Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

SC97069

IN THE SUPREME COURT OF MISSOURI

SHEREEN A. KADER,
Respondent,

vs.

BOARD OF REGENTS OF HARRIS-STOWE STATE UNIVERSITY,
Appellant.

On Appeal from the Circuit Court of the City of St. Louis
Honorable Mark H. Neill, Circuit Judge
Case No. 1222-CC02913

SUBSTITUTE BRIEF OF THE RESPONDENT

JONATHAN STERNBERG,
Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

CHRIS R. PLAYTER, Mo. #65109
ERIC S. PLAYTER, Mo. #58975
Playter & Playter, LLC
400 SW Longview Blvd, Ste. 220
Lee's Summit, Missouri 64081
Phone: (816) 666-8902
Fax: (816) 666-8903
chris@playter.com
eric@playter.com

COUNSEL FOR RESPONDENT
SHEREEN A. KADER

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Table of Contents

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Table of Authorities

Cases

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Missouri Supreme Court Rules

Other

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of the City of St. Louis in an action under the Missouri Human Rights Act.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. The appellant timely appealed to the Missouri Court of Appeals, Eastern District. This case arose in the City of St. Louis. Under § 477.050, R.S.Mo., venue lay within that district of the Court of Appeals.

On January 9, 2018, the Court of Appeals issued an opinion reversing the trial court's judgment and remanding the case for a new trial. The respondent filed a timely motion for rehearing and application for transfer in the Court of Appeals, both of which were denied. The respondent then filed a timely application for transfer in this Court under Rule 83.04. On July 3, 2018, the Court sustained that application and transferred this case.

Therefore, under Mo. Const. art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule", this Court has jurisdiction.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Statement of Facts

A. Dr. Kader's background

Respondent Shereen Kader, Ph.D. is of Egyptian national origin and is Muslim (Tr. 303).

In Egypt, Dr. Kader won a scholarship to come to the United States to study and obtain a master's degree and Ph.D. here (Tr. 305). She came to America in August 1999 and eventually obtained a master's degree from Indiana University in literacy and a Ph.D. from Pennsylvania State University in early childhood education, creativity, and innovation (Tr. 305-06). She was married in Egypt, and she and her husband have three children who all were born in the United States (Tr. 303-04).

Dr. Kader was in the United States lawfully on a J-1 visa, which allowed her to study and work in this country (Tr. 309). While she was studying at Penn State, Penn State was her visa sponsor (Tr. 310).

While on this visa status, Dr. Kader applied for an employment position at Harris-Stowe State University ("HSSU") in St. Louis as an instructor in early childhood education (Tr. 309). In 2007, while Dr. Kader was still awaiting her Ph.D. from Penn State, Appellant Board of Regents of HSSU hired Dr. Kader for three years (Tr. 310). HSSU submitted paperwork to Penn State to show the employer part of her J-1 visa (Tr. 310).

B. Dr. Kader's chain of command at HSSU

HSSU initially hired Dr. Kader as an instructor in early childhood development (Ex. A p. 637). Later, once she received her Ph.D., she was

promoted to the position of assistant professor, in which she remained for the rest of her employment at HSSU (Tr. 314-15; Ex. B p. 640; Ex. C p. 643).

During her employment at HSSU, Dr. Kader worked in the College of Education (Tr. 41). At the time her employment at HSSU ended, LaTisha Smith ("Dean Smith") was both the college's dean and the head of HSSU's Department of Education (Tr. 39-40). In Dean Smith's capacity as dean, all full- and part-time faculty in the College of Education reported to her (Tr. 242).

Dean Smith reported directly to Dewyane Smith ("V.P. Smith"), who was HSSU's Vice President of Academic Affairs and supervised all academic units within HSSU (Tr. 37, 39, 41). V.P. Smith reported directly to Henry Givens, HSSU's President and the highest ranking official in the university (Tr. 37, 136).

C. Dr. Kader's employment and visa status from 2007 to 2010

HSSU's human resources department was responsible for ensuring that employees stayed in employable status, including for employees on visas (Tr. 166). So, the university sometimes filed visa petitions on behalf of its employees as a sponsor (Tr. 166).

Each year that HSSU employed Dr. Kader, the university had to submit information relating to her employment so her visa status would remain intact (Tr. 310). Initially, to ensure Dr. Kader could continue to work, Virginia Malone, the Director of Human Resources, coordinated or supervised Dr. Kader's J-1 visa and submitted information to any parties who needed it

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

(Tr. 44, 164-65, 171, 177, 313). Ms. Malone would submit this information annually (Tr. 174).

V.P. Smith and another employee told Dr. Kader the university would assist her with her visa beyond her J-1 status (Tr. 313). V.P. Smith, another employee Robin Shaw, and Ms. Malone also all told Dr. Kader that the university would sponsor her visa (Tr. 356-57). At trial, Ms. Malone confirmed that before 2010, HSSU committed to assisting Dr. Kader with her visa (Tr. 185).

D. Dr. Kader's 2010 visa petition

By 2010, HSSU was Dr. Kader's only visa sponsor (Tr. 310). As Dr. Kader's J-1 visa would be expiring that year and she no longer was a student, another type of visa had to be obtained, specifically an O-1 or H-1B visa (Tr. 353-54). She either could file for an O-1 or could seek a waiver of a two-year residency requirement and seek an H-1B visa, either of which would require an employer sponsor (Tr. 353-55).

So, for this 2010 visa petition, she and HSSU agreed that the university would sponsor her visa and work with her immigration attorney (Tr. 428). They decided she would seek an O-1 visa and HSSU would sponsor it (Tr. 356-57). She had a meeting in which Robin Shaw, Ms. Malone, and V.P. Smith all agreed HSSU would sponsor the O-1 visa (Tr. 356-57).

Dr. Kader's immigration attorney was involved to support the process of applying for the O-1 visa but was not responsible for ensuring that the university provided everything needed to support Dr. Kader's petition (Tr. 428). Instead, President Givens admitted he assigned the responsibility to

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

act on the university's behalf for Dr. Kader's 2010 visa petition to Robin Shaw (Tr. 152, 170, 172). He assigned Ms. Shaw to get Dr. Kader's visa petition processed, filed, and completed (Tr. 152).

President Givens testified Ms. Shaw had handled visa applications and visa issues for other HSSU employees (Tr. 153). So, she was assigned the responsibility to act on the university's behalf for Dr. Kader's petition and was not assigned to rely on others' efforts (Tr. 154).

V.P. Smith admitted that Dr. Kader could not file a petition for an O-1 visa in 2010 on her own, and instead it had to be filed by HSSU (Tr. 86). He admitted that HSSU filed the petition as Dr. Kader's sponsor (Tr. 86, 360).

E. Dr. Kader's good performance and behavior at HSSU

V.P. Smith admitted that Dr. Kader was a good employee and professor at HSSU (Tr. 46). President Givens agreed that there never were any negative issues with her performance (Tr. 145). V.P. Smith never got involved in any issues concerning her performance or behavior and never disciplined her for failure to perform her job duties (Tr. 46).

President Givens said that if there are no issues with a teacher's performance at HSSU, she has a reasonable expectation that her employment will be renewed the following and later years (Tr. 146). Before 2010, V.P. Smith never recommended that HSSU not renew Dr. Kader's contract (Tr. 151). At the same time, Dean Smith admitted there were no reasons not to renew Dr. Kader's contract in 2010 based on her performance or behavior (Tr. 286).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

F. Dr. Kader's 2009 faculty evaluation

In October 2009, Dean Smith conducted a faculty evaluation of Dr. Kader (Tr. 245). During it, there was discussion about her visa, race, and national origin (Tr. 320, 324-25). Dr. Kader told Dean Smith during this evaluation that she believed some downgraded marks of "marginal" and "unsatisfactory" that she received in the evaluation were based on her race, religion, and national origin (Tr. 250, 329, 450). In response, Dean Smith accused Dr. Kader of using the "race card" (Tr. 77, 281).

During an April 2010 faculty evaluation, Dr. Kader told Dean Smith that if what happened in the fall of 2009 happened again, Dr. Kader would need to involve an attorney (Tr. 427).

G. HSSU's procedures when receiving a discrimination complaint

Ms. Malone testified that HSSU policies require an investigation into all complaints of discrimination (Tr. 201). An employee complaining of discrimination may submit her complaint to (1) Human Resources, (2) her direct supervisor, or (3) that supervisor's supervisor (Tr. 203-04). V.P. Smith agreed that if an employee reports issues about her race and her visa status coming up in a faculty evaluation, those are serious allegations and should be investigated (Tr. 79-80).

Ms. Malone said that when there is an allegation of race contained in an e-mail, even if it is not explicit from an employee that she wants it to be investigated, Human Resources considers it serious (Tr. 203). And V.P. Smith said HSSU policy requires a meeting with Human Resources whenever a discrimination complaint is lodged (Tr. 81). The process for investigating

complaints or allegations of discrimination is that the complaint is referred both to the relevant division head and to Human Resources (Tr. 147-48).

Within the Department of Education, one of V.P. Smith's job duties was to investigate complaints of discrimination (Tr. 50). He was to work with Human Resources when he received allegations of discriminatory behavior or comments that could be construed as discriminatory (Tr. 50).

H. HSSU's failure to investigate Dr. Kader's discrimination complaints

Ms. Malone said that to make a complaint of discrimination, Dr. Kader could submit it either directly to V.P. Smith or to President Givens's office (Tr. 204). After the October 2009 faculty evaluation, Dr. Kader informed V.P. Smith that she believed Dean Smith was targeting her because of her religion and her national origin (Tr. 333). Dr. Kader told V.P. Smith that she believed the downgraded marks she received in the evaluation were because of her race, religion, and national origin (Tr. 450). She told V.P. Smith she wanted her concerns addressed and treated fairly, and "called for [her] human rights" (Tr. 342, 456-59).

On October 17, 2009, after her meeting with Dr. Kader at which Dr. Kader voiced the concerns about the evaluation (Tr. 250), Dean Smith sent an e-mail to V.P. Smith, President Givens, and Ms. Malone confirming that Dr. Kader's immigration status and race came up in their discussions (Tr. 271-73; Ex. 26 pp. 612-14). Dean Smith concluded this e-mail by stating, "those who don't [support progress and the forward movement of the department] will have to be left behind" (Ex. 26 p. 614).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

V.P. Smith acknowledged that both Dean Smith and Dr. Kader made him aware that issues about Dr. Kader's immigration status and her race came up during Dr. Kader's October 2009 faculty evaluation (Tr. 82-83; Ex. 26 pp. 612-14). He said Dean Smith requested a meeting with Human Resources regarding the faculty evaluation (Tr. 80-81, 279; Ex. 9 p. 602; Ex. 26 pp. 613-14). He admitted at trial that the concerns raised regarding Dr. Kader's 2009 faculty evaluation were serious and HSSU policies required that they be investigated (Tr. 83).

After Dean Smith's e-mail, Dr. Kader went to V.P. Smith's office to discuss it (Tr. 333). He informed Dr. Kader he would hold a meeting with Human Resources (Tr. 334). In response, Dr. Kader informed him she would need to bring an attorney to ensure she received fair treatment and her human rights (Tr. 334, 450-51, 464-65). V.P. Smith told her that if she brought an attorney, she was going to face visa complications; he repeated this twice (Tr. 334, 450-51, 465). Following this meeting with V.P. Smith in October 2009, he treated Dr. Kader differently (Tr. 365).

Ms. Malone said that under HSSU's policies, V.P. Smith should have met with Human Resources to address the issues Dr. Kader raised, but he did not (Tr. 205-06). In fact, he waited an entire year before sending Human Resources Dr. Kader's e-mail outlining her complaints, even though he admitted that he would forward allegations of race and visa-status discrimination complaints to Human Resources and had no reason to wait to act on Dr. Kader's complaints (Tr. 79-80).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Ms. Malone said that in the end, no one ever reported to Human Resources Dr. Kader's concerns that her October 2009 faculty evaluation was adversely affected because of her race, national original, or status as an immigrant (Tr. 201). Because of this, there never was a meeting with Human Resources or any of Dr. Kader's administrators, Human Resources never performed any investigation, and no one from the University interviewed Dr. Kader or did anything in terms of contacting her or documenting or investigating her complaints of discrimination (Tr. 206-07, 279-80, 340-41).

I. Process and denial of Dr. Kader's 2010 O-1 visa petition

Ms. Malone said that HSSU sponsored Dr. Kader's O-1 visa petition in 2010 (Tr. 166). It was perfectly clear to Ms. Shaw and HSSU that the petition was made by the university (Tr. 462). (Though, before agreeing to file the petition for Dr. Kader, at one point V.P. Smith, Ms. Malone, and Ms. Shaw told Dr. Kader that her entire immigration file with HSSU had been lost (Tr. 357).)

After the initial petition was filed, HSSU received a request from the U.S. Customs and Immigration Service ("USCIS") for evidence to support it (Tr. 172). Ms. Shaw was HSSU's contact person for Dr. Kader's visa petition, and requests from the USCIS went to her (Tr. 462-63, 466; Ex. 38). HSSU never communicated to Dr. Kader that it had received the USCIS's request for information (Tr. 360, 460-61, 463). Instead, on June 11, 2010, Ms. Shaw denied to Dr. Kader that she was involved in Dr. Kader's visa petition and denied she ever received a request for information from the USCIS (Tr. 361). Ms. Shaw told Dr. Kader that Dr. Kader needed to leave her office

within 30 days as her visa petition should be closed and the University was going to announce her position as open (Tr. 362). Three days later, on June 14, Dr. Kader e-mailed V.P. Smith that she believed Ms. Shaw was engaging in discriminatory treatment against her and requested her rights be respected (Ex. 37 p. 617).

On July 2, 2010, the USCIS issued a decision denying HSSU's visa petition on Dr. Kader's behalf (Tr. 94; Ex. 18 p. 604). Before then, and as early as June 14, 2010, Dr. Kader had informed both V.P. Smith and Ms. Shaw that the USCIS had requested information from HSSU several times but HSSU never responded (Tr. 365-66; Ex. 37 p. 617). But as of the USCIS's July 2, 2010 denial, HSSU had provided the USCIS no initial evidence or supporting documentation in support of the petition (Ex. 18 p. 606). If was for this reason alone that the petition was denied (Tr. 97-98, 370-71; Ex. 18 p. 607). Without the initial evidence and supporting documentation, the USCIS was precluded from processing the petition (Ex. 18 p. 607).

HSSU could have appealed the USCIS's decision but elected not to do so (Tr. 98-99). It had 30 days in which to appeal the O-1 visa denial (Tr. 368; Ex. 37 p. 604). V.P. Smith testified that President Givens decided not to appeal it (Tr. 99, 127-28). But President Givens testified this was not true, and the decision not to appeal was V.P. Smith's (Tr. 142, 144). Either way, by the time V.P. Smith informed Dr. Kader that the petition had been denied and her teaching contract with HSSU therefore would not be renewed, there were only four days remaining in which to appeal (Tr. 367, 369).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

J. Dr. Kader's request for a leave of absence and to file a faculty grievance

V.P. Smith admitted that even before HSSU knew the visa petition had been denied, Dr. Kader requested a leave of absence (Tr. 128; Ex. 37 p. 618). He confirmed that HSSU policies permitted a leave of absence for nonmedical purposes (Tr. 129-30).

V.P. Smith also admitted he was one of the HSSU officials Dr. Kader contacted requesting her leave of absence (Tr. 128, 364; Ex. 37 p. 617). He admitted he never responded to her request and never explored whether it would be a possibility for her (Tr. Tr. 128, 131, 364-65). V.P. Smith testified that President Givens had authority to approve or deny a request for leave of absence, but that he never forwarded or relayed President Givens Dr. Kader's request (Tr. 132-33). Instead, Ms. Shaw summarily denied Dr. Kader's leave-of-absence request (Ex. 37 p. 617). V.P. Smith made no efforts to save Dr. Kader's position with HSSU for her after receiving notice that the USCIS had denied the visa petition (Tr. 133).

