



In the Missouri Court of Appeals Eastern District

DIVISION TWO

MATTHEW D. VACCA,	)	No. ED104100
	)	
Plaintiff/Respondent/	)	Appeal from the Circuit Court
Cross-Appellant,	)	of the City of St. Louis
	)	
v.	)	
	)	
MISSOURI DEPARTMENT OF LABOR	)	Honorable Julian Bush
AND INDUSTRIAL RELATIONS,	)	
DIVISION OF WORKER'S	)	
COMPENSATION	)	
	)	
and	)	
	)	
BRIAN MAY,	)	
	)	
Defendants/Appellants/	)	
Cross-Respondents.	)	Filed: November 7, 2017

Introduction

The Missouri Department of Labor and Industrial Relations (DOLIR or Department), Division of Worker's Compensation (Division); and Brian May (May) (collectively Appellants) appeal from the trial court's judgment in favor of Matthew D. Vacca (Vacca) on his claim alleging retaliation under the Missouri Human Rights Act (MHRA) in his Second Amended Petition. Vacca cross-appeals from the trial court's judgment granting May's motion for new trial on damages or in the alternative remittitur

and reducing the punitive damages awarded against May. We affirm in part and reverse in part.

Factual and Procedural Background

Vacca filed suit against Appellants and former defendant Administrative Law Judge (ALJ) Karla Boresi (Judge Boresi) claiming the defendants violated the MHRA by discriminating against him on the basis of disability, creating a hostile work environment for him, and retaliating against him for complaining of discrimination. The parties tried the case to a jury between September 14, 2015, and September 25, 2015. At the conclusion of the evidence, Vacca elected to submit to the jury only his claim of retaliation against the Division and May. The evidence viewed in the light most favorable to the jury's verdict is as follows.

Vacca was an ALJ with the Division from 1992 through June 2011. In the mid-1990's Vacca was diagnosed with muscular dystrophy, a chronic illness. He reported his condition to his employer in 1996.

On February 5, 2008, Vacca asked then-chief ALJ of the Division, Judge Edward Kohner (Judge Kohner) and Division Director Jeff Buker (Director Buker) to upgrade the Division restroom to comply with Americans with Disabilities Act (ADA) standards as part of a potential remodel of the Division's office space. On February 14, 2008, in an email to Judge Kohner and Director Buker, Vacca alleged the Division's recent decision not to remodel the offices due to costs was part of a calculated effort to turn the other Division ALJs against him in retaliation for requesting ADA compliance. Vacca stated if the Division did not proceed with the office remodel as a whole, he would file a "complaint for violations of the ADA, the Human Rights Act, Retaliation under both

Acts and [] conspiracy on the parts of many to violate [the MHRA].” Although the record does not contain Vacca’s complaint, the evidence indicates Vacca lodged an ADA charge with the Equal Employment Opportunity Commission (EEOC) regarding the Division restroom in 2008. The restroom was upgraded in March or April of 2009 when the Division paid to install an ADA-compliant toilet and properly affix the grab bar.

In 2008, ALJ Kathleen Hart (Judge Hart) became chief judge. Around August 2008, Judge Hart and Director Buker discussed modifying Vacca’s duties and office hours to accommodate his disability. Under the arrangement, Vacca worked from home three days a week, and held trials and kept office hours the other two days. On August 14, 2008, in a personal memorandum for her own records, Judge Hart wrote she informed Director Buker during a telephone call that Vacca would focus on conducting trials and would handle fewer daily dockets and other duties. Judge Hart wrote “the ‘essential function’ of his job” would be to conduct trials and complete his awards quickly, and that “[h]e will conduct more trials than all the other judges and will not have the duty and floating judge assignments.” The Division set up a home office for Vacca with a fax number, a computer, and dictation software for the computers at each of his offices.

In April 2009, Judge Boresi became chief judge. In July 2010, Judge Boresi completed the 2010 Performance Management Plans (PMPs) for the ALJs in the St. Louis office. Judge Boresi rated ten judges, four of which received “successful” ratings, including herself. Judge Boresi rated Vacca as “successful.” Vacca testified he believed this was a mediocre review and he should have been rated as “highly successful,” one level higher. After receiving his evaluation, Vacca emailed Judge Boresi indicating he

believed her rating was “highly discriminatory” and reflected her “belief that a disabled person under a disability accommodation cannot be successful [or] highly successful.”

On August 10, 2010, Vacca started claims paperwork with Standard Insurance, Missouri’s disability insurance carrier. In an accompanying letter to a DOLIR human resources employee, Vacca stated he was making a claim for long-term disability indicating he “may be disabled from performing material duties of my job [] at my employer’s usual place of business on a sustained and permanent basis.” Vacca stated he was enrolling in physical therapy and hoped to sufficiently recover to enable himself to perform his duties but he was initiating the disability claim “out of an abundance of caution.” Vacca stated, “I plan to continue working as best I can under my Reasonable Accommodation pursuant to the ADA.”

On August 17, 2010, Vacca emailed DOLIR’s Acting Director Peter Lyskowski (Director Lyskowski) stating he believed Judge Boresi was discriminating against him based on his disability and retaliating against him based on his discrimination complaint to the EEOC, asserting she was using her evaluation of his performance to take an adverse job action against him and was not honoring the terms of his reasonable accommodation. On August 20, 2010, Vacca again emailed Director Lyskowski alleging Judge Boresi was practicing favoritism by fabricating evidence in the PMP to raise the ratings of ALJs she liked and using the PMP to harass him based on his disability and prior EEOC complaint. In the email, Vacca indicated he filed preliminary papers for disability benefits due to Judge Boresi’s “hostility and harassment[.]” Director Lyskowski directed Cornell Dillard (Dillard), a DOLIR human resources employee, to investigate Vacca’s claims against Judge Boresi.

On September 23, 2010, Vacca emailed Director Lyskowski, Dillard, and Judge Boresi alleging Judge Boresi was not assigning him enough trials for him to meet the requirements of his reasonable accommodation as retaliation for his allegations of age, sex, and disability discrimination in her performance evaluations of him and other older, white male ALJs. On September 30, 2010, Vacca emailed Director Lyskowski and Dillard again stating Judge Boresi committed an act of retaliation against him by assigning the one trial available on September 28, 2010, to another judge.

On October 8, 2010, Dillard completed his investigation into Vacca's August 17, 2010 complaint and concluded Vacca's claims of discrimination and retaliation against him by Judge Boresi were unsubstantiated. Dillard found the PMP "successful" rating was not an unfavorable evaluation, was appropriate and fair, and there was no evidence the rating would be used to detrimentally alter the terms or conditions of Vacca's employment. Dillard noted Vacca's ADA complaint against the Division was filed prior to Judge Boresi becoming chief judge when she did not serve in any supervisory capacity and she was not involved in responding to the complaint. Dillard reported Judge Boresi stated Vacca frequently arrived after 9:30 a.m. on the days he came into the office, which resulted in him not being assigned cases. At that time, Dillard noted there was no evidence Vacca made a formal request for a reasonable accommodation due to disability as outlined under the ADA or that the proper procedure for making such an accommodation was followed. Dillard reported Vacca's modified work schedule and duties were devised by Judge Hart and former Director Buker, and there was no record of Vacca requesting a modification based on an inability to perform certain functions of his job and no submission of medical documentation to support the accommodation. Dillard

suggested DOLIR's procedure be followed for approving the accommodation since it appeared it would be ongoing.

