

# MISSOURI

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## I. AT-WILL EMPLOYMENT

### A. Statute

There is no statute on at-will employment in Missouri.

### B. Case law

In Missouri, the general rule is “that in the absence of a contract for employment for a definite term or a contrary statutory provision, an employer may discharge an employee at any time, without cause or reason, or for any reason and, in such cases no action can be obtained for wrongful discharge.” *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. 1981). But, as discussed below, Missouri courts also recognize the “public policy” exception to employment-at-will.

When a contract does not provide a definite period of employment and fails to include provisions related to the reasons for termination, the contract is deemed to be an express agreement that the employee can be fired without cause. *Kelly v. State Farm Mut. Life Ins. Co.*, 218 S.W.3d 517, 523 (Mo. Ct. App. 2007); *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500, 506 (Mo. Ct. App. 2004). But wrongful discharge may be actionable if there is a contract and a breach thereof, i.e., a termination that violates a contractual clause relating to the duration of employment or a clause preventing termination except only for cause. *Bishop*, 129 S.W.3d at 503; *Teets v. American Family Mut. Ins. Co.*, 272 S.W.3d 455, 465 (Mo. Ct. App. 2008) (overruled on other grounds by *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 32 (Mo. 2013)). In *Teets*, the Court held that a wrongful discharge claim could properly be maintained, given the presence of a provision setting forth specified grounds for termination and corrective action procedures. 272 S.W.3d at 465. This was true even though the agreement was an “independent contractor” agreement between an insurer and its agent. *Id.*

An agreement as to the amount of compensation but without a definite term of employment does not change the at-will status of the employee. *Luethans v. Wash. Univ.*, 894 S.W.2d 169, 172 (Mo. 1995). While there are significant differences between at-will employment and contractual employment, both at-will employees and contract employees may bring tort claims of wrongful discharge. *Id.* at 172; *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. banc 2010).

The Eighth Circuit has held that a Missouri at-will employee without a written contract has a contractual relationship with his employer and therefore can bring a claim under 42 U.S.C. § 1981. *Skinner v. Maritz, Inc.*, 253 F.3d 337, 340-342 (8th Cir. 2001).

## II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662-63 (Mo. 1988), the Missouri Supreme Court held that there is no handbook exception to the employment at-will doctrine in Missouri. An employer's unilateral act of publishing a handbook is not a contractual offer to the employee. *Id.*

In determining whether an arbitration clause contained within an employee handbook constituted a binding contract, the Eighth Circuit cited the general rule of *Johnson*, that employee handbooks are not contracts, with approval. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997). However, the court held that while the employee handbook itself did not constitute a contract, the arbitration provision was a separate provision enforceable under contract law theory. *Id.* The court based its ruling on the following characteristics of the arbitration clause: 1) the agreement was separate from other handbook provisions; 2) after having been signed by the employee, the agreement was removed from the handbook and placed in the employee's personnel file; 3) the agreement was in boldface type and preceded by the boldface word, "IMPORTANT;" and 4) the language of the agreement was markedly different from the language of other handbook provisions, employing contractual terms such as "I understand," "I agree," and "final decision." *Id.* See also *McIntosh v. Tenet Health Sys. Hospitals, Inc./Lutheran Med. Ctr.*, 48 S.W.3d 85 (Mo. Ct. App. 2001).

In *W. Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Comm'rs*, 939 S.W.2d 565, 567 (Mo. Ct. App. 1997), the Missouri Court of Appeals held the general rule of *Johnson*, that employee handbooks do not constitute contracts, extends beyond the boundaries of a wrongful termination case. Here, the employee police officers claimed that defendant board of police commissioners breached a contract between the two parties reflected in the employee handbook. *Id.* According to the handbook, police officers were to receive annual five percent increases in salary, but the defendant board of commissioners did not approve said raise. *Id.* The Missouri Court of Appeals held that, just as in *Johnson*, the board of police commissioner's unilateral act of publishing the manual was not a contractual offer, and plaintiff police officers had no power of acceptance. *Id.* at 566-68.

2. Provisions Regarding Fair Treatment

Missouri courts have declined to read a duty of good faith and fair dealing into at-will employment. *Nichols v. Am. Nat. Ins. Co.*, 945 F. Supp. 1242, 1247 (E.D.Mo. 1996). See also *Bishop & Assocs., LLC v. Ameren Corp.*, 520 S.W.3d 463, 471-72 (Mo. 2017). However, in *Daniels v. Board of Curators of Lincoln Univ.*, 51 S.W.3d 1 (Mo. Ct. App. 2001), the Court held that a public university's vice president of student affairs had his Fourteenth Amendment due process rights violated in connection with his termination because he had a protected property interest in his continued employment with the university, entitling him to the right to be advised of reasons for his termination and an opportunity to be heard. The university's handbook and manual, which its personnel director admitted applied to this employee, represented to employees that reasons would be provided and a hearing would be allowed prior to termination, implying a self-imposed prohibition against terminating an employee unfairly, and a promise not

to terminate without providing some procedural due process, even if employee was at will. A \$200,000 verdict for the plaintiff thus was sustained by the appellate court.

### 3. Disclaimers

Disclaimers in handbooks provide additional evidence to support that handbooks do not create a contractual relationship between employee and employer. *Link v. K-Mart Corp.*, 689 F. Supp. 982, 987 (W.D.Mo. 1988). *See also Egan v. Wells Fargo Alarm Services*, 23 F.3d 1444 (8th Cir. 1994).

### 4. Implied Covenants of Good Faith and Fair Dealing

#### a. As applied to the at-will status.

At-will employment may not be circumvented by an employee who alleges breach of a covenant of good faith and fair dealing occurring in the relationship between employee and employer. *Bishop & Assocs., LLC*, 520 S.W.3d at 472; *Neighbors v. Kirksville Coll. of Osteopathic Med.*, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985). *See also Fink v. Revco Disc. Drug Centers, Inc.*, 666 F. Supp. 1325 (W.D.Mo. 1987). *But see Morton v. Hearst Corp.*, 779 S.W.2d 268, 273 (Mo. Ct. App. 1989) (where there is an employment contract for a specified term, a breach of good faith under the contract subjects the parties to contract liability).

#### b. Duty of loyalty.

An employee owes a duty of loyalty to the employer as a result of the employee-employer relationship and must not act contrary to the employer's interests; however, an employee may plan and prepare to compete with his existing employer without revealing the plans to his employer. *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 26-27 (Mo. 1966). *See also Mo. Highway & Transp. Comm'n v. Sample*, 702 S.W.2d 535, 538 (Mo. Ct. App. 1985).

The duty of loyalty is breached where the employee goes beyond mere planning and directly competes with the employer while still employed by the principal. *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. 2005). Direct competition occurs where one gains an advantage over a competitor. *Id.* In *Scanwell*, the court determined that an employee's disclosure of confidential information to her employer's competitor, failure to renew her employer's lease, and obtaining a lease of her employer's property for the competitor had gone beyond mere planning. *Id.*

## B. Public Policy Exceptions

### 1. General

In 2017, Missouri enacted the Whistleblower's Protection Act ("the Act") to "provide the exclusive remedy for any and all claims of unlawful employment practices" and to "codify the existing common law exceptions to the at-will employment doctrine and to limit their further expansion by the courts." MO. ANN. STAT. § 285.575(3). The Act protects from discharge because of his or her protected conduct any employee who:

- (1) has reported an employer's unlawful act to the proper authorities;
- (2) has reported to the employer serious misconduct in violation of a clear mandate of **public policy**

found in the constitution, statute, or regulation; or

(3) has refused to carry out an employer's unlawful directive.

An employee is not protected under the Act if: (1) the employee is a supervisory, managerial, or executive or an officer of the employer and the unlawful act or misconduct reported concerns matters upon which the employee is employed to report or provide professional opinion; or (2) the proper authority or person to whom the employee makes his or her report is the person whom the employee claims to have committed the unlawful act or violation of a clear mandate of public policy. MO. ANN. STAT. § 285.575.2(4)(a)-(b).

Under the Act, "Employer" does not include the state of Missouri or its agencies, instrumentalities, or political subdivisions. "Proper authorities" include "governmental or law enforcement agency, an officer of an employee's employer, the employee's supervisor employed by the employer, or the employee's human resources representative employed by the employer."

Courts may award successful claimants back pay and reimbursement of directly-related medical bills. Courts may double a claimant's recovery if the employer's conduct was outrageous because of evil motive or reckless indifference to the rights of others. A successful claimant may also recover court costs and reasonable attorney fees.

#### 2. Exercising a Legal Right

See Section II.B.1, above.

#### 3. Refusing to Violate the Law

See Section II.B.1, above.

In *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 861 (Mo. Ct. App. 1985), plaintiff was employed as a lab assistant at an eyewear manufacturer with responsibility for testing eyeglass lenses for their resistance to breaking and shattering in accordance with the United States Food and Drug Administration regulations. She complained to her supervisor and to the president of the company about its practice of skipping the required hardening and testing procedures for lenses. The president told her not to worry about possible injury to the customers and to "[j]ust go do what you're told." *Id.*

After months of fruitless urging, plaintiff and four other employees complained to the Occupational Safety and Health Administration ("OSHA"). The president asked plaintiff to withdraw her complaint, and he instructed other employees to throw broken glass into the testing machine to give the impression that such tests were being performed. About two months later, plaintiff was terminated, allegedly for stating that her supervisor was using drugs. Plaintiff filed suit claiming that she was fired for reporting violations to OSHA. The Missouri Court of Appeals held that where plaintiff was given the unfortunate choice of breaking the law or losing her job, the public policy exception applied. *Id.* at 871.

#### 4. Exposing Illegal Activity (Whistleblowers)

See Section II.B.1, above.

### III. CONSTRUCTIVE DISCHARGE

Constructive discharge occurs when an employer deliberately renders an employee's working conditions so intolerable to a reasonable person that the employee is forced to quit. *Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685-86 (Mo. banc 2009). A plaintiff must establish a discriminatory motive. *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 521 (Mo. banc 2009). A claim of constructive discharge requires more than a single incident but rather a continuous pattern of discriminatory treatment. *Wallingsford*, 287 S.W.3d at 686. *See also Reed v. McDonalds Corp.*, 363 S.W.3d 134, 140 (Mo. Ct. App. 2013).

There is no constructive discharge where an employee quits without giving the employer a reasonable chance to work out a problem. *Gamber v. Missouri Dep't of Health & Senior Services*, 225 S.W.3d 470, 477-79 (Mo. Ct. App. 2007).

In determining whether working conditions are intolerable for purposes of employment discrimination claims based on constructive discharge, courts consider a variety of factors, including: (1) demotion, (2) reduction in salary, (3) reduction in job responsibilities, (4) reassignment to menial or degrading work, (5) reassignment to work under a younger supervisor, (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation, and (7) offers of early retirement or continued employment on terms less favorable than the employee's former status. *George v. Civil Service Commission of City of St. Louis*, 318 S.W.3d 266, 274 n.8 (Mo. Ct. App. 2010).

In *George*, an African-American plaintiff, who had a long and distinguished career as a St. Louis fire chief, claimed he was constructively discharged, citing two intolerable conditions: first, that he was placed under the new interim fire chief, "a Caucasian former subordinate who swiftly proceeded to carry out the promotions over [his] objections," and second, a decrease in salary and thus his pension benefits. *Id.* at 273. The Court of Appeals held that the plaintiff's loss of authority and compensation were "natural consequences of a lawful demotion resulting from [his] insubordination", and that the record lacked any evidence that plaintiff's superiors "did anything to harass, intimidate, embarrass, provoke, or otherwise deliberately torment [him] in a manner characteristic of an intolerable work environment." Thus, the Court denied his claim. *Id.* at 274.

#### A. Objective Standard

To establish a claim for constructive discharge, a plaintiff must show that his working conditions were *both* subjectively and objectively intolerable. *Wallingsford*, 287 S.W.3d at 686. The plaintiff must show that a reasonable person would find the working conditions intolerable and that the employee was forced to quit because the working conditions were intolerable. *Id.*; *citing Gamber*, 225 S.W.3d at 477, and *Bell v. Dynamite Foods*, 969 S.W.2d 847, 851 (Mo. Ct. App. 1998); *Dewalt v. Davidson Service/Air, Inc.*, 398 S.W.3d 491, 501 (Mo. Ct. App. 2013).

In *Dewalt*, an MHRA disability discrimination case, when plaintiff twice declined to violate his medical restriction by risking an over-the-road trucking run, he was punished by either being sent home or told to

stay home without pay. 398 S.W.3d at 501. He also received four disciplinary write-ups immediately following his refusal to violate his medical restriction. And after the third time in the course of a month that the plaintiff declined to violate his medical restriction, supervisors never again gave him any work. The court concluded that a reasonable person in the plaintiff's situation would find these working conditions intolerable, and that an employer could reasonably foresee that its insistence that the plaintiff consistently violate his medical restriction or suffer adverse consequences would cause the plaintiff to quit. Thus, the plaintiff was constructively discharged. 398 S.W.3d at 501.

B. Availability to Employee of Recourse

Where a plaintiff claims that sexually harassing behavior rose to the level of “constructive discharge”, the “*Faragher/Ellerth*” affirmative defense is available to employers in cases arising under state law, and has been expressly adopted in the state regulations promulgated under the Missouri Human Rights Act. 8 C.S.R. 60-3.040(17)(D)(1); *See Reed*, 363 S.W.3d at 142-43. The defense arises out of two U.S. Supreme Court cases holding that an employer can assert as an affirmative defense that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *See Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238 (Mo. Ct. App. 2006); *Herndon v. City of Manchester*, 284 S.W.3d 682 (Mo. Ct. App. 2009). The mere existence of a sexual harassment policy is insufficient to satisfy an employer’s burden of demonstrating that it has exercised reasonable care in preventing sexual harassment, especially where there is evidence that the policy was ineffective in practice, or was administered in bad faith. *Herndon*, 284 S.W.3d at 688; *Hill*, 277 S.W.3d at 667-68 (evidence that plaintiffs and others complained to their group leader and no action was taken precluded summary judgment).

