In the
Missouri Court of Appeals
Western District

DEBORAH HERVEY,	)	
	)	
Respondent,	)	**WD72899**
	)	
v.	)	**OPINION FILED:**
	)	**September 13, 2011**
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable J. Dale Youngs, Judge

Before Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

The Missouri Department of Corrections appeals the Judgment of the Circuit Court of Jackson County in favor of Deborah Hervey for a claim of disability discrimination under the Missouri Human Rights Act, Sections 213.010 - 213.137 ("MHRA").[1] We affirm.

[1] All statutory citations are to RSMo 2000 as updated through the 2011 Cumulative Supplement, unless otherwise indicated.

Factual Background[2]

Deborah Hervey ("Hervey") filed an employment discrimination lawsuit against her employer, the Missouri Department of Corrections ("DOC"), pursuant to the MHRA, alleging that DOC terminated her employment because of her mental disability and in retaliation for her complaints of discrimination.

The following facts were elicited at trial. Having been successfully employed as a probation officer by DOC on two prior occasions, Hervey was rehired in 2007. On her first day back to work, Hervey informed DOC that she had a "mental disorder diagnosis" and she may need "accommodations" as a result. Some accommodations were provided to Hervey and some were not. There was continuous conflict between Hervey and her supervisor over whether she actually needed the accommodations and which accommodations would be provided to her. Regardless, DOC claimed it found Hervey's work performance unsatisfactory and terminated her employment for failing to successfully complete her nine-month probationary period. Hervey, on the other hand, argued the DOC discriminated against her because of her disability and discharged her in retaliation for complaining of discrimination.

Following a jury trial on both claims of disability discrimination and retaliatory discharge, the jury returned a verdict in Hervey's favor, awarding her actual and punitive damages for her claim that the DOC discriminated against her due to a disability.[3] The jury assessed damages in the amount of $127,056 in actual damages, and following

[2] "The pertinent facts are viewed in the light most favorable to the jury's verdict." *Hayes v. Price*, 313 S.W.3d 645, 648 (Mo. banc 2010).

[3] Although the jury found in favor of Hervey on her retaliation claim, the jury awarded no damages, and Hervey agreed to dismiss this theory of recovery with prejudice.

additional evidence on the issues of punitive damages in a bifurcated hearing, awarded Hervey $2,500,000 in punitive damages. After taking into consideration post-trial motions, the trial court issued its Judgment awarding Hervey the following: $127,056 in actual damages; $97,382.50 in attorneys' fees; $36,288 in front pay; and $1,303,632.50 in punitive damages. The trial court reduced the punitive damage award pursuant to section 510.265.[4] The trial court denied DOC's Motion for Judgment Notwithstanding the Verdict and DOC's Motion for New Trial and, in the Alternative, Motion to Amend Judgment, and DOC now appeals. Further factual details will be provided in the analysis section below as necessary.

Analysis

In Point One, DOC argues that the trial court erred in giving Hervey's disability discrimination verdict director, Instruction Number Eight, because the instructions did not require the jury to find that Hervey was disabled and, therefore, did not follow the substantive law of Missouri and misdirected the jury, and thus gave the jury a roving commission.

"We review a trial court's decision not to give a proffered instruction under a *de novo* standard of review, determining whether it was supported by the evidence and the law." *Rader Family Ltd. P'ship, L.L.L.P. v. City of Columbia*, 307 S.W.3d 243, 252 (Mo. App. W.D. 2010) (citing *Marion v. Marcus*, 199 S.W.3d 887, 893–94 (Mo. App.

[4] The trial court reduced the punitive damages award of the jury, which was $2,500,000, pursuant to section 510.265.1(2) which sets a cap of punitive damages at five times the net amount of the judgment awarded to the plaintiff. The trial court added the $127,056 in actual damages, $97,382.50 in attorneys' fees, and $36,288 in front pay and multiplied the total by five to arrive at the punitive damages award of $1,303,632.50. ($127,056 + $97,382.50 + $36,288) x 5 = $1,303,632.50.

W.D. 2006)). "We reverse only if the refusal caused prejudice materially affecting the merits of the action." *Id*. (citing *Marion*, 199 S.W.3d at 894).

The verdict directing instruction submitted to the jury for Hervey's discrimination claim was Instruction Number Eight, which conformed to MAI 31.24. Instruction Number Eight states:

> Your verdict must be for the Plaintiff if you believe:
> First, Defendant discharged Plaintiff; and
> Second, disability was a contributing factor in such discharge; and
> Third, as a direct result of such conduct, Plaintiff sustained damage.

DOC argues that this instruction was inadequate because it omitted a finding on the second element of Hervey's disability discrimination claim, namely whether Hervey was legally disabled.

We have previously held that a claim of disability discrimination under the MHRA requires the plaintiff "to show that: (1) she is [disabled][5]; (2) she was discharged; and (3) there is evidence from which to infer that the [disability] was a factor in her discharge." *Medley v. Valentine Radford Commc'ns, Inc.*, 173 S.W.3d 315, 320 (Mo. App. W.D. 2005) (citing *Devor v. Blue Cross & Blue Shield of Kansas City*, 943 S.W.2d 662, 665 (Mo. App. W.D. 1997)).

[5] The descriptive term used in *Medley* and *Devor* was "handicap" rather than "disability." However, "disability" is the descriptive term used now and the definitions of the two are almost identical. "Handicap" was defined as "a physical or mental impairment which substantially limits one or more of a person's major life activities, a condition perceived as such, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job." Section 213.010(10) (1994). Disability is now defined as a "physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job." Section 213.010(4).

"Jury instructions are not to be viewed in isolation, but are to be taken as a whole to determine whether error occurred." *State v. Storey*, 40 S.W.3d 898, 912 (Mo. banc 2001). Instruction Number Six was also submitted to the jury and states the following:

> "A disability is a physical or mental impairment which substantially limits one or more of a person's major life activities, which with or without reasonable accommodation does not interfere with performing the job."

