SC92145

IN THE SUPREME COURT OF MISSOURI

DEBORAH HERVEY
Respondent,

v.

MISSOURI DEPARTMENT OF CORRECTIONS
Appellant.

On Appeal from the Missouri Western District Court of Appeals

# SUBSTITUTE BRIEF OF RESPONDENT

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## STATEMENT OF FACTS

Respondent objects to Appellant's Statement of Facts as in violation of Rule 84.04(c). It contains few of the facts supporting the verdict as required by rule and precedent. *Vodica v. Upjohn Co*., 869 S.W.2d 258 (Mo. App. S.D. 1994).

Respondent Deborah Hervey ("Hervey") filed this employment discrimination action under the Missouri Human Rights Act ("MHRA") against Appellant, Missouri Department of Corrections ("DOC"), in the Circuit Court of Jackson County. Hervey's action 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. Hervey did not assert a claim against DOC under the Americans with Disabilities Act ("ADA"). After a seven-day trail, the jury returned a verdict for Hervey on her disability discrimination claim.[1] (L.F. 112).

Following post-trial motions, the trial court issued its judgment, awarding Hervey $127,056 in actual damages; attorney's fees in the amount of $97,382.50; front pay in the amount of $36,288; and remitting punitive damages to $1,303,632.50. (L.F. 205-212). DOC appeals from that judgment.

### A. Evidence at Trial

[1] Hervey voluntarily dismissed the retaliation claim upon the return of the jury's verdict which found for Hervey on both claims but awarded damages on the discrimination claim only. (L.F. 113; Tr. 1471: 4-15).

### 1. Hervey's Employment with the DOC

Prior to working for the DOC, Hervey volunteered with the DOC to complete her practicum while finishing her master's degree at the University of Missouri at Kansas City. (Tr. 1138: 12- 1139: 12). Following her graduation, the DOC hired Hervey as a probation officer in 1983. (Tr. 1139: 9-14). In 1986, Hervey left the DOC when she moved out of state. (Tr. 1139: 15-21). When Hervey returned to Missouri in 2002, she was rehired by the DOC as a Probation and Parole Officer ("PO"). (Tr. 1140: 7-10). During her second stint with the DOC, Hervey was never documented by her supervisors for failing to complete work on time. (Tr. 464: 15- 465: 2). However, there were times that she did have trouble completing her reports on time. (Tr. 464: 16-19; 494: 10-17). Any time Hervey fell behind on reports, she was accommodated by being able to work with her supervisors to correct any mistakes and to help stay current with her work. (Tr. 465: 3-21; 494: 21- 495: 3). Hervey's supervisors took note of many of her successful attributes beyond her paperwork such as her exceptional communication, successful interactions with the criminal offenders to which she was assigned, and passion for her work. (Tr. 439: 10- 441: 23; 495: 4-19). As such, Hervey's supervisors never rated her below "successful." (Tr. 441: 18-23; 498: 25- 499:2). Hervey ultimately left the employment of the DOC in 2005 after accepting another job. (Tr. 1140: 9-10).

Hervey returned to the DOC as a PO, more than two years later, in September 2007. (Tr. 1140: 9-19). Because she had been gone more than two

years, Hervey was required to complete a probationary period after being rehired. (Tr. 822: 22-25). As a rehire, Hervey would not be expected to have the same familiarity with the position as she had before she last left; the DOC would expect that she needed some time when assigned a new caseload to relearn the processes and paperwork through which the employees work. (Tr. 445:15- 446:5). This process is particularly important as the role of PO was constantly being updated through new systems and advances in technology. (Tr. 446: 15- 447: 12). Due to these types of changes, Ms. Hervey was unfamiliar with many of the new technologies when she returned to the DOC. (Tr. 1142: 13- 1143: 5). Although Hervey was subject to the probationary period to which new hires and rehires where subject and there had been significant technological changes to the position since she last worked as a PO, the DOC denied Hervey the core training for the position. (Tr. 1144: 14- 1145: 6; 1161: 13- 1162: 1). Therefore, Hervey was denied the benefit that all employees in her position, whether disabled or not, would receive per company policy.

**2. Hervey's Interview with DOC**

Prior to returning to work in September 2007, Hervey interviewed with the DOC. No questions from the applications and pre-employment interviews were designed to reveal the existence of a disability in a potential employee. (Tr. 618: 14-20). During the interview process, Ms. Hervey did not disclose her disability to her interviewers. (Tr. 1163:24- 1164:6). Hervey did not feel at the time that it was necessary to disclose the nature of her disability. *Id.* When applying for the

job, the DOC did not expect Hervey to disclose her disability and admits the interview would have been an inappropriate time to do so. (Tr. 618: 21- 619: 4).

### 3. Hervey's First Day Request for Accommodations

Prior to arriving to her first day at work, Ms. Hervey suffered a panic attack that caused her to arrive late. (Tr. 1151: 2- 15). To explain her tardiness, Hervey felt that she needed to disclose her medical diagnosis. (Tr. 1151: 16 – 1152: 4). Hervey had previously been diagnosed bipolar as well as being diagnosed with anxiety disorder in 1991. (Tr. 1140: 20- 23; 969: 9-13).

Hervey discussed some potential accommodations on her first day with her supervisor, LeLonda Sherrod. (Tr. 1217: 13-18). The requested accommodations included flexibility of arrival time, short breaks to rest her eyes, the ability to listen to background music to alleviate distractions, a supervisor who could give her feedback regarding her work, and an isolated office. (Tr. 830: 4- 14; Tr. 1225: 12- 1226: 14). However, the necessary accommodations she might need were not limited to these accommodations requested the first day. Hervey's doctor included that she would need flexibility and patience to allow her to learn new processes as her disability and prescribed medications presented difficulties with concentration as well as problems with short-term memory and anxiety which were natural consequences of depression. (Tr. 1226: 4- 10; Tr. 839: 10-14). Ms. Hervey provided Ms. Sherrod with documentation which outlined her needed

accommodations from a licensed psychiatrist, Dr. Aznaurova.[2] (Tr. 1216: 24- 1217: 2; 1165: 1- 1166: 10).

**4. Denial of Hervey's First Day Accommodations**

As mentioned above, Hervey, on her first day, requested accommodations including flexibility of arrival time, short breaks to rest her eyes, the ability to listen to background music to alleviate distractions, a supervisor who could give Hervey feedback regarding her work, and an isolated office. (Tr. 830: 4- 14; Tr. 1225: 12- 1226: 14). Hervey testified that she was given many of the accommodations on her first day but testified that she was not provided an isolated office. (Tr. 1223: 9-14; Tr. 1152: 11- 1153: 1). On her first day, Ms. Hervey was originally placed in an isolated office. (Tr. 1152: 11- 1153: 1). However, after she began to unpack her belongings and set up the office, she was immediately

[2] The only accommodation requested the first day which was not included in Dr. Aznaurova's documentation was the request for an isolated office. However, the request for an isolated office was recorded on Hervey's first day in LeLonda Sherrod's log notes (Defendant's Exhibit 210 offered and received into evidence at Tr. 830:18-831:1), and the need for an isolated office was corroborated by Dr. Marshall's letter to the DOC dated November 1, 2007 (Defendant's Exhibit 222 offered and received into evidence at Tr. 922:22-923:6).

removed from the office and placed in a cubicle.[3] *Id.* Hervey was given no explanation for the sudden change. *Id.* That same office remained unused and empty from September 27, 2007 (Hervey's first day) until March 12, 2008. (Tr. 1188: 23- 189: 7). Hervey began requesting an isolated office again as early as October 19, 2007. (Tr. 1061: 24- 1062: 4). After several months of requesting accommodations, Hervey was finally approved to have an office but not until March 12, 2008, in response[4] to an official union grievance she filed. (Tr. 666: 24-25).

Additionally, Hervey asked her supervisor LeLonda Sherrod during a meeting her first day that Hervey be provided a more flexible time schedule which would allow Hervey to begin work at 8:30 am rather than 8:00 am. (Tr. 1169: 7-15; 1168: 15-17). Depending upon which shift a particular PO was assigned, the regular shift for POs in Hervey's position would be 8:00 am to 4:30 pm or 8:30 am

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[3] As suggested by Appellant's statement of facts, Hervey was provided with an office. However, she was not approved to have that office until March 12, 2008, (Defendant's Exhibit 208 offered and received into evidence at Tr. 853: 1-6), almost six months after requesting the office on her first day and four months after Dr. Marshall submitted documentation that the side effects of Hervey's disability and medication would help to be alleviated by office isolation.

