

**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 REPLY BRIEF

**GALEN BEAUFORT, #26498
City Attorney**

SASKIA C.M. JACOBSE, #49284

JAMIE L. COOK, #58885

Assistant City Attorney

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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POINTS REPLIED TO

I. Respondent Howard was not an Employment Applicant under the MHRA

As a preliminary matter, the City must respond to Respondent Howard's statement regarding the standard of review. Howard states that because the City stated the standard of review as *de novo*, this meant that the City admitted all findings made by the jury. This is an incorrect assumption. The review of the circuit court's decision is *de novo*, because the trial court's decision was on a matter of law.

In her brief, Respondent Howard argues that analysis under the Missouri Human Rights Act, § 213.010, et seq. (RSMo. 2007) should rely on the plain language of the MHRA, and not on analysis in federal case law. However, Howard's analysis of the definition of "employee" is flawed. Howard's definition of "employee" that she begins with conveniently has no specific reference to the control an employer has over an individual (and therefore the control a potential employer would have have over an individual), although in the initial definition control is implied. The initial definition cited by Howard refers to an employee as being below the executive level, which implies control. Howard then ignores the word "below", and argues that because judges are not a part of the executive branch of government, they must be employees. This is, of course, nonsense. Such a reading would make all city and state judges and legislators employees. Moreover, the definition cited by Howard says below the executive level. Howard's

argument implies that she, as a municipal judge, would be below the executive level.

Clearly, neither judges nor legislators are below the executive level. Rather, Howard's original definition implies control, and judges do not fit the definition.

This is consistent with case law, and Howard's effort to ignore the word "below" notwithstanding, the definition she cites implies that an employer must have some control over the individual for that individual to be an employee. The case law makes clear that an employer must have some control over the individual for that individual to be an "employee" under the civil rights laws. *See, e.g. Robinson v. Bankers Life & Cas. Co.*, 899 F. Supp. 848 (D.N.H. 1995); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991), *Sloan v. Bankers Life & Casualty Co.*, 1 S.W.3d 555, 563 (Mo. App. 1999). Moreover, Merriam-Webster's *Dictionary of Law* (1996) defines employee as "A person usually below the executive level who is hired by another to perform a service especially for wages or salary and is under the other's control." Thus, as does the case law, the dictionary also looks to the control imposed to determine whether an individual is an employee, whether specifically, as the definition cited above, or impliedly, as the definition cited by Howard.

In seeking to avoid the control aspect of an employee, Howard is essentially calling into question this Court's decision in *Sloan*. If this court follows Howard's analysis of the dictionary definition of employee, it will essentially be overruling *Sloan*, and making independent contractors "employees" for the purposes of MHRA, since independent

contractors are also not at the executive level. The City suggests that such an analysis would be improper, and fly in the face of all case law analyzing the application of civil rights laws to independent contractors. *See, e.g. Robinson v. Bankers Life & Cas. Co.*, 899 F. Supp. 848 (D.N.H. 1995); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991).

Howard emphasizes that *Sloan* is inapplicable, because the contract itself stated Sloan was an independent contractor. Were this statement in the contract enough to bind and make an individual an independent contractor, the court in *Sloan* would not have had to go through the analysis it did. Moreover, Howard is missing the point of *Sloan*. The court in *Sloan* was faced with an individual seeking coverage under the Missouri Human Rights Act, and went through the common law analysis to determine if he was an employee. That analysis led the court to the conclusion that he was not an employee. He was an independent contractor, and the court then found that individuals who are independent contractors are not employees under the Missouri Human Right Act.

Curiously, Howard argues that the only options for this Court is to consider her (and really all judges) either an employee or an independent contractor. There is no support for the conclusion that these are the only two options. Howard cites *Community for Creative Non-Violence*, stating “employee and independent contractor status are ‘mutually exclusive.’” However, this statement only means that one cannot be both an independent contractor and an employee. It does not mean that there are only two possibilities.

Howard then continues that leap in logic by stating “for that reason, no court has concluded that a judge is an independent contractor. . . .” The City is unclear what reason Howard is referring to. Nevertheless, the MHRA does not state that an individual is either an employee or an independent contractor. The term “independent contractor” does not appear in Section 213.055. Thus, the question is not “is a municipal judge an employee or independent contractor.” Instead, the question is “is a municipal judge (indeed, any judge) an employee within the meaning of the MHRA.”

