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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APPELLEE'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Under the Missouri constitution, the governor's powers of appointment include only department and division heads, and members of administrative boards and commissions, subject to the advice and consent of the Senate. Mo. Const. Art. IV, §51 (Resp. App. A30). The governor's appointment power does not include Administrative Law Judges (ALJ's), Legal Advisors (LA's), or any other employees of the Department of Labor and Industrial Relations (DOLIR), or the Division of Workers Compensation. *Id.* Rather, other appointments in these executive departments are within the authority of the department heads, unless otherwise provided by law. Mo. Const. Art. IV §19 (Resp. App. A28). In the case of the Division of Workers Compensation, a statute provides otherwise, and the authority for hiring ALJ's and LA's is allocated to the head of the Division of Workers Compensation. §287.610.1 RSMo (2004) (Resp. App. A25-A26).

The unique structure of the DOLIR is intended to ensure that this agency remains free of political influence and control. It is headed not by the governor or the director, but by a three-member Labor and Industrial Relations Commission (Commission). Mo. Const. Art. IV §49 (Resp. App. A29). The constitution provides that this Commission cannot be comprised of members of one political party. *Id.* It also provides that the Commission must have one member who is a representative of employees, one who represents employers, and one who represents the public. *Id.* Furthermore, the commissioners' terms are staggered, so that every two years, one commissioner exits. §286.020 RSMo (2004) (Resp. App. A24).

The DOLIR is headed by the three-member Commission, not the Director of the Department. §286.005.1 RSMo (2004) (Resp. App. A22-A23). Rather, the Director serves as the chief administrative officer of the DOLIR. *Id.* The Director is chosen and nominated by the Commission, and the governor appoints the Director, subject to the advice and consent of the Senate. *Id.*

The head of the Division of Workers Compensation answers to the Director of the DOLIR. The Division head is responsible for hiring of ALJ's and LA's for the Division. §§287.610.1, 287.615.1 RSMo (2004) (Resp. App. A25-A27). There is no provision, either in the constitution or by statute, that extends the governor's appointment power to the appointment of ALJ's. The governor is only involved in removal of ALJ's, and then only after an appeal process to an ALJ review committee is exhausted. §287.610 RSMo (2004) (Resp. App. A25-A26).

John Igoe was born on February 28, 1934. Appellants' App. A63. After 27 years of experience in workers compensation law, three of which were as Chairman of the Labor and Industrial Relations Commission, he applied for four job openings in the St. Louis office of the Division of Workers Compensation. Two of the openings were for Administrative Law Judge positions, and two were for Legal Advisor positions. All of the openings were filled in June of 1998. Tr. 52-53, 67-68; Resp. App. A1; Appellants' App. A64.

Although the head of the Division of Workers Compensation is the individual authorized to hire ALJ's and LA's, she did not conduct the interviews for these positions in

1998 because she herself was applying for the jobs. Tr. 186-187. The interviews for these positions were instead conducted by the Director of the DOLIR, Karla McLucas. Id.

Soon after her interview of Igoe, McLucas created typed notes of the interview. Tr. 251. In these notes, McLucas wrote, "This position interests him because the Division of Workers' Compensation needs experienced workers' compensation help. Applicant wants to pay back to the Bar, 'to pick up an oar and move it forward.'" Tr. 253, App. A7-A8.

At trial, descriptions of the Administrative Law Judge and Legal Advisor positions were entered into evidence, along with plaintiff's testimony of his qualifications and experience. Tr. 36-43; Resp. App. A2-A5. Plaintiff's resume also detailed his credentials for the jobs. Tr. 49, Resp. App. A6. Defendants admitted they were aware of Igoe's qualifications and that he exceeded the minimum standards for both the ALJ and LA jobs. Tr. 251-253, Resp. App. A7-A10. Igoe was not selected for any of the positions.

At the time the jobs were filled, Igoe was 64 years old. Tr. 7, 56-57, Appellants' App. A63. In addition to Igoe, six other applicants were over the age of fifty, and their experience in workers compensation law ranged from ten to thirty-five years. None of these applicants, including Igoe, were selected for any of the jobs. Tr. 52-53, 67-68; Resp. App. A2, Appellants' App. A64.

The people who were hired for the four job openings, and their ages at the time, are Margaret Landolt, 42; Jennifer Schwendemann, 32; Suzette Caldwell, 42; and Linda Wenmen, 42. Tr. 152-53, Resp. App. A11. Landolt and Caldwell had no prior workers compensation experience; Schwendemann had eight years, and Wenman had four. Pltf's Trial Exh. 51 (Resp.

App. A-15). The average age of these selected candidates was 39.5 – over 24 years younger than Igoe at the time.

Based on defendants' failure to hire him, and its hiring of four women substantially younger and less experienced than he was, Igoe filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR) in August of 1998. Tr. 56-57, Appellants' App. A63.

During the investigation of Igoe's first charge, McLucas submitted a signed affidavit describing the interview process, and stating defendants' reasons for not hiring Igoe. These same reasons were reiterated during discovery in defendants' response to interrogatories. In that affidavit, as in the interrogatory responses, McLucas never mentioned that anyone else was involved in the decision not to hire Igoe. Tr. 253-255, Resp. App. A12-A14. Neither did she mention Igoe's statement in her interview notes about helping the system (Tr. 255). Contrary to her own notes, McLucas stated, "He did not express interest in making improvements to the system." Tr. 254, Resp. App. A12-A14.

On the other hand, when describing the four younger women who were appointed to ALJ and LA positions, McLucas submitted to the EEOC, "Each of the candidates chosen for the positions demonstrated enthusiasm about the work and the position and seemed eager to make improvements to increase the efficiency within the division. The candidates were energetic and asked questions indicating that they understood the role of the legal advisor and administrative law judge and were willing to carry a heavy workload." Tr. 256. At trial, when

questioned about these statements, McLucas admitted that Igoe never indicated he was not willing to carry a heavy workload. Tr. 256.

In 1999, nine more ALJ and LA positions opened – five for Administrative Law Judge and four for Legal Advisor. Pltf's trial exhibit 57 (Resp. App A-17-18). Igoe again applied for all of the openings, and again was not hired. The nine people hired for the second round of jobs, and their ages at the time, are Karen Bosley, 38; Paula McKeon, 39; Jo Ann Karll, 51; Emily Fowler, 42; Karla Boresi, 34; Lisa Meiners, 30; Lori Neidel, 36; Michael Moroni, 41, and David Zerrer, 55. Tr. 160-62; Resp. App. A17-A18. Igoe was 65 at that time. Tr. 7, 56-57; Appellants' App. A63. During the 1999 hiring process, the average age of successful candidates was 40.6 – again, over 24 years younger than plaintiff.

For the second round of hirings, McLucas chose an interview panel of four people, including an EEO officer with whom she had worked before. She and her assistant, Thomas Pfeiffer, comprised half of the interviewing panel, and both admitted they knew Igoe had filed a charge of discrimination. The governor's staff also had knowledge of Igoe's charge. Tr. 245. This time, McLucas' panel rated Igoe at the bottom of the barrel of candidates. After he again did not get a job, Igoe filed a second charge of discrimination, this time alleging both discrimination and retaliation for filing the first charge. Tr. 69-70. This lawsuit followed.

During discovery in this case, defendants claimed that the person who made the decisions regarding Igoe was Department Director Karla McLucas. Tr. 168-70 (defendants' answer to plaintiff's interrogatory number 2). Defendants stated the following reason for not hiring plaintiff:

> Ms. McLucas did not hire plaintiff because he was not the best qualified person for the job. Further, plaintiff was not hired because he did not express interest in the work or making improvements to the system. Plaintiff indicated several times during the interview that what interested him about the position was the judicial retirement plan and being in a position of leadership. Plaintiff was not able to clearly distinguish the difference between an administrative law judge as part of the executive branch and Article 5 judges who are part of the judicial branch.

Tr. 168-170; 314-315. However, at trial, defendants changed their position and McLucas denied making the decision. She claimed she merely made recommendations to the governor. Tr. 246, L. 3-9. The governor chose people other than those she had identified as the most qualified, and she did not question the decisions. Tr. 238-240. The governor was not identified as playing any role in the interview or hiring process during either the EEOC investigation or pretrial discovery.

McLucas claimed in her EEOC affidavit, as well as at trial, that Igoe stated in his interview that "what interested him about the job was the judicial retirement plan and being in a position of leadership." Tr. 254, Resp. App. A12-A14. McLucas alleges she could remember nothing else about the interview, except that he had worked for the state before, and that the interview was short. Tr. 205-207. Igoe denied making such a statement, and testified that in fact, he told her he did not want to retire, but intended to work for a long time. Tr. 51:18-25.

He also testified that if he got one of the jobs, he thought he would work until at least age 75. Tr. 81:7-14.

In contrast to McLucas' testimony about what little she recalled from the interview, her interview notes describe the interview in detail, and do not contain any statements by Igoe regarding the retirement plan. Resp. App. A12-A14. Furthermore, no statement about an alleged "interest in the judicial retirement plan" appears in the notes of McLucas' assistant Thomas Pfeiffer, who was also present and took notes during Igoe's second interview. Tr. 305. Yet, Pfeiffer admitted that a younger candidate, Michael Moroni, did express interest in the retirement plan. Tr. 305-06. Moroni was awarded a job. Tr. 306.