[4] The DOC's response to Hervey's grievance was admitted into evidence as Defendant's Exhibit 208 (offered and received at Tr. 853: 1-5).

to 5:00 pm. (Tr. 760: 24- 761: 1; 1168: 18-20). Hervey's request to begin her shift at 8:30 am was meant to allow her extra time in the morning for the side effects of her medication to subside. (Tr. 1168: 15-17). Hervey again began asking that her scheduled shift be changed from 8:00 am to a later start time of 8:30 am on October 19, 2007. (Tr. 1103: 19- 1104: 16). Hervey spoke with her supervisors to inform them the reason for the requested change was due to the effects of her medication. (Tr. 1169: 19- 1170: 12; 850: 25- 851: 5). Nonetheless, the DOC would not permit the schedule change. (Tr. 1169: 11-18). At the time Hervey filed her official grievance on March 12, 2008, she had not been allowed the schedule change and she was still making the request. (Tr. 850: 20-24).

**5. Medical Evidence**

At the time Hervey began first requesting accommodations, she provided a report from her previous psychiatric physician, Dr. Aznaurova. (Tr. 1225: 9- 1226: 2). Dr. Aznaurova documented that Hervey needed special accommodations to offset the difficulties associated with her disability. *Id.*

The DOC asked Hervey to provide additional medical support of her need for accommodations. (Tr. 765: 12-19). Hervey was told that absolutely no accommodations would be provided until she had medical evidence to support that she had a disability. (Tr. 1164: 17-20). DOC supervisors even told Hervey that any interim actions taken should not be considered as the DOC accommodating a disability. (Tr. 1153: 3- 16). Accordingly, Hervey submitted documents from the DOC to her current physician (Dr. Marshall) and to her psychiatric nurse (Cynthia

Easter), requesting that they provide additional information to the DOC regarding Hervey's diagnosis and any needed accommodations. (Tr. 1164: 21-23; 1165: 11-15). The DOC received a letter from Hervey's Nurse Easter which reiterated the need for the accommodations contained in Dr. Aznaurova's previous assessment that Hervey had provided to the DOC on her first day.[5] (Tr. 1225: 9- 1227: 3). Also, the DOC received a letter from Hervey's physician Dr. Marshall which confirmed Hervey's diagnosis and the subsequent symptoms of her condition and medication administered to combat the disability. (Tr. 767: 10-16).

Included in the information presented to Hervey's doctors was a list of what DOC personnel deemed to be essential functions of Hervey's position. (768: 4-24). After receiving the letter outlining the essential functions of Hervey's job and basing the diagnosis on Hervey's continued treatment with Dr. Marshall, Dr. Marshall made the diagnosis that, with the assistance of her medication to balance the effects of her disability ***and the accommodations already requested***, Hervey

[5] Contrary to the suggestion presented in Appellant's statement of facts by alluding to Dr. Aznaurova's statement that "she would not lie for [Hervey]," Hervey was not at odds with her former physician Dr. Aznaurova. Hervey did not submit any additional forms from the DOC to Dr. Aznaurova because Hervey discontinued her medical treatment with Dr. Aznaurova after switching insurance carriers. (Tr. 1164: 23- 1165: 15). She was seeing a different psychiatric nurse and physician at that time. *Id.*

had no limitations which would prevent her from being able to perform the essential functions of her job.[6] (Tr. 702: 3-9). Notwithstanding all this documentation, the DOC made a determination refusing to acknowledge that Hervey had a protected disability. (Tr. 1183: 12-19).

Additionally, no one from the DOC talked with Hervey to tell her the basis of the DOC's determination or to tell her the process which led to the determination. (Tr. 637: 16-22). No one from the DOC explained to Hervey what additional information Hervey could provide to establish that she was disabled and therefore could receive accommodations. (Tr. 783: 17-25). In fact, there were no medical requests made by the DOC that Hervey did not obtain and present to the DOC. (Tr. 784: 1-4).

**6. Additional Requests for Accommodation Denied**

When Ms. Hervey started back with the DOC in September 2007, she was not given the core training which all new employees, or rehires who had been absent from employment as a probation and parole officer for more than two years, were supposed to be given as a matter of standard DOC policy. (Tr. 782: 10-18). The initial training in which she was enrolled was cancelled. (Tr. 1024: 20- 1025:1). This three-week training covered, among other things, writing

[6] In its brief, Appellant has misleadingly quoted out of context only limited excerpts from this letter, thereby giving the wrong impression that Dr. Marshall opined that Hervey had "no limitations" that needed to be accommodated.

violation reports. (Tr. 1024: 2- 24). Hervey requested this training after the DOC failed to re-enroll her in the training following the initial cancellation. (Tr. 782: 10-18). However, she was never placed in the training. *Id.*

After Hervey began having difficulty performing her job which was in part due to the DOC's failure to provide the proper core training initially, Hervey requested training for some of the more particularized aspects of her job. (Tr. 783: 2-11). The DOC recognizes that it would not be an unreasonable accommodation to allow training in certain areas of the job which would also include repeated training. (Tr. 624: 15- 624: 13). Nonetheless, like the core training, Hervey was not allowed to attend the specialized training she was requesting. (Tr. 783: 2-11).

Conscious of her difficulty with performing her job absent accommodation, Hervey took measures outside that of her requested accommodations to better her performance. Hervey sought help from a co-worker Joseph Shoppe, who was her mentor during her previous employment and an employee of the DOC for twenty-five years, asking him to provide help with the reports for which she was denied additional training. (Tr. 1179: 4-10). Mr. Shoppe willingly helped her through her reports. *Id.* Upon hearing that Hervey had sought help from another employee, the DOC administration subsequently instructed Hervey that she was no longer allowed to contact Mr. Shoppe or any other such employee who was not her assigned mentor or supervisor. (Tr. 800: 23- 801: 9).

In addition to her requests to attend training, Hervey requested a transfer out from her supervisor, LeLonda Sherrod, who she believed was discriminating

against her. The Director of Human Relations addressing her request, Rosie Shelton, suggested that Ms. Hervey be transferred to another supervisor. (Tr. 672: 17- 673:1). The DOC refused to transfer Hervey to another supervisor, however, explaining that DOC policy did not permit transfer of an employee who had worked less than one year. (Tr. 468: 15-17). This DOC policy did not permit transfer under any circumstances. (Tr. 649: 24- 650: 4). Notwithstanding this policy, Cheri Johnson, a DOC employee who was placed under LeLonda Sherrod's supervision in 2002, testified that she had been transferred to another supervisor within six months of beginning her employment. (Tr. 586: 3-12). The exception made for Ms. Johnson's transfer was based on similar complaints of discrimination regarding her diagnosis and symptoms of depression and anxiety. (Tr. 586: 13- 588: 16).

**7. Dr. Elliot's Occupational Evaluation of Hervey**

Over six months after Hervey's initial request for accommodation,[7] the DOC contracted Dr. Elliot through her hospital employer for the purposes of assessing the health of Hervey. (Tr. 972: 24- 973: 22). Dr. Elliot's assessment of Hervey's condition and her need for accommodation was based upon a one-time visit with Hervey which lasted no more than one hour. (Tr. 974: 4-15). In making her assessment of Hervey, Dr. Elliot made no effort to contact any of Hervey's

[7] Dr. Elliot's assessment (Defendant's Exhibit 201 and 202 offered and received into evidence at Tr. 946: 22-947:2) were dated April 14, 2008.

treating physicians. (Tr. 973: 23- 974: 3). Dr. Elliot concluded that the additional accommodations that Hervey had requested but not received were unnecessary.[8]

**8. Essential Functions of Hervey's Job**

The DOC created a list of Hervey's essential job functions for Hervey's physicians to consider when making evaluations. (Tr. 768: 4-5). This description of the essential functions of Hervey's job was made by the DOC District Administrator, Denise Bruce, who directly supervised those holding supervisory positions in Hervey's department including Hervey's direct supervisor LeLonda Sherrod. (Tr. 756:10- 757:5). Denise Bruce had been the district administrator for approximately nine years. (Tr. 756: 13-15). Bruce's identification of the essential functions of Hervey's job was based on her experience and on DOC documentation. (Tr. 768: 21-24). The essential functions described were the ability to maintain vigilance in routine and emergency situations, ability to comprehend and apply written rules and procedures, ability to read, write and verbally communicate, ability to conduct drug urinalyses, ability to exercise sound judgment, ability to treat offenders with appropriate concern for health and wellbeing, ability to work with a diverse group of people, ability to conduct investigations, ability to attend court, and the ability to manage crisis situations.