This definition comports verbatim to the definition of disability in the MHRA, section 213.010(4), and adheres to the required findings elaborated in *Medley*. The jury was also instructed in Instruction Number Two that they "should consider each instruction in light of and in harmony with the other instructions, and [they] should apply the instructions as a whole to the evidence. Words and phrases *which are not otherwise defined* for you as part of these instructions should be accorded their ordinary meaning." (Emphasis added.) We must assume the jury followed the instructions provided by the trial court and that they are jurors of reasonable intelligence. *Brown v. Cedar Creek Rod & Gun Club*, 298 S.W.3d 14, 21 (Mo. App. W.D. 2009) (citing *Cole ex rel. Cole v. Warren Cnty. R–III Sch. Dist.*, 23 S.W.3d 756, 759 (Mo. App. E.D. 2000)); *Berra v. Danter*, 299 S.W.3d 690, 703-04 (Mo. App. E.D. 2009). Per Instruction Number Eight, to render a verdict in favor of Hervey, the jury was required to find that "*disability* was a contributing factor in [her] discharge." (Emphasis added.) This point was extensively argued by both parties in closing arguments to the jury. Therefore, we must assume that the jury considered the provided definition of "disability," which comports with the substantive law on what a plaintiff must prove to establish disability discrimination under the MHRA.

The dissent analogizes this case to *Agri Process Innovations Inc. v. Envirotrol, Inc*., 338 S.W.3d 381 (Mo. App. W.D. 2001), but we believe this case is distinguishable. In *Agri Process*, this court found error when the trial court failed to submit as an essential element whether an agent acted within the scope and course of his agency when that fact was contested. *Id*. at 387-88. In that case, while the phrase "scope and course of agency" was defined in a separate instruction, it did not appear anywhere in the verdict director. *Id*. at 388. In the case at bar, "disability" was defined in Instruction Number Six, and Instruction Number Eight, the verdict director, required the jury to find that "disability was a contributing factor" in Hervey's discharge. Whereas in *Agri Process*, as the dissent correctly argues, nowhere in the verdict director did it require the jury to consider whether the agent was acting within the scope and course of his agency, here the jury was instructed to consider whether disability, properly defined in the jury instructions, contributed to Hervey's discharge. Hervey's alleged disability could not be a contributing factor absent a finding by the jury that she did in fact have a disability, as was fully explained to the jury by the attorneys for both parties in their respective closing arguments.

Further, the dissent also argues that, because the trial court failed to modify MAI 31.24 to include a separate paragraph submitting the issue of disability, the court did not pattern Instruction Number Eight after MAI 31.24. We disagree. The dissent agrees that "MAI 31.24 as drafted does not expressly address the submission of a plaintiff's status as a member of a protected classification when that status is contested." However, the dissent goes on to argue that the parenthetical, "(here insert one or more of the protected

classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age, or disability)," and its inclusion of the phrase, "supported by the evidence," shows the MAI's drafters intent that this be submitted as a separate paragraph when the issue is contested. If the submission of the plaintiff's disability is not "supported by the evidence" then the defendant would be entitled to a directed verdict. We do not believe that the trial court's failure to alter MAI 31.24 in a way that is not expressly sanctioned or contemplated by the MAI or its notes on use warrants a finding that the court failed to pattern the instruction in conformity with MAI 31.24 and, therefore, committed reversible error.

We do not endorse the verdict directing instruction given in this case as a model, and in cases where the plaintiff's disability is a contested issue, would certainly encourage trial judges to submit that issue in a separate paragraph in the verdict director. We also encourage the Missouri Supreme Court Committee on Jury Instructions to address this issue in future amendments or comments to MAI 31.24. However, we cannot find that it was reversible error for the trial court to follow the MAI as currently drafted.

Point One is denied.

In Point Two, DOC argues the trial court erred in giving Hervey's Instruction Number Six because it did not follow the substantive law of Missouri in that it did not properly define "disability" as requiring that Hervey was able to perform the essential functions of her job with or without reasonable accommodation and that any of the

requested accommodations would have enabled Hervey to perform the essential functions of the job.

Before addressing this point, we first point out that DOC has committed a substantial violation of the briefing requirements of Rule 84.04. In its argument, the DOC claims the trial court committed six distinct errors with regard to Instruction Number Six.[6] Rule 84.04(d)[7] "'requires that a proper point relied on must: (1) identify the ruling or action of the trial court that is being challenged on appeal; (2) state the legal reason or reasons for the claim of reversible error; and (3) explain in summary fashion why, in the context of the case, the legal reason or reasons support the claim of reversible error.'" *White v. White*, 293 S.W.3d 1, 13 (Mo. App. W.D. 2009) (internal citations omitted). Rule 84.04(e) restricts argument to the issues raised in the point relied on. "Issues not raised in the point relied on [. . .] are deemed abandoned." *Jones v. Jones*, 296 S.W.3d 526, 528 n.1 (Mo. App. W.D. 2009) (citing Rule 84.04(e)). "Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and on arguments that have not been made." *White*, 293 S.W.3d at 13 (internal citations omitted) (quoting *Bridges v. Am. Family Mut. Ins. Co.*, 146 S.W.3d 456, 458 (Mo. App. W.D. 2004)).

[6] DOC argues all of the following: the trial court (1) did not adequately define "disability" regarding essential functions of Hervey's job; (2) failed to instruct the jury on how to determine what was an essential function of Hervey's job; (3) failed to properly instruct the jury as to what was a reasonable accommodation; (4) did not require Hervey to prove that any of her requested accommodations would have been effective; (5) defined phrases that were not used in the verdict director; (6) impermissibly defined reasonable accommodation when it spoke of a duty.

[7] All rule citations are to the Missouri Supreme Court Rules (2011), unless otherwise indicated.

The only claim of error that was properly raised in the Point Relied On and preserved on appeal was DOC's claim that Instruction Number Six failed to define disability as requiring Hervey to prove that she could perform the *essential functions* of her job with or without reasonable accommodation and that any of the requested accommodations would have enabled Hervey to perform the essential functions of the job.[8]

Instruction Number Six was a non-MAI jury instruction.