Howard argues that *Missouri Comm’n on Human Rights v. Red Dragon Restaurant Inc.*, 991 S.W.2d 161, 168 (Mo. App. W.D. 1999) is applicable to this case, and because it stated the MHRA is remedial in nature and to be applied liberally to all individuals, the employment provisions should also be applied liberally. *Red Dragon* was analyzing a different section of the statute, one referring to public accommodations, which naturally would apply to all persons. It was also analyzing whether those associated with an individual with a disability should be afforded the protection of the MHRA. While the MHRA may be remedial in nature, and construed liberally, it still must be determined by this Court whether Howard, as an applicant for a judicial position, is afforded the protection of the MHRA. *Sloan* made clear that a liberal reading of the MHRA does not mean that it applies to non-employees, and the City notes that *Sloan* was decided shortly after *Red Dragon*.

Red Dragon can be instructive in that it also notes, like many other cases, that Missouri Courts may look to federal decisions when Missouri has not addressed an issue under the MHRA.

Our interpretation of § 213.065 is supported by federal cases addressing associational discrimination under various federal civil rights statutes. When Missouri has not addressed an issue under the MHRA, Missouri courts may look to federal decisions interpreting similar civil rights laws. . . . The federal courts' treatment of claims of associational discrimination in *Westray v. Porthole, Inc.*, 586 F. Supp. 834 (D. Md. 1984) and *Clayton v. White Hall School Dist.*, 875 F.2d 676 (8th Cir. 1989), is instructive of when associational discrimination is actionable under statutes which do not specifically authorize that cause of action.

Missouri Comm'n on Human Rights v. Red Dragon Restaurant Inc., 991 S.W.2d 161, 168 (Mo. App. W.D. 1999).

Presumably, the Court in *Sloan* was aware of the decision in *Red Dragon*, but did not simply determine that a liberal reading of the MHRA would provide protection under Section 213.055 to all individuals. Instead, it went through the common law analysis of whether Sloan was an employee for purposes of the MHRA. In addition, *Sloan* used the Title VII analysis of control in determining that the undefined term "employee" does not include independent contractors because employers do not have the requisite control to make an independent contractor an employee within the meaning of the MHRA. A

consistent analysis with *Sloan* requires this court to consider whether the City has enough control over the judges of the Municipal Division of the Sixteenth Judicial Circuit of Jackson County, Missouri, to make those judges employees of the City. The analysis in Appellant's brief makes clear they do not. Respondent Howard offers no facts to counter the lack of control over the judges, as dictated by the Missouri Constitution, state statute, and the City's own Charter, voted on by the citizens of Kansas City.

Instead, Howard offers a recitation of a 20/22 factor test utilized by the IRS to determine whether an individual is an employee for taxation purposes. In setting forth this test, Howard relies on *K & D Auto Body, Inc. v. Div. of Empl. Sec.*, 171 S.W.3d 100 (Mo. App. 2005). However, that case was looking at a statute that had a regulation specifically looking to the IRS rulings as well as common law rules applicable to the employee/employer relationship. The court made clear the IRS factors were only to aid the common law rules.

8 CSR 10-4.150(1), . . . , was promulgated by the director of the Division after approval of the director of the Department of Labor and Industrial Relations pursuant to section 288.220.5, further provides, in relevant part:

In order to interpret section 288.034.5, RSMo, effective June 30, 1989, the division shall apply the common law rules applicable in determining the employer-employee relationship under 26 U.S.C., Section 3306(i) the division shall consider the case

law, Internal Revenue Service regulations and Internal Revenue Service letter rulings interpreting and applying that subsection.

As an aid to determining whether a worker is an employee or an independent contractor under the common law rules, the IRS has identified twenty factors to consider in determining whether sufficient control is present to establish an employer-employee relationship.

K & D Auto Body, 171 S.W.3d at 105 (internal citation omitted). In that case, the court also highlighted that the 20/22 factors (propounded by Howard) are not a bright-line rule, and not all apply to every situation, and no one factor is decisive, but all are used to determine control.

. . .the factors have always been intended as guides or aids in determining employment status. The factors are not intended to serve as a bright-line rule with no flexibility, but rather they are indices of control to assist the employer in attempting, for tax purposes, to determine the common law employment status of its workers. Not every factor is applicable in every situation, and each case is decided on the basis of its own facts. The degree of importance attached to each factor varies depending on the type of work and individual circumstances, and the relevant factors should be considered in inquiring about employment status with no one factor being decisive.