[8] In light of the jury's verdict, the jury did not accept Dr. Elliot's conclusion and possibly gave no credence to her contradictory testimony in its entirety based on the limited medical examination.

(Tr. 770: 5- 777: 18). At trial, Ms. Bruce acknowledged Hervey's ability to perform each specific job function. *Id.* Ms. Bruce was unable to identify any specific instance which would point to a determination that Hervey was unable to perform any of the essential functions of her job; rather, her only concrete examples of feedback praised Hervey's ability to interact with her assigned offenders. (Tr. 774: 1-15).

**9. DOC Discrimination Policies**

Prior to this litigation, the DOC had not updated its discrimination policy since April 1, 1993. (Tr. 621: 9-11). That policy gave no definition of what a disability was under DOC policies or any state or federal law. (Tr. 622: 18-21). Those employees (site coordinators) of the DOC meant to address discrimination complaints and determine whether accommodations should be allowed were not given training as to what a disability is under Missouri law. (Tr. 763: 20-23). The DOC Director of Human Resources, Rosie Shelton, was not certain that site coordinators would even know what a disability was according to the law. (Tr. 632: 3-20).

Division Director of Human Resources, Vickie Myers, testified that the policies that were in place were more directed toward offenders and that any training on discrimination was relative to offenders. (Tr. 1484: 1-4). Myers further testified that the DOC has failed for three years to complete and implement a revision to the policy that would make the DOC's policies reflect the rights of its employees and how to process requests for accommodation. (Tr. 1481: 12-20).

Due to the failure to make updates to the policy since its implementation in April of 1993, DOC administrators were not trained on how to handle employee complaints of discrimination or requests for accommodation.

At trial, although Hervey's ADA site coordinator, Denise Bruce, acknowledged that Hervey's grievance made complaints regarding discrimination and the DOC's failure to accommodate her disability, Bruce stated that she was unsure what her duty was following her receipt of the complaint. (Tr. 803: 21-804: 1). Accordingly, after receiving the grievance, Ms. Bruce did not send the complaint to the human resources department or to any of her chain of command. (Tr. 805: 1-15).

**10. Hervey's Performance Evaluations and Termination**

In January 2008, Hervey's immediate supervisor, LeLonda Sherrod, gave Hervey an oral evaluation of her performance. (Tr. 1123: 21-25). Ms. Sherrod's evaluation purported that Hervey was not performing at the appropriate level of a PO. (Tr. 1123:25- 1124:2). Hervey's earlier supervisors testified that it would be a problem if a probationary employee never got up to a full caseload (Tr. 456: 11-15); however, Hervey's former supervisor further testified that probationary employees are given brand new caseloads and learn new processes and therefore build up reports gradually. (Tr. 445:15- 446:5). Hervey's response to Ms. Sherrod's evaluation was that her difficulties were arising from the DOC's failure to accommodate her disability. (Tr. 1124: 2-4; 1124: 13-22).

In April of 2008, Ms. Sherrod gave Hervey a written evaluation and rated her as "needs improvement." (Tr. 791: 18-20). Hervey admitted that she had not gotten up to a full caseload and she had late reports. (Tr. 1240: 9-12). Based on Hervey's performance evaluation, DOC Chief State Supervisor, Scott Johnston, recommended her termination for failure to successfully complete her nine-month probation period. (Tr. 1322: 6-10). At that time, Mr. Johnston had never been informed of Hervey's complaints or of her grievance against Ms. Sherrod and Ms. Bruce. (1324:23- 1325:10).

**11. Testimony Regarding the ADA**

Appellant objected to Bill Johnson's testimony regarding the DOC's duty under the ADA to enter into the interactive process with Ms. Hervey. (Tr. 380: 5-12). The trial judge allowed testimony to provide evidence of the process through which Hervey sought information and assistance. (Tr. 380:23- 381:3). Mr. Johnson testified that Hervey met several times with Mr. Johnson, a human relations officer, to discuss her rights and the DOC's need to accommodate her disability. (Tr. 379:11- 380:1). Mr. Johnson's testimony was limited to 1) establishing that his training regarding disability was limited to his ADA training sessions (Tr. 382: 6-8; 387:25- 388:7) and 2) his conversations with Ms. Hervey (Tr. 379:11- 380:1; 382: 22-25; 389:25- 390:2). His testimony did not present any details regarding the interactive process.

a. <u>Other Employee's Testimony Regarding Discrimination</u>

Cadena Brim's testimony about retaliation was limited to different supervisors and made no mention of the propensity for wrongdoing of any of the individuals involved in Hervey's claim of retaliation.[9] (Tr. 1046: 9-18). Upon objection, defense counsel was offered the opportunity to offer a limiting instruction regarding the testimony. (Tr. 1050: 1-2).

Cheri Johnson testified that she also worked under the supervision of LeLonda Sherrod. (Tr. 586: 2-3). She testified that like Hervey, she had been treated for depression and anxiety and disclosed her disability to Denise Bruce and LeLonda Sherrod. (Tr. 586: 18-21; 587: 4-7). Also like Hervey, Ms. Johnson testified that she was mistreated in similar ways by Sherrod on the basis of her disability. (Tr. 588: 7-16; 589: 2-4; 1169:22-1170:5; 1172: 6-18). She testified that she was transferred within six months of being placed under Ms. Sherrod's supervision. (Tr. 586: 4-12). She testified that the DOC made an exception to its

[9] Although Brim's testimony does illustrate the DOC's pattern and practice or plan to be elusive with information during meetings with a complaining employee (Tr. 1053: 6-14) and its motive and plan to fabricate issues to disguise its true motive of discharging those involved in protected activity (Tr. 1051: 20-23), her testimony spoke mostly to and was most relevant to retaliation, which claim was voluntarily dismissed by Plaintiff after the jury returned verdicts for Plaintiff on both the disability and retaliation claims.

policy to allow her to transfer though there was a rule in place which would not permit a transfer. (Tr. 595: 10-13).

Upon cross-examination by defense counsel, Cheri Johnson testified that she was afraid of Ms. Sherrod. (Tr. 600: 24). She testified that she and Ms. Sherrod did not like each other. (Tr. 600: 19-22). She confirmed that she had called LeLonda Sherrod a "bitch" in joking manner when inquired into by defense counsel.[10] (Tr. 601: 3-18).

**B. Jury Instructions**

Over objection by Appellant, the trial court accepted Hervey's Instruction Number 8 as the verdict director on Hervey's claim for disability discrimination. Instruction Number 8 is a verbatim restatement of MAI 31.24. (L.F. 90). The DOC objected to this instruction requesting the instruction direct the jury to a definitional instruction regarding disability and essential functions of the job. (Tr. 1378: 3-7). The DOC offered its Instruction B as an alternate verdict director. (L.F. 109). This instruction adds language to the Missouri Approved Instruction by including the phrase "Second, plaintiff is disabled as defined in Instruction No. ___, and". (L.F. 109). The trial court overruled DOC's objection and refused its alternate Instruction B. (L.F. 109).

[10] No objection was made to defense counsel's line of questioning at trial. (Tr. 600: 19- 601: 18).

Over objection by DOC, the trial court gave Instruction Number 6, a definitional instruction on her disability discrimination claim. (L.F. 88). DOC objected to this instruction claiming the instruction did not provide enough guidance to understand what is a disability, what is a reasonable accommodation, and what are the essential functions of the job.[11] (Tr. 1376: 15-24). The DOC offered alternative definitional instructions D, E, and F. (L.F. 107, 108, 111-D).

