IN THE SUPREME COURT OF MISSOURI

No. SC94462

G. STEVEN COX,

Appellant,

v.

KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JAMES F. KANATZAR, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered in favor of Respondent Kansas City Chiefs Football Club, Inc. in an age discrimination lawsuit tried in the Circuit Court of Jackson County, Missouri. [LF 1784; A 1]. On April 8, 2013, Appellant timely filed a motion for new trial, and on July 8, 2013, Appellant timely filed his Notice of Appeal. (LF 1683, 1779). The appeal involves the question of whether Appellant was prejudiced due to the trial court's exclusion of significant relevant evidence on management's intent of age discrimination, and in other respects.

On August 5, 2014, the Missouri Court of Appeals, Western District, issued its opinion affirming the trial court's judgment. On September 17, 2014, Appellant timely filed an Application for Transfer in this Court under Missouri Supreme Court Rule 83.04. On December 23, 2014, this Court sustained Appellant's application and ordered transfer of this appeal. Accordingly, this Court has appellate jurisdiction to hear the appeal of this matter pursuant to Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

A. INTRODUCTION

Appellant Steve Cox (age 61)[1] ("Cox") was fired on October 14, 2010 after a 12-year career with Respondent Kansas City Chiefs Football Club, Inc. (the "Chiefs"). (Tr. 2189:13-25, 2026:24-2032:21, 1835:15-17, 2937:24-2938:4). The Chiefs created two

[1] All ages discussed throughout this Statement of Facts refer to a person's age at the time of the events referenced unless otherwise stated.

new positions to run his department in 2010, filled them with a 39-year-old Director of Facilities and a 34-year-old Vice President of Stadium Operations, and replaced Cox a few months later with a 37-year-old recruited by the newly-hired VP of Stadium Operations. (Tr. 2702:15-2703:3, 2851:12-2852:4, 2937:9-16, 2921:8-14, 2936:3-11, 2981:4-2982:4, 3330:7-12, 2433:13-14, 2936:3-11, 3372:25-3373:22, 3158:22-3166:4). The other three candidates considered by management for Cox's job were ages 28, 29, and 30, respectively. (Tr. 3259:4-32:71:11, 3278:20-3289:19, 3580:8-3589:12).

Before discharge, Steve Cox was the Chiefs' "employee of the month" in September 2009. (1855:7-22). Management never gave Cox a negative employment review, and never wrote up Cox for a single performance deficiency during his 12 years of employment. (Tr. 1310:24-1314:12, 1810:10-1846:13, 1867:17-1868:4, 2361:8-2362:9, 1906:5-1907:1, 1910:12-1912:18, 2193:4-15). Cox asserts age discrimination contributed to his termination in violation of the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010, *et seq*., ("MHRA"). (LF 31-47).

As discussed *infra*, the Chiefs fired Cox during a series of wholesale changes throughout the Chiefs' organization in which numerous, front-office employees were terminated or forced to retire – all of whom were older than 40 (just like Cox), and all of whom were replaced by younger employees (just like Cox). At trial, the jury learned that Chiefs Chairman and CEO Clark Hunt "wanted to go in a more youthful direction," (Tr. 1393:22-1396:7), but the trial court prohibited Cox in a blanket ruling from calling numerous former employees capable of verifying the Chiefs did in fact "go in a more youthful direction." (LF 1005, 1110-1175, 1587-88, 1426:2-1427:23).

Just like Cox, most firings were at President and COO Mark Donovan's direction, consistent with Clark Hunt's directive to restructure the organization. (Tr. 905:20-24, 3374:14-3389:1, 3405:8-3421:9, 3421:10-17, 3322:12-3323:11, 1044:9-1045:12, 3330:7-20, 1702:8-1713:4, 3334:22-3336:4, 3854:21-3856:18, 3861:7-19, 1720:13-1721:15, 1726:25-1727:16, 1044:9-1045:12, 1423:19-1424:18, 1418:8-1420:8, 1654:4-1655:1, 1666:11-15, 1667:4-6, 1661:16-20, 1489:10-1490:9, 1527:22-1529:6, 1047:6-13, 1048:5-1049:8, 1166:12-1172:15, 2695:17-2697:12) (Exhibit 306 at 59:22-60:3, 163:20-172:3).

The jurors never had any idea this age restructuring occurred because, before the trial even began, the trial court silenced at least seventeen (17) witnesses capable of providing the context for management's intent and what actually happened.[2] (LF 1110-1175, 1587-88). When it was asked to reconsider that ruling, the court instead expanded the ruling to bar essentially all trial witnesses (actual and potential) from testifying about their own age, the ages of others, the circumstances of their own terminations from the Chiefs, the circumstances surrounding other employees' terminations, and the fact that some of them filed age discrimination lawsuits against the Chiefs. (Tr. 275:4-278:25, 1426:2-19).[3] Even Cox was prohibited from testifying about management's conduct against his older co-workers and his boss. (Tr. 1554:5-1556:11).

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[2] Cox would not have called all 17, but he had the right to choose from among these crucial corroborative witnesses.

[3] The only notable exception is that the trial court permitted Cox to discuss the ages of certain employees in attendance at a January 5, 2011 Directors' Meeting discussed at

B. THE FEBRUARY 8 PRETRIAL RULING, AND THE LEGAL BASIS FOR THE TRIAL COURT'S "BLANKET EXCLUSION"

The trial court premised its pretrial exclusions on two erroneous *legal* concepts: (1) Cox's purported failure to plead a "pattern and practice" claim in his Petition, and (2) Cox's purported failure to demonstrate that the other witnesses were "similarly situated" to Cox – meaning, as the trial court explained, that the people who terminated them "were [the same] decisionmakers in the termination of [Cox]." (Tr. 1426:2-19, 1427:13-1428:8, 1431:25-1433:15).

Before discussing the trial court's pretrial exclusions, it is necessary to understand the genesis of the trial court's embrace of the Chiefs' "pattern and practice" and "similarly situated" legal arguments during the earlier stages of this case, and how they took root throughout trial.

The Trial Court's Early Adoption of The Chiefs' "Pattern and Practice" and "Similarly Situated" Arguments

In February 2012, the trial court held a discovery hearing to discuss the Chiefs' Motion to Quash the depositions of several high-level Chiefs employees. (Tr. 1:22-24:9). The Chiefs' counsel argued that Cox's effort to depose the requested witnesses was an effort to "expand [his theory of the case] from one issue to a pattern and practice

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page 37, *infra*. (Tr. 2076:10-2086:21). Cox was prevented, however, from using that evidence for any purpose other than discussing who was at the meeting. (Tr. 2086:6-2087:7).

[theory]," and argued that Cox was seeking to "broaden this case beyond what Missouri law allows" because "[i]t is not permissible to get into a pattern and practice case at this late juncture." (Tr. 7:22-8:7, 8:23-9:3). The Chiefs' counsel cited *Young v. Time Warner Cable, L.P.,* 443 F.Supp.2d 1109 (W.D.Mo. 2006), and argued, "[I]t is not reasonable, as Judge Sachs ruled, to have an individual case become a pattern or practice case, a policy case involving the whole company…." (Tr. 21:9-20).

The trial court agreed, in part, and quashed the deposition of Clark Hunt. (LF 193-94). In the ruling, the trial court noted that "[Cox's] administrative charge deals with allegations of discrimination occurring to [Cox] himself, and does did (sic) not contain any allegations that reference or mention **pattern or practice discrimination, or discrimination of any kind occurring to any other person**." (LF 193-94) (emphasis added).

The Chiefs then filed a motion to strike 40 potential witnesses listed in interrogatories on the eve of a previous trial date. (Tr. 90:17-130:17). The Chiefs argued:

- "If you recall, Judge, … one of the very first dispositive or important motions …was when the Court found that the Charge of Discrimination in this case **did not contain theories of pattern and practice, and because it didn't contain theories of pattern and practice**, [Cox] did not exhaust administrative remedies, so they couldn't go past Mr. Cox's own case." (Tr. 100:14-21) (emphasis added);

- "And as you so eloquently said, Judge, in one of your orders, **similarly situated** employees are the only ones that can bear evidence as to alleged age animus…." (Tr. 101:6-12) (emphasis added); and,
- "Judge, what's happened here is a single-plaintiff wrongful discharge case, and that's what was at the charge stage and that's the scope of the case, as you've already ruled. A single-plaintiff wrongful discharge case, **first they try to make it a pattern and practice case. Denied.** … Because they're going beyond the scope of the administrative remedy that they sought at EEOC and that's the law of the state and that's what you followed. So, Judge, in summary, we believe that nothing has changed…." (Tr. 105:6-18) (emphasis added).

The case was later continued, but the trial court ruled, "If there are grounds [in the future] that these witnesses' testimonies are impermissible at trial due to previous rulings of this Court or rulings in the future from this Court, I know the defendant will bring that to my attention with a motion or other avenues and the Court will rule accordingly…." (Tr. 117:13-118:11).

Respondent's Motions *in Limine*

Before the actual trial date, the Chiefs filed a new Motion *In Limine* to Exclude Evidence of "Non-Similarly Situated" Employees, and requested an order excluding evidence "regarding the terminations of and possible allegations of discrimination by 17 non-Plaintiffs: Brenda Sniezek, Larry Clemmons, Anita Bailey, Ann Roach, Carol Modean, Nadine Steffan, Lamonte Winston, Carl Peterson, Doug Hopkins, Tom

Stephens, Ken Blume, Evelyn Bray, Pam Johnson, Lisa Siebern, Bill Newman, Gene Barr, and Pete Penland." (LF 1110-1175).[4]

The Chiefs argued – without citing any legal support – that "[Cox] did not allege a pattern and practice of discrimination or hostile work environment in either his Charge of Discrimination with the [MCHR] or his Petition," and as a result, "[Cox] should not be allowed to introduce testimony from any individuals whose terminations are wholly unrelated to [Cox's] termination." (LF 1111). The Chiefs also argued "none of the … [17 former] employees [were] similarly situated to [Cox]." (LF 1112).

The Chiefs also filed a Motion In *Limine* to Exclude Evidence of Other Lawsuits, "…including lawsuits currently pending in the Circuit Court of Jackson County involving former employees Brenda Sniezek and Larry Clemmons." (LF 1005-1010). The Chiefs argued that such evidence "will not assist in the development and/or explanation of Defendant's non-discriminatory reason for terminating [Cox] within the context of this case's respective facts." (LF 1005-1006).

The Absence of Any Factual Basis For The Chiefs' Motions

The above has never been true. As discussed in much greater detail below, Mark Donovan – who claims responsibility for the decision to terminate Steve Cox – also directed or participated in eliminating the vast majority of the older employees in the Chiefs' front office, many of whom were identified in the Chiefs' motion in *limine*, and each was terminated after Donovan commenced his evaluation of the organization

[4] The Chiefs chose this wholesale grouping.

beginning in May 2009 at Clark Hunt's instruction. (Tr. 905:20-24, 3374:14-3389:1, 3405:8-3421:9, 3421:10-17, 3322:12-3323:11, 1044:9-1045:12, 3330:7-20, 1702:8-1713:4, 3334:22-3336:4, 3854:21-3856:18, 3861:7-19, Tr. 1720:13-1721:15, 1726:25-1727:16, 1044:9-1045:12, 1423:19-1424:18, 1418:8-1420:8, 1654:4-1655:1, 1666:11-15, 1667:4-6, 1661:16-20, 1489:10-1490:9, 1527:22-1529:6, 1047:6-13, 1048:5-1049:8, 1166:12-1172:15, 2695:17-2697:12) (Exhibit 306 at 59:22-60:3, 163:20-172:3).

Donovan also hired (or participated in hiring) the younger employees who eventually replaced the older employees, including Steve Cox's 37-year-old replacement. (Tr. 1720:13-1721:15, 1726:25-1727:16, 1614:10-1623:23, 1652:13-15, 2427:7-10, 3560:18-3561:4, 3571:16-3574:20, 2702:15-2703:3, 2851:12-2852:4, 2937:9-16, 2921:8-14, 2936:3-11, 2981:4-2982:4, 3330:7-12, 2433:13-14, 2936:3-11, 3372:25-3373:22, 3436:25-3437:10, 1488:5-1490:12, 3237:20-3239:23, 3246:24-3247:2, 1166:12-1172:15, 1489:25-1490:9, 1527:22-1529:6).

Donovan also directed or participated in the terminations of Brenda Sniezek and Larry Clemmons. (Tr. 1047:6-13, 1048:5-1049:8, 1166:12-1172:15, 1489:25-1490:9, 1527:22-1529:6).

Cox's Response to the Chiefs' Motions *in Limine*

In response, Cox argued that "[g]ranting [the Chiefs]'s requests for sweeping, pre-trial evidentiary rulings would unfairly prevent [Cox] from proving his case by precluding the jury from considering facts which allow the jury to draw inferences of [the Chiefs]'s discriminatory motive" because "such rulings invite unfair prejudice before the trial even begins." (LF 1318) (*See also generally* LF 1318-1507, Cox's Sugg. in Opp.).

Cox also argued that he "must be afforded a fair opportunity to introduce logically and legally relevant evidence to demonstrate motive or intent and for the purpose of submission of [Cox]'s claim for punitive damages." (LF 1320). Cox set forth in detail the testimony expected from each of the witnesses identified by the Chiefs in its motion in *limine*. (*See generally* LF 1318-1507).

Cox also explained that the terminations of the protected-group employees referenced in the Chiefs' motion in *limine* were undertaken after Chairman and CEO Clark Hunt instructed COO Mark Donovan to evaluate the organization and its personnel, and were in most instances undertaken by Donovan himself or at his direction. (LF 1323-1338).

The Trial Court's February 8 Pretrial Order

On February 8, 2013 – before it heard testimony from a single witness – the trial court entered its pretrial Order granting, without explanation, both of the Chiefs' motions *in limine*. (LF 1587-1588). That same day, Cox filed a Motion to Reorder the Presentation of Trial and to Modify the Court's Seeming Blanket Exclusion of Evidence from 17 Witnesses, and requested a modification or clarification of the breadth of the trial court's Order. (LF 1589-1593). Cox highlighted numerous difficulties associated with the order, and requested to present offers of proof before opening statements. (LF 1590-91).

On the first day of trial, the trial court denied Cox's motion, and explained that its February 8 Order would thereafter preclude Cox from "calling these 17 witnesses to

testify that they were terminated, that they have a case of discrimination pending against the Chiefs, and I suppose they're over 40." (Tr. 275:13-278:25).

The trial court also said, "I don't think it's necessary that you make an offer of proof for each and every one of these 17 witnesses," and suggested a process of calling some of the affected witnesses, and approaching the bench whenever there was a "concern[] that some of their testimony may draw an objection." (Tr. 276:12-20). The trial court then reaffirmed the breadth of its ruling: "But I hope I made myself clear as it pertains to my ruling on the Defendant's Motion *in Limine* as to those 17 witnesses: nothing about the fact they've been terminated, they have a lawsuit, or that they're over forty." (Tr. 285:15-19).

The Trial Court's Reinforcement and Expansion of its February 8 Order

Trial began on February 11, and throughout trial, the court's pretrial order was regularly reinforced and frequently expanded to exclude a broad range of additional evidence at the Chiefs' request and, in each instance, over Cox's objections. (Tr. 912:17-913:3, 977:7-13, 914:522, 1008:5-1010:1, 2594:1-2595:1, 2600:21-2603:20, 2643:18-2645:1). Before opening statements, the trial court ordered that no witnesses could be asked about his or her age during direct or cross examination, reasoning that "normally while I would allow that, I think under these circumstances, given the rulings that I've made and everything else surrounding this case, we'll just stay away from their age." (Tr. 284:22-287:12). The trial court also expanded its order to silence at least 4 additional witnesses not originally mentioned in Respondents' Motion *in limine*,

including Steve Cox himself. (Tr. 1417:23-1421:6, 1038:7-1046:22, 1554:5-1556:11, 2690:22-2700:18, 2087:16, 2089:23) (LF 1110-1175, 1587-88).[5]

After several offers of proof, the trial court once again summarized the scope of its blanket ruling, saying (Tr. 1426:2-19) (emphasis added):

> I anticipate that [Cox's] counsel is going to make these offers of proof on all the 17 people the Court has ruled certain areas of their testimony are not admissible: the fact that they were terminated, the fact of what their age is, and the fact that they have lawsuits pending against the Chiefs currently.
>
> And just to reiterate so the record is clear, the ruling is based upon the fact that these peoples' terminations, the people who terminated them **were not decisionmakers in the termination of the plaintiff in this case** and **also because [Cox] did not plead a pattern and practice, did not plead pattern and practice**, did not plead a hostile work environment, and for these reasons and other reasons that I'm not going to go into that were cited and argued by defense counsel in their motions and in their oral arguments, these witnesses are going to be excluded from those three areas of any kind of testimony that would touch upon those three areas.

After the court's explanation, Cox pointed out Mark Donovan's extensive involvement in the terminations of nearly all of the affected witnesses – including Steve Cox. (Tr. 1426:25-1427:10). In response, the trial court clarified:

[5] Ann Roach, Steve Cox, Heather Coleman, Denny Thum, and Steve Schneider.

> And you're right and I'm sorry. … I think that some of them may have been terminated by people that weren't decisionmakers and that also came into my consideration, **but the primary thing was that you didn't plead pattern and practice and that these employees were not similarly situated to Mr. Cox**. (Tr. 1427:13-23) (emphasis added).

On February 18, after additional offers of proof, the trial court entertained another lengthy discussion on the legal basis for its blanket exclusion. (Tr. 1600:6, 1733:18-1785:18). The arguments cover more than 50 pages; Cox presented a lengthy overview of the law in an effort to explain the fallacy of the Chiefs' continuing reliance on their legally-based "pattern and practice" and "similarly situated" arguments. *Id.* The trial court took the arguments under advisement. (Tr. 1785:11-18).

The following morning, the trial court informed Cox, "Well, I am not changing my ruling, so if that helps you answer the question [about the length of trial] more accurately, what would be your answer…?" (Tr. 1791:22-24). Later, the court also explained:

> All right. Under the ruling and guidance set forth in *Williams v. Trans State Airlines*[, 281 S.W.3d 854 (Mo. App. E.D. 2009)] on this question, the testimony presented by the proposed witnesses and [Cox's] offers of proof does not establish nor demonstrate that the treatment they received by the Chiefs, nor the circumstances surrounding the termination of their employment with the Chiefs, was sufficiently similar to Mr. Cox's termination or the circumstances surrounding his termination. The court in *Williams* identified five separate examples of similarity between the

> plaintiff and the other terminated employee. In examining the record in the offers of proof, it was clear to me that such similarity didn't exist between the proffered witnesses and Mr. Cox's termination. In my determination, any probative value of the testimony proposed by [Cox] from these witnesses would be outweighed by the prejudicial effect it would have upon the jury. In addition, I believe the testimony of these other past employees would only serve to confuse and distract the jury. For these reasons and the reasons set forth in [defendant's] pleadings and argument, the [defendant's] motion in limine to exclude these witnesses remains sustained. (Tr. 2075:7-2076:9).

