
Rules of Department of Labor and Industrial Relations

Division 60—Missouri Commission on Human Rights

Chapter 3—Guidelines and Interpretations of Employment Anti-Discrimination Laws

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**Title 8—DEPARTMENT OF
LABOR AND
INDUSTRIAL RELATIONS**
**Division 60—Missouri Commission on
Human Rights**
**Chapter 3—Guidelines and
Interpretations of Employment Anti-
Discrimination Laws**

**8 CSR 60-3.010 Preservation of Records
and Posting of Posters and Interpretations**

PURPOSE: The Missouri Commission on Human Rights has the authority to formulate policies to effectuate the purposes of Chapter 213, RSMo (1986). This rule sets forth the rules for employer preservation of records, posting of posters and commission's interpretations.

(1) Every employer, labor organization, employment agency or other business or establishment covered by Chapter 213, RSMo (1986) shall post a commission equal employment poster in a place where other employee notices are posted or in a conspicuous place where employees will have access to it.

(2) Every person subject to the jurisdiction of the commission under Chapter 213, RSMo (1986) shall post the commission's fair housing poster in all places of business and establishments subject to the statute.

(3) Every person subject to the jurisdiction of the commission under Chapter 213, RSMo (1986) shall post the commission public accommodations poster in all places of business and establishments subject to this statute.

(4) Any personnel or employment record made or kept by any employer including, but not necessarily limited to, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation and selection for training or apprenticeship shall be preserved by the employer for a period of one (1) year from the date of the making of the record or the personnel action involved, whichever occurs later.

(5) Where a complaint of discrimination has been filed and the respondent notified, the respondent employer shall preserve all personnel records relevant to the complainant until final disposition of the complaint. The term personnel records relevant to the complaint, for example, would include personnel

or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers completed by an unsuccessful applicant or by all other candidates for the same position as that for which the complainant applied and was rejected. The date of final disposition of the complaint means the date which litigation is terminated, with regard to the complaint.

(6) If a person fails to make, keep, or preserve records or make reports in accordance with this regulation, the commission may draw an adverse presumption from this failure with regard to the allegations in the complaint. The presumption is rebuttable.

(7) Section 213.010(8), RSMo is interpreted to mean that any structure built after the effective date of these rules which is a place of public accommodation as covered by this statute must provide access for handicapped persons unless it can be shown this accommodation would cause undue hardship.

(8) Employer. A person is an employer subject to the provisions of Chapter 213, RSMo if at the time of the alleged discrimination that person employs six (6) or more persons within the state, whether these persons are temporary, part-time or permanent employees.

(9) A corporation or association must be one hundred percent (100%) owned and operated by a religious or sectarian group and being a member of that religion or sect must be a requirement for employment for that corporation or association to be exempt as an employer under section 213.010(5), RSMo (1986).

*AUTHORITY: section 213.030(6), RSMo 1986. * This rule was previously filed as 4 CSR 180-3.010. Original rule filed Oct. 31, 1973, effective Nov. 10, 1973. Amended: Filed July 1, 1980, effective Nov. 13, 1980.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

**8 CSR 60-3.020 Employment Advertising
Practices**

PURPOSE: The Missouri Commission on Human Rights has the authority to formulate policies to effectuate the purposes of Chapter 213, RSMo (1986). This rule sets forth the guidelines and interpretations governing, but

not limited to, the major aspects of employment advertising practices.

(1) It shall be a violation of section 213.055, RSMo (1986) for any employer, labor organization, licensing agency or employment agency to cause to be published, printed, circulated or displayed any advertisement or notice relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs, licensing opportunities or any of the terms, conditions or privileges under an employment advertisement or notice column which is segregated on the basis of race, creed, color, religion, national origin, sex, ancestry or handicap under any column heading which expresses overtly or subtly, directly or indirectly, any preference specification or limitation.

