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On February 24, 2009, the Missouri Supreme Court in *Cynthia Hill v. Ford Motor Co.* held that harassment claims under the Missouri Human Rights Act (MHRA) are to be analyzed under the contributing factor test announced in *Daugherty v. City of Maryland Heights*, continuing the trend of differentiating the MHRA from Title VII. The court also held that individual liability may be imposed not only on supervisors, but on anyone acting in the interest of the employer, even if the individual is not named in the underlying charge of discrimination.

Missouri Supreme Court Further Differentiates the Missouri Human Rights Act from Title VII

By Kimberly A. Yates and Frances S.P. Barbieri

Continuing a departure from federal precedent, the Missouri Supreme Court held in *Cynthia Hill v. Ford Motor Co.*, No. SC88981 (Feb. 24, 2009) (en banc),¹ that harassment claims under the Missouri Human Rights Act (MHRA) are not to be analyzed under the federal *McDonnell Douglas* burden-shifting framework, but simply under the language of the MHRA. As a result, a Missouri plaintiff faces less of a burden when proving harassment cases under the MHRA. The Missouri Supreme Court also made clear that any person acting directly in the interest of the employer, including a supervisor, is considered an “employer” under the MHRA and may be individually liable under the MHRA, despite the fact that the individual was not named in the underlying charge of discrimination or in right-to-sue letters from the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR).

The *Hill* opinion is the latest in a line of cases distinguishing the MHRA from Title VII. In 2003, the Missouri Supreme Court opened the door for this line of cases in its ruling in *State ex rel. Diehl v. O'Malley*.² Prior to *Diehl*, pursuant to the language of the statute, a plaintiff pursuing a case under the MHRA had no right to a trial by jury.³ Accordingly, most discrimination lawsuits in Missouri were brought in federal court where Title VII provided for jury trials. But the *Diehl* court held that the denial of a jury trial under the MHRA was unconstitutional. Since *Diehl*, Missouri plaintiffs have more frequently filed their suits in state court under the MHRA. Steadily, since *Diehl*, the Missouri Supreme Court has distinguished MHRA cases from federal precedent that guided Missouri discrimination claims for decades. *Hill* is no exception; it continues the exodus away from federal precedent with respect to harassment claims.

Factual and Procedural Background

Cynthia Hill was a production employee at a Ford Motor Company plant. In 2001, she filed a charge of discrimination with the EEOC and MCHR and received right-to-sue letters in June 2002. From June 2002 to September 2002, Hill claimed she was subject to sexual harassment, witnessing numerous sexual comments by and sexual advances

from Ken Hune, a supervisor under whom she occasionally worked. Hill and others reported Hune's comments to their group leader, who reported them to Hune's boss, the superintendent.

In September 2002, the superintendent assigned Hill to a position where Hune was her regular supervisor. On September 5, 2002, the first day Hill reported to work for the new position, Hune slammed the door in her face and said he was not going to let her work there. Hune called security and reported Hill for not wearing her safety glasses and said Hill was being hostile. Hill and Hune had a meeting with a management employee who called Labor Relations Supervisor Paul Edds to the meeting. Edds told Hill that she needed to seek psychiatric help.

On September 9, 2002, Hill called Ford's sexual harassment hotline and stated that after she reported that she was sexually harassed, she was told she was crazy, needed psychiatric help, and was sent home from work. One hour after her hotline call, Edds called Hill at home and rescinded his order to see a psychiatrist, but he suspended Hill for three days for disrespecting her supervisor.

Hill filed a second charge of discrimination in November 2002, alleging that she had been subjected to sexual harassment and that her suspension and the order to seek psychiatric help were retaliation both for reporting the harassment and for her prior charge of discrimination. Her 2002 charge named Ford and Hune as parties, but not Edds.

