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SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MISSOURI COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

2019 Update

The #MeToo movement, which has grown international in scope, is a wide-ranging campaign to shed light on the occurrence of sexual assault and harassment, particularly in the workplace. The movement began in 2006, but it went viral in 2017 in response to a number of high-profile allegations of sexual assault and misconduct against a number of public figures, perhaps most notably filmmaker Harvey Weinstein. With a goal to challenge accepted norms, change the policies and laws surrounding sexual harassment, and bring the perpetrators of sexual harassment to account, the #MeToo movement has the potential to profoundly influence the practice of law in the years to come.

This article addresses three questions. First, how has the #MeToo movement affected the political landscape in Missouri, particularly regarding new legislation in the area of sex discrimination and harassment? Second, how have courts handled claims of discrimination and harassment in light of #MeToo? Third, what is the future of Missouri labor and employment law in the #MeToo era?

In short, Missouri has seen some changes in light of the #MeToo movement, but not much in the way of concrete legislation or radical new approaches to claims of sex discrimination or harassment. It remains to be seen if and how the #MeToo movement will create long-lasting changes in Missouri employment law.

What has the Missouri legislature done in the wake of #MeToo?

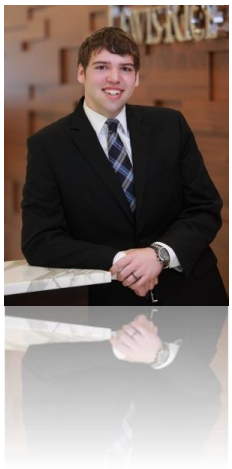
The only legislative action Missouri has seen related to the #MeToo movement concerns the use of mandatory arbitration clauses in employment contracts. As part of a larger push across the country, Missouri's legislature considered a bill in 2018 that would have strengthened the enforceability of clauses requiring any issues related to the employment relationship be resolved in arbitration proceedings. The problem with such clauses, according to the #MeToo movement, is that claims of sexual misconduct remain secret, allowing the perpetrators to continue in their positions, and possibly continue their misconduct, while the victims are kept silent. In the face of criticism from the #MeToo movement, and from politicians from both sides of the aisle, the bill died on the floor.

Similar bills have been proposed again in 2019 in both houses of the Missouri legislature. Significantly, the proposed bills contain new language that would specifically render any confidentiality or non-disclosure provisions unenforceable in cases alleging sexual harassment, sexual assault, or discrimination or harassment based on any protected status under state or federal law. Both bills remaining pending before the Missouri legislature. The bills differ from proposed legislation at the federal level, where Senators Lindsey Graham, R-South Carolina, and Kirsten Gillibrand, D-New York, have sought to prohibit

outright the use of arbitration proceedings, rather than the courts, in any claims of sexual harassment or discrimination.

Other measures introduced in the most recent term of the legislature would change how Missouri colleges handle complaints of sex discrimination under Title IX. The proposed legislation would add additional procedures to protect the rights of the accused in these proceedings. Among the changes include the use of administrative law judges to hear appeals of Title IX proceedings, the right for accused students to see evidence against them, the right to cross-examine the accuser, and the ability for the accused to sue the school (if the administrative court determines that the school failed to provide due process) or the accuser (if the administrative court determines that the accusation was false). Victims' rights advocates have criticized the legislation as re-victimizing women and creating a deterrent to the reporting of sexual assaults. The bill sponsors defend the changes as necessary to ensure the due process rights of all parties in Title IX proceedings. The legislation is currently under debate in both the House and the Senate.

How are Missouri courts handling claims of sex discrimination and harassment in the #MeToo era?



Missouri courts have increasingly been receptive to the use of "me too" evidence – testimony from employees other than the plaintiff who allege they too were subject to the same type of discrimination as the plaintiff – in cases filed under the Missouri Human Rights Act. In the leading Missouri case on "me too" evidence, the Missouri Supreme Court held that, if a plaintiff can show certain facts that suggest that he or she and the "me too" non-party employee are similarly situated, "me too" evidence should be admitted as circumstantial evidence that can support an inference of discrimination in the context of single-act employment discrimination claims. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 117-20 (Mo. banc 2015). Missouri courts still must perform their gatekeeping function to ensure only "relevant" evidence is put before the jury. *Compare Hesse v. Mo. Dep't of Corr.*, 530 S.W.3d 1, 5 (Mo. Ct. App. 2017) (upholding admission of "me too" testimony of co-worker with common experiences as plaintiff) *with Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235, 244-45 (Mo. Ct. App. 2016) (upholding exclusion of "me too" testimony when similarities are too few to make the testimony legally relevant). The analysis is fact-intensive and decided on a case-by-case basis.