Id. at 106. See also, *Klausner v. Brockman*, 58 S.W.3d 671, 680 (Mo. App. 2001) (overruled in part on other grounds). *Klausner* looked to the decision and analysis of *Travelers Equities Sales v. Div. of Empl. Sec.*, 927 S.W.2d 912, 921 (Mo. App. 1996) for guidance. That case stated:

Although the federal common law involves using different factors in the analysis, the bedrock of the law is still the “common law of agency right to control,” § 288.034.5. Consequently, the decision to apply the general common law did not represent a radical departure in philosophy, and in most cases the result of analysis will be the same because we are still looking primarily for indicia of the right to control.

Travelers Equities Sales at 921. The Court then added that “[S]ome factors are of greater weight than others, and the bedrock is still the common law agency test of the right to control the manner and means of performance. Therefore, one cannot rest a decision merely on a numerical count of factors.” *Id.* at 925, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 754 (1989).

Prior to her recitation of the 20/22 factor test, Howard argues that because the City utilizes some of the same human resources and benefits forms for municipal court judges, elected officials, and its regular employees, this is an admission of the City that the judges are employees under the MHRA. This is literally taking form over substance. To state that the City’s use of the same forms overrides the fact that the City has no control over the

judges of the Municipal Division of state court defies logic. And to claim the City has admitted municipal court judges are employees through the use of certain forms is simply inaccurate and misleading. The only admission by the City is that for administrative convenience, it uses the same general packet for employees as well as public officials such as judges, city council members and the mayor.

In his deposition, a City manager stated that the same information is given to council members and the mayor, in addition to judges and regular employees. (Supplemental Legal File 10-11; deposition p.23, l.25 – p.27, l.10) Thus, under Howard's theory, the city council and mayor are not elected or public officials, but rather regular employees, because they sign the same forms and also are eligible for medical and life insurance as are regular employees, with one small exception. *Thompson* and *Bredesen* made clear that such similarities between judges and employees are not determinative of whether the judge is an employee within the meaning of anti-discrimination laws. *Bredesen v. Tenn. Judicial Selection Comm.*, 214 S.W.3d 419, 430 (Tenn. 2007), and *Thompson v. Austin*, 979 S.W.2d 676, 682 (Tex. App. 1998) As clearly explained in *Thompson*, the most important question is the level of control the City has over municipal court judges.

Howard also argues that the provision of group life insurance and other benefits to the judges of the Municipal Division is also an admission that they are employees of purposes of the MHRA. Again, the provision of benefits is no evidence of control, and was discussed in *Bredesen* and *Thompson, supra*. Howard lists the various factors establishing

agency and states that the majority are in favor of Howard. However, Howard ignores the fact that the most important element, the right to control is completely lacking, as it was in both *Thompson* and *Bredesen*.

Howard attempts to distinguish these cases by stating that the MHRA does not have similar exclusions as the law in *Thompson*. However, this twists the MHRA, which does not have exclusions because it does not contain a definition. Like the statute in *Bredesen*, the MHRA simply does not include a definition of an “employee.” It also does not include an inconsistent definition, as implied by Howard; in reality, it simply does not contain a definition at all. In this way, this case is identical to *Bredesen*, which interpreted a Tennessee anti-discrimination statute that also did not contain a definition of employee. And while *Bredesen* relied on the analysis in *Thompson*, this does not change the facts that the issue in the two cases are identical to the issue in this case, and the law in *Bredesen* was identical to the language in the MHRA.

The Presiding Judge of Jackson County has general administrative authority over the Court and its divisions. Moreover, according to Section 479.020.5 (RSMo 2007), 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 – nor would we want them to be. In fact, in 2004, the Missouri legislature ensured that the presiding judge has general administrative authority over the judges and court personnel of the municipal divisions within the circuit. Prior to the passage of Missouri House Bill 795, the same section stated that “Notwithstanding the foregoing provisions of this subsection, in any city with a population over four hundred thousand with full-time municipal judges who are subject to a plan of merit selection and retention, such municipal judges and court personnel of the municipal judges shall not be subject to court management and case docketing in the municipal divisions by the presiding judge or the rules of the circuit court of which the municipal divisions are a part.” Missouri House Bill 795 deleted the above-quoted portion, clearly showing its legislative intent that the municipal divisions should be a part of the circuit court, and subject only to the management and rules of the circuit court, not the City.