The case was tried to a judge and jury, and the jury rendered a verdict for Igoe on his age discrimination claim in the amount of $323,177.10 in lost wages and benefits, and $10,000.00 for compensatory damages. On his sex discrimination claim, the jury rendered a verdict in favor of defendants. On his retaliation claim, the jury rendered a verdict for Igoe in the amount of $183,600.00 in lost wages and benefits, and no compensatory damages. L.F. 40, 41. An Order and Judgment was entered by Judge Cohen, in which she adopted the jury's findings as the findings of the court on the Missouri Human Rights Act claims. L.F. 96. In addition to the jury's award, Judge Cohen awarded $50,400.00 as lost wages from the date of verdict through the date of her judgment L.F. 98. The total judgment was $383,577.10. L.F. 97. Judge Cohen also ordered defendants to instate plaintiff into an ALJ job in St. Louis. L.F. 99-100.

On appeal to the Eastern District, defendants raised the issue of improper venue, but not on the basis of plaintiff's delinquency in responding to defendants' motion within ten days. Appellant's Brief, Points Relied On No. I and II. Defendants also raised an argument that instatement to an ALJ job was error, but only on the basis that no such job was available, and not on the basis that the instatement order violated the state or federal constitution. Appellant's Brief, Point Relied on V. At no point in the trial court or on appeal was a constitutional issue or a timeliness-of-response argument raised by defendants regarding venue. *See* Motion for New Trial, LF 67-74; Notice of Appeal, LF 103-104; Appellant's Brief on Appeal.

ARGUMENT

I. The circuit court's denial of defendants' motion to transfer venue must not be disturbed because: (A) venue was proper; (B) defendants did not carry their burden of proving venue was improper, and failed to argue the correct venue provisions; (C) plaintiff's response was timely under the prevailing venue rules; (D) even if the new venue rule applied, defendants themselves did not comply with it and thereby waived the venue issue; (E) defendants further waived the venue issue by changing their basis for challenging venue from their claim below; and (F) defendants waived the venue issue by submitting to the jurisdiction of the trial court, and by failing to file an immediate writ to challenge the venue ruling.

A. Venue was proper.

The circuit court unquestionably exercised proper jurisdiction over plaintiff's Title VII claim. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990). The question is whether the special venue provisions of Title VII applied to the circuit court, or only the MHRA venue provisions. Pursuant to Missouri law, the Title VII venue provisions should be applied in a Missouri state court.

The Missouri Supreme Court clarified this point in *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837 (Mo. *banc* 1985). In *Bunge*, the plaintiff obtained a default arbitration award under the Federal Arbitration Act (FAA), and sought to enforce it in a Missouri state court. The FAA had a notice provision – clearly procedural – that was less stringent than the notice provision required by the Missouri Arbitration Act. Specifically, the

Missouri act required bold-print notice, while the FAA did not. The arbitration notice given by the plaintiff complied with the FAA notice requirements, but was not in bold type as Missouri required. *Id.* at 838.

In the state court proceeding, the defendant challenged enforcement by claiming that Missouri procedure should apply, and that it had not received proper notice under Missouri law. The trial court agreed and dismissed the action. The Missouri Supreme Court reversed and held, "The court under the supremacy clause is obliged to apply federal law, and may not apply state law, *substantive or procedural*, which is in derogation of federal law." *Bunge*, 685 S.W.2d at 839 (Mo. *banc* 1985) (emphasis added).

Here, as in *Bunge*, the Missouri Human Rights Act (MHRA) has a narrower and more stringent procedural requirement than Title VII. Both statutes allow the action to be brought where the discriminatory practice occurred. §213.111.1 RSMo (2000); 42 U.S.C §2000e-5(f)(3). However, Title VII also allows two other venue alternatives: where "the employment records relevant to such practice are maintained and administered," or where "the aggrieved person would have worked but for the alleged unlawful employment practice." 42 U.S.C. §2000e-5(f)(3). Because the MHRA provides for only one of the three alternatives, Missouri's procedural law is in derogation of the federal statute. Thus, under *Bunge*, the circuit court properly applied the broader Title VII venue provisions. The Missouri Supreme Court subsequently followed *Bunge* in a case where venue was the procedural issue raised in a motion to dismiss for *forum non conveniens*. In *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298 (Mo. *banc* 1992), the plaintiff filed a Federal Employer's Liability Act (FELA)

claim in a county in which the underlying accident had not occurred, and in which neither party resided. Under Missouri law, venue was clearly improper; however, the FELA permitted venue in any jurisdiction in which the defendant conducted business. 832 S.W.2d. at 305 (*citing* 45 U.S.C. §56 (1988)). The trial court denied a motion to dismiss the case. The Supreme Court upheld the denial, and stated, "The Supremacy Clause of Article VI of the United States Constitution constrains us to apply the policy expressed by the federal venue law with no less enthusiasm than if it were our own." *Id.* at 305 (*citing Bunge*). Applied to this case presently before this Court, both *Bunge* and *Anglim* support Judge David's ruling that the Title VII venue provisions properly applied to this case. L.F. 29.

B. Defendants did not carry their burden of proving venue was improper, and failed to argue the correct venue provisions.

Defendants argued in the circuit court that the general venue provisions of Missouri applied. L.F. 8, 20-22. In denying defendants' motion, the circuit court correctly concluded that the specific venue provisions of Title VII and the MHRA prevailed over the general Missouri venue statutes. L.F. 29.[1]

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[1]"General rules establishing venue are subject to specific statutes which place venue elsewhere." *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. *banc* 1985). *See also State ex rel. Wasson v. Schroeder*, 646 S.W.2d 105, 107 (Mo. *banc* 1983) (holding that Mo. Const. Art. IV §§12 and 20, placing venue of state agencies in Cole County, Missouri, were subject to a specific statute placing venue elsewhere); *State ex rel. Mellenbruch v. Mummert*, 821 S.W.2d 108, 110 (Mo. App. E.D. 1991).

Despite defendants' failure to raise the argument, the court proceeded to analyze the special venue provisions of the MHRA. First, Judge David correctly noted that *at that time*, Missouri courts did not require a plaintiff to plead venue. L.F. 28; *Wood v. Wood*, 716 S.W.2d 491, 494 (Mo. App. S.D. 1986); *but see State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 31 (Mo. App. E.D. 2002) (decided *after* Judge David's ruling). This also made sense from a practical standpoint under the MHRA venue provision, since it will often be impossible for the plaintiff to know where the discrimination occurred until discovery is undertaken.

Before the venue motion was called for hearing, plaintiff provided a written response invoking the specific venue provisions of the MHRA and Title VII. LF 13-18. Despite the court permitting further briefing after the motion hearing (LF, Minutes of 8/7/00), defendants *still* did not argue the appropriate venue statute, but maintained its argument that the general venue statute applied (LF 19-23). In his ruling on the motion, Judge David noted that the party challenging venue has the burden of persuasion and proof. L.F. 29 (*citing Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.*, 785 S.W.2d 649, 650 (Mo. App. E.D. 1990)). This also makes practical sense, particularly in a failure-to-hire case under the MHRA, because a defendant is typically in a position to know where the discriminatory decision occurred and the plaintiff would not. Defendants now seek to raise an argument regarding the MHRA venue provisions for the first time, although they neither argued the MHRA nor offered proof of where the discrimination occurred below, but simply relied on the general venue statute. Judge David correctly ruled that defendants did not carry their burden, and waived the issue when they continued to litigate in that venue.

The circuit court analyzed the special venue provisions of the MHRA, and correctly held that Missouri's venue statutes cannot impose a more stringent requirement than that imposed by Congress under Title VII (discussed *supra*). Thus, for purposes of the MHRA, a Title VII venue analysis is still appropriate, even for the MHRA claim. The circuit court correctly ruled that: "Plaintiff may therefore bring the present action against Defendants in the City of St. Louis pursuant to the venue provisions in Title VII and §213.111.1 R.S.Mo." L.F. 29.

Even assuming *arguendo* that the more stringent venue provision of the MHRA applies, the result is the same. While the original petition did not specifically plead the location of the discrimination, this omission is not fatal to plaintiff's choice of venue. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). The circuit court correctly held that defendants did not meet their burden of demonstrating that no discriminatory conduct occurred in the City of St. Louis. L.F. 29-30.

C. Plaintiff's response to defendants' venue motion was timely under then-prevailing venue rules.

At the time defendants' venue motion was filed, argued and ruled upon, there was no rule requiring plaintiff to respond within ten days; such a rule took effect the following year. In its brief, defendants deviously cite the time requirements of a different rule, Rule 51.04,

and defendants include only that venue rule in its Substitute Appendix before this Court. Rule 51.04 applies only to venue changes sought because of prejudice or undue influence of the inhabitants of a county. Conspicuously missing from both the brief and the appendix is the now-applicable rule, Rule 51.045, which applies to venue changes sought when, as here, venue is claimed to be improper.

The reason for defendants' omission is transparent: the applicable Rule 51.045 was not in effect, so plaintiff was not required to respond within ten days at the time this motion was filed and heard. The venue motion at issue in this case was filed in May 2000 (LF 3-8), and ruled upon on August 21, 2000 (Appellant's App. A1-A4; LF 27-30). Rule 51.045 did not take effect until January 1, 2001. Rule 51.045 (Resp. App. A31-A32). Thus, no such rule applied to this motion, and plaintiff was not untimely or delinquent for failing to respond within ten days. Furthermore, at that time, there was no requirement that plaintiff plead venue facts. *Wood v. Wood*, 716 S.W.2d 491, 494 (Mo. App. S.D. 1986). Plaintiff chose to file a response to defendants' motion anyway, arguing the applicable venue provisions of the anti-discrimination statutes (LF 13).