Ms. Malone admitted that after the USCIS denied the petition, Dr. Kader requested to file a faculty grievance with her and other administrators (Tr. 234-35, 369; Ex. 19 p. 608). In her July 29, 2010 e-mail request, Dr. Kader again complained about the unfair treatment to which she was subjected (Ex. 19 p. 608). President Givens admitted that HSSU's policies permit faculty grievances in the events of termination or non-renewal (Tr. 158). But as Ms. Malone also admitted, no one from HSSU ever responded to Dr. Kader's request (Tr. 235-36, 370). And as President Givens admitted, no one sought his opinion regarding Dr. Kader's request either (Tr. 154-55).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

K. Dr. Kader's charge of discrimination and unemployment application

In August 2010, the same month Dr. Kader filed her discrimination charge against HSSU, *infra* at p. 27, she sought unemployment benefits (Tr. 375). Ms. Malone responded for HSSU in opposition to the unemployment application (Ex. 20 p. 609). She stated to the Division of Employment Security that HSSU had no part in Dr. Kader's visa application (Tr. 177; Ex. 20 p. 609). She also told the Division that HSSU sent in everything it had to the USCIS and that it "did send paperwork in to them" (Ex. 20 p. 609).

The Division denied Dr. Kader's application for unemployment benefits (Tr. 377-78). Dr. Kader had to appeal this decision, which took a year and two months, before her unemployment benefits were approved (Tr. 379).

L. Damages

V.P. Smith admitted that Dr. Kader's salary with benefits at the time of her non-renewal at HSSU were worth approximately $60,000 per year (Tr. 101-02). This included employment benefits such as medical, dental, and life insurance (Tr. 406). When the USCIS denied the visa petition, Dr. Kader's salary and insurance stopped, and her husband, who was sponsored by her visa, also was precluded from working (Tr. 374).

Following HSSU's non-renewal of Dr. Kader's contract, there were four academic years between 2010 and 2015 in which she was unable to find full-time employment and made $0 from work as full-time faculty (Tr. 396-97, 404-05). From 2012 until the date of trial in 2015, Dr. Kader had no employment benefits (Tr. 406).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

The emotional effect on Dr. Kader's life since her non-renewal at HSSU has included fears, insecurities, problems sleeping, continuing physical pain and stress, emotional distress, and loss of reputation (Tr. 406-07). She has been unable to publish work or participate in academia (Tr. 408).

M. Dr. Kader's later visa approval

In February 2011, Dr. Kader received a residency waiver from immigration authorities, which permitted her to obtain a "National Interest Waiver" and continue working in the United States (Tr. 379, 381-82). The information Dr. Kader submitted to sponsor this waiver was the same information that HSSU had been required to submit in sponsoring her O-1 visa petition (Tr. 383).

N. National-origin discrimination at HSSU

1. Investigation of complaints made by a non-Egyptian employee

V.P. Smith admitted that in 2009, he received from an HSSU employee complaints that Dean Smith was making comments within the department that were racially charged (Tr. 51-53). The complainant was Racquel Bovier-Brown, an employee whose national origin was American (Tr. 51). Human Resources investigated those complaints (Tr. 207).

2. Disparate treatment for similarly-situated employees of a different national origin than Dr. Kader

President Givens said that the hiring process in Dr. Kader's department required that an open position be advertised and a committee formed to interview applicants (Tr. 138). V.P. Smith said that committee would make a recommendation to him and he then would make a recommendation for hire to President Givens (Tr. 42-43). This is the

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

application process Dr. Kader had to go through: she had to apply, be interviewed, and send in a video of her teaching (Tr. 412). Ms. Malone said that no non-American faculty member ever has not had to go through the typical applicant vetting process (Tr. 212). President Givens said the process is supposed to apply to everyone (Tr. 138).

V.P. Smith said that after Dr. Kader's non-renewal in 2010, two assistant professors were hired in the same department and in same position she had held (Tr. 107-08). They both had different national origins than Dr. Kader, as they were American (Tr. 108). V.P. Smith, Ms. Malone, and Dean Smith all admitted that those two American employees were not required to go through the same vetting process as Dr. Kader (Tr. 107, 212, 296-97). Moreover, those two American employees were given higher salaries than Dr. Kader, even though she had three years of service with HSSU at the time of her non-renewal (Tr. 107-08, 211).

3. Discriminatory motive

HSSU's typical non-renewal process for Dr. Kader would include involvement from both Dean Smith and Ms. Malone (Tr. 44-45).

Dean Smith had been accused of stating a belief in "black power" and stating she wanted to make her department "blacker" (Tr. 286-87). President Givens testified that articulating a belief in "black power" was inappropriate and was suggestive of a discriminatory animus (Tr. 150-51).

Ms. Malone testified to having referred to an African Muslim employee – the same ethnic group and religion to which Dr. Kader belonged – as being a "strange combination" (Tr. 189-91). She also sent Dean Smith an e-mail

after Dr. Kader's non-renewal stating that she "suspect[s] that shortly [Dr. Kader] will be on her way back to Egypt" (Tr. 194; Ex. 44). Ms. Malone testified she made this statement because the letter from the USCIS she had received stated this (Tr. 195). But nowhere in the USCIS's letter to HSSU did it state Dr. Kader would have to return to Egypt (Ex. 18 p. 604-07). And Dr. Kader never told HSSU that she would have to leave the country if her visa petition were denied (Tr. 463).

There were three different dates when the decision not to renew Dr. Kader's contract could have been made, all of which preceded the date when HSSU could have been informed of the July 2, 2010 visa-petition denial: (1) Ms. Malone's statement to the Division of Employment Security identified the date as May 31, 2010 (Ex. 20 p. 609); (2) Robin Shaw's statements on June 11, 2010 that Dr. Kader needed to leave her office and that her position would advertised (Tr. 361-63; Ex. 37 p. 617); and (3) V.P. Smith testified that the effective date of Dr. Kader's non-renewal was July 1, 2010 (Tr. 94).

O. Proceedings below

In August 2010, Dr. Kader filed a charge of discrimination with the Missouri Human Rights Commission (L.F. 17, 34; Tr. 370). After the Commission issued her a "right to sue" letter, she timely filed a petition in the Circuit Court of the City of St. Louis against HSSU for race discrimination, religious discrimination, national-origin discrimination, and retaliation, all in violation of the Missouri Human Rights Act (L.F. 26-29).

Dr. Kader's claims for racial and national-origin discrimination and retaliation were tried to a jury over three days in December 2015 in a

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

bifurcated trial under § 510.263, R.S.Mo. (Tr. 2-3), after which they were submitted to the jury (L.F. 83-85). The verdict-directing instructions all listed the possible adverse employment actions disjunctively as:

> Defendant did not respond to the USCIS request for evidence to support the O-1 Visa Petition; or
>
> Defendant did not appeal the denial of the O-1 Visa Petition; or
>
> Defendant did not renew Plaintiff's employment contract; or
>
> Defendant denied Plaintiff a work leave of absence ….

(L.F. 83-85). The verdict-directing instruction on retaliation listed the possible act for which the retaliation occurred as "Plaintiff made complaints of discrimination" (L.F. 85).

The jury found for HSSU on Dr. Kader's race-discrimination claim and found for Dr. Kader on her national-origin-discrimination and retaliation claims (L.F. 89-91). It awarded her $750,000 in compensatory damages and $1,750,000 in punitive damages (L.F. 89-91). The court then entered a judgment accepting those verdicts and awarded Dr. Kader front pay of $67,000 and attorney fees and costs of $182,994.20, with post-judgment interest accruing at 5.36% on the total of $2,749,994.20 (L.F. 318-20).

HSSU timely moved for judgment notwithstanding the verdict or alternatively a new trial or to amend the judgment (L.F. 322-38). When the trial court denied that motion, HSSU timely appealed to the Missouri Court of Appeals, Eastern District (L.F. 363).

The Court of Appeals issued an opinion reversing the trial court's judgment and remanding this case for a new trial. This Court then sustained Dr. Kader's application for transfer and transferred this case.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Argument

I. HSSU's first point is not preserved for review, because it presents a claim relating to the giving of jury instructions without setting forth those instructions in full in the corresponding argument, in violation of Rule 84.04(e), it is nonspecific and multifarious, in violation of Rule 84.04(d), and the error alleged in the point is different from the error alleged in the corresponding argument, in violation of Rule 84.04(e).

(First response to HSSU's Point I)

A. HSSU fails to set forth the instructions to which its first point relates in full in its corresponding argument.

Rule 84.04(e) requires that "[i]f a point relates to the giving … of an instruction, such instruction shall be set forth in full in the argument portion of the [appellant's opening] brief." While Rule 84.04(h)(3) also requires the appellant to include in its appendix "[t]he complete text of any instruction to which a point relied on relates", Rule 84.04(h) goes on to provide that "[t]he inclusion of any matter in an appendix does not satisfy any requirement to set out such matter in a particular section of the brief." (And in 2012, the Court deleted language exempting jury instructions from this latter caveat.)

This means that when an appellant's point relates to the giving of a jury instruction, but the appellant fails to set forth the text of that instruction in full in the argument portion of its brief, this renders the appellant's point "not preserved for review …." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 763 n.4 (Mo. banc 2010) (refusing to review point for this reason); *see also State v. Oxford*, 791 S.W.2d 396, 400 (Mo. banc 1990) (same in death-penalty case); *State v. Clayton*, 995 S.W.2d 468, 483 (Mo. banc

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

1999) (same); *State v. Cella*, 32 S.W.3d 114, 119 (Mo. banc 2000) (same in non-death-penalty criminal case).

HSSU's argument over its first point violates Rule 84.04(e). Its first point relates to the giving of "the verdict directors" (Substitute Brief of the Appellant ("Aplt.Br.") 28), which it says in the argument portion of its brief are Instructions 8 and 9 (Aplt.Br. 32, 40). So, it "relates to the giving of an instruction …." Rule 84.04(e) therefore requires HSSU to "set forth" those instructions "in full in the argument portion of the brief."

HSSU does not set forth the text of any jury instruction in full anywhere in the argument portion of its brief. The argument corresponding to its first point only quotes snippets of Instructions 8 and 9 (Aplt.Br. 32, 40).

The law of Missouri is that is insufficient, so HSSU's first point is not preserved for review. *Klotz*, 311 S.W.3d at 763 n.4; *Cella*, 32 S.W.3d at 119; *Clayton*, 995 S.W.2d at 483; *Oxford*, 791 S.W.2d at 400. The Court should deny HSSU's first point for this reason alone.[1]

---

[1] At most, the Court could review HSSU's first point for plain error. *Mitchem v. Gabbert*, 31 S.W.3d 538, 541 (Mo. App. 2000). But HSSU does not request plain error review, which is "discretionary and rarely granted in civil cases," *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 617 (Mo. App. 2009), and "should be used sparingly." *MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo. App. 2012) (citation omitted). Moreover, to obtain plain error review, HSSU first would have to explain: (1) what error was evident, obvious, and clear; and (2) how it resulted in a manifest injustice or miscarriage of justice. *State v. Massa*, 410 S.W.3d 645, 657 (Mo. App. 2013). Otherwise, the Court would be forced "to become an advocate for" it and "scour the record and devise arguments on its behalf." *Id.* And if HSSU seeks to make plain-error arguments in its reply

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

B. HSSU's first point is impermissibly vague and nonspecific.

"Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that the appellate court does not become an advocate for the appellant by speculating on facts and on arguments that have not been made." *BBCB, LLC v. City of Indep.*, 201 S.W.3d 520, 530 (Mo. App. 2006).

Rule 84.04(d)(1)(A)-(C) requires that a point relied on "identify the trial court ruling or action that the appellant challenges", "state concisely the legal reasons for the appellant's claim of reversible error[,] and" "explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error."

So, a point relied on must "set out specific allegations of trial court error", "support the claim of error with legal reasons", and "explain how the case specific details support the legal reasons." *Falls Condo. Owners' Ass'n, Inc. v. Sandfort*, 263 S.W.3d 675, 679 (Mo. App. 2008). A point that does not do this violates Rule 84.04(d). *Id.* And "[p]oints on appeal that fail to comply with Rule 84.04(d) present nothing for review." *In re Marriage of Gerhard*, 34 S.W.3d 305, 307 (Mo. App. 2001) (citation omitted).

HSSU's first point violates these requirements of specificity that it identify the precise legal reasons for its claim of error and explain how the case-specific details support those reasons. The point states:

> 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

---

brief, the Court should reject it, as Dr. Kader will "have no opportunity to address" them. *Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

> included actions that are not adverse employment actions and no evidence established those actions caused any damages.

(Aplt.Br. 28).

While HSSU's first point identifies a ruling it challenges as error, "denying Harris-Stowe's Motion for New Trial", it fails Rule 84.04(d)'s remaining requirements and only presents an abstract legal issue.

First, the point does not specify a precise legal reason for the error, but instead gives three vague alternative reasons. It states that "the verdict directors misdirected, misled, or confused the jury …." But it does not identify those specific verdict directors by description or instruction number and does not specify whether the error was in misdirecting the jury, misleading the jury, or confusing the jury. (And arguing there were *three* possible legal reasons is impermissibly multifarious and violates Rule 84.04(d) for this reason, too. *Infra* at pp. 33-35.)

Second, the point gives no case-specific details supporting those legal reasons. It only says the unnamed "verdict directors" included unnamed "actions that are not adverse employment actions" and that "no evidence established" the unnamed "actions" caused Dr. Kader damages. It does not say what the actions are, what law or fact makes them not adverse employment actions, or what evidence did not support that they caused damage.

This preserves nothing for review. *Herd v. Herd*, 537 S.W.3d 414, 417-18 (Mo. App. 2018). In *Herd*, the Court of Appeals refused to review similarly deficient, abstract points. Like HSSU's first point, the points in *Herd* "challenge[d] the evidentiary basis of the" decision below but "nothing in

those points identifi[ed] or [gave the respondent or the court] notice as to the specific trial testimony or exhibits they assert support[ed] their claims." *Id.* There was no "notice to the respondent or the appellate court of the basis for reversible error." *Id.*

Like the appellant in *Herd*, HSSU's first point mentions only vague, nonspecific "verdict directors", and vague, nonspecific "actions", and then suggests three possible legal reasons for relief without identifying which it is arguing and what facts or law support this. "This deficiency, standing alone, preserves nothing for appellate review." *Id.* at 418.

The Court should deny review of HSSU's first point for this reason, too.

C. HSSU's first point is impermissibly multifarious.

Under Rule 84.04(d)(1)(B), a point relied on must state one concise legal reason for one alleged error. A point that instead "asserts several errors" is "multifarious," "does not comply with Rule 84.04(d)[,] and fails to preserve an issue for review." *Matter of Wilma G. James Trust*, 487 S.W.3d 37, 52 (Mo. App. 2016).

"A point relied on should contain only one issue, and parties should not group multiple contentions about different issues together into one point relied on." *Wolf v. Midwest Nephrology Consultants, P.C.*, 487 S.W.3d 78, 84 (Mo. App. 2016) (citation omitted). If a party violates this rule, its point "preserve[s] nothing for appellate review." *Id.*

While the Court may nonetheless "choose to review a multifarious point, or part of it, *ex gratia*," *James Trust*, 487 S.W.3d at 52, it cannot do so when the point "involve[s] the application of different legal standards," as

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

that would put the Court "in 'an advocacy role' that is 'wholly improper for a reviewing court to assume.'" *Wolf*, 487 S.W.3d at 52 (citation omitted). When that occurs, the Court must deny the point. *Id.* Alternatively, the Court can choose to review only one out of the multifarious theories the point presents. *Spence v. BNSF Ry. Co.*, 547 S.W.3d 769, 779 n.12 (Mo. banc 2018).

HSSU's first point appears to contend that the trial court erred in denying its motion for new trial because "the verdict directors" either (1) misled, (2) misdirected, *or* (3) confused the jury, and had one of these three separate effects for two separate reasons: (a) they included unnamed actions that HSSU argues did not qualify as adverse employment actions, and (b) they allowed the jury to find damages when there was no evidence that the unnamed actions caused any damages (Aplt.Br. 28).

Those latter two reasons are two different legal reasons with two different standards: a mixed question of fact and law as to whether the unnamed actions constituted adverse employment actions under the law, as well as a question of the sufficiency of the evidence in whether there was evidence that Dr. Kader was damaged by those unnamed actions.

This asserts more than one concise legal reason for HSSU's claim of error. So, HSSU's first point is multifarious and preserves nothing for review. *Spence*, 547 S.W.3d at 779 n.12 (holding that point alleging jury instruction was error for several legal reasons was impermissibly multifarious, exercising discretion to review only one of those reasons).

