SC97069

IN THE MISSOURI SUPREME COURT

SHEREEN KADER,

Plaintiff/Respondent,

vs.

BOARD OF REGENTS OF HARRIS-STOWE STATE UNIVERSITY,

Defendant/Appellant.

Appeal from the Circuit Court of St. Louis City, Missouri
The Honorable Mark H. Neill, Circuit Judge

SUBSTITUTE BRIEF OF DEFENDANT / APPELLANT

JOSHUA D. HAWLEY
Attorney General

PETER T. REED, Mo. Bar. #70756
Deputy Solicitor
ROBERT ISAACSON, Mo. Bar #38361
Assistant Attorney General
P.O. Box 861
St. Louis, MO 63188
(314) 340-7366; (314) 340-7981 (fax)
Peter.Reed@ago.mo.gov

Attorneys for Defendant / Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS 1
TABLE OF AUTHORITIES 4
INTRODUCTION 9
JURISDICTIONAL STATEMENT 12
STATEMENT OF FACTS 13
A. A native of Egypt, Dr. Kader obtained her as part of a foreign exchange program under a J-1 visa. 13
B. Harris-Stowe offered Dr. Kader three consecutive teaching contracts from 2007-2010 while Penn State continued to sponsor her J-1 foreign exchange visa. 13
C. In October 2009, Dr. Kader and Dean Smith had a disagreement over her performance evaluation, after which Dr. Kader alleges she filed a discrimination complaint. 14
D. Dr. Kader's J-1 visa ended in June 2010, and Dr. Kader was unable to get a H1-B work visa without returning to Egypt or getting a waiver of the residency requirement. 19
E. Without a waiver of the residency requirement for a H1-B visa, Dr. Kader made a last minute attempt to obtain an O-1 extraordinary-persons visa. 20
F. Dr. Kader's application for an O-1 extraordinary-persons visa was denied because the required supporting evidence was not attached or submitted within seven days. Harris-Stowe then informed her it could not renew her contract. 22
G. Dr. Kader's actions after leaving Harris-Stowe. 25

H. The jury return a verdict for Dr. Kader on her claims of national-origin discrimination and retaliation, but the court of appeals reversed because of instructional error. 27

POINTS RELIED ON 28

ARGUMENT 31

I. The trial court erred in denying Harris-Stowe's Motion for New Trial because the verdict directors misdirected, misled, or confused the jury, resulting in prejudicial error, in that they included actions that are not adverse employment actions and no evidence established those actions caused any damages. 31

A. The instructions for discrimination and retaliation misled and confused the jury by listing alleged actions that were not adverse employment actions and Harris-Stowe was prejudiced thereby. 32

B. The verdict director also misled and confused the jury as to damages, and Harris-Stowe was prejudiced thereby. 42

II. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because Dr. Kader failed to make a submissible case of national origin discrimination under the Missouri Human Rights Act in that there was no evidence showing that Harris-Stowe discriminated against her because she is of Egyptian origin, there was no evidence that Harris-Stowe took any employment actions adverse to Dr. Kader because of her national origin, and no proof of damages. 43

A. Dr. Kader's discrimination claim improperly conflates national origin and alienage, and fails to show that any action by Harris-Stowe was motivated by national origin. 45

B. Damages are speculative because O-1 visas are reserved for those at the very top of their field and Dr. Kader had only just begun her professional career. 51

III. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because Dr. Kader failed to make a submissible retaliation claim under the Missouri Human Rights Act in that she did not make a claim of discrimination for a protected activity, there was no nexus between Dr. Kader's alleged complaints in October of 2009 and Harris-Stowe's later employment actions, and no proof of damages. 54

A. Dr. Kader never made a complaint of national-origin discrimination in the fall of 2009. 55

B. Dr. Kader did not show that her alleged complaints in October 2009 caused Harris-Stowe's alleged adverse employment actions in June and July 2010. 58

C. Damages are speculative. 60

IV. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because there was not sufficient evidence of evil motive or reckless indifference on the part of Harris-Stowe to support the submission of punitive damages in that Dr. Kader could not continue to work for the university without a work visa, the university cooperated with her attorney who assured

the university they had submitted all required information, and her complaints did not support an actionable claim under the MHRA. 61

A. Punitive damages require clear and convincing evidence that an employer acted with an evil motive or reckless indifference and without just cause or excuse. 62

B. Harris-Stowe, at most, acted negligently. 64

C. The punitive damages award violates Due Process. 66

CONCLUSION 67

CERTIFICATE OF SERVICE AND COMPLIANCE 68

TABLE OF AUTHORITIES

CASES

Abravanel v. Starwood Hotels and Resorts Worldwide, Inc.,
94 F. Supp. 3d 134 (D.P.R., 2015) 29, 45, 48, 49

Alcorn v. Union Pacific R.R. Co.,
50 S.W.3d 226 (Mo. banc 2001) 63

Altenhofen v. Fabricor, Inc.,
81 S.W.3d 578 (Mo. App. W.D. 2002) 30, 63, 66

Buettner v. Arch Coal Sales Co. Inc.,
216 F.3d 707 (8th Cir. 2000) 28, 32, 58

Burnett v. Griffith,
769 S.W.2d 780 (Mo. 1989) 63

Cherry v. Ritenour Sch. Dist.,
253 F. Supp. 2d 1085 (E.D. Mo. 2003) 29, 55

Collins–Pearcy v. Mediterranean Shipping Co.,
698 F. Supp. 2d 730 (S.D. Tex. 2010) 33

Daniels v. Bd. of Curators of Lincoln Univ.,
51 S.W.3d 1 (Mo. App. W.D. 2001) 44, 54
Daugherty v. City of Maryland Heights,
231 S.W.3d 814 (Mo. banc 2007) 45
Dhyne v. Meiners Thriftway, Inc.,
184 F.3d 983 (8th Cir. 1999) 29, 58
Ellison v. O'Reilly Automotive Stores, Inc.,
463 S.W.3d 426 (Mo. App. W.D. 2015) 30, 62, 64
Espinoza v. Farah Mfg. Co.,
414 U.S. 86 (1973) 28, 45
Exxon Shipping Co. v. Baker,
554 U.S. 471 (1996) 66
Fleshner v. Pepose Vision Inst., P.C.,
304 S.W.3d 81 (Mo. banc 2010) 31
Girdley v. Coats,
825 S.W.2d 295 (Mo. banc 1992) 51
Guimaraes v. SuperValu, Inc.,
674 F.3d 962 (8th Cir. 2012) 28, 47
Harvey v. Washington,
95 S.W.3d 93 (Mo. banc 2003) 31
Herrington v. Medevac Med. Response, Inc.,
438 S.W.3d 417 (Mo. App. W.D. 2014) 41
Hervey v. Mo. Dep't of Corrections,
379 S.W.3d 156 (Mo. banc 2012) 41, 42
Hill v. Ford Motor Co.,
277 S.W.3d 659 (Mo. banc 2009) 63

Hoffman Plastic Compounds, Inc. v. N.L.R.B.,
535 U.S. 137 (2002) 28, 37, 38
Howard v. City of Kansas City,
332 S.W.3d 772 (Mo. banc 2011) 30, 64, 65
Incalza v. Fendi N. Am., Inc.,
479 F.3d 1005 (9th Cir. 2007) 38, 39
Incalza v. Fendi N. Am., Inc.,
479 F.3d 1010 (9th Cir. 2007) 38
Kan. City v. Keene Corp.,
855 S.W.2d 360 (Mo. banc 1993) 62
Kanungo v. Univ. of Ky.,
1 F. Supp. 3d 674 (E.D. Ky. 2014) 33, 34
Khalil v. Hazuda,
833 F.3d 463 (5th Cir. 2016) .....passim
Kipp v. Mo. Highway & Transp. Comm'n,
280 F.3d 893 (8th Cir. 2002) 29, 58
Lewellen v. Franklin,
441 S.W.3d 136 (Mo. 2014) 66
Liles v. C.S. McCrossan, Inc.,
851 F.3d 810 (8th Cir. 2017) 58
Lixin Liu v. BASF Corp.,
409 F. App'x 988 (8th Cir. 2011) 28, 48, 49
Lompe v. Sunridge Partners, LLC,
818 F.3d 1041 (10th Cir. 2016) 67
Lopez v. Three Rivers Elec. Co-op., Inc.,
26 S.W.3d 151 (Mo. banc 2000) 62

Madeira v. Affordable Housing Found., Inc.,
469 F.3d 219 (2d Cir. 2006) 37
McBryde v. Ritenour Sch. Dist.,
207 S.W.3d 162 (Mo. App. E.D. 2006) 44
Minze v. Missouri Department of Public Safety,
437 S.W.3d 271 (Mo. App. W.D. 2014) 29, 40, 54
Parktown Imports, Inc. v. Audi of Am., Inc.,
278 S.W.3d 670 (Mo. banc 2009) 38
Rodriguez v. Suzuki Motor Corp.,
936 S.W.2d 104 (Mo. banc 1996) 30, 62
Ross–Paige v. Saint Louis Metro. Police Dep't,
492 S.W.3d 164 (Mo. 2016) 28, 41, 42, 43
Samuel v. Metro. Police Dep't,
258 F. Supp. 3d 27 (D.D.C. 2017) ..... passim
Sanchez v. Dahlke Trailer Sales, Inc.,
897 N.W.2d 267 (Minn. 2017) 39, 40
State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 66, 67
Texas A & M University-Corpus Christi v. Upchurch,
99 F. App'x 556 (5th Cir. 2004) 53
United States v. Garcia-Ochoa,
607 F.3d 371 (4th Cir. 2010) 37
United States v. Loaiza-Sanchez,
622 F.3d 439 (8th Cir. 2010) 45
Watson v. E.S. Sutton, Inc.,
225 F. App'x 3 (2d Cir. 2006) 67

Williams v. Trans States Airlines, Inc.,
281 S.W.3d 854 (Mo. App. E.D. 2009) 58

STATUTES

8 U.S.C. § 1101(a)(15)(H)(i)(b) 19
8 U.S.C. § 1101(a)(15)(O) 35
8 U.S.C. § 1182(e) 19
8 U.S.C. § 1184(i) 19
8 U.S.C. § 1324a(a) 39, 65
8 U.S.C. § 1324a(a)(1)(A) ..... passim
8 U.S.C. § 1324a(a)(2) 37, 38, 43, 50
8 U.S.C. § 1324a(e)(4) 37
22 U.S.C. § 2452 13
§ 213.055.1(1)(a), RSMo 32, 34, 36, 39
§ 213.055.1(1), RSMo 45
§ 213.070.1, RSMo 40, 55
§ 408.040.3, RSMo 27

REGULATIONS

8 C.F.R. § 214.2(o)(1)(i) 52
8 C.F.R. § 214.2(o)(3)(iii)(A) 52
8 C.F.R. § 214.2(o)(3)(iii)(B)(1)-(8) 35, 53
22 C.F.R. § 62.2 13
22 C.F.R. § 62.4(a)-(h) 13
22 C.F.R. § 62.42(a) 13
22 C.F.R. § 62.43 13

OTHER AUTHORITIES

U.S. Citizenship and Immigration Services, "O-1 Visa: Individuals with Extraordinary Ability or Achievement" 53

INTRODUCTION

Plaintiff Shereen Kader, a native of Egypt and fresh out of graduate school, taught at Harris-Stowe State University on one-year contracts from 2007 to 2010. Dr. Kader's J-1 foreign exchange visa expired on June 13, 2010. After a J-1 visa expires, the holder often must return to their native country for two years before getting an H1-B visa. Dr. Kader filed for waiver of this residency requirement, but did not get it until long after her J-1 visa expired. In July 2010, Harris-Stowe informed Dr. Kader that it would not renew her contract because she did not have a valid visa.

