IN THE MISSOURI SUPREME COURT

SC88012

DOUGLAS DAUGHERTY,

Appellant,

vs.

CITY OF MARYLAND HEIGHTS, MISSOURI,

Respondent.

Appeal from the Circuit Court of the County of St. Louis

State of Missouri

Honorable B.C. Drumm, Jr.

SUBSTITUTE BRIEF OF APPELLANT

THE KLOEPPEL LAW FIRM &
LAW OFFICES OF KEVIN J. DOLLEY, LLC
GREG KLOEPPEL, # 47909
KEVIN J. DOLLEY, #54132
9620 Lackland Rd.
St. Louis, MO 63114
Phone: (314) 423-8003
Fax: (314) 423-8054
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

This case was filed under the Missouri Human Rights Act ("MHRA"). This action is one involving the question of what is the proper standard of review under the MHRA at the summary judgment stage and the specific application of the facts of this case to the applicable standard. In State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003), this Court held that a plaintiff has the right under the Missouri Constitution, Art. I, Section 22(a), to have his or her MHRA civil action for damages tried by a jury.

On or about May 25, 2005, Honorable B.C. Drumm, Jr. entered judgment in favor of Respondent on Respondent's Motion for Summary Judgment concerning Appellant's claims of age and regarded as disability discrimination. On or about June 27, 2006, the Court of Appeals upheld the Trial Court's Judgment for Summary Judgment. This Court granted Appellant's Application for Transfer to Supreme Court of Missouri on or about December 19, 2006.

STATEMENT OF FACTS

Appellant, Douglas Daugherty, was a sixty-two (62) year old Police Captain employed by the City of Maryland Heights Police Department for sixteen (16) years, from 1986 to November 8, 2002. (Legal File, hereinafter "Lf" 353, 472). Captain Daugherty has extensive experience in law enforcement. Specifically, he graduated from the FBI Academy and the Southern Police Institute, both of which provide valuable training for police supervisors and include physical training and completion of college accredited courses. (Lf 393-94).

Captain Daugherty's vocational experience included employment as a St. Louis City Police Officer, an Ellisville Police Officer, and a Webster Groves Police Officer. (Lf 393-94). Captain Daugherty's experience working in the City of St. Louis was noted as especially valuable, in that, employment as a St. Louis City Police Officer exposes an officer to a wide range and greater frequency of crime. (Lf 393-94).

As an employee of Respondent, City of Maryland Heights, Appellant Daugherty was initially promoted to a Lieutenant position and five (5) years later to a Captain position in 1999. (Lf 364). Chief of Police for the City of Maryland Heights, Thomas O'Connor, indicated that Captain Daugherty was promoted to Lieutenant and thereafter Captain because he had earned the right to be promoted based on his background and performance. (Lf 393).

Prior to his continued promotion through the ranks of the City of Maryland Heights Police Department, on July 4, 1986, Appellant Daugherty was on duty for the

City of Maryland Heights Police Department and was supervising an accident scene. While at that scene, Appellant Daugherty was struck by a vehicle under the operation of a drunk driver. As a result of that collision, Appellant Daugherty suffered medical complications that required him to miss work until September 1987. (Lf 353-354).

On or about August 21, 1987, Dr. David L. Wilkinson documented that Appellant Daugherty had recovered from his injuries and was able to return to full and active duty, effective September 1, 1987. (Lf 544). Dr. Wilkinson specifically stated: "I feel that he [Daugherty] has recovered to the point where he will not endanger himself or affect the safety of fellow police officers while in the line of duty." (Lf 544).

Approximately fifteen (15) years later, on or about June 14, 2001, Major Kozuszek encouraged Captain Daugherty to take disability leave. (Lf 358). No one associated with the City possessed personal knowledge that Captain Daugherty was unable to perform the duties and assignments of Platoon Commander or Bureau Commander. (Lf 465). There was no documentation nor first hand observation that Captain Daugherty was unable to effectuate an arrest, that he was unable to render aid at an accident site, or that he was unable to operate a firearm. (Lf 510-511). As evidence of Captain Daugherty's fitness, Appellant participated in firearms qualifications tests which are required four times a year and Appellant Daugherty never failed to satisfy these qualifications. (Lf 511). Further, since the time Captain Daugherty was terminated from the Department, tasers were purchased for all members of the command staff, a highly

effective tool a member of the Department could use in a physical altercation and avoid physical strain. (Lf 396).

As further evidence of Captain Daugherty's fitness and in spite of the City's beliefs, Appellant's performance evaluations exhibited his continued ability to perform his duties at a high level since 1987. (Lf 578-634). A review of Appellant's evaluations detail impressive documentation of his years of performance for Respondent City. (Lf 578-634). In April 2002, Captain Daugherty received a satisfactory score for "Appearance/Fitness," which is under the "Evaluation Anchors for Supervisors and Commanders," indicating that Captain Daugherty "consistently maintained a neat personal appearance and good physical health." (Lf 564). Captain Daugherty's average score of 3.42 on the 2002 Evaluation was considered well-above a satisfactory score. (Lf 578-634). This well-above satisfactory score contrasts with the claim made by the Court of Appeals in its decision that Captain Daugherty received a less than satisfactory evaluation in April 2002. It is also important to note that the evaluation criteria for command staff, which includes Captains, is different from the evaluation criteria used in evaluating front-line police officers, focusing more on supervisory duties for Captains. (Lf 635).

Chief O'Connor stated that Captain Daugherty's performance did not indicate that he was unable to perform the duties of a Captain prior to Captain Daugherty's termination. (Lf 396, 398). Sgt. Bova Conti, who was under Captain Daugherty's command prior to his termination, indicated that Captain Daugherty had no problems

with his ability to supervise the Department. (Lf 449). Sgt. Bova Conti had no concern with Captain Daugherty's ability to delegate jobs or give direction to subordinate employees. (Lf 449). Sgt. Bova Conti also indicated that, after Captain Daugherty left the Detective Bureau, changes were made to the Bureau that resulted in it operating less effectively. (Lf 451). Sgt. Bova Conti also believed that Captain Daugherty's experience was excellent, including his work for the Major Case Squad. (Lf 452).

Sgt. Bova Conti stated that since the inception of the Maryland Heights Police Department in 1986, he never observed a Captain involved in a physical altercation. However, he did observe Captain Daugherty arrest subjects without difficulty. (Lf 452, 453). Sgt. Bova Conti further noted that "the role of a captain or the lieutenant, especially captain of the Bureau, was more in the office, it wasn't out on the street." (Lf 452, 453). That said, Captain Daugherty was more active on the street and in responding to calls in the Detective Bureau than his predecessor Earl Rhodis. (Lf 453-454).

Sgt. Bova Conti stated that Major Kozuszek's disruption of the Detective Bureau and over-scrutinizing of Captain Daugherty had a negative impact on the Bureau. (Lf 455-456). Sgt. Bova Conti stated that he never told Chief O'Connor that the Bureau lacked leadership under Captain Daugherty. (Lf 455). Sgt. Bova Conti's statement is in contrast to the claim of Respondent and the finding of the Court of Appeals that officers complained regarding Captain Daugherty's leadership. (Court of Appeals, p. A3).

II. THE "DISABILITY EXAM"

A. THE ALLEGED BASIS FOR SENDING APPELLANT FOR A "DISABILITY EXAM"

In the April 2002 Performance Evaluation of Captain Daugherty, he was deemed to be in good physical health by his supervisor, Major Kozuszek. (Lf 578-634). Further, despite a medical opinion stating Captain Daugherty was cleared for full-duty in August 2002 as part of a Worker's Compensation claim, Captain Daugherty was informed that a "disability exam" was necessary to determine his medical condition. (Lf 382, 648-657). The City of Maryland Heights did not provide for or define the term, "disability exam," used to describe the examination of Appellant Daugherty in the letter sent to Dr. Richard Katz, who performed the examination.

However, Section 9.4 of the City of Maryland Heights Personnel Manual states that:

> An employee may be transferred, demoted or separated for disability when the employee cannot perform the essential functions of the position because of physical or mental impairment. The City may require an employee be examined by the City physician for the purpose of determining an employee's ability to perform the essential functions of his/her position.

(Lf 157-58).

The City of Maryland Heights Personnel Manual states that an "Essential Function" is:

> a required task or assignment actually performed by a specific position that, if removed, would fundamentally change the job; a task

> or assignment for which a position was created; a highly specialized task or assignment requiring special expertise or the ability to perform it; or, a task or assignment that only a limited number of employees can perform.

(Lf 139).

On or about September 29, 2002, the City of Maryland Heights sent correspondence to Dr. Katz indicating that "Captain Daugherty is scheduled for a disability exam with you…" (Lf 677). The correspondence indicated that Captain Daugherty incurred two (2) work-related injuries and that medical records and a "Lt./Cpt. Job description" were enclosed with the correspondence. (Lf 677). The correspondence further requested that Dr. Katz forward an invoice and typed report to the City of Maryland Heights. (Lf 677). The correspondence requesting a "disability exam" made no reference or request that Dr. Katz make a determination as to whether or not Captain Daugherty could perform the "essential functions" of his position as a Captain as set forth within Section 9.4. Section 9.4 is the only basis contained within the Personnel Manual for an employee to be sent for a medical evaluation. (See Lf 157-58; 677).

City Administrator ("C.A.") Mark Levin initially claimed in his deposition that his only involvement in sending Captain Daugherty for a disability examination was that he provided a copy of the position description to Dr. Katz. (Lf 466). Later in his deposition, C.A. Levin indicated that he initiated the process of sending Captain Daugherty for the "disability exam" by asking Chief O'Connor about the possibility of Captain Daugherty

being referred for a medical evaluation; he suggested to Major Kozuszek that the Major discuss with the Human Resource Administrator who would be the appropriate medical provider for the medical evaluation; and C.A. Levin was part of the final decision to send Captain Daugherty for a disability evaluation. (Lf 401, 402, 464, 468).

C.A. Levin indicated that it was his perception that Captain Daugherty had "long-standing issues, medical issues in general" that were the basis of the "disability exam." (Lf 462). However, C.A. Levin's only personal discussion with Captain Daugherty, in which C.A. Levin could base these opinions, was through informal conversations where Captain Daugherty apparently indicated he had "[a]ches and pains, problems general discussions of an informal nature…" (Lf 463). Captain Daugherty never related to C.A. Levin that "any of the medical conditions he had made him unable to perform his duties…" (Lf 463). C.A. Levin was unsure whether or not the evaluation of Captain Daugherty was focused on examining all of his job duties, essential job duties or merely peripheral job duties. (Lf 466-467). There is no documented case of Captain Daugherty being unable to perform any physical aspect of his duties since 1987. (Lf 395, 396).

When asked why other officers were not subjected to medical testing, except Captain Daugherty, Chief O'Connor indicated "[b]ecause none of them had the amount of absenteeism as Doug Daugherty."[1] (Lf 411). Chief O'Connor initially stated that

[1] Part V of this Factual Background will detail the misperceptions, inaccuracies and inconsistencies relating to Respondent's claim of excessive absenteeism of Appellant Daugherty.

Human Resource Director Trbovich made the determination for Captain Daugherty to be sent for a "disability exam" but later stated that it was C.A. Levin who made the determination. (Lf 516). In a later deposition, Chief O'Connor stated that it was actually his decision to send Captain Daugherty for the medical examination. (Lf 410).

B. THE FIRST "DISABILITY EXAM" REPORT

Dr. Richard Katz performed the "disability exam" of Captain Daugherty for Respondent City. Dr. Katz noted in his initial report that Captain Daugherty, as part of a Worker's Compensation claim, was examined on August 12, 2002 and allowed to return to work at full duty on August 13, 2002 by Dr. Chabot. (Lf 123). Dr. Katz also noted that Dr. Chabot stated that Captain Daugherty was doing quite well and was released from medical care and had not suffered any permanent partial disability. (Lf 123). Dr. Katz found that Captain Daugherty could perform the duties of a Captain. (Lf 129-130, 537). Dr. Katz noted that it was impossible for his evaluation to model the job-related activities of an officer in his evaluation or in the subsequent functional capacity examination ("FCE"). (Lf 540). Dr. Katz noted in his initial report that:

> I was asked to complete a disability evaluation on this patient, but I need more information to be sure I am completing the task required by Ms. Martha Trbovich. I will fax this report to her as it stands and will be completing an addendum once I understand more clearly the questions to be answered. Does it involve ability to work? Residual

> impairment or disability? Problems dating from 1986? I look forward to completing this report.

(Lf 128).

In response to the initial examination of Dr. Katz and his unwillingness to declare Captain Daugherty "disabled," the City responded through a second correspondence to Dr. Katz stating that the City "has concerns regarding Capt. Douglas Daugherty, and we are asking your assistance responding to these concerns." (Lf 676). Consistent with these "concerns," a list of questions was drafted by C.A. Levin and sent to Dr. Katz. (Lf 521). None of the questions addressed whether or not Appellant could perform the "essential functions" of his position as a police captain, as defined by the City of Maryland Heights. (Lf 676). Additionally, Major Kozuszek created a job description for a Police Captain different from the job description of a Captain previously set forth by the Respondent through its job descriptions. (Lf 521).

C. JOB DESCRIPTION FOR A POLICE CAPTAIN CREATED FOR THE DR. KATZ REPORT

Major Kozuszek's position description, which was created specific and selectively for Captain Daugherty's "disability exam" is different from the actual position description of Captain for the City of Maryland Heights. Major Kozuszek's position description noted that the "physical demands" of the actual position description for a Captain required Captain Daugherty to "stand, sit, talk or hear and use hands to finger, handle, or operate objects controls or tools listed above. The employee is occasionally

required to stand, walk, reach with hands and arms, climb or balance, stoop, kneel, crouch or crawl and taste or smell." (Lf 678).

Based on this description contained within the actual position description, Major Kozuszek, acting on behalf of the City, created the following criteria, to be used to selectively and specifically for the examination of Captain Daugherty:

> The point to be made here is the fact that commanders may find themselves required to participate in the actual physical process of conducting an investigation and affecting an arrest. This process might entail chasing a suspect over fences, running up stairs, climbing over boxes or crawl under equipment stored in warehouses. It may include the ability to overtake and physically wrestle with a suspect at the time of arrest. He might have to jump out of a window or off of a porch or to climb a ladder and onto a roof while in the process of a foot chase with a suspect. He may be required to carry heavy boxes or pieces of evidence from crime scenes.

(Lf 678).

Major Kozuszek's position description for Captain Daugherty differed from the actual position description for Police Lieutenant/Captain in the Personnel Manual. (Lf 551). Major Kozuszek admitted that there was a lack of similarity between his position description he created and the actual position description for a Captain. (Lf 437-438).

