MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MELISSA HOWARD,	)	
	)	**WD69803**
Respondent,	)	
v.	)	**OPINION FILED:**
	)	
CITY OF KANSAS CITY, MISSOURI,	)	**February 9, 2010**
	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Platte County, Missouri
Honorable Gerald D. McBeth, Senior Judge

Before: Clifford H. Ahrens, J., Patricia L. Cohen, J., and Jeffrey W. Bates, J., Special Judges

Melissa Howard (Howard) brought suit under the Missouri Human Rights Act (MHRA) against the City of Kansas City (the City). *See* §§ 213.010-.137.[1] Howard's petition alleged that, during the municipal judge appointment process, the City engaged in an unlawful employment practice by refusing to hire Howard because of her race. Howard's case was tried to a jury, which found in her favor and awarded her compensatory and punitive damages. The City appealed. In its first point, it contends the MHRA does not apply to the appointment process because the City's

[1] All references to statutes are to RSMo (2000) unless otherwise specified. All references to rules are to the Missouri Court Rules (2006).

municipal judges are not employees covered by the act. This Court agrees. Therefore, the judgment in Howard's favor is reversed, and the case is remanded.[2]

The selection, supervision, discipline and removal of the City's municipal judges are governed by the Missouri Constitution, state statutes, court rules and the Kansas City Charter (Charter).[3] To better understand the issues presented by this appeal, a brief overview of these provisions follows.

The Missouri Constitution provides that each state circuit court may have municipal judges who shall hear and determine violations of municipal ordinances. MO. CONST. art. V, § 23. Our Supreme Court has promulgated rules of procedure that explicitly control the manner and details of how ordinance violations are processed and determined. Rules 37.01-.75. The City's municipal judges are part of the 16th Judicial Circuit. Supervisory authority over municipal judges is vested in the presiding judge of that circuit. § 479.020.5 RSMo Cum. Supp. (2006); Rule 37.04. The Missouri Constitution provides that circuit judges may make rules for their circuit, so long as the rules are not inconsistent with the rules of the Supreme Court of Missouri. MO. CONST. art. V, § 15. Pursuant to that grant of authority, the judges of the 16th Judicial Circuit also have adopted a set of local rules explicitly governing the manner and details of how ordinance violations are processed and determined.

[2] Howard filed a motion for attorney fees on appeal and a motion to dismiss the City's appeal or strike points two, five and six. These motions, which were taken with the case, are denied.

[3] Relevant provisions of the Charter pertaining to the "Kansas City Municipal Division of the Circuit Court" are found in art. III, §§ 301-313.

Rule 69, 16th Judicial Circuit Rules of Court. The Charter also authorizes the Kansas City Municipal Division (the Division) to adopt rules of practice and procedure.

The voter-approved Charter established the qualifications, prohibited activities, retirement age and automatic forfeiture of office provisions for municipal judges. The Charter also established a Municipal Judicial Nominating Commission (Commission). The Commission consists of five members: the chair, who is the presiding judge of the 16th Judicial Circuit; two attorney members, who are elected by members of the Missouri State Bar living in Kansas City; and two non-attorney members, who are appointed by the Mayor. The Commission may act only with the concurrence of a majority of its members. Within 60 days of any vacancy in the Division, the Commission shall submit to the Mayor and City Council (Council) a panel of three names of qualified persons as nominees to serve as a municipal judge. Unless the Council chooses not to fill the vacancy, it must act within 60 days to appoint one of the nominated persons to be a municipal judge. The Charter provides that a municipal judge is subject to being approved or rejected by the City's voters after being appointed. If approved, the judge serves a four-year term. Thereafter, the judge must file a declaration of candidacy and face a retention election every four years.

The Supreme Court of Missouri is granted the ultimate authority to "remove, suspend, discipline or reprimand any judge of any court …." MO. CONST. art. V, § 24.3. That includes municipal judges. ***In re Hill***, 8 S.W.3d 578, 581 (Mo. banc 2000); ***In re Fullwood***, 518 S.W.2d 22, 23-24 (Mo. banc 1975). The Charter also gives the Commission the authority to commence removal proceedings against a

municipal judge for "nonfeasance, malfeasance or misfeasance in the performance of official duties or engaging in conduct which brings discredit on the Kansas City Municipal Division, or violating any prohibition established by this Charter for judges." Removal proceedings must be initiated by four of the five Commission members. There is no provision in the Charter that allows the Mayor, a Council member or any other official or employee of the City to initiate removal proceedings. Once removal proceedings are initiated by the Commission submitting written charges to the Council, that body is required to "hold an appropriate hearing sitting as a board of review for the purpose of hearing evidence and testimony relating to the charges." At least seven Council members must vote for removal of a judge in order for that to occur.

