or any of its political subdivisions except for claims for discriminatory housing practices authorized in Section 213.040, RSMo; and

(7) Specifies that the provisions regarding damage awards do not apply to an alleged violation of Section 213.040, unlawful housing practices; Section 213.045, discrimination in commercial real estate loans; or Section 213.050, discrimination in real estate

sales and rental organizations. The provisions will apply, however, to an alleged violation of Section 213.070, other specified unlawful discriminatory practices by an employer.

#### WHISTLEBLOWER'S PROTECTION ACT

The Whistleblower's Protection Act is established, which places in statute existing common law exceptions to the at-will employment doctrine, making it an unlawful employment practice for an employer to discharge or retaliate against an individual who is a protected person. The substitute:

- (1) Specifies that the term "because" or "because of," as it relates to a decision or action, means the person's status as a protected person was a motivating factor;
- (2) Specifies that the term "employer" means a person engaged in an industry affecting commerce who has six or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year but does not include corporations and associations owned and operated by religious or sectarian groups;
- (3) Specifies that "proper authorities" means a governmental or law enforcement agency or an officer or the supervisor or management of the employer;
- (4) Specifies that "protected person" means a person who has reported to the proper authorities an unlawful act or an act reasonably believed by the employee to be an unlawful act of the employer or its agent or serious misconduct of the employer or its agent that violates a clear mandate of public policy as articulated in a constitutional provision, regulation promulgated under statute, or rule created by a governmental entity; a person who has refused to carry out a directive issued by the employer or its agent that if completed would be a violation of the law; or a person who engages in conduct otherwise protected by statute or regulation;
- (5) Specifies that these provisions are intended to codify the existing exceptions to the at-will employment doctrine and to limit their future expansion by the courts. These provisions must provide the exclusive remedy for any and all unlawful employment practices specified in the act and voids any common law causes of action to the contrary. All defenses, privileges, and immunities including, but not limited to, sovereign, official, and governmental immunities and the public duty doctrine, that apply to causes of action under the existing common law exceptions to the at-will employment doctrine will apply to causes of action under the whistleblower's protection law;

(6) Specifies that a protected person aggrieved by a violation of these provisions will have a private right of action for damages which may be filed in a circuit court of competent jurisdiction. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order and may award actual, noneconomic, and punitive damages to the plaintiff;

(7) Specifies that the court may award the plaintiff actual damages, noneconomic damages, and punitive damages. An award of noneconomic damages may include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. The amount of all noneconomic damages awarded for each complainant cannot exceed the greater of \$500,000 or five times the amount of economic damages awarded by the court; and

(8) Specifies that the damage award limit will increase or decrease in the same amounts as any corresponding limits are changed in Section 42 U.S.C. 1981a(b)(3).

PROPONENTS: Supporters say that the bill protects employers by making Missouri law consistent with the federal Civil Rights Law. The bill removes provisions which currently make an employer liable for the actions of an employee and establishes a graduated scale for damages based on the number of employees which provides a level of uniformity in awarding damages.

Testifying for the bill were Representative Elmer; Missouri Chamber of Commerce and Industry; Associated Industries of Missouri; Jane Drummond, Missouri Intergovernmental Risk Management Association; Missouri United School Insurance Council; National Federation of Independent Business; Missouri Retailers Association; Missouri Grocers' Association; St. Louis Regional Chamber and Growth Association; Greater Kansas City Chamber of Commerce; Missouri Association of Counties; and Mike Lodewegen, School Administrators Coalition.

OPPONENTS: Those who oppose the bill say that it removes the ability to bring disparate impact suits by requiring an employee to prove that the discriminatory characteristic was a motivating factor. Mirroring federal law enacted in the 1960s is not necessarily a good thing; in this case, it is a step backward for Missouri. The bill is likely to have unintended consequences for certain individuals such as cancer patients.

Testifying against the bill were Jonathan Berns, Missouri Association of Trial Attorneys and St. Louis National Employment Lawyers Association; Missouri Commission on Human Rights; Missouri

Municipal League; Nimrod Chapel, Mid American Construction Management, LLC, and Missouri Conference of the National Association for the Advancement of Colored People; City of Nevada; Missouri AFL-CIO; Service Employees International Union MO/KS State Council; United Steelworkers District 11; ACLU-EM; Missouri National Education Association; and Tina Trickey.