

IN THE SUPREME COURT OF MISSOURI

SC8898

CYNTHIA HILL,
Plaintiff-Appellant

v.

FORD MOTOR COMPANY AND PAUL EDDS,
Defendants-Appellees

**ON APPEAL FROM THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT OF MISSOURI**

**BRIEF OF KANSAS CITY AND ST. LOUIS CHAPTERS
OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT**

BRATCHER GOCKEL & KINGSTON, L.C.
Marie L. Gockel, Mo. Bar No.: 31208
Lynne Jaben Bratcher, Mo. Bar No.: 31203
Kristi L. Kingston, Mo. Bar No.: 46539
1935 City Center Square
1100 Main Street
P.O. Box 26156
Kansas City, MO 64196-6156
Telephone: (816) 221-1614
Facsimile: (816) 421-5910

ATTORNEYS FOR AMICUS CURIAE
KANSAS CITY AND ST. LOUIS CHAPTERS
OF THE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION

TABLE OF CONTENTS

Statement of Interest	3
Table of Cases, Statutes and Other Authorities	4
Point Relied Upon.	7
Argument	8
Conclusion	28
Certification	29
Certificate of Service	30
Appendix	31
Table of Contents of Appendix	32

STATEMENT OF INTEREST

Amicus Curiae, the Kansas City and St. Louis Chapters of the National Employment Lawyers' Association, are voluntary membership organizations of approximately 100 lawyers who represent employees in labor, employment and civil rights disputes in the state of Missouri. The Chapters are affiliates of the National Employment Lawyers' Association (NELA) which consists of more than 3,000 attorneys who represent individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment discrimination laws to ensure that such laws are fully enforced and that the rights of workers are fully protected. Members of the Kansas City and St. Louis Chapters of NELA regularly represent plaintiffs in discrimination and retaliation cases brought under the Missouri Human Rights Act.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Barekman v. City of Republic, Missouri</i> , 232 S.W.3d 675	
(Mo. Ct. S.D. 2007)	7,12,13
<i>Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.</i> ,	
854 S.W.2d 371 (Mo. banc 1993)	13
<i>Cross v. Cleaver</i> , 142 F.3d 1059, 1076 (8th Cir. 1998)	19
<i>Daugherty v. City of Maryland Heights</i> , 231 S.W.3d 814 (Mo. 2007) . .	7,8,9,10,11,12,
	13,14,16,17,20,21,25,26
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003)	11
<i>Francin v. Mosby, Inc. d/b/a Elsevier</i> , __ S.W.3d __, 2008 Mo.	
App. LEXIS 24 (Mo. App. E.D. 2008)	7,12,25
<i>Graf v. Wire Rope Corp. of America</i> , 861 S.W.2d 588	
(Mo. App. W.D. 1993)	12,14
<i>Griffith v. City of Des Moines</i> , 387 F.3d 733 (8 th Cir. 2004)	26,28
<i>Hagley v. Board of Educ.</i> , 841 S.W.2d 663 (Mo. Banc 1992)	21
<i>Igoe v. Department of Labor and Industrial Relations</i> , 210 S.W.3d	
264 (Mo. App. W.D. 2006).	12
<i>Keeney v. Hereford Concrete Products, Inc.</i> , 911 S.W.2d 622 (1995)13,17,18,21,24
<i>Korando v. Mallinckrodt, Inc.</i> , 239 S.W.3d 647 (Mo. App. E.D. 2007) . . .	7,11,12,14
<i>McBryde v. Ritenour Sch. Dist.</i> , 207 S.W.3d 162, 170 (Mo. App. 2006). . .	17

McDonnell Douglas Corp. v. Green, 411 U.S. 792,
 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) 7,8,10,11,12,
 13,21,26,27,28

Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights,
 679 S.W.2d 842 (Mo. 1984) 11

Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161 (Mo. App. W.D. 1999). 16,25