In this suit, Dr. Kader charges Harris-Stowe with discrimination and retaliation based on Harris-Stowe's handling of her last minute application for an O-1 "extraordinary persons" visa, its refusal to grant her a leave of absence, and its refusal to renew her teaching contract. This Court should reverse all or part of the judgment below for at least four reasons.

First, the verdict directors misled and confused the jury by listing as "adverse employment actions" actions that are not legally adverse under Missouri law. The verdict director said Harris-Stowe did not submit documentation in support of Dr. Kader's O-1 visa application. This is not an adverse action, because an employer is not legally obligated to support an employee's visa application, and an employer's negligence in the visa process is not actionable either. The verdict director also said Harris-Stowe should

have appealed the O-1 visa denial. But the visa was denied because no evidence had been attached to the application by Dr. Kader's lawyer. Thus, there was no basis to appeal. The verdict director also said Harris-Stowe denied Dr. Kader a leave of absence. But Dr. Kader asked for leave right when her J-1 visa expired (the Friday before and the Monday after). At that time, Harris-Stowe could not legally continue to employ her and so could not grant her leave. Because these adverse actions were listed in the disjunctive, Harris-Stowe was prejudiced by the verdict directors if any one of them was nonactionable. The same analysis applies to Dr. Kader's retaliation claim.

Second, the discrimination claim should not have been submitted to the jury because of underlying legal error. Contrary to Dr. Kader's theory of the case, immigration status and national origin do not have the same meaning. National origin is a protected class, alienage is not. So evidence that an employer mishandled a visa application does not create a triable issue of fact on a national origin claim.

Alternatively, the claim should not have been submitted because the damages were too speculative. Harris-Stowe could not renew Dr. Kader's contract because her J-1 visa expired and she did not get a residency waiver in time. Getting an O-1 visa at the last minute was always unlikely, because such visas require proof that the individual is one of the small percentage who has risen to the very top of the field. This "extraordinary ability" bar is

very high, and Dr. Kader failed to offer substantial evidence to suggest she could have met it.

Third, the retaliation claim should not have been submitted to the jury. Although Dr. Kader testified about a disagreement she had with her supervisor over a performance review in the fall of 2009, she never complained that the performance review was motivated by national origin. In fact, she specifically said she did *not* make a complaint. Even if she had, at least four events break the causal chain between a fall 2009 complaint and Harris-Stowe's actions in June and July 2010: a ten-month time gap; an intervening performance review; Harris-Stowe's actions in support of Dr. Kader's O-1 visa application, including stating that it intended to employ her for three more years; and the expiration of Dr. Kader's J-1 visa and the denial of her O-1 visa application. Here, too, Dr. Kader's damages are speculative, and for the same reasons.

Fourth, punitive damages should not have been submitted to the jury. At best, Harris-Stowe's human-resources employees were negligent in submitting documentation in support of the O-1 visa. Such negligence does not establish an evil motive, and Harris-Stowe's employee had good cause or excuse for her inaction—Dr. Kader's own lawyer told the employee that "all information has been submitted" and there was "nothing else" Harris-Stowe had to do. Tr. Ex. L at 653.

JURISDICTIONAL STATEMENT

This case involves the timely appeal of a final judgment, so it falls within this Court's appellate jurisdiction. Mo. Const. Art. V, § 3.

The jury issued its verdict in December 2015. Harris-Stowe filed a notice of appeal on April 18, 2016 based on the circuit court's post-trial order. The appellate court issued several show cause orders, resulting in the circuit court filed its Second Amended Judgment on April 4, 2017. LF 318-20. Harris-Stowe's post-trial motions were denied on April 24, 2017. LF 359-62. The Court of Appeals held that the April 4, 2017 judgment was a final, appealable judgment on April 13, 2017. The Court of Appeals issued its opinion January 9, 2018. Dr. Kader applied for transfer on April 6, 2018. This Court granted transfer July 3, 2018.

STATEMENT OF FACTS

A. A native of Egypt, Dr. Kader obtained her as part of a foreign exchange program under a J-1 visa.

Plaintiff, Dr. Shereen Kader, won a scholarship to come to the United States to study and obtain a master's degree at Indiana University in Pennsylvania and a Ph.D. at Pennsylvania State University (Penn State). Tr. 305:8-12. Dr. Kader is a native of Egypt. Tr. 303:12-14. She arrived in the United States on August 19, 1999. Tr. 306:16-18.

Dr. Kader came to the United States on a J-1 non-immigrant visa. J-1 visas allow students, teachers, research scholars, and others to come to the United States temporarily as part of a foreign exchange program. 22 U.S.C. § 2452; 22 C.F.R. § 62.4(a)-(h). An approved sponsor, often an educational institution, files a J-1 visa on behalf of an applicant. 22 C.F.R. §§ 62.2; 62.4. Penn State sponsored Kader's J-1 visa while she pursued her Ph.D. Tr. 308:10-25.

B. Harris-Stowe offered Dr. Kader three consecutive teaching contracts from 2007-2010 while Penn State continued to sponsor her J-1 foreign exchange visa.

An individual who comes to the United States on a J-1 foreign-exchange visa for educational purposes can transfer and extend that J-1 visa in certain qualifying work programs. 22 C.F.R. §§ 62.42(a) & 62.43. Penn

State continued to sponsor Dr. Kader's J-1 visa after she finished her degree. Tr. 310:8-24.

The Board of Harris-Stowe State University (Harris-Stowe) hired Kader as an instructor in Early Childhood Development in the College of Education for the 2007-2008 school year, and later promoted her to assistant professor once she earned her Ph.D. Tr. 414:21-417:23. Harris-Stowe offered her a second one-year contract in August 2008, and a third contract in August 2009. Tr. Ex. A, B, and C at 639-647.

Throughout this time, Dr. Kader continued to work through the Exchange Visitor Program, and Penn State continued to sponsor her J-1 visa. Harris-Stowe submitted paperwork to Penn State each year to support Dr. Kader's J-1 visa. Tr. 310:21-24. But none of the contracts required Harris-Stowe to assist Dr. Kader with maintaining her immigration status. Tr. Ex. A, B, and C at 639-647. During her third year, the 2009-2010 academic year, Harris-Stowe paid Dr. Kader $44,133 plus benefits. Tr. Ex. C at 645-647.

C. In October 2009, Dr. Kader and Dean Smith had a disagreement over her performance evaluation, after which Dr. Kader alleges she filed a discrimination complaint.

Dr. Kader testified that she made a claim of discrimination in October 2009 following a performance evaluation from Dr. Latisha Smith, Dean of the College of Education ("Dean Smith"). 244:24-245:4. Dean Smith filled out an evaluation form and had Dr. Kader fill one out as a self-evaluation. Tr.

245:5-246:10; Tr. Ex. 41 and 42 at 621-624. Dr. Kader rated herself as outstanding, the highest rating, in all 16 categories. Tr. 419:1-18; Tr. Ex. 42 at 623-24. Dean Smith rated Dr. Kader outstanding in 12 categories and excellent in 4 categories. Tr. 419:5-8; Tr. Ex. 41 at 621-22. Dr. Kader testified that the whole review was really good and something to be proud of. Tr. 420:14-18.

Dean Smith's and Dr. Kader's testimony differed on what was said during the review. Both agreed that Dean Smith told Dr. Kader some students had complained about her teaching. Tr. 256:11-257:2, 258:19-24, 328:6-9. Dr. Kader testified that Dean Smith also said some students were not accepting of Dr. Kader's race and immigrant status, Tr. 324:15-19, and that some faculty did not accept her and did not support renewing her visa, Tr. 324:23-325:11. Dean Smith disagreed with this testimony, testifying that she did not tell Dr. Kader that there were faculty members who were unsupportive of her visa. Tr. 281:4-12. Dean Smith also testified that Dr. Kader asked her if her students were racist because they had voiced complaints about her and Dean Smith explained to Dr. Kader that it is not an indication of racism and invited her to put any concerns she had in writing. Tr. 282:4-11. The evaluation form instructed that "Faculty [members] may respond in writing to the evaluation; reply will be filed with the evaluation." Tr. Ex. 42 at 624. No faculty response is attached to the evaluations.

The next day, Dr. Kader approached Dean Smith in the reception area of the Education Department, Tr. 325:17-21, and told her she needed to talk to her about the evaluation. Their testimony disagrees about this conversation too. Dr. Kader said Dean Smith stayed in the lounge as Dr. Kader continued talking and raised her voice in response. Tr. 325:24-326:9. Dr. Kader testified that she told Dean Smith she would talk to Vice President Smith about the conflict and that she believed she was being treated differently because of her race, national origin, and immigration status. Tr. 329:13-22. She said that Dean Smith disagreed, and said there were other student complaints. Tr. 329:23-330:8. Dean Smith testified that Dr. Kader told her she had no right to evaluate Dr. Kader and use student input in Dr. Kader's evaluation. Tr. 267:10-13. Dean Smith told Dr. Kader to put her concerns in writing. Tr. 267:14-23, 268:9-13.

Two days later, faculty members told Dean Smith that Dr. Kader was upset about the evaluation and was complaining about it to others. Tr. 270:18-271:5. Dean Smith then reported the incidents from October 15-17 in an email to Director of Human Resources, Virginia Malone; Vice President of Academic Affairs, Dwayne Smith; University President Givens; and Dr. Kader. Tr. Ex. 8 at 599-601; Tr. Ex. 26 at 612-614. The next day, Dean Smith sent Dr. Kader an email that said she was trying to schedule a

meeting to discuss the incident report with administration. Tr. Ex. 9 at 602. No meeting was ever held. Tr. 335:12-15.

