IN THE MISSOURI SUPREME COURT

APPEAL NO. SC88950

TRACY GILLILAND,

Appellant,

vs.

MISSOURI ATHLETIC CLUB, ET AL.,

Respondent.

TRANSFERRED FROM THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
APPEAL NO. ED882489
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
CAUSE NO.: 032-10695
HONORABLE JIMMIE M. EDWARDS, DIVISION 19

RESPONDENT MISSOURI ATHLETIC CLUB'S SUBSTITUTE BRIEF

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Plaintiff/Appellant Tracy Gilliland[1] brought this action for damages against Defendants/Respondents Missouri Athletic Club (MAC) and Vincent Millen, pursuant to the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010, *et seq*., alleging claims under the Act against MAC for race discrimination, sexual harassment, and constructive discharge, along with a Missouri common law claim of assault against Defendant Millen.

On March 2, 2006, after trial, the jury returned a verdict in favor of Plaintiff and against Defendant MAC on Plaintiff's claim for constructive discharge. The jury awarded Plaintiff $60,000 in actual damages and made a finding that Defendant MAC was liable to Plaintiff for punitive damages on the constructive discharge claim. The jury returned verdicts in favor of Defendant MAC and against Plaintiff on his the remaining claims of race discrimination and sexual harassment, and in favor of Defendant Millen and against Plaintiff on the assault claim.

On March 3, 2006, the trial court entered Judgment Notwithstanding The Verdict as to the jury's finding in favor of Plaintiff for punitive damages against

[1]The parties are referenced as Plaintiff and Defendant, as they appeared in the trial court.

Defendant MAC on the claim for constructive discharge. On March 8, 2006, the trial court entered judgment on the verdicts as to each of Plaintiff's claims.

On April 3, 2006, Plaintiff filed a post-trial motion for equitable and/or injunctive relief, requesting additional damages and relief from the trial court in the form of front pay, benefits and/or reinstatement as a server for Defendant MAC, and for injunctive relief and court oversight to ensure future sexual harassment training at MAC. Plaintiff also filed an additional post-trial motion for the award of attorney's fees on April 3.

On June 8, 2006, the trial court entered an order granting Plaintiff's motion for attorney's fees in the amount of $22,000, and denying all other post-trial motions, including Plaintiff's motion for equitable and/or injunctive relief. The trial court also entered an order of amended judgment on June 8.

On June 19, 2006, Plaintiff filed a Notice of Appeal in the Missouri Court of Appeals Eastern District on the amended judgment of the trial court. After briefing and oral argument, the Court of Appeals issued a *per curiam* Order on September 25, 2007, affirming the trial court on all issues. Plaintiff's motion for rehearing was filed on October 10, 2007, and denied on November 8, 2007.

Pursuant to Missouri Supreme Court Rule 83.04, Plaintiff timely filed an Application For Transfer to this Court on November 21, 2007. On December 18, 2007, Plaintiff's Application For Transfer was sustained and the case was ordered

transferred to this Court. This Court has final jurisdiction over the instant case in its entirety pursuant to article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff's Application For Transfer requested this Court to review three issues: (1) whether, in a sexual harassment/discrimination suit brought pursuant to MHRA, supervisory personnel must be "acting within the scope" of their employment for an award of punitive damages against the employer, (2) whether the Missouri Court of Appeals misapplied Missouri law in the instant case, pursuant to the United States Supreme Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526, 545 (1999), and (3) whether the Court of Appeals decision conflicted with prior Court of Appeal decisions concerning the vicarious liability of employers for the actions of their employees. *Appellant's Application For Transfer, p. 1.*

The three issues in Plaintiff's Application For Transfer are not the three Points Relied On in Appellant's Substitute Brief. *Appellant's Substitute Brief, pp. 15-16.* Plaintiff addressed the three issues presented in his Application For Transfer in his first Point Relied On, but basically has re-asserted the three Points Relied On from his original Appellant's Brief, those being: (1) that the trial court erred in denying punitive damages because the evidence established Defendant's evil motive or reckless indifference, (2) that the trial court erred in its award of $22,000 for attorney's fees, and (3) that the trial court erred in denying Plaintiff's

claim for equitable and/or injunctive relief. *Appellant's Substitute Brief, pp. 15-16; Appellant's Brief, pp. 6-8.*

As a matter of procedure, Defendants maintain that Appellant's Substitute Brief exceeds the scope of the issues accepted for review by this Court, and that Point II, concerning attorney's fees, and Point III, concerning additional equitable and/or injunctive relief, should be stricken as they were not raised in nor the basis for Plaintiff's Application for Transfer. If, however, this Court seeks to review all of the issues presented on appeal and make a determination of these issues, for comprehension, clarity, and accuracy, Defendant MAC sets forth the facts that are established in the record and true to the verdicts, based on the trial testimony and the evidence in the trial court record. Defendant MAC will also briefly address the facts relevant to Plaintiff's post-trial motions for attorney's fees and equitable and/or injunctive relief, notwithstanding the fact that those issues were not accepted for review by this Court.

A. Plaintiff's Failed Claim for Race Discrimination Against Defendant MAC.

Plaintiff was a "server" at MAC from approximately December 3, 1999 until August 18, 2002. *Trial Transcript (Tr.) 64; Plaintiff's Trial Exhibit*[2] *(Plt. Exh.) 14; Plt. Exh. 8.* During this period of employment, Plaintiff sought a

[2]Plaintiff's Trial Exhibits 3 through 25 are found in Vol. III of Plaintiff's Record On Appeal Legal File. Volume III is not paginated.

promotion from the position of server to that of server trainer. *Tr. 65-66.* At trial, Plaintiff alleged that he was denied the promotion to server trainer on four occasions either because of his race (Caucasian) or his sexual orientation (homosexual).[3] *Tr. 65-66; 72-75.*

Plaintiff's claim of race discrimination was premised on his belief that four individuals promoted to the server trainer position ahead of Plaintiff were two African-American men and two African-American women. *Plt. Exh. 21.* Plaintiff admitted at trial that three of the four African-American individuals promoted to server trainer over Plaintiff had been employed at MAC for a longer period of time than him. *Tr. 66, 72-73.* The evidence at trial also demonstrated, contrary to Plaintiff's statements, that a total of seven individuals were promoted to the position of server trainer from 1998 to 2002, including two African-American males, three white males, and two African-American females. *Tr. 248-51.*

In December 2001, Plaintiff stated he first complained to Christine Maurer, MAC's Director of Human Resources, that the decision to promote Connie Hogan, an African-American woman, to the position of server trainer ahead of Plaintiff

[3]At trial, Plaintiff "testified" about additional facts related to his sexual orientation as an "outed" homosexual male; this evidence was irrelevant and immaterial to his causes of action of race discrimination, sexual harassment, constructive discharge, and assault.

was discriminatory because of Plaintiff's race and sexual orientation. *Tr. 74, 391-92; Plt. Exh. 20.* On December 14, 2001, Ms. Maurer met with Plaintiff to discuss his complaint of discrimination. *Plt. Exh. 20*. Ms. Maurer testified that she investigated Plaintiff's complaint of discrimination and met with him again on December 19, 2001. *Tr. 419-21*.

Brian Helms, MAC's Food and Beverage Director, and Defendant Millen, MAC's Operations Manager of Food and Beverage, were also present at Ms. Maurer's December 19th meeting with Plaintiff. *Tr. 419-21*, *Plt. Exh. 21*. Mr. Helms explained to Plaintiff that Ms. Hogan's promotion was not based on discrimination, but that MAC had followed standard procedure in making the selection after the supervisory staff determined that Ms. Hogan was the most qualified applicant for the position. *Tr. 340-43; Plt. Ex. 14; Plt. Exh. 21.*

Plaintiff's supervisors told him, and testified at trial, that they believed he lacked the appropriate skills necessary for a supervisory position. *Tr. 342; Plt. Exh. 21*. In addition, prior to seeking the trainer promotion, Plaintiff had been disciplined for engaging in inappropriate conversations with members and guests of MAC. *Tr. 343*. Plaintiff had also been disciplined for failing to complete his duties as a server for five consecutive days. *Tr. 345*. Plaintiff's MAC supervisors also believed he lacked the ability to be available for the schedule required of a trainer because of a history of personal priorities. *Tr. 349-50*. Although Plaintiff

had received satisfactory marks on his performance evaluations, he received his lowest marks in the area of cooperation with his fellow employees. *Tr. 139-43*. In 2001, prior to Ms. Hogan's promotion to trainer, Plaintiff's performance review stated, in part, "[Plaintiff] is an excellent server whose attitude is not always the best . . . . [Plaintiff] needs to concentrate on being a server and remember he is not a manager. If he would do this I would consider him for a trainer position." *Tr. 143-44*.