Odom v. St. Louis College, 36 F. Supp. 2d 897 (E.D. Mo. 1999) 19

Smith v. Aquila, Inc., 229 S.W.3d 106 (Mo. App. W.D. 2007). 8,16

State ex rel. Dean v. Cunningham, 182 S.W.3d 561, 565 (Mo. 2006) 9

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (2003) 9,10,11,12,13

Current Missouri Statutes

Mo. Rev. Stat. § 213.010 9,15,16,21,23

Mo. Rev. Stat. § 213.030 8,16

Mo. Rev. Stat. § 213.055 8,11,14,15,
 16,20,21,22,23,24,26

Mo. Rev. Stat. § 213.070(1). 15,24

Mo. Rev. Stat. § 213.070(2) 7,8,9,11,12,13,
 14,15,16,17,18,20,21,22,23,24,25,26

Mo. Rev. Stat. § 213.070(4) 12,15,25,26

Mo. Rev. Stat. § 213.101 16,25

Former Missouri Statutes

Mo. Rev. Stat. § 213.010 (L. 1959, H.B. 266, §§ 2, 3) 20

Mo. Rev. Stat. § 213.020 RSMo. 1959 20

Mo. Rev. Stat. § 213.065 RSMo. 1986 25

Mo. Rev. Stat. § 296.010 (repealed 1986) 22

Mo. Rev. Stat. § 296.020.1(1)(a)(repealed 1986) 23

Mo. Rev. Stat. § 296.020.1(4)(repealed 1986) 23

Mo. Rev. Stat. § 296.020.1(5)(repealed 1986) 23

Federal Statutes

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (Title VII). 10,20

Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e-3(a) 19

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g)(2)(B) 27

1991 Amendment to Civil Rights Act, 42 U.S.C. § 1981a 10

Other Authority

Missouri Approved Instruction 31.24. 7,8,9,14

Committee Comments to 8th Circuit Model Civil
Jury Instruction 5.01 (2007). 10

POINT RELIED UPON¹

THE TRIAL COURT ERRED IN APPLYING THE *McDONNELL DOUGLAS* INSTEAD OF THE “CONTRIBUTING FACTOR” ANALYSIS TO HILL’S MHRA CLAIM FOR RETALIATION BECAUSE THE MHRA REQUIRES ONLY THAT PLAINTIFF’S PROTECTED ACTIVITY WAS A “CONTRIBUTING FACTOR” FOR DEFENDANTS’ DISCRIMINATORY AND RETALIATORY CONDUCT, IN THAT RETALIATORY AND DISCRIMINATORY CONDUCT IN VIOLATION OF MO. REV. STAT. § 213.070 IS PROPERLY ANALYZED APPLYING THE “CONTRIBUTING FACTOR” ANALYSIS OF *DAUGHERTY V. CITY OF MARYLAND HEIGHTS* AND MISSOURI APPROVED INSTRUCTION 31.24 RATHER THAN THE JUDICIALLY CREATED DOCTRINE OF *McDONNELL DOUGLAS*.

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. 2007)

Korando v. Mallinckrodt, Inc., 239 S.W.3d 647 (Mo. App. E.D. 2007)

Barekman v. City of Republic, Missouri, 232 S.W.3d 675 (Mo. Ct. S.D. 2007)

Francin v. Mosby, Inc. d/b/a Elsevier, ___ S.W.3d ___, 2008 Mo. App. LEXIS 24
(Mo. App. E.D. 2008)

¹ No other position is taken on any other point not addressed in this brief.

ARGUMENT

THE TRIAL COURT ERRED IN APPLYING THE *McDONNELL DOUGLAS* INSTEAD OF THE “CONTRIBUTING FACTOR” ANALYSIS TO HILL’S MHRA CLAIM FOR RETALIATION BECAUSE THE MHRA REQUIRES ONLY THAT PLAINTIFF’S PROTECTED ACTIVITY WAS A “CONTRIBUTING FACTOR” FOR DEFENDANTS’ DISCRIMINATORY AND RETALIATORY CONDUCT, IN THAT RETALIATORY AND DISCRIMINATORY CONDUCT IN VIOLATION OF MO. REV. STAT. § 213.070 IS PROPERLY ANALYZED APPLYING THE “CONTRIBUTING FACTOR” ANALYSIS OF *DAUGHERTY V. CITY OF MARYLAND HEIGHTS* AND MISSOURI APPROVED INSTRUCTION 31.24 RATHER THAN THE JUDICIALLY CREATED DOCTRINE OF *McDONNELL DOUGLAS*.

This case presents the opportunity for this Court to hold that the “contributing factor” standard for liability recognized in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. 2007), a case involving discriminatory employment practices under the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.055, applies with equal force to retaliatory and discriminatory conduct also prohibited by the MHRA under Mo. Rev. Stat. § 213.070(2). The MHRA’s purposes encompass the important societal interests of prohibiting discrimination in employment, housing and public accommodations, and the express remedial goals to both eliminate and prevent discrimination. Mo. Rev. Stat. § 213.030.1; *Smith v. Aquila, Inc.*, 229 S.W.3d 106, 112 (Mo. App. W.D. 2007); *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 565

(Mo. 2006). To promote the MHRA goals to eliminate and prevent discrimination, persons who oppose discriminatory conduct prohibited by the MHRA must rely and count upon no less protection than the persons who suffer discrimination. Based upon the plain language of Mo. Rev. Stat. § 213.070(2), and the important societal goals of protecting persons against retaliatory conduct, the “contributing factor” language of MAI 31.24 should also be the basis of liability for claims for retaliation and discrimination prohibited by Mo. Rev. Stat. § 213.070.

