No. SC85945

IN THE SUPREME COURT OF MISSOURI

JOHN IGOE,

PLAINTIFF/APPELLEE

vs.
THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS of the STATE OF MISSOURI, AND THE DIVISION OF WORKERS COMPENSATION of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS of the STATE OF MISSOURI

DEFENDANTS/APPELLANTS

On Appeal from the Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, State of Missouri Honorable Patricia L. Cohen, Judge

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APPELLANTS' SUBSTITUTE BRIEF

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SUMMARY OF THE CASE

This appeal raises three basic issues: whether venue was proper in the City of St. Louis; whether there was sufficient evidence to support the judgment that the defendants, the Missouri Department of Labor and Industrial Relations (the "Department") and the Missouri Division of Workers' Compensation (the "Division") discriminated against the plaintiff John Igoe ("Igoe") because of his age and gender and retaliated against him; and whether the remedies awarded – back pay and instatement to a position of administrative law judge (hereafter "ALJ") in St. Louis – were proper remedies.

In 1997 and again in 1999, Igoe applied to fill a position as either an administrative law judge or legal advisor in the Division of Workers' Compensation. Igoe was not selected because he was not viewed as being one of the best candidates to help facilitate the objectives and goals of the Division. In addition, members of Governor Carnahan's staff directed defendants to appoint persons other than Igoe for the various positions throughout the State.

In this case, the circuit court erroneously found that a Department Director illegally discriminated against Igoe when the Director of the Department appointed others chosen by Governor Carnahan as administrative law judges because such findings were based on insufficient evidence and are against the weight of the evidence. Igoe's age, gender and retaliation claims – brought under the Missouri Human Rights Act (MHRA) – were determined by the trial court with the assistance of any advisory jury, while his Title VII gender discrimination issues were submitted to the jury. While purporting to adopt the jury findings on the gender discrimination claims (which verdict had been for defendants), the circuit court entered judgment for plaintiff on these claims despite the jury's verdict. The court then

ordered Igoe instated to an administrative law judge position, though there is no vacant position to which he could be appointed. Such usurpation of the Executive's power to fill judgeships would be troubling in any instance. But here, the circuit court's decision is so infected by other problems – beginning with the violation of the venue rules and statutes and continuing through its unexplained decision to ignore a jury verdict – that the Court may not here be required to protect the separation of powers enshrined in Missouri's Constitution.

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JURISDICTIONAL STATEMENT

Defendants appeal from the denial of their motion to transfer venue from the City of St. Louis entered by St. Louis City Judge Michael P. David on August 21, 2000, and from judgment in favor of the plaintiff against the Department of Labor and Industrial Relations and the Division of Workers Compensation for equitable and monetary relief entered by St. Louis City Judge Patricia L. Cohen on October 25, 2002. On May 25, 2004, this Court granted transfer after opinion by the Eastern District Court of Appeals. Hence, jurisdiction is vested in the Court pursuant to Mo. Const. Art. V, §§ 3, 4 and 9 and Mo. Rule Civ. P. 83.04.

POINTS RELIED ON

I. The circuit court erred in denying defendants' motion to transfer venue because venue was not proper in the Circuit Court for the City of St. Louis in that Missouri, not federal, venue law applies, the defendants can only be found in Cole County, the employment decisions about which plaintiff complains were made in Cole County, and plaintiff failed to timely respond to the venue motion.

State ex rel. Schnuck Markets v. Koehr, 859 S.W.2d 696 (Mo.banc 1993)

State ex rel. USAA Casualty Inc. Co. v. David, 114 S.W.3d 447 (Mo.App. 2003)

State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28 (Mo.App. 2002)

Bainbridge v. Merchants' & Miners' Transportation Co., 287 U.S. 278 (1932)

S.Ct. Rule 51.04(e)

§ 213.111.1, RSMo

II. The circuit court erred in entering judgment in favor of plaintiff on his gender discrimination claims because plaintiff did not move for judgment on these claims nor was he entitled to judgment as a matter of law in that the jury to whom these claims were submitted found such claims in favor of defendants, the jury's verdict was supported by the weight of the evidence, the jury's verdict on the Title VII gender discrimination claims was final, and the circuit court, in entering judgment in the MHRA

claims, stated it was adopting the jury's verdict but then, inexplicably, entered judgment contrary to the jury's verdict.

Strang v. Deere & Co., 796 S.W.2d 908 (Mo.App. 1990)

III. The circuit court erred in determining that the defendants discriminated against Igoe on the basis of age when he was not selected for one of the administrative law judge or legal advisor positions because the evidence submitted by Igoe in support of his claims was insubstantial and the judgment is against the weight of the evidence in that the evidence consisted solely of evidence of the ages and level of experience in workers' compensation litigation of those selected, did not address the role of Governor Carnahan's staff in the selection, and did not include any statements or other evidence suggesting that age was a factor in the decision.

Swyers v. Thermal Science, Inc., 887 S.W.2d 655 (Mo.App. 1994)

DuPre v. Fru-Con Engineering, Inc., 112 F.3d 329 (8th Cir. 1997)

Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997)

Koszer v. Ferguson Reorganized School Dist., R-2, 849 S.W.2d 205 (Mo.App. 1993)

IV. The circuit court erred in determining that defendants retaliated against Igoe for filing charges with the EEOC and MCHR when plaintiff was not selected for one of the administrative law judge or legal advisor positions after his tardy application in 1999 because the evidence submitted by Igoe

relating to this claim was insubstantial and the judgment is against the weight of the evidence in that the evidence consisted solely of the fact that the 1999 appointment decision was made after he filed his charge of discrimination.

Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893 (8th Cir. 2002)

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622 (Mo.banc 1995)

Feltmann v. Sieben, 108 F.3d 970 (8th Cir. 1997)

Ferron v. West, 10 F.Supp.2d 1363 (S.D. Ga. 1998)

V. The Circuit Court erred in granting plaintiff equitable relief specifically including instatement to the position of an administrative law judge in the City of St. Louis because plaintiff is not entitled to equitable relief under existing law or based on the weight of the evidence, in that plaintiff would not have been appointed absent the alleged discrimination, there was no vacancy for the position and removal of an incumbent was impossible, the court's order appointing a judge invaded the Governor's prerogative thereby violating separation of powers, and the instatement order was too specific.

Swyers v. Thermal Science, Inc., 887 S.W.2d 655 (Mo.App. 1994)

Valcourt v. Hyland, 503 F.Supp. 630 (D.Mass. 1980)

Hudson v. School Dist. of Kansas City, 578 S.W.2d 301 (Mo.App. 1979)

State ex rel. Missouri Highway and Transportation Commission v. Prunneau,

652 S.W.2d 281 (Mo.App. 1983)

STATEMENT OF THE FACTS

The Division of Workers' Compensation is part of the Department of Labor and Industrial Relations. *See* Trial transcript ("Tr") at 176. In 1997, the Division sought to fill four positions in the City of St. Louis – two for the position of Administrative Law Judge ("ALJ") and two for the position of legal advisor. Tr. 186-87. The Division is authorized to appoint new legal advisors and administrative law judges. *See* § 287.610 and 287.615, RSMo 1994.

The minimum qualifications for both the ALJ and legal advisor positions required that a candidate be licensed as an attorney in the State of Missouri. Tr. 209. Applications were received from many qualified applicants, including Plaintiff, John Igoe.

Igoe was 63 at the time he submitted his first application. Tr. 7. Prior to applying for both positions in 1997, Igoe had been practicing as an attorney in the area of workers' compensation, always on behalf of the employee, for approximately 27 years. Tr. 82,156. He had also served for a period of two and one half years, approximately 20 years before applying, as a Chairman of the Missouri Labor and Industrial Relations Committee. Tr. 81-83. The last year Igoe represented any paying clients in his practice was 1997. Tr. 36.