The jury returned a verdict in favor of Defendant MAC and against Plaintiff on his claim of race discrimination. *Record On Appeal Legal File (ROA) 220*.

B. Plaintiff's Failed Claim for Sexual Harassment Against Defendant MAC.

Defendant Millen was the Operations Manager of Food and Beverage at MAC. *Tr. 204, 238*. In this capacity, Defendant Millen managed approximately forty MAC employees, including Plaintiff. *Tr. 206.* MAC employees Pam Evans, Betty Hines, Barbara McDowell, and/or Matt Thiessen directly supervised Plaintiff as a server. *Tr. 206-07*.

Plaintiff testified that during the entire term of his employment as a server at MAC, Defendant Millen engaged in inappropriate conduct or physical contact toward him on almost a daily basis by "tweaking [Plaintiff's] nipples," holding Plaintiff at the waist on one occasion and simulating a thrusting motion, grabbing

at Plaintiff's penis, and making inappropriate jokes or comments in Plaintiff's presence. *Tr. 79-81, 83, 89-90*. Defendant Millen denied any of the improper conduct or acts described by Plaintiff, and denied that he intentionally touched Plaintiff in an inappropriate sexual manner or with any intent to cause harm. *Tr. 210-11, 229-32*. Plaintiff asserted that Defendant Millen's inappropriate sexual conduct and/or physical contact towards him was the basis of his claim for sexual harassment against Defendant MAC. *Plaintiff's Petition, ROA 021-25, 031-32.*

In support of his sexual harassment claim, Plaintiff testified he observed Defendant Millen touch or grab the breasts of a number of female MAC employees, including Christine Maurer, Betty Hines, Pam Evans, and Casey Cain. *Tr. 84-85*. Plaintiff also testified to Defendant Millen's alleged conduct after Plaintiff resigned (stating the Defendant Millen pressed up against him at a cash register). *Tr. 101-02*.

The facts presented at trial showed that Defendant MAC conducted sexual harassment training for all of its employees on a regular and ongoing basis. *Tr. 319-20*. Defendant Millen testified that he participated in the sexual harassment training. *Tr. 207-09*. Plaintiff also testified that he participated in the sexual harassment training. *Tr. 87*. Through this training, MAC employees were advised of the employee complaint process and how to report any complaints of harassment or discrimination to various levels of management. *Tr. 322-24*. The

complaint process permitted an employee to complain to his or her immediate supervisor, to the Human Resources Department, to the General Manager, or to the Board of Governors. *Tr. 323-24, 364*.

Plaintiff testified that Defendant MAC should have known of his objection to Defendant Millen's conduct because Plaintiff believed that Mr. Helms and Ms. Maurer had witnessed it. *Tr. 91-93*. At trial, both Ms. Maurer and Mr. Helms denied witnessing any offensive conduct by Defendant Millen towards Plaintiff. *Tr. 327, 405-06.* Both Ms. Maurer and Mr. Helms denied observing or having any knowledge of Defendant Millen engaging in any inappropriate conduct or contact towards Plaintiff or anyone else. *Id.*

Plaintiff also testified that he complained about Defendant Millen's conduct to MAC member Janis Mangelsdorf, who at the time of Plaintiff's employment was a member of the Board of Governors. *Tr. 91-93, 459.* Ms. Mangelsdorf testified that she had no knowledge of any MAC employee complaints concerning Defendant Millen and specifically denied that Plaintiff ever spoke to her about any complaints concerning Defendant Millen or Plaintiff's work conditions. *Tr. 460-61*.

Plaintiff testified about a specific complaint he made to Mr. Helms. *Tr. 81*. Plaintiff stated that Mr. Helms was present on one occasion when Defendant Millen grabbed Plaintiff from behind and made a thrusting motion. *Tr. 81*.

Plaintiff testified that he stated to Mr. Helms, "Can you put a leash on this man?" *Tr. 82-83*. Plaintiff's statement to Mr. Helms was the single instance and the total extent of what Plaintiff characterized as his "complaint" to Mr. Helms about Defendant's Millen's conduct. *Tr. 82-83*.

Plaintiff also testified that Ms. Maurer should have been aware of Defendant Millen's conduct directed to Plaintiff because Plaintiff claimed Ms. Maurer observed Defendant Millen touch the breasts of certain female employees. *Tr. 85-86*. At trial, Ms. Maurer denied that she ever observed such conduct on the part of Defendant Millen. *Tr. 405.*

Plaintiff admitted at trial that he never complained directly to Ms. Maurer about Defendant Millen's conduct, and that Ms. Maurer never personally witnessed Defendant Millen engage in inappropriate conduct or contact towards Plaintiff. *Tr. 136.* Plaintiff admitted that he did not make any written complaints to Ms. Maurer regarding Defendant Millen's conduct or physical contact. *Tr. 136*. Plaintiff also admitted that he did not make any complaints to Larry Thompson, MAC's General Manager, about Defendant Millen's alleged conduct or treatment, even though he knew MAC procedure gave him the right to do so. *Tr. 92*.

Plaintiff admitted that Ms. Maurer was available to listen to all of his work-related complaints. *Tr. 136*. Ms. Maurer testified that Plaintiff never made any complaints to her that Defendant Millen was sexually harassing him or behaving in

an inappropriate manner. *Tr. 405-06*. The evidence presented at trial also showed that Ms. Maurer had not received any prior complaints from other employees concerning any inappropriate sexual contact or sexual misconduct by Defendant Millen. *Tr. 398.* Ms. Maurer also testified that she had never observed Defendant Millen engage in any inappropriate contact or conduct directed towards Plaintiff, or towards any female employees, as described by Plaintiff. *Tr. 405*.

In August 2001, Plaintiff complained to Ms. Maurer about the behavior of one of his co-workers, Pierre Occide. *Tr. 387-388*. Ms. Maurer met with Plaintiff regarding this complaint. *Tr. 389.* It was in the context of this complaint that Mr. Maurer, as Director of Human Resources, reminded Plaintiff that his immediate supervisor was in the best position to handle day-to-day concerns or issues dealing with co-workers, and that Human Resources handled more serious issues, such as complaints of serious misconduct and sexual harassment complaints. *Tr. 389; Plt. Exh. 19*. Ms. Maurer told Plaintiff that if his concerns were of a more serious nature he was encouraged to complain to Human Resources or to General Manager Larry Thompson. *Tr. 390; Plt. Exh. 19*.

While discussing Plaintiff's grievance with Mr. Occide, Ms. Maurer told Plaintiff that when he chose to circumvent the resolution process that was in place, then that process could become less effective. *Tr. 390; Plt. Exh. 19.* Contrary to Plaintiff's assertion, Ms. Maurer never testified that she instructed him to bring

complaints only to her, nor did Plaintiff's Exhibit 19, a memo from Ms. Maurer and Defendant Millen documenting their discussion with Plaintiff about his complaint of Mr. Occide, suggest or reflect this assertion. *Tr. 390-91*; *Plt. Exh. 19.*

In August 2004, after Plaintiff resigned from MAC, MAC employee Patricia Rea came to Ms. Maurer because Ms. Rea was upset about being suspended for insubordination. *Tr. 399; Plt. Exh. 22*. During this meeting, for the first time, Ms. Rea stated to Ms. Maurer that two years earlier, in November 2002, Defendant Millen had pushed her on the shoulder and, a few days later, patted her on the shoulder. *Tr. 398.* Although the incident with Ms. Rea and Defendant Millen had taken place nearly two years earlier, Ms. Maurer discussed it with Defendant Millen. *Tr. 399-400; Plt. Exh. 22*.