> Rule 70.02 governs the provision of instructions to juries. *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 168 (Mo.App. E.D.2006). "When there is no applicable MAI instruction, a non-MAI instruction may be given if it conforms to the requirements of Rule 70.02 in that it is simple, brief, impartial and free from argument." *City of Kansas City v. Habelitz*, 857 S.W.2d 299, 303 (Mo.App. W.D.1993). "And in giving such a non-MAI instruction, 'the court must adopt an instruction that follows the substantive law and can be readily understood by the jury.'" [*Morgan v. State*, 272 S.W.3d 909, 911 (Mo.App. W.D.2009)] (quoting *Lewis v. State*, 152 S.W.3d 325, 329 (Mo.App. W.D.2004)); Rule 70.02(b).

Pool v. Farm Bureau Town & Cnty. Ins. Co. of Missouri, 311 S.W.3d 895, 903 (Mo. App. S.D. 2010). Our review of whether a jury has been properly instructed is *de novo*. *Id*.

[8] We also note that even if properly presented as separate Points Relied On, a number of DOC's arguments were not preserved for appeal. The failure to raise a claim of error in a motion for a new trial leaves those claims unpreserved for appellate review. *See* Rule 78.07(a). "[W]hen a defendant fails to raise the issue of instructional error in his motion for a new trial, he waives his claim of error." *State v. Smith*, 90 S.W.3d 132, 139 (Mo. App. W.D. 2002) (citing *State v. Wright*, 30 S.W.3d 906, 911 (Mo. App. E.D. 2000)). In its motion for a new trial, DOC only argued to the trial court that Instruction Six was in error because:

(1) the instruction did not require Hervey to prove she could perform the essential functions of her job;

(2) the instructions did not properly inform the jury of what was a reasonable accommodation and, therefore, did not allow the jury to find that certain requested accommodations were unreasonable; and

(3) the instructions did not require Hervey to prove that her requested accommodations would have been effective. For this reason also, any other claims not listed above would have been waived by DOC for not presenting them in its Motion For New Trial.

Instruction Number Six required the jury to find that "[a] disability is a physical or mental impairment which substantially limits one or more of a person's major life activities, which with or without reasonable accommodation does not interfere with performing the job." DOC argues that the failure to include in the instruction that the impairment does not interfere with performing the "essential functions of the job" means that they were prejudiced because it "allowed the jury to find that Hervey was a disabled person, even if she could not perform the essential functions of her job as a [Probation Officer]."

The MHRA defines "disability" as "a physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job." Section 213.010(4). Instruction Number Six comported verbatim with the MHRA's statutory definition of disability. The language that DOC argues is necessary to include comes from *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 822 (Mo. banc 2007). In *Daugherty*, the Missouri Supreme Court found that a person arguing a claim under the MHRA must show she is capable of performing her job. *Id.* The Court went on to say that:

> [t]he MHRA protects employees from disability discrimination for a disability that is 'unrelated to a person's ability to perform the duties of a particular job or position' and that 'does not substantially interfere with a person's ability to perform the essential functions of the employment' at issue. 8 CSR 60–3.060(1)(F).

Id. "Essential Functions" is not specifically defined in the regulations of the State of Missouri. The problem with DOC's argument is that the term "job" is sufficiently broad, and a finding by the jury that Hervey could perform her job necessarily means that she could perform the essential functions of her job, essential functions constituting a subset of functions deemed fundamental to the position and not merely marginal. *See id*. Also, "[i]t is 'generally sufficient to couch a verdict directing instruction substantially in the language of the statute.'" *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 459 (Mo. banc 2006) (quoting *Rooney v. Lloyd Metal Products Co*., 458 S.W.2d 561, 570 (Mo.1970)). We do not find error here where the submitted jury instruction comported verbatim to the MHRA's definition of disability.

Further, DOC complains that the instructions did not require the jury to find that with or without reasonable accommodations, Hervey could perform the essential functions of her job. As in Point One above, the jury's finding that Hervey had a disability per Instructions Six and Eight also means that the jury found that "with or without reasonable accommodation," Hervey's "physical or mental impairment" "does not interfere with performing the job." Again, this language tracks the MHRA's definition of disability in section 213.010(4) and was sufficient.

A new trial is required "only if the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error." *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 593 (Mo. App. W.D. 2008). DOC has not established that the proffered jury instructions were improper or that the jury would have been misdirected, misled, or confused.

Point Two is denied.

In Point Three, DOC argues the trial court erred in awarding punitive damages of $1,303,632.50 under section 510.265 because the trial court did not properly apply section 510.265 in that the statute requires the trial court to calculate the limit on punitive damages using the "net amount of the judgment awarded to the plaintiff against the defendant" and the trial court's inclusion of attorneys' fees in the net amount is contrary to the plain language of the statute and this Court's precedent on statutory interpretation.

Questions of statutory interpretation are questions of law which are reviewed *de novo*. *Knipp v. Dir. of Revenue*, 984 S.W.2d 147, 151 (Mo. App. W.D. 1998). Therefore, no deference is afforded to the trial court. *Id.*

The jury awarded Hervey $2,500,000 in punitive damages, which the trial court subsequently reduced to comply with the statutory limits. Section 510.265 sets a limit on punitive awards and reads:

> 1. No award of punitive damages against any defendant shall exceed the greater of:
> (1) Five hundred thousand dollars; or
> (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.

The question on appeal is straightforward. Does the language "net amount of the judgment awarded to the plaintiff" include or exclude damages for attorneys' fees? Both parties agree that this particular question is one of first impression. When construing statutes, this court must attempt to discern the intent of the legislature from the plain language of the statute and give effect to that intent. *State v. Barraza*, 238 S.W.3d 187, 192 (Mo. App. W.D. 2007).