C. Hotlines

The Eighth Circuit considered whether a plaintiff who had reported her allegations of sexual harassment to her supervisor, but failed to utilize the employer’s hotline for reporting alleged instances of discrimination and harassment, could state an actionable retaliation claim. *Howard v. Burns Bros.*, 149 F.3d 835, 842 (8th Cir. 1998). The Eighth Circuit held that plaintiff’s failure to utilize her employer’s hotline number did not give her employer “a reasonable chance to work out [the] problem,” and, as a matter of law, plaintiff failed to state an actionable constructive discharge claim. *Id.*

#### IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

1. Determination of “Cause”

“Cause” means “legal cause” and is defined as a “reason which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.” *Schnell v. Zobrist*, 323 S.W.3d 403, 410 (Mo. Ct. App. 2010)(defining “cause” in the context of public employment).

An employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of that time, may have an action against the employer for any damages sustained by reason of wrongful discharge. MO. ANN. STAT. § 290.130.

## 2. Burden of Proof

It is the burden of the employee to show that he substantially performed the duties required by the contract up to the time he was prevented from completing his task by the employer, and the burden shifts to the employer to show that the discharge was for good cause. *Ghalam v. Tesson Ferry, Inc.*, 560 F. Supp. 631, 635 (E.D.Mo. 1983). *But see Begley v. Werremeyer Assocs., Inc.*, 638 S.W.2d 817, 820 (Mo. Ct. App. 1982) (holding that the employee has the burden of proving substantial performance under the contract up to the time of the alleged breach, and the employer's rebuttal evidence as to substantial performance is not converted to an affirmative defense which the employer is required to prove).

### B. Status of Arbitration Clauses

The validity of an agreement to arbitrate is determined under state law. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006); *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006).

Continued at-will employment is not valid consideration to support an agreement requiring the employee to arbitrate his or her claims against the employer. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014). A company's employment arbitration program may be ruled unenforceable for lack of consideration. In *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. Ct. App. 2008), the Court observed that because arbitration can be compelled only when a party has agreed to arbitrate claims (*citing Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. 2003)), the threshold issue is whether there is a legally enforceable contract to arbitrate. The Court went on to hold that although Hallmark referred to its arbitration program as a "contract," the program did not involve mutual promises because: (1) Hallmark unilaterally imposed its arbitration program without obtaining express employee agreements, (2); it only covered employment related claims by an employee and the Employer was free to sue any employee for any reason without having to arbitrate; and (3) the company reserved the right, in its sole discretion, to modify or revoke the provisions of the program, which meant the Employer was not truly bound by its purported "promise" to arbitrate.

Similarly, in *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 438-40 (Mo. Ct. App. 2010), the Court held that an employer's "promise" to be bound by its dispute resolution program was illusory because of the employer's unilateral right to amend the program. Thus, the program did not include mutual promises sufficient to provide legal consideration for its employees' waiver of the right to access the courts. Through its dispute resolution program, the employer did not promise to submit its claims against employees to arbitration, and the employer's promise was nothing more than its promise to participate with employees who submit their disputes to the program.

*Clemmons v. Kansas City Chiefs Football Club, Inc.*, 397 S.W.3d 503 (Mo. Ct. App. 2013) and *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580 (Mo. Ct. App. 2013) both involved former Kansas



City Chiefs employees who had been terminated and filed complaints of age discrimination. In *Sniezek*, the day after the employee was hired as a Community Relations Director, she was directed to sign an agreement requiring that any dispute between the employee and the Chiefs be referred to the NFL Commissioner for binding resolution. *Id.* at 582. In *Clemmons*, the employee (a Controller) was directed to sign the agreement two years after he began work. 397 S.W.3d at 505.

When these individuals filed separate lawsuits in Circuit Court, Jackson County, the Chiefs moved to dismiss and to compel arbitration, claiming that the agreement with the Chiefs constituted a binding arbitration agreement. In each instance, the Circuit Court denied the Chiefs' motion, and the Chiefs appealed, arguing that there were two forms of consideration that supported an agreement to arbitrate: a "mutual promise" to be bound by the Commissioner's decision and a promise of continued employment with the team. In both cases the Court of Appeals held that Missouri law governed whether a valid arbitration agreement existed, and that there was no consideration for the agreement. *Sniezek*, 402 S.W.3d at 586. Regarding "mutual promises" to arbitrate, the Court held that the employees gave promises to be bound by league rules, to have disputes decided by the Commissioner, and to release various parties upon the Commissioner's decision; and that the Chiefs promised nothing. The Court likewise rejected the Chiefs' argument that the employee's continued employment long after the agreement was signed was consideration, observing that the employee could have been fired fifteen minutes after signing the agreement, and that under the Court's prior decisions in *Morrow* and *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730 (Mo. Ct. App. 2011), the fact that the employee continued to work for the team did not constitute consideration. *Id.*

## V. ORAL AGREEMENTS

### A. Promissory Estoppel

#### 1. In General

"The essential elements of a claim of promissory estoppel are: a promise, detrimental reliance on the promise in a way in which the promisor should have or did foresee, and an injustice which can only be avoided by enforcement of the promise." *Clark v. Wash. Univ.*, 906 S.W.2d 789, 792 (Mo. Ct. App. 1995) (citing *Townes v. Jerome L. Howe, Inc.*, 852 S.W.2d 359, 360 (Mo. Ct. App. 1993)). Moreover, "an employee must prove his employer made a promise in a contractual sense and may not use promissory estoppel to recover against a former employer where an employment contract could not be proven." *Clark*, 906 S.W.2d at 792 (citing *Mayer v. King Cola Mid-Am., Inc.*, 660 S.W.2d 746, 749 (Mo. Ct. App. 1983)); see also *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 291 (8th Cir. 1988) (declaring that oral promises "to be performed in the indefinite future" are unenforceable under the Missouri Statute of Frauds).

In *West Cent. Mo. Regional Lodge No. 50 v. Board of Police Comm'rs*, the appellate court considered plaintiffs' claim that they detrimentally relied on defendant board of commissioners' statements in an employee handbook. 939 S.W.2d 565, 569 (Mo. Ct. App. 1997). According to the handbook, officers "will be eligible to receive an annual one-step salary increase." The court held that the statement did not constitute a



definite promise and plaintiffs, therefore, could not state an actionable claim for promissory estoppel. According to the court, the plain language of the provision, coupled with the fact that the handbook explicitly stated that all raises were subject to the approval of the board, clearly indicated that the board did not “promise” the officers a raise. *Id.* at 568-69.

Missouri courts have refused to recognize estoppel in the context of oral employment agreements. “[T]o allow recovery on the theory of promissory estoppel would abrogate the purpose and intent of the legislature in enacting the Statute of Frauds and would nullify its fundamental requirements.” *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639, 644-45 (Mo. Ct. App. 1961); *Venable v. Hickerson, Phelps, Kirtley & Assocs., Inc.*, 903 S.W.2d 659, 664-65 (Mo. Ct. App. 1995); *Faust*, 954 S.W.2d at 393 (Mo. Ct. App. 1997). In *Adams v. One Park Place Investors, LLC*, 315 S.W.3d 742, 748 (Mo. Ct. App. 2010), the Court refused to allow recovery on a theory of promissory estoppel, where the alleged oral contract was not capable of being performed within one year, as required by the Missouri Statute of Frauds. *See* MO. ANN. STAT. § 432.010.

But in *Olson v. Curators of the Univ. of Mo.*, 381 S.W.3d 406, 410-13 (Mo. Ct. App. 2012), the appellate court held that summary judgment for defendant University was improperly granted. The court found triable issues of fact existed where 1) plaintiff and defendant had agreed on the key terms of an employment agreement for plaintiff to be appointed as a department chair, 2) plaintiff had relied on those assurances, and 3) letters between the parties could suffice to satisfy the statute of frauds.

## 2. Detrimental Reliance

Reliance on a promise of at-will employment will not suffice to support a claim of promissory estoppel. In *Rosatone v. GTE Sprint Communications*, 761 S.W.2d 670 (Mo. Ct. App. 1988), where an employer repudiated an offer of employment at-will, the court held the plaintiff failed to allege reliance on a promise of employment for a definite term, and therefore failed to state a cause of action based on promissory estoppel. *See also Nichols v. Am. Nat’l Ins. Co.*, 945 F. Supp. 1242, 1246 (E.D.Mo. 1996).

In *Faust v. Ryder Commercial Leasing*, 954 S.W.2d 383, 386 (Mo. Ct. App. 1997) (later overruled in part on other grounds), a former employee alleged that the employer’s head corporate auditor had orally promised the employee that, in return for the employee’s cooperation with a company audit, employer would rehire employee. The employee argued that the auditor had apparent authority to make this promise of rehire and that he detrimentally relied on the offer. *Id.* at 392. The court, however, stated that the employee’s claim is controlled by *Rosatone*. *Id.* at 393. As in *Rosatone*, the employee did not allege detrimental reliance on a promise of employment for a definite term. *Id.* Thus, the promise in question was a promise of employment at-will and employee could not recover under a theory of detrimental reliance. *Id.*

## B. Fraud

The elements of fraud are:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity, or his ignorance of its truth; (5) the speaker’s intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of the

falsity of the representation; (7) the hearer's reliance on the representation being true; (8) his right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

*Sofka v. Thal*, 662 S.W.2d 502, 506 (Mo. 1983) (citing *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483, 488 (Mo. 1966) (overruled in part on other grounds)).

In *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 291 (8th Cir. 1988), an employee claimed: (1) that in discussing his pension rights before hiring, a Westinghouse employee led Wilson to believe that he would remain with the company until retirement, (2) that Westinghouse falsely told Wilson that he was training a younger replacement for the purpose of making Wilson available for reassignment, and (3) that Westinghouse told Wilson his job was permanent rather than temporary. There was no other evidence presented to show "that any of these communications could have established a sufficiently concrete expectation of guaranteed employment upon which Wilson could have reasonably relied." *Id.* Therefore, the employee's fraud claims were dismissed. *Id.*

In *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1207 (8th Cir. 1985), a news anchor woman brought a claim against her employer for fraud, alleging that the employer falsely represented to her that it intended no cosmetic makeover or substantial changes in her appearance. The court held that the employer was not liable because there was insufficient evidence to show that the employer intended to make substantial changes in her appearance at the time the representation was made. *Id.* at 1219-20. Moreover, the court noted that where a speaker changes his mind and does not comply with his original intentions, the evidence is insufficient to prove fraud. *Id.* at 1219-1220.

The court further stated the "critical element in a fraud case based on a statement of present intent is proof that the speaker at the time of utterance actually did not intend to perform consistently with his words." *Id.* at 1219. See also *White v. Mulvania*, 575 S.W.2d 184, 188 (Mo. 1978) ("state of mind, or intent, is itself an 'existing fact,' the misrepresentation of which can constitute fraud"); *Medicare-Glaser Corp. v. Guardian Photo, Inc.*, 739 F. Supp. 469, 475-76 (E.D.Mo. 1990) ("[f]or a false misrepresentation of an intention to perform to be actionable, the party seeking relief must demonstrate not only that an assurance was not fulfilled, but that at the time the representation was made there was no intention to fulfill the assurance." (citations omitted)), *aff'd* 936 F.2d 1016 (8th Cir. 1991).

### C. Statute of Frauds

An alleged oral employment agreement "to be performed in the indefinite future" is unenforceable under the Missouri Statute of Frauds. *Wilson*, 838 F.2d at 291; *Adams v. One Park Place Investors, LLC*, 315 S.W.3d 742, 748 (Mo. Ct. App. 2010). See MO. ANN. STAT. § 432.010 (one-year Statute of Frauds). However, contracts that are unenforceable due to the Statute of Frauds may nonetheless become enforceable due to subsequent events. *Brown v. Hannibal Anesthesia Serv.*, 972 S.W.2d 646, 648 (Mo. Ct. App. 1998); See, e.g. Restatement (Second) of Contracts Sec. 130, comment d. (1981) (Contract which has been fully performed by one party is enforceable even though other party's performance cannot be completed in a year).

An employment contract for less than one year is not within the statute, and therefore the Statute of Frauds cannot be used as a defense to a dispute over such contract. See *Emerick v. Mutual Ben. Life Ins. Co.*, 756 S.W.2d 513, 526 (Mo. 1988).

An employment at-will contract also does not fall within the Statute of Frauds. *Null v. K & P Precast*, 882 S.W.2d 705, 706 (Mo. Ct. App. 1994). See also *Corder v. O'Neill*, 75 S.W. 764, 774 (Mo. 1903) (Statute of Frauds has no application to a cause of action for fraud). In *Null*, the court found the Statute of Frauds was not a defense to a fraudulent misrepresentation claim brought by an employee where an employer allegedly “affirmatively lied to him about the terms of his employment.” 882 S.W.2d at 708.

## VI. DEFAMATION

To establish a submissible case of defamation, the plaintiff must plead and prove the following elements: (1) publication, (2) of a defamatory statement, (3) that identifies the plaintiff, (4) that is false, (5) that is published with the requisite degree of fault, and (6) damages the plaintiff's reputation. *Topper v. Midwest Division, Inc.*, 306 S.W.3d 117, 127 (Mo. Ct. App. 2010); *Deckard v. O'Reilly Auto., Inc.*, 31 S.W.3d 6, 18 (Mo. Ct. App. 2000) (overruled in part on other grounds *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003)). In a defamation claim where the plaintiff is not a public figure, the requisite degree of fault is negligence. *Topper*, 306 S.W.3d at 127; *Decker*, 31 S.W.3d at 21.

