

# Not So Fast: Missouri Supreme Court Concludes Employee Does Not Have an Established Right to Sue His Employer's Attorney for Aiding and Abetting Alleged Discrimination

AUTHOR: JAMES KEANEY

Some background is needed to understand the issue and how it reached the high court. The case at hand involved a Charge of Discrimination by an employee—Jim Swoboda (Swoboda)—of the Board of Police Commissioners of Kansas City (BOPC) against the BOPC, as well as the law firm previously retained by the BOPC—Armstrong Teasdale (AT). BOPC had previously retained AT to defend the BOPC in a separate discrimination lawsuit brought by another BOPC employee.

As part of his Charge, Swoboda alleged he gave testimony in that separate lawsuit in support of the employee and, in doing so, AT lawyers had made statements to him suggesting he would suffer consequences for doing so. Swoboda further alleged that BOPC retaliated against him in many ways after he provided testimony in that separate lawsuit.

Upon receipt of his Charge, the Missouri Human Rights Commission (MHRC) issued him a right to sue letter against the BOPC, but denied him a right to sue letter against AT lawyers due to the lack of an employment relationship.

Swoboda filed a Petition for a Writ of Mandamus with the Circuit Court of Jackson County, asking the Court to order the MHRC to rescind its dismissal and investigate his Charge against AT. After briefing, the Court granted the Petition and entered a Permanent Writ of Mandamus. The MHRC and AT both appealed.

The Western District Court of Appeals affirmed the trial court. The Court emphasized the plain and “exceedingly broad” language of the MHRA as compelling the conclusion that the law prohibits retaliation and discrimination by “an employer”—like AT—against “any other person,” and not just that particular “employer’s employees.” In doing so, the Court rejected AT’s argument that “employer” in Section 213.070 only means “an employer of the complaining employee.”

In a divided decision, the Missouri Supreme Court, however, disagreed with both the Western District and trial court. The Supreme Court framed the issue differently than the lower courts, focusing on the procedural posture of the case.

Since the case involved a proceeding in mandamus, it asked whether, under Missouri law, Swoboda had a clear and established right to sue “an employer” that never employed him. Framed in that manner, the Supreme Court concluded he did not.

The Supreme Court emphasized, among other things, the legislative amendments to the MHRA in 2017 as evidencing an intent of the legislature to limit MHRA claims to only those arising from employment relationships. Thus, Swoboda’s right to sue AT—an entity that never employed him—for discrimination was not clearly established.

The high court summarized its conclusion as follows: “Swoboda does not cite any prior Missouri decisional law that has interpreted section 213.070 to not require an employment relationship, nor does he produce any other authority demonstrating he can pursue his claim. Rather than seeking to enforce a previously delineated right, Swoboda attempted to adjudicate whether, under applicable statutes, his claim was permissible. The issuance of mandamus relief was foreclosed in this case in which an issue of first impression is presented.”

The Chief Justice of the Supreme Court, however, authored a 24-page dissent, in which two other justices joined. The dissent disagreed with the majority’s take on both the nature and scope of mandamus review, as well as the interpretation of the MHRA. Like the Western District and trial court, the dissent contended “[n]othing in section 213.070.1 or the definition of ‘employer’ requires the employer to be ‘the employee’s employer.’”

Notwithstanding the dissent, the important takeaway from this case is that a binding decision by the majority of the Missouri Supreme Court has cast significant doubt, if not outright rejected, the notion that an employee can sue the attorneys of his or her employer under the MHRA’s “aiding and abetting” provision. Stay tuned as we continue to monitor for further developments in this space.