The Court should decline to review HSSU's first point *ex gratia*. As in *Spence* and *Wolf*, HSSU's arguments of "no evidence of damages" and "the

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

verdict directors included actions that did not qualify as adverse employment actions" are clearly two separate challenges to the verdict directors with separate standards and reasoning, so determining which argument the point really raises would require impermissible advocacy. The Court should refuse to become HSSU's advocate and determine what the first point *really* argues, and instead should deny the point outright.

Alternatively, if the Court opts to choose to review one of these two legal reasons, as it did in *Spence*, it should choose only HSSU's challenge to the evidence of damages.

D. The argument over HSSU's first point argues error in instructing the jury, but the only claim of error identified in HSSU's first point itself is in denying its motion for new trial, rendering its claim of instructional error not preserved and its claim of error in denying the motion for new trial abandoned.

Rule 84.04(e) requires that the argument in an appellant's opening brief "shall substantially follow the order of 'Points Relied On'", "[t]he point relied on shall be restated at the beginning of the section of the argument discussing that point", and "[t]he argument shall be limited to those errors included in the 'Points Relied On.'"

This means that a claim of error in a point relied on must be the same claim of error addressed in the argument over that point, and otherwise nothing is reviewable. If the claim of error in a point is different than the claim of error addressed in the argument over that point, the claim of error in the point in is waived. *R.J.K. v. J.K.B.*, 269 S.W.3d 546, 559 (Mo. App. 2008) ("Any claim of error raised in a point relied on which is not addressed in the appellant's argument is deemed waived"). At the same time, the claim of

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

error in the argument is not preserved, so the point is deemed abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002) ("an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court").

HSSU's first point and its argument fail this requirement of sameness. Each presents a different claim of error, so the claim in the argument is not preserved, the claim in the point is waived, and the point is abandoned.

The only "trial court ruling or action" that HSSU's point challenges under Rule 84.04(d)(1)(A) is "[t]he trial court erred in denying Harris-Stowe's Motion for New Trial" (Aplt.Br. 28). But nowhere in its argument over that point does it argue how this was error at all (Aplt.Br. 31-43). In fact, the sole time HSSU even mentions the motion for new trial in its argument is just to conclude at the end, "Accordingly, the trial court should have granted Harris-Stowe's motions for directed verdict[2] and motion for new trial as a matter of law" (Aplt.Br. 43), without ever making an argument how this was so.

Instead, the only claim of error HSSU presents in its argument over its first point is the trial court erred in *issuing instructions*. *See, e.g.*:

- "The trial court legally erred and misled the jury by submitting verdict directors" (Aplt.Br. 31);
- "These instructional errors" (Aplt.Br. 31);
- "Instructional error is legal error" (Aplt.Br. 31);

---

[2] HSSU's first point does not address a motion for directed verdict at all (Aplt.Br. 28). That argument is not preserved, either. *Brizendine*, 71 S.W.3d at 593.

- "the verdict directors were legally erroneous" (Aplt.Br. 31);
- "the trial court committed legal error when it submitted instructions that misled the jury" (Aplt.Br. 31);
- "The district court legally erred by listing [in an instruction] the denial of a work leave of absence as an adverse employment action" (Aplt.Br. 36);[3]
- "Harris-Stowe was prejudiced by the legally-erroneous jury instructions" (Aplt.Br. 41);
- "Instructional error prejudices the defendant" (Aplt.Br. 41); and
- "it was instructional error to suggest these actions – which were not adverse – could have caused Dr. Kader's injury" (Aplt.Br. 42).

HSSU's first point alleges error in denying a motion for new trial, but the argument over its first point does not make any argument for how denying the motion for new trial was error. The only claim of error HSSU raised in its first point relied on therefore is not addressed in its argument, so that claim of error is waived. *R.J.K.*, 269 S.W.3d at 559. At the same time, HSSU's argument that the trial court erred in issuing jury instructions is not set out in HSSU's first point itself, so that argument is not preserved and the point is abandoned. *Brizendine*, 71 S.W.3d at 593.

The Court should deny HSSU's first point for this reason, too.

[3] This is not specifically addressed in HSSU's first point, either (Aplt.Br. 28), and so is not preserved. *Brizendine*, 71 S.W.3d at 593. Also, Missouri trial courts are called *circuit* courts, not district courts.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

II. A reasonable person could find the trial court properly instructed the jury that it could enter a verdict for Dr. Kader if it believed she was damaged when her national origin and her complaints of discrimination were a contributing factor in HSSU (a) not responding to the USCIS's request for evidence to support her O-1 visa petition; (b) not appealing the denial of her O-1 visa petition; or (c) denying her a work leave of absence.

(Second response to HSSU's Point I)[4]

Standard of Review

HSSU argues that its first point presents a claim of "instructional error", so the standard of review is "de novo" (Aplt.Br. 31). This is untrue.

The actual error HSSU's first point alleges is not that the trial court erred in instructing the jury, but rather that the "trial court erred in denying Harris-Stowe's Motion for New Trial" (Aplt.Br. 28). HSSU could have begun its first point, "The trial court erred in issuing Instruction X because …." It chose to not to. This is an important distinction that changes the standard of review. *Tisch v. DST Sys., Inc.*, 368 S.W.3d 245, 255 (Mo. App. 2012).

"This Court reviews the overruling of a motion for a new trial for abuse of discretion." *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 436 (Mo. banc 2016) (citation omitted). Abuse of discretion is "[t]he most deferential standard of review" and "severely limits the power of the appellate court to

---

[4] This response is to HSSU's argument corresponding to Point I (Aplt.Br. 31-43). As Dr. Kader explained *supra* pp. 29-37, the point itself (Aplt.Br. 28) is vague and multifarious, and the argument over it fails either to argue the error alleged in the point or to set forth any related instructions, therefore preserves nothing for appeal, and should be denied. But if the Court holds otherwise, Dr. Kader offers this response to the corresponding argument as best as she can understand it.

reverse or otherwise alter the rulings of the lower court." *In re Marriage of Stephens*, 954 S.W.2d 672, 678 (Mo. App. 1997).

"An abuse of discretion occurs when the trial court's 'ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Dieser*, 498 S.W.3d at 436 (citation omitted). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Hancock v. Shook*, 100 S.W.3d 786, 794 (Mo. banc 2003).

So, when an appellant's point argues – as HSSU's appears to – that the trial court erred in denying a motion for new trial *because* an instruction misled the jury, the Court reviews whether "the trial court … abuse[d] its discretion in denying [the appellant]'s Motion for New Trial on the basis of claimed instructional error." *Tisch*, 368 S.W.3d at 245. Review is for abuse of discretion, not de novo.

And to the extent reviewing HSSU's first point involves weighing the propriety of a jury instruction, "de novo" is not the whole standard, either. "Whether a jury was properly instructed is a question of law that this Court reviews *de novo*." *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008). But that "[r]eview is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper. Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action." *Id.* "In making this determination as to a particular

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

instruction, this Court views the evidence in the light most favorable to its submission." *Edgerton v. Morrison*, 280 S.W.3d 62, 65 (Mo. banc 2009).

This is particularly true with a disjunctive verdict-directing instruction. "In order for disjunctive verdict directing instructions to be deemed appropriate, each alternative must be supported by substantial evidence." *Ross-Paige v. Saint Louis Metro. Police Dept.*, 492 S.W.3d 164, 172 (Mo. banc 2016) (citation omitted). "This Court must consider the evidence in the light most favorable to [the respondent] and disregard [the appellant's] evidence unless it tends to support the instruction's submission." *Id.* (citation omitted).

* * *

A. Summary

The law of Missouri is that any unfair treatment based on national origin or in retaliation for reporting discrimination as it relates to employment is discrimination for which the discriminated-against party has a cause of action under the MHRA, §§ 213.010, R.S.Mo., *et seq*.

Viewing the evidence in the light most favorable to Dr. Kader, taking all evidence and inferences in her favor as true and disregarding all contrary, HSSU committed unfair treatment against her based on her national origin and in retaliation for her reporting discrimination as it related to her employment when HSSU did not respond to the USCIS's request for evidence to support her O-1 visa petition, did not appeal the denial of her O-1 visa petition, and denied her a work leave of absence, and Dr. Kader was damaged

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

by this. The trial court properly instructed the jury it could find HSSU liable if it found any of these actions and that Dr. Kader was damaged.

Relying almost entirely on decisions of federal courts under Title VII of the federal Civil Rights Act of 1964, and never once viewing the evidence in the light most favorable to Dr. Kader, HSSU argues that Instructions 8 and 9, the verdict-directing instructions on Dr. Kader's claims for national-origin discrimination and retaliation, allowed the jury to find three actions were caused by a discriminatory animus when those actions were not legally capable of being discriminatory "adverse employment actions", so those instructions were error (Aplt.Br. 31-42). It also argues that the instructions were error because they suggested HSSU could have caused damages from those actions, when there was no evidence of this (Aplt.Br. 42-43).

HSSU's argument is without merit. Viewing the evidence in the light most favorable to Dr. Kader, as the Court must, all the alleged discriminatory acts Dr. Kader submitted in her national-origin and retaliation verdict directors, Instructions 8 and 9, respectively, fall squarely within the scope of actionable discriminatory acts as the MHRA defines "discrimination". This includes HSSU's actions in not responding to the USCIS's request for evidence to support her O-1 visa petition, not appealing the denial of her O-1 visa petition, and denying her a work leave of absence.

Rather, viewing the evidence in the light most favorable to Dr. Kader, HSSU was determined to get rid of her because of her national origin and the fact that she previously had reported discrimination, resolved not to renew her employment, and then engaged in adverse visa-related actions to effect

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

this and attempt to (retroactively) provide itself a sheen for this. The trial court and the jury saw through HSSU's attempt to discriminate against Dr. Kader and get around the consequences the MHRA levies for doing so. The law of Missouri is and must be that under these circumstances the jury could find she was damaged when her national origin and her complaints of discrimination were a contributing factor in HSSU not responding to the USCIS's request for evidence to support her O-1 visa petition, not appealing the denial of her O-1 visa petition, and denying her a work leave of absence. Instructing the jury so was proper.

The alternative offends the rule of law and the dignity of all people lawfully in Missouri regardless of their national origin. If HSSU is correct, anytime an employee is a lawful alien who depends on an employer to sponsor a visa application to continue their employment as promised, employers will have license to discriminate on any MHRA-prohibited basis when they opt not to take those promised steps. This tacitly would allow what the MHRA otherwise strictly guards against. Employers of authorized alien employees would be able to discriminate against those employees based on national origin, race, religion, sex, or any other MHRA-protected factor by pointing to an impending change in the employee's immigration status they, themselves engineered, and then escape liability, regardless of the evidence.

That is not and cannot be the law of Missouri. The Court should reject HSSU's attempt to insert into the MHRA a *per se* workaround allowing employers to engage in otherwise-prohibited discrimination against employees who happen to be lawful aliens.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

B. Viewing the evidence in the light most favorable to Dr. Kader, a reasonable person could find that HSSU not responding to the USCIS's request for evidence to support her O-1 visa petition, not appealing the denial of her O-1 visa petition, and denying her a work leave of absence were unfair employment-related actions legally capable of being the basis for a cause of action under the MHRA.

HSSU argues that three of the disjunctive actions alleged in Instructions 8 and 9 could not legally qualify as "adverse employment actions" for which an action for discrimination or retaliation could lie under the MHRA: (1) "Defendant did not respond to the USCIS request for evidence to support the O-1 Visa Petition;" (2) "Defendant did not appeal the denial of the O-1 Visa Petition;" or (4) "Defendant denied Plaintiff a work leave of absence" (Aplt.Br. 32-42) (quoting L.F. 84-85).[5, 6]

---

[5] Several times, HSSU mentions a fourth action, "Defendant did not renew Plaintiff's employment contract" (Aplt.Br. 32, 36, 40). It argues including this, too, was error because not renewing the contract was "statutorily required" (Aplt.Br. 36, 40). But HSSU did not object at the instructions conference to including this as an action in the verdict-directing instructions, nor did it make this argument in its motion for new trial (Tr. 522-27; L.F. 322-28). Instead, it relegated its argument only to the three issues mentioned here (Tr. 522-27; L.F. 322-28). Any argument about any other actions being included in the verdict directors is not preserved for appeal. Rule 70.03. *Infra* at pp. 55-56. And plain error review of this would be inappropriate, too. *See supra* pp. 30-31 n.1.

[6] HSSU also argues that an action listed in Instruction 9, "Defendant opposed Plaintiff's application for unemployment benefits" (L.F. 85) was not supported by sufficient evidence and the instruction was error for this reason, too (Aplt.Br. 40). But in its brief before the Court of Appeals, HSSU conceded that it had not preserved this allegation of error and expressly stated it "is not now arguing instructional error" for this reason (Appellant's opening brief in the Court of Appeals, p. 34). This argument therefore is not preserved for this Court's review. Rule 83.08. *Infra* at p. 56.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Instructions 8 and 9 were based on MAI-Civ.7th 38.01(A), which models an MHRA verdict director as this:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*) plaintiff, and
>
> Second, (*here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age or disability*) was a contributing factor in such (here, repeat alleged discriminatory act, such as "failure to hire," "discharge," etc.), and
>
> Third, as a direct result of such conduct, plaintiff sustained damage.

HSSU's apparent complaints go to the first paragraph, the insertion of the "alleged discriminatory acts" within the scope of § 213.055, R.S.Mo. (2010).[7] That statute in § 213.055.1(1)(a) makes it an "unlawful employment practice" "[f]or an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual" "[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, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability." In § 213.010(5), the MHRA defines

---

[7] In 2017, the General Assembly made major revisions to the MHRA, including changing the standard of proof of the protected class being "a contributing factor" in the discriminatory act to being "the motivating factor" for it. This case falls under the prior version of the act, specifically the version in effect in 2010.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

"discrimination" as "any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment …."

The MHRA in § 213.055.1(b) also makes it unlawful to deprive or tend to deprive any individual of employment opportunities: "To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's … national origin …." This language "outlaws every kind of disadvantage resulting from [protected class] prejudice in the employment setting." *Bibbs v. Block*, 778 F.2d 1318, 1322 (8th Cir. 1985).

So, if viewing the evidence in the light most favorable to an action listed in the first paragraph of a MAI 38.01(A) instruction, an action is an "unfair treatment based on … national origin … as it relates to employment" including "with respect to [her] compensation, terms, conditions, or privileges of employment", or one that "would deprive or tend to deprive [the plaintiff] of employment opportunities or otherwise adversely affect [her] status as an employee, because of [her] national origin," the law of Missouri is that it qualifies as a discriminatory act under the MHRA. *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 820 (Mo. banc 2007). It therefore is proper to list that action as an "alleged discriminatory act" in the first paragraph of that instruction. MAI 38.01(A).

In arguing that not responding to the USCIS's request for evidence to support Dr. Kader's O-1 visa petition, not appealing the denial of her O-1 visa petition, and denying her a work leave of absence did not qualify as "adverse

employment actions", a term that comes from federal case law and is not found in the MHRA, HSSU relies entirely on decisions of federal courts concerning Title VII of the Civil Rights Act of 1964, *not* the MHRA (Aplt.Br. 32-40) (only citing federal decisions).[8]

This is important, because the MHRA's definition of "discrimination" is *not* identical to Title VII's. In this respect, the MHRA "offers greater protection to workers than does federal law." *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664-65 (Mo. banc 2009).

For example, citing its federal decisions, HSSU argues it had no affirmative duty to engage in the actions it challenges (Aplt.Br. 33-36). But the MHRA does not require a showing of legal obligation to establish a discriminatory act. *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 625 (Mo. banc 1995) (where alleged victim was a former employee receiving non-contractual, voluntary payments, he still was protected under the MHRA's plain language). Indeed, as the law of Missouri defaults to at-will employment, no employer has a legal obligation absent a contract to retain its employees. *Flesher v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 91 (Mo. banc 2010). Nonetheless, termination where the employee's national origin contributed to the decision is a discriminatory act the MHRA prohibits. § 213.055.1(1)(a). If an employer could assert a theory of "no legal obligation"

[8] Even then, other federal courts have disagreed. *See, e.g.*, *Cordova v. R&A Oysters, Inc.*, 169 F. Supp. 3d 1288, 1295 n.7 (S.D.Ala. 2016) (revoking promise to sponsor visa applications qualified as adverse employment action under federal law).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

as a defense, then any termination where a contract does not exist would be outside of the MHRA's protections.