Major Kozuszek's position description for Captain Daugherty also differed from that of Chief O'Connor's description. Chief O'Connor stated that his description and his understanding of a Lieutenant/Captain position in the Detective Bureau was:

> to ensure that the crimes that occur within our jurisdiction are investigated as quickly as possible based upon the availability of manpower, that the kind of investigations that I consider to be quality are an integral part of how the investigations are done, that the investigations would be conducted by means other than spending most of your time in the Detective Bureau, in other words interviewing witnesses, victims and then to ensure that the strategies, the investigative strategies chosen are appropriate for the crime, that the investigators assigned to these particular crimes have an above average working knowledge of how to conduct these investigations and that these investigations fit into my personal philosophical mandates of conducting criminal investigations and also that they're done legally and with the primary intent of arresting and convicting those individuals who we're able to charge.

(Lf 372).

Chief O'Connor noted that the Captain, as a supervisor, has the duty to oversee the duties of his subordinates. (Lf 391). Chief O'Connor noted that any physical tasks that a Lieutenant performs occur on an infrequent basis. (Lf 396). Chief O'Connor noted that

Captain Daugherty's primary duties at any scene are to observe and direct his subordinate officers. (Lf 396). Former Captain of the Detective Bureau, Earl Rhodus, spent most of his time on duty at his desk and did not usually go on any calls or assignments. (Lf 408).

Chief O'Connor explained the position description of Lieutenant/Captain, who is in charge of a platoon, was to physically fill sectors with enough patrol officers in particular sectors, ensuring that there's enough officers in those sectors, and

> [t]hey are responsible to ensure that their scheduling process will ensure that the City is protected by a minimum amount of police officers. They are responsible – they are also responsible for training, the training ensuring that all the police officers receive the mandated training as prescribed by State law. They are also responsible for ensuring their reports are done appropriately, timely, accurately. They are there to oversee those scenarios where there are complex investigations and to offer assistance and knowledge as to how to best perform, and they are ultimately responsible for the quality of the work product, the quality of the interaction between the uniform police officer and members of the general public. They are also responsible for the integrity and monitoring of the uniform police officers assigned to their command.

(Lf 391).

Major Kozuszek's position description for Captain Daugherty also differed from that found in General Order 104.00 Duties and Responsibilities, as 104.06, DUTY POSITIONS DEFINED, describes these duties as:

> D. Bureau of Investigations Commander (BOI) supervises the daily activities and case assignments of the detectives assigned to the Bureau and is accountable, to the Deputy Chief of Police, for all functions of the Bureau of Investigation. The Commander of the Bureau of Investigations holds the rank of Detective Captain or Detective Lieutenant.
>
> F. Platoon Commanders report to the Deputy Chief of Police. They are responsible for the personnel assigned to their particular platoon. Platoon Commanders hold the rank of Captain or Lieutenant. In the absence of higher-ranking officers, he assumes the functions of the Chief of Police.

(Lf 556-557).

Major Kozuszek's position description for Captain Daugherty differed from Sgt. Bova Conti's description of a Captain position. Sgt. Bova Conti worked under Captain Daugherty's command in the Detective Bureau. He indicated that a Captain's duties are to:

> Maintain order in the detective bureau, you know, handle the day-to-day administrative duties, deal with the secretaries, that type of thing. You know, we would communicate with him on, you know,

different things that we were working on so that there was a good line of communication both ways.

(Lf 449). Sgt. Bova Conti, from his experience working under Lieutenants and Captains for the Department, noted that the normal duties of a Lieutenant are "[p]retty much administrative and delegating." (Lf 450). Sgt. Bova Conti was further asked:

Q: (By Mr. Dolley) Is it fair to say that a lieutenant or a captain oversees and assists in these type of actions such as responding to emergency calls and investigating the things listed here?

A: I'm sure that there could be an occasion where that might happen.

Q: How often does that occur?

Q: (By Mr. Dolley) Where a lieutenant or captain has to do that?

A: The percentage would be minimal. I couldn't even say, I mean it's -- it's almost unremarkable.

Q: Okay. But, as far as oversees and assists, do you understand that to mean that in your experience, that a lieutenant or captain will go out and do these things on his own?

Q: (By Mr. Dolley) Go ahead.

A: In my experience, this is hardly ever done by a captain or lieutenant or ranking officer. They oversee, yes, oversees and assists in that regard.

Q: What do you understand that to mean?

A: To supervise. And, you know, if we need additional manpower or, as I pointed out earlier, a stakeout, the captain had assisted. Lieutenants do occasionally come out on calls. Captains occasionally come out on calls. The sergeants are more responsible for, you know, assisting in the investigations, and we've got the system set up in Maryland Heights where the sergeants are very capable and very well trained, and that's -- I think they're all very well trained in all of these.

Q: Now, below those stars, Captain Daugherty in his position description indicates, "The point to be made here is the fact that commanders may find themselves required to participate in the actual physical process of conducting an investigation and effecting an arrest. This process might entail chasing a subject over fences, running up stairs, climbing over boxes, or crawl under equipment stored in warehouses. It may include the ability to overtake and physically wrestle with a subject at the time of arrest. He may have to jump out of a window, off of a porch, or to climb a ladder onto a roof while in the process of a foot chase with a subject -- suspect. He may be required to carry heavy boxes or pieces of evidence from crime scenes. The commander may be required to drag a body or some hazardous object from the roadway on the scene of vehicle accident. He may be required to push a vehicle from the roadway." Do you see where it says that?

A: I do, sir.

Q: How often does a lieutenant or captain have to perform any of those duties for the City of Maryland Heights?

A: The amount would be negligible.

Q: (By Mr. Dolley) Have you ever seen a commander or a lieutenant perform any of those tasks that you recall?

A: Personally seen them --

Q: Sure.

A: -- or have knowledge of seeing them?

Q: Let's do one at a time. Do you personally?

A: Personally seen, no.

Q: Knowledge of?

A: Knowledge of, I mean back when the lieutenant helped me arrest a guy on the back of a car once, and I know that in present recollection, Lieutenant, now Captain Scott Will made an arrest up at Westport Plaza, I can't remember what the exact thing was, but he effected an arrest there. But, as far as the other things, I told Mr. Jones before when I saw this, that no, that wouldn't be stuff that would be happening to a captain or a lieutenant.

(Lf 457-58). Besides Major Kozuszek's position description, the above indicates that all other descriptions confirmed that the position of police captain for Respondent City of

Maryland Heights was a supervisory position with any substantial physical activity being a very peripheral and rare activity, not an essential function of employment.

D. THE SECOND DISABILITY EXAM REPORT

Following receipt of the five questions provided by the City and the newly created position description for a Captain, Dr. Katz noted that even though Captain Daugherty's job is listed in the medium work load and Captain Daugherty described his job as within the light job level, the City provided a job description in the "very heavy work demand level." (Lf 129, 130). Dr. Katz concluded that Captain Daugherty was capable of working any work schedule and that he "demonstrated work function in the heavy work demand level for 4 hours." (Lf 129). Further, Dr. Katz noted that even though Captain Daugherty may be at risk in a physical confrontation with an uncooperative subject, as would anyone faced with an uncooperative subject, "Captain Daugherty is capable of working in his supervisory capacity as a Captain," as described within the actual position description of the City of Maryland Heights. (Lf 130, 537). Dr. Katz's only concern stemmed from the criteria created by Major Kozuszek, specific to Captain Daugherty, of demands that fell within the very heavy work level. (Lf 130). As for the actual requirements set forth within the position description, Appellant Daugherty was able to perform said duties and could actually perform above and beyond his work function into the very heavy work demand level for four (4) hours at a time. (Lf 129).

Further, Dr. Barry Feinberg, who later examined Captain Daugherty, noted that:

> it is the conclusion of this evaluator, that Captain Daugherty is fit, based upon his functional capacity evaluation and based upon the fact that he has no impairment from the use of these medications, as an individual, to perform his daily activities as a Captain Police Officer.

(Lf 684).

III. DR. ENGLAND'S EVALUATION OF CAPTAIN DAUGHERTY AND THE REFUTATION OF THE CITY'S TACTICS

Vocational Rehabilitation Specialist James England evaluated Captain Daugherty and found the following:

> "I did some investigation of the job description of a police precinct captain. According to the Dictionary of Occupational Titles, that is a light job from a physical standpoint.
>
> Police officer or patrolman is considered a medium job from a physical standpoint according to the Dictionary of Occupational Titles.
>
> None of the police positions are described as heavy or very heavy work activity.
>
> To the contrary, the command positions, such as lieutenant, captain, chief detective, etc., are all light jobs from a physical standpoint.
>
> Functional Restrictions/Limitations:

According to the results of the Functional Capacity Evaluation Captain Daugherty was apparently assessed as functioning within the heavy range of exertion.

Summary and Conclusions:

Captain Daugherty is a 61-year old gentleman who has been a police officer the majority of his career.

It is my understanding that overall he has had good reviews and evaluations and was functioning as a captain at the time of his dismissal.

Based on the results of the FCE and my understanding of what a police captain normally does on a day-to-day basis, I see no reason why Mr. Daugherty should not have been able to continue in that particular line of duty.

From talking with Captain Daugherty it was obvious that his administrative duties were being pushed and the idea of him getting out and being involved on the street was not emphasized. To the contrary, he said that although he did like to get out to go around and check on his subordinates, he spent a good part of his time there at his administrative office. He said there was even emphasis from above to do just that.

It certainly would appear to me that this gentleman is fully capable of the essential job functions required of a police captain or lieutenant and probably even as a police officer in general based on the results of the FCE.

(Lf 689-90).

To England, the FCE results showed that Captain Daugherty could function within the heavy work load for four hours at a time, meaning that he had a physical capability beyond what would normally be required for his position of Captain, as he performed two levels above what he is normally required to do in his regular functions as a Captain. (Lf 471). The Dictionary of Occupational Titles lists a Captain position within the light work load position and Captain Daugherty indicated his position was in the light category as part of his evaluation from Dr. Katz. (Lf 471).

It appeared to England that Captain Daugherty had been through some medical treatment and he had always made a good recovery and was able to return to work and function on the job. (Lf 471). England, in his professional experience, believed that Appellant Daugherty appeared to be functioning within a level needed to successfully perform work as a Captain within the Maryland Heights Police Department. (Lf 471).

England also examined Major Kozuszek's September 27, 2002, Position Description of Lieutenant/Captain specific to Captain Daugherty. (Lf 477). England stated that the memorandum involved duties more peripheral, at best, rather than essential job functions of a lieutenant/captain. (Lf 478). England believed that the actual position description of Captain was more in line with his knowledge and experiences of the duties of a Captain than the newly created description for purposes of examination of Captain Daugherty. (Lf 478).

In forming his opinion, England also reviewed the five (5) questions prepared by C.A. Levin, with regard to the "disability exam" of Captain Daugherty. (Lf 478). England testified that in his professional opinion the questions did not ask if Captain Daugherty could perform his "essential" job duties. (Lf 478). England believed that a description of police captain as a very heavy job would be an inaccurate description of what he believed to be the essential job functions of that type of work. (Lf 479).

Based on the results of the FCE, Captain Daugherty was able to function in the heavy work load for up to four hours at a time. (Lf 476). England has seen FCE reports for many years, and in his experience, Captain Daugherty's results would indicate that he would be able to perform all the activities listed in the regular position description of a police captain. (Lf 476). Since Captain Daugherty's FCE results indicated that he could work for 4 hours at a heavy work demand level, then he would be able to perform the duties described in the City of Maryland Heights manual, due to the sporadic nature of any heavy work load activities. (Lf 476).

In August 2004, Dr. Feinberg reviewed the findings of James England and reexamined Captain Daugherty. Dr. Feinberg's "Impression" included the following:

> Patient is on medications…. which he takes on a pm basis and have no effect on his cognitive abilities or his ability to perform his daily activities or his ability to perform his job related activities.
>
> Patient has undergone a vocational rehabilitation evaluation by Dr. James England who has had the opportunity to review medical records and

> interview the patient. Recommendation was that patient was able to perform his job duties. This is in concurrence with my conclusions to him in September 2003.
>
> Therefore, in summary, as a result of my initial evaluation of September 2003 and the updated evaluation at this current time as well as the review of the vocational rehabilitation reports from James England, and my discussion with patient, I have no change in my opinion of September 2003 and believe that Mr. Daugherty is capable of performing his job as a police officer captain.

(Lf 698).

IV. THE CITY'S DISCLOSURE OF ITS DISCRIMINATORY MOTIVE

A. MEETING OF OCTOBER 28, 2002

On or about October 28, 2002, Chief O'Connor and Major Kozuszek held a meeting with Appellant Daugherty and Captain Daugherty tape recorded the conversation. (Lf 384, 385). During this October 28, 2002 meeting, Chief O'Connor noted that

> When it comes to him [C.A. Mark Levin] being ... as far as the use of money and manpower, and young guys verses old guys, there is no God damn doubt about it; there is no doubt about it. If he could force me out in two years, he would force my ass out too...

> He would love to take some young stud here who has twelve, fifteen years on – some young stud and bring him in to do the job. I know, I read him like a book. I know exactly what he is. I am not safe, he's not safe [Major Kozuszek], Nickels is not safe. All the guys fifty-five years old, Emery is not safe.
>
> ... He's got it for guys fifty-five years [and] older.

(Lf 724). To Captain Daugherty's statement that such conduct "is age discrimination," Chief O'Connor stated:

"Yes, it is. And he is going to be looking for ways to buy everyone out."

(Lf 724-725). Captain Daugherty responded:

"He is going to look for ways to by-pass the age discrimination."

Chief O'Conner continued:

"Yes, he is. He is going to get a guy to sign off on something and off we go."

(Lf 725).

Chief O'Connor also agreed with Captain Daugherty's statement that "his sick time in the past, the amount of sick days that he had used in the past had been greater than in the year 2002." (Lf 420). Chief O'Connor agreed with Captain Daugherty that during the course and scope of his sixteen (16) years of employment he had wrestled people to the ground and successfully secured criminal suspects. (Lf 420). Chief O'Connor admitted that there was a desire to rid the department of older employees and

that Appellant Daugherty was perceived as old and disabled by a physical condition. (Lf 723-25).

B. CONVERSATIONS WITH SUPERVISORS REGARDING AGE AND DISABILITY

Major Kozuszek indicated that Appellant Daugherty should, given his age and disability, consider disability retirement. (Lf 359, 362). Appellant Daugherty stated that Chief O'Connor and Major Kozuszek previously told him, prior to its occurrence, that C.A. Mark Levin planned on using the results of a physical exam to determine Captain Daugherty unfit for duty. (Lf 382). Chief O'Connor heard C.A. Levin make negative comments referencing older employees, including comments to former police officer John Wachter, regarding the age of older police officers. (Lf 409). Major Kozuszek's testimony also indicated that C.A. Levin perceived Captain Daugherty as disabled. (Lf 440).

