

No. SC94462

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**IN THE SUPREME COURT OF MISSOURI**

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**G. STEVEN COX,  
Plaintiff-Appellant,**

**v.**

**KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,  
Defendant-Respondent.**

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**Appeal from the Circuit Court of Jackson County, Missouri  
The Honorable James F. Kanatzar  
Circuit Court No. 1116-CV14143**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**JURISDICTIONAL STATEMENT**

Defendant-Respondent Kansas City Chiefs Football Club, Inc. adopts Plaintiff's Jurisdictional Statement.

## **STATEMENT OF FACTS**

Plaintiff G. Steven Cox sued the Kansas City Chiefs Football Club, Inc. after the Chiefs terminated him for insubordination and performance issues in 2010. (L.F.31). Plaintiff claimed that the Chiefs violated the Missouri Human Rights Act, alleging that his termination was based not on his misconduct, but on his age. (L.F.36). After a trial of nearly three weeks, featuring more than twenty witnesses, a jury composed of 14 Jackson County residents returned a verdict in favor of the Chiefs. Plaintiff now seeks a new trial, arguing that certain evidence was wrongly excluded and that plain error was manifest in the Chiefs' closing argument.

The evidence adduced at trial, when viewed in the light most favorable to the jury's verdict, established the following facts:<sup>1</sup>

### **The Kansas City Chiefs Organization**

The Chiefs are a professional football team located in Kansas City, Missouri. (Tr.750-51). Nearly two years before Plaintiff's termination, the Club underwent a major reorganization. Long-time Chiefs President and General Manager Carl Peterson resigned in December 2008. (Tr.3321:7-17). Although Peterson had reported directly to the

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<sup>1</sup> Plaintiff's statement of facts fails to comply with Rule 84.04(c). It is argumentative, incomplete, and skewed in light of the applicable standard of review. Because the jury returned a verdict in the Chiefs' favor, the facts of this appeal must be viewed in the light most favorable to that verdict. *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456-57 (Mo. banc 2006).

Chiefs' Chairman and CEO, Clark Hunt, and had been responsible for all the Club's football and business operations, going forward the Club was split into two segments, football and business operations. (Tr.893:24-894:3). Scott Pioli was hired to run the football side, which is primarily concerned with building and fielding a competitive football team. (Tr.993). Initially, Mark Donovan became the Chief Operating Officer, with responsibility for the Club's business operations, which include things like payroll, marketing, and stadium operations. (Tr.993). Carl Peterson had run the Club for almost 20 years, and as part of his departure there was an unusually large turnover of employees, many of whom had been hired by Peterson and had worked for him for many years. (Tr.3322:12-16).

### **Plaintiff's Employment and Termination**

The Chiefs hired Plaintiff in 1998 as a Maintenance Manager in the Stadium Operations department, which had become part of the Chiefs' business operations under Mark Donovan's control by the time of Plaintiff's termination. (Tr.1808:12-21). Plaintiff held that same title throughout his employment, but when the Chiefs began in 2010 the massive stadium renovations approved by Jackson County, Missouri voters, Plaintiff was given greater responsibility. (Tr.2193:1-2195:2).

In January 2010, Kirsten Krug, the Chiefs' new Director of Human Resources, asked all the managers, including Plaintiff, to submit self-evaluations of their performance. (Tr.2199:2-2200:6). In March, Plaintiff met with Krug and business operations head Donovan to review that self-evaluation. (Tr.1910:12-1912:13). During that meeting, Krug and Donovan explained that, given the renovations to Arrowhead

Stadium the organization was undertaking ahead of the 2010 season, the Stadium Operations department needed more leadership, and that Plaintiff was well-suited to take on more responsibility. (Tr.2190:20-2191:8). Krug concluded the meeting by telling Plaintiff that “we may be looking at a title change” from Maintenance Manager to Manager of Stadium Operations, a change that Krug said was “positive” and that Plaintiff interpreted as a “promotion.” (Tr.1912:24-1913:1; 2923:14-21).

While his title had not changed, Plaintiff had become the de facto head of Stadium Operations, just as Krug suggested and Donovan had approved. (Tr.2190:20-2191:8). In addition to his existing duties, Plaintiff took over management of the hourly construction and repair employees (the previous manager had been terminated in February) and was given a 3.5% pay increase. (Tr.2192:4-2194:12).

Armed with this new management responsibility, Plaintiff approached Donovan about moving one of the employees now reporting to him, Russ Crowley, from part-time to full-time. (Tr.2177:8-12). Donovan agreed. (Tr.2177:13-15). The move allowed Crowley, an Environmental Cleaner, additional benefits, including participation in the NFL Pension Fund, medical benefits, and season tickets. (Tr.2178:4-2179:24). Plaintiff also separately sought to give Crowley \$2.21 per-hour raise, taking him from \$14.11 per hour to \$16.32 per hour. (Tr.2182:5-7).

When Donovan learned of this raise for Crowley, he challenged it. (Tr.2181:1-4). Plaintiff explained to Donovan that he thought as a full-time employee, Crowley’s pay had to be raised under the Collective Bargaining Agreement (“CBA”). (Tr.1882:6-11). Donovan explained that under the CBA Crowley’s entry-level hourly rate as a full-time

employee would actually be \$11.06 per hour, rather than the \$14.11 he had been making part time. (2182:13-18). Plaintiff convinced Donovan that it would be difficult to explain a pay cut to Crowley, even with his new benefits as a full-time employee, so the two agreed that Crowley's pay would continue at \$14.11 per hour. But Donovan specifically instructed Plaintiff—and Plaintiff agreed—that this pay rate must be “left alone” for a year. (Tr.2182:18-2184:18-21).

With the opening of the new stadium imminent, the summer of 2010 was a busy time for the Stadium Operations department. (Tr.3614:21-3615:8; 3010:4-20). In fact, that summer the Chiefs hired new management for the department. Brandon Hamilton, the Director of Facilities, and later David Young, the Vice President of Stadium Operations, were brought in—Plaintiff reported directly to Hamilton, who in turn reported to Young. (Tr.2926:10-14; 2937:14-18).

Whether it was the added duties or the increased pressure on the Stadium Operations department (or some combination of the two), Plaintiff had difficulty meeting his responsibilities in the summer of 2010. (Tr.3030:2-10). His performance was suffering, and he was having problems with budget compliance, scheduling, completing checklists, and turning in labor sheets for union workers on a timely basis. (Tr.2458:24-2459:3; 2760:1-4) Both Young and Hamilton counseled Plaintiff about his problems throughout the summer, even supplying him with written examples of what was expected. (Tr.3103:1-23; 3027:1-6). But Plaintiff's performance did not improve. (Tr:3038:4-24).

In September 2010, less than six months after Donovan and Plaintiff agreed that Russ Crowley's pay must remain at \$14.11 per hour for a full year, Plaintiff once again

tried to give Crowley a raise. Without informing Donovan or anyone else, Plaintiff emailed the personnel manager of Stadium Operations, Heather Coleman, and instructed her to “bump [Crowley] from \$14.11 to \$16.50 effective 9-6.” (Tr. 2185:14-19). At trial Plaintiff admitted that he easily could have copied Donovan and Krug on the email to Coleman, but did not (Tr. 2197:16-2198:16), and that his raising Crowley’s pay violated Donovan’s express instructions, and amounted to “insubordination.” (Tr. 2212:2-9). He also admitted that the CBA did not require the raise, but that he simply felt Crowley “deserved the increase.” (Tr. 2185:20-2187:5).<sup>2</sup>

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<sup>2</sup> At a number of points in his Substitute Brief, Plaintiff implies that the CBA required him to give Crowley the pay raise that ultimately led to Plaintiff’s termination. *See, e.g.*, Pl.’s Subst. Br. at 32 (“Cox testified that he requested Crowley’s pay increase because it was mandatory after 6 months under the terms of the Chiefs’ Collective Bargaining Agreement (“CBA”), and because Crowley deserved it.”); *Id.* at 33 (“Heather Coleman . . . also agreed at trial that Crowley’s pay raise was mandatory under the CBA in September 2010.”). The question of whether the CBA required the raise at issue was fiercely disputed at trial. On cross-examination, in testimony the jury heard, Cox admitted that the CBA did not require the raise, but that he simply felt Crowley “deserved the increase.” (Tr. 2185:20-2187:5). The jury also heard testimony from Heather Coleman, a Chiefs employee well-acquainted with the CBA, that the CBA only required Crowley to make \$12.06 an hour at the time of the raise. (Tr.2658:4-2659:1). Based on the jurors’ verdict, we must assume that they agreed with the Chiefs and concluded that

In October 2010, Krug discovered Crowley's pay increase and learned from Coleman that Plaintiff had requested it. (Tr.2470:12-2473:8). At a meeting to discuss Plaintiff's general performance, Young informed Donovan that Plaintiff had again attempted to give Crowley a raise. (Tr.3407-08). Donovan "was shocked," and asked Young to repeat himself. (Tr.3408-09). When Young confirmed that Plaintiff had again attempted to give Crowley a raise, Donovan said "this meeting is over. There's nothing more to discuss." (Tr.3408). Donovan explained that he "literally had just talked to [Plaintiff] in March and told him not to do this. In September he does it. That was shocking to me. That was a real issue, and it's a real issue of trust because now I can't trust [Plaintiff] going forward." (Tr.3409). Though reluctant to make any changes during the football season, Donovan felt termination was required given Plaintiff's deliberate flouting of Donovan's instructions about Crowley's pay. (Tr.3405-06). Plaintiff was told of Donovan's decision in a meeting with Hamilton and Young. (Tr.2029:16-2030:19).

After his termination, Plaintiff told another Chiefs employee, Brenda Sniezek, that he had been terminated because he had given Russ Crowley a raise even though he had been told not to by Mark Donovan.<sup>3</sup> (Tr.1130-31).

Before filing the present lawsuit, Plaintiff filed the required Charge of Discrimination with the Missouri Commission on Human Rights, in which he stated

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the CBA did not require the raise. But Plaintiff's statement of facts suggests that it was undisputed that the CBA *did* require the raise. This is a violation of Rule 84.04(c).

<sup>3</sup> This fact was omitted from Plaintiff's statement of facts.

under penalty of perjury that the Chiefs had told him that he had been fired for performance reasons, including specifically the Crowley pay raise. (L.F.41). Plaintiff alleged in his MCHR Charge, and in his Petition, a single incident of age discrimination—his own termination. (L.F.31-37; 39-42). He did not allege any overarching intent by the Chiefs to discriminate against employees over 40 years old, any hostile work environment, or any pattern or practice of age discrimination. (*Id.*).

### **The Trial Court Excluded Evidence Related to Terminations of Other Employees It Found To Be Irrelevant**

Before trial, it became evident that Plaintiff wanted to introduce evidence about 17 former Chiefs' employees, many of whom had left around the time of Carl Peterson's resignation. The Chiefs filed motions in limine to exclude testimony regarding (1) other discrimination lawsuits pending against the Chiefs (L.F.1005), and (2) evidence of discrimination against employees who were not sufficiently similar to Plaintiff. (L.F.1110). Although those motions were granted, the trial court made clear on the first day of trial that the 17 former employees could testify, with their testimony potentially to be restricted in only three respects: (1) their age, (2) the circumstances of their own terminations or end of their own employment with the Chiefs, and (3) the fact that other age discrimination lawsuits were pending against the Chiefs. (Tr.276:1-6; 278:7-25).

The trial court explained that these and other witnesses were free to testify about the circumstances surrounding Plaintiff's employment or termination, but could not testify about the circumstances surrounding other terminations. The trial court reminded

the parties of the limited nature of this ruling on no less than six other occasions. (Tr.285:15-19; 816; 1393:4-25; 1431-32; 1440-41; 2067-76).

Through pre-trial briefing and offers of proof, it came to light that these 17 employees were all unlike Plaintiff in various ways. Rather than being terminated for insubordination, nine were let go as part of reductions in force and restructuring, and were not replaced. Three retired or changed jobs of their own accord. Only five were terminated for performance-related issues (none for insubordination), and of these five, only one had been directly terminated by one of the decisionmakers involved in Plaintiff's termination.<sup>4</sup> During his opening statement at trial, Plaintiff conceded that there were at most only four decisionmakers involved in Plaintiff's termination—in addition to Mark Donovan, those included Kirsten Krug, David Young, and Brandon Hamilton. (Tr.711).

The record discloses the following about the 17 former employees whose testimony was limited:

### **Employees Let Go Through Reductions in Force**

#### **Anita Bailey and Ann Roach**

Anita Bailey and Ann Roach were both former Chiefs employees in the customer service department. (Tr.3855:12-13; 1044:14-18; L.F.1125). The decision to eliminate

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<sup>4</sup> This level of turnover over the course of two years occurred in a business department that employed roughly 150 people and after a change in “regime” had taken place with the departure of long-time President and General Manager Carl Peterson. (Tr.1104:4-23).

that department was made in January 2009 by Bill Newman, the former Senior Vice President of Administration, for financial reasons, before any of the four decisionmakers Plaintiff alleges were responsible for his termination had even joined the Chiefs. (L.F.1125, 1132-38). In the offer of proof regarding her testimony, Ms. Bailey acknowledged that she was told that she was being let go because “the department was being eliminated.” (T.3861:18-19). Despite the motion in limine, the jurors heard Ann Roach testify at length regarding other circumstantial evidence of age discrimination. *See* pp. 50-51, *infra*.