In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (2003), this Court first recognized as a matter of Constitutional right that employees pursuing claims for compensatory and punitive damages for violations of the MHRA, Mo. Rev. Stat. § 213.010, *et seq.*, are entitled to a trial by jury. In *Daugherty v. City of Maryland Heights*, this Court safe-guarded the Constitutional right to a jury trial in MHRA cases as recognized by *Diehl*, by directing Missouri courts in ruling on summary judgment motions in MHRA cases to apply no higher a standard than necessary to submit such claims to a jury at trial, and by concluding that the “contributing factor” language of MAI 31.24 is the proper basis for a finding of liability under the MHRA. 231 S.W.3d at 819-820. This Court in *Daugherty* further directed that the analysis of MHRA claims should “more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 and rely less on analysis developed through federal caselaw.” 231 S.W.3d at 819.

The one example of “federal case law” expressly cited in *Daugherty* that Missouri courts should not rely upon in a post-*Diehl* environment is precisely what the trial court applied in this case to erroneously grant summary judgment in favor of defendant – the judicially created methodology of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973),² used in evaluating

² *McDonnell Douglas* is a judicially created analysis of discrimination claims in a bench-tried case, predating by 18 years the right to a jury trial in federal court arising from the 1991 Amendment to the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, which amended Title VII and other federal discrimination laws to allow for jury trials. 42 U.S.C. § 1981a. The *McDonnell Douglas* three-step burden-shifting analysis consists of (1) evidence showing a prima facie case by plaintiff, (2) the defendant’s opportunity to articulate a non-discriminatory reason for the employment decision, and (3) the ultimate burden shifting to the plaintiff to show the employer’s stated reason to be a pretext for discrimination. At the stage of instructing a jury in federal court, however, “It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas*...” Committee Comments to 8th Circuit Model Civil Jury Instruction 5.01 (2007). Federal juries are instructed in discrimination cases using determining factor or motivating factor/same decision language, dependent upon a number of factors that vary with different statutes and in some circumstances, with whether

proof is “direct,” or “circumstantial.” Even the Committee Comments to the 8th Circuit Model Instructions frankly admit the state of disagreement and flux of federal law in this area, especially in light of the 1991 Amendments to Title VII and the decision of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). 8th Circuit Model Instruction Committee Comments, *id.* Thus, in federal court, the serious risk exists of applying differing and unbalanced standards for liability in summary

federal discrimination cases under various statutory laws. *Daugherty*, 231 S.W.3d at 819, n.6. Before *Diehl* recognized the Constitutional right to a jury trial, the Missouri Supreme Court held that the burden-shifting model of proof outlined in *McDonnell Douglas* was the proper basis to evaluate MHRA claims. *Daugherty*, 231 S.W.3d at

judgment compared with the standards of liability for a jury, a result *Daugherty* seeks to avoid for MHRA cases. *Daugherty*, 231 S.W.3d at 819. Nowhere in the MHRA is there any indication that terms used in federal courts such as motivating or determining factor should be the basis of liability and the same is equally true for claims under both §§ 213.055 and 213.070. *Daugherty*, 231 S.W.3d at 819-20.

818 (citing to *Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842 (Mo. 1984)).

In *Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647, 648-650 (Mo. App. E.D. 2007), the Eastern District followed *Daugherty* and rejected as inapplicable the *McDonnell Douglas* burden-shifting analysis to a case for retaliatory discharge, reversing summary judgment based upon the plaintiff's evidence showing a genuine issue of fact whether an unlawful motivation, sex discrimination and retaliation, "contributed to" the employer's decision to terminate. See also *Barekman v. City of Republic, Missouri*, 232 S.W.3d 675 (Mo. Ct. S.D. 2007)(applying *Daugherty* to retaliatory constructive discharge claim to reverse summary judgment because of conflicting versions of the facts). See also *Graf v. Wire Rope Corp. of America*, 861 S.W.2d 588, 591 (Mo. App. W.D. 1993)(finding as proper jury verdict director in an MHRA retaliation case that used "caused or contributed to cause" language and that omitted requiring the plaintiff to prove that the reason given by Defendant for the discharge was not true); *Francin v. Mosby, Inc. d/b/a Elsevier*, ___ S.W.3d ___, 2008 Mo. App. LEXIS 24 (Mo. App. E.D. 2008)(holding that *Daugherty's* "contributing factor" basis for liability applies to claims for associational discrimination provided for in Mo. Rev. Stat. § 213.070(4) and reversing summary judgment based upon existence of issues of material fact).

