

In the Supreme Court of Missouri

Cause No. SC 84659

STATE ex rel. KATHLEEN DIEHL,

Relator,

v.

HONORABLE JOHN R. O'MALLEY

Judge, Division 6,

Circuit Court of Jackson County, Missouri,

Respondent.

**BRIEF AMICI CURIAE OF CITIES OF SPRINGFIELD, MISSOURI, KANSAS
CITY, MISSOURI, ST JOSEPH, MISSOURI AND THE MISSOURI
MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENT, THE HONORABLE
JOHN R. O'MALLEY**

Howard C. Wright, Jr. #19391 and Carl S. Yendes # 29782

Attorneys for Amici Curiae, Cities of Springfield, Missouri, Kansas City, Missouri, St.
Joseph, Missouri and the Missouri Municipal League

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JURISDICTIONAL STATEMENT

This is a proceeding for a writ of prohibition in which the Relator is Plaintiff Kathleen Diehl and the Respondent is the Honorable John R. O'Malley, Judge of the Circuit Court of Jackson County, Missouri. The underlying lawsuit involves claims of employment discrimination under the Missouri Human Rights Act (MHRA), Sections 213.010, RSMo. et seq. The issue is whether Judge O'Malley exceeded his jurisdiction in denying Ms. Diehl a jury trial on her claims against Defendant NASD Regulation, Inc. This Court has jurisdiction pursuant to Section 4 of Article V of the Missouri Constitution.

STATEMENT OF INTEREST

Amici Curiae, the Cities of Springfield, Missouri, Kansas City, Missouri and St. Joseph, Missouri are public employers subject to the Missouri Human Rights Act (MHRA). Section 213.010(7), RSMo. The Missouri Municipal League is a not for profit corporation of the State of Missouri wholly owned by the municipal governments of some 623 Missouri municipalities. Under the MHRA, public employers are subject to the remedies set forth in Sec. 213.111.2, RSMo

The MHRA defines "employer" to include "the state, or any political or civil subdivision thereof." Section 213.010(7), R.S.Mo. Based on this definitional provision, at least one court has held that "municipal corporations are to be subject to the Act in the same manner as any other employer, including the award of [uncapped] punitive damages." *Fortner v. City of Archie*, 70 F. Supp.2d 1028, 1031-32 (W.D. Mo. 1999); *see also H.S. v. Board of Regents, Southeast Missouri State Univ.*, 967 S.W.2d 666, 673-74 (Mo. App. E.D. 1998) (holding that the MHRA "treats the state and its subdivisions the same as it treats other employers," and that state university therefore subject to both emotional distress damages and attorneys=fees).

Relator contends Section 213.111.2, RSMo and Article I, Section 22 (a) of the Constitution of the State of Missouri give her the right to a jury trial on the issue of damages. The MHRA currently provides that there is no right to trial by jury. Section 213.111.1, RSMo. *State ex rel. Tolbert v. Sweeney*, 828 S. W. 2d 929 (Mo. app. S. D. 1992).

Amici are concerned with the potential additional costs which may be incurred due to excessive jury verdicts and Relator's proposed broad interpretation of Article I, Section 22 (a) of the Missouri Constitution. Revenues of public employers are limited by law. Article X, Section 22 of the Constitution of the State of Missouri; Section 67.080, RSMo. Missouri municipalities are required to adopt an annual budget which must be balanced (expenditures can not exceed revenues and unencumbered balances). Section 67.010, RSMo.

If Relator's position is adopted the ability of the legislature to fashion appropriate procedures as part of a statutory remedy would be limited. The General Assembly should continue to retain the legislative prerogative to fashion new remedies and procedures including the right to determine if damages should be court or jury tried in order to have the flexibility to address problems in our society.

STATEMENT OF FACTS

Relator Diehl filed her one-count petition alleging employment discrimination on the basis of age in violation of the Missouri Human Rights Act, Sections 213.010, RSMo, et seq. (AMHRA) on October 25, 2001. Diehl's motion for a jury trial was overruled by the Honorable John R. O'Malley in an Order dated March 25, 2002, stating, "There is no right to a jury trial for claims brought under the Missouri Human Rights Act. *Wentz v. Industrial Automation*, 847 S.W.2d 877, 880 (Mo. App. 1992)." No trial date has been set for this cause. On August 27, 2002 this Court entered a Preliminary Writ of Prohibition. Amici Curiae urge that the Preliminary Writ of

Prohibition be quashed.