Brian Helms, MAC's Director of Food and Beverages, testified at trial that he was not aware of Defendant Millen harassing or touching anyone in an inappropriate manner. *Tr. 327*. Specifically, contrary to Plaintiff's assertions that Mr. Helms witnessed Defendant Millen's inappropriate behavior on a daily basis, Mr. Helms testified that he never witnessed Defendant Millen grab another man's nipples, shove Plaintiff into a corner, or push Plaintiff's face toward Defendant Millen's crotch. *Tr. 331-32, 337-38*. In addition, no other MAC employee witnessed or observed any similar inappropriate conduct between Plaintiff and Defendant Millen, nor was any such misconduct reported to Mr. Helms. *Tr. 332,*

337-38. Mr. Helms testified that his first notice of Plaintiff's complaints of sexual harassment against Defendant Millen was when Plaintiff filed his lawsuit. *Tr. 359*.

Plaintiff alleged that he "regularly complained about the conduct of Manager Millen to MAC management." *Plaintiff's Petition, ROA 19-41*. However, Plaintiff failed to present any evidence in the record to support this assertion. Plaintiff claimed that other MAC employees should have known of the alleged misconduct of Defendant Millen because Plaintiff believed they also saw it occur. *Tr. 82-86.* Specifically, Plaintiff believed that other co-workers, including Charlotte Ferrell and James Dawson, and his supervisors Betty Hines and Pam Evans, observed Defendant Millen's conduct. *Tr. 155*. Each of these individuals testified at trial and denied that they had observed Defendant Millen touch Plaintiff, or anyone else, in a sexually inappropriate or harassing manner, as set forth in greater detail below.

1. Charlotte Ferrell Testimony.

Charlotte Ferrell was a server at MAC. *Tr. 171*. Ms. Ferrell testified that on one occasion she observed Defendant Millen press against Plaintiff near a glass rack. *Tr. 176*. Ms. Ferrell had participated in MAC's sexual harassment training, but she did not believe Defendant Millen's conduct toward Plaintiff was inappropriate or sexual harassment, and did not believe Defendant Millen's conduct needed to be reported to anyone as sexual harassment or for any other

reason. *Tr. 179-80, 185-86*. Ms. Ferrell also testified that she never heard Plaintiff complain to anyone about Defendant Millen, and that Plaintiff never complained to her about Defendant Millen's conduct or contact with him. *Tr. 186*.

2. James Dawson Testimony.

James Dawson was a server and bartender at MAC. *Tr. 190*. Mr. Dawson testified that Defendant Millen had physical contact with him that consisted of a "hip check" on occasion and that Defendant Millen thumped him on the arm with his finger. *Tr. 194-95*. Mr. Dawson did not consider this contact to be harassing or sexual in any way. *Tr. 196-97*.

Mr. Dawson did not observe Defendant Millen touch Plaintiff in any offensive way or in any manner described by Plaintiff. *Tr. 197-98*. Mr. Dawson did not hear Plaintiff complain about Defendant Millen's conduct or contact or his treatment by MAC. *Tr. 198-99*.

3. Casey Cain Testimony.

Casey Cain was formerly employed in MAC's Payroll Department. *Tr. 449*. Contrary to Plaintiff's testimony that he saw Defendant Millen touch Ms. Cain's breasts in an offensive manner, Ms. Cain testified that Defendant Millen never touched her breasts at any time. *Tr. 450-51*. Ms. Cain also never saw Defendant Millen touch any other MAC employees. *Tr. 450*.

4. Kathy Russell Testimony.

Kathy Russell was a server and bartender at MAC. *Tr. 451-52.* Ms. Russell testified she worked regularly with both Plaintiff and Defendant Millen, and that she never saw Defendant Millen act inappropriately toward Plaintiff. *Tr. 453.* Ms. Russell never saw Defendant Millen touch Plaintiff inappropriately or heard him make any offensive or demeaning comments to Plaintiff. *Tr. 453.*

5. Janis Mangelsdorf Testimony.

Janis Mangelsdorf was a member of MAC who served on the Board of Governors for a period of three years during Plaintiff's employment at MAC. *Tr. 458-59.* Ms. Mangelsdorf testified that Plaintiff never reported any complaints to her regarding his employment or complaints about Defendant Millen's conduct. *Tr. 460-61.*

6. Pamela Evans Testimony.

Pamela Evans was Banquet Manager at MAC. *Tr. 461.* From December 1999 to August 2002, Ms. Evans was a supervisor of the Food and Beverage Department, and supervised Plaintiff. *Tr. 462.* Ms. Evans recommended Connie Hogan for the position of trainer because Ms. Evans believed Ms. Hogan was dependable and presented herself well. *Tr. 462-63.*

Ms. Evans never saw Defendant Millen abuse, harass, or touch Plaintiff in an inappropriate manner, nor did Defendant Millen ever touch Ms. Evans in an inappropriate manner. *Tr. 465.*

7. Betty Hines Testimony.

Betty Hines is the Manager of the Sportsmen's Club Restaurant at MAC. *Tr. 470-71*. Ms. Hines was one of Plaintiff's supervisors from December 1999 to August 2002. *Tr. 471-72*. Ms. Hines never observed Defendant Millen act inappropriately toward Plaintiff or any other employee. *Tr. 474, 479*. Neither Plaintiff nor any other employee ever complained to Ms. Hines about Defendant Millen's conduct or behavior. *Tr. 474*.

At the close of all evidence, the jury returned its verdict in favor of Defendant MAC and against Plaintiff on his claim of sexual harassment. *ROA 219*.

C. Plaintiff's Failed Claim for Assault Against Defendant Millen.

Plaintiff asserted that Defendant Millen's inappropriate conduct and/or physical contact towards Plaintiff was the basis for his claim of assault against Defendant Millen. Plaintiff testified that during the entire term of his employment as a server at MAC, Defendant Millen engaged in inappropriate conduct or physical contact toward him on almost a daily basis by "tweaking [Plaintiff's] nipples," holding Plaintiff at the waist on one occasion and simulating a thrusting motion, grabbing at Plaintiff's penis, and making inappropriate jokes or comments in Plaintiff's presence. *Tr. 79-81, 83, 89-90*. Defendant Millen denied any of the improper conduct or acts described by Plaintiff, and denied that he intentionally

touched Plaintiff in an inappropriate sexual manner or with any intent to cause harm. *Tr. 210-11, 229-32*. As stated previously, Plaintiff's supervisors and co-workers testified that they did not witness any sexual harassment or inappropriate conduct on the part of Defendant Millen. *See subsection B.*

The jury returned a verdict in favor of Defendant Millen and against Plaintiff on the assault claim. *ROA 221*.

D. Plaintiff's Claim for Constructive Discharge Against Defendant MAC.

On August 8, 2002, Plaintiff submitted his voluntary letter of resignation to MAC. *Tr. 96; Plt. Exh. 8*. Plaintiff's letter of resignation provided no stated reason for his resignation. *Plt. Exh. 8*. Plaintiff testified at trial that he left the information blank because he was embarrassed. *Tr. 96*. In addition to this letter of resignation, Plaintiff also submitted a second written notice of resignation on an MAC guest check. *Tr. 96, 98*. The second resignation notice, which Plaintiff gave to Defendant Millen, stated he was resigning because of harassment and stress caused by his supervisor Matt Thiessen (not Defendant Millen). *Tr. 132-35*. Plaintiff also testified he resigned because of what he perceived as racial discrimination at MAC. *Tr. 100-01*. Plaintiff continued to work as a server at MAC until August 18, 2002. *Tr. 96; Plt. Exh. 8.*

Jury Instruction No. 12 was submitted to the jury on the constructive discharge claim. *ROA 213*. Instruction No. 12 stated that Plaintiff was forced to

resign his employment with MAC as a direct result of "a severe and pervasive" hostile work environment," constituting constructive discharge from his at-will employment with Defendant MAC. *ROA 213*. Although the jury found in favor of Plaintiff on the constructive discharge claim, this contradicted the verdicts in favor of Defendant MAC on the sexual discrimination, sexual harassment, and assault claims. However, the verdicts were conflicting because if there was not sufficient evidence to prove a sexual harassment or assault claim, there could not be sufficient evidence of a necessary element of constructive discharge, that of a "severe and pervasive" hostile work environment. *ROA 213, 219*.

