

**IN THE SUPREME COURT OF MISSOURI
SUPREME COURT NO. SC90762**

MELISSA HOWARD,

Respondent

v.

CITY OF KANSAS CITY, MISSOURI,

Appellant

**Appeal from the Honorable Gerald D. McBeth
Visiting Judge, Circuit Court of Platte County, Missouri at Platte City
Case No. 07AECV02320**

APPELLANT'S SUBSTITUTE BRIEF

**GALEN BEAUFORT, #26498
City Attorney**

**SASKIA C.M. JACOBSE, #49284
JAMIE L. COOK, #58885
Assistant City Attorneys
414 E. 12th Street
Kansas City, Missouri 64016
Telephone: (816) 513-3121
Facsimile: (816) 513-2716
e:mail: saskia_jacobse@kcmo.org
ATTORNEYS FOR
DEFENDANT/APPELLANT CITY
OF KANSAS CITY, MISSOURI**

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II. The trial court erred by instructing on punitive damages because punitive damages were not warranted in that punitive damages are not specifically available against municipalities under the Missouri Human Rights Act and the evidence did not show the City acted willfully, wantonly, outrageously or with reckless disregard of the rights of others.

III. The trial court erred in admitting testimony of a third party regarding the lawfulness of the City Council’s decision to reject all three candidates for the municipal judge vacancy because the testimony of the third party constituted improper opinion testimony in that it was evidence regarding an ultimate issue of law.

IV. The trial court erred in refusing to admit evidence of certain City Council members' reasons for rejecting the panel because such evidence could negate an element of Respondent's prima facie case of discrimination and negate Respondent's right to punitive damages, in that the evidence was probative of the motive of the City Council in rejecting the panel for the municipal judicial vacancy.

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VI. The trial court erred in upholding the jury verdict on damages because the evidence did not support the compensatory damages awarded in that the Respondent was not entitled to front pay or back pay.

VII. The trial court erred in awarding the amount of Attorneys Fees requested by Respondent because it was excessive in that Respondent included fees incurred not in this case but in a different case in her request.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from a judgment entered by the Circuit Court of Jackson County, Missouri on June 19, 2008, upholding the jury verdict of April 3, 2008 in favor of Howard. The trial court's judgment (LF 593; Appendix A1) disposed of all claims in the Circuit Court case. On June 19, 2008, the City timely filed its Notice of Appeal. (L.F. 594-603). On June 29, 2010, this Court accepted transfer from the Missouri Court of Appeals for the Western District.

STATEMENT OF FACTS

Introduction

This case stems from a decision by the City Council of the City of Kansas City, Missouri to reject a panel of three Caucasian women to fill a judicial vacancy in the Municipal Division of the Sixteenth Judicial Circuit for the State of Missouri, commonly called the Kansas City Municipal Court. One of those three panelists, Respondent Melissa Howard, sued the City of Kansas City, alleging the rejection of the panel violated the Missouri Human Rights Act, Section 213.010, et seq. (RSMo. 2007).

Municipal Court Judges

According to the Missouri Constitution, each state circuit court may have municipal judges, who shall hear and determine violations of municipal ordinances. (L.F. 90). Municipal judges in Kansas City are judges of the Sixteenth Judicial Circuit Court. (L.F. 92). Under the Kansas City Charter, the term of a municipal judge in Kansas City is four years, and the judge can be retained after the expiration of each term by a vote of the citizens of Kansas City. (L.F. 96, 99). The Kansas City Charter established a Municipal Judicial Nominating Commission, which is responsible for the submission to the Mayor and City Council of Kansas City a panel of three names of qualified persons as nominees for any vacancy in the municipal division. (L.F. 98). The Municipal Judicial Nominating Commission is also responsible, under limited circumstances, for commencing removal proceedings against any judge of the Kansas City Municipal Division. (L.F. 98-100). The Municipal Judicial Nominating Commission consists of five members: the chair, who is the presiding judge of the Sixteenth Judicial Circuit; two

attorney members, who are elected by members of the Missouri State Bar living in Kansas City; and two non-attorney members, who are appointed by the Mayor. (L.F. 98). Municipal judges in the Kansas City Municipal Division are appointed by the City Council and Mayor, subject to certain qualifications under state statute and the City Charter. (L.F. 93, 97).

The City pays municipal court judges a salary, established by ordinance. (L.F. 103). According to state statute and the City Charter, the salary for the municipal court judges is not dependent on the number of cases tried, the number of guilty verdicts reached, or the number of fines imposed or collected, nor can the salary be diminished during the judges' terms of office. (L.F. 92, 97). The City's ordinances for vacation leave and sick leave apply only to full time, regular employees. They do not apply to elected officials such as the Mayor and City Council, or municipal court judges. (L.F. 130). Judges in the Kansas City Municipal Division are not a part of the City's retirement system for regular employees. They are a part of the retirement system for elected officials. (L.F. 131).

Under the City's Charter, judges in the Kansas City Municipal Division may be removed for nonfeasance, malfeasance, or misfeasance in the performance of their official duties, or if they engage in conduct bringing discredit to the Division, or violating any prohibition established by the Kansas City Charter. (L.F. 100). The procedure for removing a municipal court judge from office dictates that the removal process must be initiated by four of the five members of the Municipal Judicial Nominating Commission. (L.F. 100). There is no provision in the removal procedure that allows any official or

employee of the City to initiate the removal process. (L.F. 100). As part of the removal process, upon receiving written charges by the Municipal Judicial Nominating Commission, the full City Council holds a hearing and serves as a board of review for the purpose of hearing evidence and testimony relating to the charges. (L.F. 100). Removal requires that at least seven council members vote in favor of removal. (L.F. 100).

The Missouri Constitution provides that circuit judges may make rules for their circuit, so long as the rules are not inconsistent with the rules of the Missouri Supreme Court. (L.F. 84). Under both state statute and Missouri Supreme Court Rule 37.04, the presiding judge of the circuit court has general administrative authority over the court and its divisions. (L.F. 84, 150). The City Charter provides the Municipal Division has the authority to adopt rules of practice and procedure. (L.F. 96). Under the Kansas City Code of Ordinances, the judges of the Municipal Division are responsible for classifying, arranging, distributing, and assigning the business of the court to the divisions within the Municipal Division. (L.F. 433-35). The judges of the Municipal Division are responsible for making any other rules of court, so long as they are not inconsistent with state law, the City's Charter or the City's ordinances. (L.F. 136). Municipal Court judges are not part of the City's Law Department, and work independently of anyone else. (Tr. p.261, l.23 – p.262, l.5). The City pays municipal judges on a salaried basis. (Trial Ex. 24, p. 2). The City provides municipal judges with the courtrooms and offices in which they perform their duties, as well as the equipment they use. (LF 180.560). The City also has a court staff with whom the judges work. (*Id.*)

The 2006/2007 Selection Process

Respondent Melissa Howard submitted an application on or about October 18, 2006, to fill a judicial vacancy in the Kansas City Municipal Division of the Circuit Court. (L.F. 40). On or about November 9, 2006, the three member panel, all Caucasian females, submitted by the Municipal Judicial Nominating Commission, was rejected by the City Council on a 7-6 vote. (L.F. 39-41). Statements made during the open, public political deliberative process included concerns that the all-Caucasian female panel lacked diversity. (L.F. 42). Prior to rejecting the panel, discussion of diversity took place among the Council members, and included the following statements, among others:

“There is no diversity whatsoever on. . .within the panel of contestants who have been referred to us;” (Tr. Exhibit 5) “I feel as though at this point I’m given. . .a very narrow opportunity for selection because I only have a sampling of one demographic of our city and that is Caucasian females. . . .” *Id.* “For me there is an issue of equity related to racial mix, when you have thirteen candidates and you have six of color and none appear on the panel, it’s hard for me to believe that you have six of those candidates of color none of whom would qualify to be in the top three. I just don’t believe that is the case.” *Id.* “This [panel] does not reflect the diversity of Kansas City.” *Id.* On November 16, 2006, Councilman Skaggs introduced a proposed ordinance declaring the Council’s intent to not fill the vacancy in Division 205. (Tr. p. 129; Trial Ex. 7).

On December 14, 2006, Appellant’s Council met again in a public meeting to consider the panel of final applicants for Division 205. (Tr. pp. 133-34; Trial Ex. 14).