#### **Bill Newman**

In May 2009 Bill Newman’s position was also eliminated. (Tr.3328:13-21). Clark Hunt made the decision to eliminate Newman’s position before any of the decisionmakers involved in Plaintiff’s termination, including Mark Donovan, had even been hired, and almost one-and-a-half years before Plaintiff was terminated for insubordination and poor job performance. (Tr.1692:14-20; L.F.1125-26). No offer of proof was presented in connection with Bill Newman. *See* App. Br. at 20.

#### **Nadine Steffan**

Nadine Steffan was Denny Thum’s Executive Assistant. (L.F.1136). Her duties were largely clerical and administrative. When Thum left his employment with the Chiefs in September 2010, Steffan was also terminated. (L.F.1136). No offer of proof was presented in connection with Nadine Steffan. *See* App. Br. at 20.

**Brenda Sniezek**

Brenda Sniezek was the Director of Community Relations for the Chiefs. (Tr. 1049:4-6). Sniezek's position was eliminated in January 2011, three months after Plaintiff's termination, as part of restructuring that occurred before the 2011 NFL players' lockout. (L.F.1125).

**Tom Stephens, Ken Blume, Evelyn Bray, Pam Johnson**

Tom Stephens was the Manager of Creative Services for the Chiefs and reported to Vice President of Media and Marketing, Rob Alberino. (L.F.1146-47). Ken Blume was Director of Logistics for the Chiefs. (L.F.1125-26). Evelyn Bray was the Accounting Manager for the Chiefs and reported to Controller Larry Clemmons. (L.F.1152). Pam Johnson was the Administrative Assistant to Dale Young, the Chiefs' former Director of Finance who resigned due to illness in September 2010. (L.F.1151-52). Stephens, Blume, Bray, and Johnson were all terminated as part of a January 2011 reduction in force, due to restructuring that occurred in anticipation of the NFL players' lockout, some three months after Plaintiff was terminated for insubordination. (L.F.1125-26). No offer of proof was presented in connection with Johnson or Blume. See App. Br. at 20.

None of these nine employees was terminated for any kind of performance-related reason. As with all reduction-in-force terminations, these employees were not replaced by younger hires.

## **Employees Who Left Voluntarily**

### **Doug Hopkins, Gene Barr, Pete Penland**

Doug Hopkins was the Director of Ticket Operations for the Chiefs until he voluntarily resigned to take a similar job with the University of Kansas, after receiving a telephone recommendation by Mark Donovan, in January 2011, three months after Plaintiff's termination for insubordination. (L.F.1172). Gene Barr was the Manager of Security for the Chiefs until he voluntarily retired in August 2010, two months before Plaintiff's termination for insubordination. (L.F.1125-26; 1175). Pete Penland was an Environmental Cleaner until he voluntarily retired in April 2011, six months after Plaintiff's termination for insubordination. (L.F.1125-26). Hopkins was the first witness called at trial, and testified about various matters, including an age-related remark made by Dan Crumb, which he said he took personally. (Tr. 793:15 -795:5) No offer of proof was presented in connection with Penland. *See* App. Br. at 20.

## **Employees Terminated for Performance-Related Reasons**

### **Carl Peterson**

Carl Peterson was the former President and General Manager of the Chiefs. (Tr.887-890). Peterson resigned in December 2008. (Tr.888:15-22). Peterson's resignation preceded the employment of every decisionmaker involved in Plaintiff's termination. Unlike Plaintiff, who was a maintenance employee in Stadium Operations, Peterson reported directly to the Chiefs' CEO and was responsible for all the Club's operations. (Tr.886). No offer of proof was presented in connection with Peterson. *See* App. Br. at 20.

Upon Peterson's resignation, Mark Donovan was given Peterson's responsibility with respect to the business side of the Chiefs organization, and was instructed to "reorganize, restructure and efficiently run" that department. (Tr.3322:14-16).

### **Larry Clemmons**

Larry Clemmons was formerly the Controller for the Chiefs, and reported to the Chief Financial Officer, Dan Crumb. (L.F.1155). Crumb terminated Clemmons' employment for specific performance deficiencies on May 2011, seven months after Plaintiff was terminated for insubordination. (L.F.1157). The jury was allowed to hear evidence that the Chiefs' former president told Clemmons he was too old for the CFO position. (Tr.2400:24-25).

### **Lisa Siebern**

Lisa Siebern was a Player Development Assistant in football operations for the Chiefs. (L.F.1126). Siebern was terminated by Scott Pioli for performance-related reasons at the same time as the January 2011 reduction in force—three months before Plaintiff's termination for insubordination. (L.F.1126). Plaintiff made no offer of proof in connection with Siebern. *See* App. Br. at 20.

### **Carol Modean**

Carol Modean was Mark Donovan's personal administrative assistant. (L.F.1126). Unlike Plaintiff, her job duties were largely clerical and administrative in nature. In January 2010, nine months before Plaintiff's termination, Donovan terminated Modean for specific performance-related issues. (L.F.1126).

### **Lamonte Winston**

Lamonte Winston was the Director of Player Development for the Chiefs and reported to Carl Peterson and later to Scott Pioli. (L.F.1163-67). Winston's job was football-related—he was in charge developing and honing the on-field abilities and skills of the Chiefs' players. The Chiefs decided not renew his contract when it expired in February 2010 based on his performance. (L.F.1163-67). No offer of proof was presented in connection with Winston. *See* App. Br. at 20.

### **A Number of Former Employees Testified Regarding Circumstantial Evidence of Age Discrimination**

Over the course of the 13-day jury trial, Plaintiff called 21 witnesses,<sup>5</sup> including a number of the above-listed former employees, who testified regarding circumstantial evidence of age discrimination and other matters. *See* Transcript Index. For instance, Doug Hopkins testified that he heard Dan Crumb say that he was “sick and tired of these old, entitled employees.” (Tr.793:13-15). He testified that he took that statement “as a personal insult” because he “was the oldest person sitting in the room.” (Tr.793:24-794:3). Hopkins also testified that, immediately following the meeting, he complained to Krug, the director of human resources, that “it was the worst meeting [he had] ever been in, a horrible meeting . . . totally insulting” and “almost venomous in nature.” (Tr.797:7-25).

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<sup>5</sup> The Chiefs called two witnesses.

Brenda Sniezek testified that she felt at one point that Scott Pioli was “asking how old [she] was.” (Tr.1069:25-1070:3). Sniezek testified that she heard another member of management call his cameramen “young guns” which she interpreted as an age-related comment. (Tr.1081:1-10). She also testified that she heard Chiefs CFO Dan Crumb say, three months after Plaintiff’s termination, “these old people think they’re entitled to everything,” which she interpreted as a criticism of older Chiefs employees. (Tr.1090:3-9).

Plaintiff used the fact that Plaintiff’s former supervisor, Steve Schneider, had been terminated by the Chiefs, and the obvious fact that Schneider was over the age of 40 (*see, e.g.,* Tr.1299, where Schneider testified to working for the Sacramento Kings NBA franchise some 28 years before his termination by the Chiefs), to argue in closing that the Chiefs had also discriminated against Schneider on the basis of age. (Tr.3986-88).

Ann Roach was able to testify that Carl Peterson told her that Clark Hunt “wanted to go in a more youthful direction” and “want[ed] to possibly have younger people working there.” (Tr.1396:6-7; 1399:8-14; 1414:21-25; 1415:1-3). She was even allowed to testify that, immediately following the “youthful direction” remark, Peterson asked her if she would consider retiring. (Tr.1399:15-18).

### **The Trial Court Excluded Testimony Regarding an Alleged Statement by Scott Pioli as Hearsay**

Plaintiff also attempted to introduce evidence regarding a statement allegedly made by Scott Pioli and supposedly overheard by Herman Suhr, a former part-time security guard for the Chiefs. Suhr alleges that he overheard Pioli say verbatim “I need

to make major changes in this organization as so many employees of Carl Peterson are over 40 years old.” (L.F.1021) At his deposition, Suhr testified that had to “spend a long time thinking about the comment” to remember it. (L.F.1079). Suhr said that he heard the comment from 20-25 feet away, while Pioli was behind a wall, and out of sight. (L.F.1081). The comment was allegedly made by Pioli in the late summer or early fall of 2009, over a year before Plaintiff was terminated. (L.F.1080). At his deposition, Suhr also stated he was “old and forgetful.” (L.F.1079).

In his deposition, Pioli denied making the statement. (L.F.1598-1624). Pioli did not testify about making the statement at trial. As noted above, Plaintiff conceded in opening statement that Pioli was not a decisionmaker in Plaintiff’s termination.

The trial court ruled that Suhr’s testimony regarding Pioli’s alleged statement was not admissible as the admission of a party opponent or as evidence of the Chiefs’ discriminatory animus because Pioli was not a decisionmaker in Plaintiff’s termination. (Tr.948:22-949:5; L.F.1068). The trial court also ruled that, due to a lack of foundation, Suhr’s testimony was not admissible to impeach Pioli. (Tr.949:6-20).

### **The Trial Court Quashed the Subpoenas for Chiefs’ Owner Clark Hunt’s Testimony**

Plaintiff also sought to have Chiefs’ owner and CEO Clark Hunt testify, both in deposition and at trial. The trial court quashed the deposition request and the trial subpoena. The Court noted that Plaintiff had not alleged either that Hunt was involved in the decision to terminate Plaintiff or that the Chiefs engaged in a pattern or practice of

discrimination. (L.F.380-82). And Plaintiff's opening statement conceded that Hunt was not a decisionmaker on Plaintiff's termination. (Tr.698-99)

After Plaintiff was terminated, he received a quasi-form letter, ostensibly from Clark Hunt, thanking him for his years of service. (L.F.164-65, Ex. 10). Plaintiff argued that this indicated that Hunt had some knowledge of Plaintiff's job performance. (L.F.210-11). But the trial court ruled that the "letter at issue merely expresses gratitude to the Plaintiff for twelve years of service, appreciation for his ability to manage a variety of projects, and wishes Plaintiff all the best in the future" and that it did not suggest that Hunt had knowledge of Plaintiff's job performance. (L.F.382). Plaintiff was nevertheless allowed to introduce Mr. Hunt's letter as an exhibit in this trial. (Ex. 10).

### **Plaintiff's Challenges to the Chiefs' Closing Argument**

After the jury returned its verdict, Plaintiff requested a new trial, maintaining that the Chiefs' closing argument was inflammatory and included misstatements of law. But Plaintiff had objected only twice during the Chiefs' closing. The first objection is not at issue on appeal, and the second asserted that defense counsel had misstated the law with respect to the legal effect of a Missouri Commission on Human Rights consideration of a Charge of Discrimination. (Tr.3959:10-3960:5). The Court sustained that latter objection and issued a curative instruction, to which Plaintiff agreed. (Tr.3959:10-3960:5).

Plaintiff also argued that a new trial was required on a ground he had not raised at trial—because of allegedly inflammatory and prejudicial remarks defense counsel made in closing. Those remarks centered on the fact that, as Plaintiff had admitted at trial, the

Charge of Discrimination he filed with the Missouri Commission on Human Rights contained factual errors. Among other errors, the Charge stated that the second raise Plaintiff attempted to give Russ Crowley was required by the CBA (L.F.41). At trial, however, Plaintiff testified that the CBA did not require the raise, but that Plaintiff had simply felt it was “deserved.” (Tr.2185:20-23). Plaintiff, on redirect examination by his own counsel, further testified that this error and others on the Charge were the result of Plaintiff’s lawyers’ drafting. (Tr.2311-2318). The Chiefs’ counsel’s closing essentially asked the jury to believe Plaintiff’s own testimony rather than his lawyers’ incorrect statements and allegations in the Charge. (Tr.3937-3939). Plaintiff concedes no objection was ever made to these remarks at trial. Plaintiff’s counsel in fact used these remarks strategically in rebuttal to argue that the Chiefs were focused on matters other than the facts and the law relevant to Plaintiff’s claims. (Tr.3889-90).

## ARGUMENT

### **I. The Trial Court Did Not Abuse Its Discretion in Excluding Certain Limited Testimony In a Series of Evidentiary Rulings At Trial (Response to Plaintiff's Point I).**

#### **Standard of Review**

An appellant seeking a new trial based on wrongfully excluded evidence must show two things: (1) that the trial court abused its considerable discretion over evidentiary matters at trial, and (2) the absent evidence “would have materially affected the merits of the cause of action.” *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo. App. 2009).

Plaintiff argues that the trial court's evidentiary rulings were based in legal error, and are therefore entitled to no deference by this Court. But, as demonstrated below, a review of the record shows that the trial court repeatedly engaged in the proper admissibility test—weighing the probative value of the evidence against its potential for prejudice, confusion, or undue delay. Therefore abuse of discretion is the proper standard of review.

\* \* \*

Plaintiff's first point consists largely of arguments that are irrelevant to his appeal. Instead of explaining, witness by witness, why any of the excluded evidence was both logically and legally relevant, Plaintiff instead devotes most of his point to misguided claims that the trial court (1) supposedly engaged in a single, "blanket" evidentiary ruling and (2) improperly injected what Plaintiff and his amici insist are two federal employment concepts into this case. Not only was there no "blanket ruling" here, but the two supposedly federal concepts—which Plaintiff characterizes as "pattern or practice" and "similarly situated"—actually turn out to be Missouri concepts that the trial court properly applied.