On March 13, 2006, Defendants filed a Motion for Judgment Notwithstanding the Verdict. *Respondent's Substitute Brief Appendix (App.) A21-A24.* Defendants argued that the verdict in favor of Plaintiff's constructive discharge claim was against the weight of the evidence and against the weight of the credible evidence, in that the jury found there was no evidence to support the allegation that the working conditions at MAC were intolerable, and that Defendant MAC intentionally or recklessly permitted intolerable working conditions with the intention of forcing Plaintiff to quit, resulting in constructive discharge. *App. A21-24.* The trial court denied Defendants' Motion for Judgment Notwithstanding the Verdict. *ROA 223-29.*

E. Plaintiff's Post-Trial Motion for Alleged Damages and Request for Equitable and/or Injunctive Relief.

On April 3, 2006, Plaintiff filed a post-trial motion for equitable relief requesting front pay, unspecified benefits and/or reinstatement as a server, and injunctive relief with court oversight of MAC's future sexual harassment training. *ROA 239-47*. Plaintiff argued the $60,000 compensatory award was not enough. *ROA 239-40.*

Plaintiff claimed that he suffered emotional distress and lost wages as a result of the conduct of both Defendant Millen and Defendant MAC. With respect to the lost wages claim, Plaintiff testified he was earning approximately $15,000 to $25,000 a year as a MAC server. *Tr. 119*. Plaintiff "believed" a server trainer earned approximately $40,000 per year. *Tr. 119-20*. Notwithstanding the fact that the jury had found there was no racial discrimination, Plaintiff "calculated" he was unlawfully prohibited from earning additional income for each year he was denied a promotion because MAC's denial was based on racial discrimination due to the fact Plaintiff was Caucasian. *Tr. 121*. However, Plaintiff received a raise following every performance review while employed at MAC. *Tr. 147*. In addition, Plaintiff offered no specific or competent evidence regarding his benefits at MAC or the monetary value of those alleged benefits.

In August 2002, after he resigned from MAC, Plaintiff was hired at Longhorn Steak House. *Tr. 170.* Plaintiff was fired from Longhorn in December 2002. *Tr. 170.* Plaintiff offered no evidence regarding his compensation at Longhorn Steak House, or with any another employer. Plaintiff also offered no evidence regarding what benefits he may or may not have received after his resignation from MAC.

Plaintiff attached Exhibit 1, a document entitled "Tracy Gilliland's Damages," to his post-trial motion for equitable relief and request for front pay and benefits. *ROA 247.* Exhibit 1 was Plaintiff's itemized summary of what he believed were his lost wages, medical specials and other damages. *ROA 247.* Pursuant to Defendants' objection as to foundation and argumentativeness, the trial court held Exhibit 1 was inadmissible for lack of proper evidentiary support or foundation. *ROA 247; Tr. 107-08.* Exhibit 1 was never received into evidence. *Tr. 108.*

Plaintiff's only evidence of his purported front pay and/or benefits was ruled inadmissible at trial and may not now be considered by this Court for purposes of this review.

F. Plaintiff's Post-Trial Request for Award of Attorney's Fees.

On April 3, 2006, Plaintiff also filed a post-trial motion to amend or alter the judgment entered on the verdict in order to award Plaintiff attorney's fees. *ROA*

248-87. Plaintiff's attorneys submitted their joint request for fees totaling $154,430.08. *ROA 248-87*. The trial court allowed limited discovery on this issue; Plaintiff's counsel agreed to produce a copy of their fee agreement contract with Plaintiff and Defendants' prior trial counsel was ordered to produce an affidavit of the sum total of all legal services provided. *ROA 294, 331*. Defendants filed a motion in opposition to Plaintiff's Motion for Attorneys' Fees and requested the trial court deny Plaintiff's motion or significantly reduce the fee award to an amount proportionate to Plaintiff's limited success at trial. *App. A25-A37.*

On June 8, 2006, the trial court entered an order granting Plaintiff's request for attorney's fees in the amount of $22,000.

G. Procedural Background.

The trial in the instant case began on February 27, 2006. *Tr. 1.* At the close of Plaintiff's evidence and at the close of all evidence, Defendants MAC and Millen filed their motions for directed verdict on each of Plaintiff's claims and on the issue of punitive damages. *ROA 181-85*. The trial court denied Defendants' motions for directed verdict. *Tr. 441-45, 490-91*. At the close of Plaintiff's case, the trial court expressed its concern on the record that the Plaintiff had not made a submissible case on his claims for sexual harassment or constructive discharge. *Tr. 441-45*.

On March 2, 2006, the jury returned four verdicts, finding in favor of Defendants on three claims and in favor of Plaintiff only on the constructive discharge claim. *ROA 217*. The jury awarded actual damages to Plaintiff on this claim in the amount of $60,000. *ROA 218*. The jury also made a finding that Defendant MAC was liable for punitive damages on the constructive discharge claim. *ROA 217*.

The jury returned verdicts in favor of Defendant MAC and against Plaintiff on the race discrimination and sexual harassment claims. *ROA 218*. The jury also returned a verdict in favor of Defendant Millen on the assault claim. *ROA 221*.

Plaintiff's claim for punitive damages was bifurcated under Mo. Rev. Stat. § 510.263.2. *Tr. 2*. On March 3, 2006, the trial court found, as a matter of law, that Plaintiff had failed to present sufficient evidence to support the submission of punitive damages on the constructive discharge claim. *Tr. 505-16*. On the same day, the court entered Judgment Notwithstanding the Verdict as to the jury's finding for punitive damages against Defendant MAC on the constructive discharge claim. *Tr. 505-16; ROA 222.* The trial court entered judgment on March 8, 2006. *ROA 223-29.*

On April 3, 2006, Plaintiff filed his post-trial motion for equitable relief requesting front pay, unspecified benefits and/or reinstatement as a server, with injunctive relief and court oversight of MAC's future sexual harassment training.

ROA 239-47. Defendants subsequently filed their response in opposition. *ROA 288-94*. On April 7, 2006, Plaintiff filed a motion for attorney's fees. *ROA 248-87*. Defendants timely filed their response in opposition. *App. A25-A37.*

On June 8, 2006, the trial court entered its final order and judgment, granting Plaintiff's motion for attorney's fees in the amount of $22,000, denying Plaintiff's motion for equitable relief, and denying all other pending post-trial motions. *ROA 344-47*.

On June 19, 2006, Plaintiff filed a Notice of Appeal in the Missouri Court of Appeals Eastern District on the amended judgment of the trial court. After briefing and oral argument, the Court of Appeals issued a six-sentence *per curiam* Order on September 25, 2007, affirming the trial court on all issues, along with a Memorandum Supplementing Order issued only to the parties in the instant case. *App. A1-A8.* The Memorandum discussed "scope of employment" vicarious liability as applied to the instant case. *App. A6.* Pursuant to Mo. R. Civ. P. 84.16(b), the Court of Appeals Memorandum may not be reported or cited to and may not be used in any case before any court. Plaintiff's motion for rehearing was filed on October 10, 2007, and denied on November 8, 2007.

Plaintiff filed an Application For Transfer to this Court on November 21, 2007. On December 18, 2007, Plaintiff's Application For Transfer was sustained and the case was ordered transferred to this Court.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT NOTWITHSTANDING THE VERDICT ON THE FINDING OF PUNITIVE DAMAGES UNDER THE MHRA BECAUSE PLAINTIFF FAILED TO ESTABLISH THE CONDUCT OF DEFENDANT MAC WAS SUFFICIENTLY OUTRAGEOUS IN THAT THERE WAS NO EVIDENCE OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TOWARDS PLAINTIFF.

Brady v. Curators of the Univ. of Mo, 213 S.W.3d 101 (Mo. Ct. App. E.D. 2006).

Hoyt v. GE Capital Mortgage Servs., Inc., 193 S.W.3d 315 (Mo. Ct. App. E.D. 2006).

Englezos v. The Newspaper and Gazette Co., 980 S.W. 2d 25 (Mo. Ct. App. W.D. 1998).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES IN THE AMOUNT OF $22,OOO BECAUSE PLAINTIFF WAS NOT THE PREVAILING PARTY ON THREE OF HIS FOUR CLAIMS, AND THE ATTORNEY'S FEES SUBMITTED BY PLAINTIFF WERE EXCESSIVE AND UNREASONABLE.

Pollock v. Wetterau Food Distrib. Grp., 11 S.W.3d 754 (Mo. Ct. App. E.D. 1999).

Nelson v. Hotchkiss, 601 S.W.2d 14 (Mo. banc 1980).

O'Brien v. B.L.C. Ins. Co., 768 S.W.2d 64 (Mo. banc 1989).

