

HCS HB 1019 -- DISCRIMINATORY EMPLOYMENT PRACTICES

SPONSOR: Austin

COMMITTEE ACTION: Voted "Do Pass" by the Standing Committee on Workforce Standards and Development by a vote of 6 to 2. Voted "Do Pass with HCS" by the Select Committee on Labor and Industrial Relations by a vote of 6 to 2.

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

UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES UNDER THE HUMAN RIGHTS LAWS

The bill:

(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;

(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 that it does not include:

(a) The United States or a corporation wholly owned by the United States;

(b) An individual employed by an employer;

(c) An Indian tribe;

(d) Any department or agency of the District of Columbia subject by statute to procedures of the competitive service;

(e) A bona fide tax-exempt private membership club, other than a labor organization; or

(f) Corporations and associations owned and operated by religious or sectarian groups;

(3) Specifies that Chapter 213, RSMo, human rights; Chapter 285, employers and employees generally; and Chapter 287, workers' compensation law, must provide the exclusive remedy for all unlawful employment practices described in the bill, abrogating any common law causes of action not specifically described in the bill;

(4) Establishes a presumption that, for a fair presentation of a case, a jury must be given an instruction expressing the business judgment rule;

(5) Requires the courts to rely heavily on judicial interpretations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act when interpreting and deciding Missouri Human Rights Act employment discrimination cases;

(6) Specifies that the General Assembly intends expressly to abrogate the case of *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. E.D. 2006) and its progeny as it relates to the necessity and appropriateness of the issuance of a business judgment instruction;

(7) Recommends as highly persuasive two methods to the courts for analyzing employment discrimination cases as a basis for granting summary judgment. The mixed motive and burden shifting analyses are based on court rulings interpreting federal law and the bill abrogates numerous Missouri cases and certain approved jury instructions as specified in the bill;

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

(9) Specifies that an award of damages may include all future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and punitive damages;

(10) Specifies that the amount of damages awarded for each plaintiff cannot exceed the amount of the actual back pay plus interest, and other damages of up to \$50,000 in the case of an employer with six to 100 employees in each of 20 or more weeks in the current or preceding calendar year; up to \$100,000 for an employer with 101 to 200 employees; up to \$200,000 for an employer with 201 to 500 employees; and up to \$300,000 for an employer with more than 500 employees;

(11) 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, and Section 213.070, other specified unlawful discriminatory practices by an employer as it relates to housing;

(12) Specifies that in an employment-related action brought under Chapter 213, the plaintiff must bear the burden of proving that the protected criterion was a motivating factor in the alleged unlawful decision or action; and

(13) Prohibits punitive damages from being awarded against the state or any of its political subdivisions.

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 bill:

(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 an entity that 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 the state or any of its political subdivisions, a corporation wholly owned by the state, an individual employed by an employer; or corporations and associations owned and operated by religious or sectarian groups;

(3) Specifies that the term "proper authorities" means a governmental or law enforcement agency, an officer, the employer's supervisor, or the employee's human resources representative employed by the employer;

(4) Specifies that the term "protected person" means a person who has reported to the proper authorities 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, statute, or regulation promulgated under statute; 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. A person is not a protected person when the person is exempt from overtime compensation under the Fair Labor Standards Act or is a supervisory, managerial, or executive employee or an officer of the employer and the unlawful act or serious misconduct reported concerns matters upon which the person is employed to report or provide professional opinion;

(5) Specifies that these provisions are intended to codify the

existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts. These provisions must provide the exclusive remedy for all unlawful employment practices specified in the bill and voids any common law causes of action to the contrary;

(6) Specifies that it must be an unlawful employment practice for an employer to discharge or retaliate against an individual defined as a protected person in the bill because of that person's status as a protected person;

(7) Specifies that any party to an action under these provisions may demand a trial by jury; and

(8) Specifies that a protected person aggrieved by a violation of these provisions must have a private right of action for actual damages but not for punitive damages, unless the private right of action exists under other statutes or regulations, federal or state. The private right of action under the whistleblower protection law may be filed in a circuit court of competent jurisdiction. The only remedies available in an action will be back pay, reimbursement of medical bills directly related to a violation of the whistleblower protection law and, if the protected person proves outrageous conduct, an additional double amount as liquidated damages. The court may also award the prevailing party court costs and reasonable attorney fees.

UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES UNDER THE WORKERS COMPENSATION LAWS

The bill:

(1) Makes it unlawful for an employer to retaliate or discriminate against an employee because the employee refused to violate a statute, regulation, constitutional provision, ordinance, or common law at the request of someone employed by the employer who has direct or indirect supervisory authority over the employee or because the employee reported to an authority of the federal, state, or local government a violation by the employer of any statute, regulation, constitutional provision, ordinance, or common law;

(2) Specifies that Chapter 213, human rights; Chapter 285, employers and employees generally; and Chapter 287, workers' compensation law, must provide the exclusive remedy for all unlawful employment practices described in the bill, abrogating any common law causes of action not specifically described in the bill;

(3) Specifies that in any actions for damages brought under the

workers' compensation laws, the plaintiff must have the burden of proof including, but not limited to, that the employer's decision or action was motivated by the employee's exercise of his or her rights under those laws;

(4) Specifies that in an action brought by an employee against a current or former employer alleging discrimination based on the employee's exercise of rights under the worker's compensation laws, the sum of the compensatory and punitive damages for a plaintiff cannot exceed:

(a) In the case of an employer with up to 100 employees in each of 20 or more weeks in the current or preceding calendar year, \$50,000;

(b) In the case of an employer with 101 to 200 employees, \$100,000;

(c) In the case of an employer with 201 to 500 employees, \$200,000; and

(d) In the case of an employer with more than 500 employees, \$300,000;

(5) Specifies that compensatory damages must not include back pay and interest; and

(6) Authorizes a court to award the prevailing party court costs and reasonable attorney fees.

PROPOSERS: Supporters say that the bill would put Missouri back in line with a majority of the other states and the federal government regarding employment discrimination standards and would make Missouri a more attractive environment to which a business could locate or relocate.

Testifying for the bill were Representative Austin; Missouri Chamber of Commerce and Industry; Associated Industries of Missouri; Hollie Elliott, Springfield Area Chamber of Commerce; Ryan Bertels, Missouri Intergovernmental Risk Management Association; Missouri Retailers Association; Missouri Grocers Association; Missouri Council of School Administrators; National Federation of Independent Business; and Amie Needham, Littler Mendelson.

OPPOSERS: Those who oppose the bill say that the bill will cause the Missouri Human Rights Commission to lose contracts with both the U.S. Department of Housing and Urban Development and the U.S. Equal Employment Opportunity Commission, which would amount to

about two-thirds of its budget. Limiting damages to a whistleblower does not make any sense and only discourages employee action.

Testifying against the bill were United Steelworkers District 11; Eric Krekel, Missouri Commission on Human Rights; Mark Moreland, Missouri Association of Trial Attorneys; ACLU of Missouri; Robert Lee; Bert S. Braud; Benjamin Westhoff; Donna Harper; Missouri National Education Association; and Missouri AFL-CIO.