(2) It shall be a violation of section 213.055, RSMo (1986) for any employer, labor organization, licensing agency or employment agency to cause to be published, printed, circulated or displayed any advertisement or notice relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs, licensing opportunities or any of the terms, conditions or privileges the language of which advertisement or notice expresses any limitation, specification, discrimination or preference as to race, creed, color, religion, national origin, sex, ancestry or handicap. A limitation, specification, discrimination or preference as to religion, national origin or sex is not a violation where the limitation, specification, discrimination or preference is a *bona fide* occupational qualification for the particular job advertised as defined in section (5) of this rule.

(3) Whenever a help wanted advertisement or notice is to contain any job title or job description which is not clearly neutral in terms of sex and to the job advertised is not one for which sex is a *bona fide* occupational qualification as defined in this regulation, then the advertisement or notice shall instead utilize a neutral job title whenever practicable. If the use of a neutral job title is not practicable, then the advertisement or notice may contain the nonneutral job title provided, however, that the advertisement or notice also includes: a) the job title which is the counterpart of the nonneutral job title; or b) the designation "M/W." Newspapers which print employment advertisements are encouraged to voluntarily print a box on their employment advertising pages indicating that the

abbreviation “M/W”, when used, means men or women.

(4) For the purpose of this regulation, the *bona fide* occupational qualification exception shall be narrowly interpreted to include only those situations where the essence of the business would be undermined by not excluding persons on the basis of their sex, religion or national origin. The exception shall be interpreted so that individuals will not be considered for employment on the basis of any characteristics generally attributable to their group. The employer, labor organization, licensing agency or employment agency has the burden of establishing with the Missouri Commission on Human Rights that religion, national origin or sex is a *bona fide* occupational qualification.

(A) The application of the exception is not warranted where based on, for example, assumptions of the comparative general employment characteristics of persons of a particular religion, national origin or sex, such as their turnover rate; stereotyped characteristics of the previously mentioned classes, such as their mechanical ability or aggressiveness; customer, client, coworker or employer preference; historical usage, tradition or custom; or the necessity of providing separate facilities of a personal nature, such as restrooms or dressing rooms. In regard to sex, the application of the exception may be authorized by the Missouri Commission on Human Rights where it is necessary for authenticity or genuineness, such as for an actor or actress or fitters of intimate apparel.

(5) Any employer, labor organization, licensing agency or employment agency may make a request of the Missouri Commission on Human Rights as to whether religion, national origin or sex is a *bona fide* occupational qualification for a particular job which they intend to cause to be published, printed, circulated or displayed. The Missouri Commission on Human Rights shall give opinion in response to these requests. All requests shall be made in writing. An opinion in writing by the commission prior to the publication or display of any advertisement in response to this a request shall be binding on the commission for the purpose of this regulation except in those instances where the inquiry has not fully and accurately disclosed the relevant facts regarding the particular job in question. The commission shall maintain records as to each inquiry made pursuant to this section, to include the name, title and address of the inquiries, a summary of the job and job duties, the basis for the exception

claimed and the time, date, identification number and disposition of the inquiry.

(6) It shall be a violation of section 213.070, RSMo (1986) for any newspaper or other publication published or circulated within this state to print, publish or circulate employment advertisements under headings or columns that are segregated on the basis of race, creed, color, religion, national origin, sex, ancestry or handicap or under any column or heading which expresses overtly or subtly, directly or indirectly a preference, specification or limitation on the basis of race, creed, color, religion, national origin, sex, ancestry or handicap.

(A) Newspapers and other publications which print employment advertisements are encouraged to maintain lists of discriminatory terms and permissible substitutes and to instruct their employees to advise employers, labor organizations, licensing agencies or employment agencies of these terms and to have copies of these regulations available for distribution to advertisers upon request.

(B) The use of language including but not limited to black, Negro, colored, white, restricted, interracial, segregated, Christian, Jewish, men, women, boy, gal or any other word, term, phrase or expression which tends to influence, persuade or dissuade, encourage or discourage, attract or repel, any person(s) because of race, creed, color, religion, national origin, sex, ancestry or handicap shall be considered discriminatory advertising in violation of section 213.070, RSMo (1986).