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

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR EQUITABLE RELIEF FOR FRONT PAY, BENEFITS AND/OR REINSTATEMENT BECAUSE PLAINTIFF WAS MADE WHOLE IN THAT THE JURY AWARDED COMPENSATORY DAMAGES AND PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE REQUEST FOR EQUITABLE RELIEF.

Brady v. Curators of the Univ. of Mo, 213 S.W.3d 101 (Mo. Ct. App. E.D. 2006).

State ex rel. Diehl v. O'Malley, 95 S.W. 3d 82 (Mo. banc 2003).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT NOTWITHSTANDING THE VERDICT ON THE FINDING OF PUNITIVE DAMAGES UNDER THE MHRA BECAUSE PLAINTIFF FAILED TO ESTABLISH THE CONDUCT OF DEFENDANT MAC WAS SUFFICIENTLY OUTRAGEOUS IN THAT THERE WAS NO EVIDENCE OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TOWARDS PLAINTIFF.

In his Court of Appeals' Brief, Plaintiff argued that the trial court erred in denying punitive damages because there was clear and convincing evidence of evil motive or reckless indifference. In his Substitute Brief to this Court, he argued that the Court of Appeals erred by relying on improper case law in affirming the trial court's denial of punitive damages. Although the jury returned verdicts that were not entirely consistent, given the jury's findings that there was no racial discrimination, no sexual harassment, and no assault, the trial court did not err in denying punitive damages under the MHRA because Plaintiff failed to present sufficient evidence of evil motive or reckless indifference. Both the trial court's holdings and the Court of Appeals *per curiam* summary affirmance Order should be affirmed.

A. Standard of Review.

Whether there is sufficient evidence for an award of punitive damages is a question of law that falls within the reasoned discretion of the trial court. *Hoyt v. GE Capital Mortgage Servs., Inc.*, 193 S.W.3d 315, 322 (Mo. Ct. App. E.D. 2006); *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 73 (Mo. Ct. App. E.D. 2003). The evidence presented at trial is reviewed to determine whether, as a matter of law, it was sufficient to submit a claim for punitive damages. *Hoyt*, 193 S.W.3d at 322. The evidence and all reasonable inferences are viewed in the light most favorable to submissibility. *Id.* However, "liability cannot rest upon guesswork, conjecture, or speculation beyond inferences that can reasonably decide the case. For this reason, direction of a verdict will be affirmed if any one of the elements of the plaintiff's case is not supported by substantial evidence." *Englezos v. The Newspaper and Gazette Co.*, 980 S.W.2d 25, 30 (Mo. Ct. App. W.D. 1998).

In a punitive damages case, "A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity—that is, that it was highly probable—that the defendant's conduct was outrageous because of evil motive or reckless indifference." *Hoyt*, 193 S.W.3d at 322; *Brady v. Curators of the Univ. of Missouri*, 213 S.W.3d 101, 107 (Mo. Ct. App. E.D. 2006). The evidence of clear and convincing evil motive or reckless indifference to the plaintiff's rights "must instantly tilt[] the scales in the affirmative when weighed

against the evidence in opposition and . . . causes the fact finder to have an abiding conviction that the evidence is true." *Romeo v. Jones*, 144 S.W.3d 324, 334 (Mo. Ct. App. E.D. 2004) (affirming directed verdict dismissing punitive damages).

A court of review may "affirm on any ground sufficient to sustain the judgment and [is] not limited to the grounds relied on by the trial court." *Felling v. Giles*, 47 S.W.3d 390, 393 (Mo. Ct. App. E.D. 2001). The trial court's judgment will be affirmed "if it is deemed correct under any reasonable theory supported by all of the evidence." *Id.* (citation omitted). Even if the trial court did not reach its result with the correct reasoning, a reviewing court "is primarily concerned with the correctness of the result, and not the route taken by the trial court to reach it." *Id.* A case is reviewed on the whole record and the judgment will be affirmed "if any proper grounds exist within the record." *Puisis v. Puisis*, 90 S.W.3d 169, 173 n.7 (Mo. Ct. App. E.D. 2002).

B. There Was Not Sufficient Evidence of Defendant MAC's Evil Motive or Reckless Indifference Necessary for Punitive Damages Under the MHRA.

1. Evidence Presented At Trial.

On his constructive discharge claim, Plaintiff presented two written letters of resignation. The first offered no reason for his decision to voluntarily resign from his employment at MAC, and the second stated that he was resigning because of

stress and harassment caused by supervisor Matt Thiessen. There was no evidence that Defendant MAC intentionally or deliberately created intolerable working conditions with the evil motive or reckless indifference of forcing Plaintiff to quit. *See Brady*, 213 S.W.3d at 106.

Plaintiff testified he "complained" to Ms. Maurer, Mr. Helms, and Ms. Mangelsdorf. Plaintiff also testified that he did not make formal complaints because he believed all of his co-workers and supervisors observed Defendant Millen's misconduct. However, his co-workers and supervisors all testified that they had not seen any misconduct on the part of Defendant Millen. Each witness denied knowledge of any such misconduct. Plaintiff believed Mr. Helms had witnessed an incident but offered no evidence of Mr. Helms actual or constructive knowledge that Plaintiff had been subjected to unwelcome conduct that was severe and pervasive. In any event, Mr. Helms denied witnessing any such misconduct. This evidence does not suggest or infer evil motive or reckless indifference by Mr. Helms to Plaintiff's rights. Mr. Helms testified that he was not aware of Plaintiff's problems with or complaints about Defendant Millen's alleged misconduct.

Plaintiff also stated that Ms. Maurer was aware of problems with Defendant Millen because he claimed she witnessed Defendant Millen touch the breasts of other women, including Casey Cain, Pam Evans, and Betty Hines. Each of these women testified that Defendant Millen had never touched their breasts and that

they never witnessed Defendant Millen act inappropriately towards Plaintiff or other MAC employees.

Evidence was presented of Defendant MAC's employment-related grievance system. Plaintiff admitted he had gone to Ms. Maurer about other work complaints unrelated to his present claims. Plaintiff offered no evidence that he was prohibited from making a complaint of sexual harassment against Defendant Millen or that the complaint process did not exist, or the process in place was ineffectual, or that he made any clear or direct complaint to management about Defendant Millen that was disregarded by management or was intentionally ignored, submissible evidence that would support a claim for punitive damages on his constructive discharge claim. Plaintiff also admitted that he did not complain to MAC General Manager Larry Thompson, or to any other members of management to allow his employer the opportunity to correct or prevent the alleged conduct. Plaintiff's testimony that he did not make use of Defendant MAC's policy and procedures is not sufficient evidence that Defendant MAC purposely, and with malicious intent, "ignored" his problem, or was recklessly indifferent to Plaintiff's rights. *See Hoyt*, 193 S.W.3d at 322.

Under the MHRA, punitive damages require clear and convincing evidence of an employer's outrageous conduct due to evil motive or reckless indifference to a plaintiff's rights. *Brady*, 213 S.W.3d at 107. In *Brady*, the Court of Appeals

upheld an award of punitive damages where there was evidence that the plaintiff's salary was reduced by half, he lost all of his benefits, was reassigned to a smaller and inconvenient office, the defendant failed to implement goals and objectives discussed with the plaintiff, and younger employees in the same position were treated differently. 213 S.W.3d at 109-11. The Court held that such actions amounted to "a systematic campaign" of discrimination. *Id.* at 111. In this case, Plaintiff admitted he was not subject to any change in job, salary, or benefits, nor was he treated any differently by Defendant MAC up to the time of his resignation. *See id.* at 109-11. Unlike the plaintiff in *Brady*, there was no evidence in the instant case that Defendant "used trickery and deceit to cover up the discrimination . . . ." *See id.* at 111.

