



Disability Rights Education & Defense Fund

January 5, 2022

*Via Email [mayor@stlouis-mo.gov](mailto:mayor@stlouis-mo.gov)*

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*Via Email [Michael.Stelzer@courts.mo.gov](mailto:Michael.Stelzer@courts.mo.gov)*

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Presiding Judge  
Twenty-Second Judicial Circuit of Missouri  
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*Via Email [greend@stlouis-mo.gov](mailto:greend@stlouis-mo.gov)*

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*Via Email [boa-president@stlouis-mo.gov](mailto:boa-president@stlouis-mo.gov)*

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RE: Call for the City of St. Louis and Circuit Court to End and Remedy Unlawful  
Disability Discrimination Against Custodial Workers with Disabilities

Dear Mayor Jones, Comptroller Green, President Green, Counselor Hamilton, Judge Stelzer,  
Judge Hogan, and President Hammond:

The American Civil Liberties Union of Missouri (ACLU) and Disability Rights Education and  
Defense Fund (DREDF) call on you to end and remedy overt and unlawful discrimination  
against disabled custodial workers who service the court building under a contract between the  
Twenty-Second Judicial Circuit of Missouri (Circuit Court) and Challenge Unlimited. Although

all custodial workers perform the same duties in the same manner, Challenge Unlimited affords fewer employment benefits to workers with disabilities, in violation of Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111, *et seq.* and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010, *et seq.*

### **Background: Circuit Court Contract with Challenge Unlimited.**

In mid-2018, as you likely know, the Twenty-Second Judicial Circuit of Missouri entered a cleaning and custodial services contract with Challenge Unlimited. The agreement has been renewed annually since then, for a total contract value of more than \$4.4 million. The current contract will end in June 2023.

The City of St. Louis plays an important leadership role in all Circuit Court contracts. The City's Board of Estimate and Apportionment (made up of the City Mayor, Comptroller, and Alderman Board President) oversees and authorizes all Circuit Court expenditures. The City functions as a county with respect to the Court,<sup>1</sup> and City officials have the authority to ensure that these expenditures comply with applicable laws, and that City property used by the circuit courts is safely and efficiently operated, maintained, and constructed. *See In re 1983 Budget for Circuit Court*, 665 S.W.2d 943, 944 (Mo. 1984) (holding that a county may challenge budget estimates it considers to be unlawful or unnecessary for the operation of the courts and the administration of justice) (emphasis added); *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 478 (Mo. 1992) ("County officials oversee how expenditures of the circuit court are made to ensure that such expenditures are in compliance with state law ..." (emphasis added)).

For nearly five years, Challenge Unlimited has been operating under its multi-million-dollar contract in violation of federal and state law. Specifically, Challenge Unlimited employs between 21 and 25 workers, at any given time, to fulfill the custodial contract with the Circuit Court, including between eight and ten workers who have mental and/or physical disabilities. All workers, disabled and nondisabled, perform the same job duties with the same workload. All workers are paid the same hourly wage. There is no rehabilitative component (other than that associated with any employment). It's simply the same job. **But, in violation of federal and state law, Challenge Unlimited categorizes the disabled workers as "clients" rather than "employees," and on that basis denies them the unemployment insurance coverage that their nondisabled coworkers enjoy.**

Alongside wages, unemployment insurance coverage is a core privilege and benefit of employment and is a central feature of our social safety net. During the ongoing pandemic, unemployment insurance benefits have prevented hunger, poverty, and homelessness for thousands of workers.

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<sup>1</sup> The City of St. Louis is recognized as both a city and a county it is not within a county. Mo. Const. art. VI, § 31. "Insofar as the City provides budgetary support for the circuit court, it performs the functions of a county." *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 473 (Mo. 1992). *Accord* Custodial and Janitorial Service Agreement (Aug. 29, 2018), p. 2 ("This Agreement and the obligations of the Court hereunder are subject to termination in the event the City of St. Louis does not timely appropriate sufficient sums of money for the completion of this Agreement.").

At least one disabled worker terminated by Challenge Unlimited has been denied unemployment insurance benefits based on the company's unlawful failure to pay into the unemployment insurance fund for its disabled workers.

### **Legal Analysis**

Title I of the ADA prohibits employers from discriminating against qualified workers with disabilities in regard to “employee compensation, ... and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). Further, unlawful discrimination includes “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee[.]” 42 U.S.C. § 12112(b)(1). A covered employer may not “discriminate on the basis of disability against a qualified individual in regard to “[f]ringe benefits available by virtue of employment, whether or not administered by the covered entity[.]” 29 C.F.R. § 1630.4(a)(vi); accord Senate Committee on Labor and Human Resources, S. Rep. 101-116 (Aug. 30, 1989), at pp. 23-24; *Hopman v. Union Pac. R.R.*, No. 4:18-cv-00074-KGB, 2022 U.S. Dist. LEXIS 58864, at \*8 (E.D. Ark. Mar. 30, 2022) (quoting from Senate Report).