V. APPELLANT DAUGHERTY'S ALLEGED EXCESSIVE ABSENTEEISM

Following the initial termination notice claiming Appellant's termination was based upon medical conclusions of Dr. Katz, on or about November 26, 2002, Captain Daugherty received a second notice of termination stating that a new reason for his termination was attendance problems. (Lf 747). However, Chief O'Connor then claimed in his deposition that Captain Daugherty's absenteeism was the issue of primary concern in terminating Appellant's employment with the City of Maryland Heights. (Lf 399). Chief O'Connor supposed that "from my perspective talking about Doug Daugherty specifically means being absent more than being at work." (Lf 400). Chief O'Connor

explained that the problem was the number of days Captain Daugherty was absent, and the City, in fact, monitored Captain Daugherty's attendance on a daily basis. (Lf 400, 415). Nevertheless, Appellant Daugherty's actual attendance remained the same or similar from 2000 until the time Captain Daugherty was terminated. (Lf 399).

Chief O'Connor claimed in his deposition that there were problems stemming from "Doug [being] absent more than he is at work, and that there's a void in the operations of the Detective Bureau that from my perspective is not good in that eventually this issue is going to have to be addressed.

Q And it was your perception or belief that Captain Daugherty was absent more than he was at work, is that fair to say?

A (O'Connor) It was not a perception, it was a fact."

(Lf 400).

On January 17, 2002, Sergeant Joe Delia signed a Memorandum indicating that there was no problem with the leadership of the Detective Bureau. (Lf 482). Sergeant Delia testified that he had also documented that there was no problem with the leadership of the Detective Bureau. Later, during this litigation, Sergeant Delia testified that he had made a false statement that there was a lack of leadership in the Detective Bureau under Captain Daugherty. (Lf 482-483). Sergeant Delia was not disciplined for making a false statement or later claiming that he made a false statement. (Lf 482). The lack of any complaints or disputes regarding Captain Daugherty's leadership by officers is in contrast

to the finding of the Court of Appeals that such complaints were, in fact, made regarding Captain Daugherty. (Court of Appeals, p. A2-A3)

Chief O'Connor further noted that C.A. Levin asked him if he was aware of the "excessive absenteeism" of Captain Daugherty. (Lf 400). C.A. Levin further indicated that he assumed Captain Daugherty's absenteeism was related to his medical condition. (Lf 401). C.A. Levin further stated that the absenteeism was related to Captain Daugherty's "sickness." (Lf 401).

However, in contrast to the misperceptions of Chief O'Connor and C.A. Levin, the Original Officer Comparison of police officers who started with the Department in approximately 1986 from 2000 to 2002 indicates that Captain Daugherty's use of sick time was not out of the ordinary. (Lf 640-647). As shown from the documented comparison, each year several officers had the same or more hours of sick time used than Captain Daugherty. In contrast to Respondent's claim that Appellant used excessive sick time, the documented evidence clearly indicates that Respondent's misperception regarding Appellant's medical condition led them to ignore the actual documented evidence regarding his attendance. (Lf 640-647).

Chief O'Connor further acknowledged that he, himself, was often absent from his position as Chief of Police. (Lf 414). Chief O'Connor, however, was still able to manage and run the Department, even while frequently being absent. (Lf 414). Chief O'Connor's ability to continue to manage and run the Department was based on the structure of the Department, structures that are in place to ensure the effectiveness of the

Department, even when a supervising officer is absent. (Lf 414). Chief O'Connor had more absences than Captain Daugherty in 2001, the year prior to Captain Daugherty's termination. (LF 646).

VI. APPELLANT DAUGHERTY'S TERMINATION NOTICE AND RESPONDENT'S INABILITY TO ESTABLISH A CONSISTENT OR LEGITIMATE BASIS FOR APPELLANT'S TERMINATION

On or about November 8, 2002, Captain Daugherty received the initial notice of termination from Chief O'Connor, stating that Captain Daugherty's termination was based upon medical conclusions that indicated he was no longer capable of performing the functions of a police officer. (Lf 746, 747). The termination was affirmed by C.A. Levin. (Lf 747). Chief O'Connor was aware that Captain Daugherty was, at all times during his employment with the City, released by his doctors for full duty. (Lf 414). As previously stated, or about November 26, 2002, Captain Daugherty received a second notice of termination stating that a new reason for his termination was attendance problems. (Lf 747).

Chief O'Connor also acknowledged that at the time of termination he did not have information indicating Captain Daugherty could not perform the essential duties of his position. (Lf 404). Chief O'Connor testified that he could not recall and did not focus on the fact that Captain Daugherty could perform up to four hours of work in the heavy work load in evaluating Captain Daugherty's fitness for duty, but nonetheless, Chief O'Connor believed that this would have been an important fact to know. (Lf 403). Further, Chief

O'Connor admitted that a police officer is not required to perform duties of a strenuous nature for four (4) hours at a time. (Lf 403).

Chief O'Connor also stated that, even though medical reports stated Captain Daugherty could perform his duties, in Chief O'Connor's mind, that would not have been enough to "change my firsthand knowledge of the inability to respond because of the medical condition." (Lf 425). Further, Chief O'Connor indicated, regarding Plaintiff's termination, that he didn't

> need a doctor to tell me that a person cannot function when I can see for myself that they can function and perform the job of a full service policeman. I think that my opinion and my observations are just as valid as a doctor's may be from my perspective as a policeman.

(Lf 424). Apparently, Chief O'Connor's statement in the termination notice that he relied on a medical opinion was inaccurate and not the actual basis for Appellant's termination.

Chief O'Connor elaborated on this belief, noting that:

> [b]ased upon my understanding that the medical condition that he has is not going to improve but it's going to deteriorate, and that the injuries are not a self-healing injury that would allow someone to perform at the level that's required of a full service policeman. And I see nothing -- I can reach no conclusion from his impression that would indicate that Dr. Feinberg's impression was based upon the

same kind of examinations, in that he may have relied more on the verbal information than he did on the medical condition.

Q So that's your evaluation of Dr. Feinberg's report, is that fair to say?

A That's my non-medical opinion, yes…

Q In spite of Dr. Feinberg indicating Captain Daugherty is fit for duty, you're disregarding that opinion, is that fair to say?

A Yes

(Lf 424).

Chief O'Connor was also aware that Dr. Chabot failed to find any further disability as a result of his Worker's Compensation claim, stemming from an accident of July 9, 2002, and that this would not have changed his mind regarding Captain Daugherty's condition. (Lf 425).

POINTS RELIED ON

I. STANDARD OF REVIEW

ITT Commercial Fin. Corp. v. Mid-America Marine Supply, 854 S.W.2d 371 (Mo. banc 1993)

Am. Family Mut. Ins. Co. v. Hoffman ex rel. Schmutzler, 46 S.W.3d 631(Mo. App. 2001)

Contract Freighters, Inc. v. Fisher, 13 S.W.3d 720, 722 (Mo. App. 2000)

II. THE TRIAL COURT ERRED IN NOT APPLYING THE PROPER STANDARD TO APPELLANT DAUGHERTY'S CLAIMS UNDER THE MISSOURI HUMAN RIGHTS ACT BECAUSE PLAINTIFF IS ABLE TO SET FORTH EVIDENCE ESTABLISHING GENUINE ISSUES OF FACT REGARDING UNLAWFUL MOTIVATIONS OF RESPONDENT IN TERMINATING APPELLANT'S EMPLOYMENT, NAMELY EVIDENCE OF DISCRIMINATION ON THE BASIS OF AGE AND APPELLANT BEING REGARDED BY RESPONDENT AS DISABLED, IN THAT THE TRIAL COURT DID NOT EXAMINE WHETHER OR NOT THERE WAS EVIDENCE OF A CONTRIBUTING FACTOR SUPPORTING APPELLANT'S CLAIMS OF AGE AND DISABILITY DISCRIMINATION AND SUCH EVIDENCE EXISTS INCLUDING EVIDENCE OF RESPONDENT'S DISRIMINATORY AMIMUS TOWARD APPELLANT INCLUDING ADMISSIONS THAT APPELLANT'S TERMINATION WAS BASED UPON HIS AGE AND BEING REGARDED AS DISABLED, EVIDENCE OF APPELLANT'S PERFORMANCE AND THE INABILITY OF RESPONDENT TO ARTICULATE A LEGITIMATE REASON FOR APPELLANT'S TERMINATION.

Section 213.055 RSMo. (2000)

MAI 31.24, Verdict Directing – Employment Discrimination – Missouri Human Rights Act

III. ASSUMING ARGUENDO THAT THE TRIAL COURT APPLIED THE CORRECT STANDARD IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THE TRIAL COURT AND COURT OF APPEALS ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT DAUGHERTY'S AGE DISCRIMINATION CLAIM UNDER THE MISSOURI HUMAN RIGHTS ACT, BECAUSE APPELLANT DAUGHERTY ESTABLISHED A CLAIM OF AGE DISCRIMINATION UNDER THE MCDONNELL DOUGLAS STANDARD, IN THAT DIRECT EVIDENCE AND EVIDENCE MEETING THE PRIMA FACIA CASE EXISTS, INCLUDING MEDICAL AND DOCUMENTED PERFORMANCE EVALUATION EVIDENCE THAT CAPTAIN DAUGHERTY WAS PERFORMING OR ABLE TO PERFORM HIS JOB AT A LEVEL THAT MET THE CITY'S LEGITIMATE EXPECTATIONS AND EVIDENCE THAT APPELLANT WAS MERELY REPLACED ON PAPER TO CREATE THE APPERANCE OF AN OLDER REPLACEMENT BUT WAS NOT ACTUALLY REPLACED BY A YOUNGER EMPLOYEE.

Hindman v. Transkrit Corporation, 145 F.3d 986 (8th Cir. 1998)

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005)

IV. ASSUMING ARGUENDO THAT THE TRIAL COURT APPLIED THE CORRECT STANDARD IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT DAUGHERTY'S "REGARDED AS" DISABILITY DISCRIMINATION CLAIM UNDER THE MISSOURI HUMAN RIGHS ACT, BECAUSE APPELLANT DAUGHERTY ESTABLISHED A CLAIM OF DISCRIMINATION UNDER THE MCDONNELL DOUGLAS STANDARD, IN THAT THERE EXISTS DIRECT EVIDENCE OF DISABILITY DISCRIMINATION AND EVIDENCE MEETING THE PRIMA FACIE CASE, INCLUDING STATEMENTS AND ADMISSIONS OF REPSONDENT AND THE SENDING OF APPELLANT DAUGHERTY FOR AN IMPERMISSIBLE MEDICAL EVALUATION ESTABLISHING THAT APPELLANT DAUGHERTY WAS PERCEIVED AS DISABLED AND EVIDENCE THAT CAPTAIN DAUGHERTY WAS ABLE TO PERFORM HIS DUTIES AS A POLICE CAPTAIN BASED UPON THE MEDICAL EVIDENCE AND DUTY DESCRIPTIONS OF A POLICE CAPTAIN.

Section 213.010 RSMo. (2000)

Sutton v. United Air Lines, 527 U.S. 471, 489 (1999)

ARGUMENT

I. STANDARD OF REVIEW

When reviewing an order granting summary judgment, the standard of review before this Court is de novo and the Court does not need to defer to the trial court's order granting summary judgment. Murphy v. Jackson Nat'l Life Ins. Co., 83 S.W.3d 663, 665 (Mo. App. 2002); ITT Commercial Fin. Corp. v. Mid-America Marine Supply, 854 S.W.2d 371, 376 (Mo. banc 1993). "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." Murphy, 83 S.W.3d at 665 (citing ITT Commercial, 854 S.W.2d at 380). "A genuine issue of material fact exists where the record contains competent evidence that two plausible but contradictory accounts of essential facts exist." Contract Freighters, Inc. v. Fisher, 13 S.W.3d 720, 722 (Mo. App. 2000). In determining whether the entry of summary judgment was appropriate, the Court reviews the record in the light most favorable to the party against whom summary judgment was entered and allows the non-movant the benefit of all reasonable inferences. Am. Family Mut. Ins. Co. v. Hoffman ex rel. Schmutzler, 46 S.W.3d 631, 634 (Mo. App. 2001). A summary judgment should be reversed if no substantial evidence supports it; it is against the weight of the evidence; or it erroneously applies the law. Christian v. Progressive Cas. Ins., Co., 57 S.W.3d 400 (Mo. App. 2001).

The Missouri Supreme Court made clear in ITT that fact-pleading in Missouri and notice pleading in federal court were so different in substance that federal decisions

applying summary judgment standards were simply non-binding authority on Missouri courts and were no longer persuasive. ITT Commercial Fin. Corp, 854 S.W.2d at 379-80. As stated by the Missouri Supreme Court in ITT, as there is no need for our Rule 74.04 to fill in for an ineffectual motion to dismiss, the role of summary judgment in Missouri differs significantly from that in current federal practice. Id. Where the federal courts now use discovery to identify the triable issues, such has always been the role of the pleadings in Missouri. Id. at 380. Where the federal courts now use discovery to identify the facts upon which the plaintiff's claim rests, such has always been the role of pleadings in Missouri. Id. Finally, where the federal courts rely on summary judgment procedures to dispose of baseless claims, such continues to be the role of motions to dismiss in Missouri. Id. In sum, Missouri and federal summary judgment practice correspond only in language, not in function. Id.

Chief Judge Wolff recently noted that the federal courts have often been overly aggressive in granting summary judgment under the Celotex trilogy of United States Supreme Court decisions. Powel v. Chaminade College Preparatory, Inc., SC 86875, fn. 6 (Mo. Banc June 13, 2006) (Chief Judge Wolff, concurring). This, fortunately, has not been the case in Missouri courts although the standard stated is basically the same. Id. (citing ITT, 854 S.W.2d at 378-379).

It has been consistently held in Missouri that cases in which the underlying issue is one of motivation, intent, or some other subjective fact, that such cases are particularly inappropriate for summary judgment. Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 562

(Mo.App. 1990); see also Moore v. Bentrup, 840 S.W.2d 295, 298 (Mo.App. 1992). Summary judgment should seldom be granted in cases alleging employment discrimination. Luciano v. Monfort, Inc., 259 F.3d 906, 908 (8th Cir. 2001); Bradley v. Widnall, 232 F.3d 626, 630-31 (8th Cir. 2000); Keathley v. Ameritech Corp., 187 F.3d 915, 919 (8th Cir. 1999). This is so because employment discrimination cases are fact-based and frequently turn on inferences of discrimination and determinations of motive. Bell v. Conopco, Inc., 186 F.3d 1099, 1011 (8th Cir. 1999); Keathley, 187 F.3d at 919.