Again, Appellant's Council voted to reject the panel, having been presented the same panel to consider. *Id.* However, at least two City Council members who voted to reject the panel were aware of an issue involving a possible criminal matter in Howard's background that made them question the process of selection by the Municipal Judicial Nominating Commission. (Tr. p.371, 1.18 – p.374, 1.6; p.385, 1.17 – p.391, 1.6). Neither Councilmember made statements during the public meeting regarding the concerns about Howard's background. (Tr. p.372, 1.24 – p.373, 1.12; p.390, 1.22 – p.391, 1.6).

On or about January 2, 2007, Howard filed a discrimination charge with the Missouri Commission on Human Rights against the City, alleging race discrimination because the Council rejected the all-Caucasian female panel. (L.F. 43; 151). Plaintiff testified that she pulled together the discrimination charge herself. (Tr. p.204, 11.6-14). On or about January 9, 2007, the Municipal Judicial Nominating Commission submitted a panel to the City Council with the same three names listed as the original panel. (L.F. 43). On or about March 9, 2007, the City Council allowed the second panel to expire without selecting a panelist to fill the municipal judge vacancy. (L.F. 45).

The Trial

Howard filed a petition against the City on July 13, 2007, alleging three counts of discrimination and retaliation, and a claim sounding in tort, against the City. (L.F. 8-34). That petition was filed by Howard's first attorney, Brian Nicewanger, who was also representing Howard in another case in federal court seeking to overturn an ordinance passed by the City Council requiring background checks for municipal court judge candidates. (L.F. 22, Tr. p.203, 1.24 – p.204, 1.14; p.205, 11.22-24). On August 29, 2007,

Mark Jess entered his appearance as counsel of record for Howard. (L.F. 35). On September 4, 2007, Howard filed her First Amended Petition alleging two counts of discrimination and retaliation, abandoning two counts from the original petition. (L.F. 38-52). A jury trial was held beginning March 31, 2008 in Platte County Circuit Court. (Tr. p.1). During the trial, the City did an offer of proof in response to a ruling in limine, regarding evidence of Howard's background and the Council members' knowledge of the issue with her background at the time of their vote to reject the entire panel. (Tr. p.399, l.16 – p.400, l.3; p.371, l.18 – 374, l.6; p.385, l.17 – p.391, l.6). This testimony was rejected by the trial court. (Tr. p.400, l.4).

In addition, the Court allowed the jury to hear and consider testimony from an attorney, Patrick McClarney, that it was his opinion that the rejection of the three panelists by the City Council violated the Missouri Human Rights Act, and that he had stated such to certain Council members, and to the City Attorney, Galen Beaufort. (Tr. p.216, l.1 – p.218, l.5; p.220, l.7 – p.222, l.1). Additionally, Mr. Beaufort was not allowed to testify as to how the City's method of selecting municipal court judges compared or followed the Missouri Plan, used for state court judges, although Howard had testified that it was based on the Missouri Plan and should have worked as the Missouri Plan did. (Tr. p.193, ll.6-22; p.262, l.6 – p.263, l.11).

After the close of plaintiff's evidence and the close of all evidence, the City moved for a directed verdict, and renewed its summary judgment motion. (Tr. p.244, l.4 – p.251, l.21; p.418, ll.13-16). Both were denied by the trial court. (Tr. p.251, l.22 – p.252, l.1; p.418, l.17).

The jury was instructed with a verdict director only as to discrimination. Following the close of evidence, Howard abandoned her retaliation claim and proceeded only on the discrimination claim. (L.F. 249). The jury also was instructed with a damages instruction that included future damages. (L.F. 250). During the off-record jury conference, the City offered an alternate damages instruction that did not include future damages; that instruction was refused by the Court. (L.F. 239). The jury was also instructed as to punitive damages over objection by the City. (L.F. 251; Tr. p.418, l.21 – p.419, l.23; p.420, l.16 – p.421, l.1). Following deliberation by the jury, the jury found for Howard, and awarded her \$633,333.00 in compensatory damages. (L.F. 252). The jury then heard evidence as to punitive damages, and awarded Howard \$1,500,000.00 in punitive damages. (L.F.254) Following post-trial motions, the Court upheld the jury's verdict, and awarded \$188,492.43 in attorney's fees, and \$122,261.62 in prejudgment interest to Howard. (L.F. 593; App. A1).

POINTS RELIED ON

I. The trial court erred in not directing a verdict for the City because the Missouri Human Rights Act does not apply to the decision made by the City Council in that municipal court judges are not employees under the Missouri Human Rights Act and the decision to reject all three candidates was therefore not an employment decision.

Sloan v. Bankers Life & Casualty Co., 1 S.W.3d 555 (Mo. App. 1999)

Howard v. Winebrenner, 499 S.W.2d 389 (Mo. 1973)

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Brady v. Curators of the University of Missouri, 213 S.W.3d 101 (Mo. App. 2006)

Werremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo. banc 2004)

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McKinley v. Vize, 563 S.W.2d 505 (Mo. App. 1978)

Wulfinf v. Kansas City Southern Indus., Inc., 842 S.W.2d 133 (Mo. App. 1992)

Young v. Wheelock, 64 S.W.2d 950 (Mo. 1933)

IV. The trial court erred in refusing to admit evidence of certain City Council members' reasons for rejecting the panel because such evidence could negate an element of Respondent's prima facie case of discrimination and negate Respondent's right to punitive damages, in that the evidence is probative of a motive of the City Council in rejecting the panel for the municipal judicial vacancy.

R.T. French Company v. Springfield Mayor's Comm'n on Human Rights and Comm. Rel., 650 S.W.2d 717 (Mo. App. 1983)

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Wentz v. Industrial Automation, 847 S.W.2d 877 (Mo. App. 1992)

V. The trial court erred in instructing the jury on future because future damages were not supported by the evidence in that there was no evidence that Respondent was reasonably certain to sustain damage in the future.

Fincher v. Murphy, 825 S.W.2d 890 (Mo. App. 1992)

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VI. The trial court erred in upholding the jury verdict on damages because the evidence did not support the compensatory damages awarded in that the Respondent was not entitled to front pay or back pay.

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VII. The trial court erred in awarding the amount of Attorneys Fees requested by Respondent because it was excessive in that Respondent included fees incurred not in this case but in a different case in her request.

Hensley v. Eckerhart, 461 U.S. 424 (1983)

Pollock v. Wetterau Food Distrib. Group, 11 S.W.3d 754 (Mo. App. 1999)

ARGUMENT

I. The trial court erred in not directing a verdict for the City because the Missouri Human Rights Act does not apply to the decision made by the City Council in that municipal court judges are not employees under the Missouri Human Rights Act and the decision to reject all three candidates was therefore not an employment decision.

Standard of Review

Normally, “[t]he standard of review of a trial court’s denial of motions for directed verdict and judgment notwithstanding the verdict is whether the plaintiff has made a submissible case.” *Eagle v. Redmond*, 80 S.W.3d 920, 923 (Mo. App. 2002). “An appellate court reviews the evidence and reasonable inferences therefrom in a light most favorable to the jury’s verdict, disregarding evidence to the contrary.” *Id.* In this case, however, the issue is not one of a submissible case presented by the Respondent, but whether the MHRA applied to the case at all, which is a matter of statutory construction. Review of statutory construction is de novo. *Sloan v. Bankers Life & Casualty Co.*, 1 S.W.3d 555, 563 (Mo. App. 1999).

Analysis

According to the Missouri Human Rights Act (“MHRA”), “It shall be an unlawful employment practice [] for an employer, because of the race . . . of any individual [] to limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race . .

..” Section 213.055.1(1)(b) (RSMo 2005). Respondent Melissa Howard contends the City violated the MHRA when its City Council rejected the three person panel of nominees, all Caucasian females. However, in order to engage in an unlawful employment practice, the City must have been refusing to hire Howard as the City’s employee when she applied to fill a municipal judicial vacancy. Municipal judges are public officials, and not employees of the City. Therefore, the City was not depriving Howard of an employment opportunity.

Howard’s status as a candidate for judicial appointment does not afford her protection as an employee within the meaning of the MHRA. A plain reading of Section 213.055.1(1)(b) applies to the context of an employee-employer relationship. This is most clearly shown by substituting the term “employer” for the pronoun “his.” The legislature left no ambiguity regarding the desire to provide protection for a particular group of individuals in a particular setting. When the language of the statute is unambiguous, [the court] is afforded no room for construction. *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 243 (Mo. App. 2006).