Dr. Kader spoke to Vice President Smith about the incident report they had received from Dean Smith. Tr. 333:2-20. Dr. Kader testified she told Vice President Smith that she felt Dean Smith targeted her because of her "religion and national origin and all of those things." Tr. 333:21-23. She told Vice President Smith that if there was a meeting with Human Resources she would have to bring an attorney; he then said if she did she would face visa complications. Tr. 334:2-7; 338:6-21. Vice President Smith testified that he never made such a comment, Tr. 86:1-4, 123:18-21, and noted that Dr. Kader complained to him about her evaluation, not anything related to discrimination, Tr. 81:13-16, 83:16-24, 84:4-7.

Vice President Smith emailed Dr. Kader after his conversation with her. He told her he had heard from others who said she was getting a lawyer and that she was making disparaging comments about Dean Smith. He said, "Please refrain from sharing any information regarding this situation with others. It tends to complicate matters." Tr. Ex. 48 at 626. Dr. Kader emailed Vice President Smith back that same day: "please remember that I am not the one who initiate (sic) the activity or the one who wrote the complaint to human resources." Tr. Ex. 48 at 625.

Two days later, Dr. Kader sent a 15-page email responding "to [Dean Smith's] complaint." Tr. 455:24-456:4; Tr. 79:22-24. The email was not submitted into evidence, although it is referenced in the trial transcript. When asked whether the email shows that she told Vice President Smith the evaluation incident occurred because of her race, religion or national origin, Dr. Kader said, "I didn't verbalize it with the exact words, but I did address the same meaning." Tr. 458:4-9. When asked again if there was anything in the email saying the performance review had to do with her race, religion, or national origin, Dr. Kader explained, "[t]his e-mail from me responds to [Dean Smith's] complaint not to [Vice President Smith]. It's just addressing the issues in [Dean Smith's] Complaint." Tr. 458:10-16. Dr. Kader wrote, "all I'm asking for is just the fairness and judgment, and I'm asking for my full rights as a human and a faculty member." Tr. 459:2-4. Dr. Kader testified that this sentence was the closest she got to reporting in writing that her performance review was due to her race, religion, or national origin. Tr. 459:2-19.

In Dr. Kader's next performance evaluation in April of 2010, Dr. Kader again gave herself perfect scores in all categories. Tr. Ex. 4 at 586-591. Dean Smith met with Dr. Kader and, after discussion, moved some "4" ratings to a perfect "5" rating. Tr. 285:5-286:14, 427:18-21.

D. Dr. Kader's J-1 visa ended in June 2010, and Dr. Kader was unable to get a H1-B work visa without returning to Egypt or getting a waiver of the residency requirement.

Meanwhile, Dr. Kader's J-1 work authorization through Penn State was scheduled to end on May 14, 2010. Tr. Ex. J at 651. Dr. Kader received additional authorization from Penn State to continue her employment through June 13, 2010, and then she had to depart the United States within 30 days. *Id.* Dr. Kader and Penn State provided this information to Harris-Stowe's human resources department. *Id.*

Typically, a foreign national seeking to work in the United States gets a H1-B visa through a sponsoring employer. "An H1-B visa is a nonimmigrant visa that allows certain foreign nationals in 'specialty occupation[s]' to reside and work temporarily in the United States for up to six years." *Khalil v. Hazuda*, 833 F.3d 463, 464-65 (5th Cir. 2016); 8 U.S.C. § 1101(a)(15)(H)(i)(b). A specialty occupation includes occupations that requires a bachelor's or higher degree. 8 U.S.C. § 1184(i). Dr. Kader intended to file H1-B visa application so she could continue to work at Harris-Stowe after June of 2010. Tr. 355:22-356:3.

Dr. Kader was not eligible for an H1-B visa, however, because she did not get a timely waiver of the two-year home-country physical presence requirement imposed on some exchange visitors with J-1 visas. *See* 8 U.S.C. § 1182(e). Egypt had awarded her scholarship in the first place, so she had to

either return to Egypt for two years or get a waiver of this residency requirement. Tr. 354:1-15. Dr. Kader filed an application for a waiver of this two-year residency requirement in early 2010. Tr. 379:18-25. But as of April 2010—shortly before her current visa would expire—Dr. Kader had received no response. *Id.* In fact, Dr. Kader would not get a waiver until February 2011. *Id.*

E. Without a waiver of the residency requirement for a H1-B visa, Dr. Kader made a last minute attempt to obtain an O-1 extraordinary-persons visa.

Faced with an imminent deadline, Dr. Kader's attorney, Stephen Fleming, scrambled for a backup plan. He eventually filed for an O-1 "extraordinary persons" visa on May 21, 2010, about three weeks before Dr. Kader's J-1 visa expired. Decision, Tr. Ex. 18 at 606. The idea of filing an O-1 visa first came up in a March 3, 2010 email from Dr. Kader to Harris-Stowe, indicating that Attorney Fleming wanted to submit an O-1 visa application because it did not require a waiver of the residency requirement. Tr. Ex. I at 648. The plan was to get the first part of the application approved, then have Dr. Kader and Attorney Fleming fly to the Mexican border to get "the second part of the O1 Visa processed from Mexico as a different country from the U.S." *Id.*

On March 31, 2010, Dr. Kader emailed Dr. Smith, Vice President of Academic Affairs, requesting that they send Attorney Fleming "the

information needed below as soon as possible in order to process the O1 Visa (For Extra-Ordinary Persons)." Tr. Ex. M at 654. Attorney Fleming's email explains that "I can file that petition electronically; however, I will need certain information from the University as it is actually a petition made by the employer for you." *Id.*

The very next day, Robin Shaw, a human resources employee at Harris-Stowe, emailed the requested information to Attorney Fleming. Tr. Ex. 38 at 619. She also invited him to let her know if he needed additional information. *Id.* Importantly, the petition said Harris-Stowe intended to employ Dr. Kader for another three years. Decision, Tr. Ex. 18 at 606.

Despite receiving the requested information from Harris-Stowe on April 1, Attorney Fleming eventually submitted the original petition for the O-1 visa some six weeks later on May 21, about three weeks before Dr. Kader's J-1 visa expired. *See id.*

Meanwhile, Dr. Kader notified Harris-Stowe, through human resources, that the last day Dr. Kader was authorized to work was June 13, 2010, by forwarding a message from Penn State. Tr. Ex. J at 651. Penn State's letter also informed Dr. Kader (and Harris-Stowe) that she would have 30 days to pack and leave the United States after that date. *Id.* Dr. Kader explained to Malone that she hoped an O-1 visa would be approved to allow her permission to work in the United States for another two or three

years without the need to waive the two-year residency requirement. *Id.* Malone forwarded that email to Vice President Smith, who then asked Dr. Kader whether the expiration of the J-1 visa would affect her teaching in the summer session. Tr. Ex. J at 650. Dr. Kader responded to Vice President Smith that "my attorney is trying to get the O1 visa approved as soon as possible before even June 13 so I do not have to stop teaching after that date." *Id.*

F. Dr. Kader's application for an O-1 extraordinary-persons visa was denied because the required supporting evidence was not attached or submitted within seven days. Harris-Stowe then informed her it could not renew her contract.

Dr. Kader's J-1 visa expired Sunday June 13, 2010. The United States Customs and Immigration Services (USCIS) denied Dr. Kader's application for an O-1 visa on July 2. Tr. Ex. 18 at 604. The USCIS decision stated that a O-1 visa "petition *must be filed with* the following items:" (1) a written consultation from a peer group; (2) an employment contract or summary; (3) an explanation of employment activities; and (4) evidence of the alien's extraordinary ability. *Id.* (emphasis added). This supporting documentation was *not* attached to the petition filed by Attorney Fleming. *Id.* And it was not submitted by Harris-Stowe within seven days of when Attorney Fleming filed the application. *Id.*

The available record offers little insight into Attorney Fleming's thinking for providing the documentation. The first communication the record contains from him was an email he sent to Dr. Kader on Friday June 11—two days before her J-1 visa expired. Dr. Kader forwarded the email to Shaw (in human resources). Attorney Fleming assured her: "I am not ignoring you or your case. I forwarded the materials both by mail and, later, email. I will track this down this afternoon." Tr. Ex. K at 652.

The next Monday, June 14, 2010 Dr. Kader wrote an email to Vice President Smith. She said immigration services told her they had requested information from Harris-Stowe regarding her O-1 visa. Tr. Ex. 37 at 617-18. Dr. Kader said she had spoken to Shaw in human resources, who told Dr. Kader she had not received any requests from Immigration Services, did not understand that Attorney Fleming had filed the petition in Harris-Stowe's name, and thought Dr. Kader would have to leave the country in 30 days because the June 13 deadline had past. *Id.* Shaw also reportedly told Dr. Kader she could not grant her a work leave of absence. *Id.* Dr. Kader then told Vice President Smith:

> My attorney contacted the immigration services and he is going to take care of this matter of delay along with Congressman Clay ….. My O1 is still in process and I should hear shortly about the results.

> . . . I am requesting an employment leave please till the results of O1 appeared (sic) shortly ….. Please, inform me with the procedures as soon as possible ….. Thanks ….. Shereen.

Tr. Ex. 37 at 617-18. This again suggests Attorney Fleming had the matter under control.

About a week later, on June 22, 2010, Shaw sent an email message to Malone, Attorney Fleming, and to Dr. Kader to "ensure that we are all on the same page." Tr. Ex. L at 653. Shaw reported that she "*spoke with Attorney Stephen Fleming who is representing Dr. Kader and he said that all information has been submitted at this time for her O1 visa and that there was nothing else that Harris-Stowe needed to turn in right now.*" *Id.* (emphasis added). Shaw explained that she thought Dr. Kader could not be employed in the meantime, but that "this should not be a problem" because faculty contracts ended June 30 anyway. *Id.*

Once again, this email suggests Attorney Fleming had taken care of everything. Yet, he had not filed the supporting documentation with the petition as the instructions directed. And he told Shaw that all necessary information had been submitted. Two weeks later, Immigration Services denied the application because it never received the supporting documentation.

After Immigration Services denied the O-1 visa application, Vice President Smith sent the decision to Dr. Kader by letter dated July 14, 2010.

"As a result of this denial, Harris-Stowe will not be able to renew your contract for the 2010-2011 academic year. We are deeply saddened that you will not be a member of the Harris-Stowe State University faculty. I do wish you well in your future endeavors." Tr. Ex. 18 at 603. He also said the university did not plan to appeal. *Id.* On July 26, 2010 Dr. Smith authorized termination of Dr. Kader's employment effective July 1, 2010 with the reason marked "Conclusion of Contract Period." Tr. Ex. 30 at 616.