In *Topper*, the Court of Appeals upheld a jury verdict that a hospital neonatal intensive care unit's former director had been defamed by his former employer when it published false information about newborn mortality rates, casting plaintiff and his department in a bad light. But a statement that the plaintiff had “brought all of this [i.e., his termination] upon himself” was an inactionable statement of opinion, which was erroneously submitted to the jury. 306 S.W.3d at 127-28; 132-33.

In *Deckard*, plaintiff alleged that agents of his former employer made defamatory statements that plaintiff was a thief. 31 S.W.3d at 13. Defendant argued that plaintiff's defamation claim fell within the exclusive jurisdiction of the Workers' Compensation Law. The court rejected this argument, because (1) at the time of the alleged injury, plaintiff was no longer an employee of defendant; and (2) injury to reputation is not the type of injury covered by the Workers' Compensation Law. *Id.* at 15.

### A. General Rule

In *Cash v. Empire Gas Corp.*, 547 S.W.2d 830, 832 (Mo. Ct. App. 1976), a former employee alleged he was defamed by a statement made by the corporate treasurer to a prospective employer that plaintiff was terminated because he used an unfair method in winning a contest sponsored by the corporation. The Missouri Court of Appeals stated, “[i]t is an established general rule that a communication respecting the character of an employee or former employee is qualifiedly privileged if made in good faith by a person having a duty in the premises to one who has a definite interest therein . . .” *Id.* at 833. The court further held that “express malice” or knowledge of the falsity of the statement or a reckless disregard of plaintiff's rights without knowing if the statement was true or false, is necessary in order to defeat the qualified privilege. *Id.* at 833-34. The court ultimately held that plaintiff failed to meet his burden of proof because he

neither presented evidence that the defamatory statement was false nor did he prove express malice. *Id.* at 835. See also *Washington v. Thomas*, 778 S.W.2d 792 (Mo. Ct. App. 1989); *Porterfield v. Burger King Corp.*, 540 F.2d 398 (8th Cir. 1976).

Furthermore, the proof that a statement is false or was made with “reckless disregard” for its falsity can also be used to show malice. *Cash*, 547 S.W.2d at 834. However, a single defamatory statement which is false that is made when the speaker believes he had a qualified privilege “may be made without express malice when the communicator acts in good faith and reasonably believes it to be true.” *Id.* “Therefore, the burden to prove falsity really goes to the issue of whether plaintiff has proved that the communication was made with express malice.” *Id.*

In *Cash*, plaintiff did not prove that the statement at issue was false. Moreover, he did not prove that there was any express malice, which was necessary to overcome the qualified privilege. *Id.* at 835.

#### 1. Libel

Libel is defamation made in writing, usually in the form of “printing, broadcast, or electronic communication.” *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 313 (Mo. 1993).

Placing false and defamatory statements into corporate files does not constitute publication or communication as required by the tort of libel. *Washington*, 778 S.W.2d at 796 (citing MO. ANN. STAT. § 288.250).

#### 2. Slander

Slander is spoken defamation. See *Nazeri*, 860 S.W.2d at 313. Slander requires the publication of an alleged defamatory statement to a third person. *Blake v. May Dep’t Stores Co.*, 882 S.W.2d 688, 690 (E.D.Mo 1994). In *Blake*, a worker complained to the manager about wearing the same headset worn by the plaintiff because he felt the plaintiff might have AIDS or be HIV- positive. *Id.* at 689. The manager then brought the issue to human resources, seeking advice on how to handle the conflict. Plaintiff, who neither had AIDS nor had been exposed to the HIV virus filed a defamation action against the employer. The court held that the intra-corporate immunity rule applied, which provides that “communications between officers of the same corporation in the due and regular course of the corporate business, or between different offices of the same corporation, are not publication to third persons.” *Id.* at 690. The plaintiff had failed to show the statements had been “published.”

#### B. References

See discussion of Missouri’s job reference shield law in Section VI.C below.

#### C. Privileges

##### 1. Qualified Privilege

MO. ANN. STAT. § 290.152 is Missouri’s job reference shield law. It applies to an employer’s written response to a written request from the prospective employer of a current or former employee. MO. ANN. STAT. § 290.152.2(1). The written response may disclose the nature and character of service rendered by the

employee, and the duration thereof. The response must truly state the cause, if any, for which the employee was discharged or voluntarily quit. Further, the employer must send the employee a copy of the written response.

[A]n employer shall be *immune from civil liability* for any response made pursuant to this section or for any consequences of such response, *unless* such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false.

MO. ANN. STAT. § 290.152.4 (emphasis added).

If the employer's written response does not state the truthful cause for which the employee was discharged or voluntarily quit, the employer will be liable for compensatory damages, but not for punitive damages. MO. ANN. STAT. § 290.152.5.

Missouri recognizes a qualified privilege in certain situations:

A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.

*Cash v. Empire Gas Corp.*, 547 S.W.2d 830, 833 (Mo. Ct. App. 1976); *Stelzer v. Carmelite Sisters of the Divine Heart of Jesus*, 619 S.W.2d 766, 768 (Mo. Ct. App. 1981).

A privilege also applies to an allegedly defamatory communication made to an *agent* of the prospective employer. *Cash*, 547 S.W.2d at 833 (emphasis added).

Communications between supervisory and non-supervisory personnel regarding an assistant manager who was fired for dishonesty were privileged. *Deckard*, 31 S.W.3d at 17. According to the court, it was reasonable that management would inform employees that the assistant manager no longer worked for the company, would need to instruct them on how to respond to customer questions regarding the assistant manager, and that employees would be interested in the consequences of violating company policy. *Id.* Additionally, the court ruled that a qualified privilege also applied to a communication between a manager and the customer on whose account a fraudulent sale had been charged. The court noted that the business/customer relationship created a common interest justifying a privileged communication. *Id.*

In order to overcome this qualified privilege, a plaintiff must "prove that the defendant published the statement 'with the knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true.'" *Burger v. McGilley Mem'l Chapels, Inc.*, 856 F.2d 1046, 1049 n.4 (quoting MAI 23.06(2)). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that a public official may not recover damages for a "defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'"). Actual malice must

also be proved in order for a plaintiff to recover punitive damages. *Burger*, 856 F.2d at 1049 n. 4, quoting *Williams v. Pulitzer Broad. Co.*, 706 S.W.2d 508, 512 (Mo. Ct. App. 1986).

Statements made or published during the course of a union grievance proceeding only have a qualified privilege, not an absolute privilege. *Wright v. Over-the-Road & City Transfer Drivers, Local Union No. 41*, 945 S.W.2d 481, 487 (Mo. Ct. App. 1997).

## 2. Absolute Privilege - Employment Security Reports

A Missouri statute provides for an absolute privilege for reports provided by the employer to the Missouri Division of Employment Security. *Washington v. Thomas*, 778 S.W.2d 792, 796 (Mo. Ct. App. 1989) (citing MO. ANN. STAT. § 288.250). See also *Tucker v. Delmar Cleaners, Inc.*, 637 S.W.2d 222, 224 (Mo. Ct. App. 1982); *Remington v. Wal-Mart Stores, Inc.*, 817 S.W.2d 571, 575 (Mo. Ct. App. 1991); *Hutchinson v. DaimlerChrysler Corp.*, No. 4:05-CV-2091 CAS, 2007 U.S. Dist. LEXIS 43225 (E.D.Mo. June 14, 2007).

## D. Other Defenses

### 1. Truth

Plaintiff must prove falsity in order to recover for defamation. *Topper v. Midwest Division, Inc.*, 306 S.W.3d 117, 127 (Mo. Ct. App. 2010). Therefore, truth is a defense to defamation.

### 2. No Publication

Communications “between officers of the same corporation in the due and regular course of the corporate business, or between different offices of the same corporation, are not publications to third persons.” *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. 1996) (citing *Hellesen v. Knaus Truck Lines*, 370 S.W.2d 341, 344 (Mo. 1963)); *Topper*, 306 S.W.3d at 129.

Intra-corporate communications do not constitute actionable publication for purposes of libel suits. *Washington*, 778 S.W.2d at 797 (citing *Hellesen*, 370 S.W.2d at 344; *Ellis v. Jewish Hosp. of St. Louis*, 581 S.W.2d 850 (Mo. Ct. App. 1979)); 50 Am. Jur. 2d *Libel & Slander*, § 324 (1995). This holding, excluding intra-corporate communications from the definition of publication for defamation purposes, is referred to as the intra-corporate communications rule. The rule allows employees of corporations to communicate among themselves without fear of a defamation claim. *Lovelace v. Long John Silver’s*, 841 S.W.2d 682, 684-85 (Mo. Ct. App. 1992). Placing documents in corporate files does not constitute publication. *Ellis*, 581 S.W.2d at 851. The rule does not extend to communications between employees of different corporate entities related by contractual obligations. *Washington*, 778 S.W.2d at 798.

### 3. Self-Publication

In *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. banc. 2000), the Supreme Court stated that under Missouri case law, communication of defamatory matter only to the plaintiff who then discloses it to third parties ordinarily does not subject defendant to liability, citing *Herberholt v. dePaul Community Health Center*, 625 S.W.2d 617 (Mo. 1981). However, an exception exists, where “the utterer of the defamatory matter intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person.” *Overcast*, 11 S.W.3d at 70; *Herberholt*, 625

S.W.2d at 624–625. In *Overcast*, there was substantial evidence that the defamatory statement regarding plaintiff being an arsonist would be published to third parties. *Id.* at 70. Thus, the jury verdict in favor of Plaintiff on his defamation claim was upheld. *Id.*

#### 4. Invited Libel

Any publication made with the consent of the plaintiff is absolutely privileged. *Willman v. Dooner*, 770 S.W.2d 275, 280 (Mo. Ct. App. 1989). *See also Kelewae v. Jim Meagher Chevrolet Inc.*, 952 F.2d 1052, 1055 (8th Cir. 1992) (holding that one who invites or instigates the publication of defamatory words cannot complain of damage to his reputation). Moreover, this privilege remains absolute even if the statements made are false and made with actual malice. *Willman*, 770 S.W.2d at 280. *See also Westbrook v. Mack*, 575 S.W.2d 921, 924 (Mo. Ct. App. 1978).

#### 5. Opinion

Expressions of opinion are not actionable for defamation. *Henry v. Halliburton*, 690 S.W.2d 775, 780 (Mo. 1985); *Topper v. Midwest Division, Inc.*, 306 S.W.3d 117, 128 (Mo. Ct. App. 2010).

The test to determine whether a statement is an opinion is “whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.” *Diehl*, 162 S.W.3d at 155; *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 314 (Mo. 1993). “Imaginative expression” and “rhetoric hyperbole” are not actionable as defamation. *Shepard v. Courtoise*, 115 F. Supp. 2d 1142, 1147 (E.D.Mo. 2000). Accordingly, the *Shepard* court determined that statements that the plaintiff was a “useless individual,” and “sarcastic,” “cocky,” and “arrogant” were not actionable as defamation. *Id.* at 1146. However, the statement that the plaintiff abused employees could be actionable as defamation. *Id.* at 1147. Additionally, the statement that a doctor’s surgeries had a 35 percent complication rate during a given time period was not an opinion statement, since it included verifiable facts. *Clinch v. Heartland Health*, 187 S.W.3d 10, 18 (Mo. Ct. App. 2006).

#### E. Job References and Blacklisting Statutes

*See* Section VI.C.1, above, on Missouri’s job reference shield law. There are currently no blacklisting statutes in Missouri. Missouri law includes a “service letter” statute, MO. ANN. STAT. § 290.140:

An employee who has worked for an employer (of seven or more persons) for at least 90 days and whose employment ceases, may request in writing by certified mail to the superintendent, manager, or registered agent of the corporation, with reference to the statute, a service letter, and the supervisor or manager is required within 45 days of receipt of the letter to set forth in a letter to the employee 1) the nature and character of service of the employee, 2) the duration of employment, and 3) the reason for severance of the employment relationship. A corporation which issues a letter but is in violation of the statute may be liable for compensatory, but not punitive damages. If the employer does not issue the letter, it may be liable for nominal and punitive damages, but there is not a cause of action for punitive damages based upon the content of the letter.



However, the Missouri Court of Appeals held that where an employer did not comply completely and accurately with all of the requirements of the statute, it was as if the employer had not issued the service letter at all. “Failure to satisfy any of the requirements of section 290.140.1 constitutes refusal to issue the requested letter.” *J & J Home Builders, Inc. v. Hasty*, 989 S.W. 2d 614, 617 (Mo. Ct. App. 1999). Therefore, the court allowed an award of punitive damages because it determined that the employer had an “evil motive or reckless indifference to the rights of others.” *Id.* See also *Boyd v. Schwan’s Sales Enterprises, Inc.*, 23 S.W.3d 261, 266 (Mo. Ct. App. 2000).

F. Non-Disparagement Clauses

There are no reported cases on enforcement of non-disparagement clauses.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

Missouri recognizes the tort of intentional infliction of emotional distress. *Pretsky v. Sw. Bell Tel. Co.*, 396 S.W.2d 566 (Mo. 1965). There are three elements of the tort of intentional infliction of emotional distress: (1) defendant’s conduct must be extreme and outrageous; (2) defendant must act in an intentional or reckless manner; and (3) by reason of such acts, plaintiff must suffer severe emotional distress for which severe bodily harm results. *Gibson v. Hummel*, 688 S.W.2d 4, 7 (Mo. Ct. App. 1985). Further, the defendant’s conduct must be “intended *only* to cause extreme emotional distress to the victim.” *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. 1997) (emphasis added). See also *Smith v. City of Kan. City*, No. 07-0917-CV-W-ODS, 2009 U.S. Dist. LEXIS 9623, at \*18-19 (W.D. Mo. Feb. 10, 2009). However, “medically documented damages” are not required to establish intentional infliction of emotional distress. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 566 n. 4 (Mo. banc 2006); *Bogan v. GMC*, 500 F.3d 828, 832 (8th Cir. 2007).

