IN THE
SUPREME COURT OF MISSOURI

No. SC92145

DEBORAH HERVEY

Respondent,

v.

MISSOURI DEPARTMENT OF CORRECTIONS

Appellant.

Transferred from the Court of Appeals, Western District

SUBSTITUTE BRIEF OF APPELLANT

CHRIS KOSTER
Attorney General
RONALD HOLLIGER
General Counsel
Missouri Bar No. 23359
JAMES R. WARD
Assistant Attorney General
Missouri Bar No. 43422
JULIANNE O. GERMINDER
Assistant Attorney General
Missouri Bar No. 60836
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Facsimile: (573) 751-9456
Julianne.Germinder@ago.mo.gov

ATTORNEYS FOR APPELLANT

Table of Contents

Table of Authorities

Cases

Statutes, Rules and Other Authorities

JURISDICTIONAL STATEMENT

Missouri Department of Corrections ("DOC") appeals from the June 23, 2010, judgment of the Circuit Court of Jackson County in favor of Respondent Deborah Hervey ("Hervey"). The judgment granted Hervey $127,056 in actual damages, $97,382.50 in attorneys' fees, $36,288 in front pay, and punitive damages in the amount of $1,303,632.50 on the count of disability discrimination under the Missouri Human Rights Act, §§213.010-213.037[1] After a September 13, 2011, opinion of the Missouri Court of Appeals, Western District, affirming the judgment, DOC filed a motion for rehearing/transfer by the Court of Appeals. After denial, DOC filed an application for transfer with this Court on November 16, 2011. This Court granted transfer on December 20, 2011.

[1] All statutory citations are to the 2000 edition of the Revised Statutes of Missouri except as otherwise indicated.

STATEMENT OF FACTS

A. Summary of Hervey's Lawsuit

Hervey filed this employment discrimination action under the Missouri Human Rights Act ("MHRA") against DOC, in the Circuit Court of Jackson County. Hervey asserted claims of disability discrimination and retaliation, contending that DOC terminated her on the basis of a mental disability and in retaliation for making complaints of discrimination. The jury returned a verdict for Hervey on her disability discrimination claim.[2] (L.F. 112.) Following post-trial motions, the trial court issued its judgment, awarding Hervey $1,564,359, which included attorneys' fees with the actual damages in the punitive damage multiplier in determining the applicable punitive damage cap. (L.F. 205-212; Attached in Appendix at A3-A10.) DOC appeals from that judgment.

B. Summary of Trial Evidence

1. Overview of Hervey's Employment History with DOC.

Hervey was employed with DOC three separate times as a probation officer from 1983 until 2008, including the final occasion at issue. Hervey left

[2] Although the jury found for Hervey on her retaliation claim, it did not award damages on that claim. (L.F. 113.) Hervey voluntarily dismissed the retaliation claim upon return of the jury's verdict. (Tr. 1471: 4-15.)

DOC voluntarily at the end of her first two employment stints with DOC. (Tr. 1139: 15-17; 1140: 6-10.)

Hervey rehired with DOC as a Probation and Parole Officer ("PO") for her third, and final, period of employment in September 2007. As a rehire, Hervey was required to successfully complete a nine-month probationary period, like new employees. (Tr. 822: 22-25.)

Hervey's PO job required her to ensure that offenders adhered to the conditions of their probation or parole by making reports to the courts when offenders violated the terms of their probation or parole. (Tr. 816: 5-10; 816: 11-15; 507: 14-17.) These reports, called violation reports, are a priority of the job of a PO, as they had been during Hervey's earlier employments with DOC. (Tr. 536: 18-20; 457: 6-12.) Hervey admitted that preparation of violation reports was an essential function of the job of a PO. (Tr. 1237: 4-10.)

2. Hervey Requests Multiple Accommodations on Her First Workday, which DOC Grants.

Hervey reported for her first day of work as a rehired PO on September 24, 2007. Although Hervey previously had performed successfully as a PO with no accommodations, she told DOC on her first day that she had a "mental disorder diagnosis" and that she might need "accommodations." (Tr.

1138: 7-11; 506: 3-4; 458: 11-13; 1152: 2-7.)