The rules of statutory construction dictate that the undefined terms of the MHRA be given their “plain and ordinary meaning.” *McBryde v. Ritenour School Dist.*, 207 S.W.3d 162, 170 (Mo. App. 2006) (The “plain meaning of words supply their statutory definition unless the legislature provides a definition.”). The MHRA terms “employee,” “employment,” and “employment applicant” all have a definite and well known meanings at common law. “When the legislature enacts a statute referring to a term which it does not define and which has judicial or common law meaning attached to it, the legislature is

presumed to have acted with knowledge of that meaning.” *PharmFlex, Inc. v. Div. of Empl. Sec.*, 964 S.W.2d 825, 830 (Mo. App. 1997). “It is a familiar rule of construction that where a statute uses words which have a definite and well known meaning at common law it will be presumed that the terms are used in the sense in which they were understood at common law, and they will be so construed unless it clearly appears that it was not so intended.” *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 912 (Mo. 1934). The purpose of a court’s efforts to interpret terms in the statute is to interpret the legislature’s intent in drafting the statute. “When construing a statute, our primary role is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent.” *Brady v. Curators of University of Missouri*, 213 S.W.3d 101, 107 (Mo. App. 2006).

Case law dictates that “although the term ‘employee’ is not expressly defined by the MHRA, [] a definition similar to those used in the analogous federal statutes may be implied.” *Sloan v. Bankers Life & Casualty Co.*, 1 S.W.3d 555, 563 (Mo. App. 1999). Statutory construction is a matter of law. *See Westwood Partnership v. Goherty*, 103 S.W.3d 152, 158 (Mo. App. 2003). Therefore, this issue was not one to go to the jury, but was one to be decided by the trial court. “Statutory construction is a matter of law, not a matter of discretion. As such, our review of the trial court’s dismissal is de novo, and no deference is given to the trial court’s determination.” *Sloan*, at 561 (internal citation omitted).

In *Sloan*, this Court considered whether an independent contractor was to be considered an “employee” under the Missouri Human Rights Act.

“In interpreting provisions of the MHRA, Missouri courts have often turned to federal case law as well as case law from other states interpreting analogous discrimination statutes. Neither Title VII, the Americans with Disabilities Act (“ADA”) nor the Age Discrimination in Employment Act (“ADEA”) all of which use similar definitions of ‘employer’, have been held to protect independent contractors.”

Id.

According to the Court in *Sloan*, “Because only employees can be hired and discharged, we may assume that the MHRA applies only to employer-employee relationships.” *Id.* at 562. Title VII defines “employee” as “an individual employed by an employer.” 42 U.S.C. Section 2000e(f). For purposes of Title VII, the question of whether an individual is an employee is determined by applying common law principles of agency. *See, e.g. Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004). In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), the U.S. Supreme Court described the relevant agency principles:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required, the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s

discretion over when and how long to work; the method of payment; the hired parties role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. . . . No one of these factors is determinative.

Sloan's focus on the employer-employee relationship was well-placed.

Furthermore, Missouri courts consistently looked to the Restatement of Agency for determining the question of employment. See *Auto Owners Mut. Ins. Co. v. Wieners*, 791 S.W.2d 751, 756 (Mo. App. 1990) (defining the term employee for an insurance contract); *Vinyard v. Missouri P. Railroad*, 632 S.W.2d 272, 274-275 (Mo. App. 1982) (common law principles used to understand the question of what constitutes employment under FELA). “The Restatement of Agency, embodying common-law principles, provides a guideline to analyze the employment issue. The Restatement defines a servant as ‘a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.’ In § 220(2), the Restatement recites various factors which help in applying that definition. No single factor is determinative, but the primary factor is who had the right to control and direct the worker in the detailed performance of his work...” *Vinyard v. Missouri P. Railroad*, 632 S.W.2d 272, 274-275 (Mo. App. 1982) (citing Restatement (Second) of Agency, § 220(1)) (Citation omitted). “The focus here is not on who controls the result of the work but who controls the detailed

performance of the work, and it is the right or power of control that is important, not necessarily the exercise of that right or power.” *Id.* (Citations omitted).

To establish an employer-employee relationship, the employer must have “control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist.” *Sidney Smith Inc. v. Steinberg*,, 280 S.W.2d 696, 702 (Mo. App. 1955) (quoting 18 R.C.L. p. 490, § 1).

In *Sloan*, the Court used common law principles to determine who is an employee for purposes of the MHRA. The Court in *Sloan* held that the MHRA “applies only to employer-employee relationships,” and stated that “[e]mployees and independent contractors are distinguished primarily on the basis of the amount of control the alleged employer has over them.” *Id.* at 562. After considering the relevant factors, the court decided that the alleged employer did not exercise sufficient control of the plaintiff’s activities to make him an employee who was covered by the MHRA. *Id.* at 563-64. The same analysis should be conducted in this case to determine whether public officials such as judges are covered by the employer-employee relationship contemplated by the MHRA.

“Control is the pivotal factor in distinguishing between employees and other types of workers. If the employer has a right to control the means and manner of a person’s service – as opposed to controlling only the results of that service – the person is an employee rather than an independent contractor.” *Leach*

v. Board of Police Comm'rs of Kansas City, 118 S.W.2d 646, 649 (Mo. App. 2003). The factors to be considered in determining whether the requisite level of control exists such that an individual is an employee include: (1) the extent of control; (2) actual exercise of control; (3) duration of employment; (4) right to discharge; (5) method of payment for services; (6) the degree to which the alleged employer furnished equipment; (7) whether the work is part of the alleged employer's regular business; and (8) the contract of employment. *Howard v. Winebrenner*, 499 S.W.2d 389, 395 (Mo. 1973); *Leach*, 118 S.W.3d at 649; *Chandler v. Allen*, 108 S.W.3d 756, 763 (Mo. App. 2003). While each factor is relevant, no single factor is controlling. *Winebrenner*, 499 S.W.2d at 395.

Although this Court has already determined that independent contractors are not employees within the meaning of the MHRA, Missouri Courts have not yet had to face the issue of whether the MHRA applies to public officials such as the governor, legislators, secretary of state, attorney general, council members, municipal judge candidate, etc. Nonetheless, the *Winebrenner* analysis is appropriate in this case, as it determines whether an individual is in an employer/employee relationship. That is the question in this case.

In the case of municipal judges for the Kansas City Municipal Division of the Sixteenth Judicial Circuit in Jackson County, the *Winebrenner* factors weigh heavily in favor of the conclusion that municipal court judges are not employees of the City for purposes of the MHRA, but rather are public officials separate and apart from an employer/employee relationship. The first three factors in *Winebrenner* involve the

actual control exercised by the City over the judges, and the duration of employment. The City Council has no authority to control the manner and means by which judges perform their official duties. Under the Missouri Constitution, Article 5, Section 23, the Kansas City Municipal Division are divisions of the Circuit Court of Jackson County. (L.F. 90). The Constitution also establishes that the Presiding Judge of Jackson County has general administrative authority over the Court and its divisions. (L.F. 84). According to Section 479.020.5 (RSMo 2007) (L.F. 92), municipal judges are:

judges of the circuit court and shall be divisions of the circuit court of the circuit in which the municipality, or major geographical portion thereof, is located. The judges of these municipal divisions shall be subject to the rules of the circuit court which are not inconsistent with the rules of the supreme court. The presiding judge of the circuit shall have general administrative authority over the judges and court personnel of the municipal divisions within the circuit.

Thus, municipal judges, in their day-to-day administration of the Court, are not subject to the control of any official or employee of the City. *See also*, Missouri R. Civ. P. 37.04.

To be retained, Kansas City municipal judges are subject to a retention vote by the voters of the City. (L.F. 99). The City Council does not vote on retention or renewal following each four year term. (L.F. 99) Likewise, there is no provision in the Code of Ordinances or City Charter for the discipline of municipal judges. (L.F. 95-101; 432-437).