The DOC also objected to the submission of the punitive damages instruction, Instruction 11. (1357: 13-18; 1379: 9-18; 1380: 7-18; 1382:22-1283:6). The DOC proffered Instruction A and Verdict Forms G and K as alternatives, which the court refused. (L.F. 106, 100, 111-B).

**C. Jury Verdict**

After a seven-day trial, the jury found in Hervey's favor on her disability discrimination claim and awarded her $127,056. (L.F. 112).[12] In addition, the jury assessed punitive damages in the amount of $2,500,000 on her disability discrimination claim. (L.F. 114).

**D. Post-trial Motions and Judgment**

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[11] The term "essential functions of the job" did not appear in the MAI or in the DOC's proposed alternative instruction.

[12] The jury found in favor of Hervey on the retaliation claim but awarded no damages. To avoid potential problems, Hervey voluntarily dismissed the retaliation claim before the bifurcated punitive damages evidentiary proceeding.

DOC filed a motion for judgment notwithstanding the verdict arguing that the trial court erred in: 1) the manner of instructing the jury on Hervey's claim of disability discrimination; 2) awarding punitive damages without limiting the amount under § 510.265 RSMo; 3) awarding punitive damages to Hervey because the State and DOC are immune from an award of punitive damages; 4) admitting evidence of other acts of discrimination; and 5) admitting evidence of disability law outside the jury instructions. (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). The trial court included actual damages, attorneys' fees, and front pay in determining a total net recovery of $260,726.50, and then used that number to calculate the punitive damages cap under § 501.265 RSMo of $1,303,632.50. (L.F. 211).

DOC filed its motion for a new trial, and in the alternative, motion to amend the judgment arguing that the trial court erred in: 1) the manner of instructing the jury on Hervey's claim of disability discrimination; 2) awarding an improper amount of punitive damages; 3) awarding punitive damages to Hervey because DOC is immune from punitive damages; 4) admitting evidence of other acts of discrimination; and 5) admitting evidence of disability law outside the jury

instruction. (L.F. 214-232). The trial court denied the motion for a new trial. (L.F. 252).

## ARGUMENT

## I.

### Introduction

The State, as Appellant, makes an unusual claim in this case. Having been found liable for breaking its own laws, the State now asks this Court to set aside that verdict. It claims that instructions written by this Court's Committee on Jury Instructions and expressly approved by this Court actually misstate the law.

Reduced to its essence, the State's claim is this:

(a) One of the factual elements a jury must find to conclude that the State violated the MHRA based on a disability discharge claim is that the plaintiff was disabled. (There is no dispute on that issue.)

(b) The State's argument continues by saying that MAI 31.24, upon which Instruction 8 was modeled, allows the jury to assume plaintiff's disability, thus absolving the jury of its responsibility to find that ultimate fact.

(c) As a result, the State was prejudiced by the giving of the MAI 31.24 instruction.

As noted there is no dispute on (a). But Ms. Hervey strongly disagrees with (b) and (c). As will be shown, Instruction 8 (and MAI 31.24) required the jury to find that Ms. Hervey suffered a disability. Further, the State gives short shrift to the standard for reversal. Even if this Court believes that there is a better way to instruct the jury in a disability-discharge case under the Missouri Human Rights Act. It is not enough to warrant reversal for the State to show that the instruction

given could be improved. Under settled law, reversal is permitted *only* if substantial, material prejudice resulted to the State from the giving of Instruction 8. The State cites the proper platitude, but makes no attempt to show the existence of prejudice in this case, beyond its demonstrably incorrect claim that the instruction assumes an ultimate fact.

And all of this must be measured against the clear directives of this Court's precedents and Rule 70.02, both of which warn that where an approved MAI Instruction is available "such instruction shall be given to the exclusion of any other instructions on the same subject."

The Court of Appeals got it right. The instruction mandated by MAI 31.24 did not misstate the law nor did it relieve the jury of the duty of finding an essential, ultimate fact. As a result, no prejudice resulted to the State. It follows, then, that the trial court did not err and should be affirmed.

**Standard of Review**

This Court reviews "the trial court's submission of a jury instruction ... de novo." *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 593 (Mo.App.2008); *see Gumpanberger v. Jakob*, 241 S.W.3d 843, 846 (Mo.App.2007). A new trial is warranted " 'only if the offending instruction misdirected, misled, or confused the jury, ***resulting in prejudicial error.***' " *Rinehart*, 261 S.W.3d at 593 (quoting *Kopp v. Home Furnishing Ctr., LLC.*, 210 S.W.3d 319, 328 (Mo.App.2006)) (emphasis added); *see McBryde v. Ritenour School Dist.*, 207 S.W.3d 162, 168 (Mo.App.2006)(same). Stated another way, "[r]eversal for instructional error

should not occur unless it is found that the instruction contains an error of substance with ***substantial potential for prejudicial effect***." *White v. Curators of Univ. of Missouri*, 937 S.W.2d 366, 369 (Mo.App.1996)(emphasis added). Accord, *State ex rel. Missouri Highway & Transp. Comm'n v. Dale*, 309 S.W.3d 380, 384-85 (Mo. Ct. App. 2010), *transfer denied* (May 25, 2010). *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 128 (Mo. App. 1993) states the standard for reversal a bit differently, but nevertheless, with the same deference to the jury's efforts. "No judgment is to be reversed on account of instruction error unless the error materially affected the merits of the case." *Id.*

**The Substantial, Material Prejudice Standard**

This Court's long-standing precedents and Rule 70.02 advise a trial judge to deviate from an approved MAI only at the trial court's peril. Indeed, departure from an approved MAI creates a presumption of prejudicial error. *Powers v. Ellfeldt*, 768 S.W.2d 142, 146 (Mo.App.1989). The trial court's refusal to deviate from MAI has the opposite effect – there is a presumption that no error occurred when the trial court follows MAI.

All of this follows from the rigorous system put in place by this Court to clean up the instruction morass that existed in pre-MAI days. By design, MAI-approved instructions are the product of a thorough vetting process conducted by lawyers possessed of a special expertise and substantial instruction-specific experience. Once submitted to the Court, the Court applies its own careful scrutiny before the instruction is approved – thus the "A" in MAI stands for

"approved." This does not guarantee perfection in the instructions, however. Nor does it prohibit further tweaking when the Court finds that necessary. It does, however, assure that instructions follow a model of simplicity and clarity; asking the jury only to consider ultimate facts and requiring lawyers to argue evidentiary detail to assist the jury in honing its deliberations. Deviation from the tried-and-true method invites meddling that risks the loss of linguistic neutrality and legal comprehensiveness that MAI instructions strive to achieve. See, *Brown v. St. Louis Pub. Serv. Co.*, 421 S.W.2d 255, 257-58 (Mo. 1967)(explaining rationale for MAI system and rejection of case-specific instructional improvements).

Thus, where an appellant assigns error to a trial court's faithful adherence to MAI, the burden rests on the appellant (here, the State) to demonstrate that prejudice resulted from the *failure* to follow MAI. This burden is a substantial one. A decision by a trial court *not* to deviate from MAI will be affirmed unless a failure to deviate from MAI materially affects the merits of the case. But candidly, the test for any instruction is whether it prejudiced a party by failing correctly to state the law resulting in juror confusion or misdirection. "It is not enough to show erroneous deviation [from MAI] unless prejudice also appears." *Hudson v. Carr*, 668 S.W.2d 68, 71 (Mo. 1984). "Although Instruction No. 5 is not an MAI approved instruction, identical principles of instructing a jury apply. An instruction must be a correct statement of the law….." *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 226 (Mo. banc 1994)

Further, to require the giving of a non-MAI instruction, a party must prove that the MAI instructions submitted to the jury misstate the law. *City of Kansas City v. Habelitz*, 857 S.W.2d 299, 303 (Mo.App. W.D.1993). See also *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 168-70 (Mo. Ct. App. 2006)(not error for trial court to refuse to modify MAI 31.24 to delete "contributing factor" and replace with "motivating factor").