D. Even if the new rule had been in effect, defendants themselves did not comply with it, and thereby waived the venue issue.

Even if the strictures of the new rule 51.045 had applied at the time this motion was heard, defendants cannot rely on them because defendants themselves did not comply with the timeliness requirements. Defendant Division of Workers Compensation was served on May 31, 2000 ((Resp. App. A20-21), but did not file its venue motion until 35 days later, on July 5,

2000 (LF 3-4). Rule 51.045(a) requires that an application for transfer of venue must be filed within the time allowed for the party's pleading (here, thirty days under Rule 55.25(a)), or the venue issue is waived. Rule 51.045(a) (Resp. App. A31-A32). Although defendant filed an entry of appearance on June 21 and sought an extension of time, no order extending the time was entered. Thus, defendant Division of Workers Compensation was delinquent in filing its motion and has waived the issue of venue.

E. Defendants further waived the venue issue by changing the basis for challenging venue from their claim below.

Rule 83.08(b) clearly states that a party before the Missouri Supreme Court "shall not alter the basis of any claim that was raised in the court of appeals brief. . . ." Rule 83.08(b) (Resp. App. A33). Here, defendants have done just that – they now raise as a basis for reversing Judge David's venue ruling the argument that plaintiff was untimely in his response to their venue motion. This argument was not raised before the court of appeals, either in the brief or at oral argument. Indeed, the untimeliness argument has *never* been raised until now. Therefore, pursuant to Rule 83.08 (b), defendants are barred from raising it now.

F. Defendants waived the venue issue by not raising it immediately by writ.

After losing the motion for change of venue, defendants participated in discovery (L.F. Minutes 8/28/00, 9/22/00), filed their answer (L.F. Minutes 1/29/02, L.F. 32), and proceeded to trial in March of 2002 (L.F. Minutes 3/02). By electing to submit to jurisdiction in the City of St. Louis without objection after transfer was denied, and by proceeding through

discovery and trial, defendants waived their right to challenge venue in the Court of Appeals. *Wood v. Wood, et al.*, 716 S.W.2d 491, 494 (Mo. App. S.D. 1986).

The proper remedy for challenging the denial of a change of venue is to seek an immediate extraordinary writ before advancing further in the circuit court. *Gillman v. Mercantile Trust Co.*, 629 S.W.2d 441, 443 (Mo. App. E.D. 1981); *see also State ex rel. Bohannon v. Adolf*, 724 S.W.2d 248, 249 (Mo. App. E.D. 1987) ("An extraordinary writ is the proper method of challenging an order sustaining a motion to dismiss for improper venue."); *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. *banc* 1985)(writ taken from order denying motion to transfer venue). In Missouri, parties challenging venue must seek either a writ of prohibition to prevent the judge from asserting jurisdiction over a case because of improper venue, or seek a writ of mandamus to compel a circuit judge to transfer venue. "If venue is improper where an action is brought, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue." *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo. App. E.D. 2002)(overturning trial court's denial of change of venue). Likewise, "Mandamus is the appropriate remedy where a court fails to perform a ministerial act such as ordering the transfer of a case from a court of improper venue to a court of proper venue." *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663, 664 (Mo. App. E.D. 1997).

Thus, defendants' options for challenging the venue ruling were filing a petition for writ of mandamus or prohibition.[2] They did neither. Defendants were fairly warned by the

[2]While the Eastern District in *Carey v. The Pulitzer Publishing Co.*, 859 S.W.2d

circuit court that if they continued to proceed to trial, they would be waiving the issue of venue. In his ruling, Judge David explicitly stated, "Venue is therefore proper in the City of St. Louis, and the issue is hereafter deemed waived." L.F. 30. Appellants may not neglect viable remedies available to them, subject themselves to the jurisdiction of St. Louis City Circuit Court through trial and verdict, and now revive a challenge to venue on appeal.

A venue ruling is not an appropriate issue for appeal. In *Gillman v. Mercantile Trust Co.*, the Eastern District held that when the lower court rules on a motion alleging improper venue, its ruling is not an appealable order. "The proper method of attacking the order of the trial court is by extraordinary writ. We do not have jurisdiction to consider the issue of venue on appeal here." 629 S.W.2d 441, 443 (Mo. App. E.D. 1981) (*citing Pagliara v. Gideon-Anderson Lumber Co.*, 541 S.W.2d 92 (Mo. App. E.D. 1976)); *see also Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc*., 785 S.W.2d 649, 650 (Mo. App. S.D. 1990). Thus, defendants may not challenge the adverse ruling on their venue motion on appeal.

II. Any error by the trial court in inadvertently adopting the jury's verdict on both the age and the sex discrimination claims, rather than only the age claim, was harmless, in that the relief is the same.

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851 (Mo. App. E.D. 1993) suggests that writs of prohibition and mandamus are not the exclusive remedies for defective venue, *Carey* relies on authority that does not stand for this proposition, and should not be followed.

In the Order and Judgment of the trial court, Judge Cohen wrote, "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 and retaliation claims." Obviously, the court inadvertently misread the jury's verdicts, which were in favor of plaintiff on both of his age discrimination claims and his retaliation claim, but not on his sex discrimination claims. The judge went on to state, "The Court has reviewed the record and finds that the jury verdicts finding in plaintiff's favor on the issues of liability were supported by the preponderance of the evidence at trial, and the Court adopts such findings as the findings of the Court on the Missouri Human Rights Act claims." Because the trial court expressly adopted the findings of the jury, and because the damages available to plaintiff are identical under the age and sex discrimination claims, there is no practical difference in the result. Therefore, plaintiff concedes that the judge's obvious intent was to adopt the jury verdicts, and has no objection to defendants' request that this Court reform the judgment in accordance with the jury's verdict.

III. The trial court properly found that substantial evidence supported plaintiff's age discrimination claim in that ample evidence was admitted to support each element of his claims of age discrimination.

Defendants accurately state that the analysis for an age claim under the MHRA is the same as the analysis under federal law. Appellant's Subst. Brf. At 37. The Eighth Circuit has set out clearly the proper burden-shifting analysis for a failure to hire case based on circumstantial evidence, and plaintiff produced substantial evidence at trial to support the

circuit court's decision. In *Schiltz v. Burlington Northern Railroad, et al.*, 115 F.3d 1407, 1412 (8th Cir. 1997), the Eighth circuit laid out this framework:

> [T]his court must employ the familiar burden-shifting analysis established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). We have held this burden-shifting analysis to be applicable in ADEA cases. . . . Therefore, for Schiltz's failure to hire claim, he may establish a prima facie case of age discrimination by proving that (1) he belonged to the protected class; (2) he was qualified for the positions for which he applied; (3) he was not hired for the position applied for despite his being sufficiently qualified; and (4) the employer finally filled the position with a person sufficiently younger to permit an inference of age discrimination. . . . If Schiltz makes a prima facie case, thus raising an inference of age discrimination, the burden of production then shifts to BNR to articulate a legitimate, nondiscriminatory reason for its decision not to hire him. . . . If BNR meets that burden of production, then Schiltz must prove that BNR's reason is merely a pretext for discrimination.

A. Plaintiff's *Prima Facie* Case

1. Igoe belonged to the protected class.

Plaintiff was born on February 28, 1934. Appellants' App. A63. The protected class includes prospective employees from age 40 to 70. §213.010.1 RSMo (2000). The failures to hire plaintiff occurred in June of 1998 and January of 2000 (Tr. 52-53, 67-68; App. A1;

Appellants' App. A64), when plaintiff was 64 and 65 years old, respectively. Plaintiff established substantial evidence on this element.

2. Igoe was qualified for the positions for which he applied.

Descriptions of the jobs at issue were entered into evidence, along with plaintiff's testimony of his qualifications and experience. Tr. 36-43; Resp. App. A2-A5. Plaintiff's resume also detailed his qualifications for the jobs. Tr. 49, Resp. App. A6. Defendants admitted they were aware of his qualifications and that he met the standards for both the ALJ and LA jobs. Tr. 251-253, Resp. App. A7-A10.

3. Igoe was not hired for the positions applied for despite his qualification.

There is no dispute that Igoe was not hired for any of the thirteen jobs at issue. Tr. 52-53, 67-68; Resp. App. A1, Appellants' App. A64.

4. Defendants hired persons sufficiently younger to permit an inference of age discrimination.

The U.S. Supreme Court, as well as courts within the Eighth Circuit, have held that an inference of age discrimination is permissible even when the person or persons hired are not outside the statutorily protected age group, so long as they are "sufficiently younger" than the plaintiff. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S 308, 312, 116 S.Ct. 1307, 1310 (1996); *Keathley v. Ameritech Corp.*, 187 F.3d 915, 920 (8th Cir. 1999); *Galambos v. Fairbanks Scales*, 144 F.Supp.2d 1112, 1122 (E.D.Mo. 2000). Here, some of

the persons hired were younger than forty, and all thirteen of the successful candidates were significantly younger than Igoe.

The people hired for the four[3] job openings in 1998, and their ages at the time, are Margaret Landolt, 42; Jennifer Schwendemann, 32; Suzette Caldwell, 42; and Linda Wenmen, 42. Tr. 152-53, Resp. App. A11. Igoe was 64 at that time. Tr. 7, 56-57, Appellants' App. A63.

The nine people hired for the second round of jobs, and their ages at the time, are Karen Bosley, 38; Paula McKeon, 39; Jo Ann Karll, 51; Emily Fowler, 42; Karla Boresi, 34; Lisa Meiners, 30; Lori Neidel, 36; Michael Moroni, 41, and David Zerrer, 55. Tr. 160-62; Resp. App. A17-A18. Igoe was 65 at that time. Tr. 7, 56-57, Appellants' App. A63.