Constructive discharge occurs "when an employer renders the employee's working conditions intolerable, forcing the employee to quit." *Pennsylvania State Police v. Nancy Drew Suders*, 542 U.S. 129, 134 (2004). An employer constructively discharges an employee when the employer "deliberately renders the employee's working conditions intolerable and thus forces [her] to quit [her] job." *Pollock v. Wetterau Food Distrib. Grp.*, 11 S.W.3d 754, 764 (Mo. Ct. App. E.D. 1999). An employee who quits without giving her employer a reasonable chance to work out a problem has not been constructively discharged. *Id.* at 765. The significance of such "passivity" is that it is inconsistent with an allegation of

intolerable working conditions. *Id.* The fact that an employee fails to complain of alleged harassment may show that her working conditions were in fact tolerable. *Id.* For this reason, an employee's failure to complain may be fatal to a claim of constructive discharge in some, but not all, cases. *Id.*

The jury found in favor of Plaintiff only on his claim for constructive discharge, concluding that the evidence showed the exclusive reason for Plaintiff's resignation was due to Defendant Millen's conduct. *See Jury Instruction No. 12, ROA 123*. The evidence considered by the jury indicated that it was the unwelcome acts or conduct of Defendant Millen, not Defendant MAC, which directly resulted in Plaintiff's resignation. *See id.*

2. Legal Analysis.

Plaintiff requested review by this Court because he believed the Court of Appeals misapplied Missouri law "in light of the United State's Supreme Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), which held that an employer can be liable for punitive damages in connection with the discriminatory acts of its supervisory personnel unless the employer can prove it was acting in good faith." *Appellant's Application For Transfer, p. 1.* Plaintiff also asserted that the Court of Appeals Memorandum Supporting Order conflicted with previous appellate decisions concerning vicarious liability. *Id.*

On September 25, 2007, the Court of Appeals issued a six-sentence *per curiam* Order, affirming the judgment denying punitive damages, awarding attorney's fees, and denying equitable relief, without a written opinion. The Memorandum was issued only to the parties. Pursuant to Mo. R. Civ. P. 84.16(b), the Memorandum may not be reported or cited to or used in any case before any court. There is no "opinion" in the instant case that is a valid basis for Plaintiff's assertion that there is a conflict of law.

The jury found that Defendant MAC was not guilty of sexual harassment or race discrimination, and that Defendant Millen was not guilty of assault. In order for a plaintiff to be eligible for punitive damages based on sexual harassment or race discrimination, the jury must return verdicts in the plaintiff's favor on the underlying claims in addition to presenting sufficient evidence that the defendant's conduct was based on evil motive or reckless disregard for a plaintiff's rights. *See Brady*, 213 S.W.3d at 107.

Proof of a sexual harassment claim alone is not sufficient for a submission of punitive damages to the jury. *See, e.g., Brady*, 213 S.W.3d at 107. "[A] plaintiff is entitled to a punitive damages award if he shows that the defendant's conduct toward him was outrageous because of the defendant's evil motive or reckless indifference to the rights of others." *Id.* The test for punitive damages in the instant case required Plaintiff to prove that Defendant MAC's conduct, as

Plaintiff's employer, was outrageous because of evil motive or reckless indifference to his rights, or that Defendant participated in the discrimination and treated him differently. *See Brady*, 213 S.W.3d at 107. Plaintiff failed to present any evidence that Defendant MAC acted with evil motive or reckless indifference, or participated in the discrimination against Plaintiff or treated him differently from others. *See id.*

Plaintiff's reliance on the United States Supreme Court holding in *Kolstad* is misplaced. It is not Defendant MAC's liability, through Defendant Millen, that is at issue. The issue is whether there was sufficient evidence under the MHRA to support a punitive damages claim of evil motive and reckless indifference, taking into consideration the jury found in this case that there was not sufficient evidence of racial discrimination, sexual harassment, or assault. *See Brady*, 213 S.W.3d at 107; *see also Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. 2007).

In *Kolstad*, the United States Supreme Court held that imputed liability of the employer for punitive damages should be allowed under general agency principles. 527 U.S. at 546. However, the Court held only that imputed liability existed, not that punitive damages were always merited. *Id*. (emphasis added). The Court held that the plaintiff had the burden of proof to show "egregious" misconduct on the part of the employer, and that the plaintiff must "identify facts

sufficient to support an inference that the requisite mental state [of malice or reckless indifference] can be imputed to [the employer]." *Id.*

In *Kolstad*, the Court remanded the case for further proceedings in order to determine if the plaintiff could present sufficient evidence. 527 U.S. at 546. In this case, Plaintiff not only failed to present sufficient facts of evil motive or reckless indifference on the part of Defendant Millen or Defendant MAC, but he failed to present sufficient facts of racial discrimination, sexual harassment, or assault.

Plaintiff also mistakenly interpreted the holding in *Kolstad*. In Subsection B of his Substitute Brief, Plaintiff based his argument on the premise that "the Court in *Kolstad* adopted the Restatement of Agency limitations on the application of vicarious liability for punitive damages . . . ." *Appellant's Substitute Brief, p. 22.* In fact, the Court in *Kolstad* did just the opposite, noting that '[a]pplying the Restatement of Agency's 'scope of employment' rule in Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs." 527 U.S. at 544. "In light of the perverse incentive that the Restatement's 'scope of employment' rules create, we are compelled to modify these principles to avoid undermining the objective underlying Title VII." *Id.* at 545. The Court in *Kolstad* did not adopt the Restatement of Agency's "scope of employment" rules, as Plaintiff stated. *Id.*

Plaintiff also relied on *Brady* and *H.S. v. Board of Regents, Southeast Missouri State University*, 967 S.W.2d 665 (Mo. Ct. App. E.D. 1998), to support his argument that punitive damages should have been allowed. In both the *Brady* and *H.S.* cases, the juries not only found in favor of the plaintiffs on the underlying discrimination claims, but found sufficient evidence of the employer's evil motive or reckless indifference to the plaintiff's rights. *Brady*, 213 S.W. 3d at 106; *H.S.*, 967 S.W.2d at 670.

Plaintiff also relied on the seminal United States Supreme Court cases *Burlington Industries, Inc. v. Ellerth (Ellerth)*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which addressed the issue of vicarious liability in the context of discrimination claims. In *Ellerth* and *Faragher*, the Supreme Court held that "an employer may be liable under Title VII . . . for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." *Faragher*, 524 U.S. at 780. However, the Supreme Court held there must be evidence that the work environment is "sufficiently hostile or abusive." *Id.* at 787-88.

The primary directive of Title VII "is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806. An employer's efforts to prevent violations and make reasonable efforts to discharge their duties must also be recognized. *Id.*

Defendant MAC proved at trial that it conducted sexual harassment training for all employees on a regular basis. There was a complaint process in place for employee grievances, including complaints of harassment or discrimination. At trial, Plaintiff stated that he "orally" complained to many people, while at the same time he stated that he did not file any written complaints because he believed so many co-workers and supervisors had "witnessed" Defendant Millen's allegedly inappropriate conduct. Plaintiff's testimony, however, was not corroborated by a single witness. In fact, all of the employees and supervisors who testified at trial stated they had never seen any inappropriate conduct of the part of Defendant Millen.

The Court in *Faragher* also held that if a plaintiff "unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so." 524 U.S. at 806-07. Plaintiff failed to invoke the grievance process that was in place at MAC. He testified he had not done so because he believed the majority of his co-workers and supervisors had witnessed the alleged misconduct of Defendant Millen.

In Subsection B of his Substitute Brief, Plaintiff criticized the Court of Appeals for not relying on federal law:

> The Appellate Court here did not acknowledge the settled
>
> Federal precedent that exists in the context of claims for

> civil rights violations in determining Respondent MAC's punitive damages liability, but rather relied on *Flood ex rel. Oakley v. Holzwarth*, 182 S.W.3d 673, 680 (Mo. App. S.D. 2005) and *Noah v. Ziehl*, 759 S.W.2d 905, 911 (Mo. App. E.D. 1998) to conclude that Respondent MAC is not liable for its manager's outrageous conduct and its own failure to act and stop the outrageous conduct despite its knowledge of the conduct and Appellant's complaints.

Appellant's Substitute Brief, p. 24. This Court has emphasized the differences between Title VII federal claims and MHRA claims. *Daugherty*, 231 S.W.3d at 818. "Missouri's discrimination safeguards under the MHRA, however, are not identical to the federal standards and can offer greater discrimination protection." *Id.* at 818-19 (citing *Brady*, 213 S.W.3d at 12-13 (discussing that MHRA and federal Title VII are "coextensive, *but not identical*, acts," with the MHRA "in some ways broader than Title VII, and in other ways is more restrictive" (emphasis in original)). The Court of Appeals did not misapply Missouri law by relying on Missouri cases. *See Daugherty*, 231 S.W.3d at 818-19; *Brady*, 213 S.W.3d at 12-13. Plaintiff is mistaken in stating that federal case law takes precedent over

claims made under the MHRA. *See Daugherty*, 231 S.W.3d at 818-19; *Brady*, 213 S.W.3d at 12-13.