Although Kansas City municipal judges are paid by the City and are provided supplies and courtrooms and offices by the City, the fifth and sixth *Winebrenner* factors, the same can be said of the City's other elected officials, i.e. the City Council members and the Mayor. (L.F. 121; 141). Moreover, although the municipal judges' salaries are, like those of the other elected officials, set by the City Council, Missouri statute provides that "the compensation of any municipal judge and other court personnel shall not be dependent in any way upon the number of cases tried, the number of guilty verdicts reached or the amount of fines imposed or collected." Section 479.020.6 (RSMo 2007) (L.F. 92-93). See also, Kansas City Charter Section 305 ("The compensation shall not be diminished during a term of office.") (L.F. 97).

The City Council does not control the means or manner in which a municipal court judge discharges his or her official duties. While the City Council has ultimate authority to remove a municipal court judge from his or her position, (the fourth *Winebrenner* factor) the removal process can only be initiated by the Municipal Judicial Nominating Commission who, by a vote of at least four members of the five member board, must bring charges against a judge by bringing written charges to the City Council. (L.F. 100). Under the City Charter, the Municipal Judicial Nominating Commission consists of a chair, who is the presiding judge of the Sixteenth Judicial Circuit, two attorney members, who are elected by the members of the Missouri State Bar living in Kansas City, and two non-attorney members, appointed by the Mayor. (L.F. 98) No member of the Nominating Commission can hold any public office, other than the Chair of the Commission. (L.F. 98).

Moreover, the City Charter provides that charges can only be brought for nonfeasance, malfeasance, or misfeasance in the performance of official duties, or for engaging in conduct which brings discredit to the Kansas City Municipal Division, or for violating any prohibition established by the City Charter for judges. (L.F. 100). The full City Council then, upon receiving written charges from the Commission, sits as a board of review for the purpose of hearing evidence and testimony related to the charges. (L.F. 100). A majority of seven votes is necessary to remove a judge. (L.F. 100).

Other than these strict removal procedures, which cannot be initiated by any official or employee of the City, the only method of removal of the municipal judge is by the vote of the citizens of Kansas City to not retain a judge at the end of his or her term. (L.F. 99). In Kansas City, the City Council has no authority to reappoint judges at the end of each term, and, absent the very limited circumstances listed above, the City Council has no authority to remove a judge in the Municipal Division of the Sixteenth Judicial Circuit.

Moreover, there is no method of discipline of a municipal judge in Kansas City by any official or employee of the City, under either the Kansas City Charter or ordinances. (L.F. 95-101; 432-437). City officials have no authority over the day-to-day business of the court. Section 303 of the Kansas City Charter states that, “The Court shall exercise all powers authorized by law, including, but not limited to . . . [adopting] rules of practice and procedure.” (L.F. 96). According to Kansas City Code of Ordinance Section 2-1406, “the municipal court may classify, arrange, distribute and assign the business thereof and the causes instituted therein among the several judges thereof, in such manner

and at such time as the majority of such judges may from time to time prescribe by rules or orders. . . .” (L.F. 433-35).

The seventh and eighth *Winebrenner* factors involve whether the municipal court work is part of the City’s regular business. The adjudication of ordinance violations by a municipal judge is a judicial function. *See Weinstock v. Holden*, 995 S.W.2d 408, 411 (Mo. banc 1998). That is not part of the City’s regular business. *Lederer v. State, Dept. of Social Services*, 825 S.W.2d 858, 863 (Mo. App. 1992) (noting that Missouri’s constitution vests the adjudicative function exclusively in the courts). Although the City provides municipal judges with a salary, certain benefits, supplies and an office, the duties of a municipal court judge are not integrally tied to the duties of the City Council. (L.F. 95-101; 140-143). Additionally, there is no contract of employment between the City and its municipal judges. Therefore, this factor weighs against a predetermination that a municipal judge is an employee. *Leslie v. School Services and Leasing, Inc.*, 947 S.W.2d 97, 101 (Mo. App. 1997). Finally, while not an enumerated factor, the appointing authority of the City Council is limited. While the City Council is the appointing authority, the qualifications for and prohibitions of a municipal judge in Kansas City are largely outlined in the City Charter, which was voted on by the citizens of Kansas City. *See Kansas City Charter Sections 306-308* (L.F. 97).

The issue of whether public officials such as municipal court judges are employees within the meaning of the Missouri Human Rights Act is a case of first impression, and therefore this Court may look to cases in other jurisdictions for guidance in interpreting the MHRA and determining its applicability to Howard’s candidacy for a municipal court

judgeship. See, e.g. *State ex rel. Cason v. Bond*, 485 S.W.2d 385, 390 (Mo. 1973); *Jarvis v. Ernhart*, 823 S.W.2d 154, 156 (Mo. App. 1992); *Cruzan v. Harmon*, 760 S.W.2d 408, 413 (Mo. 1988). Two cases in other jurisdictions have faced the same issue as the one presented in this case, whether the agency principles outlined in *Reid* and *Winebrenner* create an employment relationship sufficient to consider a judge an “employee” for purposes of a state human rights law. See *Thompson v. Austin*, 979 S.W.2d 676 (Tex. App. 1998); *Bredesen v. Tenn. Judicial Selection Comm.*, 214 S.W.3d 419 (Tenn. 2007). Both cases were interpreting their respective state’s human rights laws, both cases held the laws were to be interpreted consistent with Title VII, and both cases answered the question of whether judges were employees within the meaning of the human rights acts.

The courts in both cases decided that the judges were public officials rather than employees, and therefore, were not protected as employees under the states’ human rights acts. In *Thompson*, Plaintiffs were former municipal court judges who were not reappointed by the City Council of Austin upon expiration of their initial two year terms. Even though the Texas human rights law defined employee in a manner similar to Title VII, the substantive portion of the law is identical to the MHRA Section 213.055.1(1)(b). See, Tex. Lab. Code Ann. Section 21.051(b). (App., p.A8).

The factors used by the court in *Thompson* to conclude that municipal court judges are public officials are nearly identical to the applicable factors in this case. In *Thompson*, the court determined that the City Council did not have enough control over the means and manner of municipal judges and their performance to consider them employees of the city. The court stated that,

while the Council enjoys the power to appoint municipal judges, it is limited in its selection of individuals by the statute The power to remove those judges is even more limited . . . [judges] may be removed upon a finding of incompetency, habitual drunkenness, or other causes defined by law . . . [M]unicipal judges have the independent authority to create their own procedural rules. Thus, we cannot find that the Council possessed the necessary and most important element in an employment relationship: the right to control...

Thompson 979 S.W.2d 676, 682 (Tex. App. 1998). Moreover, the court in *Thompson* acknowledged that the City provided a salary and other benefits for the municipal judge, but the amount could not be altered during the judge's term or made dependent upon court fines, fees, or costs. In addition, the court noted that the City provided the judges with supplies, an office and a staff. Nonetheless, the court found that the judges were public officials rather than employees, adding that the court could find no integral relationship between the work of the municipal court and the work of the Council. *Id.*

The retention vote by the citizens of Kansas City, of course, demonstrates even less control by the City Council over judges than in the *Thompson* case, where the city council of Austin was able to vote at the end of the judge's two year term whether to reappoint the judges to the next term. *See Thompson*, 979 S.W.2d 676, 678-79 (Tex. App. 1998).

Similarly, in *Bredesen*, 214 S.W.3d 419, the court determined that a state court judge was a public official. In that case, a nominee for a state court judge position

alleged that the Tennessee Governor’s rejection of the panel members was based on race (Caucasian). Like the MHRA the Tennessee human rights law at issue in *Bredesen* does not contain a definition of the word “employee.” *Bredesen*, 214 S.W.3d at 430.

Additionally, the Tennessee human rights law at issue contains a provision identical to RSMo. Section 213.055.0(1)(b). *See* Tenn. Code Ann. Section 4-21-401(a)(2). (App., p.A9).

In *Bredesen*, the court stated, “We begin by emphasizing that the question in this case is not whether judges are employed by the State. The question is whether a nominee or applicant to fill a judicial vacancy is an ‘employee’ for purposes of [the Tennessee human right law].” *Id.* The court in *Bredesen* agreed with the earlier decision in *Thompson* that where the “hiring party” has no authority to control in any way the manner and means by which judges perform their duties, state court judges are not employees for purposes of the Tennessee statute.

