SC97069

IN THE MISSOURI SUPREME COURT

SHEREEN KADER,

Plaintiff/Respondent,

vs.

BOARD OF REGENTS OF HARRIS-STOWE STATE UNIVERSITY,

Defendant/Appellant.

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

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INTRODUCTION

The Court should reverse and remand for a new trial, or vacate the judgment entirely, based on one or more of the following grounds.

First, the Court should remand for a new trial because the jury instructions allowed the jury to find liability based on Harris-Stowe's decision not to take a frivolous appeal of the denial of her O-1 visa application. As a matter of law, there was no basis for taking the appeal, so the decision could not have adversely affected Kader's employment. Kader's response brief barely touches on this argument. Resp. Br. 51.

Second, the jury instructions allowed for liability based on Harris-Stowe's decision not to grant Kader a leave of absence *after* her visa expired and *after* the end of her employment contract. Federal immigration law likely made it illegal to grant that leave of absence. But at the very least, the MHRA's language does not support a per se rule that employers *must* grant a leave of absence to employees who do not have a valid visa. §§ 213.055, RSMo.; 213.010(5), RSMo. (2010).

Third, the jury instructions allowed for liability based on Harris-Stowe's alleged negligence in assisting Kader's lawyer with Kader's visa application. The MHRA does not create a per se legal obligation for employers to assist employees in obtaining visas. Harris-Stowe also had no contractual obligation to help Kader's lawyer. Still, it provided all documents requested by Kader's

lawyer, sponsored the visa application he submitted, and even indicated its intent to employ Kader three more years. The MHRA, like Title VII, should not require anything more.

Fourth, the Court should vacate the judgment on the discrimination claim because Kader did not present substantial evidence that Harris-Stowe's alleged failures were motivated by animus toward her national origin. Federal courts in analogous cases explain that a party cannot prove discrimination by conflating national origin and visa status. A look at the national-origin case that Kader cites shows that *this case* bears little resemblance. This case is about visa status, not national origin.

Fifth, the Court should vacate the judgment on both claims because Kader did not present substantial evidence that she qualified for an O-1 "extraordinary ability" visa. O-1 visas are reserved for the small percentage at the very top of their field—like Nobel Prize winners. Kader had just begun her career in higher education and made no showing that she qualified. Without that evidence, Kader cannot show any damages stemming from Harris-Stowe's alleged failures with respect to her O-1 visa application.

Sixth, the Court should vacate the judgment on the retaliation claim because Kader decided *not* to file any complaint regarding her performance review in the fall of 2009. Even if she had, several factors break any possible causal link, including the passage of time and Harris-Stowe's clearly

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communicated intent to continue employing Kader had she received an O-1 visa.

At the least, the Court should vacate the punitive damages award because, at worst, Harris-Stowe acted negligently and without evil motive. As late as June 22, Kader's attorney reassured Kader and Harris-Stowe that "all information has been submitted at this time for her O1 visa and that there was nothing else that Harris-Stowe needed to turn in right now." Ex. L at 653 (email from Harris-Stowe to Kader).

ARGUMENT

I. The Eastern District correctly remanded for a new trial because the jury instructions contained legal errors that prejudiced Harris-Stowe.

Kader (at 29-66) does not dispute the legal framework presented by Harris-Stowe, and followed by the Eastern District. A new trial must be granted if the submitted jury instructions misled the jury and prejudiced Harris Stowe. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90-91 (Mo. banc 2010). Jury Instruction 8 (discrimination) and Jury Instruction 9 (retaliation) listed multiple adverse employment actions in the disjunctive, so "there is no way of discerning which theory the jury chose." *Ross-Paige v. St. Louis Metro. Police Dep't*, 492 S.W.3d 164, 176 (Mo. banc 2016). Thus, if any one of those disjunctive theories was "erroneous as a matter of law," *id.*, this Court should reverse and remand for a new trial. Because the Court only needs

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to find that one of these theories was erroneous, this brief takes them out of order, starting with the least contentious.

Contrary to Kader's brief at 38-39, this Court reviews instructional error de novo even when a point relied on cites error in the motion for a new trial. *See Fleshner*, 304 S.W.3d at 90.

A. Harris-Stowe had no legal basis to appeal the denial of Kader's O-1 visa application, so its decision not to appeal did not adversely affect Kader's employment.

The jury instructions listed Harris-Stowe's decision not to appeal the denial of the O-1 visa petition as an alleged discriminatory action. That was legal error. Harris-Stowe had no plausible legal grounds for appealing the visa denial. USCIS's denial addressed only one issue: "whether the petitioner may qualify the beneficiary for the visa application without a complete Form I-129 and/or the required initial evidence and supporting documentation." Decision at 2, Tr. Ex. 18 at 605. The answer was "no"—the application had to be complete. *See* 8 C.F.R. § 103.2(b)(8)(ii). That holding was not an "erroneous conclusion of law or statement of fact," so any appeal would have been summarily dismissed. 8 C.F.R. § 103.3(a)(1)(v). If there was no basis to appeal, then the decision not to appeal was not an adverse employment action.