More fundamentally, Plaintiff's first point preserves nothing for review. Through a combination of waiver at the trial court, the court of appeals, and even before this Court, Plaintiff has lost the ability to claim (1) that the standard of review on appeal is anything other than abuse of discretion; (2) that any of the excluded evidence was *legally* relevant (which was an independent basis for the trial court's rulings); and (3) that any of the excluded evidence had logical relevance as well.

Much of Plaintiff's waiver occurred at the Missouri Court of Appeals level. Appellants may not use a Substitute Brief before this Court to alter or enlarge any points they raised below. Plaintiff's appellate brief below limited its first point to claiming that the trial court abused its discretion in determining that his evidence was not logically relevant. He is thus barred from now trying to expand his argument, as his first Point Relied On clearly does, to claim that de novo review is appropriate, or that the evidence was not legally relevant. Moreover, despite the criticism he received below, Cox's

Substitute Brief does not even properly argue logical relevance because he fails to set out in the argument portion of his brief any of the specific rulings and individualized, witness-by-witness discussion that his arguments demand.

The court of appeals conducted an exhaustive review of the seven-volume transcript and lengthy legal file in this appeal, and produced a 42-page opinion carefully analyzing every claim Cox preserved, and even some he did not. Cox cannot now expand that review, and his first point fails for that reason alone. But even in its improperly expanded form, Cox's first point still lacks merit, as explained fully below.

**A. Cox's First Point Preserves Nothing for Review**

**1. Cox has Waived any Standard of Review other Than Abuse of Discretion**

Rule 83.08(b) provides that, if a party chooses to file a substitute brief in this Court, the "substitute brief shall conform with Rule 84.04, [that it] shall include all claims the party desires this Court to review, [and that it] *shall not alter the basis of any claim that was raised in the court of appeals brief* [.]" (emphasis added).

In his court of appeals brief, Cox argued that the trial court's evidentiary rulings at issue in Point I should be reviewed under an abuse of discretion standard. Pl.'s Br. p. 31. Here, however, he alters his position and argues that Point I should be reviewed under a de novo standard to the extent that the trial court applied incorrect legal principles. Pl.'s Subst. Br. p. 56. Because Cox failed to argue below for de novo review, such argument has been waived and is barred by Rule 83.08(b). *See Essex Contracting, Inc. v. Jefferson*

*County*, 277 S.W.3d 647, 656 (Mo. banc 2009) (refusing to consider portion of brief that violated Rule 83.08(b)).

## **2. Cox has Waived Any Claim That His Evidence Was Legally Relevant**

The Trial Court's exclusion of the testimony at issue in Point I was independently based on its lack of legal relevance. *See, e.g.*, Tr.1101:21-23 (ruling with respect to Brenda Sniezek's testimony that "[i]ts prejudicial effect outweighs any probative value. I think we've talked that six different ways to Sunday.").<sup>6</sup> In order for Cox to establish that testimony was legally relevant, he had to show that, for each individual employee, the probative value of the testimony outweighed the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence. *See Porter v. Toys 'R' Us-Deleware, Inc.*, 152 S.W.3d 310, 318 (Mo. App. 2004). But in his court of appeals brief, Cox did not argue that the excluded

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<sup>6</sup> One fundamental problem with Plaintiff's attempt to call 17 witnesses to testify about *their* employment experiences rather than Plaintiff's was that it risked expanding the trial beyond all reasonable limits, a factor that weighed heavily in the trial court's legal relevance analysis. Any attempt to use these other witnesses' experiences to prove that Plaintiff suffered discrimination essentially would have required 17 mini-trials to analyze the particular facts of each employment. And if the trial had been expanded in this way, the Chiefs were ready to call approximately 38 witnesses of their own who were over 40 and who were *not* terminated. (L.F.1625).

testimony was legally relevant at even a general level, much less the required employee-by-employee level. *See generally* Pl.’s Br. pp. 30–41. Cox now attempts to argue legal relevance in his Substitute Brief at pages 73–74, but this is an alteration of the basis of Point I, and such argument has been waived under Rule 83.08(b).

Moreover, even the Substitute Brief’s abbreviated new legal relevance section fails to properly argue that the excluded testimony was legally relevant. In the legal relevance portion of Cox’s Substitute Brief (pp. 73-74), Cox simply asserts that at a general level, the excluded testimony was highly probative and “cannot possibly be ‘overly prejudicial,’” and that “the trial court never explained the nature of any *unfair prejudice* associated with the excluded evidence.” Pl.’s Subst. Br. p. 74. Setting aside the substantive problems with those arguments, at a procedural level they fail to discuss in any intelligible way the legal relevance of individual employees’ testimony. Instead, Cox simply recites abstract legal principles and makes generalized references to his statement of facts. This is insufficient to preserve an argument that the excluded testimony was legally relevant.

Because the lack of legal relevance served as an independent basis for the trial court’s exclusion of the testimony at issue, Plaintiff’s waiver of his legal relevance argument is dispositive of Point I. *See City of Peculiar v. Hunt Martin Materials, LLC*, 274 S.W.3d 588, 590-91 (Mo. App. 2009) (holding that to establish grounds for reversal, an appellant must challenge all grounds on which the trial court ruled against it); *STRCUE, Inc. v. Potts*, 386 S.W.3d 214, 219 (Mo. App. 2012) (holding that the failure to challenge an alternative basis for the trial court’s finding or ruling is fatal to appeal)

### **3. Cox's Substitute Brief Also Fails to Properly Argue Logical Relevance**

Plaintiff also fails to properly argue that the excluded testimony was even *logically* relevant. Under Missouri law, when a plaintiff attempts to establish an employer's discriminatory animus through testimony from co-employees that they too saw, heard, or experienced discriminatory conduct, "the relevancy of such evidence must be reviewed on a case-by-case basis." *Hurst v. Kansas City, Missouri School Dist.*, 437 S.W.3d 327, 341 (Mo. App. 2014) (citation omitted). But Point I engages in no individualized discussion of what the excluded testimony would have been, or why that testimony was logically relevant to establish the Chiefs' discriminatory animus. Such individualized argument is now waived, as raising it for the first time in the reply brief would deprive the Chiefs of their ability to respond. *See Coyne v. Coyne*, 17 S.W.3d 904, 906 (Mo. App. 2000) ("Appellate courts are generally precluded from addressing assertions made for the first time in a reply brief because a respondent has no opportunity to address the argument.").

The failure to identify and discuss specifically what evidence was excluded and why it was both logically and legally relevant is not a mere technical defect. Such a failure makes it difficult for the Chiefs to rebut the relevance of specific evidence, or defend specific evidentiary rulings, particularly in a case like this with a seven-volume transcript that is shot through with evidentiary rulings regarding the testimony of former and current Chiefs employees. The problem is particularly vexing here, as Point I challenges the exclusion of testimony from "17 or more" former employees (Pl.'s Subst.

Br. p. 55), yet Plaintiff separately asserts that he “would not have called all 17 . . . .” (Pl.’s Subst. Br. p. 3 n.2). Such a failure to identify and discuss specific excluded evidence precludes meaningful review by this Court. *See Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 348 (Mo. App. 2006) (holding claim of error regarding exclusion of evidence is unreviewable and is deemed abandoned where neither point relied on nor argument portion of the brief under the point identifies the excluded evidence).

**B. There Was No “Blanket” Evidentiary Ruling Below**

Another overarching difficulty with Point I is that it fails to explain exactly which ruling or rulings Plaintiff claims were prejudicially erroneous. Plaintiff’s first Point Relied On alleges that “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 . . . .” But the record shows that there was no “blanket exclusion” of circumstantial evidence of age discrimination. Nor was there a “blanket exclusion” of testimony “from and about” the 17 former employees. Testimony from and about these employees was instead *allowed*, and was generally restricted in only three respects: (1) the other employees’ age, (2) the circumstances of *their* terminations or ends of employment, and (3) the fact *they* may have had their *own* discrimination lawsuit pending against the Chiefs. (Tr.276:1-6; 278:7-25).

The trial court carefully tailored its ruling so that all witnesses could fully share their knowledge of *Plaintiff’s* employment or termination, as well as circumstantial evidence not related to their own terminations. (Tr.276:1-6; 278:7-25). The limited

nature of this restriction was reiterated by the trial court at least six times. (Tr.285:15-19; 816; 1393:4-25; 1431-32; 1440-41; 2067-76).

Most importantly, each time Plaintiff presented an offer of proof regarding excluded testimony, and sometimes during testimony to the jury, the trial court painstakingly revisited its *in limine* ruling with respect to the individual witness. (See, e.g., Tr.1101:21-23 (ruling, specifically with respect to Benda Sniezek testifying about the circumstances of her termination that “[i]ts prejudicial effect outweighs any probative value. I think we’ve talked that six different ways to Sunday.”); Tr.1348:25-1349:5 (upholding Plaintiff’s objection that questions about the circumstances of Steve Schneider’s termination “would take us now into many other collateral matters that don’t need to come into this case or confuse the jury and the prejudicial effect far outweighs the probative value of you rebutting that evidence or that testimony, so I’m going to sustain the plaintiff’s objection.”); Tr.2067:21-2068:1 (recalling previous individualized legal relevance discussions and noting that “[t]he only individual we didn’t discuss in great detail yesterday was Steve Schneider, and I’d like a brief argument from each side as to where you think Steve Schneider stands as it pertains to the admission of similarly situated employees pursuant to the *Williams v. Trans State Airlines*” (emphasis added)).

Moreover, a number of these former Chiefs employees *did* testify, providing circumstantial evidence of age discrimination, as well as testimony that allowed the jurors to infer that they were well over 40, even if they had not been able to do so from physical appearance alone. See Argument Point I(D)(4), *infra*.

There was thus no “blanket exclusion” in this case, either in the sense that all circumstantial evidence of age-based animus was excluded, or in the sense that the trial court failed to engage in an individualized probative-versus-prejudice analysis for each proffered witness. Because an alleged “blanket exclusion” is the only error identified in Plaintiff’s first Point Relied On, it is impossible for the Chiefs to determine which particular trial rulings Plaintiff believes were an abuse of the trial court’s discretion. Therefore the lack of a blanket exclusion is separately dispositive of this point. *See Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 346 (Mo. App. 2006) (“We do not address errors that first appear in the argument portion of a brief and are not encompassed in the point relied on, because they are not preserved for review.”).

**C. The Trial Court Did Not Abuse Its Discretion In Limiting Plaintiff to the Claim Raised in his Administrative Charge**

Plaintiff argues at length that the trial court erred, and that the standard of review for Point I should be *de novo*, because the trial court noted that the Plaintiff failed to plead a hostile work environment or pattern and practice claim when it ruled on the admissibility of certain evidence.<sup>7</sup> However, the record is clear that the trial court ruled that the evidence at issue was admissible *neither* as circumstantial evidence under the sufficiently similar standard, *nor* under a broader standard that might have applied if Plaintiff had properly pleaded a hostile work environment or pattern and practice claim. As was noted in the appellate court’s opinion, at oral argument below Plaintiff’s counsel

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<sup>7</sup> This argument is absent from the Point Relied On, and thus is not preserved for review.

confirmed that these were two *independent* bases of admissibility. *See* App. Op. p. 14. Plaintiff's brief fails to identify any evidentiary ruling based solely on the lack of hostile work environment or pattern and practice claim.

The only reason the trial court even discussed hostile work environment or pattern or practice claims was because Plaintiff improperly sought to amend his petition beyond the scope of his administrative charge prior to trial. In support of a motion to amend the petition, Plaintiff's counsel argued:

The defendant raised the subject of how and the manner in which the plaintiff in this case has alleged a *pattern and practice of discrimination* on the basis of age. Keep in mind that the original Petition filed ten months ago includes a single count of discrimination on the basis of age. My client seeks to amend his Petition for the exclusive purpose of adding an indisputably intertwined claim that he was also subjected to a *hostile work environment* on the basis of his age in the summer and fall of 2000.

The defendant opposes this request on the principal basis that they seem to believe that the underlying Charge of Discrimination filed with the Missouri Commission on Human Rights somehow includes insufficient detail that would allow an investigator for the Missouri Commission on Human Rights or the defendant to have sufficient notice of the possibility that this claim might at some point be raised.

(Tr.50:21-51:11 (emphasis added)). Plaintiff's counsel later characterized the claim he sought to add as one for "harassment." (Tr.54:15). Plaintiff's motion to amend was denied, and *that denial is not challenged on appeal.* (L.F.9)

From that point forward, the trial court (and the parties) appeared to conflate the concepts of a hostile work environment claim and a pattern and practice claim. And understandably so. Even though "pattern and practice" may be a term of art in federal practice, in ordinary English it refers to ongoing conduct, such as the type involved in a hostile work environment or harassment claim. *See, e.g., Minze v. Missouri Dept. of Public Safety*, 437 S.W.3d 271, 277 n.11 (Mo. App. 2014) ("In the case at bar, the petition did not allege a claim of a *hostile work environment*, constructive discharge or a continuing violation theory. Thus, our holding does not affect cases containing such claims. A claim based on an *ongoing practice*, may well require less specificity in the verdict director." (emphasis added)).