That day, Director Lyskowski informed Vacca of the result of Dillard's investigation; supplied Vacca with a contact in DOLIR's human resources office in order to properly request a work accommodation in line with his current modified duties; and advised Vacca to follow the Department's formal grievance process and contact Dillard to file a grievance in the event of future or ongoing claims of discrimination.

Vacca then filed a formal grievance with the Department complaining Judge Boresi was using the case assignment process to retaliate against him. On October 14, 2010, Dillard met with Vacca to discuss his allegation Judge Boresi retaliated against him by refusing to assign him sufficient cases to meet his performance goals. On October 27, 2010, Dillard issued his decision finding there was no evidence to substantiate Vacca's claim of retaliation, noting Vacca had averaged the same number of case assignments every year since 2008.

Meanwhile, on October 25, 2010, Vacca filed a charge with the Missouri Commission on Human Rights (Commission) and the EEOC against Judge Boresi, Dillard, and Director Lyskowski, all related to Judge Boresi's evaluation rating based on alleged race, sex, age, and disability discrimination and retaliation for his prior complaint about the restroom facilities. Vacca also alleged Dillard was conspiring with Judge Boresi to deprive him of his reasonable work accommodation and was purposefully making the complaint process difficult by refusing to "take any action" on his claims of discrimination and retaliation unless Vacca filed his requests and complaints on the

Department's forms. Vacca's claim against Director Lyskowski was premised upon his failure to take reasonable measures to stop the alleged retaliation.

Sometime during the last week of December 2010, May became Director of the Division.

On January 3, 2011, Vacca renewed his application for long-term disability benefits with Standard Insurance. In a letter to the insurer, Vacca referenced his August 2010 application which was not completed because he was able to continue working and indicated he was renewing his claim because, "[u]nfortunately, I am no longer able to work." In his January 3, 2011 application, Vacca stated his last full day of work was December 7, 2010; he was unable to work as of January 1, 2011; and that he continued "to work for my current employer to the extent of my abilities and to finish work I have begun."

On January 5, 2011, the ALJ Review Committee (Committee) convened to conduct a performance audit review of several ALJs. On that date, May and Lyskowski, who was no longer DOLIR's Director but was now a member of the Committee, instructed Judge Boresi to supplement her performance review of Vacca by addressing Vacca's work hours, accessibility, professionalism, and a lawsuit Vacca filed challenging Judge Boresi's position as chief judge.

Judge Boresi completed the supplemental PMP on January 7, 2011. In the supplement, Judge Boresi defended her review of Vacca based on the outlined areas of concern. This included information as to Vacca's office hours and his availability when working outside the office; allegations Vacca had yelled, used profanity, and called attorneys practicing before the Division "trailer trash," "pathetic," and "scum" in a staff

meeting; and, in a follow-up meeting with Judge Boresi, labeled the attorneys as “bottom feeders” and “pedophiles.” Judge Boresi’s supplemental report and enclosed materials included two references to Vacca’s discrimination claim against her filed with the Commission and the EEOC; a single page from Vacca’s discrimination complaint against Judge Boresi in which Vacca defends his comments about attorneys practicing before the Division based on his constitutional right to free speech; a general reference to the prior ADA complaint regarding the Division bathrooms in a personal memo written by Judge Hart; and copies of documents from Vacca’s lawsuit against Judge Boresi challenging her position as chief judge which included allegations she was using the PMP to retaliate against him for filing the first discrimination claim, including the court’s order dismissing his action.

Vacca was provided with Judge Boresi’s supplemental PMP and, on January 11, 2011, sent his response to the Committee for its consideration. Vacca alleged Judge Boresi was again retaliating and she included the information on the lawsuit in order to make him look bad, as the lawsuit was irrelevant to his evaluation and the Committee’s involvement in the case was improper and constituted an infringement on his first amendment rights and his freedom to access the courts to determine legal disputes. Vacca accused Judge Boresi of using the Committee to retaliate against him because she filed the supplemental information after he filed the lawsuit and the EEOC complaint, and asserted she provided the information in a calculated attempt to bias the Committee and smear his reputation and alternatively accused the Committee’s seeking of additional information as being politically motivated.

On January 12, 2011, the Committee reconvened. During the meeting, the Committee discussed the propriety of Vacca filing a lawsuit against a fellow ALJ; Vacca's modified work duties and schedule; Vacca's refusal to complete requested grievance and accommodation forms; Vacca's application for long-term disability benefits; and the October 2010 EEOC charge of discrimination. The Committee issued a vote of no confidence against Vacca in a 4-1 vote. The minutes indicate May was going to discuss with Vacca his office hours and that he "[s]hould not run over people," and May would provide Vacca with the necessary "forms" and offer their "concerns."

On January 13, 2011, May informed Vacca of the no confidence vote. On January 19, 2011, May personally delivered a letter to Vacca acknowledging Vacca was currently working under a modified schedule and duties and that the current arrangement was approved by Judge Hart as reasonable and necessary. May requested Vacca complete an enclosed Request for Accommodation Form to advise the Division of any particular reasonable accommodation he might require and provide medical information to support the accommodation. In a follow-up email on January 27, 2011, May again acknowledged Vacca's current modified work schedule and duties but indicated his disagreement with Vacca that he had a "reasonable accommodation" as it was not properly requested and documented, and requested Vacca begin the process to do so.

On February 14, 2011, Vacca responded to May's email indicating he needed to continue his current modified work duties and office hours and requested additional accommodations. Vacca stated his condition had deteriorated since the original accommodation began; he needed to sleep when necessary, usually at 10:30 a.m. and at 2:00 or 3:00 p.m.; he must lie down or recline or lie in a tub of hot water when necessary;

he experienced exhaustion, pain, and swelling; he cannot walk, stand, take notes or type for more than 10 to 15 minutes; he needed to lie down frequently and change positions; he sleeps 12 hours a day and is exhausted after being awake 6 hours; and “I find it very difficult to work in the office the two days that I currently do[.]” In his letter, Vacca advised May that the physician’s statement he was relying on from the Mayo Clinic “declined to determine work limitations or suggest accommodations because he does not have any first-hand knowledge of my work and is not an ergonomic expert. He rightfully suggested to me that limitations and accommodations” are matters for the employer and employee to decide and not the physician. On February 16, 2011, Vacca returned the Request for Accommodation Form to May.

On February 28, 2011, Vacca submitted to Standard Insurance two physician’s statements, neither from the Mayo Clinic, supporting his claim for long-term disability benefits indicating he was currently working under a reasonable accommodation but that he could no longer work with any “reasonable work or job site modification” and that he had a regressive condition with no expectation of improvement.

On March 14, 2011, Tammy Cavender (Cavender), the Department’s Director of Administration and the human resources manager who handles requests for work accommodations, contacted Vacca seeking additional information from Vacca’s physician regarding Vacca’s limitations in support of his request for workplace accommodations. On April 26, 2011, Vacca emailed Cavender requesting additional time to secure the necessary physician’s statement.