During that same exchange, however, the trial court referred to *Williams v. Trans State Airlines* as supporting its "similarly situated" standard, (Tr. 2067:17-2068:1), and reinforced a "similarly situated" standard the following day: "Your request is **denied** … **as it pertains to similarly situated or lack thereof employees**, which we discussed yesterday, on Monday." (Tr. 2309:9-12).

The Chiefs never made any individualized, testimony-specific objections as to any witnesses. Throughout the *entire* trial, the Chiefs repeated the legally-based phrases "pattern and practice" and "similarly situated," and the trial court sustained the Chiefs' objections. (Tr. 912:17-913:3, 977:7-13, 914:522, 1008:5-1010:1, 2594:1-2595:1, 2600:21-2603:20, 2643:18-2645:1).

C. SUMMARY OF THE EVIDENCE EXCLUDED AS A RESULT OF THE TRIAL COURT'S BLANKET EXCLUSION

The story of what happened in the Chiefs' front office between 2008 and January 2011 is presented immediately below – in context. The Chiefs terminated Cox in the middle of that timeline. *The matters referenced in italics were excluded from the evidence based on the trial court's pretrial ruling*. The matters referenced in normal typeface were received in evidence.[6]

Clark Hunt Seeks to Take the Chiefs' Front Office "In A More Youthful Direction"

Clark Hunt assumed leadership of the Chiefs organization in 2006. (Tr. 891:25-892:10). In the spring of 2008, long-tenured employee Ann Roach became privy to Clark Hunt's intention to take the Chiefs' front office in a younger direction. Roach *(age 63)* worked in the front office for 43 years under 5 different general managers. (Tr. 1379:23-1380:10, 1421:16-1424:18).

President and General Manager Carl Peterson explained to Roach that "things were going to be different under Clark Hunt," and that "Clark wanted to go in a more youthful direction." (Tr. 1393:22-1396:7). Peterson then asked Roach if she was willing

[6] In addition to the offers of proof and the evidence discussed below, the trial court also had the opportunity to understand Mark Donovan's extensive involvement in the hiring and firing of the relevant witnesses before trial started because his involvement was explained during a voluminous round of summary judgment briefing. (LF 384-999).

to retire. (Tr. 1399:8-1400:2). Roach declined in 2008*, but she was forced out in January 2010.* (Tr. 1421:16-1424:18, 1379:23-1380:10, 1421:16-1424:18).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1421:16-1427:23, 2087:16-2089:23).

Clark Hunt Begins Restructuring the Front Office

In December 2008, Hunt met with Assistant General Manager Denny Thum, and informed Thum that he intended to "evaluate the organization." (Tr. 886:7-14; 892:11-893:6). Soon thereafter, he asked Carl Peterson to step down, and asked Thum to become "Interim President." (Tr. 892:6-893:2; 1152:24-1153:7; 3321:7-17). Clark Hunt told Thum "that he wanted to hire a General Manager with football experience and that he was going to change [the] organization, that the President would be responsible for the administrative side of the organization and the General Manager would be in charge of the football side." (Tr. 893:16-894:3).

In January 2009, Clark Hunt hired Scott Pioli as the new General Manager. (Tr. 1152:24-1153:6, LF 586). Shortly after hiring Pioli, Clark Hunt held a press conference with Pioli and newly-hired Head Coach Todd Haley. (Tr. 1849:13-1851:11). One of the "major story line[s]" of that press conference was the common ages of the new "control group;" Clark Hunt was 44-years-old, and the other two were either the same age, or within one year of Hunt. *Id.*

Five months after Pioli was hired, Clark Hunt hired Mark Donovan (age 43) *to replace Bill Newman (age 59)* as the Chiefs Chief Operating Officer (COO). (Tr.

2432:12-23, 1692:10-25, 3306:10-13; LF 586).[7] When Donovan was hired, Donovan reported directly to Clark Hunt and Denny Thum. (Tr. 3326:24-3327:3).

Beginning in May 2009, Clark Hunt convened monthly management meetings to discuss the reorganization and restructuring of the business, and the highest-level executives attended – Clark Hunt, Scott Pioli, Denny Thum, Mark Donovan, and others. (Tr. 899:19-903:17, 3328:13-3330:5). During the meetings, Clark Hunt explained that he "wanted to make changes" in order to "become more efficient" because he felt that the organization was "heavy in a number of departments and they needed to revalue the number of people [they] had in each department." (Tr. 902:22-904:14). He explained his intention to model the organization after the New England Patriots. (Tr. 902:22-904:14, 905:11-19). Scott Pioli was the highest-ranking Chiefs executive with previous experience working for the New England Patriots. (Tr. 903:18-905:24; 980:1-5).

Donovan and Pioli Begin Working Towards A "Common Goal"

Clark Hunt instructed Mark Donovan to evaluate each department within the administrative side of the organization and to "lead[] an effort to reorganize, restructure, and efficiently run the Chiefs' operation." (Tr. 905:20-24, 3322:12-25). Donovan spent the first 6 months of his job studying and evaluating the administrative departments in the Chiefs' front office. (Tr. 3322:17-3323:11).

[7] Bill Newman was one of the 17 former employees barred from testifying about the issues covered by the pretrial order, (LF 1110-1175), but no offer of proof was presented in relation to Newman.

Hunt assigned Scott Pioli the corresponding task of evaluating football-side departments and personnel. (Tr. 905:11-909:22). Denny Thum regularly spoke with Donovan and Pioli about their ongoing evaluation of the organization. (Tr. 908:20-909:22). Together, Donovan and Pioli were "**working at the same time towards a common goal**" which included the replacement of employees throughout both sides of the front office. (Tr. 910:3-10) (emphasis added).

Scott Pioli Asks Ann Roach to Retire (Again)

In February 2009, Scott Pioli called Ann Roach to his office, and once again asked her to retire. (Tr. 1421:16-1422:24). *Roach declined. Id. Thereafter, Pioli told her that her salary was "rather on the high end," [Pioli] "raised his arm" to emphasize his point, and told her "that there had been a young man who had been hired [right out of college] ... and that "he was making so much less than [she] was…."* (Tr. 1422:25-1422:24).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1421:16-1427:23, 2087:16-2089:23).

Scott Pioli Expresses the Goal of Eliminating Employees Over 40 Who Previously Worked Under Carl Peterson

In August or September of 2009, Herman Suhr, a Chiefs field security supervisor for 27 years, overheard Scott Pioli talking to an unknown guest near a quiet hallway inside Arrowhead Stadium where several offices were located, including one office used by Mr. Pioli himself. (Tr. 2090:22-2096:15) (Exhibits 288B and 288C at 177:16-179:15,

179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3). *As Mr. Suhr walked down the hallway, he overheard Mr. Pioli say "**I need to make major changes in this organization as so many employees of CP [Carl Peterson] are over 40 years old.**"* (Exhibits 288B and 288C, at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3) (emphasis added).

Cox submitted an offer of proof on the matters italicized above, and the trial court rejected it.[8] (Tr. 2090:22-2096:15, 2307:8-2310:20; Exhibits 288B and 288C at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3).

Pioli Begins Replacing Employees Over 40 Who Worked Under Carl Peterson:

Lamonte Winston

In early 2010, Scott Pioli hired Katie Douglass (age 31) *to replace Lamonte Winston (age 50) as the Chiefs' director of player development.* (Tr. 1284:17-1288:22, 2087:16-2089:23). *Pioli consulted with Clark Hunt on the decision to replace Lamonte Winston, and Clark Hunt agreed. Id.*

Lamonte Winston was the Chiefs' Executive Director of Player Development for 17 years. Id. Before terminating him, Scott Pioli was unaware that Winston's player development program was nationally recognized, that the NFL commissioned an award

[8] The entire basis for the trial court's exclusion of this statement is discussed in greater detail at page 82, *infra.* It was addressed through a separate pretrial ruling, but the trial court's "similarly situated/same decisionmaker" test governed nearly all of the analysis.

in Winston's own name, and that Winston's program received two significant awards in 2008, including the award for the best player development program. Id.

According to Scott Pioli, he replaced Winston due to "performance issues," but when pressed, Pioli could not recall an issue Winston was unable (or unwilling) to resolve. Id.

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1284:17-1288:22, 2087:16-2089:23) (offer of proof and rejection). Lamonte Winston was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Mark Donovan Begins By Firing Four Older, Long-Tenured Employees, Including Steve Cox's Boss in Stadium Operations

On January 4, 2010, Mark Donovan hired Kirsten Krug (age 42) as the Chiefs' new Director of Human Resources. (Tr. 2361:8-2362:12). *Days later, Donovan terminated four older, long-tenured employees in the front office: Carol Modean (age 48), Anita Bailey (age 58), Ann Roach (age 63),* and Steve Schneider *(age 51).* (Tr. 1044:9-1045:12, 3330:7-20, 1702:8-1713:4, 3334:22-3336:4).

Anita Bailey

Anita Bailey (age 59) worked for the Chiefs for 21 years, and was the Chiefs' Director of Customer Relations. (Tr. 3854:21-3856:18, 3861:7-19). *Mark Donovan terminated her in January 2010. Id. She worked at the same director level as Steve Schneider (discussed below), and was the Chiefs' "Employee of the Year" in 1996. Id.*

When Mark Donovan started with the Chiefs, Denny Thum explained to Bailey that she needed to "fight for her job," and he encouraged her to set a meeting with Donovan. (Tr. 3859:3-15). *Bailey explained to Donovan that "[she] had been in the NFL for a very long time, ... [and that she] would love to ... chat with [him] ... regarding the future of [her] department."* (Tr. 3859:16-3861:8). *Donovan reassured her that he wanted to meet and speak with her, but after their initial conversation, Donovan ignored her subsequent attempts to speak between June 2009 and December 2009. Id. Donovan fired her in January 2010, and explained that her "department was being eliminated." Id.*

In truth, the Customer Relations Department (and its function) was never eliminated; Bailey was replaced by a younger employee in her 30's. (Tr. 3861:7-3864:22*). The younger employee eventually carried out the same plans Bailey had originally proposed in an effort to fight for her job.* (Tr. 3861:7-3864:22).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 3854:21-3864:22, 3871:9-12). Anita Bailey was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Carol Modean

Carol Modean (age 48) was Mark Donovan's assistant, and worked for the Chiefs for 24 years. (Tr. 1690:6-1691:8, 1693:4-6, 1698:22-1699:6, 1712:17-1713:4). *Throughout her entire career with the Chiefs, Modean was never written up, and never*

received a negative performance review. (Tr. 1693:11-1698:21, 1716:22-1717:2, 1718:24-1719:22, 1721:7-15).

Donovan told Modean "he didn't need a traditional Executive Assistant and [that her] position was being eliminated[,] and ... would be handled by a whole different team of people going forward." (Tr. 1720:13-19). *In truth, Donovan replaced her with a younger, traditional executive assistant, and according to Ms. Modean, Donovan's stated reason for firing her was a "lie."* (Tr. 1720:13-1721:15, 1726:25-1727:16).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1690:6-1723:10, 1731:17-1732:9, 2087:16-2089:23). Carol Modean was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Ann Roach

As discussed above, Ann Roach *(age 63)* worked in the Chiefs' front office for 43 years under 5 different general managers. (Tr. 1379:23-1380:10, 1421:16-1424:18). Carl Peterson asked her to retire in 2008; *Scott Pioli asked her to retire in February 2009.* (Tr. 1393:22-1396:7, 1399:8-1400:2, 1421:16-1422:24).

In January 2010, Mark Donovan made the final decision to "eliminate" the Customer Relations Department in which Ann Roach and Anita Bailey worked. (Tr. 1044:9-1045:12). *Denny Thum disagreed with Donovan's decision, but he asked "to handle [Ann Roach's] retirement rather than have Mark Donovan handle it because he*

knew [her well].” (Tr. 1044:9-1045:12, 1423:19-1424:18). *Ann Roach never wanted to retire, and was forced out. Id.*

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1421:16-1425:11, 2087:16-2089:23). The trial court's rulings related to Ann Roach illustrate an expansion of its pretrial ruling to others beyond the initial 17 witnesses.

Steve Schneider

Steve Schneider (age 51) was Steve Cox's boss in Stadium Operations, and worked for the Chiefs for more than a decade before Mark Donovan fired him. (Tr. 1298:21-1299:8, 1303:1-1305:1, LF 588). Schneider reported directly to Donovan. (Tr. 934:16-21, 3310:6-10, 3330:13-3336:4). Denny Thum testified that Steve Schneider "did a tremendous job … and … was a good employee …, but yet … he was a direct report to Mark Donovan and Mark wanted to make a change." (Tr. 934:15-21). Donovan never documented a single job performance concern related to Steve Schneider. (Tr. 3334:3-6).

In January 2010, Donovan summoned Schneider to his office, and told him they were "letting him go." (Tr. 1418:8-16). *During their conversation, Donovan "just kind of stared out the window and never looked at [him]."* (Tr. 1419:3-19). *When Schneider objected, Donovan said, "Well, the decision is made and you don't have to go talk to Clark or Denny or anybody else because everybody is in agreement." Id. Before his termination, Schneider never received a negative performance review, and was never written up for a single performance deficiency.* (Tr. 1420:2-8).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1417:23-1421:6, 2087:16-2089:23). The trial court also instructed counsel for Cox to not elicit Steve Schneider's age. (Tr. 3311:21-3315:13).

Following the offer of proof from Mr. Schneider, the trial court instructed counsel for the parties: "I assume that both sides are warning their witnesses about things that are off limits based upon my rulings in motions *in limine*" and to "do a better job of preparing your witnesses when the come up here as to what's off limits based upon my rulings." (Tr. 1329:17-19, 1348:3-15). Steve Schneider was not among the original 17 witnesses addressed in the Chiefs' motion in *limine*, (LF 1110-1175), but the trial court expanded its blanket exclusion to include him.

Heather Coleman Learns About a "Hit List"

Immediately after Anita Bailey, Carol Modean, and Steve Schneider were fired in January 2010, Heather Coleman had a discussion with Dawn Martin, Kirsten Krug's "right-hand person in [Human Resources]," about personnel changes that would be taking place in the Chiefs organization. (Tr. 2690:22-2692:25). Heather Coleman *(age 45)* worked for the Chiefs for 17 years; she and Steve Cox were equal level managers in the Stadium Operations department, and both reported to Steve Schneider. (Tr. 2609:11-2611:20, 2690:22-2700:18).

*Dawn Martin told Coleman that the firing of Bailey, Modean, and Schneider "**was just the first round.**"* (Tr. 2692:13-25) (emphasis added). *Dawn Martin also told*

Coleman "that there was a list of employees that they were going to terminate and they knew who and they knew when." (Tr. 2692:13-25).

Cox submitted an offer of proof on the matters italicized above — including Ms. Coleman's age, but the trial court rejected the offer of proof in its entirety "[b]ased upon [its] previous rulings." (Tr. 2690:22-2700:18, 2700:15-18). Heather Coleman was not among the original 17 witnesses addressed in the Chiefs' motion in *limine*, (LF 1110-1175), but the trial court expanded its blanket exclusion to include her.

The Impact of Steve Schneider's Termination

In Donovan's words, the firing of Steve Schneider was a "shock to the organization." (Tr. 3338:4-9). After Schneider's firing, Donovan held a meeting with the salaried employees in the Stadium Operations department. (Tr. 1558:18-1561:21, 3334:7-3340:1). Donovan said, "There was going to be an immediate [nationwide] search for [Schneider's] replacement." (Tr. 1559:12-23, 1861:16-25). Donovan "… told [them] to take care of [their] departments, run [their] departments the way [they] know how to do it, and … said … that [they] would be reporting to him." (Tr. 1559:12-23). He also said, "[d]on't worry about bothering me with the small stuff." *Id.*

Between January 2010 and June/July 2010, Steve Cox worked without a Director, and without a direct boss, in the Stadium Operations department. (Tr. 1563:15-1564:13). This concerned Steve Cox and others because Stadium Operations "had more things going on than [they'd] ever had." (Tr. 1562:3-1563:14). They were "full speed ahead" in completing a 3-year renovation to Arrowhead Stadium (set to reopen in September 2010), and they were renovating a new training facility at Missouri Western University – all in

addition to the normal maintenance and operation of Arrowhead Stadium. (Tr. 928:22-929:24, 1562:3-1563:18, 2627:22-2628:7, 3119:22-3120:6).

Donovan invited Cox to attend the weekly Director's Meetings and the construction closeout meeting. (Tr. 3340:12-3342:15). According to Donovan, no one else was more qualified in Stadium Operations to attend those meetings than Steve Cox. (Tr. 3340:12-3342:15, 1862:23-1863:8).

Mark Donovan, Clark Hunt, and Scott Pioli Begin Hiring Younger Employees To Eventually Replace Older Ones

Jason Stone / Gene Barr

In the spring of 2010, Scott Pioli contacted Jason Stone (age 31), a former employee from the New England Patriots, and asked Stone if he was interested in coming to interview for a security position – which falls within the Chiefs' Stadium Operations department. (Tr. 1448:16-1449:7, 1616:8-15, 1452:4-7, 1452:12-1452:16). Stone interviewed with Mark Donovan, Scott Pioli, Denny Thum, Kirsten Krug, and others. (Tr. 1449:21-1450:18). A few weeks later, Donovan hired Stone as the Chiefs' new Director of Security, and told him that he reported to Mark Donovan and Scott Pioli only. (Tr. 1451:16-1452:11).

Gene Barr (age 58) was the Chiefs' previous Manager of Security for 18 years (the highest ranking role), and before assuming that role, Mr. Barr worked as a part-time security employee for the Chiefs between 1975 and 1992. (Tr. 1610:10-1611:8, 1615:4-11). *After Steve Schneider was fired, Gene Barr reported directly to Mark Donovan – just as Steve Cox did.* (Tr. 1637:2-1637:19).

In June 2010, Mark Donovan informed Gene Barr that he hired Jason Stone as a "consultant" in order to assist with training camp. (Tr. 1614:10-1616:7). *Donovan later informed Barr that Stone was no longer a "consultant."* (Tr. 1618:12-1619:13). *Donovan told Barr that the Chiefs created a new position for Stone titled "Director of Security," and that he now reported to Jason Stone. Id. Gene Barr submitted his letter of resignation shortly thereafter.* (Tr. 1622:11-1623:23).

In Barr's opinion, the new management team intended to let him go at the end of the season "as they had done a number of other people prior to that. Rather than go through that ... [he] chose to just go ahead and leave." (Tr. 1624:1-1625:22). *Mark Donovan never told Gene Barr about his intention to create a new position, and never gave Gene Barr an opportunity to be considered for that position.* (Tr. 1623:15-23).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1610:10-1626:8, 1634:16-1638:20, 2087:16-2089:23). Gene Barr was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Rob Alberino / Tom Stephens

In March 2010, Mark Donovan hired Rob Alberino (age 40) for a "creative services" position (i.e. video, Internet, and television production) that, according to Alberino, did not previously exist. (Tr. 1652:13-15, 2427:7-10, 3560:18-3561:4, 3571:16-3574:20). *Alberino reported directly to Mark Donovan after he was hired.* (Tr. 1666:6-10).