Essentially, HSSU tacitly makes the same argument that the defendant in *Hill* did, which this Court rejected: "that even though this Court rejected the argument in *Daugherty* that federal law … should govern Missouri courts' interpretation of a Missouri statute (the MHRA), this Court now should hold that federal rather than Missouri law governs" some MHRA claims (i.e., those involving immigration-related items). *Hill*, 277 S.W.3d at 665. But like the defendant in *Hill*, HSSU "does not point to anything in the MHRA that would lead to this result …." *Id.*

Just as with the defendant's argument in *Hill*, HSSU's invocation solely of federal law fails for this same reason. Dr. Kader's claims "constitut[e] discrimination under the MHRA, and … [are] proved by showing the elements required by the MHRA, rather than by reference to cases … analyzing violations of federal law." *Id.*

So, regardless of what some federal courts have held as to federal law, under the MHRA and the circumstances of this case, all the actions alleged as "discriminatory acts" in the first paragraphs of Instructions 8 and 9 were proper. At the very least, it cannot be said that including them shocks the sense of justice and is something with which no reasonable person could agree, which is the standard of review HSSU must meet. *Supra* at pp. 38-40.

Viewing the evidence and any inferences in the light most favorable to the submission of Instructions 8 and 9, and disregarding all contrary evidence and inferences, a reasonable person could find that HSSU not

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

responding to the USCIS's request for evidence to support Dr. Kader's O-1 visa petition, not appealing the denial of her O-1 visa petition, and denying her a work leave of absence were acts of "unfair treatment … as it relates to employment" with respect to her compensation, terms, conditions, and privileges of employment, as well as acts that "would deprive or tend to deprive [Dr. Kader] of employment opportunities or otherwise adversely affect [her] status as an employee", which is all the MHRA required.

1. Not responding to the USCIS's request for evidence to support Dr. Kader's O-1 visa petition and not appealing the denial of the petition

From the start of her employment, HSSU was aware that Dr. Kader was eligible to work through her visa (Tr. 310). When HSSU offered Dr. Kader employment, and throughout the entire course of her employment there, a condition and privilege of her employment was that HSSU cooperate to provide the necessary information to the appropriate parties for her to maintain her work eligibility (Tr. 310).

When Harris-Stowe initially undertook this privilege of Dr. Kader's employment, Ms. Malone coordinated and supervised Dr. Kader's visa issues by submitting the necessary information to the appropriate parties (Tr. 171, 177, 313) Ms. Malone submitted this information annually to allow Dr. Kader to remain work-eligible (Tr. 174).

This privilege of employment was not unique to Dr. Kader. It was the job of HSSU's Human Resources department to make sure the university's employees stayed in employable status, including those who were on visas

(Tr. 166). HSSU had filed petitions of other employees as sponsors for their visas (Tr. 166, 153).

This condition and privilege of Dr. Kader's employment continued when HSSU accepted responsibility to assist her to continue pursuing a new visa that would allow her to maintain eligible work status (Tr. 166). And HSSU committed to doing this as a condition and privilege of her employment. V.P. Smith and another employee told Dr. Kader the university would assist her with her visa beyond her J-1 status (Tr. 313). V.P. Smith, Ms. Shaw, and Ms. Malone also all told Dr. Kader that the university would sponsor her visa (Tr. 356-57). And Ms. Malone confirmed that before 2010, HSSU committed to assisting Dr. Kader with her visa (Tr. 185).

So, for the 2010 visa petition, Dr. Kader and HSSU agreed that the university would sponsor her visa and work with her immigration attorney (Tr. 428). They decided she would seek an O-1 visa and HSSU would sponsor it (Tr. 356-57). She had a meeting in which Ms. Shaw, Ms. Malone, and V.P. Smith all agreed HSSU would sponsor the O-1 visa (Tr. 356-57). President Givens even admitted he assigned the responsibility to act on the university's behalf for Dr. Kader's 2010 visa petition to Ms. Shaw (Tr. 152, 170, 172). He assigned Ms. Shaw to get Dr. Kader's visa petition processed, filed, and completed (Tr. 152).

V.P. Smith admitted that Dr. Kader could not file a petition for an O-1 visa in 2010 on her own, and instead it had to be filed by HSSU (Tr. 86). He admitted that HSSU filed the petition as Dr. Kader's sponsor (Tr. 86, 360). Ms. Malone also said that HSSU sponsored Dr. Kader's O-1 visa petition in

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

2010 (Tr. 166). It was perfectly clear to Ms. Shaw and HSSU that the petition was made by the university (Tr. 462).

But then, after other faculty members made comments about Dr. Kader's national origin in her 2009 faculty evaluation (Tr. 320, 324-25, 329, 450), and HSSU received and refused to investigate her national-origin discrimination complaints (Tr. 82-83, 201, 205-06, 271-73, 333, 450), including by threatening her with visa complications if she continued them (Tr. 334, 450-51, 465), it discriminated against Dr. Kader by unfairly failing to follow through with this condition and privilege of her employment by not responding to the USCIS's request for information (Tr. 172, 360-61, 460-61, 463). And later, it lied to the Missouri Division of Employment Security and said it had no part in her visa application and *had* sent in all necessary information to the USCIS information, causing a denial of employment security benefits until Dr. Kader could prove her case on appeal (Tr. 177; Ex. 20 p. 609).

HSSU never even communicated to Dr. Kader that it had received the USCIS's request for information (Tr. 360-61, 460-61, 463). Instead, Ms. Shaw falsely denied to Dr. Kader that she was involved in Dr. Kader's visa petition or ever received a request for information from the USCIS, and told Dr. Kader that Dr. Kader needed to leave her office within 30 days as her visa petition should be closed and that the University was going to announce her position as open, even though the visa had not yet been denied (Tr. 361-62).

On July 2, 2010, the USCIS issued a decision denying HSSU's visa petition on Dr. Kader's behalf (Tr. 94; Ex. 18 p. 604). Before that date, and as

early as June 14, 2010, Dr. Kader had informed both V.P. Smith and Ms. Shaw that the USCIS had requested information from HSSU several times but HSSU never responded (Tr. 365-66; Ex. 37 p. 617). But as of the USCIS's July 2, 2010 denial, HSSU had provided the USCIS no initial evidence or supporting documentation in support of the petition (Ex. 18 p. 606).

It was for this reason *alone* that the petition was denied (Tr. 97-98, 370-71; Ex. 18 p. 607). Without the initial evidence and supporting documentation, the USCIS was precluded from processing the petition (Ex. 18 p. 607).

HSSU could have appealed the USCIS's decision within 30 days and remedied this but elected not to do so (Tr. 98, 368; Ex. 37 p. 604). V.P. Smith blamed the decision not to appeal on President Givens, but President Givens blamed it on V.P. Smith (Tr. 99, 127-28, 142, 144). Either way, by the time V.P. Smith informed Dr. Kader that the petition had been denied and her teaching contract with HSSU therefore would not be renewed, there were four days remaining in which to appeal (Tr. 367, 369).

Ultimately, months later, Dr. Kader received a residency waiver from immigration authorities, which permitted her to obtain a "National Interest Waiver" and continue working in the United States (Tr. 379, 381-82). The information Dr. Kader submitted to sponsor this waiver was the same information that HSSU had been required to submit in sponsoring her O-1 visa petition (Tr. 383).

Plainly, viewing the evidence in the light most favorable to Instructions 8 and 9, taking all evidence and inferences in favor of their submission as

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

true and disregarding all contrary evidence and inferences, a reasonable person could find that HSSU sponsoring Dr. Kader's visa petition was a condition and privilege of her employment, and HSSU treated her unfairly in failing to answer the USCIS's request or appeal the denial which had been due solely to the USCIS's failure to respond. A reasonable person could find this was unfair treatment as it relates to employment with respect to conditions or privileges of that employment and tended to deprive Dr. Kader of employment opportunities or adversely affected her status as an employee.

Regardless of what some federal courts have said in other cases under federal law, the law of Missouri is that the trial court did not abuse its discretion in holding that HSSU not answering the USCIS's request for information and not appealing the denial of her visa application qualifies as a discriminatory act under the MHRA.

HSSU's argument otherwise, which relies entirely on inapplicable federal law, fails to view the facts in the light most favorable to the submission of Instructions 8 and 9, and uses the wrong standard of review, is without merit.

2. Denying a work leave of absence

Viewing the evidence in the light most favorable to the submission of Instructions 8 and 9, denying Dr. Kader a work leave of absence also qualifies as a discriminatory act under the MHRA. A reasonable person could find this was unfair treatment as it relates to employment, with respect to conditions or privileges of that employment, and tended to deprive Dr. Kader of employment opportunities.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

An unpaid leave of absence was a privilege of Dr. Kader's employment that was available to her under HSSU's policies (Tr. 129-30). Nonetheless, V.P. Smith never responded to her request for a leave of absence (Tr. 128, 364-65) and never explored whether it would be a possibility for her (Tr. 131). In fact, no one from HSSU even forwarded or relayed her leave-of-absence request to President Givens, even though he was the authority who could approve or deny the request (Tr. 132-33).

a. HSSU's arguments about federal immigration law are not preserved for this Court's review.

HSSU also argues that federal law precluded it from granting Dr. Kader an unpaid leave of absence if her visa had expired (Aplt.Br. 36-40).

HSSU bases this argument on the language of 8 U.S.C. § 1324a(a)(2), a portion of the Immigration Reform and Control Act of 1986 ("IRCA") that makes it "unlawful" for HSSU to "continue to employ" Dr. Kader (Aplt.Br. 37-38). It says that this statute's language "compels discharge, not a leave of absence" (Aplt.Br. 38). It quotes several decisions saying that if an employee becomes unauthorized, "the employer is compelled to discharge the worker" (Aplt.Br. 37) (quoting *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 148 (2002); citing *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 236 n.17 (2d Cir. 2006)).

The Court should reject HSSU's attempts to cover itself in federal immigration law because they are not preserved for review. This includes its immigration-law challenge to any of the discriminatory acts Dr. Kader submitted to the jury in Instructions 8 and 9. And it includes HSSU's invocation of immigration law to support both its instructional claims in its

Point I (Aplt.Br. 37-39, 43) and its challenge to the sufficiency of the evidence in its Points II or III (Aplt.Br. 50, 65).

The first time HSSU *ever* mentioned any federal immigration statute or argued their effect on this case is in its substitute brief in this Court. It did not make these arguments in the six-plus years since this case began until just now.

First, for HSSU to argue in Points II and III that federal immigration law precluded Dr. Kader from submitting the discriminatory acts, it specifically had to make that argument in its motion for directed verdict at the close of all evidence and repeat that argument in its motion for judgment notwithstanding the verdict. To preserve any question of sufficiency of the evidence for appellate review in a jury-tried case, "a motion for directed verdict must be filed at the close of all evidence and, in the event of an adverse verdict, an after-trial motion for new trial or to set aside a verdict must assign as error the trial court's failure to have directed such a verdict." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 163 (Mo. App. 1997) (W.D. en banc), *overruled in part on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013).

Rule 72.01(a) provides that "[a] motion for directed verdict shall state the specific grounds thereof." An insufficient oral motion for directed verdict preserves nothing for review, and the failure to move for a directed verdict for a specific reason or seek a judgment notwithstanding the verdict for that reason waives that reason. *Letz*, 975 S.W.2d at 163.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

HSSU's motion for directed verdict did not argue that federal immigration law precluded Dr. Kader from submitting any discriminatory act to the jury. It only argued "there's been no evidence of any discriminatory animus with regard to national origin", "of pretext", that Dr. Kader "may have been granted the O-1 visa", or that the denial of a leave of absence "would have damaged [Dr. Kader] unless there's evidence that she would've gotten the O-1 visa", and that "these are not adverse employment actions", "there's no evidence to connect" Dr. Kader's complaints with "[t]he acts complained of", it is "speculative as to whether [the acts] caused her any damage", and they "are not adverse employment actions" (Tr. 513-15, 517-19). There was no mention of any federal statute and no argument that immigration law precluded HSSU from granting a leave of absence.

HSSU's motion for judgment notwithstanding the verdict also did not argue that federal immigration law precluded Dr. Kader from submitting any of her discriminatory acts to the jury. It simply repeated these same reasons, with no mention of any federal statute and no argument based in any way on federal immigration law (L.F. 324, 326-33).

HSSU therefore failed to state the "specific grounds" it now alleges in its substitute brief in either its motion for directed verdict or its motion for judgment notwithstanding the verdict, and its invocation of federal immigration law when challenging the sufficiency of the evidence in Points II and III (Aplt.Br. 50, 65) is not preserved for review. *Letz*, 975 S.W.2d at 163.

Second, for HSSU to argue in Point I that there was "instructional error" because federal immigration law precluded Dr. Kader from submitting

any of the discriminatory acts in Instructions 8 or 9 to the jury, it had to state that specific objection at the instruction conference and then repeat that same argument in its motion for new trial. Rule 70.03 ("No party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection. The objections must also be raised in the motion for new trial in accordance with Rule 78.07").

It did not. At the conference, it merely argued the discriminatory acts in Instructions 8 and 9 were "not adverse employment actions" and "there's no evidence that those actions caused any damage" (Tr. 520, 523-25, 28). Its motion for new trial just repeated this (L.F. 333-35). There was no mention of any federal statute and no argument about immigration law.

HSSU therefore failed to preserve its immigration-law argument in Point I for review.

Finally, even if HSSU had taken any of these required steps in the trial court, it never made this argument in its brief in the Court of Appeals. HSSU's Court of Appeals brief does not cite any federal immigration statute or make any argument how federal immigration law precluded any of Dr. Kader's claims. Its immigration-law arguments in Points I, II, and III therefore are not preserved for this reason, too. Rule 83.08 (an appellant's "substitute brief … shall not alter the basis of any claim that was raised in the court of appeals brief"); *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629-30 (Mo. banc 2014) (arguments in appellant's substitute brief not made in Court of Appeals brief are not preserved; collecting cases).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

b. If HSSU's arguments about federal immigration law are preserved, they are without merit.

In any case, neither the federal statute nor the decisions HSSU cites directly address whether an unpaid leave of absence constitutes "employment", or instead qualifies as "discharge" because the employee is no longer being paid by the employer.

HSSU acknowledges that the one federal decision ever to decide this question, *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1009 (9th Cir. 2007), held that an unpaid leave of absence *did not* qualify as continued "employment" under 8 U.S.C. § 1324a(a)(2), but instead qualified as a discharge (Aplt.Br. 38). But HSSU argues this Court should reject this conclusion because *Incalza* was a "strained reading" reached only "because of the strictures of preemption law" and was "result-oriented jurisprudence" that was contrary to "the statute's plain text" (Aplt.Br. 38).[9]

HSSU's attempt to disparage or distinguish *Incalza* is without merit. *Incalza* is directly on-point, well-reasoned, grounded in the plain text of the relevant statutes and the regulations implementing them, and answers the question in this case squarely in Dr. Kader's favor.

In *Incalza*, the plaintiff was an Italian citizen working under an E-1 visa for an Italian employer. 479 F.3d at 1007-08. When his employer was

---

[9] HSSU also draws attention to the authoring judge of *Incalza* in its citation, Judge Stephen Reinhardt. If this is an attempt to infer *Incalza* stemmed from Judge Reinhardt's supposed politics because he was appointed by President Carter, a Democrat, this is inappropriate. Moreover, *Incalza* was a unanimous panel decision in which Judge Reinhardt's opinion was joined in its entirety by Judges Melvin Brunetti and Alex Kozinski, both of whom were appointed by President Reagan, a Republican.

purchased by a non-Italian company, his existing visa no longer allowed him to work for it. *Id.* at 1008. He asked for a leave of absence while he corrected his visa status. *Id.* The employer denied the request for leave, terminated the employee instead, and when he brought state and federal national-origin discrimination claims for his termination, alleged the employee's claims lacked merit because IRCA compelled it to terminate him. *Id.* at 1008-09.