Kader's brief barely addresses the decision to appeal, instead focusing its argument on whether Harris-Stowe should have submitted evidence initially. Resp. Br. 48. But the jury instruction listed them separately. The brief only

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raises two factual disputes. First, Kader says it is unclear who at Harris-Stowe made the decision not to appeal. Resp. Br. 22, 51. But if there was no legal basis for the appeal, then this does not matter. Second, Kader says she did not learn about the denial of her application until "there were four days remaining in which to appeal." Resp. Br. 22, 51. Attorney Fleming also received a copy of the decision and the appeals form. *See* Decision at 1, Tr. Ex. 18 at 604. But again, if there was no basis to appeal, this does not matter.

Listing the decision not to appeal as an adverse discriminatory action in the jury instructions prejudiced Harris-Stowe. A key fact dispute was whether Kader's attorney or Harris-Stowe were responsible for submitting the initial evidence. As written, the jury instructions allowed the jury to conclude that Kader's attorney was completely at fault in failing to submit evidence, but still find Harris-Stowe liable based on its failure to appeal. When jury instructions are written in the disjunctive, "*each alternative* must be supported by substantial evidence." *Ross-Paige*, 492 S.W.3d at 172 (emphasis added). There is *no evidence* to support the proposition that Harris-Stowe should have filed an appeal.

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B. Harris-Stowe had no legal discretion or obligation to grant Kader a leave of absence once both her visa and her employment contract expired, so its decision denying leave did not adversely affect her employment.

The jury instructions also listed Harris Stowe's decision not to grant Kader a leave of absence as an alleged discriminatory action. Kader's visa expired June 13, but she asked for a leave of absence on Friday, June 11 and Monday, June 14. As the unanimous Eastern District panel held, denying a work leave of absence to an individual without a valid visa is not "unfair treatment" constituting a discriminatory employment action. Indeed, federal law makes it *unlawful* for an employer "to continue to employ [an] alien" after the individual's visa expires. App. Op. 10 (quoting 8 U.S.C. § 1324a(a)(2)). That provision is backed up by "a wide range of federal civil and criminal penalties." *Id.* (citing 8 U.S.C. § 1324a(e)-(f)).

In addition, Kader's employment contract expired June 30, but she requested a leave of absence that would have extended into July. Kader could not take a leave of absence from a job she did not have. Harris-Stowe's hands were tied: it could not give her a new employment contract until she had a valid visa. Kader does not cite a single case to the contrary.

Again, federal law makes it unlawful to employ or "to continue to employ [an] alien . . . knowing the alien is (or has become) unauthorized" to work. 8 U.S.C. § 1324a(a)(2). The U.S. Supreme Court explains that "if the alien

becomes unauthorized while employed, the employer is compelled to discharge the worker." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 148 (2002). If this language is not clear enough, the Second and Fourth Circuits explain that the statute requires "termination," or the employer will face possible civil or criminal charges. *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 236 n.17 (2d Cir. 2006); *United States v. Garcia-Ochoa*, 607 F.3d 371, 377 (4th Cir. 2010). Kader calls this a "strained" reading of *Hoffman*, Resp. Br. 61, but even the authority Kader cites "reads *Hoffman* as instructing that, as a general rule, individuals who are indisputably not authorized to work must be discharged immediately." *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1012 (9th Cir. 2007).

Rather than confront *Hoffman*'s language, Kader argues that a leave of absence is a form of "discharge" not a form of "employment." Resp. Br. 57-62. This argument is legally mistaken.

First, Kader's argument proves too much. Kader asks for a leave of absence *so that* she can continue to be employed and have an "employer," as required for an O-1 visa application. 8 C.F.R. § 214.2(o)(1)(i). If a leave of absence is not a type of employment, and is in fact a form of discharge, then a leave of absence would not have helped Kader. So denying the leave of absence was not "unfair treatment . . . as it relates to employment," *see* § 213.010(f), RSMo. (2010), and did not "adversely affect" her employment, § 213.055.1(1).

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Harris-Stowe did what it could to help Kader: it delayed any decision on renewing her contract until after USCIS's decision on the O-1 visa application. The MHRA does not require more.