On her first day Hervey proposed several accommodations to her supervisor, Ms. LeLonda Sherrod ("Sherrod"). (Tr. 1217: 13-18.) The requested accommodations included assignment of a mentor, the ability to play music in her workplace, and frequent breaks. (Tr. 1219: 3-5; 1221: 9-12.) That same day, Hervey left Sherrod a doctor's letter from Dr. Aznaurova, a psychiatrist, dated April 2007 (written when Hervey worked for her previous employer). (Tr. 1216: 24-1217: 2; 1218: 23-25.) The letter indicated that Hervey suffered from "panic attacks" and needed the ability to take frequent breaks. (Tr. 837: 4-7.) Hervey testified that DOC gave her all the accommodations she requested on her first day on the job. (Tr. 1223: 9-14.)

3. Hervey Requests Additional Accommodations, which DOC Grants.

In October 2007, DOC received a letter from Hervey's primary physician (Dr. Marshall), citing a need for additional accommodations of increased breaks and a workday not to exceed eight hours. (Tr. 767: 4-16; 1165: 13-25.) The letter also indicated that Hervey's various medications (including for mental health) might cause dizziness, short-term memory loss, and confusion. (Tr. 767: 13-16; 1145: 16-24.) DOC agreed to provide the only accommodation noted by Hervey's primary physician — i.e., no working more

than eight hours a day. (Tr. 1122: 3-11.)

Over the next two months, Hervey provided additional medical submissions to DOC from Dr. Marshall and a psychiatric nurse, Ms. Easter. (Tr. 1232: 16-25; 1230: 6-22; 1225: 12-21.) Dr. Marshall's reports indicated that Hervey "currently has no limitations" and that any side effects she had were "not severe enough to prevent the performance of Ms. Hervey's essential functions." (Tr. 702: 5-9.) By contrast, Ms. Easter's submission cited several additional "special accommodations," including: flexibility of arrival time, shorts breaks, listening to music, patience in learning, and feedback from Hervey's supervisor on a weekly basis. (Tr. 691: 3-14.) Despite Dr. Marshall's report, DOC provided Hervey all of these accommodations except — according to Hervey — patience. (Tr. 692: 18-23; 693: 20-694: 4; 694: 5-13; 695: 1-15.)

4. Hervey Fails to Perform the Essential Functions of the PO Job, Even with Multiple Accommodations.

In January 2008, Hervey's immediate supervisor, LeLonda Sherrod, gave Hervey an oral evaluation of her performance. She informed Hervey that she was not performing at the level expected of a PO. (Tr. 1123: 21-1124: 2.) Specifically, Hervey had failed to get above a 50 percent caseload,[3]

[3] Hervey's earlier supervisors testified that if a probationary employee never

and was late turning in reports. (Tr. 1239: 1-8; 1240: 9-12.) Hervey acknowledged this, and knew she was failing her probation and told DOC so. (Tr. 1178: 4-10; 1239: 1-8, 9-14.)

5. Hervey Continues to Expand her Requests for Accommodation.

At trial, Hervey testified that she wanted even more accommodations than what DOC had provided her. Specifically, Hervey additionally requested, and received, a private office. (Tr. 746: 7-10; 1188: 23-25.) Hervey testified that she also wanted to change her supervisor to someone who would provide "more positive feedback," and under whom Hervey would not have to be "extra vigilant to make sure she didn't make a mistake." (Tr. 1192: 13-17; 1240: 15-22.) Hervey also wanted to switch from the mentor she already had been assigned to her friend, Mr. Shoppee. (Tr. 1196: 4-16; 1253: 16-24.) She also wanted more TAPs[4] training. (Tr. 1254: 1-11.) Hervey testified that although she had received all-day TAPs training, she "was in a fog that day"

---

got up to a full caseload, this would be considered unacceptable; whenever an employee doesn't handle a full caseload, another employee has to do extra work. (Tr. 456: 11-15; 506: 13-17; 928: 22-929:1.)

[4] TAPs is an acronym for a program that DOC used to keep track of what an offender has to do to facilitate his probation. (Tr. 479: 3-9.)

so "it didn't stick" and she wanted to repeat it. (Tr. 1254: 16-22.) She further testified that although she received additional TAPS training from Mr. Shoppe, it "didn't stick either." (Tr. 1256: 14-23.)

In the spring of 2008, DOC sent Hervey for an evaluation by Dr. Elliott, a board-certified occupational physician. (Tr. 945: 18-20; 957: 23-25; 1194: 7-21.) Dr. Elliot testified that she had twenty-seven years of experience in the field of occupational medicine and had attained her fellowship status in a society for occupational medicine. (Tr. 957: 23-958: 2.) Dr. Elliott concluded that the additional accommodations that Hervey had requested (i.e. a new supervisor, a different mentor, and more TAPs training), were unnecessary. (Tr. 965:18-25; 972: 2-4.)