The Ninth Circuit disagreed, holding that IRCA did not require termination and instead the employer equally could have placed the employee on an unpaid leave of absence while he obtained a change in work authorization. *Id.* at 1011-13. Nothing in IRCA "bar[s] an employer from suspending an employee or placing him on unpaid leave for a reasonable period while he remedies the deficiency in his status." *Id.* at 1011. Moreover, under the employer's policies there, like Dr. Kader the employee was entitled to the leave of absence and not to be terminated without cause. *Id.*

This was not a "strained reading" reached only "because of the strictures of preemption law", as HSSU argues (Aplt.Br. 38). Instead, it derived directly from the text of IRCA and the regulations implementing it. While part of the Ninth Circuit's decision addressed whether IRCA preempted a California statute under which the plaintiff had brought claims, the decision also directly held that IRCA's requirement that an employer not continue to employ an alien upon a visa's expiration *did not* bar an unpaid leave of absence while the alien attempts to address his or her visa status:

> [The employer] could have granted [the employee]'s request for temporary, unpaid leave so that he could resolve his work authorization problems. IRCA requires that an employer not "continue to employ" workers if it discovers that they are

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

> unauthorized, but does not bar an employer from suspending an employee or placing him on unpaid leave for a reasonable period while he remedies the deficiency in his status. We read the IRCA implementing regulations as deeming an individual "employed" only if he is performing work and receiving remuneration for that work. The regulations define employment as "any service or labor performed by an employee for an employer within the United States." 8 C.F.R. § 274a.1(h). An employee is defined as "an individual who provides services or labor for an employer for wages or other remuneration." 8 C.F.R. § 274a.1(f). **Thus, an entity does not "continue to employ" an alien in violation of 8 U.S.C. § 1324a(a)(2) unless that individual is continuing to perform a service or labor for the employer for which it is providing remuneration. The employment status of an employee placed on leave without pay is, in effect, suspended during the period that he is neither working nor receiving pay**.

Incalza, 479 F.3d at 1010-11 (footnotes omitted) (emphasis added); *see also Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106, 1114-15 (10th Cir. 2006) (finding that an employer who placed an employee on leave without pay while his immigration status was being clarified could defend itself in a subsequent Title VII suit on the basis that it did so to comply with IRCA); *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 271-72 (Minn. 2017) (employer correctly argued that IRCA allowed placing worker on unpaid leave until he could prove immigration status).

And this is consistent with IRCA's purposes. *Incalza*, 479 F.3d at 1011. Permitting employers to grant leave so that an alien employee can resolve any work authorization problems allows the employee to "obtain a different form or work permit to meet changed conditions or renew a permit that has expired." *Id.* at 1010-11. It also protects employers who, concerned with

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

liability under IRCA, otherwise might terminate first and ask questions later. *Id.* at 1012; *Zamora*, 449 F.3d at 1114-15. And if this were not so, employers would have free rein to fire employees with immigration status issues without providing any time at all for a correction, risking encouraging discriminatory practices in the name of IRCA compliance. *Aramark Facility v. Serv. Employees, Local 1877*, 530 F.3d 831, 825 (9th Cir. 2008).

Just as with the plaintiff in *Incalza*, nothing in IRCA prevented HSSU from granting Dr. Kader a leave of absence. To the contrary, its employment policies permitted leaves of absence (Tr. 129-30, 132-33). And she had a reasonable expectation at the time of requesting the leave of absence that she could correct any deficiencies in her work authorization in a reasonable time. Moreover, just like the plaintiff in *Incalza*, she did in fact ultimately correct them (Tr. 379, 381-83).

HSSU also briefly argues that the U.S. Supreme Court's decision in *Hoffman*, 535 U.S. at 137, conflicts with *Incalza*, and this Court therefore must follow *Hoffman* and not *Incalza* (Aplt.Br. 38). This is untrue.

HSSU argues that *Hoffman* held "continue to employ" in 8 U.S.C. § 1324a means that the employer cannot place the employee on unpaid leave (Aplt.Br. 37-38). To reach this, it quotes language from *Hoffman* describing IRCA as requiring that "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" (Aplt.Br. 37) (quoting 535 U.S. at 148) (HSSU's emphasis removed).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

If anything is strained, it is HSSU's reading of *Hoffman*. As the Ninth Circuit explained in *Incalza*, rejecting the employer's same argument there, *Hoffman* is factually and legally distinguishable, and does not address unpaid leaves of absence and whether they are "employment", which the regulations implementing IRCA squarely do:

> *Hoffman* … did not address the question of terminating employees whose work authorization problems could be expeditiously resolved by renewing an expired application or changing the form of an existing permit. To the contrary, it dealt with undocumented aliens working in a factory without any basis for, or prospect of, obtaining legal status. Unpaid leave would have accomplished absolutely no purpose in their cases. We read *Hoffman* as instructing that, as a general rule, individuals who are indisputably not authorized to work must be discharged immediately. An individual who has an opportunity to switch from an E-1 visa to an H1-B visa, or some other form of work authorization, is, however, another matter, as is an individual whose status is either unclear or disputed. *Hoffman* did not consider the question whether employees who are able to resolve their work authorization problems within a short time may be suspended or granted leave without pay for the interim period. We conclude, for the reasons stated above, that such a practice is fully consistent with IRCA.

Incalza, 479 F.3d at 1012.

Finally, HSSU argues it could not have granted Dr. Kader an unpaid leave of absence due to timing (Aplt.Br. 36-37, 39). This fails to view the facts in the light most favorable to the submission of Instructions 8 and 9.

HSSU policies permitted an unpaid leave of absence (Tr. 129-30). It was President Givens who had authority to approve a request for this (Tr. 132-33). Dr. Kader requested a leave of absence on June 14, 2010, weeks

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

before her visa petition was denied (Tr. 128-31). But V.P. Smith never responded to her request for a leave of absence, never explored whether it would be a possibility for her, and no one even relayed her request to President Givens, who *could have* approved the request (Tr. 128, 131-33, 364-65).

Viewed most favorably to Instructions 8 and 9, the evidence was that HSSU could have granted Dr. Kader an unpaid leave of absence but did not. Nothing in IRCA and nothing in the timing of the request prevented it from doing so. A reasonable person could find that HSSU granting Dr. Kader a leave of absence was a condition and privilege of her employment, and HSSU treated her unfairly in failing even to forward the request to the person who could make that decision. A reasonable person could find this was unfair treatment as it relates to employment with respect to conditions or privileges of that employment and tended to deprive Dr. Kader of employment opportunities or adversely affected her status as an employee.

The law of Missouri is that the trial court did not abuse its discretion in holding that HSSU denying Dr. Kader a leave of absence qualifies as a discriminatory act under the MHRA. HSSU's argument otherwise, which misreads IRCA, ignores the regulations implementing it, and relies only on evidence and inferences contrary to Instructions 8 and 9, is without merit.

C. Viewing the evidence in the light most favorable to Dr. Kader, a reasonable person could find that HSSU's discriminatory acts damaged her.

HSSU also spends a page of so of the argument over its first point arguing (multifariously, *supra* at pp. 33-35), that the verdict directors

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

"suggested" HSSU's discriminatory acts "could have caused damages", whereas "Dr. Kader's damages are wholly speculative" (Aplt.Br. 42-43).[10]

This is without merit. As before, HSSU's argument fails to view the facts in the light most favorable to the submission of Instructions 8 and 9 and uses the wrong standard of review.

Viewing the evidence in the light most favorable to the submission of Instructions 8 and 9, taking all evidence and inferences in their favor as true and disregarding all contrary evidence and inferences, a reasonable person could find that Dr. Kader was damaged from HSSU's discriminatory acts.

Whether a plaintiff in an MHRA was damaged due to a discriminatory act is a question for the jury. *Hurst v. Kan. City, Mo. Sch. Dist.*, 437 S.W.3d 327, 336-37 (Mo. App. 2014). Permissible damages include not only "economic damages" but also damages "incurred for emotional distress, humiliation, and anxiety." *Id.* at 337 (citing *State ex rel. Sir v. Gateway Taxi Mgmt. Co.*, 400 S.W.3d 478, 491 (Mo. App. 2013)). And the emotional distress does not have to be medically diagnosable or proven with expert testimony. *Conway v. Mo. Comm'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App. 1999) (joined by Russell, C.J., and Blackmar, S.J.). Showing that the plaintiff "was embarrassed and upset" by the discrimination and the discrimination "caused … anxiety" is enough. *Hurst*, 437 S.W.3d at 337. The damages the plaintiff suffered are enough to establish the requirement to prove damages even where they are simply "in the form of, at the very least, a denial of work

---

[10] Dr. Kader requests the Court to deny HSSU's first point as impermissibly multifarious, period. But if the Court chooses to review only one part of HSSU's multifarious point, it should be this argument about damages.

opportunities." *Walsh v. City of Kan. City*, 481 S.W.3d 97, 112 (Mo. App. 2016). And the amount of damages the plaintiff deserves for these issues is up to the trier of fact. *Sir*, 400 S.W.3d at 491-92.

Under these principles, a reasonable person could find that Dr. Kader introduced enough evidence to prove that HSSU's discriminatory acts caused her damage, and so the trial court did not abuse its discretion in denying HSSU's motion for new trial for this reason.

First, viewing the evidence in the light most favorable to the submission of Instructions 8 and 9, HSSU's contention that it is "speculation" whether Dr. Kader would have been approved for a visa if HSSU had provided the requisite documentation to the USCIS (Aplt.Br. 42) is untrue. Dr. Kader submitted substantial evidence to support the fact that her ability to obtain work status was not speculative.

Dr. Kader testified that when she sponsored herself, she was able to obtain a visa and maintain her work status by submitting the same or substantially the same paperwork that the USCIS had requested of HSSU in 2010 (Tr. 383). When those same documents were provided, she was granted a visa and work status (Tr. 383). She also testified that she did obtain work status after receiving her residency waiver in February 2011 and would have been able to continue working at that time (Tr. 379, 381-82).

But because HSSU did not submit the documents to the USCIS, appeal the denial of the visa petition, or grant Dr. Kader a leave of absence to fix this issue, there were four academic years between 2010 and 2015 in which she was unable to find full-time employment and made $0 from work as full-

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

time faculty (Tr. 396-97, 404-05). And from 2012 until the date of trial, she had no employment benefits (Tr. 406). Absent the discriminatory acts, Dr. Kader would not have incurred the same amount of lost wages.

There also was substantial evidence of the denial of work opportunities from HSSU's discriminatory acts. Dr. Kader's contract was non-renewed, causing her to incur lost wages and lost benefits (Tr. 374). She was further denied a leave of absence (Ex. 37 p. 617), which, if granted, would have given her time to obtain the national interest waiver she ultimately obtained when sponsoring herself, and return to work for HSSU (Tr. 379, 381-83).

Finally, Dr. Kader testified to suffering emotional distress damages in the form of fears, insecurities, problems sleeping, continuing physical pain and stress, emotional distress, being scared for tomorrow, and loss of reputation (Tr. 406-07). Her testimony regarding the emotional components of her damage was not limited to the non-renewal of her contract but related to the entire process and time frame of the discriminatory acts, including all the acts included within the first paragraph of Instructions 8 and 9 (Tr. 407-07).

Viewing the evidence in the light most favorable to the submission of Instructions 8 and 9, a reasonable person could find that Dr. Kader suffered damages from every disjunctive discriminatory act listed. The trial court did not abuse its discretion in denying HSSU's motion for new trial for this reason.

The Court should affirm the trial court's judgment.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

III. Dr. Kader made a submissible case for national-origin discrimination, because viewing the evidence in the light most favorable to the jury's verdict, she showed (1) she is a member of a protected class, (2) HSSU engaged in discriminatory acts, (3) her membership in the protected class was a contributing factor to those discriminatory acts, and (4) she sustained damage.

(Response to HSSU's Point II)

Standard of Review

"In reviewing the denial of a directed verdict motion, [this Court is] limited to determine whether a submissible case was made," "view[ing] the evidence and all reasonable inferences from it in the light most favorable to the plaintiff and disregard[ing] all contrary evidence." *Kerr v. Vatterott Educ. Cents., Inc.*, 439 S.W.3d 802, 809 (Mo. App. 2014).

"A directed verdict is inappropriate unless reasonable minds could *only* find in favor of the defendant." *McGinnis v. Northland Ready Mix, Inc.*, 344 S.W.3d 804, 809 (Mo. App. 2011) (emphasis in the original). "[D]irecting a verdict is a drastic measure" and is presumed reversible error. *Friend v. Holman*, 888 S.W.2d 369, 371 (Mo. App. 1994).

"A jury verdict will not be overturned unless there is a complete absence of probative facts to support it." *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 865 (Mo. App. 2009). "Where reasonable minds can differ on the question before the jury, this Court will not disturb the jury's verdict." *Id.*

* * *

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

In its second point, HSSU argues that Dr. Kader failed to make a prima facie case of national-origin discrimination. Its argument misstates the law and fails to view the facts in the light most favorable to the jury's verdict.

This Court should affirm the trial court's judgment. Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, there was ample evidence establishing all four elements of Dr. Kader's national-origin discrimination claim.

To make a submissible case of discrimination under the MHRA, a plaintiff must prove (1) she is a member of a protected class, (2) the defendant engaged in a discriminatory act, (3) the plaintiff's membership in the protected class was a contributing factor to that discriminatory act, and (4) the plaintiff sustained damage. *Daugherty*, 231 S.W.3d at 820. If an individual's national origin is a contributing factor, the MHRA makes it unlawful for an employer to fail or refuse to hire or to discharge her, or otherwise to discriminate against her with respect to his compensation, terms, conditions, or privileges of employment, or to limit her in any way which would deprive or tend to deprive her of employment opportunities. § 213.055(1)(a)-(b).

In arguing Dr. Kader failed to make a submissible case, HSSU incorrectly relies exclusively on federal decisions in cases arising under federal civil rights laws, such as Title VII (Aplt.Br. 45-51). But as Dr. Kader explained *supra* at pp. 46-47, and incorporates here, discrimination under the MHRA is not identical to that under Title VII, and the MHRA offers greater

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

protection to workers than does federal law. The MHRA does not require a showing of legal obligation to establish a discriminatory act. *Supra* at p. 46.

So, the question here is whether Dr. Kader's evidence of national-origin discrimination was sufficient under the MHRA, not whatever some federal law might require a federal plaintiff to prove. And there is no dispute as to the first two elements of Dr. Kader's claim. First, HSSU concedes that Dr. Kader is Egyptian (Aplt.Br. 9). Second, there was no question that the discriminatory acts that Dr. Kader submitted to the jury occurred: HSSU did not respond to the USCIS's request for evidence (Ex. 18 p. 606); it did not appeal the denial of the O-1 visa petition (Tr. 99, 127-28; Ex. 18 p. 605); it did not renew her teaching contract (Tr. 367, 369; Ex. 18 p. 605; and it denied her a work leave of absence (Ex. 37 p. 617).

A. Evidence that Dr. Kader's national origin was a contributing factor to the discriminatory acts

HSSU first contends that Dr. Kader did not offer any evidence to establish that its conduct was motivated by her national origin. Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, this is untrue. There was substantial evidence for a reasonable juror to link HSSU's wrongful acts with a discriminatory motive.

Nothing in the MHRA requires a plaintiff prove that discrimination was a "substantial" or "determining" factor behind the employment decision. *Daugherty*, 231 S.W.3d at 820. If consideration of national origin contributed at all to the unfair treatment, it is enough. *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Direct evidence is not common to establish the causal relationship between the wrongful acts and their discriminatory motive because employers are shrewd enough to not leave a trail of direct evidence. *Holmes v. Kan. City Bd. of Police Comm'rs*, 364 S.W.3d 615, 629 (Mo. App. 2012). Instead, most employment discrimination cases depend on inferences and other circumstantial evidence of motive. *Williams*, 281 S.W.3d at 867.

Statements or conduct by people involved in a decision-making process that directly may tend to reflect an alleged discriminatory attitude can support an inference that a discriminatory attitude more likely than not was a factor in the alleged discriminatory acts. *Daugherty*, 231 S.W.3d at 824 n.4.

Under these principles, the evidence was sufficient to show that Dr. Kader's national origin was a contributing factor to HSSU's decisions not to supply the USCIS with the information it requested, not to appeal the denial of her visa that had been due solely to that failure, not to renew her contract, and to deny her a leave of absence. Taken as true, the evidence shows statements by decisionmakers in Dr. Kader's chain-of-command who made direct reference to her national origin, as well as statements from which a reasonable juror could infer a discriminatory animus based on her national origin.