On May 16, 2011, as a result of Vacca’s application for long-term disability benefits and the representations contained therein, Standard Insurance awarded Vacca

long-term disability benefits. Cavender testified Vacca called her the following day and she explained to him that the Department treats the application for and approval of long-term disability benefits as a voluntary resignation because the benefits are intended for persons unable to do their jobs. Cavender testified Vacca informed her during their telephone call and later by email that he wanted to continue to work.

Cavender then met with May and the Division's legal counsel to discuss the implications of Vacca receiving long-term disability benefits. May testified following this meeting it was his understanding that receipt of long-term disability benefits amounted to a resignation by operation of law. Cavender testified when people apply for long-term disability it is because they can no longer do their job and the Department treats it as a voluntary resignation.

On May 24, 2011, the Division's human resources department received a letter dated April 26, 2011, from Dr. Sean Taylor of the Mayo Clinic, one of Vacca's physicians, responding to Cavender's March 14, 2011 request for additional information to support Vacca's request for workplace accommodations. Dr. Taylor opined Vacca could continue working under his current modified work hours and duties.

On June 7, 2011, May hand-delivered a letter to Vacca informing him he no longer worked at the Division based on his being granted long-term disability benefits and the determination pursuant to Section 287.855¹ the application for and obtaining of long-term disability benefits amounted to a resignation. Up until this time, Vacca had continued to work under his modified work schedule and duties. The letter stated in part:

Under [Section] 287.855, long-term disability benefits may only be awarded based upon the total incapacity of an administrative law judge to perform any duties of that position. For this reason, the award of long-term

¹ All statutory references are to RSMo 2000.

disability benefits to an administrative law judge is inconsistent with the judge continuing to serve in that position. Your application for and obtaining of a decision granting you long-term disability benefits is a resignation from your position as an [ALJ].

In August 2011, Vacca amended his charge of discrimination with the Commission and the EEOC to include his termination.

In January 2012, Vacca stated in his verified dissolution petition that he could not work, averring he was permanently and completely disabled and was no longer capable of being employed. Vacca made a claim for maintenance in his dissolution petition asserting he was unable to support himself through appropriate employment due to his total and permanent disability and he should not be required to seek employment outside the home. In May 2012, in his dissolution proceeding, Vacca testified he did not have the ability from a mental or emotional standpoint to work in any type of employment, stating:

I just can't keep facts straight anymore, and it's just difficult to do that type of thing any longer. You know, I sleep so much. I'm generally always exhausted.

...

Anybody who wants to hear I'm like a cellphone that's constantly running in the red with a battery about to die. It's just - - you know, it's an exhausting day, and just getting through the daily, you know, things associated with just getting food on the table and getting up, having some kind of routine, it's just, you know, I tried to do it as long as I could, but I just - - I can't do it anymore.

After the trial in his dissolution and before trial in this case, Vacca amended his dissolution petition from asserting he was permanently and completely disabled and incapable of any employment to stating he was permanently and completely disabled and incapable of being employed other than as an ALJ.

In September 2015, during trial in this case, Vacca testified he could have worked as an ALJ every day "virtually" until his death and until he was at least 75 years old, and

his total lost salary and benefits was more than \$2.8 million, based on an additional 20 years of working full-time.

At the beginning of the seventh and last day of testimony, Vacca abandoned all of his claims against Judge Boresi. At the conclusion of the evidence, Vacca abandoned his discrimination and hostile work environment claims against Appellants. The sole issue submitted to the jury for consideration was Vacca's claim of retaliation against May and the Division, alleging Vacca's complaint of employment discrimination based on disability was a contributing factor in May's termination of Vacca's employment.

The jury returned a verdict in favor of Vacca and awarded him \$4 million in compensatory damages, \$2.5 million in punitive damages against the Division, and \$500,000 in punitive damages against May. The trial court granted May's request for remittitur, reducing the punitive damages award against him to \$5,000. This appeal follows. Additional facts necessary to the resolution of the points on appeal will be discussed below.

Points on Appeal

In their first point on appeal, Appellants argue the trial court erred in denying their motion for judgment notwithstanding the verdict because judicial estoppel precludes Vacca from stating he could perform the functions of his job and thus defeated an element of his claim, in that Vacca previously pleaded and testified under oath to a court that he could not work at all.

In their second point on appeal, Appellants argue the trial court erred in denying their motion for judgment notwithstanding the verdict because by operation of law Vacca was no longer employed by the Division and thus he could not claim retaliatory

discharge, in that Vacca had applied for and been approved for long-term disability benefits.

In their third point on appeal, Appellants contend the trial court erred in failing to remit the jury's compensatory damages verdict because the award was grossly excessive, in that the award amounted to 20 years of full salary plus more than a million dollars when Vacca's evidence was that he was in poor health and his health will continue to deteriorate.

In their fourth point on appeal, Appellants argue the trial court erred in allowing the issue of punitive damages to be submitted to the jury because there was not substantial evidence they acted with evil motive or reckless indifference, in that the uncontroverted evidence demonstrated May and the Division relied on legal advice in determining Vacca had resigned by operation of law.

In their fifth point on appeal, Appellants argue the trial court erred in not remitting the punitive damages award against the Division because the award fails to comport with due process, in that the complained-of behavior of Appellants related to an isolated incident and a single employee, lacks reprehensibility, and fails to meet other factors in determining the constitutional soundness of a punitive award.

In their sixth point on appeal, Appellants contend the trial court erred in issuing a new judgment granting Vacca post-judgment interest during this appeal because the trial court was without jurisdiction to vacate its earlier final judgment, in that 30 days had passed, the initial final judgment dealt with all remaining parties and claims, and Vacca had not timely asserted a request for post-judgment interest.

Points on Cross-Appeal

In his first point on cross-appeal, Vacca argues the trial court erred in granting May's motion for new trial on damages or in the alternative remittitur and in amending its judgment to reduce the punitive damages awarded against May because it lacked authority to grant statutory remittitur pursuant to Section 510.263.6, in that: (1) May did not request statutory remittitur in his post-trial motion; and (2) the amended judgment was not entered during the 30-day period in which the court retained control over the judgment under Rule 75.01.²

In his second point on cross-appeal, Vacca contends the trial court erred in granting May's motion for remittitur because it misapplied Section 510.263 and case law construing that statute by relying exclusively on the absence of evidence of May's wealth and its consequent presumption that May is "not a rich man," in that: (1) Section 510.263.6 authorizes remittitur of punitive damages awards based on the assessment of the "totality of the circumstances;" (2) a defendant's financial condition is not a circumstance the jury must consider, nor is evidence of a defendant's financial condition necessary to award punitive damages; and (3) the court failed to consider all factors relevant to determining whether a punitive damages award is excessive.

Discussion

Under the MHRA, it is unlawful discriminatory practice to "retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint,

² All rule references are to Mo. R. Civ. P. 2015.

testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter[.]” Section 213.070(2).

The MHRA prohibits various types of discrimination, including discrimination in employment. Section 213.055; see also, *e.g.*, Section 213.040 (prohibiting discrimination in housing) and Section 213.065 (prohibiting discrimination in public accommodations). Discrimination is defined as “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing[.]” Section 213.010(5).

To make a submissible case for retaliatory discrimination under the MHRA, a plaintiff must establish: (1) he complained of discrimination; (2) the employer took adverse action against him; and (3) a causal relationship existed between the complaint of discrimination and the adverse employment action. Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 245 (Mo. App. E.D. 2006). In deciding cases under the MHRA, appellate courts are guided by both Missouri law and any federal employment discrimination law consistent with Missouri law. Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 866 (Mo. App. E.D. 2009).