G. Dr. Kader's actions after leaving Harris-Stowe.

Dr. Kader took three actions after USCIS denied her O-1 visa application and Harris-Stowe indicated that it would not renew her contract.

Dr. Kader emailed Malone and Dr. Givens, President of Harris-Stowe, on July 29, 2010, asking how to pursue a faculty grievance Tr. 369:15-20; Tr. Ex. 19 at 608. Dr. Kader testified that Ms. Malone did not answer her question about filing a faculty grievance because Dr. Givens was out of town. Tr. 373:5-11. Dr. Kader also testified that Malone told her Harris-Stowe never received a request for evidence from Immigration Services. Tr. 372:23-373:4. Dr. Kader then filed her charge with the EEOC. Tr. 373:21-25.

Next, Dr. Kader filed for unemployment benefits in August 2010, which were initially denied. Malone filled out the Employer Statement for Harris-Stowe: "We had no part in the visa part. Her contract with us ended 5/31/10. As far as I know we sent everything we had to them. We did send paper

work into them. The lady that handled this is no longer with the university. She may have had a job if she was going to be eligible to work." Tr. Ex. 20 at 609. On the employer paperwork the box for "Protest Received" is marked "NO." Tr. Ex. 20 at 610. Unemployment benefits were approved on appeal. *See* Tr. Ex. 20 at 611.

Next, Dr. Kader hired a different immigration attorney. This attorney filed a national interest waiver and immigrant visa application for her. Tr. 497:24-498:16. Dr. Kader received a waiver of the two-year residency requirement in February 2011, and was then able to obtain a permanent worker visa. Tr. 379:25; 381:20-382:6. A national interest waiver requires proof of exceptional ability (not extraordinary ability) and is governed by different criteria than an O-1 visa.

Once she had the waiver and visa she was able to get work. During 2011-2012, she worked in a tenure track position at New Mexico Highland University, earning $48,000 and benefits. Tr. 383:13-384:5, 384:10-18. The next year, she got a tenure track position paying $60,000 and benefits at the University of Pennsylvania-Bloomsburg. Tr. 384:19-385:8. Before she could begin that position, Dr. Kader's adjustment of status application was denied and she could not work again until she filed a request for asylum in 2013. Tr. 394:4-395:4, 506:20-507:5. Dr. Kader has been legally able to work since 2013. Tr. 396:9-21, 398:4-7. Dr. Kader testified that between 2013 and the

time of trial in December 2015 she earned approximately $18,000 in part-time work, although she was uncertain of the exact amount. Tr. 398:22-25; Tr. 459:20-460:7.

H. The jury return a verdict for Dr. Kader on her claims of national-origin discrimination and retaliation, but the court of appeals reversed because of instructional error.

Dr. Kader filed this suit in 2013 and it went to trial in December 2015. The jury found in favor of Harris-Stowe on the race discrimination claim, but in favor of Dr. Kader on the national origin and retaliation claims. Jury Verdict, LF 089-091. The Second Amended Judgment reflected $750,000 in actual damages, $1,750,000 in punitive damages, front pay in the amount of $67,000, and attorney's fees and costs in the amount of $182,994.20, with post-judgment interest to accrue at 5.36% pursuant to § 408.040.3, RSMo. Second Amended Judgment, LF 246-250. The court denied Harris-Stowe's post-trial motions. LF 322-38; LF 359-62.

Harris-Stowe appealed and the court of appeals reversed the judgment. The Court of Appeals only needed to consider one issue. It reversed because the trial court committed instructional error when it listed a nonactionable employee action in the jury instructions for discrimination and retaliation. App. Op. at 11. This Court granted Dr. Kader's request for transfer.

POINTS RELIED ON

I. The trial court erred in denying Harris-Stowe's Motion for New Trial because the verdict directors misdirected, misled, or confused the jury, resulting in prejudicial error, in that they included actions that are not adverse employment actions and no evidence established those actions caused any damages.

Ross–Paige v. Saint Louis Metro. Police Dep't, 492 S.W.3d 164 (Mo. 2016)

Samuel v. Metro. Police Dep't, 258 F. Supp. 3d 27 (D.D.C. 2017)

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002)

Buettner v. Arch Coal Sales Co. Inc., 216 F.3d 707 (8th Cir. 2000)

II. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because Dr. Kader failed to make a submissible case of national origin discrimination under the Missouri Human Rights Act in that there was no evidence showing that Harris-Stowe discriminated against her because she is of Egyptian origin, there was no evidence that Harris-Stowe took any employment actions adverse to Dr. Kader because of her national origin, and no proof of damages.

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)

Guimaraes v. SuperValu, Inc., 674 F.3d 962 (8th Cir. 2012)

Lixin Liu v. BASF Corp., 409 F. App'x 988 (8th Cir. 2011)

Abravanel v. Starwood Hotels and Resorts Worldwide, Inc., 94 F. Supp. 3d 134 (D.P.R., 2015)

III. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because Dr. Kader failed to make a submissible retaliation claim under the Missouri Human Rights Act in that she did not make a claim of discrimination for a protected activity, there was no nexus between Dr. Kader's alleged complaints in October of 2009 and Harris-Stowe's later employment actions, and no proof of damages.

Minze v. Missouri Department of Public Safety, 437 S.W.3d 271 (Mo. App. W.D. 2014)

Cherry v. Ritenour Sch. Dist., 253 F. Supp. 2d 1085 (E.D. Mo. 2003)

Dhyne v. Meiners Thriftway, Inc., 184 F.3d 983 (8th Cir. 1999)

Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893 (8th Cir. 2002)

IV. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because there was not sufficient evidence of evil motive or reckless indifference on the part of Harris-Stowe to support the submission of punitive damages in that Dr. Kader could not continue to work for the university without a work visa, the university cooperated with her attorney who assured the university they had

submitted all required information, and her complaints did not support an actionable claim under the MHRA.

Howard v. City of Kansas City, 332 S.W.3d 772 (Mo. banc 2011)

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 110 (Mo. banc 1996)

Altenhofen v. Fabricor, Inc., 81 S.W.3d 578 (Mo. App. W.D. 2002)

Ellison v. O'Reilly Automotive Stores, Inc., 463 S.W.3d 426 (Mo. App. W.D. 2015)

ARGUMENT

I. The trial court erred in denying Harris-Stowe's Motion for New Trial because the verdict directors misdirected, misled, or confused the jury, resulting in prejudicial error, in that they included actions that are not adverse employment actions and no evidence established those actions caused any damages.

A verdict should be reversed if (1) the submitted jury instruction misdirected, misled, or confused the jury, and (2) prejudice resulted from the instruction. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90-91 (Mo. banc 2010); Rule 70.02(c). The trial court legally erred and misled the jury by submitting verdict directors that included three actions that are *not* adverse actions under Missouri law. These instructional errors, listed in the disjunctive, caused prejudice to Harris-Stowe and require reversal of the judgment.

Instructional error is legal error, and so reviewed de novo. *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003). Harris-Stowe fully preserved this argument in a motion for directed verdict, Tr. 513:13-515:12, 517:16-519:12, in objections during the instructional conference, Tr. 522:22-527:22, and in an after-trial motion, LF at 322-38.

The court of appeals agreed with Harris-Stowe that the verdict directors were legally erroneous and reversed the judgment. App. Op. 6-11.

A. The instructions for discrimination and retaliation misled and confused the jury by listing alleged actions that were not adverse employment actions and Harris-Stowe was prejudiced thereby.

1. The instructions misled the jury by listing employer actions that were not legally adverse.

The jury instruction for discrimination misdirected the jury because it includes at least one non-actionable employment action. A discrimination claim requires proof of an adverse employment action. For purposes of showing discrimination, the Missouri Human Rights Act (MHRA) lists the following as adverse employment actions: "[t]o 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." § 213.055.1(1)(a), RSMo. Because it is a required element, the failure to show a "materially adverse employment action" dooms the claim. *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 715 (8th Cir. 2000).

Jury Instruction 8 (discrimination) listed four alleged adverse employment actions: (1) "Defendant did not respond to the USCIS request for evidence to support the O-1 Visa Petition;" or (2) "Defendant did not appeal the denial of the O-1 Visa Petition;" or (3) "Defendant did not renew Plaintiff's employment contract;" or (4) "Defendant denied Plaintiff a work leave of absence." LF 084, Instr. 8.

At least three of these are not actionable adverse employment actions. First, Harris-Stowe was in no way obligated to assist Dr. Kader with her O-1 visa petition. The MHRA should be read to follow Title VII, which "does not impose an affirmative obligation on employers to sponsor their employees' visa applications." *Samuel v. Metro. Police Dep't*, 258 F. Supp. 3d 27, 44 (D.D.C. 2017). "[T]he mere failure to sponsor or continue sponsoring a visa application generally cannot be considered an adverse employment action." *See id.* Under facts similar to Dr. Kader's case, a federal court rejected a retaliation claim against the University of Kentucky on precisely this basis. *Kanungo v. Univ. of Ky.*, 1 F. Supp. 3d 674, 683 (E.D. Ky. 2014). "Dr. Kanungo has not shown that [the University of Kentucky] had any affirmative duty to continue to sponsor her visa," the court explained. *Id.* "The delay of visa application processing, or even the decision to not sponsor an H1B visa, does not constitute an adverse employment action." *Id.*; *see also Collins–Pearcy v. Mediterranean Shipping Co.,* 698 F. Supp. 2d 730, 760 (S.D. Tex. 2010) (holding that refusal to sponsor employee's visa application, even where it will result in termination of employment, does not constitute an adverse employment action).

As in those three cases, Harris-Stowe had no affirmative duty to sponsor Dr. Kader's visa or assist with the application process. As in *Kanungo*, "it was Dr. [Kader's] decision to change her visa status" and change

her visa sponsor, "and it was the subsequent change of status that resulted in her ineligibility for employment." 1 F. Supp. 3d at 685.

Employer mistakes in applying for an employee's visa are also not adverse employment actions. *Samuel*, 258 F. Supp. 3d at 44. In *Samuel*, the employer agreed to file an application for permanent residency on behalf of the employee *Id.* at 35. The employer's lawyers, however, failed to file the application in a timely manner and failed to communicate information to her about her limited visa extension. *Id.* When the employee's visa expired soon after, the employee terminated her employment. *Id.* at 36. The Court explained that the employer had taken no adverse employment action. *Id.* at 44. Because the employer had no affirmative obligation to sponsor the visa application in the first place, its subsequent negligence and withholding of information could not be an adverse employment action either. *Id.* at 44.

