

Summary of SC90762, *Melissa Howard v. City of Kansas City, Missouri*

Appeal from the Platte County circuit court, Special Judge Gerald D. McBeth
Argued and submitted Sept. 16, 2010; opinion issued Jan. 25, 2011

Attorneys: The city was represented by Saskia C.M. Jacobse, Galen Beaufort and Mr. Jamie L. Cook of the city attorney's office in Kansas City, (816) 513-3121. Howard was represented by Edward D. "Chip" Robertson Jr., Mary D. Winter and Anthony L. DeWitt of Bartimus, Frickleton, Robertson & Gorny PC in Jefferson City, (573) 659-4454; and Mark A. Jess, Christie S. Jess and John J. Ziegelmeyer III of the Law Offices of Mark A. Jess LLC in Kansas City, (816) 474-4600.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A city appeals the trial court's judgment against it of more than \$2.13 million in actual and punitive damages, plus attorneys fees, in a discrimination case filed by a rejected nominee for a municipal judge position. In a 6-1 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the trial court's judgment. As a matter of law, a municipal judge for the city is an "employee" or "employment applicant" under the state's human rights act. The trial court did not abuse its discretion in admitting certain testimony and in excluding certain other testimony. The trial court did not err in instructing the jury regarding punitive damages. The city failed to show the trial court erred in entering a judgment based on the jury's award of compensatory damages – including future damages – and punitive damages or abused its discretion in awarding attorneys fees.

In an opinion concurring in part and dissenting in part, Chief Justice William Ray Price Jr. agrees with the principal opinion except its holding as to the punitive damages award. He would hold that the language of the human rights act does not overcome the longstanding presumption against awarding punitive damages against a municipality.

Judges Nannette A. Baker and Kathianne K. Crane – both of the Missouri Court of Appeals, Eastern District – sat by special designation in place of Judges Patricia Breckenridge and Laura Denvir Stith, respectively.

Facts: Thirteen lawyers applied for a judicial vacancy on the Kansas City municipal division left by the August 2006 retirement of the division's only white female judge. In October 2006, a judicial nominating commission submitted to the mayor and city council three panelists it deemed to be well-qualified for the vacancy. All three panelists were white women. At a November 2006 meeting, the city council rejected the entire panel by a 7-6 vote, despite acknowledging that all three panelists were well-qualified for the judgeship. The next month, the council again met to consider the panel and again voted to refuse to select one of the three panelists to fill the vacancy. When the panel expired after 60 days pursuant to the city's charter, the commission in January 2007 renominated the same three women for its panel; the council again declined to appoint any of the panelists for the judicial position. Several council members expressed dissatisfaction with the panel because it did not include any racial minorities. They

made statements during the various city council meetings, which were public, and in the media. Howard sued the city under the Missouri Human Rights Act, alleging the city engaged in an unlawful employment practice during the municipal judge appointment process by refusing even to consider hiring her because of her race. Following a jury trial, the circuit court entered its judgment in Howard's favor, awarding her \$633,333 in compensatory damages, including future damages; \$1.5 million in punitive damages; attorneys fees and prejudgment interest. The city appeals.

AFFIRMED.

Court en banc holds: (1) The trial court properly refused to direct a verdict in favor of the city because, as a matter of law, a Kansas City municipal judge is an "employee" or "employment applicant" under the Missouri Human Rights Act, codified in chapter 213, RSMo 2000. Because the city does not contest the submissibility of Howard's claim (whether there was sufficient evidence to support it) but only the scope and application of the act, the question of whether Howard actually was deprived of an employment opportunity because of her race is not before this Court.

(a) Section 213.055.1 provides that it is unlawful for an employer to refuse to discharge any "individual" – a broadly inclusive term – with respect to the individual's race or to limit, segregate or classify "employees" or "employment applicants" in any way that would tend to deprive any individual of employment opportunities. The city concedes it is an "employer" under section 213.010(7). The act does not define "employee" or "employment applicant." Under its charter, the city pays its municipal judges a fixed salary and requires that they work exclusively for the city. As such, the common dictionary definitions of "employee" and "employ" – which focus on one working for wages or salary – support a finding that a municipal judge is a city employee.

(b) Kansas City municipal judges are not independent contractors, as that term commonly is understood. Independent contractors typically are hired to complete a specific task, use their own tools in completing their work, are paid a fixed sum on a by-the-job basis and are not provided with benefits. The municipal judges, however, are employed full-time, are provided the supplies and work space they need, and are paid a regular salary that includes benefits.

(c) The evidence at trial shows that Kansas City treats its municipal judges as employees. In addition to the evidence discussed in Paragraph (1)(b), they repeatedly are referred to as "employee" on various forms they fill out on being hired, some of which are placed in the judges' "personnel" files in the city's human resources department; qualify to enroll in the city's health and life insurance group policies based on their "employment" with the city or status as "active employee[s];" and are treated as "employees" for federal and state tax-withholding purposes. These factors further emphasize why the common law analysis applied in independent contractor cases – almost all of which are in the context of workers' compensation or tort cases, not discrimination cases under the human rights act – simply does not fit.

(d) Missouri’s legislature chose not to include in its act a definition for “employee,” as provided by the federal Title VII, which includes a “public official” exception. As such, the rationale underlying conflicting cases such as *Thompson v. City of Austin*, 979 S.W.2d 676, 679 (Tex. App. 1998), and *Bredesen v. Tennessee Judicial Selection Commission*, 214 S.W.3d 419, 432 (Tenn. 2007) – both from states whose human rights acts include the federal Title VII definition of “employee” and its exclusion of certain public officials – is not persuasive here. The language of Missouri’s act is more like that in Kentucky, making more persuasive the precedent of *Kearney v. City of Simpsonville*, 209 S.W.3d 483, 485-86 (Ken. App. 2006), which held that an elected mayor and elected commissioners were “employees” for purposes of Kentucky’s civil rights act, noting that act did not exclude public officials from the definition of “employee.”