Retaliation claims are not based upon prohibited discrimination, but instead upon an employer’s adverse action against an employee who complains of discrimination. McCrainey v. Kansas City Missouri Sch. Dist., 337 S.W.3d 746, 753 (Mo. App. W.D. 2011). “A finding of unlawful retaliation...is not conditioned on the merits of the underlying discrimination complaint.” Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 714 (8th Cir. 2000). A plaintiff does not need to establish that the underlying conduct was in fact discriminatory in order to maintain a retaliation claim. Id. “In

general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.” McCrainey, 337 S.W.3d at 753, quoting Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1118 (8th Cir. 2006).

Point I – Judicial Estoppel

In his dissolution proceeding, Vacca pled he was physically incapable of performing any work and testified to such inability under oath in those proceedings in support of his claim for maintenance. At this trial, however, Vacca asserted he was capable of working as an ALJ for an additional 20 years to support his claim for more than \$2.8 million in economic damages. Appellants unsuccessfully sought to prevent Vacca from presenting evidence he was capable of working on the basis of judicial estoppel. On appeal, Appellants argue the trial court erred in failing to apply judicial estoppel and in allowing Vacca to assert at trial he could perform the functions of his job, an essential element of his claim for damages, because he asserted he was unable to work at all in his dissolution proceeding.

We will affirm the trial court judgment unless it is unsupported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Vinson v. Vinson, 243 S.W.3d 418, 421–22 (Mo. App. E.D. 2007).

“Judicial estoppel will lie to prevent litigants from taking a position, under oath, ‘in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits ... at that time.’” State Bd. of Accountancy v. Integrated Fin. Sols., L.L.C., 256 S.W.3d 48,

54 (Mo. banc 2008), quoting Shockley v. Dir., Div. of Child Support Enforcement, 980 S.W.2d 173, 175 (Mo. App. E.D. 1998). There are three factors in determining if judicial estoppel applies, whether (1) the party's two positions are clearly inconsistent; (2) the party succeeded in persuading a court to accept his earlier position; and (3) the party asserting the "inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Vinson, 243 S.W.3d at 422.

Appellants have failed to demonstrate the second factor, whether Vacca succeeded in persuading a court to accept his earlier position. Although the dissolution court awarded Vacca maintenance, this Court reversed the award as arbitrary in Vacca v. Vacca, 450 S.W.3d 490 (Mo. App. E.D. 2014). On appeal of the dissolution judgment, the parties challenged "every aspect of the trial court's [j]udgment, including the maintenance award, the child support order, the findings of marital misconduct or lack thereof, the distribution of property, and the attorney's fees order." Id. at 492. In our opinion, this Court noted Vacca had been receiving disability since 2011 and the trial court found, in addressing maintenance, that Vacca was "in poor health and without adequate means to support himself[.]" Id. at 491. Upon review of the record, this Court found the trial court's decision was "arbitrary and without evidence to support it in every aspect[.]" and concluded the amount of maintenance and child support awarded were examples of the arbitrariness of the trial court's judgment. Id. at 492. This Court concluded the trial court's judgment was "filled with similarly arbitrary decisions" and held "the entire [j]udgment [was] without substantial evidence to support it and [was] so arbitrary and unreasonable that it [amounted] to an abuse of discretion." Id. at 493. This Court vacated the trial court's dissolution judgment and remanded the cause for a new

trial for proper determination of maintenance, child support, property division, and attorney's fees. Id.

After the trial in his dissolution and before trial in this case, Vacca amended his dissolution petition from asserting he was permanently and completely disabled and incapable of any employment to stating he was permanently and completely disabled and incapable of being employed other than as an ALJ. It is unclear from the record before this Court how the dissolution proceeding concluded. However, in light of this Court's prior opinion vacating the trial court's judgment in the dissolution action and ordering a new trial, we cannot find Appellants demonstrated that Vacca persuaded a court to accept his earlier position.³ Without evidence that an earlier court has accepted Vacca's contrary position that he is completely incapable of working, Appellants have failed to demonstrate Vacca should be barred from taking a contrary position in this case. Having found Appellants failed to establish the second factor, this Court need not discuss the remaining factors. See Vinson, 243 S.W.3d at 422. The trial court did not err in denying Appellants' motion for judgment notwithstanding the verdict based on judicial estoppel. Appellants' Point I is denied.

³ The majority respectfully disagrees with the dissenting opinion's characterization of this Court's opinion reversing the dissolution judgment. Specifically, the dissent indicates the reversal was silent on the issue of Vacca's disability and seemingly suggests the dissolution court was bound on remand by its initial determination that Vacca was "in poor health and without adequate means to support himself." This Court's opinion in Vacca, 450 S.W.3d 490, provides no such limitation. The opinion *vacated* the trial court's judgment and is broadly written to address the myriad of claims presented by the judgment related to the issues of maintenance, child support, property division, and attorney's fees. The issue of maintenance is inextricably linked to whether a party is able to support themselves. For Vacca, this necessarily involves factual determinations related to his level of disability and ability to work. Nothing in the opinion reversing the trial court's dissolution judgment prevented the trial court on remand from considering evidence regarding Vacca's level of disability and alleged inability to work in determining whether an award of maintenance was proper.

Point II – Section 287.855

Next, Appellants argue the trial court erred in denying their motion for judgment notwithstanding the verdict because Vacca voluntarily resigned from his position by applying for and accepting long-term disability benefits and, thus, could not maintain a claim for retaliatory discharge. Appellants cite Section 287.855 as their sole source of support for this claim.

Section 287.855, titled “Disability benefits[,]” provides as follows:

Any administrative law judge or legal advisor who, while so employed, becomes disabled so that he or she is totally incapable of performing any duties of his or her office shall be entitled to disability benefits as provided by the Missouri state employees’ retirement system.

Statutory interpretation is a question of law which this Court reviews *de novo*.

Brady v. Curators of Univ. of Missouri, 213 S.W.3d 101, 107 (Mo. App. E.D. 2006).

“When construing a statute, our primary role is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent.” Id.

Words and phrases in the statute are construed in their plain, ordinary, and usual sense in determining the legislative intent. Id. When the statutory language is unambiguous, we will give effect to the language as written and will not resort to rules of statutory construction. Id.

On appeal, Appellants contend Vacca failed to show a causal connection between his separation from his employment and his complaint of discrimination because Vacca’s separation from the Division’s employment occurred by operation of law based on his own actions in applying for long-term disability and representing he could not work. Appellants assert that once Vacca was approved for long-term disability benefits, he was “by operation of law totally incapable of performing any duties of his office” and his

receipt of benefits constituted a resignation of his position as a matter of law. We disagree.

Section 104.320 established the Missouri State Employees' Retirement System (MOSERS) for the purpose of providing retirement income and other benefits to state employees. Section 104.320. MOSERS's board of trustees is required to provide and/or contract for disability income benefits for certain enumerated state employees including "persons covered by the provisions of [S]ections 287.812 to 287.855[.]" Section 287.855, in turn, includes Division ALJs in the category of state employees eligible for disability benefits. The plain language of Section 287.855 suggests it intended to provide ALJs access to disability insurance provided by MOSERS and nothing in the section states that an ALJ who receives disability benefits is automatically deemed to have resigned his or her position.