Plaintiff asserted that the Court of Appeals Memorandum—issued only to the two parties, "conflicts with other Missouri appellate court precedent," citing to *Cohen v. Express Financial Services, Inc.*, 145 S.W.3d 857 (Mo. Ct. App. W.D. 2004). *Appellant's Substitute Brief, p. 25.* In *Cohen*, the jury found in favor of the plaintiff on his claim for a violation of the Missouri Merchandising Practices Act (MMPA), and awarded punitive damages based on the defendant employee's intentional omission of a material fact. 145 S.W.3d at 860. The court in *Cohen* reviewed the evidence in the record and held that there was "substantial evidence establishing that the defendant's conduct was 'outrageous because of the defendant's evil motive or reckless indifference to the rights of others.'" *Id.* at 865-66 (citing *Burnett v. Griffith*, 769 S.W.3d 780, 789 (Mo. banc 1989)).

Unlike the jury in *Cohen*, the jury in the instant case did not find Plaintiff presented sufficient evidence of sexual harassment or racial discrimination, much less any evidence of "evil motive or reckless indifference." *See id.* The trial court's findings and the Court of Appeals *per curiam* affirmance order do not conflict with any Missouri case law.

Plaintiff argued that the reasoning on "scope of employment" vicarious liability, set forth in the Court of Appeals Memorandum Supplementing Order,

conflicts with Missouri case law. However, the Memorandum Supplementing Order cannot conflict with any case law because it was issued only to the parties in the instant case and may not be reported or cited to and used in any case before any court. Mo. R. Civ. P. 84.16(b).

In addition, even if one were to accept that the reasoning in the Court of Appeals memorandum may not necessarily be correct, a court of review may "affirm on any ground sufficient to sustain the judgment . . . ." *Felling*, 47 S.W.3d at 393. A reviewing court "is primarily concerned with the correctness of the result, and not the route taken by the trial court to reach it." *Id.* A case is reviewed on the whole record and the judgment will be affirmed "if any proper grounds exist within the record." *Puisis*, 90 S.W.3d at 173 n.7.

Plaintiff supports his argument that a punitive damages claim should have been allowed by citing to four federal district court cases, none of which are from Missouri, none of which have any authoritative value, and all of which have a plaintiff who presented sufficient evidence to establish punitive damages. *Appellant's Substitute Brief, p. 27.* In *Beard v. Flying J, Inc.*, 116 F. Supp. 2d 1077, 1092 (S.D. Iowa 2000), the jury found that the plaintiff had submitted sufficient evidence on her claim of a sexually hostile work environment to allow for the submission of punitive damages. In *Luu v. Seagate Technology, Inc.*, 2001 WL 920013/2001 U.S. Dist. LEXIS 15567, *1-2, 25-26 (D. Minn 2001), the jury

found in favor of the plaintiff on her retaliation claim that was based on her reporting what she believed was an incident of sexual harassment, with evidence of extreme consequences, and awarded punitive damages.

In *Flockhart v. Iowa Beef Processors, Inc.*, 192 F. Supp. 2d 947, 965-66, 977 (N.D. Iowa 2001), the district court held that the plaintiff proved sufficiently severe continuous violations of sexual harassment under Title VII and the Iowa Human Rights Act to award punitive damages. In *Storlie v. Rainbow Food Group, Inc.*, 2002 WL 46997/2002 U.S. Dist. LEXIS 455, *1-2 (D. Minn. 2002), the jury found sufficient evidence of pervasive sexual harassment in the workplace and awarded compensatory and punitive damages. None of these cases are applicable to the instant case, and serve only to support the trial court and Court of Appeals orders that punitive damages were not appropriate in a case where Plaintiff failed to prevail on any of the other claims, and failed to present sufficient evidence of Defendant MAC's evil motive or reckless indifference. *See Brady*, 213 S.W.3d at 107.

Proof of a sexual harassment claim alone is not sufficient for a submission of punitive damages to the jury. *See, e.g., Brady*, 213 S.W.3d at 107. "[A] plaintiff is entitled to a punitive damages award if he shows that the defendant's conduct toward him was outrageous because of the defendant's evil motive or reckless indifference to the rights of others." *Id.* Plaintiff failed to present any evidence

that Defendant MAC's conduct was "outrageous" because of evil motive or reckless indifference, the necessary standard for punitive damages under the MHRA. *See id; see also Burnett*, 769 S.W.2d at 789.

The trial court properly relied on the holding in *Englezos* to direct a verdict on the issue of punitive damages. 980 S.W.2d at 33. In *Englezos*, the Court of Appeals upheld a trial court's directed verdict denying a punitive damages claim because there was no evidence of actual malice. *Id.* Like the instant case, the trial court had previously denied the defendant's motion for a directed verdict on the issue of punitive damages, but then granted the motion after the jury returned with a finding of liability. *Id.* at 35-36. "[T]he court in effect ruled that it had erred in allowing punitive damages to go to the jury at all, because no submissible case had been made of actual malice. Nothing barred it from correcting a prior incorrect interlocutory ruling of this type." *Id.* at 36. "[A]ny time before final judgment a court may open, amend, reverse or vacate an interlocutory order." *Id.* (citing *Woods v. Juvenile Shoe Corp.*, 362 S.W.2d 6984, 695 (Mo. 1962)). "The court thus had power to grant a directed verdict before submission of the case to the jury, and of granting JNOV after submission of both parts of the bifurcated case to the jury." *Id.*

The trial court properly determined, as a matter of law, that Plaintiff failed to present sufficient evidence that Defendant MAC's conduct was outrageous because

of evil motive or reckless indifference to the rights of others on Plaintiff's constructive discharge claim. The trial court properly ordered judgment notwithstanding the verdict on the issue of punitive damages.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES IN THE AMOUNT OF $22,OOO BECAUSE PLAINTIFF WAS NOT THE PREVAILING PARTY ON THREE OF HIS FOUR CLAIMS, AND THE ATTORNEY'S FEES SUBMITTED BY PLAINTIFF WERE EXCESSIVE AND UNREASONABLE.

The issues raised in Plaintiff's Application For Transfer are not the same issues raised in his Substitute Brief. Generally, appellate review is limited to specific issues. *Bishop v. Bishop*, 81 S.W.2d 616, 622 (Mo. Ct. App. W.D. 2002); Mo. R. Civ. P. 84.04(e). Defendants maintain the issue of Plaintiff's attorney's fees was not submitted for review in Plaintiffs Application for Transfer and should be dismissed. *See* Mo. R. Civ. R. 83.05(b).

A. Standard of Review.

Awarding attorney's fees in an action brought under the MHRA falls within the discretion of the court. *Pollock*, 11 S.W.3d at 722; *see also, H.S.*, 967 S.W.2d at 674 (holding that attorney's fee of $35,000 awarded by the court to prevailing party was reasonable with actual damages of $500,000 and punitive damages of

$100,000). The setting of attorney's fees is in the sound discretion of the trial court and should not be reversed unless the amount awarded is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration. *Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980).

B. The Trial Court Did Not Abuse Its Discretion in Awarding Plaintiff $22,000 in Attorney's Fees.

In the absence of a contrary showing, the trial court is presumed to know the character of the legal services rendered in their duration, zeal, and ability. *Nelson*, 601 S.W.2d at 21. The trial court is considered to be an expert on the question of attorney's fees and the court that tries a case and is acquainted with all the issues involved may fix the amount of attorney's fees. *Id.* However, when attorney's fees are in issue, the court should hear from the parties just as in other matters. *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989).

An important factor to consider in determining reasonable attorney's fees is the amount involved or the result obtained. *O'Brien*, 768 S.W.2d at 71. This factor is particularly crucial where a prevailing plaintiff has succeeded on only some of his claims for relief. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). If a plaintiff's claims for relief are based on different facts and legal theories and counsel's work on one claim is unrelated to his work on another claim, the unrelated claims must be treated as if they had been raised in separate lawsuits,

and, therefore, no fee may be awarded for services on the unsuccessful and unrelated claims. *Id.* at 434-35 (emphasis added).

