IN THE SUPREME COURT OF MISSOURI

CASE NO. SC97641

LI LIN,

Respondent,

v.

WASHINGTON UNIVERSITY,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

HONORABLE CHRISTOPHER EDWARD McGRAUGH
CIRCUIT JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Plaintiff/Respondent Li Lin ("Plaintiff" or "Lin") is a Chinese woman. She attended a five-year program at Shanghai Second Medical University and graduated with a dual Bachelor of Science and Medical Degree. Transcript ("Tr.") 351. After graduation, Plaintiff worked for eight years at Shanghai Children's Hospital. Tr. 352. Thereafter, she moved to the United States. Tr. 352.

In 1996, Plaintiff began working for Washington University ("Defendant") as a research scientist. Tr. 353-54. Initially, she worked in the lab of Dr. Harvey Colton conducting research in pediatric molecular biology and immunology. Tr. 353-54. One year later, Dr. Colten left Washington University to take a position at Northwestern Medical School. Tr. 354. As a result of his departure, Plaintiff's position in his lab was eliminated. Tr. 354. She then applied for, and successfully transferred to, a research position in the laboratory of Dr. David Perlmutter. Tr. 354. After three years, her position was again eliminated when Dr. Perlmutter left to take a position at another academic institution. Tr. 355.

Plaintiff thereafter successfully applied for, and received, a research position in the laboratory of Dr. Jeffrey Drevins in the Department of Surgery. Tr. 355. In that position, she conducted research on colon cancer. Tr. 356. Thereafter, she transferred to a position in the laboratory of Dr. Jeremy McDonald in the Department of Neurology where she performed stem cell and spinal cord injury research. Tr. 356 and 357. The position in Dr. McDonald's laboratory ended after approximately one year when Dr.

McDonald left to take a position at Johns Hopkins University. Tr. 356. In 2004, Plaintiff then applied for, and was hired, into the laboratory of Defendant Dr. Matthew Ellis. Tr. 360-61. Ellis operated and managed a lab focusing on breast cancer research. Tr. 570.

In the four positions Plaintiff held before Ellis' lab, her managers consistently rated her work performance as outstanding and never issued any discipline to her. Tr. 357. During that time, when she applied for other positions, she usually got interviews quickly and job offers typically followed. Tr. 420-21.

Ellis managed the staff scientists and other employees working in his laboratory. Tr. 262-63. Jeremy Hoog worked as the Research Lab Supervisor in Ellis' lab. Tr. 386. When Ellis was not present in the lab, Hoog was in charge of the lab. Tr. 386. Nicole Nichols was the Research Administrator for Ellis' lab and was responsible for managing the grants that funded the laboratory and assisting with the lab's administration. Tr. 259 and 261. Sandra Sledge was the Human Resource consultant for Ellis' lab. Tr. 167-68 and 200-01. Hoog viewed Plaintiff as a "sincere team player who has high standards and is willing to be helpful when the need arises." Hoog Deposition ("Depo.")., p. 44. Hoog also considered her to have a "solid and sensible communication style and interpersonal skills." Hoog Depo., p. 44.

In 2010, Ellis notified Plaintiff that her position in his lab would be eliminated in six months because of a lack of funding. Tr. 373 and 580. However, Ellis subsequently secured additional funding and Plaintiff's position in his lab thereafter continued. Tr. 374-75.

In Ellis' lab, the normal practice was to have a person's salary funded through each grant on which the person worked. If a person worked equally on two grants, then each grant would provide funds for half of the individual's salary. Tr. 277-78. In 2011 and 2012, Plaintiff worked on multiple different grants. Tr. 415-17; 296-97. Even though Plaintiff worked on multiple different projects in 2012, Ellis and Nichols decided to charge Plaintiff's salary to a single grant, the RO1 Grant. Tr. 313. As Nichols admitted, their decision to place Plaintiff on a single grant was "unusual." Tr. 313.

During her employment with Washington University, Plaintiff began to experience severe and chronic back pain. In 2003, her doctor diagnosed her with herniated discs in her lower back. Tr. 358-60. As recommended by her physician, Plaintiff temporarily went to a half-day work schedule to address her back condition. Tr. 359-60. She also had to hire a helper at home to assist her in washing dishes. Tr. 361. Over the years, as her condition worsened, Plaintiff also experienced significant pain in her shoulder and lower extremity. Tr. 377. To address her physical problems relating to the herniated discs, Plaintiff received ongoing chiropractic care and physical therapy. Tr. 191-92. Plaintiff continued to experience these physical limitations from her herniated discs through trial. Tr. 360.

At work, the performance of certain job duties exacerbated her back condition. In particular, cell culture work required Plaintiff to work under a hood to ensure that tissue cultures remained in a sterile environment. Tr. 401-02. This task involved bending over and stretching out her arms to perform the work. Tr. 402. Performing work on a

laboratory bench, or counter, also required Plaintiff to bend her back to perform her work. Tr. 191-92. When these activities involve prolonged bending of Plaintiff's back, they caused her significant pain. Tr. 191-92 and 401-02; *see also* Hoog Depo., pp. 51-52 (Hoog testifies that the cell culture work required her to be "hunched over" and that doing more excessive bench work would cause her back pain).

On multiple occasions, Plaintiff talked with Ellis and Hoog about her back condition. In 2011, because of a heavy workload, Plaintiff experienced substantial pain in her back, shoulders, and foot. Tr. 376-77. She went to Ellis and told him about her physical problems to see what could be done. Tr. 377-78. Then, in approximately April 2012, Plaintiff again approached Ellis about her back condition. Tr. 382-83. She requested an accommodation that she not be assigned cell culture work because the work caused her severe pain. Tr. 383. Plaintiff also notified Hoog that she could not perform cell culture work in the hood or more extensive bench work. Hoog Depo., pp. 51-52. Nevertheless, after Plaintiff had requested accommodation, Hoog attempted to assign Plaintiff work contrary to her request. *See* Tr. 384 and 386. This assignment related to a project on which Jackie Snider, another colleague in the lab, sought assistance. Tr. 384. Plaintiff refused to do the assignment because of her back condition. Tr. 384.

Very shortly after Plaintiff refused to perform work on Jackie Snider's project, a complaint was made about Plaintiff regarding an interaction between Jackie Snider and her. Respondent's Appendix, A26-A27 (Exhibit ("Ex.") 33). Although Plaintiff was a "team player" with "solid" interpersonal skills, Ellis responded to the report just nine minutes later

by contacting Nicole Nichols, his lab Administrator, and notifying her that he wanted "to start an HR process on Li Lin with a view to terminating her position." Respondent's Appendix, A26-A27 (Ex. 33). Ellis thereafter instructed Nichols and Sledge, his HR consultant, to meet with Lin. Tr. 292-93.

Although Ellis had sought to terminate Plaintiff's position in response to the complaint about Plaintiff's interaction with Snider, several days later, Nichols sent an email to Ellis in which she raised the issue of whether there was sufficient funding to support Plaintiff's current position. Tr. 241-42; Ex. F4. In response, Ellis notified Nichols and Sledge that he believed that he could support Plaintiff for six more months (which would be through mid-January 2013). Ex. F4. Sledge began to draft a letter to notify Plaintiff that her position in Ellis' lab would be eliminated. Ex. F4; Respondent's Appendix, A29 (Ex. 22); Tr. 248-49. Defendant later used this letter to justify the decision to eliminate Plaintiff's position in Ellis' lab. Tr. 249 and 297-98; Respondent's Appendix, A29 (Ex. 22). Even though Ellis stated that he had funding to retain Plaintiff's position in his lab through mid-January 2013, in the letter prepared by Sledge, Defendants notified Plaintiff that her position in Ellis' lab would be eliminated as of November 30, 2012. Tr. 248-49.

On or about July 10, 2012, Nichols called Plaintiff into a meeting. Tr. 293 and 389. In the meeting, Nichols discussed with Plaintiff what type of work she was physically able to do. Tr. 389 and 395-96. Plaintiff told her about her back condition and, as she had previously explained to Ellis, requested that she not perform cell culture work. Tr. 395-96. Nichols also told Plaintiff that Ellis had concerns that the funding for

the R01 Grant (the sole grant to which Ellis and Nichols had assigned Plaintiff) might come to an end. Tr. 395-96.

Later on the same day, Plaintiff met with Sledge. Tr. 167, 200-01, 396-98. In that meeting, Sledge also talked with Plaintiff about her back condition and Plaintiff's request for an accommodation for it. Tr. 396-98; *see also* Tr. 181 and 190-91. Sledge told Plaintiff that if she needed an accommodation, she would need to obtain doctor's statement documenting her condition. Tr. 189, 191, and 398.

On the same day, Ellis also called Plaintiff into a meeting. Like Nichols, Ellis told Plaintiff that he was concerned that the funding on the R01 grant might soon be ending. Tr. 399; *see also* Tr. 587. He told her that he had other positions in his lab. Tr. 399. These positions involved various responsibilities including sample work and cell culture work. Tr. 399-400. In that meeting, for at least the third time, Plaintiff told Ellis about her back condition and that she could not perform the cell culture work. Tr. 399-402.

On July 12, Ellis met with Plaintiff again. Tr. 403-04. In the meeting, Ellis asked Plaintiff if she would assist Crowder, another colleague in his lab, with one of his projects. Tr. 404. Plaintiff told Ellis that he could "give [her] everything" except the work involving mice because she was allergic to mice. Tr. 404 and 470.

As Sledge required, Plaintiff submitted a doctor's statement to her, Nichols and Ellis in late July 2012. Tr. 191-92, 244-45, 477; Respondent's Appendix, A28 (Ex. F7). In that statement, Plaintiff's doctor diagnosed Plaintiff with two herniated discs and stated that she "has chronic pain that is acutely worsened in certain positions, including

but not limited to, cell culture and extensive bench work. At times, this requires patient to have chiropractic care and treatment as well as physical therapy." Tr. 192; Respondent's Appendix, A28 (Ex. F7). Accordingly, Plaintiff's doctor recommended that she be accommodated to avoid doing cell culture and extensive bench work "to avoid re-injuring and exacerbating these herniated discs." Tr. 192-93; Respondent's Appendix, A28 (Ex. F7). Defendants never requested that Plaintiff submit to an independent medical evaluation or otherwise sought information to question the nature of Plaintiff's back condition or the accommodation she requested. Tr. 195 and 613.

After receiving the doctor's statement, on August 10, 2012, Ellis, Sledge, and Nichols called Plaintiff into a meeting. Tr. 246 and 413-14. In that meeting, they told Plaintiff that her position in Ellis' lab would be ending or eliminated by the end of November 2012. Tr. 246 and 413-14. On or about August 28, 2012, they provided Plaintiff with a letter notifying her that "the position you have as Staff Scientist with the Division of Medical Oncology is being eliminated due to lack of funding." Tr. 297-98; Respondent's Appendix, A29 (Ex. 22). In that letter, they also notified Plaintiff that she was eligible for transfer within the university. Respondent's Appendix, A29 (Ex. 22).