Under the City's ordinances, municipal judges are responsible for: (1) classifying, arranging, distributing and assigning the business of the court to the divisions within the Division; and (2) making any other rules of court, so long as they are not inconsistent with state law, the City Charter or the City's ordinances.[4] Municipal judges are not part of the City's law department and work independently of anyone else.

The City pays municipal judges a salary that is set by ordinance. According to § 479.020.6 RSMo Cum. Supp. (2006) and the Charter, a municipal judge's salary is not dependent on the number of cases tried, the number of guilty verdicts reached, or the number of fines imposed or collected, nor can the salary be diminished during the

[4] Relevant provisions of the City's ordinances are found in the Kansas City Code § 2-1406 and § 2-1409.

judge's term of office. The City's ordinances for vacation leave and sick leave apply only to full-time, regular employees; elected officials such as the Mayor, Council members and municipal judges do not receive these benefits. Similarly, municipal judges in the Division are not a part of the City's retirement system for regular employees. Instead, municipal judges participate in the retirement system for elected officials.

On August 31, 2006, the retirement of Municipal Judge Marcia Walsh created a vacancy in Division 205.[5] The Mayor initiated the process to appoint Judge Walsh's replacement. In mid-October 2006, Howard submitted an application and was interviewed by the Commission. On October 30, 2006, the Commission submitted a panel of three nominees to the Council. All were Caucasian females. Howard was one of the nominees.

On November 9, 2006, the Council rejected the panel by a 7-6 vote. Statements made during deliberations included concerns that the all-Caucasian female panel lacked diversity. The Council did not appoint any of the three nominees to fill the vacancy within the 60-day time period. On January 9, 2007, the Commission submitted a panel containing the same three nominees. The Council, in turn, again declined to appoint any of the three nominees to fill the vacancy within the 60-day time period.

In July 2007, Howard filed suit against the City. In September 2007, she filed an amended petition alleging that the City engaged in race discrimination and

[5] At the time of her retirement, Marcia Walsh was the only Caucasian female on the court. Three of the six judges then on the court were minorities.

retaliation in violation of the MHRA. The City's answer alleged that the MHRA did not apply to the City's municipal judge appointment process.

In March 2008, Howard's claim was tried to a jury. At the close of her evidence, the City moved for a directed verdict on the ground that the MHRA does not apply to the Council's decision not to appoint Howard as a municipal judge. The trial court denied the motion. The same motion was renewed and denied at the close of all of the evidence. The jury, which was instructed only on Howard's discrimination theory, found in her favor and awarded her compensatory and punitive damages.[6] The City filed a post-trial motion for judgment notwithstanding the verdict on the same ground advanced at trial. The trial court denied the motion and entered a judgment awarding Howard's damages, attorney fees and prejudgment interest. This appeal followed.

In the City's first point on appeal, it contends the trial court erred in not directing a verdict for the City because the MHRA does not apply to the City's municipal judge appointment process. Howard's amended petition alleged, *inter alia*, that the City engaged in an unlawful employment practice because it "refused to hire Mrs. Howard, or to allow her the opportunity to move forward in the hiring process, because of her race." Howard based this allegation upon § 213.055.1(1)(b), which states:

> 1. 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:
> …

[6] Howard's verdict-directing instruction was based upon MAI 31.24 [2005 New], which is the pattern instruction used to submit a discriminatory act that violates § 213.055.

> (b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability[.]

Id. The City argues that the Division's municipal court judges are not employees within the meaning of this statute. In response, Howard argues that the statute does apply to her because she was an employment applicant. This presents an issue of statutory interpretation, which is a question of law that we review *de novo*. ***Brady v. Curators of University of Missouri***, 213 S.W.3d 101, 107 (Mo. App. 2006); ***Sloan v. Bankers Life & Cas. Co.***, 1 S.W.3d 555, 561 (Mo. App. 1999); ***Gerlach v. Missouri Comm'n on Human Rights***, 980 S.W.2d 589, 591 (Mo. App. 1998). "When construing a statute, our primary role is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent." ***Brady***, 213 S.W.3d at 107.