We agree with the trial court that section 510.265 requires attorneys' fees to be included in the calculation of punitive damages. "Net amount of the judgment" is not defined in the statute. "When the Legislature has not defined a word or phrase, a court can examine other legislative or judicial meanings of the word or phrase, and can also ascertain a word or phrase's plain and ordinary meaning from its definition in the dictionary." *Mayfield v. Dir. of Revenue, MO*, 335 S.W.3d 572, 574 (Mo. App. E.D. 2011). Black's Law Dictionary defines "net" as "[t]hat which remains after all allowable deductions, such as charges, expenses, discounts, commissions, taxes, etc., are made." BLACK'S LAW DICTIONARY 1040 (6th ed. 1990). Webster's Third International Dictionary defines "net" as "free from all charges or deductions" as "opposed to gross." WEBSTER'S INTERNATIONAL DICTIONARY 1519 (3rd 1961). DOC argues that if attorneys' fees are not excluded from the calculation of punitive damages, it would render the words "net amount of the judgment" superfluous. We disagree. Section 510.265 is a general punitive damages provision and applies to many civil actions, not just employment actions under the MHRA. There are certainly scenarios in which a judgment awarded to the plaintiff is offset by an amount the plaintiff owes back to the defendant on a counterclaim or is offset by the amount of a codefendant's settlement. If section 510.265 were viewed in the vacuum of its applicability to the MHRA, then it might appear that the phrase "net amount of the judgment" is superfluous. However, when viewed in the context of all the categories of cases to which it is applied, the words "net amount of the judgment" is clearly not superfluous. We do not believe including attorneys' fees in the

calculation of punitive damages would by itself render the words "net amount of the judgment" superfluous.

Section 213.111 specifically authorizes the award of attorneys' fees to the plaintiff in discrimination actions because the legislature intended to make sure the plaintiff could afford to bring a discrimination suit and to ensure that the plaintiff was made whole in the award of damages. The legislature has found that the costs of the reasonable fees of the plaintiff's attorney, to take her case to court, is an element of the damages caused to the plaintiff by the discriminatory actions of the defendant. This is one of the few causes of action where the legislature has authorized a recovery of attorneys' fees, so one can infer that it was important to the legislature that they exempt these actions from the "American Rule" that each party pay her own attorney fees. *See Lett v. City of St. Louis*, 24 S.W.3d 157, 162 (Mo. App. E.D. 2000). Often in discrimination cases, the actual monetary harm to the employee is minimal, but discrimination is so insidious in society that the legislature has found it necessary to allow the assessment of punitive awards to punish the wrongdoing and deter future discriminatory conduct. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 771 (Mo. banc 2007) (quoting *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996)) ("The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct.") Including the award of attorneys' fees in calculating the final cap on the punitive damages award furthers this goal. We believe this was the legislature's intent in section 213.111. The actual judgment shows a total award of moneys to the plaintiff, which includes the amount calculated for reasonable attorneys' fees. We affirm the trial court's finding that it

was proper to include the amount of attorneys' fees in determining the cap on punitive damages under the MHRA.

Point Three is denied.

In Point Four, DOC argues the trial court erred in submitting punitive damages to the jury and in denying DOC's motion for judgment notwithstanding the verdict and for a new trial because the recovery of punitive damages is barred by the State's sovereign immunity, in that the General Assembly has prohibited recovery of punitive damages in all tort actions and did not expressly waive the State's sovereign immunity from punitive damages in enacting the MHRA.

Whether the State has waived its sovereign immunity is a question of statutory interpretation and is subject to *de novo* review. *Howard v. City of Kansas City*, 332 S.W.3d 772, 787 (Mo. banc 2011); *Hogan v. Bd. of Police Comm'rs of Kansas City*, 337 S.W.3d 124, 130 (Mo. App. W.D. 2011).

Generally, without an express statutory waiver, the State cannot be sued without its consent. *McNeil Trucking Co., Inc. v. Missouri State Highway and Transp. Comm'n*, 35 S.W.3d 846, 848 (Mo. banc 2001). DOC argues that the State has not waived its sovereign immunity with respect to the DOC under the MHRA.

The MHRA defines "employer" to include "the state, or any political or civil subdivision thereof." Section 213.010(7). The MHRA makes it unlawful for an "employer" to discriminate against an employee who has a disability as defined under the MHRA. Section 213.055(1). The MHRA also allows a court to award actual and punitive damages, costs, and attorneys' fees to the prevailing party. Section 213.111(2).

The Supreme Court of Missouri has recently addressed the issue of sovereign immunity and the MHRA. In *Howard*, the Court specifically addressed whether a potential employee could recover punitive damages against a municipality for gender discrimination and answered in the affirmative. *Howard*, 332 S.W.3d at 776-78. The Court reasoned in *Howard* that: (1) the plain language of the MHRA supported such a finding; *Id*. at 787-88 and (2) the Missouri Legislature had accepted this court's decision in *Brady v. Curators of Univ. of Missouri*, 213 S.W.3d 101, 108 (Mo. App. E.D. 2006), which held that the Legislature intended to allow the recovery of punitive damages against a state university under the MHRA. *Id*. at 788. The Court clarified in *Howard* that the Legislature, in enacting the MHRA, "intended to treat the state and its subdivisions in the same manner as it treats other employers." *Id*. 788. In that case, as a matter of statutory interpretation, the Court found that the MHRA clearly and unequivocally allows employees (or potential employees) to recover punitive damages from subdivisions of the State. The same also applies here to DOC, which is a Department of the State. *See* Chapter 217. DOC has offered no compelling argument against this conclusion and we are bound to follow latest Missouri Supreme Court precedent. *State v. Aaron*, 218 S.W.3d 501, 511 (Mo. App. W.D. 2007).

Point Four is denied.

In Point Five, DOC argues the trial court erred in admitting irrelevant and unduly prejudicial testimony of multiple prior unrelated allegations of discrimination and retaliation, because the evidence was irrelevant in that it involved neither Hervey nor disability discrimination and served only to inflame the minds of the jury.

> The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. banc 2000). This standard gives the trial court broad leeway in choosing to admit evidence, and its exercise of discretion will not be disturbed unless it is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *State v. Freeman*, 269 S.W.3d 422, 426–27 (Mo. banc 2008), quoting, *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). In part, such broad leeway is granted to ensure the probative value of admitted evidence outweighs any unfair prejudice. *Freeman*, 269 S.W.3d at 427, quoting, *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). For evidentiary error to cause reversal, prejudice must be demonstrated. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009).

Mitchell v. Kardesch, 313 S.W.3d 667, 674-75 (Mo. banc 2010) (internal quotation marks omitted).

DOC argues that the admitted non-cumulative testimony by witnesses Cadena Brim ("Brim") and Cherie Johnson ("Johnson") as to other alleged discrimination they endured from the DOC prejudiced the DOC and requires reversal.