Plaintiff's tenure in Ellis' lab had been very successful and productive. During the eight year period, she received co-authorship credit on nine publications. Tr. 419. Beginning in early September, she initiated a comprehensive search for jobs elsewhere within Defendant, applying for 41 positions at Defendant. Tr. 197-98 and 418-20; Ex. 24. To apply for these jobs, Plaintiff filed online applications with Defendant's Human

Resources department. Tr. 197-98 and 640-43. In stark contrast with her prior experiences before she requested accommodations for her back condition, Plaintiff was not interviewed for, or offered, a single job. Tr. 420.

On November 30, 2012, Plaintiff's employment with Defendant Washington University ended. Tr. 249.

In 2014, Ellis left Washington University to take a position at Baylor University. Hoog Depo., p. 56. At that time, all of the positions in Ellis' lab were eliminated. After Ellis left Washington University, Defendant Washington University transferred every other employee in Ellis' lab to another position at Defendant. Hoog Depo., pp. 56-59. Plaintiff was the only person who was let go from Ellis' lab due to a job elimination who was unable to find another job at Washington University. Hoog Depo., pp. 57-58.

On or about February 20, 2013, Plaintiff filed her charge of discrimination. Tr. 418. On August 7, 2014, Plaintiff filed a two-count Petition under the Missouri Human Rights Act ("MHRA"). D2. In Count I, Plaintiff alleged that Defendant Washington University and Defendant Ellis discriminated against her on the basis of a disability. D2, pp. 2-4. In Count II, she alleged that both Defendants also retaliated against her by their decision to terminate her employment and/or not provide her with other employment. D2, pp. 4-5; *see also* D943, p. 3 (same language in Second Amended Petition). Before trial, Plaintiff dismissed Count I and proceeded only on her retaliation claim against each Defendant.

Beginning on April 17, 2017, the trial court conducted a jury trial. During the

trial, Defendant argued that Plaintiff had not filed her lawsuit within the two-year statute of limitations under the MHRA. *See* Mo. Rev. Stat. § 213.111 (2016). In connection with this defense, Defendants contended that they made the decision to eliminate Plaintiff's position in Ellis' lab in July 2012, which was more than two years before Plaintiff filed her lawsuit. In response, Plaintiff contended that no one definitively told her that her job in Ellis' lab would be ending until at least August 10, 2012, less than two years before she filed her lawsuit. *See*, e.g., Tr. 699.

At the conclusion of the evidence, the trial court submitted a separate verdict director for each Defendant regarding Plaintiff's "discharge" and whether Plaintiff's "request for a reasonable accommodation for herniated discs" was a contributing factor in such discharge. Appellant's Appendix, A29–A30. The trial court also permitted Defendant to submit its statute-of-limitations defense under § 213.111. Tr. 689-90.

The jury rendered its verdict on April 21, 2017. With respect to its verdict on the retaliation claim against Defendant Washington University, the jury found in favor of Plaintiff. Appellant's Appendix, A31. In rendering this verdict, the jury necessarily rejected Defendants' limitations defense. With respect to its verdict on the retaliation claim against Defendant Ellis, the jury found in favor of Defendant Ellis. Appellant's Appendix, A31.

On or about July 12, 2017, Defendant filed a Motion for Judgment Notwithstanding the Verdict or, Alternatively, for New Trial. D952-53. On or about August 25, 2017, the trial court denied Defendant's post-trial motions and entered its

Order and Amended Judgment. Appellant's Appendix, A1-A11.

ARGUMENT

I. Plaintiff Engaged in Protected Activity Sufficient to Serve as a Basis for Her Retaliation Claim (Response to Point I).

Defendant first contends that the trial court erred in denying its motion for judgment notwithstanding the verdict because Plaintiff failed to engage in a protected activity sufficient to make a submissible retaliation claim.

Standard of Review

The following standard of review is applicable to Points I-III raised by Defendant. "The standard of review based on a trial court's denial of a motion for judgment notwithstanding the verdict is whether the plaintiff made a submissible case." *Echard v. Barnes-Jewish Hosp.*, 98 S.W.3d 558, 565 (Mo. App. 2002). To make a submissible case, a plaintiff must present substantial evidence to support every fact essential to liability. *Id.*

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000). "The jury is the sole judge of the credibility of the witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony." *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 584 (Mo. App. W.D. 2002).

"A judgment notwithstanding the verdict is a drastic action, and will only be granted when reasonable persons could not differ on a correct disposition of the case." *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 832 (Mo. App. E.D. 2005).

If a denial of a judgment notwithstanding the verdict is based on a conclusion of law or an interpretation of a statute, then the decision warrants *de novo* review. *Lapponese v. Carts of Colorado, Inc.*, 422 S.W.3d 396, 400-401 (Mo. App. E.D. 2013).

Argument

The MHRA's prohibition of retaliation is contained in § 213.070 which states that "[i]t shall be an unlawful discriminatory practice . . . [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter." Mo. Rev. Stat. § 213.070(2).[1]

In order to make a submissible retaliation claim under the MHRA, a plaintiff must establish that: (1) she engaged in an activity protected by the MHRA[2]; (2) a discharge

[1] Unless otherwise indicated, all statutory references to the MHRA are references to Mo. Rev. Stat. 2016.

[2] Defendant suggests that the Plaintiff must prove that she "complained of discrimination" to have a submissible retaliation claim. *See* Appellant's Substitute Brief ("Appellant's Br."), p. 40 n. 14. Many MHRA retaliation cases do arise after a plaintiff complains of discrimination. In such cases, the discrimination complaint may be a protected activity sufficient to give rise to a retaliation claim. However, there other forms of protected activity that can also give rise to a retaliation claim. *See, e.g., Walsh v. City of Kansas City*, 481 S.W.3d 97, 105-06 (Mo. App. W.D. 2016)(plaintiff engaged in

occurred; (3) her protected activity was a contributing factor in the discharge; and (4) as a direct result of such conduct, she sustained damage. *See* Missouri Approved Instructions ("MAI") 38.01(A)(2014 Revision); *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665, 668-9 (Mo. 2009) (retaliation claims follow same analysis as discrimination claims); *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 866 (Mo. App. E.D. 2009); *Igoe v. Dep't of Labor & Indus. Relations*, 2004 Mo. App. LEXIS 275, *13-14 (Mo. App. E.D.2004), *reversed and remanded on other grounds*, 152 S.W.3d 284 (Mo. 2005). In this case, Plaintiff's request for an accommodation not to perform cell culture or excessive bench work because of her herniated discs constituted the protected activity on which Plaintiff based her retaliation claim. *See* Appellant's Appendix, A29-30; Ex. F4; Tr. 383-86, 395-99.

A. A Request for an Accommodation Is a Protected Activity.

Defendant does not dispute that Plaintiff submitted sufficient evidence on elements (2)-(4). However, Defendant contends that Plaintiff failed to prove the first element because a request for an accommodation cannot be a protected activity under the MHRA. This contention must be rejected.

Plaintiff is not aware of any Missouri appellate cases that have directly addressed the issue of whether a request for an accommodation can serve as the basis for a

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protected activity under the MHRA retaliation provision even though he did not make a complaint of discrimination); *see also Keeney v. Hereford Concrete Products*, 911 S.W.2d 622, 625 (Mo. 1995); *see* also pp. 75-79, *infra*.

retaliation claim under the MHRA.[3] However, this Court has held that "[i]n deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination case law that is consistent with Missouri law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. 2007); *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 115 (Mo. 2015). In disability-related cases, Missouri appellate courts have specifically held that the provisions of the MHRA and The Americans with Disability Act ("ADA"), 42 U.S.C. § 12101 *et seq*., a federal law prohibiting discrimination against individuals with disabilities, are "similar enough" such that "federal cases are instructive whenever Missouri cases do not answer a question." *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315, 320 (Mo. App. W.D. 2005); *see also Daugherty*, 231 S.W.3d at 821-22 (in disability discrimination case, Court cites *Medley* with approval and relies upon federal cases interpreting the ADA).

In addition, the Missouri Courts of Appeal have relied upon federal law when interpreting the MHRA's retaliation provision. In *McCrainey v. Kansas City Missouri School District*, 337 S.W.3d 746 (Mo. App. W.D. 2011), the defendant employer argued that the plaintiff failed to make a submissible case of retaliation under § 213.070 because he had not complained about conduct which in fact violated the MHRA. *Id*., at 752. In interpreting the retaliation provision under the MHRA, the court specifically relied upon

[3] In *Kerr v. Curators of Univ. of Missouri*, 512 S.W.3d 798, 814-15 (Mo. App. W.D. 2016), the Court of Appeals assumed, without discussion or analysis, that a request for an accommodation is a protected activity under the MHRA.

federal case law to conclude that the plaintiff did not have to prove that discrimination in fact occurred. *Id*., at 753. Other courts have similarly relied upon federal case law to interpret § 213.070 in this manner. *See, e.g.*, *Vacca v. Missouri Department of Labor and Industrial Relations*, 2017 Mo. LEXIS 1145, *23 (Mo. App. E.D. 2017), *vacated and reversed on other grounds*, 2019 Mo. LEXIS 87.

In determining whether a request for an accommodation is a protected activity, reliance on federal case law interpreting the ADA retaliation provision is particularly appropriate because the MHRA and ADA have very similar retaliation provisions:

ADA	**MHRA**
No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203(a).	It shall be an unlawful discriminatory practice . . . [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter. Mo. Rev. Stat. § 213.070(2).

As this side-by-side comparison demonstrates, although the ADA and MHRA use slightly different words, there are no meaningful differences in the substance of the two statutes with regard to their prohibitions of retaliation. Because there are no Missouri cases on point and the retaliation provisions contained in the MHRA and the ADA are substantively identical, federal case law provides compelling guidance.

The first federal appellate case to address the issue of whether the ADA prohibits an employer from retaliating against an employee because the employee requested a reasonable accommodation was *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997). In discussing that issue, the First Circuit stated: "It is questionable whether *Soileau* fits within the literal language of the statute: he filed no charge, nor participated in any investigation. Moreover, he did not literally oppose any act or practice, but simply requested an accommodation, which was given. It would seem anomalous, however, to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation." 105 F.3d at 16. The First Circuit did not expressly decide the issue in that case, but simply assumed *arguendo* that the plaintiff's request for a reasonable accommodation was protected under the ADA. *Id.* However, in a later decision, the First Circuit expressly held that "requesting an accommodation is protected activity for the purposes of § 12203(a)." *Wright v. CompUSA, Inc.*, 352 F.3d 472, 478 (1st Cir. 2003); *see also Freadman v. Metropolitan Property & Casualty Ins. Co.*, 484 F.3d 91, 106 (1st Cir. 2007).