Nor was visa assistance a contractually negotiated "term[], condition[], or privilege[]," § 213.055.1(1)(a), RSMo, of Dr. Kader's employment. None of Harris-Stowe's contracts with Dr. Kader obligated it to provide visa assistance. Tr. Ex. A, B, and C at 639-647. Penn State, not Harris-Stowe, had sponsored Dr. Kader's visa applications in the past. And Penn State had sponsored a *different kind* of visa, a J-1. Dr. Kader was not eligible for a H1-B work visa because she did not have a waiver of the two-year residency requirement. Dr. Kader hoped to acquire an O-1 "extraordinary persons"

visa. Tr. Ex. I at 648; 8 U.S.C. § 1101(a)(15)(O). As discussed in Part II.B. below, an O-1 visa requires a particularly intensive factual showing in order to meet a particularly high bar—"extraordinary ability . . . which has been demonstrated by sustained national or international acclaim." *Id.* If an employer has no affirmative duty to apply for an ordinary visa, Harris-Stowe certainly had no duty to go through the more exhaustive process of supporting an O-1 visa application, which has a lower likelihood of success. Given the nature of an O-1 visa, the required supporting evidence was likely in Dr. Kader's possession anyway. *See* 8 C.F.R. § 214.2(o)(3)(iii)(B)(1)-(8) (listing the evidentiary criteria for O-1 visas).

Second, even if the Court found that Harris-Stowe did have an affirmative duty to respond to a request for evidence from Immigration Services (assuming such a request reached Harris Stowe), that argument should not be extended to require Harris-Stowe to *appeal* Immigration Services' denial of the application. An appeal was unlikely to succeed given that the initial O-1 visa application was denied based on a lack of evidence. USCIS Decision, Tr. Ex. 18 at 604. Again, the "extraordinary ability" standard for an O-1 visa means an unusually fact intensive standard. *See* 8 C.F.R. § 214.2(o)(3)(iii)(B)(1)-(8). Thus, the trial court committed legal error when it submitted instructions that misled the jury by labeling the failure to pursue an appeal as an adverse employment action.

The third adverse employment action listed in the jury instructions for discrimination was Harris-Stowe's decision not to renew Dr. Kader's contract. Section 213.055.1(1)(a), RSMo, does recognize failure to hire as an adverse action. The trial court should not have submitted a verdict director based on this adverse action, however, because Harris-Stowe was legally barred from renewing Dr. Kader's contract once her visa expired on June 13, as explained more below. *See* 8 U.S.C. § 1324a(a)(1)(A). A decision compelled by federal law does not support damages.

Fourth, the district court legally erred by listing the denial of a work leave of absence as an adverse employment action. The record suggests that Dr. Kader requested a work leave of absence on two occasions, first from Dr. Shaw on June 11, and second from Dr. Smith on June 14. Tr. Ex. 37 at 617-18. She only requested a leave of absence "till the results of 01 appeared shortly." *Id.* Both leave requests were denied, but Harris-Stowe also delayed acting on her contract renewal. Vice President Smith did not authorize Dr. Kader's termination until *July 26*, although that termination was backdated to July 1 (because Dr. Kader's previous contract expired June 30th). *See* Tr. Ex. 30 at 616. This *effectively* gave Dr. Kader the extra time she requested because the Immigration Services' decision is dated July 2.

The legal problem with granting either leave request is that Dr. Kader's J-1 visa expired on June 13, so Harris-Stowe could not legally employ

her past that date and could not renew her contract, which expired June 30. Federal law makes it unlawful for an employer "to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2). As the U.S. Supreme Court put it, "if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, *the employer is compelled to discharge the worker* upon discovery of the worker's undocumented status." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 148 (2002); *see also Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 236 n.17 (2d Cir. 2006) ("termination is effectively required once an employer learns of an employee's undocumented status"). Employers who violate this provision face civil fines, 8 U.S.C. § 1324a(e)(4), and possible criminal prosecution, *id.* § 1324a(f)(1). *See also United States v. Garcia-Ochoa*, 607 F.3d 371, 377 (4th Cir. 2010) (explaining that once a defendant's visa expires, he is ineligible for continued employment, and law enforcement may "bring[] charges against his employer if it did not terminate him"). Because Harris-Stowe could not employ Dr. Kader past June 13, it had no legal obligation to grant a leave of absence past June 13. Denying the leave of absence was not an adverse employment action. App. Op. at 8-9.

The cases Dr. Kader cites in her application for transfer are both legally mistaken and factually distinguishable. Legally, federal law made it

"unlawful" for Harris-Stowe to "continue to employ" Dr. Kader. 8 U.S.C. § 1324a(a)(2). This language compels discharge, not a leave of absence. The Ninth Circuit's opinion cited by Dr. Kader *agreed* that continued employment is illegal. *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1009 (9th Cir. 2007) (Reinhardt, J.) (quoting 8 U.S.C. § 1324a(a)(2)). But it held that an employer "does not 'continue to employ' an alien" when the alien is on "unpaid leave." *Id.* at 1011. The Ninth Circuit reached this strained reading because of the strictures of preemption law. *Id.* at 1010. This Court, however, avoids "result-oriented jurisprudence" in favor of the "plain language of the statute." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672-73 (Mo. banc 2009). The statute's plain text indicates that Harris-Stowe could not "continue to employ" Dr. Kader, and so had to discharge her. The U.S. Supreme Court assumed that plain reading when it explained that under § 1324a(a)(2) "the employer is compelled to discharge" an alien who "becomes unauthorized while employed." *Hoffman Plastic*, 535 U.S. at 148. *Hoffman*'s reading is binding on this Court; *Incalza*'s reading is not.

At any rate, unlike California law, Missouri law places no affirmative duty on an employer to grant a leave of absence to an alien that the employer can no longer "continue to employ." *See Incalza*, 479 F.3d 1010 (reading California law to require an employer to take any action "short of discharge" if such a remedy is "permissible under federal law"). Dr. Kader's contract

states that continuation of employment beyond the contract period is "at the discretion" of Harris-Stowe. Tr. Ex. C at Tr. Ex. C at 645-647. Without a legal or contractual obligation to grant a leave of absence under these narrow circumstances, Harris-Stowe's decision not to grant a leave of absence was not an adverse employment action. § 213.055.1(1)(a), RSMo.

Incalza is also factually distinguishable. Dr. Kader's one-year employment contract ended June 30th. A leave of absence *until* June 30th would have done Dr. Kader little good. And Harris-Stowe could not have granted Dr. Kader a leave of absence that extended past June 30th—doing so would have required a new employment contract. Even the Ninth Circuit's strained reading of 8 U.S.C. § 1324a(a) does not allow an employer to grant a new employment contract to an alien who cannot be lawfully employed. 8 U.S.C. § 1324a(a)(1)(A) ("It is unlawful . . .to hire . . . for employment in the United States an alien knowing the alien is an authorized alien"); *Incalza*, 479 F.3d at 1009. Harris-Stowe did the best it could—it waited until after the O-1 visa decision to decide Dr. Kader's contract renewal.

Dr. Kader also cites *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267 (Minn. 2017), but misreads it. The Minnesota Supreme Court reversed in that case because it believed the apparent suspension of Sanchez's employment may have been a constructive discharge. *Id.* at 274-75. Under those facts, there may have been no unpaid leave at all. The employer in

Sanchez had also "been aware of" the employee's undocumented-alien status "for years," indicating that its later constructive discharge of Sanchez was pretextual. *Id.* at 275. *Sanchez* says little about whether Harris-Stowe had an affirmative duty under Missouri law to grant Dr. Kader a leave of absence after both her employment contract and visa had expired.

In sum, of the four bases for the discrimination claim, three are not statutorily recognized as adverse employment actions, and the fourth—non-renewal of Dr. Kader's employment—was statutorily required.

The same is true of Dr. Kader's retaliation claim. Under Missouri law, a retaliation claim also requires proof of an adverse employee action. *See Minze v. Mo. Dep't of Public Safety*, 437 S.W.3d 271, 275 (Mo. App. W.D. 2014); § 213.070.1, RSMo. Jury Instruction 9 (retaliation) listed five adverse employment actions. LF 085, Instr. 9. The first four actions listed are the same as for the discrimination claim. *Id.* The fifth is that "Defendant opposed Plaintiff's application for unemployment benefits." *Id.*

The same analysis applies to the first four listed actions. Three of the four are not actionable. And the decision not to renew Dr. Kader's contract was statutorily required. The trial court held that the fifth action, relating to adverse employment actions, was not supported by substantial evidence, and it should have been removed from the jury instructions. *See infra* Part III.B.

2. Harris-Stowe was prejudiced by the legally-erroneous jury instructions, because the jury's verdict may have been based on one or more nonactionable employer actions.

Harris-Stowe was prejudiced if just one of the listed employer actions was nonactionable, because the disjunctive instructions would have allowed the jury to find liability for nonactionable behavior.

Instructional error prejudices the defendant when it allows the jury to reach a verdict without deciding an element of the claim. *Hervey v. Mo. Dep't of Corrections*, 379 S.W.3d 156, 159-60 (Mo. banc 2012). When an element of a jury instruction is framed in the disjunctive "or"—as the adverse employment action element was here—Missouri law requires that "*each alternative* must be supported by substantial evidence." *Herrington v. Medevac Med. Response, Inc.,* 438 S.W.3d 417, 422 (Mo. App. W.D. 2014). This is so because a jury given a disjunctive instruction may have based its ruling on one or all of the disjunctive options. Each of those disjunctive options must be legally sound for the same reason—the jury may have based its ruling on one of the legally inadequate disjunctive theories.

The jury found Harris-Stowe liable under the jury instructions submitted. "While it is clear the jury found in [Dr. Kader's] favor on at least one of the disjunctive theories submitted" in each instruction, "there is no way of discerning which theory the jury chose." *Ross-Paige v. Saint Louis Metro. Police Dep't*, 492 S.W.3d 164, 176 (Mo banc. 2016). Thus, "this Court

cannot rule out the possibility" that the jury never found a legally actionable adverse action—an essential element of both discrimination and retaliation claims. *Id*. (finding prejudice from submission of the verdict director, because one of the disjunctive theories was legally erroneous); *see Hervey*, 379 S.W.3d at 163 ("The submission of a verdict director that did not hypothesize all essential elements of [the] claim was prejudicial error"). Thus, the verdict instruction prejudiced Harris-Stowe by including one or more nonactionable adverse actions.

B. The verdict director also misled and confused the jury as to damages, and Harris-Stowe was prejudiced thereby.

In addition, the jury was misled and Harris-Stowe was prejudiced because the verdict directors suggested these nonactionable actions could have caused damages. If any one of the listed action could not have contributed to Dr. Kader's injury as the verdict director suggests, then the jury instructions confused the jury and prejudiced Harris-Stowe.