We begin our analysis by noting that the legislature has the right to define the terms and phrases it uses when enacting statutes. ***State v. Bristow***, 190 S.W.3d 479, 485 (Mo. App. 2006).[7] The legislature exercised that prerogative when it enacted the MHRA by defining the word "employer" to include any Missouri political subdivision employing six or more persons within the state. *See* § 213.010(7). Therefore, the word "employer" as used in § 213.055.1 has a specific statutory meaning.[8] In contrast, § 213.055.1 also uses the words "employment," "employee"

[7] ***Bristow*** was overruled on other grounds by ***State v. Avery***, 275 S.W.3d 231, 235 (Mo. banc 2009).

[8] In the City's answer, it admitted that it is an employer as defined by this statute.

and "employment applicant." None of these words or phrases is defined either in § 213.055 or elsewhere in the MHRA. These terms, however, have a definite and well known meaning at common law. *See, e.g.*, ***Maltz v. Jackoway-Katz Cap Co.***, 82 S.W.2d 909, 912 (Mo. 1934) (noting that the employee-employer relationship is bottomed on services provided by the former and is peculiarly characterized by the right of control vested in the latter). "It is a familiar rule of construction that where a statute uses words which have a definite and well known meaning at common law it will be presumed that the terms are used in the sense in which they were understood at common law, and they will be so construed unless it clearly appears that it was not so intended." ***Id***. (quoting 24 R.C.L. p. 994, § 236); ***State v. Duggar***, 806 S.W.2d 407, 408 (Mo. banc 1991); *see* ***Morgan v. Gaeth***, 273 S.W.3d 55, 59 (Mo. App. 2008).

In ***Sloan v. Bankers Life & Cas. Co.***, 1 S.W.3d 555 (Mo. App. 1999), the western district of this Court used common law principles to determine who is an employee for purposes of the MHRA. The issue there was whether Sloan, an insurance agent who sold Bankers Life policies, was protected by the age discrimination and retaliation provisions in the MHRA. ***Id***. at 560 n.2. After examining the language used in § 213.055.1, the western district held that the MHRA "applies only to employer-employee relationships." ***Id***. at 562. The Court also noted that "[e]mployees and independent contractors are distinguished primarily on the basis of the amount of control the alleged employer has over them." ***Id***. After considering the relevant factors, the western district decided that Bankers Life did not exercise sufficient control over Sloan's activities to make him an employee who was

covered by the MHRA. ***Id***. at 563-64. Therefore, the trial court's dismissal of Sloan's MHRA claim was affirmed. ***Id***. at 564.

We agree with the holding in ***Sloan*** that the MHRA only applies to employer-employee relationships. We also agree that common law principles must be applied to make that determination here. "Control is the pivotal factor in distinguishing between employees and other types of workers. If the employer has a right to control the means and manner of a person's service – as opposed to controlling only the results of that service – the person is an employee rather than an independent contractor." ***Leach v. Board of Police Comm'rs of Kansas City***, 118 S.W.3d 646, 649 (Mo. App. 2003). The factors to be considered in determining whether the requisite level of control exists include: (1) the extent of control; (2) actual exercise of control; (3) duration of employment; (4) right to discharge; (5) method of payment for services; (6) the degree to which the alleged employer furnished equipment; (7) whether the work is part of the alleged employer's regular business; and (8) the contract of employment. ***Howard v. Winebrenner***, 499 S.W.2d 389, 395 (Mo. 1973); ***Leach***, 118 S.W.3d at 649; ***Chandler v. Allen***, 108 S.W.3d 756, 763 (Mo. App. 2003). While each factor is relevant, no single factor is controlling. ***Howard***, 499 S.W.2d at 395.

Factors one and two deal with what control, if any, the City has and actually exercises over a municipal judge. The authority to control the manner and details of a municipal judge's work is vested in our Supreme Court and the 16th Judicial Circuit. Actual exercise of that authority has occurred through the adoption of rules of procedure that explicitly control how ordinance violations are processed and

determined. Rules 37.01-.75; Rule 69, 16th Judicial Circuit Rules of Court. Moreover, supervisory authority over municipal judges is vested in the presiding judge of the 16th Judicial Circuit. § 479.020.5 RSMo Cum. Supp. (2006); Rule 37.04. Because the City has no ability to control the manner and means of a municipal judge's work, these two factors weigh against a determination that a municipal judge is an employee.