Karla McLucas, ("McLucas"), the Director of the Department at the time Igoe applied, was interviewed and selected for her position by Governor Carnahan. Tr. 177. Because she was a gubernatorial appointee, McLucas served in her position at the will of the Governor and ultimately answered to him, through his department liaison and other senior staff. Tr. 177-78. During her tenure, McLucas met with members of Governor Carnahan's staff several times

a week to discuss various issues relating to the Department. Tr. 178, 180. She viewed the Governor as her boss. Tr. 223. Thus, in considering the applicants for ALJ and legal advisor, McLucas talked with three members of Governor Carnahan's staff: Joe Bednar, the Governor's General Counsel and her liaison to the Governor; Brad Ketcher, the Governor's Chief of Staff; and John Beakley, who handled appointments to various boards and commissions for the Governor. Tr. 186-88.

One of the applicants for an ALJ positions in 1997 was JoAnn Karll, the then-Director of the Division. *See* Tr. 184, 187. McLucas was told by members of Governor Carnahan's staff that Karll had expressed interest and was going to interview for the positions. McLucas was therefore told to interview the candidates for both the ALJ and legal advisor positions. Tr. 186-87. She received resumes of individuals to interview from Governor Carnahan's office. Tr. 192-93. She also received recommendations for candidates from various sources, including members of the General Assembly. Tr. 193-95.

Bednar, Beakley, and Ketcher asked McLucas to consider Governor Carnahan's vision when formulating her interview questions. Tr. 190. This vision required that all departments, including the Department and the Division, become more effective, efficient, and fair in rendering their services. Tr. 191. It was McLucas's understanding that productivity within the Division was a major concern. Tr. 202. The Division had spent a great deal of money recently to totally integrate its computer system. Tr. 201. There had been some issues associated with the Second Injury Fund scandal, a backlog, and general disarray. Tr. 202.

With Governor Carnahan's stated objectives in mind, McLucas interviewed all the candidates and looked for those candidates who appeared ready to help make changes in the Division to address the concerns regarding efficiency, responsiveness and fairness. Tr. 202-05. McLucas's impression of Igoe was that he was qualified, as were all the candidates, in that he was licensed to practice law in the State of Missouri. Tr. 209. She testified that the set of questions asked of all candidates was meant to try and draw out what the candidates understood about the Division's process, objectives and goals. Tr. 209. She recalled that Igoe's interview was shorter than many of the others'. Tr. 205-06. McLucas's interview notes reflect that Igoe stated that ALJs are like Article V Judges and that he was interested in the position because it was a position of leadership. Igoe indicated that he had used "some" types of hardware and software applications and had "some" experience with computerized legal research, but that he was willing to learn. Defendant's Exhibit A.

After interviewing all the candidates, McLucas made her assessments of the candidates and discussed them with Bednar, Beakley, and Ketcher. Tr. 200, 217. At that time, Governor Carnahan's staff told her to identify who sponsored or recommended each particular candidate. Tr. 220. Igoe had no sponsors. Plaintiff's Exhibit 74. Subsequent to this, Bednar, Beakley, and Ketcher told McLucas which candidates to run background checks on, signaling who they wanted to be appointed for the four positions. Tr. 217-18, 221-22. McLucas appointed those four candidates that were indicated to her by Governor Carnahan's staff. Tr. 222, lns. 6-9. The successful applicants were all female and ranged in age from 33 to 42. *See* App. A 16, A 25, A 39, A 49. Their workers' compensation experience ranged from 0 to 8 years, but each had

significant legal experiences that distinguished them from the plaintiff. Tr. 157, Defendant's Exhibits A-E. In McLucas's opinion all the appointed candidates displayed enthusiasm and initiative, which she considered important attributes in filling the positions. Tr. 210-16.

After failing to obtain one of the positions for legal advisor or ALJ in St. Louis, Igoe filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the Missouri Commission on Human Rights ("MCHR").[1] He alleged discrimination on the basis of age and gender. Tr. 56.

In 1999, the Division sought to fill several newly-created legal advisor and ALJ positions around the state. Tr. 61. Once again, the Director of the Division applied, Plaintiff's Exhibit 57, shifting responsibility for the appointments to the Department Director. Because the number of positions to be filled was much larger, this time Bednar and Beakley told McLucas to put together a committee to interview the pool of candidates. Tr. 224. McLucas put together a committee consisting of herself, her Deputy Director, Thomas Pfeiffer, and two employees of the State who did not work within the Department, including one person employed by the State of Missouri's equal employment opportunity office. Tr. 225-26.

Igoe again applied, but after the deadline. Tr. 228. Igoe's application was still considered. Tr. 88, 283. As most candidates indicated their interest directly to Governor Carnahan's Office, the names of the majority of candidates to be interviewed for the ALJ and legal advisor positions came directly from Governor Carnahan's Office. Tr. 228. McLucas

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[1]The MCHR is an agency within the Department. As a result, the EEOC investigated and made the findings on Igoe's discrimination charges.

was asked by Bednar to schedule the interviews and have the process completed by the end of July, 1998. Tr. 228.

Igoe's interview again was short and did not suggest that he was best able to keep with the objectives of the Division. *See* Tr. 287-88. Thomas Pfeiffer testified that Igoe started the interview in a negative way by looking at McLucas and, referring to the panel, saying "Who are all these people? When did this start?" Tr. 285-86. It was Pfeiffer's impression that Igoe was not familiar with the current standards for evaluating the productivity of ALJ's. Tr. 287, Defendant's Exhibit O. Pfeiffer also testified that Igoe's suggestion for improving customer service in the Division, to make sure the customer understands what is happening and why, was not what the panel was looking for because the Division was already doing that. Tr. 288. In response to a question about experience in performing computerized legal research, Igoe responded that he had experience conducting discrimination research. Tr. 229. He asked no questions of the panel at the end of the interview. Defendant's Exhibit O.

After the interviews were completed, the panel collectively ranked all the candidates in order of their preference for selection. Tr. 234-35. They were put in three groups - extremely qualified, highly qualified, and qualified. Tr. 235. The order was based on the strength of the interviews and the knowledge, skills, and abilities that the candidates communicated to the panel in the interviews. Tr. 292. The top two categories were the people that the panel believed gave the strongest interviews and had the best potential to do the job. Tr. 292. Igoe was ranked second to the bottom on the ALJ list and at the bottom of the legal

advisor list. Tr. 316-17. The panel came to a consensus with regard to their assessments of the individual candidates. Tr. 237.

At the time of the rankings, McLucas and Pfeiffer were aware of the charges of discrimination which had been filed by Igoe. Tr. 232. There was no evidence, however, that the other two panelists had any knowledge of the charges. Tr. 232-33. After meeting with the panel members and ranking the candidates, McLucas and Pfeiffer submitted the panel's assessment and rankings to Bednar and Beakley. Tr. 233-35, 238, 293-94. Sometime later, one or more members of Governor Carnahan's Office indicated to McLucas to whom the positions should be offered. Tr. 238. Those candidates eventually selected were not all in accordance with the rankings of the panel. Tr. 238-40. One of the candidates selected was at the bottom of the ALJ list submitted by the panel. Tr. 239. McLucas followed the direction of Governor Carnahan's senior staff because they told her it was the Governor's pleasure that these individuals receive appointment letters. Tr. 240. The successful applicants ranged in age from 30 to 55. Tr. 163.

After filing new charges of discrimination with the EEOC and MCHR, Igoe then filed suit against the Department and the Division, alleging gender and age discrimination and retaliation in violation of the MHRA, and gender discrimination in violation of Title VII. L.F. 9. On July 5, 2000, defendants moved for a change of venue to Cole County. L.F. 3. Igoe filed his response to the venue motion on August 7, 2000. L.F. 13. The circuit court denied the defendants' motion, and the matter proceeded to trial before judge and jury in the City of St. Louis. App. A 1-4, L.F. 30.