In addition to the First Circuit, every other federal appellate court has either expressly held or assumed that a request for a reasonable accommodation constitutes protected activity under the ADA. *See Weixel v. Board of Educ. of the City of New York*, 287 F.3d 138, 149 (2nd Cir. 2002); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183,

190-191 (3rd Cir. 2003); *Haulbrook v. Michelin N. Amer., Inc.*, 252 F.3d 696, 706 n.3 (4th Cir. 2001); *Tabatchnik v. Continental Airlines*, 2008 U.S. App. LEXIS 2051, at *7 (5th Cir. 2008); *A.C. v. Shelby County Bd. of Educ.*, 711 F.3d 687, 698 (6th Cir. 2013); *Hoppe v. Lewis Univ.*, 692 F.3d 833, 842 (7th Cir. 2012); *Heisler v. Metropolitan Council*, 339 F.3d 622, 632 (8th Cir. 2003); *Coons v. Secretary of the Dep't of the Treasury*, 383 F.3d 879, 887 (9th Cir. 2004); *Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1194 (10th Cir. 2007); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998); *Solomon v. Vilsack*, 763 F.3d 1, 15-16 (D.C.Cir. 2014). As the above authority demonstrates, the federal courts have reached an extraordinary consensus on the issue.

The reasoning of the federal courts is sound. If an employer can fire an employee without repercussions for requesting a reasonable accommodation or can grant the accommodation for one day and then fire the employee, then the employer's obligation to provide a reasonable accommodation is rendered meaningless. The power to fire the employee for requesting an accommodation essentially nullifies and eliminates the right. Moreover, if employers can fire employees with impunity for making a request for an accommodation, it would have a tremendous chilling effect on whether employees will seek accommodations.

Defendant argues that the federal court authority should not be followed because the federal courts relied upon 42 U.S.C. § 12203(b), a provision not found in the MHRA, to conclude that a request for an accommodation can constitute a protected activity.

Defendant's argument is without merit. The federal courts have found that the ADA prohibits retaliation against an employee who requests an accommodation based upon § 12203(a), not § 12203(b). *See Soileau*, 105 F.3d, at 16 (court makes its determination with reference to § 12203(a) only); *Wright*, 352 F.3d, at 478 ("requesting an accommodation is protected activity for purposes of § 12203(a)."); *Freadman*, 484 F.3d, at 106; *Shellenberger*, 318 F.3d, at 188-91; *Heisler*, 339 F.3d, at 632; *Kirkeberg v. Canadian Pacific Ry.*, 619 F.3d 898, 907-08 (8th Cir. 2010)(follows *Heisler* in concluding that a request for an accommodation "is protected activity for purposes of 42 U.S.C. § 12203(a)"); *Jones*, 502 F.3d, at 1194-95; *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 758-59 (3rd Cir. 2004); *Jackson v. J. Lewis Crozier Library*, 445 Fed. Appx. 533, 536 (3rd Cir. 2011); *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49, 60 (4th Cir. 2002); *Rodrigo v. Carle Foundation Hosp.*, 879 F.3d 236, 243 (7th Cir. 2018); *Pittman v. American Airlines, Inc.*, 692 Fed. Appx. 549, 553 (10th Cir. 2017); *Meyer v. Secretary of the United States H.H.S.*, 592 Fed. Appx. 786, 792 (11th Cir. 2014). Contrary to Defendant's assertion, none of these cases have relied upon § 12203(b) to conclude that the ADA prohibits retaliation against an employee for making a request for an accommodation. Instead, the federal courts have relied upon § 12203(a), the provision which is virtually identical to the MHRA retaliation provision.

Defendant also argues that the language of § 213.070 does not encompass a request for accommodation. However, in interpreting § 213.070, the Court has previously followed federal law to impose requirements not found in the explicit

language of the provision. Specifically, in *McCrainey*, the court found that a plaintiff had to demonstrate a "reasonable, good faith, belief" that he was complaining about discrimination to prevail upon his retaliation claim, even though that standard is not contained within the language of § 213.070. 337 S.W.3d at 752-54.

In an effort to find some authority to support its position, Defendant cites to a Circuit Court decision in Ray County, Missouri. *See* Appellant's Br., pp. 42-43. However, upon reviewing Case.Net, it is apparent that neither party in that case provided any written substantive analysis or legal authority regarding that issue or cited the unanimous federal legal authority on this issue.

Further, at least one other Circuit Court in Missouri has come to the opposite conclusion. In *Kudlinski v. State of Missouri*, Cause No. 11SL-CC04793, before the Circuit Court of St. Louis County, the State of Missouri, represented by the Missouri Attorney General, also argued that a request for a reasonable accommodation could not serve as a basis for a retaliation claim. Respondent's Appendix, A1-A6. In contrast to the Ray County case, the plaintiff's counsel in *Kudlinski* cited the federal authority holding that a request for a reasonable accommodation can serve as a basis for such a claim. Respondent's Appendix, A7-A13. With the benefit of such legal authority, the Circuit Court rejected the State's argument and denied its motion for judgment notwithstanding the verdict. *Kudlinski v. State of Missouri*, Cause No. 11SL-CC04793, (Mo. Cir. St. Louis Cty. October 8, 2014). Respondent's Appendix, A14-A17.

As an additional basis for arguing that a request for an accommodation is not a protected activity, Defendant contends that if an employer grants an employee's request for an accommodation and thereafter fires him for making the request, the employee can still bring a disability claim under § 213.055. *See* Appellant's Br., pp. 44-45. This contention ignores how a retaliation claim fundamentally differs from a discrimination claim. A claim for retaliation is not based upon discrimination against a protected characteristic, but instead is based upon an employer's actions taken to punish an employee who makes a claim of discrimination or otherwise engages in protected activity. *McCrainey*, 337 S.W.3d, at 752; *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006). In other words, whereas a disability discrimination claim brought under § 213.055 necessarily focuses on whether, and requires a plaintiff to prove that, the plaintiff's *disability* was a contributing factor in the challenged employment action, a retaliation claim brought under § 213.070 focuses on whether the employee's *protected activity* was a contributing factor. This distinction is crucial because it requires the fact finder to assess whether a different reason or motive factored in the employer's decision. Importantly, the MHRA, like the federal antidiscrimination laws, prohibit employment actions based on discriminatory *or* retaliatory motives.

Defendant also suggests that the Court should not recognize that requesting an accommodation is a protected activity under § 213.070 because, under some factual circumstances, a plaintiff may be able to bring some other type of claim relating to a request for an accommodation. *See* Appellant's Br., p. 41. For example, as Defendant

correctly points out, if an employer denies a request for a reasonable accommodation or fires an employee for making a complaint about a denial of a reasonable accommodation, an employee may have a cause of action under the MHRA. However, there is no discernable reason why the existence of such potential claims would be a basis to preclude a retaliation claim under § 213.070 based upon a request for an accommodation. Defendant has certainly provided no such reason.

Based on Missouri case law and the virtually identical language of the ADA and MHRA retaliation provisions, it is appropriate to look to federal case law on the issue of whether a request for reasonable accommodation can be the basis for a retaliation claim. Federal case law is uniform that a request for an accommodation can be the basis for a retaliation claim and that consensus is based upon sound reasoning. The Court should therefore follow that guidance and similarly hold that a request for an accommodation is a protected activity that can serve as the basis for a retaliation claim under the MHRA.

B. Plaintiff's Repeated Requests for Accommodation Constituted Protected Activity.

Even if the Court were to conclude that a single request for an accommodation does not always constitute a protected activity under § 213.070, Plaintiff's requests for an accommodation constituted protected activity in this case.

Under Missouri law, an employer is required to provide an employee with a reasonable accommodation for a known disability. *Lomax v. DaimlerChrysler Corp.*, 243 S.W.3d 474, 480 (Mo. App. E.D. 2007); *Kerr*, 512 S.W.3d, at 811; 8 CSR 60-

3.010(G)(1). As Defendant itself acknowledges, if an employee requests a reasonable accommodation and the employer thereafter refuses to provide it or otherwise seeks to assign the employee perform work contrary to that accommodation, the employer has violated the MHRA. *Medley*, 173 S.W.2d, at 320; 8 CSR 60-3.010(G)(1); Appellant's Br., p. 41. If the employee must thereafter reassert her request for the accommodation, she is "opposing" the employer's violation of her rights under the MHRA.

In this case, Plaintiff did not merely request an accommodation on a single occasion. In multiple instances, she approached Ellis and Hoog to demand an accommodation. *See* Tr. 181, 190-91, 276-78, 382-86, 395-98, and 399-400; Hoog Dep., pp. 51-52. Even after Plaintiff communicated her need to receive an accommodation, Defendants attempted to assign her work that would violate that accommodation. Tr. 377-78, 382, 384, and 386. Plaintiff refused to perform the assignments because of her back condition and went to Ellis and Human Resources to reassert her need for an accommodation. Tr. 384 and 395-400.

Plaintiff's repeated requests for a reasonable accommodation were efforts by her to respond to, and address, Defendant's attempts to violate her right under the MHRA to be provided a reasonable accommodation. By making these repeated requests for accommodation, she made a submissible case that she "opposed [a] practice prohibited" by the MHRA within the meaning of § 213.070. Thus, even if the Court held that a single request for an accommodation does not constitute protected activity under the

MHRA's retaliation provision, Plaintiff's repeated demands for the accommodation constitute "opposition" sufficient to serve as the basis for her retaliation claim.

II. Plaintiff's Claim Was Not Time-Barred Under § 213.075 (Response to Point II).

Under the MHRA, "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice may make, sign, and file with the commission a verified complaint in writing, within one hundred and eighty days of the alleged act of discrimination." Mo. Rev. Stat. § 213.075. On August 10, 2012, Ellis, Sledge and Nichols met with Plaintiff and notified her that, as of the end of November 2012, her job in Ellis' lab would be eliminated. Tr. 245-6, 413-14. On February 20, 2013, more than 180 days after that meeting, Plaintiff filed her charge of discrimination. Tr. 418. Defendant argues that Plaintiff failed to make a submissible retaliation case because she failed to file her charge within 180 days of receiving notification that her position in Ellis' lab would end.[4] This argument is without merit because (1) Defendant has waived it, (2) August 10, 2012, is not the proper date on which to start the 180-day period under

[4] At trial, Defendant contended that the decision to terminate Plaintiff was actually made in July 2012. Based on this contention, Defendants submitted an affirmative defense to the jury that Plaintiff had failed to comply with the MHRA's two-year statute of limitations under Mo. Rev. Stat. § 213.111.1. *See supra*, at pp. 20-21; Tr. 689-90, 734-37. In finding against Defendant Washington University, the jury necessarily rejected the affirmative defense. Defendant has not raised any issue in its appeals regarding this finding by the jury. Thus, August 10, 2012, is the earliest date on which Defendant can contend that Plaintiff had definitive knowledge that her job in Ellis' lab would be eliminated.

§ 213.075, and (3) the 180-day rule was not a condition precedent to the filing of Plaintiff's lawsuit or to her ability to prevail upon her claim.

A. Defendant Waived Any Argument That the 180-Rule Compels Judgment in Its Favor Because It Failed to Tender a Jury Instruction for the Affirmative Defense.

Defendant contends that it is entitled to judgment because Plaintiff failed to file her charge within 180 days of the alleged discriminatory act as set forth in § 213.075. According to the Defendant, § 213.075 creates a statute of limitations, which, in turn, gives rise to an affirmative defense to liability to Plaintiff's MHRA claim. *See* D878, p. 4 (in their Answer, Defendants set forth as an affirmative defense that Plaintiff failed to comply with "the 180-day limitation period for filing a charge provided for in R.S.Mo. § 213.075").