(7) Employers and/or labor organizations whose work forces or memberships do not bear a reasonable relationship to the racial and/or ethnic pattern of the general population in their recruiting areas, may not recruit exclusively or even primarily by means of word-of-mouth referrals from present employees or present members.

(8) Employers and/or labor organizations whose work forces or memberships do not bear a reasonable relationship to the racial and/or ethnic pattern of the general population in their recruiting areas may not give preference in hiring or in admission to membership to relatives or present employees of present members by reason of those relationships.

(9) Nothing contained in this regulation shall be deemed to prohibit the commission from including in any of its orders against any respondent employer, labor organization, licensing agency or employment agency a

provision requiring the respondent to include in any advertisement or notice regarding any employment or licensing opportunity the term equal opportunity employer or any substantially similar term. Nor shall this regulation be deemed to prohibit persons from voluntarily using the term equal opportunity or any substantially similar term in any notice or advertisement.

AUTHORITY: section 213.030(6), RSMo 1986. This rule was previously filed as 4 CSR 180-3.020. Original rule filed Oct. 31, 1973, effective Nov. 10, 1973. Amended: Filed July 1, 1980, effective Nov. 13, 1980.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

8 CSR 60-3.030 Employment Testing

PURPOSE: The Missouri Commission on Human Rights has the authority to formulate policies to effectuate the purposes of Chapter 213, RSMo (1986). This rule sets forth the guidelines and interpretations governing, but not limited to the major aspects of employment testing.

Editor’s Note: The secretary of state has determined that the publication of this rule in its entirety would be unduly cumbersome or expensive. The entire text of the material referenced has been filed with the secretary of state. This material may be found at the Office of the Secretary of State or at the headquarters of the agency and is available to any interested person at a cost established by state law.

(1) For the purpose of the guidelines in this rule, the term test is defined as any pencil-and-paper or performance measure used as a basis for any employment decision. The guidelines in this rule apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not limited to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical or other abilities, dexterity and coordination; knowledge and proficiency; occupational and other interest; and attitudes, personality or temperament. The term test includes all formal, scored, quantified and standardized techniques of assessing job suitability including, in addition to these guidelines, specific qualifying or disqualifying personal history or

background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

(2) The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by the Missouri Fair Employment Practices Act constitutes discrimination unless—

(A) The test has been validated and evidences a high degree of utility as described; and

(B) The person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his/her use.

(3) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate section (2) of this rule. This evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(A) The term technically feasible as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(B) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job(s) for which candidates are being evaluated.

1. If job progression structures and seniority provisions are so established that new employees probably will progress within a reasonable period of time and in a great majority of cases, to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic or the time span is such that higher level jobs or employees' potential may be

expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a high level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will, in fact, attain that higher level job within a reasonable period of time.

2. Where a test is to be used in different units of a multi-unit organization and no significant differences exist between units, jobs and applicant populations, evidence obtained in one (1) unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multi-unit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one (1) company in the same industry. Both in this instance and in the use of data collected throughout a multi-unit organization, evidence of validity specific to each unit may not be required; provided, that no significant differences exist between units, jobs and applicant populations.

(4) When probable cause is found by the investigating commissioner following the filing of a complaint pursuant to Chapter 213, RSMo (1986), the following standards shall apply:

(A) For the purpose of satisfying the requirements of section (4) of this rule, empirical evidence in support of a test's validity may be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in *Standards for Educational and Psychological Tests and Manuals* published by American Psychological Association, 1200 17th Street, N.W., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job;

(B) Although any appropriate validation strategy may be used to develop empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

1. Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job(s) in question. This further assumes that the applicant sample is representative of the minority population available for the job(s) in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his/her subsequent obligation for validation when inclusion of minority candidates becomes technically feasible;

2. Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring and interpretation of tests results, that are privately developed and/or are not available through normal commercial channels, must be included as a part of the validation evidence;

3. The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. This criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses;

4. In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scored for reasons other than supervisors' prejudice, as when, as new

employees, they have had less opportunity to learn job skills. The general point is that all criteria needs to be examined to insure freedom from factors which would unfairly depress the scores of minority groups; and

