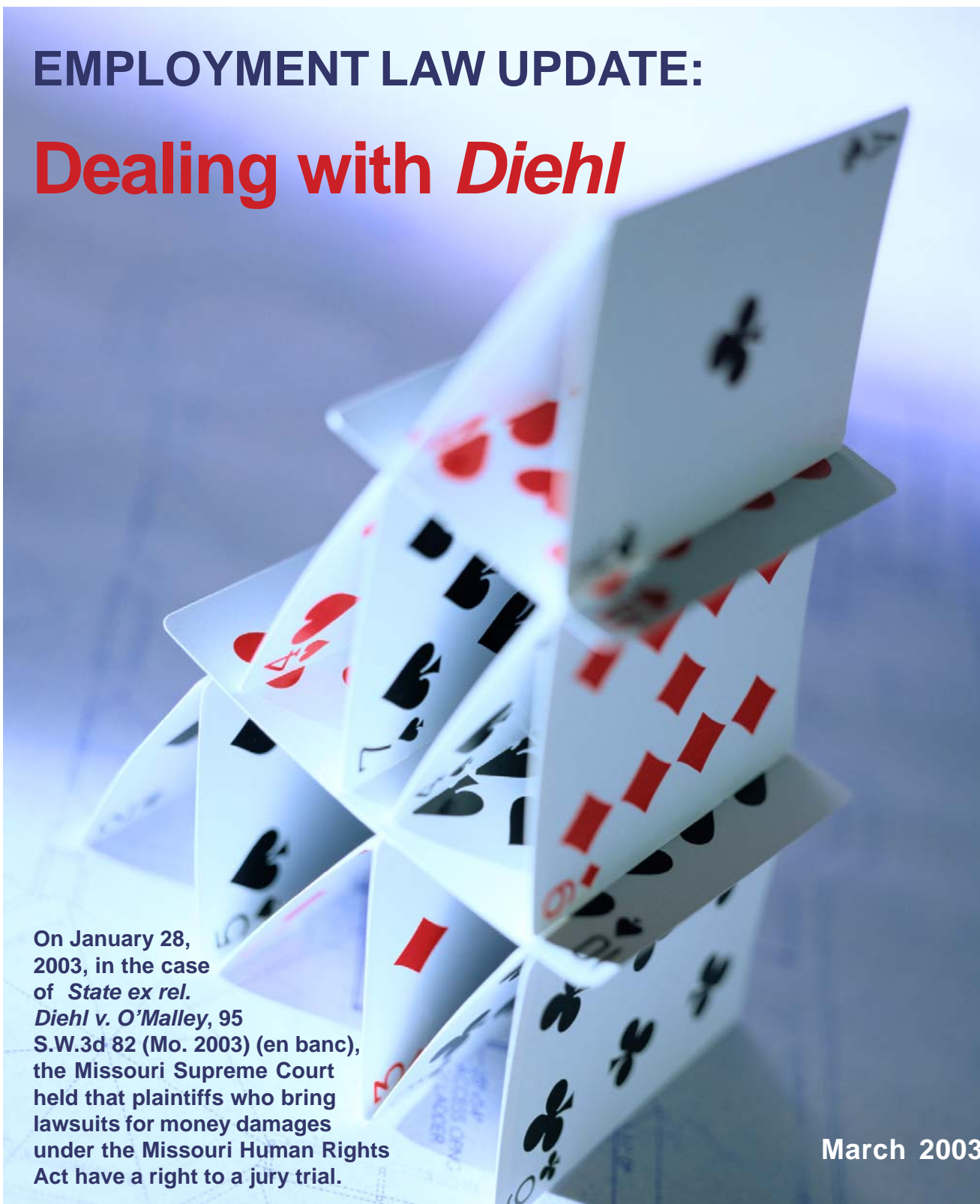


EMPLOYMENT LAW UPDATE:

Dealing with *Diehl*



On January 28, 2003, in the case of *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003) (en banc), the Missouri Supreme Court held that plaintiffs who bring lawsuits for money damages under the Missouri Human Rights Act have a right to a jury trial.