“It is for the court to determine ...whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.” *Viehweg v. Vic Tanny Int’l of Mo., Inc.*, 732 S.W.2d 212, 213 (Mo. Ct. App. 1987) (citing *Wilt v. Kansas City Area Transp. Auth.*, 629 S.W.2d 669, 671 (Mo. Ct. App. 1982), and RESTATEMENT (SECOND) OF TORTS § 46 comment h (1965)). “Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities” will not be considered “outrageous.” *Boes v. Deschu*, 768 S.W.2d 205, 207 (Mo. Ct. App. 1989).

In *Hendrix v. Wainwright Indus.*, 755 S.W.2d 411, 412 (Mo. Ct. App. 1988), the employee filed complaints with various governmental agencies against the employer and the employee alleged that as a result, the employer “continuously harassed and threatened [him] with termination.” The court held that plaintiff failed to show that such conduct resulted in severe emotional distress and that the conduct of the employer did not reach the level of extreme and outrageous. *Id.* at 412.

The plaintiff in *Yount v. Davis*, 846 S.W.2d 780, 781 (Mo. Ct. App. 1993), alleged that “as a direct and proximate result of the repeated assault and battery perpetrated upon her by the defendant, [she] suffered severe emotional damage and [would] in the future suffer physically and emotionally and [would] require

medical and psychological treatment.” However, the defendant filed a motion to dismiss alleging that “work related assaults and intentional infliction of emotional distress are clearly covered by the Missouri Workers’ Compensation Law which provides the exclusive remedy.” *Id.* See also *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. 1991). The trial court sustained the defendant’s motion to dismiss and the appellate court affirmed, citing *Killian*, holding that the trial court properly concluded that it lacked subject matter jurisdiction. *Yount*, 846 S.W.2d at 783.

The Eighth Circuit recognized an exception to the Workers’ Compensation exclusivity provision in *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993). Plaintiff asserted Title VII sexual harassment, sex discrimination and mental distress damages claims. *Id.* at 1054. Defendant employer claimed that plaintiff’s mental distress damages claim was preempted by the Workers’ Compensation exclusivity provision. *Id.* at 1060-61. The Eighth Circuit disagreed, reasoning that when an employee alleges that her emotional distress injury resulted from her unemployment following her discharge from employment, her claim is not barred by the Workers’ Compensation exclusivity provision. The court reasoned that the said injury did not arise “out of and in the course of employment.” *Id.* at 1060-61. See also *Owner Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.*, 133 S.W.3d 162, 169 (Mo. Ct. App. 2004) (abrogated in part on other grounds in *Parsons v. Steelman Transp., Inc.*, 335 S.W.3d 6, 16, (Mo. Ct. App. 2011) (holding that “if it is a close question as to whether the case comes within the workers’ compensation law, the decision should be weighted in favor of retention of the common law right of action”).

#### B. Negligent Infliction of Emotional Distress

For negligent infliction of emotional distress, a plaintiff may recover for her own emotional distress by showing: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury is medically diagnosable and severe enough to be medically significant. *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983). Unlike claims for *intentional* infliction of emotional distress, to establish a claim for negligent infliction of mental distress, unaccompanied by physical injury, the plaintiff must establish that the negligent act resulted in a medically diagnosed condition via medical expert witness testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. banc 2006); *State v. Moran*, 297 S.W.3d 100, 104 n.2 (Mo. Ct. App. 2009).

A plaintiff may also bring a cause of action for negligent infliction of emotional distress arising out of injuries incurred upon a third person by showing: (1) the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) plaintiff was present at the scene of an injury-producing, sudden event, and (3) plaintiff was in the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person. *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990).

In *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 465 (Mo. 2001), the Supreme Court of Missouri held that a spouse’s claim for negligent infliction of emotional distress, arising from his wife’s contraction of hepatitis C in the course of her employment at a medical center, failed to satisfy the second element of the tort. Because the husband was not present at the scene of the injury-producing sudden event, which was the hospital where the wife was working when she pricked her finger with a needle, the

husband could not recover. The court declined to address the possible extension of the third element's "zone of danger." *Id.*

Claims for negligent infliction of emotional distress against employers are within the exclusive jurisdiction of the Labor and Industrial Relations Board. *Hill v. John Chezik Imports*, 797 S.W.2d 528, 531 (Mo. Ct. App. 1990).

## VIII. PRIVACY RIGHTS

### A. Generally

The right of privacy is defined in Missouri to be the right to be left alone, the invasion of which gives rise to a cause of action in tort. *Sofka v. Thal*, 662 S.W.2d 502, 509-10 (Mo. 1983); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892, 895 (Mo. 1959). Invasion of privacy is actually a grouping of the following four separate torts: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public. *Sofka*, 662 S.W.2d at 510.

In *State ex rel. Delmar Gardens v. Gaertner*, 239 S.W.3d 608, 609-10 (Mo. banc 2007), a nursing facility brought an action to permanently enjoin a resident's son from entering the premises, after an employee saw him looking around a different resident's room. In discovery, a subpoena was sought for the entire personnel file of the employee who had witnessed the misconduct, and the trial court refused a motion to quash the subpoena. *Id.* at 610. The Supreme Court issued a writ of prohibition, denying the request for production of the entire personnel file as overbroad and improper. *Id.* at 611-12. The Court stated that "Missouri recognizes a right of privacy in personnel records that should not be lightly disregarded or dismissed", and that "[a]ny discovery that is permitted of confidential personnel records must be limited to information that relates to matters put at issue in the pleadings, especially in relation to sensitive personal information." *Id.* (citations omitted); *Cook v. Cracker Barrel Old country Store, Inc.*, No. 4:18-CV-00003-DGK, 2018 U.S. Dist. LEXIS 75128, at \* 4-6 (W.D. Mo. Apr. 30, 2018).

In order for an employee to succeed in bringing an action against an employer based on a public disclosure of private facts, the following four elements must be proven: (1) publication, (2) absent any waiver or privilege, (3) of private matters in which the public has no legitimate concern, and (4) such as to bring shame or humiliation to a person of ordinary sensibilities. *Balke v. Ream*, 33 S.W.3d 589, 594 (Mo. Ct. App. 2000); *Brown v. Mullarkey*, 632 S.W.2d 507, 509 (Mo. Ct. App. 1982). Public disclosure means communication to the public in general or to a large number of people; a few individuals would be insufficient. *Balke*, 33 S.W.3d at 594; *Brown*, 632 S.W.2d at 509.

### B. New Hire Processing

#### 1. Eligibility Verification & Reporting Procedures.

Missouri law provides for a central registry of sex-offenders, and requires providers of child-care services to consult that registry, as part of the hiring process, to determine if an applicant or volunteer has

committed child abuse or neglect. MO. ANN. STAT. § 210.150; 19 CSR 30- 62.102(1)(K); *Jamison v. Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 406 (Mo. banc 2007).

## 2. Background Checks

There is no law in Missouri that prevents private employers from asking candidates about criminal history, considering their arrest records, or having candidates submit to background checks. The Missouri Commission on Human Rights has issued guidance, however, encouraging employers to ignore arrest records unless they have a substantial relation to the job at hand. Further, the Commission urges employers to consider only convictions that relate to the job at hand.

An employer's use of a third party in the background checking process implicates the Fair Credit Reporting Act ("FCRA").

Some municipalities, including Kansas City, St. Louis, and Columbia, bar all employers, public and private, from inquiring about criminal history on job applications or in interviews, until after the individual is otherwise determined to be qualified for the position. Other municipalities, including Jackson County, only bar public employers from such inquiries.

In *Reed v. Kelly*, 37 S.W.3d 274, 276 (Mo. Ct. App. 2000), the Court of Appeals upheld summary judgment for defendant on a negligent hiring claim where plaintiff claimed that the employer had failed to perform a sufficient background check on a security guard who behaved inappropriately toward a female employee who worked in the building. The Court ruled that plaintiff misconstrued the ruling of the trial court, which was not simply grounded in the conclusion that a limited background check by the employer was reasonable; rather, the trial court based its judgment on an assumption that employer knew or should have known of the two incidents which plaintiff argues employer would have discovered had it conducted the pre-employment investigation and background check in the manner in which plaintiff argues it should have. *Id.*

## C. Other Specific Issues

### 1. Workplace Searches

#### a. E-mail and Internet communications.

In *Ernst v. Sumner Group, Inc.*, 264 S.W.3d 669, 672 (Mo. Ct. App. 2008), the Court of Appeals held that a former employee had been terminated for misconduct, and therefore properly denied unemployment benefits, where he had used the company computer system to circulate sexually explicit photos. Company policy manuals clearly stated that such conduct was unauthorized and that company computers and e-mails "may be monitored 24 hours a day, 7 days a week to ensure appropriate business use. *The employee has no expectation of privacy at any time when using Company property.*" *Id.* at 670 (Emphasis in original).

The Missouri Supreme Court has not yet specifically addressed the issue of employee privacy rights in e-mail and internet communications. In *State v. Faruqi*, 344 S.W.3d 193, 204-05 (Mo. banc 2011), a criminal defendant who consented to the search of his work computer was held to have maintained no personal expectation of privacy in the computer, and was therefore barred from challenging evidence discovered on

the computer. The Supreme Court stated that because Faruqi had consented to the search, the Court did not need to reach “whether any expectation of privacy with respect to [his] work computer would be deemed objectively reasonable,” under the U.S. Supreme Court’s decision in *City of Ontario v. Quon*, 560 U.S. 746 (2010).

The Eight Circuit has held that public employees have no legitimate expectation of privacy with respect to the use of their computers where the employer’s computer use policy provides that employees have no such privacy rights and the employee is fully aware of the policy. *U.S. v. Thorn*, 375 F.3d 679, 683 (8th Cir. 2004) (overruled in part on other grounds in *U.S. v. Booker*, 543 U.S. 220 (2005)). In *Thorn*, a computer technician found pornographic material on an employee’s computer while investigating reports of workplace misconduct. *Id.* at 681. This discovery led to the termination of the employee and further investigation of the contents of the employee’s computer files. *Id.* at 182. Eventually, the investigation uncovered child pornography and law enforcement officials were contacted. The employee sought to suppress the evidence discovered by the employer at his criminal trial. *Id.* at 683. The court noted that “[a] workplace search by a government employer implicates an employee’s Fourth Amendment rights only if the employer’s conduct infringes upon the employee’s reasonable expectation of privacy.” *Id.*, citing *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987). The court concluded that the employee had no legitimate expectation of privacy with respect to his computer, citing the employer’s computer use policy, which provided that employees had no personal right of privacy with regard to the agency’s computers, and the employee’s written acknowledgement of this policy. *Thorn*, 375 F.3d at 683.

Recently a Missouri federal court concluded that a plaintiff could bring a claim for trespass to chattel against his employer for interfering with his private email. *Porters Bldg. Ctrs., Inc. v. Sprint Lumber*, No. 16-06055-CV-SJ-ODS, 2017 U.S. Dist. LEXIS 162139, \*32 (W.D. Mo. Oct. 2, 2017). In *Porter*, an employer accessed the personal email account of his employee and read some of the emails, even printing a few. *Id.* at \*24. The court held that because the email communication was connected to a tangible object, a server, the employee could maintain an action against his employer who “intermeddled” with his possessory interest in his private email account. *Id.* at 32-33.

b. Drug and alcohol testing.

There is no statute in Missouri prohibiting or regulating drug testing by private employers. See *Embree v. Norfolk & W. Ry. Co.*, 907 S.W.2d 319, 324 (Mo. Ct. App. 1995). In *Embree*, the court allowed into evidence a positive drug test because the results of the test were relevant and highly probative of the employee’s motivation to fabricate injury to avoid dismissal due to a positive test result. *Id.*

An at-will employee can be discharged for violation of a drug testing policy put into effect after the employee commenced employment. *Rothweil v. Wetterau, Inc.*, 820 S.W.2d 557, 559 (Mo. Ct. App. 1991). Further, when an employee voluntarily terminates his employment rather than submit to a drug and/or alcohol test, he does so without “good cause” attributable to his work or to his employer, and thus is disqualified from unemployment benefits. *Winco Mfg., Inc. v. Capone*, 133 S.W.3d 555 (Mo. Ct. App. 2004).

Employees terminated as a result of a positive drug test may have a negligence cause of action against the company performing the testing where the test produces a false positive. See *Meekins v. St.*

*John's Reg. Health Ctr.*, 149 S.W.3d 525 (Mo. Ct. App. 2004). In *Meekins*, an employee filed a negligence claim against a hospital whose tests resulted in a false positive within the statute of limitations period for general negligence claims, but after the statute of limitations for medical malpractice claims. *Id.* at 530. The court held that such drug tests were not healthcare services because no physician/relationship was present. Therefore, while no medical malpractice claim existed, a general negligence claim may have. *Id.* at 533.

Where dismissal of a public employee based on positive drug testing does not conform to the requirements of public regulations, the employee is entitled to reinstatement. *See Morgan v. City of St. Louis.*, 154 S.W.3d 6 (Mo. Ct. App. 2004) (employee terminated as a result of a positive drug test was reinstated because the results of a confirmatory drug test to which employee was entitled did not conform to the requirements of the City's regulations).

Missouri law also calls for reduction or denial of worker's compensation benefits, if an employee's injury was sustained as a result of his use of alcohol or non-prescription drugs, in violation of the employer's drug-free workplace or alcohol policies. MO. ANN. STAT. § 287.120.6.

## 2. Electronic Monitoring

The Missouri Wiretap Act provides that a wire communication can be intercepted by a party to the communication or where one of the parties to the communication has given his or her prior consent to the interception. *See* MO. ANN. STAT. § 542.400 *et seq.* The Act was modeled after the federal scheme, specifically, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Electronic Communications Privacy Act of 1986 (18 U.S.C. § 2510 *et seq.*). *See State v. King*, 873 S.W.2d 905, 908 (Mo. Ct. App. 1994). Thus, in Missouri, a party to a conversation may record the conversation without the consent of the other party.