The City Council of Kansas City, like the City Council of Austin and the Governor of Tennessee, is an appointing authority authorized to appoint a public official, a municipal judge. Other than that, neither the City Council nor any official of the City has any independent authority to control the manner and means by which the municipal judges of the Sixteenth Judicial Circuit conduct their official duties in any way. Because of this, judges in the municipal divisions of the circuit court are public officials and not employees of the City of Kansas City. As a result, the City Council’s decision to reject the panelists for a vacancy in the Municipal Division of the Sixteenth Judicial Circuit cannot be considered an employment action prohibited by the MHRA.

Similarly, the U.S. Supreme Court has faced the issue of whether judges are employees, in a case involving whether Missouri state court judges are employees within the meaning of the Age Discrimination in Employment Act which defines employees in the same way as they are defined in Title VII. *See, Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395 (1991). In *Gregory*, two state court judges appointed under the Missouri Plan were challenging Missouri's mandatory retirement age for judges. The Supreme Court found that Missouri's judges, who are appointed just as municipal court judges for the Kansas City Municipal Division of the Sixteenth Judicial Circuit, are not employees under the Age Discrimination in Employment Act, and as previously mentioned, *supra*, this court in *Sloan* determined that the Age Discrimination in Employment Act can be read consistently with the MHRA.

Although the Missouri Supreme Court has limited the analysis of the MHRA using federal employment discrimination law in some cases in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (2007), that limitation does not apply to this case. In *Daugherty*, the court was determining whether summary judgment was appropriate based on whether the facts constituted discrimination under the MHRA. In this case, the issue is purely a legal one, the applicability of the MHRA. In addition, in *Daugherty*, the Court was considering the similarity between the analysis of the discrimination prohibition, and stated "Missouri's discrimination safeguards under the MHRA, however, are not identical to the federal standards and can offer greater discrimination protection. . . . 'If the wording in the MHRA is clear and unambiguous, then federal case law which is contrary to the plain meaning of the MHRA is not binding.'" *Daugherty* at 818, *citing Brady v.*

Curators of Univ. of Mo., 213 S.W.3d 101, 112-113 (Mo. App. 2006). In the current case, however, there is no definition of employee in the MHRA, so there is no clear and unambiguous wording for the federal case law to contradict. Therefore, even under *Daugherty*, as well as under *Sloan*, it is perfectly appropriate for this court to consider Federal and other states' case law in determining the applicability of the MHRA to public and elected officials.

Howard has expressed concern in the courts below that this will allow the floodgates of discrimination to open. However, civil rights laws such as the MHRA do not apply to all individuals, and they were not intended to apply to all individuals. The MHRA itself only affords protection from age discrimination to employees from ages 40-69. Thus, employees and applicants to be employees who are over 70 are not afforded the protection from age discrimination that employees between ages 40 and 69 are. Similarly, employees who are age 39 and under cannot sue for age discrimination under the MHRA. And employees working for employers who are very small are not afforded the protection of the MHRA. As the court in *Sloan* decided, independent contractors are not afforded rights under the MHRA's employment discrimination protection. Simply put, the MHRA was never intended to cover every person working from every possible claim for discrimination.

Moreover, other civil rights laws have been determined to not cover every individual. The Age Discrimination in Employment Act has been held to not cover state court judges. *See, Gregory v. Ashcroft*, 501 U.S. 452 (1991), wherein Missouri state court judges were held to not be employees. Although this is a federal case, and a

different civil rights law, the fact remains that not every individual is afforded the protection of civil rights laws, including the Missouri Human Rights Act.

Finally, the Sixteenth Judicial Circuit Court rendered a decision regarding whether, for purposes of the Missouri Sunshine Law, municipal judges are employees of the City. *Glorioso v. Ford*, Case No. 16CV95-27296 (April 22, 1996) (L.F. 457-465; App. p.A10). In that case, there was a question as to whether meetings involving discussions of municipal judge selection were meetings regarding “personnel” and therefore an exception to the general rule of openness under the Missouri Sunshine Law. The Circuit Court ordered the meetings open because it found that municipal court judges are not employees of the City, but rather public officials, because the City did not have the requisite control over the judges to consider them employees. While the decision is not binding, it is instructive, along with *Sloan*, *Bredesen* and *Thompson*, as to whether municipal court judges are employees of the City.

All of these cases rely on whether a possible “employer” has control over the individual to determine whether the individual is an “employee.” While appointed policymakers of the legislative and executive branch tend to work closely with the officials who appointed them, judges, whether appointed or elected, operate independently from his or her appointer. *EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988). To say judges and their appointers have an employee-employer relationship, would imply that judges are subordinate to their appointer. *See State ex rel. Rothrum v. Darby*, 345 Mo. 1002, 1012 (1940). Based on the independence of the judges in the Municipal Division of the Sixteenth Judicial Circuit, it is clear that, for purposes of the

MHRA, the judges are public officials that are not in any way subordinate to executive or legislative officials. Municipal judges are not subordinate to the City; they are not “employees.” Therefore, the MHRA does not apply to them, and the City’s motion for directed verdict or JNOV should have been sustained.

II. The trial court erred by instructing on punitive damages because punitive damages were not warranted in that punitive damages are not specifically available against municipalities under the Missouri Human Rights Act and the evidence did not show the City acted willfully, wantonly, outrageously or with reckless disregard of the rights of others.

Standard of Review

The standard of review for instructional error is de novo. *Harvey v. Washington*, 95 S.W.3d 93, 98 (Mo. Banc 2003). To reverse on grounds of instructional error, the party claiming instructional error must establish that the instruction at issue misdirected, mislead, or confused the jury. Additionally, prejudice must have resulted from the instructional error. *Dhyne v. State Farm Fire and Cas. Co.*, 188 S.W.3d 454, 459 (Mo. Banc 2006).

Analysis

Although the Missouri Court of Appeals for the Eastern District determined that punitive damages are available against a public entity in *Brady v. Curators of the University of Missouri*, 213 S.W.3d 101, 108 (Mo. App. 2006), that court relied on a federal district court case rather than an available Eighth Circuit case, *Kline v. City of*

Kansas City, 175 F.3d 660 (8th Cir. 1999). In *Kline*, the Eighth Circuit Court of Appeals, in analyzing Missouri case law, stated that

“[b]ecause the burden of a punitive damages award against a municipality ultimately falls on the taxpayers, and thus will fail to deter future harmful activity by the municipality itself, punitive damages are not usually recoverable against a municipality in Missouri. . . A municipality in Missouri is subject to punitive damages only if a statute specifically provides that it is.”

Kline at 669-70, citing *Chappell v. City of Springfield*, 423 S.W.2d 810, 813-15 (Mo. 1968) and *Angelo v. City of Hazelwood*, 810 S.W.2d 706, 707 (Mo. App. 1991).

The Court in *Kline* went on to find that the Missouri Human Rights Act was insufficiently specific to overcome the presumption against punitive damages against municipalities, because the MHRA’s definition of employer to include political subdivisions of the state was in a completely separate section from the general provision that punitive damages may be awarded to a prevailing party.

In *Brady*, the Missouri Court of Appeals for the Eastern District instead relied on *Archie v. Fortner*, a case from the U.S. District Court for the Western District of Missouri. *Archie* did not mention *Kline* or its analysis, instead stating that “the legislature must have intended the damages provision, which includes punitive damages with no limiting language, to apply to all ‘employers.’” *Brady, supra* at 108, quoting *Archie v. Fortner*, 70 F. Supp. 2d 1028, 1031 (W.D. Mo. 1999).

In *Brady*, the Court recognized the general rule that “in the absence of a statute specifically authorizing such recovery, punitive or exemplary damages are not recoverable against a municipal corporation.” It then, like the Court in *Archie*, decided that rather than a specific provision that punitive damages are allowed against a municipality, only a failure to limit the damages section is required to overcome the general presumption against punitive damages against a municipality.

The City believes that the appropriate analysis in this case is supported by the decision in *Kline*. As the Court in *Kline* stated, “the MHRA is a voluminous statute with many provisions and definitions. We believe that a result cobbled together from different sections of the statute is insufficiently explicit under the Missouri cases to overcome the presumption against punitive damages when a municipality is a defendant that has been found liable.” *Kline* at 670. The MHRA does not specifically state that punitive damages may be recovered against a municipality. Short of that, the general public policy against holding a municipality liable for punitive damages should remain in effect.