Before Alberino's arrival, Tom Stephens (age 52) was the Creative Services Manager responsible for all aspects of the Chiefs' audio, video, Internet, and television production since September 2006. (Tr. 2427:1-6, 1644:19-1645:14). *Before 2006, Stephens worked for 12 years as an outside contractor for the Chiefs, and handled the Chiefs' television advertising and production.* (Tr. 1646:8-19). *Tom Stephens was never offered an opportunity to interview for Rob Alberino's position, and was never considered for it.* (Tr. 1653:8-1654:3).

After he was hired, Alberino assumed control of Stephens' entire department, and from that point forward, everyone reported to Alberino, including Tom Stephens. (Tr. 1649:19-1650:18). *Alberino began producing/directing the same television show Tom Stephens had produced for 15 years, and continued assuming the remainder of Tom Stephens' job responsibilities until Stephens was eventually fired on January 26, 2011 as part of a supposed "reduction in force."* (Tr. 1654:4-1655:1, 1666:11-15, 1667:4-6, 1661:16-20).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1643:24-1667:16, 2087:16-2089:23). Tom Stephens was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Brandon Hamilton

On June 28, 2010, Mark Donovan hired Brandon Hamilton (age 39) as the Chiefs' new Director of Facilities in Stadium Operations. (Tr. 2702:15-2703:3, 2851:12-2852:4,

2937:9-16). After Hamilton was hired, Steve Cox reported to him for the next 108 days before Cox was fired on October 14, 2010. (Tr. 2707:25-2708:14). Donovan never invited Steve Cox to apply or interview for that position – which Donovan alone created. (Tr. 1594:8-1595:13, 2317:20-25, 2337:25-2338:9, 3372:25-3373:12).

Hamilton agreed that Steve Cox was a hard worker, that he arrived early for work, that he liked his job, that he had no plans to retire, and that he holds multiple certifications in areas important to the operation of Arrowhead Stadium, and in which Hamilton holds no such certifications. (Tr. 2708:15-2710:15). Hamilton never documented a single performance issue related to Steve Cox's job performance on the official forms created by the Chiefs for that purpose. (Tr. 2711:6-2716:22).

David Young

On July 7, 2010, Mark Donovan hired David Young (age 34) as the new VP of Stadium Operations, and Young assumed most or all of Steve Schneider's previous duties. (Tr. 2921:8-14, 2936:3-11, 2981:4-2982:4, 3330:7-12, 2433:13-14, 2936:3-11, 3372:25-3373:22). Donovan never invited Steve Cox to apply or interview for that position – which Donovan alone created. (Tr. 1594:8-1595:13, 2317:20-25, 2337:25-2338:9, 3372:4-3373:12). After David Young was hired, Young reported directly to Mark Donovan, and Hamilton reported to Young. (Tr. 2921:8-14, 2937:9-23, 3012:14-3013:7).

David Young worked with Steve Cox for 99 days before Cox was fired on October 14, 2010. (Tr. 3009:2-3010:3). Young agreed at trial that Steve Cox was a hard worker, that he liked him, that he thought he was a "good guy," and that he could tell Steve Cox

wanted to "perform and be successful." (Tr. 3008:5-15). Young never documented a single performance issue related to Steve Cox's job performance on the official forms created by the Chiefs for that purpose. (Tr. 3003:2-3008:1, 3006:22-24, 3026:15-18).

Dan Crumb / Larry Clemmons

In September 2010, Mark Donovan hired Dan Crumb (age 45) as the Chiefs' new Chief Financial Officer. (Tr. 3436:25-3437:10, 1488:5-1490:12). *Months earlier, the Chiefs' longtime controller Larry Clemmons (age 60) met with Denny Thum to discuss his interest in the CFO position.* (Tr. 1527:22-1529:8, 3872:15-3881:16, offers of proof) (Exhibit 306 Clemmons Depo. at 38:2-6, 170:4-172:14). According to Kirsten Krug, Denny Thum told Clemmons, "'**we would consider [you] for the CFO role if you weren't so old. You know we need someone in this role who can be here for 15 years or more**.'" (Tr. 2400:4-2401:7) (emphasis added).

After Crumb was hired, Clemmons reported to Crumb, and Crumb reported to Mark Donovan. (Tr. 1675:11-16). *In May 2011, Mark Donovan, Dan Crumb, and Kirsten Krug forced Clemmons to retire, and replaced him with a 36-year-old employee.* (Tr. 1489:10-1490:9, 1527:22-1529:6) (Exhibit 306 at 59:22-60:3, 163:20-172:3). *Dan Crumb began the meeting by telling Larry Clemmons, "**you are the last.**"* (Exhibit 306 at 164:17-165:25) (emphasis added).[9]

[9] During Clemmons' offer of proof (which took place on the 12th day of trial), the trial court briefly considered letting Cox recall Larry Clemmons for the singular purpose of letting him testify about Mark Donovan referring to him as an "old man." (Tr. 3872:15-

Cox submitted offers of proof on the matters italicized above, and the trial court rejected them for the same reasons cited in support of its pretrial order. (Tr. 1527:22-1529:8, 1675:11-16, 3872:15-3881:16, 2087:16-2089:23, Exhibit 306). Larry Clemmons was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Denny Thum / Mark Donovan

On September 13, 2010, the Chiefs opened their newly-renovated stadium. (Tr. 1038:7-1038:17). At that time, Denny Thum (age 59) was President of the organization, and 17 months into his 3-year contract with the Chiefs. (Tr. 897:7-898:11, 899:15-899:18). His contract was set to expire in April 2012, and Thum fully expected to serve all three years. (Tr. 899:15-18).

On the morning following the Chiefs' first regular-season game, Clark Hunt terminated Denny Thum during an unannounced, and hastily scheduled meeting. (Tr. 1040:5-1041:8). *When Thum objected, Hunt responded, "Well, I want you to leave this organization as of today."* (Tr. 1040:11-21). *Thum asked Clark Hunt why he wanted him to leave, and Hunt explained "that he wanted to take a larger role in the organization, the day to day."* (Tr. 1040:22-24). *Thum asked Clark Hunt if he was going to select a new President, and Hunt informed him that he had no such plans.* (Tr. 1040:24-1041:3).

3883:7). The court took that issue under advisement, but never ruled on the record, and closing arguments followed. (Tr. 3872:15-3883:7, 3882:20-3906:22).

Shortly thereafter, Clark Hunt named Mark Donovan (age 44) the new President in January 2011. (Tr. 3305:17-3306:4, 3310:4-5, 2432:12-23).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1038:7-1046:22, 2087:16-2089:23). Denny Thum was not among the original 17 witnesses addressed in the Chiefs' motion in *limine*, (LF 1110-1175), but the trial court expanded its blanket exclusion to include him.

Steve Cox's Termination

On October 14, 2010, Steve Cox was summoned to meet with Brandon Hamilton and David Young. (Tr. 2026:24-2032:21, 2039:23-2042:14, 2054:25-2057:1). Hamilton said, "'We've called you in here this afternoon, Steve, to inform you that your employment with the Kansas City Chiefs is being terminated effective immediately due to poor performance.'" (Tr. 2013:6-12). According to Hamilton, "it was his decision, but Mr. Young … supported him." *Id.* No one used the terms "insubordination" or "egregious insubordination" during Steve Cox's termination meeting. (Tr. 2063:21-2064:12, 2311:19-2312:13, 2030:2-2033:21, 2063:21-2064:12).

Hamilton accused Cox of failing to create checklists and templates for his job, and referenced Cox's decision to give a $1.89/hr. pay raise to an hourly employee named Russell Crowley without asking for approval in advance – something Cox was never required to do in his previous 12 years of employment with the Chiefs. (Tr. 2031:17-23, 1999:20-2010:12, 2012:7-2015:13, 2311:19-2313:25, 2320:16-2322:3, 2609:11-2610:12,

2620:2-2624:2, 2628:8-2635:6). Up until that time, Steve Cox had never been fired from a job during his entire life, and had worked continuously since age 13. (Tr. 2032:13-15).

Mark Donovan claims that he alone "made the decision to terminate Steve Cox" after he learned about Crowley's pay raise on October 4 or 5, 2010, but Donovan never attended Steve Cox's termination meeting.[10] (Tr. 3374:14-3389:1, 3405:8-3421:9, 3421:10-17). Mark Donovan, Brandon Hamilton, David Young, and Kirsten Krug never asked Steve Cox about Crowley's pay raise, nor the circumstances under which Cox requested it, between the time of the Crowley's raise and the time of Cox's termination. (Tr. 2064:13-2065:13, 3412:4-3416:15, 2327:22-2328:18, 2474:21-24, 2759:7-19, 3066:11-3067:13).

The Pay Raise Issue

According to Donovan, he and Steve Cox agreed to leave Crowley's pay alone for 1 year in March 2010, and Cox's subsequent attempt to raise Crowley's pay 6 months later constituted an act of "egregious insubordination." (Tr. 3374:14-3389:1). Cox testified that he requested Crowley's pay raise because it was mandatory after 6 months under the terms of the Chiefs' Collective Bargaining Agreement ("CBA"), and because Crowley deserved it. (Tr. 2031:17-23, 1999:20-2010:12, 2012:7-2015:13, 2311:19-2313:25, 2320:16-2322:3).

[10] Donovan also discussed the decision to terminate Steve Cox with Clark Hunt. (Tr. 3421:10-17).

Cox admitted at trial that defiance of a manager's directive might ordinarily meet the technical definition of "insubordination," (Tr. 2212:2-9), but Cox denied engaging in insubordinate conduct related to the pay raise because the raise was mandatory under the terms of the CBA, and because Cox did not want to violate the Chiefs' union contract. (Tr. 2031:17-23, 1999:20-2010:12, 2012:7-2015:13, 2311:19-2313:25, 2320:16-2322:3). Cox maintained his position at trial that he was terminated because of age, and not because of any act of insubordination. (Tr. 2311:19-2312:13).

Heather Coleman, the Chiefs' employee responsible for discharging the Chiefs' payroll responsibilities under the CBA, and for correctly paying the Chiefs' 800 union employees, also agreed at trial that Crowley's pay raise was mandatory under the CBA in September 2010. (Tr. 2609:11-2611:20, 2620:2-2624:2, 2628:8-2635:6). Coleman remembered Steve Cox telling her that he was continuously trying to meet or speak with Donovan about Crowley's pay raise, and that Donovan was too busy or kept rescheduling. (Tr. 2629:22-2630:5).

Donovan never asked Heather Coleman about the CBA, the raise, or whether or not it was mandatory, before Steve Cox's termination. (Tr. 3413:18-343416:16). No one else ever spoke to Heather Coleman about it. (Tr. 2634:17-22). Donovan never looked at the CBA to assess whether or not Crowley's pay raise was mandatory – not even to prepare for trial. (Tr. 3379:15-3380:2). Donovan never asked his secretary if Steve Cox had been trying to meet with him. (Tr. 3416:14-16).

No one at the Chiefs organization ever used the terms "insubordination" or "egregious insubordination" in relation to Steve Cox's termination until after Steve Cox

filed this lawsuit. (Tr. 2063:21-2064:12, 2311:19-2312:13). Those terms were never used during his termination. (Tr. 2030:2-2033:21, 2063:21-2064:12).

Steve Cox Is Replaced One Month Later

Rocco Mazzella (age 37)

Brandon Hamilton (age 39) first testified in this case that he alone had "exclusive authority to identify and hire" Steve Cox's replacement in October 2010, and that he discovered Steve Cox's replacement – Rocco Mazzella (age 37) – through an online advertisement the Chiefs posted on the Internet. (Tr. 768:16-21, 2936:12-2937:10, 2940:1-2941:17, 2774:6-2778:17, 2765:15-23, 2772:1-2774:5). At trial, however, Mazzella admitted that:

- Mazzella and David Young originally met each other in 1998, and have been good friends ever since (Tr. 3158:22-3166:4);
- Mazzella began inquiring with David Young about an NFL job back in 2008 or 2009 when David Young worked for the Seattle Seahawks before joining the Chiefs (Tr. 3114:3-3115:24, 3183:17-3191:4);
- Mazzella and David Young took 5 or 6 personal trips to Las Vegas, and other trips to Chicago, North Carolina and Arizona before David Young ever started working for the Chiefs (Tr. 3166:9-3175:24);
- Mazzella and David Young share many mutual friends, and worked together at Disneyworld for several years before David Young started working for the Chiefs (Tr. 3158:22-3166:4);

- They attended each other's weddings – both before and after Mazzella was hired by the Chiefs. (Tr. 3176:1-3177:16).

At trial, Brandon Hamilton completely abandoned his previous testimony, and explained that he instead "identified Rocco Mazzella through some other means, other than just him being somebody that applied on the Internet for the job." (Tr. 2772:1-2774:5).

Hamilton and Young initially testified under oath (by depositions) that they never began looking for Steve Cox's replacement until **after** Steve Cox was fired on October 14, 2010. (Tr. 2940:1-2941:17, 2774:6-2778:17, 2993:21-25, 2996:19-3001:6, 3137:21-3138:15). Not true, however, as Mazzella admitted at trial that:

- David Young traveled to visit Mazzella in Orlando, Florida one or two months **before** Steve Cox was ever fired, and talked to him about the Chiefs' efforts to recruit "strong leadership" (Tr. 3195:8-3203:24);
- Mazzella sent David Young his resume several weeks **before** Steve Cox was fired (Tr. 3142:1-20, 3227:15-3228:19);
- Mazzella participated in a telephone interview with Brandon Hamilton **before** Steve Cox was fired (Tr. 3230:3-3231:1, 3243:9-13);
- Mazzella booked his flight to Kansas City on October 13, 2014 – the day **before** Steve Cox was fired (Tr. 3242:10-3243:19;
- Mazzella was the only job candidate who travelled to Kansas City for 2 nights, was reimbursed for his travel expenses, received a stadium tour, and interviewed with Mark Donovan (Tr. 3237:20-3239:23, 3246:24-3247:2); and,

- Mazzella had dinner and drinks with David Young after his interviews in Kansas City (Tr. 3241:8-3241:25, 3244:9-3246:10).

At trial, David Young and Brandon Hamilton completely changed their previous testimony that they never began searching for Steve Cox's replacement until after Steve Cox was fired, and instead explained that they probably contacted Rocco Mazzella earlier. (Tr. 2774:6-2778:17, 2993:21-25, 2996:19-3001:6, 3137:21-3138:15).

The "Straw" Candidates

The other three candidates considered for Steve Cox's job were Brad Acker (age 28), Melissa Hay (age 30), and Daniel Melise (age 29). (Tr. 3259:4-32:71:11, 3278:20-3289:19, 3580:8-3589:12). Unlike Mazzella, none of them met with Mark Donovan. (Tr. 3259:4-32:71:11, 3278:20-3289:19, 3580:8-3589:12). They were brought in for 15 or 20-minute interviews between October 28-30, 2010, and received minimal consideration at best. *Id.* All of them applied via the internet, but by the time the position was posted, Mazzella had already flown to Kansas City and completed his interview process. (Tr. 2557:19-22, 3259:4-32:71:11, 3278:20-3289:19, 3580:8-3589:12).

None of the other candidates were invited back, and days later, Kirsten Krug offered Mazzella a job on November 1, 2010. (Tr. 3251:10-12, Tr. 3259:4-32:71:11, 3278:20-3289:19, 3580:8-3589:12). Mark Donovan testified at trial that he does not know whether Rocco Mazella (age 37 at time of hire) is older or younger than Steve Cox (61 at termination). (Tr. 3318:3-3319:23).

January 5, 2011 Directors' Meeting

In 2010/2011, the Chiefs' Vice-President and Director-level employees met every Wednesday for weekly "Directors' Meetings." (Tr. 1491:4-1492:4). Mark Donovan generally led those meetings, and conducted the Directors' Meeting on January 5, 2011 – 83 days after Steve Cox was terminated. (Tr. 785:8-17, 790:4-20). That meeting was attended by, among others: Mark Donovan, Brenda Sniezek, Doug Hopkins, Dan Crumb, Kirsten Krug, Rob Alberino, Ken Blume, Katie Douglass, Pete Morris, Brandon Hamilton, David Young, and Jason Stone. (Tr. 789:5-790:3, 1086:16-1088:13).

The meeting opened with a discussion about playoff bonuses, and the related question of how to communicate with staff members about playoff bonuses. (Tr. 786:10-12, 792:6-793:1). Donovan invited some initial comments, and Dan Crumb (age 46) said, "**he was sick and tired of these old, entitled employees**." (Tr. 793:7-19, 2432:3-2434:4) (emphasis added). Jason Stone (age 32) and David Young (age 35) also spoke up to agree with Dan Crumb's opinions. (Tr. 794:7-24, 2432:3-2434:4). At the conclusion of the meeting, Mark Donovan (age 44) told everyone that "it was the best … Directors Meeting[ ] he had ever been in and this is the way he foresaw all the other ones." (Tr. 796:23-797:4). Donovan also said, "'This is the type of discussion I'm looking for in this meeting.'" (Tr. 1092:22-1093:3).

At trial, Dan Crumb admitted saying, "these old people feel a sense of entitlement," but denied that it was a reference to age. (Tr. 1493:7-1496:4). Others strongly disagreed.

Brenda Sniezek (age 51) "was so stunned that someone had referred to people as old, and … just sat there with a pit in [her] stomach. (Tr. 1089:19-23). "All [of a] sudden [she] felt very old given the fact that the three people that had made that comment …, two of them [were] very young and [she] just thought to [herself], [w]hen is this ever going to stop?" (Tr. 1090:23-1091:9).

Doug Hopkins (age 61) also testified that his "jaw dropped" when he heard the comments expressed by Crumb, Young, and Stone, that he was "shocked," "stunned," and "personally insulted," and that he never heard those types of comments during his previous 17 years as the Chiefs' Director of Ticket Operations. (Tr. 785:8-786:7, 793:20-794:6, 796:5-22). Hopkins understood Crumb's statements to mean that Crumb "was sick and tired of old and entitled employees." (Tr. 794:4-6). Immediately following the meeting, Hopkins "walked into Kirsten Krug's office … and told her that it was the worst meeting [he] had been in, a horrible meeting, and that it was totally insulting to listen to those people talk the way they did …." (Tr. 797:5-798:6). Hopkins thought it was "almost venomous in nature." *Id.* Hopkins resigned the following day.[11] (Tr. 799:14-18).

Kirsten Krug (age 43) testified that she does not recall Doug Hopkins ever coming by her office to discuss that meeting. (Tr. 2362:10-12, 2440:9-2442:4). She did,

[11] Hopkins also explained at trial, however, that he already planned to resign before the meeting, and that he had already accepted a new position the previous day. (Tr. 799:14-18).

however, recall Dan Crumb saying, "These old people around here think they're entitled to everything." (Tr. 2435:21-2436:11). She never asked Crumb what Crumb meant by that statement, however, because she already knew "[h]e was not referring to people based on their age." (Tr. 2362:10-12, 2443:14-2444:7).

The other people involved in terminating Steve Cox – David Young, Brandon Hamilton, and Mark Donovan – all testified that they do not recall Crumb making any of the comments referenced above. (Tr. 2780:14-19, 3076:22-3077:4, 3430:11-3431:23).