## 3. Social Media

In *Edmonds Dental Co. v. Keener*, 403 S.W.3d 87, 89-90 (Mo. Ct. App. 2013), the Court reviewed the unemployment agency's determination that an employee who allegedly violated his employer's social media policy was not discharged for work-related misconduct and was thus entitled to benefits. The employee was discharged for using company computers to make Facebook posts, perform job searches, and conduct other personal business. *Id.* While the Court of Appeals tacitly acknowledged that these types of conduct could amount to work-related misconduct and a denial of benefits, the Court remanded the case to the agency because it was unclear from the record below whether the social media policy in question applied to the company that employed the claimant, or only applied to a sister company having the same owner. *Id.* at 90-91.

## 4. Taping of Employees

In *Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992), the Eighth Circuit, applying Arkansas law, held that an employee's consent to a tape recording of an intercepted telephone call may not be implied, so as to exempt the employer from liability for violating the wire and electronic communications interception provisions of the federal Omnibus Crime Control and Safe Streets Act, merely because the employer warned the employee that calls might be monitored to cut down on the personal use of the

telephone, or because an extension telephone was located in the owners' residence. However, the employer in *Deal* was not liable for punitive damages. The Eighth Circuit stated that where the employer had a legitimate reason for the recording (the investigation of an in-store theft), the employee had been warned of the possibility of such recordings, the employer had inquired into the legality of such recordings, and the recordings had only been played to the employee in order to let her know why she was being fired, such a recording cannot be described as either wanton or reckless and therefore no punitive damages may be awarded. *Id.* at 1159.

*See also* discussion on "Electronic Monitoring" above.

#### 5. Release of Personal Information on Employees

Under Missouri's Open Meetings and Records Law, also called the Sunshine Law, individually identifiable personnel records, performance ratings, and records pertaining to employees or applicants for employment are not open to the public. MO. ANN. STAT § 610.021(13). The names, positions, salaries, and lengths of service of officers and employees of public agencies, however, are open and subject to the Sunshine Law. *Id.*

As discussed above, under MO. ANN. STAT § 290.152, employers are immune from civil liability for truthfully responding to a written request from a former employee or prospective new employer by providing the following information: (1) A disclosure of the nature and character of service rendered by the current or former employee to the disclosing employer and the duration thereof; and (2) A truthful statement of the cause, if any, of discharge or cessation of employment.

Employers in Missouri are not to display, communicate, or make available to the general public an employee's social security number. MO. ANN. STAT § 407.1355. However, Social Security numbers can still be utilized for internal verification, administrative purposes, or consistently with federal or state requirements. *Id.*

*See* Section VIII.A, above, for discussion of *State ex rel. Delmar Gardens v. Gaertner*, 239 S.W.3d 608 (Mo. banc 2007) ("Permitting discovery of a witness' entire personnel file solely for a collateral matter such as impeachment would eviscerate the right of privacy that employees enjoy as to those records.").

#### 6. Medical Information

Missouri statutes specifically prohibit disclosure by any person or private or public entity of an individual's HIV infection status. MO. ANN. STAT § 191.656. There are exceptions however, such as if it is disclosed to government employees who need the information to do their jobs, day care centers, nursing homes, and similar entities. *Id.* Another exception applies when the information is released to the subject, a spouse, the parent of a minor, the department of health, or to anyone the subject so authorizes, as long as it is not disclosed in bad faith or with conscious disregard. *Id.* Any unauthorized disclosure may result in a civil action. *Id.*



Missouri also considers Acquired Immune Deficiency Syndrome (AIDS) a disability for the purposes of the Missouri Human Rights Act. *See* MO. ANN. STAT. §§ 191.650 *et seq.* and 213.055. Therefore, an employer cannot discriminate against an employee based on his having AIDS. However, the protections will not apply if there is a “direct threat” to the safety of others, or the disease prevents the employee from performing the job. *Id. See Rose City Oil Co. v. Mo. Comm’n on Human Rights*, 832 S.W.2d 314, 317 (Mo. Ct. App. 1992).

#### 7. Restrictions on Requesting Salary History

Although the state of Missouri does not have a salary history ban, Kansas City, Missouri has passed legislation stating, “the City shall not inquire about an applicant’s salary history until after an individual otherwise qualified for the position has been hired at an agreed upon agency.” Kansas City, MO, Resolution No. 180519 (July 26, 2018).

#### 8. Other Privacy Issues

##### a. Social Security numbers.

*See* Section VIII.C.5, above.

##### b. Workers’ compensation law.

The courts have held that an employee’s violation of privacy claim arising out of and in the course of employment is covered under the workers’ compensation law. *See Massey v. Victor L. Phillips Co.*, 827 F. Supp. 597, 598-99 (W.D.Mo. 1993). This case involved a claim of invasion of privacy due to the defendant’s employees’ use of a “peephole” to spy on plaintiff during her use of the bathroom. *Id.* at 598. The court determined that “Missouri courts appear undaunted by the fact that the injury in question is the result of obviously intentional acts, and they make no distinction between acts resulting in physical injuries and those which result in emotional injuries.” *Id.* at 599. The court therefore held that where a plaintiff claims injuries which began during the time of employment, the exclusivity of the Labor and Industrial Relation Commission’s jurisdiction should be recognized, and the common law tort claim should be dismissed. *Id.*

## IX. WORKPLACE SAFETY

### A. Negligent Hiring

Missouri courts recognize a cause of action against an employer for negligent hiring. *State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 825 (Mo. banc 1995); *Gaines v. Monsanto Co.*, 655 S.W.2d 568, 570-71 (Mo. Ct. App. 1983).

To establish a claim for negligent hiring, a plaintiff must show that: (1) the employer knew or should have known of the employee’s dangerous proclivities; and (2) the employer’s negligence was the proximate cause of the plaintiff’s injuries. *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997); *Dibrill v. Normandy Assocs.*, 383 S.W.3d 77, 87 (Mo. Ct. App. 2012); *Gaines*, 655 S.W.2d at 570.

In *Gaines*, the plaintiffs sued the defendant for the wrongful death of their daughter under a theory of negligent hiring. 655 S.W.2d at 569. Their daughter had been murdered, in her apartment, by a security

guard employed by the defendant. *Id.* The court upheld the complaint on a motion to dismiss finding that allegations that the defendant knew of its employee's prior convictions for rape and assault, placed the employee in a position requiring circulation among female co-workers, and had knowledge of the employee's advances towards female employees were sufficient to state a claim upon which relief may be granted. *Id.* at 572.

However, an action for negligent hiring will not stand where the employee's dangerous proclivities are not consistent with the employee's misconduct. *Reed*, 37 S.W.3d at 276-78. In *Reed*, a visitor of the employer's building brought claims of negligent hiring and supervision after she was sexually assaulted by a security guard. *Id.* at 276. Prior to his employment with the defendant, the security guard had been arrested and charged for assault because he had slapped his wife. *Id.* Additionally, the security guard had been discharged from a previous employer for physically fighting with another co-worker. Plaintiff argued that these two incidents proved causation on her negligent hiring claim because the defendant presented evidence that the security guard would not have been hired had the defendant known about these incidents. The court explained that the issue of causation was whether these incidents created a risk that the security guard would sexually assault Plaintiff. *Id.* at 278. Here, the security guard's history of engaging in violent behaviors towards people he knew was not consistent with his actions of sexually assaulting a complete stranger. Therefore, the defendant was not liable for negligent hiring. *Id.*

In *Dibrill v. Normandy Assocs.*, 383 S.W.3d 77, 87 (Mo. Ct. App. 2012), in support of her claim for negligent hiring, Plaintiff alleged that: State law (MO. ANN. STAT. § 198.079) required Defendants to perform pre- and post-employment background checks of a nursing home housekeeper, who was accused of raping a nursing home resident; that the housekeeper had a criminal background of intentional violent assault against persons; Defendants knew or should have known that the housekeeper had dangerous proclivities of violent felonious assault against persons; Defendants knew or should have known that the housekeeper's violent proclivities would result in this violence against nursing home residents; and that the negligent hiring of the housekeeper proximately caused Plaintiff's injuries. The Court concluded that Plaintiff had plead sufficient facts to survive a motion to dismiss, and reversed the trial court's dismissal of the negligent hiring claim. *Id.* at 89.

There is no strict requirement that the employee's misconduct must occur within the scope of employment to hold an employer liable for negligent hiring. *McHaffie*, 891 S.W.2d at 825; *Hare v. Cole*, 25 S.W.3d 617, 621 (Mo. Ct. App. 2000). However, the employer must have some involvement in bringing about the employee's interaction with the injured party. *Hare*, 25 S.W.3d at 621. In some cases, the only way to establish a sufficient causal relationship is to require that the conduct occur within the course and scope of employment. For example, in *Hare*, plaintiffs sued an employer for injuries they sustained from a car accident involving one of the employer's pizza delivery employees. *Id.* at 618. Defendant argued that the employee was on his way to work and therefore, was not acting within the scope and course of his employment. *Id.* at 620. The court decided that a greater causal connection than the fact that an employee is on his way to work is required; therefore, under the facts of this case, the employee must be working in the course and scope of employment to hold the employer liable. *Id.*

B. Negligent Supervision/Retention

Generally, Missouri courts assess a negligent supervision claim under traditional common law rules. *Smith v. Goodyear Tire & Rubber Co.*, 856 F. Supp. 1347, 1352 (W.D.Mo. 1994). A cause of action for negligent supervision exists where there is a duty to protect the injured party from injury, a failure to perform such a duty, and an injury caused by this breach of duty.

Additionally, an employer has a duty to control its employees acting outside of the scope of employment under certain conditions. Specifically:

A master is under the duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if:

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is suing a chattel of the master, *and*

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317 (1965), *cited with favor in Dibrill v. Normandy Assocs.*, 383 S.W.3d 77, 87 (Mo. Ct. App. 2012); and *Reed*, 37 S.W.3d at 278. *See also Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997); *Conroy v. City of Ballwin*, 723 S.W.2d 476, 479 (Mo. Ct. App. 1986).

In *Conroy*, a police officer, who was practicing target shooting with a gun he purchased solely for his personal use, accidentally shot a squirrel hunter. 723 S.W.2d at 477. The hunter sued the police officer's employer under a theory of negligent supervision. *Id.* at 478. The court found that the employer was not liable because the officer had purchased the gun himself and for his personal use and was therefore not using the property of his employer. The court also noted that there was no evidence that the employer had reason to know of an unreasonable risk of harm created by the police officer. *Id.*

C. Interplay with Worker's Compensation Bar

MO. ANN. STAT § 287.120.4 of the Workers' Compensation Law is "rationally designed to further the government's legitimate interest in promoting workplace safety." *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 635 (W.D.Mo. 2011). Cases have recognized that the purpose of §287.120.4 is "to encourage employers to comply with the laws governing safety," by imposing a financial penalty where an employer's noncompliance

causes a compensable injury. *Id.* (citing *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 244 (Mo. Ct. App. 2003) (emphasis added)).

D. Firearms in the Workplace

MO. ANN. STAT. § 571.107 provides that Missouri residents may apply for a concealed weapon endorsement enabling them to carry a concealed weapon. However, the carrying of concealed weapons is prohibited in certain public places, such as schools, police stations, courthouses, airports, child care facilities and places of worship. The law expressly permits other public and private property owners to post a notice that concealed weapons are not permitted on the premises, and any private employer that wants to lawfully prohibit weapons from entering the workplace must follow this procedure. (The statute includes specific requirements for the size and location of this notice.) Possession of a firearm in a vehicle on the employer's premises is not prohibited by law so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the employer's premises.

In *Lavender v. Illinois Central Railroad Co.*, 219 S.W.2d 353 (Mo. 1949), a Federal Employer's Liability Act case, cited with approval in *Cluck v. Union Pac. R.R. Co.*, 367 S.W.3d 25, 29 (Mo. banc 2012), a railroad dining car employee negligently discharged a firearm, killing another dining car employee. 219 S.W.2d at 355. The estate of the decedent brought an action against the employer-railroad under FELA. *Id.* at 354. In analyzing the decedent's claim, the Supreme Court reasoned that, under FELA, for an employer to be liable to an employee for a co-employee's conduct, it is not enough that the injury occur during the hours of both employees' employment. *Id.* at 357. Rather, the co-employee's actions must have been within the scope of the employment, in furtherance of the employer's business. As Lavender stated the issue:

If the shooting was not in the course of the discharge of [the injury-causing employees'] duties and had no tendency to further the work of defendant's business the case is much simplified. Under the Federal Act and the Missouri law, unless the shooting can be said to be within the scope of the employment and in furtherance of the railroad's business, the railroad is not liable.

*Id.* at 357. In *Lavender*, the gun was not carried for any purpose of the railroad and it discharged while the employees were playing around with it. *Id.* at 358. The Court explained that the acts causing the negligent discharge of the gun, therefore, were outside the course and scope of the co-employee's employment because they were not done in furtherance of the employer's business; so, the railroad was not liable for the acts under FELA. *Id.* at 358-59.

E. Use of Mobile Devices

There are no reported cases on this subject.

## X. TORT LIABILITY

### A. Respondeat Superior Liability

Under the doctrine of respondeat superior, “a master is liable for the torts of his servant which are committed within the scope of employment.” *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506, 511 (Mo. 1986).