Rather than applying *Daugherty's* mandated "contributing factor" language to retaliation cases under Mo. Rev. Stat. § 213.070(2) – as in *Korando* and *Barekman*,

and as also applied to associational discrimination cases under Mo. Rev. Stat. § 213.070(4) in *Francin* – the Eastern District Court of Appeals erroneously relied upon *Igoe v. Department of Labor and Industrial Relations*, 210 S.W.3d 264 (Mo. App. W.D. 2006), to apply the *McDonnell Douglas* analysis to Hill’s claims for retaliation. The Court of Appeals overlooked the fact that *Igoe*, although a jury trial, actually preceded *Daugherty*.³

Instead of applying the *McDonnell Douglas* burden shifting analysis, *Daugherty* found summary judgment should be denied in MHRA cases “if there is a genuine

³ *Igoe* had addressed rulings on post-trial motions and therefore, the analysis of *McDonnell Douglas* was not applicable even before *Daugherty*. In *Graf v. Wire Rope*, a case tried to a jury under the MHRA prior to *Diehl* (presumably with the consent of the parties), *McDonnell Douglas* was recognized as involving the order and allocation of proof and not intended to add additional elements of proof for a jury. 861 S.W.2d at 591.

issue of material fact as to whether [the protected category] was a ‘contributing factor’ in the [employer’s] termination decision. As in any summary judgment matter, this Court’s review of summary judgment in the context of MHRA employment discrimination claims must determine whether the record shows two plausible, but contradictory, accounts of the essential facts and the ‘genuine issue’ in the case is real, not merely argumentative, imaginary, or frivolous.” *Daugherty*, 231 S.W.3d at 820 (citing to *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)).

The elements for a cause of action for retaliation under § 213.070(2) should include the following, whether in examining the evidence for summary judgment purposes, in determining the sufficiency of the evidence at trial or in instructing the jury:

- 1) engaging in activity protected by Chapter 213;
- 2) an act of reprisal; and
- 3) that the protected activity was a “contributing cause” for the act of reprisal.

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622, 625-26 (1995); *Barekman*, 232 S.W.3d at 681-82; *Graf v. Wire Rope*, 861 S.W.2d at 591; *Korando*, 239 S.W.3d at 649.⁴

⁴ Following *Daugherty*, in a federal district court case tried in the Western District of Missouri in October, 2007, *Wallace v. DTG Operations, Inc.*, Case No. 03-6055-CV-SJ-DW, the Court instructed the jury on Plaintiff’s sole claim of MHRA retaliation using the “contributing factor” language of M.A.I. 31.24 based upon the reasoning of

The Plain Language of Mo. Rev. Stat. § 213.070(2)

By following the directives of *Daugherty* to focus upon the plain language of the MHRA, the conclusion that MHRA claims under Mo. Rev. Stat. §§ 213.055 and 213.070 deserve consistent standards of proof is easily reached. The MHRA uses broad and unqualified wording in providing protection against retaliatory and discriminatory conduct:

It shall be an unlawful **discriminatory** practice:

(1) To aid, abet, incite, compel, or coerce the commission of acts prohibited
under this chapter or to attempt to do so;

(2) To **retaliate or discriminate in any manner** against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;

Daugherty. The Order overruling Defendant's post-trial motions and the verdict director for retaliatory discharge based upon M.A.I. 31.24 given by the federal district court are contained in the Appendix of this Brief.

* * *

(4) To **discriminate** in any manner against any other person because of such person's association with any person protected by this chapter.

Mo. Rev. Stat. § 213.070(1),(2) and (4)(emphasis added).

When § 213.070 is compared with the language of § 213.055, one finds the Missouri General Assembly carefully used the same words, “discriminate” and “because,” within the same statutory scheme, no doubt with the intent to carry the same meaning. Mo. Rev. Stat. § 213.055 provides: “It shall be an **unlawful employment practice**: (1) for an employer, **because of** the race, color, religion, national origin, sex, ancestry, age or disability of any individual: (a) To fail or refuse to hire or to discharge any individual, or otherwise to **discriminate** against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's race, color religion, national origin, sex, ancestry, age or disability...” (Emphasis added).

The definition of “discrimination” expressly is intended to apply to the entirety of Chapter 213. Mo. Rev. Stat. § 213.010. Thus, under both “Discriminatory employment practices” set forth in Mo. Rev. Stat. § 213.055, and “Additional unlawful discriminatory practices” as set forth in Mo. Rev. Stat. § 213.070, the term “discrimination” is expressly defined as “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing.” Mo. Rev. Stat. § 213.010(5). Although the

word “retaliate” does not appear in the definition of “discriminate,” Mo. Rev. Stat. § 213.070(2) expressly protects against retaliatory and discriminatory conduct because a person opposes any practice prohibited by Mo. Rev. Stat. § 213.055 or has filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing conducted pursuant to Chapter 213. Therefore, retaliation or discrimination prohibited by § 213.070(2) is “based upon” the prohibited factors set forth in the definition of discrimination under § 213.010(5).

The Missouri General Assembly enacted the MHRA for the express purpose “[t]o.... eliminate and prevent discrimination because of race, color, religion, national origin, ancestry, sex, age as it relates to employment, [or] disability.” Mo. Rev. Stat. § 213.030.1(1); *Smith v. Aquila*, 229 S.W.3d at 106. The MHRA expressly provides, “The provisions of this chapter **shall** be construed to accomplish the purposes thereof....” Mo. Rev. Stat. § 213.101 (emphasis added). That retaliation or discrimination prohibited by § 213.070(2) was intended to be viewed as “based upon” the prohibited factors of race, color, religion, national origin, ancestry, sex, age, and disability is a required construction of the MHRA because such a construction serves its twin purposes to eliminate and prevent discriminatory employment practices. See *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 167 (Mo. App. W.D. 1999).