After trial, the advisory jury rendered a verdict in favor of Igoe on his age discrimination and retaliation claims and, though the evidence was identical, the jury gave its verdict to defendants on Igoe's gender discrimination claims. Tr. 331-33, L.F. 40-42. The Department and the Division moved to set aside the advisory jury verdict on the MHRA claims (L.F. 64-66) and, in addition, moved for judgment notwithstanding the verdict or alternatively, a new trial. L.F. 67. Both motions were presumably, though never specifically, denied when the circuit court later rendered its decision and adopted the jury verdicts in favor of Igoe on the age discrimination and retaliation claims, determining that they were supported by the preponderance of evidence. App. A 5-10, L.F. 96. Inexplicably, the circuit court also entered judgment for plaintiff on his gender discrimination claims (App. A 5-6,8, L.F. 94-95, 97), despite the jury's verdict for defendants on the gender discrimination claims (L.F. 40-42).

ARGUMENT

Standards of Review

As to Point I concerning venue, the standard of review is de novo. Venue in Missouri is solely a matter of statute. *State ex rel. Public Service Com'n v. Dally*, 50 S.W.3d 774, 777 (Mo. banc 2001). Statutory construction is a question of law that is reviewed de novo. *Estate of Burford ex rel. Bruse v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589, 594 (Mo.App. 2002).

As to Point II, defendants have located no case in which a circuit court vacated a defendants' jury verdict and judgment thereon and entered a contrary judgment for plaintiff or a case in which a circuit court, purporting to adopt the advisory jury's defendants' verdict then entered judgment for plaintiff. It is clear that "[o]rdinarily, a court is not justified in directing a verdict in favor of a party having the burden of proof when the evidence consists of oral testimony. . . .Judgment notwithstanding the verdict is a drastic action and should only be granted where the minds of reasonable persons would not differ as to the outcome of the case." *Strang v. Deere & Co.*, 796 S.W.2d 908, 913 (Mo.App. 1990). Plaintiff did not even file motions for a directed verdict or for a judgment notwithstanding the verdict in this case, but he received their equivalence nonetheless. As the alleged error is an error at law, defendants suggest de novo review.

As to the remaining points, the circuit court determined the claims relating to age discrimination and retaliation under the MHRA and the jury determined the gender discrimination claims under Title VII (though the circuit court entered a judgment contrary to

the jury's verdict). A judge's decision in a court-tried case is to be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The trial court used an advisory jury to aid in its decision holding there was age discrimination and retaliation when Igoe applied for the ALJ and legal advisor positions in 1997 and 1999.[2] That the court used an advisory jury does not affect the standard of review. *See Edwards v. Maples*, 388 S.W.2d 850, 852 (Mo. 1965). Additionally and specifically, a trial court's decision to order instatement is reviewed for an abuse of discretion. *See Yancey v. Weyerhaeser Company*, 277 F.3d 1021, 1025 (8th Cir. 2002).

[2] The only determination the jury was entitled to make at the time the case was tried according to the then-existing law in the Eastern District, was whether there was gender discrimination under Title VII. Plaintiff did not plead a retaliation claim under Title VII. On the Title VII gender discrimination claim, where the evidence was substantially the same as Igoe's age discrimination claim, the jury found in favor of the defendants. Tr. 331-33, L.F. 40-42.

I.

The circuit court erred in denying defendants' motion to transfer venue because venue was not proper in the Circuit Court for the City of St. Louis in that Missouri, not federal, venue law applies, the defendants can only be found in Cole County, the employment decisions about which plaintiff complains were made in Cole County, and plaintiff failed to timely respond to the venue motion.

Defendants' initial pleading in this matter was a motion to dismiss or, alternatively, to transfer venue because venue was not proper in the Circuit Court for the City of St. Louis. The circuit court improperly denied the venue motion.

A. Plaintiff's petition pleads no venue facts.

Plaintiff's four page original petition pleads no venue facts. While we know plaintiff's age and gender, we are told nothing of plaintiff's residence, where interviews were conducted, the location of the positions he was allegedly improperly denied, how he came to be informed of the denials, or where the denial decisions were made. As to defendants, we are told they are state agencies, citing §§ 286.060 and 287.050. Hence, the only venue fact the petition disclosed, and it only by inference, is that defendants' official residences are in Jefferson City, which is in Cole County. *See* Mo. Const., Art. IV, § 20 ("The executive and administrative officials and departments herein provided for shall establish their principal offices and keep all necessary public records, books and papers at the City of Jefferson."). "Generally, venue in actions against executive heads of departments lies in the county in which their offices are located and their principal duties are performed. . . . The constitution requires the department

to establish its principal office and keep its necessary public records, books, and papers in Jefferson City. . . . This establishes the legal residence of the department at Jefferson City and limits the place where it can be 'found' to Cole County. . . ." *State ex rel. Missouri Dept. of Conservation v. Judges of the Circuit Court of Reynolds County*, 91 S.W.3d 602, 603 (Mo.banc 2002). Given the nature of this pleading, defendants filed a motion to dismiss venue contesting venue on the only factual basis that could be gleaned from the petition, where defendants could be found. § 508.010, RSMo.[3] While a party contesting venue bears the burden of persuasion and proof, "it does not need to disprove bases for venue that were never pleaded to meet those burdens." *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo.App. 2002). Pursuant to the only venue allegations that could be divined from the petition, venue was not proper in the City of St. Louis and defendants so advised the trial court.

B. The Circuit Court improperly decided venue based on federal law.

Igoe did not respond to the venue motion until thirty-three (33) days after it was filed. When he did respond, he asserted that venue was proper in the City of St. Louis pursuant to the venue statute for Title VII claims. L.F. 16-18. The circuit court accepted Igoe's venue argument. L.F. 27. The Court of Appeals properly rejected plaintiff's assertion and

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[3] Section 508.010.1, under which plaintiff was apparently proceeding, provides:

"Suits instituted by summons shall, except as otherwise provided by law, be brought: (1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found."

determined that the venue statute in § 213.111.1 controlled venue in this proceeding. *Igoe v. Dept. of Labor and Industrial Relations et. al.,* ED82559, Slip op. at *2-3, March 2, 2004 (also at 2004 WL 376872 at *2-3).

Regardless of the applicable venue statute,[4] the allegations[5] contained in the original petition do not support venue in the City of St. Louis. To the extent those allegations provide any basis on which to evaluate venue, they affirmatively disclose that venue was improper in the City of St. Louis.[6]

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[4] In an employment discrimination action, venue is properly determined when a suit is brought. Section 213.111.1, RSMo, provides in relevant part: actions covered by the Missouri Human Rights Act "may be *brought* in any circuit court in any county in which the unlawful discriminatory practice *is alleged* to have occurred. . . ." Emphasis added. Title VII provides that actions of this type, "may be *brought* in any judicial district in the State in which the unlawful employment practice *is alleged* to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. . . ." 42 U.S.C. §2000e-5(f)(3). Emphasis added.

[5] Both statutes focus on the *allegations* in the petition when the suit is *brought* to assess venue.

