

Discrimination Litigation Prevention and Mitigation

MASA

Central Office Administrators Conference

J. Drew Marriott & Brian Mayer



EdCounsel^{LLC}
SCHOOL ATTORNEYS

MHRA - Overview



Former Law - Overview

Contributing Factor”

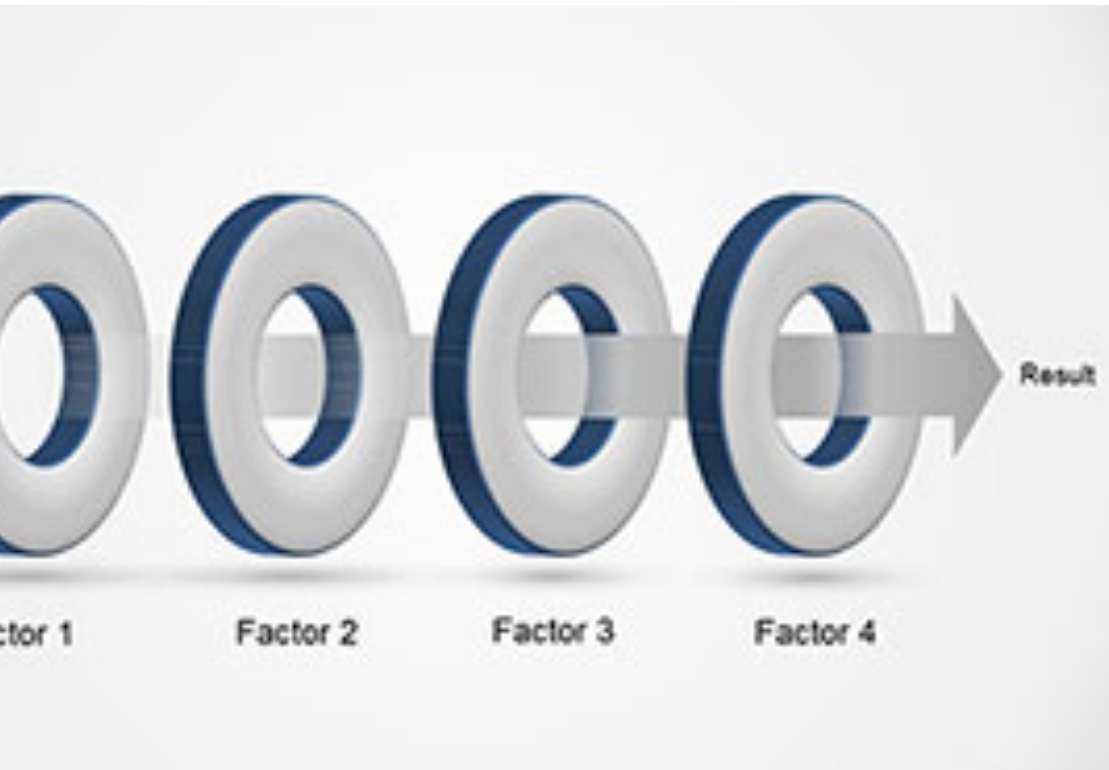
Race, Color, Religion, National
Origin, Ancestry, Sex,
Disability, Age

Adverse action: Discrimination
Retaliation

Damages, attorney’s fees



Contributing Factor



- 1%
- Could be inferred
- (Damages still 100%)

Current Standard



- The Motivating Factor
- Actual, but-for cause
- Business Judgment defense
- “Employer” ≠ Administrator
no more individual liability
- Punitive damage caps

Sex



- Pregnancy
- Gender
- NOT sexual orientation (for now)
- BUT sexual stereotypes
- Slurs with gender connotations
= sexual harassment

Disability

any physical or mental impairment
that substantially limits one major life
activity

Issue: disability often assumed, but
what is a reasonable accommodator



Adverse Action

employment: change in terms of employment

students: denial of public accommodation (education)

constructive: when employee or student leave because of hostile environment”

allowing Harassment: failing to take prompt effective action



Predictions

Courts changing law?
Federal discrimination
aims
removal to Federal
court)



Takeaways

Discrimination and harassment still actionable

Plaintiff will still infer discrimination and harassment based on protected activity

Juries will still be sympathetic to victims and angry with employers who "allow" harassment

Therefore, the District still needs to show that it acted affirmatively to address discrimination and harassment issues



Evolution of a Discrimination or Harassment Lawsuit



Student or Staff Member

Student—Student

Staff member—Staff member

Student—Staff member

Staff member—Student



Complaint of Unfair Treatment

Identify possible litigant early

Identify possible issue early

Red flags: “harassed,” “unfair”

Empathetic employee: takes leave for cancer treatment,
Cares for a special-needs child, has an obvious disability



Incident Occurs



- Victim of perceived bullying harassment fights back
- Teacher transferred to new school
- Employee receives disciplinary memo for absences or performance issues

CHR Complaint (or EEOC or OCR Complaint)

Investigation

Response

Right to sue letter

MISSOURI COMMISSION ON HUMAN RIGHTS

DISCRIMINATION IN EMPLOYMENT IS PROHIBITED

www.labor.mo.gov/mohumanrights

The Missouri Human Rights Act makes it illegal to discriminate in any aspect of employment because of an individual's race, color, religion, national origin, ancestry, sex, disability or age (40 through 69).