In *Cluck v. Union Pac. R.R. Co.*, 367 S.W.3d 25, 29 (Mo. banc 2012), the Supreme Court explained that traditional respondeat superior principles require that the injury-causing conduct of an employee be within the course and scope of employment before the employer can be held vicariously liable, *citing Stanley v. City of Independence*, 995 S.W.2d 485, 487 (Mo. banc 1999). The course and scope of employment is not simply a measure of whether the injury-causing conduct of the employee occurred during work hours or work duties. *Cluck*, 367 S.W.3d at 25. Rather, it is a test of whether the conduct of that employee was performed in furtherance of the employer's business. *Id.* “Whether an act was committed within the scope and course of employment is not measured by the time or motive of the conduct, but whether it was done by virtue of the employment and in furtherance of the business or interest of the employer.” *Id.* (*quoting Daugherty v. Allee's Sports Bar & Grill*, 260 S.W.3d 869, 873 (Mo. Ct. App. 2008) (emphasis removed)); *see also Southers v. City of Farmington*, 263 S.W.3d 603, 619 n.22 (Mo. banc. 2008); *Ewing-Cage v. Quality Prods., Inc.*, 18 S.W.3d 147, 150 (Mo. Ct. App. 2000).

Once an employer has admitted respondeat superior liability for an employee's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability, such as negligent hiring or retention. *McHaffie*, 891 S.W.2d at 826.

### B. Tortious Interference with Business/Contractual Relations

To prove a claim for tortious interference with a contract or business expectancy, the plaintiff must demonstrate: (1) a contract or a valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages resulting from defendant's conduct. *Cent. Trust & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 324 (Mo. 2014) (*citing Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 19 (Mo. banc 2012)). *See also Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 317 (Mo. 1993); *Topper v. Midwest Division, Inc.*, 306 S.W.3d 117, 125 (Mo. Ct. App. 2010); *Chandler v. Allen*, 108 S.W.3d 756, 760 (Mo. Ct. App. 2003). A breach of the underlying contract is not necessary for a tortious interference claim to lie. *Clinch v. Heartland Health*, 187 S.W.3d 10, 15 (Mo. App. Ct. 2006); *Topper*, 306 S.W.3d at 125.

In *Western Blue Print*, Myrna Roberts worked as a manager for Western Blue, a document printing and management service company. 367 S.W.3d at 12. In that capacity, she oversaw a major contract with the University of Missouri. *Id.* Her husband, Mel Roberts, operated Graystone Properties, a real estate investment company that took a 49% ownership interest in a newly formed reprographic services company called DocuCopy. *Id.* The 51% owner was a female Graystone employee with no prior experience in reprographics. Western Blue's contract with the University required that it retain a certified women- or

minority-owned business as a subcontractor. DocuCopy sought and obtained certification as a women's business enterprise (WBE). Acting on Western Blue's behalf, Myrna hired DocuCopy as a subcontractor for the university contract. Neither Myrna nor Mel disclosed their interest in DocuCopy to Western Blue. *Id.* at 13. After Western Blue was purchased, Myrna and a large number of staff left their employment with Western Blue and began working for DocuCopy. Thereafter, the university awarded DocuCopy rather than Western Blue the renewal of its contract. As a result of losing the university contract, Western Blue lost another contract and was forced to close a branch office.

Western Blue filed a petition against Myrna, Mel, DocuCopy, and Graystone Properties (Appellants), alleging breach of fiduciary duties, tortious interference with a valid business expectancy, computer tampering, and civil conspiracy. *Id.* at 11. The circuit court entered judgment in favor of Western Blue on all counts and awarded attorney's fees. The Supreme Court reversed the circuit court's finding that Myrna owed Western Blue a fiduciary duty and affirmed the trial court judgment in all other respects. *Id.* at 24.

On the tortious interference claim, Appellants argued Western Blue had no valid business expectancy in the renewal of the university contract because the university contract was "up for grabs" in that it was a public competitive bid process. *Id.* at 19. The Supreme Court responded that a business expectancy need not be based on an existing contract. *Id.* (citing *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 190 (Mo. Ct. App. 2007)). "A probable future business relationship that gives rise to a reasonable expectancy of financial benefit is enough." *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 251 (Mo. banc 2006). Moreover, Missouri courts have recognized that a regular course of prior dealings suggests a valid business expectancy. *Sloan v. Bankers Life & Cas. Co.*, 1 S.W.3d 555, 565 (Mo. Ct. App. 1999). The court held Western Blue presented sufficient evidence to demonstrate it had a reasonable, valid business expectancy that it would win the university contract bid before Myrna left and went to work for DocuCopy. 367 S.W.3d at 19.

The Court in *Western Blue Print* also rejected appellants' claim that Western Blue hadn't shown that Myrna lacked justification for submitting a competing bid for the University's business, after she left Western Blue:

Absence of justification refers to the absence of a legal right to justify actions taken. A defendant cannot be held liable for interfering with a business relationship if he or she has an unqualified right to perform the act. If the defendant has a legitimate interest, economic or otherwise, in the expectancy the plaintiff seeks to protect, then the plaintiff must show that the defendant employed improper means in seeking to further only his or her own interests. Improper means are those that are independently wrongful, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade, or any other wrongful act recognized by statute or the common law.

367 S.W.3d at 19-20 (internal citations and quotations omitted).

## XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

### A. General Rule

Missouri courts will typically enforce non-compete agreements so long as they are reasonable. *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610 (Mo. 2006). A non-compete agreement is reasonable if it is “no more restrictive than is necessary to protect the legitimate interests of the employer.” *Id.* (citing *American Pamcor, Inc. v. Klote*, 438 S.W.2d 287, 290 (Mo. Ct. App. 1969)). It must serve the “proper interest of the employer in promoting the good will of a business, and must be reasonably limited in time and space.” *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 72 (Mo. 1985).

Among the factors evaluated when considering reasonableness of a non-compete are: (1) the subject matter at issue; (2) the purpose served; (3) the situation of the parties; (4) the nature of the business restraint; (5) the specialization of the business, and; (6) the extent of the restraint with reference to time and space. *Herrington v. Hall*, 624 S.W.2d 148, 151 (Mo. Ct. App. 1981) (citing *House of Tools & Eng’g, Inc. v. Price*, 504 S.W.2d 157, 159 (Mo. Ct. App. 1973)). See also *A.B.Chance Co. v. Schmidt*, 719 S.W.2d 854, 857 (Mo. Ct. App. 1986). See generally W. Corrigan & M. Kass, *Non-Compete Agreements & Unfair Competition – An Updated Overview*, 62 J. MO. Bar 81-90 (2006).

In addition to being reasonable, non-competition agreements must protect either trade secrets or customer contacts. Non-competition agreements “are not enforceable to protect an employer from mere competition from a former employee, but only to the extent that the restrictions protect the employer’s trade secrets or customer contacts.” *Copeland*, 198 S.W.3d at 610.

More recently, in *Whelan Security Co. v. Kennebrew*, 379 S.W.3d 835 (Mo. banc 2012), the Supreme Court reviewed in detail a non-compete agreement (actually, two separate agreements with the same company), in which the Court applied the principles set forth in *Copeland*. Whelan Security provided security guard services nationwide, with 38 branches in 23 states. *Id.* at 839. Whelan hired W. Landon Morgan as a branch manager for its Nashville, Tennessee office, under an employment agreement. *Id.* Morgan was responsible for operations, sales, and marketing, which required him to meet with clients and gave him access to client records and employee files. Whelan hired Charles Kennebrew as the director of quality assurance for Whelan's Dallas office, also under an employment agreement. Kennebrew's duties included managing the operations, clients, and customers of the office, which gave him access to employee and financial records of the company. He was in contact with Whelan's customers in various parts of Texas. Both employment contracts contained non-competition and employee non-solicitation clauses. Kennebrew's employment agreement prohibited him from:

- (1) For a period of two years, soliciting Whelan customers, or prospective customers whose business was being sought during the last 12 months of Kennebrew’s employment.
- (2) Soliciting any Whelan employees.
- (3) Working for a Whelan competitor within 50 miles of his Whelan worklocation(s).
- (4) Working for a Whelan customer or prospective customer whose business was being sought during the last 12 months of Kennebrew’s employment.



*Id.* at 839-40. Morgan's agreement had the same restrictions, except that his employee non-solicitation clause contained a one-year prohibition, rather than two. *Id.* at 840.

After Kennebrew and Morgan left the company and took other jobs, Whelan sued to enforce the restrictions in their non-compete agreements. The trial court ruled in favor of Kennebrew and Morgan, granting them summary judgment on the grounds that the non-competition and non-solicitation clauses were overbroad and unenforceable.

The Supreme Court reversed, holding: (1) the "existing customer" non-solicitation clauses were overbroad, in that they prohibited contact with any customer of Whelan, anywhere in the nation, regardless of whether the employee knew it was Whelan's customer or previously dealt with that customer. Both Kennebrew and Morgan served customers in geographically areas. However, courts in Missouri have the authority to limit an overly restrictive non-compete clause by refusing to give effect to its unreasonable terms or to modify the terms of the contract to be reasonable. *Id.* at 844. In this case, the existing customer non-solicitation clause was modified so that Kennebrew and Morgan were only prohibited from soliciting customers they had dealt with during their employment with Whelan.

(2) The "prospective customer" non-solicitation clauses were overbroad, because this could include any business in the country that could potentially benefit from increased security services, and would encompass solicitation of prospective customers, no matter how tenuous the relationship between Whelan and the prospect, or how detached Kennebrew and Morgan were from Whelan's solicitation. This clause was held unenforceable.

(3) The clause prohibiting Morgan from soliciting Whelan's employees was held enforceable. In Morgan's case, there was a one-year restriction, and R.S.Mo. 431.202 is a "safe harbor" provision which says that an employee non-solicitation covenant of up to one year is presumed reasonable when its purpose is to protect confidential or trade secret business information, relationships with customers or suppliers, goodwill, or company loyalty. In Kennebrew's case, the restriction was two years, and the court held that there were triable issues of fact as to whether the longer restriction was reasonable under the circumstances; thus, it vacated the trial court's grant of summary judgment on this point, and remanded for further proceedings.

A non-competition covenant will not be enforced if the new and old employer are not truly in competition with each other. In *Victoria's Secret Stores, Inc. v. May Dep't Stores Co.*, 157 S.W.3d 256 (Mo. Ct. App. 2004), the Court found that although both May and Victoria's Secret sold intimate apparel, they sold to different groups of customers. Therefore, the Court declined to enforce May's non-compete covenant against an employee who moved to Victoria's Secret. *Id.* at 262.

Non-competition covenants can apply to independent contractors, as well as employees. *Renal Treatment Centers - Missouri, Inc. v. Braxton*, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997).

While customer contacts can properly be the subject of a non-compete covenant, in order to justify enforcement of a non-compete agreement under a "customer contacts" theory, an employer must show that the employee had contacts of the kind enabling him to influence customers; in other words, the opportunity for influencing customers must exist. *Brown v. Rollet Bros. Trucking Co., Inc.*, 291 S.W.3d 766, 774 (Mo. Ct. App. 2009). In *Brown*, the court held although trucking dispatchers had daily contact with the former employer's customers, a customer's decision to ship with a particular broker was based

wholly on rates, and not at all on the identity of the dispatcher. The dispatcher did not have discretion to approve customer offers, or have personal relationships with the customers. Thus, the court refused to uphold the restrictive covenant when the dispatcher went to work for a competitor.

If an employer has good cause for an employee's dismissal, then the employer is entitled to an injunction to enforce a non-compete agreement. However, if the employer discharges the employee without cause, a court of equity may, in exercise of its discretion, refuse to aid the employer in enforcing the non-compete agreement by injunction. *Prop. Tax Representatives, Inc. v. Chatam*, 891 S.W.2d 153, 156 (Mo. Ct. App. 1995).

Additionally, a court may refuse to enforce a non-competition agreement against an employee where it finds that the employer violated the agreement first. In *Supermarket Merch. & Supply, Inc. v. Marschuetz*, 196 S.W.3d 581, 585 (Mo. Ct. App. 2006), the court held that when an employer first breaches an employment agreement before the employee allegedly violates the non-competition agreement, the employer is barred from enforcing the restrictive covenants against the employee.

#### B. Blue Penciling

While eschewing use of the phrase “blue pencil doctrine” to describe judicial modifications to a restrictive covenant, Missouri courts have recognized that “when the provisions of a non-compete clause impose a restraint that is unreasonably broad, appellate courts still can give effect to its purpose by refusing to give effect to the unreasonable terms or modifying the terms of the contract to be reasonable.” *Whelan*, 379 S.W.3d at 844. Thus, a court can reduce an unreasonable time restriction and geographical scope to the extent that such modifications are no more restrictive than necessary to protect the employer from unfair competition by the employee. *Mid-States Paint & Chem. Co. v. Herr*, 746 S.W. 2d 613, 616 (Mo. Ct. App. 1988). *See also Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 304 (Mo. Ct. App. 1980) (reducing a geographic restriction from 200 miles to 125 miles); *Paradise v. Midwest Asphalt Coatings*, 316 S.W.3d 327, 328-29 (Mo. Ct. App. 2010) (reducing duration of restriction); *Sigma Chem. Co. v. Harris*, 794 F.2d 371 (8th Cir. 1986) (geographic restriction specified by the court, and duration shortened).