What type of benefits, if any, Vacca was entitled to receive from MOSERS is not an issue before this Court. Regardless, Appellants' assertion that Vacca's receipt of any type or amount of disability benefits from MOSERS constitutes a resignation of his position as a matter law is not supported by the language of the statute. The trial court did not err in denying Appellants' request for judgment notwithstanding the verdict on this issue. Appellants' Point II is denied.

Point III – Remittitur on Compensatory Damages

Appellants contend the trial court erred in denying their motion for new trial and refusing to remit the jury's \$4 million award of compensatory damages because the verdict was grossly excessive. Appellants assert the award was excessive because it amounts to 20 years of salary plus more than a million dollars in pain and suffering

damages even though the evidence demonstrates it was not reasonable to conclude Vacca could have continued to work fulltime for an additional 20 years.

The trial court's determination as to remittitur is reviewed for an abuse of discretion. Dieser v. St. Anthony's Med. Ctr., 498 S.W.3d 419, 439 (Mo. banc 2016). The courts will not interfere with a verdict unless it is manifestly unjust. Id. "Before a verdict can be deemed excessive, the party must show both that the amount of 'the verdict is excessive and that some event occurred at trial that incited the bias and prejudice of the jury.'" Id. at 439-40, quoting Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 822 (Mo. banc 2000). The size of the verdict alone is insufficient to prove passion and prejudice, and the defendant must demonstrate some other error occurred at trial. Id. at 440.

"[A] court may order remittitur if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for [the] plaintiff's injury and damages.'" Dieser, 498 S.W.3d at 440, quoting Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226, 249 (Mo. banc 2001), overruled on other grounds by Badahman v. Catering St. Louis, 395 S.W.3d 29 (Mo. banc 2013). "Because there 'is no exact formula for determining whether an award of compensatory damages is excessive,...each case must be considered on its own set of facts.'" Dieser, 498 S.W.3d at 440, quoting Alcorn, 50 S.W.3d at 250. On review, this Court views the evidence in the light most favorable to the trial court's judgment. Badahman, 395 S.W.3d at 39.

Appellants contend they are entitled to remittitur because the evidence was that Vacca was unable to work and his health continued to deteriorate. At trial, Appellants

relied upon evidence of Vacca's own prior representations he was incapable of working, including those (1) in and related to his application for long-term disability benefits on January 3, 2011, and (2) in his dissolution proceeding wherein he asserted in his pleadings and at trial he was incapable of performing any work in support of his request for maintenance from his spouse. The first instance is particularly concerning, in that Vacca's letter and application to the insurer seeking disability benefits clearly distinguished his current application from a prior application filed several months earlier which Vacca withdrew because he had been able to continue working. In his January 3, 2011 application, however, Vacca asserted he was no longer able to work as of January 1, 2011; his last full day of work was December 7, 2010; and he was continuing to work only "to the extent of [his] ability and to finish work [he had already] begun." Furthermore, on February 28, 2011, Vacca provided the insurer with two physician's statements supporting his claim for disability benefits indicating he was currently working under a reasonable accommodation but he could no longer work with any "reasonable work or job site modification" and he had a regressive condition with no expectation of improvement. As a result of Vacca's application and the representations contained therein, he was awarded and received long term disability benefits.

The jury was presented with this evidence at trial, as well as evidence that Vacca had subsequently amended his dissolution pleadings and Vacca's testimony that his condition had improved and he was capable of working for an additional 20 years as an ALJ with reasonable accommodations. Vacca presented the testimony of witnesses who observed him continuing to perform his duties as an ALJ at the time of his termination with the assistance of reasonable accommodations. Vacca also presented evidence that,

at the time his application for disability benefits was pending and he was securing the necessary physician's statements to support that claim, he simultaneously maintained to certain Division and Department employees he was able to continue working with accommodations, including securing documentation from a different physician to support his request.

Vacca defended his filing of his disability claim at trial, asserting it was a protective measure in the event he was unable to work because the Division rescinded his reasonable accommodation or he received a vote of no confidence by the ALJ Review Committee during an upcoming review. While Vacca's trial testimony might seem incredible as it indicates a 19-year veteran ALJ specializing in disability claims does not appreciate the factual and legal difference between being able to perform one's job with a reasonable accommodation and not being able to work at all regardless of any accommodation; or that disability benefits are not a substitute for unemployment compensation or a legal claim for a wrongful termination; or that a vote of no confidence would not actually result in his termination as an ALJ in the near future but was, at most, the beginning of a minimum two-year review process, the compensatory damages verdict suggests the jury found Vacca's trial testimony that he could work for an additional 20 years credible. The weight and credibility of the evidence is a jury determination.

Lomax v. DaimlerChrysler Corp., 243 S.W.3d 474, 483 (Mo. App. E.D. 2007); Heidrick v. Smith, 169 S.W.3d 180, 186 (Mo. App. S.D. 2005). This Court views the evidence in the light most favorable to the judgment on review. Dieser, 498 S.W.3d at 439.

While the jury's award in Vacca's favor in this case necessarily suggests the jury concluded Vacca's repeated representations to the insurer in his disability application and

accompanying documents that he was completely unable to work may have been false or misleading, on appeal this Court is only addressing the sufficiency of the evidence supporting the compensatory damages award on his retaliation claim. Whether any payer of disability benefits to Vacca could successfully seek return of those benefits based on Vacca's subsequent steadfast assertions he has always been capable of working is not before this Court.

Here, Vacca presented evidence he was capable of working with reasonable accommodations. While Appellants presented contrary evidence, on review the evidence is viewed in the light most favorable to the trial court's judgment. Dieser, 498 S.W.3d at 439. In light of the evidence of Vacca's continued ability to work, Appellants have failed to demonstrate the compensatory damages award was excessive, and the trial court did not abuse its discretion by overruling their motion for remittitur of compensatory damages. Appellants' Point III is denied.

Point IV – Submission of Punitive Damages to Jury

In their fourth point, Appellants argue the trial court erred in allowing the issue of punitive damages to be submitted to the jury because there was not substantial evidence they acted with evil motive or reckless indifference.

Section 213.111 permits the recovery of punitive damages in an action brought under the MHRA. Ellison v. O'Reilly Auto. Stores, Inc., 463 S.W.3d 426, 434 (Mo. App. W.D. 2015). Whether there was sufficient evidence to support an award of punitive damages is a question of law which is reviewed *de novo*. Id. We review the evidence and all reasonable inference in the light most favorable to submissibility. Id.

An award of punitive damages requires proof (1) of an element of outrageous conduct, and (2) the defendant acted with a “willful, wanton or malicious culpable mental state.” Poage v. Crane Co., 523 S.W.3d 496, 515 (Mo. App. E.D. 2017) (internal citations omitted). For punitive damages to be presented to a jury, there must be clear and convincing evidence demonstrating a high probability the defendant’s conduct was outrageous because of evil motive or reckless indifference. Ellison, 463 S.W.3d at 434; Holmes v. Kansas City Missouri Bd. of Police Com’rs ex rel. Its Members, 364 S.W.3d 615, 628 (Mo. App. W.D. 2012). Punitive damages are so extraordinary and harsh, the remedy should be applied sparingly. Altenhofen v. Fabricor, Inc., 81 S.W.3d 578, 590 (Mo. App. W.D. 2002).