As to Johnson, DOC complains that her testimony was unfairly prejudicial. However, the DOC never objected at trial to the testimony of Johnson on the basis that alleged "prior bad acts and character that was irrelevant and highly prejudicial." "[F]ailure to object at the earliest opportunity to the admission of evidence or argument of counsel constitutes a waiver of the claim." *State v. Barnett*, 980 S.W.2d 297, 304 (Mo. banc 1998).

> A point on appeal must be based upon the theory voiced in the objection at trial and an appellant cannot expand or change on appeal the objection as made. *Carroll v. Kelsey*, 234 S.W.3d 559, 563 (Mo.App. W.D.2007). A point on appeal may not enlarge or change the objection made at trial. *Berra v. Danter*, 299 S.W.3d 690, 703 (Mo.App. E.D.2009).

Kline v. City of Kansas City, 334 S.W.3d 632, 647 (Mo. App. W.D. 2011) (internal quotation marks omitted). DOC's claim of error with respect to witness Johnson is therefore waived.

As to witness Brim, she testified that DOC retaliated against her for testifying on behalf of other DOC employees who had filed discrimination claims against DOC. DOC argues that admitting this into evidence was error because Brim was not similarly situated to Hervey and the evidence was unfairly prejudicial. However, here DOC failed to object to Brim's testimony concerning her allegations of retaliation. At trial, DOC renewed its motion to exclude the witness. However, the motions in limine never specifically refer to witness Brim but only "testimony or any other evidence which relates to any supposed maltreatment of employees." Looking further, the objection in the motion in limine refers to evidence "that supervisors acted in conformity therewith their characters for meanness." Nowhere can we find an objection to Brim's testimony regarding her claim of retaliation (DOC has not identified in its briefing where their supposed objection to this testimony by Brim is located). At trial, DOC's only voiced objection to Brim's testimony was that DOC was afraid Brim was going to get into the specifics of the discrimination claim of the third party for whom she had previously testified. The judge assured DOC that the testimony was not going to get into the specifics of that third party discrimination claim but was only allowed to show Brim was engaging in a protected activity, for which DOC allegedly retaliated against Brim. Nowhere, either in the motions in limine or at trial, did DOC object to Brim's testimony on the basis on which it now requests relief from this Court; that the DOC likely discriminated against Hervey

because it was acting in accordance with its character to retaliate against employees complaining of discrimination. This claim of error is, therefore, not preserved. *See Kline*, 334 S.W.3d at 647.

Point Five is denied.

In Point Six, DOC argues the trial court erred in admitting evidence of disability law outside of the jury instructions because such evidence was irrelevant and prejudicial in that the jury is to obtain the law only from approved instructions. Again, "[t]he admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson*, 9 S.W.3d at 603.

DOC argues evidence of disability law outside the jury instructions improperly appeared in two separate forms. First, DOC argues the testimony of Bill Johnson ("Bill"),[9] a DOC Human Relations Officer, that the DOC was required under law to enter into the interactive process to determine accommodations was improper and unfairly prejudicial. DOC has failed to cite to exactly what testimony by Bill they claim was improper. DOC merely asserts that "[t]he evidence erroneously admitted included statements by Bill Johnson that DOC was *required under law* to enter into the interactive process to determine accommodations for plaintiff under the [Americans with Disabilities Act] ADA." However, the record is clear that the trial court agreed with DOC that such testimony was inappropriate and agreed to restrict testimony regarding the ADA to the process actually sought by Hervey and not to legal requirements of the ADA. DOC has

[9] No disrespect or familiarity is intended in the use of Mr. Johnson's first name, but we use it for clarity's sake to distinguish him from another witness, Cherie Johnson.

failed to provide any instance where the trial court failed to sustain an objection on this basis.

Further, the trial court offered a limiting instruction to the jury during Bill's testimony to clarify that evidence regarding accommodations sought and policies in place at the time were admitted only to determine whether Hervey was disabled, whether disability was a contributing factor in her discharge, and whether DOC retaliated against Hervey. The proffer of a limiting instruction that instructed the jury to consider only the evidence in the context of Missouri's disability law makes the likelihood that DOC suffered prejudice in this regard minimal. *See State v. Porter*, 241 S.W.3d 385, 399 (Mo. App. W.D. 2007) (quoting *State v. Myers*, 997 S.W.2d 26, 35 (Mo. App. S.D. 1999)) ("A limiting instruction may be sufficient to avoid prejudice, and the trial court is in the best position to determine the impact on the jury.")

Second, DOC argues that exhibits sixty-two, sixty-three, and sixty-four were improperly admitted because they consisted of disability statutes which were not the law of the case and the jury is to obtain the law only from approved jury instructions. The trial court allowed the three exhibits to be admitted so that Hervey could cross-examine witness Vickie Meyers as to whether she trained her staff regarding certain portions of the law. The judge gave a thorough limiting instruction to the jury, saying

> These statutes and regulations are not being received nor are they to be considered by you as a declaration of the law that would guide your deliberations in the case. That law will come from me in the instructions that will come at the close of all the evidence in the case.

"It is generally presumed that a jury will properly follow an instruction given by the court." *State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999). The trial court limited the purpose to which this evidence could be used and thereby sufficiently avoided any potential prejudice that could have been suffered by the introduction of this evidence. *See Porter*, 241 S.W.3d at 399.

Point Six is denied.

Conclusion

For all of the reasons set forth herein, the judgment of the trial court is affirmed. As the prevailing party, we grant Hervey's motion for attorney's fees on this appeal. Although this court has "the authority to allow and fix the amount of attorney's fees on appeal, we exercise this power with caution, believing in most cases that the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested." *Rosehill Gardens, Inc. v. Luttrell*, 67 S.W.3d 641, 648 (Mo.App.W.D.2002). Therefore, we remand this matter to the trial court for the sole purpose of determining and ordering reasonable attorneys' fees for Hervey on this appeal.

_____

Gary D. Witt, Judge

Newton, Presiding Judge, concurs.
Martin, Judge, dissents in separate opinion.