Second, Kader's argument misreads federal law, which compels discharge and termination of employment. Federal law clearly barred Harris-Stowe from maintaining an employer-employee relationship with Kader once her visa expired. 8 C.F.R. § 274a.3. Kader's requests for leave asked Harris-Stowe to continue that relationship in some form. Ex. 37 at 618. This Court should follow *Hoffman* rather than the California-specific law at issue in *Incalza*. *Incalza*'s "holding that IRCA did not require termination"—*see* Resp. Br. 58—expressly conflicts with the Second and Fourth Circuit's holding that IRCA does require "termination." *Madeira*, 469 F.3d at 236 n.17; *Garcia-Ochoa*, 607 F.3d at 377. California changed its labor laws to extend certain protections to unauthorized immigrants as a direct "response to" the Supreme Court's decision in *Hoffman*. *See Salas v. Sierra Chem. Co.*, 327 P.3d 797 (Cal. 2014). Specifically, "California law provides" that unauthorized workers may not be "discharged" without good cause. *Incalza*, 479 F.3d at 1009. Thus, *Incalza* held that California law requires employers to place certain unauthorized workers on leave rather than terminate them, then holds that IRCA is not "necessarily" inconsistent with that holding. *Id.* (explaining that conflict preemption law sets this high standard). Missouri does not have a

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similar provision for unauthorized workers, so *Hoffman* controls. (Kader also cites a new case, but it is not good law. *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106, 1114-15 (10th Cir. 2006), *vacated on rehearing en banc*, 478 F.3d 1160 (10th Cir. 2007).)

Third, Missouri law does not require Harris-Stowe to risk federal penalties by granting Kader a leave of absence when she did not have a valid visa or (as of July) a valid employment contract. When a federal statute says an individual cannot be employed, and the Supreme Court says an individual must be discharged, it is at least *fair* treatment (not discriminatory "unfair treatment") for the employer to take such actions to protect itself. Even *Incalza* acknowledges that immediate discharge is the "general rule." 479 F.3d at 1012. Missouri law should not force employers to violate that rule and grant a leave of absence in order to protect themselves from MHRA liability.

Fourth, Kader's reading of federal law does not help on these facts because it assumes an ongoing employment contract. Kader never explains how Harris-Stowe could have granted a leave of absence running into July when Kader's current contract expired June 30, and Harris-Stowe could not legally give her a new contract.

Finally, it is simply false to suggest that Harris-Stowe has not preserved any of its "arguments about federal immigration law" simply because it has not cited chapter and verse of the U.S. code. Resp. Br. 53-56. Harris-Stowe has

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repeatedly argued the common sense principle that it could not legally continue employing Kader once her visa expired. Tr. 513:13-515:12, 517:16-519:12; 522:22-527:22; LF at 322-38; E.D. Apt. Br. at 22-23, 28, 30, 39. The Eastern District reversed and remanded precisely because 8 U.S.C. § 1324a(a)(1)-(2) legally barred Harris-Stowe from granting Kader's requested leave of absence. App. Op. 8-11. Kader asked this Court to transfer the case because "[t]he Court of Appeals decision misinterprets federal law." Transfer App. at 1, 6-10. This Court granted transfer—an "extraordinary remedy"—to review whether federal law allowed Harris-Stowe to grant Kader a leave of absence. Rule 83.04. Kader's attempt to now bar the Court from reviewing that very question lacks merit, and should be rejected.

C. The MHRA does not impose an affirmative obligation on employers to assist employees with visa applications and Harris-Stowe had no contractual obligation either.

Jury instructions 8 and 9 also listed "did not respond to the USCIS request for evidence" as an adverse employment action. LF 84-85. This Court should find that the MHRA aligns with Title VII on this point, and hold that Missouri law "does not impose an affirmative obligation on employers to sponsor their employees' visa applications." *Samuel v. Metro. Police Dep't*, 258 F. Supp. 3d 27, 44 (D.D.C. 2017).

"In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is

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consistent with Missouri law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). To be sure, *Daugherty* held that the MHRA differed from Title VII by setting a contributing-factor test rather than a motivating-fact test, at least at the time. *Id.* at 819. But Kader's brief overreads *Daugherty* as a repudiation of any reliance on federal cases. Resp. Br. 47. *Daugherty* carefully explained that its holding was rooted in the clear and unambiguous text of the statute. "'If the wording in the MHRA is clear and unambiguous, then federal caselaw which is contrary to the plain meaning of the MHRA is not binding.'" 231 S.W.3d at 819 (citation omitted). That rule allows Missouri courts to look to federal cases for guidance when confronted with issues outside their typical caseload—like immigration law.

The difference between "contributing" and "motivating" factor plays no role in determining whether the MHRA affirmatively requires employers to give visa assistance. Like Title VII, the MHRA requires that an employer engage in *some* "unlawful employment practice" that either discriminates against the individual or "adversely affect[s]" an individual's status as an employee. § 213.055.1(1), RSMo. The initial question, then, is whether the MHRA creates a *per se* "affirmative obligation on employers to sponsor their employees' visa applications." *Samuel*, 258 F. Supp. 3d at 44. The statute does create some per se rules, as Kader notes, like failing or refusing to hire or discharge, or discrimination in compensation. Resp. Br. 46-47. Title VII does

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too. But like Title VII, the MHRA's language does not suggest a per se rule requiring employees to sponsor visa applications.

