

**IN THE
MISSOURI SUPREME COURT**

APPEAL NO. SC88950

TRACY GILLILAND,

Appellant,

v.

MISSOURI ATHLETIC CLUB,

Respondent.

APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS

THE HONORABLE JIMMIE M. EDWARDS, DIVISION 19

APPELLANT'S SUBSTITUTE REPLY BRIEF

Respectively Submitted,

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ARGUMENT

I . SUFFICIENT EVIDENCE OF RESPONDENT MAC’S EVIL MOTIVE OR RECKLESS INDIFFERENCE TO APPELLANT’S RIGHTS NOT ONLY EXISTED TO SUBMIT THE ISSUE OF PUNITIVE DAMAGES TO THE JURY, BUT TO ALLOW THE JURY TO DETERMINE AN APPROPRIATE AMOUNT OF PUNITIVE DAMAGES.

In its response to Appellant’s brief, Respondent MAC relies on facts that the jury rejected in concluding that “no evidence” of evil motive or reckless indifference to Appellant’s protected rights existed. Simply put, Respondent’s resurrection of such facts is of no consequence in determining whether sufficient facts existed to support the jury’s

determination that clear and convincing evidence of evil motive or reckless indifference to protected rights was presented. *Schumacher v. Barker*, 948 S.W.2d 166, 168 (Mo. App. 1997)(holding that a directed verdict should be reversed unless the facts and inferences supporting that verdict would clearly cause one to find against the plaintiff). Respondent MAC reargues the probative effect of the evidence it offered then reaches a different conclusion in attempting to dispel the factual basis for punitive damages. The jury clearly disagreed with Respondent MAC's characterization of these facts. Significantly, the judgment for constructive discharge claim has been satisfied, was not an issue before the Court of Appeals and is not before this Court.

Respondent MAC's argument is that because *conflicting* information was presented on these issues that clear and convincing evidence cannot - as a matter of law - exist. Such a position is not only wrongheaded but long-since rejected. As the U.S. Supreme Court discussed in *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 147-48 (2000), it has long been the case that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Citing *Wright v. West*, 505 U.S. 277, 296 (1992); *Wilson v. United States*, 162 U.S. 613-620-21 (1896); and 2 J. Wigmore, *Evidence* § 278(2), p. 133 (J. Chadbourn rev. 1979).¹ A plausible inference to draw from the jury's verdict is that the numerous management officials denying Manager Millen's outrageous conduct were

¹ It should be noted that the Supreme Court's decision in *Reeves* addressed an employment claim.

disbelieved by the jury. Moreover, Appellant's testimony painstakingly described the outrageous conduct as well as his complaints regarding same. All of these things likely contributed to the jury's conclusion that management recklessly disregarded Appellant's rights to be free from such inappropriate physical touching that was not only prohibited by Respondent MAC's own sexual harassment policy, but also by the Missouri Human Rights Act. For Respondent MAC to claim that there was "no evidence" of evil motive or reckless indifference to protected rights ignores not only the testimony of Plaintiff, but the testimony of others that was rightfully rejected by the jury.

The real issue here remains whether employer liability for punitive damages should be imported wholesale from Missouri tort law, or modified from agency law to the employment law context. The issue is significant because it remains Appellant's position that in a hostile work environment claim that forced an employee to quit his job, the harassment forming the basis for the complaint will rarely, if ever, be within the scope of the offending management official's employment. Respondent MAC correctly describes the effect of the Appellate Court's per curiam decision on this subject, but utterly fails to explain how Missouri principles of agency law, taken from tort law, can properly address the situation presented here. Importantly, the record should be corrected to reflect that Appellant has nowhere represented that "Federal case law takes precedence" over Missouri Human Rights claims. Rather, a fair reading of Appellant's Substitute Brief is that a well-reasoned, analytical framework exists for determining employer liability for supervisory personnel harassment that should be implemented to impose punitive damages liability against Respondent MAC

for its reckless disregard for Appellant's rights.

The issue thus becomes whether Respondent MAC should be responsible for Manager Millen's outrageous conduct because it knew of the conduct and condoned it through its failure to intervene; or alternatively, cannot be liable for the conduct because Manager Millen's job duties did not include the outrageous conduct the jury believed occurred. Appellant respectfully submits that in the context of hostile work environment claims where the harassing party is a management level official, the appropriate standard that balances the deterrent effect of the Missouri Human Rights Act with common sense, calls for a framework such as the one announced by the Supreme Court in *Kolstad v. Am. Dental Ass'n.*, 527 U.S. 526, 539-542 (1999). Contrary to Respondent MAC's assertion that Appellant is urging a Missouri court to adopt Federal law, Appellant is merely citing to this Court a well-reasoned, conscientious principle of vicarious liability that presents a good-faith argument for an extension or clarification of existing law. The punitive damages issue should therefore be remanded for further trial proceedings.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING \$22,000.00 IN ATTORNEY FEES, AS THE AWARD WAS ARBITRARY AND DEMONSTRATED INDIFFERENCE TO THE FEES CLAIMED.

