

38.01(A) [2018 Revision] Verdict Directing – Missouri Human Rights Act – Employment Discrimination (for actions accruing before August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for 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 § 213.055, RSMo)^{1, 2} plaintiff, and

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*)³ 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.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ___ (*here insert number of affirmative defense instruction*)].⁴

Notes on Use (2014 Revision) [NO CHANGE]

(Approved May 22, 2013; Effective January 1, 2014)

1. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph First of this instruction may be appropriately modified.

2. Where the status of the plaintiff's membership in a protected class is at issue, except in cases involving disability discrimination, (see MAI 38.01(B)), Paragraph First in the verdict directing instruction shall be in the following form:

First, plaintiff is (here insert one of more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, or age), and

The remaining paragraphs of the verdict directing instruction must be renumbered.

3. Use only where plaintiff's disability is not at issue. Where plaintiff's disability is disputed, use MAI 38.01(B).

4. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012).

* Add if affirmative defense is submitted. This bracketed phrase should not be used to submit lawful justification under MAI 38.02.

Committee Comment (2018 Revision)

(Approved May 21, 2018; Effective January 1, 2019)

A. § 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri

Human Rights Act, § 213.055, RSMo, *et seq.*

C. "Garden variety" emotional distress under the Missouri Human Rights Act, § 213.055, RSMo, *et seq.*, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

D. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo. banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. Do not use this instruction for a disability discrimination claim where the issue of disability is disputed. Where plaintiff's disability is disputed, use MAI 38.01(B).

E. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

F. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

The trial court's wording of the but for issue—"but for ... their age ..., they would not have been terminated"—effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail

only if the jury believed that their age was *the* cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

G. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014). But see, S.B. 43 (2017) and Historical Note, below.

Historical Note (2018 Revision)
(Approved May 21, 2018; Effective January 1, 2019)

MAI 38.01(A) replaces the prior 31.24 (2005 New).

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.01(B) [2018 Revision] Verdict Directing – Missouri Human Rights Act – Employment Discrimination by Reason of Disability – Existence of Disability Disputed (for actions accruing before August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for plaintiff if you believe:

First, plaintiff [*"has a (physical)(mental) impairment that substantially limits one or more of plaintiff's major life activities;" "is regarded as having a (physical)(mental) impairment that substantially limits one or more of plaintiff's major life activities;" "has a (physical)(mental) impairment of record that substantially limits one or more of plaintiff's major life activities"*],¹ and

Second, such impairment (*"would not" "did not"*)² interfere with performing the job in question (*"if provided reasonable accommodation"*)(*"and did not require any accommodation"*),³ and

Third, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*),⁴ plaintiff, and

Fourth, such disability was a contributing factor in such (*here insert the alleged discriminatory act, such as "failure to hire," "discharge," etc.*), and

Fifth, as a direct result of such conduct, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number (*here insert number of affirmative defense instruction*)].⁵

Notes on Use (2014 New) [NO CHANGE]

(Approved May 22, 2013; Effective January 1, 2014)

1. Select the phrase that applies to the case as supported by the evidence. Use only where plaintiff's disability is disputed. Where plaintiff's disability is not disputed, use MAI 38.01(A).

2. Select appropriate phrase depending on whether plaintiff was "not hired," or was "discharged" or other alleged discriminatory act set out in § 213.055, RSMo.

3. Select appropriate phrase as supported by the evidence.

4. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph Third of this Instruction may be appropriately modified.

5. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit lawful justification under MAI 38.02.

Committee Comment (2018 Revision)

(Approved May 21, 2018; Effective January 1, 2019)

A. § 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055, RSMo, *et seq.*

C. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055, RSMo, *et seq.*, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

D. This instruction is based on *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo. banc 2012), wherein the court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed

element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38.01(A). Use this instruction only for disability discrimination claims where the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.01(A).

E. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

F. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

The trial court's wording of the but for issue—"but for ... their age ..., they would not have been terminated"—effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was the cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used

when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

G. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014). But see, S.B. 43 (2017) and Historical Note, below.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. If such action conflicts with Art V, Section 5 and Art I, Section 13 of the Missouri Constitution (1945), then see MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v.*

Kansas City Missouri School District, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.02 [2018 Revision] Missouri Human Rights Act—Lawful Justification (for actions accruing before August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for defendant if you believe:

First, defendant (*here insert alleged discriminatory act submitted in plaintiff's verdict directing instruction such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*) plaintiff because (*here set forth the alleged lawful reason such action was taken*), and

Second, in so doing (*here insert the protected classification submitted by plaintiff, such as race, color, religion, national origin, etc.*) was not a contributing factor.

Notes on Use (2017 Revision) [NO CHANGE]

See MAI 38.01(A) and 38.01(B).

If supported by the law and the evidence, an instruction on "lawful justification" may be submitted at the defendant's option, or "lawful justification" may be argued without submission of an instruction on that issue. If such an instruction is submitted, it must be in the form of this MAI 38.02.

Historical Note (2018 Revision)

(Approved May 21, 2018; Effective January 1, 2019)

MAI 38.02 replaces the prior 31.25 (2005 New).

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly

abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.03 [2012 Revision] Verdict Directing--Wrongful Discharge in Violation of Public Policy [NO CHANGE]

Your verdict must be for plaintiff if you believe:

First, plaintiff (*here describe plaintiff's act or refusal to act such as "refused to submit duplicate billing to Medicare," or "reported suspected child abuse to the Division of Family Services"*),¹ and

Second, defendant discharged plaintiff, and

Third, such conduct of plaintiff as submitted in paragraph First was a contributing factor in his/her discharge, and

Fourth, as a direct result of his/her discharge, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (here insert number of affirmative defense instruction)].

Notes on Use (2011 New) [NO CHANGE]

1. The act(s) inserted must be in accordance with *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), which adopted the public policy exception for discharge of an at-will employee stating:

An at-will employee may not be terminated (1) for refusing to violate the law or any well established and clear mandate of public policy as expressed in the Constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.

See also *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. banc 2010) (adopting the public policy exception for an employee under contract).

For submitting multiple acts in the disjunctive, refer to the form in MAI 17.02. As is

the case with all disjunctive submissions, there must be sufficient evidence to support each submission or the instruction will be erroneous.

* Add if affirmative defense is submitted.

Committee Comment (2018 Revision)

(Approved May 21, 2018; Effective January 1, 2019)

A. If the case involves constructive discharge, demotion, or adverse job consequences, this instruction can be easily modified. The Committee takes no position as to whether the public policy exception applies to cases in which the employee's action has resulted in constructive discharge, demotion, or adverse job consequences.

B. In *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), the employee was discharged for talking to federal investigators about the employer's violation of Fair Labor Standards Act requirements to pay overtime compensation. The Court expressly adopted a public policy exception to the "at will" doctrine where the employee is discharged for reporting violations of law to authorities or for refusing to perform illegal acts. *Id.*

C. The public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. However, the public policy need only be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body, and there need not be a direct violation by the employer of that same statute or regulation. Additionally, "there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting

its violation." *Fleshner*, 304 S.W.3d at 97. Moreover, the public policy is applicable to communications made to federal or state officials as well as to the employee's supervisors. *Fleshner*, 304 S.W.3d at 97. See also, *Margiotta v. Christian Hospital Northeast-Northwest*, 315 S.W.3d 342 (Mo. banc 2010).

D. In *Fleshner* the Court also cited the "contributing factor" standard expressed in MAI 31.24 with approval as the standard for causation in this type of wrongful discharge case. *Fleshner*, 304 S.W.3d at 94-95. But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A) and 38.01(B).

E. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo. banc 2010), the Court extended the public policy exception to the at-will doctrine to "contract employees" in addition to "at-will" employees.

F. The Court, under the facts in *Keveney*, also determined that in order to survive a motion to dismiss, an employee must plead the following in order to state a cause of action for wrongful discharge under the public policy exception:

(1) That the employee refused to perform an illegal act or act in a manner contrary to public policy;

(2) That the employee was discharged; and

(3) That there is a causal connection between the employee's discharge and the employee's refusal to engage in the actions at issue.

Id. at 103.