Imposing such a per se obligation would be a bad idea. Deciding not to sponsor an employee's visa is not discriminatory—it is not "unfair treatment," § 213.010(5) (2010)—because visas impose additional costs on employers that other employees do not impose. So requiring employers to sponsor visas has no textual support in the MHRA. It also would be bad policy. As this case shows, the requirement that work visas be "sponsored" by the employer is somewhat flexible—the cost of fees and legal assistance is sometime born by the employee.

Nor, under the facts of this case, was visa assistance a "term[], condition[], or privilege[]" of Kader's employment. § 213.055.1(1), RSMo. Harris-Stowe never made visa assistance part of Kader's employment contracts. Tr. 417:2-19; Tr. Ex. C at 645-46. In previous years, Harris-Stowe had submitted information to Penn State, which had sponsored Kader's foreign-exchange visa. Resp. Br. 48-49.

The idea of filing for an O-1 visa came from Kader and Kader's attorney. Kader's attorney assembled the application materials. Kader and her attorney planned to fly to the Mexican border to get the second part of the O-1 visa processed. Tr. Ex. I at 645. Kader's attorney submitted the incomplete visa application and paid the corresponding fees. To be sure, Harris-Stowe acted

as the employer sponsor for the visa application submitted by Kader's attorney. Tr. Ex. M at 654. Harris-Stowe also promptly provided supporting information to Kader's attorney whenever he requested it. Tr. Ex. 38 at 619. Harris-Stowe even indicated to USCIS that it intended to employ Kader for three more years if she obtained an O-1 visa. Decision, Tr. Ex. 18 at 606.

But it was Kader's attorney who was responsible for the application at each turn. For instance, when Harris-Stowe asked Kader if she would have a visa in time to teach the summer term, Kader responded "my attorney is trying to get the O1 visa approved as soon as possible." Tr. Ex. J at 650. On June 11, Kader emailed Attorney Fleming (not Harris-Stowe) for an update on the visa application, and Attorney Fleming assured her he had it under control. Tr. Ex. K at 652. On June 14, in the same email in which Kader told Vice President Smith that USCIS needed more information, Kader also said that Attorney Fleming had "contacted the immigration services and he is going to take care of this matter of delay." Tr. Ex. 37 at 617-18. And when, in June, Kader told Shaw (in human resources) that USCIS needed more information, Shaw reached out to Attorney Fleming. Tr. Ex. L at 653. Shaw reported that she "spoke with Attorney Stephen Fleming who is representing Dr. Kader and he said that all information has been submitted at this time for her O1 visa and that there was nothing else that Harris-Stowe needed to turn in right now." *Id*. (June 22 email).

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These are undisputed facts supported by a paper record. These facts do not support any kind of contractual obligation on the part of Harris-Stowe. Attorney Fleming, not Harris-Stowe, submitted the O-1 visa application and was the point person for it. Harris-Stowe had no control of Attorney Fleming, who was indisputably acting on behalf of Kader. It remains unclear whether USCIS contacted Harris-Stowe or contacted Attorney Fleming or both about the need for supporting documentation. Resp. Br. at 50-51. But we do know that when Kader raised concerns about supporting documentation to Harris-Stowe, Harris-Stowe asked Attorney Fleming what needed to be done, and Attorney Fleming said that nothing else needed to be submitted. Tr. Ex. L at 653. Harris-Stowe had no independent duty, by law or by contract, to independently verify whether this was true.

Finally, Kader suggest that *one* federal court has carved out a minority position under Title VII. Resp. Br. at 46 n.8. At least three cases have found Title VII does not impose an affirmative obligation on employers to provide visa assistance. *See Samuel*, 258 F. Supp. 3d at 44; *Kanungo v. Univ. of Ky.*, 1 F. Supp. 3d 674, 683 (E.D. Ky. 2014); *Collins–Pearcy v. Mediterranean Shipping Co.,* 698 F. Supp. 2d 730, 760 (S.D. Tex. 2010). The one case Kader cites, *Cordova v. R&A Oysters, Inc.*, 169 F. Supp. 3d 1288, 1295 n.7 (S.D. Ala. 2016), was an FMLA case. It did not say that federal law imposes any affirmative duties on employers, but only that an employer could not revoke a

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promise to sponsor a plaintiff's already submitted H-2B visa. *Id.* Here, there was no contractual obligation to begin with, and no revocation of sponsorship.