Moreover, Plaintiff's current assertion (despite his earlier arguments to the contrary) that "pattern and practice" is purely a federal term of art is incorrect. Missouri's equitable "continuing violation doctrine" allows plaintiffs to sue for acts that create a hostile work environment outside of the MHRA's limitations period if they can show that an act of discrimination within the limitations period is "part of an ongoing practice or pattern of discrimination" by the employer. *Plengemeier v. Thermadyne Industries, Inc.*, 409 S.W.3d 395, 402 (Mo. App. 2013); *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 252 (Mo. App. 2012); *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 763 (Mo. App. 1999).

Thus, if Plaintiff had amended his petition to allege a hostile work environment claim as part of a pattern and practice of discrimination by the Chiefs, he could have been able to recover for previous harassment, not just his termination. This could have broadened the scope of logically relevant evidence in the testimony from other former Chiefs employees regarding comments or conduct from years ago might have had substantial probative value if Plaintiff had claimed he was subjected to hostile work environment claim as part of a pattern and practice of discrimination, but that same evidence might be completely irrelevant to the motivation for his individual termination.

For example, Anita Bailey and Ann Roach were informed of the decision to eliminate their division in January 2009, before Donovan, Krug, Young, or Hamilton, the alleged decisionmakers in Plaintiff's termination, were even employed by the Chiefs. (L.F.1125; 1132-33). This decision could not have possibly been evidence of discriminatory animus in the minds of Donovan, Krug, Young, or Hamilton. But it could possibly have been evidence of a hostile work environment in 2009. Thus the presence of a hostile work environment or pattern or practice claim might have expanded the universe of logically relevant evidence. But Plaintiff's failure to allege in his administrative charge either a hostile work environment or a pattern and practice of discrimination led the trial court to properly deny Plaintiff leave to expand his Petition, in a ruling Plaintiff has not appealed.

In determining the legal relevance of the excluded testimony, the trial court had to weigh the probative value of that which is logically relevant against its potential for prejudice. Far from injecting some federal concept into Missouri law, it was perfectly

appropriate for the trial court to note that there was no hostile work environment or pattern and practice claim at issue as part of its ruling that certain circumstantial evidence was not legally relevant.

**D. The Trial Court Did Not Abuse Its Discretion In Determining That Any of the Witnesses Whose Testimony Was Limited Were Not Sufficiently Similar to Plaintiff to Support Logical, Much Less Legal, Relevance**

Even if Plaintiff had preserved and properly raised his relevancy arguments, his first point in any even fails on the merits. The trial court limited certain testimony about 17 Chiefs employees who were older than 40 and who were no longer employed by the Chiefs either because they resigned, were part of a general reduction in force, or were otherwise terminated. The trial court ruled that because these former employees were not sufficiently similar to Plaintiff, and because Plaintiff had failed to allege that the Chiefs maintained a hostile work environment or engaged in a pattern or practice of discrimination, it would be more prejudicial than probative to receive testimony about (1) their own terminations, (2) their own discrimination claims against the Chiefs, or (3) their age. (*See, e.g.*, Tr.276:1-6; 278:7-25). That is to say, their testimony on those three subjects would not be *legally* relevant. These employees were nevertheless free to testify (and many did) about Plaintiff's employment and termination, and about other circumstances that Plaintiff claimed showed age discrimination. (Tr.276:1-6; 278:7-25).

Plaintiff claims in general terms that these 17 former employees, and the circumstances of their departure from the Chiefs, were similar enough to his own firing

that they would have had some probative value to the jury's determination of whether age-based animus contributed to Plaintiff's firing.<sup>8</sup> Plaintiff's first point unfortunately fails to discuss any of the former employees individually. This failure makes it impossible to know Plaintiff's argument as to why each individual employee is sufficiently similar to Plaintiff, why that employee's testimony would be more probative than prejudicial, and what prejudice resulted from the restrictions on that employee's testimony. Moreover, Plaintiff fails to discuss the risks of delay, cumulativeness, or confusion of the jury at even a general level, thereby waiving his legal relevance argument. Again, these failures are alone fatal to his first point.

Plaintiff now says that he would *not* have called all 17 proposed witnesses to testify, asserting merely that he had a "right to choose" from among them. Pl.'s Subst. Br. p. 3 n.2. We are left to guess which ones he would have called, and thus whether any

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<sup>8</sup> Point I asserts that the excluded evidence would also be relevant to "corroborate[] other critical and relevant evidence namely the existence of the business owner's plan to take the organization 'in a more youthful direction.'" However, this language was not in the Point Relied On in Plaintiff's court of appeals brief. These changes violate Rule 83.08(b)'s command that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Therefore, this additional argument for relevance is not preserved for this Court's review. *See Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009) (refusing to consider portion of brief that violated Rule 83.08(b)).

prejudice would have resulted. And without offers of proof for at least seven of these witnesses, it is still harder for Plaintiff to show any prejudicial error. Such uncertainty separately precludes a finding of prejudicial error.

### **1. The proper standard**

To be admissible, evidence must be relevant, both logically and legally. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App. 2004). Evidence is logically relevant if it “tends to prove or disprove a fact in issue or corroborate other evidence.” *Guess v. Escobar*, 26 S.W.3d 235, 242 (Mo. App. 2000). Evidence is legally relevant when its probative value, or usefulness, outweighs its prejudicial effect, such as unfair prejudice, confusion of the issues, undue delay or waste of time, and in the case of jury trial, misleading the jury. *Id.*

In a discrimination case, other employees’ testimony regarding their own discrimination claims is admissible—that is, both logically and legally relevant—only if the circumstances are “sufficiently similar” to those of the plaintiff. *See Williams*, 281 S.W.3d at 874 (holding that employees were not “similarly situated” in all relevant respects under the federal standard but finding “sufficiently similar” circumstances where two female employees both complained of sexual harassment, and both were fired within 60 days of complaint by their common supervisor). Put another way, “evidence of other acts of defendant are admissible *if those acts are sufficiently connected* with the wrongful acts that they may tend to show defendant’s disposition, intention, or motive in the commission of the acts for which . . . damages are claimed.” *Kline v. City of Kansas City*,

334 S.W.3d 632 (Mo. App. 2011) (discrimination case) (emphasis in original) (citation omitted).

Thus, the “sufficiently similar” or “sufficient connection” standard is no more than an articulation of the general legal relevance test as applied in the context of circumstantial evidence of discriminatory animus. *See Williams*, 281 S.W.3d at 874 (applying “sufficiently similar” test to determine legal relevance). “Legal relevance involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence.” *Porter v. Toys 'R' Us-Deleware, Inc.*, 152 S.W.3d 310, 318 (Mo. App. 2004) (citations omitted). A trial court must weigh the probative value of evidence against any possible prejudice that might come from its admission because “[l]ogically relevant evidence is not necessarily admissible; the evidence must also be legally relevant.” *Id.*

Much of the confusion in this case arises from the similarity between the rigid federal concept of the “similarly situated” employee and the more flexible Missouri evidentiary concept of the employee who is “sufficiently similar” to the plaintiff. In analyzing discrimination claims, federal courts “generally recognize that instances of disparate treatment can support a claim of pretext, but the plaintiff bears the burden of establishing that the employees are similarly situated in all relevant respects.” *Young v. Am. Airlines, Inc.*, 182 S.W.3d 647, 654 (Mo. App. 2005) (internal quotations and emphasis omitted). This stands in contrast to the Missouri “sufficiently similar” standard, where the other employees offered to show circumstantial evidence of discrimination

need not be like the plaintiff in every respect, but must be similar enough such that their testimony would be more probative than prejudicial. *See Williams*, 281 S.W.3d at 874.

The closeness between “similarly situated” and “sufficiently similar” can be confusing, and in fact, Missouri courts often use the phrase “similarly situated” when engaging in what the parties in this case call the “sufficiently similar” analysis. This is best illustrated in the *Williams* case. There, the appellant argued that the trial court abused its discretion in admitting the testimony of a co-worker who was fired in order to show discriminatory animus. *Id.* at 873. The appellate court opened its discussion of the point by saying “[respondent] asserts the evidence regarding [the co-worker’s] termination was relevant to show [the employer’s] retaliatory animus toward women who file sexual harassment complaints, and that the two women were *similarly situated* to permit [respondent] to compare her termination to that of [the co-worker]. We agree with [respondent].” *Id.* (emphasis added). However, the appellate court’s later discussion shows that it was actually applying the Missouri “sufficiently similar” standard.

In *Williams*, the appellant was trying to apply the federal “similarly situated” standard in evidentiary rulings, an approach the court found “neither persuasive nor relevant.” *Id.* The court explained that the federal similarly situated standard applies when federal plaintiffs seek to use the disparate treatment of similarly situated employees to show that their own termination was pretextual; this federal standard requires that the employees be “similarly situated in all relevant respects” in order to make a pretext argument. *Id.* (quoting *Young*, 182 S.W.3d at 654).

But the *Williams* court then went on to discuss the “sufficiently similar” standard used in Missouri to determine the logical or legal relevance of proposed evidence:

On the other hand, when considering this evidence in light of its probative value to [the respondent’s] claim, evidence of [the co-worker’s] discharge demonstrates that [the employer’s] treatment of [the co-worker] and [the respondent] was *sufficiently similar* to be relevant to [the respondent’s] claim for retaliatory discharge. Both [the co-worker] and [the respondent] were female flight attendants with [the employer]. Both complained of sexual harassment by male pilots. Both women brought their harassment complaints against the respective pilots, and both women were terminated within sixty days of making their complaint. Furthermore, both women were terminated by the same male member of management . . . .

*Id.* at 873-74 (emphasis added). Thus although the *Williams* court initially used the phrase “similarly situated,” it ended up applying the Missouri “sufficiently similar” standard in determining whether evidence from co-employees was relevant.

Whether “similarly situated” or “sufficiently similar” is the proper nomenclature, in order to avoid confusion, in this brief the Chiefs use “sufficiently similar” to refer to the proper test for determining the legal relevance of co-employee claims of discrimination under Missouri law. Plaintiff appears to adopt the same convention. *See* Pl.’s Subst. Br. pp. 78-81.

## 2. The trial court's application of the "sufficiently similar" standard

Although the trial court, like the court of appeals in Williams, at used the terms "similarly situated" and "sufficiently similar" interchangeably, it is clear from the substance of its analysis that it was applying the Missouri relevancy test in which the co-employee has to be similar enough to the plaintiff that her testimony is more probative than prejudicial, and not the federal test in which the co-employee has to be essentially identical in all relevant respects for the purpose of a pretext analysis.

As one example, during the testimony of Brenda Sniezek, Plaintiff's counsel asked if she was still with the Chiefs, and what happened that caused her employment there to end. (Tr.1099:11-15). The Chiefs' counsel objected.<sup>9</sup> (Tr.1099:16). Plaintiff's counsel acknowledged that he asked the question so that the Chiefs' counsel would object in order to give the trial court the opportunity to rule on the admissibility of such testimony in the specific context of Ms. Sniezek's testimony about her termination. (Tr.1100:3-7). The trial court then explained that it was sustaining the objection because "Its prejudicial effect outweighs any probative value. I think we've talked that six different ways to Sunday." (Tr.1101:21-23). This is clearly an application of the generalized legal relevance test, and not some effort to impose a rigid federal "similarly situated" test.

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<sup>9</sup> This objection alone belies Plaintiff's factual assertion that "[t]he Chiefs never made any individualized, testimony-specific objections as to any witnesses." *See* Pl.'s Subst. Br. p. 13.

Similarly, when the Chiefs' counsel arguably sought during cross-examination to ask Steve Schneider about some circumstances of his termination (Tr.1343:5-9), Plaintiff objected. The trial court sustained the objection, holding that "it's going to open the door to all sorts of other collateral things that shouldn't come into this case. I think the prejudicial effect of that would outweigh any probative value . . . ." (Tr.1347:9-14). The trial court reiterated "I just think it would take us now into many other collateral matters that don't need to come into this case or confuse the jury and the prejudicial effect far outweighs the probative value of you rebutting that evidence or that testimony, so I'm going to sustain the plaintiff's objection." (Tr.1348:25-1349:5).

Numerous other examples exist. But because the Plaintiff's First Point Relied On fails to allege error with respect to any particular trial ruling, it is impossible for the Chiefs to know which rulings to discuss. However, the block-quoted trial court ruling within Plaintiff's statement of facts at pages 12 to 13 of its Substitute Brief illustrates this point perfectly. That particular discussion began:

Back to the issue of the Defendant's Motion in Limine to Preclude Testimony of Similarly Situated Employees, in going over my notes and the cases that were discussed yesterday, I need a brief refresher, I think. The only individual we didn't discuss in great detail yesterday was Steve Schneider, and I'd like a brief argument from each side as to where you think Steve Schneider stands as it pertains to the admission of *similarly situated* employees pursuant to the *Williams v. Trans State Airlines* case . . .