Start with the visa application and visa appeal. As explained more fully below, Dr. Kader's damages are wholly speculative. The expiration of her J-1 visa and her inability to get a timely waiver of the residency requirement led to Harris-Stowe not renewing her contract. An O-1 visa was always unlikely. Because of this, it was instructional error to suggest these actions—which were not adverse—could have caused Dr. Kader's injury.

The verdict directors also wrongly suggested that actions Harris-Stowe was legally required to take contributed to Dr. Kader's injury. Harris-Stowe had no legal discretion to grant Dr. Kader a leave of absence after her contract and visa had expired. 8 U.S.C. § 1324a(a)(2). It also had no legal discretion to renew her contract when she did not have a valid visa. 8 U.S.C. § 1324a(a)(1)(A). At best, this only shows federal immigration law contributed to Dr. Kader's alleged damages.

Harris-Stowe was prejudiced because the misleading verdict director allowed the jury to find that any one of the listed employer actions contributed to damages, and this was legally inaccurate and "not supported by substantial evidence." *Ross-Paige*, 492 S.W.3d at 176.

Accordingly, the trial court should have granted Harris-Stowe's motions for directed verdict and motion for new trial as a matter of law.

II. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because Dr. Kader failed to make a submissible case of national origin discrimination under the Missouri Human Rights Act in that there was no evidence showing that Harris-Stowe discriminated against her because she is of Egyptian origin, there was no evidence that Harris-Stowe took any employment actions adverse to Dr. Kader because of her national origin, and no proof of damages.

Dr. Kader did not present the substantial evidence needed to submit a prima facie discrimination claim to the jury. First, Dr. Kader did not present evidence suggesting Harris-Stowe's actions were based on her national origin.

Her claim improperly conflates national origin and immigration status, which is not a protected class. Second, Dr. Kader's alleged injury is speculative, because she presented no evidence that her O-1 visa would have been granted if Harris-Stowe had submitted more supporting information, appealed the denial of the visa, or given Dr. Kader leave. The primary obstacle to Dr. Kader's continued employment was the residency requirement. Her chances of getting an O-1 visa were speculative at best.

A plaintiff must support each element of a claim before a trial court can submit the claim to the jury. "A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Daniels v. Bd. of Curators of Lincoln Univ.*, 51 S.W.3d 1, 5 (Mo. App. W.D. 2001) (internal quotation marks and citations omitted). A reviewing court views the evidence in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences which conflict with that verdict. *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 173 (Mo. App. E.D. 2006). Harris-Stowe preserved this error in a motion for directed verdict at trial, Tr. 513:8-515:12, and in a motion for judgment notwithstanding the verdict after trial, LF 322-38.

A. Dr. Kader's discrimination claim improperly conflates national origin and alienage, and fails to show that any action by Harris-Stowe was motivated by national origin.

The MHRA forbids discrimination based on "race, color, religion, national origin, sex, ancestry, age, or disability." § 213.055.1(1), RSMo. Dr. Kader brought her claim for discrimination based on her national origin. National origin refers to the country where a person was born or the country from which his or her ancestors came. *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 88 (1973); *see also Daugherty v. City of Maryland Heights,* 231 S.W.3d 814, 818 (Mo. banc 2007) (explaining that Missouri courts may be guided by federal employment discrimination case law).

A plaintiff cannot "'conflate[] national origin and alienage.'" *Abravanel v. Starwood Hotels and Resorts Worldwide, Inc*., 94 F. Supp. 3d 134, 145 (D.P.R. 2015) (citation omitted). State law, like federal law, does not "make[] it illegal to discriminate on the basis of citizenship or alienage." *Espinoza*, 414 U.S. at 95. A person's legal immigrant status "'is not synonymous with national origin.'" *United States v. Loaiza-Sanchez*, 622 F.3d 439, 941 (8th Cir. 2010) (citation omitted). The terms "Egypt" or "Egyptian" were barely mentioned at trial. There was no evidence of any anti-Egyptian slurs or comments made to her or about her by any Harris-Stowe employee. Instead, the trial was only about how Harris-Stowe processed her visa request.

Dr. Kader's theory of the case, throughout the trial, repeatedly conflated national origin with immigration and visa status. For example, counsel asked human resources director Malone: "-- were you aware that Dr. Kader had relayed concerns that her faculty evaluation was -- was adversely affected because of either her race or her status as an immigrant?" Tr. 201:13-17. Dr. Kader's testimony also treated immigration and national origin as the same thing. *See* Tr. 324:8-22 ("A. [Dean Smith communicated with me that some students not accepting, like, my race or my -- who I am as immigrant or being diverse, you know. And also what other part, I'm sorry? Q. Did anything about your visa or your national origin come up in that meeting? A. Yes, immigration."). This testimony at best suggests discrimination based on alienage, but presents no real evidence of national origin discrimination. These are only two examples that illustrate a pervasive problem with Dr. Kader's theory of the case: visa status and national origin are *not* the same, and the evidence at best showed that Harris-Stowe's actions were motivated by Dr. Kader's visa status.

This matters because the only suggestion of discrimination of any sort comes from Dr. Kader's testimony about her fall 2009 performance review. And in that testimony, Dr. Kader referred to people talking about her visa and immigration status, but little about her national origin. Tr. 324:15-325:11. Tellingly, Dr. Kader's 15-page email about the performance review,

despite its length, does not discuss national origin: "I didn't verbalize it with the exact words, but I did address the same meaning." Tr. 458:4-9. By law, immigration status and national origin do *not* have "the same meaning." Statements regarding immigration status are "facially neutral as to national origin, and neutral statements, without more, do not demonstrate animus on the part of the speaker." *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 974 (8th Cir. 2012) (a supervisor's statement that she was trying to get plaintiff fired and stop her green card process did not show a link between an adverse employment action and alleged discriminatory animus toward plaintiff's national origin). At any rate, Dr. Kader's discrimination claim is not based on the performance review, which gave Dr. Kader very high marks.

As for the actions that are listed in the verdict director, Dr. Kader offered no evidence at all connecting those actions to national origin. Start with her visa application. Harris-Stowe did not complain when Dr. Kader could not get a residency waiver and so could not teach the summer term as planned. *See* Ex. J at 650 (Vice President Smith inquiring whether Dr. Kader would still be able to teach the summer term). Harris-Stowe cooperated with Dr. Kader's last minute attempt to get an O-1 visa. Tr. Ex. M at 654; Tr. Ex. 38 at 619. It sent her attorney the information he requested. *Id.* And it represented to Immigration Services that it intended to employ Dr. Kader for three more years if the O-1 visa was granted.

Decision, Tr. Ex. 18 at 606. These are not the actions of a malicious employer. Assume, even, that the lack of supporting documentation was Harris-Stowe's fault and not the fault of Attorney Fleming. That conclusion at most shows that Harris-Stowe employees were confused about their responsibilities or had misplaced mail. That negligence may have been costly to Dr. Kader, but it is insufficient to submit a claim of national origin discrimination to the jury.

Several federal courts reached the same conclusion when confronted with similar employer negligence. In *Lixin Liu v BASF Corp.*, 409 F. App'x 988 (8th Cir. 2011), plaintiff argued that he could have renewed his H1B visa with his employer's "cooperation," and that the employer's inaction on this front showed discrimination based on national origin. *Id.* at 991. The Eighth Circuit rejected the argument. "Even if [the employer] could have effectuated an extension of his H1B visa, the record is wholly devoid of any evidence that its failure to do so had anything to do with Liu's national origin." *Id.* Liu's argument improperly "conflate[d] national origin and alienage." *Id.* The same is true here: even if Harris-Stowe could have done more to assist Dr. Kader's O-1 visa application, the record does not suggest that Harris-Stowe's shortcomings "had anything to do with" Dr. Kader's national origin.

Similarly, plaintiff in *Abravanel* asserted that his visa was not renewed because his employer "negligent[ly]" filed his visa renewal late. *Abravanel*,

94 F. Supp. 3d at 145. This allegation did "not create a triable issue of fact on pretext." *Id.* There was "simply . . . no link to tie the delay to discrimination" based on national origin. *Id.* So here, there is simply no link to tie any negligence by Harris-Stowe to a discriminatory motive. Even if Harris-Stowe did not act "with the desired diligence to try to secure a timely visa approval," *Abravanel*, 94 F. Supp. 3d at 144, that does not show discriminatory animus toward Dr. Kader due to her Egyptian ancestry. And much of the delay and lack of diligence was due to inaction by Dr. Kader and Attorney Fleming, not Harris-Stowe. As in *Liu* and *Abravanel*, Dr. Kader's claim improperly conflates national origin and alienage.

The remaining actions alleged in the verdict director were even more plainly not motivated by discrimination based on national origin. While it is true Harris-Stowe did not appeal the Immigration Services' decision, Tr. Ex. 18 at 603, it had no basis to do so. Immigration Services denied the O-1 visa application because it was not filed with the required supporting documentation attached, and not supplemented in the seven days after filing. Decision, Tr. Ex. 18 at 604. Given the basis of the denial, there was no ground for appeal. *See also Lixin Liu*, 409 F. App'x at 991 (holding employer did not discriminate based on national origin by refusing to begin anew a green card application process, which was a legitimate business decision).

Harris-Stowe also denied Dr. Kader's last minute requests for a leave of absence while her O-1 visa application was processed. But these denials were legally required because Dr. Kader's J-1 visa expired that same weekend. Tr. Ex. 37 at 617-18; 8 U.S.C. § 1324a(a)(2). They were not motivated by discrimination. In fact, Harris-Stowe did what it could to help in this regard—it did not make a decision on renewing Dr. Kader's contract until July 14, *see* Tr. Ex. 18 at 603, and did not terminate Dr. Kader's employment until July 26 (effective July 1), Tr. Ex. 30 at 616. Both decisions occurred *after* Immigration Services denied the O-1 visa on July 3.

Finally, Harris-Stowe refused to renew Dr. Kader's contract on July 14, 2010. Tr. Ex. 18 at 603. Again, it had no choice. Once Dr. Kader's visa expired, Harris-Stowe could not offer her an employment contract knowing that she did not have a visa. "It is unlawful" for an employer "to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment." 8 U.S.C. § 1324a(a)(1)(A). As a university, Harris-Stowe had a limited time window for contract renewal decisions during the summer of 2010 in order to staff its classrooms that fall. It did not act until Immigration Services denied Dr. Kader's O-1 visa. At that point, the undisputed evidence showed Dr. Kader would not be legally able to teach in the fall of 2010 after her J-1 visa expired in June, so Harris-Stowe had no choice but to not renew her contract.