6. Hervey is Terminated for Failing to Successfully Complete Probation.

Near the end of Hervey's nine-month probation, in April of 2008, Hervey's supervisor (Ms. Sherrod) gave Hervey her written performance evaluation and rated her as "needs improvement." (Tr. 791: 18-24.) Hervey admitted that even though she never got up to a full caseload, she still had several late violation reports. (Tr. 1240: 9-12.) Based on Hervey's April 2008 performance evaluation, DOC Chief State Supervisor Scott Johnston recommended Hervey's termination for failure to successfully complete her

nine-month probation period. (Tr. 1322: 6-10; 817: 23-818: 1.)

C. Jury Instructions

Over DOC's objection, the trial court accepted Hervey's Instruction Number 8 as the verdict director on Hervey's claim for disability discrimination. Instruction Number 8 did not present or require the jury to make a finding that Hervey was disabled as an essential element of the claim. (L.F. 90; Attached in Appendix at A1.) DOC offered its Instruction B as an alternate verdict director. (Tr. 1378: 10-17; L.F. 109; Attached in Appendix at A2.) This alternate director specifically required the jury to find that Hervey was disabled under a separately enumerated paragraph. (L.F. 109; A2.) DOC further objected to Hervey's Instruction Number 8, because it did not direct the jury to any definitional instruction regarding disability or to any instruction regarding work place accommodation or essential functions of the job. (Tr. 1377: 25; 1378: 10.) The trial court overruled DOC's objections and refused its alternate Instruction B. (L.F.109; A2; Tr. 1378: 13-19.)

D. Jury Verdict

Without a separate instruction or finding on the essential element of "disability," the jury found in Hervey's favor on her disability discrimination claim and awarded her $127,056. (L.F. 112.) In addition, the jury assessed

punitive damages in the amount of $2,500,000 on her disability discrimination claim. (L.F. 114.)

E. DOC's Post-trial Motions and Judgment

DOC filed a motion for judgment notwithstanding the verdict, arguing that the trial court erred in the manner of instructing the jury on Hervey's claim of disability discrimination and by awarding punitive damages without properly limiting the amount under §510.265 RSMo. (L.F. 145-155.)

The trial court issued its judgment, partially granting and partially denying Appellant's motion for judgment notwithstanding the verdict. The judgment awarded Hervey $127,056 in actual damages; attorneys' fees in the amount of $97,382.50; front pay in the amount of $36,288; and remitted punitive damages to $1,303,632.50. (L.F. 205-212; A3-10.) The trial court used the actual damages, attorneys' fees, and front pay dollar amounts to determine a total recovery of $260,726.50. The trial court then used that number as the "net" judgment, to calculate the cap on punitive damages under §510.265 RSMo. of $1,303,632.50, even though that figure included attorneys' fees. (L.F. 211; A9.)

DOC filed its motion for a new trial, and in the alternative, motion to amend the judgment, arguing that the trial court erred in the manner of instructing the jury on Hervey's claim of disability discrimination under

Instruction No. 8 (which failed to follow the substantive law), and by awarding punitive damages without properly limiting the amount under §510.265 RSMo. (L.F. 214-232.) The trial court denied these motions. (L.F. 252.)

POINTS RELIED ON

I. The Trial Court erred in giving Hervey's disability discrimination verdict director, Instruction Number 8, because the instruction did not require the jury to find that Hervey was disabled as required by Missouri law in that the instruction misdirected the jury, and thus gave the jury a roving commission.

Medley v. Valentine Radford Comm., Inc., 173 S.W.3d 315 (Mo. App. 2005).

Devor v. Blue Cross & Blue Shield of Kansas City, 943 S.W.2d 662 (Mo. App. 1997).

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. 2007).

Harvey v. Washington, 95 S.W.3d 93 (Mo. banc 2003).

II. The Trial Court erred in awarding punitive damages of $1,303,632.50 under §510.265 RSMo., because the trial court improperly included attorneys' fees in its calculation of the "net amount of the judgment awarded to the plaintiff against the defendant," in that it was contrary to the plain language of the statute and this Court's precedent on statutory interpretation, as well as the purpose of punitive damages.

§510.265 RSMo.

State v. Ruch, 926 S.W.2d 937 (Mo. App. 1996).

Reed v. Reed, 10 S.W.3d 173 (Mo. App. 2000).

Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968).