(Tr.2067:17-2068:1) (emphasis added). Thus, although the trial court used the words similarly situated, the record is clear that it was using them in the *Williams* sense, where the appellate court at times called the “sufficiently similar” test the “similarly situated” test. *See Williams*, 281 S.W.3d at 873. After hearing extensive argument regarding Steve Schneider individually, the trial court then included the individuals discussed “in great detail” the previous day, and carefully explained its ruling:

All right. Under the ruling and guidance set forth in *Williams v. Trans State Airlines* on this question, the testimony presented by the proposed witnesses and plaintiff’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 plaintiff 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.2075:7-2076:3) (*See also* Pl.'s Subst. Br. pp. 12-13). Here, the trial court not only used the words "sufficiently similar," but it unquestionably engaged in the proper analysis by weighing the probative value of proffered evidence against its prejudicial effect and potential to confuse and distract the jury. This was no rigid application of the federal "similarly situated in all relevant respects" analysis. And the trial court, after hearing extensive argument regarding Steve Schneider, was careful to note that there had been a detailed discussion of the other co-employees the prior day. Not only did the trial court apply the correct standard, but it was painstakingly thorough in doing so.

The broad "sufficiently similar" standard cries out for application of the trial court's discretionary judgment, as is the case in judging legal relevance generally. "The trial court is in the best position to evaluate whether the potential prejudice of relevant evidence outweighs the relevance. [It] is vested with broad discretion in ruling questions of relevancy of evidence and, absent a clear showing of abuse of that discretion, the appellate court should not interfere with the trial court's ruling." *Pittman v. Ripley Cnty. Mem'l Hosp.*, 318 S.W.3d 289, 294 (Mo. App. 2010) (citations omitted).

### **3. Plaintiff's failure to analyze the 17 former employees individually**

Plaintiff was obligated to come forth with evidence showing that the other terminations were enough like his that their probative value outweighed their potential for

prejudice, confusion, and undue delay, and to do so with sufficient force so as to “shock the sense of justice” when the trial court failed to agree. *See Williams*, 281 S.W.3d at 872.

But in the argument associated with his First Point Relied on, Plaintiff fails to show any real connection between the termination of the former employees and his own, and fails to weigh any probative value against the potential for prejudice, delay and confusion. The majority of the argument under Plaintiff’s First Point Relied On is devoted to arguing that the trial court applied an incorrect legal standard. The only portion of the argument that addresses the possibility of error if the trial court applied the “sufficiently similar” standard is found at pages 78 to 81. Plaintiff provides a table, for which he cites nothing in the record, that purportedly shows Mark Donovan to have been “directly involved” in the termination of 13 (of the 17) employees, all of whom were over 40. *See Pl.’s Subst. Br. p. 79.* Plaintiff then asserts, again without citing any part of the transcript, that Plaintiff’s offers of proof show that Mark Donovan was involved in hiring eight younger employees to replace some of the 13 employees listed in the table. *See Pl.’s Subst. Br. p. 80.* He also cites the legal file in asserting that Mark Donovan was involved in the terminations of three other employees. *See Pl.’s Subst. Br. p. 80.*

Thus the only similarities Plaintiff alleges are that the former employees were all over 40, and that Donovan was purportedly “involved in” their firing. Nowhere does Plaintiff engage in any individualized analysis of these former employees, attempt to demonstrate additional similarities between the employees and himself, or explain what they would have testified to or how the exclusion of that testimony was prejudicial. Nor does he address the potential delay, confusion, and prejudice that would have resulted

from the admission of the testimony. This complete failure to engage in an individualized “sufficiently similar” analysis, which the parties appear to agree is the correct standard, is dispositive of Point I.

Nonetheless, without waiving its objection to Plaintiff’s Point Relied On, a review of the “17”—a review that Plaintiff failed to conduct in the argument portion of his Brief—shows that the trial court did not abuse its discretion in determining that they were not sufficiently similar to Plaintiff to allow them to testify without limits. First, virtually none of the former employees in question were terminated by Mark Donovan, the man who ultimately decided to terminate Plaintiff. Carl Peterson, the well-known former Chiefs general manager, resigned in 2008 before Donovan was even hired. (Tr.888:15-22). Anita Bailey and Ann Roach were let go as a result of Bill Newman’s decision to eliminate their division. (L.F.1125; 1132-33). They were informed of this decision in January 2009, again before Donovan was hired. (L.F.1125; 1132-33). Lisa Siebern and Lamonte Wilson were employed on the football side—not the business side headed by Donovan—and thus were terminated by General Manager Scott Pioli. (L.F.1126, 1163-68). Doug Hopkins, Gene Barr, and Pete Penland all voluntarily retired or resigned, and thus were not terminated by *anyone*. None of these former employees’ testimony could be evidence of discriminatory animus by Donovan.

Second, despite Plaintiff’s suggestions to the contrary, the trial court was presented with evidence that nine of the former employees had been let go as part of a reduction in force, and thus not replaced at all. (L.F.1125-26; 1132-38 Tr.1692:14-20).

Such layoffs—most coming in the face of a looming NFL work stoppage—are not sufficiently similar to Plaintiff’s firing to be admissible.

Third, literally none of the former employees whose testimony was limited shared a job title, job duties, or a supervisor with Plaintiff, and certainly none admitted to the insubordination that Plaintiff *concedes*. (Tr.1130-31).

A person-by-person analysis reveals many more differences between Plaintiff and the other former employees, differences that easily support the trial court’s discretionary decision to limit their testimony:

#### **Carl Peterson**

One of the 17 former employees that Plaintiff seeks to compare himself to is Carl Peterson, the former President and General Manager of the Chiefs. Pl’s Subst. Br. p. 6. But Peterson’s job duties—he was in charge of the entire Chiefs operations, both football and business—differed vastly from Plaintiff’s stadium maintenance work. (Tr.898:12-25). Peterson reported directly to Clark Hunt, who Plaintiff concedes was not a decisionmaker in his case. (Tr.886-889). Peterson’s termination in fact preceded the employment of every decisionmaker involved in Cox’s termination. (Tr.888:12-15). Plaintiff did not make an offer of proof regarding Peterson’s testimony. The trial court thus cannot have abused its discretion in excluding Carl Peterson’s testimony regarding his own termination.

#### **Larry Clemmons**

Larry Clemmons had a different supervisor than Plaintiff, reporting to Chief Financial Officer Dan Crumb. (L.F.1155). Clemmons was terminated by Crumb, who

was concededly not a decisionmaker here, for performance deficiencies in May 2011, seven months after Plaintiff was terminated for insubordination. (L.F.1157). Thus, Clemmons' termination would have had no probative value regarding discriminatory animus by Donovan or other claimed decisionmakers here. In addition, in Plaintiff's Objections to and Motion to Strike Defendant's Bill of Costs, Plaintiff argued that Clemmons' deposition costs should not be taxed based on Plaintiff's opinion that his testimony was "only relevant on a few discrete subjects at trial." (Supplemental Legal File at 5). Exclusion of testimony with such admittedly limited relevance cannot be a prejudicial abuse of discretion.

#### **Lisa Siebern**

Player Development Assistant Lisa Siebern, unlike Plaintiff, worked on the football operation side of the Chiefs organization. (L.F.1126; 1163-68). This fact alone makes her wholly dissimilar. Siebern was terminated by Scott Pioli, not Mark Donovan or any other person Plaintiff alleges was a decisionmaker here. (L.F.1126; 1163-68). Thus her testimony would not have been probative on the issue of whether discriminatory animus played a role in Plaintiff's termination, and the trial court easily had discretion to exclude it.

#### **Carol Modean**

Carol Modean was Mark Donovan's Administrative Assistant, an office position quite different from Plaintiff's. (L.F.1170). Donovan was Modean's direct supervisor, while Young and Hamilton were Plaintiff's direct supervisors (Tr.2926:10-14; 2937:14-18). Perhaps most importantly, Modean was not fired for insubordination. Her

testimony about her own termination would have had, at best, minimal relevance, and would have injected a host of side issues into the case about the particular grounds for her termination. Its exclusion cannot rise to the level of prejudicial error, and Plaintiff fails to argue to the contrary.

### **Lamonte Winston**

Lamonte Winston was the Director of Player Development for the Chiefs, reporting first to Carl Peterson and then to Scott Pioli. (L.F.1163-67). His job was football-related, and when his contract ended in 2010, Pioli, not Donovan, made the decision not to renew it. (L.F.1163-67). Even if his testimony regarding the circumstances of departure had some probative value, Plaintiff has not preserved its exclusion for review because he made no offer of proof regarding Winston at trial.

### **Doug Hopkins, Gene Barr, and Pete Penland**

Doug Hopkins voluntarily resigned to take another job in January 2011. (L.F.1172). Gene Barr voluntarily retired in August 2010. (L.F.1125-26; 1175). Pete Penland voluntarily retired in April 2011. (L.F.1125-26). These voluntary departures could not possibly have been evidence of discriminatory animus.

### **Anita Bailey and Ann Roach**

Anita Bailey and Ann Roach were both former Chiefs employees in the now-defunct customer service department, and were let go as part of a reduction in force. (L.F.1125; 1132) Contrary to Plaintiff's assertion, Donovan had nothing to do with Bailey's or Roach's departure—the decision to eliminate the customer service department was made by Bill Newman and occurred before Donovan was employed by the Chiefs.

(See L.F.1132-33). In addition, Bailey and Roach were let go as part of a reduction in force, and thus were not replaced by younger employees. L.F.1132-33. The trial court properly excluded Bailey and Roach's testimony regarding their terminations due to a lack of sufficient similarity to Plaintiff's.

### **Bill Newman**

Bill Newman's position was eliminated by Clark Hunt in May 2009, before any decisionmaker involved in Plaintiff's termination was even employed by the Chiefs, and one year and five months before Plaintiff was terminated for insubordination. (Tr.1692:14-20; L.F.1125-26). Newman was not replaced by a younger employee. (Tr.1692:14-20; L.F.1125-26). No offer of proof regarding Newman's testimony was made at trial. Exclusion of his testimony regarding his own termination was within the trial court's discretion.

### **Nadine Steffan**

Nadine Steffan was Denny Thum's executive assistant, so when Thum left his employment with the Chiefs in September 2010, Steffan's position no longer existed and she was terminated. Nothing about this termination—the job duties, the supervisor, or the circumstances—was at all similar to Plaintiff's termination. Nor did Plaintiff make an offer of proof.

### **Brenda Sniezek**

Brenda Sniezek was the Director of Community Relations for the Chiefs. (Tr.1049:4-6). She was let go as part of the January 2011 reduction in force in anticipation of the NFL lock-out, and she was not replaced by anyone. (L.F.1125). In

Plaintiff's Objections to and Motion to Strike Defendant's Bill of Costs, he argued that Sniezek's deposition costs should not be taxed because her testimony was "only relevant on a few discrete subjects at trial" (Supplemental Legal File at 5). Exclusion of testimony with such admittedly limited relevance could not have been prejudicial in an outcome-determinative way.

**Tom Stephens, Ken Blume, Evelyn Bray, and Pam Johnson**

These employees' positions were eliminated in the January 2011 in anticipation of the NFL lock-out. (L.F.1126). As with all reduction-in-force terminations, they were not replaced by any employees, much less younger ones. The circumstances surrounding these terminations are not sufficiently similar to Plaintiff's termination to render their exclusion an abuse of discretion. In addition, no offer of proof was made regarding either Blume or Johnson.

Plaintiff failed to establish that any of the former employees whose testimony was limited were sufficiently similar to himself for their terminations (or retirements) to constitute circumstantial evidence of discriminatory animus by Mark Donovan or any other decisionmaker in this case.

**4. The "costs" of admitting the testimony render it legally irrelevant**

Moreover, even if Point I had attempted to establish that each of the 17 former co-employees was extremely similar to Plaintiff such that their testimony was logically relevant, their testimony still would not be legally relevant because allowing it would have been so time-consuming, confusing, and potentially prejudicial that its exclusion

was separately justified here. “[L]egal relevance is determined by weighing the probative value of the evidence against its costs, including unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. Thus, logically relevant evidence is excluded if its costs outweigh its benefits.” *Cogdill v. Flanagan ex rel. Larson*, 410 S.W.3d 714,727 (Mo. App. 2013) (citation omitted).

Here, the risk of jury confusion of the issues, undue delay, cumulativeness, and unfair prejudice to the Chiefs was manifest. If Plaintiff had been allowed to question all of the former employees about *their* terminations, or terminations other than Plaintiff’s, a trial that took three weeks would not only have been extended indefinitely, but would have injected confusing and prejudicial evidence into the trial.

Hashing out the details of 17 different terminations would have necessarily devolved into mini age-discrimination trials. Plaintiff would have sought to establish that each former employee’s firing was age-related, and the Chiefs would have been forced to counter with their own evidence that each one was not.

This is illustrated by the testimony of Steven Schneider. After testifying that had been employed for at least 20 years (Tr.1299), and that he had been “terminated” by the Chiefs (Tr.1339), the Chiefs sought to establish that Schneider had in fact been terminated for condoning theft. However, the trial court sided with the Plaintiff in not allowing testimony about the reason Schneider was terminated, explaining: “I still believe, though, if we go into this line of questioning about . . . the situation surrounding his termination and the allegations of theft that it’s going to open the door to all sorts of

other collateral things that shouldn't come into this case. I think the prejudicial effect of that would outweigh any probative value . . . ." (Tr.1347:6-12).