Even if this Court agrees that punitive damages may be recovered against a municipality, the trial court erred in instructing the jury as to punitive damages and upholding the punitive damages award in this case. A submissible case for punitive damages requires clear and convincing proof that defendant intentionally acted “either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred).” *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004); *Downey v. McKee*, 218 S.W.3d 492, 497 (Mo. App. 2007). The defendant must have intentionally committed a “wrongful act without just cause or

excuse.” *Downey v. McKee*, 219 S.W.3d at 497; *Hoyt v. GE Capital Mortgage Servs., Inc.*, 193 S.W.3d 315, 322 (Mo. App. 2006).

Whether there is sufficient evidence for an award of punitive damages is a question of law. We review the evidence presented to determine whether, as a matter of law, it was sufficient to submit the claim for punitive damages. In doing so, we view the evidence and all reasonable inferences in the light most favorable to submissibility. A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity – that is, it was highly probable – that the defendant’s conduct was outrageous because of evil motive or reckless indifference.

Brady, supra at 109, *citing Hoyt v. GE Capital Mortgage Servs., Inc.*, 193 S.W.3d 315, 322 (Mo. App. 2006). Additionally, “because the remedy of punitive damages is so extraordinary and harsh, it should be applied sparingly.” *Altenhoefer v. Fabricor, Inc.*, 81 S.W.3d 578, 590 (Mo. App. 2002), *citing Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

At trial, the jury was instructed, in Instruction Number 7:

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction Number 5 was outrageous because of defendant’s evil motive or reckless indifference to the rights of others, then, in Verdict A, you may find that defendant is liable for punitive damages.

If you find that defendant is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of the trial.

(L.F. 251; App., p.A2).

First, the City Council cannot be said to have intentionally committed a wrongful act without just cause or excuse, or intentionally acted by a wanton, willful or outrageous act, or with reckless disregard to the act's consequences. As discussed in Point I, whether the MHRA even applies to this decision is questionable at best, and certainly not well-settled. Moreover, the City Council members are political, elected officials, who were seeking to fill a public position. That they would consider diversity of the Court serving the citizens of Kansas City is hardly outrageous. When presented with a panel of only Caucasian females, it cannot be considered an outrageous act or even reckless disregard to the act's consequences to question the homogeneity of the panel presented to them in light of the diversity of Kansas City's population. Moreover, the former Mayor testified that the selection of judges is a very political process, with numerous groups and citizens of the City weighing in on all candidates. (Tr. p.155, ll.2-19). The former Mayor also testified that a legislative body often makes decisions through a difficult discussion and deliberation process. (Tr. p.153, l.10 – p.3). Finally, the former Mayor testified that diversity is an important consideration, and she was concerned that the panel lacked diversity. (Tr. p.154, ll.4-21).

In addition, as Howard testified, the City's plan is very similar to the Missouri Plan, and the City's appointment process should work essentially the way the State's plan

does. (Tr. p.193, ll.6-22). In Missouri Supreme Court Rule 10.32 (App. p.A2), the Missouri Supreme Court specifically states that the State's Nominating Commission should consider the diversity of the community when nominating a panel. While it is true that the Supreme Court Rule also states that the most qualified candidates should be selected for the panel, under the state system, it is not unlawful to consider diversity regarding a judicial panel. That is exactly what some, if not all, the City Council members were debating when it decided not to choose a judge from that panel.

Additionally, at least two Council members testified (in offers of proof) that they were concerned about an issue alleged in Howard's background that made them question the Nominating Commission's decision on the panel. (Tr. p. 371, l.18 – p.374, l.6; p.385, l.17 – p.391, l.6). There was not clear and convincing evidence that the City Council's actions were outrageous or with reckless disregard for the rights of others. Punitive damages were not warranted, and a jury instruction on punitive damages was error by the trial court.

Howard argued in her closing that the City acted with reckless disregard toward the rights of others because the City Attorney and a few council members were offered an unsolicited opinion by an area attorney that he believed the actions of the council were unlawful. (Tr. 435, ll.10-22). Although he disagreed with the actions taken by the Council, this very attorney agreed that diversity in the Municipal Court is important, and advised the City that he was working to increase the diversity of the applicant pool. (Tr. p.222, l.10 – p.223, l.6).

The City Attorney testified that he receives unsolicited legal opinions, but it is his job to advise the City Council as to the legality of its actions. (Tr. p.298, l.11 – p.299, l.7). For a municipality to be open to punitive damages simply because they do not follow the unsolicited advice of an outside attorney would require those municipalities to follow all unsolicited advice, lest they get sued and be automatically subject to punitive damages. Additionally, this testimony from the outside attorney was offered over the objection of the City. The error related to the admission of this opinion evidence is discussed in Point III, *infra*.

No council member made any statements about Howard personally, and she was not present in the Council room at two meetings discussing the panel. (Tr. p.209, ll.12-19; p.208, ll.1-22). Moreover, the two Council members who testified (in offers of proof) that they had concerns about the background of Howard specifically testified that they did not mention this in the open Council meeting out of deference to her. (Tr. p.372, l.24 – p.373, l.12; p.390, l.22 – p.391, l.6). The actions of the City Council were not designed to trample on the rights of Howard or others; it simply was debating the diversity of the municipal court, and was concerned about the homogeneity of the panel that was presented to it, an issue that the Missouri Supreme Court has established is very important in selecting judges. The prejudice against the City was obvious: the jury awarded \$1,500,000.00 in punitive damages against the City. Because the submitted instruction was not warranted by the evidence, it should not have been submitted to the jury.

III. The trial court erred in admitting testimony of a third party regarding the lawfulness of the City Council’s decision because the testimony of the third party was improper opinion testimony in that it was evidence regarding an ultimate issue of law.

Standard of Review

“The admissibility of evidence lies within the sound discretion of the trial court.” *Litton v. Kornbrust*, 85 S.W.3d 110, 113 (Mo. App. 2002), quoting *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000). “The trial court will not be found to have abused its discretion unless its ‘ruling was clearly against the logic of the circumstances, and so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful, deliberate deliberation.’” *Id.*, quoting *Brantley v. Sears Roebuck & Co.*, 959 S.W.2d 927, 929 (Mo. App. 1998).

Analysis

Evidence of local Kansas City attorney Patrick McClarney’s personal opinion on the lawfulness of the Council’s decision should not have been admitted. McClarney’s testimony of his personal opinion amounted to testimony directing the jury to find the Council’s actions were unlawful. As such, his testimony invaded the province of the jury on an ultimate issue of law.

Opinion evidence of an expert cannot invade the province of the jury in a strict sense, even when the opinion is on the very issue of law to be decided. *McKinley v. Vize*, 563 S.W.2d 505 (Mo. App. 1978). Although expert testimony can be on an ultimate issue for the fact finder, the expert testimony cannot be on an ultimate issue of law. *Wulfling v. Kansas City Southern Indus., Inc.*, 842 S.W.2d 133, 153 (Mo. App. 1992).

The Court in *Wulfing* explained that “[t]his is because the special legal knowledge of the judge makes such testimony of the witness superfluous. It also encroaches upon the duty of the court to instruct on the law.” *Id.* (internal citations omitted). This is well-settled law in Missouri. *See, e.g. Young v. Wheelock*, 64 S.W.2d 950 (Mo. 1933). The testimony of one of Howard’s witnesses, over objection by the City, violated this principle.

The Court allowed an outside attorney, Patrick McClarney, to state his opinion regarding whether the Council’s decision to reject the panel was lawful, and allowed in evidence that he stated his opinion to the City Attorney and a few Council members. (Tr. p. 216, l. 1-p. 218, l. 5 - p. 220, l. 7 – p. 222, l. 1) This was improper expert testimony which invaded the province of the jury on an ultimate issue of law, whether the City Council discriminated against the panelists. The City was prejudiced because the jury was only allowed to hear Howard’s position, by a purported expert, that the actions were illegal. The City was also prejudiced because the jury was led to believe that an outside person offering an unsolicited opinion regarding the legality of a decision is enough to constitute reckless disregard for the rights of others, when the Council has a legal advisor to whom they listen, and who did not believe the Council acted unlawfully and advised them of such. (Tr. p. 298, l. 11 – p. 299, l. 7) This prejudiced the City because the jury was left with the impression that the outside attorney was advising the jury that the City had discriminated against Howard when it rejected the entire panel, essentially amounting to a direction by McClarney to the jury to find discrimination and to find the City had acted with reckless disregard for the rights of others so that punitive damages could be awarded.

