IN THE MISSOURI SUPREME COURT

SC88012

DOUGLAS DAUGHERTY,

Appellant,

vs.

CITY OF MARYLAND HEIGHTS, MISSOURI,

Respondent.

Appeal from the Circuit Court of the County of St. Louis

State of Missouri

Honorable B.C. Drumm, Jr.

SUBSTITUTE REPLY BRIEF OF APPELLANT

THE KLOEPPEL LAW FIRM &
LAW OFFICES OF KEVIN J. DOLLEY, LLC
GREG KLOEPPEL, # 47909
KEVIN J. DOLLEY, #54132
9620 Lackland Rd.
St. Louis, MO 63114
Phone: (314) 423-8003
Fax: (314) 423-8054
Attorneys for Appellant

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REPLY TO RESPONDENT'S STATEMENT OF FACTS

Included within Respondent City of Maryland Height's ("City") Substitute Brief are disputed fact questions which require inferences to be drawn in Appellant Douglas Daugherty's ("Daugherty") favor, as discussed below.

A. Dr. Wilkinson's medical opinion in 1987

City stated in its Brief, "Dr. Wilkinson formed the medical opinion in 1987 that Appellant should never return to his full and active duties as a Police Officer, but he could return to administrative duties as a Police Officer." (Respondent's Brief, hereinafter "Respondent," p. 14). This is a disputed question of fact. On or about August 21, 1987, Dr. David L. Wilkinson noted that Daugherty had recovered from his injuries and was able to return to full and active duty, effective September 1, 1987, stating "I feel that he [Daugherty] has recovered to the point where he will not endanger himself or affect the safety of fellow police officers while in the line of duty." (Lf 544). Dr. Wilkinson's opinion stated unequivocally that Daugherty was released to "full and active duty" and that Daugherty will not endanger other police officers "in the line of duty." (Lf 544). Over the next fifteen (15) years, Daugherty continued in his duties as a Sergeant, Lieutenant and Captain performing at a high level, as documented in his performance evaluations, and by his continued promotion through the ranks of the City's Police Department. (Lf 578-634).

B. Disability Claims of City

City incorrectly stated that Daugherty agreed that he referred to himself as disabled as a result of his 1986 injury, that Daugherty never denied having a disability and that he may in the future be eligible for retirement benefits. (Respondent, p. 17).

Daugherty stated in his deposition, "I was told by my …rehabilitation physicians years ago that, you know, you have a disability but you're not disabled. There's nothing you can't do. I always kept that in the back of my head." (Lf 30). Daugherty acknowledged that he received medical treatment in the past but that his medical condition was never of a disabling level and that he was fully rehabilitated when he was released to full and active duty in 1987. (Lf 30). When Daugherty was asked in his deposition whether he "recognized at that time that you did have some level of disability which might qualify you for a disability retirement," Daugherty responded in the negative. (Lf 29; Respondent, p. 29).

C. Complaints from other Officers

City claimed that Chief O'Connor received several complaints from the Detectives and Sergeants in the Detective Bureau regarding Daugherty's performance. (Respondent, p. 17). This is a disputed issue of fact.

On January 17, 2002, Sergeant Joe Delia signed a Memorandum indicating that there was no problem with the leadership of the Detective Bureau. (Lf 482). Sergeant Delia testified that he had also documented that there was no problem with the leadership of the Detective Bureau. (Lf 455). Later, during this

litigation, Sergeant Delia testified that he had made a false statement and that there was a lack of leadership in the Detective Bureau under Daugherty. (Lf 482-483). Sergeant Bova Conti stated that he never told O'Connor that the Bureau lacked leadership under Daugherty. (Lf 455). City provides no further information regarding its vague claims as to who made complaints within the Detective Bureau regarding Daugherty. (Respondent, p. 17).

D. Basis for Sending Daugherty for Medical Evaluation

City stated that the only reason for sending Daugherty for the fitness for duty exam was "protracted absences." (Respondent, p. 21).