Ironically, the risks of confusion of the issues and waste of time are illustrated by the Plaintiff's argument itself. Plaintiff asks this Court to place itself in the trial court's shoes and decide for itself whether the Chiefs' or the Plaintiff's version of events is accurate regarding each of the 17 former employees. Take, for example, Anita Bailey and Ann Roach, formerly employees in the Chiefs' customer service department. (Tr.3855:12-13; 1044:14-18; L.F.1125). In a sworn affidavit attached to the Chiefs' motion in limine, the Chiefs' head of human resources said that their positions were eliminated as part of a reduction in force. (L.F.1125). In the offer of proof regarding her testimony, Ms. Bailey acknowledged that she was told that she was being let go because "the department was being eliminated." (T.3861:18-19). Yet in his statement of facts, Plaintiff improperly asserts that "[i]n truth, the Customer Relations Department (and its function) was never eliminated; Bailey was replaced by a younger employee in her 30's." App. Subst. Br. p. 20. It is easy to see how asking the jury to resolve mini-trials regarding 17 former employees could be confusing and unduly time consuming. This shift of focus away from the ostensible focus of this case—Plaintiff's own termination—would have been confusing to the jury, unfair, and a waste of time.

In addition, the simple truth is that the trial court did not completely foreclose testimony from *any* of the other former employees. The jury instead heard substantial circumstantial evidence of age-based animus, rendering the admission of the excluded testimony cumulative. For example, the jury heard Brenda Sniezek testify that she

graduated from college in 1982 (Tr.1047:20-23), making her well over 40, and that she felt at one point that Scott Pioli was “asking how old [she] was.” (Tr.1069:25-1070:3). Sniezek testified that she heard another member of management call his cameramen “young guns,” which she interpreted as an age-related comment. (Tr.1081:1-10). She also testified that she heard Chiefs CFO Dan Crumb say “these old people think they’re entitled to everything,” which she interpreted as a criticism of older Chiefs employees. (Tr. 1090:3-9). When asked if she was still with the Chiefs, Sniezek testified “No.” (Tr.1099:13).

The jury heard Doug Hopkins, the Chiefs’ Director of Ticket Operations, testify that he also heard Dan Crumb say that he was “sick and tired of these old, entitled employees.” (Tr. 793:13-15). He testified that he took that statement “as a personal insult” because he “was the oldest person sitting in the room.” (Tr. 793:24-794:3), and that, immediately following the meeting, he complained to Krug, the director of human resources, that “it was the worst meeting [he had] ever been in, a horrible meeting . . . totally insulting” and “almost venomous in nature.” (Tr.797:7-25). Hopkins also testified that he was 61 years old at the time of Crumb’s statement. (Tr. 862:5-19). The jury heard Hopkins testify that he resigned the next day. (Tr.799:16-18).

In addition, Ann Roach testified that she began working for the Chiefs in 1966, and had worked for the Chiefs for 42 years. (Tr. 1379:25; 1380:7). She was allowed to testify, and repeat at least twice in the presence of the jury, that Carl Peterson told her that Clark Hunt “wanted to go in a more youthful direction” and was “want[ed] to possibly have younger people working there.” (Tr. 1396:6-7; 1399:8-14; 1414:21-25;

1415:1-3). She was even allowed to testify that immediately following the “youthful direction” remark, Peterson asked her if she would consider retiring. (Tr. 1399: 15-18). All of this testimony was admitted; excluded testimony was in the same vein, and therefore cumulative.

Critically, Plaintiff fails even to argue otherwise. In the short legal relevance portion of his Substitute Brief (pp. 73-74), Plaintiff simply repeats his mantra that the excluded evidence “cannot possibly be ‘overly prejudicial,’” without ever addressing the need for the jury to essentially hear and resolve 17 mini-trials, the delay and confusion associated with such an exercise, or the cumulative nature of the testimony that was excluded.

Plaintiff finally asserts that “the trial court never explained the nature of any *unfair prejudice* associated with the excluded evidence.” Pl.’s Subst. Br. p. 74 (emphasis in original). This is simply incorrect. For example, as shown, in discussing the exclusion of the Steve Schneider testimony, the court specifically explained that, because it would involve an extensive discussion of collateral matters (such as whether he was fired for his involvement in a theft ring), the excluded evidence was more probative than prejudicial. (Tr.1347:6-12). Similarly, in reconsidering its ruling on the motion in limine, the court specifically noted that the testimony from so many former employees would “serve to confuse and distract the jury.” (Tr.2075:25).

The trial court’s limited evidentiary exclusions were an effort to keep this case focused on Plaintiff’s employment, and did not abuse its wide discretion. The trial court applied the correct legal standard, properly weighing the probative value of the testimony

against its potential for prejudice, delay, confusion of the issues and cumulateness. Plaintiff fails to discuss the probative value of any individual former employee's testimony, or why that probative value outweighed the costs of presenting the testimony to the jury. The trial court did not abuse its considerable discretion in limiting testimony.

**E. Plaintiff in Any Event Was Not Prejudiced**

Finally, Plaintiff's first point fails on a more fundamental ground: even if the trial court somehow abused its discretion in limiting testimony about other employees' discrimination claims, Plaintiff has failed to show prejudice. He has specifically failed to show that limiting these witnesses' testimony was outcome determinative. *Compare Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo. App. 2009) (burden is on appellant to show that alleged abuse of discretion was outcome determinative). In fact, Plaintiff now says that he *would not have called all 17 witnesses*, but refuses to say whom he would have called. Pl.'s Subst. Br. p. 3 n.2. This makes it impossible to determine if a particular witness's exclusion was prejudicial. Prejudice is particularly difficult to demonstrate in light of the volume of evidence that Plaintiff *was* allowed to present to the jury, including numerous allegations of age-based bias by the Chiefs' management.

Plaintiff was able to introduce circumstantial evidence of the very kind he claims was improperly excluded. As discussed above, Brenda Sniezek, Doug Hopkins, Ann Roach and Steve Schneider—all former employees—all gave testimony which arguably provided circumstantial evidence of age-based animus within the Chiefs organization. Nonetheless, the jury concluded that age was not a contributing factor in Plaintiff's own

termination. Plaintiff fails to show how, or even argue that, more testimony like this would have changed the outcome of the trial.

Plaintiff in any event faced daunting obstacles to ever showing prejudice because of the admitted facts supporting his own termination. Plaintiff expressly admitted at trial that he was insubordinate, and that this was a ground for termination. (Tr.2211-12). Despite Mark Donovan's reversal of the first unauthorized raise Plaintiff gave to Russ Crowley, and despite Donovan's express instructions not to revisit that subject for at least a year, Plaintiff nevertheless unilaterally chose to reinstate *that same raise*. (Tr.2185:14-19). This was a clear ground for termination, even apart from Plaintiff's other performance problems. Plaintiff conceded as much, admitting that his conduct amounted to "insubordination," and admitting that such insubordination was grounds for termination under the CBA. (Tr.2211-12). He further admitted that, contrary to the Charge he filed with the MCHR, Crowley was not required by the CBA to receive the raise that Plaintiff surreptitiously tried to give him. (Tr.2185:20-2187:5). The jury understandably concluded that, in these circumstances, Plaintiff's termination was not motivated by discriminatory animus. Plaintiff cannot show that the trial court's evidentiary rulings affected the jury's verdict. Point I should be denied.

**II. The Court Properly Excluded as Unreliable Hearsay Testimony From Herman Suhr About A Comment He Supposedly Overheard Scott Pioli Make (Response to Plaintiff’s Point II).**

**Standard of Review**

Same as Point I. The trial court has broad discretion with respect to evidentiary rulings, and should be reversed only if there was an outcome-determinative abuse of that discretion. *Williams*, 281 S.W.3d at 872.<sup>10</sup>

\* \* \*

Plaintiff next argues that the trial court erred in excluding hearsay evidence about a comment allegedly made by Scott Pioli and allegedly overheard by Herman Suhr. Suhr claims he overheard Pioli say verbatim “I need to make major changes in this organization as so many employees of Carl Peterson are over 40 years old.” (L.F.1021). Putting aside the wholly implausible nature of this supposed remark,<sup>11</sup> the testimony was

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<sup>10</sup> As in Point I, Plaintiff now attempts to argue that the standard of review for Point II should be de novo. This argument was completely absent from Plaintiff’s court of appeals brief and is therefore barred by Rule 83.08.

<sup>11</sup> What supervisor would ever announce some deliberate intent to discriminate by citing the very “40-year-old” age cutoff that is a predicate for age discrimination claims?

inadmissible hearsay not subject to any exception. Plaintiff nevertheless maintains the “statement” was admissible as (1) the admission of a party-opponent, (2) evidence of discriminatory animus by the Chiefs, or (3) to impeach Pioli’s testimony.

The Court did not err in excluding Mr. Suhr’s testimony because it is hearsay, which, even if some exception applied, was far more prejudicial than probative. Moreover, Plaintiff has failed to show how this statement, had it been admitted, would have affected the outcome here given his own clear insubordination.

**A. The Excluded Comment is Not Admissible as an Admission of a Party Opponent Because Scott Pioli is Not a Party, and Personnel Decisions within the Business Department were not within the Scope of His Duties as a Chiefs’ Employee.**

Plaintiff first argues that the alleged statement by Scott Pioli, supposedly overheard by Herman Suhr, is not hearsay because it is the admission of a party-opponent, and is therefore admissible. Pl.’s Subst. Br. pp. 84-86.<sup>12</sup> Plaintiff is correct that, under *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 123-24 (Mo. banc

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<sup>12</sup> Plaintiff adds that the evidence would additionally be relevant to “corroborate[] other critical and relevant evidence namely the existence of the business owner’s plan to take the organization “in a more youthful direction.”” However, this language was not in the Point Relied On in Plaintiff’s court of appeals brief. As above, these changes violate Rule 83.08(b) and are not preserved for this Court’s review. *See Essex Contracting*, 277 S.W.3d at 656.

1995), an employee's statement can be admissible against an employer as an admission of a party-opponent if it is made within the scope of the employee's authority. App. Br. at p. 45. But where—as here—the employee's statements fall *outside* the scope of his authority, it follows that they *cannot* be an admission of a party opponent. See *Skay v. St. Louis Parking Co.*, 130 S.W.3d 22, 27 (Mo. App. 2004) (distinguishing *Bynote* and holding that employee's out of court statement regarding matters outside the scope of his duties was inadmissible hearsay).

The trial court correctly recognized that Plaintiff never established that Scott Pioli, who ran the Chiefs' *football* operations, had any role whatsoever in Plaintiff's termination on the *business* side of the Chiefs' organization. In excluding Suhr's testimony as to Pioli's statement, the trial court explained:

Keep in mind I have read all of your briefs on this and there's argument on this going back to last Friday and some last night and today. I have also reviewed Mr. Pioli's deposition in its entirety. I reviewed Mr. Suhr's deposition as well. I think it's helpful to back up as to what my previous ruling was on the defendant's original motion on this subject in limine. It was my determination and I was convinced based upon my reading on the deposition and, quite frankly, I'm even more convinced after hearing some of the testimony today that Mr. Pioli was not a decisionmaker in the termination of the plaintiff.

(Tr.947:16-948:2).

This ruling cannot have been an abuse of the trial court's discretion. Plaintiff effectively conceded this issue in his opening statement by failing to include Pioli when he listed the four decisionmakers on his termination. (*See* Tr.698-99) (listing Mark Donovan, Kirsten Krug, David Young and Brandon Hamilton as decisionmakers). *See DeArmon v. City of St. Louis*, 525 S.W.2d 795, 799 (Mo. App. 1975) (opening statements are considered judicial admissions when an attorney makes clear, unequivocal admission of fact, in which case they are binding on the party in whose interest they are made).

Scott Pioli would never have been involved in Plaintiff's termination. As General Manager, he ran the Chiefs' football operations, not their business operations, and certainly had nothing to do with stadium operations. (L.F.25-26). He had no involvement in evaluating Plaintiff's job performance or in the decision to terminate him. Because the alleged statement, to the extent it could be said to relate to Plaintiff or other employees not part of the Chiefs' football operations, was outside the scope of Pioli's authority, it cannot have been an admission of the Chiefs for purposes of this case. The trial court thus did not abuse its discretion. *Cf. Skay v. St. Louis Parking Co.*, 130 S.W.3d 22, 27 (Mo. App. 2004).

**B. Pioli's Alleged Comment Is In Any Event Not Admissible As Evidence of Discriminatory Animus Because it is a Stray Remark of a Non-decisionmaker.**

Plaintiff correctly recognizes that, even if the Pioli statement had been potentially admissible as an admission of a party opponent, Plaintiff would still have to demonstrate

its relevance. Pl.'s Subst. Br. p. 87. However, the fact that Pioli is a non-decisionmaker is fatal to this argument as well.

As the trial court correctly noted, even if the Pioli statement were admissible, because he was not a decisionmaker with respect to the Plaintiff's termination the statement would not be legally relevant because its probative value is outweighed by its potential for prejudice and confusion of the jury. "Mr. Pioli was not a decisionmaker, so the statement can't come in for that reason, because I think its prejudicial effect outweighs any probative value that it would have." (Tr.957:17-20) The trial court expressed concern that the jury would mistakenly attribute Pioli's remark to a decisionmaker involved in Plaintiff's termination, which is concededly not the case. (Tr.958:2-3). In making this ruling, the trial court at times referred to the Pioli statement as a stray remark of a non-decisionmaker.