The average age of the successful candidates in the first round of hires was 39.5, which is over 24 years younger than plaintiff at that time. For the second round of hires, the average age was 40.6 – again, over 24 years younger than plaintiff at the time. The new hires were sufficiently younger than plaintiff to permit an inference of age discrimination. Plaintiff has clearly established his prima facie case.

B. Defendants did not meet their burden of production because they did not explain the reasons for not selecting plaintiff.

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[3]Because Schwendemann's selection as ALJ is what created one of the open jobs for LA, there actually could only have been three jobs open prior to her selection. That defendants knew four jobs were open gives rise to an inference that Schwendemann was pre-selected for the ALJ job. Tr. 258-61.

Once a plaintiff has made his prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its failure to select the plaintiff. *Schiltz v. Burlington Northern Railroad, et al.*, 115 F.3d at 1412 (8th Cir. 1997). Although defendants here identified a decision maker and articulated reasons for the failure to hire plaintiff in pretrial discovery[4], defendants changed their position at trial and identified a different decision maker, but articulated no reason for his decision. Tr. 168-170, 221-23, 238-240, 246. Defendants maintained this position before the Court of Appeals – that they were not "privy" to the reason Igoe was not hired (App. Br. 19). Defendants to this day have not explained the reason they failed to hire Igoe. Thus, defendants have failed to articulate *any* reason for the deceased governor's alleged decision not to hire plaintiff. This is not sufficient to meet the required burden of production.

The U.S. Supreme Court clearly described the employer's burden of production at this stage of the analysis in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).[5] In *Burdine*,, the plaintiff alleged the employer had not promoted her into a supervisory job because of her gender, and instead hired a male. The Court applied the *McDonnell Douglas* burden-shifting analysis, and held that the plaintiff's prima facie case raises a presumption of discrimination unless otherwise explained by the

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[4]Plaintiff read these reasons into evidence at Tr. 168-170.

[5]This analysis was followed by the Missouri Court of Appeals in *R.T. French Co. v. Springfield Mayor's Commission on Human Rights and Community Relations, et al.*, 50 S.W.2d 717, 722 (Mo. App. S.D. 1983).

employer. "[I]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." 101 S.Ct. at 1094, 67 L.Ed.2d at 216. The Court further explained:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. . . . To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. . . . Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Burdine, 101 S.Ct. at 1094-95, 67 L.Ed.2d at 216-17. The Court remanded for consideration of whether the defendant had produced enough evidence to meet its burden.

Although the burden of production required of the employer under *Burdine* is not heavy, it does require *some* explanation from the employer for its actions. In *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057 (11th Cir. 1994), a failure to hire case, the employer acknowledged that one of its employees, Catherine Alexander, had conducted an initial

interview with the plaintiff. However, Alexander could not recall the interview, or why she did not recommend the plaintiff for a second interview with her boss. In the subsequent race discrimination litigation, both Alexander and her boss testified that they did not consider race in their hiring decisions, although all the applicants hired were white, while the plaintiff was black. As here, the plaintiff also showed that he had significantly more experience than any other applicant. *Id.* at 1059. Reversing summary judgment for the employer, the Eleventh Circuit held that the employer's inability to recall its reason for not hiring the plaintiff was not enough to meet its burden of production, so that the plaintiff's "prima facie case stands unrebutted, and discrimination is established." *Id.* at 1062. The Eighth Circuit has cited *Turnes* with approval. *Buchholz v. Rockwell International Corp.*, 120 F.3d 146, 150 (8th Cir. 1997).

Here, as in *Turnes*, defendants claim that they simply do not know why the decision not to hire plaintiff was made. Because plaintiff has established his prima facie case, and because defendants fail to articulate a nondiscriminatory reason for the failure to hire, the presumption of discrimination remains unrebutted. This Court need look no further at the *McDonnell Douglas* framework, and judgment for plaintiff is proper.

C. Substantial record evidence supports a finding that defendants' earlier articulated reason, which it now denies, is a pretext for age discrimination.

Before the EEOC and during discovery in this case, defendants claimed that the person who made the decisions at issue was Department Director Karla McLucas. Tr. 168-70

(Defendants' Answer to Plaintiff's Interrogatory No. 2). Defendants claimed that the reason for not hiring plaintiff was the following:

> Ms. McLucas did not hire plaintiff because he was not the best qualified person for the job. Further, plaintiff was not hired because he did not express interest in the work or making improvements to the system. Plaintiff indicated several times during the interview that what interested him about the position was the judicial retirement plan and being in a position of leadership. Plaintiff was not able to clearly distinguish the difference between an administrative law judge as part of the executive branch and Article 5 judges who are part of the judicial branch.

Tr. 168-170; 314-315. However, at trial, defendants changed their postition, and claimed McLucas merely made recommendations to the governor. Tr. 246, L. 3-9. The governor chose people other than those she had identified as the most qualified, and she did not question the decision "because it was at the governor's pleasure." Tr. 238-240.

Assuming *arguendo* that defendants had continued to rely on the reasons articulated during the pretrial phases of the case, the burden shifts to plaintiff to produce evidence that the articulated reasons were pretextual. The following evidence supports a finding that the reasons given are a pretext for age discrimination.

1. The evidence contradicts the alleged reasons for not hiring Igoe.

a. "[H]e did not express interest in the work or making improvements to the system."

McLucas created typed interview notes soon after her first interview with Igoe, and before she knew he had filed an age discrimination charge. Tr. 251. These notes contradict the statement above, as well as the rest of the interrogatory statements about Igoe's qualifications. She wrote, "This position interests him because the Division of Workers' Compensation needs experienced workers' compensation help. Applicant wants to pay back to the Bar, 'to pick up an oar and move it forward.'" Tr. 253, App. A7-A8.

After Igoe filed his charge, the EEOC conducted an investigation. In response to the charge, McLucas signed an affidavit describing the interview process, and giving reasons similar to those in the subsequent interrogatory answer for not hiring Igoe. In that affidavit, as in the interrogatory answer, she never mentioned that anyone else was involved in the decision. Tr. 253-255, Resp. App. A12-A14. Neither did she mention Igoe's statement in her interview notes about helping the system (Tr. 255), but rather stated, "He did not express interest in making improvements to the system." Tr. 254, Resp. App. A12-A14.

On the other hand, when describing the four younger women who got the jobs, McLucas stated, "Each of the candidates chosen for the positions demonstrated enthusiasm about the work and the position and seemed eager to make improvements to increase the efficiency within the division. The candidates were energetic and asked questions indicating that they understood the role of the legal advisor and administrative law judge and were willing to carry a heavy workload." Tr. 256. At trial, when questioned about these statements, McLucas admitted that Igoe had never indicated he was not willing to carry a heavy workload. Tr. 256.

These claimed reasons for not hiring Igoe – that he was not interested in improving the system, was not energetic, and was not willing to carry a heavy load – are subjective conclusions about Igoe. These conclusions have no factual support in the record, and are actually contradicted by McLucas' own interview notes. But most importantly, they also support a finding that she was influenced by stereotypes about older workers – that they have less energy, are less willing to work hard, and are less forward-thinking. Such subjective conclusions are suspect and support a finding of impermissible motive, particularly where the objective qualifications (here, relevant experience) strongly support the conclusion that the plaintiff is better qualified than the selected persons. *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1129 (8th Cir. 1998)**.**

b. "[W]hat interested him about the position was the judicial retirement plan and being in a position of leadership."

McLucas claimed in her affidavit at the EEOC stage, as well as at trial, that Igoe stated in his interview that "what interested him about the job was the judicial retirement plan and being in a position of leadership." Tr. 254, Resp. App. A12-A14. She alleges she could remember nothing else about the interview, except that he had worked for the state before, and that the interview was short. Tr. 205-207. Igoe denied making such a statement, and testified that in fact, he told her he did not want to retire, and intended to work for a long time. Tr. 51, 866-87.

In contrast to McLucas's testimony about the interview, her interview notes describe the interview in detail, and contain no statements by Igoe about the retirement plan. Resp.

App. A7-A10. Neither does any statement about this alleged "interest in the judicial retirement plan" appear in the notes of McLucas's assistant Thomas Pfeiffer, who was also present and took notes during Igoe's second interview. Tr. 305. Yet, Pfeiffer admitted that a younger candidate, Michael Moroni, expressed interest in the retirement plan. Tr. 305-06. Moroni was awarded a job. Tr. 306.

Igoe's testimony denying that he made such a statement, together with its absence from the interview notes, and the award of a job to another candidate who clearly stated he was interested in the retirement plan, provide substantial evidence to conclude that this articulated reason for not hiring Igoe is a pretext. The fact that McLucas thinks Igoe was mainly interested in retirement when the objective evidence plainly contradicts that assertion also supports the conclusion that Igoe's age was on her mind and influenced her decision.

c. "Plaintiff was not able to clearly distinguish the difference between an administrative law judge as part of the executive branch and Article 5 judges."

Again, McLucas's own interview notes described Igoe's discussion of the differences between an administrative judge and an Article 5 judge. App. A7-A8. Igoe not only had years of experience before administrative law judges in the Workers Compensation Division. Tr. 41. He had also served on the Labor and Industrial Relations Commission, and had actually decided appeals from workers compensation rulings by administrative law judges. Tr. 40. The record contains substantial evidence to support a finding that this reason is also pretextual.