5. Data must be generated and results separately reported for minority and non-minority groups whenever technically feasible. When a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. A test which is differentially valid may be used in groups but one (1) group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups;

(C) In assessing the utility of a test, the following considerations will be applicable:

1. The relationship between the test and at least one (1) relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a high probability of no more than one-to-twenty (1:20) to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one (1) component of job performance; and

2. In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including: the larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful; conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available; the larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful; conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory; the smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful; and conversely, a relatively low relationship may

prove useful when the former risks are relatively high;

(D) The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted;

(E) In cases where the validity of a test cannot be determined under sections (3) and (4) of this rule (for example, the number of subjects is less than that required for a technically adequate validation study or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when—

1. The studies pertain to jobs which are comparable (that is, have basically the same task elements); and there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of a test validity for his/her own job must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in this rule;

(F) Under no circumstances will the general reputation of a test, its author or its publisher or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are—assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes. Although professional supervision of testing activities may help

greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity; and

(G) Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue.

1. Provided the person can cite substantial evidence of validity as described in subsection (4)(E) of this rule, and s/he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity which will be obtained.

(5) An employment service, including private employment agencies and state employment agencies, as defined in section 213.010, RSMo shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(A) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation because the test user did not request validation or has requested the use of some lesser standard than is provided in these guidelines.

(B) When an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or make referral pursuant to the test results. The employment agency must furnish on request this evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the user on the reputation of the test, its author or the name of the test shall not be deemed sufficient evidence of validity. An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in subsection (4)(E) of this rule.

(6) The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard even though validated against job performance in accordance with the guidelines in this rule cannot be imposed upon any individual or class protected by the Missouri Fair Employment Practices Act where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority group have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by the Missouri Fair Employment Practices Act, who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

(7) Employers, unions and employment agencies should provide an opportunity for retesting and reconsideration to earlier failure candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that applicant should be retested.

(8) Selection techniques other than tests, as defined in section (1) of this rule, may be improperly used so as to have the effect of discriminating against minority groups. These techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there is data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his/her unscored procedures as well as of any tests which may be used, the evidence of validity being the same types referred to in section (6) of this rule. Data suggesting the possibility of discrimination exists, for example, when there are differential rates of applicant rejection from various minority and nonminority groups for the same job or group of jobs or when there are disproportionate representa-

tions of minority and nonminority groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority groups among present employees in different types of jobs. If the person is unable or unwilling to perform the validation studies, s/he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

(9) Nothing in these guidelines shall be interpreted as diminishing a person's obligation under the Missouri Fair Employment Practices Act to undertake affirmative action to ensure that applicants or employees are treated without regard to race, religion, creed, color, sex, national origin or ancestry. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligation to take positive action in affording employment and training to members of classes protected by the Missouri Fair Employment Practices Act.

AUTHORITY: section 213.030(6), RSMo 1986. This rule was previously filed as 4 CSR 180-3.030. Original rule filed Oct. 31, 1973, effective Nov. 10, 1973.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

8 CSR 60-3.040 Employment Practices Related to Men and Women

PURPOSE: The Missouri Commission on Human Rights has the authority to formulate policies to effectuate the purposes of Chapter 213, RSMo (1986). This rule sets forth guidelines and interpretations governing, but not limited to, the major aspects of employment practices in relation to sex.

(1) References to employer(s) in these rules state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities, as defined in the Missouri Fair Employment Practices Act, Chapter 213, RSMo (1986).

(2) The *bona fide* occupational qualification exception as to sex is strictly and narrowly construed. Labels—men's jobs and women's jobs—tend to deny employment opportunities unnecessarily to one sex or the other.

(A) The following situations do not warrant the application of the *bona fide* occupational qualification exception:

1. The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men;

2. The refusal to hire an individual based on stereotyped characterizations of the sexes. These stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group; and

3. The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.

(3) Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a *bona fide* occupational qualification.

