



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
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OFFICE OF FAIR HOUSING  
AND EQUAL OPPORTUNITY

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Dr. Alisa Warren, Executive Director  
Missouri Commission on Human Rights  
3315 W. Truman Blvd. Suite 212  
Jefferson City, MO 65109

**RE: Missouri Senate Committee Substitute for Senate Bill 43**

Dear Dr. Warren:

I have recently become aware of the above-referenced bill pending before the Missouri General Assembly. As set forth more fully below, the Senate Committee Substitute for Senate Bill 43 (SCS SB 43) would revise several sections of Missouri's existing fair housing law in a manner that raises extremely serious concerns with respect to the continued substantial equivalence of Missouri's fair housing law and the continued participation of MCHR in the Fair Housing Assistance Program.

Definition of "Because" or "Because of"

SCS SB 43 would add a new definition to § 213.010 as follows:

*Translation* (2) "Because" or "because of", the adverse decision or action would not have been made or taken but for the employee's protected classification. If the decision or action would have been made or taken even if the employee did not belong to the protected classification, it was not taken because of that classification

SCS SB 43 thus appears to be the latest annual installment of Missouri's efforts to preclude the application of a disparate impact standard under the Missouri Human Rights Act. As we have consistently indicated in the past, this creates very serious concerns with respect to the continued substantial equivalence of Missouri's fair housing law.

The "but for" standard in SCS SB 43 necessitates an intentional act, thus creating a pure intent standard that is inconsistent with the federal Fair Housing Act (the Act). It is interesting to note that, by its express terms, § 213.010 (2) applies exclusively to actions taken against employees. However, this appears to be a drafting oversight, as the proposed amendments add "because" or "because [of]" to the definition of "discrimination" at § 213.010(6), as well as to other substantive provisions of the MHRA. Note also that the introduction to § 213.010 states clearly that the terms as defined therein apply to the entire chapter.

The viability of the disparate impact standard (*a.k.a.* "discriminatory effects") effectuates Congress's broad, remedial intent in passing the Fair Housing Act and the Act's stated purpose of providing for fair housing, within constitutional limitations, throughout the country. Federal courts have unanimously held that liability may be established by proof of discriminatory effects. HUD has recently published a discriminatory effects rule to codify this interpretation, the preamble to which specifically states:

*'Discriminate' is a term that may encompass actions that have a discriminatory effect but not a discriminatory intent.* HUD's extensive experience in administering the Fair Housing Act and in investigating and adjudicating claims arising under the Act, which is discussed in this preamble and that of the proposed rule, informs its conclusion that not only can the term 'discriminate' be interpreted to encompass discriminatory effects liability, but it must be so interpreted in order to achieve the Act's stated purpose to provide for fair housing to the extent the Constitution allows.

78 Fed. Reg. 11466 (*emphasis added*).

Note that, for the same reasons set forth above, the proposed amendment at § 213.010(6) that would alter the definition of "discrimination" in a manner to require intent is equally unacceptable for purposes of continued substantial equivalence.

#### Punitive Damages Shield for the State and Political Subdivisions

We note that SCS SB 43, as with proposed legislation in previous years, would amend § 213.111 to bar courts from awarding punitive damages to plaintiffs in cases where the respondent is the state of Missouri or any of its political subdivisions. As we have consistently indicated in previous correspondence, limitations on punitive damages in fair housing cases raise serious substantial equivalence concerns. The availability of such damages is an essential element of the Act's enforcement scheme, and the Act's authority for punitive damages contains no express limitation for certain categories or classes of defendants.

#### Limitations on Actual and Punitive Damages

In addition to the attempt to shield the State and its political subdivisions from punitive damages, SCS SB 43 also would amend § 213.111(4) to place caps on the total award of both actual and punitive damages.

Substantial equivalence requires that a State or local law provide similar remedies to victims of housing discrimination. *See*, 42 U.S.C. §3610(f)(3)(A); 24 C.F.R. §115.202(a). Actual damages are damages necessary to make a victim of discrimination whole. The imposition of a cap is antithetical to that fundamental purpose, and no such cap is authorized by the Fair Housing Act. Similarly, punitive damages are expressly authorized in civil actions by the Act, *see*, 42 U.S.C. §3613(c)(1), and required by the regulations governing substantial equivalence. As with actual damages, the Act contains neither an express limitation nor authorization to impose such a limitation. Importantly, while the original Act of 1968 included a cap on punitive damages, *see*, former 42 U.S.C. §3612(c), that cap was removed by the Fair Housing Amendments Act of 1988,

which, *inter alia*, introduced the administrative and judicial enforcement mechanism. This change represented an effort on the part of Congress to "remove barriers to court enforcement by private litigants." *See*, U.S. House of Representatives, Committee on the Judiciary, Report 100-711: The Fair Housing Amendments Act of 1988, 13, 100<sup>th</sup> Cong., 2d. Sess. (June 17, 1988).

