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Missouri Supreme Court Allows Employees to Proceed with Discrimination Lawsuits Based on Untimely Filed Charges of Discrimination

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On August 27, 2013, the Missouri Supreme Court issued an opinion that significantly changes the way employers will have to approach raising objections to improperly filed charges of discrimination under the Missouri Human Rights Act (MHRA).¹ In a stunning change of MHRA jurisprudence, the opinion allows an employee to proceed with an MHRA lawsuit based on an untimely or other improperly filed charge of discrimination if the employer fails to object to the charge before the Missouri Commission on Human Rights (MCHR) and fails to seek judicial review of the MCHR's improperly issued right-to-sue notice.

Before filing a lawsuit under the MHRA, a plaintiff must first file a charge of discrimination with the MCHR within 180 days of the allegedly discriminatory act.² Traditionally, Missouri courts have treated this timing requirement as a statutory limitation that could be raised as an affirmative defense to an MHRA lawsuit.³ But the court's recent opinion undermines this jurisprudence and creates significant traps for the unsuspecting employer.

Below is a summary of the court's opinion, with an emphasis on how the court construed an employer's duties to object to the MCHR's lack of jurisdiction and follow the MHRA's judicial review process when the MCHR exceeds its jurisdiction. Also discussed is the court's rejection of the traditional practice of allowing employers to raise arguments attacking the MCHR's jurisdiction as affirmative defenses to an MHRA lawsuit. This article concludes with considerations that every employer should evaluate upon receiving notice of a new MCHR charge of discrimination in light of these new objection requirements.

Factual Background

Plaintiff was a longtime nurse working for a medical center employer. She contended that in the mid-2000's, a doctor propositioned her, suggested an affair, and sporadically made inappropriate

1 *Farrow v. Saint Francis Medical Center*, Case No. SC92793 (Mo. Aug. 27, 2013) (en banc) (slip opinion).

2 Mo. Rev. Stat. § 213.075.1.

3 See, e.g., *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245 (Mo. Ct. App. 2012) (holding that failure to file charge of discrimination within 180 days of the allegedly discriminatory act barred the claim and affirming summary judgment for the employer on that basis); *Thompson v. Western-Southern Life Assurance Co.*, 82 S.W.3d 203 (Mo. Ct. App. 2002) (same).

sexual comments. Plaintiff allegedly reported these incidents and claimed that the employer took various retaliatory actions in response. Ultimately, plaintiff's employment was terminated on December 10, 2008.

On July 27, 2009—230 days after her discharge—she filed a charge of discrimination with the MCHR. Plaintiff's charge was dual filed with the Equal Employment Opportunity Commission (EEOC). In November 2009, the EEOC issued plaintiff a right-to-sue notice and, about one month later, the MCHR issued a right-to-sue notice as a result of the EEOC's notice.⁴ The MCHR did not conduct an investigation independent from the EEOC's investigation before issuing its right-to-sue notice.

Plaintiff filed a lawsuit in state court alleging discrimination and retaliation in violation of the MHRA within 90 days of the MCHR's right-to-sue notice.⁵ In response, the employer argued that because plaintiff's charge of discrimination was filed more than 180 days after the last possible allegedly discriminatory act occurred, *i.e.*, on the date her employment was terminated, plaintiff's MHRA claims were time barred. The trial court granted summary judgment in the employer's favor.

The Court's Opinion Reversing Summary Judgment

On appeal, plaintiff argued that the trial court erred in granting summary judgment because the employer should have challenged the untimely filing of plaintiff's charge of discrimination while the charge was still pending with the MCHR. Plaintiff contended that once the MCHR issued the right-to-sue notice, the employer's avenue of redress was to seek judicial review of the MCHR's determination. The Missouri Supreme Court agreed.

Despite the fact that plaintiff's charge was dual filed with the EEOC, and the EEOC took the lead in investigating the charge, the court held that the employer should have filed its timeliness objection with the MCHR. According to the court, the MCHR's regulations allow an employer to submit a position statement in response to a charge, and the employer could have voiced its objection to the timeliness of the charge at that time. The court opined that, having failed to do so when the MCHR was considering the charge, the employer waived the right to make the objection later, in response to the lawsuit.