In holding that the “contributing factor” language is the proper basis for liability for discrimination claims under Mo. Rev. Stat. § 213.055, *Daugherty* focused upon

the plain language of the definition of “discrimination” set forth in Mo. Rev. Stat. § 213.010(5). This Court concluded that “nothing in this statutory language of the MHRA requires a plaintiff to prove that discrimination was a substantial or determining factor in an employment decision; if consideration of age disability or other protected characteristics contributed to the unfair treatment, a sufficient basis for liability exists.” *Daugherty*, 231 S.W.2d at 819 (citing to *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 170 (Mo. App. 2006)). *Daugherty* did not employ any “burden shifting” analysis to reach its result reversing summary judgment on the age and disability discrimination claims. Mo. Rev. Stat. § 213.070(2) likewise provides no language evidencing any intent to require a plaintiff to prove that discrimination or retaliation was a substantial or determining factor in any employment decision.

In interpreting MHRA provisions, appellate courts are guided by Missouri law and federal employment discrimination case law that is consistent with Missouri law, but not by federal case law that is contrary to the plain meaning of the MHRA. *Daugherty*, 231 S.W.3d at 818-19. The retaliation statute, Mo. Rev. Stat. § 213.070(2), is a clear example where the MHRA provides broader protection than Title VII in its language and intended meaning, further evidencing the diminished value of federal law in construing its meaning where inconsistent with federal law. In *Keeney*, 911 S.W.2d at 625-26, this Court concluded that the reach of the retaliation statute under the MHRA is broader than that of federal law. The directives of *Daugherty* to rely less on federal case law apply with even greater force to § 213.070(2), where “the difference in the language employed by [the MHRA and Title VII] is

sufficiently stark to render judicial interpretations of the federal law inapposite for purposes of assigning meaning to Section 213.070.”*Keeney*, 911S.W.2d at 624.

Keeney held that a former employee is a “person” under Mo. Rev. Stat. c 213.070(2) protected by the anti-retaliation provisions of the MHRA. The plaintiff in *Keeney* had alleged that following the filing of a charge of discrimination, his former employer retaliated by ceasing payments of non-contractual early retirement pay. Based upon the breadth of Mo. Rev. Stat. § 213.070, the termination of voluntary payments to a former employee provides a basis for a cause of action for retaliation under the MHRA, even though not actionable as a breach of any contract or tort. The Court reasoned:

Section 213.070 prohibits retaliation “in any manner.” To retaliate is to “inflict in return.” Webster’s Third New International Dictionary 1938 (1976). As used in the statute, retaliation includes any act done for the purpose of reprisal that results in damage to the plaintiff even though the act is not otherwise the subject of a claim in contract or tort. Retaliation does not require that a contractual relationship exist between the alleged victim of retaliation and the alleged perpetrator. **It merely requires the commission or omission of an act as a quid pro quo for the filing of a complaint before the Commission.** While the statutory language is broad enough to give us pause, it is unambiguous and consistent with the purposes of chapter 213.

Keeney, 911 S.W.2d at 625 (emphasis added).⁵

⁵ In contrast to the MHRA language, Title VII prohibits retaliation as

follows: “It shall be an unlawful employment practice for **an employer** to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice...or because he has made a charge...under this title.” 42 U.S.C. c 2000e-3(a)(emphasis added). Federal courts have also construed the MHRA retaliation provisions to be to be broader than those under Title VII. See *Cross v. Cleaver*, 142 F.3d 1059, 1076 (8th Cir. 1998); *Odom v. St. Louis College*, 36 F. Supp. 2d 897 (E.D. Mo. 1999). *Odom* recognized that the "Missouri Supreme Court has interpreted the [MHRA] broadly enough to include any retaliatory action whatsoever, whether or not it affects [a] plaintiff's future employment or employability." 36 F. Supp. 2d at 907 (E.D. Mo. 1999). In *Odom*, the campus president, after learning of plaintiff's complaints of sexual harassment, issued a confidential memorandum to the chancellor referring to plaintiff as a troublemaker and ordering her removal from campus. *Id.* at 904. Even though the order was never carried out, *Odom* found an issue of fact precluding summary judgment existed under the MHRA whether issuing the memorandum was retaliatory. *Id.* at 907.