Moreover, Howard specifically lists factors such as provision of an office and supplies. Under Howard’s analysis, then, state court judges such as the judges of this Court would be employees under the MHRA. Taken to its logical end, then, actions by the judges of the Municipal Division of the Sixteenth Judicial Circuit, or the Missouri Court of

Appeals for the Western District, or even this Court, such as electing a presiding judge, could lead to charges of discrimination under the MHRA against the City or the State of Missouri. *Sloan* make clear that the intent of the MHRA is to protect employees from employment discrimination, not to protect individuals over whom the employer has no control from employment discrimination. That principal should be extended to this case to find that municipal judges are not employees within the meaning of the MHRA.

While the City does not agree with many of Howard's conclusions regarding her recitation of the 20/22 factor test, it takes particular issue with several other factors not described above. First, factor number 1 refers to instructions. Although Howard makes several unsupported factual statements, it completely ignores who administrates the work of the judges; rather she just assumes it is the City, a direct contravention of § 479.020.5 (RSMo. 2007). Similarly, she assumes the Court Administrator is an aid of the judges. In addition, several of the factors imply that a judge is just like a CPA in the City's Finance Department, which is another unsupported and irrelevant assumption. Factor 3, regarding integration, assumes that because the City has a judicial branch, it is a part of the workings of the City, and therefore judges must be employees. This would, like most of Howard's analysis, make all state court judges (and indeed, legislators) employees. And while Howard's analysis includes several references to the Municipal Court as a department of the City, with set hours, it simply assumes that the Municipal Court has no other function than the courtrooms and judge's actions within those courtrooms. This assumption is

unsupported by the record. Finally, with regard to the 20/22 factor test, Howard argues that the independent Municipal Judicial Nominating Commission is acting on behalf of the City and therefore all actions by the Commission are really actions of the City. This is simply untrue. While the Mayor may select certain members of the commission, others are voted on by attorneys within the City, and the Presiding Judge of the Sixteenth Judicial Circuit is the head of the Commission. This is hardly a City Commission such that they are acting in place of the City. Moreover, in arguing that the City Council has the right to discharge (Factor 19, p. 61), Howard notes that the procedures that require the Commission to bring charges of misconduct are “in place to assure judicial independence by protecting judges from arbitrarily or politically motivated firing by the political branches of the City.” In other words, they cannot be fired by the other branches of the City, and in fact, the other branches of the City lack control over the judges. Thus, despite her best efforts, even Howard admits to some extent, that the City lacks control over the municipal judges.

Howard also urges this Court to ignore the thoughtful analysis of the courts in *Bredesen* and *Thompson*, in addition to *Sloan*. Instead, Howard urges this Court follow the Kentucky Court of Appeals in *Kearney v. City of Simpsonville*, 209 S.W.3d 483 (Ky. App. 2006). However, according to that case, the Kentucky Civil Rights law was enacted after Title VII, and specifically modeled after federal civil rights laws, other than the exception for public officials. *Id.* at 485. The court in that case determined that by specifically excluding that exception from the Kentucky Civil Rights Law, the Kentucky legislature

intended to include elected officials as employees. *Id.* Aside from the fact that Howard would be an appointed official rather than an elected mayor or commissioner, no such specific legislative intent to include elected or public officials or judges in the definition of “employee” exists in this case. Thus, *Kearney* is inapposite to this case, and its analysis should not be followed by this Court.

Howard complains of the citation to *Glorioso v. Ford*, Case No. 16CV95-27296 (April 22, 1996) (L.F. 457-465; Appendix to Appellant’s Main Brief, p.A10), but this Court may take judicial notice of state court orders. Appeal courts can take judicial notice of a Circuit Court order. *Burton v. State*, 641 S.W.2d 95, 101 (Mo. 1982) Though not binding authority, it is authority that was properly cited by the City and its rationale may be considered by this Court in determining whether municipal judges are employees.

Although Plaintiff clearly believes the MHRA should apply to everyone, many anti-discriminatory laws do not apply to all individuals. For example, independent contractors are not protected by employment laws. Similarly, employees under 40 and over 70 years of age are not afforded protection under the Age Discrimination in Employment Act. And, similar to this case, state court judges in Missouri are not afforded the protection of Title VII or the Age Discrimination in Employment Act, according the U.S. Supreme Court. *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395 (1991). Interestingly, although Howard urges this Court to ignore *Gregory* and its analysis of the ADEA, on page 76 of her Brief, she urges this Court to follow two other lower-court Federal cases analyzing the ADEA as

it relates to her argument that she was an employment applicant, seeking an employment opportunity. The City also notes that neither cases involve applicants for judicial positions.