Factor three deals with the duration of employment. Initially, we note that, unlike the commencement of a typical employer-employee relationship, the City has no ability to interview and hire whomever it wishes to serve as a municipal judge. Instead, the voter-approved Charter gives the Commission the authority to interview all applicants and nominate a three-person panel for the Council's consideration. One of those persons must be appointed to serve as municipal judge unless the Council decides not to fill the vacancy. The Charter also provides that, after a municipal judge is appointed and has been in office at least 12 months, he or she must be approved or rejected by the municipal voters. If approved, the judge serves a four-year term. At the end of each four-year term, the judge must file a declaration of candidacy and be approved by the voters to remain in office. The Charter also contains automatic forfeiture of office provisions and a mandatory retirement age for a municipal judge. All of these limitations on the duration of a municipal judge's employment were adopted by the City's voters and are not matters within the City's control. This factor weighs against a determination that a municipal judge is an employee.

Factor four deals with the right to discharge. Our Supreme Court is constitutionally vested with the ultimate authority to suspend, discipline, reprimand or remove a municipal judge. MO. CONST. art. V, § 24.3; ***In re Hill***, 8 S.W.3d 578, 581 (Mo. banc 2000); ***In re Fullwood***, 518 S.W.2d 22, 23-24 (Mo. banc 1975). The Charter permits a municipal judge to be removed for "nonfeasance, malfeasance or misfeasance in the performance of official duties or engaging in conduct which brings discredit on the Kansas City Municipal Division, or violating any prohibition established by this Charter for judges." The City, however, is not allowed to independently initiate removal proceedings for any of these reasons. Instead, four of the five Commission members must vote to bring charges against the judge. Once removal proceedings are initiated, the Council must "hold an appropriate hearing sitting as a board of review for the purpose of hearing evidence and testimony relating to the charges." Seven or more Council members must vote to remove the judge from office in order for that to occur. These limitations impose highly significant restrictions upon the City's right to appoint, discipline and fire a municipal judge. Accordingly, this factor weighs against a determination that a municipal judge is an employee. *See* ***Coble v. Economy Forms Corp.***, 304 S.W.2d 47, 52 (Mo. App. 1957) (right of control usually involves the ability to fire the employee for failure to perform the work by the methods and in the manner required by the employer).

The fifth factor involves the method of payment for services. The City pays a municipal judge a salary in an amount set by ordinance. Nevertheless, the judge's salary cannot be diminished during his or her term in office, and the amount paid is

not dependent on the number of cases tried, the number of guilty verdicts reached, or the number of fines imposed or collected. Unlike the City's regular full-time employees, a municipal judge does not accrue vacation or sick leave. In addition, a municipal judge participates in the retirement system for elected officials, rather than the retirement system covering the City's regular employees. This factor weighs against a determination that a municipal judge is an employee.

The sixth factor involves the degree to which the alleged employer furnished equipment. Because the City provides a municipal judge with courtroom facilities, this factor weighs in favor of a determination that the judge is an employee.

The seventh factor concerns whether the work is part of the alleged employer's regular business. The adjudication of ordinance violations by a municipal judge is a judicial function. *See* ***Weinstock v. Holden***, 995 S.W.2d 408, 411 (Mo. banc 1999); ***State on Information of Dalton v. Russell***, 281 S.W.2d 781, 783 (Mo. banc 1955). That is not, nor could it be, part of the City's regular business. ***Lederer v. State, Dept. of Social Services***, 825 S.W.2d 858, 863 (Mo. App. 1992) (noting that our constitution vests the adjudicative function exclusively in the courts). This factor weighs against a determination that a municipal judge is an employee.

The eighth factor is the contract of employment. There is no contract of employment between the City and its municipal judges. Therefore, this factor weighs against a determination that a municipal judge is an employee. ***Leslie v. School Services and Leasing, Inc.***, 947 S.W.2d 97, 101 (Mo. App. 1997).