POINTS RELIED ON

I. THE PRELIMINARY WRIT OF PROHIBITION ISSUED IN THIS MATTER SHOULD BE DISCHARGED BECAUSE THERE IS NO RIGHT TO A JURY TRIAL IN ACTIONS BROUGHT UNDER THE MISSOURI HUMAN RIGHTS ACT.

A. The MHRA as Established by the General Assembly is a Statutory Remedy Unknown at Common Law Which Should be Viewed in its Totality.

State ex rel. Tolbert v. Sweeney, 828 S.W.2d 929, 930-935 (Mo. App. D.D. 1992)

Fortner v. City of Archie, 70 F. Supp.2d 1028, 1031-32 (W.D.Mo. 1999)

H.S. v. Board of Regents, Southeast Missouri State Univ., 967 S.W.2d 666, 673-74 (Mo. App. E.D. 1998)

39 St. Louis U.L.J. 1235, 1307, n.129

MO CONST Art. 1, Section 22(a)

MO CONST Art 10, Section 22

Section 213.11.2, RSMo.

Section 213.010(7), RSMo.

Section 67.030, RSMo.

Section 67.080, RSMo.

Section 213.111.1, RSMo.

Section 213.075.1, RSMo.

Section 213.075.7.11(1), RSMo.

Section 213.211.2, RSMo.

Section 213.211.1, RSMo.

B. The Historic Interpretation of the Phrase As heretofore enjoyed^e in Article I, Section 22 (a) of the Constitution of the Sate of Missouri Protects the Right to a Jury Trial as it Existed When the Constitutional Provision Was Adopted

Hammons v. Ehney, 924 S.W.2d 843, 848-849 (Mo.banc 1996)

Vannoy v. Swift & Co., 356 Mo. 218, 201 S.W.2d 350, 354 (1947)

State ex rel. Tolbert v. Sweeney, 828 S.W.2d 929, 930-935 (Mo. App. S. D. 1992)

State ex rel. Wayside Waifs, Inc., v. Williamson, 3 S.W.3d 390, 393 n.1 (Mo. App. W.D. 1999)

Cook v. Atoma Intern. of America, 930 S.W.2d 43 (Mo.App.1996)

MO CONST Art 1, Section 22(a)

ARGUMENT

I. THE PRELIMINARY WRIT OF PROHIBITION ISSUED IN THIS MATTER SHOULD BE DISCHARGED BECAUSE THERE IS NO RIGHT TO A JURY TRIAL IN ACTIONS BROUGHT UNDER THE MISSOURI HUMAN RIGHTS ACT.

A. The MHRA as Established by the General Assembly is a Statutory

**Remedy Unknown at Common Law Which Should be Viewed in its
Totality.**

Amici are concerned that the delicate statutory balance reached through the legislative process will be substantially changed if this Court accepts the broad interpretation of the Relator by reading into Article I, Section 22 (a) of the Missouri Constitution the right to jury trials in MHRA cases. The legislative history shows that the Missouri General Assembly struggled long and hard with this issue, leaving no doubt that the General Assembly intended to leave the trial of MHRA cases to judges, not juries. *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 930 -935 (Mo.App. S.D. 1992).