As such, it was testimony related to the ultimate issue of law, and should not have been admitted.

IV. The trial court erred in refusing to admit evidence of certain City Council members' reasons for rejecting the panel because such evidence could negate an element of Respondent's prima facie case of discrimination and negate Respondent's right to punitive damages, in that the evidence is probative of the motive of the City Council in rejecting the panel for the municipal judicial vacancy.

Standard of Review

“The admissibility of evidence lies within the sound discretion of the trial court.” *Litton v. Kornbrust*, 85 S.W.3d 110, 113 (Mo. App. 2002), quoting *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000). “The trial court will not be found to have abused its discretion unless its ‘ruling was clearly against the logic of the circumstances, and so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful, deliberate deliberation.’” *Id.*, quoting *Brantley v. Sears Roebuck & Co.*, 959 S.W.2d 927, 929 (Mo. App. E.D. 1998).

Analysis

In this case, Howard contended that the City Council's action of rejecting the panel was based on race in violation of the MHRA. Discriminatory intent or motivation is critical in proving a case of discrimination. *See, R.T. French Company v. Springfield Mayor's Comm'n on Human Rights and Comm. Rel.*, 650 S.W.2d 717 (Mo. App. 1983). *See also, Wentz v. Industrial Automation*, 847 S.W.2d 877 (Mo. App. 1992). Although under *Daugherty* the Plaintiff need only show that race was a contributing factor, the jury

was never given an opportunity to hear the evidence to make its determination of the City Council's intent when it rejected the panel. The City was prejudiced by the court's ruling preventing it from showing why the City Council chose not to select someone from the panel Howard was on, not only because the jury could have chosen to believe the Council members' concern was the real reason for rejecting the panel, but also because this evidence further negated punitive damages.

Howard presented testimony that she was not selected because of her race. The Court ruled in limine that the City could not offer testimony on the reason why she was not selected, namely a story about Howard's past that raised concerns for at least two council members who voted to reject the panel after hearing the story about Howard. In an offer of proof, the two Council members testified that the information they heard about Howard made them question the process by which the panel had been selected, and whether the most qualified individuals were on the panel. (Tr. p.399, l.16 – p.400, l.3; p.371, l.18 – p.374, l.6; p.385, l.17 – p.391, l.6). Although Respondent argued that this was so prejudicial to Howard that it should not be admitted, evidence of possible misconduct, even unproven, has been admitted at trial or used at summary judgment. *See, e.g. Johnson v. AT&T Corp.*, 422 F.3d 756 (8th Cir. 2005); *Brown v. Packaging Corp. of America*, 338 F.3d 586 (6th Cir. 2003). The trial court improperly excluded this evidence and the exclusion prejudiced the City because it could not explain the intent of other council members or offer evidence of other reasons for its actions or reasons that Howard would not have been appointed, leaving the jury with only Howard's side of the story.

Moreover, a submissible case for punitive damages requires clear and convincing evidence that defendant intentionally acted “either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred).” *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004); *Downey v. McKee*, 218 S.W.3d 492, 497 (Mo. App. 2007). The defendant must have intentionally committed a “wrongful act without just cause or excuse.” *Downey v. McKee*, 219 S.W.3d at 497; *Hoyt v. GE Capital Mortgage Servs., Inc.*, 193 S.W.3d 315, 322 (Mo. App. 2006). Evidence of the City Council’s intent, and the information it had before it is critical in determining whether evil motive necessary for punitive damages was present. Two Council members testified that the information they had heard concerned them enough to question the actions of the Municipal Judicial Nominating Commission in presenting that particular panel. (Tr. 371, 1.18 – p.374, 1.6; p.385, 1.17 – p.391, 1.6). Thus, even if the jury determined that race was a contributing factor, the jury could be free to find that the City Council had not intentionally committed a wrongful act without just cause of excuse and refused to award punitive damages. The evidence of the Council’s concern regarding Howard’s background should have been heard by the jury, and the Court’s refusal to allow it in was an abuse of discretion warranting a new trial.

V. The trial court erred in instructing the jury on future damages because future damages were not supported by the evidence in that there was no evidence that Respondent was reasonably certain to sustain damage in the future.

Standard of Review

The standard of review for instructional error is de novo. *Harvey v. Washington*, 95 S.W.3d 93, 98 (Mo. banc 2003). To reverse on grounds of instructional error, the party claiming instructional error must establish that the instruction at issue misdirected, mislead, or confused the jury. Additionally, prejudice must have resulted from the instructional error. *Dhyne v. State Farm Fire and Cas. Co.*, 188 S.W.3d 454, 459 (Mo. banc 2006).

Analysis

MAI 4.01 states that if the jury finds in favor of the plaintiff, then it must award such sum as it believes will fairly and justly compensate the plaintiff for any damages it believes the plaintiff sustained and *is reasonably certain to sustain in the future* due to the defendants actions. (Emphasis added). However, future damages may not be submitted if they are not supported by the evidence. *Fincher v. Murphy*, 825 S.W.2d 890 (Mo. App. 1992).

During the instruction conference, the City proffered a damages instruction based on MAI 4.01 that did not include future damages. The Court rejected that proffered alternate instruction, and instead submitted to the jury a damages instruction proffered by Howard that included future damages. (L.F. 239, 249, 259; App., p.A3, A4).

“Future damages may not be recovered unless they are reasonably certain to occur in the future.” *Still v. Anhemann*, 984 S.W.2d 568, 576 (Mo. App. 1999). *See also Brenneke v. Department of Missouri, Vet. Of Foreign Wars*, 984 S.W.2d 134 (Mo. App. 1998) (damages need not be established with absolute certainty, but with reasonable certainty).

In *Brenneke*, the plaintiff was alleging wrongful termination of her employment. She testified as to her past wage lost and her future employment prospects. She also testified as to her efforts to find new employment, and that her ability to find a new job had been compromised by her former employer's bad references given to prospective employers. The Court of Appeals agreed with the trial court that this testimony was not enough to submit an instruction on future damages.

In this case, Howard did not even provide as much reasonable certainty as to future damages as the plaintiff in *Brenneke* had. Howard testified only that she believed it would affect her future employment prospects because she would have to talk about it and her lawsuit. (Tr. p.172, ll.1-11). She did not testify to any specifics where the Council's actions in rejecting the entire panel had any effect on her prospects, and an e-mail to the current Mayor she sent is evidence that she had contact with the City regarding its business following the rejection of the entire panel. (Tr. p.211, l.24 – p.212, l.9). She did not testify to having any continued emotional damage. Her husband testified to stress during the application process, but he identified only one incident after the rejection of the entire panel where Howard cried when talking to him about the City's actions. (Tr. p.237, l.4 – p.238, l.11). He did not testify to any current effect on Howard. Although Howard testified to losing sleep and still getting sick to her stomach, she further commented that "we're still here." (Tr. p.162, ll.3-12). Ostensibly, then, Howard's loss of sleep is related to the progress of her lawsuit, not the continued effect of the City Council's decision.

Howard testified that she believes she will continue to lose economic opportunities, but had no basis for such belief. (Tr. p. 172, ll.1-11). Howard did not testify about any other positions for which she applied but was denied due somehow to the City Council's decision to reject the panel when she sought an appointment as municipal court judge. Howard provided absolutely no evidence beyond her own speculation. Case law is clear that to warrant a future damages instruction, a plaintiff must offer evidence to support the claim, not just rely on mere speculation. Therefore, the damages instruction given to the jury should not have included future damages. In closing arguments, Howard's attorney talked about future lost economic opportunities, stating that the lost economic opportunities amounted to one third of the difference in pay times the length of Howard's remaining working years. (Tr. p.431, l.14 – p.433, l.11).

To allow future damages in this case would essentially open the door to future damages in any employment case involving hiring, promotion or termination, because any economic impact from lost wages could be multiplied by the remaining work years. The prejudice to the City is clear in the form of the compensatory damage amount, because the jury believed, based on the instruction, that it was to award Howard future damages. The trial court's instruction to the jury on damages, including future damages, was an abuse of discretion, and for that reason a new trial is warranted.

VI. The trial court erred in upholding the jury verdict on damages because the evidence did not support the compensatory damages awarded in that the Respondent was not entitled to front pay or back pay.