Unlike the MHRA, Title VII and other separate federal discrimination statutes prohibiting age discrimination, 29 U.S.C. § 621, *et. seq.* and disability discrimination, 42 U.S.C. § 12101, *et. seq.*, contain no definition whatsoever of the word, “discriminate.” In stark contrast, a definition for the word “discrimination” appeared in the very first enactment by the Missouri General Assembly in 1959 of the Chapter on “Human Rights,” which defined “Discrimination” as, “As used in this chapter “discrimination” shall mean any unfair treatment based on race or national ancestry.” Mo. Rev. Stat. § 213.010 (L. 1959, H.B. 266, §§ 2, 3). The MHRA’s origins date to 1961, three years before the original enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Title VII). In 1961, the Missouri General Assembly first enacted the predecessor to the MHRA, the Fair Employment Practice Act, which originally prohibited discrimination on the basis of race and national ancestry, Section 296.020 RSMo (1963 Cum. Supp.) (L. 1959 H.B. 266), and added other prohibitions based upon other prohibited factors (color, religion, ancestry, age sex and disability), through various amendments. The Missouri Commission on Human Rights, the agency charged with administrative enforcement of the MHRA, first came into existence in 1957 and then became a permanent agency in 1959, two years before the enactment of the first Fair Employment Practices Act. Mo. Rev. Stat. § 213.020 RSMo. 1959.

Thus, based upon the plain meaning and legislative history, it must be recognized that the language of the MHRA itself is not wholly derived from federal

statutory and case law, is unique and has its own independent meanings.

Nor does the presence of the word “because” in § 213.070(2) in any way alter the conclusion that “contributing cause” should provide the basis for liability for retaliation cases under the MHRA. Nowhere did this Court in *Daugherty* cite, nor rely upon, the presence of the word, “because” in Mo. Rev. Stat. § 213.055 for its conclusion that the phrase, “contributing cause” appropriately sets forth the standard for determining liability in MHRA claims. *Daugherty* assigned no technical meaning to the word, “because,” and found no evidence from this word, nor any other part of the MHRA, that the terms “motivating factor,” or “determining factor” were to be used in analyzing summary judgment motions nor in instructing juries under the MHRA.

Any argument that the reasoning of *Daugherty* does not apply to retaliation claims under the MHRA illogically would mean that the words “discriminate” and “because” contained in the retaliation provision of the MHRA, Mo. Rev. Stat. § 213.070, have different meanings than the words “discriminate” and “because” as used in the MHRA’s prohibitions against discriminatory employment practices, Mo. Rev. Stat. Section § 213.055. That the defined word “discriminate” and the undefined but simple word “because” would be intended to change their respective meanings within the same statutory scheme of Chapter 213 flies in the face of statutory rules of construction requiring that the provisions of the entire MHRA must be construed together, if possible. See *Keeney v. Hereford Concrete Products, Inc.*, 1995 Mo.App. LEXIS 1306 (Mo. Ct. App. 1995); *Hagley v. Board of Educ.*, 841 S.W.2d 663, 667

(Mo. Banc 1992).

By employing the same language, clearly the legislature of Missouri intended Mo. Rev. Stat. §§ 213.010(5), 213.055 and 213.070 to be construed in harmony rather than in conflict with each other. Any conclusion that *McDonnell Douglas* uniquely applies to claims for retaliation, or that the terms, “motivating factor” and “same decision” are included in Mo. Rev. Stat. § 213.070, is entirely inconsistent with the conclusion reached in *Daugherty* rejecting such a meaning of those same words and language within the same statutory scheme of the MHRA. The meaning of the words “discriminate” and “because” do not logically change when used in describing the basis for liability for unlawful employment practices in Mo. Rev. Stat. § 213.055, compared to describing the basis for liability for opposing this same unlawful conduct in Mo. Rev. Stat. § 213.070.

Further review of the legislative history of the MHRA, in light of its predecessor employment statute, the Fair Employment Practices Act, Mo. Rev. Stat. § 296.010, *et seq.* provides even firmer conviction for the conclusion that liability for retaliatory and discriminatory conduct under Mo. Rev. Stat. § 213.070 is intended to be governed by the same standards as liability for discrimination claims under Mo. Rev. Stat. § 213.055. In 1986, the Missouri General Assembly amended Chapter 213 and consolidated three different laws into the MHRA: the Fair Employment Practices Act under Section 296.010, *et seq.*, in effect since 1961, which was then repealed, the Public Accommodation Act, in effect since 1965, under Chapter 314, which was also

repealed, and the Fair Housing Act, in effect since 1972 that had already been included under Chapter 213.

Prior to the 1986 amendment creating the present MHRA, Chapter 296 had previously set forth as “unlawful employment practices” both discriminatory conduct and the retaliation language now in § 213.070 in one single section rather than two. Section 296.020 had made it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals’s race, creed, color, religion, national origin, sex, ancestry, or handicap.” Mo. Rev. Stat. § 296.020.1(1)(a)(repealed 1986). The same statute also contained the prohibitions against retaliation, without using the word, “retaliate,” as are now found in Mo. Rev. Stat. § 213.070(2), by providing at that time: “It shall be an unlawful employment practice (4) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under this law or because he has filed a complaint, testified, or assisted in any proceeding under this chapter.” Mo. Rev. Stat. § 296.020.1(4)(repealed 1986). The language now found in Mo. Rev. Stat. 213.070(2) has been changed to be inclusive of all of the discriminatory practices now included under Chapter 213 and has added the word, “retaliate.” The continued inclusion of the word “discriminate” used in § 213.070(2), with the intentional adding of the word “retaliate” to Mo. Rev. Stat. § 213.070(2), certainly

reflects an intention to provide a remedy in a consistent manner to claims under § 213.055, allowing for a cause of action where a contributing factor to any unfair retaliatory treatment is a person's opposition of practices prohibited by the MHRA, or where other protected activities have occurred. Mo. Rev. Stat. § 213.010(5).