In the
Missouri Court of Appeals
Western District

DEBORAH HERVEY,	)	
	)	
Respondent,	)	**WD72899**
	)	
v.	)	**OPINION FILED:**
	)	**September 13, 2011**
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	
	)	
Appellant.	)	

DISSENTING OPINION

I respectfully dissent from the majority opinion's conclusion that Hervey's disability discrimination verdict director was not prejudicially erroneous despite its failure to require the jury to find a contested essential element of Hervey's case--that Hervey was disabled. I would reverse the trial court's judgment and remand this matter for a new trial.

The verdict directing instruction submitted to the jury for Hervey's discrimination claim was Instruction Number Eight. Instruction Number Eight required the jury to find as follows:

Your verdict must be for Plaintiff if you believe:
First, Defendant discharged Plaintiff; and
Second, disability was a contributing factor in such discharge; and
Third, as a direct result of such conduct, Plaintiff sustained damage.

"An instruction authorizing a verdict must require a finding of all ultimate facts necessary to sustain the verdict except those which have been unmistak[ab]ly conceded by both parties." *Young v. Kansas City Power & Light Co*., 773 S.W.2d 120, 125 (Mo. App. W.D. 1989).

A claim of disability discrimination under the MHRA requires a plaintiff "to show that: (1) she is [disabled][1]; (2) she was discharged; and (3) there is evidence from which to infer that the [disability] was a factor in her discharge." *Medley v. Valentine Radford Commc'ns, Inc*., 173 S.W.3d 315, 320 (Mo. App. W.D. 2005) (citing *Devor v. Blue Cross & Blue Shield of Kansas City*, 943 S.W.2d 662, 665 (Mo. App. W.D. 1997)). Instruction Number Eight expressly required the jury to find whether Hervey was discharged, and whether disability was a contributing factor in Hervey's discharge, the second and third essential elements of a disability discrimination claim described in *Medley*. The verdict director did not, however, expressly require the jury to find that Hervey was disabled, the first essential element of a disability discrimination claim described in *Medley*.

"As a general rule, it is not error for the trial court to fail to instruct on a factual issue or proof element on which there is no serious dispute at trial in that no prejudice results." *Rice v. Bol*, 116 S.W.3d 599, 613 (Mo. App. W.D. 2003). However, in this case, whether Hervey was disabled was a hotly contested factual issue. "It is error to

[1] See footnote 5 in majority opinion, which is incorporated herein by reference.

submit an instruction that assumes or omits a controverted fact that is essential to the plaintiff's claim." *Agri Process Innovations, Inc. v. Envirotol, Inc.*, 338 S.W.3d 381, 387 (Mo. App. W.D. 2011) (citing *Young*, 773 S.W.2d at 125).

The majority acknowledges that Instruction Number Eight was not a model of clarity for submission of a disability discrimination claim where the fact of disability is in dispute and recommends that in such cases, the issue of a plaintiff's status as a member of a protected classification be submitted in a separate paragraph in the verdict director. The majority nonetheless concludes that the use of Instruction Number Eight did not constitute reversible error because it was patterned after Missouri Approved Instruction ("MAI") 31.24 as currently drafted.

It is true that prejudicial error is presumed if an *applicable* MAI instruction is not given. *Nagaragadde v. Pandurangi*, 216 S.W.3d 241, 244 (Mo. App. W.D. 2007). However, "MAI and its Notes on Use are not binding to the extent they conflict with the substantive law." *Letz v. Turbomeca Engine Corp*., 975 S.W.2d 155, 167 (Mo. App. W.D. 1997) (citing *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997)). Thus, where the facts of a case require, an MAI must be appropriately modified to be consistent with the applicable substantive law.

MAI 31.24 does not submit as a separate essential element of a discrimination case under the MHRA the requirement to find that the plaintiff is a member of a protected classification. Instead, MAI 31.24 as drafted presumes that a plaintiff's status as a member of a protected classification is not in dispute. MAI 31.24 provides, in pertinent part:

> Second, *(here insert one or more of* ***the protected classifications supported by the evidence*** *such as race, color, religion, national origin, sex, ancestry, age, or disability)* was a contributing factor in such *(here, repeat alleged discriminatory act, such as "failure to hire", "discharge", etc.)*, and

(Bolded text emphasis added.) In the ordinary case, a plaintiff's status as a member of a protected class is not in dispute, and may in fact be self evident, permitting the mere substitution of the appropriate protected classification where indicated, and as instructed, in paragraph second of MAI 31.24.

However, where a plaintiff's status as a member of a protected class is in dispute, the substantive law requires that the jury find, as an essential element of the plaintiff's claim, that the plaintiff is a member of the protected classification claimed. *See Medley*, 173 S.W.3d at 320. MAI 31.24 as drafted does not expressly address the submission of a plaintiff's status as a member of a protected classification when that status is contested. Though the Notes on Use to MAI 31.24 do not provide guidance about how the instruction should be modified when a plaintiff's status as a member of a protected classification is in dispute, it cannot be reasonably argued that the parenthetical in paragraph second of MAI 31.24 permits the insertion of a protected classification into paragraph second of the instruction when doing so is not "supported by the evidence," *i.e.*, when the issue of protected classification is disputed. Thus, MAI 31.24 must be modified when a plaintiff's status as a member of a protected classification is in dispute to insert as paragraph second the predicate, and essential, element that the plaintiff is a member of the protected class she claims. I do not agree, therefore, with the majority's conclusion that Instruction Number Eight was patterned after MAI 31.24. Rather, the

parenthetical discussion in paragraph second of MAI 31.24 reasonably anticipates modification will be required where insertion of a protected classification into paragraph second is *not* supported by the evidence because the plaintiff's status is in dispute. Even if the parenthetical reference in paragraph second of MAI 31.24 cannot be so read, it was error to give MAI 31.24 without modification to comport with the substantive law when Hervey's status as a member of the protected classification of disabled individuals was in dispute.

Here, the Missouri Department of Corrections ("DOC") timely objected to the verdict directing instruction tendered by Hervey and specifically objected on the basis that the verdict directing instruction failed to submit the essential (and contested) element that Hervey was disabled. In addition, DOC tendered a verdict directing instruction that was a modified form of MAI 31.24 as it inserted as paragraph second the following:

Second, plaintiff is disabled as defined in Instruction No. ___, and

The verdict directing instruction tendered by DOC was refused.[2]

At oral argument, counsel for Hervey conceded that it would not have been error to submit a verdict directing instruction in this case which required the jury to find, based on a separately enumerated paragraph, that Hervey was disabled. The majority opinion agrees, and in fact recommends, that it would be preferred to submit the essential element of a plaintiff's status as a member of a protected classification in a separately enumerated paragraph of the verdict directing instruction when that status is in contest.