On review, instructions are not read in a vacuum. Whether prejudice occurred from the use of any instruction requires the reviewing court to consider all of the instructions together and the argument of the parties. *AgriBank FCB v. Cross Timbers Ranch, Inc.*, 919 S.W.2d 256, 261-62 (Mo. Ct. App. 1996), a case involving unlawful detainer, is instructive. There the reviewing court found that the verdict directing instruction (Instruction 4) was flawed. That instruction was written so that the jury could never make the determination that the tenant was holding over lawfully as a result of an oral lease agreed to after the foreclosure sale. Thus, there was "no real defense to the verdict director." *Id*. at 261. Instruction 4 required the jury to find for AgriBank "if there was a holding over, for *whatever* reason…." *Id*. at 262 (emphasis in original).

This error alone was not sufficient to warrant reversal, however. "'It is not enough to show erroneous deviation unless prejudice also appears.' *Hudson v. Carr*, 668 S.W.2d 68, 71 (Mo. banc 1984)." *Id.* Thus, the court concluded, reversal was proper only if the appellant demonstrated that prejudice occurred when the entire set of instructions and closing argument were considered.

"'Instructions must be considered and read together when assessing any claim of error. When the instructions are considered as a whole and there is no misdirection, any error, is not prejudicial.' *Ahrens & McCarron, Inc. v. Mullenix Corp.*, 793 S.W.2d 534, 541 (Mo.App.1990)(Citations omitted).'" *Id.*

In considering the prejudice issue, *AgriBank* also considered Instruction No. 5, an affirmative converse. "Implicit in [Instruction 5] …was the direction that if the jury found that an oral agreement had been entered into, then Cross Timbers had not "willfully" withheld the property from AgriBank. The instruction therefore cured Instruction No. 4's defective directives…." Given these two instructions, the court reasoned that "the jury necessarily concluded that Cross Timbers was willfully continuing in possession of the property since the jury found no oral lease had been created." *Id.*

AgriBank also agreed that "it is appropriate to review the contents of closing arguments to assist in the determination of whether or not a deviation from MAI or not-in-MAI instructions has had a prejudicial effect on the jury." *Id.*

> AgriBank's counsel emphasized that the jury had to view the case from the standpoint of an on-going series of legal maneuverings that had essentially allowed Cross Timbers to remain on the property over a period of four years without AgriBank receiving any money. More importantly, Cross Timbers' counsel emphasized Cross Timbers' right to remain in possession of the property on the basis of

> the oral agreement that, he argued, had been entered into by the parties. He related to the jury, *inter alia*, that "This instruction [Instruction No. 5] tells you that if Cross Timbers Ranch was on the property on the date that they [AgriBank] filed this action claiming an unlawful detainer, if they were in possession under the oral agreement, then you must find for Cross Timbers Ranch.

*Id.* The court concluded that the

> jury was therefore not misdirected by Instruction No. 4, when considered in conjunction with Instruction No. 5. These instructions hypothesized the ultimate facts that had to be decided by the jury. Any instructional error found in Instruction No. 4 was therefore not substantially prejudicial to Cross Timbers because the combined instructions substantially tracked the statutory law of unlawful detainer and the jury had the clear opportunity to find or not find there was an oral lease.

*Id.*

**The Instructions Here**

Instruction 6, which is not challenged on transfer, was a definitional instruction that preceded the verdict director. Its purpose was to define "disability" for the jurors.

> "Generally, definitional instructions are utilized when necessary to make the instructions understandable to the average juror. MAI,

> How to Use This Book, p. XCV (1981)…. Even if not mandated by MAI, however, a trial court must define for the jury legal or technical terms occurring in the instructions, for their meaning is not within the ken of the ordinary juror."

*Brock v. Firemens Fund of Am. Ins. Co.*, 637 S.W.2d 824, 827 (Mo. Ct. App. 1982).

Here, to assist the jury in understanding the meaning of the word "disability", Instruction 6 read in pertinent part:

> A disability is a physical or mental impairment which substantially limits one or more of a person's major life activities, which with or without reasonable accommodation does not interfere with performing the job.

(Emphasis added). This definition tracked § 213.010.4 RSMo. (2009)

Instruction Number 8 was the verdict director. It tracked MAI 31.24[13] faithfully. It read:

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[13] MAI 31.24 states:

> Your verdict must be for the plaintiff if you believe:
>
> First, Defendant (*here insert the alleged discriminatory act, such as "failed to hire", "discharged" or other act within the scope of* Section 213.055, RSMo) plaintiff; and

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).

The State proffered Instruction B, which modified MAI 31.24 by adding a new paragraph Second. The relevant part of the State's proposed non-MAI Instruction B read as follows (words added to MAI 31.24 by the State's proposed non-MAI instruction are italicized):

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.* ___; and

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

Fourth, as a direct result of such conduct, Plaintiff sustained damage.

---

Second, (*here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age, or disability*) was a contributing factor in such (*here, repeat alleged discriminatory act, such as "failure to hire", "discharge", etc.*); and

Third, as a direct result of such conduct, Plaintiff sustained damage.

*Id.*

(L.F. 111). The trial court refused to give not-in-MAI Instruction B – and properly so.

**The State's Claim of Error**

As previously stated, **r**educed to its essence, the State's claim follows this path:

(a) One of the factual elements a jury must find to conclude that the State violated the MHRA based on a disability discharge is that the plaintiff was disabled.

(b) MAI 31.24, upon which Instruction 8 was modeled, allows the jury to assume plaintiff's disability, thus absolving the jury of its responsibility to find the ultimate fact of disability.

(c) As a result, prejudice to the State occurred.

The reasoning is faulty because the minor premise (the second element) is faulty.

**The Parties Agree on the Required Elements**

Ms. Hervey does not contest the State's assertion that an element of a discharge based on disability claim under the MHRA requires a finding that the Plaintiff suffers from a disability. See, *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315 (Mo. App. W.D. 2005)(listing elements of a disability-discharge violation of the MHRA).

**Instruction 8 Required the Jury to Find the Ultimate Fact of Disability**

The State argues that Instruction 8 assumed an ultimate fact – that plaintiff suffered a disability. A close reading of Instruction 8 defeats this claim.

The cases in which an appellate court concludes that an instruction assumes an ultimate fact find a common language pattern in the faulty instruction – verbiage that informs the jury that the factual conclusion that the jury should be making has already been made. For example, in *Spring*, a not-in-MAI Instruction, No. 5, read:

> In your verdict you must assess a percentage of fault to defendant Gottstein and defendant KCATA, whether or not plaintiff was partly at fault, if you believe:
>
> First, defendant Gottstein caused the bus to move forward and suddenly stop when he knew, or should have known, *that plaintiff had not yet reached a place of safety in the bus*,

873 S.W.2d at 226. (Emphasis added). Instruction No. 5 did not require the jury to find independently that the plaintiff had reached a place of safety, but as the Court said, "the instruction informed the jury that Ms. Spring was not in a place of safety" when the bus started and stopped. *Id.*

Similarly in *Brown v. Van Noy*, 879 S.W.2d 667 (Mo. App.W.D. 1994), plaintiff sued for injuries sustained at the Martin City Pub in a fight. The plaintiff's theory of the case was that the defendant bar had a duty to protect its invitees from known violent patrons.

In *Brown* another not-in-MAI verdict director, stated in pertinent part:

> In your verdict, you must assess a percentage of fault to Defendant Martin City Pub, Inc., if you believe:

> First, Defendant Martin City Pub, Inc. held its premises open for members of the general public to enter and consume beverages, and
>
> Second, Plaintiff Myron Brown was a paying patron of Defendant Martin City Pub, Inc., and
>
> Third, 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, and….

*Id*. at 673 (emphasis added).

> The court found that
>
> [p]aragraphs first and second correctly establish the relationship status between an owner/occupier of a premises held open for business invitees and a business invitee properly on the premises. … The additional special facts to establish liability require two elements: 1) Mike Becker was a person with vicious tendencies likely to inflict injury upon others, and 2) Martin City Pub knew of these tendencies. [citation omitted]

*Id.* The court reasoned that the instruction, as posited, implied that Mike Becker was a person with violent tendencies. That particular finding was an ultimate fact that could not be implied and should have been presented to the jury in a separate paragraph in the instruction. The court concluded that the "verdict finding instruction was erroneous and prejudicial to Martin City Pub, Inc. because it did

not require the jury to specifically find that Mike Becker was a person with vicious tendencies likely to inflict injury upon others." *Id*.

Again, the faulty (not-in-MAI) instruction informed the jury that Becker was a patron with violent tendencies, thus absolving the jury of any responsibility to make that necessary factual determination.