When a party pleads an affirmative defense and the case goes to trial, the party is required to request an instruction setting forth the affirmative defense and to tender a proposed instruction regarding the affirmative defense. *State ex rel. State Highway Commission v. Washington*, 533 S.W.2d 555, 559 (Mo. 1976); *Yeager v. Wittels*, 517 S.W.2d 457, 465-66 (Mo. App. 1974); *Goudeaux v. Board of Police Commissioners of Kansas City*, 409 S.W.3d 508, 515 (Mo. App. W.D. 2013). A failure to request and tender such an instruction constitutes waiver and abandonment of the affirmative defense. *Washington*, 533 S.W.2d, at 559; *Yeager*, 517 S.W.2d, at 465-66.

In this case, Defendant failed to request or tender a jury instruction regarding Plaintiff's purported failure to comply with the 180-day rule. *See* Tr. 669-84.[5] Therefore, Defendant has abandoned and waived any argument that it is entitled to judgment on the defense that Plaintiff failed to comply with the purported 180-day rule.

B. For Purposes of § 213.075, the 180-Day Limitation Period Should Start on the Date of Plaintiff's Discharge from Defendant.

As explained below at pp. 40-53, the 180-day period under § 213.075 was not a condition precedent for the filing of Plaintiff's lawsuit. However, even if it were, Plaintiff met that requirement. In arguing that Plaintiff failed to timely file her charge within 180 days, Defendant bases its argument on the premise that the operative start date for the 180-day period is, at the latest, August 10, 2012--the date that Defendants notified Plaintiff that her job in Ellis' lab would be eliminated by the end of November 2012. However, for purposes of calculating the 180-day period under § 213.075, August 10, 2012, is not the proper start date.

Under Missouri law, a statute of limitations begins to run "when the damage resulting therefrom was sustained and capable of ascertainment." *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 580 (Mo. 2006); *see also* Mo. Rev. Stat. § 516.100. As Defendant acknowledges, Missouri courts view MHRA actions as tort actions. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 86-88 (Mo. 2003)(MHRA claim is "analogous" to tort claims); *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 57 (Mo.

[5] By contrast, Defendant did propose and tender a jury instruction regarding the two-year statute of limitations under § 213.111. Tr. 667-69 and 689-90.

App. W.D. 2016)(MHRA claim treated as a tort action for determining proper rate for post judgment interest); *Bowolak v. Mercy East Communities*, 452 S.W.3d 688, 704 (Mo. App. E.D. 2014)(same). Accordingly, although *Powel* specifically discussed tort claims encompassed by § 516.100, its principles and holdings should apply with equal force to the MHRA.

Under § 213.075, a charge should be filed within 180 days of the "alleged act of discrimination." In this case, the "alleged act of discrimination" was the discharge of her employment from Defendant, not the elimination of her job in Ellis' lab. *See* Appellant's Appendix, A29–A30 (verdict directors focused on "discharge" of Plaintiff). Between August 10 and the date of her discharge, Plaintiff retained her job with all benefits. She only sought damages directly resulting from her discharge in November 2012. *See* A29-30. Accordingly, under *Powel*, the 180-day limitations period does not begin to run until her employment ended.

Defendant's only authority for its argument that the August 10, 2012, meeting provides the operative starting date for the 180-day limitations period is a Missouri appellate case relying upon United States Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Appellant's Br., p. 47 n.20. Defendants' reliance on *Delaware State College* is misplaced.

First, under *Powel*, Missouri law applies a different rule for the start date of a period of limitation.

Second, *Delaware State College* is factually distinguishable from the instant case. In that case, the plaintiff alleged a discriminatory denial of tenure. 449 U.S., at 252. Under the College's procedures, when a person was denied tenure, the person was offered a "terminal" contract to teach one additional year. *Id.*, at 252-53. When that contract expired, the employment relationship ended. *Id*. Thus, under these procedures, when a person was denied tenure, "termination of employment at [the college was] a delayed, but inevitable, consequence." *Id*., at 257-58. Because termination of employment inexorably flowed from the denial of tenure, the Supreme Court held that the proper date to start the limitations period for filing the charge was when the tenure decision was made and communicated to the plaintiff. *Id*., at 258.

In Plaintiff's case, Plaintiff's termination of employment from Washington University did not inevitably flow from the decision to eliminate her position in Ellis' lab. In the August 10 meeting and in the subsequent letter confirming the substance of the meeting, Defendant only informed Plaintiff that her position as "Staff Scientist with the Division of Oncology is being eliminated," not that her employment with Washington University was being terminated. Respondent's Appendix, A29 (Ex. 22). Further, in the meeting and letter, Defendant informed Plaintiff that she was eligible to transfer to another position at Defendant. *Id*. Consistent with this letter, all involved parties anticipated that Plaintiff would have the opportunity to transfer to another position within Washington University. Normally, when Washington University eliminates an employee's position, it only provided 30 days' notice to the effected employee. Tr. 248.

However, in Plaintiff's case, Defendants provided her with more than 3.5 months of notice. Ellis explained that he seeks to provide more advanced notice so that the effected employee has the opportunity to look for other jobs within or outside the University. Tr. 579-80. Defendant's Human Resource Consultant Sledge also testified that Defendant would undertake efforts to attempt to transition Plaintiff to other positions within the University after the decision had been made to eliminate Plaintiff's position in Ellis' lab. Tr. 244 and 248; *see also* Tr. 149; Respondent's Appendix, A29 (Ex. 22).

Plaintiff likewise believed that, as in the past, she would likely be able to transfer to another position at Defendant. Tr. 452. During her employment with Washington University, Defendant eliminated her position at least three times. Tr. 353-56. In each instance, she successfully applied for, and received offers to, other positions at Defendant. Tr. 353-56. After she learned that her job in Ellis' lab would also be eliminated, she similarly initiated a search for other positions within Defendant. Tr. 197-98 and 419.

As the evidence shows, after the August 10, 2012, meeting, absent retaliation, Plaintiff had a robust and realistic opportunity to secure another position at Defendant before the end of November 2012, thereby avoiding a termination of her employment with Defendant. Because the elimination of Plaintiff's job in Defendant Ellis' lab did not automatically equate to termination at Defendant Washington University, *Delaware State College* is distinguishable and inapplicable.

Accordingly, the proper date for starting the 180-day period under § 213.075 was Plaintiff's date of termination, not the August 10, 2012 meeting. Because Plaintiff filed her charge within 180 days of the date of termination, she in fact filed a timely charge under § 213.075.[6]

C. Under *Farrow*, the 180-Day Limitation Period Is Not a Condition Precedent to the Filing of a Lawsuit.

Defendant's assertion that Plaintiff failed to make a submissible case on the basis that she did not satisfy the 180-day period is also without merit because, in *Farrow v. St. Francis Medical Center*, 407 S.W.3d 579, 591 (Mo. 2013), the Court squarely held that that filing of a timely charge is *not* a condition precedent to filing a civil action in the circuit court. In that case, the Court stated:

> "[T]he only requirements imposed…to file a claim under the MHRA are that: (1) an employee file a charge with the Commission prior to filing a state court action; (2) the Commission issue a right to sue letter; and (3) the state court action be filed within ninety days of the issuance of the right to sue letter but not later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party. The statute does not

[6] Defendant also points to Plaintiff's counsel's closing argument in which he stated that in the August 10, 2012 meeting that Plaintiff "was notified that she would be fired." Tr. 699. This argument is not inconsistent with Plaintiff's position. As discussed above, although Plaintiff was definitively notified in that meeting that her position in Ellis' lab was being eliminated and she was being "fired" from Ellis' lab, there is no evidence that anyone told her in that meeting that her employment with Defendant Washington University would end or that she would be denied an opportunity to apply for other positions within Washington University.

> read, "If, after one hundred eighty days from the filing a *timely* complaint…." This Court will not read such a requirement into the plain statutory language."

407 S.W.3d at 591. The Court later reaffirmed this holding. *State ex rel. Tivol Plaza, Inc. v. Mo. Comm'n on Human Rights*, 527 S.W.3d 837, 843-44 (Mo. 2017).

It is undisputed that Plaintiff met each of the three requirements specified above in *Farrow*. Plaintiff filed a charge of discrimination. Tr. 418. The Missouri Commission on Human Rights ("MCHR") issued a right to sue letter. Tr. 418. Plaintiff also filed her lawsuit within 90 days of the issuance of the right to sue letter. Tr. 418; D2, pp. 1 and 2. Under *Farrow*, whether Plaintiff filed her charge within 180 days of "the alleged act of discrimination" is simply not a basis to conclude that Plaintiff failed to make a submissible case.

Despite *Farrow's* clear language, Defendant argues that *Farrow* does not hold that the 180-day rule is not a condition precedent to filing a MHRA lawsuit. This argument is baseless. In *Farrow*, the defendants argued that plaintiff had failed to state a claim under the MHRA because she failed to satisfy the statutory prerequisites for filing a lawsuit under the MHRA, including the 180-day rule. 407 S.W.3d, at 588. The Court rejected the defendant's argument based on its holding that the plain statutory language in the MHRA does not require that a charge be filed within 180 days of the alleged discriminatory act as a condition precedent to filing a MHRA lawsuit. *Id.*, at 591. If this analysis in *Farrow* were not clear enough, the Court stated just a few years later that, in

Farrow, it had "held" that the 180-day rule was not a condition precedent to filing a MHRA action in the circuit court. *Tivol*, 527 S.W.3d, at 843-44.

Even in the face of this language in *Farrow* and *Tivol*, Defendant contends that "the holding" of *Farrow* was that the defendant in that case had waived the timeliness issue "under the particular circumstances presented." *See* Appellant's Br., p. 69. Yet, in *Farrow*, there is no discussion of waiver and certainly no discussion or suggestion that the defendant in the case would have been able to assert the 180-day rule as a defense in circuit court if it had not "waived" the issue.

Defendant further argues that "*Farrow* was never applicable to this case." Appellant's Br., pp. 68-72. It provides several bases for this argument, none of which have any merit.

Defendant first suggests that *Tivol* narrowly limited the application *Farrow's* holding that the filing of a timely charge is not a condition precedent to the filing of a MHRA claim. Appellant's Br., pp. 68-69. This interpretation of *Tivol* is plainly wrong. In *Tivol*, the two charges of discrimination at issue had been pending before the MCHR for more than 180 days at the time that the MCHR issued the right to sue letters. 527 S.W.3d at 839-40. In its analysis, the *Tivol* court first reaffirmed the holding from *Farrow* that a filing of a timely charge is *not* a condition precedent to the filing of a civil action. *Id*., at 843-44. Nothing in *Tivol* stated or suggested that the Court was limiting or modifying this holding from *Farrow*.

However, the *Tivol* court then proceeded to provide a clarification of a different holding in *Farrow*. In *Farrow*, the MCHR issued a right to sue letter to the plaintiff after the plaintiff's charge had been pending before the MCHR for 145 days. 407 S.W.3d, at 586. The Court stated that when the MCHR issued the right to sue letter to the plaintiff under these circumstances, it was "implicitly finding Farrow's claim was timely." *Id.*, at 589. The Court held that the employer could therefore file a writ of mandamus or other relief under Mo. Rev. Stat. § 213.085.2 to challenge this implicit finding that the charging party's claim was timely. *Id.*, at 589-90.