(2) The trial court did not abuse its discretion in permitting the testimony of a third party – an attorney in private practice in Kansas City – regarding his opinion about the illegality of the city’s actions. The court did not rule this testimony admissible as an expert opinion. Rather, it ruled that the testimony was admissible to rebut testimony given by an earlier witness. The mayor previously had testified she did not know whether it was illegal for an employer to make employment decisions on the basis of race. The attorney then was allowed to testify that he told the mayor and certain city council members that he believed such an action was illegal. Once a party opens the door to a topic, admission of rebuttal evidence about that topic is permissible. The attorney’s testimony here also was relevant to the issue of punitive damages.

(3) The trial court did not abuse its discretion in refusing to let the city admit testimony from certain council members about an unsubstantiated story in a blog about Howard’s past that allegedly raised concerns for at least two council members who voted to reject the panel. The evidence at issue was unconfirmed hearsay. Further, the council members admitted they had no personal knowledge whether the information about Howard was true, and regardless, it related only to Howard and not to the other two panelists whom the council members also rejected.

(4) The trial court did not err in instructing the jury regarding punitive damages or in entering judgment on the jury’s award of punitive damages against the city.

(a) Although this Court previously has not determined whether a municipality is an “employer” that can be required to pay punitive damages under section 213.010(7), the court of appeals uniformly has held that municipalities and other political or civil subdivisions are liable for actual and punitive damages under the human rights act just like any other employer defined in the statute. The legislature has not amended or clarified the act in the face of these decisions authorizing punitive damages against political subdivisions and has included the phrase “the state, or any political or civil subdivision” in its definition of “employer” in section 213.010. It is clear, therefore, that the legislature intended to treat the state and its subdivisions in the same manner in which it treats other employers.

(b) There was sufficient evidence to support the punitive damages award. A submissible case for punitive damages requires clear and convincing proof that the defendant acted intentionally – without just cause or excuse – either by a wanton, willful or outrageous

act or by reckless disregard for an act's consequences. Here, the evidence included many statements that the council rejected the panel because it lacked racial diversity. Howard testified that one council member asked her why she applied because she was not black, and the mayor testified that race was a factor in her decision to reject the panel. Various council members testified that they were concerned none of the applicants of color was nominated on the panel; that members moved they reject the panel because it had no diversity and did not reflect the city's diversity; and that the rejection of the panel had nothing to do with the panelists' qualifications and that the panelists, in fact, were highly qualified. One member testified the council should have voted for one of the panelists, noting that the council would not have rejected the panel had it included three qualified black panelists, even though such a panel also would not have been an exact representation of the city's demographics. One member also said the council's apparent belief that the panel was not diverse enough failed to recognize the difficulty women have had in achieving success in a male-dominated field. Further, the private practice attorney testified he had advised the mayor, the city's attorney and at least five city council members that he believed the city's action in rejecting the panel was discriminating against white women and was illegal.

(5) The city fails to show the trial court erred in awarding future damages against it. Because the city did not argue that future damages should not be submitted to the jury in its motion for a directed verdict (asking the court to find, as a matter of law, that the plaintiff failed to prove its case and, therefore, enter a judgment in the defendant's favor without submitting the case to the jury) or its motion for a new trial, it failed to preserve this issue for appeal. Further, to the extent the city attempts to challenge the jury instruction given, it failed to preserve this claim by objecting to the instruction before the jury began deliberating.

(6) The city's point on appeal regarding the compensatory damages verdict fails to meet the requirements of Rule 84.04(d)(1). Nonetheless, this Court will provide review to the extent it understands the city's argument. If the city is complaining about the manner in which Howard's counsel argued the evidence regarding her emotional distress and lost wages, the city failed to object at the time, thereby waiving its right to complain on appeal. If the city is complaining that the trial court did not order remittitur (reducing the jury's verdict) – or that this Court should do so in place of the trial court – the city did not preserve this argument in its point on appeal and did not develop or support this point adequately in the brief. As such, the city failed to show the verdict was unjust.

(7) The city failed to demonstrate the trial court abused its discretion in awarding attorneys fees based on Howard's amended fee application. The city argues the attorneys fee award includes fees incurred by Howard's prior counsel in a different case against the city. When it raised this point in a post-trial proceeding, however, Howard amended her fee application to exclude any fees that may have related solely to her prior case, and the trial court based its decision to award fees on her amended application.

Opinion concurring in part and dissenting in part by Chief Justice Price: The author agrees with the principal opinion except its holding as to the punitive damages award. He would hold that, pursuant to *Chappell v. City of Springfield*, 423 S.W.2d 810, 813 (Mo. 1968), punitive

damages are not recoverable against a municipality. The presumption is that punitive damages are not available against municipalities unless a statute specifically provides otherwise. Here, combining the fact that actual and punitive damages are available against an “employer” pursuant to section 213.111.2 with section 213.010(7)’s definition of “employer” as including municipalities does not provide the specificity necessary to overcome this presumption. This is the same rationale the Eighth Circuit used in *Kline v. City of Kansas City*, 175 F.3d 660, 670 (8th Cir. 1999), in which it held that the state’s human rights act does not overcome the presumption against awarding punitive damages against municipal defendants.