Direct evidence is uncommon in employment discrimination cases and the plaintiff may rely on circumstantial evidence to prove his case. Ellison, 463 S.W.3d at 435. The evidence offered to support the underlying substantive claim is not mutually exclusive from that supporting the plaintiff’s additional claim for punitive damages and may be used in determining whether the defendant acted with evil motive or reckless indifference. Id.

In his petition, Vacca brought claims against the Division, May, and Judge Boresi for discrimination based on disability, hostile work environment, and retaliation seeking an award for compensatory and punitive damages under each theory. On the final day of testimony, Vacca elected to drop most of his claims and submitted to the jury the sole claim of retaliation against May and the Division, alleging his complaint of employment discrimination based on disability was a contributing factor in May’s decision to terminate his employment.

As already noted, to make a submissible case for retaliatory discrimination under the MHRA, a plaintiff must establish: (1) he complained of discrimination; (2) the employer took adverse action against him; and (3) a causal relationship existed between the complaint of discrimination and the adverse employment action. Cooper, 204 S.W.3d at 245. A plaintiff does not need to establish that the underlying conduct was discriminatory in order to maintain a retaliation claim because the claim is based on the employer's adverse action against the employee for complaining of discrimination. McCrainey, 337 S.W.3d at 753; Buettner, 216 F.3d at 714. “[A]s long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.” McCrainey, 337 S.W.3d at 753, quoting Wallace, 442 F.3d at 1118.

Consistent with this principle, the verdict instructor in this case instructed the jury to find in favor of Vacca and against Appellants if they believed (1) Vacca complained of employment discrimination based on disability; (2) May discharged or constructively discharged Vacca; (3) Vacca's complaint of discrimination was a contributing factor in such discharge; and (4) the conduct damaged Vacca. At the conclusion of the evidence, the jury found in favor of Vacca and awarded him compensatory and punitive damages on his retaliation claim.

On appeal, in defense of the jury's award, Vacca repeatedly relies upon evidence regarding the alleged acts of discrimination against him in support of affirming the judgment entered upon his retaliation claim and suggests this Court must view this evidence in the light most favorable to him and ignore the substantial evidence presented

by Appellants contesting Vacca's allegations. The jury, however, did not render a verdict on the discrimination claims because Vacca voluntarily removed them from the jury's consideration. The State requested the trial court advise the jury that the discrimination claims against Appellants and all of the claims against Judge Boresi were no longer before them and elected not to request a limiting instruction advising the jury they were not to consider the evidence offered in support of Vacca's withdrawn claims in rendering their decision.⁴

In a jury trial, the general rule is that evidence admissible for one purpose or issue but inadmissible for other purposes or issues should be received but the opposing party has the right to an instruction, if he requests it, limiting the extent to which and the purpose for which the jury may consider the evidence. Heifner v. Synergy Gas Corp., 883 S.W.2d 29, 33 (Mo. App. S.D. 1994); Dyer v. Globe-Democrat Publishing Co., 378 S.W.2d 570, 581 (Mo. 1964). "If the defendant fails to seek an instruction limiting the purpose for which the evidence may be considered, he cannot later be heard to complain that the jury considered such evidence for the wrong purpose." Martin v. Durham, 933 S.W.2d 921, 923-24 (Mo. App. W.D. 1996). However, it is presumed trial judges will not consider evidence for an improper purpose and that the court will not be prejudiced by inadmissible evidence. Teasdale & Associates v. Richmond Heights Church of God in Christ, 373 S.W.3d 17, 25 (Mo. App. E.D. 2012) (evidence admitted for limited purpose may only be considered for that purpose and judges are presumed not to consider

⁴ Although Vacca's petition included a claim of hostile work environment against all of the defendants, it appears from the record this claim was abandoned by Vacca at some point prior to the beginning of trial. The record suggests Defendants' Motion to Dismiss the claim was taken under submission but never ruled upon. In his opening statement, Vacca makes no mention of the hostile work environment claim and only requested the jury to return verdicts in his favor on the discrimination and retaliation claims. Nothing in the record indicates the jury was ever made aware of the claim.

evidence for an improper purpose); State v. Girardier, 484 S.W.3d 356, 364–65 (Mo. App. E.D. 2015).

While compensatory damages are intended to redress a plaintiff’s loss suffered by the defendant’s wrongful conduct, punitive damages are aimed at deterrence and retribution. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519, 155 L. Ed. 2d 585 (2003). “‘Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.’” Id. at 417, quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996).

The question in this case is whether Vacca presented clear and convincing evidence that Appellants’ conduct, as related to Vacca’s retaliatory discharge, was outrageous because of their evil motive or reckless indifference. This is a question of law that was decided by the trial court and is reviewed *de novo* on appeal. Ellison, 463 S.W.3d at 434. In making this determination, the Court looks to the conduct relevant to the retaliatory discharge and does not consider evidence relevant only for the purpose of establishing Vacca’s untested claims of discrimination. Consideration of this evidence, specifically any assumption that Appellants or others actually discriminated against Vacca, is improper because it is not intrinsic to the verdict rendered and would amount to a punitive damages award on Vacca’s unproven, unsubmitted claims of wrongdoing against Appellants and an abandoned third party.

Under his chosen theory of liability, Vacca was required to submit evidence he complained of discrimination based on disability; May discharged him; and his complaint

of discrimination was a contributing factor in the discharge. In support of his claim, Vacca presented evidence he believed Judge Boresi discriminated and retaliated against him in evaluating his performance and giving him a “successful” rating in his 2010 PMP instead of a higher rating and that she was not honoring his reasonable accommodation by failing to assign him more trials. Vacca notified Judge Boresi of his belief in July 2010 and several Department and Division employees in August and September 2010. In October 2010, after an internal investigation conducted by the Department concluded his claims were unsubstantiated, Vacca filed a charge of discrimination with the Commission and the EEOC. In the last week of December 2010, May became the Division Director.

On January 5, 2011, the ALJ Review Committee convened to conduct a performance audit review of the ALJs. On that date, May and Lyskowski instructed Judge Boresi to supplement her performance review of Vacca by addressing Vacca’s work hours, accessibility, and professionalism, and a lawsuit Vacca filed against her challenging her position as chief judge. Judge Boresi filed her supplemental PMP a couple of days later, which included several references to Vacca’s EEOC discrimination claim against her.

When the ALJ Review Committee reconvened on January 12, 2011, the Committee discussed several issues, including Vacca’s October 2010 EEOC charge of discrimination. Approximately six months later, on June 7, 2011, May hand-delivered a letter to Vacca informing him he no longer worked at the Division based on Vacca being granted long-term disability benefits and the determination that, pursuant to Section 287.855, the application and receipt of long term disability benefits amounted to a resignation. Based on this evidence, the jury could have concluded May and the

Division were aware of Vacca's charge of discrimination to the Commission and the EEOC and that it was a contributing factor in their decision to terminate Vacca's employment with the Division. However, while this evidence was sufficient for a reasonable jury to conclude Appellants were aware of the discrimination claim and retaliated against Vacca, it is insufficient to support a finding Appellants acted with evil intent or reckless indifference required to sustain an award of punitive damages.