Standard of Review

An appellate court reviews a motion for new trial or remittitur for abuse of discretion. *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 927 (Mo. App. 2006). “An abuse of discretion occurs when a verdict is so excessive as to shock the conscience of the appellate court.” *Id.*, citing *McCormack v. Capital Elec. Constr. Co.*, 159 S.W.3d 387, 395 (Mo. App. 2004).

Analysis

Although there is no rule mandating that compensatory damages be remitted where the non-economic damages are considerably less than the damages award, courts in Missouri have remitted excessive compensatory damages. *See, e.g. Barnett v. La Societe Anonyme Turbomeca Fr.*, 963 S.W.2d 639 (Mo. App. 1997); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. App. 1997); *McCormack v. Capital Elec. Constr. Co.*, 159 S.W.3d 387 (Mo. App. 2004). “There is no exact formula for whether a verdict for compensatory damages is excessive, and, of course, each case must be considered on its own merits.” *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 929 (Mo. App. 2006), quoting *Barnett*, 963 S.W.2d at 657. Indeed, the cases cited above are all personal injury cases, rather than employment discrimination cases. The ultimate test is “what amount fairly and reasonably compensates the injured party, given the record.” *Knifong* at 930 (citation omitted).

Howard testified that she was not seeking lost wages. However, when Howard’s attorney made his closing arguments, he essentially asked for both back and front wages to the jury (although couched it as “lost economic opportunity damages.” (Tr. p.431, l.14 – p.433, l.11). In this case, Respondent Howard did not reapply for the vacancy, which

was then given to Katherine Emke, a candidate on the all-Caucasian female panel with Howard. (Tr. p.361, ll.1-10; Tr.367, ll.4-12). This evidence was not allowed in by the Court, although an offer of proof was made. In addition, as discussed in Point V, the jury was instructed as to future damages, or, in essence, front pay, although she had previously testified that she was not seeking lost wages. (Tr. p.173, ll.4-6). In closing arguments, Howard's attorney argued that the lost economic damages should be \$533,000.00, based on a calculation involving back pay and front pay. (Tr. p.431, l.14 – p.433, l.11). Thus, since Howard testified that she was not seeking lost wages, the jury's award of \$633,333.00 was excessive. This was improper and not supported by the evidence. Howard did not know whether she would be selected, and stated she believed all three of the panelists would make fine judges. (Tr. p.208, l.18 – p.209, l.8). Furthermore, Councilman Bill Skaggs testified that he believed Katherine Emke had the most votes for the position, not Howard. (Tr. p.413, ll.14-17). Therefore, the damages calculated using back pay and front pay calculations was not supported by the evidence and the verdict award should be reduced by that amount, \$533,000.00.

VII. The trial court erred in awarding the amount of attorney's fees requested by Respondent because it was excessive in that Respondent included fees incurred not in this case but in a different case in her request.

Standard of Review

Review of a trial court's award of attorney's fees is an abuse of discretion. *Kopp v. Home Furnishing Ctr., LLC*, 210 S.W.3d 319, 329 (Mo. App. 2006). "A court abuses its discretion when its action is so clearly against the logic of the circumstance and so

arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Id.*, citing *Anglim v. Mo. Pacific R.R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992).

Analysis

“In general, counsel for the prevailing plaintiff should be compensated for all time reasonably expended on a matter.” *Pollock v. Wetterau Food Distrib. Group*, 11 S.W.3d 754, 774 (Mo. App. 1999) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 430, n. 4 (1983)). In *Hensley* the United States Supreme Court noted the twelve factors for determining attorney's fees: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley* at p. 430, n.3. The issue the City raises on appeal with Howard's attorney's fees award are those fees for attorney Brian Nicewanger's submission in the area of “time and labor” required. *Hensley v. Eckerhart*, 461 U.S. 424, 403 n. 3 (1983).

“Hours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority.” *Hensley*, at p. 434. The bulk of the time submitted by Nicewanger is for work performed on another case Ms. Howard filed on January 25, 2007 against the City, *Howard v. City of Kansas City*, 07AE-CV00239. (L.F.

315-328). In that case, Ms. Howard challenged the constitutionality of a city ordinance concerning conducting background checks as part of the selection process of municipal court judges and the treatment of her “confidential” information. (L.F. 485-511). On August 1, 2007, the case was resolved. (L.F. 512) A review of the Nicewanger time submissions shows entries related to work done mainly on the first case as reflected in the activities noted and the dates performed. (L.F. 315-328).

On July 13, 2007, Ms. Howard filed this case alleging employment discrimination (based on race, sex and age) and retaliation under the MHRA styled *Howard v. City of Kansas City*, 07AE-CV02320. (L.F. 8-34). Mr. Nicewanger filed the original petition in this case, but Howard testified that she had “pulled together” the MHRA charge, because that was her area of expertise. (Tr. p.204, ll.6-14). On August 29, 2007 Mr. Jess entered his appearance for Howard. (L.F. 35) Mr. Jess handled all work on the second case since August 29, 2007. (L.F. 315-328; 311-314).

Nicewanger is entitled to receive only nominal fees for work done on the charge of discrimination, since, according to Howard’s own testimony, she prepared the charge. (Tr. p.204, ll.6-14). He is also entitled to fees for the filing of the petition in this lawsuit, although two of the four counts in Howard’s original petition were immediately abandoned by Mr. Jess, and a third count was abandoned at trial. (L.F.8-34; 38-52; 249). Mr. Nicewanger is not entitled to any fee award in this case for work performed on the first case concerning the City ordinance’s validity and Howard’s confidential information.

Other than filing the original petition, Mr. Nicewanger did not obtain any results in this case. Though Mr. Nicewanger filed the original petition in July of 2007, the case

went forward on the amended petition filed in August 2007 and Howard was represented by Mr. Jess.

In the post trial proceeding, Howard's attorney (Mr. Jess) offered to cut the amount of the request that was clearly referencing work solely done on the other case, and the trial court agreed. (Tr. of 6/11/08 proceeding, p.17, ll.10-21; p.18, ll.7-13). However, this is based on Nicewanger's failure to delineate between the two cases. He should not be rewarded for poor recordkeeping when it is clear he had little work on this case as compared to the other case. As set forth in *Hensley*, if Nicewanger could not bill Howard for the work done on the former case as a part of this case, he cannot recover fees from the City as part of this case for work done on the former case. Therefore, the amount of Nicewanger's fees should be limited to only that which is clearly related to this case.

CONCLUSION

The City respectfully requests this court reverse the judgment of the trial court because the Missouri Human Rights Act does not apply to the appointment of municipal judges because such appointment is not an employment decision within the meaning of the MHRA. In the alternative, the City requests that the punitive damages award be overturned, and/or a new trial based on instructional and evidentiary error, or that the amount of damages awarded Plaintiff be remitted because the amount of the compensatory damages were based on lost wages and far outweighed the Plaintiff's actual damages in this case.

Respectfully submitted,

GALEN BEAUFORT, #26498
City Attorney

By: _____

SASKIA C.M. JACOBSE, #49284

JAMIE L. COOK, #58885

Assistant City Attorneys

2800 City Hall

414 E. 12th Street

Kansas City, Missouri 64106

Telephone (816) 513-3121

Facsimile: (816) 513-2716

e:mail: saskia_jacobse@kcmo.org

**ATTORNEYS FOR
DEFENDANT/APPELLANT CITY OF
KANSAS CITY, MISSOURI**

RULE 84.06(b) CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 14,398 words/1,378 lines and complies with the word/line limitations contained in Rule 84.06(b); that a diskette of the Brief is included herewith in Microsoft Word format; that the diskette was scanned for virus using Norton Antivirus and found to be free of virus; and that one copy of the diskette and two copies of Appellant's Substitute Brief were hand delivered this 19th day of July, 2010 to:

Edward D. Robertson, Jr.
Bartimus, Frickleton, Robertson & Gorny, P.C.
715 Swifts Highway
Jefferson City, Missouri 65109

Mark A. Jess
Law Offices of Mark A. Jess, LLC
Kansas City Livestock Exchange Building
Post Office Box 025639
1600 Genessee, Suite 842
Kansas City, Missouri 64102

Attorneys for Plaintiff/Respondent

Saskia C.M. Jacobse
Attorney for Defendant/Appellants