

## SS#2 SCS SB 43 -- UNLAWFUL DISCRIMINATORY PRACTICES

SPONSOR: Romine

COMMITTEE ACTION: Voted "Do Pass" by the Special Committee on Litigation Reform by a vote of 8 to 5. A motion was made to "Return To The Committee of Origin" which was defeated by the Standing Committee on Rules- Legislative Oversight by a vote of 6 to 6. Voted "Do Pass" by the Standing Committee on Rules- Legislative Oversight by a vote of 9 to 5.

This bill changes the laws regarding unlawful discriminatory employment practices and establishes the "Whistleblower's Protection Act."

### UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES

The bill specifies that the term "because" or "because of," as it relates to a decision or action, means that the protected criterion was the motivating factor. The term "the motivating factor" means that a protected classification played a role in and had a determinative influence on an adverse employment action. The bill also revises the term "employer" by excluding those persons acting in the interests of the employer. The definition of employer further specifies that, with certain exceptions, an employer 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.

Chapter 213, RSMo, human rights; Chapter 285, employers and employees generally; and Chapter 287, workers' compensation law, provide the exclusive remedies for damages arising out of the employment relationship. The bill establishes a presumption that, for a fair presentation of a case, a jury must be given an instruction expressing the business judgment rule. The bill provides that the court shall consider the burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 782 (1973) in cases not involving direct evidence.

The bill 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. The amount of damages awarded for each plaintiff cannot exceed the amount of the actual back pay plus interest, and up to \$50,000 in the case of an employer with six to 100 employees; 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 \$500,000 for an employer with more than 500 employees.

The bill specifies that in an employment-related action brought under Chapter 213, the plaintiff bears the burden of proving that the alleged unlawful decision or action was made or taken because of the protected criterion. Any party to an action under this section may demand a trial by jury.

#### WHISTLEBLOWER'S PROTECTION ACT

This bill establishes the Whistleblower's Protection Act which codifies existing common law exceptions to the at-will employment doctrine. The provisions of this bill provide the exclusive remedy for all unlawful employment practices specified in the bill.

The bill provides that it is an unlawful employment practice for an employer to discharge or retaliate against an individual because of his or her status as a protected person. The bill defines a "protected person" as a person who has reported to the proper authorities an unlawful act or serious misconduct of the employer that violates a clear mandate of public policy. A "protected person" also includes a person who has refused to carry out a directive issued by the employer that if completed would be a violation of the law, or a person who engages in conduct otherwise protected by statute or regulation. Specified persons are excluded from the definition of a "protected person."

The term "employer" is defined as an entity that has six or more employees, excluding the state and other public bodies, an individual employed by an employer, and certain religious or sectarian groups. The term "proper authorities" is defined as a governmental or law enforcement agency or officer, or the employee's human resources representative employed by the employer.

A protected person aggrieved by a violation of these provisions shall have a private right of action for actual damages, unless a private right of action for damages exists under other statutes or regulations, either federal or state. The only remedies available are back pay, 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. Any party to an action under these provisions may demand a trial by jury.

This bill is similar to HB 550, HB 552, and HB 676 (2017).

This bill contains a severability clause.

PROPOSERS: Supporters say that the provisions of this bill balances the employer and employee responsibilities in

discrimination cases and that a more balanced approach will assist in resolving these claims. The provisions modifying the burden of proof mirror the federal standard in discrimination cases. The purpose of the human rights act is served by holding the employer and not supervisor liable. The phrase motivating factor needs to be defined because of state court opinions interpreting the standard as a contributing factor.

Testifying for the bill were Senator Romine; Alex T. Eaton, Kansas City Power & Light; Brad Jones, National Federation of Independent Business; Dan O'Keefe; Missouri Retailers Association; Missouri Grocers Association; Associated Industries of Missouri; Tina Fowler; and Missouri Chamber of Commerce and Industry.

OPPONENTS: Those who oppose the bill say that there is no effective remedy under this bill for an employee that suffers from discrimination; that the caps on actual damage are too low; and that individuals are not held accountable for discriminatory actions. The bill creates a higher standard for proving discrimination similar to federal age discrimination cases, and its exclusivity provisions will repeal by implication other employment related laws outside of Chapters 213, 285 and 287.

Testifying against the bill were Missouri State NAACP; Missouri National Education Association; Tina L. Tricky; Dan Viets, J.D., Mid-Missouri Civil Liberties Association; Susan Gibson, Capitol Area Missouri Now; Rev. Dr. Cassandra Gould, Missouri Faith Voices; Jim Brady; Dr. Amie Breshears; ACLU Missouri; Webster Davis, NAACP; Alan Green, Missouri Black Caucus; Missouri AFL-CIO; SEIU; Empower Missouri; Benjamin Westhoff, National Employment Lawyers Association; Paul Bullman, MATA; Roger G. Brown, Roger Brown and Associates; Martin Meyers, MATA/NELA; Wayne Lee; and Susan Gibson.