While Plaintiff seeks to limit the meaning of “employment applicant” to the dictionary definition of “employment,” Plaintiff is ignoring the modifier in the MHRA. Both “employee” and “employment applicant” are modified by the word “his,” which refers to the employer. Thus, each of those terms refer to the employer-employee relationship. As such, an employment applicant is simply an applicant to become an employee. While members of the group may differ in that not all employment applicants may be hired and become employees of that employer, those applicants are seeking to become employees.

Plaintiff appears to want this Court to ignore the employer-employee relationship in arguing that employment applicants and employees are completely separate groups. However, following Plaintiff’s argument regarding “employee” vs. “employment applicant,” an applicant for municipal court judge would be covered by the MHRA, but upon appointment, would no longer be covered by the MHRA, because the City lacks the control over municipal court judges as discussed in the Court below. Similarly, an applicant to be an insurance agent such as the plaintiff in *Sloan v. Bankers Life & Cas. Co.*, 1 S.W.3d 555 (Mo. App. 1999), would be covered by the MHRA. However, because *Sloan* determined that independent contractors are not covered by the MHRA, he would no longer be covered. There is absolutely no language in the MHRA that supports the

conclusion that one who would not be an employee would still be an employment applicant. The MHRA is simply extending the rights it is awarding employees to individuals who are seeking to become employees. The plain and ordinary meaning of an employer's "employment applicant" under the MHRA involves the employer-employee relationship, and that relationship, and the case law surrounding it, cannot be ignored.

Since the record does not contain any evidence that the City has any control over the judges of the Municipal Division of the Sixteenth Circuit of the State of Missouri, they are not employees within the meaning of the MHRA. It follows, then, that a candidate for such a position is not an employment applicant under the MHRA, and the MHRA does not afford protection to Howard, and as a matter of law, this case never should have been submitted to the jury and the jury's verdict should be reversed by this Court.

II. Respondent Howard was not entitled to punitive damages.

The only court to expressly hold that punitive damages may be awarded against a municipality under the MHRA was the Missouri Court of Appeals for the Eastern District in *Brady v. Curators of the University of Missouri*, 213 S.W.3d 101, 108 (Mo. App. E.D. 2006). Howard does not address the statutory construction principles that lead the City to question whether *Brady* should be followed. Howard focuses on the Missouri opinion, *Brady*, that relies on a U.S. District Court opinion *Archie v. Fortner*, 70 F. Supp. 2d 1028, 1031 (W.D. Mo. 1999), but ignores an Eighth Circuit opinion, *Kline v. City of Kansas City*, 175 F.3d 660 (8th Cir. 1999), that was decided earlier. Howard assumes that

because the City is an employer and therefore liable for compensatory damages under MHRA, it is also automatically liable for punitive damages. This is contrary to the holding in *Chappell v. City of Springfield*, 423 S.W.2d 810, 813 (Mo. 1968), which reiterated the general rule that in the absence of a statute specifically authorizing such recovery, punitive damages are not recoverable against a municipal corporation. The court in *Chappell* explained:

In *Hunt v. City of Boonville*, 65 Mo. 620 (Mo. 1877), the Missouri Supreme Court held that although a municipal corporation could be liable for actual damages resulting from trespass, it could not be held liable for treble damages under the precursor of Section 537.340.

The MHRA provides that a municipal corporation could be liable for actual damages resulting from an MHRA violation; it does not specifically state that punitive damages are recoverable from municipalities. It would be consistent with *Chappell* for this court to hold that punitive damages are only recoverable from municipalities with an express statement in the MHRA. Such a ruling would also not offend *Brady*, because that case did not involve a municipality.

Although Howard outlined a laundry list of statements made by the City Council members during the selection and deliberation process in her brief, the vast majority of statements were about diversity, racial diversity in particular. This underscores the problem with Howard's reliance on these statements for punitive damages. Those

statements, coupled with Missouri Supreme Court Rule 10.13, is the reason punitive damages are not warranted in this case. The Supreme Court formally adopted a rule recognizing the importance of diversity in selecting judges in Missouri. But when the City Council, as part of its deliberative process, discusses the very thing the Supreme Court has recognized as an important consideration at the panel selection level, Howard argues that it is justification for punitive damages. This is simply not so.