2. Defendants' claimed criteria are subjective, and contradict the objective evidence of plaintiff's qualifications.

In addition to the evidence that contradicts McLucas's statements about Igoe's purported lack of qualifications, the fact finder is entitled to consider the subjectivity of those reasons**,** especially when objective measures indicate plaintiff is more qualified than those who were offered jobs. In *McCullough v. Real Foods, Inc.*, 140 F.3d 1123 (8th Cir. 1998), the employee alleged that she had not been selected for a promotion to deli manager because of her race. The plaintiff, a black woman, possessed fifteen months more experience working in the deli than the white woman who was selected for the job. The employer claimed it did not promote her for subjective reasons – that the plaintiff planned to quit soon, refused to work past 3:00 p.m., wanted too much time off, and would not accept the job for less than $9.00 per hour. The plaintiff denied making these statements.

The Eighth Circuit reversed summary judgment for the employer, stating, "Critical to our analysis in this case is the extremely subjective nature of the employer's stated promotion criteria." *Id.* at 1129. "[W]hen the employer's asserted nondiscriminatory reason are essentially checkmated by McCullough's denials that she ever made the statements the employer advances as its nondiscriminatory reasons, the failure to promote the objectively better qualified black woman raises a reasonable, nonspeculative inference that the decision to promote the less qualified white woman was based on an impermissible consideration...." *Id.; see also Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612, 615 (8th Cir. 1998) ("[S]ubjective criteria for promotions 'are particularly easy for an employer to invent in an

effort to sabotage a plaintiff's prima facie case and mask discrimination.'")(internal citation omitted); *Coble v. Hot Springs School Dist.*, .682 F.2d 721, 726-27 (8th Cir. 1982). Under the reasoning of *McCullough, Lyoch* and *Coble*, McLucas's subjectivity in articulating her reasons is subject to abuse, and supports an inference of pretext. The nature of her subjective statements – Igoe's perceived lack of eagerness, unwillingness to move the department forward, and interest in retirement – also supports a finding that the true reason for not hiring plaintiff was his age.

3. Defendants have changed their explanation for their action.

When an employer modifies its explanation of why a plaintiff was not hired, an inference of pretext for discrimination can be drawn. *Newhouse v. McCormick*, 110 F.3d 635, 640 (8th Cir. 1997); *Locke v. Kansas City Power and Light Co.*, 660 F. 2d. 359, 365 (8th Cir. 1981); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1064 (8th Cir. 1988). In *Newhouse*, a sixty-one-year-old man applied for a sales representative job opening with McCormick, a job he formerly held prior to a downsizing. McCormick later recreated the former sales jobs, and sought to fill four openings. Newhouse had good sales records in his prior employment with McCormick. He was interviewed with the hiring manager, but was not hired. Instead, a thirty-seven-year-old got the job. *Newhouse*, 110 F.3d at 637-38.

During the course of the agency investigation and subsequent litigation, the hiring manager offered various reasons for not hiring Newhouse. Initially, he claimed Newhouse

was not qualified, but then admitted at trial that he was. He also wrote a letter stating that the younger applicant was hired because he had direct experience with a new customer; later, he signed an affidavit explaining that person was hired because he had good ideas for expanding the business (a fact disproved at trial). *Id.* at 638.

After a verdict for Newhouse, McCormick appealed on the sufficiency of the evidence. The Eighth Circuit applied the *McDonnell Douglas* burden-shifting analysis, and focused on the issue of pretext. "Because McCormick's 'nondiscriminatory reasons' for not hiring Newhouse were various and always changing, McCormick's motive becomes suspect" *Id.* at 640. Quoting the U.S. Supreme Court in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed2d 407 (1993), the Court stated, "The factfinder's disbelief (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.*

Likewise, in *Brooks v. Woodline Motor Freight, Inc.,* the Eighth Circuit found that where the plaintiff's objective qualifications were good, and there was "evasion and inconsistency on the part of [the employer] in articulating [its] reasons," there was ample evidence to support a finding of pretext. *Brooks,* 852 F.2d 1061 at 1064-65. Here, as in *Brooks* and *Newhouse*, defendants have produced inconsistent explanations for their failure to hire Igoe – at one point, under oath, they claimed McLucas made the decisions based on purportedly inferior subjective qualifications, but at trial, they claimed McLucas did not even make the decisions. This inconsistency and vacillation supports a finding that the defendants' explanations are a pretext for impermissible discrimination.

4. Defendants failed to hire other older applicants who were objectively better qualified than the younger candidates hired.

Defendants argue that the younger ages of all the people hired is not enough to infer age discrimination, and that "that is all that Igoe had." App. Br. 16. Defendants are wrong on both counts. As discussed above, the prima facie evidence *was* enough to infer age discrimination because at trial, defendants could not come up with an explanation for why Igoe was not hired. Igoe had proven his expertise with the subject matter, workers' compensation law, was far greater than any of the selected applicants, and the applicants were all substantially younger than him. Tr. 154-157, Resp. App. A15.

But the evidence went further than that. In the first round of hires, Igoe was not the only candidate who was older, had better objective qualifications, and was not hired. In fact, seven persons over the age of 50 applied and were interviewed, and none of them were hired, despite the fact that each of them had far more workers' compensation experience than any of the four persons who were hired. Tr. 157-162, Resp. App. A16-A18. Further evidence of age discrimination consisted of another agency charge based on the same hiring decisions**,** which had been filed by an applicant who was sixty years old at the time of the 1998 hiring process. Tr. 164-166, Resp. App. A19.

The Eighth Circuit has held that a defendant's treatment of others in the protected class, as well as other charges of discrimination against a defendant, are relevant and support an inference of age discrimination. In *Phillip v. ANR Freight Systems, Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991), *cert. denied* 506 U.S. 825, 113 S.Ct. 81, 121 L.Ed.2d 45 (1992) the

Court reversed and remanded the case for new trial because evidence of other complaints of same type of discrimination had been excluded. *See also Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 154 (8th Cir. 1990) *cert. denied* 498 U.S. 854, 111 S.Ct. 150 , 112 L.Ed.2d 116 (1990)(error to exclude evidence of discrimination against others because such evidence is probative of motive in employment cases).

The law is clear that once the plaintiff has made his prima facie case, and has proven pretext of the articulated reason for the employer's action, a fact finder is normally entitled to (but not *required* to) make a finding of discrimination. *St. Mary's Honor Center v. Hicks, supra*. In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108 (2000), the Supreme Court stated, "[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Plaintiff has exceeded that standard here; in addition to the prima facie case, plaintiff produced the additional evidence described above, and demonstrated that the defendants have changed their claim as to the reason for the failure to hire. *Newhouse*, 110 F.3d at 640.

IV. The trial court did not err in finding that substantial evidence supported plaintiff's retaliation claim in that ample evidence was admitted to support an inference of retaliation.

Because the Court below entered its own order granting judgment on both the age discrimination and retaliation claims, and used the jury's verdict only as an advisory verdict, it is unnecessary to review the ruling on JNOV. The correct standard for review of the Court's

order and judgment is for abuse of discretion. *First Bank of St. Charles v. Frankel*, 86 S.W.3d 161, 172 (Mo. App. 2002).

For a retaliation claim, plaintiff must produce evidence to support three elements – that plaintiff engaged in protected activity, that he was not hired, and that there is a causal connection between the protected activity and the failure to hire. *Evans v. Pugh*, 902 F.2d 689, 693 (8th Cir. 1990); App. Br. 22. Plaintiff produced substantial evidence on each element, as explained below.

A. Plaintiff engaged in protected activity.

Plaintiff's first charge, filed in August of 1998, was protected activity. Tr. 56-57, Appellants' App. A63. There is no dispute on this point.

B. An adverse employment action occurred - plaintiff was not hired.

There is also no dispute as to whether plaintiff was hired for the next job openings, which occurred in 1999 – he was not hired. Tr. 67-68, Appellants' App. A64.

C. A causal connection exists.

The causal connection between plaintiff's protected activity (his first charge) and the adverse action (defendants' failure to hire him) stems from the fact that defendants refused to hire plaintiff at their very next opportunity. In this situation, where the plaintiff is not an employee of the defendant, timing is irrelevant. Defendants seek to impose a requirement that the plaintiff *must* prove timing plus additional evidence to support a retaliation claim. Subst. Brf. At 45. The cases described below, as well as the *Kipp* case cited by defendants (Subst. Brf. At 44), do not require proof of temporal proximity. Rather, they simply stand for

the proposition that timing is one way of meeting the burden of proof, which alone may not always support an inference of causation. The causal connection requirement, as correctly stated in *Kipp*, is that the plaintiff must produce evidence to support an inference that a retaliatory motive played a part in the adverse action. *Kipp v. Missouri Highway and Transportation Commission*, 280 F.2d 893, 898 (8th Cir. 2002).

The Eighth Circuit further explained this in *Warren v. Prejean*, 301 F.3d 893 (8th Cir. 2002). There, the employee's termination occurred four and a half years after her protected activity, and the employer asked the court to find, as a matter of law, that this precluded a finding of causal connection. The district court refused, and the Eighth Circuit upheld the ruling, stating that where there is other circumstantial evidence to support the causal connection, close timing is not essential. *Id.* at 900.

Often, with a current employee who has been discharged, timing between the employee's complaint and the discharge is probative evidence. However, in a situation where the plaintiff is not an employee, but has applied for two consecutive job openings with the same employer and is interviewed by the same decision maker, close timing between the two decisions is not critical. It is enough to prove that the decision maker knew that Igoe had filed a charge based on the first refusal to hire, and the same decision maker again refused to hire him at her next opportunity.