(4) Advertisement in newspapers and other media for employment must not express a sex preference, unless sex is a *bona fide* occupational qualification for the job. The placement of an advertisement in columns headed male or female will be considered an expression of a preference limitation, specification or discrimination based on sex.

(5) Section 213.055, RSMo (1986) specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. Private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that those agencies limit their services to furnishing employees for particular jobs for which sex is a *bona fide* occupational qualification.

(A) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a *bona fide* occupational qualification. However, an employment agency is not in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of *bona fide* occupational qualification is without substance and the agency makes and maintains a written record available to the commission of each job order. This record shall include the name of the employer, the description of the job and

the basis for the employer's claim of a *bona fide* occupational qualification.

(B) It is the responsibility of employment agencies to keep informed of opinions and decisions of the commission on sex discrimination.

(6) A preemployment inquiry may ask male—, female—, or Mr., Mrs. Or Miss, provided that the inquiry is made in good faith for nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a *bona fide* occupational qualification.

(7) Written personnel policies relating to job policies and practices must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for his/her employees and there is a written agreement on conditions of employment, this agreement shall not be inconsistent with these rules.

(8) Employees of both sexes shall have an equal opportunity to any available job that s/he is qualified to perform unless sex is a *bona fide* occupational qualification.

(9) No employer shall make any distinction based upon sex in employment opportunities, wages, hours or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar fringe benefits, the employer will not violate these rules if benefits are equal for men and women.

(10) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

(11) The employer's policies and practices must assure the appropriate physical facilities to both sexes. The employer may not refuse to hire men or women or deny men or women a particular job because there are no restrooms or associated facilities.

(12) An employer must not deny a female employee the right to any job she is qualified to perform. For example, an employer's rules cannot bar a woman from a job that would require more than a certain number of hours or from working at jobs that require lifting or carrying more than designated weights.

(13) It is an unlawful practice to classify a job as male or female or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a *bona fide* occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that—

(A) A female is prohibited from applying for a job labeled male or for a job in a male line of progression and vice versa;

(B) A male scheduled for layoff is prohibited from displacing a less senior female on a female seniority list and vice versa; and

(C) A seniority system or line of progression which distinguishes between light and heavy jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex or creates unreasonable obstacles to the advancement by members of either sex.

(14) The employer's wage schedules must not be related to or based on the sex of the employees; and the employer may not discriminatorily restrict one sex to certain job classifications. The employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex.

(15) Fringe benefits, as used in this rule, include medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions and privileges of employment.

(A) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(B) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the head of the household or principal wage earner in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that conditioning discriminatorily affects the rights of women employees, and that head of household or principal wage earner status bears no relationship to job performance, benefits which are so conditioned will be found in a *prima*

facie violation of the prohibitions against sex discrimination contained in the act.

(C) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees.

(D) It shall not be a defense under Chapter 213, RSMo (1986) to a charge of sex discrimination in benefits that the cost of benefits is greater with respect to one sex than the other.

(16) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Chapter 213, RSMo (1986) and may be justified only upon showing of business necessity.

(A) Disabilities caused or contributed to by pregnancy, miscarriage, legal abortion, childbirth and recovery are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave, plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(B) Where 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 act if it has a disparate impact on employees of one sex and is not justified by a business necessity.

(17) Harassment on the basis of sex is a violation of Chapter 213, RSMo.

(A) Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when—

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or

3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(B) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

(C) Applying general principles of Chapter 213, RSMo, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as employer) is responsible for its acts and those of its agents, employees and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer if the employer knew or should have known of their occurrence.

(D) 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 or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

1. 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

2. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

3. A tangible employment action is a significant change in employment status. It is the means by which the supervisor brings official power of the enterprise to bear on subordinates, as demonstrated by the following: it requires an official act of the enterprise; it usually is documented in official company records; it may be subject to review

by higher level supervisors; and it often requires the formal approval of the enterprise and use of its internal processes. A tangible employment action usually inflicts direct economic harm.