Moreover, the primary argument made by Howard's counsel during closing argument to show reckless indifference was not the statements by the Council members, it was the unsolicited legal opinion of Patrick McClarney. (Tr. 435, ll.10-22). As discussed in the City's main brief, and in this reply brief, *infra*, McClarney's unsolicited legal opinion should not have been allowed into evidence as it was opinion testimony as to the ultimate issue of law. As argued in the City's main brief, to allow an unsolicited legal opinion to warrant punitive damages would open the door for virtually any attorney to notify an employer that in his or her personal opinion that employer's actions were discriminatory, and such notice, without more, would open the door to punitive damages as reckless indifference to the rights of others. "[B]ecause 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. W.D. 2002), *citing Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. Banc 1996). This Court awarding punitive damages based on unsolicited legal advice, and thereby opening the door to such advice

for the purposes of punitive damages, would fly in the face of the basic principle that punitive damages should be applied sparingly.

III. Improper opinion testimony should not have been allowed.

“The rule here is that the question whether a publication conforms to general community standards and is obscene is not within the proper scope of expert testimony and that an opinion that a certain publication is obscene would invade the province of the jury by expressing an opinion on an essential ultimate fact to be determined by the jury.” *State v. Smith*, 422 S.W.2d 50, 63 (Mo. 1967). Based on the above case, Howard cannot suggest that the City has expanded its argument on appeal as the objection that “improper expert testimony which invaded the province of the jury” is not the same as testimony that involved “an ultimate issue of law.” Even if the Court believes the issue was not properly preserved, it can still consider the issue under a plain error standard.

The trial court’s admission of McClarney’s testimony (Tr. 435, ll.10-22) and e-mail (Ex. 22, e-mail) invaded the province of the jury on an ultimate determination of law as they learned of his opinion that it was illegal for the City reject the entire panel. (Tr. 435, ll.10-23; Ex 22). The jury was there to decide whether it was illegal for the City to reject the entire panel. A comparison of the verdict director (L.F. 249) to McClarney’s e-mail and testimony bears out the problem. For the trial court to allow evidence of McClarney’s legal opinion on the ultimate issue of law was both an abuse of discretion and prejudicial. The trial court’s decision should be reversed and a new trial ordered.

IV. Evidence of additional reasons for rejection of the panel should have been admitted.

Respondent Howard's primary argument in favor of the exclusion of the evidence that council members had other reasons for the rejection of the panel of judicial nominees was that the information was based on an "untrue rumor." However evidence of information upon which actions are taken does not have to be proven or accurate to be admissible. *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).

Substantial evidence is evidence which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case. *Devor v. Blue Cross & Blue Shield*, 943 S.W.2d 662, 665 (Mo. App. 1997). In this case, the evidence submitted in an offer of proof, (Tr. p.399, 1.16 – p.400, 1.3; p.371, 1.18 – p.374, 1.6; p.385, 1.17 – p.391, 1.6) was that City Council Members were aware of information that called into question the submission of the panel of candidates to the Council. It is not relevant whether the information they had turned out to be true or not, only that they knew of it and it was the reason they voted to reject the panel. "An employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Smith v. Aquila, Inc.*, 229 S.W.3d 106, 122 (Mo. App. 2007).

In this case the evidence concerning why the Council rejected the panel was not heard by the jury. As argued in the City's main brief, the evidence concerning what Council members knew about Howard while her nomination was being considered should have been admitted as it was probative of a non-discriminatory reason for her non-selection. The jury was not permitted to hear why council members had reason to question the nominating process and push for background checks. Council members' knowledge of Howard's background was a legitimate reason that led to their suspicions regarding the nominating process and ultimately the decision not to select an individual from that panel. The evidence was not offered to discredit Howard, it was offered to show why she was not considered for the position, why the City Council believed the panel should be rejected. The City was not allowed to articulate its defense to the jury by exclusion of this evidence.

V. Future Damages should not have been submitted to the jury.

Respondent Howard contends that this matter was not preserved on appeal. However, the City objected to the instruction in the instruction conference, and offered an alternative damages instruction that did not include future damages. (L.F. 239, 249, 259; Appendix to Appellant's Main Brief, p.A3, A4).