It is undisputed that the decision maker for the second round of hirings knew of Igoe's discrimination charge, under either of defendants' theories regarding who actually made the decision. McLucas chose and headed the interview panel of four people for the second round

of interviews, and included an EEO officer with whom she had worked. She and her assistant, Thomas Pfeiffer, comprised half of the interviewing panel, and both admitted they knew Igoe had filed the charge. This time, McLucas's panel rated Igoe at the bottom of the barrel of candidates, despite his extensive experience in workers compensation law. This is circumstantial evidence that supports an inference of a retaliatory motive.

Even assuming the truth of McLucas's and Pfeiffer's testimony that they did not make the decision, but it was really made in the governor's office, the record still supports a finding that the governor's staff also had knowledge of Igoe's charge. Tr. 245. Defendants' knowledge of the charge, coupled with Igoe's superior objective qualifications and the fact that this was the very next opportunity defendants had to deal with Igoe, support an inference of retaliatory motive.

V. The circuit court did not err in granting plaintiff equitable relief of instatement because (A) plaintiff was entitled to equitable relief to make him whole, and an opportunity for a "fair selection process" is an improper remedy for age discrimination cases; (B) defendants failed to prove that plaintiff would not have been hired absent discrimination, and the jury's and judge's findings that he would have been hired were supported by substantial evidence; (C) instatement is appropriate equitable relief regardless of whether an actual vacancy exists at the time of the order, (D) separation of powers does not preclude an order instating plaintiff to an ALJ job, and defendants failed to preserve that constitutional issue; and (E) the order of instatement was not "too specific."

A. Plaintiff is entitled to instatement, back pay, front pay, and any other equitable relief calculated to "make the plaintiff whole," and an opportunity for a "fair selection process" is an improper remedy for age discrimination cases.

Defendants assert that to make plaintiff whole, he need only be given a fair job selection process. App. Subst. Brf. 47, subheading A. In support of this assertion, defendants state, "Plaintiff alleges that he was discriminated against during the job selection process ... [T]o give him what he was allegedly denied, he must be given a fair selection process ... Essentially, plaintiff has a due process claim." App. Subst. Brf. 47. Defendants slyly confuse legal theories in order to mismatch remedies. Defendants attempt to merge a constitutional due process claim into plaintiff's statutory age discrimination claim. In doing so, Defendants assert that the proper remedy for a violation of the age discrimination statutes is merely another opportunity to apply and to be treated fairly in the hiring process. Defendants' mischaracterization of plaintiff's statutory discrimination claim as a due process claim is completely unfounded. While it is true that an opportunity for a "fair selection process" may be an appropriate remedy for a constitutional due process claim, Defendants may not randomly select a remedy from an entirely distinct legal theory and apply it to a statutory age discrimination claim.

To the contrary, federal cases under employment discrimination statutes have long held that back pay, reinstatement, hiring, and promotion are all remedies well within the court's discretion, and in fact are the *preferred* remedies for victims of discrimination. When discrimination is proven, placing the plaintiff into a job is a typical award as the appropriate

remedy for unlawful discrimination. *Tadlock v. Powell,* 291 F.3d 541, 548 (8th Cir. 2002). "Reinstatement is the preferred remedy for unlawful employment discrimination, and front pay is a disfavored alternative, available only when reinstatement is impracticable or impossible." *Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002). As the Western District of Missouri has declared, "Reinstatement is such a basic element of Title VII relief that granting such relief is presumed appropriate and, except in extraordinary cases, is required." *Evans v. The School District of Kansas City, Missouri,* 861 F.Supp. 851, 858-59 (W.D.Mo. 1994).

Courts have broad discretion to order those remedies which they find appropriate in anti-discrimination cases. *Garza v. Brownsville Independent School Dist*., 700 F.2d 253, 255 (5th Cir. 1983). These remedies may include, but are not limited to, "reinstatement…with or without back pay …, or any other equitable relief as the court deems appropriate." *Locke v. Kansas City Power & Light Co*., 660 F.2d 359, 367 (8th Cir. 1981), *citing Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763 (1976). A court's discretion, however, must always be directed toward the goal of "making whole" the employee who has been discriminated against. *Garza,* 700 F.3d 253 at 255. In order to make victims of discrimination whole, they are presumptively entitled to reinstatement and back pay. *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir.1985). Reinstatement or hiring preference remedies are to be granted in all but the most unusual cases, *id*., and the most extraordinary circumstances, *Standley v. Chilhowee R-IV Sch. Dist.,* 5 F.3d 319, 322 (8th Cir. 1993).

In *King v. Staley*, 849 F.2d 1143 (8th Cir. 1988), the trial court determined that the plaintiff was not promoted because of her race, but it did not order back pay or front pay at the rate of pay for the higher level job she had been denied. For injunctive relief, the trial court ordered only that the plaintiff be afforded the opportunity to seek promotion when the next higher level job became available. On appeal, the Eighth Circuit held the trial court's order granting plaintiff only an opportunity for a position when one became available constituted an abuse of discretion. The Eighth Circuit remanded the case, ruling that the plaintiff must be paid a the higher pay rate of the job she was denied until she could be instated to a such a position, or until she turned one down. *King*, 849 F.2d at 1144-45. Clearly, the discrimination statutes require the victim of discrimination to be awarded more than merely another shot at a job interview.

Once discrimination is proven, a plaintiff is presumptively entitled to back pay and individual injunctive relief. If an employer seeks to avoid such relief, it has the burden of proving by clear and convincing evidence that even absent discrimination, the plaintiff would not have been hired. *Nord*, 758 F.2d 1462 at 1463. This burden-shifting is proper, because it is the defendant's "unlawful acts [that] have made it difficult to determine what would have transpired if all parties had acted properly." *King v. Trans World Airlines, Inc.*, 738 F.2d 255 (8th Cir. 1984). In the present case, defendants offered no evidence to prove that plaintiff would not have been hired absent discrimination.

Defendant relies on *Valcourt v. Hyland*, 503 F.Supp. 630, 635 (D.Mass. 1980), a First Amendment case, to support their contention that plaintiff should be made whole through a

"fair selection process" rather than instatement, and to claim that there are private and public interests here that do not entitle the plaintiff to instatement. However, in *Valcourt*, the district court did not deny instatement on this basis. Rather, the court in *Valcourt* determined that the reason for denying the plaintiff instatement was the discord between the parties that would have seriously impaired the resulting employment relationship if the plaintiff were instated. The court found that the "then-existing antagonisms, growing out of past wrongs, [made] the development of an effective future relationship impossible." 503 F.Supp. 630, 635 (D. Mass. 1980). The court did *not* rule that individuals must be given a fair selection process rather than instatement or front pay. Rather, the plaintiff was awarded back pay and front pay in lieu of instatement, with a proviso that instatement remained a viable option available to the parties.

Furthermore, Defendants misconstrue *King v. Trans World Airlines, Inc*., 738 F.2d 255, 259 (8th Cir. 1984). Defendants argue that a court must "determine whether [the] employer would have hired [the] plaintiff absent the unlawful discrimination before plaintiff is entitled [to instatement]." *Id.* (emphasis added). *King* does not quite stand for this proposition. *King* states that before the plaintiff is granted instatement, the defendant should be given the *chance to prove* that the plaintiff would not have been hired absent discrimination. The court in *King* ruled that "[u]nlawful discrimination having been proven, . . . the burden is on [the *employer*] to prove by clear and convincing evidence that [appellant] would not have been . . . hired in the absence of discrimination," *Id., citing Ostroff v. Employment Exchange, Inc.*, 683 F.2d 302, 304 (9th cir. 1982) (emphasis added). The court

did not rule that instatement was an unfair remedy or that the plaintiff could only receive fair consideration of an application rather than instatement. Placement in a job remains the preferred remedy in employment discrimination cases, and once the plaintiff proves his prima facie case of discrimination, the burden remains on the defendant to clearly and convincingly demonstrate that the plaintiff would not have been hired absent discrimination.

In any event, defendants have waived this argument by failing to raise it at any point below. Defendants simply state that Igoe would not have been hired even if defendants had not illegally discriminated against him, relying only on the testimony of a non-decisionmaker. Defendants did not argue the point to the jury or the judge at trial, and did not seek an instruction to that effect.

The jury was correctly instructed that their verdict must be for Igoe if they found that Igoe's age motivated defendants' failure to hire, *and that he was thereby damaged.* LF 106. The jury assessed Igoe's damages at the amount of lost wages commensurate for the ALJ position, so the jury must have believed that it was defendants' illegal age discrimination that caused his loss of ALJ wages. At defendants' request, the jury was also instructed that they could not find for Igoe just because the decision may have been harsh or unreasonable. LF 106. Clearly, the jury believed that he was the victim of age discrimination, and that he would have earned the wages of an ALJ, but for the discrimination. If they did not believe so, then they would not have awarded lost wages in that amount.

Additionally, Judge Cohen's opinion determines that but for the discrimination, Igoe would have been hired as an ALJ. She awarded ALJ wages beyond the date of the verdict,

adding them to Igoe's jury verdict at the same rate from the date of verdict to the date of her opinion. LF 97-100. Judge Cohen further ordered that Igoe be instated to an ALJ position, thereby indicating she believed he would have been hired absent discrimination. LF 97-100. Defendants had ample opportunity to convince the trial court otherwise in their motion for new trial, in response to plaintiff's motion for equitable relief, or at the bench hearing on equitable relief after the trial. LF 64-74, 79-83. At no points did defendants argue to the trial court that Igoe was only entitled to a "fair selection process" instead of lost wages, instatement or front pay. Rather, defendants argued only that instatement was inappropriate because there were no openings. LF 64-74; 79-83.