4. Examples of tangible employment actions include but are not limited to: hiring and firing; promotion and failure to promote; demotion; undesirable reassignment; a decision causing a significant change in benefits; compensation decisions; and work assignments.

5. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory capacity with immediate (or successively higher) authority over an employee or is another supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

AUTHORITY: section 213.030(6), RSMo 2000. This rule was previously filed as 4 CSR 180-3.040. Original rule filed Oct. 31, 1973, effective Nov. 10, 1973. Amended: Filed July 1, 1980, effective Nov. 13, 1980. Emergency amendment filed Sept. 17, 1999, effective Sept. 27, 1999, terminated Dec. 29, 1999. Amended Filed Dec. 28, 2000, effective June 30, 2001.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

8 CSR 60-3.050 Religious Discrimination

PURPOSE: The Missouri Commission on Human Rights is proposing to enact this rule to provide an interpretation of the prohibitions in Chapter 213, RSMo against religious discriminations and to the requirement of an employer to reasonably accommodate religious beliefs of employees.

(1) The employer has an obligation to make reasonable accommodations to the religious needs of employees and prospective employees where these accommodations can be made without undue hardships on the conduct of the employer's business. Undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer. The commission will review each case on an individual basis in an effort to seek an equitable application of these rules to the variety of situations which

arise due to the varied religious practices of the people of this state.

AUTHORITY: section 213.030(6), RSMo 1986. This rule was previously filed as 4 CSR 180-3.050. Original rule filed July 1, 1980, effective Nov. 13, 1980.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

8 CSR 60-3.060 Handicap Discrimination in Employment

PURPOSE: The Missouri Commission on Human Rights has the power and authority to adopt suitable rules to carry out the provisions of the state Fair Employment Practices Act pursuant to 213.030(6), RSMo (1986). The rules represent the commission's construction of provisions dealing with handicap discrimination in employment.

(1) Definitions. When used in these rules—

(A) The phrase physical or mental impairment means—

1. Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one (1) or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and learning disabilities;

(B) Disability means a person either has a physical or mental impairment which substantially limits one (1) or more of that person's major life activities; or has a record of such impairment; or is regarded as having such an impairment.

1. Minor temporary illnesses shall not be considered physical or mental impairments resulting in a disability. Examples of minor temporary illnesses include, but are not limited to, broken bones, sprains or colds;

(C) Major life activities means those life activities which affect employability such as communication, ambulation, self-care, socialization, education, vocational training, employment and transportation;

(D) Has a record of such an impairment means a person has a history of, or has been misclassified, as having a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer as constituting such a limitation;

(E) Is regarded as having such an impairment means a person—

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or by others as constituting such a limitation; or

2. Has none of the impairments defined in paragraph (1)(A)1. Or 2. of this rule, but is treated by an employer or by others as having an impairment which substantially limits a major life activity;

(F) Disability unrelated to a person's ability to perform the duties of a particular job or position means a disability which does not substantially interfere with a person's ability to perform the essential functions of the employment for which the person applies, is engaged in or had been engaged.

1. Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a disability job related.

2. A disability is not job related merely because the job may pose a threat of harm to the employee or applicant with the disability unless the threat is one of demonstrable serious harm to his/her safety.

3. A disability is job related if placing the disabled person in the job would pose a demonstrable threat of harm to the health and safety of others.

4. A disability is not job related if, with reasonable accommodation, it does not prevent performance of the essential functions of the job in question; and

(G) Reasonable accommodation means—

1. An employer shall make reasonable accommodation to the known limitations of a handicapped employee or applicant;

2. Accommodation may include:

A. Making facilities used by employees readily accessible to and usable by handicapped persons; and

B. Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters and other similar actions; and

3. In determining whether an accommodation is reasonable, factors to be considered include, but are not limited to:

A. The nature and cost of the accommodation needed;

B. The size and nature of a business, including the number and type of facilities and the structure and composition of the work force;

C. The good faith efforts previously made to accommodate similar disabilities; and

D. The ownership interest in the subject of the proposed accommodation including the authority to make the accommodation

under the terms of any *bona fide* agreement such as a lease.