[6] *See supra* Section II. A. In an amended pleading filed before a ruling was entered

The circuit court was wrong to conclude that the Title VII venue provision controlled venue in this matter. 42 U.S.C. §2000e-5(f)(3), *see* footnote 4. That choice ignored the teaching of the Supreme Court in *Bainbridge v. Merchants' & Miners' Transportation Co.*, 287 U.S. 278 (1932). In *Bainbridge*, the Court held that where an action was brought in state court under the Jones Act, venue should have been determined in accordance with the laws of the state, as opposed to the venue provisions of the federal statute. *Id.* at 280-81. The Jones Act contained language regarding proper venue similar to the language contained in Title VII. In reaching its decision, the Court focused on the proper definition of "district" in both the federal and state contexts, pointing out that the word "district" would require a more elastic interpretation in state court if used, where the state geographical area may or may not be designated as a "district." *Id.* at 280. The Court surmised that this probably was not what Congress had in mind. *Id.* at 280-81. The Court expressed reluctance to interfere with state statutory provisions "fixing the venue of their own courts." *Id.* Consequently, the Court determined, state venue provisions were properly applied. In Justice Marshall's dissent on other grounds in *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 272, n.6 (1991), he restated this rule as it applied to employment discrimination actions, citing *Bainbridge,* 287

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on defendants' motion to transfer venue, plaintiff alleged that the job openings for which he had applied were "in the Division of Workers Compensation office in St. Louis, Missouri." S.L.F. 130. The only conceivable venue statute this factual allegation could address is that found in Title VII. As the federal venue statute is inapplicable to this state court proceeding, this new fact adds nothing to the venue analysis.

U.S. at 280-81. "[A] United States citizen who suffers employment discrimination abroad may bring a Title VII action against the United States employer in state court . . . to which the venue provisions of Title VII would clearly not apply." 499 U.S. at 272, n. 6. Hence, the Supreme Court of the United States has decided that federal venue provisions employing language placing venue in particular "districts," as does Title VII's venue provision, do not control the venue of federal claims filed in the state courts.

The circuit court, citing *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837 (Mo. banc 1985), determined that pursuant to the Supremacy Clause, federal law was applicable when state law was more restrictive. L.F. 29. *Bunge* involved an interpretation of the Missouri Arbitration Act, a more restrictive Missouri statute, which took away rights granted by the Federal Arbitration Act. *Bunge*, however, is not controlling when determining the applicability of a state venue statute that does not defeat any right granted by Congress under the discrimination statute. *See Clayco Const. Co., Inc. v. THF Carondelet Dev., L.L.C.*, 105 S.W. 3d 518, 523 (Mo. App. 2003); *see also State ex rel. Peabody Coal Co. v. Powell*, 574 S.W.2d 423, 426 (Mo.banc 1978) (change of venue does not "create, destroy, or modify anyone's primary rights"). Hence, venue in this matter must be resolved by state law.

C. The Circuit Court improperly decided that venue could be found in the City of St. Louis under Missouri law.

As indicated above, the only venue fact that could be gleaned from plaintiff's original petition was the place where defendants resided and this venue fact did not support venue in the City of St. Louis. Nevertheless, the circuit court erroneously found that venue

was proper in the City of St. Louis pursuant to the venue provisions of the MHRA. While venue is properly determined in this action pursuant to the provisions of the MHRA, the statue provides that the appropriate venue is where the discriminatory action is *alleged* to have occurred. § 213.111.1. Any action asserting a discriminatory practice:

> "[m]ay be *brought* in any circuit court in any county, in which the unlawful discriminatory practice *is alleged* to have occurred."

(Emphasis added.)

In denying the defendants' transfer of venue motion, the circuit court held the issue was waived because the defendants had not met their burden of proof. L.F. 29-30. Because Igoe did not allege any basis for venue, the burden never moved to defendants as they were not required to "disprove bases for venue that were never pleaded." *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 31-32 (Mo.App. 2002).

Igoe never specifically alleged any venue facts in his initial Petition. Prior to the ruling on the venue issue, Igoe amended his Petition to state that the initial four positions for which he applied were to be based in the City of St. Louis. S.L.F. 127, 130. The circuit court, citing *State ex rel. DePaul Health Center v. Mummert*,870 S.W.2d 820, 823 (Mo.banc 1994), concluded that venue had to be considered at the time the action was first filed and refused to consider the Amended Petition in rendering its decision. L.F 28. Even if the Amended Petition were considered, however, it still does not specify any relevant venue fact. It only states where the positions to be filled were located, a fact not relevant to a proper venue

determination under MHRA. Because the appointment decisions were made in Jefferson City,[7] by state officials whose offices are located there by law, this is logically where the cause of action would have arisen. *See* Tr. 217-18, 237-38, 295-96. Venue in this case is only proper in Cole County. Hence, the decision of the circuit court denying defendants' motion to transfer venue must be reversed and this matter remanded with instructions to transfer this proceeding to Cole County.

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[7] By including as two distinct bases for venue – where the "unlawful employment practice is alleged to have been committed" and "where the aggrieved person would have worked"– Title VII venue law indicates that these are two different things. 42 USC § 2000e-5(f)(3). The legislature, selecting as it did in § 213.111.1 only one of these two for inclusion in Missouri law, chose not to follow the federal model. The circuit court's conclusions that the MHRA venue requirement – where "the discriminatory practice is alleged to have occurred" – is "similar" to the Title VII venue requirement – where the aggrieved person would have worked – and that where the latter is satisfied so is the former, is clearly erroneous. L.F. 29.

D. Plaintiff's response to defendants' venue motion was delinquent.

Defendants filed their venue motion on July 5, 2000. Plaintiff filed his opposition to the motion on or about August 7, 2000. No court order authorized this delinquent filing. As such, the plaintiff's response was untimely and the circuit court was required to grant defendants' venue motion.

Rule 51.04(e) provides in relevant part:

> The adverse party, within ten days after the filing of the application for change of venue, may file a denial of the cause or causes alleged in the application. . . . If a denial is filed, the court shall hear evidence and determine the issues. If they are determined in favor of applicant, or if no denial is filed, a change of venue shall be ordered. . . .

It is undisputed that plaintiff filed his suggestions in opposition to defendants' venue motion more than thirty days after the motion contesting venue was filed and that the court did not issue an order extending this rule's filing deadline. As such, the circuit court was required to grant defendants' venue motion. *State ex rel. Schnuck Markets v. Koehr,* 859 S.W.2d 696, 698 (Mo.banc 1993) ("Because no timely denial [of the venue motion] was filed, Judge Koehr was required to order a change of venue."). *See also State ex rel. Vee-Jay Contracting Co. v. Neill,* 89 S.W.3d 470, 472 (Mo.banc 2002) ("The plain and ordinary meaning of Rule 51.045 (formerly Rule 51.04(e)) mandates a transfer of venue when no reply is filed by the opposing party, to a motion to transfer venue that alleges venue is improper. The term 'shall' is mandatory."); *State ex rel. USAA Casualty Ins. Co. v. David,* 114 S.W.3d 447, 448 (Mo.App.

2003) ("If a plaintiff's reply to a motion to transfer for improper venue is filed after the ten days allowed by Rule 51.045(b) (formerly rule 51.04(e)), the trial court does not have the discretion to deny the motion. . . .", a case involving the same motion judge whose venue ruling is currently before the Court).

As the circuit court had a duty to grant defendants' venue motion and failed to do so, this Court must correct the circuit court's error and remand with directions to order venue transferred.

II.

The circuit court erred in entering judgment in favor of plaintiff on his gender discrimination claims because plaintiff did not move for judgment on these claims nor was he entitled to judgment as a matter of law in that the jury to whom these claims were submitted found such claims in favor of defendants, the jury's verdict was supported by the weight of the evidence, the jury's verdict on the Title VII gender discrimination claims was final, and the circuit court, in entering judgment in the MHRA claims, stated it was adopting the jury's verdict but then, inexplicably, entered judgment contrary to the jury's verdict.

To describe the circuit court's judgment in favor of plaintiff on his gender discrimination claims as confusing would be generous. Plaintiff brought his age, gender, and retaliation claims pursuant to the MHRA (Count I) and additional gender discrimination claims pursuant to Title VII (Count II). The trial court believed, based on then applicable law, that all the Count I claims were to be court tried and that the Count II claims were to be jury tried. Nevertheless, the court submitted all the claims to the jury, the jury acting in its advisory capacity as to the MHRA claims.