Under former § 296.020.1(5), "Discriminatory Employment Practices" also included that, "It shall be an unlawful employment practice: (5) For any person, whether an employer or an employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so." Mo. Rev. Stat. § 296.020.1(5)(repealed 1986) (emphasis added). This same language, changed to be inclusive of all of the discriminatory practices now included under Chapter 213, is now found in Mo. Rev. Stat. § 213.070(1). The express reference in this former section to "whether an employer or an employee, or not," no longer is included in § 213.070, but its broad and inclusive meaning continues, in light of the unqualified language of § 213.070, which by its terms is not limited in the persons to whom the prohibitions apply. *Keeney*, 911 S.W.2d at 625-26.

Purposes of the MHRA Provisions Against Retaliation

The purposes of the MHRA to eliminate and prevent discrimination are best served by giving full remedial meaning to the broad and unqualified language that prohibits "in any manner" discrimination or retaliation for opposing conduct prohibited by the MHRA, or for participating "in any manner" in any investigation, proceeding, or hearing pursuant to Chapter 213. Victims of discrimination must be able to fully rely and count upon the protections

afforded under the MHRA to persons who oppose discriminatory conduct, or who participate in proceedings or investigations of discriminatory conduct. If such victims can be subjected to retaliatory conduct without full recourse and protection, a chilling effect on complaining against discrimination, or assisting others who do complain, can easily result. The prohibitions against discrimination will be rendered as meaningless if employers can send messages to their employees that complaints of discrimination will be met with vengeance.

The purposes of the MHRA to eliminate and prevent discrimination are also served through consistent treatment analyzing MHRA claims under §§ 213.055 and 213.070. Where an employer is liable under the MHRA because a discriminatory basis such as race or sex is a contributing factor to an employment decision, the same plaintiff should not be required to climb greater evidentiary hurdles to reach a jury (or for the jury to conclude) that retaliation contributed to the discharge or other unfair treatment because of the opposition to the same discriminatory conduct. To further the purpose of preventing discriminatory conduct, the Missouri General Assembly intended to give the same, if not greater teeth, to the protection of employees who oppose discriminatory conduct prohibited by Chapter 213.

Missouri Commission on Human Rights v. Red Dragon, demonstrates how the broad and remedial purposes of the MHRA “shall” guide the statutory construction of its intended meaning, as required by Mo. Rev. Stat. § 213.101. In *Red Dragon*, the Court held that the prohibitions against discrimination in public accommodations under then-existing Mo. Rev. Stat. § 213.065, RSMo. 1986, includes an action on behalf of a person associating with a protected individual, even though the statute did not at that time expressly protect

associational discrimination for public accommodations. The Court reached this conclusion in light of the purpose inherent in the plain meaning of the words of then existing Section 213.065, “to prevent anyone in the state of Missouri from being refused public accommodations because of discriminatory attitudes toward persons with disabilities.” 991 S.W.2d at 167.

The Missouri General Assembly amended § 213.070(4) in 1992 to expressly provide protection against discrimination in any manner because of a person’s association with any person protected by Chapter 213. Section 213.070(4) RSMo. Supp. 1992; Laws of Missouri, 86th General Assembly. In *Francin*, the “contributing cause” analysis of *Daugherty* was held to apply to “association” claims expressly provided for in § 213.070(4). Applying *Daugherty* to claims for associational discrimination under § 213.070(4) is consistent with the language of the MHRA providing protection against retaliation under § 213.070(2), as both parts of this statute serve the purpose of preventing retaliatory conduct for the exercise of rights under Chapter 213. Section 213.070 provides for a cause of action where an employer has sought to chill the exercise of rights to complain by discriminating against not only the victim of discrimination but those associated with such victim, and both aim at preventing such retaliatory conduct.

The burden shifting analysis of *McDonnell Douglas* has outlived its usefulness for all MHRA cases, not just those under § 213.055, in light of the Constitutional right to a trial by jury. Missouri discrimination law should be harmonized with the same law prohibiting retaliation. In the concurring opinion of *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir.