SUMMARY OF THE ARGUMENT

Following a trial in which the issue of whether plaintiff Hervey was "disabled" (and, thus, qualified for protection under the MHRA) was contested, the trial court erred by submitting Instruction 8, the verdict director, which failed to require the jury to find that Hervey was disabled. Under the MHRA, the question of whether a plaintiff is disabled is a threshold question which must be answered before examining whether the employer acted with discriminatory motive. *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315, 321 (Mo. App. 2005). Instead of requiring the jury to find that Hervey was disabled as an essential, contested element of her claim, the verdict director improperly assumed that Hervey was legally disabled. Missouri courts, including this Court, have clearly held that it is reversible error to assume a disputed ultimate fact, and that each element in a verdict director must be explicitly presented to the jury. *Brown v. Van Noy*, 879 S.W.2d 667, 673 (Mo. App. 1994); *Lasky v. Union Electric Company*, 936 S.W.2d 797, 801 (Mo. banc 1997).

The trial court further erred by incorrectly interpreting the statute limiting punitive damages, §510.265 RSMo., by including the award of attorneys' fees in its calculation of the *net amount of the judgment*. The trial court's interpretation impermissibly reads "net" out of the statute and simply

applies the punitive damages limit to the whole judgment. There is no support for this interpretation, which contradicts the plain meaning of the statute. Courts and state legislatures both have limited punitive damages to guard against excessive punitive damages awards, just as the Missouri Legislature did in §510.265 RSMo. The purpose of punitive damages is to punish wrongdoers for their wrongdoing and deter future wrongdoing, subject to the limitations on their amount under §510.265 RSMo. *See Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968). Arbitrarily tying the amount of punitive damages to attorneys' fees runs counter to the purpose of punitive damages and to the legislature's purpose behind limiting such awards and, in this case, increased the punitive damages award by nearly half a million dollars.

ARGUMENT

I. The Trial Court erred in giving Hervey's disability discrimination verdict director, Instruction Number 8, because the instruction did not require the jury to find that Hervey was disabled as required by Missouri law in that the instruction misdirected the jury, and thus gave the jury a roving commission.

Standard of Review

"This Court reviews de novo, as a question of law, whether a jury was properly instructed." *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003) (citation omitted). A trial court's decision not to give a proffered instruction is subject to *de novo* review; the appellate court must determine whether it was supported by the evidence and the law. *Rader Family Ltd. Partnership, L.L.L.P. v. City of Columbia,* 307 S.W.3d 243, 252 (Mo. App. 2010). When the given instruction is a Missouri Approved Instruction ("MAI"), "the error must materially affect the merits of the case." *See Koppe v. Campbell*, 318 S.W.3d 233, 245 (Mo. App. 2010) (citations omitted). A new trial is required if the "instruction misdirected, misled, or confused the jury, resulting in prejudicial error." *Id*.

A. Elements of a Disability Discrimination Claim

A plaintiff claiming disability discrimination under the MHRA must establish each of the following elements: (1) she is disabled or "handicapped"; (2) she was discharged; and (3) there is evidence from which to infer that the disability or "handicap" was a factor in her discharge. *Medley v. Valentine Radford Communications, Inc.,* 173 S.W.3d 315, 320-21 (Mo. App. 2005).

Whether a plaintiff is "disabled" under the MHRA is a "threshold question" that must be answered before potentially examining whether an employer acted with a discriminatory motive. *Medley,* 173 S.W.3d at 321, 323; *See Daugherty v. City of Maryland Heights,* 231 S.W. 3d 814, 821 (Mo. 2007) (identifying "disability within the protections of the MHRA" as a predicate "before the 'contributing factor' analysis can be applied to [a plaintiff's] disability discrimination claim"); *see also Devor v. Blue Cross & Blue Shield of Kansas City*, 943 S.W.2d 662, 665-66 (Mo. App. 1997) (An employee bears the burden of proving that she is disabled and entitled to protection under the MHRA.).

Furthermore, this "disability" requires the plaintiff to prove more than simply that he or she suffered from a medical impairment: "[t]he MHRA makes the question of whether the job can be performed with or without reasonable accommodation a part of the test to determine whether an

employee is disabled," *Medley*. 173 S.W.3d at 320, and that when the employee cannot do so without accommodation, the "question . . . is whether she can complete the essential functions of her job with reasonable accommodations." *Id*. at 321.