The Missouri Human Rights Act (MHRA) includes virtually identical prohibitions. Mo. Rev. Stat. § 213.055.1(1)(a) (prohibiting discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment ... because of ... disability”), (b) (unlawful for employer to “limit, segregate, or classify” employees in a way that adversely affects them because of disability); see also *Medley v. Valentine Radford Communs., Inc.*, 173 S.W.3d 315, 319 (Mo. Ct. App. 2005) (“in deciding a case under the MHRA, we are guided by both Missouri law and any applicable federal employment discrimination decisions”).

Under the ADA and the MHRA, Challenge Unlimited is prohibited from classifying its disabled workers differently and providing them with lesser benefits.

There is no colorable argument that the disabled workers here are not “employees.” The U.S. Supreme Court has ruled that “the common-law element of control is the principal guidepost that should be followed” in determining whether someone is an “employee” under the ADA. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003). The Missouri Supreme Court uses an even broader standard to determine whether someone is an “employee” for purposes of the MHRA. *Howard v. City of Kan. City*, 332 S.W.3d 772, 782 (Mo. 2011) (applying dictionary definition of “employee,” and holding that municipal judges are employees even though they are free from the control of their employer as to the result of their work).

Here, there is no doubt that Challenge Unlimited controls all its workers, disabled and nondisabled, assigned to the court contract. Its 105-page handbook for “clients” delineates in minute detail the terms and conditions of the employment relationship, from timekeeping to badges to mandatory staff meetings to safety to smoking to parking to proper telephone etiquette. The manual further states:

The Company has the right, at its sole discretion, to add new policies, change policies, or cancel policies at any time with or without prior notice to clients or

employees. ... The Company follows an employment-at-will policy. The employment-at-will policy allows you or the Company to terminate your employment at any time for any reason.

Challenge Unlimited, Client Handbook – Operations (eff. Dec. 1, 2020), at pp. x, 1. All aspects of the workplace here demonstrates that Challenge Unlimited is the “employer” and the disabled people providing custodial services are “employees” (other than the fact that Challenge Unlimited uses the term “client” in place of “employee”).<sup>2</sup>

We understand that Challenge Unlimited relies upon a Missouri state unemployment insurance statute in choosing not to pay into unemployment insurance for the disabled workers. *See* Mo. Rev. Stat. § 288.034(9)(4) (stating that “employment” does not apply to service performed in “a facility conducted for the purpose of carrying out a program of rehabilitation”). But this exemption does not apply here, as the Circuit Court building is not a facility conducted for the purpose of rehabilitation – nor are the workers participating in some kind of rehabilitation program. They are working a regular custodial job.

Further, Missouri courts have ruled that the term “employee” for purposes of the MHRA is defined using the ordinary dictionary definition – not by definitions of “employee” pulled from other parts of the Missouri code. *Klee v. Mo. Comm’n on Human Rights*, 516 S.W.3d 917, 921 (Mo. Ct. App. 2017) (holding that the definition of “employee” under the MHRA is not limited by statutory exceptions to the definition of “employee” under the Missouri Minimum Wage Law) (citing to and reasoning from *Howard*, 332 S.W.3d 772).

Moreover, the requirements of ADA govern over a state statute. U.S. Const. Art. VI, Cl 2 (Supremacy Clause); *Arc of Iowa v. Reynolds*, 559 F. Supp. 3d 861, 878 (S.D. Iowa 2021) (“[T]he Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law. ... Under the Supremacy Clause, federal law may supersede state law in several different ways, ... [including] when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”) (quoting from *Hillsborough Cnty. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 712 (1985)) (citations and quotation marks omitted).

Here, the disabled workers are doing the exact same job, and the ADA and the MHRA prohibit Challenge Unlimited from providing a less valuable compensation package – one without unemployment insurance coverage – to the disabled workers as compared to the nondisabled workers.

### **Demand for End of and Remedy to Overt Disability Discrimination.**

We call on the recipients of this letter to take all steps necessary to end and remedy the overt disability discrimination described herein. Specifically:

- City and Circuit Court leaders must direct Challenge Unlimited to immediately begin and continue paying into Missouri unemployment insurance for all its workers at the Circuit

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<sup>2</sup> Challenge Unlimited maintains a nearly identical manual for “employees.”

Court, including workers with disabilities;

- City and Circuit Court leaders must direct Challenge Unlimited to retroactively pay into Missouri unemployment insurance for all of the disabled workers at the Court, past and present, who were unlawfully labeled “clients,” going back through the duration of the contract, such that all affected disabled workers are made whole and may seek unemployment insurance on an equal basis with nondisabled workers;
- The Circuit Court and the City of St. Louis must take steps to ensure that any future custodial contract for the court facilities provides lawful ADA and MHRA-compliant compensation packages to disabled and nondisabled workers;
- Challenge Unlimited, the Circuit Court, and the City of St. Louis must take affirmative steps to communicate with past, present, and future custodial workers that they are entitled to unemployment insurance, even if they have been unlawfully mischaracterized as “clients”; and
- The workers who have brought this overt form of disability discrimination to our attention must not experience retaliation or interference with their rights; the new contract should require that the contractor offer employment to the existing workers at the Circuit Court.

Thank you for your attention to this urgent matter.

Sincerely,

ACLU OF MISSOURI

Tony Rothert  
Director of Integrated Advocacy

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

Claudia Center  
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