To have an employer-employee relationship, the employer must have "control and direction not only of the employment to which the contract relates, but of all of

its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist." ***Sidney Smith, Inc. v. Steinberg***, 280 S.W.2d 696, 702 (Mo. App. 1955) (quoting 18 R.C.L. p. 490, § 1). After considering the relevant common law factors, seven of the eight weigh against a determination that the City's municipal judges are employees. Accordingly, we hold that these municipal judges are independent contractors because the City lacks the right to control the means and manner of their services. *See* ***Sloan v. Bankers Life & Cas. Co.***, 1 S.W.3d 555, 564 (Mo. App. 1999).[9] Because no employer-employee relationship would have resulted from the City's

[9] The result we reach here is consistent with appellate decisions from other states addressing similar issues. In ***Thompson v. City of Austin***, 979 S.W.2d 676 (Tex. App. 1998), the Texas Court of Appeals considered the issue of whether municipal judges were employees of the City of Austin so as to be covered by the Texas Commission on Human Rights Act (TCHRA). ***Id***. at 680-81. The appellate court held that the municipal judges were not protected by the TCHRA because the City of Austin overwhelmingly lacked the right to control the means and manner of the judges' performance. ***Id***. at 681-82. In ***City of Roman Forest v. Stockman***, 141 S.W.3d 805 (Tex. App. 2004), Stockman was a municipal judge who claimed that he was protected by a Texas whistleblower act. Applying a common law test for determining who is an employee, the Texas Court of Appeals held that Stockman was an independent contractor because the City of Roman Forest lacked the right to control the details of Stockman's work as a municipal judge. ***Id***. at 810. Finally, in ***Bredesen v. Tennessee Judicial Selection Commission***, 214 S.W.3d 419 (Tenn. 2007), a nominee for a state court judgeship claimed that he was an applicant for employment covered by the Tennessee Human Rights Act (THRA). ***Id***. at 429-30. The THRA contained a provision making it a discriminatory practice for an employer to "[l]imit, segregate or classify an employee or applicants for employment in any way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, creed, color, religion, sex, age or national origin." ***Id.*** at 429. This subsection of the THRA is virtually identical to § 213.055.1(1)(b), upon which Howard relies. Applying common law agency principles, the Tennessee Supreme Court held that the nominee was not an employee protected by the THRA because the hiring party had no authority to control in any way the means and manner by which state court judges performed their duties. ***Id***. at 431-32.

appointment of a replacement municipal judge, the MHRA has no application to the appointment process. Therefore, the trial court erred in failing to direct a verdict in the City's favor on Howard's MHRA claim.

Howard argues, however, that the MHRA does apply to the City's municipal judge appointment process because the legislature never adopted explicit language in the MHRA excluding public officials from being treated as employees. To support that argument, she points out the adoption of such an express exclusion in Title VII cases. *See* 42 U.S.C. § 2000e(f). We find that argument unpersuasive. As discussed above, the legislature chose to use words like "employee" in § 213.055 that had a well understood common law meaning. We presume that common law meaning was intended because no different statutory definition was provided. *Cf*. § 287.020.1 (providing a statutory definition for the word "employee" in workers' compensation cases). Additionally, the legislature generally has treated an elective or appointive official as an "employee" covered by a particular act through the adoption of an explicit statutory definition to that effect.[10] Because Congress addressed the public official exclusion in Title VII cases in a manner inconsistent with Missouri law, that federal exclusion provides no guidance in how the MHRA should be interpreted. *See* ***Daugherty v. City of Maryland Heights***, 231 S.W.3d 814, 818-19 (Mo. banc 2007). The protections provided by the MHRA are not identical to the federal standards and may be broader or more restrictive than Title VII. ***Id***. at 819; ***Brady v. Curators of University of Missouri***, 213 S.W.3d 101, 112-13 (Mo. App. 2006).

[10] *See, e.g.*, § 104.010(20)(a); § 105.272.1; § 105.900.1; § 105.1000; § 376.421.1(1)(a); § 376.691(1)(a); ***Boone County v. County Employees' Retirement Fund***, 26 S.W.3d 257, 264 (Mo. App. 2000).

The City's first point is granted.[11] The judgment in Howard's favor is reversed, and the case is remanded.

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Jeffrey W. Bates, Special Judge, Presiding

Ahrens, Special J. and Cohen, Special J., concur.

[11] In light of this disposition, the City's other points are moot and need not be addressed.