B. Missouri Law Requires that Each Ultimate Fact Be Presented to and Found by the Jury.

This Court has instructed that "each element [in a verdict director] should be explicitly presented to the jury" and that each be specifically found by the jury. *Lasky v. Union Electric Company*, 936 S.W.2d 797, 801 (Mo. banc 1997) (citing *Spring v. Kansas City Area Tranp. Auth*., 873 S.W.2d 224 (Mo. banc 1994)). Citing this Court's decision in *Spring*, *supra*, the Western District Court of Appeals explained the necessity of listing each ultimate fact in a separate paragraph in the verdict director:

> In Missouri, the ultimate facts are listed as separate paragraphs in the verdict director. This insures that the jury focuses on each element separately and does not assume an element to be true. If the verdict directing instruction assumes an essential, ultimate fact in dispute, that fact has been removed from the jury's determination and constitutes prejudicial error.

Brown v. Van Noy, 879 S.W.2d 667, 673 (Mo. App. 1994) (cited with approval in *Lasky v. Union Electric Company*, 936 S.W.2d 797, 800-801 (Mo. banc 1997)).

C. The Verdict Director Was Defective Because it Improperly Assumed an Essential, Ultimate Fact in Dispute.

Respondent's approved verdict director, Instruction No. 8, failed to require the jury to make a specific, threshold finding on the disputed issue of whether Hervey was disabled. (L.F. 90; A1.) In this regard, the verdict director instructed:

INSTRUCTION NO. 8

> Your verdict must be for the Plaintiff if you believe:
>
> First, Defendant discharged Plaintiff; and
>
> Second, disability was a contributing factor in such discharge; and
>
> Third, as a direct result of such conduct, Plaintiff sustained damage.

(L.F. 90; A1.) Instruction No. 8, given over DOC's objection, improperly assumed that Hervey was disabled by not presenting that contested, essential element in a separate paragraph for determination by the jury. (Tr. 1378: 10-17.) In essence, the verdict director informed or implied to the jury

that Hervey had a disability, even though that matter was contested. This left the jury to decide only whether Hervey's presumed disability was a "contributing factor" in her discharge in order to find liability. In contrast, DOC's alternate verdict director, Instruction B, did not assume disability but required the jury to make a specific finding on that contested element as follows:

INSTRUCTION B

Your verdict must be for the Plaintiff if you believe:

First, defendant discharged plaintiff from her employment, and

Second, plaintiff is disabled as defined in Instruction No. [6], and

Third, plaintiff's disability was a contributing factor in such discharge, and

Fourth, as a direct result of such conduct, plaintiff sustained damages.

Unless you find by reason of Instruction No. [E] that plaintiff's request for a workplace accommodation was not reasonable or you find by reason of Instruction No. [F] that plaintiff's could not perform

the essential functions of her job.

(L.F. 109; A2.) This Court and other courts have made it clear that by assuming the determination of a disputed fact (here, whether Hervey was disabled), the subject verdict director removed from the jury the determination of this fact, thus causing prejudicial error. *See Spring v. Kansas City Area Transportation Authority*, 873 S.W.2d 224, 227 (Mo. banc 1994); *see also Brown*, 879 S.W.2d at 673 ("It is reversible error for a verdict director to assume a [sic] controversial ultimate fact."); *see also Harvey v. Washington*, 95 S.W.3d 93, 98 (Mo. banc 2003) ("The verdict director confused the jury by assuming a disputed fact. Thus submission of the defective instructions constitutes prejudicial error."); *see also Coon v. Dryden*, 46 S.W.3d 81, 93 (Mo. App. 2001) (The verdict director constituted reversible error because it assumed a disputed ultimate fact and, therefore, constituted a "roving commission" which "misdirected, misled, and confused the jury."). Accordingly, following entry of judgment, DOC moved for a new trial, citing the trial court's error in submitting Instruction 8, which failed to follow the substantive law. (L.F. 214-232.)

In *Harvey*, for example, this Court overturned the jury's verdict because the verdict director assumed a disputed fact, and thus was defective and given in error. 95 S.W.3d at 93. Specifically, the erroneous verdict

director assumed a disputed fact (i.e., that plaintiff had a pseudomonas urinary tract infection) by combining it with a second disputed fact (i.e., that defendant failed to prescribe plaintiff an antibiotic which would treat pseudomonas urinary tract infection) in a single paragraph in the verdict director. *Id*. at 95, 97-98. This Court reversed and remanded, stating, "A verdict director must require the jury to find all ultimate issues or elements necessary to the plaintiff's case, except those unmistakably conceded by both parties." *Id*. at 98 (citation omitted).