[2] DOC's tendered and refused verdict directing instruction also varied from MAI 31.24 in that it added a paragraph third requiring the jury to find that Hervey complained to DOC that she was being discriminated against on the basis of her disability.

Hervey argues and the majority concludes, however, that although it would not have been error to submit the essential element of Hervey's status as disabled in a separately enumerated paragraph in the verdict directing instruction, it was not error to fail to do so. The majority concludes that the reference to "disability" in paragraph second of the verdict directing instruction did not suggest to the jury that Hervey's status as disabled was undisputed because "disability" was defined in a separate instruction in a manner which required the jury to find that Hervey satisfied the definition. I respectfully disagree.

As the majority correctly notes, "[j]ury instructions are not to be viewed in isolation, but are to be taken as a whole to determine whether error occurred." *State v. Storey*, 40 S.W.3d 898, 912 (Mo. banc 2001). That principle has been frequently applied in cases to defeat a claim that a verdict directing instruction so misdirects, misleads, or confuses the jury as to result in prejudice to the party challenging the instruction. Yet, I have not located, nor has the majority opinion cited, a single Missouri case which has applied this principle as to permit the implication that the jury has been instructed to find an essential element of the plaintiff's case by combining the mere mention of a word in a verdict director with a separate instruction defining that word.

The jury in the instant case was instructed as to the definition of "disability" in Instruction Number Six which provided:

> A disability is a physical or mental impairment which substantially limits one or more of a person's major life activities, which with or without reasonable accommodations does not interfere with performing the job.[3]

The definition of "disability" in Instruction Number Six did not direct the jury to find that Hervey was disabled. The reference to "disability" in paragraph second of Instruction Number Eight did not cross-reference Instruction Number Six and certainly did not instruct the jury to determine whether Hervey was disabled as defined in Instruction Number Six.

The majority notes that Instruction Number Two told the jury that they:

> [S]hould consider each instruction in light of and in harmony with the other instructions, and [they] should apply the instructions as a whole to the evidence. Words and phrases which are not otherwise defined for you as part of these instructions should be accorded their ordinary meaning.

I agree with the majority's observation that we must assume the jury followed the instructions. *See Brown v. Cedar Creek Rod & Gun Club*, 298 S.W.3d 14, 21 (Mo. App. W.D. 2009). It is for precisely that reason that I cannot presume that the jury read Instruction Number Six and Instruction Number Eight to require a finding that neither instruction directed them to make. It is more likely that the definition of disability in

[3] There is no pattern instruction defining "disability" in the context of claims under the MHRA. Nor does MAI require the word "disability" to be defined in an MHRA case. I agree with the majority, however, that the "not in MAI" Instruction Number Six defining disability was appropriately submitted to the jury in this case. In fact, "disability" likely should be defined in every disability discrimination case, whether or not the plaintiff's status as disabled is in contest, as the legal definition of "disability" does not necessarily comport with the common parlance or understanding of the word. *See Brock v. Firemens Fund of Am. Ins. Co.*, 637 S.W.2d 824, 827 (Mo. App. E.D. 1982) ("Even if not mandated by MAI, however, a trial court must define for the jury legal or technical terms occurring in the instructions, for their meaning is not within the ken of the ordinary juror."). DOC argues that even though the definition of disability given in Instruction Number Six was drawn directly from the legislature's definition of "disability" found at section 213.010(4), the definition was erroneous because it failed to incorporate the concept of interference with a person's ability to perform the essential functions of a job discussed in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 822 (Mo. banc 2007). Notwithstanding the discussion in *Daugherty*, I agree with the majority that it is not error to use a definition of disability crafted by the legislature and drawn from the MHRA.

Instruction Number Six was treated as merely informative, just as suggested by Instruction Number Two, and thus not inconsistent with the conclusion that reference to "disability" in paragraph second of Instruction Number Eight implied that disability was not in contest. It is far more likely that the jury did exactly as they were told by the Instructions read as a whole, and did ***not*** take the uninstructed step of determining whether the definition of disability applied to Hervey.

"To reverse a jury verdict on the ground of instructional error, it must appear that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction." *Rice*, 116 S.W.3d at 606. "In determining whether the jury was misdirected, misled or confused by an instruction, [the question] is 'whether an average juror would correctly understand the applicable rule of law' being conveyed thereby." *Id.* (quoting *Lashmet v. McQueary*, 954 S.W.2d 546, 550 (Mo. App. S.D. 1997)). Here, the applicable rule of law that needed to be conveyed to the jury was the need for the jury to find that Hervey was disabled. The jury was never asked to make that finding. An average juror would not, in this author's opinion, presume, ***without being instructed to do so***, that she was supposed to decide whether Hervey was disabled merely because disability was a defined term.

In fact, we held precisely that in *Agri Process Innovations, Inc. v. Envirotrol, Inc*. In *Agri Process*, we held it was error to fail to submit as an essential element in a verdict directing instruction whether an agent acted within the scope and course of his agency where that fact was contested, and where the finding of that fact was essential to sustain a verdict in favor of the plaintiff. *Id*. at 387-88. We concluded that although "scope and

course of agency" was defined in a separate instruction, "the question of *whether* [agent] acted within the scope and course of his alleged agency with [principal] was not actually submitted to the jury in the verdict director. ***Defining of a necessary term does not constitute submission of a necessary issue***." 338 S.W.3d at 388 (bolded text emphasis added). We found the omitted essential element in the verdict director constituted prejudicial error because "the central factual issue in the case (and one that a reasonable fact-finder could have decided either way) was never decided by the jury. The jury was also misdirected, misled, or confused because, from reading the verdict director, an average juror would have thought that the jury was not required to find" the contested essential element. *Id*. at 389.