(2) Preemployment Inquiries.

(A) An employer, labor organization or employment agency shall not make pre-employment inquiry of an applicant as to whether the applicant has a physical or mental impairment or as to the nature or severity of this impairment. However, an employer, labor organization or employment agency may make preemployment inquiry into an applicant's ability to perform specific job-related functions.

(B) An employer, labor organization or employment agency may conduct pre-employment medical examinations relating to minimum physical standards for employment provided that—

1. All applicants for which the medical examination is required are subjected to the examination regardless of physical or mental impairment;

2. The minimum physical standards for employment are related to the person's ability to perform the essential functions of employment for which the person has applied; and

3. These medical examination results are given the same consideration in employment decisions for all applicants regardless of physical or mental impairment.

(C) Medical exams and other assessments shall take into account the degree to which the person has compensated for his/her limitations and the rehabilitation services s/he has received.

(D) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be accorded confidentiality as medical records, except that—

1. Supervisors and managers may be informed regarding restriction on the work or duties of handicapped persons and regarding necessary accommodations;

2. First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

3. The commission shall be provided relevant information upon request when investigating compliance with Chapter 213, RSMo (1986).

(3) Employment Criteria.

(A) An employer, labor organization or employment agency shall not make use of any employment test or other selection criterion which screens out or tends to screen out handicapped persons or any class of handicapped persons unless—

1. The test score or the selection criterion is shown to be job related for the position in question; and

2. Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are shown to be unavailable.

(B) An employer, labor organization or employment agency shall select and administer tests concerning employment to ensure that, when administered to the applicant or employee who has a handicap that impairs sensory, manual, reading or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, reading or speaking skills, except where those skills are the factors that the test purports to measure.

(C) The requirements of 8 CSR 60-3.030 regarding employment testing shall apply to the handicapped.

(4) The requirements of 8 CSR 60-3.010 regarding employer reporting and preservation of records shall apply to the handicapped.

(5) The requirements of 8 CSR 60-3.020 regarding employment advertising practices shall apply to the handicapped.

(6) The requirements of Chapter 8 CSR 60-2 regarding practice and procedure shall apply to the handicapped.

AUTHORITY: section 213.030(6), RSMo 1986. This rule was previously filed as 4 CSR 180-3.060. Original rule filed July 1, 1980, effective Nov. 13, 1980.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

8 CSR 60-3.070 National Origin Discrimination

PURPOSE: The Missouri Commission on Human Rights is proposing to enact this rule as an interpretation of the statutory prohibition of Chapter 213, RSMo against national origin discrimination.

(1) It is intended to eliminate covert as well as overt practices of discrimination, and the commission, therefore, will examine, with particular concern, cases where persons within the jurisdiction of the commission have been denied equal employment opportunity for reasons which are grounded in

national origin considerations. Examples of cases of this character which have come to the attention of the commission include, but are not limited to: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a specific national origin; denial of equal opportunity because of membership in lawful organizations identified with or seeking to promote the interests of national groups; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a given national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin; and denial of equal opportunity to persons who as a class of persons tend to fall outside national norms for height and weight where the height and weight specifications are not necessary for the performance of the work involved.

AUTHORITY: section 213.030(6), RSMo 1986. This rule was previously filed as 4 CSR 180-3.070. Original rule filed July 1, 1980, effective Nov. 13, 1980.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*

8 CSR 60-3.080 Affirmative Action

PURPOSE: The Missouri Commission on Human Rights enacts this rule to provide employers subject to the jurisdiction of the commission under Chapter 213, RSMo 1986 some guidance in developing voluntary affirmative action plans. This rule will provide the standards that the commission will use to judge whether the plans are unlawfully discriminatory.

Editor's Note: The secretary of state has determined that the publication of this rule in its entirety would be unduly cumbersome or expensive. The entire text of the material referenced has been filed with the secretary of state. This material may be found at the Office of the Secretary of State or at the headquarters of the agency and is available to any interested person at a cost established by state law.