Plaintiff criticizes the use of the term "stray remark" as an "unrecognized principle of law in Missouri which offers little analytical value in the admission of Pioli's statement." Pl.'s Subst. Br. p. 90. Amicus Missouri Association of Trial Attorneys similarly criticizes the trial court for its use of this "federal" term. MATA Amicus Br. pp. 9-12. But in its briefing to the trial court, *Plaintiff* cited exclusively federal case law in arguing that "stray remarks" should be *admitted* in circumstances like the present. (L.F.1513-1515). Plaintiff takes the same approach in this Court, citing federal case law for the proposition that "stray remarks" of non-decisionmakers are sometimes admissible. Pl.'s Subst. Br. pp. 90-91. To the extent the "stray remark" concept is analytically useful here, it supports the exclusion of the Pioli statement.

In employment discrimination matters, federal courts draw a distinction between comments by those actually involved in the employment decision—comments which can constitute evidence of discriminatory animus—and “stray remarks” of non-decisionmakers—which cannot. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Stray remarks include “statements by nondecisionmakers,” or “statements by decisionmakers unrelated to the decision itself.” *Price Waterhouse*, 490 U.S. at 277. The stray remark concept is based on the idea that, generally speaking, a discriminatory remark made by a non-decisionmaker is more prejudicial than probative, and therefore inadmissible. *See EEOC v. Liberal R-II School District*, 314 F.3d 920, 923 (8th Cir. 2002) (“The Supreme Court has defined direct evidence [of discrimination] in the negative by stating that it excludes ‘stray remarks in the workplace,’ ‘statements by nondecisionmakers,’ and ‘statements by decisionmakers unrelated to the decisional process itself.’”), *abrogated on other grounds, Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (quoting *Price Waterhouse*, 490 U.S. at 277 (1989); *Burgess v. A.M. Multigraphics*, 989 F.Supp. 1012, 1016 (E.D. Mo. 1997) (“[C]omments which demonstrate discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions [are to be distinguished] from stray remarks in the work place, statements by nondecisionmakers, or statements unrelated to the decisional process.... ‘Stray remarks’ are those made by decisionmakers or nondecisionmakers that are unrelated to the decision to the decision making process”). (Citation omitted). Pioli’s statement falls into the category of a “stray remark” because he was not involved in the decision to terminate Plaintiff.

No Missouri court has held that stray remarks from a non-decisionmaker are admissible, even when they are not hearsay. Although Plaintiff cites federal cases where courts have considered stray remarks as part of the total picture of discrimination, none of those cases reverses a trial court's decision to exclude or admit evidence. The occasional admission by federal courts of stray remarks or remarks from non-decisionmakers therefore speaks more to the breadth of a trial court's discretion in admitting or excluding evidence than it does to the inherent admissibility of stray remarks.

Whatever slight probative value the alleged statement might have is offset by its potential for prejudice and confusion of the jury. Allowing such evidence from an individual who admittedly lacked authority and decisionmaking power would not only waste time, but would mislead or confuse jurors as to the parties and conduct actually at issue in this case. *Stevinson v. Deffenbaugh Industries*, 870 S.W.2d 851, 860 (Mo. App.1993) (“[e]ven when evidence is relevant, it is within the discretion of the trial court to exclude the evidence if its probative value is outweighed by its prejudicial effect”); *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 104 (Mo. banc 1985) (“where the trier of fact is a jury, the trial court should determine, before admitting an item of evidence of doubtful or slight relevance, that the value of such evidence to prove the point in question outweighs its tendency to confuse”).

Even if Missouri courts had adopted the principle (which they have not) that stray remarks of non-decisionmakers may have some probative value in discrimination suits, any probative value here is outweighed by unreliability and by the potential for prejudice.

Here, the trial court, after concluding Pioli was not a decisionmaker in Plaintiff's termination, held:

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.

....

For example, the prejudicial effect of the jury attributing that stray remark to a decisionmaker in this case as to the plaintiff's termination outweighs any probative value the statement brings to the case.

(Tr.948:2-949:5). This ruling was well within the trial court's discretion, and frankly was superfluous due to the fact that Pioli's statement was not the admission of a party opponent.

### **C. The Alleged Remark is Not Admissible to Impeach Pioli**

Plaintiff next argues that, simply because Pioli testified in his deposition that he did not make alleged comment, Suhr's testimony should be admissible to impeach Pioli's supposed "prior inconsistent statement." Pl.'s Subst. Br. pp. 91-95. This argument is completely outside the scope of Plaintiff's Second Point Relied On, and is not preserved for the Court's review. *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 346 (Mo. App. 2006) (matters first raised in argument portion of brief and not included in point relied on are not preserved for appellate review).

On a substantive level, the jury never heard Pioli testify that he did not make the statement. *See* Tr.1283:2-18 (Pioli testifying outside the presence of the jury that he did not make the statement as part of an offer of proof). A trial court does not abuse its discretion in excluding a statement offered to impeach a prior inconsistent statement the jury has never heard. *State v. Mitchell*, 693 S.W.2d 155, 158 (Mo. App. 1985) (cannot impeach with a prior inconsistent statement unless inconsistent testimony is shown); *Englebert v. Flanders*, 670 S.W.2d 19, 21 (Mo. App. 1984) (requiring prior inconsistent statement by testifying witness in order to allow impeachment). Plaintiff has not appealed the exclusion of Pioli's testimony that he did not make the statement, only Suhr's that he did.

Moreover, witnesses cannot be impeached regarding collateral matters. *See, e.g., Bussell v. Leat*, 781 S.W.2d 97, 101 (Mo. App. 1989); *Lineberry v. Shull*, 695 S.W.2d 132, 136 (Mo. App. 1985). Here, the trial court heard Pioli's consistent testimony that he did not make the remark, and saw Suhr's testimony that he did, as part of an offer of proof. (Tr.1283:2-18; L.F.1021). It correctly decided there was no need to allow Plaintiff to first create some "need" for impeachment, and then use hearsay to impeach. In this situation, there was no prior inconsistent statement to impeach, and there was no abuse of discretion.

**D. The Alleged Comment is Unreliable.**

As the trial court separately recognized, whatever probative value the alleged comment might have had is in any event offset by the considerable evidence undermining its reliability. Missouri courts "view the facts in the light most favorable to the trial

court's decision and defer to the trial court's superior ability to determine the credibility of witnesses." *Pope v. Child Abuse and Neglect Review Bd.*, 309 S.W.3d 362, 365 (Mo. App. 2010) (determining reliability of hearsay statement).

In his deposition, Suhr mentioned that he was "old and forgetful," and that he had to "spend a long time thinking about the comment" in order to remember it correctly. (L.F.1079, 1081). He further admitted that he heard the comment from 20-25 feet away, while Pioli was behind a wall, and out of sight. (L.F.1082). The comment was allegedly made by Pioli in the late summer or early fall of 2009, over a full year before Plaintiff's termination. (L.F.1080). And the supposed remark itself, which conveniently referenced the exact age discrimination threshold of "40 years old," was preposterous on its face. The trial court specifically held that, due to the uncertainty surrounding the circumstances of the statement, it would not be admitted. (Tr. 2094:12-24). Considering the inconsistency of every fact surrounding Pioli's alleged comment, the trial court properly exercised its discretion in excluding it.

**E. Plaintiff has Failed to Show How He was Prejudiced by the Exclusion of Suhr's Hearsay Testimony.**

Finally, even if the trial court had somehow abused its discretion in excluding Suhr's unreliable hearsay testimony, Plaintiff has failed to establish that the exclusion was prejudicial. There is no reason to believe Suhr would have been a particularly compelling witness in light of his difficulty remembering details. And even if the jury had ultimately become convinced that Pioli made the alleged comment, it is not clear why that would have an outcome-determinative impact on the verdict, especially because

Plaintiff admitted that Pioli was not a decisionmaker, and because Plaintiff did not deny the insubordination that led to his firing. Point II should be denied.

### **III. The Trial Court Properly Quashed the Deposition Notice and Trial Subpoena of Clark Hunt (Response to Plaintiff's Point III).**

#### **Standard of Review**

A trial court's decision to quash a subpoena is reviewed for abuse of discretion. *State v. Hayes*, 15 S.W.3d 779, 785 (Mo. App. 2000).

#### **A. Plaintiff Failed to Establish What Mr. Hunt's Testimony Would Have Added to His Case.**

Plaintiff sought to depose and later to subpoena for trial the Chiefs' Chairman and CEO, Clark Hunt, a resident of Dallas, Texas, an individual not involved in the Chiefs' day-to-day operations. (L.F.208-236). The trial court did not abuse its discretion in quashing both<sup>13</sup> Plaintiff's deposition notice and Plaintiff's trial subpoena because the Chiefs showed "good cause to limit discovery through the deposition of Mr. Hunt since

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<sup>13</sup> Plaintiff's challenge of both rulings renders Point III multifarious in violation of Rule 84.04. *McLean v. First Horizon Home Loan, Corp.*, 369 S.W.3d 794, 800 n.4 (Mo. App. 2012) ("A statement of a point relied on . . . violates Rule 84.04 when it groups together contentions not related to a single issue. As such it is multifarious. . . . Improper points relied on, including those that are multifarious, preserve nothing for appellate review.") (internal citations omitted).

annoyance, oppression, undue burden and expense outweigh the need for such discovery.” (L.F.379).

Although this Court reviews both the quashed discovery and trial subpoenas for a prejudicial abuse of discretion, the universe of discoverable information exceeds that of admissible evidence at trial. *See State ex rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669, 672 (Mo. App. 2010); *see also* Rule 56.01(b). That is, if the Plaintiff cannot even establish the need to *discover* information, he could never demonstrate that the same information would be admissible at trial.

This Court has recognized that “[e]ven if [a] top-level employee has discoverable information, the organization or its top-level employee may seek a protective order.” *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). Because “[r]ank-and-file employees perform most tasks, while top-level employees are responsible for coordination and oversight[,]” the information that they could provide is often inferior to persons in lower positions within an organization. *Id.* at 606. Discovery from a “top-level executive” can therefore be prohibited if the party opposing the discovery establishes “good cause.” *Id.* at 607. “For top-level employee depositions, the court should consider: whether other methods of discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent.” *Id.*

Plaintiff did not contend that Mr. Hunt was in any way involved in evaluating Plaintiff's performance in stadium operations, or in the decision to terminate him. Mr. Hunt was not identified by Plaintiff in his explanation of his evaluation and termination

either in his Charge, his Petition, or his Interrogatory Responses. (L.F.31-47; 202-208). As explained above, Plaintiff's counsel expressly identified the four decisionmakers in opening statement. Clark Hunt was not mentioned, which amounts to a binding admission under Missouri law that Mr. Hunt was not a decisionmaker. *See DeArmon*, 525 S.W.2d at 799.

Plaintiff contends that because he received a quasi form-letter, ostensibly from Mr. Hunt, Mr. Hunt somehow had knowledge of Plaintiff's work performance. But the "letter at issue merely expresses gratitude to the Plaintiff for twelve years of service, appreciation for his ability to manage a variety of projects, and wishes Plaintiff all the best in the future." (L.F.164-65, Ex. 10). The trial court carefully considered each side's arguments:

Plaintiff also seeks the deposition of Clark Hunt, Chairman and Chief Executive Officer of the Kansas City Chiefs Football Club. Plaintiff claims the basis for taking Mr. Hunt's deposition is a letter that Mr. Hunt wrote to Plaintiff following Plaintiff's termination. Plaintiff argues that the letter directly contradicts not only the purported reasons for Plaintiff's termination, but also the sworn testimony of each witness who has provided testimony on Defendant's behalf. Plaintiff also contends that Mr. Hunt made comments regarding his own age relative to the age of Mr. Pioli's at the time of Mr. Pioli's hiring. Defendant argues in opposition that the letter from Mr. Hunt merely expresses gratitude to the Plaintiff and provides no basis for his deposition. Defendant argues that, as Chairman and CEO of

the entire organization, Mr. Hunt was not involved in Plaintiff's work evaluation nor did he participate in the decision to terminate Plaintiff.

(L.F.193) The trial court then considered Missouri law regarding top-level executives discussed above, and concluded that the Chiefs had shown "good cause" that discovery not be had. (L.F.193-94). This was not an abuse of discretion.<sup>14</sup>

Moreover, even if it was an abuse of the trial court's discretion to quash the deposition request, Plaintiff was not prejudiced. The letter from Mr. Hunt was referred to on several occasions at trial, and was introduced into evidence by Plaintiff on the fourth day of trial. (Tr.730:5-17; Tr.1327:18-19; 1331:8-14). This renders Mr. Hunt's testimony cumulative, and disposes of any allegation of prejudice. *See, e.g., Adkins v. Hontz*, 337 S.W.3d 711, 720 (Mo. App. 2011) ("Even if the exclusion of . . . evidence was an abuse of the trial court's discretion, we cannot find the exclusion was prejudicial" where the excluded evidence was cumulative of other evidence admitted at trial).

Because the trial court was within its discretion in limiting *pretrial* discovery, it is impossible for Plaintiff to demonstrate prejudicial error regarding the *trial* subpoena. First, as noted above, the universe of discoverable information exceeds that of admissible evidence at trial. *Beetem*, 317 S.W.3d at 672. As a matter of logic, information that is not discoverable is certainly not admissible. Second, Plaintiff failed to make an offer of proof

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<sup>14</sup> On appeal Plaintiff makes no assertion as to what he expects Mr. Hunt's testimony would be, why that testimony is admissible, or why its exclusion was prejudicial. *See* Pl's Subst. Br. pp. 99-104. This is fatal to his Third Point.

regarding Mr. Hunt's testimony. *State v. Foulk*, 725 S.W.2d 56, 66 (Mo. App. 1987) ("When an objection is sustained to proffered evidence, the offering party must show its relevancy and materiality by way of an offer of proof in order to preserve the issue for appellate review."). Plaintiff cannot establish any error, much less a prejudicial abuse of discretion, regarding the quashing of the trial subpoena.