D. The Court should reject Kader's procedural arguments.

Kader also makes four procedural objections. These arguments lack merit and should be rejected. In addition, this is a transfer case—the point relied on is nearly identical to the point relied on before the Eastern District; Kader made no objection before that court; and Kader had no trouble discerning the substantive issues there. Kader accordingly "waived the waiver" on appeal. *See City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 750 n.6 (Mo. banc 2016). It is inconsistent with the rules governing transfer to make these kinds of objections this late. Rule 83.05(b); 83.08(b).

The point relied on, Apt. Br. 28, challenges the trial court's denial of Harris-Stowe's motion for new trial, LF 322-38. Kader suggests Harris-Stowe is really challenging the jury instructions, Resp. Br. 35-37, but Kader did not object to the same wording in the Eastern District. Harris-Stowe raised and preserved its legal argument about the verdict directors at three different points before the trial court, including in the new trial motion, and the trial court erred each time. Rule 84.04(d) does not suggest that the point relied on must list all three. A point relied on may be tied to any erroneous ruling or action by the trial court. For example, the appellant in *Fleshner* raised similar

instructional error (Point IV), tied it to the motion for new trial, and this Court reviewed de novo on the merits. 304 S.W.3d at 90-91.

The point relied on also states "concisely the legal reasons for the appellant's claim of reversible error," Rule 84.04(d). The court erred ". . . because the verdict directors misdirected, misled, or confused the jury, resulting in prejudicial error. . . ." Apt. Br. 31. Kader complains that this is vague because the objected-to verdict directors are "unnamed." Resp. Br. 32. But there are only two claims on appeal, and use of "directors" shows it refers to both of them. Kader also complains that this statement is "multifarious" because it says "misdirected, misled or confused." *Id.* Rule 84.04(d) uses the plural, asking appellants to identify legal *reasons*, and the phrase used by the point relied on comes from this Court's past cases. The Southern District cases Kader cites do not say "one legal reason only"; they frown on grouping different or unrelated issues. Once again, Kader could have made these same objections to identical language in the Eastern District, but did not do so.

The point relied on also explains "in summary fashion, why, in the context of the case, those legal reasons support the claim of reversible error." Rule 84.04(d)(1)(c). Specifically, the trial court's verdict directors "included actions that are not adverse employment actions and no evidence established those actions caused any damages." Apt. Br. 31. Kader again argues that this fails to "state one concise legal reason for one alleged error." Resp. Br. 33-35.

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Again, Kader gets the law wrong; Rule 84.04(d)(1)(B) says a point relied on should identify legal *reasons*. And the reasons listed are related. One reason Harris-Stowe's actions were not "adverse" to Kader's employment is because those actions could not have led to damages.

Finally, the opening brief "set forth in full" the objected-to portions of the verdict directors. Rule 84.04(e). *See* Apt. Br. at 32, 40. The "complete text" of those instructions was in the appendix. Rule 84.04(h)(3). Kader argues that the complete text of the instructions must be in *both* the argument portion of the brief and in the appendix. Resp. Br. 29-30. This contradicts Kader's argument that Harris-Stowe's point relied on is limited to the motion for new trial, and so is not about jury instructions. *Id.* at 35-37; 38-39. But at any rate, there is no standard practice in this Court when litigants challenge specific legal errors rather than the instruction as a whole. *See, e.g.*, *Fleshner*, 304 S.W.3d 81 (appellant's brief quotes only the portion of the instruction objected to in point IV); *Ross-Paige*, 492 S.W.3d at 170 (opinion quoting instruction "in pertinent part" and brief leaving out an unchallenged portion of the instruction). At any rate, the complete text of Jury Instructions 8 states:

> Your verdict must be for Plaintiff on Plaintiff's national origin discrimination claim if you believe:
> First, either:
>> 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

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Defendant denied Plaintiff a work leave of absence: and

Second, Plaintiff's national origin was a contributing factor in Defendant's conduct in any one or more of the respects submitted in paragraph First, and

Third, such conduct directly caused or directly contributed to cause damage to Plaintiff.

Jury Instruction 9 states:

> Your verdict must be for Plaintiff on Plaintiff's claim for retaliation if you believe:
>
> First, Plaintiff made complaints of discrimination, and
>
> Second, either:
>
> 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: or
>
> Defendant opposed Plaintiff's application for unemployment benefits; and
>
> Third, Plaintiff's complaints of discrimination were a contributing factor in any such actions described in the preceding paragraph Second, and
>
> Fourth, such conduct directly caused or directly contributed to cause damage to Plaintiff.

See LF 84-85.

As to all these procedural objections, Harris-Stowe also asks for discretionary review since the parties are fully aware of the substantive issues, or plain error review, in the alternative.