B. Defendants failed to prove that plaintiff would not have been hired absent discrimination, and the jury's and judge's findings that he would have been hired were supported by substantial evidence, making an award of back pay and instatement appropriate.

Apparently defendants now take the position that this is a "mixed motive" case[6], although no such argument was raised in the trial court or on appeal. Defendants argue that because it would have taken the same action in the absence of illegal discrimination, *no* damages can be awarded. Again, the problem with defendants' argument is that they never raised it at trial, never asked for a mixed motive instruction, and certainly never carried their burden of proving this defense by clear and convincing evidence. *King v. Trans World*

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[6]Defendants cite 42 U.S.C. §2000e-5(g)(2)(B), the mixed-motive provision of Title VII. App. Sub. Brf. at 49.

Airlines, Inc., 738 F.2d 255, 259 (8th Cir. 1984). The extensive review of McLucas' testimony in defendants' substitute brief, pp. 49-52, does not aid defendants, because it is clear that the jury and judge did not believe her, and she admits she did not make the decision.

Back pay and instatement are warranted in this case because the judge and jury clearly believed Igoe would have been hired as an ALJ if defendants had not discriminated against him because of his age. In *Albemarle Paper Co. et al. v. Moody et al.,* 422 U.S. 405 (1975), the U.S. Supreme Court reversed a district court's refusal to award back pay in a Title VII race case, stating, "Backpay has an obvious connection with [the purpose of the anti-discrimination statutes]. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . ." 422 U.S. at 417-418. Discussing the make-whole purpose of Title VII, the court stated, "It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination. . . ." *Id.*

C. Instatement is appropriate equitable relief regardless of whether an actual vacancy exists at the time of the order

The standard of review for an order of instatement is for an abuse of discretion. *See Yancey v. Weyerhauser Company,* 277 F.3d 1021, 1025 (8th Cir. 2001). Such injunctive relief is typically awarded as the appropriate remedy for unlawful discrimination. *Tadlock v.*

Powell, 291 F.3d 541, 548 (8th Cir. 2002). *See also, Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002); *Evans v. The School District of Kansas City, Missouri*, 861 F.Supp. 851, 858-59 (W.D.Mo. 1994).

In his motion for equitable relief, Igoe initially sought front pay in lieu of instatement. L.F. 54. However, in light of defendants' response, it became clear that defendants were not claiming instatement was impracticable because of potential hostility or disruption in the workplace; defendants only cited the lack of job openings. L.F. 80. In reply, plaintiff requested instatement because defendants did not produce any evidence that instatement would not be impracticable. Plaintiff requested an order of instatement to the next available position, and for an order that defendants pay him as though he had been reinstated in the meantime. L.F. 85. Judge Cohen simply ordered instatement. L.F. 96.

The relief sought by plaintiff – instatement to the next available position, with commensurate pay until then – has been upheld by the U.S. Supreme Court in *Pollard v. E.I. duPont de Nemours & Co.*, 532 U.S. 843, 846, 121 S.Ct. 1946, 1948, 150 L.Ed.2d 62, 66 (2001). "When an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs." (*citing King v. Staley*, 849 F.2d 1143, 1145 (8th Cir. 1988)); *accord Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984). Indeed, this is the common solution to the problem.

The Eighth Circuit has also established that there need not be an actual job opening before equitable relief can be rendered. In *King v. Staley, supra,* the Eighth Circuit directed a trial court to order the employer to offer a promotion to the plaintiff when one came available, and to pay her at the promotion-level rate until then. *King,* 849 F.2d at 1144-45. Explaining this decision, the Eighth Circuit states, "'A district court is obligated to grant a plaintiff who has been discriminated against . . . the most complete relief possible.' . . . 'There is a strong presumption that persons who have been discriminated against are entitled under Title VII to back pay.'" *King,* 849 F.2d at 1144 (internal citations omitted). Thus, the lack of an open position does not relieve the defendants of their obligation to make plaintiff whole. If defendants are unable to place plaintiff in an ALJ job because there are no openings, then they are required to continue to pay plaintiff his salary until he can be placed.[7]

The Eighth Circuit ruled similarly in *E.E.O.C. v. The Rath Packing Co., et al.,* 787 F.2d. 318 (8th Cir. 1986), despite there being no current vacant jobs. "Where no vacancy exists, the plaintiff is entitled to receive monthly payments equal to the difference between what plaintiff would receive in a comparable position and what the plaintiff earned in mitigation of damages. These payments should continue until the plaintiff is hired by the employer." *Rath,* 787 F.2d at 335 (*citing Briseno v. Central Technical Community College Area,* 739 F.2d 344, 348 (8th Cir. 1984)). Even where the defendant was a federal executive

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[7]In 1998, the legislature approved the continued hiring of new ALJ's annually through 2004. §287.610.1 RSMo (2004). It was this legislation that enabled defendants to hire the 13 ALJ's and LA's at issue in this case.

agency, an order was entered requiring the agency to place the plaintiff in the next available job, as well as payment of full back pay and front pay. *Felder & Simmons v. Glickman,* 2001 U.S. Dist. Lexis 22646 at 16-17 (D.D.C. 2002). *See also Lander v. Lujan*, 888 F.2d 153, 159 (D.C.Cir. 1989) (Justice Ginsburg concurring that bumping an innocent employee to place the plaintiff in that case into a unique director-level job was proper, but explaining that the normal propriety of the "rightful place" approach is to order instatement to the next available job, coupled with front pay until that time); *Tye v. Houston County Board of Education, et al.,* 681 F.Supp. 740, 748 (M.D. Ala. 1987) (ordering school district to instate the plaintiff to a high school principalship when an opening occurs, to pay wages and benefits as if she were a principal in the meantime, and to give her the "right of first refusal," to expire only when she accepts or rejects an offer).

It was clearly within Judge Cohen's power to order instatement. As the Eighth Circuit made clear in *King v. Staley, supra,* until instatement can be effected, defendants must pay to plaintiff ALJ wages in order to make him whole as required by the U.S. Supreme Court in *Albemarle.*

D. Separation of powers does not preclude an order instating plaintiff to an ALJ job, and defendants failed to preserve that constitutional issue.

1. Defendants failed to preserve the issue.

Rule 83.08(b) states that a party "shall not alter the basis of any claim that was raised in the court of appeals brief. . . ." Yet, this is exactly what defendants have done on the

"separation of powers" issue. Because the language of the rule is mandatory ("shall not"), it is too late to raise the argument now.

Even absent the rule, both Missouri law and federal law mandate that constitutional issues such as separation of powers must be raised at the earliest opportunity, or they are waived. *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836 (1948); *Hoskins v. Business Men's Assurance, et al.,* 79 S.W.3d 901, 903 (Mo. *banc* 2002); *City of St. Louis v. Missouri Commission on Human Rights,* 517 S.W.2d 65, 71 (Mo.1974). The rationale for this is sound. "Generally, constitutional issues must be raised at the earliest opportunity if they are to be preserved for review. This is necessary in order to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Call v. Heard,* 925 S.W. 2d 840, 847 (Mo. *banc* 1996).

In *Hollis v. Blevins, et al.,* 926 S.W.2d 683 (Mo *banc* 1996), one of the losing defendants in a personal injury case filed a motion for new trial, challenging the constitutional validity of the statute providing for joint and several liability of tortfeasors. On appeal, the court of appeals first transferred the case to the Supreme Court because the constitutional issue was within the Supreme Court's exclusive jurisdiction. The Supreme Court remanded to the court of appeals after holding the appellant had waived the constitutional challenge by not raising it earlier. "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." 926 S.W.2d at 684 (*citing Land Clearance for Redevelopment Authority v. Kansas University Endowment Ass'n,* 805 S.W.2d 173, 175

(Mo *banc* 1991)). Because the issue had not been raised in defendant's answer to the petition, the issue was waived. Here, unlike the defendant in *Hollis*, defendants *never* raised the issue in the trial court, either in their answer to the petition (LF 32-35), or in their motion for new trial (LF 67-74).

More importantly, this Court has specifically held that the constitutional issue of the separation of powers must be raised in the trial court, or it is waived. In *State of Missouri ex rel. Williamson v. County Court of Barry County, Missouri, et al.*, 363 S.W.2d 691 (Mo. 1963), the circuit clerk of Barry County appointed a deputy clerk and set her salary at $2,400 per year with the approval of a circuit judge, as was authorized by state statute. However, the county court judges approved and budgeted a lower salary - $2,100 per year. Each month the deputy clerk requested pay in the amount of $200, and each month the county court judges paid her only $175. The deputy clerk sought a writ of mandamus to compel the difference that the judges had withheld, and the trial court compelled payment. The county court judges appealed, claiming that the statute allowing the clerk to set salary was unconstitutional because "it contravenes and violates Article II of the Constitution of Missouri by allowing the judicial department to usurp the functions of the executive or administrative branch of the government." 363 S.W.2d at 694. This is the same constitutional provision claimed by defendants in the present case.

On appeal, the Supreme Court held that in order to preserve for review a contention that a statute is unconstitutional, the question must be raised at the first available opportunity. This means that the sections of the Constitution at issue must be specified; that the point must

be presented in the motion for new trial; and that the point must be briefed for the court. 363 S.W.2d at 694 (*citing City of St. Louis v. Butler*, 219 S.W.2d 372 (Mo 1949)). Because the county court judges did not raise the issue in their motion for new trial, the issue was waived. "We should not purport to determine whether the trial court erred as to an issue not presented to it in the motion for new trial, and as to which under the long established rules of procedure the appellants abandoned in the trial court." *Id.* at 694. In order to attack the statute's constitutionality, defendants in *Barry County* had to raise the point at the trial level, and not wait until transfer to this Court.