The jury found in favor of plaintiff on his age and retaliation claims, but in favor of defendants on his gender discrimination claims. L.F. 40-42. The circuit court immediately entered judgment on the jury's verdict. L.F. 43-48. Defendants filed a motion to vacate this judgment and set aside the jury verdict (obviously, only so much of it as they had lost) and a second motion for judgment notwithstanding the verdict or for new trial (again, obviously, not

related to their victorious judgment regarding gender discrimination). Plaintiff filed a motion for equitable relief but did not request judgment on the gender discrimination claim. As such, the jury's Title VII gender discrimination verdict was a final judgment.

Following these motions, the circuit court entered its judgment, specifically stating: "The jury found in favor of plaintiff on his 1998 age and *sex* discrimination claim and in favor of plaintiff on his 2000 age and *sex* discrimination claim and retaliation claims." L.F. 94-95 (emphasis added). This is erroneous; the jury had not found in favor of plaintiff on his gender discrimination claims. The court went on to note that the jury verdicts on the MHRA claims were advisory and adopted the jury's findings as its own on the MHRA claims. As the jury's MHRA gender discrimination finding was for defendants, the circuit court could not have adopted it in rendering a judgment for plaintiff on this claim. Further confusing the matter, despite the fact that the jury's Title VII gender discrimination verdict was final, the court awarded damages of $50,400 on plaintiff's Title VII gender discrimination claim.

If not the product of confusion, the circuit court's entry of judgment for plaintiff on his MHRA and Title VII gender discrimination claims is erroneous and the equivalent of a directed verdict for plaintiff. But "a court is not justified in directing a verdict in favor of the party having the burden of proof when the evidence relied on consists of oral testimony. . . . 'Only in cases where the defendant in his pleadings or by his counsel in open court admits or by his own evidence establishes plaintiff's claim or where there is no real dispute of the basic facts and the facts are supported by uncontradicted testimony have the courts indicated there may be an exception to the general rule.'" *Strang v. Deere & Co.*, 796 S.W.2d 908, 913 (Mo.App.

1990) (citations omitted). As the jury found in favor of defendants on the gender discrimination claims and defendants admitted no liability, entry of judgment in favor of plaintiff was erroneous.

The circuit court's judgment suggests a desire to enter judgment in accordance with the jury's verdict. As such, defendants request that the Court either reform the judgment in accordance with the jury's verdict or remand this proceeding to the circuit court for reconsideration of its judgment on the gender discrimination claims.

III.

The circuit court erred in determining that the defendants discriminated against Igoe on the basis of age when he was not selected for one of the administrative law judge or legal advisor positions because the evidence submitted by Igoe in support of his claims was insubstantial and the judgment is against the weight of the evidence in that the evidence consisted solely of evidence of the ages and level of experience in workers' compensation litigation of those selected, did not address the role of Governor Carnahan's staff in the selection, and did not include any statements or other evidence suggesting that age was a factor in the decision.

"In interpreting the MHRA, Missouri courts have adopted federal case law from Title VII cases. . . ." *Swyers v. Thermal Science, Inc.*, 887 S.W.2d 655, 656 (Mo.App. 1994). In employment discrimination actions, the plaintiff retains at all times the ultimate burden to demonstrate that he was subjected to unlawful discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000).

Igoe's evidence largely consisted of showing that he was between forty and seventy years of age and was not appointed and that others, who are younger, were appointed. Such evidence is not sufficient, in and of itself, to establish a claim of age discrimination. *Bradford v. Norfolk Southern Corp.*, 54 F.3d 1412, 1421 (8th Cir. 1995) (mere membership in a protected class is not enough to permit an inference of age discrimination under MHRA).

The evidence at trial established that on both occasions when Igoe applied, all the candidates for the positions had the minimum qualifications in that they were duly licensed

lawyers. Tr. 209. McLucas was told by members of Governor Carnahan's staff that she was to conduct interviews because the head of the Division was applying for one of the ALJ positions. Tr. 186-87.[8] Governor Carnahan's staff asked McLucas to develop the interview questions with an eye on service delivery, and the vision and goals of the Governor. Tr. 190. As a result, when interviewing candidates, McLucas was interested in those candidates who could help make the Division more productive and utilize the new, efficiency enhancing computer system. Tr. 201-04.

With regard to Igoe's 1997 interview, McLucas testified that Igoe's interview was shorter than many of the others, despite the fact that the twenty-six questions asked of all candidates were meant to draw out what the candidates understood about the Division process and the objectives and goals of the Division. Tr. 205-06. On the other hand, she recalled the interviews of those candidates who were eventually selected as reflecting more enthusiasm, interest and dedication. *See* Tr. 210-16. Reflecting a fundamental misunderstanding of his

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[8]There is no mandatory language in the Missouri laws specifying who must select ALJ's and legal advisors. Section 287.610.1, RSMo 1994, merely authorizes "The division" to appoint those officials: "The division may appoint such number of administrative law judges as it may find necessary. . . . Administrative law judges shall be duly licensed lawyers. . . . Any administrative law judge may be discharged or removed only by the governor pursuant to an evaluation and recommendation by the admistrative law judge review committee . . . ." Section 287.615, RSMo 1994 states that "[t]he division may appoint or employ such persons as may be necessary."

role, Igoe stated in his interview that ALJs are like Article V Judges. Tr. 207-08. Igoe indicated he had used "some" types of hardware and software applications and has "some" experience with computerized legal research, but that he was willing to learn. Defendant's Exhibit A.

The evidence at trial was that McLucas made assessments of the candidates and presented these assessments to members of Governor Carnahan's staff. At the request of Governor Carnahan's Office, each assessment included a list of the candidate's sponsors – frequently including public officials. For the 1997 interview, Igoe had absolutely no sponsors. Plaintiff's Exhibit 74. McLucas was then told by Governor Carnahan's staff which candidates should be appointed. The evidence, which was not disputed, was that members of Governor Carnahan's staff made the selections for the four positions that were filled in 1998. That McLucas went along with Governor Carnahan's appointment directives was understandable given the subordinate nature of her own position as a member of Governor Carnahan's cabinet. Tr. 223.

Similarly, in 1999, while McLucas assembled a team of four people, including one person employed by the State of Missouri's equal employment opportunity office, to interview candidates and make assessments of them, the actual selections were again made at the direction of members of Governor Carnahan's staff. Tr. 225-26, 233-38. In fact, this time, one candidate who was at the bottom of the panel rankings, was selected by Governor Carnahan's staff. *See* Tr. 239-40.

Igoe had no rebuttal to this evidence. So he merely pointed out an omission in an effort to discredit it: the Division's failure to mention the role of Governor Carnahan's staff during the course of the EEOC investigation and in response to interrogatories. Tr. 255-57. Presumably, plaintiff intended to use these answers to throw doubt on the issue of whether the appointments were actually directed by members of Governor Carnahan's staff. But McLucas and Pfeiffer testified to the Governor's staff's directions, Igoe offered nothing to disprove them, and the appointment of one candidate at the bottom of panel's rankings substantiates them.

Even if the role of Governor Carnahan's staff is entirely disregarded, Igoe's case is insufficient. Again, he presented no other evidence of age discrimination other than his own age and the ages of those selected, which covered a broad range. While he repeatedly stated at trial that he had far more years of experience as an attorney practicing in the area of workers' compensation, this assertion adds nothing. "Time on the job does not always translate into a net performance improvement–which is one of the reasons why general allegations of superior qualifications are legally meaningless." *Ferron v. West*, 10 F.Supp.2d 1363, 1367 (S.D. Ga. 1998). Further, Igoe presented no evidence to contradict the evidence that workers' compensation experience was not the main focus in trying to fill the positions. Despite Igoe's contentions, there was no requirement to select the candidates with the most years of worker's compensation experience. The baseball player with the most years of experience does not always get selected to be the team's manager.