#### Protections related to Retaliation and Association

SCS SB 43 amends § 213.070 in a manner that creates additional grave concerns. Whereas the existing section of the MHRA applies without limitation to any class of respondents/defendants, SCS SB 43 would narrow the scope of coverage to encompass only employers, employment agencies, labor organizations, or places of public accommodation. Thus, important protections provided in § 213.070 that are available under the Act, including protection from retaliation and protection because of having associated with a person protected by the MHRA, would no longer be available to aggrieved persons in cases of housing discrimination. Failing to provide for these protections in housing cases would render the MHRA not substantially equivalent on its face with the Act.

The amendments to section 213.070 further contain a curious deletion of the existing subsection 213.070 (3), which currently makes it a discriminatory act for "the state or any political subdivision of this state to discriminate on the basis of race, color, religion, national origin, sex, ancestry, age, as it relates to employment, disability, or familial status as it relates to housing . . ." Given the statute's definition of "person," this could arguably be viewed as an attempt to insulate the State and its political subdivisions from any liability whatsoever for any violation of the Missouri Human Rights Act.

#### **Additional Concerns**

##### Prerequisite for Filing of a Civil Action

SCS SB 43 would amend § 213.075.1 such that the filing of a complaint with MHRC would be a jurisdictional prerequisite to the filing of a civil action by an aggrieved person. This not only conflicts with the current state of Missouri's fair housing law, but is fundamentally inconsistent with the rights of an aggrieved person under the Act. Under the Act, aggrieved persons have the unqualified right to file an administrative complaint, to proceed directly in State or federal court, or to do both simultaneously.

The ability to directly file a civil action was present in the original 1968 Fair Housing Act. *See*, former 42 U.S.C. §3612(a). The Supreme Court, interpreting this provision in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), stated:

The most plausible inference to be drawn from Title VIII is that Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation fail.

Gladstone at 103-104.



The legislative history of the 1968 Fair Housing Act further supports complainants' direct access to courts without filing an administrative complaint. In describing the enforcement of the Act, Representative Celler stated: "In addition to administrative remedies, the bill authorizes immediate civil suits by private persons within 180 days after the alleged discriminatory housing practice occurred ..." 114 Cong.Rec. 9560 (1968). In addition, the House Judiciary Committee Report stated: "§ 812 states what is apparently an alternative to the conciliation-then-litigation approach [of § 810]: an aggrieved person within 180 days after the alleged discriminatory practice occurred, may, *without complaining to HUD*, file an action in the appropriate U.S. district court." *Id.* at 9612 (emphasis added).

It is worth noting that it is not entirely clear whether this proposed amendment is intended to apply to housing cases, as it appears to apply only to complaints against employers, employment agencies, labor organizations, or places of public accommodation. If it is intended to apply to housing cases, it is problematic for the reasons set forth above; if it is not intended to apply to housing cases, the legislation should be clarified.

#### § 213.101 Burden Shifting

SCS SB 43 would add new subsections (2)-(7) to existing section 213.101. While the proposed amendments in § 213.101 purport to apply exclusively to employment cases, we note that § 213.101 itself is of general applicability. To the extent that any of the proposed revisions to § 213.101 are directed at establishing a framework for analyzing any or all allegations of discrimination, including an allegation of housing discrimination, in a manner that is inconsistent with the federal Fair Housing Act those revisions raise serious concerns for the reasons noted above.

In sum, the enactment of the provisions in SCS SB 43 identified above would create several extremely serious and fundamental concerns with respect to the continued substantial equivalence of the Missouri Human Rights Act, as well as MCHR's continued participation in the Fair Housing Assistance Program. Please feel free to call me at (202) 402-2126 if you have any questions.

Sincerely,



Joseph A. Pelletier, Director  
Fair Housing Assistance Program

cc: Betty Bottiger, FHEO Region VII Director