G. The *Margiotta* case limited the public policy exception by excluding situations in which the claimed "public policy" is vague or general and not a specific statute, rule,

regulation, or constitutional requirement. The Court found that the two regulations cited in *Margiotta* were vague statements and did not specifically proscribe conduct in the alleged incidents. One regulation was extremely broad as to patient safety, and the other regulation clearly dealt with building safety and not patient treatment. For these reasons the Court found that summary judgment was appropriately granted. *Margiotta*, 315 S.W.3d at 347-48.

H. In *Bennartz v. City of Columbia, Missouri*, 300 S.W.3d 251, 261-62 (Mo. App. 2009), the court held that a municipal employee may not maintain a wrongful discharge cause of action against the municipality or another municipal employee under the public policy exception because the defendants are protected by sovereign immunity.

I. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014). But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A), 38.01(B) and 38.05.

Historical Note (2018 Revision)

(Approved May 21, 2018; Effective January 1, 2019)

MAI 38.03 replaces the prior MAI 31.27 (2011 New).

As part of S.B. 43, the 99th General Assembly enacted the "Whistleblowers Protection Act," effective August 28, 2017. § 287.575.3 provides: "This section is intended to codify the existing common law exceptions to the at-will doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment practices."

The Act does not appear to impact causes of action accruing prior to August 28, 2017. The Act seems to explicitly recognize and codify the common law for wrongful discharge in violation of public policy and further seems to explicitly recognize the remedy provided for retaliatory discharge in a Workers Compensation setting under § 287.780.

38.04 [2018 Revision] Verdict Directing – Retaliatory Discharge or Discrimination – Workers' Compensation (for actions accruing before August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim,¹ and

Third, defendant discharged² plaintiff, and

Fourth, plaintiff's filing of the workers' compensation claim¹ was a contributing factor to plaintiff's discharge,² and

Fifth, as a direct result of such discharge² plaintiff sustained damage.

Notes on Use (2000 New) [NO CHANGE]

1. Describe the right exercised by the plaintiff under the workers' compensation law if it was other than filing a claim for compensation.

2. If the claim is for discrimination rather than discharge, describe the act of discrimination, such as "reduced plaintiff's rate of pay" or "demoted plaintiff."

Committee Comment (2018 Revision)

(Approved May 21, 2018; Effective January 1, 2019)

This instruction is for use in a retaliatory discharge case under § 287.780, RSMo, for actions accruing before August 28, 2017. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. banc 2014) held that "contributing factor" is the standard for causation in retaliatory discharge under § 287.780, RSMo. Prior cases to the contrary have been overruled. This instruction may be modified to submit acts of discrimination other than discharge where appropriate. For a retaliatory discharge case under § 287.780, RSMo, for actions accruing on or after August 28, 2017, see MAI 38.05.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

As part of S.B. 43, the 99th General Assembly enacted the "Whistleblowers Protection Act," effective August 28, 2017. § 287.575.3 provides: "This section is intended to codify the existing common law exceptions to the at-will doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment practices."

The Act does not appear to impact causes of action accruing prior to August 28, 2017. See MAI 38.03. The Act seems to explicitly recognize and codify the common law for wrongful discharge in violation of public policy and further seems to explicitly recognize the remedy provided for retaliatory discharge in a Workers Compensation setting under § 287.780.

**38.05 [2018 New] Verdict Directing – Retaliatory Discharge or Discrimination –
Workers' Compensation (for actions accruing on or after August
28, 2017)**

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim,¹ and

Third, defendant discharged² plaintiff, and

Fourth, plaintiff's filing of the workers' compensation claim¹ actually played a role
in and had a determinative influence on plaintiff's discharge,² and

Fifth, such discharge² directly caused damage to plaintiff.

Notes on Use (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

1. Describe the right exercised by the plaintiff under the workers' compensation law
if it was other than filing a claim for compensation.

2. If the claim is for discrimination rather than discharge, describe the act of
discrimination, such as "reduced plaintiff's rate of pay" or "demoted plaintiff."

Committee Comment (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

This instruction is for use in a retaliatory discharge case under § 287.780, RSMo,
that accrues on or after August 28, 2017. S.B. 66 (Laws 2017). This instruction may be
modified to submit acts of discrimination other than discharge where appropriate.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

As part of S.B. 66 (2017), the 99th General Assembly amended a number of sections of the Missouri Workers' Compensation Act, effective August 28, 2017. S.B. 66 modifies the burden of proof for workers' compensation retaliation claims under § 287.780.