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II. Kader did not show that Harris-Stowe was motivated by animus toward her national origin, and she did not establish damages.

A. Kader has not distinguished persuasive federal authority explaining that visa status and national origin are distinct.

"[T]he record is wholly devoid of any evidence that" Harris-Stowe's allegedly discriminatory inaction "had anything to do with [plaintiff's] national origin." *Lixin Liu v. BASF Corp.*, 409 F. App'x 988, 991 (8th Cir. 2011). Visa application errors are not per se evidence of discrimination.

Kader first says this Court should ignore federal cases because Missouri law does not follow the "burden-shifting analysis under Title VII." Resp. Br. 75-76. But that is not a reason to reject the clear distinction made by federal courts between national origin and visa status. Missouri law still requires evidence that *national origin*, rather than alienage or visa status, be a contributing factor to an employer's actions.

Kader then tries to distinguish the federal cases by saying that Harris-Stowe *did* discriminate based on national origin rather than visa status. Resp. Br. 76-79. Kader begins by pointing to the fall 2009 disagreement over her performance review. *Id.* at 76. This conflates her retaliation claim, which points back to that event, with her discrimination claim, which does not allege that her performance review was discriminatory.

Kader next alleges that Vice President Smith threatened her with "visa complications" during that earlier disagreement over her performance review.

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Resp. Br. 70-71. This is a retaliation argument, and is not cited as a basis for her discrimination claim. Kader continues, "[w]hile this statement does not make direct reference to Kader's specific country of origin, Kader's immigration status is inherently linked to her national origin." *Id.* Not surprisingly, Kader fails to cite any supporting authority for this statement. *See Abravanel v. Starwood Hotels and Resorts Worldwide, Inc.*, 94 F. Supp. 3d 134, 145 (D.P.R. 2015) (noting a plaintiff cannot prove discrimination by "'conflat[ing] national origin and alienage'" (citation omitted)). Consequently, Kader's argument fails badly.

Kader also suggests discrimination because when H.R. Director Malone told Dean Smith that Kader's contract had not been renewed, she said "I suspect that shortly she will be on her way back to Egypt." Resp. Br. 72-73. The brief goes on to talk about Malone's "false testimony," "lies," and "gloat[ing]." *Id.* This response illustrates why a discrimination claim cannot be proven by conflating national origin and alienage. Malone's understanding of the law was correct, and it was drawn from an email from Penn State that Kader herself forwarded to Malone. See Tr. Ex. J at pp. 651 ("Per the regulations governing J1 status holders, Dr. Abdel Kader . . . will have a Grace Period of up to 30 days to pack, travel and depart the US after June 13, 2010"). The reference to Egypt is not at all derogatory or demeaning—it simply assumes that if Kader had to depart the US, she would likely return home.

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Kader next cites a stray remark made five years after Kader left Harris-Stowe. Resp. Br. 72. In a deposition three weeks before trial, Malone identified another faculty member at Harris-Stowe as "African Muslim, I don't know, some strange combination." *See* Tr. 190:23-25. Even when considered in a light most favorable to the jury verdict, this comment cannot support any inference of national origin discrimination. *See Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 489 (Mo. App. 2016). Malone's comment was not made to Kader, it was not made about Kader, and it was not made in reference to anyone's employment status, visa status, or immigrant status. In addition, the phrase "a strange combination" is not "charged with national-origin discriminatory animus." *See Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 974 (8th Cir. 2012).

Kader also says some employees in her department did not have to go through a formal interview and were paid more. Resp. Br. 73-74. "Employees are deemed 'similarly situated' when they are involved in or accused of the same or similar conduct and are disciplined in different ways." *Williams v. Trans States Airlines, Inc.,* 281 S.W.3d 854, 873 (Mo. App. E.D. 2009). Kader's cited comparators were not similarly situated as to the complained of conduct, because Harris-Stowe did not assist any of them with visa applications. Thus, it does not show Harris-Stowe's actions were taken because Kader is Egyptian, or African, or due to her physical, cultural, or linguistic characteristics.

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Kader next makes the odd claim that Harris-Stowe decided to non-renew her employment contract while she "still was in valid work status." Resp. Br. 76-77. Not so. Vice President Smith stated that Kader's contract would not be renewed "[a]s a result of this [visa] denial." Tr. Ex. 18 at 603 (July 14). The USCIS decision says Harris-Stowe intended to "employ" Kader "for a period of three years" if she received an O-1 visa. Tr. Ex. 18 at 606. Emails show that Vice President Smith and Kader expected her to teach during the 2010 summer term. Tr. Ex. J at 650. And last, Kader's three employment contracts show the academic year typically ran from August to May, and were signed at the end of August or beginning of September. Tr. Ex. A, B, and C at 639-47.