Similarly, in *Brown*, the Western District Court of Appeals found it was error for the trial court to submit two disputed elements in one paragraph in the verdict director. *Brown*, 879 S.W.2d at 673. In *Brown*, one of the essential disputed elements concerned whether an individual was a person with vicious tendencies likely to inflict injury upon others. *Id*. The given verdict director assumed this first element by combining it with another contested element in a single paragraph: "Defendant Martin City Pub, Inc. knew or should have known that Mike Becker was a person with vicious tendencies likely to inflict injury upon others." *Id*. Just as in *Brown*, the trial court here erred by giving a verdict director that submitted two contested, essential elements in a single paragraph — whether Hervey was disabled and whether Hervey's disability was a contributing factor in

Hervey's discharge.

Whether Hervey was legally disabled was a contested issue that was anything but "unmistakably conceded" in this case. Indeed, in closing argument, Hervey's counsel pointed out that DOC *refused* to concede that Hervey was "disabled." (Tr. 1444: 5-10.) Hervey's counsel's use of the term "disability" in the closing further underscores why the jury should have been required to make a specific finding that Hervey was legally disabled, as his comments essentially equated the term "disability" with impairment: "Clearly she has a disability. The doctors' notes by October says [sic] she has a disability." (Tr. 1444: 9-11.) However, a conclusion that an employee has a medical disability or impairment is not enough to establish liability under the MHRA. *See Devor*, *supra* (plaintiff must also establish that she is able to perform the essential functions of the position in question).

D. The Defective Verdict Director is Not Cured by the Whole of the Jury Instructions.

Hervey will undoubtedly argue that the trial court's inclusion of the definition of "disability" in separate Instruction 6 cured the fact that the verdict director did not explicitly require the jury to find whether Hervey was disabled. By breaking apart the essential elements of Hervey's claim into two separate instructions, however, the trial court here committed the same

instructional error that required reversal in the *Syn* case. *See Syn, Inc. v. Beebe*, 200 S.W.3d 122, 130 (Mo. App. 2006). In *Syn*, the use of separate instructions to present essential facts to the jury was error, because this "relegate[d] a predicate finding to a subsequent instruction." *Id*. at 131. Here, use of the verdict director and separate definitional instruction of "disability" resulted in the same prejudicial error that occurred in *Syn,* because a finding of disability under Missouri law is a predicate finding. *See Medley, supra.*

DOC anticipates that Hervey may also try to argue that a finding on the disputed fact of whether she was disabled was necessarily implied from the other required findings in the verdict director. This Court, in *Harvey,* however, considered and rejected the "necessarily implied exception" to cases where, as here, a verdict director fails to require the jury to find all ultimate issues or elements necessary to the plaintiff's case. *Harvey*, 95 S.W.3d at 98 (citing *Lasky*, 936 S.W.2d at 800-01).

E. Although Instruction No. 8 was a MAI Approved Instruction, It Should Have Been Modified to Correctly State the Law as DOC Requested in Proposed Instruction B.

Finally, DOC anticipates that Hervey will argue that the verdict director was not given in error to the extent that it was based on MAI 31.24.

However, the authorities make it clear that an MAI approved instruction must properly state the law, and is given in error if it does not. *See Koppe*, 318 S.W. 3d at 245; *see also Spring*, 873 S.W.2d at 226 (citation omitted) ("[I]dentical principles of instructing a jury apply [to MAI approved instruction and not-in-MAI instructions]. An instruction must be a correct statement of the law."). *See Gillis v. Collins*, 770 S.W.2d 503, 505 (Mo. App. 1989) (approving omission of one paragraph of a Missouri Approved Instruction because it was a remnant of contributory negligence and no longer appropriate); *Cox v. J.C. Penney Company, Inc.*, 741 S.W.2d 28, 30 (Mo. 1987) (holding that trial court erred in giving an MAI approved instruction that did not comport with the law, and reversing and remanding the case for a new trial). For the reasons established above, the MAI approved instruction given by the trial court was defective, and given in error, because it failed to properly conform to the law governing the essential elements of a claim for disability discrimination, as well as the law directing that each element be presented explicitly in a separate paragraph in the verdict director.

F. Relief That Should be Accorded.

DOC asks that this matter be reversed and remanded for a new trial. *See Lasky*, 936 S.W.2d at 801. Additionally, DOC respectfully prays this

Court order the trial court to submit a verdict director to the jury requiring them to make a finding as to whether Hervey was "disabled" under a separately enumerated paragraph.