City's claim that Daugherty's "protracted absences" were the basis for his medical evaluation is false and, instead, City's medical evaluation of Daugherty was based on his age and perceived disability. When comparing Daugherty's sick time usage from 2000 to 2002 with that of the other officers who started with the Department in approximately 1986, Daugherty's use of sick time was not out of the ordinary. (Lf 640-647). Each year, several officers used the same or more hours of sick time than Daugherty. In the City's disability request letter to Dr. Katz, City expressed no concern related to absenteeism as the basis for the examination. (Lf 677). In the disability exam request letter, City stated that it was requesting Daugherty be examined because of two previous work injuries and said nothing about absenteeism. (Lf 677).

E. Appellant's Ability to Perform Duties

Throughout its brief, City insisted that Daugherty was unable to perform the duties of a Police Officer citing the opinions of Dr. Katz and Victor Zucarello. (Respondent p. 10). Dr. Katz and Zucarello's opinions, however, were based on a job description which differed from Daugherty's actual job duties. (Lf 437-38; 551). Major Kozuszek admitted that there was a lack of similarity between the position description that he created and the City's actual position description for a Captain. (Lf 437-438). All descriptions of the Captain position, besides Major Kozuszek's position description, indicated that the position of police Captain for the City was a supervisory position with any substantial physical activity being a very peripheral and rare activity, not an essential function of employment. (Lf 391; 396; 556-557; 449-50; 457-58).

City's actual position description of a Captain includes "Essential Duties and Responsibilities" which state nothing regarding directly enacting an arrest, subduing an unwilling perpetrator, pulling an accident victim from an accident scene or lifting more than one hundred (100) pounds. (Lf 551). The evidence shows that the essential functions of Captain do not include such duties. (Lf 391; 396; 556-557; 449-50; 457-58). Any patrol work or emergency response work of a Police Captain for City are in the capacity of "oversees and assists" subordinates in performing such functions. (Lf 551). Further, Daugherty established that he was able to perform heavier work load demands than required for his position as indicated by the FCE results which showed that Daugherty could function within

the heavy work load level for four (4) hours at a time. (Lf 471). This work load level is two (2) work load levels above what is required for the position of Captain. (Lf 471). The position of Captain is in the light work load level and police officer is in the medium work load level. (Lf 129-30).

Based on the essential functions of the Captain position, Dr. Katz opined that "Captain Daugherty is capable of working in his supervisory work as a captain." (Lf 130). Dr. Katz further concluded that Daugherty was capable of working any work schedule and that he "demonstrated work function in the heavy work demand level for four (4) hours" above and beyond the light or medium work load level of police officer and police captain positions. (Lf 129).

Based on the findings of Dr. Katz, Dr. Feinberg, all of Daugherty's treating physicians, the results of the FCE, and James England's expert opinion, Daugherty was able to perform the duties of Captain for the Maryland Heights Police Department.

F. Termination of Appellant

City argued that the decision to terminate Daugherty was made solely by O'Connor and based solely on the medical report of Dr. Katz. (Respondent, p. 23). This is a disputed issue of material fact. (Lf 88). During their October 28, 2002 meeting, O'Connor told Daugherty that City Administrator Levin wanted older employees out of the City's employment and that he was eliminating employees fifty-five years old and older and looking for medical reasons to justify such terminations as occurred with Appellant. (Lf 724-25). O'Connor admitted

that there was a desire to rid the department of older employees and that Daugherty was perceived as old and disabled. (Lf 723-25). O'Connor stated Levin was involved in the decision-making process regarding Daugherty's termination and wanted Daugherty terminated. (Lf 60; 723-24).

O'Connor acknowledged at the time of Daugherty's termination he did not have information and/or medical documentation indicating whether or not Daugherty was unable to perform the essential duties of his position, which is required to terminate an employee for being unable to perform the essential functions of the position. (Lf 404). O'Connor testified that he could not recall and did not focus on the fact that Daugherty could perform up to four hours of work in the heavy work load level in evaluating Daugherty's fitness for duty. O'Connor believed that this would have been important information to know. (Lf 403). Further, O'Connor admitted that a police officer is not required to perform duties of a strenuous nature for four (4) hours at a time and that none of the essential functions of Daugherty's position lasted four (4) hours or longer. (Lf 403).