Also, instructive is *Harvey v. Washington*, 95 S.W.3d 93 (Mo. banc 2003). There, Instruction 10 provided:

> Your verdict must be for the plaintiff and against defendant Denise Taylor, M.D., if you believe:
>
> First, defendant Denise Taylor, M.D., either:
>
> failed to advocate for dialysis treatment for Mary Harvey's kidney failure on or before September 29, 1995, or defendant Denise Taylor, M.D., failed to prescribe Mary Harvey an antibiotic from September 26 through September 30, 1995 *which would treat Mary Harvey's pseudomonas urinary tract infection*, and
>
> Second, defendant Denise Taylor, M.D. was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause the death of Mary Harvey.

*Id.* at 95 (emphasis added).

This Court found the instruction erroneous for informing the jury that Ms. Harvey had a pseudomonas urinary tract infection without requiring the jury to find that she did, in fact, have such an infection.

Here, Instruction 8 did not inform the jury that Ms. Hervey had a disability. There was no reference to the "plaintiff's disability" in the instruction. Had the instruction read: "Second, *plaintiff's* disability was a contributing factor in such discharge" the instruction would have assumed that ultimate fact. But the absence of a link between "plaintiff" and "disability" in Instruction 8 destroyed any implication or assumption in the instruction that the fact of disability had been decided or did not need to be decided.

To reach any conclusion on liability then, the jury was required to decide whether disability (expressly not "Plaintiff's disability") was a contributing factor in her discharge. To answer the question, the jury was required to find the fact of disability. Instruction 8, as given, did not give the jury that answer.

The only difference between the State's rejected Instruction B and the given Instruction 8 was whether the finding of disability must be set out in a separate paragraph. Both required the jury to determine whether Ms. Hervey was disabled.

When boiled all the way down, the State's argument is a form-over-substance argument. It is an argument that there is only one possible way to instruct on a disability discharge case – the State's way. The fact that the MAI instruction chose a different linguistic formula to achieve the same end – a requirement that the jury find the fact of disability – does not render the MAI wrong. To repeat: the MAI form requires exactly what the State's proposal requires. Only the words are different.

**The Use of the MAI-Approved Instruction Did Not Prejudice the State**

Alternatively, if the Court believes that Instruction 8 should have appeared in the form suggested by the State rather than by MAI, the State nevertheless suffered no prejudice. As previously noted, prejudice exists only if a "substantial potential for prejudicial effect" exists, White, 937 S.W.2d at 369, such that the jury is misdirected, mislead or confused. *Rinehart*, 261 S.W.3d at 593. *See*, also *Citizens Bank,* 869 S.W.2d 120, 128 (Mo. App. 1993)("No judgment is to be reversed on account of instruction error unless the error materially affected the merits of the case").

**Other instructions**

a. Instruction 6 – Defining Disability

Somewhat curiously, the State argues that the presence of Instruction 6, which defined "disability," does not cure the instructional error it believes exists. This argument is curious for three reasons.

First, as previously argued, Ms. Hervey does not here contend that Instruction 6 is a verdict directing instruction, as the State seems to imply.

Second, Instruction 6 intended nothing more than – and should carry no more load than –to assist the jury in one regard – understanding the meaning of "disability." That word needed to be defined precisely because the jury was required by MAI 31.24 and Instruction 8 to determine whether Ms. Hervey was disabled. If Instruction 8 had relieved the jury of that responsibility, no definition would have been necessary. Indeed, the State's proposed non-MAI Instruction B,

which put the required finding in a separate paragraph, was also accompanied by a definition instruction (rejected Instruction D) for this very reason. LF 107.

Third, the State relies on *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 129-32 (Mo. Ct. App. 2006) as support for its argument that verdict directors cannot be broken apart. As already noted, the verdict director in this case was not split apart.

In *Syn*, the not-in-MAI instruction on employer liability for independent contractors was submitted to the jury in two separate instructions. Instruction 8 and Instruction 10 "broke apart" the elements strung together by MAI 31.15 into two separate instructions. *Id*. at 129. *Syn* mused[14] that the use of two separate instructions to present essential facts to the jury was error, because it "relegate[d] a predicate finding to a subsequent instruction." *Id.* at 131. The supposed error existed because the

> jury was asked to determine what activities Beebe hired Markle to perform and that these activities were inherently dangerous, *only*

[14] The word "mused" is purposefully chosen. For the point the State hopes to make with it, *Syn* is dicta at best. The court there did not decide whether the giving of the instructions in this form was prejudicial error because that point was not preserved for appeal. "The failure to track MAI, although error as discussed above, is not preserved for appellate review and this court must disregard this point on appeal." *Id*. at 135.

> *after* they had found that Markle was negligent in the activities he in fact performed. The submitted instructions segregate the predicate finding of the scope and nature of the activity to another subsequent instruction severing the requisite legal connections between the elements of the instruction.

*Id.* (Emphasis added). The Court later explained that it was the reverse order of the two instructions that created the supposed error, not the splitting itself. "[T]he reverse order in which the instructions were given ask[ed] for a determination of negligence and then a finding of the scope of employment, contrary to the MAI form." *Id.* at 132.

*Syn* has no application in this case because Instruction 8 neither broke apart a verdict director, nor asked the jury to make a predicate finding based on a subsequent instruction. Instruction 6 (a first-read instruction) merely defined what the jury was required to find in the single verdict director that followed.

b. <u>The State's Affirmative Converse</u>

The State never mentions Instruction 9, its own affirmative converse given by the trial court. Instruction 9 read:

> Your verdict must be for the Defendant if you believe:
>
> First, defendant discharged plaintiff because she could not successfully complete her probationary period, and
>
> Second, in so doing, her complaint of disability discrimination was not a contributing factor.

LF 91.

This instruction put the existence of a disability at issue, going so far as to suggest that it was nothing more than a "complaint of disability." When read with Instruction 8, the jury clearly understood that it needed to decide whether Ms. Hervey was disabled or not.

**Closing Argument**

The closing argument highlighted the necessity of the jury finding that Ms. Hervey had a disability as well. First, her counsel argued:

> if she does not have a disability, they don't have to accommodate her. If she does have a disability they have to accommodate her.
>
> Does she have a disability? We clearly think that she does….

Tr.1400. The argument continued by Plaintiff's counsel, discussing Instruction 9, the State's affirmative converse:

> Now, they have an instruction too. "Defendant discharged Plaintiff because she could not successfully complete her probationary period." And that's the whole reason why we are fighting about this because, of course, if she has a disability and she needs accommodation she will never be able to successfully complete her probation unless they accommodate her.

Tr. 1410.

The State's argument took up the same theme in its closing argument – that disability was at issue.

First, the State argued that "it is her perceptions that cause her to believe she is disabled." Tr. 1420. The argument from the State about disability continues.

> Later on when Ms. Hervey is asked to, "Oh, you say you have a disability." That's what you say, but it is not obvious. We can't see this. Please go to your providers and have them tell us what it is and tell us what you need because of your disability to perform the essential functions of this job.

Tr. 1429. Then, "Ms. Hervey asks for things that can't be supported by her diagnosis because a diagnosis doesn't mean there is a disability." Tr. 1430. And again, "[t]he reasonable conclusion from the evidence you were offered is she couldn't do her job [']with or without accommodation.[']" Tr. 1438. This last, is, of course, a reference to the definition of disability in Instruction 6. This is shorthand for a conclusion that Ms. Hervey is not disabled under the definition provided by the trial court.

And finally, the State argued to the jury:

> Ms. Hervey comes in and says she is disabled. The department says, "Well, what is it? How does it affect you? Give us some information." Ms. Hervey gets the information. The department considers the information, the key information. Not limited. Not limited equals not disabled. That is the logical conclusion.

Tr.1440.

Plaintiff's rebuttal responds to the State's claim that Ms. Hervey is not disabled.

> The Department of Corrections has the legal department. Did the legal department make an effort to get the right finding of whether she's got a disability? We can sit here and look. Clearly she's got a disability. The doctors' notes by October says [sic] she has a disability. The doctors' notes say she has an impairment. She has a problem learning.
>
> It is not difficult to piece together from two or three doctors' notes. Clearly she has a disability. Their legal department got it wrong.