The court acknowledged that, by exercising its authority to issue the right-to-sue notice, the MCHR implicitly made a finding that plaintiff's charge was timely filed. But, importantly, the court recognized that, had the MCHR determined that plaintiff's claim was untimely, it would have lacked the authority to issue the right-to-sue notice, and its only option would have been to close the charge for lack of jurisdiction.⁶ Despite the fact that the charge appeared to be untimely on its face, and thus, issuing the right-to-sue notice was likely beyond the MCHR's jurisdiction, the court concluded that raising the issue in response to plaintiff's MHRA lawsuit was not the proper avenue for seeking relief from the MCHR's extra-jurisdictional action.

Rather, the court concluded that the employer should have sought relief from the improperly issued right-to-sue notice by invoking the MHRA's judicial review procedures. Under the MHRA, "any person who is aggrieved by a final decision, finding, rule or order of the [MCHR] may obtain judicial review by filing a petition in the circuit court ... within thirty days ... of the [MCHR's] final decision."⁷ According to the court, by issuing a right-to-sue notice, the MCHR made a "finding" that terminates its proceedings, and thus, the judicial review procedures were applicable to the notice.

To add insult to injury, the court then concluded that a plaintiff could file an MHRA lawsuit based on a right-to-sue notice—even if the notice was improperly issued—so long as the improper notice was not challenged through the judicial review procedure. Specifically, the court found that the only requirements to file a lawsuit under the MHRA were that: (1) an employee filed a charge with the MCHR before filing a lawsuit;

4 In accordance with the work-share agreement between the MCHR and the EEOC, it is standard practice for the MCHR to issue a right-to-sue notice once the EEOC has issued its right-to-sue notice.

5 See Mo. Rev. Stat. § 213.111.1.

6 The MCHR's current practice when it lacks jurisdiction is to both issue a dismissal and simultaneously issue a right-to-sue notice. In light of the court's opinion, this practice is plainly invalid because the MCHR has only the authority to issue a right-to-sue notice when it has jurisdiction. A right-to-sue notice is wholly incompatible with a dismissal for lack of jurisdiction.

7 Mo. Rev. Stat. § 213.085.2.

(2) the MCHR issued a right-to-sue notice; and (3) the lawsuit was filed within 90 days of the issuance of the right-to-sue notice, but no later than two years after the alleged discriminatory act occurred. The court went on to state “The statute does not read, ‘If, after one hundred eighty days from the filing of a *timely* complaint. . . .’ This Court will not read such a requirement into the plain statutory language.”

The implication of this holding is that the only way to avoid MHRA claims based on an improperly issued right-to-sue notice is to request that the right-to-sue notice be rescinded through the judicial review process.

Takeaways from the Opinion

The court’s opinion is a stunning departure from the traditional practice allowing employers to challenge a charge’s timeliness by asserting an affirmative defense. In an era when employers are increasingly using human resources or other non-lawyer professionals to respond to charges of discrimination, the court’s opinion creates significant procedural and legal traps for the unsuspecting employer. Indeed, an employer’s failure to recognize, object to, and seek judicial review of the MCHR’s lack of jurisdiction could result in the employer waiving a potentially dispositive defense to an employee’s MHRA claims.

Accordingly, Missouri employers should consider the following after receiving notice that an MHRA charge has been filed with the MCHR:

- Is there a defect in the MCHR’s jurisdiction over the charge? For example, was the charge filed with the MCHR more than 180 days after the allegedly discriminatory act?
- If there is a defect in the MCHR’s jurisdiction, the employer must object to the MCHR’s jurisdiction in its response to the charge.
- For dual filed charges where the EEOC or a municipal fair employment practices agency takes the lead in investigating the charge, employers should submit objections to the MCHR’s jurisdiction directly to the MCHR.
- If the MCHR issues a right-to-sue notice despite the objections, employers should immediately reassert their objections to the MCHR and request that the MCHR rescind the right-to-sue notice.
- Within 30 days of the MCHR’s right-to-sue notice being issued, employers must invoke judicial review under the MHRA’s procedures. Importantly, this means that employers must determine whether to seek judicial review before knowing whether the employee will file an MHRA lawsuit based on the improperly issued right-to-sue notice.

Employers should also put internal processes in place to ensure that there is a prompt legal review of all MCHR charges of discrimination to determine whether there are jurisdictional defects. Failure to do so will create a significant risk that a potentially dispositive defense will be waived.

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