The trial court did not abuse its discretion, and Plaintiff was not prejudiced by the exclusion of Mr. Hunt. Point III should be denied.<sup>15</sup>

#### **IV. There Was No Error in Closing Arguments That Warrants A New Trial (Response to Plaintiff's Point IV).**

##### **Standard of Review**

Plaintiff's counsel admittedly failed to object to what he calls "character attacks" during closing argument, so the trial court's failure to strike them *sua sponte* is reviewed for plain error. *State v. Vorhees*, 342 S.W.3d 446 (Mo. App. 2011). Plaintiff's separate contention that the trial court erred in refusing to grant a new trial based on alleged misstatements

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<sup>15</sup> Plaintiff's Third Point Relied On now includes the sweeping argument that Missouri law imposes literally no limit on who may be subpoenaed to appear at trial. *See* Pl.'s Subst. Br. p. 101. In addition to the pure implausibility of the proposition that a plaintiff may require anyone at all to appear at trial and testify, regardless of whether they have admissible testimony, this argument appeared nowhere in Plaintiff's court of appeals brief. Rule 83.08(b) prohibits Plaintiff from raising it here.

of the law during closing is reviewed for abuse of discretion. *McMillin v. Union Elec. Co.*, 820 S.W.2d 352, 355 (Mo. App. 1991).

\* \* \*

Plaintiff complains that, during closing argument, counsel for the Chiefs impugned the character of Plaintiff's counsel, accused Plaintiff's counsel of dishonesty, and misstated the law. Pl's Subst Br. pp. 107-111. But Plaintiff's counsel did not object at the time to any of this claimed "character assassination," and he in any event received, *and agreed to*, a curative instruction in response to his lone relevant objection on the statement of the law. The Chiefs' closing was in any event based on Plaintiff's *own admissions* about incorrect statements made by his attorneys, and were well within the bounds of acceptable closing argument. The trial court's denial of Plaintiff's motion for a new trial cannot have been an abuse of discretion, much less plain error.

**A. Plaintiff's Counsel Agreed to a Curative Instruction, Waiving any Error Involving Alleged Misstatement of the Law During the Chiefs' Closing Argument.**

Plaintiff contends that the Chiefs misstated the law with respect to the consequence of Plaintiff's omitting relevant, unfavorable facts from the Charge of Discrimination. Pl's Subst Br. p. 111. Although unmentioned by Plaintiff in his substitute brief, the Court sustained Plaintiff's objection and offered a curative measure that Plaintiff's counsel *agreed was sufficient*:

MR. EGAN: Blatant misstatement of the law, and he should know it. The Missouri Commission on Human Rights has nothing to do with determining whether someone has a claim or does not have a claim. That is a misstatement of the law. All they do is it's an administrative agency. You file with them. You request a right to sue. Blatant misstatement of the law. Indicates up. *I'm going to ask for an instruction to have the jury disregard it.*

MR. ROMANO: Judge, they find where there's probable cause to believe that a violation occurred. That's their function.

MR. EGAN: That is absolutely false.

THE COURT: I'm familiar with the process.

MR. EGAN: Because by doing it, you have a right to sue.

THE COURT: What I can tell the jury is that they should be guided by the instructions from this Court.

...

MR. EGAN: Yes, sir. *That will do.*

(Tr.3959:10-3960:5(emphasis added)).

Plaintiff now argues that a new trial is required because the curative instruction was not good enough. But “[f]ailure to make a timely request for further relief when an

objection has been sustained may be deemed a waiver or abandonment of further remedial relief.” *McMillin v. Union Elec. Co.*, 820 S.W.2d 352, 355 (Mo. App. 1991). “A party cannot object to the admission of certain evidence or argument, purposely delay making a request for further relief and then use the evidence to its advantage.” *Id.* “Nor can a party wait to evaluate the impact of the evidence on the jury or delay for any other strategic reason, without giving a clear intention to waive or abandon the request.” *Id.*

Moreover, even if Plaintiff’s counsel had preserved the error by requesting additional relief (like a mistrial), the trial court is in a better position to assess the prejudicial effect of improper argument, and to evaluate whether any resulting prejudice can be cured by an instruction to the jury. *Woods v. Friendly Ford, Inc.*, 248 S.W.3d 699, 707 (Mo. App. 2008). The jury is presumed to have followed the curative instruction, *id.*, and there is no basis here for reversal.

**B. Plaintiff’s Counsel Made No Other Objections, and the Trial Court Cannot Be Convicted Of Plain Error**

The requirement of timely and specific objections fully applies to objections regarding non-evidentiary matters, like closing arguments. *See, e.g., State v. Stuckey*, 680 S.W.2d 931, 937 (Mo. banc 1984) (objections to closing arguments must be timely); *Mueller v. Storbakken*, 583 S.W.2d 179, 186 (Mo. banc 1979) (any objection to closing argument was foreclosed by “failure to object to the allegedly erroneous argument at the time it was made.”); *Peters v. ContiGroup*, 292 S.W.3d 380, 391 (Mo. App. 2009) (objection must be timely and on the record). Failure to properly object to closing argument results in a waiver of any objection to that argument on appeal. *State v. Hall*,

319 S.W.3d 519, 523 (Mo. App. 2010) (no objection, and thus, waiver, where counsel approached the bench and indicated his displeasure with State's argument but did not expressly object or request a mistrial or a curative instruction and the court did not rule but simply told counsel "to get off that . . . topic"). A motion for a new trial may not be used to raise for the first time objections that should have been raised at trial. *See State v. Mahoney*, 70 S.W.3d 601, 605 (Mo. App. 2002); *Stone v. City of Columbia*, 885 S.W.2d 744, 747 (Mo. App. 1994).

It remains the general rule in Missouri that any prejudicial effect of improper argument by counsel is waived if proper and timely objection is not made to the trial court, so that the court may take appropriate steps under the circumstances to remove that prejudicial effect. *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 428 (Mo. 1958). The trial court is in the best position to appraise the consequence of a closing argument, and the appellate court may intervene only if it concludes that the trial court has abused its discretion. *Titsworth v. Powell*, 776 S.W.2d 416, 420 (Mo. App. 1989). In closing argument, counsel is afforded wide latitude to suggest inferences from the evidence, and the trial court similarly has broad discretion to determine if the particular line of argument is proper. *Id.*

Despite the strident tone of Plaintiff's brief, Plaintiff did not make a single objection to what he now calls "character assassination" before receiving the adverse verdict. Instead of objecting to the purported theme of Defendant's closing arguments, Plaintiff's counsel used his own rebuttal strategically, making the tactical argument that

the *Chiefs*' closing (and, presumably, any "character assassination") was nothing more than an attempt to distract the jurors from the law and the facts. (Tr. 3889-90).

Having made a strategic decision not to object, Plaintiff cannot now complain that the trial court erred in allowing the argument to be made. Plaintiff preserved nothing in Point IV for review.

Nor should the plain error rule help Plaintiff. Reversals for plain error are rare in civil cases. *Robertson v. Cameron Mut. Ins. Co.*, 855 S.W.2d 442, 447 (Mo. App. 1993). A manifest injustice or miscarriage of justice is necessary. *Id.* Plain error review is a two-step process. First, the court determines whether the plain error claim—on its face—provides a substantial basis for believing that manifest injustice or miscarriage of justice has occurred. *Eagan v. Duello*, 173 S.W.3d 341, 348 (Mo. App. 2005). Plaintiff cannot make this basic showing, thus ending the plain error inquiry.

There was nothing improper about the statements Plaintiff complains about; they certainly did not "go[] to the extreme" such that they warrant a new trial even in the absence of any objection. *Compare Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 428 (Mo. 1958). It was an established fact at trial that Plaintiff's charge of discrimination contained incorrect information, and that Plaintiff's attorney, not Plaintiff, was the source of the incorrect statements. (Tr. 2315:1-2323:14). Specifically, Plaintiff's charge of discrimination falsely asserted that Plaintiff gave Crowley the surreptitious pay raise because it was mandated by the collective bargaining agreement, when the collective

bargaining agreement required no such thing.<sup>16</sup> (Tr. 2321:11-15). Plaintiff's counsel took the blame for the false statement. (Tr. 2315:1-2323:14). Once Plaintiff testified in a way that was inconsistent with his own charge of discrimination, there was nothing inappropriate about bringing that inconsistency to the attention of the jury. Moreover, statements such as "don't let these lawyers fool you" are standard fare in closing arguments. This is nothing like charging "both plaintiff and her counsel with knowingly presenting false and perjured testimony." *Critcher*, 315 S.W.2d at 428.<sup>17</sup>

Even if Plaintiff could clear the first hurdle of plain error review, he must still show an actual manifest injustice or miscarriage of justice. *Id.* This he cannot do. Plaintiff has admitted he was insubordinate. (Tr.2212:2-9). The Chiefs fired him for that reason (as well as for other performance-based concerns), as Plaintiff actually admitted at the time to another employee. (Tr.1130-31). The jury accordingly found that age did not play a role in the decision to terminate. Plaintiff's complaints about the Chiefs' closing

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<sup>16</sup> The charge of discrimination also contained other, more minor inaccuracies. (Tr.2315:1-2323:14).

<sup>17</sup> Ironically, *Plaintiff's* counsel expressly called testimony from three Chiefs employees "lies." *See, e.g.*, Tr.3921 ("[I]n my town and at my house these are not called inaccuracies. These are called lies" (referencing testimony of Brandon Hamilton)); Tr.3924 (Chiefs employee David Young "told me a lie."); *see also* Tr.3922 (challenging the truthfulness of Kirsten Krug's testimony).

argument, even if they had merit, were not prejudicial, and cannot support reversal for plain error.

**V. Cumulative Error Does Not Warrant A New Trial (Response to Plaintiff's Point V).**

**Standard of Review**

To the extent individual claimed errors were not brought to the trial court's attention, a claim of cumulative error should likewise be reviewed under a plain error standard. *See Roberson v. Weston*, 255 S.W.3d 15, 19-20 (Mo. App. 2008). Moreover, "[a]ny number of non-errors cannot add up to an error." *Shepherd v. State*, 529 S.W.2d 943, 948 (Mo. App. 1975).

\* \* \*

Because at least one of the alleged errors was not objected to at the time of trial, the Chiefs submit that this Court should review Plaintiff's allegations of cumulative error under a plain error standard. "[T]o consider plain error in the context of cumulative error, where the individual claimed errors were not brought to the trial court's attention by proper objection, would essentially require us to find that the trial court had an obligation to sua sponte take a much more active role in trying the entire case than [Plaintiff] took or otherwise deemed appropriate during trial." *Roberson v. Weston*, 255 S.W.3d 15, 19-20 (Mo. App. 2008). This would effectively "eviscerate the trial court's opportunity upon proper objection to correct or remediate any of the claimed individual

errors and, thus, potentially avoid their claimed cumulative effect in the first instance.”  
*Id.* at 20.

As noted above, Plaintiff failed to properly object to a number of the allegedly improper statements made during the Chiefs’ closing argument. And he failed to make offers of proof with respect to seven supposedly similar witnesses and with respect to Clark Hunt.<sup>18</sup> Although he did properly preserve some of the alleged evidentiary errors, it is not clear how the cumulative error argument adds anything to those points, and Plaintiff provides no real guidance. None of trial court’s evidentiary rulings amount to an abuse of discretion, either alone or in combination. And Plaintiff has failed to establish prejudice with respect to any of the purported cumulative error because he has admitted to the dishonesty and insubordination for which he was terminated.

“Any number of non-errors cannot add up to an error.” *Shepherd v. State*, 529 S.W.2d 943, 948 (Mo. App. 1975). “[R]elief will not be granted for cumulative error when there is no showing that prejudice resulted from any rulings of the trial court.” *Kline v. City of Kansas City*, 334 S.W.3d 632, 649 (Mo. App. 2011). None of the points relied on by Plaintiff constitutes error. Nor does he ever explain how some combination of the alleged errors, even if not rising to the level of prejudicial or reversible error

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<sup>18</sup> Plaintiff also failed to discuss the supposedly similar witnesses and their testimony in his first point relied on with sufficient specificity to allow the Court to make an informed decision.

individually, somehow becomes error in the aggregate. Plaintiff's final point must be denied.

The trial court has broad discretion to rule on evidentiary matters. Plaintiff has failed to establish that it abused that discretion, much less that such abuse resulted in outcome-determinative prejudice. There is no error here, either alone or in combination, and the jury's verdict—reached after an exhaustive, three-week trial—should not be disturbed.

### CONCLUSION

The trial court's judgment should be affirmed in all respects.

Respectfully submitted,

POLSINELLI PC

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**CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT**

**RULES 103.04, 84.06(B) AND (C)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), according to the word count function of Word by which it was prepared, contains 20,187 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

/s/ Jon R. Dedon

Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was filed electronically this 18th day of March 2015, causing a copy of the same to be transmitted to counsel for all parties of record in this action.

/s/ Jon R. Dedon  
Attorney for Respondent