Regarding broader claims of sex discrimination and harassment, the Missouri Supreme Court recently handed down a decision regarding claims of "sex" discrimination alleged by homosexual employees. Under Missouri law, sexual orientation is not an enumerated protected class. But in *Lampley v. Missouri Commission on Human Rights*, the Court adopted the rationale of *PriceWaterhouse v. Hopkins*, the 1989 U.S. Supreme Court opinion holding that evidence of sex stereotyping could support a claim of sex discrimination under federal law. In *Lampley*, the Court reasoned that the homosexual employee's sex discrimination claim could proceed, supported by evidence of sex stereotyping. By implication, the *Lampley* decision also offers heterosexual employees the ability to support their claims of sex discrimination through evidence of sex stereotyping.

A case currently pending before the Missouri Supreme Court – *Halsey v. Phillips* – asks the question whether the #MeToo movement is grounds to extend the statute of limitations for a woman's claim of sexual harassment by her supervisor. The woman filed her lawsuit in 2018 over claims of harassment that took place in 2013, outside of the applicable two-year statute of limitations. Seeking to evade the limitations period, the woman has argued to the courts that she did not appreciate the impact of her supervisor's sexual misconduct until 2017 when the #MeToo movement gained prominence. The trial court accepted her arguments and allowed her claims to proceed. The Missouri Supreme Court has taken up the appeal of that decision and heard oral arguments on February 5, 2019.

What does the future hold in Missouri?

It is difficult to predict what further impact the #MeToo movement will have in Missouri. We have seen an uptick in requests for sexual harassment training and general awareness of the complex issues related to sex discrimination and harassment. It is not clear yet whether the #MeToo movement has resulted, or will result, in an increased number of sexual harassment claims. But a rise in such claims is a distinct possibility employers should consider and preemptively address. Another consideration for employers and attorneys in the labor and employment field is that, with the increased visibility of sexual misconduct in the workplace, juries may now be more inclined to believe claims of sex discrimination and harassment.

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2018 Edition: Sexual Harassment in the Workplace: What US: Missouri Companies Need to Know

What constitutes sexual harassment?

In general, Missouri discrimination law now closely resembles Title VII jurisprudence. "There are two types of discriminatory harassment claims: *quid pro quo* and hostile work environment. The former involves the creation of a hostile work environment with threats to alter a term or condition of employment that is carried out. The latter involves the creation of a hostile work environment with threats that are not carried out, or with other severe or pervasive offensive conduct." *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 731-32 (Mo. App. W.D. 2014).

What body of law governs sexual harassment in your jurisdiction?

The Missouri Human Rights Act ("MHRA"), §§ 213.010 through 213.137, R.S.Mo., prohibits employers with 6 or more employees in Missouri from discriminating on the basis of sex. Sexual harassment is considered to be sex-based discrimination under the MHRA. *See, e.g.*, *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 731 (Mo. App. W.D. 2014).

What actions constitute sexual harassment?

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when-

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or
- Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

8 C.S.R. § 60-3.040(17)(A).

> "Sexual harassment is defined as any behavior of a sexual nature that is unwelcome and creates a hostile, offensive or intimidating work environment. It includes verbal comments as well as physical touching, as well as 'dirty' pictures or lewd jokes. Situations are analyzed on a case-by-case basis. Another kind of sexual harassment is when a supervisor tries to extort sexual favors for subordinates by threatening adverse actions or promising rewards."

(https://molabor.uservoice.com/knowledgebase/articles/283102-what-is-the-legal-definition-of-sexual-harassment).

Can sexual harassment occur between two members of the same sex?

"The Missouri Human Rights Act, like Title VII, prohibits sexual harassment regardless of the sex of the claimant or the harasser. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that sex discrimination consisting of same-sex harassment is actionable under Title VII). In other words, the human rights act protects individuals against sexual harassment, a form of sex discrimination, by members of either the same sex or the opposite sex." *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 521 n.8 (Mo. banc 2009).

Are employers required to provide sexual harassment training for their employees?

Missouri law does not require employers to provide sexual harassment training for their employees. However, it is common and normally recommended that employers provide such training with the aim toward reducing the incidence of sexual harassment. Further, a court, jury, or administrative agency may look more favorably on a defendant-employer who conducts sexual harassment training for employees.

What are the liabilities and damages for sexual harassment and where do they fall?

Under Missouri law, among the damages an employee can seek for sexual harassment are back pay, front pay, compensatory and punitive damages, and attorney's fees. As recently amended by Senate Bill No. 43 ("SB 43"), effective as of August 2017, the MHRA limits compensatory and punitive damages in the following way:

> For employers with 6-100 employees, the limit is $50,000.
>
> For employers with 101-200 employees, the limit is $100,000.
>
> For employers with 201-500 employees, the limit is $200,000.

For employers with more than 500 employees, the limit is $500,000.

§ 213.111.4, R.S.Mo.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

A plaintiff must prove that:

- He was part of a protected class.
- He was subjected to unwelcome harassment.
- His gender was a motivating factor in the harassment (§§ 213.010(2) and 213.101.4, R.S.Mo.).
- The harassment affected a term, condition, or privilege of his employment.
- The employer, if the harassers are the plaintiff's co-workers:
    - knew or should have known about the harassment; and
    - did not take prompt and effective remedial action.