While it is impossible to determine the underlying reasons why the General Assembly ultimately decided to continue to have MHRA cases tried before a judge, it must be recognized that many factors were part of the legislative process, including the decision to allow uncapped actual and punitive damages and attorney fees. Section 213.111.2, RSMo. As noted in our Statement of Interest, the MHRA defines "employer" to include "the state, or any political or civil subdivision thereof," Section 213.010(7), RSMo., and at least one court has held that "municipal corporations are to be subject to the Act in the same manner as any other employer, including the award

of [uncapped] punitive damages." *Fortner v. City of Archie*, 70 F. Supp.2d 1028, 1031-32 (W.D. Mo. 1999); *see also H.S. v. Board of Regents, Southeast Missouri State Univ.*, 967 S.W.2d 666, 673-74 (Mo. App. E.D. 1998) (holding that the MHRA "treats the state and its subdivisions the same as it treats other employers," including for purposes of award of emotional distress damages and attorneys' fees). Amici are concerned with the potential financial impact runaway jury verdicts could have on municipalities who are by law required to have balanced budgets based upon identifiable lawful revenue sources. Article X, Section 22, Constitution of the State of Missouri; Sections 67.030 and 67.080, RSMo.

We recognize that the preference for judge-tried cases may seem motivated by self-interest, nevertheless concern for budget-busting jury verdicts is a reality and was surely part of the political balancing the General Assembly engaged in when it created this new cause of action unknown at common law. The Relator urges the Court to infer a right to jury trial in MHRA cases, which are a creation of statute, when the legislature, after years of uniform case precedent on the question, has chosen not to create one. This would run completely contrary to the legislature's clear intent on this issue, as it would subject state and local governments to the unlimited liability exposure under the MHRA, amplified by the potential financial dangers of jury

awards. See, 39 St. Louis U. L.J. 1235, 1307, n. 129, (in a discussion of the merits of fixed penalty provisions versus those judicially assessed in civil enforcement actions, “Compare this to jury verdicts, which are inevitably disparate on similar facts, but still presumed to properly compensate for harms”).

Amici are not only concerned with the potential budget busting effect of jury verdicts but also with the effect an overly broad interpretation of Article I, Section 22 (a) of the Missouri Constitution could have on the ability of the General Assembly to fashion new remedies to solve social problems. Currently, the General Assembly has the authority to authorize MHRA cases to be tried before juries, but has chosen not to implement this through legislation. Reading into Article I, Section 22 (a), a constitutional right to a jury trial on all questions of damages constrains the ability of the General Assembly to fashion appropriate remedies to address other future problems.

Relator chooses to ignore the totality of the MHRA by failing to even mention the process required to be followed before any case can be filed in Circuit Court under section 213.111.1, RSMo. We will not attempt to set out in detail this process, since it is well documented in Respondent's brief and in *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 930 -935 (Mo.App. S.D. 1992). Viewed in its totality it is clear that the MHRA process is intended to be much more than the overly simplistic position

advocated by the Relator, i.e. a trial on damages, which the Relator contends should be before a jury, following the issuance of a right to sue letter from the state administrative agency.

The MHRA process starts with the filing and investigation of a complaint of discrimination by a state administrative agency. Section 213.075.1, RSMo. The MHRA contemplates a full range of remedies, both administrative and judicial. Sections 213.075.7.11 (1) and 213.211.2, RSMo. Even if a right to sue letter is granted under Section 213.211.1 RSMo, the statute provides that the court has the right to A...grant relief as it deems appropriate, any permanent or temporary injunction restraining order or other order...@and actual and punitive damages as well as attorneys fees. Section 213.211.2, RSMo.

Relator=s focus on one part of the total MCHR process, monetary damages, misses the point. Like the Missouri Workers Compensation law, Chapter 287, RSMo, the MHRA is a statutory cause of action with equitable remedies available at each stage of the process. *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 934 -935 (Mo.App. S.D. 1992). To isolate one part of Chapter 213 RSMo. does injustice to the legislative intent of the General Assembly.

B. The Historic Interpretation of the Phrase Aas heretofore enjoyed® in

**Article I, Section 22 (a) of the Constitution of the State of Missouri
Protects the Right to a Jury Trial as it Existed When the Constitutional
Provision Was Adopted**