January 2011 Terminations

The Chiefs announced Mark Donovan (age 44) as their new President in January 2011. (Tr. 3305:17-3306:4, 3310:4-5, 2432:12-23). *Six days later, Mark Donovan oversaw a "reduction in force" in which the Chiefs terminated 7 individuals by informing them that their "positions" were being eliminated: Brenda Sniezek* (age 51)*, Evelyn Bray (age 55), Pam Johnson (age 49), Tom Stephens (age 52), Ken Blume (age 56), Lisa Siebern (age 50), and Heather Coleman (age 45).* (Tr. 1166:12-1172:15, 1668:16-1689:17, 1643:24-1667:16, 1288:23-1291:11, 2690:22-2700:18, 1689:7-13) (LF 619-20).

Six of the above witnesses[12] were among the 17 former, protected-group employees barred from testifying about the issues covered by the pretrial order, (LF1110-1175, 1587-1588). Despite that hurdle, Cox submitted offers of proof from 4 of them: Sniezek, Bray, Stephens, and Coleman. (Tr. 1166:12-1172:15, 1668:16-1689:17,

[12] Brenda Sniezek, Evelyn Bray, Pam Johnson, Tom Stephens, Ken Blume, and Lisa Siebern.

1643:24-1667:16, 1288:23-1291:11, 2690:22-2700:18). The offers of proof were rejected in their entirety for the same reasons cited in support of the trial court's pretrial order. (Tr. 2087:16-2089:23, 2700:15-18).

Brenda Sniezek

Brenda Sniezek (age 51) worked for the Chiefs for 29 years, and served as their Director of Community Relations for 11 years *before Mark Donovan terminated her in January 2011.* (Tr. 1047:6-13, 1048:5-1049:8, 1166:12-1172:15). *She was informed that her position was being eliminated as part of a reduction in force, but in truth, she was replaced by a 32-year-old employee named Chuck Castellano.* (Tr. 1166:12-1172:15).

Before her termination, Donovan reviewed Sniezek's performance, and she described that process as a "joke." She was criticized for a multitude of minute errors for which she held no responsibility (such as a misspelled word on an invitation prepared by a different employee), and that had no bearing on her actual job performance. (Tr. 1169:20-1172:15).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1166:12-1172:15, 2087:16-2089:23). Brenda Sniezek was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Evelyn Bray

Evelyn Bray (age 55) began working for the Hunt owned companies in 1987, and worked for the Chiefs for 4 years as a staff accountant before she was terminated on

January 26, 2011. (Tr. 1668:16-1683:9). *Dan Crumb told her that her position was being eliminated as part of a reduction in force; in truth, Bray was replaced by a "much younger employee."* (Tr. 1674:3-1677:11). All of Crumb's personnel changes necessitated Mark Donovan's approval. (Tr. 1489:25-1490:9).

Bray also testified that it would have been "impossible" to eliminate her position because she was the only person responsible for handling payroll for hundreds of non-player employees. (Tr. 1676:6-23). *Before her termination, Bray never received a negative performance review, and was never written-up for any reason whatsoever.* (Tr. 1677:12-20).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1668:16-1689:17, 2087:16-2089:23). Evelyn Bray was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Tom Stephens

As discussed above, Mark Donovan hired Rob Alberino (age 40) for a "creative services" position that did not previously exist. (Tr. 1652:13-15, 2427:7-10, 3560:18-3561:4, 3571:16-3574:20). *Tom Stephens (age 52) was never offered an opportunity to interview for Rob Alberino's newly created position, and was never considered for it.* (Tr. 1653:8-1654:3). *Alberino immediately assumed control of Stephens' entire department, and from that point forward, everyone reported to Alberino, including Tom Stephens.* (Tr. 1649:19-1650:18). *Alberino continued assuming Tom Stephens' job*

responsibilities until Stephens was fired on January 26, 2011 as part of a "reduction in force." (Tr. 1654:4-1655:1, 1666:11-15, 1667:4-6, 1661:16-20).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected it for the same reasons cited in support of its pretrial order. (Tr. 1643:24-1667:16, 2087:16-2089:23). Tom Stephens was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

Heather Coleman

Heather Coleman *(age 45)* worked for the Chiefs for 17 years; as discussed above, she and Steve Cox were equal level managers in the Stadium Operations department. (Tr. 2609:11-2611:20). She was the Chiefs' Manager of Personnel, and also reported to Steve Schneider. (Tr. 2609:18-2610:5, 2611:15-20).

In January 2011, David Young and Kirsten Krug summoned Coleman to a meeting, and informed her that they were "firing people across the organization," and that "they were terminating her position." (Tr. 2695:17-2697:12). *Similar to Evelyn Bray, Coleman testified that it would have been impossible eliminate her position because she was the only person responsible for handling payroll for hundreds of union employees.* (Tr. 2696:18-2697:11, 2610:4-2611:14).

Cox submitted an offer of proof on the matters italicized above, but the trial court rejected the offer of proof in its entirety "[b]ased upon [its] previous rulings." (Tr. 2690:22-2700:18, 2700:15-18). Heather Coleman was not among the original 17

witnesses addressed in the Chiefs' motion in *limine*, (LF 1110-1175), but the trial court expanded its blanket exclusion to include her.

Pam Johnson, Lisa Siebern, and Ken Blume

No offers of proof were presented from Pam Johnson, Lisa Siebern, or Ken Blume, but all three of them were still prevented from potentially testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-1588) (Tr. 275:13-278:25, 284:22-287:12, 1426:2-19, 1329:17-19, 1348:3-15, 2075:7-2076:3).

All of them were replaced by younger employees. Scott Pioli and Katie Douglass hired BJ Stabler (age 25) to assume Lisa Siebern's (age 50) previous responsibilities. (LF 619-20) (Tr. 1288:23-1291:7). Brandon Hamilton (age 39) assumed Ken Blume's (age 51) previous responsibilities. (LF 620). Lisa Plunkett (age 39) was hired to assume after Pam Johnson's (age 49) previous responsibilities. (LF 620).

The Chiefs Signal the End of Their Efforts to "Go In A More Youthful Direction"

As discussed above, the Chiefs' longtime controller Larry Clemmons (age 60) met with Denny Thum in 2010 to discuss his interest in the Chiefs' CFO position. (Tr. 1527:22-1529:8, 3872:15-3881:16, offers of proof) (Exhibit 306 Clemmons Depo. at 38:2-6, 170:4-172:14). *Denny Thum informed Clemmons that he did not believe Clark Hunt "would approve of [him] having the position because ... Clark [Hunt] was interested in bringing in someone from outside of the organization."* (Exhibit 306 at 171:08-172:03). According to Kirsten Krug, Denny Thum also said to Larry Clemmons, "**we would consider [you] for the CFO role if you weren't so old. You know we need someone in this role who can be here for 15 years or more**." (Tr. 2400:4-2401:7)

(emphasis added). In September 2010, Mark Donovan hired Dan Crumb (age 45) as the Chiefs' new CFO. (Tr. 3436:25-3437:10, 1488:5-1490:12).

In May 2011, Larry Clemmons was summoned to meet with Dan Crumb and Kirsten Krug. (Exhibit 306 at 164:17-167:21). *Dan Crumb began the meeting by telling Larry Clemmons, "**you are the last.**"* (Exhibit 306 at 164:17-165:25) (emphasis added). *Larry Clemmons asked him what he meant, and Crumb told him "that they were going to make a change at [his] position, and they planned on [him] retiring at the end of May."* (Exhibit 306 at 165:01-166:04). *Dan Crumb said that they wanted someone who could work another 10 to 15 years, and someone that was "stronger."* (Exhibit 306 at 165:01-166:04). *Dan Crumb told him that **Clark Hunt "wasn't going to wait much longer**."* (Exhibit 306 at 165:01-166:04) (emphasis added).

After the meeting, Larry Clemmons sent Dan Crumb an e-mail questioning Mr. Crumb's comment about the 10 to 15 years, and questioning why he thought Clemmons was unfit to work for another 10 or 15 years. (Exhibit 306 at 167:22-169:19). *The following day, another meeting took place.* (Exhibit 306 at 167:22-169:19). *Dan Crumb began by saying that when he made his comment about the 10 to 15 years, he meant to convey that "that he wanted someone that could work another 10 to 15 [years] after [Dan Crumb retired] in 10 to 15 [years]."* (Exhibit 306 at 168:24-169:15).

Donovan and Crumb mutually agreed on the decision to terminate Larry Clemmons in 2011. (Tr. 1489:25-1490:9, 1527:22-1529:6). *Mark Donovan and Dan Crumb mutually decided to hire Brian Dunn (age 36) to replace Larry Clemmons (age 60).* (Tr. 1489:25-1490:9, 1527:22-1529:6).

Cox submitted offers of proof on the matters italicized above, but the trial court rejected them for the same reasons cited in support of its pretrial order. (Tr. 1527:22-1529:6, 1675:11-16, 3872:15-3881:16, 2087:16-2089:23) (Exhibit 306). Larry Clemmons was also one of the 17 former employees barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

D. THE TRIAL COURT'S EXCLUSION OF SCOTT PIOLI'S ADMISSION ABOUT GETTING RID OF EMPLOYEES OVER THE AGE OF 40 WHO PREVIOUSLY WORKED UNDER CARL PETERSON (AS OVERHEARD BY HERMAN SUHR)

As discussed above, in August or September of 2009, Herman Suhr, a Chiefs field security supervisor for 27 years, overheard Scott Pioli talking to an unknown guest near a quiet hallway inside Arrowhead Stadium where several offices were located, including one office used by Mr. Pioli himself. (Tr. 2090:22-2096:15; Exhibits 288B and 288C at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3). As Mr. Suhr walked down the hallway, he overheard Mr. Pioli say "I need to make major changes in this organization as so many employees of CP [Carl Peterson] are over 40 years old." (Exhibits 288B and 288C, at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3).

Before trial, the Chiefs filed a motion *in limine* to exclude evidence of the statement overheard by Herman Suhr. (LF 1011-1109). In response, Cox argued that if the statement attributed to Mr. Pioli "will cause a reasonable trier of fact to raise more than an eyebrow, and will serve as an essential thread to Plaintiff's remaining

circumstantial evidence intended to prove [Respondent]'s discriminatory animus at trial." (LF 1515) (See also generally LF 1508-1585, Cox's suggestions in opposition).

Thereafter the court entered a pre-trial Order granting Respondent's motion *in limine* without explanation. (LF 1587-1588). During trial, the court explained that the court's earlier Order excluding the statement attributed to Mr. Pioli was based upon the fact that the trial court determined that Mr. Pioli "was not a decisionmaker in the termination of Mr. Cox" and because the statement "would fall into a category of a stray remark." (Tr. 280:3-284:10). Also at trial, the jury learned that Pioli told Cox "point blank that anything he said carried the weight of Clark Hunt and that if [he] didn't like that, that it wouldn't be necessary to take it to Mr. Hunt." (Tr. 1613:21-1614:9).

In his deposition, Scott Pioli denied making a statement in the fall of 2009 about getting rid of employees over the age of 40 who worked with Carl Peterson. (LF 1598-1624). Based on that testimony, Cox filed an additional Motion to Set Aside the Court's pretrial order based on additional and independent reasons that Herman's Suhr's testimony is: (1) independently admissible to impeach Scott Pioli's credibility with inconsistent statements and conduct, and (2) independently admissible on the basis that it constitutes an admission by a party opponent. (LF 1598-1624; Tr. 1279:1284:6).

The trial court overruled Cox's motion on the same grounds, and on the additional basis that a sufficient foundation could not be laid for the impeachment of the witness with the statement attributed to him. (Tr. 947:16-958:16). After that ruling, Cox submitted an additional offer of proof from Scott Pioli in order to lay additional foundation for impeaching Mr. Pioli with Herman Suhr's statement (Tr. 1279:1-1284:6).

Once again, Mr. Pioli unequivocally denied making any statements in the fall of 2009 about getting rid of employees over the age of 40 who worked with Carl Peterson. (Tr. 1279:1-1284:6).

Cox submitted an offer of proof regarding Herman Suhr's anticipated testimony in its entirety, including the overheard statement from Scott Pioli, and the trial court rejected it in its entirety for the reasons stated above. (Tr. 2090:22-2096:15, 2307:8-2310:20; Exhibits 288B and 288C at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3). It also refused to reconsider its ruling an additional time. (Tr. 2307:8-2310:20).

E. THE TRIAL COURT'S QUASHING OF DISCOVERY AND TRIAL SUBPOENAS FOR CHIEFS CHAIRMAN AND CEO CLARK HUNT

During discovery, Cox sought sworn testimony from the Chiefs' Chairman and CEO. (LF 59-60). Thereafter the Chiefs sought to quash the notice of deposition, arguing that Cox "seeks the deposition[] of…[Mr.] Hunt solely to annoy and harass Defendant and to impose an undue burden on Defendant" and because Hunt "[has] no facts to offer in this case that would be reasonably calculated to lead to the discovery of admissible evidence." (LF 62). The Chiefs also claimed that the deposition of Clark Hunt was sought "in an effort to broaden this case beyond what Missouri law allows" because "[i]t is not permissible to get into a pattern and practice case at this late juncture [one year before the trial]." (Tr. 8:23-9:1).

Cox argued in response that Clark Hunt authored a letter to Cox dated 13 days after his termination directly contradicting the purported reasons offered by the Chiefs' witnesses for the purported grounds for his termination which read:

> **Dear Steve:**
>
> **I write to thank you for your 12 years of service with the Chiefs. Your ability to manage a wide variety of projects as maintenance manager was sincerely appreciated, and we are grateful for your efforts. On behalf of my family and the entire Kansas City Chiefs organization, I wish you all the best in the future.**
>
> **Best regards,**
>
> **Clark Hunt**

(LF 164-165; Ex. 10). Cox noted also that each of the witnesses from whom Cox had sought testimony had disagreed with the representations made by Clark Hunt in his letter to Cox. (Tr. 13:18-25). Cox argued further that Clark Hunt had made public, age-based comments about himself and others the Chiefs recently hired, and that testimony from Clark Hunt was likely to lead to the discovery of other admissible evidence regarding the termination and replacement of other older employees. (LF 164-165; Ex. 10) (*See also generally*, LF 162-179). The trial court quashed the deposition notice for Clark Hunt on the exclusive basis that "annoyance, oppression, undue burden, and expense outweigh the need for such discovery." (LF 193-194).

Cox also sought trial testimony from Clark Hunt, and a trial subpoena was issued and served upon Clark Hunt (through counsel) in the month before an earlier trial setting.

(LF 195-197). The Chiefs then sought to quash the trial subpoena on the basis that "[Cox] seeks Mr. Hunt's appearance at trial solely to annoy and harass Defendant and to impose undue burden on Defendant" and because "Mr. Hunt has no relevant information to offer in this case that would be admissible evidence." (LF 198-207). The trial court quashed the trial subpoena served upon Clark Hunt, without explanation (LF 379). Cox sought a writ of prohibition or, in the alternative, mandamus on this subject from this Court, and Cox's request was denied. (LF 380).

Though he was not called by the Chiefs as a witness at trial, Clark Hunt's name was invoked at trial on more than 300 separate occasions. (Tr. Vol. 2 Index p. 13, Tr. Vol. 3 Index p. 12, Tr. Vol. 4 Index p. 14, Tr. Vol. 5 Index p. 11, Tr. Vol. 6 Index p. 11-12, Tr. Vol. 7 Index p. 15). At trial, Mark Donovan also testified that he discussed the decision to terminate Steve Cox with Clark Hunt, and the jury learned that Hunt "wanted to go in a more youthful direction." (Tr. 3421:10-17, 1393:22-1396:7). The jury heard testimony that in December 2008, Clark Hunt met with Assistant General Manager Denny Thum, and informed Thum that he intended to "evaluate the organization." (Tr. 886:7-14; 892:11-893:6). Shortly after hiring Pioli, Clark Hunt held a press conference with Pioli and newly-hired Head Coach Todd Haley. (Tr. 1849:13-1851:11). One of the "major story line[s]" of that press conference was the common ages of the new "control group;" Clark Hunt was 44-years-old, and the other two were either the same age, or within one year of Hunt. *Id*.

The jury also learned about Clark Hunt's involvement in the redirection of the organization and that in May 2009, Hunt convened monthly management meetings to

discuss the reorganization and restructuring of the business, and the highest-level executives attended – Clark Hunt, Scott Pioli, Denny Thum, Mark Donovan, and others. (Tr. 899:19-903:17, 3328:13-3330:5). During the meetings, Clark Hunt explained that he "wanted to make changes" in order to "become more efficient" because he felt that the organization was "heavy in a number of departments and they needed to revalue the number of people [they] had in each department." (Tr. 902:22-904:14). Additional testimony revealed that Clark Hunt instructed Mark Donovan to evaluate each department within the administrative side of the organization and to "lead[] an effort to reorganize, restructure, and efficiently run the Chiefs' operation." (Tr. 905:20-24, 3322:12-25).

Cox asked the trial court to reconsider and set aside the Order quashing the trial subpoena issued to Clark Hunt on two separate occasions during trial. Cox's requests were denied. (Tr. 1434:13-1436:11, 3456:17-3457:6).

F. CLOSING ARGUMENT BY COUNSEL FOR THE CHIEFS

During the Chiefs' closing argument, the Chiefs' counsel accused Cox's counsel of dishonesty, greed, and purposeful efforts to deceive the jurors, the EEOC, and/or the Missouri Commission on Human Rights ("MCHR") in **23** separate instances. None of counsel's accusations were supported by the record:

- "**Don't let these lawyers over here fool you. It's about them. This lawsuit isn't about Mr. Cox. It's about these lawyers.**" (Tr. 3938:3-5) (emphasis added).

- "**These lawyers** over here don't want to listen to their own client." (Tr. 3938:20-21) (emphasis added).
- "**These lawyers** don't want to listen to their own client." (Tr. 3939:2-3).
- "He can't come into this courtroom asking for a half a million dollars from you and ignore the facts. **He's not, but his lawyers are**." (Tr. 3939:10-12) (emphasis added).
- "**The lawyers** don't want to hear that and they have the audacity to stand up on closing statement and say that was a made-up reason." (Tr. 3942:2-4) (emphasis added).
- "But they, **these lawyers over here, what's their motive? What's their motive? Look around you. What are they trying to do here**?" (Tr. 3943:11-13) (emphasis added).
- "Mr. Cox is not a liar. He told the truth and they don't want to face it. Why? Why? Ask yourself. **Why don't these lawyers want to face the truth? What are they trying to do here**?" (Tr. 3949:23-3950:1) (emphasis added).
- "…because I read his Charge of Discrimination that he filed with the EEOC and it's obvious it's not truthful… and I thought, you know, I'm going to go after this guy. And then I found out what **Mr. Galloway** said to you. He wrote it. He signed it. Aha. Now we know. Now we know. (Tr. 3950:7-14) (emphasis added).