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In her lawsuit filed in the Circuit Court of Jackson County, Missouri, plaintiff Diehl alleged that her former employer violated the Missouri Human Rights Act (“MHRA”) when it discriminated against her on the basis of her age and gender and retaliated against her for filing a charge of discrimination with the Missouri Commission on Human Rights. In her lawsuit, Diehl asked for money damages, including lost wages, emotional distress damages and punitive damages. Diehl did not ask for any equitable relief in her petition (i.e. a request for reinstatement or that the employer be prohibited from committing future acts of discrimination or retaliation). Diehl did ask for a jury trial, which request the trial court denied. The Missouri Supreme Court determined that trial court violated Diehl’s right to a jury trial under the Missouri Constitution when it denied her request for a jury trial. (The *Diehl* opinion provides a detailed history of an individual’s right to a jury trial under Missouri’s constitution, an analysis of claims brought under the MHRA, and a discussion of a variety of statutory and common law civil actions where an individual has a right to a jury trial when the request is for money damages and not equitable relief).

In the past, it has never been a particularly appealing option for a plaintiff to bring a claim for the alleged violation of the MHRA in state court because the MHRA did not specifically provide for a jury trial. Accordingly, most MHRA claims ended up finding their way into federal court as companions to claims brought under federal non-discrimination statutes, such as Title VII, the Americans With Disabilities Act, and the Age Discrimination in Employment Act, which do provide for jury trials.

In the case of *Gipson v. KAS Snacktime Co.*, 83 F.3d 225 (8th Cir. 1996), the Eighth Circuit held that a plaintiff has a right to a jury trial under the Seventh Amendment of the United States Constitution for MHRA claims that are brought in federal court. The Eighth Circuit reasoned that claims brought under the MHRA are analogous to common law claims and are therefore within the Seventh Amendment’s right to a jury trial. Because of *Gipson*, the *Diehl* ruling is not a complete and utter surprise. However, because most of the federal non-discrimination statutes already provided for jury trials, the anticipated impact that *Diehl* will have on employment discrimination lawsuits is incomparable to that of *Gipson*.

Despite the fact that plaintiffs were already getting their jury trials in federal court on MHRA claims, federal judges were often influenced by the damage caps imposed by federal statutes and typically kept damages awarded to plaintiffs in check with such caps. Additionally, federal courts typically impose clear discovery and summary judgment deadlines, which help to set a stable framework for the progression of an employment discrimination lawsuit. Unfortunately, after *Diehl*, employers may not like what’s in the cards.

First, there are no damage caps that apply to the MHRA, arguably making the sky the limit for employment-related cases tried in state court.

Second, jury pools in state court are generally less diverse than in federal court, and, in some venues, are generally very plaintiff-friendly.

Third, Missouri state court practice differs from federal court practice in many respects. For example, unless a particular judge imposes one, case management orders are the exception in state court, and the typical employment discrimination case often lacks the structure and reliability of enforceable timelines and deadlines as in federal court. For example, state courts generally do not impose discovery deadlines. Accordingly, expert designations may be made late in the game, and depositions and other discovery may occur at virtually any time, even days before trial.

Fourth, state court trial dockets can also be handled much differently than federal court trial dockets. Take for example the Missouri Circuit Court, Twenty-Second Judicial Circuit (City of St. Louis). All civil, non-equity cases filed in Circuit Court of the City of St. Louis are assigned to a single docket managed by the presiding judge in Division 1 for the handling of all pre-trial motions and matters. In this regard, shortly after a case is filed, it is assigned to a trial docket. Throughout its pendency, the case works its way up the trial docket, which rolls over approximately every six weeks. How much a case moves on a particular trial docket is unpredictable and depends completely on uncontrollable factors, such as the disposition of cases that are higher on the trial docket (i.e. by trial, dismissal or settlement) and the availability of trial judges to hear cases. Ultimately, the lawsuit will be “called out” to trial,

typically by a phone call from the clerk of Division 1, who advises the lawyers to be in a certain division by a certain time, usually on the same day as the phone call. The parties generally do not know which judge will be trying the case until the day the case is called out, making cases more difficult to preliminarily assess. Additionally, the judge who tries the case typically will not see the file at all until the day of trial. Furthermore, this system requires parties to have their witness on call and ready for trial on several occasions once the case is in a “reachable” position on the trial docket, and before the case is actually assigned out to trial.