Furthermore, it is improper for even this Court to raise a constitutional issue on its own. In *State of Missouri v. Larry Smith*, 779 S.W.2d 241 (Mo. *banc* 1989), on an appeal from a dismissal of a misdemeanor charge made pursuant to an ordinance of a fire protection district, neither party raised a constitutional claim. However, the Court of Appeals for the Eastern District *sua sponte* raised the question of whether a fire protection district could declare an ordinance violation a misdemeanor, and transferred the case to the Supreme Court. The Supreme Court refused to decide the constitutional issue, holding that, "Neither this Court nor the court of appeals possesses the inherent power to create or defeat jurisdiction by a *sua sponte* discovery that a constitutional issue lies lurking, but hidden from the parties to the litigation." 779 S.W.2d at 242. As demonstrated by *Call, Hollis, Barry County* and *Smith*, because Defendants failed to raise the constitutional separation of powers issue at either the trial court or on appeal, they are barred from raising it for the first time before this Court.

2. Instatement is not an improper violation of the separation of powers.

Defendants claim that even though they were found to have denied Igoe a position as an ALJ because of his age, it was beyond the trial court's power to award him the job. This claim is based on the fact that a statute gives the head of the Workers Compensation Division the power to hire ALJ's. Defendants argue that because the division is within an executive agency, and the position is a "high-level, policy-making" one, the power to hire for that job can only be made by the executive branch, and a court may not order Igoe be given that job.[8]

If defendants' argument was correct, then the MHRA would be toothless for any employee of the executive branch. Although defendants baldly assert that the ALJ job is a "high-level policy making" position within the governor's appointment power, there is no law to support that contention. In fact, the constitution does not grant that power to the governor. His constitutional powers of appointment include only department and division heads, and members of administrative boards and commissions, subject to the advice and consent of the Senate. Mo. Const. Art. IV, §51. The governor's power of appointment does not include ALJ's or LA's, or any other employees of the departments. *Id.* Rather, other appointments within executive departments are within the authority of the department heads, unless otherwise provided by law. Mo. Const. Art. IV §19. In the case of ALJ's for the Division of Workers Compensation, §287.610.1 RSMo (2004) delegates the hiring authority to the head of the Division.

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[8]Defendants argue that because Igoe had represented claimants, he could not be a fair ALJ. There is no evidence to support this claim, nor was it argued below.

Furthermore, in this case, the department at issue is the Department of Labor, which is uniquely structured to remain independent of political influence and control. It is headed by a three-member Labor and Industrial Relations Commission. Mo. Const. Art. IV §49. This Commission cannot be comprised of members of one political party, and must include one member who is a representative of employees, one who represents employers, and one who represents the public. *Id.* The commissioners' terms are staggered, so that every two years, one of the commissioners exits. Resp. App. A24.

The Department of Labor and Industrial Relations is headed by the Commission, and not the Director of the Department. §286.005.1 RSMo (2004). The Director is the chief administrative officer of the Department. *Id.* The Director is chosen by the Commission, then nominated, and the governor makes the appointment, subject to the advice and consent of the Senate. *Id.*

Under the department director is the head of the Division of Workers Compensation. That division head in turn is responsible for the hiring of ALJ's for the Division. There is no provision for the governor's involvement in appointing ALJ's. This scheme is designed to insure that workers compensation judges are free from political influence and patronage. It would be contrary to the legislative scheme for ALJ's to be high-level, policy-making appointments by the governor that promote the political agenda of the party in power in the governor's office.

When McLucas conducted the interviews at issue in this case, she was acting in the capacity of the head of the Workers Compensation Division because the true head of the

Division had applied for the jobs. The appointment of ALJ's and LA's in the Workers Compensation Division was still not within the governor's power of political appointments, subject to advice and consent of the Senate, and should not be politicized, in the interest of justice. These are not high-level policy-making positions, and the separation of powers is not violated by Judge Cohen's instatement order.

Again, *State of Missouri ex rel. Williamson v. County Court of Barry County, Missouri, et al.,* 363 S.W.2d 691 (Mo. 1963) is instructive. When the county court judges challenged the constitutionality of the statute authorizing the county clerk to set their deputy clerk's salary, they claimed that the county clerk violated the separation of powers because they should be the ones to set salary.

This Supreme Court held that a statute is never presumed to be unconstitutional. 363 S.W.2d at 694. Because the appellants had not preserved the claim, the Court presumed that the statute was a valid legislative directive, and required the court to pay the deputy clerk in accordance with the circuit clerk's directive.

Here, as in *Barry County*, a statute is at issue. The MHRA prohibits discrimination by employers, and specifically includes the state in its definition of employer. §213.010.7 RSMo (2004). The statute provides that a court may grant injunctive relief as it deems appropriate, which is exactly what Judge Cohen did.

In *Hoskins v. Business Men's Assurance*, 79 S.W.3d 901, 904 (Mo. 2002), this Court again stated, "An act of the legislature approved by the governor carries with it a strong

presumption of constitutionality. This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature." (*citing Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo *banc* 1994)). In *Hoskins*, the constitutional argument had been preserved and was addressed by the Court, and the challenged statute was upheld. Here, as in *Hoskins*, the statute was passed by the legislature and approved by the governor, who presumably knew he was an executive of the State and subject to the statute's definition of "employer."

For years, courts have ordered injunctive relief against executive agencies that illegally discriminated against their employees and applicants. In *Hayes v. Shalala*, 933 F.Supp. 21 (D.D.C. 1996), a jury found that because of race and in retaliation for EEO activity, the plaintiff was denied an appointment to the Director of the Division of Acquisition Management for the Department of Health and Human Services. Although the Department argued that placing the plaintiff in the Director position would be "severely detrimental" and would undermine the Division's ability to operate effectively, the district court ordered the Department to promote him retroactively, despite the fact that the appointment "bumped" the person who got the job. 933 F.Supp. at 25.

In *Lander v. Lujan*, 888 F.2d 153, 156 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia ordered the Department of the Interior to place the plaintiff in the top administrative position for the Bureau of Mines, which also required bumping the person who got that job. The Department argued that the Civil Service Reform Act was designed to ensure management flexibility in the department, prohibiting the plaintiff from claiming entitlement

to a particular job. *Id.* at 158. The court of appeals disagreed, stating, "Nor do we understand how an employer's claim that his workplace would be disrupted could possibly defeat the victim's entitlement to complete relief when, after all, the employers' intentional discrimination created the disturbance by harming the plaintiff. A district court's discrimination remedy cannot turn on the employer's preferences." *Id.* *Accord Evans v. Secretary of Energy*, 1990 U.S. Lexis 853 at 11-12 (D.D.C. 1990) (ordering the Secretary of Energy to promote the plaintiff to a GS-14 job, with commensurate pay as a GS-14, retroactive to date of discrimination).

In the event that this Court holds that, despite the authority cited *supra*, Judge Cohen's order of instatement to an ALJ position was an invalid violation of the separation of powers, another alternative exists to denying the plaintiff any injunctive relief. This Court has the power to modify the ruling to require defendants to instate Igoe to the lower level job of Legal Advisor. While plaintiff does not believe this modification is necessary or appropriate, it would be a solution that does not violate the constitution because the job is neither high-level nor policy-making, and is not within the governor's power of appointment.

E. Judge Cohen's order of instatement was not "too specific."

The trial court has broad discretion to formulate a make-whole remedy for a victim of illegal discrimination. *Albemarle Paper Co. et al. v. Moody et al.,* 422 U.S. 405 (1975). Judge Cohen's order was well within her discretion, and properly implemented the findings of the jury. The jury clearly found that Igoe was entitled to an ALJ job when it awarded him the full ALJ pay based on the salary information provided to the jury. Tr. 162; Resp. App. A-11,

A-17, A-18 (showing comparative salaries of ALJ's and LA's). The judge also ordered additional damages based on the ALJ wages for the time period from verdict to her entry of judgment, as well as instatement to an ALJ position. Both the jury and judge obviously felt that absent discrimination, Igoe would have been hired as an ALJ in the first hiring round, and all of those jobs were performed in St. Louis. It is irrelevant that, having been passed over the first time, Igoe applied for jobs in other areas when more jobs were open. Defendants cite no authority for their proposition that Igoe should be instated to whatever job opens first, regardless of title, location or pay. To place Igoe in a different job and in a different location than the one he was illegally denied would not make him whole as intended by the statute. The trial court appropriately ordered placement in the same job he was wrongfully denied.

CONCLUSION

Because the judgment and verdict were supported by substantial evidence, and the trial court properly accepted venue, the judgment and order should be affirmed, with a modification to accurately reflect the jury's findings that plaintiff prevailed on his age and retaliation claims, but not his sex claim. In all other respects, the judgment was proper.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 1st day of September, 2004, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned certifies that this Substitute Brief of the Respondent complies with the limitations of Rule 84.06(b) in that the number of words is no more than 16, 393 [less than the ninety percent of 31,000 word limit rule for a Respondent's brief, or 27, 900 words]. Also served and filed with this Brief of the Respondent is a floppy disk containing the brief, which is double-sided, high density, IBM-PC compatible 1.44MB, 3.5 inch size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format (Word Perfect 11.0). The disk has been scanned for viruses and it is virus-free.

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