(1) This rule is not intended to provide standards for determining whether voluntary action has fully remedied past or existing discrimination. Therefore, the rule does not

apply to a determination of the adequacy of an affirmative action plan to eliminate discrimination against previously excluded groups. Employers, labor organizations or other persons who take affirmative action may still be liable if the plan or program does not adequately remedy illegal discrimination. This rule applies to charges that the affirmative action plan itself is discriminatory.

(2) Voluntary affirmative action is appropriate under the following circumstances:

(A) Employers, labor organizations and other persons may take affirmative action based on an analysis which reveals employment practices causing potential adverse impact on the employment opportunities of those classes protected by Chapter 213, RSMo and

(B) Because of historic restrictions by employers, labor organizations and others, the available pool of persons in a protected class who are qualified for employment or promotional opportunities is artificially limited. Employers, labor organizations and other persons are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

1. Training plans and programs, including on-the-job training, which emphasize providing members of the protected categories with the opportunity, skill and experience necessary to perform the functions of skilled trades, crafts or professions;

2. Extensive and focused recruiting activity; and

3. Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

(3) An affirmative action plan or program under this section shall contain three (3) elements—a reasonable self analysis, a reasonable basis for concluding action is appropriate and reasonable action.

(A) The objective of a self-analysis is to determine whether employment practices do or tend to, exclude, disadvantage, restrict or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self-analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246 and its implementing regulations, including 41 CFR Part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis

similar to that required under other federal, state or local laws or regulations prohibiting employment discrimination. In conducting a self-analysis, the employer labor organization, or other person should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions.

(B) If the self-analysis shows that one (1) or more employment practices—1) have or tend to have an adverse effect on employment opportunities of members of previously excluded protected groups, or groups whose employment or promotional opportunities have been artificially limited; 2) leave uncorrected the effects of prior discriminations; or 3) result in disparate treatment, the person making the self-analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self-analysis establish a violation of Chapter 213, RSMo. This reasonable basis exists without any admission or formal finding that the person has violated Chapter 213, RSMo and without regard to whether there exist arguable defenses to a Chapter 213, RSMo violation.

(C) The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self-analysis. Reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, creed, color, religion, sex, national origin, ancestry or handicap of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment or effect of past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(D) Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for the State and Local Government Agencies," 41 FedReg 38,814 (September 13, 1976), reaffirmed and extended to all persons subject to federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FedReg 38,290; 38,300 (August 26, 1978).

(4) In considering the reasonableness of a particular affirmative action plan or program,

the commission will apply the following standards:

(A) The plan should be tailored to solve the problems which were identified in the self-analysis and to ensure that employment systems operate fairly in the future while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, creed, color, religion, sex, ancestry, national origin or handicap conscious provision of the plan or program should be maintained only so long as necessary to achieve these objectives; and

(B) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants and the number of employment opportunities expected to be available.

(5) Where an affirmative action plan or program is alleged to violate, or is asserted as a defense to a charge of discrimination, the commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these rules, whether or not the analysis and plan are in writing. However, the absence of a written self-analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted and that action was taken pursuant to a plan or program based on the analysis. Therefore, the commission recommends that these analyses and plans be in writing.

(6) Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a federal, state or local equal employment opportunity law or regulation, is the basis of a complaint or is alleged to be the justification for an action which is challenged, the commission will investigate to determine whether such an order exists and whether adherence to the affirmative action plan which is part of the order was the basis of the complaint or justification. If the commission so finds, it will issue a determination of no probable cause. The commission interprets Chapter 213, RSMo to mean that good faith actions taken pursuant to the direction of a court order cannot give rise to liability under Chapter 213, RSMo.

(7) Compliance with an affirmative action plan developed pursuant to these rules is a

defense to a complaint of discrimination based upon the implementation of that plan.

AUTHORITY: section 213.030(6), RSMo 1986. This rule was previously filed as 4 CSR 180-3.080. Original rule filed Sept. 19, 1980, effective Feb. 12, 1981.*

**Original authority: 213.030, RSMo 1959, amended 1978, 1986, 1992, 1993, 1995, 1998.*