The law does not require an employer to hire the person the court considers most experienced or qualified, it only forbids basing the decision on age. *See DuPre v. Fru-Con Engineering, Inc.*, 112 F.3d 329, 335-36 (8th Cir. 1997); *see also McCarthney v. Griffin-Spalding County Board of Education*, 791 F.2d 1549, 1551 (11th Cir. 1986). That is demonstrated by a case analogous to this one, *White v. Seventh Judicial Circuit of Maryland*, 846 F.2d 75, 1998 WL 41047 (4th Cir. 1998) (unpublished) (App. A 11- A 14), where a sixty-three year old male applied for the position of Master for Domestic Relations in the Seventh Judicial Circuit of Maryland. A thirty-one year old was selected to fill the position. The candidates were all rated in interest, experience and initiative, with interest being the most important. The court ultimately found no age discrimination, stating that the plaintiff had presented no evidence his non-selection was motivated by age discrimination. He had only established that a younger person was selected to fill the vacancy. Thus, the plaintiff failed to show any connection that would support an inference that he was not appointed because of his age. Similarly, Igoe presented no substantial evidence of age discrimination.

Igoe also presented no evidence related to any age-related animus against him either by way of negative comments or actions on the part of either the Department or the Division. The evidence established that Governor Carnahan's staff had its own reasons for selecting the candidates to fill the positions in both 1998 and 2000 – reasons to which neither the Department nor the Division were privy. This, however, should not have meant that the trial court could attribute age discrimination to the Department and the Division when Igoe was not selected, particularly when there was no indication that McLucas or anyone else involved in

the interview process on behalf of the defendants had any reason to suspect that Governor Carnahan's staff's action were being guided by age discrimination. *See Reeves,* 120 S.Ct. at 2106 (ultimate burden of proving defendant intentionally discriminated against plaintiff remains at all times with the plaintiff).

The goal was to appoint candidates who would be able and willing to help facilitate the "vision" of the Governor in the Division in making the Division more effective, efficient, and fair. Tr. 191, 202-05. Igoe presented no evidence that he had that ability – or that, if he had the ability, that he demonstrated it to any decision maker – or, if he had demonstrated it, that his ability matched or exceeded that of other candidates, either objectively or in the judgment of anyone but himself. *See Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997) ("The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance."). Further, Igoe's 27 years of experience as a worker's compensation attorney was 100% as the claimant's representative, a background indicating he would be perceived to favor claimants. But the job descriptions for ALJ and legal advisor require the individual "be impartial and fair." Tr. 40, 42. Igoe testified he thought he could be impartial and fair; but he based this opinion upon the fact that he had never been cited for contempt. Tr. 40.

Courts may not second-guess the fairness or wisdom of an employer's hiring decision so long as it is not discriminatory. *Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1109 (8th Cir. 1998). "[I]t is not unlawful for an employer to make decisions based on favoritism or even unsound business practices, as long as these decisions are not the result of discrimination

based on an employee's membership in a protected class." *Cooney v. Union Pac. R.R. Co.*, 258 F.3d 731, 735-36 (8th Cir. 2001). "Even if the plaintiff does not agree with the explanation provided and believes it to be false or incorrect, this does not entitle the plaintiff to judgment unless he shows that discrimination is the true explanation." *Id.* Igoe presented no substantial evidence that discrimination was the true explanation and abundant evidence demonstrated that age played no role in the decision making process. Again, plaintiffs always retain the burden of demonstrating that the adverse employment action was based on an impermissible motivating factor at the moment the adverse employment decision was made. *Koszer v. Ferguson Reorganized School Dist. R-2,* 849 S.W.2d 205, 207 (Mo.App. 1993) (reversing the denial of motions for directed verdict or judgment notwithstanding the verdict in a case where the jury had found that race discrimination had been a motivating in his termination). Igoe here did not discharge that burden because he did not present a scintilla of evidence that age played a part in his non-selection. As such, judgment in his favor is against the weight of the evidence.

IV.

The circuit court erred in determining that defendants retaliated against Igoe for filing charges with the EEOC and MCHR when plaintiff was not selected for one of the administrative law judge or legal advisor positions after his tardy application in 1999 because the evidence submitted by Igoe relating to this claim was insubstantial and the judgment is against the weight of the evidence in that the evidence consisted solely of the fact that the 1999 appointment decision was made after he filed his charge of discrimination.

The circuit court's judgment on retaliation is unsupported by substantial evidence and against the great weight of the evidence. A prima facie case of retaliation requires the plaintiff to prove that there existed a causal connection between participation in the protected activity and the adverse employment action. *Kipp v. Mo. Highway & Transp. Comm'n,* 280 F.3d 893, 896 (8th Cir. 2002). In fact, under MHRA, plaintiff must show he engaged in a protected activity and *as a direct result* he suffered damages due to an act of reprisal. *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 625 (Mo. banc 1995). The evidence submitted by Igoe was insufficient to establish that Igoe's non-selection was the direct result of Igoe's filing of a discrimination charge.

Igoe produced no evidence that retaliatory motive played any role in the decision not to appoint him to an ALJ or legal advisor position. Indeed, defendants interviewed Igoe for the positions even though he had missed the cut-off date for applications. If the defendants'

intention was to prevent Igoe from obtaining a position with the Division, they could have legitimately prevented him from being interviewed altogether.

Igoe's evidence consisted of nothing more than a decision not to appoint him that followed a charge of discrimination. The action did not follow the protected activity so closely in time to justify any inference of a retaliatory motive. *See Feltmann v. Sieben*, 108 F.3d 970, 977 (8th Cir 1997) (discharge six weeks after complaint insufficient to link complaint to discharge); *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346-47 (8th Cir. 1996) (discharge one month after filing of age-discrimination charge failed to establish causal link), *cert. denied*, 519 U.S. 813 (1996). Here the temporal proximity was not hours, days, or even months, but over a year. Igoe filed his charge of discrimination with the EEOC and MCHR in August, 1998. Plaintiff's Exhibit 14. He was not rejected for the positions within the Division until approximately January 2000. Plaintiff's Exhibit 20. In addition, there was no evidence to even suggest that two of the panelists assessing Igoe had any knowledge of the filing of the charges by Igoe. And, although the other two panelists had knowledge of Igoe's charges, that fact alone is legally insufficient because "to hold otherwise would in effect impose strict liability," rendering the employer's explanation superfluous. *Ferron*, 10 F. Supp.2d at 1366. The panel ranked him at the very bottom of applicants.

The defendants offered two legitimate nondiscriminatory reasons for the decision not to appoint Igoe. First, they were looking for people who would help improve the workers' compensation system and Igoe did not demonstrate that he would be one of the best candidates to help accomplish this. Tr. 247. Second, Governor Carnahan's Office issued the edict

directing whom McLucas was to appoint to the positions and for reasons unexplored by Igoe, he was not selected by Governor Carnahan's staff involved in the selection process. Tr. 199-200. As discussed in Point III, *supra*, Igoe offered no evidence suggesting that the directive of Governor Carnahan's Office was tainted by discriminatory motive or retaliatory animus.

In sum, plaintiff presented no evidence, as he must in a retaliation case, that he engaged in a protected activity and *as a direct result* he suffered damages due to an act of reprisal. *Keeney*, 911 S.W.2d at 625. Because Igoe failed to make a submissible case on this retaliation claim, there was no substantial evidence to support Igoe's claim and the circuit court's judgment was against the weight of the evidence.

V.