G. October 28, 2002 Tape Recording

City stated it could possibly have disciplined Daugherty for tape-recording the October 28, 2002 conversation. (Respondent, p. 26). This is a red-herring as City did not claim Daugherty was fired for recording the conversation during a hearing shortly after his termination. (Lf 499). O'Connor only indicated at the hearing that had he known that Daugherty was tape recording the conversation, he

would have simultaneously recorded the conversation for accuracy, he never suggested Daugherty could be terminated for such action. (Lf 499).

Further, it is a question of fact as to whether or not O'Connor was aware that Daugherty was tape recording the conversation based on their close location at the time and the glowing red light coming from the pocket of Daugherty's white command staff shirt. (SLF, p. 62).

I. City failed to establish a basis for applying McDonnell Douglas at the summary judgment stage to Daugherty's claims under the Missouri Human Rights Act. (Response to Respondent's Argument A).

City stated that "[i]n the instant case the question is whether a material factual dispute exists as to whether age and/or perceived handicap played any improper[1] contributing role in Respondent's decision-making regarding Appellant's employment." (Respondent, p. 35). City further stated that "at the summary judgment stage, the controlling issue ordinarily is whether or not there exists a genuine issue of fact regarding *any* discriminatory motive." (Respondent, p. 35). City admits in its Brief that the issue to be decided by this Court at summary judgment is whether plaintiff possesses any evidence of discrimination by defendant against plaintiff. As stated in Appellant's Substitute Brief, Daugherty proposed that the standard at summary judgment should be based upon whether or not there exists any genuine issue of fact indicating that a contributing factor in defendant's alleged discriminatory act against plaintiff was plaintiff being a member of a protected classification. MAI 31.24; Sections 213.010 and 213.055 RSMo. (2002).

[1] Appellant will discuss later in this Section Respondent's use of the word "improper" as lacking in foundation for inclusion in the summary judgment standard.

City argued that using the elements of MAI 31.24 as the elements a plaintiff needs to establish a claim under the MHRA would cause all Missouri Approved Instructions to trump statues, rules or controlling decisions. (Respondent, p. 31). City urges this Court to employ the McDonnell Douglas burden-shifting framework citing Midstate Oil Co., Inc. v. Missouri Commission on Human Rights, 679 S.W.2d 842, 845 (Mo. Banc 1984) to support its position. (Respondent, p. 31, 33).

This Court in Midstate Oil Co., Inc. held "that disparate treatment claims under §296.020 (repealed) should be *tried* and evaluated under the methodology set forth in McDonnell Douglas." Id. at 845 (italics added). This determination was voided by the establishment of Chapter 213 *et al.* and tacitly overruled by State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003). In O'Malley, this Court held that a plaintiff has the right under the Missouri Constitution, Art. I, Section 22(a), to have his or her Missouri Human Rights Act civil action for damages *tried* by a jury. Id. at 84 (italics added).

City never explained why using MAI 31.24, which is based upon Sections 213.055 and 213.010 RSMo., as the standard for summary judgment is incorrect. (Respondent, p. 36). City cites no authority to support its position that this Court should employ a different standard for employment discrimination cases at summary judgment. Rule 74.04; Respondent, p. 36. The standard proposed by Daugherty is, however, congruent with Rule 74.04 in determining the issue of whether any material issues of law or fact exist at the summary judgment stage.

See also ITT Commercial Fin. Corp. v. Mid-America Marine Supply, 854 S.W.2d 371, 379-80 (Mo. banc 1993). City provides no basis for employing a federal standard to summary judgment under Missouri law. Id.

City is further incorrect in stating that Daugherty's proposed standard is based solely on MAI 31.24. (Respondent, p. 29-38). In fact, the language upon which the standard at summary judgment and trial should be based upon are Sections 213.010 and 213.055 RSMo. Section 213.055 states that it is unlawful for an employer to permit any unfair treatment based on a protected classification, such as age or disability.