II. The Trial Court erred in awarding punitive damages of $1,303,632.50 under §510.265 RSMo., because the trial court improperly included attorneys' fees in its calculation of the "net amount of the judgment awarded to the plaintiff against the defendant," in that it was contrary to the plain language of the statute and this Court's precedent on statutory interpretation, as well as the purpose of punitive damages.

Standard of Review

The issue here concerns the trial court's interpretation of §510.265 RSMo., a statute governing calculation of punitive damages. Statutory interpretation is a question of law, not fact, and where the lower court rules on a question of law, it is not a matter of discretion. *Lombardo v. Lombardo*, 35 S.W.3d 386, 388 (Mo. App. 2000) (internal citations omitted). Thus, this Court reviews these determinations de novo, granting no deference to the trial court's determination of the law. *Id.*

A. Missouri's Statutory Cap on Punitive Damages and the Damages Awarded at Trial.

Missouri's statute governing the amount of potential punitive damages provides: "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the *net*

amount of the judgment awarded to the plaintiff against the defendant." §510.265.1 RSMo. (emphasis added).

Actual damages awarded in this case amounted to $127,056; front pay amounted to $36,288; and attorney fees were awarded of $97,382.50. Although the trial court reduced the punitive damages award from $2,500,000 to $1,303,632.50[5], per §510.265 RSMo., the court included the attorneys' fees award in its calculation of five times the *net amount* of the judgment. By including the attorneys' fees in the calculation, the trial court increased the limit on punitive damages by $486,912.50, or nearly half a million dollars.

B. "Net" versus "Gross" Amount of the Judgment.

The trial court erred by including the attorneys' fees award in the net amount of the judgment upon which it calculated the total award of punitive damages under §510.265 RSMo. The trial court's decision to include the attorneys' fees award in calculating punitive damages essentially used the

[5] The trial court added actual damages, front pay, and attorneys' fees to arrive at its calculation of net amount of the judgment as $260,726.50 and then applied the multiplier of five under the statute to arrive at a limit on punitive damages of $1,303,632.50. The State raises no objection in this case to the inclusion of front pay in the net judgment.

gross amount of the judgment rather than the *net amount* of the judgment. This is contrary to the plain statutory language of §510.265 RSMo. "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010). The meaning of "net" under the statute is clear. The trial court's construction of "net amount of the judgment," however, made no offsets or deductions. In sum, the trial court's interpretation of the statute seems to confuse "net" with "gross." *See* Black's Law Dictionary 417 (8th ed. 2004) ("Gross damages" means "[t]he total damages found before adjustments and offsets.")

DOC acknowledges that there is no direct authority interpreting use of the term "net amount of the judgment" under §510.265 RSMo. Missouri case law nevertheless is instructive. Specifically, the Western District Court of Appeals held, before the legislature's adoption of the subject phrase in §510.265 RSMo., that attorneys' fees should be offset before arriving at the "net amount of the judgment," when calculating the figure to which an attorney's lien should attach. *Reed v. Reed*, 10 S.W.3d 173, 183 (Mo. App. 2000). Similarly, Missouri courts have used the word "net" in the context of judgments to describe the amount plaintiff receives after reductions for expenses, attorneys' fees, or offsets. *See Murray v. Joslyn*, No. 01CV221164,

2003 WL 24141284, at 1 (Mo. Cir. Ct. Nov. 7, 2003) (plaintiff entitled to receive "net proceeds of judgment, after payment of attorney's fees and expenses"); *Baker v. Whitaker*, 887 S.W.2d 664, 670 (Mo. App. 1994) ("The net amount recovered is the amount allowed by the judgment less the amount of any claim, expense, or offset that may properly be deducted therefrom.") (quotation omitted).

C. Legislative Intent.

When construing statutes, courts must endeavor to ascertain the intent of the legislature from the language used and, if possible, give effect to that intent. *State v. Ruch*, 926 S.W.2d 937, 938 (Mo. App. 1996) (internal citations omitted). Legislative intent should be determined by considering the plain and ordinary meaning of the terms in the statute. *Id.* Each word, clause, sentence, and section of a statute should be given meaning. *Id.* Assuming *arguendo* that the statute is not plain on its face, DOC submits that the intent of the legislature is clear, and the trial court's interpretation conflicts with the legislative intent of §510.265 RSMo.

"To determine the legislature's intent, a court must examine the words used in the statute, the context in which the words are used and the problem the legislature is seeking to address with the statute's enactment, while construing the statute in light of the purpose that the legislature intended to

accomplish and the evils it intended to cure." *Mayfield v. Director of Rev.*, 335 S.W.3d 572, 573 (Mo. App. 2011).

