

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DONNA J. LINDAHL

APPELLANT,

**v.
STATE OF MISSOURI, ET AL.**

RESPONDENTS.

DOCKET NUMBER WD72555

DATE: August 2, 2011

Appeal From:

Johnson County Circuit Court
The Honorable R. Michael Wagner, Judge

Appellate Judges:

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

Attorneys:

Rik N. Siro, Kansas City, MO, for appellant.

Theodore A. Bruce, Jefferson City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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

Donna Lindahl, a civilian employee of the Missouri National Guard, filed suit against her employer, the State of Missouri, for retaliation after she made complaints of sexual harassment against a fellow employee. After a trial, the jury returned a verdict finding no actual damages but assessing \$500,000 in punitive damages in favor of Lindahl. The trial court granted the Defendant's motion for judgment notwithstanding the verdict on the basis that a punitive damage award, without a finding of actual damages, is an inconsistent verdict and cannot stand, as a matter of law. Lindahl now appeals.

REVERSED AND REMANDED.

Division Two holds:

In Point One, Lindahl argues the trial court erred in granting Defendant's motion for judgment notwithstanding the verdict because she made a submissible case on retaliation and punitive damages under the MHRA, and the language of the MHRA does not require an award of actual damages to support punitive damages. Missouri courts have consistently held that punitive damages cannot be awarded absent an award of actual or nominal damages. This type of inconsistent verdict must be addressed before the jury is discharged. This is the common law and it applies to the MHRA unless a statute clearly abrogates it expressly or by necessary implication. As it has not been abrogated by statute, the rule stands.

However, in light of the inequity of affirming the judgment notwithstanding the verdict in light of the conduct of defense counsel in this matter, we refuse to do so. Although defense counsel was aware of controlling precedent (as he was the counsel of record for the trial and appeal of the case that established the applicable precedent) that held a jury's verdict of no actual damages and an award of punitive damages constituted an inconsistent verdict and, therefore, something that must be remedied prior to the discharge of the jury or it is waived. Defendant's counsel invited the trial court to err by affirmatively arguing that the verdict was not inconsistent and even if it was any problem could be remedied at a later time. This was over the protestations of plaintiff's counsel that the jury should be re-instructed and sent back for further deliberations. Therefore, based on the principles of "invited error" and "judicial estoppel," we conclude that the

great inequity that would befall the plaintiff, based on defense counsel actively misleading the trial court as to the status of the law, necessitates a new trial on all issues. Point One is granted.

Plaintiff's Point Two argues the trial court erred in denying her motion for a new trial. The point is now moot given the disposition of Point One.

Finally, Defendant argues the trial court did not err in its granting a judgment notwithstanding the verdict in favor of the Defendant because the National Guard is immune from suit under the *Feres* doctrine. The *Feres* doctrine makes the government immune to suits by military personnel against their superiors. However, the *Feres* doctrine has not been used to make the government immune to suits by civilian employees against military departments and, thus, has no applicability here where Lindahl was a civilian employee working for the Missouri National Guard. Defendant's point is denied.

Opinion by: Gary D. Witt, Judge

August 2, 2011

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