Hill v. Ford Motor Co., 277 S.W.3d 659, 666 & n.6 (Mo. banc 2009).

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Yes. "An employer is subject to vicarious liability to a victimized employee with respect to sexual harassment by a supervisor with immediate (or successively higher) authority over an employee or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command." 8 C.S.R. § 60-3.040(17)(D). "If the alleged harassers are co-workers, the plaintiff must also show that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action." *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 666 n.6 (Mo. banc 2009).

What are the potential defenses employers have against sexual harassment claims?

An employer may raise an affirmative defense to liability or damages if "no tangible employment action" is taken by a harassing supervisor. 8 C.S.R. § 60-3.040(17)(D)(1)-(2). A tangible employment action is a significant change in employment status, including: hiring and firing, promotion and failure to promote, demotion, making an undesirable reassignment, making a decision that causes significant changes in benefits, compensation decisions, or work assignments. 8 C.S.R. § 60-3.040(17)(D)(3)-(4).

To establish an affirmative defense, an employer must prove by a preponderance of the evidence that:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- The employee unreasonably failed to take advantage of any of the employer's preventive or corrective opportunities or to avoid harm.

Reed v. McDonald's Corp., 363 S.W.3d 134, 142 (Mo. App. E.D. 2012); 8 CSR § 60-3.040(17)(D)(1).

Who qualifies as a supervisor?

An employer is subject to liability with respect to a supervisor with immediate (or successively higher) authority over an employee or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command. 8 C.S.R. § 60-3.040(17)(D). (Note: Following the recent amendments to the MHRA, there is no longer individual liability for supervisors as the definition of employer now expressly excludes an individual employed by an employer. § 213.010(8), R.S.Mo.).

How can employers protect themselves from sexual harassment claims?

Employers should develop and institute clear, straightforward complaint procedures for employees who believe they are being subjected to, or witness, sexual harassment. Further, employers should present sexual harassment policies in a company handbook or otherwise provide each employee a copy of the employer's sexual harassment policy to make sure employees know how to raise complaints if they wish to do so. Finally, employers should conduct sexual harassment trainings for employees, including supervisory employees.

Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment based on a gender-related trait, such as pregnancy, is unlawful under the MHRA. *See, e.g.*, *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984).

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Under Missouri law, discrimination or harassment on the basis of sexual orientation is not prohibited. *See Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 485 (Mo. App. W.D. 2015). A case is currently on appeal to the Missouri Supreme Court addressing situations when the MHRA might prohibit discrimination based on sexual orientation. *See Lampley v. Mo. Comm'n on Human Rights*, 2017 WL 4779447 (Mo. App. W.D. Oct. 24, 2017), *reh'g and/or transfer denied* (Nov. 16, 2017), *cause ordered transferred to mo. s. ct.* (Jan. 23, 2018).

What is prohibited retaliation?

The MHRA prohibits retaliation (generally defined as taking an adverse employment action against an employee) or discrimination against any individual who:

- Opposed a practice prohibited by the MHRA.
- Filed a complaint.
- Testified, assisted, or participated in an investigation, proceeding, or hearing conducted under the MHRA.

§ 213.070.1(2), R.S.Mo.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

No. By itself, a consensual relationship between a supervisor and a subordinate is not unlawful. That being said, such a relationship can lead to problematic situations, and a post hoc attempt could be made to use such a relationship as evidence of quid pro quo sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. An employer can be liable for the actions of third parties if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. *See Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 76-77 (Mo. App. W.D. 2015); 8 C.S.R. 60-3.040(17)(C).

What is the #MeToo movement?

The #MeToo movement, which has grown international in scope, is a wide-ranging campaign to shed light on the prevalence of sexual assault and harassment, especially in the workplace. The movement became widely known in 2017 in response to a number of high-profile allegations of sexual assault and misconduct against a number of public figures, most notably the filmmaker Harvey Weinstein. The purpose of the hashtag is to empower women and focus attention on male supervisors who engage in sexual misconduct. The #MeToo movement seeks to challenge social norms and change policies and laws surrounding sexual harassment.

How is the #MeToo movement impacting the law in your jurisdiction?

Missouri has seen a rise in cases wherein the court permits "me too" evidence – testimony from employees other than the plaintiff who allege that they too were subject to the same type of discrimination as the plaintiff – in cases filed under the MHRA. The Missouri Supreme Court has held that, if a plaintiff can show certain facts that suggest that he/she and the "me too" non-party employee are similarly situated, "me too" evidence should be admitted as circumstantial evidence that can support an inference of discrimination in the context of single-act employment discrimination claims. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 117-20 (Mo. banc 2015).

We have seen an uptick in requests for sexual harassment training and general awareness of the complex issues related to sexual discrimination and harassment. It is not clear yet whether the #MeToo movement will result in an increased number of sexual harassment claims, but a rise in such claims is a distinct possibility employers should consider and preemptively address. An apparent consequence of the #MeToo movement and the many stories of sexual harassment that have come to light is that juries may now be more inclined to believe claims of sexual harassment and, therefore, more likely to find against employers.

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