Tr. 1444.

This exchange shows beyond cavil that closing argument informed the jury that the existence of a disability was an issue in the case that they needed to decide.

**Alternatively, Even if Instruction 8 Could be Better Written it Accurately States the Law and, as a Result, the State Suffered no Prejudice.**

Reversal of a judgment based on instruction error requires a showing that "'the offending instruction misdirected, misled, or confused the jury, ***resulting in prejudicial error.***' " *Rinehart*, 261 S.W.3d at 593. The State's argument for prejudice is a stark one usually rejected by the courts – that a flawed instruction must necessarily result in prejudice requiring reversal without regard for whether

the jury was misdirected, mislead or confused. Giving the State the benefit of the doubt, however, its argument may be that Instruction 8's assumption of an ultimate fact relieved the jury of finding that fact, that the jury was thus mislead, and prejudice naturally follows.

As previously shown, Instruction 8 did not assume the fact of disability. Indeed, it required the jury to decide whether Ms. Hervey was in fact disabled as a predicate to determining whether she was discharged for that reason. Both MAI 31.24 and Instruction 8, which followed MAI 31.24, carefully avoided the words "plaintiff's disability" which would have made the State's argument correct.

But the critical issue in the prejudice analysis was whether the jury was misdirected, mislead or confused. The State made no such showing in its brief. The State limited its argument to its claim of instructional error, apparently hoping that the Court would abandon its duty to conduct the required prejudice analysis. Indeed, the State did not bother to show the Court the closing argument that highlighted the stark controversy between the parties on the disability issue or the State's own affirmative converse (Instruction 9), which described Ms. Hervey's claim as no more than a "complaint."

The jury could only have been misdirected, mislead or confused if Instruction 8 was an incorrect statement of the law. It was not. As the Court of Appeals concluded, the judicial mind can imagine a different and perhaps better wording, but until it is shown that the equally correct Instruction 8 sent the jury on an improper deliberative frolic, there is no basis for reversal.

## Conclusion

Instruction 8 properly informed the jury. Even if it could be written differently, Instruction 8 did not misstate the law. The jury was neither misdirected, mislead, nor confused. No prejudice flowed to the State. The trial court should be affirmed.

## II.

The State's second point challenges the trial court's inclusion of statutory attorneys' fees in the calculation required by § 510.265 RSMo (2009) to determine the permissible amount of punitive damages. The question presented is thus one of statutory interpretation that has, apparently, escaped appellate court scrutiny thus far.[15] As the Court of Appeals put it: "The question on appeal is straightforward. Does the language "net amount of the judgment awarded to the plaintiff" include or exclude damages for attorneys' fees?"

**Standard of Review**

Statutory interpretation is a question of law. *Lombardo v. Lombardo*, 35 S.W.3d 386, 388 (Mo. Ct. App. 2000). Questions of law are reviewed *de novo*. *Id.*

**Argument**

Section 510.265 caps punitive damages awards in Missouri at:

> (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.

*Id*. The State contends that the phrase "net amount" requires that the judgment be reduced by something. The statute does not define the "something." With a

[15] The State abandons its claim that punitive damages were not appropriate on transfer.

reasoning born of necessity, but divorced from any textual support, the State urges that that "something" is attorneys' fees.

"Net amount of the judgment" is not defined in the statute. Nevertheless, the words used in the statute are unambiguous taken alone. Their application, however, is a function of legal context, not an open-ended proposition designed to serve one party or the other. Thus, their application requires that the words actually used be given their accepted meaning[16] and then applied to the legal context in which that meaning matters.[17]

"Net" means "free from all charges or deductions" as "opposed to gross." Webster's Third International Dictionary 1519 (3rd 1961). Thus, all agree that "net amount of the judgment" means an amount determined after the reduction of the judgment by something. But two other words help determine what that something is: "judgment" and "awarded."

Rule 74.01 defines "judgment" to mean "a decree and any order from which an appeal lies." An appeal lies only from a final judgment. § 512.020,

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[16] "This Court will look to the plain and ordinary meaning of those words as defined in the dictionary." *Dorris v. State*, ___ S.W.3d ___ (Mo. banc 2012) (No. SC91652, decided Jan. 17, 2012).

[17] "When the Legislature has not defined a word or phrase, a court can examine other legislative or judicial meanings of the word or phrase…." *Mayfield v. Dir. of Revenue, MO*, 335 S.W.3d 572, 574 (Mo.App. E.D.2011).

RSMo (2000). "As a general rule, for the purpose of appeal, a judgment must dispose of all parties and all issues in the case and leave nothing for future determination." *House Rescue Corp. v. Thomas*, 328 S.W.3d 267, 272 (Mo. Ct. App. 2010).

"Judgment" has a specific legal meaning that the legislature is presumed to know. "It is presumed that the General Assembly legislates with knowledge of existing laws." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667-68 (Mo. 2010).

Thus the phrase "net amount of the judgment" means that something must be subtracted from the order entered by the court finally establishing the plaintiff's complete rights in this case.

Chapter 213 establishes the rights of the plaintiff in this case. Among these rights is the right to receive an award of attorneys' fees. See § 213.111.2, RSMo (2009)("The court may … award costs and attorneys' fees to the prevailing party…."). The statute makes it clear that attorney's fees are not awarded to the attorneys. They are awarded to the "prevailing party." Here, the plaintiff prevailed. She was forced to hire counsel to vindicate her statutory rights. She maintains a legal obligation to pay her attorneys' fees for their efforts on her behalf in securing that vindication. Such fees are, therefore, part of the damages suffered by the plaintiff and as such, are part of the overall damages for which the law permits compensation.

Given this understanding, the § 510.265 phrase "awarded to the plaintiff" necessarily includes attorneys' fees. Section 213.111.2 says so. Attorneys' fees are *awarded* to the prevailing party. For that reason, the judgment for attorneys' fees is entered in favor of the plaintiff, not her counsel, under the statutory rubric. And because they are "awarded" to the plaintiff, attorneys' fees are properly part of the judgment awarded to the plaintiff under the meaning of § 510.265 RSMo.[18]

There is no textual support for a conclusion advanced by the State that the phrase "net amount of the judgment awarded to the plaintiff" requires that judgment to be reduced by the amount of attorneys' fees awarded to the plaintiff. Indeed, the text commands the inclusion of all amounts *awarded* to the plaintiff. That includes attorneys' fees.

---

[18] Several cases note that attorneys' fees are sometimes properly included in a "judgment" when the law allows for such an award. See, *Ford Motor Credit Co. v. Housing Authority of Kansas City, Mo*, 849 S.W.2d 588, 597 (Mo. Ct. App. 1993)(court noted that "judgment" *includes both damages and attorneys' fees*)(breach of contract containing attorneys' fees provision); *Student Loan Mktg. Ass'n v. Raja*, 914 S.W.2d 825, 826 (Mo. Ct. App. 1996)(judgment included attorney's fees)(action on promissory note that provided for attorneys' fees); *Mihlfeld & Assoc., Inc. v. Bishop & Bishop, L.L.C.*, 295 S.W.3d 163, 179 (Mo. Ct. App. 2009)(case remanded with directions to enter a judgment that included an award of attorney fees)(breach of contract containing attorneys' fee provision).

There must be something else that produces a "net amount."

There is.

When a defendant facing a punitive damages judgment asks the Court to apply § 510.265 in a JNOV motion, the trial court cannot apply the statutory multiplier to the entire judgment because that judgment already includes punitive damages. Therefore, the legislature mandated that the multiplier be applied to the "net amount of the judgment," that is, the full amount awarded the plaintiff less the punitive damages contained in the jury's verdict. This simple mathematical formula

Punitive damages cap = (Full amount due Plaintiff – punitive damages verdict) x 5

gives full meaning to the words "net amount" while giving full meaning to the words "judgment" and "awarded to the plaintiff" as well. It also avoids two preposterous results: (1) including the amount of the punitive damages in the base against which the multiplier is applied and (2) manufacturing from thin air a textually divorced conclusion that "net amount" requires the reduction of the judgment by amounts actually awarded to the plaintiff pursuant to statute.