In summary, a defendant's acts or omissions regarding an employee's pursuit of proper immigration documents do not create a link to discrimination without additional evidence that the acts or omissions were in fact motivated by the plaintiff's national origin.

B. Damages are speculative because O-1 visas are reserved for those at the very top of their field and Dr. Kader had only just begun her professional career.

Moreover, Dr. Kader did not prove any damages stemming from Harris-Stowe's actions. The predominant reason Harris-Stowe could not renew Dr. Kader's contract was because Dr. Kader did not get a timely waiver of the two-year residency requirement. Once it became clear that Dr. Kader would not get a timely waiver, it became very likely that Harris-Stowe would not be able to renew her contract.

Filing for an O-1 extraordinary person visa was plan B, and Dr. Kader's attorney waited to file until only about three weeks before Dr. Kader's J-1 visa expired. Tr. Ex. 18 at 606. Nothing in the record demonstrates that Dr. Kader even qualified for an O-1 "extraordinary person" visa. Consequently, her claims in this regard are completely speculative. "Speculative results are not a proper element of damages." *Girdley v. Coats*, 825 S.W.2d 295, 298 (Mo. banc 1992). Harris-Stowe preserves this argument as an objection to both the verdict directors and the submission of the claims. The verdict directors not only listed adverse actions that are not legally actionable, but

compounded the error by suggesting those actions led to Dr. Kader's lost wages. The claims also should not have been submitted to the jury, because Dr. Kader did not present substantial evidence to show non-speculative damages.

O-1 visas are, by definition, very hard to get. They are reserved for those with "extraordinary ability in the sciences, arts, education, business, or athletics." 8 C.F.R. § 214.2(o)(1)(i). O-1 visas are reserved for those coming to the United States temporarily. An application for an O-1 visa must present evidence of extraordinary ability, like the receipt of a major award "such as the Nobel Prize," *see* 8 C.F.R. 214.2(o)(3)(iii)(A), or evidence satisfying at least three of eight criteria: (1) "nationally or internationally recognized prizes or award for excellence in the field"; (2) membership in associations in the field for which classification is sought, "which require outstanding achievements of their members" as "judged by recognized . . . experts"; (3) "published material in professional or major trade publications or major media" about the individual; (4) "participation . . . as a judge of the work of others in the same" or similar "field of specialization"; (5) evidence of "original . . . contributions of major significance in the field"; (6) "authorship of scholarly articles in the field, in professional journals, or other major media"; (7) employment "in a critical or essential capacity for [an] organization" with a "distinguished reputation"; or (8) evidence the alien

"commanded" or "will command a high salary or other remuneration." 8 C.F.R. § 214.2(o)(iii)(B)(1)-(8). An O-1 visa also requires a "consultation" leading to a "written advisory opinion from a peer group . . . or a person with expertise in the beneficiary's area of ability." USCIS, "O-1 Visa: Individuals with Extraordinary Ability or Achievement," https://www.uscis.gov/working-united-states/temporary-workers/o-1-visa-individuals-extraordinary-ability-or-achievement (last accessed Aug. 17, 2018). In sum, O-1 visas are reserved for the "small percentage who ha[ve] risen to the very top of the field of endeavor." *Id.*

With all due respect to Dr. Kader's abilities, she failed to prove that she qualified for an O-1 visa. At the time, she was less than three years out of graduate school, making it very difficult to establish sustained and demonstrated extraordinary ability. She has not shown that she received an award like a Nobel Prize. She did not show that she received nationally recognized awards in her field, or original contributions of major importance, or any other criteria for an O-1 visa. Nor did Dr. Kader offer evidence from an expert or Immigration Services' representative to prove that she could have qualified for an O-1 visa. A "good record" of academic excellence and teaching is not enough. *See Texas A & M University-Corpus Christi v. Upchurch*, 99 F. App'x 556, 557 (5th Cir. 2004) (affirming denial of O-1 visa renewal because professor was no longer at the very top of his field).

All this is only speculative, and that is the point. The expiration of Dr. Kader's J-1 visa and her failure to get a waiver of the residency requirement directly caused Harris-Stowe's subsequent decision not to renew her contract. No evidence in the record shows that Dr. Kader was likely to get an O-1 visa, so any suggestion that the O-1 visa process contributed to her damages is only speculative. A claim should not be submitted unless "each and every fact essential to liability" is supported by "substantial evidence." *Daniels*, 51 S.W.3d at 5. Substantial evidence does not show a causal link between Harris-Stowe's actions and Dr. Kader's alleged injuries.

III. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because Dr. Kader failed to make a submissible retaliation claim under the Missouri Human Rights Act in that she did not make a claim of discrimination for a protected activity, there was no nexus between Dr. Kader's alleged complaints in October of 2009 and Harris-Stowe's later employment actions, and no proof of damages.

Dr. Kader also did not present the evidence needed to submit a prima facie retaliation claim to the jury. In order to establish a prima facie case of retaliation under the MHRA, Dr. Kader must show that she complained of discrimination, the employer took adverse action against her, and a causal relationship existed between the complaint and the adverse action. *See Minze*, 437 S.W.3d at 275; § 213.070.1, RSMo. Here, Dr. Kader cannot show she formally filed a complaint alleging that her performance evaluation was

based on national-origin discrimination. Even if she had, any causal link between that complaint and Harris-Stowe's decision not to renew her teaching contract eight months later is broken by an intervening and immediate cause—Dr. Kader did not have a work visa so her teaching contract could not be renewed.

The standard of review is the same as in Point II. Harris-Stowe preserved this error in a motion for directed verdict at trial, Tr. 517:16-519:12, and in a motion for judgment notwithstanding the verdict after trial, LF 322-38.

A. Dr. Kader never made a complaint of national-origin discrimination in the fall of 2009.

First, Dr. Kader's statements about her October 2009 performance review cannot support her claim that she complained of discriminatory conduct recognized by the MHRA. "Merely complaining of working conditions without attributing the complaints to an illegitimate criterion does not constitute opposition to an unlawful employment action and is not protected activity." *Cherry v. Ritenour Sch. Dist.*, 253 F. Supp. 2d 1085, 1099 (E.D. Mo. 2003), *aff'd*, 361 F.3d 474 (8th Cir. 2004).

As explained in Point II, an employee cannot establish a prima facie case by conflating national origin and immigration status, because the latter is not a protected class. Dr. Kader testified that during the performance

evaluation meeting in October 2009, Dean Smith said some students commented about Dr. Kader's race or her immigrant status. Tr. 324:15-19. Dr. Kader also testified that Dean Smith said some faculty did not accept her and did not support renewing her visa. Tr. 324:23-325:1111. Dr. Kader testified that the next day she told Dean Smith that she would talk to Vice President Smith about the conflict and that she believed she was being treated differently because of her race and national origin and immigration status. Tr. 329:13-22. Even her testimony at trial improperly conflates national origin and alienage and fails to support her claim. Tr. 324:8-22 (Plaintiff's counsel: "Did anything about your visa or your national origin come up in that meeting?" Dr. Kader: "Yes, immigration.").

Despite what she told Dean Smith, Dr. Kader decided not to file a complaint about national-origin discrimination. She testified that she told Vice President Smith that she felt Dean Smith targeted her because of her "religion and national origin and all of those things." Tr. 333:21-23. She then told Vice President Smith that if there was a meeting with human resources she would have to bring an attorney; he then said if she did she would face visa complications. Tr. 334:2-7; 338:6-21. After the meeting, neither party scheduled a meeting with human resources. Dr. Kader also sent a 15-page email to Dean Smith, Vice President Smith, and human resources in response to Dean Smith's complaint that Dr. Kader had been spreading

rumors about her. Dr. Kader emphasized that the email simply "responds to [Dean Smith's] complaint." Tr. 458:14-16. In fact, Dr. Kader expressly told Vice President Smith that she did *not* file a complaint with human resources: "I am not the one who initiate (sic) the activity or the one who wrote the complaint to human resources." Tr. Ex. 48 at 625; *see* Tr. 455:24-456:4, 458:10-16. Dr. Kader made no complaint of discrimination in fall 2009, and did not tie any such complaint to a statutorily forbidden criterion.

Dr. Kader's alleged complaints in October of 2009 regarding race and religion are similarly insufficient. Dr. Kader suggested at trial that she complained of racial and religious discrimination, but no specific facts support such claims. Dr. Kader suggested her students were racist for making complaints against her, and Dean Smith mentioned Dr. Kader playing the "race card" in regard to the students' complaints. Tr. 281:13-282:11. This alleged non-employer student behavior is not a sufficient complaint of discrimination to support a claim of retaliation. Also, Dr. Kader's suggestion that she had complained of religious discrimination is not supported by any evidence and Dr. Kader abandoned and did not submit this claim to the jury. *See* Second Amended Judgment, LF 318.

B. Dr. Kader did not show that her alleged complaints in October 2009 caused Harris-Stowe's alleged adverse employment actions in June and July 2010.

Equally important, the adverse employment actions Dr. Kader alleges Harris-Stowe took in retaliation for her alleged complaints in October 2009 did not occur until eight months later, in June and July of 2010.

The time gap alone makes it difficult to show causation. *See Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 988-989 (8th Cir. 1999). Courts have found causation lacking in instances where far less time passed between the protected activity and the adverse employment action. *See, e.g., Kipp v. Mo. Highway & Transp. Comm'n,* 280 F.3d 893, 897 (8th Cir. 2002) ("[T]he interval of two months between the complaint and Ms. Kipp's termination so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding [of causation]."); *Liles v. C.S. McCrossan, Inc.*, 851 F.3d 810, 819 (8th Cir. 2017) (employee's complaints about male coworker's inappropriate behavior occurred about eight months before corrective action plan placement and ten months before termination). Generally, "'more than a temporal connection between protected activity and an adverse employment action is required to show a genuine factual issue on retaliation exists.'" *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 868–69 (Mo. App. E.D. 2009) (quoting *Buettner*, 216 F.3d at 715–16).

Dr. Kader's April 2010 performance review is another break in the causal chain. Dr. Kader again gave herself perfect marks in all categories and Dean Smith gave her a perfect "5" in many categories and a "4" in other categories. Tr. 285:5-286:14, 427:18-21; Tr. Ex. 4 at 586-591. This performance review controlled at the time Harris-Stowe chose not to renew Dr. Kader's contract.