II. THE TRIAL COURT ERRED IN NOT APPLYING THE PROPER STANDARD TO APPELLANT DAUGHERTY'S CLAIMS UNDER THE MISSOURI HUMAN RIGHTS ACT BECAUSE PLAINTIFF IS ABLE TO SET FORTH EVIDENCE ESTABLISHING GENUINE ISSUES OF FACT REGARDING UNLAWFUL MOTIVATIONS OF RESPONDENT IN TERMINATING APPELLANT'S EMPLOYMENT, NAMELY EVIDENCE OF DISCRIMINATION ON THE BASIS OF AGE AND APPELLANT BEING REGARDED BY RESPONDENT AS DISABLED, IN THAT THE TRIAL COURT DID NOT EXAMINE WHETHER OR NOT THERE WAS EVIDENCE OF A CONTRIBUTING FACTOR SUPPORTING APPELLANT'S CLAIMS OF AGE AND DISABILITY DISCRIMINATION AND SUCH EVIDENCE EXISTS INCLUDING EVIDENCE OF RESPONDENT'S DISRIMINATORY AMIMUS TOWARD APPELLANT INCLUDING ADMISSIONS THAT APPELLANT'S TERMINATION WAS BASED UPON HIS AGE AND BEING REGARDED AS DISABLED, EVIDENCE OF APPELLANT'S PERFORMANCE AND THE INABILITY OF RESPONDENT TO ARTICULATE A LEGITIMATE REASON FOR APPELLANT'S TERMINATION.

Appellant submits that the trial court's judgment is erroneous as a matter of law, in that, the Court failed to apply the correct standard of law. The trial court found in its judgment that Appellant's claims of age and regarded as disability discrimination failed based upon Appellant's failure to establish the elements of a prima facie case under

McDonell Douglas v. Green, 411 U.S. 792 (1973), hereinafter the McDonnell Douglas standard. Under that prima facie case, the trial court cited Appellant's alleged failures as the basis for granting Respondent's Motion for Summary Judgment. At this time, Appellant challenges McDonnell Douglas as the appropriate standard in Missouri

In State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003), the Missouri Supreme Court held that a plaintiff has the right under the Missouri Constitution, Art. I, Section 22(a), to have his or her Missouri Human Rights Act civil action for damages tried by a jury. Id. at 84.

With the development of jury trials in Missouri under the MHRA, the Missouri Supreme Court approved MAI 31.24, Verdict Directing – Employment Discrimination – Missouri Human Rights Act MAI 31.24 on March 7, 2005.

Your verdict must be for plaintiff if you believe:

First, defendant (here insert the alleged discriminatory act, such as "failed to hire", "discharged" or other act within the scope of Section 213.055 RSMo.) plaintiff, and

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

Third, as a direct result of such conduct, plaintiff sustained damage.

MAI 31.24.

The above instruction is based upon Section 213.055 RSMo. Unlawful

Employment Practices, which provides in part:

> 1. It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, Religion, national origin, sex, ancestry, age or disability;

See also Committee Comment, MAI 31.24.

"MAI instructions, promulgated and approved by the Supreme Court, are authoritative if applicable to the factual situation . . . this court, as well as the trial court, is bound by them as surely as it is bound by Supreme Court cases and rules." Lindsay v. McMilian, 649 S.W.2d 491, 493-94 (Mo.App. 1983). Supreme Court Rule 70.02(b) directs the exclusive use of the Missouri Approved Instructions whenever an approved instruction is applicable to the case. Clark v. Mo. & N. Ark. R.R. Co., 157 S.W.3d 665, 671 (Mo.App. 2004); Meredith v. Mo. Pacific R.R. Co., 467 S.W.2d 79, 82 (Mo. 1971) ("[i]f the Missouri Approved Instructions include an instruction which correctly states the substantive law [governing the case], the approved instruction must be given"). In insisting that the appropriate MAI be followed, the Supreme Court of Missouri has

explained that use of the MAI is key to the integrity of the court system. Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d 255, 258 (Mo. banc 1967).

The Court of Appeals, however, found that "what a plaintiff needs to prove under an MAI instruction is very different from what a plaintiff needs to survive summary judgment." (citing Ribaudo v. Bauer, 982 S.W.2d 701, 704 (Mo.App.E.D. 1998)). Appellant found no language contained within Ribaudo to support the assertion of the Court of Appeals. Section 213.055 and MAI Instruction 31.24 set out the same principle, that it is an unlawful employment practice for an employer to discriminate against an employee on the basis of the employee's protected classification. Ribaudo was a defamation case in which the court was determining the issue of whether a statement was "defamatory" as a matter of law. The Court of Appeals found that "courts are employed to determine whether an allegedly libelous statement is capable of a defamatory meaning. If the statement is capable of a defamatory meaning, then a plaintiff can survive summary judgment on that issue and the jury must determine if the statement did, indeed, have a defamatory meaning." In fact, from the language contained within Ribaudo, it appears that the same proof and issue are brought before both a judge at summary judgment and a jury at trial. Further, the initial determinations of law contained within a defamation case are not contained within Section 213.055 RSMo. See e.g., Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 562 (Mo.App. 1990) (noting that summary judgment is inappropriate when subjective facts are at issue).

Therefore, based upon MAI Instruction 31.24 and Section 213.055, Appellant submits that the determination at summary judgment should be based upon whether or not there exists any genuine issue of fact indicating that a “contributing factor” in defendant’s alleged discriminatory act against plaintiff was plaintiff being a member of a protected classification. MAI 31.24. Here, Appellant submits that the determination at the summary judgment stage should be whether or not there is any evidence of discrimination that was a “contributing factor” in Defendant’s act of terminating Plaintiff based upon Plaintiff’s age or based upon Plaintiff being regarded as disabled.

The need for a clear “contributing factor” analysis is further enunciated by the Court of Appeals antiquated use of a multiple course approach utilizing differing standards should a plaintiff adduce direct or indirect evidence. Numerous courts, including the Supreme Court, have increasing eliminated or criticized this standard. In Desert Palace v. Costa, 539 U.S. 90 (2003), the Supreme Court noted that

> Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." Ibid. That rule requires a plaintiff to prove his case "by a preponderance of the evidence," ibid., using "direct or circumstantial evidence." Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714, n. 3 (1983). The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: "Circumstantial evidence is not only sufficient, but may also be *more* certain, satisfying and persuasive than

direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17 (1957). The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required. See Holland v. United States, 348 U.S. 121, 140 (1954) (observing that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence"). (Italics added).

In Desert Palace v. Costa, 539 U.S. 90 (2003), the plaintiff sued her former employer in federal court alleging gender discrimination and sexual harassment against her employer in violation of Title VII. At trial, notwithstanding the defendant's objection based upon the plaintiff's lack of direct evidence, the district court gave a mixed-motive jury instruction, similar in nature to MAI 31.24 incorporating legal standards established by Congress in the 1991 Civil Rights Act, which had been enacted in response to the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). After the district court's judgment was affirmed by the Ninth Circuit en banc, the Supreme Court granted review to consider the following limited issue: "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991." Id. at 92. The Supreme Court held that direct evidence is not required in order for a mixed-motive jury instruction to be given. The Court noted, that “Section 2000e-2(m) unambiguously states that a plaintiff need only ‘demonstrat[e]’ that an employer used a

forbidden consideration with respect to 'any employment practice.' The Court noted that, on its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." Id. at 98-99.

MAI 31.24 also establishes a "contributing factor" analysis parallel to the Price Waterhouse standard and the 1991 Civil Rights Act. In 1992, the United States Congress passed the 1991 Civil Rights Act which provided for jury trials in Title VII cases. 42 U.S.C. §1981a(c). At that same time, Congress overrode the McDonnell Douglas standard and stated by statute that "an unlawful employment practice is established when the complaining party demonstrates that [a protected classification] was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2(m).

In Price Waterhouse, the district court noted that the jury had heard evidence of both lawful and unlawful motives for the defendant's adverse employment action and instructed the jury that the plaintiff was entitled to a favorable verdict on liability if the protected characteristic (gender) was a motivating factor in the adverse employment action, regardless of whether other lawful motives also played a role. Id. at 252-53; see also Desert Palace, 539 U.S. at 96-97. On damages, the district court instructed the jury that the plaintiff was entitled to damages even if the adverse action was motivated by both gender and a lawful reason, unless the defendant had proven by a preponderance of the evidence that it would have taken the same adverse action if plaintiff's gender had

played no role in the employment decision, and the jury returned a verdict for the plaintiff. Id.

The continued devolution of the McDonnell Douglas standard, developed by the Supreme Court in 1973, parallels the increased statutory and judicial policy of allowing for jury trials in discrimination cases. See William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. Pa. J. Lab. & Emp. L. 199, 212-13 (2003) (arguing that McDonnell Douglas is "dead" after Costa and all future cases "will be mixed motives because that structure has a lower standard of causation than the pretext but-for standard" that was the third step in the McDonnell Douglas approach)[2]. The McDonnell Douglas standard provided some structure for judges to determine employment discrimination cases prior to juries being used to determine such claims.[3]

[2] See also Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 668-72 (1998) (describing the tripartite test as wrought with cumbersome and meaningless formalities that make the inquiry confusing to courts and jurors alike).

[3] Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 371 (1997) (questioning whether the McDonnell Douglas three-step approach accomplishes a useful purpose for anyone other than the publishers of the Federal Reporters); Kenneth R. Davis, *The Stumbling Three-Step Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 704 (1995) (citing critics that fault the McDonnell Douglas approach "for its

The Trial Court and Court of Appeal's Opinions are specifically inapposite to controlling Missouri law with regard to the appropriate standard to employ in analyzing employment discrimination cases at the summary judgment stage. This standard is inapposite to Missouri fact-pleading and the limited use of summary judgment in Missouri contrasting with that of the federal courts. ITT Commercial Fin. Corp. v. Mid-America Marine Supply, 854 S.W.2d 371 (Mo. banc 1993). The contributing or motivating factor analysis should be applied at the summary judgment and trial stages for claims brought under the MHRA.

Sufficient evidence exists to establish that Appellant's age and Appellant being regarded as disabled by Respondent were contributing factors in Respondent's decision to terminate Appellant's employment. MAI 31.24.

Respondent's agents admitted, against their interest, that Appellant's termination was based upon his age and because the City believed he was disabled by a physical condition. Respondent admitted that the "disability exam" did not have any connection

---

insistence on jamming facts into an inapt mold and for its unwieldy complexity which displaces reasoned determinations with the vagaries of befuddled jurors"); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2237 (1995) (suggesting that, after Hicks, the McDonnell Douglas proof structure has become an empty ritual that does nothing the normal rules of civil procedure cannot do and that it would be better to abandon it rather than repair it).

to determining whether or not Appellant could perform his duties as a Police Captain and the examination was shown to not have any job-related necessity. Additionally, Respondent attempted to manipulate the results of the "disability exam" by creating a heavy work load job description for a Police Captain selectively for the examination of Captain Daugherty and Captain Daugherty alone. Despite the City's attempts to distort the results of the examination, Captain Daugherty was shown to be able to perform in the heavy work load for up to four (4) hours at a time and could work any schedule. Respondent thereafter could not establish a consistent reason for Appellant's termination and at various times stated that medical conclusions, absenteeism or various other reasons were the basis for Appellant's termination.

At the time of his termination, Respondent City possessed no knowledge that Captain Daugherty was unable to perform the duties or assignments of Platoon Commander or Bureau Commander, yet he was still subjected to a disability test to which no other officer was subjected. (Lf 395-96). Dr. Katz and all of the command staff deposed from the City of Maryland Heights acknowledged that there was no connection between the examination of Captain Daugherty and whether Appellant could perform the essential duties of his position as a Captain. In Barnes v. Benham Group, Inc., 22 F. Supp.2d 1013, 1019 (Minn. 1998), the court stated that an employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with

business necessity. Respondent and its agents admit that there is no indication that the testing of Plaintiff was related to any business necessity of Defendant or how the "disability exam" was related to Plaintiff's job duties. Not only can Respondent not produce evidence that the "disability exam" was job-related and consistent with business necessity, Respondent admits that there is no connection between the disability exam and its connection to the job of Appellant as a police captain. (Lf 466-67, 410-11). England further testified that Major Kozuszek's description of police captain within the very heavy work load was an inaccurate description of what the essential job functions were for a Police Captain. (Lf 478-79).

Respondent's medical basis could not be established and the manipulated job description was refuted as inaccurate by the expert testimony of Vocational Rehabilitation Specialist James England. Respondent's statement that absenteeism was the basis for Appellant's termination was refuted by the documented absenteeism of similarly situated officers for the City of Maryland Heights during the same time period. Finally, the documented performance of Captain Daugherty over an extended number of years refutes any attempt by Respondent to establish a legitimate basis for his termination.

The legitimacy of the "disability exam" is further put into doubt based upon Chief O'Connor documented statement that the City was attempting to "bypass" the age discrimination by getting "a guy to sign off on something".

As part of the October 28, 2002 meeting between Captain Daugherty, Chief O'Connor and Major Kozuszek, Captain Daugherty tape recorded the conversation. In the conversation, Chief O'Connor admitted:

> When it comes to him [Mark Levin] being ... as far as the use of money and manpower, and young guys verses old guys, there is no God damn doubt about it; there is no doubt about it. If he could force me out in two years, he would force my ass out too...
>
> He would love to take some young stud here who has twelve, fifteen years on – some young stud and bring him in to do the job. I know, I read him like a book. I know exactly what he is. I am not safe, he's not safe [Major Kozuszek], Nickels is not safe. All the guys fifty-five years old, Emery is not safe.
>
> ... He's got it for guys fifty-five years [and] older.

To Captain Daugherty's statement that such conduction "is age discrimination," Chief O'Connor stated:

"Yes, it is. And he is going to be looking for ways to buy everyone out."

Captain Daugherty responded:

"He is going to look for ways to by-pass the age discrimination."

Chief O'Conner continued:

"Yes, he is. He is going to get a guy to sign off on something and off we go." (Lf 724-25).

Chief O'Connor agreed with Captain Daugherty's statement that "his sick time in the past, the amount of sick days that he had used in the past had been greater than in the year 2002." (Lf 420). Chief O'Connor also agreed with Captain Daugherty that during the course and scope of his 16 years of employment he [Captain Daugherty] had wrestled people to the ground and successfully secured criminals. (Lf 420).

On or about November 8, 2002, Captain Daugherty received a first notice of termination from Chief O'Connor, stating that Captain Daugherty's termination was based on the medical conclusions that indicated he was no longer capable of performing the functions of a police officer. (Lf 746-47). On or about November 26, 2002, Captain Daugherty received a second notice of termination stating a different reason for his termination, said being an attendance problem. (Lf 747); see also Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1022 (8th Cir. 1998) (noting inconsistencies in the justifications advanced by Defendant for terminating Plaintiff support a finding of discrimination); Kobrin v. University of Minnesota, 34 F.3d 698, 703 (8th Cir. 1994).

Respondent's claim that Captain Daugherty's termination was based on absenteeism is clearly false and subject to question based upon the attendance records showing that Appellant Daugherty's attendance remained the same or similar from 2000 until the time Captain Daugherty was terminated. Further, several officers within the Department at various times used more sick leave than Captain Daugherty. (Lf 640-47). Respondent's insistence that Captain Daugherty had excessive absenteeism, in spite of

the actual documented attendance records, is further evidence that Respondent misperceived Appellant as old and disabled. (Lf 640-47).