Here the trial court applied the correct formula. The jury's verdict awarded Ms. Hervey $2.5 million in punitive damages plus actual damages of $127,056. The trial court awarded front pay of $36,288 and statutory attorneys' fees of $97,382.50. When applying § 510.265, the trial court properly subtracted the

punitive damages amount from the calculation. Thus, the § 510.265 calculation performed by the trial court was net of punitive damages.

| | |
|---|---|
| Total Awarded to Plaintiff = | $2,500,000 (punitive damages) |
| | +$127,056 (damages) |
| | + $ 36,288 (front pay) |
| | + $ 97,382.50 (attorneys' fees) |
| | $2,760,726.50 |
| Net amount of the judgment = | |
| | $2,760,726.50 |
| | -$2,500,000.00 |
| | $ 260,726.50 |
| § 510.265 calculation | |
| | $ 260,726.50 |
| | x 5 |
| Punitive Damages Cap | $1,303,632.50 |

The State's sole case supporting its argument is a slender reed at best. *Reed v. Reed*, 10 S.W.3d 173 (Mo. Ct. App. 2000). The State cites this case because two phrases "net amount" and "attorneys' fees" appear in it. That is as close as *Reed* comes to being relevant to this case.

*Reed* involved messy cross-contempt actions by an unhappily divorced couple. There, wife was to pay the husband her tuition reimbursement amounts.

He was to pay the mortgage on the couple's former home. Instead, he paid his attorneys' fees and failed to make mortgage payments. As a result, the wife made mortgage payments. When the husband sought recovery of the tuition reimbursement amounts, the wife claimed a set off for the mortgage payments she made that he should have made. The issue, simplified for these purposes, was whether an attorney's lien took priority over a property set-off resulting from a dissolution action. (Perhaps the reader is now wondering what this has to do with a punitive damages cap. Be assured: that is the right question).

*Reed* used this example to illustrate its use of the terms "net amount" [19]:

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[19] The phrase "net judgment" is scattered through various appellate cases. *Reed's* use of the phrase "net amount" is consistent with the meaning attached to "net judgment."

That phrase, which is different from the phrase found in the statute, nevertheless indicates that a "net judgment" is a judgment reduced by some amount. In other contexts, "net judgment" means the amount ultimately due one party after reduction by an amount due the defendant. This is the most common usage. See *Harris v. R. Webbe Corp.*, 669 S.W.2d 578, 579 (Mo. Ct. App. 1984)("net judgment" for contractor of $3,703.03 resulted from finding for subcontractor in the amount of $6,359.43 and for contractor on counterclaim for $10,062.46); *Biederman Furniture Co. v. Isbell*, 102 S.W.2d 746, 747 (Mo. Ct. App. 1937)(in case where counterclaim is filed, the court can render only a single

> In other words, if Client A wins a judgment against B, but A already owed B money for a related matter, or B won a counterclaim against A on a related matter, then the claims of A and B will be offset, and the attorney's lien will attach only to the net amount following the set-off.

*Id*. at 183. *Reed* holds that the attorneys' fee lien does not take priority over the dissolution property division.

Obviously *Reed* has nothing to do with the application of § 510.265 sought in this case.

Nor does *Baker v. Whitaker*, 887 S.W.2d 664, 670 (Mo. App. 1994) assist the State. The issue there was the meaning of a contingent fee contract providing for attorneys' fees of 50% of the "amount paid me." Counsel obtained a $1 million settlement, but from that amount paid substantial medical bills incurred by their client. The client claimed that the "amount paid me" required a set off of the medical bills. The court concluded that the phrase was ambiguous and interpreted the contingent fee must be measured against the "net amount" recovered by the client (gross settlement minus medical payments). In *Baker*, "net" required a reduction of medical expenses, not attorneys' fees.

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judgment, the "net amount due the prevailing party, covering both the plaintiff's cause of action and the defendant's counterclaim); *Edmonds v. Stratton*, 457 S.W.2d 228, 230 (Mo. Ct. App. 1970)(same); and *Johnson v. Heitland*, 314 S.W.3d 777, 778-79 (Mo. Ct. App. 2010)(same).

Again, *Baker* adds nothing to the State's argument beyond the agreed-to proposition that net means that something must be deducted.

Finally, the State asserts that including a statutory attorneys' fee award in the § 510.265 calculation "arbitrarily inflates" the amount of punitive damages permitted under the law. The premise of this argument is that attorneys' fees are not part of the damages suffered by the plaintiff. As previously discussed, § 213.111 refutes that claim. The very purpose of the statutory fees awarded is to compensate the prevailing party for the additional damages of incurring attorneys' fees to vindicate rights under the law. The statutory attorney fee provision is a reimbursement provision – reimbursement for damages incurred by the prevailing plaintiff in vindicating her rights. *Lilly v. County of Orange*, 910 F. Supp. 945, 955 (S.D.N.Y. 1996) reminds that the purpose of attorneys' fees under 42 U.S.C. § 1988 is to "stimulate enforcement of the civil rights laws by entitling those who vindicate their own civil rights to *reimbursement* for their legal expenses, and for law firms to accept such assignments." *Id.* (emphasis added).

The State further urges that claims for attorneys' fees "do not have to be decided in the court's judgment" and that the court was authorized to "consider motions for attorneys' fees filed *after* the entry of judgment." (App.Br.32)(emphasis in original).

Though it did not happen in this case, courts usually enter a judgment on receipt of the jury's verdict. That judgment is not a final judgment unless no post-trial motions are filed. A motion for attorneys' fees, which cannot be filed until a

prevailing party is determined under the MHRA statutes, is a proper after trial motion designed to amend the judgment. See, *Brady v. Curators of Univ. of Missouri*, 213 S.W.3d 101, 114-15 (Mo. Ct. App. 2006)(motion for attorneys' fees is motion to amend judgment under Rule 78.04). If the attorneys' fees are awarded, the judgment is amended accordingly. It is that amended judgment that determines what is awarded to the plaintiff and from which the punitive damages must be subtracted to determine the "net amount of the judgment awarded the plaintiff."

*Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996) holds that the "well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct." Including the award of attorneys' fees in calculating the final cap on the punitive damages award furthers this purpose. Indeed, an award of punitive damages that is founded on the plaintiff's damages, including attorneys' fees, is entirely consistent with Missouri law. Section 213.111 permits such an award to become part of the judgment and § 510.265 makes the judgment the measure of the punitive damages cap.

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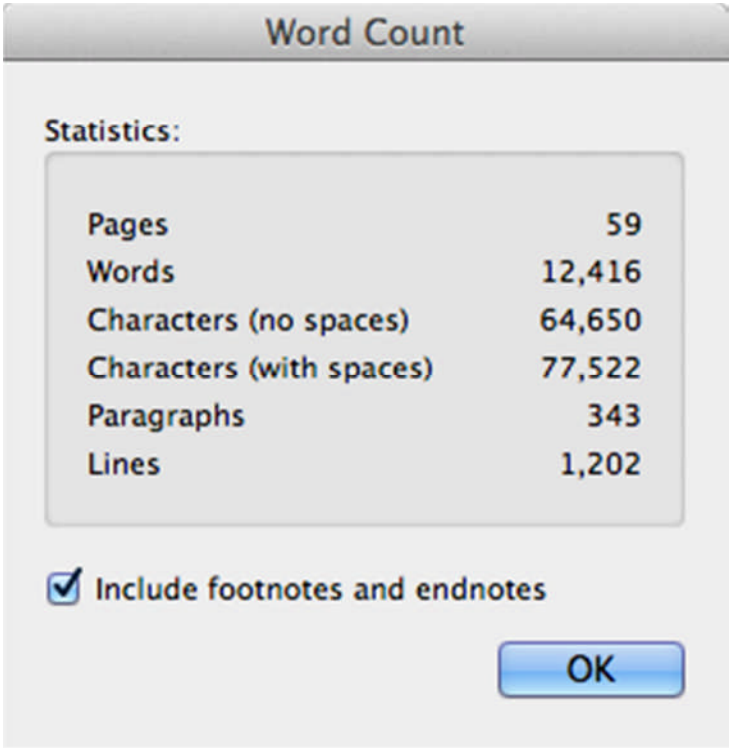
## CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 12,416 words. The word count was derived from Microsoft Word.

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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing document was served via the MO e-filing system on this 17th day of February, 2012, to the following:

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