Templemire v. W&M Welding, Inc., 433 S.W.3d 371 (Mo. banc 2014) adopted a contributing factor standard for Missouri Human Rights Act claims. § 287.780 now provides:

No employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under this chapter when the exercising of such rights is the motivating factor in the discharge or discrimination. Any employee who has been discharged or discriminated against in such manner shall have a civil action for damages against his or her employer. For purposes of this section, 'motivating factor' shall mean that the employee's exercise of his or her rights under this chapter actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.

§ 287.780, RSMo.

MAI 38.05 [2018 New] is for use in retaliatory discharge or discrimination claims that accrued on or after August 28, 2017, under the Missouri Workers' Compensation Act.

38.06 [2018 New] Verdict Directing – Missouri Human Rights Act – Employment Discrimination (for actions accruing on or after August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for 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 § 213.055, RSMo*),^{1,2} plaintiff, and

Second, plaintiff's (*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*)³ actually played a role in and had a determinative influence on such action, and

Third, such conduct directly caused damage to plaintiff.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (*here insert number of affirmative defense instruction*)].⁴

Notes on Use (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

1. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph First of this instruction may be appropriately modified.

2. Where the status of the plaintiff's membership in a protected class is at issue, except in cases involving disability discrimination (see MAI 38.07), Paragraph First in the verdict directing instruction shall be in the following form:

First, plaintiff is (here insert one of more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, or age), and

The remaining paragraphs of the verdict directing instruction must be renumbered.

3. Use only where plaintiff's disability is not at issue. Where plaintiff's disability is disputed, this instruction must be modified. See e.g. MAI 38.07.

4. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012).

Committee Comment (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

A. § 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, § 213.055, RSMo, *et seq.* The Missouri legislature specifically recognized such a right to trial by jury in § 213.111.3.

C. "Garden variety;" emotional distress under the Missouri Human Rights Act, §§ 213.055, RSMo, *et seq.*, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

D. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo. banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note

on Use 2. For a disability discrimination claim where the issue of disability is disputed, this instruction must be modified. See e.g., MAI 38.07 and modify accordingly.

E. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage

of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.07 [2018 New] Verdict Directing – Missouri Human Rights Act – Employment Discrimination by Reason of Disability – Existence of Disability Disputed (for actions accruing on or after August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for plaintiff if you believe:

First, plaintiff [*"has a (physical)(mental) impairment that substantially limits one or more of plaintiff's major life activities;" "is regarded as having a (physical)(mental) impairment that substantially limits one or more of plaintiff's major life activities;" "has a (physical)(mental) impairment of record that substantially limits one or more of plaintiff's major life activities"*],¹ and

Second, such impairment (*"would not" "did not"*)² interfere with performing the job in question (*"if provided reasonable accommodation"*) (*"and did not require any accommodation"*),³ and

Third, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*),⁴ plaintiff, and

Fourth, such disability actually played a role in and had a determinative influence on (*here insert the alleged discriminatory act, such as "failure to hire," "discharge," etc.*), and

Fifth, such conduct directly caused damage to plaintiff.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ___ (*here insert number of affirmative defense instruction*)].⁵

Notes on Use (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

1. Select the phrase that applies to the case as supported by the evidence. Use only where plaintiff's disability is disputed. Where plaintiff's disability is not disputed, use MAI 38.06.

2. Select appropriate phrase depending on whether plaintiff was "not hired," or was "discharged" or other alleged discriminatory act set out in § 213.055, RSMo.

3. Select appropriate phrase as supported by the evidence.

4. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph Third of this Instruction may be appropriately modified.

5. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit lawful justification under MAI 38.02.

Committee Comment (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

A. § 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in *actions* for damages under the Missouri Human Rights Act, §§ 213.055, RSMo, *et seq.*

C. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055, RSMo, *et seq.*, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006).

D. This instruction is based on *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo. banc 2012), wherein the court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38.01(A). Use this instruction only for disability discrimination claims where the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.06.

E. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability"

within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo. App. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage

of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.08 [2018 New] Missouri Human Rights Act – Business Judgment Rule (for actions accruing on or after August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

Your verdict must be for defendant if you believe defendant (*here insert the alleged discriminatory act submitted in plaintiff's verdict directing instruction such as "failed to hire," "discharged," or other act within the scope of § 213.055, RSMo*),¹ plaintiff because (*here insert non-discriminatory business reason for defendant's action*) as an exercise of sound business judgment without regard to plaintiff's (*here insert the applicable protected classification submitted by plaintiff such as race, color, religion, national origin, etc.*)² even if you disagree with such decision or believe it to be harsh.

Notes on Use (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

1. Select appropriate phrase depending on whether plaintiff was "not hired," or was "discharged," or other alleged discriminatory act.
2. Select appropriate phrase as supported by the evidence.

Committee Comment (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly, states "[i]n all civil actions brought under this Chapter (Chapter 213), a jury shall be given an instruction expressing the business judgment rule." See S.B. 43, § 213.101.2. This instruction is for use in actions accruing on or after August 28, 2017.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states "it hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage

of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.09 [2018 New] Missouri Human Rights Act – Damages (for actions accruing on or after August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any actual damages including back pay, other past [and future]¹ economic losses, and any past [and future]¹ emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-economic losses as a direct result of the occurrence mentioned in the evidence.

Notes on Use (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

1. This may be added if supported by the evidence.

Committee Comment (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

A. During the instruction conference, the parties and the court should discuss (on the record) what damages are supported by the evidence and can properly be argued to the jury. In this way, jury arguments can proceed without undue interruption.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, § 213.055, RSMo, *et seq.* The Missouri legislature specifically recognized such a right to trial by jury in § 213.111.3.

C. For recovery of attorney's fees under the MHRA, see § 231.111.2.

D. If punitive damages are submitted, a punitive damage instruction should be given. See, MAI 10.07. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to RSMo, § 510.263.

E. The amendments in S.B. 43 (Laws 2017) to § 213 impose limitations on damages under the MHRA. Damages awarded for employment claims under the MHRA may not exceed back pay and interest on that back pay, plus an additional amount of damages dependent upon the size of the company. See § 213.111.3.

F. The statutory limitations on damages and the calculation of interest on back pay is a judicial function rather than a jury function.

G. For MHRA actions accruing August 28, 2017, see MAI 4.01.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict

directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.

38.10 [2018 New] Missouri Human Rights Act – Verdict Form (for actions accruing on or after August 28, 2017)

(Approved May 21, 2018; Effective January 1, 2019)

VERDICT __¹

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff (*state the name*) against defendant (*state the name*),² we, the undersigned jurors, find in favor of:

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

For back pay³ \$_____ *(stating the amount or, if none, write the word, "none")*.

For past economic losses excluding back pay³ \$_____ *(stating the amount or, if none, write the word, "none")*.

For future economic losses³ \$_____ *(stating the amount or, if none, write the word, "none")*.

For non-economic losses³ \$_____ *(stating the amount or, if none, write the word, "none")*.

Note: All jurors who agree to the above must legibly sign or print their names below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Notes on Use (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

1. Verdicts will be designated alphabetically (A, B, C, etc.).
2. Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

3. Do not submit any category of damage that is not supported by the evidence.
4. A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."
5. Verdict forms should not be read by the court to the jury.
6. For MHRA actions accruing before August 28, 2017, see MAI 36.01; MAI 36.05.

Committee Comment (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

A. The amendments in S.B. 43 (Laws 2017) to § 213 place back pay in a category with punitive damages. If punitive damages and back pay are submitted, the verdict form should be modified to include separate findings for back pay and punitive damages. See MAI 36.11.

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to RSMo, § 510.263.

C. The amendments in S.B. 43 (Laws 2017) to § 213 impose limitations on damages under the MHRA. Damages awarded for employment claims under the MHRA may not exceed back pay and interest on that back pay, plus an additional amount of damages dependent upon the size of the company. See § 213.111.4.

D. The statutory limitations on damages and the calculation of interest on back pay is a judicial function rather than a jury function.

Historical Note (2018 New)

(Approved May 21, 2018; Effective January 1, 2019)

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing – wrongful discharge in violation of public policy), MAI 38.05 (verdict directing – retaliatory discharge or discrimination), MAI 38.06 (verdict directing – MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense – business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; and *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017.