A review of Appellant's evaluations documenting his performance and basis for continued promotion through the City of Maryland Heights Police Department establishes doubt as to the legitimacy of any reason provided by Respondent for Appellant's termination. (Lf 578-634). In Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1020 (8th Cir. February 15, 2005), the court noted that "[i]n the present case, Strate's apparently unblemished employment history with the Bank, spanning more than a decade of work, casts genuine doubt upon the Bank's stated reason for terminating her." Here, Plaintiff's remarkable eighteen (18) year work history casts genuine doubt on Respondent's proffered reasons for Appellant's termination. There is also no documented problem Captain Daugherty had with performing physical duties as part of his employment with the City of Maryland Heights since 1987. (Lf 395-96).

III. ASSUMING ARGUENDO THAT THE TRIAL COURT APPLIED THE CORRECT STANDARD IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THE TRIAL COURT AND COURT OF APPEALS ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT DAUGHERTY'S AGE DISCRIMINATION CLAIM UNDER THE MISSOURI HUMAN RIGHTS ACT, BECAUSE APPELLANT DAUGHERTY ESTABLISHED A CLAIM OF AGE DISCRIMINATION UNDER THE MCDONNELL DOUGLAS STANDARD, IN THAT DIRECT EVIDENCE AND EVIDENCE MEETING THE PRIMA FACIA CASE EXISTS, INCLUDING MEDICAL AND DOCUMENTED PERFORMANCE EVALUATION EVIDENCE THAT CAPTAIN DAUGHERTY WAS PERFORMING OR ABLE TO PERFORM HIS JOB AT A LEVEL THAT MET THE CITY'S LEGITIMATE EXPECTATIONS AND EVIDENCE THAT APPELLANT WAS MERELY REPLACED ON PAPER TO CREATE THE APPERANCE OF AN OLDER REPLACEMENT BUT WAS NOT ACTUALLY REPLACED BY A YOUNGER EMPLOYEE.

The Court of Appeals, citing Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004), stated that a plaintiff in an employment discrimination case may survive a defendant's motion for summary judgment in one of two ways: (1) by proof of "direct evidence" of discrimination, or, (2) if there is no direct evidence of discrimination, the

inference of unlawful discrimination through the McDonnell Douglas analysis. McDonell Douglas v. Green, 411 U.S. 792 (1973)

To make out a prima facie case of age discrimination under the McDonnell Douglas standard, a plaintiff must show "that 1) he was within the protected age group, 2) that he was performing his job at a level that met his employer's legitimate expectations, 3) he was discharged, and 4) his employer attempted to replace him." McDonell Douglas, 411 U.S. 792 (1973); Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir.1993). "The burden of establishing a prima facie case of disparate treatment is not onerous." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

A. Direct Evidence under McDonnell Douglas Standard

Assuming Appellant is required to establish direct evidence of age discrimination, the Court failed to properly analyze the direct evidence of discrimination present in this case. Some courts have held that direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Quick v. Wal-Mart Stores, Inc., 441 F.3d 606, 609 (8th Cir. 2006); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); EEOC v. Liberal R-II School Dist., 314 F.3d 920, 923 (8th Cir. 2002) (direct evidence may include evidence of actions or remarks of the employer that reflect a discriminatory attitude).

This Court of Appeals stated that "the evidence reveals that that [sic.] O'Connor made these statements to Daugherty in an effort to shift part of the blame in the termination decision and to avoid confrontation with his brother-in-law, Daugherty." The actual evidence is in stark contrast to the summary of Chief O'Connor's motivations made by the Court of Appeals. There is, in fact, no evidence that Chief O'Connor made the incriminating statements regarding the illegal motivations of the City to shift part of the blame or to avoid confrontation with Appellant beyond O'Connor's own bald and later-scripted deposition statements. In direct contrast to this assertion by the Court, Chief O'Connor admitted that he was telling the truth, not shifting the blame, in telling Appellant that the City desired to get rid of Appellant based upon his age and perception of him as disabled. (Lf 512-13). Additionally, the motivations of an individual are not an appropriate determination to be made at summary judgment. See Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 562 (Mo.App. 1990) (noting that when the underlying issue is one of motivation, intent, or some other subjective fact that the case is particularly inappropriate for summary judgment).

The admissions made by Chief O'Connor were far greater and more incriminating than acknowledged by the Court of Appeals in its Opinion. During this October 28, 2002 meeting, Chief O'Connor noted that

> When it comes to him [C.A. Mark Levin] being ... as far as the use of money and manpower, and young guys verses old guys, there is no God

damn doubt about it; there is no doubt about it. If he could force me out in two years, he would force my ass out too...

He would love to take some young stud here who has twelve, fifteen years on – some young stud and bring him in to do the job. I know, I read him like a book. I know exactly what he is. I am not safe, he's not safe [Major Kozuszek], Nickels is not safe. All the guys fifty-five years old, Emery is not safe.

... He's got it for guys fifty-five years [and] older.

(Lf 724). To Captain Daugherty's statement that such conduction "is age discrimination," Chief O'Connor stated:

"Yes, it is. And he is going to be looking for ways to buy everyone out."

(Lf 724-725). Captain Daugherty responded:

"He is going to look for ways to by-pass the age discrimination."

Chief O'Conner continued:

"Yes, he is. He is going to get a guy to sign off on something and off we go."

(Lf 725).

Chief O'Connor admitted that there was a desire to rid the department of older employees and that Appellant Daugherty was considered old and disabled by a physical condition. (Lf 723-25). Based on this direct evidence, the granting of Respondent's Motion to Summary Judgment was inappropriate.

B. FOUR PRONG <u>MCDONNELL DOUGLAS</u> STANDARD

1. Plaintiff was performing his job at a level that met his employer's legitimate expectations.

The trial court concluded, in granting Respondent's Motion for Summary Judgment, that Captain Daugherty was not able to perform his job at a level that met the City's legitimate expectations.

However, Plaintiff has shown that he "satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires," and he "with or without reasonable accommodation, can perform the essential functions of the position held or sought." Craig Bishop v. Nu-Way Service Stations, Inc., 340 F.Supp.2d 1008 (E.D. Mo. 2004).

Based on the above findings of Dr. Katz, Dr. Feinberg, all of Captain Daugherty's treating physicians, the results of the FCE, and James England's expert opinion, the evidence suggests that Captain Daugherty was able to perform the duties of Captain for the Maryland Heights Police Department. These determinations were made, in part, based on the City of Maryland Heights own position description of Lieutenant/Captain. Further, Captain Daugherty was determined to be able to work in the very heavy work load level for up to four (4) hours and Chief O'Connor, and others within the Department, acknowledged that any strenuous activity by a Captain would be infrequent and for a short period of time less than four (4) hours. Also, Captain Daugherty was held to a higher standard with regard to the duties of a Captain based on the position

description for Captain Daugherty created by Major Kozuszek for Dr. Katz's report as part of Captain Daugherty's "disability exam."[4]

2. Appellant was replaced by a younger police officer

The trial court and Court of Appeals relied on Respondent's assertion that Plaintiff could not meet his prima facie burden under McDonnell Douglas, because Appellant had not proven that he was replaced by a younger officer. The Court of Appeals claimed that Captain Daugherty was replaced by an older employee, Captain Robert Nichols. (Court of Appeals, p. 13).

The Eighth Circuit, however, has ruled that evidence regarding the individuals that may replace dismissed or demoted employees pertains not to legal sufficiency of an age discrimination claim, but only affects the overall weight of the evidence. Hindman v. Transkrit Corporation, 145 F.3d 986 (8th Cir. 1998). The Supreme Court has recognized that the prima facie case in discrimination suits varies somewhat with the specific facts of each case; the standard is not inflexible. See McDonnell Douglas, 411 U.S. at 802 n.13, (noting that its own standard, though a useful yardstick, "is not necessarily applicable in every respect to differing factual situations").

Further, in Hindman, the Eighth Circuit noted that although the traditionally-stated elements of a prima facie case tend to indicate that the employee is required to show that

[4] Appellant will not restate in the same detail as in the Factual Background and Section II his ability to perform his duties as a police captain and Respondent's failures in attempting to show Appellant's inability to perform his duties.

he was actually replaced by one individual or that his position was still open and the employer, the Eighth Circuit noted that it is not necessarily required under McDonnell Douglas and that the prima facie case in discrimination suits varies somewhat with the specific facts of each case. Id. The court in Hindman continued that

> "[u]nder the present factual circumstances, there certainly exists a question of material fact, as to whether Transkrit actually used several other employees to take over Hindman's responsibilities and thereby effectively replaced him. Obviously, if Hindman had been replaced by one single individual, that fact would be relevant in evaluating Transkrit's motive. Nevertheless, it is entirely conceivable to this court that an ADEA plaintiff who was demoted and effectively replaced by many individuals adopting his duties may still be able to establish that he was the object of impermissible discrimination related to his age."

Id.

Prior to his termination, Appellant indicated to his supervisors on October 28, 2002, including Chief O'Connor, that he believed that his pending termination was the result of age and disability discrimination. (Lf 420; 724-725). Therefore, any resulting adjustment of personnel by Defendant City resulting in an employee of similar age as Appellant working in Appellant's position is called into question by the knowledge that the City had of Appellant's claims of discrimination. There is a question of fact as to

whether any resulting adjustment of personnel by Respondent was motivated by its attempts to "by-pass" illegal discrimination. (Lf 420; 724-725).

Further, the claim that Captain Bob Nichols replaced Captain Daugherty in his position is actually false. Respondent admits that Captain Bob Nichols never worked in Appellant's position. (Lf 416). During his deposition, Chief O'Connor confirmed that the transfer of positions of Daugherty or Nichols occurred only on paper but did not actually occur. (Lf 416). There are, at a minimum, questions of fact regarding the replacement of Captain Daugherty and the weight of the evidence regarding the replacement of Captain Daugherty's position by Respondent. Hindman v. Transkrit Corporation, 145 F.3d 986 (8th Cir. 1998).

The evidence also indicated that Scott Will, who was near the age of 40, became Lieutenant at or around the time Appellant was terminated. (Lf 394). Respondent finally admits that it chose not to go through the hiring process for a new Lieutenant based on the advice of the City Attorney relating to this lawsuit to manipulate the position titles in an attempt to make it appear a younger employee had not taken Captain Daugherty's position. (Addendum, p. A16-A17; Lf 394; 416).

Just as noted in Hindman, the actions of Respondent in moving position tiles on paper and having individuals effectively replace Captain Daugherty's job duties after his termination raises genuine issues of fact. Further, the McDonnell Douglas standard is not onerous or inflexible to account for all of the evidence of discrimination set forth in a particular claim and evidence regarding the individuals that may replace dismissed or

demoted employees pertains not to legal sufficiency of an age discrimination claim, but only affects the overall weight of the evidence and is not a sufficient basis to grant summary judgment in favor of the employer. Hindman v. Transkrit Corporation, 145 F.3d 986 (8th Cir. 1998).

3. Respondent's alleged justifications for appellant's termination were pretext for discrimination against Appellant.

The Court of Appeals noted in its decision that the Eight Circuit, in Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005), found that Desert Palace did not change the summary judgment standard under McDonnell Douglas. The Court of Appeals continued that the Eighth Circuit had found in Strate that Desert Palace elucidated or clarified the third prong of the McDonnell Douglas burden-shifting analysis. The Court of Appeals further determined the Eighth Circuit in Strate found that the third prong of the McDonnell Douglas standard is met if the plaintiff "can establish enough admissible evidence to raise a genuine doubt as to the legitimacy of the employer's motive, even if the evidence does not directly contradict the reasons for the employment action articulated by the employer." The Court of Appeals continued that "[w]e will now determine what standard of law should apply at the summary judgment level for employment discrimination claims under the MHRA." (Court of Appeals, p. A9).

The Court of Appeal's acknowledgement of Strate and the Court's acknowledgement of Strate clarifying the McDonnell Douglas standard and the Court's

citation to Griffith and the traditional McDonnell Douglas standard without acknowledgement of modification or clarification of McDonnell Douglas is at tension within the Court's own decision. The Eighth Circuit in Strate acknowledged that

> "the Supreme Court's decision in Desert Palace, to the extent relevant, merely reaffirms our prior holdings by indicating that a plaintiff bringing an employment discrimination claim may succeed in resisting a motion for summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (i.e., a motivation based upon a protected characteristic), even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation." Strate, 1018 (emphasis added).

The Eighth Circuit stated that the Supreme Court's decision in Desert Palace, to the extent relevant, merely reaffirms the Eighth Circuit's prior holdings by indicating that a plaintiff bringing an employment discrimination claim may succeed in resisting a motion for summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (i.e., a motivation based upon a protected characteristic), even though the plaintiff may not be able to create genuine doubt as to the third McDonnell Douglas prong of

proving the pretextual nature of a different, yet lawful, employer motivation. Id. at 1018.[5]

[5] The Eighth Circuit has recognized that a genuine issue of fact regarding unlawful employment discrimination may exist notwithstanding the plaintiff's inability to directly disprove the defendant's proffered reason for the adverse employment action. See, e.g., O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995) ("It appears that the district court was under the impression that, in order to survive defendants' motion for summary judgment, plaintiff could only rely upon evidence that directly tended to disprove the exact reason stated by defendants for terminating him . . . [w]e have specifically rejected such a narrow approach to the plaintiff's burden of proof, when resisting a defendant's motion for summary judgment, in order to establish a genuine issue of fact as to pretext and the ultimate issue of intentional discrimination."); Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940, 945 fn. 8 (8th Cir. 1994) ("[T]he standard for plaintiff to survive summary judgment required only that plaintiff adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive, even if that evidence did not directly contradict or disprove defendant's articulated reasons for its actions."). The focus of inquiry at the summary judgment stage "always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of [the protected characteristic]." Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996).

In Desert Palace v. Costa, 539 U.S. 90, 156 L. Ed. 2d 84, 123 S. Ct. 2148 (2003), the Supreme Court acknowledged that direct and indirect evidence were equally persuasive in proving employment discrimination, and that the key issue in such cases is whether intentional discrimination occurred. Id.

The Court of Appeals in analyzing Appellant's claims failed to determine whether Appellant presented sufficient evidence of discrimination based upon direct or circumstantial evidence to establish a genuine issue of fact regarding an unlawful motivation for Appellant's termination. At a minimum, Appellant submits that the third prong of McDonnell Douglas has been modified to require the plaintiff to simply establish by direct or indirect evidence a genuine doubt as to the legitimacy of the employer's motive, even if the evidence does not directly contradict the reasons for the employment action articulated by the employer.

Assuming that Plaintiff is required to establish pretext, Appellant has shown that the statements and admissions of Chief O'Connor establish Appellant was terminated because of his age and because he was misperceived as being disabled.

Respondent has provided numerous and differing reasons for Captain Daugherty's termination. As noted above, one termination notice indicated that the reason for termination was the findings of Dr. Katz, while a later notice indicated that attendance was an issue in the decision making process. Kobrin v. University of Minnesota, 34 F.3d

698, 703 (8th Cir. 1994) ("[s]ubstantial changes over time in the employer's proffered reason for its employment decision supports a finding of pretext").