Vacca voluntarily elected to abandon most of his claims against Appellants and Judge Boresi and to narrow the case to a single issue and act of wrongdoing, *i.e.*, whether May's termination of Vacca was retaliatory. While Vacca presented sufficient evidence to support the underlying claim of retaliatory discharges, this single act of termination standing alone is insufficient to sustain a claim for punitive damages. To hold otherwise could "make punitive damages mandatory in every proven case of retaliatory discharge." Altenhofen, 81 S.W.3d at 592 (discussing submissibility of punitive damages for retaliatory discharge under the Fair Labor Standards Act). To submit the issue of punitive damages to the jury, the plaintiff must demonstrate by clear and convincing evidence the defendant's conduct was *outrageous* because of *evil motive or reckless indifference* to the rights of others. There must be an element of outrage in order to warrant submission of the issue of punitive damages to the jury. Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 804 (8th Cir. 1994).

Here, Vacca failed to meet his evidentiary burden. While the jury believed Vacca's trial testimony that he was able to continue working, the uncontested evidence at trial was that Vacca actively sought to receive long-term disability benefits conferred by Section 287.855 by representing to the insurer that he had a regressive condition

preventing him from performing the functions of his job, even with reasonable accommodations. This representation was not an isolated event, but was made in his written application for benefits in January 2011, in a separate letter accompanying the application, and reaffirmed approximately eight weeks later when Vacca submitted the statements of two physicians supporting his claim. Vacca's application contained specific details as to his inability to work, stating his last full day of work was December 7, 2010; he was unable to work as of January 1, 2011; and that he continued to work only to the "extent of his abilities" in order to "finish work I have begun." At no point has Vacca claimed the affirmative representations he made to the insurer that he was incapable of performing his job in order to secure long-term disability benefits were somehow a mistake or an inadvertence but, by Vacca's own testimony, were strategic, intentional, and designed to protect his personal financial interests. The uncontested facts are that Vacca simultaneously maintained two contradictory positions as to his ability to work in order to secure his most advantageous position. While the jury concluded that Vacca's complaint of discrimination was a contributing factor in Appellants' decision to terminate him, Vacca failed to demonstrate Appellants acted outrageously and with evil motive and reckless indifference to Vacca's rights by accepting Vacca's own repeated representations he was unable to perform his job.

While Vacca has demonstrated a violation of the MHRA, he failed to prove by clear and convincing relevant evidence outrageous conduct by Appellants evidencing an evil motive or reckless indifference. As such, the trial court erred in submitting the issue of punitive damages to the jury. Therefore, Appellants' Point IV is granted. The punitive damages awards are reversed.

In light of this Court’s holding on Appellants’ Point IV regarding the submission of punitive damages, Appellants’ Point V and Vacca’s Points I and II on cross-appeal regarding remittitur of punitive damages are denied as moot.

Point VI – Post-Judgment Interest

On November 2, 2015, the trial court entered its Order and Judgment upon the jury’s verdict in favor of Vacca and against Appellants and awarded Vacca \$4 million in compensatory damages from Appellants, \$2.5 million in punitive damages from the Division, \$500,000 in punitive damages from May, and \$650,000 in attorney’s fees from Appellants.⁵ The judgment did not include an award of post-judgment interest.

Appellants filed post-trial motions for judgment notwithstanding the verdict, a new trial, and remittitur on December 2, 2015. On January 14, 2016, Vacca filed a motion asking the court to “correct” the Order and Judgment for failing to award post-judgment interest. On January 21, 2016, the trial court denied Vacca’s motion. On January 25, 2016, Vacca filed a motion to vacate and set aside the court’s Order and Judgment based on the court’s failure to rule on the issue of post-judgment interest, which the trial court denied on February 16, 2016.

On February 18, 2016, Vacca filed a Motion to Amend the Judgment asserting the November 2, 2015 Order and Judgment was not final because it did not dispose of all parties and issues in the case.

On February 22, 2016, the trial court granted a remittitur as to May, reducing the punitive damages award against him to \$5,000, and allowing Vacca to file an election for a new trial solely on the issue of punitive damages within 30 days.

⁵ On November 3, 2015, the trial court corrected a clerical error in the judgment by *nunc pro tunc*.

On March 1, 2016, the trial court entered a Memorandum Opinion and Order granting Vacca's third motion seeking post-judgment interest, finding the November 2, 2015 Order and Judgment was not a judgment because it failed to dispose of Judge Boresi as a party.

On March 11, 2016, the trial court entered a Judgment dismissing Vacca's claims against Judge Boresi and entering judgment in Vacca's favor and against Appellants on the original, unremitted damages, and providing for post-judgment interest. Appellants refiled their previous after-trial motions and the court again granted a remittitur as to May. On April 29, 2016, the court entered an Amended Judgment following Vacca's election to accept remittitur, and reflected such in the judgment.

On appeal, Appellants contend the trial court erred in issuing the April 29, 2016 Amended Judgment granting Vacca post-judgment interest because the court was without jurisdiction to vacate its November 2, 2015 judgment, in that 30 days had passed since the entry of the judgment, the judgment dealt with all remaining parties and claims, and Vacca had not timely asserted a request for post-judgment interest.

In his second amended petition, Vacca brought claims of discrimination, retaliation, and hostile work environment against Appellants and Judge Boresi. There is no dispute Vacca abandoned all of his claims against Judge Boresi and his discrimination and hostile work environment claims against Appellants.⁶ The primary contention between the parties in this point is whether the November 2, 2015 judgment constituted a

⁶ On the final day of testimony, the trial court notified the jury that "Judge Boresi [was] no longer a party to [the] lawsuit" and that the only claim they would be considering was the retaliation claim against Appellants.

final judgment even though it did not address any of Vacca's claims against Judge Boresi or Vacca's claim of hostile work environment and discrimination against Appellants.

A judgment is entered when a writing signed by the judge and denominated "judgment" or "decree" is filed. Rule 74.01(a). "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Rule 81.05. "[A]ny order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties...." Rule 74.01(b).

The trial court ultimately concluded that its November 2, 2015 Order and Judgment was not final because the judgment failed to dispose of Judge Boresi as a party even though Vacca abandoned all of his claims not submitted to the jury. However, it is not necessary for a judgment to address abandoned parties and claims in order for it to be considered a final judgment. See Unnerstall Contracting Company v. City of Salem, 962 S.W.2d 1, 5–6 (Mo. App. S.D 1997) (judgment was final even though it did not adjudicate claims abandoned by the plaintiff); Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC, 504 S.W.3d 804, 806 (Mo. App. W.D. 2016) (judgment does not have to address claims clearly abandoned at trial in order to be final); Murray v. Ray, 862 S.W.2d 931, 932 (Mo. App. S.D. 1993) (plaintiff abandoned a party by failing to submit its case against it and judgment was final even though it made no disposition of the party); and Heckadon v. CFS Enterprises, Inc., 400 S.W.3d 372, 377 n. 3 (Mo. App. W.D. 2013) (theories of liability pleaded and proven but not submitted to the jury are abandoned and the judgment need not address those claims in order to be final). Because Vacca abandoned all of his claims against Judge Boresi and his discrimination

and hostile work environment claims against Appellants, although clearly the best practice, it was not necessary for the court to address Vacca's abandoned claims in the judgment in order to constitute a final judgment.