Fifth, state courts have generally been less likely to grant summary judgment than federal courts.

Sixth, the MHRA covers smaller employers that most federal statutes, namely most employers with six or more employees.

Finally, employers currently should probably not expect too much in the way of relief if they appeal an unfavorable verdict rendered in state court.

Employers should be mindful that timeliness might bar some careless individuals from bringing a lawsuit in state court. Before a lawsuit is ever filed, a prospective plaintiff must first file a charge of discrimination with the Missouri Commission on Human Rights within 180 days of the alleged discriminatory or retaliatory act. This time limitation is significantly less than the 300 days that an individual is allotted to file a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) for violation of certain federal statutes prohibiting discrimination and retaliation. If an individual blows the 180 day deadline, the MHRA claim may end up as a companion claim in federal court after all.

On the off chance that a plaintiff should happen to request only equitable relief in the state court petition, an employer arguably should be able to successfully oppose a request by the plaintiff for a jury trial under such circumstances.

Note: The Illinois Human Rights Act (“IHRA”) does not give private litigants a right to litigate their employment discrimination claims in court.

Rather, the IHRA vests exclusive jurisdiction to hear such claims in the Illinois Human Rights Commission. Private litigants may file a petition for review of the Commission’s order to the proper Illinois Appellate Court. For information about the employment laws and rights of claimants employed in other states, please contact any member of the our Labor and Employment Practice Group.

A Good Time for Employers to Consider Mandatory Arbitration Agreements

The *Diehl* decision also gives employers a good reason to consider having employees sign mandatory arbitration agreements. Through such agreements, employees agree to submit claims arising from their employment to binding arbitration, rather than having the option to file a lawsuit in state or federal court.

Approximately two years ago, in March 2001, the United States Supreme Court created very favorable conditions for the use of mandatory arbitration agreements in *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001). In *Circuit City*, the plaintiff had signed a mandatory arbitration agreement as part of the hiring process. The issue before the U.S. Supreme Court was whether the Federal Arbitration Act (FAA), which compels enforcement of a wide range of written arbitration agreements, also applied to employment contracts. The U.S. Supreme Court held that the FAA does apply to all employment contracts, except a very narrow class of interstate transportation workers, such as seaman and railroad employees. Accordingly, the Court compelled the employee to arbitrate the employment discrimination claim.

Subsequent decisions, particularly in the Eighth Circuit, indicate that the courts will do everything they can to give effect to the intent set forth in an arbitration agreement. For example, when some terms of an arbitration agreement are found to be unenforceable, but the agreement is not so one-sided so as to make it unconscionable, the Eighth Circuit will sever the unenforceable provision and compel arbitration according to the remaining provisions of the agreement. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680-81 (8th Cir. 2001).

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The decision to implement mandatory arbitration agreements is an individual employer's business decision. One thing that employers should keep in mind is that the U.S. Supreme Court held last year that even when an employee has signed a mandatory arbitration agreement, the Equal Employment Opportunity Commission (EEOC) may still sue on behalf of an employee. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The same rule would likely apply for the Missouri Commission on Human Rights (MCHR) which may initiate a public hearing before a panel of three commissioners or before a hearing examiner on behalf of an individual. When the MCHR does initiate such an action, the complainant or the respondent may elect to have the claims decided in a civil action.

Employers with a unionized work force are in a tougher spot as the U.S. Supreme Court has not yet decided whether a union may waive covered employees' rights to a judicial forum for claims of employment discrimination. Most recently, the Supreme Court has said that if a union may bargain away this right, the collective bargaining agreement must contain a "clear and unmistakable waiver." *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 82 (1998).

The Firm's Labor & Employment Practice Group continues to give prompt, thoughtful, thorough, and creative analysis to our clients' questions and concerns. If we can be of assistance, or if you require additional information or clarification, please do not hesitate to contact us at (314) 241-9090.

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