The Circuit Court erred in granting plaintiff equitable relief specifically including instatement to the position of an administrative law judge in the City of St. Louis because plaintiff is not entitled to equitable relief under existing law or based on the weight of the evidence, in that plaintiff would not have been appointed absent the alleged discrimination, there was no vacancy for the position and removal of an incumbent was impossible, the court's order appointing a judge invaded the Governor's prerogative thereby violating separation of powers, and the instatement order was too specific.

The "purpose of anti-discrimination legislation is to make persons whole for injuries caused by unlawful employment discrimination." *Swyers v. Thermal Science, Inc.*, 887 S.W.2d 655, 656-57 (Mo.App. 1994). But plaintiff here was not entitled to an award of back pay or instatement as he would not have been appointed for the position he sought even absent the discrimination he alleged.

A. To make plaintiff whole, he should be given a fair job selection process.

Plaintiff alleges that he was discriminated against during the job selection process, and thus, was denied a position. Even if plaintiff was discriminated against, it does not necessarily follow that he is entitled to the position for which he interviewed. Rather, to give him what he was allegedly denied, he must be given a fair selection process – one untainted by discrimination or retaliation. Essentially, plaintiff has a due process claim: he was denied due process by allegedly being discriminated against when he applied for the position. In

discussing a plaintiff's 42 U.S.C. §1983 claim that he had been denied employment as a police officer in retaliation for exercising his First Amendment rights, a court stated that:

> [the p]laintiff does not...have a constitutional right to employment...he has a constitutional right not to be refused fair consideration of his application for a position...That right having been violated, he is entitled to a fair and effective remedy. It does not follow that he is entitled to the position. Public as well as private interests are at stake.

Valcourt v. Hyland, 503 F.Supp. 630, 635 (D. Mass. 1980).

Because plaintiff was allegedly discriminated against during the job selection process, the remedy that would make him whole would be a consideration of his application without discrimination. As in *Valcourt*, there is a public interest at stake here, in addition to plaintiff's private interest. Plaintiff is seeking a high level, policy-making position with a governmental agency. The public interest demands that those who serve the people be chosen fairly and that the executive – within the statutory parameters of Chapter 213 – make the judicial appointment. Plaintiff is not entitled to a position simply because he may have been

discriminated against during appointment.[9] Both the private and public interests require that plaintiff be given fair treatment, not that he have bestowed upon him an appointed position.

B. Neither back or front pay nor instatement is appropriate because plaintiff would not have been appointed absent the alleged discrimination.

If an employer can show that it "would have taken the same action in the absence of the impermissible motivating factor, the court shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment." 42 U.S.C. § 2000e-5 (g)(2)(B). This federal statutory standard is also the law in Missouri as declared in *Swyers,* 887 S.W.2d at 656. There a job applicant brought a sex discrimination claim, demonstrating that the employer refused to interview the applicant on account of gender. *Id.* Nevertheless, the plaintiff was not entitled to the position. Rather, the trial court entered summary judgment for the employer and the appellate court affirmed because the evidence demonstrated that "even if the alleged discrimination had not occurred and plaintiff had initially been granted an

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[9] What plaintiff is entitled to if this Court accepts the circuit court's determination that he was discriminated against during the selection process is compensatory damages – not necessarily back pay, front pay or instatement. *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 259 (8th Cir. 1984) (court must determine whether employer would have hired plaintiff absent the unlawful discrimination before plaintiff is entitled relief in the form of an order directing the employer to hire the plaintiff and to pay back pay). Here the circuit court awarded plaintiff $10,000 in compensatory damages. L.F. 98.

interview, she would not have been hired." *Id.* at 657, citing *Puhy v. Delta Air Lines, Inc.*, 833 F.Supp 1577 (N.D.Ga. 1993).

Here Governor Carnahan's Office directed the selection of the applicants. Tr. 221-22. There is no indication that Governor Carnahan's Office discriminated in its choice of applicants. But even if discrimination could be inferred, had Governor Carnahan's Office not been involved and McLucas had unfettered discretion in selecting the ALJ's, the evidence demonstrates plaintiff would not have been appointed. For the 1998 appointments, McLucas interviewed twenty-seven applicants for four positions. Tr. 116. For the 2000 appointments, over fifty applicants applied for nine positions. Tr. 246, 278. Although McLucas felt that plaintiff was qualified, she felt that he was not as knowledgeable or prepared as many of the other applicants. Tr. 287-88. Further, his demeanor during his interviews gave at least one 1999 panelist an unfavorable impression. Tr. 285-86. In his panel interview, Igoe ranked near the bottom of all candidates. Tr. 316-17. This evidence stands unrebutted. For those reasons McLucas would not have appointed plaintiff and, thus, he is not entitled to back pay, front pay or instatement.

Plaintiff also would not have been appointed because McLucas was concerned that he would not be able to be impartial, one of the requirements of being an ALJ and legal advisor. Tr. 38-40, 182. Plaintiff's entire twenty-seven years of experience in workers' compensation law was on the side of employees; he admitted at trial telling McLucas during his first interview that he had "always represented working men." Tr. 51. He also stated that he felt that "the working man wasn't getting justice," and that he wanted to "help them." *Id.* An expressed

desire to provide "help" to the claimant's bar and an articulated concern with justice only for the claimant's bar is a disqualifier for a judicial appointment. Plaintiff's one-sided experience and statements during his interview lead to an inference of partiality, and it is imperative that an ALJ, who decides cases involving both employees and employers, not be partial or be seen as partial by the parties. Further, at trial, plaintiff's anemic reason for why he thought he could be impartial was that he had "never been cited for contempt." Tr. 40. While never having been cited for contempt shows that plaintiff acted in a professional – not overly zealous – manner, it has no bearing on whether he could be impartial. Plaintiff's one-sided experience and slanted interview responses were a liability, especially when several other applicants had experience representing both sides and would be less likely to give an impression of partiality. Plaintiff's Exhibit 77.

Furthermore, McLucas found plaintiff to be lacking in his knowledge and preparedness during his first interview. She was concerned that plaintiff could not appropriately differentiate between Article V judges and ALJ's. Tr. 207-08. This factor was especially important as there are significant differences between Article V judges and ALJ's, not the least of which is that they work in different branches of the government. Tr. 181-82, 207. Further, plaintiff did not ask any questions during the interview, unlike some of the other applicants. Tr. 211, 215. Plaintiff "did not express interest in making improvements to the system." Tr. 254.

Plaintiff also would not have been appointed as a result of the second series of interviews in 1999. During the 1999 interviews, plaintiff was interviewed by a panel, and one

member of the panel, Thomas Pfeiffer, Deputy Director of the Department of Labor and Industrial Relations, stated that plaintiff began the interview in "a negative way" by asking why there were so many people conducting the interview. Tr. 285-86. Plaintiff was not familiar with the current standards of evaluation for ALJ's. Tr. 286-87. When asked what improvements he would make to customer service within the Division, plaintiff stated that he would "'[m]ake sure the customer understands what is happening and why.'" Tr. 288. Mr. Pfeiffer stated that, instead of being a suggestion for improvement, plaintiff's suggestion was "what [the Department employees] are doing now." Tr. 288. When the panel ranked the applicants after the interviews, plaintiff was ranked second to last on the ALJ list and last on the legal advisor list. Tr. 316-17.

Although plaintiff was minimally qualified in that he was a licensed attorney in Missouri and had years of experience, McLucas and other interviewers felt plaintiff was not the best person for the position compared to the other applicants. Thus, even if Governor Carnahan's Office had not been involved, McLucas would not have appointed plaintiff; others among the twenty-six applicants for the first round and the over fifty applicants in the second round were more impartial, knowledgeable, prepared, and gave more favorable impressions during the interviews. As defendants have shown that they would not have appointed plaintiff even without any alleged discrimination or retaliation, plaintiff is not entitled to instatement as an ALJ or an award of back or front pay.