Kader also attempts to distinguish the federal cases by saying that, in those cases, there was no evidence the employer's visa-related decisions were motivated by national-origin discrimination. Resp. Br. 78-80. As discussed above, the same is true here. An employer's acts or omissions regarding an employee's pursuit of proper immigration documents are not enough to infer national-origin animus.

Finally, Kader argues that a national-origin claim does not have to be specifically linked to a country of origin, Resp. Br. 71, but that misstates the issue. Harris-Stowe does not dispute that Kader is a member of a protected class in that she is from another country. Harris-Stowe argues instead that there are no probative facts in the record demonstrating discriminatory

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conduct based on Kader's national origin, whether related to her physical, cultural, or linguistic characteristics, or her national origin as Egyptian or African. By contrast, in *Kanaji v. Children's Hosp. of Philadelphia*, 276 F. Supp. 2d 399 (E.D. Pa. 2003), the case Kader relies on, Resp. Br. 71, plaintiff's evidence relating to his national origin discrimination claim included:

> (1) ordering that all "Afrocentric paintings" be removed from office walls; (2) criticizing individuals who were "Afrocentric ... in dress or in speech" as "unprofessional"; (3) forbidding plaintiff and a co-worker to greet each other by saying "good morning, African"; (4) making "negative and critical comments" to an employee "about [her] ethnic African clothing items and accessories"; and (5) refusing to use the word "Africa," substituting the word "abroad" in its place.

Id. at 400. Here, Kader has not directed the Court to a single specific example of a Harris-Stowe decision-maker making a statement to or about Kader describing or referencing her national origin, or making any decision based on national origin.

B. Damages are speculative because O-1 visas are reserved for those at the very top of their field and Kader presented no evidence that she qualified.

O-1 visas are expressly reserved for the small percentage who have risen to the very top of the field of endeavor. The opening brief explained that the trial court erred by submitting the discrimination claim to the jury because Kader had not submitted any evidence that she qualified for an O-1 "extraordinary persons" visa. A claim should not be submitted unless "each

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and every fact essential to liability" is supported by "substantial evidence." *Daniels v. Bd. of Curators of Lincoln, Univ.*, 51 S.W.3d 1, 5 (Mo. App. W.D. 2001). Without that evidence, the court should have held that Kader failed to show any damages stemming from the denial of her O-1 visa application.

Kader first argues that she later obtained an immigrant visa and national interest waiver and suggests that this shows she could have gotten an O-1 visa. Resp. Br. 64 (citing Tr. 383). As explained in the opening brief (at 26), the visa and waiver that Kader obtained is governed by different criteria, and a lower evidentiary bar, than an O-1 visa. A national interest waiver and corresponding visa are available to persons "holding advanced degrees" or persons of "exceptional ability." *See* 8 U.S.C. 1153(b)(2); *see also* Tr. 383 (describing this type of visa). That Kader later qualified for a different type of visa does not show she was qualified for a O-1 "extraordinary persons" visa. It certainly did not give the jury a non-speculative basis for damages.

Kader also suggests that a leave of absence would have given her time to obtain a waiver of the two-year residency requirement. Resp. Br. 65. But she only requested a leave of absence until USCIS made a decision on her O-1 visa application. Tr. Ex. 37 at 617-18 ("till the result of 01 appeared shortly"). That decision was made in early July. Her home country did not grant the residency waiver until seven months later in February 2011. *See* Resp. Br. 64.

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Finally, Kader asserts that her emotional damages were "not limited to the non-renewal of her contract but related" to "all the acts included within the first paragraph of Instructions 8 and 9." Resp. Br. 64. But again, those emotional damages flowed from the fact that her home country did not give her a timely waiver of the residency. The content of the O-1 visa application, the appeal of the denial, and refusal to grant a leave of absence could only have caused damages, including emotional damages, *if that application had a non-speculative chance of success*. No evidence, however, suggests that it did.

III. Kader did not present substantial evidence establishing an earlier complaint of discrimination, a causal relationship between such a complaint and the alleged adverse actions, or damages flowing from the alleged adverse actions.

Kader did not show a prima facie retaliation claim to the jury. Dr. Kader must show that she complained of discrimination, the employer took adverse action against her, and a causal relationship existed between the complaint and the adverse action. *See* § 213.070.1, RSMo.

To be sure, Kader disagreed with Dean Smith's performance review. But that was not related to a protected class. § 213.070.1(2), RSMo. "Merely complaining of working conditions without attributing the complaints to an illegitimate criterion does not constitute opposition to an unlawful employment action and is not protected activity." *Cherry v. Ritenour Sch. Dist.*, 253 F. Supp. 2d 1085, 1099 (E.D. Mo. 2003), *aff'd*, 361 F.3d 474 (8th Cir. 2004). When Dean

Smith complained about Kader's reaction to the performance review, Kader wrote an email explaining her objections without mentioning race, religion, or national origin even once. *See* Tr. 454:14-458:9. Further, Kader expressly told Vice President Smith that she did *not* file a complaint about her performance review. Tr. Ex. 48 at 625; *see* Tr. 455:24-456:4, 458:10-16.