- "Why would **Mr. Galloway**, when he drafted this, be putting this statement in this Charge of Discrimination? Why? Because he's looking forward to being in front of a jury someday and saying Steve Cox should be paid through his retirement date of 2013 and 2014, not through 2011, when he really was going to retire." (Tr. 3953:5-11) (emphasis added).
- "So they have **to concoct and the lawyer** has got him in his office and he's admitted to you. He's admitted to you he wrote this statement and that Mr. Cox signed it. **So he's got to concoct this."** (Tr. 3954:2-5).
- "Now again we're going to read this next paragraph…and I'm going to suggest to you…that these statements are not true and you know they're not true when we read them, but I'm not going to say Mr. Cox is a liar. **I'm not because I know who wrote this, so let's see what happened**." (Tr. 3955:1-6) (emphasis added).
- "…**and this lawyer over here has the audacity to write a statement** that says… 'I had never been required to obtain permission for pay increases of this type on any previous occasion'." (Tr. 3955:17-21) (emphasis added).
- "**Dishonesty by omission, ladies and gentlemen**?" (Tr. 3956:2) (emphasis added).
- "Again this is a sworn statement to the Missouri Human Rights Commission **that Mr. Galloway drafted….Again, again, not being**

fazed by what his own client says, a document before a government agency that is blatantly untrue." (Tr. 3958:9-18) (emphasis added).

- "**If Mr. Galloway would have told the truth to the Missouri Human Rights Commission, he would be very fearful that those folks at the Missouri Human Rights Commission would say you have no claim here**." (Tr. 3958:25-3959:3) (emphasis added)
- "We know that's not true. We know it because Mr. Cox testified that it's not true, again for the umpteenth time, the statement that these with **lawyers over there ignore** time and time again." (Tr. 3960:24-3961:2) (emphasis added).
- "**Don't let those lawyers fool you.**" (Tr. 3965:25) (emphasis added).
- "…but the burden that these **plaintiff lawyers** have, **and you notice I said plaintiff's lawyers because they've ignored their own client in this case**…." (Tr. 3967:1-3) (emphasis added).
- "…**these lawyers over here** that didn't want to listen to their own client." (Tr. 3969:1-2) (emphasis added).
- "**Don't let these lawyers over there fool you.**" (Tr. 3970:13) (emphasis added).
- "**Whose case is this? Don't let those lawyers fool you**. …I'd submit to you, ladies and gentlemen, that's disingenuous, to say the least." (Tr. 3972:16-24) (emphasis added).

- "There's **four lawyers** and there's one man sitting right here. He's testified under oath, **notwithstanding his lawyers wanting to ignore what he says**…." (Tr. 3981:9-12) (emphasis added).
- "[We're asking you to enter a verdict finding]…that the Kansas City Chiefs are not liable to Mr. Cox and that his claim for half a million dollars is not a claim that should be sustained **and that these lawyers over here haven't fooled you and pulled the wool over your eyes**…." (Tr. 3982:19-25) (emphasis added).

The Chiefs' counsel also dovetailed the above with significant misstatements of the law, including the false legal concept that, if "Mr. Galloway would have told the truth to the MCHR," the MCHR would have told Steve Cox and his counsel "you have no claim here," and Steve Cox would have been barred from pursuing his case. (Tr. 3958:9-3960:16). In other words, the Chiefs' counsel argued that Steve Cox's case should have never been filed, but was only permitted to be filed, because of the blatant lies contained in his Charge of Discrimination (authored by counsel). *Id.*

Despite Cox's objection to the above portion of counsel's argument, the damage was highly prejudicial, and the Chiefs' counsel repeatedly returned to the same subject anyway – and reinforced it at least 8 more times after the objection – by continually accusing Cox's counsel of dishonesty, greed, and purposeful efforts to deceive the jurors, the EEOC, and/or the MCHR. (Tr. 3960:24-3961:2, 3965:25, 3967:1-3, 3969:1-2, 3970:13, 3972:16-24, 3981:9-12, 3982:19-25).

ARGUMENT AND LEGAL AUTHORITIES

POINT RELIED ON

I. THE TRIAL COURT ERRED IN ORDERING A BLANKET EXCLUSION OF CIRCUMSTANTIAL EVIDENCE OF AGE DISCRIMINATION, INCLUDING POTENTIAL TESTIMONY AND EVIDENCE FROM AND ABOUT 17 OR MORE FORMER EMPLOYEES, BECAUSE SUCH EVIDENCE WAS LOGICALLY AND LEGALLY RELEVANT TO PROVE PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT WOULD HAVE DEMONSTRATED RESPONDENT'S DISCRIMINATORY MOTIVES AND/OR INTENT IN TERMINATING PLAINTIFF, AND IT WOULD HAVE CORROBORATED OTHER CRITICAL AND RELEVANT EVIDENCE NAMELY THE EXISTENCE OF THE BUSINESS OWNER'S PLAN TO TAKE THE ORGANIZATION "IN A MORE YOUTHFUL DIRECTION."

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. 2007)

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854 (Mo. App. E.D. 2009)

Hurst v. Kansas City, Missouri School Dist., 437 S.W.3d 327 (Mo. App. W.D. 2014)

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008)

42 U.S.C. § 2000e-6(a)

Mo. Rev. Stat. § 213.010, *et seq*.

Standard of Review

The standard of review for a trial court's decision to admit or exclude evidence is whether the trial court abused its discretion. *Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310, 317 (Mo. App. W.D. 2004). This Court held in *State v. Taylor*, 298 S.W.3d 482 (Mo. banc 2009), that "[a] trial court can abuse its discretion through the inaccurate resolution of factual issues or through the application of incorrect legal principles." *Id.* at 492. "[W]hen the issue is primarily legal, no deference is warranted and appellate courts engage in *de novo* review." *Id.* at 492 (citations omitted).

Otherwise, the trial court's abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 123 (Mo. 2013).

Reversal due to an evidentiary error requires a showing of prejudice. *State v. Wolfe*, 13 S.W.3d 248, 260 (Mo. banc 2000). Prejudice exists when "there is a reasonable probability that the trial court's error affected the outcome of the trial." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). Prejudice is presumed when admissible evidence is excluded and is rebutted by specific facts and circumstances. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003).

A. The MHRA Does Not Require a Plaintiff In An Individual Discrimination Claim To Satisfy Special Pleading Requirements As a Precondition To The Admission Of Circumstantial Evidence Of Discrimination.

Never before has an employment discrimination plaintiff in Missouri been required to invoke a "**claim**" of "pattern and practice" in their charge of discrimination or petition as a precondition to using circumstantial evidence of a defendant's discriminatory treatment of other employees. There are no controlling legal authorities supporting this new requirement, but the trial court embraced it during the earliest stages of this case at the Chiefs' urging, and continually reinforced it throughout its evidentiary exclusions. Tellingly, the Chiefs never cited a single legal authority for their "pattern and practice" argument in their original motion *in limine* filed with the trial court. (L.F. 1110-1114). There are none.

The trial court repeatedly emphasized: "…**but the primary thing was that you didn't plead pattern and practice** and that these employees were not similarly situated to Mr. Cox." (Tr. 1427:13-23) (emphasis added). The trial court's ruling was rooted in "incorrect legal principles." "When the issue is primarily legal, no deference is warranted," and this Court "engage[s] in *de novo* review." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009).[13]

[13] The trial court's "similarly situated" analysis is also addressed separately, *infra*, and turns on incorrect legal principles.

1. "Pattern-Or-Practice" Cases Are Exclusively Creatures Of Federal Law.

This has never been a federal "pattern-or-practice" case. The Chiefs' reliance on this legal term of art – for a rare, class action-style cause of action predicated on federal statutes under which Cox has not sought relief – is unfounded.

Pattern-practice claims originate from Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6(a), which authorizes the U.S. Department of Justice to bring lawsuits alleging a "pattern or practice" of discrimination:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights secured by this sub-chapter, and that the *pattern or practice* is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate District Court of the United States by filing with it a Complaint....

Id. (emphasis added).

In 1972, Congress amended Section 707 of Title VII, 42 U.S.C. §2000e-6, and transferred authority from the Attorney General to the EEOC. *General Tel. Co. of Newark West, Inc. v. EEOC*, 446 U.S. 318, 329 (1980). "It was unquestionably the design of Congress...to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." *U.S. v. Allegheny-Ludlum*

Indus., 517 F.2d 826, 843 (5th Cir. 1975). The MHRA contains nothing remotely similar to the federal statutory provision authorizing "pattern or practice" litigation.

Under federal law, the government, and individuals, can now bring class-action-styled "pattern or practice" claims following a *federal* procedural model named after *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Under Title VII, *Teamsters*-style pattern and practice cases can be brought as private class actions. *See Cooper v. Federal Reserve Board*, 467 U.S. 867, 876 (1984). Groups of plaintiffs can also pursue a "collective action" under the Age Discrimination in Employment Act ("ADEA"). *See Thiessen v. Gen'l Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001).

"Pattern-or-practice cases differ significantly from the far more common cases involving one or more claims of individualized discrimination." *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001). "[T]he order and allocation of proof, as well as the overall nature of the trial proceedings, in a pattern-or-practice case differ dramatically from a case involving only individual claims of discrimination." *Id.* (citing *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 357-62 (1977)). In a true pattern-or-practice case, a class of plaintiffs must establish that intentional discrimination was defendant's "standard operating procedure." *Teamsters*, 431 U.S. at 336.

Cox has never tried to allege a special federal class-action-style "pattern or practice" claim. The MHRA never uses the phrase "pattern or practice," and does not include a provision for these class-action-style claims. "The operation of the statute must

be confined to 'matters affirmatively pointed out by its terms, and to cases which fall squarely within its letter.'" *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014). The MHRA is a creature of Missouri statute. Accordingly, "[i]n deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is **consistent** with Missouri law […]" and caselaw "should more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 [Now MAI 38.01] and rely less on analysis developed through federal caselaw. *"* *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). (Bold added). "Where the language of the statute is unambiguous, courts must give effect to the language used by the legislature. Courts lack authority 'to read into a statute a legislative intent contrary to the intent made evident by the plain language. There is no room for construction even when the court may prefer a policy different from that enunciated by the legislature.'" *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995). (Internal citation omitted).

In their briefing below, the Chiefs misconstrued the holding in *Young v. Time Warner Cable Capital, L.P.*, 443 F.Supp.2d 1109 (W.D. Mo. 2006) – the sole "authority" on which they rested their entire argument after trial. *Young* is a non-binding federal trial court's summary judgment on a plaintiff's attempted "pattern or practice" claim because the plaintiff failed to allege a "pattern or practice" of discrimination in his EEOC charge, and therefore failed to exhaust administrative remedies. *Id*. at 1123-25. Its ruling on that issue did not impact the plaintiff's ability to pursue his *individual claims* based on: (1) hostile work environment, (2) race discrimination, and (3) retaliation, and it did not

impact the types of *circumstantial evidence* he was permitted to introduce at trial in support of his claims. *Id.*

Citing no legal authority, the Chiefs injected error in this case from the very beginning, and insisted that Cox was legally required to "plead" a pattern or practice "claim" before he could offer relevant evidence of other acts of discrimination toward members of the same protected class: "[Cox] did not allege a pattern and practice of discrimination or hostile work environment in either his Charge of Discrimination with the [MCHR] or his Petition," and as a result, "[Cox] should not be allowed to introduce testimony from any individuals whose terminations are wholly unrelated to [Cox's] termination." (LF 1111). No Missouri authority has ever imposed any such pleading requirement; it does not exist in the statutory framework of the MHRA, and it does not exist in the caselaw.

2. The Trial Court's "Pattern and Practice" Standard Also Conflicts With This Court's Liberal Approach to MHRA Requirements.

The trial court's erroneous "pattern and practice" pleading requirement is also contradicted by this Court's "liberal approach to the fulfillment of procedural requirements under the MHRA." *Alhalabi v. Mo. Dept. of Natural Res.*, 300 S.W.3d 518, 525 (Mo. App. E.D. 2009) (citing *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 670 (Mo. banc 2009)); *Farrow*, 407 S.W.3d at 594. "[T]he scope of the civil suit may be as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." *Alhalabi*, 300 S.W.3d at 525.

Under Missouri law, a petition need only plead "ultimate facts." *State ex. rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. banc 2006). "A petition…does not disclose what evidence a plaintiff will seek to introduce, nor is it required to do so." *Id*. There is nothing in R.S.Mo. § 213.075 requiring a plaintiff to allege a "pattern or practice" of discrimination prior to receiving the full benefit of any circumstantial evidence supporting his theory of the case, and that rule makes sense.

For example, administrative charges are frequently filed by laypersons with little or no legal training. How would such individuals understand the importance of including the magic phrase "pattern or practice" in their charge of discrimination if they intend to rely on circumstantial evidence at trial? In practice, this will never happen, and if the trial court's rulings are not reversed, it will strip many Missouri plaintiffs of their ability to present relevant, circumstantial evidence of their employer's discriminatory conduct at trial. It will also diminish the rights and protections afforded by the MHRA.

Cox's charge of discrimination and petition allege *age discrimination*, and that alone is sufficient. The trial court's newly announced pleading requirement starkly alters the landscape of admissible evidence in all cases of this type, and prejudicially cripples a plaintiff's ability to introduce relevant, circumstantial evidence in support of his claims. This Court should reject the trial court's erroneous exclusion of evidence premised on non-existent law.

B. Circumstantial Evidence of Other Similar Acts is Critical for Proving MHRA Claims and Punitive Conduct, And Blanket Exclusions Are Inappropriate.

This Court has recognized that direct evidence of employment discrimination is *rare*. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818, n.4 (Mo. banc 2007). "**[E]mployment discrimination cases…are inherently fact based and often depend on inferences rather than on direct evidence**." *Id*. (emphasis added). "**Direct evidence is not common in discrimination cases because employers are shrewd enough to not leave a trail of direct evidence**." *Id*. (emphasis added). A recent case put it even more bluntly: "[i]t is the rare case where the defendants openly announce an intention to discriminate." *Holmes v. Kansas City Missouri Board of Police Com'rs*, 364 S.W.3d 615, 618 n. 8 (Mo. App. W.D. 2012).

For more than a century, Missouri courts have held that where motive or intent for a particular action are at issue, other similar acts by a party are both relevant and admissible. *Powell v. St. Louis & S.F.R. Co.*, 129 S.W. 963, 971 (Mo. 1910). State and federal courts[14] in Missouri have long applied this principle of law in discrimination cases, recognizing the often-critical value of *other acts of discrimination* in proving motive or intent. *See Hurst v. Kansas City, Missouri School Dist.*, 437 S.W.3d 327, 342-43 (Mo.App. W.D. 2014); *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 873-

[14] As this Court previously held in Daugherty, "[i]n deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is consistent with Missouri law." *Daugherty*, 231 S.W.3d at 818.

74 (Mo.App. E.D. 2009); *State ex rel. Swyers v. Romines*, 858 S.W.2d 862, 864-65 (Mo. App. E.D. 1993); *see also Phillip v. ANR Freight Systems, Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991); *Estes v. Dick Smith Ford*, 856 F.2d 1097, 1103 (8th Cir. 1988); *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1086 (8th Cir. 2013) ("A demonstrated pattern of preference for younger employees can help prove discriminatory intent."); *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988) (termination of other older employees "is certainly not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which would cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome."); *Parrish v. Immanuel Medical Center*, 92 F.3d 727, 733 (8th Cir. 1996) ("…such evidence provides valuable circumstantial proof of an atmosphere of age bias and an employer's unlawful intent."); *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997) (en banc); *Acevedo-Parilla v. Novartis Ex-Lax, Inc.*, 696 F.3d 128, 146 (1st Cir. 2012) (A reasonable inference of a discriminatory pattern may however be drawn from evidence that nearly all the terminated employees were over forty.); *Bingham v. Natkin & Co.*, 937 F.2d 553, 556-57 (10th Cir. 1991); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 951 (8th Cir. 1990); *Cummings v. Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001) ("[S]ince discrimination is often subtle and pervasive, plaintiffs must be able to rely on circumstantial evidence to prove discriminatory intent.") (citation omitted); *Quinn v. Consolidated Freightways Corp. of Delaware*, 283 F.3d 572, 578 (3rd Cir. 2002) (reversing a trial court's blanket exclusion of circumstantial evidence, and discussing the

inappropriateness "blanket evidentiary exclusions in discrimination cases'") (citation omitted).

Wholesale blanket exclusions run afoul of a long line of Missouri cases approving "other acts evidence" in a multitude of other contexts: *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 591 (Mo. App. W.D. 2008) (bad faith) (citing *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 51 (Mo. App. W.D. 2004) (malicious prosecution)); *see also Baker v. Newcomb*, 621 S.W.2d 535, 538 (Mo. App. S.D. 1981) (landlord-tenant); *K.C. Roofing Center v. On Top Roofing*, 807 S.W.2d 545, 550 (Mo. App. W.D. 1991) (contract); *Boyer v. Grandview Manor Care Center, Inc.*, 759 S.W.2d 230, 234 (Mo. App. W.D. 1988) (tortious interference); *Russell v. Frank*, 154 S.W.2d 63, 66 (Mo. 1941) (equity).

A plaintiff must also be afforded a fair opportunity to demonstrate motive and intent for purposes of proving punitive damages. In *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 591, 597 (Mo. App. W.D. 2008), the court found that the trial court properly overruled defendant's objections "that the evidence [of the treatment of others] was unfairly prejudicial and lacked any factual foundation or legal relevance to prove a pattern or practice of misconduct." *Id*. at 591. The court held that evidence of the treatment of others was properly admitted to demonstrate intent. *Id*. at 591, 597 (internal citations omitted). *See also Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 51 (Mo. App. W.D. 2004) (holding that "[w]hen intent or mental culpability must be proven, a party's actions towards others tending to demonstrate the intent with which the party may have acted in the present become relevant"). Indeed, Missouri courts have

acknowledged that such evidence is admissible for either or *both* purposes. "Proof offered to support an employee's underlying substantive claim and the employee's additional claim for punitive damages need not be mutually exclusive, and often is not." *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777, 783 (Mo. App. W.D. 2010).

This Court very recently recognized that a defendant's treatment of others – both before and after what happened to the plaintiff – can be crucially relevant evidence to prove liability for actual and punitive damages. *See Lewellen v. Franklin, et al.*, 441 S.W.3d 136 (Mo. banc 2014) (Action for fraudulent misrepresentation under Missouri Merchandising Practice Act); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales, et al.*, 361 S.W.3d 364 (Mo. banc 2012) (Action for fraudulent misrepresentation under Missouri Merchandising Practice Act); *Newton v. Ford*, 282 S.W.3d 825 (Mo. banc 2009) (Common law product liability action).

Thus, circumstantial evidence of the treatment of others is often critical for proving MHRA claims and punitive conduct, and blanket exclusions of such evidence are inappropriate. *Hurst v. Kansas City, Missouri School Dist.*, 437 S.W.3d 327, 342-43 (Mo.App. W.D. 2014). **"[T]he relevancy of such [circumstantial] evidence must [instead] be reviewed on a case-by-case basis.**" *Id.* at 343 (emphasis added) (citing *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387, 128 S.Ct. 1140, 1147, 170 L.Ed.2d 1 (2008).

The Supreme Court expressly rejected blanket exclusions of circumstantial evidence from nonparty co-workers – for purposes of proving age discrimination claims – in *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008). It held that testimony

"by nonparties alleging discrimination at the hands of supervisors of the defendant company who played no role in the adverse employment decision … **is neither *per se* admissible nor *per se* inadmissible**." *Id.* at 380-81 (emphasis added). "The question [of] whether [that type of evidence] is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Id.* at 388.