C. Instatement is impracticable and impossible.

As part of its judgement, the trial court ordered that Igoe be instated as an administrative law judge in the City of St. Louis. L.F. 99-100. In response to Igoe's Motion For Equitable Relief, the Department and the Division informed the court that there were no openings for an administrative law judge in the City of St. Louis. L.F. 80. Despite the impossibility of performance, the trial court issued its order of instatement. "[T]he court will not issue an injunction when the order of the court to be embodied in an injunction is impossible of performance." *Hudson v. School Dist. of Kansas City,* 578 S.W.2d 301, 312 (Mo.App. 1979).

Instatement as an ALJ in the St. Louis office was both impracticable and impossible. Whether instatement is practicable depends on the conditions at the time of the grant of relief. *Kucia v. Southeast Arkansas Community Action Corp.*, 284 F.3d 944, 949 (8th Cir. 2002). At the time of judgment, there were no openings for an ALJ and the number of ALJ positions was fixed by law, subject to appropriation. § 287.610.1, RSMo 1998. Nevertheless, the court ordered instatement. In rare instances it is possible for a court to order an incumbent employee "bumped" to make a position available for a plaintiff. *See Walters v. City of Atlanta,* 803 F.2d 1135,1148-49 (11th Cir. 1986); *Ogden v. Wax Works, Inc.*, 29 F.Supp.2d 1003, 1009-10 (N.D. Ia. 1998). However, "bumping" another ALJ is not an option, as ALJ's can be "discharged or removed only by the governor pursuant to an evaluation and recommendation by the administrative law judge review committee. . . of the judge's conduct, performance and productivity." § 287.610, RSMo Supp. 1998.

When instatement is "impossible or impracticable," a court may, instead of granting instatement, grant front pay instead or until instatement is possible, *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997); *Pollard v. E.I. duPont Nemours & Co.*, 532 U.S. 843, 846 (2001), *citing King v. Stanley*, 849 F.2d 1143, 1145 (8th Cir. 1988), but this is not what the trial court ordered here. It ordered instatement, and every day defendants failed in that impossible directive, they were in violation of the circuit court's improper order.

In addition, plaintiff stated in his Motion for Equitable Relief that he did "not believe an amicable employment relationship would be possible," which makes instatement impracticable. L.F. 51; *see Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002). Plaintiff believed that an amicable and productive relationship would not be possible as he would be "working for the people who placed him at the bottom of a qualification-ranked list of applicants." L.F. 57. Further, the trial court ordered plaintiff instated as an ALJ specifically in the St. Louis office, which makes any possible instatement more impracticable as the limited number of positions in St. Louis makes it less likely a position would be available at any time promptly following the court's order.

Finally, instatement is also no longer practicable because it is now several months past the time plaintiff stated he anticipated retiring. Plaintiff stated in his Motion for Equitable Relief, that he anticipated working until his 70th birthday on February 28, 2004. L.F. 51. Because it is now several months after plaintiff's 70th birthday, if plaintiff is to receive equitable relief, he should be granted front pay. "If a plaintiff is close to retirement, front pay

may be the only practical approach." *Newhouse*, 110 F.3d at 642, *quoting Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991), *cert. denied*, 502 U.S. 963 (1991).

D. The selection of administrative law judges is dedicated to the executive branch.

By granting instatement as an ALJ to plaintiff, the circuit court encroached on the executive branch's right to appoint ALJ's. The Missouri Constitution sets out the three separate branches of government, executive, legislative, and judicial, and specifies that "no person...charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others." Mo. Const. Art. II, § 1. Within the executive branch, "[t]he head of each department may select and remove all appointees." Mo. Const. Art. IV, § 19. Under normal circumstances, administrative law judges are to be appointed by the Division of Workers' Compensation of the Department of Labor and Industrial Relations, which, being an administrative agency, is part of the executive department. § 287.610.1, RSMo Supp. 1998. Here the appointment decision was made by the Director of the Department, not the Division Director who was an applicant for the position. And it was made at the direction of Governor Carnahan's Office.

Although a court has discretion in granting remedies to those it decides have been subjected to discrimination, there are limits on a court's power. A court, being part of the judicial branch,

> may not interfere with, or attempt to control, the exercise of discretion by the executive department where. . .the law vests such right to exercise

> judgment in a discretionary manner with the executive branch of government. . . . These limitations on the judicial branch become particularly sensitive where. . .the law places discretion at the highest level of the executive department.

State ex rel. Missouri Highway and Transportation Commission v. Pruneau, 652 S.W.2d 281, 289 (Mo.App. 1983). Further, "[i]t has long been the settled law of this state that our courts will not interfere with either of the co-ordinate departments of government in the exercise of their powers, except to enforce ministerial acts required by law that leave to the officer no discretion." *State ex rel. Johnson v. Regan*, 76 S.W.2d 736, 741 (Mo. App. 1934). Instead of interfering with the executive branch, the courts "have the duty and obligation to protect the right of...the executive branch, to exercise those powers specifically delegated to it in the same manner we would a similar challenge to the powers of the judiciary." *State on Information of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc 1970).

The appointment of an ALJ is a discretionary act that has been assigned to the executive branch. It is the duty and right of the executive to choose the person believed to be the correct person for the job. The executive's discretion in this matter is especially important considering the nature of the position of ALJ, which is a powerful, policy-making position. Additionally, as ALJ's cannot be easily removed, *see* § 287.610.1, RSMo Supp. 1998, it is imperative that the person chosen will deliver critical state services in a manner for which the executive is willing to be held politically responsible. The courts should not interfere with the executive's selection prerogative to choose by dictating who shall be appointed as an ALJ.

The potential for constitutional mischief undermines the circuit court's order. Are the courts to review every judicial appointment Governors make and, on evidence no more substantial than Igoe's, find discrimination occurred and then exercise the Governor's appointment power? This is not only folly, it is constitutional heresy. This Court must act to prevent the evisceration of the executive's prerogative.

E. The instatement order was too specific.

Though "[o]ne purpose of anti-discrimination legislation is to make persons whole for injuries caused by unlawful employment discrimination," *Swyers*, 887 S.W.2d at 656-57, instatement is not the proper remedy in this case and, if it were, the order of instatement was too specific, and should be broadened by allowing plaintiff to be instated as either an ALJ or as a legal advisor, and to allow plaintiff's instatement in places other than St. Louis.

The trial court impermissibly narrowed the requirements of the instatement remedy by requiring that plaintiff be instated as an ALJ in St. Louis. Plaintiff applied for both a position as an ALJ as well as a position as a legal advisor. Tr. 36-37, 62. If instatement is deemed an appropriate remedy, he should be instated to whichever of the positions had an available opening first. Although plaintiff requested instatement only as an ALJ, he applied for both positions, and thus the remedy should match what he was allegedly denied. Further, plaintiff stated, both to the interviewers and to the trial court, that he would be willing to work any place in "the state...except Poughkeepsie or something." Tr. 90. Thus, limiting the relief to ALJ positions in St. Louis was inappropriate, and should the Court decide to affirm the order of instatement, the relief should be modified to allow instatement as either an ALJ or a legal advisor, anywhere in the state.

CONCLUSION

For all the foregoing reasons, the order and judgment of the circuit court should be reversed with directions to transfer venue. Alternatively, the order and judgment of the circuit court should be reversed because it is against the weight of the evidence and because the relief order granted by the circuit court is either impermissible or inappropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on the 14th day of July, 2004, two true and correct copies of the foregoing brief and two supplemental appendices, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 13,368 words.

The undersigned further certifies that the labeled disk, simultaneously filed herewith has been scanned for viruses and is virus free.

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JAMES ROBERT McADAMS