1. Dean Smith's and V.P. Smith's comments during and after the 2009 evaluation about Dr. Kader's national origin and threatening "visa complications"

Dr. Kader's national origin first was injected when Dean Smith discussed Dr. Kader's visa, race, and national origin during a performance evaluation in October 2009 (Tr. 320, 324). Dr. Kader informed Dean Smith

during this meeting that she believed the downgrade in her evaluation was based on her national origin, among other protected classes (Tr. 329, 450). Rather than respond appropriately to Dr. Kader's complaint, Dean Smith accused Dr. Kader of playing the "race card" (Tr. 77, 281).

Following this meeting, Dean Smith sent an e-mail to Ms. Malone, V.P. Smith, and President Givens in which she described the events of the meeting and suggested "those who don't [support progress and the forward movement of the department] will have to be left behind" (Ex. 26 p. 614). A reasonable juror could infer that this was a clear reference to terminating Dr. Kader one day after the meeting in which Dr. Kader's national origin came up as part of the performance-evaluation process.

After the October 2009 evaluation meeting, Dr. Kader informed V.P. Smith that she believed she was being targeted because of her religion and national origin (Tr. 333, 450). She informed him that she wanted to involve an attorney in any meeting with Human Resources to ensure she received fair treatment and her human rights (Tr. 334, 450-51, 464-65). In response, V.P. Smith threatened that Dr. Kader could face "visa complications" if she chose to involve a lawyer (Tr. 334, 450-51, 465).

While V.P. Smith's statement threatening "visa complications" did not make direct reference to Dr. Kader's specific country of origin, her immigration status is inherently linked to her national origin. It still was a statement or conduct by a person involved in the decision-making process from which a reasonable person could infer that a discriminatory attitude

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

more likely than not was a factor in V.P. Smith's part in the discriminatory acts Dr. Kader alleged. *Daugherty*, 231 S.W.3d at 824 n.4.

And a national-origin discrimination claim does not have to be specifically linked to a country of origin, as HSSU seems to argue (Aplt.Br. 45-46). Instead,

> it is clear that the Supreme Court would not require that one's 'national origin' be linked directly to a specific country or nation. Rather, this implies that the term 'national origin' must embrace a broader class of people, and that the term is better understood by reference to certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation.

See Kanaji v. Children's Hosp. of Phila., 276 F. Supp. 2d 399, 401-02 (E.D.Penn. 2003) (under Title VII, holding absence of any specific identification of the plaintiff's nation or county of origin in the discriminatory statements did not warrant summary judgment).

The EEOC's regulations implementing Title VII also support this conclusion. They provide that Title VII prohibits discrimination against individuals because of their "national origin group" or "ethnic group", which is a group of people sharing a common language, culture, ancestry, race, or other social characteristics. *See, e.g.*, 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity … because an individual has the physical, cultural or linguistic characteristics of a national origin group").

So, a reasonable juror could infer that Dr. Kader's national origin was a contributing factor for two administrators, Dean Smith and V.P. Smith, who then subsequently were involved in the discriminatory acts against her.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

2. Ms. Malone's comments about "African Muslims" being "strange" and expecting Dr. Kader to be on her way back to Egypt

Dean Smith and V.P. Smith were not the only two individuals involved in the decision-making process of non-renewing Dr. Kader's contract and engaging in the other discriminatory acts. As V.P. Smith stated, the typical non-renewal process for Dr. Kader's position would also include Ms. Malone, the Director of Human Resources (Tr. 44-45).

Ms. Malone, who was involved in the non-renewal process and who took over the representation of HSSU with respect to the O-1 visa petition after Ms. Shaw left the university (Ex. L p. 651), made discriminatory statements that directly referred to Dr. Kader's national origin at trial, when she admitted to referring to African Muslims as a "strange combination" (Tr. 189-91). (Of course, Egypt is in Africa.) Even though this phrase was not used to describe Dr. Kader specifically, Ms. Malone unquestionably used it, so a reasonable juror could infer that her attitude toward African Muslims contributed to her participation in her discriminatory conduct.

Further evidence of the decisionmakers' discriminatory animus toward Dr. Kader's national origin came in Ms. Malone's July 26, 2010 e-mail to Dean Smith. There, after Dr. Kader's contract was not renewed, Ms. Malone wrote in an e-mail to Dean Smith, "I suspect that shortly she will be on her way back to Egypt" (Tr. 194; Ex. 44).

Ms. Malone then gave false testimony to cover for this statement. She testified that she made this statement because it was in the letter she received from the USCIS (Tr. 195). But the USCIS's denial decision did not

state that Dr. Kader would have to return to Egypt (Ex. 18 pp. 604-07). And Dr. Kader never stated that she would have to leave the country if the visa petition were denied (Tr. 463).

So, especially given Ms. Malone's lies, a reasonable juror could find there was no reason for her to refer to Dr. Kader's country of origin other than to gloat to Dean Smith that not only was Dr. Kader non-renewed, but they also were responsible for her being forced to leave the country (Tr. 463). A reasonable juror could interpret this evidence, too, as establishing that Dr. Kader's national origin was a contributing factor in HSSU's discriminatory acts against her.

3. Disparate treatment to similarly-situated non-Egyptian employees

A link between Dr. Kader's national origin and the discriminatory acts against her also reasonably could be inferred from the disparate treatment she received compared to similarly-situated, non-Egyptian employees. Evidence that employees are sufficiently similar to be relevant is enough to allow treatment of other employees to be used as circumstantial evidence from which an inference of discriminatory animus can be drawn. *Williams*, 281 S.W.3d at 873-74.

First, when Dr. Kader complained about Dean Smith's discriminatory treatment and statements in October 2009, neither V.P. Smith nor Human Resources investigated her complaints (Tr. 206-07). But earlier that same year, V.P. Smith had received complaints from Racquel Bovier-Brown, an employee whose national original was American, that Dean Smith had made racially-charged comments (Tr. 51-53). Unlike with Dr. Kader's complaints,

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Dr. Bovier-Brown's complaints were investigated by Human Resources (Tr. 207). Conversely, Dr. Kader's complaints were ignored (Tr. 206-07). So, Dr. Kader was treated differently than her similarly-situated American colleagues.

Second, following Dr. Kader's non-renewal, two employees were hired into assistant professor positions in her department, the same position she had held within the same department before her non-renewal (Tr. 107-08). Both had different national origins than Dr. Kader, as they were American (Tr. 108). These two American employees were not required to go through the same vetting process as Dr. Kader to receive their positions (Tr. 107, 212, 296-97).

Rather than go through the formal hiring process, they were hired into their positions without responding to job postings, filling out applications, being interviewed, or submitting their résumés (Tr. 107). This circumvention of the formal hiring process never had occurred for any non-American faculty (Tr. 212). Moreover, these two American employees were given higher salaries than Dr. Kader for the same position, even though Dr. Kader had had three years of service with the university (Tr. 107-08, 211).

So, other non-Egyptian employees in the same position, in the same department, and under the same management team were receiving preferential treatment to Dr. Kader. A reasonable juror could find from this evidence, too, that Dr. Kader's national origin was a contributing factor in the discriminatory acts against her.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

B. Dr. Kader does not "conflate national origin with alienage"

HSSU argues that Dr. Kader's claim "conflates national origin and alienage", so while she is a member of a protected class, it was not that membership that was discriminated against, but instead only was her status as an alien, which it says was not actionable (Aplt.Br. 45).

Besides again failing to view the evidence in the light most favorable to the jury's verdict, HSSU only cites federal authorities under Title VII for this proposition (Aplt.Br. 45-48) (citing *Abravanel v. Starwood Hotels & Resorts Worldwide, Inc.*, 94 F. Supp. 3d 134, 145 (D.P.R. 2015); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *United States v. Loaiza-Sanchez*, 622 F.3d 439, 941 (8th Cir. 2010); *Lixin Liu v. BASF Corp.*, 409 Fed.Appx. 988 (8th Cir. 2011); and *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 974 (8th Cir. 2012)).

This is without merit.

First, the decisions on which HSSU relies for this argument are inapposite. The discussion in *Abravanel* related to immigration status and national origin concerned the burden-shifting analysis under Title VII that this Court rejected for the MHRA in *Daugherty*, 231 S.W.3d at 820, and *Hill,* 277 S.W.3d at 664-65.

Rather, under the MHRA, articulating a legitimate, non-discriminatory business reason for an action is not a recognized defense, and a plaintiff is not required to establish that the articulated defense is pretextual. *Daugherty*, 231 S.W.3d at 820. Instead, a plaintiff need only present enough

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

circumstantial evidence from which a jury can infer that national origin was a contributing factor. *Id*.

And even under the federal law HSSU cites, there was a wealth of evidence at trial that established that the alleged justification of "alienage", not "national origin", was, in fact, pretextual.

Unlike in *Abravanel*, 94 F. Supp. 3d at 140, or *Lixin Liu*, 409 Fed.Appx. at 989-91, where the plaintiffs admitted they did not have any evidence of discrimination and did not present any, Dr. Kader objected to discrimination she believed she had been subjected to in October 2009 when her work status was still valid (Tr. 329, 450). She stated she believed she was being discriminated against based on her race, religion, and national origin (Tr. 329, 450). Later, in her June 14, 2010 e-mail to V.P. Smith, she reiterated her fear that she was being discriminated against, particularly regarding how her visa application was being handled, when she wrote,

> Anyway, I reminded [Ms. Shaw] with the law and my rights and she said she will ask the university attorney and will get back to me which she did not do till now.... Is it that simple that Harris-Stowe let me go after all what I did and dreamed for Harris-Stowe? Now I can see that all of my thoughts and feelings were right.

(Ex. 37 p. 617).

Most importantly, unlike the plaintiff in *Abravanel* Dr. Kader was not only qualified for the position she held, having been doing her job for the past three years and having not been terminated for job performance, she also still was in valid work status when her employment contract was non-renewed. This is shown by Ms. Malone's statement to the Missouri Division of

Employment Security on August 23, 2010, in which she indicated that Dr. Kader's employment contract ended on May 31, 2010 (Ex. 20 p. 609). Even HSSU admits that Dr. Kader was authorized to work, at minimum, through June 13, 2010 (Aplt.Br. 36) (*see also* Ex. J p. 648).

So, unlike the plaintiff in *Abravanel* Dr. Kader was not terminated due to her alienage. She had a valid work authorization at the time of her non-renewal, so a reasonable juror could find that the claim that she was non-renewed because she was unable to work due to her visa status was a pretext.

Likewise, viewing the evidence in the light most favorable to the verdict, Dr. Kader was not non-renewed because her O-1 visa petition was denied, as that denial did not come until *after* HSSU already had non-renewed her contract. The three possible dates HSSU gave for the termination of Dr. Kader's contract were May 31, 2010 (Ex. 20 p. 609); June 11, 2010 (Ex. 37 p. 605); or July 1, 2010 (Tr. 94). The USCIS's denial determination was not issued until July 2, 2010 (Ex. 18 p. 604).

So, a reasonable juror could find that HSSU's decision to non-renew Dr. Kader's employment was not related to her alienage or non-legal work status, as she was still in legal work status when the discriminatory acts occurred. A reasonable juror could find that HSSU revealed its discriminatory intent by the October 2009 statements of Dean Smith and V.P. Smith, and then executed the decision to non-renew Dr. Kader's contract before it ever could have known that the O-1 visa petition was denied. Even if "pretext" somehow applied, this establishes that HSSU's claimed reason for non-renewing Dr. Kader's contract was pretextual.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

All the other federal decisions HSSU cites for this proposition are inapposite in other ways, too.

In *Espinoza*, 414 U.S. at 86, the U.S. Supreme Court held that refusal to hire a person because he is not a United States citizen does not constitute employment discrimination based on national origin. *Id.* at 91-95. *Espinoza* is distinguishable because the only action about which the plaintiff there complained was the failure to hire him because of his Mexican citizenship. *Id.* at 87-88. Here, the discrimination against Dr. Kader was far more pervasive than just that. *Supra* at pp. 68-74.

In *Guimaraes*, the Eighth Circuit held the plaintiff had not made a submissible case of national-origin discrimination. 674 F.3d at 974. But it held this was because (1) she did not identify a similarly-situated employee outside of her protected class who was treated more favorably, and (2) the potentially discriminatory statement of a decisionmaker who the plaintiff offered did not suggest that the statement was "charged with national-origin discriminatory animus or carrie[d] the distinct tone of such motivation or implication." *Id.* Conversely, Dr. Kader offered evidence that similarly-situated, non-Egyptian employees were treated more favorably than she was, and she offered statements from the decisionmakers involved in the adverse employment actions taken against her that suggested a discriminatory animus toward members of her protected class. *Supra* at pp. 68-74.

Finally, in *Lixin Liu*, the plaintiff's national-origin-discrimination claim was based solely on comparing himself to other employees in his unit who were not terminated, three of whom had his same national origin. 409

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Fed.Appx. at 991. And he pointed to no other evidence of discrimination beyond his own unsupported affidavit. *Id.* at 989-90. In short, there was no evidence his employer had any concern except for immigration-law compliance. *Id.* Conversely, Dr. Kader had no comparators of the same national origin who received a benefit for which she was seeking redress. Indeed, hers all were of different races and national origin yet received preferential treatment to her. And she presented additional evidence of national origin discrimination and retaliation beyond the simple denial of her request for a leave of absence, including direct reference to her national origin, threats of visa complications, and discriminatory statements from superiors and others.

Dr. Kader does not conflate national origin with "alienage". Even if federal pretext law somehow applied, a reasonable juror could find that HSSU's appeal to "alienage" was mere pretext.

C. HSSU not renewing Dr. Kader's contract, not responding to the USCIS's request for evidence to support her O-1 visa petition, not appealing the denial of her O-1 visa petition, and denying her a work leave of absence were unfair employment-related actions legally capable of being the basis for a cause of action under the MHRA.

HSSU also repeats the argument from its first point that the actions Dr. Kader alleged were its discriminatory acts legally could not have been (Aplt.Br. 48-50). It argues not responding to the USCIS was "negligence"[11]

[11] That is an inference in HSSU's favor, not the jury's, and must be disregarded. The inference in the jury's favor is that, just as Dean Smith and V.P. Smith threatened, HSSU *intentionally* sabotaged Dr. Kader's visa

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

that was "insufficient to submit a claim of national origin discrimination" (Aplt.Br. 48). It argues there were "no grounds" to appeal the denial of Dr. Kader's visa petition (Aplt.Br. 49). It argues denying Dr. Kader a leave of absence was "legally required" (Aplt.Br. 50). It argues it had "no choice" not to renew Dr. Kader's contract (Aplt.Br. 50).

Dr. Kader already explained *supra* at pp. 43-62 why this is without merit and incorporates that explanation here.

Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in favor of their submission as true and disregarding all contrary evidence and inferences, a reasonable juror could find that HSSU sponsoring Dr. Kader's visa petition was a condition and privilege of her employment, and HSSU treated her unfairly in failing to answer the USCIS's request, failing to appeal the denial that had been due solely to that failure to answer, in failing to renew her contract, and in denying her a leave of absence, to all of which her national origin was a contributing factor. A reasonable person could find this was unfair treatment as it relates to employment with respect to conditions or privileges of that employment and tended to deprive Dr. Kader of employment opportunities or adversely affected her status as an employee.

There was ample evidence that Dr. Kader was a member of a protected class as to her national origin, HSSU engaged in discriminatory acts, and her national origin was a contributing factor in those discriminatory acts.

---

petition. HSSU's brief is littered with similar inferences in its own favor and evidence the jury obviously rejected.

D. Viewing the evidence in the light most favorable to Dr. Kader, HSSU's discriminatory acts damaged her.

Finally, HSSU repeats its same argument from its first point that there was insufficient evidence Dr. Kader was damaged by its discriminatory acts (Aplt.Br. 51-54).

Dr. Kader already explained *supra* at pp. 62-65 why this is without merit and incorporates that explanation here.

Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, a reasonable juror could find that Dr. Kader suffered damages from every discriminatory act she submitted to the jury.

The Court should affirm the trial court's judgment.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

IV. Dr. Kader made a submissible case for retaliation, because viewing the evidence in the light most favorable to the jury's verdict, she showed (1) she complained of discrimination, (2) the employer took adverse action, and (3) the adverse action was causally linked to the protected activity.