Estes v. Dick Smith Ford, 856 F.2d 1097 (8th Cir. 1988) is particularly instructive on the issue of blanket exclusions. There, the court reversed a jury verdict for the employer on race and age discrimination claims, in part, because the trial court excluded evidence of alleged discrimination against other employees and customers of the dealership, finding:

> **The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives**. Judge Posner has explained:
>
> > Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it…The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason…for…firing a worker who

> is not superlative. **A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.**
>
> Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices – evidence which in other cases may well unfairly prejudice the jury against defendant. **In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.**

Id. at 1103 (emphasis added) (internal citations omitted); *see also MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988) (termination of other older employees "is certainly not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which would cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome.").

Here, the trial court engaged in a steadfast refusal to rule on a case-by-case basis, and issued a "one-size-fits-all" order that effectively barred all of Cox's witnesses (actual and potential) from testifying about the broader organizational context surrounding Cox's termination, and about relevant, circumstantial evidence of age discrimination affecting Cox and others. It sustained the Chiefs' Motion *in Limine* before it ever heard one shred of testimony, and it never wavered from its original position.

In the words of *Estes,* the "effects" of the trial court's blanket exclusion were "especially damaging" because Cox "face[d] the difficult task of persuading the fact-finder to disbelieve [the Chiefs'] account of its own motives." *Estes,* 856 F.2d at 1103.

For example, the Chiefs were permitted to restrict and isolate Cox from the rest of his co-workers, and to continually harp on the pretextual basis for his termination: his purported "insubordination" in giving a $1.89/hr. pay raise to an hourly employee without asking for approval in advance. Cox explained at trial that he gave Russell Crowley a pay raise because it was mandatory under the terms of the Chiefs' union contract (the CBA), but Cox was **completely handcuffed** in his ability to explain why the stated reason for his termination was actually pretext. Cox and other witnesses were barred from explaining that:

- The Chiefs eliminated numerous, protected group employees in their late 40's, 50's, and 60's – including Cox (age 61) – after Scott Pioli and Mark Donovan began "working at the same time towards a common goal" to restructure the Chiefs' front office based on the express instructions of Clark Hunt who wanted to take his front office "in a more youthful direction";[15]

[15] The offers of proof alone cover: Lamonte Winston (age 50), Ann Roach (age 64), Anita Bailey (age 59), Carol Modean (age 48), Steve Schneider (age 51), Denny Thum (age 59), Brenda Sniezek (age 51), Tom Stephens (age 52), Evelyn Bray (age 55), Heather Coleman (age 45), Gene Barr (age 58), and Larry Clemmons (age 60).

- The Chiefs eliminated the above employees for reasons that were unexplained, defied logic, and/or in the case of some were outright lies;
- The Chiefs replaced the above employees with younger employees after they were informed their "departments" and "positions" were being eliminated; and,
- Heather Coleman – who was in the same department as Steve Cox – became aware of a "hit list" as early as early 2010, and was informed by Kirsten Krug's "right-hand person in Human Resources" that "there was a list of employees that they were going to terminate and they knew who and they knew when." (Tr. 2692:13-25).

If the jury learned the above information at trial (in addition to the other excluded evidence italicized in Cox's Statement of Facts above) the jury would have had a *much greater* reason to discount the Chiefs' proffered reasons for terminating Cox. The litany of trial testimony devoted to the minute details of the Chiefs' CBA, for example, would have been dismissed by jurors as a preposterous waste of time. Instead, and because the trial court forced Cox into an isolated compartment, the jurors perceived the CBA discussion as a critical lynchpin to the question of whether or not Cox was actually "insubordinate" in the eyes of Mark Donovan. The prejudice was severe.

The trial court's blanket exclusion erroneously allowed the Chiefs to repeatedly stress Mark Donovan's singular, "plausible reason" for terminating Cox – in a vacuum – without ever having to explain why his stated reason made no sense in light of the other wholesale changes undertaken throughout the entire organization.

This Court should reject the trial court's inflexible unwillingness to engage in a careful weighing of the evidence, and its steadfast reliance on a "one-size-fits-all" order in order to bar all of Cox's witnesses (actual and potential) from testifying about the broader organizational context surrounding Cox's termination, and about relevant, circumstantial evidence of age discrimination occurring in the Chiefs' front office.

C. The Circumstantial Evidence Excluded From Trial Was Logically and Legally Relevant.

Logical Relevance

In determining whether evidence is admissible in a discrimination case, the trial court must ascertain whether the proffered evidence would allow "a rational finder of fact to infer a discriminatory motive or ... [to] conclude that the employer intended to discriminate in reaching the decision at issue." *Kline v. City of Kansas City*, 334 S.W.3d 632, 643 (Mo. App. W.D. 2011) (quoting *West v. Conopco Corp.,* 974 S.W.2d 554, 556 (Mo. App. W.D. 1998)).

This Court's "test for relevancy is whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence." *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. banc 1998). This Court has also held that "[e]vidence has probative force if it has any tendency to make a material fact more or less likely." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. 2014). Logical relevance has a very low threshold. *State v. Anderson*, 76 S.W.3d 275, 277 (Mo. 2002). Reasonable minds can disagree on probative value, so the jury decides weight and persuasiveness of evidence through the crucible of adversary trial. *State v. Kennedy*, 107 S.W.3d 306, 311 (Mo. App. W.D.

2001) (to the extent a party challenges evidence as "too remote" to be probative, that "affects weight not admissibility.")

Here, the jury learned that Clark Hunt "wanted to go in a more youthful direction," but the trial court *gutted* Cox's ability to corroborate that critical fact with the evidence discussed immediately above and in the italicized portions of Cox's Statement of Facts. The jury never learned that Clark Hunt and his immediate subordinates worked to achieve Hunt's stated goal.

All of the excluded evidence was logically relevant for proving Cox's claim of age discrimination and punitive conduct. It "tends to prove" and "corroborates" Cox's theory that the Chiefs engaged in age discrimination against him and other, older front office employees when Scott Pioli and Mark Donovan began working at Clark Hunt's instruction "towards a common goal," which included the replacement of employees throughout both sides of the front office. (Tr. 910:3-10). It "tends to prove" and "corroborates" Cox's theory that his age contributed to the Chiefs' decision to terminate him since "things were going to be different under Clark Hunt," and because "Clark wanted to go in a more youthful direction." (Tr. 1393:22-1396:7). It "tends to prove" and "corroborates" Cox's theory that he was not "insubordinate" in the eyes of Mark Donovan, and that he was instead the victim of a company-wide restructuring in which many older employees were replaced with younger ones for reasons that were unexplained, defied logic, and/or in the case of some were outright lies. The low threshold for logical relevance is easily met in this case.

Legal Relevance

Evidence must also be legally relevant. "Legal relevance weighs the probative value of the evidence against its costs – unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. banc 2001).

Evidence is not "unfairly prejudicial" just because it might hurt the objecting party's case, *State v. Davis*, 318 S.W.3d 618, 640 (Mo. 2010), and "[p]rejudice [to the moving party] is presumed when admissible evidence is excluded and is rebutted by specific facts and circumstances." *State v. Taylor*, *supra*, 298 S.W.3d at 492. Those rules are critical here.

The evidence in the italicized portions of Cox's Statement of Facts is *highly probative* for demonstrating the broader organizational context surrounding Cox's termination, the Chiefs' discriminatory motives in terminating Cox, and the pretextual nature of the Chiefs' proffered reasons for terminating Cox. It was *highly probative* for demonstrating the essential threads of the entire story of what happened in the wake of Clark Hunt's stated mission to take the front office "in a more youthful direction" after he put Donovan and Pioli in charge of "working at the same time towards a common goal" to restructure the Chiefs' front office.

Evidence of the organization's wholesale replacement of as many as 17 protected-group employees – many of whom were in the same department as Steve Cox and/or were terminated by the same person responsible for firing Steve Cox – cannot possibly be

"overly prejudicial" in an age discrimination trial. Likewise, evidence that those older employees were terminated for reasons that were unexplained, defied logic, and/or in the case of some were outright lies, cannot possibly be "overly prejudicial" in an age discrimination case in which Cox himself was tasked with the onerous obligation of explaining why his purported "insubordination" had nothing to do his termination.

"'[A]ll probative evidence is prejudicial' …[;] the relevant question is whether the testimony was ***unfairly*** prejudicial.'" *Cummings,* 265 F.3d at 64 (citing *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 348 (1st Cir.1998)) (emphasis added). The same principle is equally instructive here, and the trial court never explained the nature of any *unfair prejudice* associated with the excluded evidence. The excluded evidence discussed in Cox's Statement of Facts was highly probative, and easily satisfied the requirements of logical and legal relevance.

D. Missouri Courts Have Also Rejected The Federal "Similarly Situated" Standard As A Special Relevance Test Applicable To Discrimination Claims Under The MHRA.

Before the trial began, no Missouri Court ever held that a co-worker must have the same supervisor/decision-maker to be "similarly-situated" to the plaintiff. After the trial court sustained the Chiefs' Motions *in Limine* to Exclude Evidence of "Non-Similarly Situated" Employees, (LF 1110-1175), it repeatedly enforced its blanket exclusion on the basis that Cox failed to demonstrate that the affected witnesses were "similarly situated" to Cox – meaning that the people who terminated them "were [the same] decisionmakers in the termination of [Cox]." (Tr. 1426:2-19, 1427:13-1428:8, 1431:25-1433:15). It said:

- …And just to reiterate so the record is clear, the ruling is based upon the fact that these peoples' terminations, the people who terminated them **were not decisionmakers in the termination of the plaintiff in this case….** (Tr. 1426:2-19) (emphasis added);
- **"…[B]ut the primary thing was that you didn't plead pattern and practice and that these employees were not similarly situated to Mr. Cox**. (Tr. 1427:13-23) (emphasis added);
- "Your request is **denied** … **as it pertains to similarly situated or lack thereof employees**, which we discussed yesterday, on Monday." (Tr. 2309:9-12).

Time and again – throughout the *entire* trial – the Chiefs incanted the magic phrases "pattern and practice" and "similarly situated," and the trial court sustained the Chiefs' objections. Generically excluding group of potential witnesses before trial, just because their treatment might have happened under other supervisors, or originated in departments different than plaintiff's, constitutes a forbidden blanket exclusion. *Hurst,* 437 S.W.3d at 342-43.

This "alternative" ruling was once again rooted in "incorrect legal principles," and *de novo* review is appropriate. *State v. Taylor*, 298 S.W.3d at 492. However, and even if the applicable standard is for abuse of discretion, the trial court's blanket ruling should be reversed because it is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack

of careful, deliberate consideration. *St. Louis Cnty. v. River Bend Estates Homeowners' As'n*, 408 S.W.3d 116, 123 (Mo. 2013).

1. The Trial Court's "Similarly Situated" Test Finds No Support in Missouri Caselaw, and Should Be Rejected.

Since 2008, state and federal courts alike have been guided by the unanimous Supreme Court of the United States in considering evidence of a defendant's discriminatory treatment of other employees. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380-81 (2008). In *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012) – a single-plaintiff race/retaliation case – the court reversed for "abuse of discretion" the pretrial exclusion of other discharges because the trial court focused "solely on whether the same person made each termination decision." *Id.* at 601. The court held:

> In the employment-discrimination-law context, 'other acts' evidence consists of testimony or other evidence of discrimination by the employer against non-party employees. The Supreme Court has instructed lower courts not to apply a *per se* rule excluding 'other acts' testimony from non-parties alleging discrimination by supervisors who did not play a role in the challenged decision. Whether such evidence is relevant is a case-by-case determination that 'depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.'

Id. at 598 (quoting *Mendelsohn*, 552 U.S. at 380-81). Evidence of the type excluded above is routinely admitted in state and federal courts in Missouri as circumstantial

evidence of discriminatory motive or intent, and without any consideration of a "similarly situated" standard as the Chiefs argued below.

In *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854 (Mo. App. E.D. 2009), the court rejected precisely the same argument, and admitted evidence of the treatment of other employees. *Id.* at 873-74. The plaintiff in *Williams* claimed retaliatory discharge after complaining about sexual harassment. She (Williams) presented evidence that another employee, Zeb Ray, was also terminated shortly after making a complaint of sexual harassment.

Defendant TSAI objected to evidence of Zeb Ray's termination on the same grounds raised by the Chiefs in this case, and argued that Williams and Zeb Ray were not "similarly situated" because Ray was not a probationary flight attendant, the two employees had a different status with the company, and each was accused of different misconduct. *Id.* at 864. The court found TSAI's argument "**neither persuasive nor relevant.**" *Id.* at 873 (emphasis added). Instead, it held that Ray's situation was sufficiently similar to *Williams*' to be relevant: both were females who filed sexual harassment complaints against male pilots and both were terminated within sixty days of making their complaint. *Id.* at 874.

In *Holmes v. Kansas City Missouri Board of Police Com'rs ex. rel. its Member*, 364 S.W.3d 615 (Mo. App. W.D. 2012), the Missouri Court of Appeals for the Western District recently rejected a similar argument out of hand:

> First, the Board relies on a **federal standard** and, thus, misstates the proof required. …**To make a submissible case under the MHRA, [plaintiff]**

> **was not required to show, as [defendant] argues, that the [defendant] treated 'similarly-situated police department employees…differently.'** Rather, the MHRA required him to show that a protected characteristic contributed to the adverse employment decision.
>
> ...
>
> **While [defendant] further attempts to argue that 'similarly situated' is a standard distinct from 'contributing factor" and consequently remains a standard in effect, we find its argument without support.**

Id. at 626-27 and at n. 6 (emphasis added) (citations omitted); *see also Young v. Am. Airlines, Inc*., 182 S.W.3d 647, 653-654 (Mo. App. E.D. 2005) (rejecting any requirement that plaintiff make a comparison to "similarly-situated" employees). The trial court's reliance on a "similarly situated" standard was unfounded in this case, finds no support in Missouri caselaw or the statutory framework of the MHRA, and should be rejected.

2. Whether or Not the Trial Court Premised its Blanket exclusion on a "Sufficiently Similar" Test, Its Abuse of Discretion Is Still Clear.

Even if the trial court premised its blanket exclusion on a "sufficiently similar" test under *Williams v. Trans States Airlines, Inc*. (instead of the "pattern and practice" and "similarly situated" rationales repeatedly advanced by the Chiefs), its evidentiary determinations were entirely belied by the record, and the trial court's abuse of discretion is clear because it ignored an ocean of similarities between Cox and the other affected employees.

As Cox argued below, one of the most enduring mysteries throughout trial was the trial court's (and the Chiefs') inexplicable position that Mark Donovan was somehow simultaneously a decisionmaker in the firing of Steve Cox and yet not a decisionmaker in the firing of Steve Cox when it came to evaluating whether or not a multitude of other witnesses should also testify.

Cox's offers of proof at trial support the following chart:

Employee	**Person(s) Directly Involved in Termination**
Lamonte Winston (age 50)	Scott Pioli/Clark Hunt
Ann Roach (age 64)	Mark Donovan/Scott Pioli/Dennis Thum
Anita Bailey (age 59)	Mark Donovan
Carol Modean (age 48)	Mark Donovan
Steve Schneider (age 51)	Mark Donovan
Gene Barr (age 58)*	Mark Donovan/Scott Pioli *Quit voluntarily after Donovan/Pioli hired a 31-year-old to run his department.
Denny Thum (age 59)	Clark Hunt
Steve Cox (age 61)	Mark Donovan
Brenda Sniezek (age 51)	Mark Donovan
Tom Stephens (age 52)	Mark Donovan/Rob Alberino
Evelyn Bray (age 55)	Mark Donovan/Dan Crumb
Heather Coleman (age 45)	Mark Donovan/David Young
Larry Clemmons (age 60)	Mark Donovan/Dan Crumb

Cox's offers of proof also demonstrate Mark Donovan's direct involvement in hiring the following individuals in conjunction with the Chiefs' elimination of many of the older employees referenced above: Jason Stone (age 31), Rob Alberino (age 40), Brandon Hamilton (age 39), David Young (age 34), Rocco Mazzella (age 37), Chuck Castellano (age 32), and Brian Dunn (age 36).

The legal file supports Mark Donovan's direct involvement in the terminations of: Pam Johnson (age 49), Ken Blume (age 56), and Lisa Siebern (age 50), and the Chiefs' replacement of those individuals with employees in their 20's and 30's. (LF 619-20). All of three of them were barred from testifying about the issues covered by the pretrial order. (LF 1110-1175, 1587-88).

All of the older, terminated employees referenced above were terminated after Scott Pioli and Mark Donovan began "working at the same time towards a common goal" to restructure the Chiefs' front office based on the express instructions of Clark Hunt who wanted to take his front office "in a more youthful direction." Most of the older employees referenced above were terminated or forced out for reasons that were unexplained, defied logic, and/or were outright lies. They were replaced by younger employees.

The trial court turned a blind eye to ALL of these similarities, and never weighed the evidence on a case-by-case basis. Its blanket exclusion of circumstantial evidence throughout this trial was clearly against the "logic of the circumstances," and demonstrated "a lack of careful, deliberate consideration." *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 123 (Mo. 2013). Simply put, the trial

transcript does not reflect examples of "careful, deliberate consideration" by the trial court; it reflects a steadfast refusal to reconsider the court's "one-size-fits-all" order throughout trial – regardless of what the witnesses said about the circumstances of their termination, and regardless of who terminated them.

Based on the above, the trial court summarily excluded from the jury's consideration a wide range of relevant evidence from and about 17 or more witnesses related to the Chiefs' treatment of older employees both before and after Cox's termination. The court's pretrial evidentiary rulings, and the manner in which they were continually enforced throughout trial, resulted in an immediate and irreversible prejudice to Cox's ability to prove the basic elements of his case by excluding critical facts that would have allowed the jury to draw rational inferences of the Chiefs' discriminatory motive or intent in eliminating many older employees – including Cox – from the ranks of its workforce. The vast majority of the affected witnesses – including Cox – were terminated by Mark Donovan. Prejudice exists when "there is a reasonable probability that the trial court's error affected the outcome of the trial." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). That clearly happened here.

The excluded evidence should have been allowed under the clear principles of Missouri law discussed above. The trial court's blanket exclusion was reversible and prejudicial error, and materially affected the merits of this case.

POINT RELIED ON

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A DECLARATION BY RESPONDENT'S GENERAL MANAGER THAT "I NEED TO MAKE MAJOR CHANGES IN THIS ORGANIZATION AS SO MANY EMPLOYEES OF [THE FORMER GENERAL MANAGER] ARE OVER 40 YEARS OLD" ON THE BASIS THAT THE GENERAL MANAGER WAS A NON-DECISIONMAKER AND BECAUSE IT FELL IN THE CATEGORY OF A "STRAY REMARK," BECAUSE SUCH EVIDENCE WAS AN ADMISSION THAT WAS BOTH LOGICALLY AND LEGALLY RELEVANT TO PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT WOULD HAVE TENDED TO SHOW DISCRIMINATORY INTENT IN FIRING COX, AND CORROBORATED OTHER RELEVANT EVIDENCE, NAMELY THAT THE BUSINESS OWNER PLANNED TO TAKE THE ORGANIZATION "IN A MORE YOUTHFUL DIRECTION," THUS MAKING AGE A MORE LIKELY "CONTRIBUTING FACTOR" IN COX'S DISCHARGE.