Article I, Section 22(a) of the Missouri Constitution states "That the right of trial by jury as heretofore enjoyed shall remain inviolate." The history of this section of the Missouri Constitution is well documented. *Hammons v. Ehney*, 924 S.W.2d 843, 848-849 (Mo. banc 1996). Since the MHRA does not expressly grant parties a right to a trial by jury for claims under the Act, if such a right exists, it must fall within the parameters of this state constitutional provision. When analyzing the meaning of this section, the primary question is whether or not the cause of action at issue is one that either was tried at law in 1875 (the time when the "as heretofore enjoyed" language was added) or is at least analogous to such a cause of action. Missouri Courts have interpreted the phrase "as heretofore enjoyed" in Article I, Section 22 (a), of the Missouri Constitution, to mean the right of trial by jury as it existed at common law. *Hammons v. Ehney*, supra, 924 S.W.2d at 848 ("Citizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted," citing *Mo. Const. art. I, § 22(a)*; *Vannoy v. Swift & Co.*, 356 Mo. 218, 201 S.W.2d 350, 354 (1947); *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 933 (Mo.App.1992)).

It is clear that at common law prior to the adoption of Article I, Section 22 (a)

of the Missouri Constitution, no common law right to be free from the types of discriminatory acts protected by the MHRA existed. As stated in *State ex rel. Tolbert v. Sweeney*, supra, 828 S.W.2d at 933, “In the instant case, Chapter 213 was not a procedure known to common law or in existence prior to the adoption of our 1945 Constitution. Therefore, trial by jury to award money damages in age discrimination cases was not "heretofore enjoyed".

In fact, sadly, our history shows that at common law it was possible to discriminate in employment matters with impunity. Try as one may, no analogous right to be free from the types of discriminatory acts now protected by the MHRA can be found at common law. In an attempt to overcome this burden, Relator focuses on one of a multitude of remedies available under the MHRA (damages), and confuses the remedy with the cause of action. This is contrary to the plain words in Article I, Section 22 (a) and the intent of the drafters, which require the cause of action, and not just the nature of the remedy, be examined for a common law antecedent. Clearly, since at common law no right to a jury trial for employment discrimination existed nor was there an analogous right in 1875, no jury trial is available to the Relator for her MHRA cause of action.

Additionally, Amici submit that not only is the Relator's interpretation of Article

I, Section 22 (a) flawed, but the MHRA cause of action is generally equitable in nature, as determined by the Missouri courts which have considered this issue, and, as such appropriately triable without a jury. As stated in *State ex rel. Wayside Waifs, Inc. v. Williamson*, 3 S.W.3d 390, 393 (Mo.App.W.D.,1999):

As Respondent and Relator both agree, prior decisions by the other Districts of this Court have explicitly held that there is no right to a jury trial under MHRA, as it provides a statutory cause of action which did not exist at common law, the remedies it provides are generally equitable in nature, and the statute contains no provision entitling persons suing under it to a jury trial. *See, e.g., Cook v. Atoma Intern. of America*, 930 S.W.2d 43 (Mo.App.1996); *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929 (Mo.App.1992).

While Amici defer to the detailed discussion of the equitable nature of the MHRA cause of action contained in the brief of the Respondent, which need not be repeated here, Amici submit that this further supports the appropriateness of the current position of the Missouri courts and legislature that causes of action under the MHRA are not subject to trial by jury.

CONCLUSION

Respondent correctly applied Missouri law when it denied Relator's Motion for Jury Trial. The Relator's claim under Missouri Human Rights Act does not entitle the Relator to a jury trial under the Missouri Constitution because the nature of Relator's action, redress for alleged age discrimination, is not analogous to any legal action available at common law before enactment of the 1875 constitution. Further, the Missouri Human Rights Act is equitable and administrative in nature and affords no right to a jury trial, whether by statute or state constitution. Finally, the Relator fails to justify the need for remedial action by this Court to judicially create a right to trial by jury in this matter, or why the decision on such a question should not be left to the legislature to decide, given that the Missouri Human Rights Act itself is a creation of state statute. For all of the foregoing reasons, Amici respectfully request the Court deny Relator's Petition for Writ of Prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Supreme Court Rule 55.03;
2. The brief complies with the limitations contained in Supreme Court Rule 84.06(b); and
3. According to the Word Count Function of counsel's word processing software, the brief contains 3,331 words.

Carl S. Yendes

CERTIFICATE OF SERVICE

A true and accurate copy of the above and foregoing was served upon:

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