In *Tivol*, the Court limited this specific holding in *Farrow* to cases in which the charge of discrimination had been pending for fewer than 180 days. 527 S.W.3d, at 844. As the Court explained in *Tivol*, if a plaintiff requests a right to sue letter after the charge has been pending for more than 180 days, statutory language in the MHRA compels the MCHR to issue the right to sue letter. *Id.*, at 844-45. In such a cases (unlike in *Farrow*), the issuance of the right to sue letter could *not* be construed to be "implicitly finding [that the plaintiff's] claim was timely." *See id.* As a result, the *Tivol* court held that the employer was unable to file a writ of mandamus to challenge the issuance of the right to sue letter. *Id.*

In the instant case, Defendant contends that *Tivol* also limited *Farrow's* holding that a filing of timely charge is not a condition precedent to the filing of a civil action to cases where the charge was pending before the MCHR for more than 180 days. However, nothing in *Tivol* states that this particular holding from *Farrow* was limited or

modified at all. The *Tivol* court only limited the completely separate holding in *Farrow* relating to when an employer can file a writ of mandamus to challenge the issuance of a Notice of Right to Sue.

Defendant next argues that the Court's discussion in *Farrow* regarding the 180-day rule was limited to a finding that the statutory prerequisites found in § 213.111 were not "jurisdictional" but were merely a statutory limit on remedies. *See* Appellant's Br., pp. 70-71. Yet, again, Defendant's interpretation of *Farrow* is incorrect. Although the *Farrow* Court did reference the distinction between "jurisdictional" limits on a court's authority to render a decision and "statutory limits on remedies," the Court then proceeded to discuss the MHRA's "limits on remedies." 407 S.W.3d, at 591. After examining the MHRA's statutory language, the Court concluded that there was no statutory requirement that the plaintiff comply with the 180-day rule as a condition precedent to filing a MHRA lawsuit. *Id*. Again, the Court later affirmed this conclusion in *Tivol*. 527 S.W.3d, at 843-44 ("in *Farrow*, this Court applied these statutory provisions and held filing a timely complaint with the MCHR is not a condition precedent to filing a civil action in the circuit court"). As *Farrow* and *Tivol* plainly state, the 180-day rule is not a condition precedent to filing a civil action under the MHRA.

Relying upon pre-*Farrow* case law, the statutory language in the MHRA, and broad policy considerations, Defendant argues that the 180-day rule is a condition precedent to filing a lawsuit. *See* Appellant's Br., pp. 53-67. However, as discussed above, after *Farrow* and *Tivol*, the ship has sailed on that argument. Without openly

stating it, Defendant's argument is that the Court should overturn *Farrow* and *Tivol*, two decisions issued less than six and two years ago, respectively. Given the plain language of the MHRA and the sound reasoning of those decisions, the attempt to have the Court overturn these recent decisions is inappropriate and unwarranted.

Finally, Defendant complains that it has no method by which to raise its claim that the charge was not timely filed. Based on this complaint, it suggests that it must be given the right to raise the untimeliness "defense" in Plaintiff's civil action. This argument is unavailing. Defendant did in fact have a full opportunity to challenge the timeliness of the filing of the charge with the MCHR and to seek to have the MCHR dismiss those allegations in the charge that were deemed untimely. *See Farrow*, 407 S.W.3d 588-89; *Tivol*, 527 S.W.3d, at 843; 8 C.S.R. 60-2.025(7)(B)(3). There is no evidence in this case that Defendant took any steps to challenge the timeliness of the charge. In any event, as *Farrow* and *Tivol* make clear, once Plaintiff filed her lawsuit, it was too late for Defendant to raise this concern. Plaintiff simply had no requirement to demonstrate that she filed her charge within 180 days of the alleged discriminatory act in order to proceed with, and prevail in, her civil action. *Farrow*, 407 S.W.3d, at 591; *Tivol*, 527 S.W.3d at 843-44.

D. The Newly-Enacted Amendment to § 213.075 Does Not Apply to This Case.

Defendant also argues that the 180-day rule applies to this case based on a statutory amendment of the MHRA that went into effect after the completion of the trial and the entry of judgment in this matter. This amendment provides:

> "As a jurisdictional condition precedent to filing a civil action under the this chapter, any person claiming to be aggrieved by an unlawful discriminatory practice shall make, sign, and file with the commission a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination…The failure to timely file a complaint with the commission may be raised as a complete defense by a respondent or defendant at any time during the administrative proceedings before the commission, or in subsequent litigation…"

Mo. Rev. Stat. § 213.075.1 (2017).

According to Defendant, this new provision, in effect, abrogated *Farrow* and now requires an employee to file a charge within 180 days of the alleged discriminatory action as a condition precedent to filing a civil action. Defendant further alleges that this new provision applies to this case and requires reversal of the judgment. In other words, Defendant argues that that Plaintiff failed to make a submissible claim at trial based on a statute that had not yet been enacted. This argument must be rejected.

1. The amendments do not apply because the changes are substantive.

The MHRA amendment to § 213.075 does not apply to this case because the amendment, if applied to this case, would constitute a substantive change.

It is well established that the Missouri Constitution prohibits laws that are retrospective in operation. Mo. Const., art. I, Sec. 13 ("that no ex post facto law nor law impairing the obligation of contracts are retrospective in operation…can be enacted."); *State ex rel. St. Louis-San Francisco Ry. Co., v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974). The exception to this prohibition is where the statute is "procedural only" and does not affect any substantive right of the parties. *See Doe v. Roman Catholic Diocese,* 862 S.W.2d 338, 341 (Mo. 1993).[7] If a statutory provision is not "procedural only," then it can only be applied prospectively to cases which accrued after the effective date of the change in the law.

A case accrues when the wrongful conduct occurs that gives rise to the damages alleged in the claim. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. 2010). In the instant case, because all of the alleged unlawful conduct occurred before the effective date of the statutory amendment, Plaintiff's claims accrued before the new law

[7] In *Buder*, the Court stated that there were two exceptions to the rule that a statute shall not be applied retrospectively: (1) where the legislature manifested clear intent that it does so, and (2) where the statute is procedural only and does not affect the substantive right of the parties. *Buder*, 515 S.W.2d, at 411. However, in the *Doe* case, the Court clarified that the first exception was not a valid exception standing on its own. Because the rule against applying statutes retrospectively is based on the Missouri Constitution, the legislature cannot supersede the constitutional provision by a statute. *Doe*, 862 S.W.2d, at 341.

went into effect. Thus, Mo. Rev. Stat. § 213.075.1 (2017) can only be applied retrospectively to this case if it is "procedural only."

A substantive provision relates to the rights and duties giving rise to the cause of action or creates, defines, or regulates rights. *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769 (Mo. 2007). On the other hand, a procedural law is the machinery used to carry on the suit. *Id*.

In the instant case, Mo. Rev. Stat. § 213.075.1 (2017) is a substantive provision and is not "procedural only." Under *Farrow*, the 180-day rule was not a condition precedent to the filing of a MHRA lawsuit at the time that Plaintiff's claims accrued.[8] *Farrow*, 407 S.W.3d at 491. Based on its interpretation of the amendment to § 213.075.1 (2017), Defendant maintains that it now has a new affirmative defense to liability that it did not have before. *See McDonald v. Chamber of Congress of Independence, MO*, 2019 Mo. App. LEXIS 790, at *10-14 (W.D. May 21, 2019)(a claim that a MHRA plaintiff has failed to exhaust her administrative remedies with the MCHR is an affirmative defense that the defendant may raise to question the circuit court's statutory authority to proceed with resolving the plaintiff's claim); *McCracken v. Wal-Mart Stores East, LP*, 298

[8] Defendant falsely characterizes the newly-amended § 213.075.1 as merely "clarifying" that the 180-day rule could be raised as a defense to the filing of the MHRA lawsuit. Appellant's Br., pp. 50-51. *Farrow* involved the interpretation of § 213.075, which had been in effect for a substantial period of time. Thus, *Farrow* represents an accurate statement of what the law was, and had been, well before Plaintiff ever filed her charge. To the extent that the amendment to § 213.075 imposes as a condition precedent to a lawsuit that a plaintiff file a charge within 180 days of the alleged discrimination, the amendment constitutes a clear change to the law and is not a mere "clarification."

S.W.3d 473, 476-77 (Mo. 2009)(non-jurisdictional defenses that might bar relief, including a claim that a statutory prerequisite to sue has not been met, should be raised as an affirmative defense); *see also* D878, p.4 (Defendants' characterization of failure to comply with 180-day rule as an affirmative defense). Because § 213.075.1 (2017) purportedly creates a new affirmative defense to liability for a MHRA claim, the amendment is clearly "regulating rights." It is therefore substantive and cannot apply retrospectively to this case.

Defendant suggests that the amendment to § 213.075 should be viewed as a change in the statute of limitations. Courts generally view legislative changes to the length of a statute of limitations as procedural changes. *See State ex rel. Wade v. Frawley*, 966 S.W.2d 405, 407 (Mo. App.E.D.1998). However, the amendment to § 213.075 does not merely lengthen or shorten a statute of limitations. Before the enactment of the amendment, Plaintiff had no obligation at all to demonstrate that she had filed a timely charge in order to prevail upon her civil action. As a result, the statutory amendment imposes a wholly new condition precedent on this action. Therefore, the amendment should not be viewed as an equivalent to a statutory amendment that simply lengthens or shortens a statute of limitations.

Moreover, Missouri courts have recognized that statutes of limitation, while often viewed as procedural, also have a substantive component that can predominate in some circumstances. In such circumstances, "[a] litigant has a right [] that a repeal and new enactment shall not by retrospective operation impair a *substantive* right vested by the

prior statute." *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 938, 941 (Mo. App. W.D. 1982)(emphasis in original). Thus, once an original statute of limitations expires and bars a plaintiff's action, the defendant has acquired a vested substantive right to be free from suit, such that a subsequent statutory lengthening of the statute of limitations cannot revive the cause of action. *Doe*, 862 S.W.2d, at 341.

Similarly, it has long been held that when the Missouri legislature shortens a statute of limitations, the shortened statute of limitations "can only be operative *after* the passage of the act. In other words, the Legislature is not authorized to make a statute of limitation retrospective in its operation, and include the period of existence of the causes of action prior to the enactment of the statute." *Tice v. Fleming*, 72 S.W. 689, 691 (Mo.1903); *see also Cranor v. School District*, 52 S.W. 232, 233 (Mo. 1899)(same as *Tice* except that the *Cranor* Court found that a shortening of a statute of limitations could apply retrospectively "provided a reasonable length of time is given [to the plaintiff] in which to bring his suit"). As the *Cranor* Court further explained:

> "Limitation acts are based on the idea that the party has had an opportunity to try his rights in the courts. A statute which should bar the existing rights of claimants, without affording that opportunity, after the time when the statute should take effect, would not be a statute of limitations, but an unlawful attempt to extinguish rights."