#### C. Confidentiality Agreements

Restraints placed in non-disclosure agreements must be limited to a time period that is no longer than the time required for a new employer to produce the protected information in the absence of the employee subjected to the restraint. *A.B. Chance Co. v. Schmidt*, 719 S.W.2d 854, 859 (Mo. Ct. App. 1986). *See also Sigma Chem. Co. v. Harris*, 794 F.2d 371, 375 (8th Cir. 1986). In *Sigma Chem.*, an employee signed a non-disclosure agreement prohibiting him from disclosing his employer's trade secrets. *Id.* at 372. The district court found the restrictive covenant was reasonable and enjoined the employee from disclosing or using trade secrets. On appeal, the employee argued that the non-disclosure agreement was invalid because it was unlimited as to time. The Eighth Circuit noted that under Missouri law, “in cases where the court has granted injunctive relief based upon the misuse of actual trade secrets, the courts have limited the injunction to the time which would have been required to reproduce a copyable product.” *Id.* at 375 (citing *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 43 (Mo. 1966) (internal citations omitted)). Therefore, the district court erred in its holding that “employees are under a ‘temporally unlimited’ duty not to disclose trade secrets.” *Sigma Chem.*,

794 F.2d at 375. Thus, the Eighth Circuit instructed the district court to temporally limit its injunction and insert language noting the employee could use information that is within the public domain. *Id.*

Non-disclosure agreements may prevent employees from working in certain areas in which they have knowledge of confidential information where the restraint is a reasonable limitation. *See A.B. Chance Co.*, 719 S.W.2d at 859. In *A.B. Chance Co.*, an employee who obtained confidential information about his employer's pultrusion process signed a non-disclosure agreement at the beginning of his employment. *Id.* at 865. The trial court enjoined the employee from disclosing trade secrets for five years and from engaging in the pultrusion of rods, poles, and other products made by the employer. The Court of Appeals rejected the employee's argument that the injunction was overbroad and would keep him from using his general knowledge gained in the pultrusion field, noting that all of the employee's knowledge regarding pultrusion was obtained while working for his previous employer. In light of the trial judge's finding that the pultrusion process was a trade secret and despite the fact that the agreement only forbade disclosure of information rather than participation in the pultrusion process, the employee could be enjoined from working in pultrusion. The employee could still participate in his new employer's current methods without disclosing his former employer's process. *Id.* at 861.

#### D. Trade Secrets Statute

The Missouri Uniform Trade Secrets Act provides for a civil action, which permits injunctive relief, for any actual or threatened misappropriation of trade secrets. MO. ANN. STAT. §§ 417.450 *et seq.*

Information is a trade secret if it constitutes technical or nontechnical data, a formula, compilation, program, device, or process that derives independent economic value from not being generally known to or readily ascertainable by other persons who can obtain economic value from its disclosure and use and that is the subject of reasonable efforts to maintain its secrecy.

*Khazai v. Watlow Elec. Mfg. Co.*, 201 F. Supp. 2d 967, 973 (E.D.Mo. 2001) (*citing* MO. ANN. STAT. §§ 417.453, 417.457).

Missouri courts generally rely on six factors in determining whether a particular piece of information is a trade secret: (1) the extent to which the information is known outside the movant's business; (2) the extent to which it is known by employees and others involved in that business; (3) the extent of measures taken by the movant to guard the secrecy of the information, the value of the information to him and his competitors, (5) the amount of effort or money expended by movant in developing that information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610-11 (Mo. banc 2006); *Brown v. Rollet Bros. Trucking Co., Inc.*, 291 S.W.3d 766, 776 (Mo. Ct. App. 2009).

In *Brown*, the Court found that the trial court record contained substantial evidence that the customer list of the former employer was nothing more than a listing of firms or individuals that could be compiled from generally available sources. 291 S.W.3d at 777-78. Likewise, the company's rate sheets

were not entitled to trade secret protection, because the information in the sheets in the employee's possession was short-lived and outdated, and once such information expires, it had no value to a competitor. *Id.* at 779 (citing *Victoria's Secret Stores, Inc. v. May Dept. Stores Co.*, 157 S.W.3d 256, 263 (Mo. Ct. App. 2004)).

In *H&R Block E. Tax Services, Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1074 (W.D.Mo. 2000), the court considered whether to grant an employer an injunction preventing former employees from disclosing trade secrets. The court stated that items publicly available and elementary, along with obvious items, did not constitute trade secrets, but that details of advertising and marketing plans, changes and additions to services offered to customers, and compensation and pricing issues were trade secrets. *Id.* at 1074. However, the court declined to issue an injunction. *Id.* at 1076. The court rejected the employer's argument that the former employees' disclosure of the trade secrets was inevitable. "To prevail under this theory, employers must demonstrate inevitability exists with facts indicating that the nature of the secrets at issue and the nature of the employee's past and future work justify an inference that the employee cannot help but consider secret information." *Id.* at 1076. According to the court, the employer did not meet that burden. *Id.* See also *N. Kan. City Hosp. Bd. of Trs. v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 121 (Mo. Ct. App. 1998) (holding that while disputed documents "certainly contain[ed] 'trade secrets' . . . the Trade Secrets Act protects only those trade secrets that are 'misappropriated,' or 'acquired through 'improper means,' . . . includ[ing] theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means," and that "filing a request for a document under the Sunshine Law is simply not an 'improper means' within the provisions of the Trade Secrets Act").

#### E. Fiduciary Duty and Other Considerations

In *Western Blue Print Co., LLC*, the Supreme Court explained a plaintiff's burden of proving breach of fiduciary duty as follows:

When breach of fiduciary duty is asserted as a tort claim, as here, the proponent must establish that a fiduciary duty existed between it and the defending party, that the defending party breached the duty, and that the breach caused the proponent to suffer harm.

Whether a fiduciary duty exists is a question of law, while the breach of that duty is for the trier of fact to decide.

367 S.W.3d at 14-16 (citations omitted). The court found that while Myrna Roberts held a responsible position with the company and was privy to large amounts of confidential information, she was not an officer or director of the company and did not have a non-compete agreement with the company. Generally "an employer-employee relationship, without more, is insufficient to cause a confidential relationship to exist as to knowledge naturally acquired during employment." 367 S.W.3d at 16 (citing *Walter E. Zemitsch v. Harrison*, 712 S.W.2d 418, 421 (Mo. Ct. App. 1986)). Thus, the trial court's finding that Myrna had breached a fiduciary duty to the company was reversed.

However, "Missouri law is clear that officers and directors of public and closely held corporations are fiduciaries because they occupy positions of the highest trust and confidence and are required to exercise the utmost good faith when using the powers conferred upon them to both the corporation and their

shareholders.” *Western Blue Print*, 367 S.W.3d at 15 (citing *Gieselmann v. Stegeman*, 443 S.W.2d 127, 136 (Mo. 1969) and *Waters v. G & B Feeds, Inc.*, 306 S.W.3d 138, 146 (Mo. Ct. App. 2010)).

Every employee owes his or her employer a duty of loyalty. *Scanwell*, 162 S.W.3d at 479.

## XII. DRUG TESTING LAWS

### A. Public Employers

Missouri has no statute regulating drug testing by public employers. However, any drug test required by a public employer must be reasonable because such a test constitutes a search under the Fourth Amendment. *Reeves v. Singleton*, 994 S.W.2d 586, 591 (Mo. Ct. App. 1999). In the public employment context, warrants are required to force employees to take drug tests unless reasonable suspicion is present or the special needs exception applies. *Id.* at 592. The special needs exception is applicable where an employee holds a safety sensitive position, for example a prison guard, and the employer uses a random or uniform selection process. *Id.*

In *Reeves*, a state hospital was required to reinstate an employee and compensate the employee for back pay where it fired the employee for refusal to take a drug test. *Id.* at 588. The hospital argued that it had reasonable suspicion based upon an anonymous phone call and the employee’s behavior when he was asked to take the test. The court held that this was insufficient to show reasonable suspicion. Additionally, the special needs exception did not apply despite the fact that the employee was a security guard at a hospital for the criminally insane, because the test was not made pursuant to a uniform or systematic random selection plan. *Id.*

In *Johnson v. Clements*, 344 S.W.3d 253, 259-60 (Mo. Ct. App. 2011), the Court of Appeals held that a Corrections Case Worker at a state correctional facility could properly be required to submit to random drug testing, and that his dismissal when a test came back positive for narcotics was justified.

### B. Private Employers

Missouri has no statute regulating or restricting drug testing by private employers.

Employers may terminate employees based upon positive drug tests. In *Rothweil v. Wetterau, Inc.*, 820 S.W.2d 557, 558 (Mo. Ct. App. 1991), an employee brought a wrongful discharge suit against his employer for dismissing him as a result of a positive drug test. The employee argued that he was discriminated against on the basis of a handicap, his drug addiction; that the employer’s drug testing policy was a unilateral contract between the employer and employee; and that he stated a cause of action under the public policy exception to the employment at-will doctrine. *Id.* at 559. The court held that Missouri’s human rights law does not protect “self-inflicted addiction to illegal drugs.” *Id.* Furthermore, the court found no unilateral contract because employee failed to show the elements of offer, acceptance, and bargained for consideration. Finally, the court determined that the public policy exception to the at-will doctrine did not apply, noting that in cases where the exception did apply, the employee typically had the benefit of the

constitution, a statute, or regulation based on a statute. *Id.* The employee did not have any such benefit in this case.

### XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

Prior to 2017, Missouri was a very challenging place for employers to defend employment discrimination or retaliation claims. Effective August 28, 2017, amendments were made to the Missouri Human Rights Act (“MHRA”) which brought Missouri into closer alignment with federal and other states’ anti-discrimination statutes.

Previously, a plaintiff needed only to show that her race, sex, age, or other protected characteristic was a “contributing factor” to the adverse employment action, which was a low bar. The 2017 amendment now provides a “motivating factor” standard. To be a “motivating factor” the plaintiff must show his “protected classification actually played a role in the adverse action or decision and had a determinative influence on the adverse decision or action.” *See* MO. ANN. STAT. § 213.010(19). The amendment also endorses the federal *McDonnell-Douglas* burden-shifting framework.

Another change brought by the 2017 amendment is the deletion of the ability for plaintiffs to sue individual supervisors for violation of the MHRA. *See* MO. ANN. STAT. § 213.010(8)(c).

Further, the MHRA now caps damages, similar to federal law. Damages cannot exceed (1) actual back pay plus interest and (2) a fixed amount based on the defendant’s number of employees, ranging from \$50,000 to \$500,000. *See* MO. ANN. STAT. § 213.111(4). Attorney fees, however, are not subject to the cap.

Timeliness of filing claims was also affected by the amendments. Missouri courts now lack jurisdiction to hear a lawsuit if the employee does not file a charge within 180 days of the alleged discriminatory act. *See* MO. ANN. STAT. § 213.075(1). Failure to timely file a complaint may be raised as a complete defense by a defendant at any time.

Another big change to Missouri’s employment discrimination laws is the addition of the Whistleblower’s Protection Act, which also took effect in 2017, the same day as the amended MHRA. *See* MO. ANN. STAT. § 285.575; *See* Section II.B.1 above. This Act codifies and replaces common law wrongful discharge causes of action. It also acts to prevent courts from creating further common law exceptions to the at-will employment doctrine.

#### A. Employers/Employees Covered

The MHRA defines an “employer” as corporations, partnerships, associations, organizations, individuals, etc. engaged in an industry affecting commerce and has six or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, including the state or any political subdivision thereof. MO. ANN. STAT. §§ 213.010(8), (15).

The definition of “employer” under the Whistleblower’s Protection Act is similar if not identical. *See* MO. ANN. STAT. § 285.575.

## B. Types of Conduct Prohibited

The MHRA prohibits discrimination in employment because of race, color, religion, national origin, sex, ancestry, age, or disability. MO. ANN. STAT. § 213.055. The Act also prohibits discrimination because of familial status as it relates to housing and discrimination in public accommodations. MO. ANN. STAT. §§ 213.040, 213.065.

The Missouri Court of Appeals has held that the MHRA applies to non-protected people who are associated with someone who is protected. *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W. 2d 161 (Mo. Ct. App. 1999). In *Red Dragon* a group of people went to a restaurant to have dinner and two members of the party were blind and had guide dogs. *Id.* at 164- 65. The group was not allowed in the restaurant with the dogs and was subsequently refused service. A non-disabled member of the party brought suit alleging violation of the MHRA because she was not being given “equal use and enjoyment” of a public accommodation. *Id.* at 170 (*citing* MO. ANN. STAT. § 213.065 (Supp. 1998)). The court determined that plaintiff must prove that she was denied the use of a public accommodation because she was accompanied by a disabled person. *Red Dragon*, 991 S.W. 2d at 170. The appellate court agreed that she had proven this and affirmed the award of damages. *Id.*

See Section II.B.1, above, for protected conduct under the Whistleblower’s Protection Act.

## C. Administrative Requirements

Any charge of discrimination alleging a violation of the MHRA must be filed within 180 days of the alleged act of discrimination with the Missouri Commission on Human Rights or the Equal Employment Opportunity Commission (“EEOC”). See MO. ANN. STAT. § 213.075; See Section II.B.1, above. A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of the investigation, may be joined as an additional or substitute respondent upon written notice. MO. ANN. STAT. § 213.075(4).

If, after 180 days from filing the complaint the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue the claimant a right to sue letter, indicating the claimant’s right to bring a civil action within 90 days. MO. ANN. STAT. § 213.111(1). Suit must be brought within two years from the last act of discrimination.

## D. Remedies Available

Chapters 213, 285, and 287 provide the “exclusive remedy” for any and all claims for injury or damages arising out of an employment relationship. See MO. ANN. STAT. § 213.070.

### 1. Jury Trials

Any party to any action initiated under the MHRA or the Whistleblower’s Protection Act may demand a trial by jury. MO. ANN. STAT. §§ 213.111(3), 285.575(6).

### 2. Damages



A successful claimant under the MHRA can be awarded injunctive relief, actual damages, punitive damages, reinstatement, promotion, back pay, front pay, fringe benefits, attorney's fees, and court costs. See MO. ANN. STAT. § 213.111(2). The sum of the actual damages awarded may include damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. MO. ANN. STAT. § 213.111(4). Any punitive damages awarded may not exceed (1) actual back pay plus interest, and (2) a fixed amount based on the defendant's number of employees, ranging from \$50,000 to \$500,000.

A successful claimant under the Whistleblower's Protection Act may be awarded back pay and reimbursement of directly-related medical bills. Courts may double a claimant's recovery if the employer's conduct was outrageous because of evil motive or reckless indifference to the rights of others. See Section II.B.1, above.

### 3. Attorney's Fees

Under both the MHRA and the Whistleblower's Protection Act, the court may award reasonable attorney fees to a successful claimant. However, a prevailing respondent may only be awarded reasonable attorney fees upon a showing that the case was without foundation. MO. ANN. STAT. §§ 213.111(2), 285.575(7)-(8).