Further, Chief O'Connor noted in his deposition that the issue was Captain Daugherty's attendance and later stated it was based on personal observations. As stated previously, the facts simply do not support the assertion of Captain Daugherty being absent from work a number of days greater than other members of the Department. In fact, each year other members of the Department used more sick leave than Captain Daugherty. Further, there is a large amount of evidence describing the discriminatory animus of Respondent in sending Captain Daugherty for a "disability exam" and attempting to have the process skewed to make Appellant's position appear more strenuous than the actual essential duties of a police captain. See E.E.O.C. v. Kohler Co., 335 F.3d 766, 773-74 (8th Cir. 2003) (noting that the proximity of plaintiff's complaint of discrimination in relation to his discharge coupled with defendant's inconsistent enforcement of its policies and use of disciplinary actions established facts from which a reasonable jury could have drawn the conclusion that defendant retaliated against plaintiff).

This case is analogous to E.E.O.C. v. Kohler Co., 335 F.3d 766, 773-74 (8th Cir. 2003), where Defendant's inconsistent enforcement of its policies and use of disciplinary actions against Plaintiff established facts from which a reasonable jury could have drawn the conclusion that Defendant discriminated against Plaintiff. Similarly, the City altered the requirements for the position of Captain, as they pertained only to Captain Daugherty

and not to any other Captain.

There is a question of fact regarding the inconsistencies in the statements made by Dr. Wilkinson. On or about August 21, 1987, Dr. David L. Wilkinson documented that Captain Daugherty was injured on duty on July 4, 1986 while working in his capacity as a police officer. Dr. Wilkinson stated that based on his evaluation Captain Daugherty was recovered sufficiently to be able to return to full and active duty, effective September 1, 1987. Dr. Wilkinson further noted that "I feel that he has recovered to the point where he will not endanger himself or affect the safety of fellow police officers while in the line of duty." (Lf 544). The statements in Dr. Wilkinson's affidavit that contradict his statements from 1987 only lead to questions regarding his motivation and credibility in signing a false affidavit. (Lf 544).

In Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1020 (8th Cir. February 15, 2005), the court noted that "[i]n the present case, Strate's apparently unblemished employment history with the Bank, spanning more than a decade of work, casts genuine doubt upon the Bank's stated reason for terminating her." Here, Plaintiff's remarkable eighteen (18) year work history casts doubt on Defendant's motivations and further establishes any necessary showing of pretext.

Finally, an employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. Barnes v. Benham Group, Inc.,

22 F. Supp.2d 1013, 1019 (Minn. 1998). Respondent admits that there it can not make the requisite showing that the testing of Appellant was related to any business necessity of Defendant or how the “disability exam” was related to Plaintiff’s job duties. The legitimacy of the “disability exam” is further put into doubt based upon Chief O’Connor documented statement that the City was attempting to “bypass” the age discrimination by getting “a guy to sign off on something”.

IV. ASSUMING ARGUENDO THAT THE TRIAL COURT APPLIED THE CORRECT STANDARD IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT DAUGHERTY'S "REGARDED AS" DISABILITY DISCRIMINATION CLAIM UNDER THE MISSOURI HUMAN RIGHS ACT, BECAUSE APPELLANT DAUGHERTY ESTABLISHED A CLAIM OF DISCRIMINATION UNDER THE MCDONNELL DOUGLAS STANDARD, IN THAT THERE EXISTS DIRECT EVIDENCE OF DISABILITY DISCRIMINATION AND EVIDENCE MEETING THE PRIMA FACIE CASE, INCLUDING STATEMENTS AND ADMISSIONS OF REPSONDENT AND THE SENDING OF APPELLANT DAUGHERTY FOR AN IMPERMISSIBLE MEDICAL EVALUATION ESTABLISHING THAT APPELLANT DAUGHERTY WAS PERCEIVED AS DISABLED AND EVIDENCE THAT CAPTAIN DAUGHERTY WAS ABLE TO PERFORM HIS DUTIES AS A POLICE CAPTAIN BASED UPON THE MEDICAL EVIDENCE AND DUTY DESCRIPTIONS OF A POLICE CAPTAIN.

In order to establish a prima facie case of disability discrimination under the McDonnell Douglas standard, a plaintiff must show (1) that he has a disability within the meaning of the MHRA, (2) that he is qualified to perform the essential functions of the job, with or without reasonable accommodation, and (3) that he suffered an adverse employment action under circumstances which give rise to an inference of unlawful

discrimination. Galambos v. Fairbanks Scales, 144 F.Supp.2d 1112, 1124 (E.D. Mo. 2000).

A. DIRECT EVIDENCE OF DISABILITY DISCRIMINATION

At the time of his termination, Respondent City possessed no knowledge that Captain Daugherty was unable to perform the duties or assignments of Platoon Commander or Bureau Commander, yet he was still subjected to a disability test to which no other officer was subjected. (Lf 395-96). Dr. Katz and all of the command staff deposed from the City of Maryland Heights acknowledged that there was no connection between the examination of Captain Daugherty and whether he could perform the essential duties of his position as a Captain. In Barnes v. Benham Group, Inc., 22 F. Supp.2d 1013, 1019 (Minn. 1998), the court stated that an employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Respondent and its agents admit that there is no indication that the testing of Plaintiff was related to any business necessity of Defendant or how the "disability exam" was related to Plaintiff's job duties. Not only can Respondent not produce evidence that the "disability exam" was job related and consistent with business necessity, Respondent admits that there is no connection between the disability exam and its connection to the job of Appellant as a police captain. (Lf 466-67, 410-11). Major Kozuszek's position

description for Captain Daugherty differed from the actual position description for Police Lieutenant/Captain in the Personnel Manual. (Lf 551). Major Kozuszek admitted that there was a lack of similarity between the position description that he created and the actual position description for a Captain. (Lf 437-438); see also Barnes v. Benham Group, Inc., 22 F. Supp.2d 1013, 1019 (Minn. 1998).

Direct evidence of Respondent' discriminatory motive in sending Appellant for the disability exam was ignored by the Trial Court and Court of Appeals.

B. THE EVIDENCE SUGGESTS THAT RESPONDENT REGARDED PLAINTIFF AS HAVING A DISABILITY.

The MHRA defines "disability" as:

> a physical or mental impairment which substantially limits one or more of a person's major life activities, *being regarded as having such an impairment*, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job, utilizing the place of public accommodation, or occupying the dwelling in question.

Section 213.010 RSMo. (2000) (italics added).

The Supreme Court of the United States defined "disability" to include individuals who are "regarded as" having a physical or mental impairment that substantially limits

one or more of the major life activities of such individual. Sutton v. United Air Lines, 527 U.S. 471, 489 (1999); see also Section 213.010 RSMo.[6]

The Supreme Court held that there are two ways in which individuals may fall within the definition of "disability": "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) that a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." Id. at 489.

The Supreme Court has defined "Major life activities" as including walking, seeing, learning, working, etc. Sutton, 527 U.S. at 489. Substantial limitation of the major life activity of working requires that a plaintiff be "regarded as" unable to work in a class of jobs and regarded as suffering a significant reduction in meaningful employment opportunities as a result of his impairments. Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999); Nichols v. ABB DE, Inc., 324 F.Supp.2d 1036, 1043 (E.D. Mo. 2004).

Here, there is substantial evidence as to Respondent's perception of Plaintiff as disabled in major life activities. It is clear that the City mistakenly believed that an

[6]The Eight Circuit, in adopting the Supreme Court's "regarded as" disability framework for MHRA cases, stated that "individuals who are 'regarded as' having a disability, but are not actually disabled, can still fall within the protection of the MHRA." Epps v. The City of Pine Lawn, 355 F.2d 588, 592 (8th Cir. 2003).

actual, non-limiting impairment of Captain Daugherty substantially limited one or more of his major life activities. This is evidenced by Dr. Katz's actual release of Captain Daugherty for work as a supervisory captain. There are numerous references made by the decision-makers, including Chief O'Connor, Major Kozuszek, and Mark Levin, that Captain Daugherty was perceived as old and disabled by a physical condition. Further, Respondent's belief that Appellant had to have had attendance problems despite the documented attendance records establishes a continued misperception on the part of Respondent as to the extent of Appellant's medical condition.[7]

C. THE EVIDENCE IS THAT CAPTAIN DAUGHERTY COULD PERFORM HIS JOB AS A POLICE CAPTAIN

Plaintiff is qualified to perform the essential functions of his job if the "individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires," and "the individual, with or without reasonable accommodation, can perform the essential functions of the position held or sought." Craig Bishop v. Nu-Way Service Stations, Inc., 340 F.Supp.2d 1008 (E.D. Mo. 2004).

Based on the above findings of Dr. Katz, Dr. Feinberg, all of Captain Daugherty's treating physicians, the results of the FCE, and James England's expert opinion, Captain Daugherty was able to perform the essential duties of Captain for the Maryland Heights

[7] Appellant will not restate in the same detail as in the Factual Background and Section II Respondent's misperceptions with regard to Appellant's medical condition.

Police Department. These determinations were made, in part, based on the City of Maryland Heights' own position description of Lieutenant/Captain. Further, Captain Daugherty was determined to be able to work in the very heavy work level for up to four (4) hours and Chief O'Connor acknowledged that any strenuous activity by a Captain would be infrequent and for a short period of time. Also, Captain Daugherty was held to a higher standard in the requirements of the duties of a police captain based on the position description newly created by Major Kozuszek for Dr. Katz's report.[8]

[8]Appellant will not restate in the same detail as in the Factual Background and Section II his ability to perform his duties as a police captain and Respondent's failures in attempting to show Appellant's inability to perform his duties.

CONCLUSION

For the aforementioned reasons, the trial court and Court of Appeals erred in granting Respondent's Motion for Summary Judgment on Appellant Douglas Daugherty's claims of age discrimination and regarded as disability discrimination. As a result of the foregoing, Appellant Daugherty respectfully requests that this Court enter judgment in his favor and remand this case to the trial court for trial. Appellant also requests an award of attorneys' fees and costs and such further and necessary relief as this Court may deem just and proper under the circumstances of this case.

THE KLOEPPEL LAW FIRM &
THE LAW OFFICES OF KEVIN J. DOLLEY

By: _____
GREGORY KLOEPPEL, MBE #47909
KEVIN J. DOLLEY, MBE #54132
Attorneys for Plaintiff
9620 Lackland Road
St. Louis, MO 63114
Phone: (314) 423-8003
Fax: (314) 423-8054

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage pre-paid, this ____ day of _____, 2007, to:

James N. Foster, Jr.
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
2730 North Ballas Road, Suite 200
St. Louis MO 63131-3039

CERTIFICATE OF COMPLIANCE

I certify that this brief is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 15,282 words, which is in compliance with the 31,000 word count allowed. This brief is otherwise in compliance with Rule 84.06(b).

I also certify that the computer diskette that I am providing has been scanned for viruses under Norton Anti-Virus for windows and has been found to be virus free.

_____

APPENDIX

INDEX TO APPENDIX

In the Missouri Court of Appeals
Eastern District

DIVISION TWO

DOUGLAS L. DAUGHERTY, Appellant, v. THE CITY OF MARYLAND HEIGHTS, Respondent.	))))))))))	No. ED86438 Appeal from the Circuit Court of St. Louis County Honorable B.C. Drumm, Jr. FILED: June 27, 2006

Before Gary M. Gaertner, Sr., P.J., George W. Draper III, J., and Kenneth M. Romines, J.

PER CURIAM

Appellant, Douglas L. Daugherty ("Daugherty"), appeals the judgment of the Circuit Court of St. Louis County granting summary judgment in favor of Respondent, The City of Maryland Heights ("the City"). Daugherty, a former employee of the City's Police Department ("the Police Department"), brought an action against the City alleging unlawful discharge based on age discrimination and disability discrimination in violation of section 213.055.1(1), RSMo 2000[1] of the Missouri Human Rights Act ("the MHRA"). We affirm.

In 1985, Daugherty, at the age of forty-two years old, began working as a sergeant for the Police Department. Daugherty later obtained the rank of captain, worked as

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

A1

commander in the detective bureau, and then worked as a watch commander until he was notified of his termination.

On July 4, 1986, a drunk driver struck Daugherty while he was working for the Police Department. Daugherty's spinal cord was partially severed and he was initially paralyzed from the chest down. Daugherty had surgery for the injury, which eventually alleviated his paralysis. However, Daugherty's spinal cord remained partially severed. On or about September 1, 1987, Daugherty was released back to work.

After the injury, Daugherty continued to suffer the following physical effects of his spinal cord injury: pain, spasms, burning sensations, muscle weakness, and muscle atrophy. As a result, Daugherty took several medications.

In April of 2000, Daugherty was diagnosed with degenerative spine disease, which was related to his 1986 injury. This condition caused Daugherty to have pain in his lower back, left leg, and hips. As a result, in April of 2000, Daugherty had lower back fusion surgery and was out of work from April to October of 2000.

Sometime in the year 2000, Daugherty exhausted all of his paid sick leave. Around that time, the City enacted a temporary ordinance specifically for Daugherty that allowed employees to share some of their paid sick leave with other employees. As a result, some employees donated sick leave time to Daugherty until Daugherty returned to work. After Daugherty returned to work, he began accruing his own paid sick leave. However, in June of 2001, Daugherty again became close to exhausting all of his paid sick leave.

During 2001 and 2002, Daugherty's brother-in-law and chief of police for the City, Thomas O'Connor ("O'Connor"), received complaints from officers regarding

Daugherty's lack of leadership and supervision due to his poor attendance. In April of 2002, Daugherty received a less than satisfactory evaluation based upon his lack of leadership and supervision, his increased use of sick time, and two violations of the Police Department's sick leave policies.

On July 9, 2002, Daugherty injured his lower back again, when he stepped off a curb. As a result of this injury, Daugherty missed at least four days of work.

Subsequently, the City's attorney, Mark Levin ("Levin"), approached O'Connor and asked him if he thought it would be a good idea to have Daugherty complete a test to determine his fitness for duty. As a result of Daugherty's absenteeism, which seemed in large part related to Daugherty's back injuries, O'Connor agreed with Levin that O'Connor should be sent for a test to determine his fitness for duty. Thereafter, Daugherty was notified by the City's human resource department that O'Connor and deputy chief of police, Major Michael Kozuszek ("Kozuszek"), wanted him to be evaluated for his fitness for duty.

Accordingly, Daugherty was scheduled for a physical exam[2] with Dr. Richard Katz ("Dr. Katz") to determine Daugherty's fitness for duty. On August 27, 2002, Dr. Katz examined Daugherty, and concluded that he needed more information from the City to complete his evaluation.