Harris-Stowe's actions in support of Dr. Kader's O-1 visa application also break any causal connection between October 2009 and July 2010. When Dr. Kader's attorney requested information from Harris-Stowe on March 31, 2010 so that he could file a petition for an O-1 visa, Shaw responded with the requested information the next day. Tr. Ex. 38 at 619. In doing so, Harris-Stowe stated its intention to employ Dr. Kader for three more years. Decision, Tr. Ex. 18 at 606. Later, when Dr. Kader informed Shaw that Immigration Services had not received the information they needed, Shaw contacted Dr. Kader's attorney and then followed up with an e-mail on June 22, 2010 "to ensure that we are all on the same page" and to explain that Attorney Fleming had told her "all information had been submitted: to Immigration Services and there was "nothing else that Harris-Stowe needed to turn in right now." Tr. Ex. L at 651.

Fourth, the expiration of Dr. Kader's J-1 visa, and the USCIS denial of Dr. Kader's O-1 visa application, also break any causal connection between

the October 2009 complaint about her evaluation and Harris-Stowe's later decision not to renew her contract. Once Dr. Kader's J-1 visa expired, and Immigration Services denied her O-1 visa application, Harris-Stowe could not have legally renewed Dr. Kader's contract.

Finally, Dr. Kader also alleges Harris-Stowe opposed her application for unemployment benefits in August 2010, in retaliation for having complained of discrimination nine months earlier. LF 085. Actually, the employer paperwork shows the box for "Protest Received" is marked "NO." Tr. Ex. 20 at 610. The record shows that during the instructional conference the trial court ordered Dr. Kader's attorney to remove this claim from the verdict director because there was insufficient evidence showing why the benefits were originally denied or whether Dr. Kader was entitled to them. Tr. 527:8-22. Although Harris-Stowe did not object when Dr. Kader's counsel included the allegation in the jury instructions anyway, this Court should find that insufficient evidence supports the allegation that Harris-Stowe opposed Dr. Kader's unemployment benefits.

C. Damages are speculative.

In addition, the trial court erred in submitted the retaliation claim because Dr. Kader's allegations of damages as a result of Harris-Stowe's actions are only speculative. This is so for all the same reasons that Dr.

Kader's allegations of damages should not have been submitted in support of her discrimination claim.

* * *

Viewing the record as a whole, Dr. Kader does not, as a matter of law, meet her burden of proof that Harris-Stowe retaliated against her. The evidence is insufficient to permit a reasonable jury, without resort to speculation, to draw an inference that Harris-Stowe took adverse actions against her in retaliation for a complaint about actionable discrimination.

The trial court should have granted Harris-Stowe's motions for directed verdict and for judgment notwithstanding the verdict as a matter of law. Consequently, Harris-Stowe respectfully requests this Court reverse the trial court's decision and grant judgment notwithstanding the verdict in favor of Harris-Stowe on the claim of retaliation.

IV. The trial court erred in denying Harris-Stowe's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because there was not sufficient evidence of evil motive or reckless indifference on the part of Harris-Stowe to support the submission of punitive damages in that Dr. Kader could not continue to work for the university without a work visa, the university cooperated with her attorney who assured the university they had submitted all required information, and her complaints did not support an actionable claim under the MHRA.

At the very least, punitive damages should not have been submitted to the jury on either claim. Dr. Kader failed to show evil motive or reckless indifference, so submitting punitive damages to the jury was legal error.

Whether punitive damages should be submitted to the jury is a legal question reviewed de novo. *Ellison v. O'Reilly Auto Stores, Inc.*, 463 S.W.3d 426, 434 (Mo. App. W.D. 2015). The issue is fully preserved. Harris-Stowe asked for a directed verdict on both the discrimination and retaliation claims. Tr. 513:13-515:12, 517:16-519:12. It necessarily asked the Court not to submit punitive damages on those claims either. Harris-Stowe also objected to the punitive damages instructions during the instructions conference before the case was submitted to the jury for deliberation, Tr. 530:24-531:6, 533:13-24, and again preserved the issue in a post-trial motion, LF 322-38.

A. Punitive damages require clear and convincing evidence that an employer acted with an evil motive or reckless indifference and without just cause or excuse.

Punitive damages are an "extraordinary" remedy that should be applied "sparingly." *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996); *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000); *see also Kan. City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993) (Holstein, J., concurring) ("Punitive damages are not favored."). They are meant as punishment for and deterrence of truly egregious conduct. This high bar means three things.

First, punitive damages require a "higher standard" of proof—clear and convincing evidence. *Rodriguez*, 936 S.W.2d at 111. This higher standard ensures that punitive damages remain rare. Courts should be especially

careful in jury trials: the "[s]ubmission of a punitive damages claim to the jury warrants special judicial scrutiny." *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 247 (Mo. banc 2001) *overruled on other grounds*, *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 40 (Mo. banc 2013).

Second, punitive damages are reserved for truly outrageous conduct motivated by "evil motive or reckless indifference." *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 590 (Mo. App. W.D. 2002) (*citing Burnett v. Griffith,* 769 S.W.2d 780, 789 (Mo. 1989)). 'A submissible case for punitive damages requires clear and convincing proof that the defendant intentionally acted 'either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred)." *Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. 2011) (citation omitted).

Third, punitive damages should only be submitted if a defendant's actions are "'without just cause or excuse.'" *Id.* (citation omitted). This language mirrors the "contributing factor" standard. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665, 668 (Mo. banc 2009). A plaintiff must show that a "just cause or excuse" was *not* even a contributing factor. An employer's conduct is not "'outrageous because of evil motive,'" *Howard*, 332 S.W.3d at 788 (citation omitted), if it was even partly motivated by good faith.

B. Harris-Stowe, at most, acted negligently.

Dr. Kader fell far short of showing clear and convincing evidence of evil motive.

Start with Dr. Kader's application for an O-1 "extraordinary persons" visa. As explained above, Harris-Stowe had no affirmative duty to submit an application for an O-1 visa, or to appeal the denial of the visa. But even if it did have such an affirmative duty, its actions were at most only negligent. Dr. Kader's attorney handled the application, not Harris-Stowe, and Harris-Stowe worked with Attorney Fleming to provide the information he requested. Tr. Ex. 38 at 619. In support of that application, Harris-Stowe expressly committed to employing Dr. Kader for three years. Decision, Tr. Ex. 18 at 606. A human resources employee, Shaw, even told Attorney Fleming to let her know if Harris-Stowe could help with anything else. Tr. Ex. 38 at 619. These actions *in support* of Dr. Kader's visa fall far short of the "evil motive" standard required for submission of punitive damages. *Ellison*, 463 S.W.3d at 435. Shaw said she did not receive any further request for information, either from Attorney Fleming or directly from Immigration Services. Tr. Ex. 37 at 617-18; Tr. Ex. L at 653. This suggests, at most, that Harris-Stowe acted negligently. Dr. Kader's own attorney even reassured Harris-Stowe, through Shaw, that "there was nothing else that Harris-Stowe needed to turn in right now." Tr. Ex. L at 653. Harris-Stowe's

employees merely relied on Attorney Fleming's statements; this reliance gave it "just cause or excuse" to assume that it did not need to provide Immigration Services with anything more until they heard otherwise from Attorney Fleming. *Howard*, 332 S.W.3d at 788.

As for not renewing Dr. Kader's contract, undisputed evidence showed Harris-Stowe could not renew Dr. Kader's employment contract once she was no longer eligible to work in the United States. 8 U.S.C. § 1324a(a)(1)(A). Dr. Kader's path to staying at Harris-Stowe was a waiver and an H1-B visa. That path was closed through no fault of Harris-Stowe. Despite that, Dr. Kader assured Harris-Stowe several times in writing that her attorney would make sure she had a visa to allow her to work. Tr. Ex. J at 650; Tr. Ex. 37 at 617-18. Dr. Kader's lawyer advised Harris-Stowe, through Shaw, that he had everything from Harris-Stowe that he needed for the O-1 visa. Tr. Ex. L at 651. Once the visa was denied, Harris-Stowe could not enter into a contract to employ her. 8 U.S.C. § 1324a(a). As Harris-Stowe could not continue to employ her, it could not grant her request for a "work leave" either, although it waited until July in case the O-1 visa was granted. Here, too, Dr. Kader fell well short of clear and convincing evidence demonstrating evil motive on the part of Harris-Stowe. Federal law provides just cause or excuse for Harris-Stowe's actions.

The submission of punitive damages to the jury was error. Consequently, the Court should reverse the judgment for punitive damages and remove the award of attorney's fees.

C. The punitive damages award violates Due Process.

Punitive damages are also subject to due process limitations under the U.S. and Missouri constitutions, which prohibit the imposition of grossly excessive or arbitrary punishments. *Lewellen v. Franklin*, 441 S.W.3d 136, 144-45 (Mo. 2014) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 409 (2003)). The jury award of $1.75 million in punitive damages was grossly excessive compared to the alleged conduct and alleged damages. The purpose of punitive damages is not to compensate the claimant for its injury. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 & n.9 (1996); *Rodriguez*, 936 S.W.2d at 110 (noting punitive damages are for punishment and deterrence). To the contrary, courts must presume "a plaintiff has been made whole for his injuries by compensatory damages." *State Farm*, 538 U.S. at 419. Punitive damages are based on a defendant's "culpability." *Id.* "Because the remedy of punitive damages is so extraordinary and harsh, it should be applied sparingly." *Altenhofen*, 81 S.W.3d at 590.

When courts have deviated upward from a 1:1 ratio, the defendant has either intended to cause the substantial compensatory damages or engaged in shocking behavior measured against other employment discrimination cases.

Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1073 (10th Cir. 2016) ("many federal appellate courts have imposed a 1.1 ratio where . . .the compensatory damages exceed $1 million"). The general rule, even in discrimination cases involving reprehensible conduct, is that a lower ratio can suffice. *Watson v. E.S. Sutton, Inc.*, 225 F. App'x 3, at *2 (2d Cir. 2006). The punitive damages award was unreasonable here, because Harris-Stowe did not act reprehensibly, the damages ratio was disproportionate, and the compensatory awards made Dr. Kader whole. *State Farm*, 538 U.S. at 419.

CONCLUSION

Harris-Stowe respectfully asks this Court to reverse the trial court's judgment.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ *Peter T. Reed*
PETER T. REED, Mo. Bar. #70756
Deputy Solicitor
ROBERT ISAACSON, Mo. Bar #38361
Assistant Attorney General
P.O. Box 861
St. Louis, MO 63188
(314) 340-7366; (314) 340-7981 (fax)
Peter.Reed@ago.mo.gov

Attorneys for Appellant-Defendant

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document and the accompanying Appendix was served on counsel of record through the Court's electronic notice system on August 17, 2018.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. This brief contains 15,024 words, excluding the cover, the signature block, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the anti-virus program.

/s/ *Peter T. Reed*
Peter T. Reed
Deputy Solicitor