D. The Purpose of Punitive Damages and the Trial Court's Disconnect.

The purpose and legal context of punitive damages further supports DOC's position regarding the proper meaning of "net amount of the judgment." The purpose of awarding punitive damages is to inflict punishment for *wrongdoing* and to deter similar conduct. *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968). Accordingly, the calculation/determination of the amount of punitive damages based on the "net amount of the judgment" should not factor in an award of attorneys' fees (which is meant to compensate counsel for his work).

Although courts have been reluctant to identify concrete limits on the ratio between actual versus punitive damages to the plaintiff, the Supreme Court and state and federal Missouri courts have consistently focused their examination on the ratio between *compensatory damages to the plaintiff* and the punitive damages award. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003); *Brady v. Curators of the Univ. of Mo.*, 213 S.W.3d 101, 111 (Mo. App. 2006); *Trickey v. Kaman Indus. Technologies Corp.*, 2011 WL 5900993 (E.D. Mo. November 23, 2011); c*f. Kelly v. Bass Pro Outdoor World,*

LLC, 245 S.W.3d 841, 851 (Mo. App. 2007). Stated differently, these courts looked to the ratio of punitive damages to compensatory or actual damages, rather than including other associated costs and fees. *See Id. generally*. Interpretation of the legislative limit on punitive damages under §510.265 RSMo. should follow this same line of analysis, because it would effect the least change in the common law. *See Estate of Williams v. Williams*, 12 S.W.3d 302, 307 (Mo. 2000) ("[N]o statute should be construed to alter the common law further than the words import," and, if any doubt exists, "the words should be given the meaning which makes the least, rather than the most, change in the common law.").

E. Including Attorneys' Fees in the Calculation under §510.265 RSMo. Arbitrarily Inflates the Punitive Damages Limit.

Computing the limit on punitive damages by including attorneys' fees in the multiplier also leads to arbitrary results. Allowing punitive damages to be awarded for the limited purposes of punishment and deterrence prevents imposition of awards which are arbitrary. *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. 1996). Under the trial court's interpretation, however, a plaintiff who hires more expensive counsel or counsel who takes more extensive discovery could arbitrarily inflate the limit on punitive damages. Indeed, claims for attorneys' fees are collateral to the main cause of action.

Landgraf v. USI Film Prods., 511 U.S. 244, 277 (1994) (citation omitted). Although attorneys' fees are authorized under the MHRA, claims for attorneys' fees do not have to be decided in a court's judgment, and Missouri courts also consider motions for attorneys' fees filed *after* entry of judgment. *See Brady*, 213 S.W.3d at 115. Accordingly, calculating the limit on punitive damages based on the *net* amount of the judgment (i.e., excluding fees) would comport with procedural reality, as well as the plain language of the statute. Further, excluding fees from the calculation would help ensure that the award of punitive damages is not arbitrarily affected by attorneys' fees, which obviously vary widely and do not meaningfully correlate to the harm suffered by the plaintiff.

By properly offsetting the attorneys' fees from the total award to arrive at the net amount of the judgment, the court would have arrived at a proper net judgment of $163,344. In turn, by applying §510.265 RSMo., plaintiff's punitive damages would be limited to $816,720 (i.e., five times the net amount of the judgment). By contrast, the trial court's improper interpretation of "net amount of the judgment" to include attorneys' fees directly conflicts with the plain language of the statute and the intent of the legislature, and it impermissibly increased the punitive damages awarded to Hervey by nearly half a million dollars.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment of the trial court and award a new trial. In that the event that the court finds no instructional error it is requested that the court remand for the proper calculation of punitive damages or enter judgment as provided by Rule 84.14.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Ronald Holliger
RONALD HOLLIGER #23359
General Counsel

/s/ James R. Ward
JAMES R. WARD #43422
Assistant Attorney General

/s/ Julianne O. Germinder
JULIANNE O. GERMINDER #60836
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-9456 (facsimile)
jim.ward@ago.mo.gov
julianne.germinder@ago.mo.gov
ATTORNEYS FOR APPELLANT

Certificate of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 30th day of January, 2012, the foregoing brief was filed via Missouri Courts' Electronic Filing System which served a copy of the brief on:

David Lunceford.
201 S.E. 1st Street
Lee's Summit, Missouri 64063

The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 6,540 words.

/s/Julianne Germinder
Assistant Attorney General