City argued in its Brief that Appellant ignored the existence of MAI 31.25. (Respondent, p. 38). Based on MAI 31.25, City claimed that there is an "improper contributing use" test which this Court should employ. (Respondent, p. 39). City cited McBryde v. Ritenour School Dist., 207 S.W.3d 162 (Mo.App. E.D. 2006) to support this position. (Respondent, p. 38-39). City cites McBryde stating that "an improper consideration is a contributing factor [in an employment decision], regardless if other factors also exist." Id. at 170.

City's use of "improper" is misplaced. As an initial matter, the word "improper" is not contained within MAI 31.25 or 31.24. MAI 31.25 is simply a permitted instruction to allow the defendant to state the alleged lawful reason for its actions. The second prong of MAI 31.25 indicates that a contributing factor in an employer's lawful reason for its action must not be a protected classification.

The remaining language contained within MAI 31.25 is simply the converse of MAI 31.24.

City further misstates the Court of Appeals' use of "improper" contained within McBryde. McBryde states as follows:

> Discrimination is defined in section 213.010 as "*any unfair treatment* based on race, color, religion, national origin, ancestry, sex, age as it relates to employment…" (emphasis in original). Therefore, in enacting the MHRA, the legislature sought to prohibit any consideration of race or other improper characteristic no matter how slight in employment decisions. The plain meaning of the MHRA imposes liability on an employer when an improper consideration is a contributing factor, regardless if other factors also exist. The plain language of the statute does not require a plaintiff to provide that discrimination was a substantial or determining factor; a plaintiff need only demonstrate that discrimination was a contributing factor in the employment decision.

McBryde, 207 S.W.3d at 170.

From the text of McBryde, it is clear that the court's reference to "improper consideration" is in reference to the protected classes such as race, age or disability. In fact, the Court of Appeals stated in the sentence prior to that cited by City, "the legislature sought to prohibit any consideration of race or other improper characteristic." The use of "improper" has relation only to prohibiting discrimination based upon a protected classification or another way of indicating

protected classification. "Improper" had no relation to the contributing factor analysis of the Court. Further, City's suggestion that there should be some type of "improper contributing use test" at the summary judgment stage is in conflict with the case, McBryde, it cites in support of its proposition. McBryde states that a violation of Section 213.055 and 213.010 occurs when *any* consideration of a protected classification is used in an employment decision. Id. at 170 (italics added).

City finally argues that MAI 31.24 includes a causation requirement and that plaintiff must submit evidence to show a protected classification was a factor. Daugherty does not dispute the language of 31.24 or its inclusion of a causation requirement. However, proximate cause questions are for determination by a jury. See, e.g., Howard v. Youngman, 81 S.W.3d 101 (Mo.App.E.D. 2002) ("question of proximate cause is ordinarily for jury determination"); Lewis v. Biegel, 204 S.W.3d 354, 362 (Mo.App. 2006) ("the issue of proximate cause remains a factual question for the jury to resolve"); Stafford v. Drury Inns, Inc., 165 S.W.3d 494, 497 (Mo.App.E.D. 2005) (the facts put forth appear to go to the issue of proximate cause, which is generally a question for a jury). As indicated previously, Appellant has proffered evidence of City's discriminatory actions[2].

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[2] Appellant will not restate its evidence of discrimination contained within Appellant's Substitute Reply Brief or within the Factual Background and Section II, pp. 51-56 of the Substitute Brief.

II. Assuming arguendo that the Trial Court applied the correct standard in granting Respondent's Motion for Summary Judgment, the Trial Court and Court of Appeals erred in granting Respondent's Motion for Summary Judgment on Appellant Daugherty's age and regarded as disabled discrimination claims under the Missouri Human Rights Act. (Response to Respondent's Arguments 2 and 3).

City argued that City Administrator Levin was not a decision maker regarding Daugherty's termination and that the tape recorded conversation is inadmissible hearsay. (Respondent, p. 42). However, as discussed above, during the October 28, 2002 meeting, O'Connor told Daugherty that Levin wanted older employees out of the City's employment and that he was eliminating employees fifty-five years old and older and looking for medical reasons to justify such terminations as occurred with Appellant. (Lf 724-25). O'Connor admitted that there was a desire to rid the department of older employees and that Daugherty was perceived as old and disabled. (Lf 723-25). O'Connor stated Levin was involved in the decision-making process regarding Daugherty's termination and wanted Daugherty terminated. (Lf 60; 723-24). These are admissions against interest by City. See, e.g., United Missouri Bank v. City of Grandview, 179 S.W.3d 362, 371 (Mo. App. 2005) Further, Levin was also a required decision-maker in approving the termination of Daugherty and his name is signed on the termination form indicating his involvement as a decision-maker in terminating Daugherty. (Lf 746).