Bynote v. National Super Markets, Inc., 891 S.W.2d 117 (Mo. banc. 1995)

State v. Taylor, 298 S.W.3d 482 (Mo. banc 2009)

Rowe v. Farmers Insurance Co., 699 S.W.2d 423 (Mo. banc 1985)

Aliff v. Cody, 26 S.W.3d 309 (Mo. App. W.D. 2000)

Standard of Review

The standard of review for a trial court's decision to admit or exclude evidence is whether the trial court abused its discretion. *Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310, 317 (Mo. App. W.D. 2004). This Court held in *State v. Taylor*, 298 S.W.3d 482 (Mo. banc 2009), that "[a] trial court can abuse its discretion through the inaccurate resolution of factual issues or through the application of incorrect legal principles." *Id.* at 492. "[W]hen the issue is primarily legal, no deference is warranted and appellate courts engage in *de novo* review." *Id.* at 492. In *Taylor*, this Court also stated that "whether a statement is hearsay is given no deference and is reviewed *de novo*." *Id*. n. 4.

Otherwise, the trial court's abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 123 (Mo. 2013).

Reversal due to an evidentiary error requires a showing of prejudice. *State v. Wolfe*, 13 S.W.3d 248, 260 (Mo. banc 2000). Prejudice exists when "there is a reasonable probability that the trial court's error affected the outcome of the trial." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). Prejudice is presumed when admissible evidence is excluded and is rebutted by specific facts and circumstances. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003).

In the fall of 2009, long-tenured Chiefs security employee Herman Suhr overheard General Manager Scott Pioli say to an unidentified guest: "I need to make major changes in this organization as so many employees of [former GM Carl Peterson] are over 40 years old." (Exhibits 288B and 288C, at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3). The trial court's exclusion of this plainly relevant admission by Mr. Pioli from the evidence considered by the jury deeply prejudiced Cox's ability to fully and accurately depict the reorganization efforts undertaken at the direction of Scott Pioli, Mark Donovan, and Clark Hunt, and it materially affected Cox's ability to demonstrate the merits of his claims.

A. General Manager Scott Pioli's Statement Is a Relevant Admission.

The statement attributed to Scott Pioli – in and of itself – constitutes an admission as to his role (or to his potential role) in effectuating a plan that led to the termination of employees who worked for Carl Peterson over the age of 40 – including Cox. It constitutes an admission that the elimination of employees fitting that description would be carried out, with Mr. Pioli's specific knowledge, if not at his express direction. The jury should have been allowed to consider evidence of that statement as an admission for both purposes.

In Missouri, admissions by a party opponent are not hearsay. *Still v. Ahnemann*, 984 S.W.2d 568, 572 (Mo. App. W.D. 1999). "A statement or admission by a party opponent may be admitted as evidence if the statement is material to the issues of the case, the statement is relevant to the case, and the statement is offered by the opposing party." *Stanbrough v. Vitek Solutions, Inc.*, 445 S.W.3d 90, 102 (Mo. App. E.D. 2014).

See also Taylor v. Republic Automotive Parts, Inc., 950 S.W.2d 318, 323 (Mo. App. W.D. 1997) (A relevant statement is admissible as an admission if it was made by a party or someone legally identified with a party.)

This Court has recognized that admissions by a corporate defendant are admissible if the statement is made within the scope of the employee's authority. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 123-24 (Mo. banc. 1995). In *Bynote*, this Court reasoned that "[c]ourts allow testimony of admissions by party-opponents because the party objecting is, in effect, objecting to a statement it previously authorized by the establishment of an agency relationship with the declarant." *Id.* at 123. Since *Bynote,* Missouri courts have recognized "that an admission of an agent or employee may be received in evidence against his principal, if relevant to the issues involved, where the agent, in making the admission, was acting within the scope of his authority." *Id*. at 124 (internal citations omitted). *See also Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 870 (Mo. App. W.D. 2013) ("[I]t is the subject matter of an employee's statement and not the relationship with the person who overhears the statement, or the circumstances giving rise to the conversation, which must be within the scope of the employee's duty.").

The scope of a declarant's authority bears a direct and proportional relationship to the employee's duties and responsibilities. "It is true that a person with executive capacity is generally an agent for the entity he or she serves and has broad authority to bind the principal by his or her statements." *Bynote*, 891 S.W.2d at 124. Further, "[s]upervisory employees, having general powers or authority beyond that of mere

'ministerial' employees, are treated as agents of a corporation, and thus, knowledge of the supervisor's conduct, by the supervisor himself, may be imputed to the corporation." *Alhalabi v. Missouri Dept. of Natural Res*., 300 S.W.3d 518, 529 (Mo. App. E.D. 2009). *See also Essex v. Getty Oil Co.*, 661 S.W.2d 544, 558 (Mo. App. W.D. 1983) ("A corporate defendant is bound by the knowledge of all its agents and cannot make the act of one agent proper by his ignorance of the true facts.").

The statement was made in Pioli's capacity as a key executive who directly collaborated with fellow executive Mark Donovan to effectuate a series of wholesale changes to the Chiefs' front office in which many key front office employees were eliminated – all of whom were over 40, all of whom worked for Carl Peterson, and all of whom were replaced by younger employees.[16] The trial court committed reversible error in this instance because the statement constitutes an admission that: (a) this executive had knowledge of (or an actual role in effectuating) the process that led to the termination of front office employees over the age of 40 who previously worked under Carl Peterson; and (b) the process was undertaken at his direction (or collectively with Clark Hunt and Mark Donovan) consistent with Clark Hunt's stated goal of reevaluating and eliminating front office employees.

[16] Indeed, the jury learned at trial that in 2010 Scott Pioli told Cox "point blank that anything [Pioli] said carried the weight of Clark Hunt and that if [he] didn't like that, that it wouldn't be necessary to take it to Mr. Hunt." (Tr. 1613:21-1614:9).

A determination of admissibility obviously also requires a consideration of relevance.[17] "The test for relevancy is whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence." *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. banc 1998). This Court has also held that "[e]vidence has probative force if it has any tendency to make a material fact more or less likely." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. 2014). Logical relevance has a very low threshold. *State v. Anderson*, 76 S.W.3d 275, 277 (Mo. 2002). Evidence must also be legally relevant. "Legal relevance weighs the probative value of the evidence against its costs – unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. *State v. Mayes*, 63

[17] The Court of Appeals affirmed the trial court's exclusion of the statement made by Pioli in part because "evidence offered to prove that the Chiefs allegedly engaged in the discriminatory practice of terminating older employees is beyond the discrete claim of discriminatory termination alleged in Cox's petition." (Op., p. 21). The court reasoned further that "such assertions were not fairly raised by the allegations in Cox's Charge of Discrimination filed with the MCHR, and Cox thus failed to exhaust his administrative remedies as to that claim." *Id*. As set forth above in Point One, a "pattern or practice claim" is not a legal precondition to the admission of relevant circumstantial evidence of discriminatory intent.

S.W.3d 615, 629 (Mo. banc 2001). Evidence cannot be characterized as "unfairly prejudicial" because it may happen to hurt the objecting party's case. *State v. Davis*, 318 S.W.3d 618, 640 (Mo. banc 2010). *See also Robinson v. Runyon*, 149 F.3d 507, 515 (6th Cir. 1998) ("It is axiomatic that the available evidence provided to establish racial animus may be racially inflammatory.").

On its face, Pioli's statement is logically relevant to Cox's claims of age discrimination. The statement supports Cox's theory that the Chiefs engaged in age discrimination against him and other front office employees as part of the efforts of Pioli and Mark Donovan to work at Clark Hunt's instruction "at the same time towards a common goal" which included the replacement of employees throughout the front office because Hunt "wanted to make changes" to "become more efficient." (Tr. 910:3-10, 902:22-904:14). More importantly, Pioli's statement corroborates Cox's theory that his age contributed to the Chiefs' decision to terminate him since "things were going to be different under Clark Hunt," and because "Clark wanted to go in a more youthful direction." (Tr. 1393:22-1396:7). The statement made by Pioli serves as an essential, logically relevant thread to Cox's circumstantial evidence intended to prove the Chiefs' discriminatory motive at trial, and the jury should have been allowed to consider it.

In light of the Cox's theory of the case – that he and others had been discriminated against on the basis of their age as part of an effort to assemble a younger workforce – neither should the statement from Pioli have been excluded from the jury's consideration on a strained analysis of legal relevance or because it somehow constituted only a "stray remark." In so finding, the trial court ruled:

> Pioli was not a decisionmaker in the termination of the plaintiff.[18] Therefore, it was my position then and it's my position now that the disputed statement falls into the category of a stray remark and therefore is inadmissible, and also that its prejudicial effect, that being the statement, outweighs any probative value that the statement would have for the jury.

(Tr. 948).

On balance, the probative value of a statement made by a senior company executive regarding proposed changes to the age demographics of the company's workforce almost certainly outweighs whatever potential unfair prejudice might result from the jury's consideration of the evidentiary weight of such a statement. After all, the prejudicial effect of proffered evidence should not be exaggerated simply because it is detrimental to a party's defense. *State v. Davis*, 318 S.W.3d 618, 640 (Mo. banc 2010). The jury should have been allowed the opportunity to conclude that comments from GM Scott Pioli demonstrating managerial age bias were relevant to the Chiefs' motive in the termination of Cox's employment as part of a corporate restructuring with the stated goal of moving "in a more youthful direction."

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[18] As set forth in Point One, Missouri courts have rejected the federal "similarly situated" standard as a special relevance test applicable to discrimination claims under the MHRA. Neither has any Missouri court ever held that a co-worker must have the same supervisor/decision-maker in order for relevant "other acts" evidence to be considered by the jury.

Neither should the General Manager's statement corroborating the Chiefs' efforts to assemble a younger workforce be excluded on the basis that it "falls into the category of a stray remark." (Tr. 948). The "stray remark" analysis adopted by the trial court is an unrecognized principle of law in Missouri which offers little analytical value in the admission of Pioli's statement. The concept is borrowed from the evidentiary evaluation principles adopted in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and rejected by this Court in *Daugherty v. Maryland Heights*, 231 S.W.3d 814, 819 (Mo. 2007). Under this unique federal concept of law, a statement reflecting discriminatory motive made by a "non-decisonmaker" does not constitute *direct* evidence of discrimination. *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). Still, even statements labeled merely "stray remarks" have routinely been considered probative evidence of discriminatory motive or intent under federal law:

> [S]uch comments are surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury. When combined with other evidence, stray remarks constitute circumstantial evidence that…may give rise to a reasonable inference of age discrimination.

Fitzgerald v. Action, Inc., 521 F.3d 867, 876 (8th Cir. 2008). *See also Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 923 (8th Cir. 2000) ("Stray remarks therefore constitute circumstantial evidence that, when considered together with other evidence, may give rise to a reasonable inference of age discrimination."; *Girgen v. McRentals, Inc.*, 337 F.3d 979, 983 (8th Cir. 2003) ("such comments are not irrelevant"); *Ryder v.*

Westinghouse Electric Corp., 128 F.3d 128, 130-133 (3d Cir. 1997) (holding that remarks made one year after termination, and not directly about plaintiff, admitted on the basis that "[i]f the jury were to believe that these comments accurately reflected a then existing managerial attitude toward older workers…this evidence would make the existence of an improper motive for [plaintiff's] termination more probable.").

As set forth above the trial court's error in this regard was prejudicial, as the exclusion of this evidence materially affected Cox's ability to prove his claims. *Newton v. Ford*, 282 S.W.3d 825, 831 (Mo. banc 2009). Prejudice exists when "there is a reasonable probability that the trial court's error affected the outcome of the trial." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). Prejudice is presumed when admissible evidence is excluded and is rebutted by specific facts and circumstances. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). Concerns about the potential prejudicial effect or the perceived remoteness of Pioli's statement expressed by the trial court were unfounded in light of the immeasurable probative value of a statement of this type made by an executive leading a corporate restructuring. Moreover, in the context of the overwhelming additional circumstantial evidence Cox sought (but generally was not allowed) to introduce, the statement offers unique evidentiary insight into the Chiefs' motive in the termination of Cox and numerous other older employees.

B. Impeachment of Scott Pioli Using the Testimony of Herman Suhr Should Be Allowed.

"In 1985, Missouri adopted the rule that a party can impeach his or her own witness in a civil case with a prior inconsistent statement." *Lindsay v. Mazzio's Corp.*,

136 S.W.3d 915, 922 (Mo.App. S.D. 2004) (citing *Rowe v. Farmers Insurance Co*., 699 S.W.2d 423, 425 (Mo. banc 1985)). This means that any party has the right "to introduce a prior inconsistent statement to impeach any witness regardless of by whom the witness may have been subpoenaed or called." *Rowe*, 699 S.W.2d at 425. "[T]he fundamental historical purpose underlying the use of a prior inconsistent statement…[is] to attack credibility." *Aliff v. Cody*, 26 S.W.3d 309, 317 (Mo. App. W.D. 2000). Actions or conduct inconsistent with the witness' trial testimony can also be used to impeach. *State ex rel. State Highway Commission of Missouri v. Shain*, 340 Mo. 802 (1937).

Importantly, the Missouri Supreme Court held in *Rowe*, *supra*, that the *content* of the inconsistent statement "[c]an be considered as substantive evidence in civil trials." *Rowe*, 699 S.W.2d at 425-29. "[A]ny material variance between the testimony and the previous statement suffices" for its introduction into evidence. *Id.* at 319 (citation omitted) (emphasis added). "Thus, if the previous statement is ambiguous and according to one meaning inconsistent with the testimony, it ought to be admitted for the jury's consideration." *Id.* at 319. "Whether an inconsistency exists between trial testimony and statements made prior to trial is to be determined by the whole impression and effect of what has been said and done." Id. at 319-20 (citations omitted). The trial judge should always "lean toward receiving such statements in case of doubt." *Id.* (citation omitted). Importantly, "**[w]here a witness's prior inconsistent statement relates specifically to a paramount issue in the case, the trial court may not prevent impeachment of the witness through use of that statement.**" *Id.* at 320-321 (citing *Reno v. Wakeman*, 869

S.W.2d 219, 224 (Mo. App. S.D. 1993) (other internal citations omitted) (emphasis added)).

Here, Scott Pioli unequivocally denied making any statement in the fall of 2009 about getting rid of employees over the age of 40 who worked with Carl Peterson. There is no question that Herman Suhr overheard Pioli make that shocking statement, and their testimony is diametrically opposed. Herman Suhr's additional testimony eliminates any conceivable doubt. (*See generally,* Ex. 288A (videotaped testimony), 288B (summarized transcript)). During Cox's offer of proof from Scott Pioli, Cox also established an elaborate foundation for the factual circumstances surrounding Scott Pioli's inconsistent statement. For example, Cox transported Scott Pioli back in time to the *location* and the *timeframe* of his alleged statement, and Cox furnished Scott Pioli with a physical description of the person to whom he allegedly made that statement. (Tr. 1279:1-1284:6). Pioli was also informed that a person fitting Suhr's physical description walked through the weight room at or about the same time Pioli was overheard saying it. *Id.* Pioli still denied making the statement, and he denied making any similar statement. *Id.*[19]

[19] The Court of Appeals affirmed the trial court's exclusion of the statement made by Pioli on the additional basis that "Pioli never testified at trial about the statement Suhr purportedly overheard." (Op., p. 30). Indeed, the trial court precluded counsel for Cox from asking Pioli about the statement. (Tr. 1172:21-22, 1251:20-1252:11). Cox submitted an offer of proof outside the presence of the jury in which Pioli specifically denied making any such statement. (Tr. 1279:1-1284:6).

The trial court was not permitted to analyze Pioli's inconsistent statement in a vacuum, and was instead required to make its determination by analyzing "the whole impression and effect of what has been said and done." Cox was only required to show a *material variance* between the two inconsistent statements, and thereafter, the trial judge is instructed to resolve doubts in favor of letting the jurors hear and decide the witness' credibility for themselves. Most importantly, if the "witness's prior inconsistent statement relates specifically to a paramount issue in the case,"—as it certainly does in this age discrimination case—the trial judge is not permitted to "prevent impeachment of the witness through use of that statement." *Aliff v. Cody*, 26 S.W.3d 309, 320-21 (Mo. App. W.D. 2000). The statement can be used as substantive evidence of the truth of that statement.

Herman Suhr's testimony also impeaches Scott Pioli's credibility with inconsistent *conduct.* Scott Pioli denied any personal interactions – ever – with Herman Suhr, and Scott Pioli denied any recollection of the Chiefs ever employing a field security person named Herman Suhr. (Tr. 1283:13-1284:4, LF 1598-1624). Herman Suhr's testimony directly contradicts Pioli's testimony on these points. (Exhibits 288B and 288C, at 177:16-179:15, 179:19-187:19, 188:04-190:21, 191:1-5, 191:7-194:3). Because Pioli's statement concerns an issue of paramount importance, the trial court erred when it excluded Cox's offer of proof from Pioli, and when it prevented Cox's impeachment of Pioli with Suhr's testimony.

The excluded evidence should have been allowed under the clear principles of Missouri law discussed above. The trial court's exclusion was reversible and prejudicial

error because the evidence from Herman Suhr discussed above would have materially affected the merits of this case, and allowed the jury to draw rational inferences of the Chiefs' discriminatory motive or intent in undertaking an organization-wide restructuring of its personnel lead by Scott Pioli and Mark Donovan which resulted in the elimination of many of the Chiefs' older employees.

POINT RELIED ON

III. THE TRIAL COURT ERRED IN ITS EXCLUSION OF WITNESS CLARK HUNT FROM THIS CASE FOR ALL PURPOSES, DURING DISCOVERY AND TRIAL, BY QUASHING CLARK HUNT'S DEPOSITION NOTICE AND HIS TRIAL SUBPOENA ON THE BASIS THAT "ANNOYANCE, OPPRESSION, UNDUE BURDEN, AND EXPENSE OUTWEIGH[ED] THE NEED" FOR HIS APPEARANCE AT TRIAL AND FOR HIS DEPOSITION, BECAUSE THERE IS NO "ANNOYANCE AND HARRASSMENT" STANDARD APPLICABLE TO TRIAL SUBPOENAS WHEN WITNESSES ARE REQUESTED WITHOUT DOCUMENTS, BECAUSE MISSOURI LAW IMPOSES NO LIMIT ON THE RIGHT OF A TRIAL LITIGANT TO SUBPOENA AN ADVERSE WITNESS TO TRIAL WITHOUT DOCUMENTS, AND BECAUSE CLARK HUNT'S POTENTIAL TESTIMONY WAS LOGICALLY AND LEGALLY RELEVANT TO PROVE PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT COULD HAVE DEMONSTRATED RESPONDENT'S DISCRIMINATORY MOTIVES AND/OR INTENT IN TERMINATING OLDER WORKERS INCLUDING PLAINTIFF, IT COULD HAVE DEMONSTRATED A PRETEXTUAL BASIS FOR PLAINTIFF'S TERMINATION BASED ON A COMMUNICATION SENT BY CLARK HUNT TO APPELLANT 13 DAYS AFTER HIS TERMINATION

CONTRADICTING THE STATED REASONS FOR HIS TERMINATION, AND IT COULD HAVE CORROBORATED OTHER CRITICAL AND RELEVANT EVIDENCE NAMELY THE EXISTENCE OF THE BUSINESS OWNER'S PLAN TO TAKE THE ORGANIZATION "IN A MORE YOUTHFUL DIRECTION."