(Response to HSSU's Point III)

Standard of Review

"In reviewing the denial of a directed verdict motion, [this Court is] limited to determine whether a submissible case was made," "view[ing] the evidence and all reasonable inferences from it in the light most favorable to the plaintiff and disregard[ing] all contrary evidence." *Kerr*, 439 S.W.3d at 809. "A directed verdict is inappropriate unless reasonable minds could *only* find in favor of the defendant." *McGinnis*, 344 S.W.3d at 809 (emphasis in the original). "[D]irecting a verdict is a drastic measure" and is presumed reversible error. *Friend*, 888 S.W.2d 371.

"A jury verdict will not be overturned unless there is a complete absence of probative facts to support it." *Williams*, 281 S.W.3d at 865. "Where reasonable minds can differ on the question before the jury, this Court will not disturb the jury's verdict." *Id.*

* * *

In its third point, HSSU argues that Dr. Kader failed to make a prima facie case of retaliation. It argues this is because Dr. Kader's case suffers from two deficiencies: (1) she did not engage in protected activity, and (2) there was no nexus between her complaints and the subsequent discriminatory acts against her.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Both of HSSU's arguments misstate the law and fails to view the facts in the light most favorable to the jury's verdict. Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, there was ample evidence establishing all three elements of Dr. Kader's retaliation claim.

This Court should affirm the trial court's judgment.

A. Dr. Kader made complaints of discrimination within the meaning of the MHRA.

Section 213.070.1(2), R.S.Mo., makes it

> an unlawful discriminatory practice for an employer … [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter [i.e., the MHRA] or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter.

So, to prevail on a claim of retaliation, a plaintiff must demonstrate (1) she complained of discrimination, (2) the employer took adverse action, and (3) the adverse action was causally linked to the protected activity. *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 245 (Mo. App. 2006).

Section 213.070's language is broad and prohibits retaliation in any manner. *Keeney*, 911 S.W.2d at 625. To retaliate is to inflict in return. *Id.* Per § 213.070.1(2), retaliation includes ***any*** act done for the purpose of reprisal that results in damage to the plaintiff, even if the act is not otherwise the subject of a claim in contract or tort. *Id.* (emphasis added).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Citing almost no authority, HSSU argues that Dr. Kader did not make a submissible case that she had complained of discrimination, and her complaint in October 2009 was insufficient (Aplt.Br. 55-57). It argues this is because she merely complained about comments about her race or immigrant status, and her comments to Dean Smith were insufficient (Aplt.Br. 55-56).

HSSU's arguments are without merit. Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, a reasonable juror could find that Dr. Kader engaged in protected oppositional activity that the MHRA protects.

The scope of oppositional behavior to meet the first element of a retaliation claim is extremely broad and extends to "someone who has taken no action at all to advance a position beyond disclosing it." *Crawford v. Metro. Govt. of Nashville & Davidson Cty.*, 555 U.S. 271, 277 (2009). "'When an employee communicates a belief that the employer engaged in … a form of employment discrimination, that communication' virtually always constitutes the employee's *opposition* to the activity." *Id.* at 276 (citation omitted; emphasis and ellipsis the Court's).

Assessing whether an employee engaged in oppositional behavior is based on the employee's reasonable belief rather than a requirement that the employee knows the finer points of the law governing discrimination when she makes a complaint. *Moyo v. Gomez*, 40 F.3d 982, 984-85 (9th Cir. 1995).

Nor is an employee expected to use legal terms or buzzwords when opposing discrimination. *Yanowitz v. L'Oreal USA, Inc.*, 116 P.3d 1123, 1134

(Cal. 2005). For example, an "employee need not utter the magic words 'Title VII' to put an employer on notice of unlawful discrimination." *Bahri v. Home Depot USA, Inc.*, 242 F. Supp. 2d 922, 956 (D.Ore. 2002).

Under these principles, viewing the evidence in the light most favorable to the jury's verdict Dr. Kader's activity in October 2009, the spring of 2010, and the summer of 2010 all fall within the broad definition of "opposition" in § 213.070.1(2).

In October 2009, Dr. Kader engaged in oppositional activity to unlawful discrimination when she complained to Dean Smith that she believed she was being downgraded in her faculty evaluation because of her race, religion, and national origin (Tr. 329, 450). She did not merely "sa[y] some students commented about [her] race or her immigrant status", as HSSU argues (Aplt.Br. 56).

Dr. Kader continued engaging in this protected behavior in October 2009 by meeting with V.P. Smith and complaining to him that Dean Smith was targeting her because of her religion and national origin and that she believed her evaluation results were happening because of her race, religion, and national origin (Tr. 333, 450).

Dr. Kader again engaged in protected activity in the spring of 2010. In April 2010, she underwent another faculty evaluation in which she believed she was being downgraded by Dean Smith (Tr. 427). During that evaluation, she informed Dean Smith that if what happened in the fall of 2009 happened again, she would need to involve an attorney (Tr. 427). In doing so, Dr. Kader was making a clear communication referring to her complaints of

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

discrimination in October 2009, regardless of whether she had used the precise terms or buzzwords contained in the MHRA.

Dr. Kader again engaged in protected activity in the summer of 2010. In a conversation in June 2010 with Robin Shaw, the employee responsible for submitting information to the USCIS on HSSU's behalf, Dr. Kader reminded Ms. Shaw "with the law and [her] rights under the law" (Ex. 37 p. 617). Dr. Kader identified the treatment she believed was discriminatory in an e-mail to V.P. Smith, stating, "Is it that simple that Harris-Stowe let me go after all what I did and dreamed for Harris-Stowe? Now I can see that all of my thoughts and feelings were right" (Ex. 37 p. 617). Later that summer, Dr. Kader again engaged in protected activity one last time by filing a charge of discrimination on August 2, 2010 (Tr. 370).

In each of these instances, Dr. Kader engaged in protected oppositional activity. She disclosed her position that she had experienced discrimination based on her race, religion, and national origin. *Crawford*, 555 U.S. at 277. She communicated her belief that others at HSSU had engaged in a form of employment discrimination. *Id.* Viewing the evidence in the light most favorable to the jury's verdict, a reasonable juror could find that Dr. Kader had a reasonable belief that she had experienced this discrimination and was disclosing it, which his all she had to prove. *Moyo*, 40 F.3d at 984-85.

HSSU's argument otherwise is that Dr. Kader's complaints solely related to her status as an immigrant and her visa status (Aplt.Br. 55-57). As before, it only views evidence in the light most favorable to it and ignores evidence and inferences in Dr. Kader's favor. Dr. Kader made a clear

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

communication to Dean Smith that she believed her downgrade in her evaluation was based on her "**race, religion, and national origin**" (Tr. 329, 450). Similarly, she told V.P. Smith that she was being targeted because of "**her religion and national origin**" (Tr. 333) and that her evaluation results were happening because of her "**race, religion, and national origin**" (Tr. 450). Race, religion, and national origin are all protected classes distinct from alienage, and all are in the MHRA's plain language. *See* § 213.055.1(1).

A reasonable juror could find that Dr. Kader engaged in protected oppositional activity that the MHRA protects, meeting the first element of retaliation.

B. Dr. Kader showed a causal connection between her complaints and HSSU's discriminatory acts.

HSSU also argues Dr. Kader failed to prove the third element of retaliation, a causal connection between her complaints and HSSU's discriminatory acts (Aplt.Br. 58-60). It bases this almost entirely on what it says is the timing of the complaints in 2009 versus the discriminatory acts in June and July 2010 (Aplt.Br. 58).

HSSU's argument is without merit. A causal connection between the protected activity and the retaliatory conduct can be proven circumstantially. *Williams*, 281 S.W.3d at 868. Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, there was substantial evidence to link Dr. Kader's complaints of discrimination to HSSU's retaliatory acts.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Dr. Kader testified that Dean Smith discussed her visa, race, and national origin during her October 2009 performance evaluation (Tr. 320, 324). Following this meeting, Dean Smith sent her October 17, 2009 e-mail to Ms. Malone, V.P. Smith, and Ms. Givens stating that Dr. Kader needed to be "left behind" (Ex. 26 p. 614). Based on the language used and temporal proximity to Dr. Kader's oppositional behavior, a reasonable juror could infer a retaliatory animus by Dean Smith and other decisionmakers to whom she sent her e-mail, as Dean Smith made a specific reference to the group that Dr. Kader needed to be left behind.

Then, within days of the October 2009 evaluation meeting, Dr. Kader made complaints to V.P. Smith regarding Dean Smith's discriminatory behavior. During that meeting, Dr. Kader stated she wanted her concerns addressed and called for her human rights (Tr. 342, 456-58). She also stated she wanted to have an attorney present for any meeting with Human Resources to ensure she received fair treatment and her human rights (Tr. 334, 45-51, 464-65). In response, V.P. Smith specifically threatened Dr. Kader that she would face "visa complications" if she insisted on involving a lawyer (Tr. 334, 450-51, 465). This response, which obviously was temporally connected to Dr. Kader's October 2009 complaints, illuminated HSSU's motive and directly foreshadowed the retaliatory conduct of interfering with Dr. Kader's visa.

HSSU's argument that there was no temporal connection between Dr. Kader's October 2009 complaints and the retaliatory conduct that came to a head in 2010 ignores two important facts: (1) the discriminatory behavior

that culminated in the interference with Dr. Kader's visa began long before summer 2010 and (2) Dr. Kader engaged in protected activity not just in October 2009 but also in the spring and summer of 2010.

Although the non-renewal of Dr. Kader's contract occurred ten months after she first raised her complaints of discrimination, the interference with her employment began much sooner. Dean Smith and V.P. Smith both made comments, motivated by Dr. Kader's discrimination complaints as early as October 2009, which prefigured discriminatory conduct to create visa complications and not renew Dr. Kader's employment within days of Dr. Kader's initial complaints. And in the spring of 2010, which was HSSU's first opportunity following Dr. Kader's 2009 protected activity to interfere with her pursuit of a new visa, V.P. Smith, Ms. Malone and Ms. Shaw falsely informed Dr. Kader that her entire immigration file with HSSU had been lost or destroyed (Tr. 356-57). So, a reasonable juror could find that the decisions to engage in the discriminatory behavior and the process of executing that decision began long before summer 2010.

Then, in the late spring of 2010, after the O-1 visa petition had been filed, HSSU failed to respond to requests for information from the USCIS (Ex. 18 p. 606). Dr. Kader reached out to HSSU to inform it that the USCIS needed this information (Ex. 37 p. 617). Nonetheless, from June 14 to July 2, 2010, HSSU did not send the information, continuing its retaliation against Dr. Kader. The two-week period in which HSSU failed to respond to the USCIS's requests for evidence immediately followed Dr. Kader's protected activity: her June 11, 2010 phone call with Ms. Shaw in which she reminded

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Ms. Shaw about her human rights, and her June 14, 2010 e-mail to V.P. Smith in which she reported her meeting with Dr. Shaw and expressed concern that her "thoughts and feelings [that she was being discriminated against] were right" (Ex. 37 p. 617).

Similarly, HSSU's opposition to Dr. Kader's unemployment benefits application occurred just three weeks after Dr. Kader filed her charge of discrimination (Ex. 20). Ms. Malone's opposition was made on August 23, 2010, which was only 21 days after Dr. Kader filed her charge (Ex. 20).

HSSU argues there was no evidence that it had opposed Dr. Kader's application for unemployment benefits at all (Aplt.Br. 60). This argument is missing from HSSU's corresponding point in its brief before the Court of Appeals (Appellant's opening brief in the Court of Appeals, pp. 29-35). Instead, HSSU specifically said it was *not* arguing this was error (*id.* at p. 34). This is because it acknowledged this was not preserved (*id.* at p. 34). In any case, by not making this argument in its brief in the Court of Appeals, HSSU has waived this claim in this Court. Rule 83.08. *Supra* at p. 56.

Regardless, viewing the evidence in the light most favorable to the jury's verdict, there was ample evidence that HSSU had opposed Dr. Kader's application for unemployment benefits, had done so falsely, and that Dr. Kader had been entitled to the benefits. Ms. Malone responded for HSSU in opposition to the unemployment application (Ex. 20 p. 609). In the opposition, she falsely stated to the Division of Employment Security that HSSU had no part in Dr. Kader's visa application (Tr. 177; Ex. 20 p. 609). She also falsely told the Division that HSSU sent in everything it had to the

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

USCIS and that it "did send paperwork in to them" (Ex. 20 p. 609). Given that HSSU concedes it did not respond to the USCIS's request for information, this was a lie. The Division then denied Dr. Kader's application for unemployment benefits (Tr. 377-78). Later, after she appealed this decision, her benefits were approved (Tr. 379).

In any case, from each of these instances a reasonable juror could find that all HSSU's retaliatory behavior Dr. Kader submitted to the jury occurred within weeks, sometimes days, after her continued complaints of discrimination in the spring and summer of 2010.

Moreover, following Dr. Kader's engagement in protected activity, May, June, and July 2010 were the first opportunity HSSU had to retaliate against Dr. Kader by interfering with her visa application process and non-renew her contract. Before then, Dr. Kader's visa and contract simply had not been up for renewal. So, the events in May, June, and July 2010 were the most temporally connected opportunity to engage in retaliatory conduct, and HSSU did just that:

- HSSU could not have failed to respond to the USCIS's request for evidence before 2010 because there was no petition on file and no request before then.
- HSSU could not have non-renewed Dr. Kader's contract before the summer of 2010 because her contract was not up for renewal before then.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

- HSSU could not have denied Dr. Kader's request for a work leave of absence or request to file a faculty grievance before the summer of 2010 because she had not requested this before then.

So, viewing the evidence in the light most favorable to the jury's verdict, a reasonable juror could find there was a sufficient temporal nexus between all these retaliatory acts and Dr. Kader's complaints of discrimination.

And this temporal connection is enough to establish the wrongful acts were motivated by a retaliatory animus. Unlike the cases HSSU cites, the temporal connection in this case is supplemented by other substantial evidence from which the jury drew the reasonable inference of retaliatory animus, such as the October 2009 statements of Dean Smith that Dr. Kader would need to be "left behind" and of V.P. Smith that Dr. Kader would face "visa complications."

Indeed, Dr. Kader's retaliation claim does not depend on timing alone. A plaintiff who has evidence besides timing to support the causal connection element has an even stronger prima facie case of retaliation. For example, in *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819-20 (8th Cir. 1998), the Eighth Circuit held that three months between protected activity and an adverse action, combined with evidence that management confronted the plaintiff about filing a charge and treated similarly-situated employees less harshly, was enough to show a causal connection.

The fact that ten months passed between Dr. Kader initially raising her complaints of discrimination and HSSU interfering with her visa, as V.P.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Smith threatened in October 2009, and non-renewing her contract does not break the causal connection between Dr. Kader's complaints and the discriminatory acts committed against her.

If anything, this is merely a question for the jury. Longer periods of time have passed scrutiny. For example, in *Smith v. St. Louis Univ.*, the Eighth Circuit held that a factual question regarding the causal connection precluded summary judgment, even though the alleged retaliation occurred close to one year after the protected activity. 109 F.3d 1261, 1266 (8th Cir. 2011), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011). In *Smith*, the court recognized that "the passage of time between events does not by itself foreclose a claim of retaliation; rather, it weakens the inference of retaliation that arises when a retaliatory act occurs shortly after a complaint." *Id.* But whether it is too weak is for the jury. *Id.*

Dr. Kader engaged in oppositional behavior in October 2009, and the university took retaliatory action at its first opportunity in the spring of 2010 to deliver on the threats made in October 2009 that she would face "visa complications" for her desire to involve an attorney to protect her human rights.

Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence, a reasonable juror could find that Dr. Kader engaged in oppositional behavior and there was substantial evidence linking that oppositional behavior with HSSU's discriminatory acts.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

C. HSSU has not preserved its challenge to Dr. Kader's damages as to her retaliation claim, but either way, viewing the evidence in the light most favorable to Dr. Kader, HSSU's retaliatory acts damaged her.

At the end of its third point, HSSU argues Dr. Kader's retaliation claim also was not submissible because her "allegations of damages as a result of Harris-Stowe's actions are only speculative" (Aplt.Br. 60).

This claim, too, is missing from HSSU's corresponding point in its brief before the Court of Appeals (Appellant's opening brief in the Court of Appeals, pp. 29-35). There, its point challenging the submissibility of Dr. Kader's retaliation claim was Point II. While its third point in its substitute brief argues "there was no proof of damages" (Aplt.Br. 29), this language was missing from Point II in its Court of Appeals brief (p. 17), as is the subsection of its point that it now includes in its substitute brief (Aplt.Br. 60-61).