In its June 8, 2006 Order, the trial court correctly set forth the relevant factors to be considered when determining attorneys' fees for claims brought under the MHRA. *A9-A12*. These factors included: (1) the rate customarily charged by the attorneys involved in the case and by other attorneys in the community for similar services, (2) the number of hours reasonably expended on the litigation, (3) the nature and character of the services rendered, (4) the degree of professional ability required, (5) the nature and importance of the subject matter, (6) the amount involved or the result obtained, and (7) the vigor of the opposition, citing to *Hutchings v. Roling*, 193 S.W.3d 334, 345-46 (Mo. Ct. App. E.D. 2006), *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 187 (Mo. Ct. App. W.D. 2002), and *Union Center Redevelopment Corp. v. Leslie*, 733 S.W.2d 6, 9 (Mo. Ct. App. E.D. 1987).

In the present case, Defendants were the prevailing party on three of the four claims submitted to the jury. The jury returned a verdict in Plaintiff's favor only on the constructive discharge claim and awarded Plaintiff damages in the sum of $60,000. Following *Hensley*, Plaintiff's claims of race discrimination, sexual harassment, and assault are wholly unrelated claims and should be treated as separate suits when considering an award of attorney's fees. *See* 461 U.S. at 434-35. Given Plaintiff's limited success, the trial court correctly reasoned that it was

unreasonable and inequitable to award the requested amount of Plaintiff's attorney's fees, which were excessive and grossly disproportionate to the success achieved at trial.

The total amount of attorney's fees requested was particularly unreasonable and excessive given the amount of the money damages the jury awarded to Plaintiff. *See Hensley*, 461 U.S. at 434-35; *O'Brien*, 768 S.W.2d at 71. Plaintiff's attorney's submitted fees greater than two-and-a-half times the damages awarded to Plaintiff. It would be unreasonable, unfair and unjust for Plaintiff's attorneys to be compensated in an amount greater than the jury determined Plaintiff's own damages to be. An award of attorney's fees under the MHRA is not intended to provide a windfall. *See, e.g., Hensley*, 461 U.S. 434-35; *O'Brien*, 768 S.W.2d at 71.

Defendants maintain that Plaintiff was not entitled to the award of attorney's fees submitted in the amount of $154,430.08 because Plaintiff was not the prevailing party on three out of four claims against Defendants. *See Hensley*, 461 U.S. 434-35; *O'Brien*, 768 S.W.2d at 71. In addition, Plaintiff's submitted attorney's fees were unreasonable and grossly excessive, in that the time submitted for the legal services provided were excessive, duplicative, disproportionate to the relief obtained, and represent either excessive or inefficient trial preparation. *See*

A17-A29. The trial court's ruling on Plaintiff's award of attorney's fees should be affirmed.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR EQUITABLE RELIEF FOR FRONT PAY, BENEFITS AND/OR REINSTATEMENT BECAUSE PLAINTIFF WAS MADE WHOLE IN THAT THE JURY AWARDED COMPENSATORY DAMAGES AND PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE REQUEST FOR EQUITABLE RELIEF.

The issues raised in Plaintiff's Application For Transfer are not the same issues raised in his Substitute Brief. Generally, appellate review is limited to specific issues. *Bishop,* 81 S.W.2d at 622; Mo. R. Civ. P. 84.04(e). Defendants maintain the issue of the trial court's denial of Plaintiff's motion for equitable and/or injunctive relief was not submitted for review in Plaintiff's Application For Transfer and should be dismissed. *See* Mo. R. Civ. R. 83.05(b).

A. Standard of Review.

A trial court's decision to award front pay is subject to review only for abuse of discretion. *Brady*, 213 S.W.3d at 114.

B. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion for Equitable and/or Injunctive Relief.

The trial court properly determined that Plaintiff's request for equitable relief in the form of front pay and benefits and/or reinstatement at MAC was not warranted as an equitable remedy, was unsupported by the evidence presented at trial, and was contrary to the jury's verdict and award of $60,000 in compensatory damages on his constructive discharge claim. *See ROA 239-47.* Further, any request for injunctive relief that the court monitor Defendant MAC's sexual harassment training or request that the court "ensure that the violations of MHRA are not repeated" is improper, particularly given the facts of record and the jury's verdict of no discriminatory conduct on the part of Defendant MAC.

A trial court has authority to grant equitable relief pursuant to Mo. Rev. Stat. § 213.111. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 88 (Mo. banc 2003). Chapter 213 provides a variety of remedies, not only the common-law remedy of money damages, but equitable relief as well. *Id.* at 88; Mo. Rev. Stat. § 213.111 (2000). The trial court is required to decide equitable issues "consistently with the factual findings made by the jury." *State ex rel. Leonardo v. Sherry*, 137 S.W.3d 462, 473 (Mo. 2004). "Reinstatement is the preferred remedy for unlawful employment discrimination, and front pay is the disfavored alternative, available only when reinstatement is impractical or impossible." *Brady*, 213 S.W.3d at 114.

The evidence presented at trial showed that Plaintiff earned approximately $15,000 to $25,000 per year as a server. Any evidence regarding the purported

compensation of a server trainer at MAC was related to Plaintiff's claim for race discrimination, which the jury rejected. Plaintiff submitted Exhibit 1 to support his purported damages for "lost server wages from MAC employment" and "lost server earning capacity." Defendant objected to Exhibit 1 as part of Plaintiff's post-trial motion because it lacked evidentiary foundation and this Exhibit was never received into evidence.

Plaintiff also offered no competent evidence regarding unspecific and uncertain benefits or the basis for his request for front pay for a period of ten years. Further, Plaintiff was employed at Longhorn Steak House within months after his voluntary resignation from MAC. Plaintiff was subsequently fired from Longhorn but there was no evidence that Plaintiff sought other or comparable employment up to and until the time of trial. The jury's award of $60,000 made Plaintiff whole, an award nearly three times his annual salary as a server.

Front pay should address a plaintiff's equitable needs, including the ability to obtain employment with comparable compensation and responsibility. *Ollie v. Titan Tire Corp.*, 336 F.3d 680, 688 (8th Cir. 2003). Plaintiff offered no testimony that he attempted to seek a comparable server position. *See id.* There was no evidence that Plaintiff used reasonable care and diligence to seek whatever similar jobs that were available and for which he was suitably qualified. *Id.* A plaintiff's failure to mitigate his damages is enough to deny a request for front pay. *Excel*

Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir. 1999) (denying front pay when plaintiff presented no evidence and did not show that she had mitigated her damages). When the evidence of record showed a plaintiff failed to mitigate for purposes of front pay, the trial court did not abuse its discretion in denying an award of front pay. *Id.* at 640.

The trial court properly determined that there was no evidence in the record to support an award of front pay, reinstatement, or benefits. *See Excel Corp.*, 165 F.3d at 640. Plaintiff failed to present evidence regarding the likelihood that his employment would have continued at MAC or that he had made any reasonable efforts to secure comparable employment. Plaintiff was not restricted from seeking comparable employment and made no effort to mitigate his claimed damages. *See id.* In addition, the jury concluded that Defendant MAC did not discriminate against Plaintiff or engage in unlawful conduct.

The trial court did not abuse its discretion in denying Plaintiff's request for equitable and/or injunctive relief and the trial court's order should be affirmed.

CONCLUSION

Based on the foregoing, Defendants MAC and Millen respectfully request this Court to affirm both the trial court's order granting Judgment Notwithstanding The Verdict on punitive damages in favor of Defendant MAC and the subsequent Court of Appeals *per curiam* summary affirmance Order, affirm the trial court's order granting Plaintiff's attorney's fees in the amount of $22,000, and affirm the trial court's order denying Plaintiff's motion for equitable and/or injunctive relief.

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CERTIFICATE OF SERVICE

The undersigned states that on the 27th day of February, 2007, an original and nine (9) copies of Respondent's Substitute Brief were filed with the Missouri Supreme Court, and two (2) copies of Respondent's Brief were mailed to: **Kurt Cummiskey**, Attorney for Plaintiff, 3803 Connecticut, Suite 100, St. Louis, Missouri 63116 and **Donald Murano**, Co-Counsel for Plaintiff, 415 North Second Street, St. Charles, Missouri 63301.

CERTIFICATE OF COMPLIANCE

I certify that Respondent's Substitute Brief includes the information required by Rule 55.03, and complies with the requirements of Rule 84.06(b) and contains 11,281 words. It was prepared using Microsoft Word 2000. The computer disks containing said brief provided to the Missouri Supreme Court and opposing counsel are virus-free.