Subsequently, the City provided Dr. Katz with Daugherty's medical records and a description of a police captain's duties. In addition, the City specifically asked Dr. Katz to make an assessment whether Daugherty was capable of functioning in a physical confrontation and subsequent arrest with an adult where public safety is at risk.

Thereafter, Dr. Katz examined Daugherty for a second time. Dr. Katz also sent Daugherty to undergo a functional capacity evaluation with Mr. Victor Zucarello ("Mr. Zucarello"), a licensed occupational therapist.

In October of 2002, Dr. Katz issued a report which incorporated Mr. Zucarello's findings as to Daugherty's fitness for duty. Dr. Katz opined in relevant part that "[Daugherty] has not been safe in functioning in a physical confrontation and subsequent arrest with an adult . . . where public safety is at risk . . . [t]hus he can not work in the capacity as a front line officer." Mr. Zucarello opined that "[Daugherty] may be at risk of harm should he directly attempt to physically chase and subdue an uncooperative suspect," and "[h]e also does not display adequate lifting or pulling strength to assist in moving an injured person from an emergency scene."

Although Dr. Katz also opined that Daugherty was capable of performing his supervisory work as a captain, Daugherty acknowledges that every police officer, including captains, are required to do more than supervisory work. Daugherty specifically admits that every police officer for the City is required to do the same type of work that Dr. Katz and Mr. Zucarello determined that he can not or may not be able to do: enact an arrest, subdue an unwilling perpetrator, lift more than one hundred pounds, and pull an accident victim from an accident scene.

---

[2] The City's personnel policy provides that "[t]he [C]ity may require an employee to be examined by the City's physician for the purpose of determining an employee's ability to perform the essential functions of his/her position."

Based upon Dr. Katz's report, O'Connor made the decision to terminate Daugherty. On October 28, 2002, O'Connor and Kozuszek met with Daugherty to inform him that he had the choice of being terminated or taking disability retirement[3] ("the October of 2002 meeting"). Subsequently, Daugherty was temporarily assigned to a community services position so he could determine whether he was going to voluntarily apply for disability retirement benefits. However, Daugherty never actually performed any work in his position in the community services bureau. Once O'Connor learned that Daugherty chose not to apply for disability retirement, Daugherty was effectively terminated as of November 8, 2002.

On November 8, 2002, O'Connor issued a memorandum to Daugherty, notifying him that his termination was based upon Dr. Katz's medical conclusions. On November 26, 2002, O'Connor issued at letter to Daugherty, which stated that Daugherty was terminated due to: (1) the Police Department's determination that Daugherty cannot perform the duties required of him as a police officer based on Dr. Katz's and Mr. Zucarello's findings, and (2) "a related and supporting reason . . . that [Daugherty's] physical condition has caused him attendance problems which interfere with his ability to act as a supervisor and the [Police D]epartment's ability to properly schedule its officers."

Subsequently, Daugherty requested a hearing on the termination decision, which took place on or about March of 2003. After the hearing, Daugherty's termination decision was upheld by the Police Department.

---

[3] Under the City's long term disability insurance plan, a disabled employee can receive up to 66% of his base salary until the age of 65, which is the mandatory retirement age for the Police Department's employees.

Daugherty then filed a complaint with the Missouri Commission on Human Rights ("the MCHR") against the City on May 4, 2003, alleging an unlawful discriminatory practice. On November 4, 2003, the MCHR issued Daugherty a "notice of right to sue" letter pursuant to section 213.111 of the MHRA. On November 12, 2003, Daugherty filed an action against the City, alleging unlawful discharge based on age discrimination and disability discrimination in violation of section 213.055.1(1) of the MHRA.

On April 11, 2005, the City filed its motion for summary judgment, which the trial court granted with respect to both of Daugherty's claims. This appeal by Daugherty followed.

Our review of a grant of summary judgment is essentially *de novo*. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo.banc 1993). We view the record in the light most favorable to the non-movant. Id. Facts set forth in support of the moving party's motion are considered to be true unless contradicted by the non-movant's response. Id. A trial court's judgment will be upheld if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. Id. at 380.

In his first point on appeal,[4] Daugherty contends that the trial court failed to use the correct standard of law. In granting summary judgment in favor of the City, the trial court used the McDonnell Douglas burden shifting analysis and found that: (1) Daugherty failed to establish a prima facie case of age discrimination or disability discrimination

[4] Because Daugherty's first point on appeal in his brief only discusses the standard of review for summary judgment, for purposes of this appeal we will consider his second point on appeal his first point on appeal. Accordingly, we will also consider Daugherty's third point on appeal his second point on appeal, and his fourth point on appeal his third point on appeal.

under the MHRA, (2) the City articulated a legitimate, non-discriminatory reason for Daugherty's discharge, and (3) Plaintiff failed to adduce any evidence of pretext for discrimination. See McDonnell Douglas Corp v. Green, 411 U.S. 792, 802-04 (1973).

The McDonnell Douglas three-part burden shifting analysis applies to claims of employment discrimination. H.S. v. Board of Regents, 967 S.W.2d 665, 670 (Mo.App.E.D. 1998). Under that approach, the plaintiff must first establish a prima facie case of discrimination ("the first prong"). Id. Should the plaintiff carry this burden, then the burden shifts to the employer to state a legitimate, non-discriminatory reason for the employment action ("the second prong"). Id. If the employer satisfies this burden, then the burden shifts back to the plaintiff to prove that the reasons for the employment action articulated by the employer are pretextual ("the third prong"). Id.

Daugherty contends that the correct standard of law at the summary judgment level in an employment discrimination case is "whether or not there exists a genuine issue of fact as to whether or not . . . evidence of discrimination on the basis of [a protected class] [i]s a 'contributing factor' in [the employment action]." In support of his argument, Daugherty cites (1) Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005), and (2) Missouri Approved Instruction ("MAI") 31.24 (2005), the verdict director for employment discrimination claims under the MHRA.

Daugherty apparently argues that Strate, in discussing the impact of Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), abrogated the McDonnell Douglas burden shifting analysis. Desert Palace involved the post-trial issue of when a plaintiff should be able to obtain a "mixed motive" instruction. Desert Palace, 539 U.S. at 92. However, Daugherty's argument is rejected by the Eighth Circuit's finding in Strate that, "the

district court did not err in concluding that Desert Palace has not changed our summary judgment standards under the McDonnell Douglas paradigm." 398 F.3d at 1017.

Furthermore, the Eighth Circuit then reviewed the district court's summary judgment decision using the McDonnell Douglas burden-shifting framework. Id. at 1018-21. First, the court found that the plaintiff met the first prong by making a prima facie case of discrimination. Id. at 1019. Next, the court found that employer satisfied the second prong by setting forth a non-discriminatory reason for the plaintiff's termination. Id. The court then held that a plaintiff can meet the third prong, and thus survive summary judgment, if he can establish enough admissible evidence to raise a genuine doubt as to the legitimacy of the employer's motive, even if the evidence does not directly contradict the reasons for the employment action articulated by the employer. Id. at 1021. Accordingly, we hold that Strate does not abrogate any part of McDonnell Douglas burden shifting analysis, but merely elucidates, or clarifies the third prong.

Daugherty also relies upon MAI 31.24, the verdict director for employment discrimination claims under the MHRA, for his contention that the trial court used the incorrect standard of law. MAI 31.24 states in relevant part that "[y]our verdict must be for plaintiff if you believe . . . age or disability . . . was a *contributing factor* in . . . [plaintiff's] discharge . . .." MAI 31.24 (emphasis added).

Daugherty maintains that because a plaintiff is entitled to a verdict if he proves that his protected class was a contributing factor in his discharge at trial, it follows that a plaintiff is entitled to survive summary judgment if he provides evidence that his protected class was a contributing factor in his discharge. However, what a plaintiff needs to prove under an MAI instruction is very different from what a plaintiff needs to

survive summary judgment. See Ribaudo v. Bauer, 982 S.W.2d 701, 704 (Mo.App.E.D. 1998). Thus, we find that Plaintiff's argument that MAI 31.24 should apply at the summary judgment level has no merit.

We will now determine what standard of law should apply at the summary judgment level for employment discrimination claims under the MHRA.

In Griffith v. City of Des Moines, the Eighth Circuit held that a plaintiff in an employment discrimination case may survive a defendant's motion for summary judgment in one of two ways: (1) by proof of "direct evidence" of discrimination, or, (2) if there is no direct evidence of discrimination, the inference of unlawful discrimination through the McDonnell Douglas analysis. 387 F.3d 733, 736 (8th Cir. 2004). We hold that this is the standard of law that should be utilized at the summary judgment level for employment discrimination claims under the MHRA.

Accordingly, we will now determine, *de novo*, whether plaintiff has provided direct evidence of discrimination and consequently, whether the trial court was correct in using the McDonnell Douglas burden-shifting analysis in its judgment.

Direct evidence is evidence which shows a specific connection between the alleged discrimination and the challenged decision, sufficient to support a finding by a reasonable trier of fact that an illegitimate criterion actually motivated the adverse employment action. Griffith, 387 F.3d at 736. Direct evidence includes evidence of remarks made by individuals closely involved in employment decisions that reflect a discriminatory attitude. E.E.O.C. v. Liberal R-II School Dist., 314 F.3d 920, 923 (8th Cir. 2002). However, direct evidence does not include "stray remarks in the workplace" or "statements by decision makers unrelated to the decisional process itself." Id.

It is undisputed that O'Connor made the decision to terminate Daugherty, and Levin approved O'Connor's termination. In addition, it is undisputed that Kozuszek was at the October of 2002 meeting when Daugherty was notified of his termination. Thus, O'Connor, Levin, and Kozuszek were all individuals closely involved in the decision to terminate Daugherty. Accordingly, the only issue is whether Daugherty has provided direct evidence that any of these individuals made remarks reflecting a discriminatory attitude.

We will first determine whether Daugherty has provided direct evidence of age discrimination.

In this case, Daugherty stated in oral argument that the only alleged direct evidence of age discrimination took place during the October of 2002 meeting. During this meeting, O'Connor told Daugherty that Levin was trying to get rid of employees over the age of fifty-five, because they were making too much money. In response, Daugherty suggested that was age discrimination, and O'Connor agreed with Daugherty.

However, the evidence reveals that that O'Connor made these statements to Daugherty in an effort to shift part of the blame in the termination decision and to avoid confrontation with his brother-in-law, Daugherty. In addition, there is no evidence that Levin represented to anyone that he wanted to get rid of older employees. Furthermore, Daugherty stated that he understood that O'Connor, in making the statements, was expressing his opinion as to Levin's desires with respect to older police officers. Finally, Daugherty also stated that nothing offensive was said to him relating to his age by Levin, O'Connor, or Kozuszek.

Because the above evidence does not reflect a discriminatory attitude on the part of Levin, O'Connor, or Kozuszek, we find there is not direct evidence of age discrimination.

We will now determine whether Daugherty has provided direct evidence of disability discrimination.

Daugherty contended in oral argument that the record reveals direct evidence of disability discrimination in that prior to Daugherty being sent to the physical exam, someone had told him that Levin was going to use the results of the physical exam to terminate him. However, there is no evidence of this statement in the record.

Daugherty's actual statement in his deposition was that Levin wanted to have him evaluated to assess his fitness for duty because he was using a lot of sick time and had many absences. Levin stated that he suspected that Daugherty's absences were related to Daugherty's ongoing back injury, and concluded that the City had an obligation to find out.

The record reveals that Daugherty did in fact miss a lot of work due to, at least in large part, his ongoing back injury. In addition, Daugherty's poor attendance had an effect on his job performance. Further, there is nothing in the record that shows a discriminatory attitude on the part of Levin in his desire to have Daugherty submit to a physical exam. Also, Daugherty stated that nothing offensive was said to him relating to a disability by Levin, O'Connor, or Kozuszek. Thus, we find there is not direct evidence of disability discrimination.

Therefore, because Daugherty has failed to provide direct evidence of either age discrimination or disability discrimination, the trial court properly used the McDonnell

Douglas burden shifting analysis. See Griffith, 387 F.3d at 736. Under Plaintiff's second and third points on appeal below, we will review, *de novo*, whether the trial court also properly determined that plaintiff failed to establish an inference of discrimination under the McDonnell Douglas framework. Point denied.

In his second point on appeal, Daugherty maintains the trial court erred in finding he failed to establish a claim of age discrimination under the McDonnell Douglas burden-shifting analysis.

The MHRA prohibits employers from engaging in unlawful employment practices, including discharging an employee on the basis of his age. Section 213.055.1(1). When analyzing an employment discrimination claim under the MHRA, we consult federal employment discrimination decisions and Missouri law. Cook v. Atoma Intern. of America, Inc., 930 S.W.2d 43, 45 (Mo.App.E.D. 1996).

The McDonnell Douglas burden shifting analysis requires a plaintiff to establish a prima facie case of age discrimination. Haas v. Kelly Services, Inc., 409 F.3d 1030, 1035 (8th Cir. 2005). In order to establish a prima facie case of age discrimination under the MHRA, a plaintiff is required to show that: (1) he is a member of a protected age group, (2) he met the applicable job qualifications, (3) he was discharged by his employer, and (4) he was replaced by a younger employee. Schierhoff v. Glaxosmithkline Consumer Healthcare, L.P., 444 F.3d 961, 965 (8th Cir. 2006). Under the MHRA, a plaintiff is a member of a protected age group if he is "an age of forty or more years but less than seventy years." Section 213.010(1).

In this case, Daugherty was fifty-nine years old at the time of his termination. Daugherty's last active job with the City was as a captain in the watch commander

position. After his termination, Daugherty was replaced by Captain Robert Nichols, who was sixty-three years old. Because he was replaced by an older employee, Daugherty has failed to make a prima facie case of age discrimination under the MHRA. Thus, summary judgment in favor of the City was proper. See Fox v. McDonnell Douglas Corp., 890 S.W.2d 408, 412 (Mo.App.E.D. 1995). Point denied.

In his third point on appeal, Daugherty asserts the trial court erred in finding he failed to establish a claim of disability discrimination under the McDonnell Douglas framework. Daugherty argues the City regarded him as having a disability.

The MHRA prohibits employers from engaging in unlawful employment practices, including discharging an employee on the basis of his disability. Section 213.055.1(1). When analyzing an employment discrimination claim under the MHRA, we consult federal employment discrimination decisions and Missouri law. Cook, 930 S.W.2d at 45.

The McDonnell Douglas burden shifting analysis requires a plaintiff to establish a prima facie case of disability discrimination. See Medley v. Valentine Radford Communications, 173 S.W.3d 315, 321 (Mo.App.W.D. 2005). In order to establish a prima facie case of disability discrimination under the MHRA, a plaintiff is required to show that: (1) he is a member of a protected class because he has a disability as defined by the MHRA, (2) he was discharged by his employer, and (3) there is evidence to infer that the disability was a factor in his discharge. Id. at 320.