Because of this, HSSU has waived this claim in this Court. Rule 83.08. *Supra* at p. 56.

Regardless, Dr. Kader already explained *supra* at pp. 62-65 why HSSU's damages argument is without merit and incorporates that explanation here.

Viewing the evidence in the light most favorable to the jury's verdict, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences, a reasonable juror could find that Dr. Kader suffered damages from every retaliatory act she submitted to the jury.

The Court should affirm the trial court's judgment.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

V. HSSU's fourth point is not preserved for review, because HSSU never moved for a directed verdict as to punitive damages, waiving any argument as to the submissibility of punitive damages.

(First response to HSSU's Point IV)

HSSU's fourth point argues that the trial court erred in submitting the issue of punitive damages to the jury (Aplt.Br. 61-67).

This point is not preserved for appeal because HSSU never moved for a directed verdict regarding punitive damages (Tr. 513-19). Citing no authority, HSSU argues that by "ask[ing] for a directed verdict on both the discrimination and retaliation claims … [i]t necessarily asked the Court not to submit punitive damages on those claims either" (Aplt.Br. 62).

HSSU's preservation argument is without merit. The law of Missouri is that seeking a directed verdict on a claim generally without specifically seeking so on the issue of punitive damages is not specific enough to preserve a challenge to the submissibility of punitive damages on appeal.

To preserve the question of sufficiency of the evidence for appellate review in a jury-tried case, "a motion for directed verdict must be filed at the close of all evidence and, in the event of an adverse verdict, an after-trial motion for new trial or to set aside a verdict must assign as error the trial court's failure to have directed such a verdict." *Letz*, 975 S.W.2d at 163.

Rule 72.01(a) authorizes motions for directed verdict and provides that "[a] motion for directed verdict shall state the specific grounds thereof." (emphasis added). An insufficient oral motion for directed verdict preserves nothing for review, and the failure to move for a directed verdict with

specificity waives any contention that the plaintiff failed to prove a submissible case. *Letz*, 975 S.W.2d at 163.

So, raising a challenge to the submissibility of the evidence to support punitive damages for the first time in an instruction conference is insufficient to preserve the issue for appellate review. *Wilkins v. Bd. of Regents of Harris-Stowe State Univ.*, 519 S.W.3d 526, 545 (Mo. App. 2017); *Walsh*, 481 S.W.3d at 112.

In *Walsh*, the defendant moved for directed verdict at the close of the plaintiff's evidence and again at the close of all evidence. *Walsh*, 481 S.W.3d at 104. But it was not until the instruction conference that the defendant, in an objection to the instructions regarding punitive damages, argued that the plaintiff failed to make a submissible case on the issue of punitive damages. *Id.* So, because an objection to punitive damages had not been among the "specific grounds" in the motion for directed verdict, the Court of Appeals held that by failing to raise the submissibility of a claim of punitive damages in its motions for directed verdict, the defendant had not challenged the submissibility of punitive damages with the specificity required by Rule 72.01(a) and therefore failed to preserve the issue for appeal. *Id.* at 113.

Similarly, in *Wilkins* the defendant "for the first time raised the issue of submissibility as to punitive damages when it objected to [plaintiff's] proposed jury instruction claiming that [plaintiff] failed to make a submissible case for punitive damages." 519 S.W.3d at 544. So, the Court of Appeals, following *Walsh*, held the defendant did not preserve this claim of

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

error because it did not raise the issue before the trial court ruled on its motions for directed verdicts. *Id.* at 545.

The same as in *Walsh* and *Wilkins* is true here. HSSU did not dispute the evidence of punitive damages until the instruction conference (Tr. 530-31). By that time, its motions for directed verdicts had been raised, argued, and denied, and none of their specific grounds mentioned punitive damages at all (Tr. 513-19).

Accordingly, HSSU's fourth point is not preserved for review. The Court should deny it for this reason alone. Nor should the Court review HSSU's fourth point for plain error. *See supra* at pp. 30-31 n.1.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

VI. Dr. Kader made a submissible case for punitive damages for her national-origin-discrimination and retaliation claims, because viewing the evidence in the light most favorable to the jury's verdict, she showed HSSU's conduct was outrageous because of evil motive or reckless indifference to the rights of others.

(Second response to HSSU's Point IV)[12]

Standard of Review

Whether a plaintiff made a submissible case for an award of punitive damages is a question of law reviewed de novo using the same criteria the trial court had to use. *Williams*, 281 S.W.3d at 869-70.

This Court views the evidence in the light most favorable to submissibility, taking all evidence and inferences in favor of submissibility as true and disregarding all contrary evidence and inferences. *Id.* Only evidence that tends to support the submission should be considered. *Alhalabi v. Mo. Dep't of Natural Res.*, 300 S.W.3d 518, 529 (Mo. App. 2009). The plaintiff makes a submissible case for punitive damages if the evidence, viewed this way, would permit a reasonable juror to conclude that the defendant's conduct was outrageous because of evil motive or reckless indifference to the rights of others. *Id.*; *Williams*, 281 S.W.3d at 870.

* * *

In its fourth point, HSSU argues Dr. Kader did not make a submissible case for punitive damages (Aplt.Br. 61-67).

This is without merit. Viewing the evidence in the light most favorable to the submission of punitive damages, taking all evidence and inferences in

---

[12] HSSU's fourth point is not preserved for appeal. *Supra* pp. 95-97. Dr. Kader only offers this response as an alternative, should the Court somehow hold the point is preserved.

favor of submission as true and disregarding all contrary evidence and inferences, a reasonable juror could find that HSSU's actions in discriminating and retaliating against Dr. Kader were outrageous because of evil motive or reckless indifference to the rights of others.

A. Ample evidence supported that HSSU's conduct was outrageous because of evil motive or reckless indifference to the rights of others.

In an MHRA case, the plaintiff establishes a claim to punitive damages by showing that the defendant's conduct was outrageous, because of evil motive or reckless indifference to the rights of others. *H.S. v. Bd. of Regents, S.E. Mo. State Univ.*, 967 S.W.2d 665, 672 (Mo. App. 1998); *Alhalabi*, 300 S.W.3d at 529.

Punitive damages are permissible whether there is an element of malice, wantonness, or bad motive. *Williams*, 281 S.W.3d at 870. To determine whether malice existed, the Court examines whether the defendant engaged in a wrongful act intentionally and without just cause. *Id.* If a defendant intentionally engages in a wrongful act and knows the act is wrongful, it is done wantonly and with bad motive. *Id.*

In MHRA cases, proof an employee offered to support her underlying claim of discrimination or retaliation and proof she offered to prove an additional claim for punitive damages need not be mutually exclusive, and often is not. *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777, 783 (Mo. App. 2010); *Holmes*, 364 S.W.3d at 629. The employee's evidence supporting the underlying MHRA claim, with nothing more, also can allow a reasonable fact-finder to conclude evil motive or reckless indifference, meeting the employee's

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

burden in submitting punitive damages, too. *Claus*, 328 S.W.3d at 783; *Holmes*, 364 S.W.3d at 629.

Proof sufficient to support punitive damages may be established by circumstantial evidence, as employers may act to prevent the development of direct evidence of discriminatory motive. *Holmes*, 364 S.W.3d at 629. "Punitive damages awards have been sustained when the court found management participated in the discriminatory conduct and treated the plaintiff differently from others." *H.S.*, 967 S.W.2d at 672; *Alhalabi*, 300 S.W.3d at 529. Similarly, punitive damages are appropriately affirmed where the employee's supervisors participated in the discriminatory conduct and treated the employee differently than others. *H.S.*, 967 S.W.2d at 672

Under these principles, viewing the evidence in the light most favorable to submitting punitive damages the evidence in this case was sufficient for a reasonable juror to conclude that the management and Human Resource employees who perpetuated the wrongful acts against Dr. Kader acted wantonly and with bad motive.

First, during Dr. Kader's 2009 faculty evaluation with her direct supervisor, there was a discussion about her visa, race, and national origin (Tr. 320, 324-25). Once Dr. Kader told Dean Smith that she believed the downgrade in her evaluation was based on race, religion, and national origin (Tr. 329, 450), Dean Smith accused her of using the "race card" (Tr. 77, 281) and recommended to other administrators that Dr. Kader be "left behind" (Ex. 26 p. 614).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

From this, a reasonable juror could conclude that Dean Smith knew it was inappropriate to discuss an employee's visa, race, and national origin in a routine annual faculty evaluation. She was an educated professional with experience in the field of education training. Beyond knowing that discussing race, visa status, and national origin was inappropriate, she was aware that responding to a complaint of discrimination from a direct subordinate by accusing the subordinate of using the "race card" is wrongful and in direct contravention of university policies.

University policies also required investigation into all complaints of discrimination (Tr. 201). An employee in Dr. Kader's position could voice complaints to Human Resources, her direct supervisor, or that supervisor's supervisor (Tr. 203-04). If an employee reported issues about her race and her visa status coming up in a faculty evaluation, those would be serious allegations and should be investigated (Tr. 79-80). But Dr. Kader's complaints were not investigated. They were ignored. When Dr. Kader further reported her complaints up the chain of command by speaking with V.P. Smith, no one ever reported her complaints to Human Resources (Tr. 201).

Ignoring Dr. Kader's complaints violated HSSU's policies regarding investigation of complaints of discrimination. V.P. Smith testified he would forward allegations of race and visa status complaints to Human Resources, but he waited a year before sending Dr. Kader's e-mail containing her complaints to Human Resources despite having no reason for having waited so long (Tr. 79-80). No one ever reported Dr. Kader's concerns that her

faculty evaluation was adversely affected because of her race, national origin, or her status as an immigrant (Tr. 201). And because of this, there was never a meeting with Human Resources or any of the administrators about her complaints (Tr. 279), nor did Human Resources ever investigate them (Tr. 206-07).

V.P. Smith and Ms. Malone testified at length regarding the responsibilities of management and Human Resources to investigate complaints of discrimination. V.P. Smith acknowledged it was his job to investigate complaints of discrimination and work with Human Resources when he received allegations of discriminatory behavior or comments that could be construed as discriminatory behavior (Tr. 50). But he never provided this information to Human Resources until a year later, conspicuously *after* Dr. Kader's employment had been non-renewed, and he ignored Dean Smith and Dr. Kader's requests to meet with Human Resources. The only steps he took in response were to threaten "visa complications" if Dr. Kader involved an attorney to protect her human rights (Tr. 334, 450-51, 465).

A reasonable juror could infer that V.P. Smith and Human Resources knew the appropriate procedures to respond to a complaint of discrimination, as they had investigated when they received similar complaints from a non-Egyptian employee (Tr. 51-53). V.P. Smith previously received complaints from an American employee alleging racially discriminatory comments (Tr. 51-53). Unlike Dr. Kader's complaints, Human Resources investigated those complaints (Tr. 207).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

HSSU's failure to disclose to Dr. Kader that it received a request from the USCIS for initial evidence and its failure to respond to this request after Dr. Kader notified them again of the request also supports an inference of evil motive and reckless indifference. After the petition for Dr. Kader's visa was submitted, HSSU received a request for evidence from the USCIS (Tr. 172). But HSSU never communicated this to Dr. Kader (Tr. 360, 461-61, 463). Instead, Ms. Shaw falsely denied to Dr. Kader that she ever received the request (Tr. 361). And following Dr. Kader's conversation with Ms. Shaw, HSSU still never sent in the requested information to support Dr. Kader's Petition (Ex. 18 p. 606).

From this, a reasonable juror could conclude that HSSU and its administration knew that failing to respond to the USCIS's requests for information was wrongful and would tend to lead to the denial of Dr. Kader's visa petition.

Management's denials of Dr. Kader's requests for a leave of absence and to file a grievance further establish evil motive and reckless indifference. University policies permitted a leave of absence for nonmedical purposes (Tr. 129-30) and for Dr. Kader to file a faculty grievance even after her non-renewal (Tr. 158). Despite these policies, V.P. Smith never responded to Dr. Kader's request for a leave of absence (Tr. 128, 364-65) and never explored whether it would be a possibility for her (Tr. 131). Similarly, no one from HSSU's administration, including the Director of Human Resources, ever responded to Dr. Kader's request to file a faculty grievance (Tr. 235-36, 370).

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Finally, a reasonable juror could infer an evil motive and reckless indifference from the preferential treatment that the two similarly-situated, non-Egyptian employees hired after Dr. Kader's non-renewal received. The hiring process for Dr. Kader, which was supposed to be the process for all employees (Tr. 138), was to apply per HSSU's established application process, interview, and send a video of herself teaching (Tr. 412). The two similarly-situated, non-Egyptian employees hired after Dr. Kader's non-renewal were not required to go through the same vetting process (Tr. 107-22, 212, 296-97). Moreover, these two employees were given higher salaries than Dr. Kader (Tr. 107-08, 211).

Viewing the evidence in the light most favorable to the submission of punitive damages, ample evidence supported Dr. Kader's request for punitive damages. A reasonable juror could find that HSSU and its employees engaged in wrongful acts intentionally and without just cause. HSSU's management, including her direct supervisors, participated in the discriminatory and retaliatory conduct against Dr. Kader and treated her differently from others.

B. HSSU's due process argument is not preserved for this Court's review.

In a page or so at the end of its fourth point, HSSU argues the jury's punitive-damage award "violates due process" (Aplt.Br. 66-67).

This claim is missing from HSSU's corresponding argument in its brief before the Court of Appeals (Appellant's opening brief in the Court of Appeals, pp. 40-42). There, its fourth point also challenged the submissibility of punitive damages. But nowhere in the argument over it did HSSU make

any argument that the punitive-award violated due process (*id.* at 40-42). While HSSU mentioned in passing that "[p]unitive damages are subject to due process limitations of the U.S. and Missouri constitutions" (*id.* at 41), it only argued that "Dr. Kader failed to provide sufficient evidence of evil intent or motive" (*id.* at 41) and did not make the argument it does in its substitute brief that the amount of punitive damages "violates due process" (Aplt.Br. 66-67).

By not making this argument in its brief in the Court of Appeals, HSSU has waived this claim in this Court. Rule 83.08. *Supra* at p. 56. The Court should deny HSSU's due-process argument for this reason alone.

HSSU's due-process argument also is not preserved because it does not appear in HSSU's fourth point relied on itself.

Under Rule 84.04(e), the argument in an appellant's opening brief "shall substantially follow the order of 'Points Relied On'", "[t]he point relied on shall be restated at the beginning of the section of the argument discussing that point", and "[t]he argument shall be limited to those errors included in the 'Points Relied On.'" So, "an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d)" and is not preserved. *Brizendine*, 71 S.W.3d at 593.

HSSU's fourth point does not mention any argument that the amount of punitive damages violated due process. Instead, it only says:

> 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

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

> 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.

(Aplt.Br. 29-30).

To allege a constitutional issue in a point relied on, the point must specify the law or action alleged to be unconstitutional, specify the constitutional provision alleged to have been violated, and make a legal argument explaining exactly why. *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339-40 (Mo. banc 1998). If it does not, the argument is not preserved. *Id.*

HSSU's constitutional argument fails this requirement, too, and the Court also should deny it for this reason.

The Court should affirm the trial court's judgment.

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (x7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

/s/ *Chris R. Playter*
CHRIS R. PLAYTER
Mo. Bar No. 65109
ERIC S. PLAYTER
Mo. Bar No. 58975
Playter & Playter, LLC
400 SW Longview Blvd., Suite 220
Lee's Summit, Missouri 64081
Phone: (816) 666-8902
Fax: (816) 666-8903
chris@playter.com
eric@playter.com

COUNSEL FOR RESPONDENT
SHEREEN A. KADER

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 02, 2018 - 09:32 PM

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, size-13 font, which is not smaller than Times New Roman, size-13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, as this brief contains 26,949 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of the foregoing, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on October 2, 2018, I filed a true and accurate Adobe PDF copy of this brief of the respondent and its appendix via the Court's electronic filing system, which notified the following of that filing:

Mr. Robert Isaacson, Counsel for Appellant
Assistant Attorney General
Post Office Box 861
St. Louis, Missouri 63118
Telephone: (314) 340-7861
Facsimile: (314) 340-7029
robert.isaacson@ago.mo.gov

/s/Jonathan Sternberg
Attorney