State ex. rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. banc. 2002)

Halford v. Yandell, 558 S.W.2d 400 (Mo. App. S.D. 1977).

Standard of Review

The standard of review for a trial court's decisions related to discovery issues is whether the trial court abused its discretion. *Feiteira v. Clark Equipment Co.*, 236 S.W.3d 54, 61 (Mo. App. E.D. 2007). When a discovery ruling is challenged, the appellate court considers "whether the challenged act, under the totality of the circumstances, has resulted in prejudice or unfair surprise." *Id*.

Reversal due to an evidentiary error requires a showing of prejudice. *State v. Wolfe*, 13 S.W.3d 248, 260 (Mo. banc 2000). Prejudice exists when "there is a reasonable probability that the trial court's error affected the outcome of the trial." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). Prejudice is presumed when admissible evidence is excluded and is rebutted by specific facts and circumstances. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003).

Further prejudice stems from the trial court's decision to bar Cox from obtaining testimony at any stage and on any subject from perhaps the central character in this play – Clark Hunt. The trial court abused its discretion in its refusal to allow Cox to obtain sworn testimony for any reason from Hunt during discovery, and in refusing to allow Hunt to be called as a witness at trial without explanation of the court's rationale. (LF 193-194, 379). For the full duration of the case, the trial court refused to allow Cox access to a witness who, in light of substantial additional evidence already presented, could provide plainly discoverable and relevant testimony. The trial court's decision in this regard resulted in unfair prejudice to Cox, and the exclusion of Clark Hunt from the case altogether necessarily affected the merits of the case in profound ways.

A. The Deposition Clark Hunt Should Have Been Allowed.

The trial court quashed the deposition notice for Clark Hunt on the basis that "annoyance, oppression, undue burden, and expense outweigh the need for such discovery." (LF 193-194). The court did so notwithstanding the fact that on October 27, 2010, Chiefs Chairman and CEO Clark Hunt authored a letter to Cox dated 13 days after Cox's termination which directly contradicted the purported reasons offered by the Chiefs' witnesses for Cox's termination, that Clark Hunt had made public age-based comments about himself and others the Chiefs had recently hired. (LF 164-165; Ex. 10). Consider what Cox has learned

"Discovery should be conducted on a 'level playing field,' without affording either side a tactical advantage." *State ex. rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606-607 (Mo. banc. 2002). "Evidence is logically relevant if it tends to make the existence of

a material fact more or less probable." *State v. Kennedy*, 107 S.W.3d 306, 311 (Mo. App. W.D. 2003). "This is a very low standard that is easily met." *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo. App. W.D. 2004). "The term 'relevant' is broadly defined to include material 'reasonably calculated to lead to the discovery of admissible evidence." *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 231 (Mo. App. S.D. 1996). "When the discovery rules were proposed and adopted, they were intended to allow the parties a greater opportunity to gather information as to pertinent facts and documents within the knowledge and possession of the other party, in order to ensure a more just adjudication on the merits." *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 642 (Mo. App. W.D. 1994). "The scope of matters subject to discovery was intended to be broad, consistent with the purposes behind the rules of discovery. Thus, not only may parties discover facts where are relevant to the litigation, but they may also discovery that which is reasonably calculated to lead to the discovery of admissible evidence. *Id.*

The law in Missouri on this subject is clear. "Opposing litigants may depose top-level executives who have discoverable information." *Messina*, 71 S.W.3d at 606-607 (Noting also that "[a] top-level employee – like anyone else – should not be deposed unless the information sought is relevant, or reasonably calculated to lead to the discovery of admissible evidence"). "Courts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is 'relevant' to the proceedings and subject matter of the case not protected by privilege."

State ex rel. Plank v. Koehr, 831 S.W.2d 926, 927 (Mo. banc. 1992). Though trial judges have broad discretion in administering the rules of discovery, "judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 819 (Mo. banc 2000).

B. The Trial Subpoena Issued to Clark Hunt Should Have Been Honored.

The trial court also quashed the trial subpoena issued to Clark Hunt, without explanation. (LF 379). In its suggestions in support of this effort, the Chiefs cited numerous authorities addressing the rules of civil discovery, but never mentioned or relied on any Missouri statutes or case law applicable to a **trial** subpoena. (LF 198-207). In these circumstances, however, Rule 56 has no application. *See Halford v. Yandell*, 558 S.W.2d 400, 409-10 (Mo. Ct. App. 1977). The only statutory limitation on the right of a litigant to require the attendance of a witness at trial is contained in the second paragraph of R.S.Mo. § 491.100. *See, Halford*, 558 S.W.2d at 409-10. That Section, which sets forth an "annoyance and harassment" standard applicable to trial subpoenas containing *duces tecum* requests only, has no application because the trial subpoena issued to Clark Hunt contained no *duces tecum* requests. Section 491.100 imposes no limit on the right of a *trial* litigant to subpoena an adverse witness to *trial*, and that rule makes good sense; it dovetails with a plaintiff's fundamental right to present offers of proof from excluded witnesses at trial.

Moreover, only an offer of proof would preserve the issue of the admissibility of Clark Hunt's testimony for appeal if it were challenged at trial. *State v. Dodd*, 10 S.W.3d 546, 556 (Mo. App. W.D. 1999). Put another way:

> It has long been the rule in this state that the proper procedure to present and preserve such an offer is to have the witness present; put them on the stand; propound the questions; and thus enable the trial court to intelligently rule upon, and appellate court to review, the propriety and admissibility of the evidence sought to be elicited.

State v. Hurtt, 836 S.W.2d 56, 59 (Mo. App. S.D. 1992). Cox was provided no such opportunity, and he opposed the Chiefs' request on these grounds. (LF 208-236). The trial sustained the Chiefs' motion, and denied Cox any opportunity to call a critical witness capable of addressing a multitude of important subjects related to Defendant's discriminatory motive and intent.

Though he was not called by the Chiefs as a witness at trial, Clark Hunt's name was invoked at trial on more than 300 separate occasions. (Tr. Vol. 2 Index p. 13, Tr. Vol. 3 Index p. 12, Tr. Vol. 4 Index p. 14, Tr. Vol. 5 Index p. 11, Tr. Vol. 6 Index p. 11-12, Tr. Vol. 7 Index p. 15).[20] During the trial, the jury considered significant evidence

[20] Here again, the Court of Appeals affirmed the trial court's exclusion of Clark Hunt from the case to testify, for example, about his desire to "go in a more youthful direction" and his involvement or direction in the termination of other older employees, on the basis that "evidence offered to prove that the Chiefs allegedly engaged in a discriminatory

about Clark Hunt which corroborates Cox's theory of the case – that Clark Hunt "wanted to go in a more youthful direction" and that he set in motion a plan for the termination of older front office employees in furtherance of this directive (Tr. 1393:22-1396:7). The jury learned that Hunt "was very interested in what was going on" and that Hunt had instructed Scott Pioli and Mark Donovan to work "towards a common goal," because "things were going to be different under [Hunt's direction]." (Tr. 905:1-10, 910:3-10, 1393:22-1396:7). The jury learned also that Hunt met frequently with then Assistant General Manager Denny Thum and announced his intention to "evaluate the organization," and that "important" monthly management meetings were held at which the reorganization and restructuring of the business was discussed by Clark Hunt with members of his executive team (Tr. 886:7-14; 892:11-893:6, 899:19-903:17).

The jury was also allowed to consider, without testimony from the author, the fact Clark Hunt authored a letter to Cox dated 13 days after his termination directly contradicting the purported reasons offered by the Chiefs' witnesses for the purported grounds for his termination which read:

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practice of systematically terminating older employees is beyond the discrete claim of discriminatory termination alleged in Cox's petition." (Op., p. 34-35). As set forth in Point One, a "pattern or practice claim" is not a legal precondition to the admission of relevant circumstantial evidence of discriminatory intent.

> Dear Steve:
>
> I write to thank you for your 12 years of service with the Chiefs. Your ability to manage a wide variety of projects as maintenance manager was sincerely appreciated, and we are grateful for your efforts. On behalf of my family and the entire Kansas City Chiefs organization, I wish you all the best in the future.
>
> Best regards,
>
> Clark Hunt

(LF 164-165; Ex. 10). **Perhaps most importantly, the jury also learned that President Mark Donovan discussed the decision to terminate Steve Cox with Clark Hunt.** (Tr. 3421:10-17).

Though Clark Hunt indisputably played a central role in both the themes offered by Cox in support of his claims and the Chiefs' defenses, Cox was nevertheless precluded from obtaining logically relevant testimony from him for the duration of pre-trial discovery and at trial. Cox asked the trial court to reconsider and set aside the Order quashing the trial subpoena issued to Clark Hunt on two separate occasions following the jury's consideration of significant evidence tying Clark Hunt to the case. Cox's requests were denied. (Tr. 1434:13-1436:11, 3456:17-3457:6). Under the totality of the circumstances, the trial court's decisions to exclude Clark Hunt from the case altogether resulted in substantial unfair prejudice to Cox, and Cox's inability to present testimony from Clark Hunt at trial materially affected the jury's ability to weigh the evidence in its entirety and, therefore, the outcome of the case.

POINT RELIED ON

IV. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO RESTRAIN AND PURGE THE ARGUMENTS OF RESPONDENT'S COUNSEL DURING CLOSING ARGUMENT, AND BY REFUSING TO GRANT APPELLANT A NEW TRIAL, BECAUSE RESPONDENT DID NOT RECEIVE A FAIR TRIAL IN THAT RESPONDENT'S COUNSEL REPEATEDLY IMPUGNED THE CHARACTER OF APELLANT'S COUNSEL, ACCUSED APPELLANT'S COUNSEL OF GREED AND DISHONESTY, AND MISSTATED THE LAW IN MATERIAL RESPECTS.

Critcher v. Rudy Fick, Inc., 315 S.W.2d 421 (Mo. 1958)

Yingling v. Hartwig, 925 S.W.2d 952 (Mo. App. W.D. 1996)

Giddens v. Kansas City Southern Ry. Co., 937 S.W.2d 300 (Mo. App. W.D. 1996)

Standard of Review

The standard of review for a trial court's ruling on the propriety of a closing argument to the jury is whether the trial court abused its discretion. *Moore v. Missouri Pacific R. Co.*, 825 S.W. 2d 839, 844 (Mo. banc 1992).

As discussed above, the Chiefs' counsel's closing argument was little more than a studied effort to incite bias and prejudice against Steve Cox (and his attorneys) for an entire hour. The Chiefs' counsel accused Cox's counsel of dishonesty, greed, and purposeful efforts to deceive the jurors, the EEOC, and/or the MCHR in **23** separate instances, and none of counsel's highly inflammatory arguments were true, or supported by the evidence. The Chiefs' counsel's tactics should be condemned, and plain error was evident.

> Trials before juries ought to be conducted with dignity and in such manner as to bring about a verdict based solely on the law and the facts. **Hence reckless assertions unwarranted by the proof and intended to arouse hatred or prejudice against a litigant or the witnesses are condemned as tending to cause a miscarriage of justice....** Due administration of justice demands that the jury in passing on such grave questions should not be allowed to have injected in a case, either by evidence, remarks of counsel, or even by the conduct of the judge, any extrinsic matter that tends to create bias or prejudice. **The evil effect of such matters is not always cured by the ruling of the court withdrawing them from consideration or even by rebuking counsel. The red hot iron of prejudice has been thrust into the case; merely withdrawing it still leaves a festering wound.** When there is no evidence to justify it is **always improper** for

> counsel to indulge in argument to the jury which tends towards the prejudice of one party or to the undue sympathy for the other.

Yingling v. Hartwig, 925 S.W.2d 952, 958 (Mo. App. W.D. 1996) (emphasis added).

When improper argument "goes to the extreme," or becomes "highly prejudicial," plain error is invoked to correct miscarriages of justice resulting therefrom—even if insufficient or no objections were made at the time of trial. *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 427-28 (Mo. 1958) (noting other instances in which plain error was invoked to correct miscarriages of justice); *Leaman v. Campbell 66 Exp. Truck Lines*, 355 Mo. 939 (1947); *Calloway v. Fogel*, 358 Mo. 47 (1948); *see also Robertson v. Cameron Mut. Ins. Co.*, 855 S.W.2d 442, 447-48 (Mo. App. W.D. 1993) (undertaking plain error review to evaluate misstatements of the law during closing argument).

"There is substantial authority that under such circumstances the trial court has a duty to restrain counsel 'firmly and unflinchingly,' [ ], and 'to require counsel to proceed in an orderly and lawyerlike manner' even though no objection is made." *Critcher,* 315 S.W.2d at 427 (citations omitted). "It is a basic concept of our judicial system that '[o]ne of the first duties of the judge of a trial court is to preserve order and require that the attorneys as well as other persons should, by their behavior, show a decent respect for the court and for the opposing counsel.'" *Id.* (citations omitted). Under Rule 78.08, "**…not only does the trial court have the authority to grant a new trial, it has the duty to do so when the effect of the argument was so prejudicial that a party did not receive a fair trial.**" *Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 306 (Mo.App. W.D. 1996) (affirming trial court's grant of a new trial on the ground that closing

argument was improper as a matter of plain error, and regardless of whether or not timely objections were raised) (emphasis added).

The inflammatory arguments confronted in this case bear similarity to the arguments confronted — and harshly condemned — in *Critcher v. Rudy Fick, Inc.*:

> The argument of defendant's counsel [in *Critcher* presented] **a studied effort to convey to the jury the idea that plaintiff and her counsel had conspired to present a 'fixed-up' and 'framed-up' case, that is, one based on untrue and perjured testimony, and that plaintiff and her counsel had improperly seized upon an opportunity to sue a corporation and present her 'framed-up' case** because a jury would normally be prejudiced against a corporation. **An express and direct charge was made that counsel for plaintiff had attempted to obtain perjured testimony and that they were dishonest and lacking in integrity.** From a careful study of the record we conclude that these accusations and denunciations were not based on any evidence or on any legitimate inference from the evidence, and they were not a legitimate reply to argument by opposing counsel. Therefore, the statements went beyond and outside the scope of legitimate argument, they included objectionable personalities and offended against the dignity of the trial court, and they could have been made with no purpose but to arouse and inflame the jury with a feeling of hostility toward and prejudice against plaintiff and her counsel.

Critcher, 315 S.W.2d at 427-28.

The Chiefs' counsel's arguments in this case were even *more reprehensible*, however, because counsel dovetailed the personal attacks with inflammatory misstatements of the law. "Indubitably, misstatements of law are impermissible during closing argument and a positive and absolute duty, as opposed to a discretionary duty, rests upon a trial judge to restrain and purge such arguments." *Heshion Motors, Inc. v. Western Intern. Hotels*, 600 S.W.2d 526, 534 (Mo.App.W.D. 1980) (citations omitted). "It is the function of the court, and not of counsel, to instruct the jury in writing 'according to the law and the evidence in the case.'" *Halford v. Yandell*, 558 S.W.2d 400, 411 (Mo. Ct. App. 1977). It is the duty of the trial court to promptly correct such misstatements of law made during closing argument. *White v. Gallion*, 532 S.W.2d 769, 771 (Mo. Ct. App. 1975).

Misstatements of the law are so potentially damaging, and so universally condemned, that highly prejudicial examples merit reversal and a new trial *even if* the trial objections were sustained and the jury was instructed to disregard. *Mooney v. Terminal Railway Ass'n of St. Louis*, 352 Mo. 245, 176 S.W.2d 605, 611(15) (1944); *see also McGowan v. Wells*, 324 Mo. 652, 666 (1929) (reversing and remanding despite the trial court sustaining opposing counsel's objections and instructing the jury to disregard counsel's remarks); *Bradley v. Waste Management of Missouri, Inc.*, 810 S.W.2d 525, 528 (Mo.Ct.App. 1991) (reversing and remanding despite the trial court sustaining opposing counsel's objection and instructing the jury to disregard counsel's remarks

where counsel continued to make the same misstatements and the court undertook no further action).

Here, after spending the better part of an hour impugning the character of Cox's counsel, and accusing Cox's counsel of making false and/or misleading statements in Steve Cox's Charge of Discrimination, the Chiefs' counsel took the *additional step* of telling the jurors that, if "Mr. Galloway would have told the truth to the MCHR," the MCHR would have told Steve Cox and his counsel "you have no claim here," and Steve Cox would have been barred from pursuing this case altogether. In other words, the Chiefs' counsel argued that Steve Cox's case should have never been filed, but was only permitted to be filed, because of the blatant lies contained in his Charge of Discrimination.

Despite Cox's timely objection to that portion of counsel's argument, the damage associated with that misstatement of the law was immediate, irreversible, and highly prejudicial. Additionally, the Chiefs' counsel repeatedly returned to the same subject anyway – and reinforced it at least 8 more times after the objection – by continually accusing Cox's counsel of dishonesty, greed, and purposeful efforts to deceive the jurors, the EEOC, and/or the MCHR.

The trial court's failure to restrain and purge the arguments of the Chiefs' counsel during closing argument, and the trial court's failure to grant Cox a new trial, constituted plain error, and resulted in irreversible prejudice to Cox that materially affected the outcome of this cause of action. The Chiefs' counsel's tactics should be condemned, and Cox should be afforded a new trial on this basis alone.

POINT RELIED ON

V. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT A NEW TRIAL BASED ON THE CUMULATIVE AND PREJUDICIAL EFFECT OF THE ERRORS SPECIFIED ABOVE.

Koontz v. Ferber, 870 S.W.2d 885 (Mo.App. W.D.1993)

A new trial may be granted where multiple errors not of themselves sufficient to justify a new trial cumulatively result in prejudice to the moving party. *Koontz v. Ferber*, 870 S.W.2d 885 (Mo. App. W.D. 1993). Under the totality of the circumstances, the trial court's decisions resulted in substantial unfair prejudice to Cox, and the cumulative effect of those decisions materially affected the jury's ability to consider the evidence in its entirety. The errors discussed above and herein warrant a new trial on these grounds.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment and jury verdict entered in the above matter, reverse the trial court, and remand this case for a new trial on the merits consistent with the legal principles discussed herein.

WHEREFORE, for the aforementioned reasons, Appellant respectfully prays for that relief requested above, and for such other and further relief as the Court deems just and equitable under the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned counsel hereby certifies that Appellant's Substitute Brief complies with the requirements of Missouri Rule 84.06(b). The brief was completed using Microsoft Office Word 2010 in Times New Roman size 13-point font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief in its entirety contains 27,843 words, and does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.06(b).

The undersigned also certifies that electronic copies of the brief have been filed with the Court, and provided to opposing counsel, and that bound copies of the brief will be provided to the Court without delay.

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CERTIFICATE OF SERVICE

The foregoing was filed with the captioned court in accordance with the rules of its electronic filing system on February 6, 2015, and was contemporaneously served electronically upon all counsel of record.

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