The circumstances in *Agri Process* are identical in all material respects to the instant case.[4] The definition of disability contained in Instruction Number Six, even when read in combination with the verdict directing instruction contained in Instruction Number Eight, did not direct the jury to find that Hervey was disabled. This misdirected, misled, or confused the jury, particularly as the jury was never instructed that it should determine the applicability of the definition of disability to the facts of the case. It was prejudicial to DOC to treat the definition of disability as the functional equivalent of submission of an essential element of Hervey's case--whether she was disabled--to the

[4] I acknowledge that in *Agri Process*, the term "scope and course of agency" was defined, but that term was not used at all in any other instruction, including the verdict director. 338 S.W.3d at 388. Clearly, under such a circumstance, a definition cannot cure a verdict director's failure to require the jury to find an unmentioned essential element notwithstanding a related definition. However, I do not read *Agri Process* as applying only to situations where a definition dangles unattached to use of the defined word in another instruction. The general principle articulated in *Agri Process* that the "[d]efining of a necessary term does not constitute submission of a necessary issue" is a principle of general application. *Id*.

jury. *See Syn, Inc. v. Beebe*, 200 S.W.3d 122, 130-31 (Mo. App. W.D. 2006) (holding it is error to "relegate[] a predicate finding to a subsequent instruction").

"For prejudice to be found sufficient to reverse for instructional error, the error must have materially affected the merits and outcome of the case." *Rice*, 116 S.W.3d at 606. I have no difficulty concluding that this standard has been met in this case, as the failure to submit an essential element of Hervey's case to the jury for determination relieved Hervey of the obligation of proving all of the essential elements of her case. *See Nagaragadde*, 216 S.W.3d at 244 ("If the verdict directing instruction omits an essential element, it is given in error . . . .")

The majority suggests that Hervey's status as disabled was "extensively argued by both parties in closing arguments to the jury." From this, the majority assumes "that the jury considered the provided definition of 'disability,' which comports with the substantive law on what a plaintiff must prove to establish disability discrimination under the MHRA." Though closing argument in a case can "be beneficial in curing the instructional deficiency created by the trial court's failure to instruct [on an essential element], it [is] not sufficient to adequately inform the jury of the precise rule of law concerning [the essential element], leaving the jury to speculate . . . ." *Rice*, 116 S.W.3d at 611. Moreover, it seems patently unfair to indict DOC for doing its best to argue this case in closing as it believed the substantive law required notwithstanding the trial court's refusal of a proffered verdict directing instruction which would have properly tendered the essential element of Hervey's disability. Finally, notwithstanding closing arguments, if the jury followed the instructions they were given, which we are required to assume,

Brown, 298 S.W.3d at 21, the jury cannot be presumed to have made the required factual finding that Hervey was disabled because they were never instructed to do so. I do not believe, therefore, that closing arguments cured the instructional error in this case.

Further, even if the majority is correct in its conclusion that paragraph second of Instruction Number Eight in conjunction with Instruction Number Six sufficiently instructed the jury to find that Hervey was disabled, the instruction was still given in error because two essential elements of Hervey's disability discrimination case--whether Hervey was disabled and whether disability was a contributing factor in her discharge--were submitted in a single paragraph of the verdict directing instruction. I believe that the effect of submission of both of these essential elements in a single paragraph of Instruction Number Eight implied that the first referenced element (disability) was not in contest.

A nearly identical scenario occurred in *Brown v. Van Noy*, 879 S.W.2d 667 (Mo. App. W.D. 1994). In *Brown*, the plaintiff sued a bar for damages sustained when the plaintiff was injured by another patron. *Id*. at 669-70. The verdict directing instruction stated, in pertinent part, and in a single paragraph, that:

> . . . Defendant . . . knew or should have known that [the assailant] was a person with vicious tendencies likely to inflict injury upon others . . .

Id. at 673. The plaintiff in *Brown* was required to prove as distinct essential elements of his case: (1) that the bar patron was a person with vicious tendencies likely to inflict injury on others, and (2) that the bar owner knew of those tendencies. *Id*. The court in *Brown* held that the submission of these two distinct essential elements in a single

paragraph of the verdict directing instruction implied that one of the referenced elements (the bar patron's violent tendencies) was not in dispute, and only required the jury to determine the other referenced element (the bar owner's knowledge of those tendencies). *Id.* Because "the implied finding contained in the jury instruction assumed an ultimate disputed fact," the instruction was defective. *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 801 (Mo. banc 1997) (citing *Brown*, 879 S.W.2d at 673).

> In Missouri, the ultimate facts are listed as separate paragraphs in the verdict director. This insures that the jury focuses on each element separately and does not assume an element to be true. It the verdict directing instruction assumes an essential, ultimate fact in dispute, that fact has been removed from the jury's determination ***and constitutes prejudicial error***.

Brown, 879 S.W.2d at 673 (citing *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 226-27 (Mo. banc 2004)) (emphasis added). In *Lasky*, our Supreme Court agreed that contested essential elements should be submitted in separate paragraphs in a verdict directing instruction and that the failure to do so erroneously implies that one of the referenced elements is undisputed. *Id.*

Instruction Number Eight submitted two contested essential elements in a single paragraph--whether Hervey was disabled, and whether disability was a contributing factor in Hervey's discharge. Pursuant to the authority of *Brown* and *Lasky*, paragraph second of Instruction Number Eight thus implied that one of these contested essential elements was undisputed. "Assuming a disputed fact is error." *Lasky*, 936 S.W.2d at 800. For the reasons herein described, this error in Instruction Number Eight was not cured by the submission of a definition for "disability" in Instruction Number Six, and the

error was prejudicial to DOC as it relieved Hervey of the obligation to establish an essential element of her case. *Brown*, 879 S.W.2d at 673 (holding that removing an essential element from the jury's determination constitutes prejudicial error).

I would reverse the trial court's judgment and remand this case for a new trial.[5]

_____

Cynthia L. Martin, Judge

[5] On remand, I would concur with the majority that the definition of "disability" submitted in Instruction Number Six should have been given and was not erroneous. I also concur with the majority's construction of section 510.265 and section 213.111, which combine to require any punitive damages awarded under the MHRA to be a capped at five times the "net judgment," which in an MHRA case, includes an award of attorney's fees.