The Missouri Human Rights Act applies to:

- Private employers with six or more employees
- All apprenticeship or training programs
- All labor organizations
- All employment agencies
- All state and local government agencies

Discriminatory employment practices prohibited by the Missouri Human Rights Act include:

- Hiring and firing, compensation, assignment or classification of employees, transfer, promotion, layoff or recall, job advertisements, recruitment, testing, use of company facilities, training and apprenticeship programs, fringe benefits, pay, retirement plans, or disability leave, or other terms and conditions of employment
- Harassment on the basis of race, color, religion, national origin, ancestry, sex, disability, or age
- Retaliating against an individual for filing a complaint of discrimination, participating in a discrimination investigation or hearing, or opposing discriminatory practices
- Discriminating in any aspect of employment against an individual because of his or her association with a person in one of the protected categories.

An employment agency includes any person or agency, public or private, regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.

The mission of MCHR is to develop, recommend, and implement ways to prevent and eliminate discrimination, and to provide equitable and timely resolutions of discrimination claims through enforcement of the Missouri Human Rights Act.

CONTACT US
Missouri Commission on Human Rights (MCHR)
3315 W. Truman Blvd., Suite 212
Jefferson City, MO 65102-1129
573-751-3325
Toll-Free Discrimination Complaint Hotline: 877-781-4236
TDD/TTY: 800-735-2966
Relay Missouri: 711


Take Action File a Complaint

If you believe you have been discriminated against in employment, you can file a complaint of discrimination by calling one of the numbers above or emailing mchr@labor.mo.gov. Note complaints must be filed within **180 days** of the alleged discrimination.

Missouri Commission on Human Rights is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities.

MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS

State regulation 8 CSR 60-3.010 requires this notice be posted in all places of business or establishments which are subject to the Missouri Human Rights Act.



MCHR-9 (04-16) A1

Litigation



- Complaint or Petition
- Discovery, document production, interviews, depositions...
- Trial

Mitigate Risk of Claims and of Damages when Claims Escalate into Litigation



Investigate and Document all Complaints Under Lens of Antidiscrimination Policy

When age, sex, or other factors are just the legal way for someone to bring their claim of unfair treatment into the legal system.

Claimant: “why would a good teacher or student be treated unfairly?”

Semantics + confirmation bias = story that allows student or employee to feel justified in their performance or conduct and the treatment by their peers or the District

Something bad happened to me, not because I am mean or incompetent, but because of discrimination based on my ___

Investigate and Document all Complaints Under Lens of Antidiscrimination Policy

Sometimes discrimination or harassment based on sex or other factors did occur

The sooner the District deals with it, the cheaper the resolution

Dealing with it": investigating it, listening to employee, student or resolving their concerns or, documenting attempts to Documenting resolution



Consequences of No Investigation

Standard: prompt, effective action

"They filed no grievance" = weak defense

Student or employee will create own story of incident to fill the holes in the District's record



Consequences of Improper Investigation

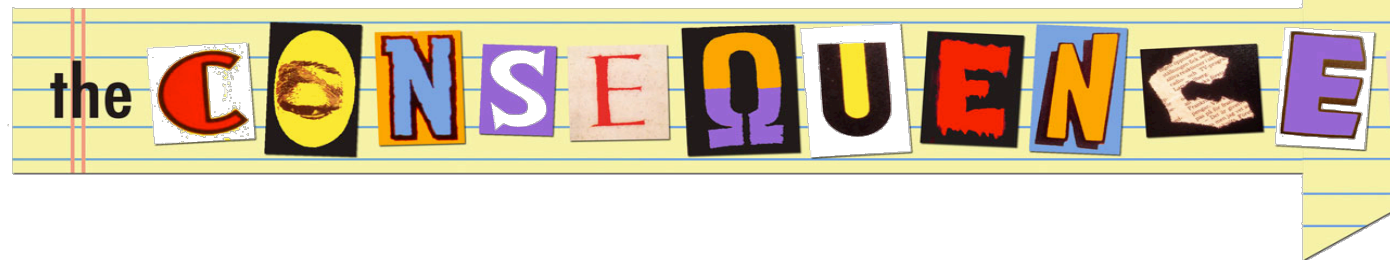
opportunities for resolution

Listening

Accommodations

evidence of prompt action

inquiries by employee or student of evidence or claims of
discrimination or harassment



Mitigating Claims

Documenting consent to resolution

Possible release

Documentation of prompt effective action to stop harassment



Questions??



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