Id., at 233. As a result, such an application of a statute of limitations would be unconstitutional. *Id.*

Defendant seeks to use the amendment to § 213.075 to extinguish Plaintiff's rights. Plaintiff complied with all conditions precedent for the filing of her lawsuit that were in effect at the time she filed her lawsuit. As Defendant itself acknowledges, if the Court applies the newly-enacted amendment of § 213.075, Plaintiff would have no opportunity to comply with newly-created limitations period. Instead, assuming that the operative start date is August 10, 2012, or earlier, the application of the new amendment would necessarily result in a reversal of the judgment and an extinguishment of Plaintiff's rights. As held in *Cranor*, the application of the newly-amended § 213.075.1 in this manner in this case would violate the Missouri Constitution. Defendant's argument must therefore be rejected.

2. Even if the amendment was considered procedural, it would not apply to this case because the amendments do not apply to portions of the case already completed.

Even assuming, *arguendo*, that the amendment to § 213.075 is viewed as procedural, it should not be applied to this case.

Generally, procedural or remedial statutes are "applicable to all pending cases—that is, those cases not yet reduced to a final, unappealable judgment. *State ex rel. Faith Hosp. v. Enright*, 706 S.W.2d 852, 854 (Mo. 1986). However, procedural or remedial amendments do not apply to any part of a proceeding completed prior to the effective date of the amendment. *Estate of Pierce v. State Dep't of Social Services*, 969 S.W.2d 814, 823 (Mo. App.W.D.1998); *State v. Thomaston*, 726 S.W.2d 448, 462 (Mo. App. 1987). "The steps already taken, the status of the case as to the court in which it was

commenced, the pleadings put in, and all things done under the late law will stand unless an intention to the contrary is plainly manifested; and pending cases are only affected by general works as to future proceedings from the point reached when the new law intervened." *Estate of Pierce*, 969 S.W.2d, at 823, *quoting Clark v. Kansas City, St. L. & C.R. Co.*, 118 S.W. 40, 43 (Mo. 1909); *see also City of Branson v. Biedenstein*, 618 S.W.2d 665, 671 (Mo. 1981).

In *Estate of Pierce*, the Department of Social Services sought a judgment against the Estate in connection with public assistance funds provided to the decedent during his lifetime. 969 S.W.3d, at 816-17. After a hearing, the trial court entered a judgment in favor of the Department. *Id*, at 817. In determining the amount of the judgment to be awarded to the Department, the trial court followed the applicable Missouri statutes in effect at the time. *Id.*, at 816-17. The *Estate* then appealed. *Id.*, at 817. While the case was on appeal, the Missouri legislature amended a statute regulating how a trial court should determine the amount of a judgment like the one sought by the Department. *Id.*, at 816 and 819. The *Estate* argued that the newly-amended statute should apply retroactively to the case and was a basis to vacate the judgment against it. *Id.*, at 819-20.

The Court of Appeals found that the newly-amended statute indeed applied to judgments like the one obtained by Department. *Id.*, at 820. It further concluded that the change in the statute was procedural or remedial. *Id.*, at 823.

Notwithstanding, it refused to apply the newly-amended statute retroactively to the judgment entered in favor the Department. The court held that procedural and remedial

amendments do *not* apply to any part of proceeding completed prior to the effective date of the amendment. *Id.*, at 823. Because the application of the newly-amended statute would require "a redetermination of the issues already resolved by the trial court, and thus would invalidate what has already been done," the provision could not be retroactively applied to the case. *Id.; see also City of Branson*, 618 S.W.2d, at 669-70 (in annexation case, the Court refused to require the City to comply with "new and more onerous requirements as conditions precedent to annexation" contained in newly-amended statute when it would require the City to begin the annexation process "completely anew," but did require separate elections required by new law because it would not "require invalidation of what has already been done").

Based on *Estate of Pierce* and *City of Branson*, it would be inappropriate to apply the newly-amended § 213.075 to this case, even if this provision were found to be procedural. At trial, Plaintiff made a submissible case of retaliation and a jury verdict was rendered. Later, based on the law in effect at the time of the decision, the trial court properly denied Defendant's motion for judgment notwithstanding the verdict and entered the Amended Judgment. To apply the new provision now would necessarily require that the Court invalidate these parts of this proceeding that have been correctly completed based on the law then in effect.[9]

[9] Under *Estate of Pierce*, the presumption that procedural changes would not apply to parts of the proceeding completed prior to the effective date of the amendment can be overcome where the legislative intent is "plainly manifested" in the statute. Any contention that the statutory amendments to the MHRA show such legislative intent is

III. The Jury's Verdict for Ellis Does Not Require an Entry of Judgment for Defendant Washington University (Response To Point III).

Relying on the *McGinnis* rule, Defendant next argues that the trial court erred in denying its motion for judgment notwithstanding the verdict based on the jury's verdict in favor of Defendant Ellis.

Defendant's argument on this Point is based on its assertion that Plaintiff's entire case was based solely on allegations of unlawful conduct by Ellis. *See* Appellant's Br., p. 73. This assertion is simply wrong. As submitted to the jury, Plaintiff's retaliation claim focused on her "discharge" from Defendant. Her discharge resulted from two separate "events": (1) the decision to eliminate her position in Ellis' lab; and (2) Defendant's failure to retain her in another position at Defendant. If either event had not occurred, Plaintiff would not have been discharged in November 2012. With respect to the decision to eliminate Plaintiff's position in Ellis' lab, the evidence indicated that Ellis initiated the decision. However, the evidence demonstrated that Sandra Sledge and Nicole Nichols also played active roles in the process of eliminating Plaintiff's position in Ellis' lab. With respect to the failure to retain Plaintiff in other positions at Defendant, the evidence established that employees other than Ellis were involved the

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without merit. By providing that the filing of a charge within 180 days of the alleged act of discrimination is a "jurisdictional condition precedent to filing a civil action" and "may be raised as a complete defense by a respondent or defendant at any time during the administrative proceedings…or in subsequent litigation," the legislature apparently intended to abrogate *Farrow's* holding that the timely filing of a charge is not a condition precedent to filing the lawsuit. However, nothing in this provision demonstrates any legislative intent to require that this new condition precedent to be applied to cases previously tried to a jury for which judgment had already been entered.

decisionmaking process. Indeed, Ellis admitted he played absolutely no role in that part of the process. Tr. 611. Defendant's reliance on its inaccurate claim that Plaintiff's entire case was based solely upon Ellis' actions is fatal to its argument in Point III.

The *McGinnis* doctrine is a well-established Missouri rule of law that where the right to recover on a claim is dependent entirely on the doctrine of respondent superior, exoneration of the employee alleged to have engaged in the wrongdoing operates to exonerate the employer. *Burnett v. Griffith*, 739 S.W.2d 712, 715 (Mo. 1987)("*Burnett I*"); *Moran v. North County Neurosurgery, Inc.*, 714 S.W.2d 231, 232-33 (Mo. App. E.D. 1986); *Stacy v. Truman Medical Center*, 836 S.W.2d 911, 923 (Mo. 1992). However, where the liability of the employer may be predicated upon a basis of liability other than the conduct of the exonerated employee, the *McGinnis* doctrine does not apply. *Burnett I*, 739 S.W.2d, at 716; *Stacy*, 836 S.W.2d, at 923; *Moran*, 714 S.W.2d, at 233. If the petition or jury instructions encompass actions of other employees of the employer on which liability of the employer may be predicated, the *McGinnis* doctrine is also inapplicable. *Burnett I*, 739 S.W.2d, at 715; *Stacy*, 836 S.W.2d, at 923; *Turman v. Schneider Bailey, Inc.*, 768 S.W.2d 108, 111-12 (Mo. App.W.D. 1988).

Missouri courts have consistently refused to apply the *McGinnis* doctrine in cases where there was a verdict in favor of the individual defendant but the evidence, pleadings, and theory of liability submitted to the jury support a contention that individuals other than the named individual defendant may have been involved in the alleged wrongdoing. *Burnett I*, 739 S.W.2d, at 715; *Stith v. J. J. Newberry Co.*, 79

S.W.2d 447, 492-93 (Mo. 1935)(in a slip-and-fall case against a retail store where the individually named defendant manager was involuntarily dismissed during trial, the Court refused to apply the *McGinnis* doctrine because other employees under the individual defendant's direction may have participated in the negligent acts which allegedly caused the plaintiff's injury); *Stoutimore v. Atchison, T. & S.F.RY. Co.*, 92 S.W.2d 658, 661-62 (Mo. 1936)(in a personal injury case against a defendant railroad and an individual conductor, the Court refused to apply the *McGinnis* doctrine when the plaintiff's petition was not strictly limited to allegations against the individual defendant and the evidence reflected that the negligence of other "agents, servants, and employees" of defendant combined with the negligence of the individual conductor resulted in the injury to the plaintiff); *Devine v. Kroger Grocery & Banking, Co.*, 162 S.W.2d 813, 818 (Mo. 1942)(in a slip-and-fall case against a grocery store and its individual store manager, the Court refused to apply the *McGinnis* doctrine when other employees may "have been negligent with respect to the condition complained of").

On the other hand, Missouri courts have applied the *McGinnis* doctrine when the plaintiff's theory of the case is, and the evidence reflects, that a single individual was solely responsible for the alleged wrongdoing and the jury returned a verdict in favor of that individual defendant. *See, e.g., Williams v. Venture Stores, Inc.*, 673 S.W.2d 480, 482-83 (Mo. App. E.D. 1984)(in false arrest and imprisonment case against a retail store and an individual security guard, the court applied the *McGinnis* doctrine when the plaintiff's sole theory against the corporate defendant was based upon the claim that the

individual defendant instigated the plaintiff's arrest and therefore the individual's alleged misconduct "became the key element of plaintiff's right to recover against either defendant."); *Burnett v. Griffith*, 769 S.W.2d 780, 783-84 (Mo. 1989)("*Burnett II*")(in malicious prosecution case, the Court upholds the application of the *McGinnis* doctrine when there was no evidence "that anyone associated with [the corporate defendant], except [the exonerated individual defendant], instigated [the plaintiff's] arrest or prosecution"); *Vaughn v. Sears Roebuck & Co.*, 643 S.W.2d 30, 32-33 (Mo. App. E.D. 1982)(in a false imprisonment claim against a retail store and individual security guard, the court found the application of the *McGinnis* doctrine appropriate where, in the plaintiff's petition, plaintiff specifically limited his claims against the company based on the wrongdoing of the individual security guard defendant and the evidence at trial reflected that the individual defendant was the only person who participated in the alleged wrongdoing).

As these cases reflect, Missouri courts only apply the *McGinnis* doctrine where the evidence demonstrates that a single individual was involved, or participated, in the alleged injurious act or conduct giving rise to liability on the claims submitted to jury and the jury exonerates that individual. It does not apply when the evidence reveals that multiple individuals participated, or were involved, in the injurious act or conduct.