Second, the alleged retaliation did not occur until seven months later, in June and July of 2010. Kader's attempts to close that gap fall flat. She says her spring 2010 review was protected activity, but Dean Smith actually increased her scores after speaking with Kader. Tr. 285:5-286:14, 427:18-21; Tr. Ex. 4 at 586-591. Kader also points to her June 11 and June 14 emails asking for a leave of absence because her visa expired June 13. Resp. Br. 86. Even if this qualified as protected activity, mid-June emails could not have triggered the confusion about submitting supporting evidence for the O-1 visa application in the last week of May.

Alternatively, Kader argues that the alleged retaliation started earlier. But that does not match the claim submitted to the jury. Jury Instruction 9, LF85. Attorney Fleming submitted the visa application May 21. Harris-Stowe's alleged retaliation must be later than that. The only link between fall 2009 and summer 2010 is Vice President Smith allegedly telling Kader she would have "visa complications" if she brought an attorney to a fall meeting. Resp. Br. 88. Even taken as true, it does not show retaliation because the

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meeting never occurred. Dean Smith gave her a better performance review in the spring of 2010. Harris-Stowe repeatedly indicated that it intended to employ Kader. Harris-Stowe accommodated Kader's change in visa plans, Tr. Ex. 38 at 619; planned for her to teach that summer, Tr. Ex. J at 650; indicated its intent to retain Kader for three more years, Decision, Tr. Ex. 18 at 606; and provided Attorney Fleming with all the supporting documents he requested, Tr. Ex. 38 at 619.

Nor was the summer of 2010 the "first opportunity" for Harris-Stowe to act. If Harris-Stowe meant to non-renew Kader after the October 2009 performance review, then it could have not offered her another teaching contract. It could have non-renewed Kader when she was unable to secure a residency waiver. It could have refused to sponsor the visa application Attorney Fleming submitted. Instead, substantial evidence shows Harris-Stowe intended to employ Kader but could not without a work visa. Kader asks the Court to assume far too much to find retaliation where there was none.

Third, Kader did not show damages because no evidence suggests she qualified for an O-1 visa.

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IV. The record shows that Harris Stowe acted in reliance on Kader's lawyer, not with reckless indifference or evil motive, so punitive damages should not have been submitted to the jury.

At the very least, punitive damages should not have been submitted. Dr. Kader failed to demonstrate evil motive or reckless indifference, so presenting punitive damages to the jury was legal error.

Harris-Stowe properly preserved and raised these arguments repeatedly during the course of trial, asking for a directed verdict on the underlying claims, then objecting to punitive damages during the instruction conference, and again in a motion for judgment notwithstanding the verdict. A motion for directed verdict on the underlying claims should at least preserve an objection to damages on those claims. As for Due Process, Harris-Stowe explained in its brief before the Eastern District that the state and federal constitutions prohibit the imposition of grossly excessive or arbitrary punishments. E.D. Apt. Br. at 41 (citing *Lewellen v. Franklin*, 441 S.W.3d 136, 144-45 (Mo. 2014) and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 409 (2003)). Punitive damages should at least be reviewed for plain error. Rule 84.13(c).

The fall 2009 performance review does not support punitive damages. Resp. Br. 100-102. Again, Kader did not file a complaint. So Harris-Stowe had no basis to act. The denied leave of absence, and alleged comparators do not support punitive damages either. Resp. Br. 103-104.

Finally, Kader's O-1 visa application does not support punitive damages. Resp. Br. 103. Harris-Stowe provided everything Attorney Fleming asked for. Tr. Ex. 38 at 619. He submitted an incomplete application. When Kader suggested that they needed to submit more evidence, Harris-Stowe's Robin Shaw followed up with Attorney Fleming, who assured her "there was nothing else that Harris-Stowe needed to turn in right now." Ex. L at 653 (June 22 email to Kader).

Relying on Kader's lawyer may have been a mistake, but it is not evidence of evil motive. *Howard v. Kansas City*, 332 S.W.3d 772, 786 (Mo. banc 2011) (citation omitted). As for Due Process, Harris-Stowe did not act reprehensibly, the damages ratio was disproportionate, and the compensatory awards made Dr. Kader whole. *See State Farm*, 538 U.S. at 419.

CONCLUSION

Harris-Stowe respectfully asks this Court to reverse the judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. This brief contains 7,592 words, excluding the cover, the signature block, and this certificate.

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