Alternatively, Vacca argues the November 2, 2015 Order and Judgment was not a final judgment because the court granted May's post-trial motion for remittitur and, therefore, the court's April 29, 2016 Amended Judgment reflecting Vacca's acceptance of remittitur constituted the final judgment. However, an order granting a motion to remit the judgment to a liquidated sum does not create an amended judgment.

Dangerfield v. City of Kansas City, 108 S.W.3d 769, 774-75 (Mo. App. W.D. 2003), abrogated on other grounds by Blue Ridge Bank & Tr. Co. v. Hart, 152 S.W.3d 420 (Mo. App. W.D. 2005). “[T]he entry after *remittitur* [*i.e.*, the actual remitting of the judgment] is a correction of the judgment originally entered and not actually a new judgment. The appealable judgment is the original judgment (as corrected of course) but still the appeal is from the original judgment, that is[,] from what remains of it.” Id. at 775, quoting Steuernagel v. St. Louis Pub. Serv. Co., 361 Mo. 1066, 1071, 238 S.W.2d 426, 429 (Mo. banc 1951).

The November 2, 2015 Order and Judgment was a final judgment and the court was without jurisdiction to entertain Vacca's untimely post-trial motions seeking post-judgment interest. Accordingly, Appellants' Point VI is granted. The award of post-judgment interest is reversed.

Conclusion

The judgment of the trial court is affirmed in part and reversed in part, in accordance with this opinion.⁷

A handwritten signature in dark ink, reading "Sherri B. Sullivan". The signature is written in a cursive, flowing style. The first name "Sherri" is written with a large, prominent "S". The middle initial "B." is written in a smaller, more compact script. The last name "Sullivan" is written with a large, prominent "S" and a long, sweeping tail that extends to the right.

SHERRI B. SULLIVAN, P.J.

Kurt S. Odenwald, J., concurs.

Roy L. Richter, J., dissents in separate opinion.

⁷ Vacca's Motion for Award of Attorney's Fees and Expenses is granted in the amount of \$150,000.



In the Missouri Court of Appeals
Eastern District
DIVISION TWO

MATTHEW D. VACCA,	)	No. ED104100
	)	
Plaintiff/Respondent/	)	Appeal from the Circuit Court
Cross-Appellant,	)	of the City of St. Louis
	)	
v.	)	
	)	
MISSOURI DEPARTMENT OF LABOR	)	Honorable Julian Bush
AND INDUSTRIAL RELATIONS,	)	
DIVISION OF WORKER'S	)	
COMPENSATION	)	
	)	
and	)	
	)	
BRIAN MAY,	)	
	)	
Defendants/Appellants/	)	
Cross-Respondents.	)	Filed: November 7, 2017

DISSENT

I respectfully dissent.

After reviewing the timeline of Vacca's filings in this present case and his dissolution proceedings that began in 2011, the trial court should have granted Appellants' Motions and Suggestions in Support of Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, or in the Alternative for an Elimination of Punitive Damages and Reduction in Fee Awards on the basis of judicial estoppel.

"Judicial estoppel prevents a person who states facts under oath during the course of a trial from denying those facts in a second suit, even though the parties in the second

suit may not be the same as those in the first.” In re Contest of Primary Election Candidacy of Fletcher, 337 S.W.3d 137, 145 (Mo. App. W.D. 2011) (quoting State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 403 (Mo. E.D. 1998)).

As noted by the majority, in determining whether judicial estoppel is applicable, we must consider three factors: (1) the party’s later position must be clearly inconsistent with its earlier position; (2) the party succeeded in persuading a court to accept its earlier, inconsistent position; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Vinson v. Vinson, 243 S.W.3d 418, 422 (Mo. App. E.D. 2007) (citing Zedner v. United States, 547 U.S. 489 (2006)). As factors, rather than elements, these considerations are not “fixed or inflexible prerequisites.” In re Contest of Primary Election Candidacy of Fletcher, 337 S.W.3d at 140.

In denying Point I, the majority states that Appellants failed to demonstrate that Vacca succeeded in persuading a court to accept his earlier inconsistent position because this Court reversed the trial court’s May 16, 2013 order and decree of dissolution to which Vacca was a party. This Court’s reversal, however, occurred nearly a month after Vacca filed his petition claiming unlawful discrimination based on disability.¹ In reversing the trial court’s order, this Court acknowledged that Vacca had been on disability since 2011 and noted the trial court’s finding that Vacca was “in poor health and without adequate means to support himself.” The reversal of the trial court’s order of dissolution, however, was completely silent on the issue or extent of Vacca’s disability.

¹ This Court vacated the trial court’s judgment and remanded for a new trial for proper determination of maintenance, child support, property division, and attorney’s fees because the judgment was without substantial evidence to support it and amounted to an abuse of discretion. Vacca v. Vacca, 450 S.W3d 490, 493 (Mo. App. E.D. 2014).

Considering the trial court's express award of maintenance predicated on Vacca's petition alleging that he was incapable of working – which had not been reversed at the time of Vacca's petition filed in the present case – I conclude that Vacca was successful in persuading a court to accept his earlier position.

Vacca pleaded in his January 12, 2012 Counter-Petition for Dissolution of Marriage that he was “permanently and completely disabled and he is no longer capable of being employed” and “unable to support himself through appropriate employment due to his disability which is total and permanent in nature.” Conversely, in his September 28, 2012 petition claiming unlawful discrimination based upon his disability, Vacca pleaded that he was damaged by the termination because he was capable of performing the essential functions of his job with reasonable accommodations. Additionally, Vacca testified at trial that he could have worked until he was at least 75 years old, which resulted in damages for 20 years of full-time work. Vacca's September 28, 2012 position that he was capable of working full-time is clearly inconsistent with his January 12, 2012 position that he was permanently and completely disabled and incapable of being employed.

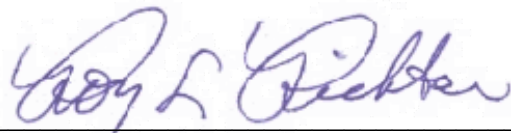
This contradiction was further exemplified by Vacca's reliance on differing physician statements. On February 14, 2011, Vacca responded to May's request to complete a Request for Accommodation Form with a request for additional accommodations and indicated that he could continue his current modified work duties and office hours. In support of this request for additional accommodations, Vacca noted a physician's statement from the Mayo Clinic. However, merely two weeks later, Vacca submitted two physicians' statements dated February 21, 2011, to Standard Insurance

supporting his claim for long-term disability. The statements, which were unrelated to the Mayo Clinic's statements, asserted he could no longer work with reasonable accommodations and had no expectation of improvement.

Vacca's assertion of these inconsistent positions provided an unfair advantage as he was able to argue total disability when advantageous in his counter-petition for dissolution, while subsequently arguing the opposite when advantageous to establish damages in his petition for discrimination based on disability. This unfair advantage allowed Vacca to benefit from contradictory arguments and was the sole reliance for damages in the present case.

Applying these three considerations to Vacca's timeline of contradictory pleadings, I conclude that he should have been estopped from claiming total disability in his counter-petition for dissolution and then claiming he was capable of working with reasonable accommodations in his petition in the present case.

Thus, I would reverse the trial court's denial of Appellants' Motions and Suggestions in Support of Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, or in the Alternative for an Elimination of Punitive Damages and Reduction in Fee Awards on the basis of judicial estoppel.



ROY L. RICHTER, Judge