2004), a persuasive argument is laid out for the reasons that *McDonnell Douglas* should no longer apply in federal discrimination laws. The concurring opinion's articulation of the inconsistencies of *McDonnell Douglas* with common sense, common experience and fundamental fairness provides the reasoning that should lead to the sounding of the death knell of *McDonnell Douglas* for MHRA cases:

For thirty years, courts have been slaves to the *McDonnell Douglas* burden shifting paradigm that is inconsistent with Title VII. *McDonnell Douglas* cannot be reconciled with the Civil Rights Act of 1991, as it is indignant to the clear text of the statute. *McDonnell Douglas* impermissibly focuses on the but-for cause of the employment decision, when all that the Civil Rights Act of 1991 requires is that discrimination be a motivating factor in the employment decision. Because a plaintiff need not demonstrate that discrimination was the but-for cause in the employment decision, all cases under Title VII should be evaluated to determine whether invidious discrimination in any way influenced or motivated the employment decision. *McDonnell Douglas* fails to always achieve this result, while the motivating factor test consistently does... Under *McDonnell Douglas*, requiring the employer to articulate a nondiscriminatory reason for the employment decision is worthless. First, this element is not highly significant to a plaintiff's claim because in the vast majority of cases, if not all, the defendant employer always chooses to deny claims of discrimination and offers a nondiscriminatory reason for the adverse employment action. Moreover, mere

articulation of a nondiscriminatory reason without requiring evidentiary proof is a useless ritual. Second, even if the plaintiff successfully disproves the employer's nondiscriminatory reason, this does not necessarily result in judgment in favor of the plaintiff [citations omitted]. Finally, the plain language of the statute lacks any reference whatsoever to a burden-shifting paradigm articulated in *McDonnell Douglas*. Instead, the Civil Rights Act of 1991 requires the plaintiff to prove that discrimination was a motivating factor, and then allows the defendant to affirmatively prove otherwise to negate damages. See 42 U.S.C. § 2000e-5(g)(2)(B). Rather than aiding the plaintiff in proving that discrimination was a motivating factor in the employment decision, *McDonnell Douglas* focuses on the legitimacy of the employer's proffered reasons without considering whether discrimination played *any* part in the adverse employment decision.

Griffith, 387 F.3d at 745 (concurring opinion).

CONCLUSION

The plain meaning of the MHRA's protections against discrimination and retaliation throughout its statutory scheme provide no basis for the *McDonnell Douglas*, motivating or determining factor analyses. The twin purposes of the MHRA in seeking to prohibit and eliminate discrimination are best served through consistent treatment of discrimination claims throughout the MHRA, including persons who are victims of discrimination, those who assist those victims by opposing discriminatory conduct or otherwise assist in pursuit of claims under Chapter 213, and those who

associate with the victims of discrimination. A jury should decide whether the protected activities of which Hill participated were a contributing factor for the Defendant's various acts of retaliation in this case.

BRATCHER GOCKEL & KINGSTON, L.C.

By _____

Marie L. Gockel, Mo. Bar No.: 31208
Lynne Jaben Bratcher, Mo. Bar No.: 31203
Kristi L. Kingston, Mo. Bar: 46539
1935 City Center Square
1100 Main Street
P.O. Box 26156
Kansas City, MO 64196-6156
Ph.: (816) 221-1614
Fax: (816) 421-5910

**ATTORNEYS FOR AMICUS CURIAE
KANSAS CITY AND ST. LOUIS CHAPTERS
OF THE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION**

CERTIFICATION

I hereby certify this Brief complies with the requirements of Rule 55.03 of the Missouri Rules of Civil Procedure and complies with all of the limitations contained in Rule 84.06 (b) applicable to *amicus curiae* briefs. This Brief contains 6,086 words.

Marie L. Gockel

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2008, two copies of the Brief of Amicus Curiae, along with a copy of the Brief on diskette, which was scanned for viruses, were mailed to the following by First Class Mail, postage prepaid:

D. Eric Sowers, Ferne P. Wolf, M. Beth Fetterman, Sowers & Wolf, LLC,
530 Maryville Centre Drive, Suite 460, St. Louis, MO 63141, and
Charlie Harris, Kathleen M. Nemechek, Berkowitz Oliver Williams Shaw
& Eisenbrandt, LLP, 2600 Grand Blvd., Suite 1200, Kansas City, MO
64108.

I further certify that on February 27, 2008 the original and nine copies of the Brief of *Amicus Curiae*, and a copy of the Brief on diskette, which was scanned for viruses, were filed with the Supreme Court of Missouri by sending the same via Federal Express overnight delivery to: Thomas F. Simon, Clerk of the Supreme Court of Missouri, Missouri Supreme Court Building, P.O. Box 150, Jefferson City, MO 65102.

Marie L. Gockel

APPENDIX

APPENDIX TABLE OF CONTENTS

Verdict Directing Instruction in *Wallace v. Dollar Rent-A-Car*, Case No.
03-6055-CV-SJ-DW, United States District Court for the
Western District of Missouri

A-1

Order ruling on post-trial motions in *Wallace v. Dollar Rent-A-Car*, Case No.
03-6055-CV-SJ-DW, United States District Court for the
Western District of Missouri

A-2