The MHRA defines a "disability" as: "a physical or mental impairment which substantially limits one or more of a person's major life activities, [or] being regarded as having such an impairment . . . which with or without reasonable accommodation does

not interfere with performing the job . . .." Section 213.010(4).[5] To establish that he is "regarded as having" a disability, a plaintiff can show that the employer mistakenly believed that he had an actual, non-limiting impairment which substantially limited one or more major life activities. Brunko v. Mercy Hosp., 260 F.3d 939, 942 (8th Cir. 2001). An employer does not mistakenly believe an employee has an actual, non-limiting impairment which substantially limits the major life activity of working if the employer bases his belief on an uncontradicted physician's opinion that he could not perform certain duties. See id.

Furthermore, the major life activity of working does not mean working at a particular job of the employee's choice. Id. Additionally, an impairment does not substantially limit the major life activity of working if it only disqualifies an employee from a narrow range of jobs. Id.

In this case, Daugherty contends the City mistakenly believed he had an actual, non-limiting impairment which substantially limited his major life activity of working. Daugherty asserts that "[t]his is evidenced by Dr. Katz's actual release of [Daugherty] for work as a supervisory captain."

However, the record reflects that Dr. Katz did not release Daugherty to return to work, but rather found that Daugherty "is capable of working in his supervisory work as a captain." Nonetheless, Daugherty admits that every police officer, including a captain, is required to do more than supervisory work.

---

[5] In this case, the question of reasonable accommodations is not at issue because Daugherty does not maintain that the City should have accommodated him in any way so that he could perform his job. Rather, Daugherty's sole argument, as discussed in this point on appeal, is that the City mistakenly believed he had a disability.

In addition, Daugherty specifically admits that every police officer for the City is required to do the type of work that Dr. Katz and Mr. Zucarello determined that he can not or may not be able to do: enact an arrest, subdue an unwilling perpetrator, lift more than one hundred pounds, and pull an accident victim from an accident scene. Moreover, neither of Daugherty's own experts, Dr. Barry Feinberg or vocational rehabilitation counselor Mr. James England, specifically opined that Daugherty can perform these particular duties that are required of all officers in the Police Department.

In its decision to terminate Daugherty, the City relied upon Dr. Katz's uncontradicted opinion that Daugherty could not perform certain duties. The City based its decision to terminate Daugherty on his inability to perform his job as a police officer rather than a belief that Daugherty had an impairment which substantially limits his major life activity of working. Accordingly, the City did not have a mistaken belief that Daugherty had an actual, non-limiting impairment which substantially limits his major life activity of working. Thus, Daugherty has failed to establish that the City regarded him as having a disability, or that he has a disability within the meaning of the MHRA. Because Daugherty has failed to make a prima facie case of disability discrimination under the MHRA, summary judgment in favor of the City was proper. Point denied.

Based upon the foregoing, we affirm the judgment of the trial court.

Page 45

Q: Did that add another Lieutenant's position to the City. Did it go from four to five, I'm just trying to understand?
A: No. We created another Lieutenant's position that was not associated with the traffic but was associated with the accreditation process for CALEA.
Q: My whole thought process is blown now. Could you explain who the Lieutenants are over because I thought I had it and now I'm not sure I do?
A: Okay. You have one Lieutenant per platoon.
Q: Right.
A: You have one Lieutenant Detective Bureau.
Q: Right.
A: We have one Lieutenant now who is in charge of Community Services, which includes traffic, CALEA, dispatchers, the reserves, the fleet, civilian personnel assigned to the police department, about 49 people.
Q: Okay. Has that Lieutenant always been there or was there a change that was made, how did that work?
A: There was a change of the table of the organization.

Page 46

Q: Okay.
A: When we started the CALEA process for certification, we created an administrative position, which was the Lieutenant.
Q: Okay.
A: And that position has evolved into the supervisor of the Traffic Bureau, et cetera, et cetera.
Q: And was there -- when did that occur?
A: I guess probably in the last two years, two, three years.
Q: Can you give me one minute. And who are those current Lieutenants, and probably give me their platoon and/or who they're over?
MR. JONES: Let me make sure I understand the question. You're asking who the current five Lieutenants are?
Q: (By Mr. Dolley) Right.
A: Gil Weingart.
Q: Who is he over?
A: He's over a platoon, either A, B or C platoon. I'll give you the names, the first three names I give you will be the platoon supervisors. Gil Weingart, Rex Gooch, Mike Klos, A, B and C.
Q: Okay.

Page 47

A: Detective Bureau is Bill Carson and Community Service is Scott Will.
Q: How old is Mr. Will?
A: I think I said previously he's about 40, 42.
Q: How about Carson?
A: Probably 48.
Q: How about Klos?
MR. JONES: Let me make an objection that it's requiring the Chief to speculate as to the exact age.
Q: (By Mr. Dolley) I'm not requiring exact age, just to the best of your ability?
A: I'd say between 48 and 50.
Q: Okay. How about Mr. Gooch, Lieutenant Gooch?
A: He's in his 50s.
Q: And Weingart?
A: 50s.
Q: Now when did Scott Will become a Lieutenant?
A: I think about two or three years ago.
Q: Did he become a Lieutenant after Captain Daugherty left the department, was it at or around the same time?
A: I'm not sure.
Q: How about Lieutenant Carson, when did he

Page 48

become a Lieutenant?
A: Well, it was five years ago.
Q: Okay. Who is over Community Relations currently?
A: Scott Will.
Q: Are there any plans to add additional Lieutenants to the staff?
A: We have one of those names that I gave you is an acting Lieutenant, that would be Klos, and the promotional process has not started.
Q: How long have you been waiting to start that promotional process?
A: A couple years.
Q: What's holding up that process?
A: Two lawsuits.
Q: Okay, and whose lawsuits are those?
A: Will Fink and Douglas Daugherty.
Q: Is that process being put on hold based on the possibility that or consideration of Captain Daugherty returning to the department?
A: That process was put on hold on the advice of the City Attorney.
MR. JONES: Let's not go into anything beyond the advice of the City Attorney.
MR. DOLLEY: Well we may or we may not.

Page 49

MR. JONES: You won't be going into any conversations today regarding conversations with the City Attorney on that regard. Now there's a subject we've agreed on, which would be fine, but as far as personnel decisions they've made since the termination based on the advice of counsel you will not get into.

Q: (By Mr. Dolley) Well let me just ask you this. Have you indicated to anyone that the promotional process is being put on hold because of Captain Daugherty possibly returning to the department?

A: No.

Q: Is the promotional contact also being put on hold because Captain Fink may become a Lieutenant?

A: Yes.

Q: Pending a court decision?

A: Yes.

Q: Any idea who -- do you have in your mind any front runner with regard to who would likely become the next Lieutenant?

A: No.

Q: Have you asked anyone to become a Lieutenant?

A: No, I can't ask that question.

Page 50

Q: Have you approached anyone with regard to the possibility of becoming a Lieutenant?

A: No.

Q: Have you discussed the possibility of Sergeant Delia becoming a Lieutenant with anyone, including Sergeant Delia?

A: No.

Q: Is it fairly possible that he could become the next Lieutenant, is that a strong likelihood?

MR. JONES: Objection, calls for speculation.

THE WITNESS: Depends on how well he does in the three-step process.

Q: (By Mr. Dolley) Okay, fair enough. Now you know what a payroll change form is, do you know what those are, am I saying that right?

A: It's an administrative form for change of payroll but that's very broad.

Q: I have a specific question I'm aiming toward. Would that be the best way to determine what an employee's salary is, what's indicated on that form?

A: Yes.

Q: Have you ever observed Captain Daugherty use a weapon?

Page 51

A: No.

Q: Are you aware of him having any documented difficulty with his ability to use a weapon?

A: No.

Q: Are officers for the City of Maryland Heights required to carry a weapon at all times while in uniform?

A: Yes.

Q: And you're aware Captain Daugherty was injured in the line of duty in 1986; is that correct?

A: Yes.

Q: And that involved a drunk driver to your knowledge?

A: Yes.

Q: Have you worked side-by-side or closely with Captain Daugherty during any period of time since 1986?

A: Yes.

Q: And when was that?

A: Well, it would have been during different scenarios that occurred from the BFO. I would interact with supervisors as well as the Patrol Officers on particular instances, so depending upon the instance and the significance of it, I usually

Page 52

was at most significant incidents.

Q: Would that be while you were -- primarily while you were Deputy Chief?

A: Yes.

Q: And while Captain Daugherty was a Lieutenant over a platoon?

A: Correct.

Q: And did you ever observe Captain Daugherty have any, since returning to work in September of 1987, any problems performing his duties as a Lieutenant or as a Sergeant before that?

A: No.

Q: Have you observed Captain Daugherty since 1987 arrest a subject?

A: No.

Q: And you're not aware of any problem he's had ever arresting a subject?

A: No.

Q: Are you aware that he has arrested a subject?

A: I think he has, yes.

Q: Did you ever observe him to draw his weapon?

A: No.

Q: Ever observed him performing any duties with regard to any type of an emergency scene?

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY,
STATE OF MISSOURI

DOUGLAS L. DAUGHERTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Cause No. 03CC-004611
THE CITY OF MARYLAND HEIGHTS, MISSOURI, a Municipal corporation,	)	
	)	Division No.: 4
Defendant.	)	

ORDER AND JUDGMENT

This cause comes before the Court on Defendants' Motion For Summary Judgment. The Court, having considered the merits of the Motion, finds and rules as follows:

1. Summary Judgment is granted with respect to Plaintiff's claim of age discrimination under the MHRA because Plaintiff failed to establish a *prima facie* case of age discrimination. Plaintiff was not replaced by a younger police officer and he could not establish he was performing or able to perform his job at a level that met the City's legitimate expectations. Moreover, the City articulated a legitimate non-discriminatory reason for Plaintiff's discharge – the medical opinion of Dr. Richard Katz stating Plaintiff could not safely perform his job as a police officer. Plaintiff failed to adduce any evidence of the City's legitimate, non-discriminatory reason for discharge pretext for illegal age discrimination.

2. Summary Judgment is granted with respect to Plaintiff's claim of Plaintiff's handicap discrimination under the MHRA because Plaintiff failed to establish a *prima facie* case of handicap discrimination. Plaintiff's physical impairment prevented him from performing his Job as a police officer and the City did not mistakenly regard or perceive Plaintiff as having a physical impairment that substantially limited any major life activity. Furthermore, the City articulated a legitimate non-discriminatory reason for Plaintiff's discharge – the medical opinion of Dr. Richard Katz stating Plaintiff could not safely perform his job as a police officer. Plaintiff failed to adduce any evidence the City's legitimate, non-discriminatory reason for discharge was pretext for illegal handicap discrimination.

SO ORDERED:

B.C. Drumm, Jr.
Judge, 21st Judicial Circuit

5-25-05
Date

118080. 1

Order dated March 7, 2005, re: Revisions to MAI-Civil

SUPREME COURT OF MISSOURI

en banc

March 7, 2005

Effective July 1, 2005

IN RE: REVISIONS TO MAI-CIVIL

TABLE OF INSTRUCTIONS

MAI 2.03 EXPLANATORY – ORDER OF INSTRUCTIONS

(Instruction – Revision)

(Committee Comment – New)

MAI 31.24 VERDICT DIRECTING – EMPLOYMENT DISCRIMINATION – MISSOURI HUMAN RIGHTS ACT

(Instruction - New)

(Notes on Use – New)

(Committee Comment – New)

MAI 31.25 VERDICT DIRECTING – LAWFUL JUSTIFICATION – EMPLOYMENT DISCRIMINATION – MISSOURI HUMAN RIGHTS ACT

(Instruction - New)

(Notes on Use – New)

(Committee Comment – New)

ORDER

1. Additions and revisions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after July 1, 2005, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The

Missouri Bar.
Day - to - Day

_____ RONNIE L. WHITE
Chief Justice

2.03 [2005 Revision] Explanatory - Order of Instructions
(Approved March 7, 2005; Effective July 1, 2005)

As you remember, the court gave you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be accorded their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Committee Comment (2005 New)

(Approved March 7, 2005; Effective July 1, 2005)

For cases addressing the issue of what words and phrases should be defined in instructions, see: *Steffens v. Paramount Properties, Inc., 667* S.W.2d 725, 727 (Mo. App. 1984), and *Huff v. Union Electric Ca,* 598 S.W.2d 503, 510 (Mo. App. 1980).

31.24 [2005 New] Verdict Directing - Employment Discrimination – Missouri

Human Rights
Act

(Approved March 7, 2005; Effective July 1 , 2005)

Your verdict must be for plaintiff if you believe:

First, defendant (*here insert the alleged discriminatory act, such as "failed to hire", "discharged" or other act within the scope of Section 213.055, RSMo*) plaintiff, and

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

Third, as a direct result of such conduct, plaintiff sustained damage.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number (*here insert number of affirmative defense instruction*)].

Notes On Use (2005 New)

(Approved March 7, 2005; Effective July 1, 2005)

* Add if affirmative defense is submitted.

This bracketed phrase should not be used to submit lawful justification under MAI 31.25.

Committee Comment (2005 New)

(Approved March 7, 2005; Effective July 1, 2005)

Section 213.055, RSMo. Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

In *State ex rel. Diehl v. O'Malley*. 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court of Missouri held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, Section 213.055, RSMo, et seq.

-~

31.25 [2005 New] Verdict Directing - Lawful Justification - Employment Discrimination –
Missouri Human Rights Act

(Approved March 7, 2005; Effective July 1, 2005)

Your verdict must be for defendant if you believe:

First, defendant (*here insert alleged discriminatory act submitted in plaintiff's verdict directing instruction such as "failed to hire", "discharged" or other act within the scope of Section 213.055, RSMo*) plaintiff because (*here set forth the alleged lawful reason such action was taken*), and

Second, in so doing (*here insert the protected classification submitted by plaintiff, such as race, color, religion, national origin, etc.*) was not a contributing factor.

Notes on Use (2005 New)

(Approved March 7, 2005; Effective July 1, 2005)

See MAI 31.24.

This verdict directing instruction must be used to submit lawful justification.

U.S. Code

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment 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, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

A24

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 (**50 U.S.C. § 781** et seq.).

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or

A25

refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section **206**(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified

A26

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws —

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had —

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to —

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a

A27

Missouri Statutes

Missouri Statutes
TITLE XII PUBLIC HEALTH AND WELFARE
Chapter 213 HUMAN RIGHTS

213.055. **Unlawful employment practices – exceptions. –**

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

(b) 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, color, religion, national origin, sex, ancestry, age or disability;

(2) For a labor organization to exclude or to expel from its membership any individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer because of race, color, religion, national origin, sex, ancestry, age or disability of any individual; or to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability; or for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, national origin, sex, ancestry, age or disability in admission to, or employment in, any program established to provide apprenticeship or other training;

(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, color, religion, national origin, sex, ancestry, age or disability unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, national origin, sex, ancestry, age as it relates to employment, or disability, or to classify or refer for employment any individual on the basis of his race, color, religion, national origin, sex, ancestry, age or disability.

A28