### 4. Affirmative Defense to Harassment Claims

Under the MHRA, an employer "is subject to vicarious liability to a victimized employee with respect to sexual harassment by a supervisor with immediate (or successively higher) authority over an employee." 8 C.S.R. 60-3.040(17)(D).

The regulations for the MHRA adopt the federal "*Faragher/Ellerth*" affirmative defense to harassment claims:

When no tangible employment action is taken, an employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and b) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

8 C.S.R. 60-3.040(17)(D)(1). See *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238 (Mo. Ct. App. 2006); *Herndon v. City of Manchester*, 284 S.W.3d 682 (Mo. Ct. App. 2009). No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action. 8 C.S.R. 60-3.040(17)(D)(2).

Examples of tangible employment actions include hiring and firing, promotion and failure to promote, demotion, undesirable reassignment, and decisions causing a significant change in benefits. See 8 C.S.R. 60-3.040(17)(D)(4).

### 5. Liability to Former Employees

The MHRA's retaliation provisions protect any person, including former employees, from retaliation. *State ex rel. Swoboda v. Mo. Comm'n on Human Rights*, Nos. WD83556, WD83571, 2021 Mo. App. LEXIS 20 at \*16 (Mo.App.W.D. Jan. 12, 2021) (citing MO. ANN. STAT § 213.070(2)). In *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 625 (Mo. 1995), the Missouri Supreme Court considered whether Section 213.070(2) of the MHRA protects former employees asserting retaliation claims. The court stated, "where, as here, the alleged victim of retaliation is a former employee of the company charged with committing a retaliatory act, the claim promotes the Act's purpose of prohibiting discrimination or retaliation in employment." *Id.* at 625. According to the court, the fact that an employment relationship no longer existed between the two parties at the time the allegedly retaliatory act was committed does not preclude a former employee from asserting a cognizable retaliation claim under the MHRA. *Id.*

#### XIV. STATE LEAVE LAWS

##### A. Jury/Witness Duty

Missouri law specifically protects employees called to jury duty from any adverse employment action taken by their employer. Specifically, "[a]n employer shall not terminate, discipline, threaten or take adverse actions against an employee on account of that employee's receipt of or response to a jury summons." MO ANN. STAT. § 494.460(1).

An employee who is terminated because of jury duty may file a civil action against her employer within 90 days of the discharge for lost wages, reinstatement and other damages. Prevailing employees are also entitled to reasonable attorney's fees. MO ANN. STAT. § 494.460(2). Finally, "[a]n employee may not be required or requested to use annual, vacation, personal or sick leave for time spent responding to a summons or jury duty, time spent participating in the jury selection process, or time spent actually serving on a jury." MO. ANN. STAT. § 494.460(3).

##### B. Voting

Missouri law allows employees to take three hours off of work during an election day to vote. MO. ANN. STAT. § 115.639. Under the statute:

Any person entitled to vote at any election held within this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting.

Employers may not discharge, threaten discharge, penalize or discipline or deduct the wages or salary of any employee who takes time off pursuant to the statute to vote. MO. ANN. STAT. § 115.639.

However, employees must request time off to vote prior to the day of the election and the statute does not apply to any employee who has three consecutive hours while the polls are open outside of his working time. MO. ANN. STAT. § 115.639. Finally, the employer may determine which hours between the time of opening and the time of closing of the polls that an employee may be absent to vote. *Id.*

C. Family/Medical Leave

Missouri Law provides very limited protection for family and medical leave, and the protection that is provided is mainly limited to state employees.

For private employers, there is no state statute requiring family or medical leave. However, employers must treat disabilities caused or contributed to by pregnancy, miscarriage, legal abortion, childbirth, and recovery the same as other temporary disabilities. 8 C.S.R.60-3.040(16). Additionally, if “the termination of a temporarily disabled employee is caused by an employment policy under which insufficient or no leave is available, this termination violates the [Missouri Human Rights] act if it has a disparate impact on employees of one sex and is not justified by a business necessity.” 8 C.S.R. 60-3.040(16).

State employees who adopt a child are permitted to use their “sick leave, annual leave, or the same leave without pay granted to biological parents to take time off for purposes of arranging for the adopted child’s placement or caring for the child after placement.” MO. ANN. STAT. § 105.271(1). Employers shall not penalize an employee for taking time off under this statute. *Id.* However, the employee may request leave under this section only if the employee is “the person who is primarily responsible for furnishing the care and nurture of the child.” MO. ANN. STAT. § 105.271(8). Additionally, application of this statute is limited only to employees of “the state of Missouri, its departments, agencies, or political subdivisions.” MO. ANN. STAT. § 105.271(1).

Likewise, stepparents employed by the State are permitted to use their “accrued sick leave, annual leave or the same leave without pay granted to biological parents to take time off to care for [their] stepchild.” Employers shall not penalize an employee for taking time off under this statute. MO. ANN. STAT. § 105.271(7). Again, the employee may request leave under this section only if the employee is “the person who is primarily responsible for furnishing the care and nurture of the child.” MO. ANN. STAT. § 105.271(8).

Additionally, employees of the State of Missouri, its departments or agencies are entitled to five workdays off to serve as bone marrow donors provided the employee gives her employer written verification that she is donating bone marrow. MO. ANN. STAT. § 105.266.

D. Pregnancy/Maternity/Paternity Leave

See Section XIII.C, above.

E. Day of Rest Statutes

Missouri has no day of rest statute.

F. Military Leave

Missouri law provides for a leave of absence for state employees. MO. ANN. STAT. § 105.270.1. The statute applies to all state employees who are or may become members of the National Guard or of any reserve component of the armed forces of the United States. These employees shall not lose time, pay, or regular leave, or be subject to impairment of efficiency rating or other rights or benefits to which they are entitled for all periods of military service that involve:

The performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general without regard to length of time, and for all period of military services during which they are engaged in the performance of duty in the service of the United States under competent orders for a period not to exceed a total of one hundred twenty hours in any federal fiscal year.

MO. ANN. STAT. § 105.270.1. However, employees called to active duty to perform military training, special duty, or for participation in gunnery competitions shall not receive paid leaves of absences if they are eligible for pay and allowances from federal funds. MO. ANN. STAT. § 41.470.4.

G. Sick Leave

While state employees are entitled to sick leave, MO. ANN. STAT. § 36.350, Missouri does not require private employers to provide its employees with sick leave benefits. This is left up to the employer's discretion, or to any contract between the employer and its employees.

H. Domestic Violence Leave

Missouri does not require employers to provide employees with domestic violence leave benefits. However, employers may not discharge or discipline any witness, victim, or member of a victim's immediate family for (1) honoring a subpoena to testify in a criminal proceeding, (2) attending a criminal proceeding, or (3) participating in preparation of a criminal proceeding. MO. ANN. STAT. § 595.209.1(14). Employers also may not require use of vacation, personal time, or sick leave to honor a subpoena, attend a criminal proceeding, or participate in preparation for a criminal proceeding. *Id.*

I. Other Leave Laws

Under MO. ANN. STAT. § 105.267, an employee of a state agency who is a certified disaster service volunteer may be granted leave from work to participate in specialized relief services.

**XV. STATE WAGE AND HOUR LAWS**

A. Current Minimum Wage in State

For 2021, the Missouri minimum wage is \$10.30/hour, except for retail and service businesses with annual gross sales of less than \$500,000. Tipped employees must be paid half of the state minimum wage rate or \$5.15 per hour.

B. Deductions from Pay

An employer may deduct funds from an employee's wages for meals, lodging, fuel, and other goods and services voluntarily received by the employee for the private benefit of the employee. These deductions can be made as long as the deductions do not take the employee's wages below the required minimum hourly wage rate. Mo. CSR Title 8, § 30-4.050.

An employer may reduce an employee's wages, providing the employee is given a 30-day advance written notice of a reduction in wages. MO. ANN. STAT. § 290.100. Any company or corporation violating this requirement shall pay each affected person \$50, which can be recovered through court action. *Id.*

C. Overtime Rules

In Missouri, eight hours is considered a full workday. However, the statute does not prohibit employers and employees from otherwise agreeing on a longer or shorter time. Additionally, the statute does not apply to: employees hired by the month; laborers and farm hands employed by farmers; or other employees engaged in agriculture. MO. ANN. STAT. § 290.010.

Employers must pay at least one and one-half times the employee's regular rate of pay once overtime pay is in effect. Overtime pay begins once an employee works more than 40 hours in a work week rather than more than 8 hours in a work day. MO. ANN. STAT. § 290.505.

D. Time for Payment Upon Termination

When an employer discharges an employee, "the employee may request in writing of his foreman or the keeper of his time to have the money due him, or valid check therefor, sent to any station or office where a regular agent is kept. . . ." MO. ANN. STAT. § 290.110. If the employee is not then paid within seven days of the request, the wages of the employee continue from the date of discharge at the same rate until the employee is paid. *Id.* However, the accrued wages shall not continue for longer than 60 days. *Id.*

There is no requirement that the written request be addressed to the corporation. *Taylor v. Goldammer*, 944 S.W.2d 216, 218 (Mo. Ct. App. 1997) (addressing request to company president was sufficient). "The statute does not require that the letter give a time certain for payment of the wages, or that it be signed, or that it include only the subject of unpaid wages, or that it correctly calculate the amount of unpaid wages." *Id.* The request must be made within a reasonable amount of time. *Monterosso v. St. Louis Globe-Democrat Publ'g*, 368 S.W.2d 481, 489 (Mo. 1963). The purpose of the statute is to ensure that employees are quickly paid wages owed to them after they are discharged. In *Monterosso*, the court determined that 90 days was an unreasonable length of time to delay in making the request. *Id.*

Wages protected by § 290.110 include the basic pay rate, which includes "wage payment due and payable at regular intervals." *Doores v. Intercontinental Engineering-Mfg. Corp.*, 670 S.W.2d 65, 67 (Mo. Ct. App. 1984). They do not include vacation credits that have accrued based on seniority and days worked in a preceding calendar year. *Id.*

E. Breaks and Meal Periods

Missouri does not require employers to provide employees a break of any kind, including a lunch hour. These provisions are either left up to the discretion of the employer, can be agreed upon by the employer and the employee, or may be addressed by company policy or contract.

F. Employee Scheduling Laws

Although they are on the rise, Missouri has not enacted predictive scheduling laws.

## XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

### A. Smoking in Workplace

While there are no state laws regulating employer workplace smoking rules, Missouri law restricts smoking to designated areas in public places. See MO. ANN. STAT. §§ 191.765 - 191.773. Public places are defined as any indoor area used by the general public or serving as a place of work, except: taxicabs or limousines; any place where more than 50% of the volume of trade is derived from tobacco; bowling alleys and billiard halls; private residences or halls used for private social functions; any area used for sporting events that seats more than 15,000 people; and other areas that are legally designated for smoking.

Persons having control and custody over public places can designate “smoking areas” so long as not over 30% of the public place is designated for smoking use and the local fire marshal has not prohibited smoking in the public place. The person having control and custody over the public place must erect appropriate signs to designate “smoking” and “non-smoking” areas. For example, a manager of a restaurant can designate smoking areas so long as less than 30% of the restaurant is for smoking and appropriate signs are placed throughout the designated areas. MO. ANN. STAT. § 191.767.

Municipalities may enact more stringent anti-smoking laws. MO. ANN. STAT. § 191.777.

### B. Health Benefit Mandates for Employers

There are no Missouri laws mandating certain levels of health benefits for employees.

However, if an employer offers health insurance to its employees, the employer must offer certain mandated benefits. Employers may provide health insurance benefits at a reduced premium rate or deductible level for employees who do not smoke or use tobacco products. MO. ANN. STAT. § 290.145.

### C. Immigration Laws

The federal Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. 8 U.S.C. § 1324a(a)(1)(A), (a)(2). IRCA also requires every employer to verify the employment authorization status of prospective employees. A recent Supreme Court case made it clear that the IRCA provides a comprehensive framework for combating the employment of illegal aliens. *Arizona v. United States*, 567 U.S. 387, 406 (2012). Therefore, Missouri does not provide immigration laws.

### D. Right to Work Laws

Missouri voters recently struck down the state’s right-to-work law.

### E. Lawful Off-duty Conduct (including lawful marijuana use)

Missouri does not have a “catch all” lawful off-duty conduct statute. However, MO. ANN. STAT. § 290.145 makes it unlawful for an employer to refuse to fire, or to discharge, any individual because of his or her use of lawful alcohol or tobacco products off the premises and outside working hours, unless their drug-

free workplace policies. Recreational use of marijuana, however, is still illegal in Missouri, and thus is not lawful off-duty conduct protected by employment law.

F. Gender/Transgender Expression

Currently in the employment context, transgender expression is not protected by the state of Missouri. The Missouri Human Rights Act does not protect employment discrimination based on gender/transgender expression. MO. ANN. STAT. § 213.055. However, as of September 2018, 17 municipalities in Missouri have ordinances prohibiting discrimination based on gender identity. *See e.g., City of Clayton, Mo., Code of Ordinances, tit. II, ch. 225.*

On February 26, 2019, the Missouri Supreme Court ruled that a transgender male student who was barred from the boys' restroom and locker room has the right to sue for sex discrimination. *See R.M.A. v. Blue Springs R-IV Sch. Dist.*, No. SC96683, 2019 Mo. LEXIS 54, \*1 (Mo. Feb. 26, 2019). The ruling is significant because in allowing this transgender student to sue for sex discrimination, the court has signaled that it is embracing the interpretation that the MHRA's prohibitions against sex-based discrimination also protect transgender people in school or in the workplace.

G. Other Key State Statutes

As of June 1, 2018, private employers may grant preference to hiring and promoting veterans, spouses of disabled veterans, and surviving spouses of deceased veterans. MO. ANN. STAT. § 285.250.