With regard to the authenticity of the October 28, 2002 tape recorded conversation, the transcript of the conversation was authenticated by Daugherty and O'Connor. (Lf 26; 418-21). During O'Connor's deposition, the following was asked:

> Q: From looking at what you said during this conversation did you disagree with – do you have any independent memory of saying something different than what is indicated on this document?
>
> A: No.
>
> Q: Do you believe that this document fairly and accurately provides a rendition of what was said as far as the words used during that conversation?
>
> A: Yes.

(Lf 418).

O'Connor further confirmed the accuracy of the transcript of the recording during his deposition. (Lf 418-421).

City also makes a revised claim that Daugherty was sent for the medical evaluation because of "it became clear that Appellant's attendance pattern was unusual" and later City indicates that the real issue with attendance is that Appellant had an "awkward pattern of attendance." (Respondent, p. 44, 46, 51). These new statements are in conflict with O'Connor's deposition testimony in which he indicated nothing with regard to an "attendance pattern." O'Connor

relays only his misperception that there was a problem with "the *number of days* Captain Daugherty was absent from work." (Lf 400) (italics added).[3]

City further fails to address Daugherty's documented evidence regarding his replacement. City does not respond to the claims of Daugherty that the issue of replacement employees pertains not to legal sufficiency of the claim but only affects the overall weight of the evidence. Hindman v. Transkrit Corp., 145 F.3d 986 (8th Cir. 1998). City further does not address the fact that it adjusted its personnel roster after learning of Daugherty's discrimination claims, only making employee roster changes on paper but not actually making actual transfers of employees and City does not address the fact that the City Attorney recommended to the command staff that it manipulate the position titles within the Department after Daugherty's termination. (Appellant Substitute Brief, p. 62-65).

City indicated in its Brief that Daugherty was not able to perform the duties of a Captain and that should be the basis for this Court denying Daugherty's claim of regarded as disability discrimination. (Respondent p. 59-60). This issue is a disputed fact question that has been previously addressed in this Brief. Daugherty refers the Court to his "Factual Background" in this Reply Brief and his Substitute Brief establishing Daugherty's ability to perform his duties of employment and establishing, at a minimum, questions of fact regarding this issue. (Appellant's

[3] Appellant will not further restate the documented misperceptions regarding Appellant's attendance. (See Appellant's Substitute Brief, p. 30-33),

Substitute Reply Brief, p. 8-11, 5, 6, 7; Appellant's Substitute Brief, p. 7-30; 61-62).

CONCLUSION

As a result of the foregoing, Daugherty respectfully requests that this Court reverse and remand this case to the trial court to be set on its trial docket.

THE KLOEPPEL LAW FIRM &
THE LAW OFFICES OF KEVIN J. DOLLEY

By: _____

GREGORY KLOEPPEL, MBE #47909
KEVIN J. DOLLEY, MBE #54132
Attorneys for Plaintiff
9620 Lackland Road
St. Louis, MO 63114
Phone: (314) 423-8003
Fax: (314) 423-8054

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage pre-paid, this ____ day of _____, 2007, to:

James N. Foster, Jr.
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
2730 North Ballas Road, Suite 200
St. Louis MO 63131-3039

Fern P. Wolf
D. Eric Sowers
Sowers & Wolf, LLC
1401 S. Brentwood Blvd., Suite 575
St. Louis MO 63144

Kathryn Render
8390 Delmar Boulevard, Suite 218
St. Louis MO 63124

_____

CERTIFICATE OF COMPLIANCE

I certify that this brief is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 3,376 words which is in compliance with Rule 84.06(b).

I also certify that the computer diskette that I am providing has been scanned for viruses under Norton Anti-Virus for windows and has been found to be virus free.

_____

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