To prevail on her retaliation claim, Plaintiff was required to show that her protected activity was a "contributing factor" in her discharge. *See* MAI 38.01 (A); *Hill*, 277 S.W.3d, at 664-65 and 668-69. The "contributing factor" standard is meant to

"prohibit any consideration of [an improper factor] no matter how slight in employment decisions." *McBryde v. Ritenour School District*, 207 S.W.3d 162, 170 (Mo. App. E.D. 2006). In nearly all cases in the employment context, there are multiple individuals who actively participate in the decision making process to take a significant employment action against an employee. It is rare that a significant personnel decision like a promotion, demotion, suspension, termination, or job elimination, only involves a single individual, especially at a large, institutional employer like Washington University. There may be someone who "initiates" an employment action or is the "final" decisionmaker. However, there are typically multiple other individuals actively participating in the decisionmaking process including the employee's direct supervisor, that supervisor's manager, Human Resource personnel, other higher level managers who must provide approval for the personnel action, or legal counsel.

Under such circumstances, a plaintiff can demonstrate that discrimination or retaliation was a contributing factor in a number of different ways. For example, a plaintiff can prove discrimination or retaliation by demonstrating that the stated reason for the challenged employment action was unworthy of credence. *See Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 491 (Mo. App. W.D. 2015).

Further, the actions and statements of managers can provide evidence that discrimination or retaliation was a contributing factor even if such managers were not the "decisionmakers." *See, e.g., Cox*, 473 S.W.3d, at 122-25 (finding that evidence of comments and/or personnel decisions made by individuals other than the decisionmaker

in a plaintiff's case could still be relevant to establish that a protected characteristic was a contributing factor). A plaintiff can prevail in a discrimination or retaliation claim even when some of the decisionmakers, including the "final" decisionmaker, did not possess a discriminatory or retaliatory motive if there is evidence that someone with the requisite animus was in a position to influence in the decisionmaking process. *See, e.g.*, *Ferguson*, 498 S.W.3d, at 489-90 (in an age discrimination termination case, a comment by a non-decisionmaker about retirement was admissible and probative to establish age discrimination because the speaker was in a position to influence the discharge decision); *Kientzy v. McDonnell-Douglas Corp.*, 990 F.2d 1051, 1057-60 (8th Circ. 1993) (affirming a jury verdict in a discrimination claim brought under the MHRA and Title VII where a reasonable jury could find that one of plaintiff's supervisors had a discriminatory motive but the ultimate decisionmakers did not); *Straub v. Proctor Hosp.*, 561 US 411, 417-21 (2011)(recognizing that a plaintiff could prevail in a USERRA case that a plaintiff could establish liability against an employer even when the ultimate decisionmaker did not have the requisite animus when his decision was influenced by individuals who did); *see also Cox*, 473 S.W.3d, at 122-25 (finding that evidence that other employees in the plaintiff's protected class were terminated could be probative to plaintiff's termination claim even where the plaintiff had a different direct supervisor than the other terminated employees).

As these cases demonstrate, an employer can be held liable for discrimination or retaliation even when one or more of the critical decisionmakers, even the "ultimate" or "final" decisonmaker, did not possess a discriminatory or retaliatory motive. If one or

more those decisionmakers were exonerated at trial, it would clearly inappropriate to apply the *McGinnis* doctrine so long as there was evidence that other individuals were actually involved in, and in a position to influence, the decisionmaking process. Because significant employment personnel decisions usually involve multiple individuals who are in a position to influence the decisionmaking process, the *McGinnis* doctrine should rarely be applicable in employment discrimination cases. It is unsurprising then that Defendant has failed to identify a single Missouri case in which the *McGinnis* doctrine has been applied in the context of the MHRA or other similar statute involving employment personnel decisions.

A. Plaintiff's Theory of the Case Was Not Strictly Limited to Ellis' Conduct.

Plaintiff consistently maintained throughout this action that Defendants' alleged retaliation was not limited to Ellis' conduct, but also involved the conduct of others at Defendant. In her petitions, Plaintiff did not allege that Ellis was the sole person responsible for the alleged retaliation, but instead alleged that Defendant Washington University and Defendant Ellis were both involved in the alleged retaliation. D2, p. 4, ¶ 22 and D943, p. 4, ¶ 20 (reference to "Defendants" as being responsible for the alleged retaliation). During opening statement, Plaintiff's counsel alleged that individuals other than Ellis were involved in the alleged wrongful conduct. Tr. 125-26 ("we're here because Dr. Ellis in [sic] Human Relations did not insure the work place was free of discrimination or retaliation"), 130-31 (discussion of the identity and role of the key

individuals involved in Plaintiff's claim including Sledge, Ellis, and Nichols), 135-36 (discussion of meetings between Plaintiff and Sledge and Nichols), 138-39 (discussion of Plaintiff's efforts to locate other positions at Washington University after her position in Ellis' lab was eliminated). Similarly, in closing argument, Plaintiff's counsel discussed the involvement of individuals other than Ellis in the alleged misconduct. Tr. 700-01 (discussion of emails between Sledge and Plaintiff regarding her request for accommodation), 709-10 (discussion of Sledge's testimony as basis for punitive damages), and 745-46 (Plaintiff's counsel argues that she is notified of the elimination of her job in Ellis' lab within 30 days of approaching HR about her request for an accommodation).

Moreover, Plaintiff consistently contended that Defendants' alleged retaliation included not only the elimination of her position in Ellis' lab, but also the failure to transfer her to another position at Defendant. *See* D2, p. 4, ¶ 22 (Plaintiff's "efforts to seek reasonable accommodation…contributed to Defendants' retaliatory decision to terminate her employment and/or not provide her with other employment."); D943, p. 4, ¶20 (same). At trial, in her opening statement, Plaintiff emphasized that part of her claim was based on Defendant Washington University's failure to transfer her to another position after her position in Dr. Ellis' lab was eliminated. *See* Tr. 122 and 123 (Plaintiff's counsel claims that Plaintiff was "blackballed" and that the "evidence will be that immediately before and after she was discharged from Dr. Ellis' lab, she was not able to find another job at the university despite applying for more than 40 positions with the

university. That's why we're here today."). Significantly, it was uncontroverted that Ellis played no role in Defendant's failure to retain Plaintiff at another position at Defendant. *See* Tr. 611.

Finally, the jury instructions referred to actions which encompassed the actions of employees other than Ellis. The trial court submitted two separate jury directors, one against Washington University and one against Ellis. *See* Appellant's Appendix, A29-A30. These verdict directors referenced the "discharge" of plaintiff and were not limited to the elimination of the position in Ellis' lab. *Id*. The jury instructions did not refer to a specific act of Ellis as a basis for liability against defendant Washington University. *Id.* [10] On the verdict form, there were separate lines for the jury to assess liability independently on the claim against Washington University and the claim against Ellis. Appellant's Appendix, A31. Plaintiff's theory of liability was not based solely on Ellis' actions.

B. The Evidence Demonstrated that Individuals Other Than Ellis were Actively Involved in Plaintiff's Discharge from Washington University.

Consistent with Plaintiff's theory of the case, the evidence clearly reflected that Ellis was not the only person involved in the process resulting in Plaintiff's discharge from employment at Washington University.

[10]When a verdict director does not refer to a specific act by the individual defendant, the plaintiff has sufficiently submitted the issue of the company's liability, independent of the individual defendant's conduct. *See Burnett I*, 739 S.W.2d, at 716.

1. The elimination of Plaintiff's position in Ellis' lab.

First, the evidence showed that individuals other than Ellis were involved in the process resulting in the elimination of Plaintiff's position in Ellis' lab. Ellis initiated the process of terminating Plaintiff's position in his lab and was likely the final decision maker. *See* Respondent's Appendix, A26-A27 (Ex. 33). However, Sledge and Nichols also played active roles in the process of eliminating Plaintiff's position in Ellis' lab. Sledge and Nichols repeatedly met with Plaintiff without Ellis to discuss the elimination of Plaintiff's position and to address Plaintiff's requests for accommodation. Tr. 167, 189, 191, 200-01, 246, 293, 389, 395-98, 413, and 414.

In particular, Sledge and Nichols formulated the reason ultimately provided to Plaintiff as the justification for removing her from Ellis' lab. Ellis initially sought to eliminate Plaintiff's position in response to an interaction between Plaintiff and another colleague in the lab. Tr. 621-22; Respondent's Appendix, A26-A27 (Ex. 33). After Nichols and Sledge met to discuss Plaintiff, Nichols sent an email to Ellis, copied to Sledge. Tr. 241-42; F4. In the email, Nichols questioned whether in light of Plaintiff's requests for accommodation, Plaintiff's position could continue to be funded. Tr. 241-42; Ex. F4. In her email, she emphasized that Plaintiff was "sourced" to RO1, a grant whose funding was coming to an end. Ex. F4. Plaintiff was solely sourced to the RO1 grant because Nichols, as Research Administrator, and Ellis had engaged in the admittedly "unusual" practice of funding Plaintiff's salary through a single grant even though Plaintiff was working on multiple different projects. Tr. 296-97, 313, and 415-17.

Ultimately, Ellis, Sledge, and Nichols used "lack of funding" as the stated reason for eliminating Plaintiff from Ellis' lab. Tr. 246, 297-98, and 413-414; Respondent's Appendix, A29 (Ex. 22). Thus, whereas Ellis initiated the process to terminate Plaintiff's position solely in response to an employee interaction (with no mention of funding issues), the final stated reason (after Sledge and Nichols became involved) related to lack of funding (with no mention of the employee interaction). An employer's formulation of the stated reason for an adverse employment action is significant in an employment discrimination case because evidence demonstrating that the stated reason is pretextual can show discrimination or retaliation. *See Grissom v. First National Agency*, 364 S.W.3d 728, 739 (Mo. App. S.D. 2012); *Buchheit, Inc. v. MCHR*, 215 S.W.3d 268, 277-78 (Mo. App. W.D. 2007). Indeed, evidence that an employer's stated reason is unworthy of credence can, standing alone, allow the jury to infer discrimination or retaliation. *Ferguson*, 498 S.W.3d, at 491.

Moreover, Sledge and Nichols played a role in determining the date on which Plaintiff's position would be eliminated in Ellis' lab. When Nichols began to discuss a lack of funding as a stated basis to remove Plaintiff from Ellis' lab, Ellis responded that he had funding for Plaintiff for six more months (which would be through mid-January 2013). Ex. F4. However, when Sledge drafted the letter notifying Plaintiff that her position in Ellis' lab would be eliminated, she inserted an elimination date of November 30, 2012, a month and a half earlier than the date suggested by Ellis. Respondent's Appendix, A29 (Ex. 22); Tr. 248-49.

As this evidence showed, Sledge and Nichols were actively involved in the decision making process involving the elimination of Plaintiff's job in Ellis' lab. Such evidence demonstrates that Sledge's and Nichols' conduct independent of, or combining with Ellis' conduct, could have been a basis for a determination that the decision to eliminate Plaintiff's position in Ellis' lab was retaliatory. *See Stith*, 79 S.W.2d, at 458; *Stoutimore*, 92 S.W.2d, at 661.[11]

2. Defendant's failure to retain Plaintiff at another position at Washington University.

During the trial, Plaintiff also presented evidence about Defendant's failure to retain her in another position at Defendant after the decision was made to eliminate her job in Ellis' lab. After requesting an accommodation and then learning that her position in Ellis' lab was being eliminated, Lin began in early September 2012 to search for other jobs within Washington University. Tr. 418. She electronically submitted applications for 41 jobs with Defendant's Human Resource Department. *See* Tr. 197-98, 418-19, and 640-41. Despite her strong work record at Washington University, Plaintiff did not receive even a single interview after she requested the accommodation. Tr. 420.