As the court in *Doe v. Alpha Therapeutic Corp.*, 3 S.W.3d 404 (Mo. App. 1999) observed,

We note that plaintiffs did not object to the language of Instructions No. 11, 19 and 27. Further, the record does not indicate that plaintiffs requested an instruction as to an exception to the learned intermediary doctrine or preserved that issue for

review. At trial, plaintiffs' objection was to the fact that a learned intermediary instruction was given. In their Motion for New Trial, plaintiffs again objected only to the giving of a learned intermediary instruction, arguing that the doctrine of learned intermediary is not a viable defense under the facts of this case and the laws of the State of Missouri. Therefore, the only issues preserved for our review is whether there is evidence which supports the giving of the learned intermediary instruction and whether the instruction was in accord with Missouri law.

Id. at 419.

Respondent argues that the City should have anticipated its future damages instruction at the close of her evidence and objected at that time by moving for a directed verdict. There is no requirement that defendant anticipate plaintiff's damages instructions at the close of Plaintiff's evidence. The time to object to an instruction based on the lack of evidence is before it is given to the jury, not at the close of Plaintiff's evidence. Thus the City preserved the issue of including future damages in the instruction, and it can be considered by this Court.

It is basic appellate law that the court of appeals does not consider matters outside the record on appeal. *Welch v. Contreras*, 174 S.W.3d 53, 55 (Mo. Ct. App. 2005). At pages 30 and 119 of her brief, Howard refers to website posts in support of her contention that she is entitled to future damages. There are no citations to the record on appeal for these websites. These websites are not part of the record considered by the jury.

Accordingly, this Court should not consider this information on appeal as evidence of future damages that Howard contends she will sustain.

VI. The Jury's verdict on damages should not have been upheld because it included backpay.

Appellant City believes this issue was preserved for appeal, and that the jury clearly considered Howard's counsel's argument couching back pay as a method of calculating emotional damages in his closing argument. Furthermore, Howard claims that there was no evidence that Appellant was prejudiced by this argument. Considering the jury's damages verdict was what Howard formulated during her counsel's close argument, plus \$100,000.00, the City fails to see how it was not prejudiced by the argument. Clearly the jury relied on this formula in reaching its verdict, so the prejudice is clear, and the damages verdict should not have been upheld by the trial court during the post-trial motion phase of this case.

VII. Attorneys fees for a separate case should not have been awarded.

Howard claims that the City did not indicate with specificity what fees should be overturned. That, however, underscores the entire problem with the fee petition, in that Howard's first attorney, who worked primarily on another case, did not specifically identify on which case his fees were incurred. This Court may overturn an award of attorneys fees if it determines the court abused its discretion. *Kopp v. Home Furnishing Ctr., LLC*, 210 S.W.3d 319, 329 (Mo. App. W.D. 2006). That discretion is abused when

the decision 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). Thus, Missouri case law, while giving deference to the trial court in determining the award of attorneys fees, recognizes that trial courts are not infallible.

In this case, awarding fees incurred in a completely different case, alleging completely different violations of law, but against the same defendant, is against the logic of the circumstance. “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)). “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. In stating this principle, the Supreme Court recognized that an adversary is entitled to the same ethical billing that a client is. Assuming he was paid for the first case, and there is no evidence he was not, her first attorney certainly would not bill Howard for the time expended in the first case as a part of this current case. To do so would be outrageous. To bill the City for work done in the first case, then, is equally outrageous under *Hensley*. Howard’s first attorney should not be awarded for any time expended on the first case. For the trial court to award attorneys fees for any time expended on the first case was an abuse

of discretion and this case should be remanded to the trial court for an appropriate accounting of fees expended in this case.

CONCLUSION

For the foregoing reasons, Appellant City of Kansas City, Missouri's appeal should not be dismissed, and the City requests this court overturn the judgment rendered by the trial court with regard to the applicability of the Missouri Human Rights Act to Respondent Howard as a candidate for a judge in the Municipal Division of the Sixteenth Circuit Court of Jackson County, Missouri. The City also requests the Court overturn the judgment or order a new trial based on the arguments above, and in the City's Main Brief.

Respectfully submitted,

GALEN BEAUFORT, #26498
City Attorney

By: _____

SASKIA C.M. JACOBSE, #49284

Assistant City Attorney

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 Appellant's Substitute Reply Brief fully complies with the provisions of Rule 55.03; that it contains 7,367 words/ 726 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 Brief were mailed this 18th day of August, 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 Appellants