At its core, Respondent MAC's position respecting attorney fees remains that a complete award of fees would be excessive and unreasonable, despite the verified affidavits submitted by Appellant's counsel in support of the fee petition. Indeed, without citation to any authority, Respondent MAC posited that "It is unreasonable, unfair and

unjust for Plaintiff's attorney to be compensated in an amount greater than the jury determined Plaintiff's own damages to be." Appellant's Substitute Response Brief, p. 50. However, even the cases cited by Respondent fail to provide any support for this draconian position. *O'Brien v. B.L.C. Insurance Co.*, 768 S.W.2d 64, 71 (Mo. App. 1989)(an award of fees should bear some relation to the damages award, ***but there is no established principle that the fee may not exceed the damages awarded***)(emphasis supplied).

As evidenced by Respondent MAC's 55-page brief arguing there was no evidence upon which an award of punitives could be made, the claims presented in Appellant's complaint have been hard fought by the parties. Facts submitted as true by one party have been countered by outright denials from the opposing party. See Respondent MAC's Response Brief, ps. 15-18. Moreover, Respondent MAC served hundreds of interrogatories and requests for production of documents upon Appellant. Furthermore, the testimony of a treating physician was introduced at trial, and Respondent MAC even sought and received court order to have Appellant sent for a medical examination. In sum, a great deal of information was collected, requiring expertise in preparing, defending and presenting such information to a jury, and achieving the favorable result obtained. Despite Respondent MAC's arguments to the contrary, the result of this case was deserving of a full award of fees. To highlight the inadequacy of the current attorney fee award, it is worthwhile to note that the \$22,000.00 in attorney fees compensates Plaintiff's counsel for

the time spent at trial, plus approximately \$1,400.00 more for the time spent over 42 months outside the courtroom in responding to discovery, responding to motions to dismiss and for summary judgment, and the other matters necessary to bringing Appellant's claims to trial. Because the Trial Court – with little more than one month's familiarity with the matter - incorrectly applied the applicable factors and ignored other relevant factors, this Court may find that an abuse of discretion occurred, and remand the matter for a more appropriate award of fees. While Appellant's counsel does not argue that the Trial Court failed to "hear" from them regarding fees, a verified statement of attorney fees was submitted and significantly discounted. Therefore the issue of attorney fees should be remanded to the Trial Court with specific instructions to further analyze the matter consistent with a consideration of all proper factors.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CLAIMS FOR INJUNCTIVE RELIEF.

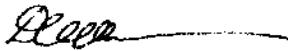
The Trial Court addressed the issue of equitable relief by summarily denying Appellant's request. In his post-trial Motion to Amend or Alter the Judgment, Appellant moved the Court to award a set amount of front-pay damages and order specific injunctive relief. It is impossible to discern what factual shortcomings the court may have identified, if any, because the court summarily denied Appellant's request. Should the Trial Court have had questions concerning these matters, it could have convened a brief hearing on the issue, or order the parties to brief the issue. As it stands, there remains an important aspect of

Appellant's damages that has not been addressed by the jury's verdict (which considered only past damages) (Record on Appeal, hereafter "ROA" 218), or the Court's subsequent rulings (which denied Appellant's request without comment)(ROA 346).

CONCLUSION

Wherefore, for the foregoing reasons and the reasons described in Appellant's Substitute Brief, this matter should be returned to the Trial Court for additional proceedings to determine the amount of punitive damages to award Appellant, to consider all relevant factors in determining an amount of attorneys fees to award, and to determine the appropriate equitable relief to award Appellant in light consideration of the jury verdict finding that a hostile and abusive working environment drove Appellant from his career.

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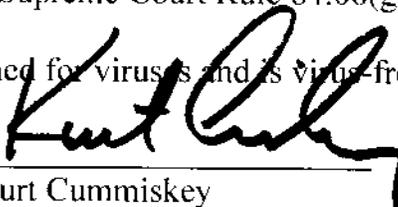
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CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Supreme Court Rule 84.06(c), certifies that: 1) this brief includes the information required by Rule 55.03; 2) this brief complies with the limitations contained in Rule 84.06(b); and, 3) this brief contains 1,855 words, as calculated by the Word Perfect software used to prepare this brief.

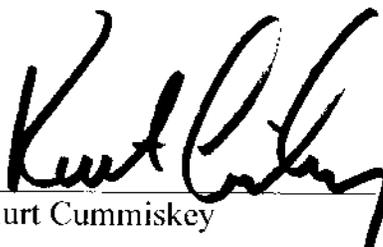
The undersigned also certifies, pursuant to Supreme Court Rule 84.06(g), that the cd rom filed with Appellant's brief has been scanned for viruses and is virus-free.


Kurt Cummiskey

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of March, 2008, served the foregoing upon opposing counsel for Respondent by depositing a copy in the U.S. mail, postage paid to the following:

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