New Harassment Test

In 2007, the Missouri Supreme Court explained that because the language of the MHRA defining discrimination is broader than the language of Title VII, proscribing **any** unfair treatment based on a protected characteristic, a plaintiff must show only that a protected characteristic *contributed* to an unfair employment decision to prevail on a discrimination claim under the MHRA.⁴

The decision in *Daugherty* was limited to claims of age and disability discrimination. *Hill* is the first Missouri Supreme Court decision to address whether MHRA harassment claims should proceed under *Daugherty* or federal precedent concerning harassment claims. Making clear that Title VII analysis does not control MHRA harassment claims, the Missouri Supreme Court in *Hill* held that a plaintiff alleging sexual harassment must prove that: (1) she is a member of a protected group; (2) she was subjected to unwelcome sexual harassment; (3) her gender was a *contributing* factor in the harassment; and (4) a term, condition or privilege of her employment was affected by the harassment.⁵ If the alleged harassers are coworkers, the plaintiff must also show that her employer knew or should have known of the harassment and failed to take prompt and effective remedial action.⁶

The court overturned the summary judgment award for defendants and remanded the case on a finding that Hill had shown the existence of an issue of fact – specifically, whether her suspension and referral to a psychiatrist constituted a tangible employment action, and whether Ford knew of the alleged harassment and failed to act.⁷

The court also overturned summary judgment for Ford with respect to Hill's MHRA retaliation claim. The Court held that Hill adduced sufficient evidence that her opposition to Hune's alleged sexual harassment was a contributing factor to her psychiatric referral and suspension, and therefore defeated summary judgment.⁸

Individuals Acting in the Interest of the Employer May be Sued, Even If Not Named at the Charge Level

Hill is also the first Missouri Supreme Court decision finding individual liability under the MHRA.⁹ The court stated that "the MHRA is intended to reach not just the corporate or public employer but any person acting directly in the interest of the employer. A supervisory employee clearly falls into that category."¹⁰ The court went further, holding that the fact that Hill failed to name Edds in her charge of discrimination did not preclude Hill from bringing a lawsuit against him, given that Edds had actual notice of the charge and there may be substantial identity of interest between Edds and Ford Motor Company. The court found that the trial court did not consider whether Edds was prejudiced by Hill's failure to name him in her charge, and it remanded the case, ordering the trial court to consider whether there was prejudice

Implications for Employers

With the Missouri Supreme Court's mandate in *Hill*, trial courts will interpret and apply the language of the MHRA, rather than long-standing federal precedent, in Missouri discrimination and harassment cases. *Hill* continues the trend toward pushing Missouri discrimination and harassment cases into state court venues, which tend to be far more favorable for plaintiffs. It is likely to be more difficult to obtain summary judgment under the "contributing factor" test. While it had become increasing common for plaintiffs to name individual supervisors in MHRA cases, after *Hill*, it is anticipated that individual defendants will almost certainly be named, which, in many instances, will defeat an employer's chance of removing a case to federal court. Unlike Title VII, the MHRA has no cap on punitive damages, which makes pursuing a claim in state court more desirable for most plaintiffs.

Missouri employers need to be more careful than ever to ensure that their sexual harassment and discrimination policies are clearly communicated to all employees and supervisors, and that investigation procedures are followed. Additionally, Missouri employers should provide harassment and discrimination training, both to prevent actual violations of the MHRA from occurring and to provide employers with the foundation for appropriate affirmative defenses in the event litigation should arise.

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 Kimberly A. Yates is a Shareholder and Frances S.P. Barbieri is an Associate in Littler Mendelson's St. Louis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Yates at kyates@littler.com, or Ms. Barbieri at fbarbieri@littler.com.

¹ 2009 Mo. LEXIS 15 (Mo. Feb. 24, 2009).

² 95 S.W.3d 82 (Mo. 2003) (en banc).

³ *Id.* at 91-92.

⁴ *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. 2007) (en banc), citing Mo. Rev. Stat. § 213.010(5).

⁵ *Hill*, 2009 Mo. LEXIS 15, *15.

⁶ *Id.* n.6.

⁷ *Id.* at *18.

⁸ *Id.* at **20-21.

⁹ *Id.* at **22-23.

¹⁰ *Id.* at *23.