Plaintiff's experience in attempting to locate another job at Defendant after she requested accommodations was starkly different than her experience in the past before

[11] Defendant contends that Sledge and Nichols "did nothing more than provide peripheral administrative support" in the process of eliminating Plaintiff from Ellis' lab. Appellant's Br., p. 83. As above discussion shows, and as the Court of Appeals recognized, the evidence demonstrated that Sledge and Nichols played a far more active role than merely providing administrative or clerical support.

she had requested such accommodations. Tr. 420-21. In the past, on at least three previous occasions at Defendant, her job was eliminated after the doctor in whose lab she worked left Washington University. Tr. 353-56. In each instance, she applied for other positions at Defendant. Tr. 353-56. When she submitted applications for these positions, she typically received a very quick request for an interview. Tr. 420-21. She also was able to successfully transfer to other positions. Tr. 353-56.

Other than pointing out that Defendant received numerous applications for some of the 41 jobs for which Plaintiff applied, Defendants failed to provide any explanation for why Plaintiff never received an offer, or even an interview, for any of her 41 applications. *See* Tr. 645. Defendant never alleged or presented any evidence that Plaintiff was unqualified for any of the jobs for which she applied or that any other candidates were more qualified than she was. Defendant never had Sledge, any other human resource personnel, or any hiring manager provide any explanation to the jury for why Plaintiff was not interviewed or hired. Defendant Washington University chose to remain completely silent on, and not to address, such issues with the jury.

Plaintiff also presented evidence that, when Ellis left Washington University in 2014, thereby causing the elimination of all of the positions in his lab, every other employee in his lab successfully transferred to another position at Defendant. Hoog Depo., pp. 56-59. In fact, Plaintiff was the only person let go from Ellis' lab due to a job elimination that Defendant did not retain at another position at Washington University. Hoog Depo., pp. 57-58. This evidence forcefully demonstrated grossly disparate

treatment between Plaintiff, who requested accommodations, and all of the other employees in Ellis' lab.[12]

Thus, with respect to the failure to transfer or retain Plaintiff in another position at Washington University after the elimination of her job in Ellis' lab, the jury was presented with uncontroverted evidence that:

(1) on each occasion when Plaintiff's position had been eliminated in the past, before she demanded reasonable accommodations for a medical condition, Washington University quickly granted her interviews, extended job offers, and transferred her to another position without discharging her.

(2) after Plaintiff learned that her job was being eliminated in Ellis' lab, she began in early September 2012 to seek another position at Washington University and applied for 41 positions.

(3) Despite 41 applications, Washington University never offered her single job or granted a single job interview.

(4) Defendant Washington University never presented any evidence that Plaintiff was unqualified for any of the positions or that it selected more qualified applicants for any of the positions;

[12] There was no evidence that any other employees in Ellis's lab had ever requested an accommodation for a disability.

(5) When Ellis left Washington University in 2014, every other person in his lab was able to transfer successfully to another job at Washington University.

This evidence could reasonably lead the jury to conclude that Plaintiff's request for a reasonable accommodation was a contributing factor in why she was unable to transfer, thereby resulting in her discharge from her employment with Washington University.

Significantly, it was undisputed that Ellis played no role in Plaintiff's efforts to locate other work within Defendant. *See* Tr. 611. Thus, other individuals were necessarily involved in the process of refusing to transfer Plaintiff to another position at Defendant. Accordingly, Defendant Washington University's failure to transfer Plaintiff to another position at Defendant Washington University after August 2012 provided an independent basis for a jury to conclude that individuals other that Ellis were involved in retaliating against Plaintiff. Because Defendant's refusal to transfer Plaintiff to another position necessarily involved individuals whose conduct was completely independent of Ellis, this evidence becomes an additional basis for why the *McGinnis* doctrine is inapplicable in this case.[13]

[13] Defendant has argued that there is no evidence that Plaintiff submitted any applications for employment at Washington University before her discharge in November 2012. Yet, Plaintiff specifically testified that she began her job search at Washington University in the beginning of September 2012 and applied for, and was rejected for, multiple jobs in 2012. Tr. 197-98 and 418-21; *see also* D867 (affidavit of Sledge attesting that there were 41 applications submitted by Plaintiff "during 2012 and thereafter.") and D848, p. 7 (Plaintiff states she went to HR in November 2012 to discuss the jobs she had applied for). Plaintiff's job search journal, which she began on January 3, 2013, reflects only 27

Under this Court's precedent, it is clear that the *McGinnis* doctrine is inapplicable in this case. From the filing of her first Petition, Plaintiff consistently alleged retaliatory actions that were not limited to Defendant Ellis. At trial, there was substantial evidence on which the liability of Washington University could have been predicated other than the conduct of Ellis, the exonerated employee. In addition, separate verdict directors were submitted as well as a verdict form requiring a separate verdict for each of the two defendants. In this case, the jury could have reasonably concluded that there was insufficient evidence to prove that Ellis had retaliatory motive, but that the conduct by others at Washington University, either combining with Ellis' conduct or independent of it, was retaliatory. Because the jury could find that Washington University engaged in unlawful retaliation, based in part on or in whole an act by individuals other that Ellis, the jury's verdict in favor of Ellis does not require judgment to be entered in favor of Defendant Washington University.

C. The Cases on Which Defendant Relies Are Distinguishable from This Case.

Defendant cites a number of cases in support of its argument that the *McGinnis* doctrine should apply. However, in each such case, a single individual engaged in all of

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or 28 applications for positions at Washington University, leaving approximately 14 applications in 2012. *See* Ex. 24 (Plaintiff marks "WU" for each of her job applications to Washington University); *see* Tr. 420. If Plaintiff had failed to apply for any jobs before her discharge, Defendant would have undoubtedly emphasized that fact. It did not do so. The evidence was sufficient to infer that Plaintiff applied for multiple jobs before her discharge. *See Giddens*, 29 S.W.3d, at 18. Further, Defendant's rejection of the applications submitted by Plaintiff after her discharge would be highly relevant to establish Defendant's retaliatory animus.

the alleged misconduct giving rise to liability under the theory submitted by the plaintiff to the jury. *See Williams v. Venture Stores, Inc.*, 673 S.W.2d, at 482-83; *Burnett II*, 769 S.W.2d, at 783-84; *Zobel v. General Motors Corp.*, 702 S.W.2d 105, 106 (Mo. App. E.D. 1985)(in a malicious prosecution claim, the court found the application of the *McGinnis* doctrine to be appropriate when the plaintiff's case against corporate defendant was submitted only on the theory of respondeat superior); *Vaughn*, 643 S.W.2d at, 32-33; *Forbes v. Forbes*, 987 S.W.2d 468 (Mo. App. E.D. 1999)(in fraud claim, plaintiff only submitted a claim to the jury based upon the theory of respondeat superior).

This case is distinguishable from each of those cases because (1) there is evidence that Sledge and Nichols were also involved in the decisionmaking process relating to the elimination of Plaintiff's job in Ellis' lab and (2) it was uncontroverted that individuals other than Ellis were involved in Defendants' failure to transfer Plaintiff to another position at Washington University after her position in Ellis' lab was eliminated. Because the evidence reflected that Ellis was not the sole person involved in the alleged injurious act (Plaintiff's discharge from employment at Washington University), this case is analogous to those cases in which the Missouri courts have refused to apply the *McGinnis* doctrine, like *Burnett I*, *Moran*, *Stith*, *Stoutimore*, and *Devine*.

Relying on language in *Burnett II*, Defendant further argues that the exoneration of Ellis requires that Ellis' acts be "eliminated from consideration." Defendant's Brief, p. 77. Although Defendant's meaning is not entirely clear, it appears that Defendant contends that the exoneration of Ellis requires that the Court ignore any evidence of any

conduct relating to the process resulting in Plaintiff's discharge of employment from Washington University regardless of who engaged in such conduct, whether the evidence related to the elimination of Plaintiff's job in Ellis' lab, or whether the evidence related to the failure to transfer Plaintiff to another job. *See* Appellant's Br., p. 77 ("the decision to discharge Plaintiff must be eliminated from consideration.") If that is Defendant's meaning, it is clearly incorrect and runs counter to the Court's precedent. In multiple other cases, the Missouri courts have considered and addressed evidence of potential participation or involvement by individuals other than the exonerated individual concerning the same injurious act for which the individual defendant was exonerated. *Stith*, 79 S.W.2d, at 492-93 (the Court refused to apply the *McGinnis* doctrine where other employees may have participated in the negligent acts which caused the plaintiff's injury for which the individual defendant had been exonerated through an involuntary dismissal); *Stoutimore*, 92 S.W.2d, at 661-62 (the Court refused to apply the *McGinnis* doctrine when the evidence reflected that the negligence of other individuals combined with negligence of the individual conductor could have resulted in the plaintiff's injury for which the individual conductor had been exonerated); *Devine*, 162 S.W.2d. at 818 (the Court refused to apply the *McGinnis* doctrine when the Court determined that other individuals may have been negligent with respect to a dangerous condition on the store premise that caused the plaintiff's injury and for which the individual defendant had been exonerated). Indeed, this Court has held that, even when the individual defendant is exonerated, it is appropriate to consider whether the exonerated individual's conduct,

when combined with others, could be a predicate to liability. *Stith*, 79 S.W.2d, at 492-93;[14] *Stoutimore*, 92 S.W.2d, at 661-62. As these cases demonstrate, when an individual defendant is exonerated for liability for an injurious act, the evidence of others' involvement in the injurious act is not "eliminated from consideration." To the contrary, courts must examine such evidence to determine whether the *McGinnis* doctrine is applicable.

Defendant has clearly misconstrued the Court's language in *Burnett II*. In that case, the Court found that the only evidence of any employee of the corporate defendant who engaged in the alleged misconduct was the individual exonerated defendant. *See Burnett II*, 769 S.W.2d, at 784 ("in this case, no evidence shows that anyone associated with [the corporate defendant], except [the individual exonerated defendant], instigated *Burnett's* arrest or prosecution"). The Court then concluded that "[o]nce consideration of

[14] Defendant contends that *Stith* is inapplicable because it was not an inconsistent verdict case. Defendant misinterprets *Stith*. In *Stith*, the plaintiff went to trial against the retail store and an individual manager of the retail store. After the close of the evidence, the trial court granted an involuntary dismissal of the individual defendant. 79 S.W.2d, at 452. Because of this dismissal, as the Court stated, there was not an "inconsistent verdict." *Id*., at 459. However, as the Court emphasized, if it was appropriate to apply the *McGinnis* doctrine in the case, then the involuntary dismissal of the individual defendant would require the dismissal of the corporate defendant as well. *See id*.. Accordingly, the Court proceeded to analyze whether the *McGinnis* doctrine was applicable. It ultimately concluded that the *McGinnis* doctrine was inapplicable because it could not find that "the negligence causing plaintiff's injuries in this case was *solely* that of the [individual defendant]." *Id*., at 460 (emphasis in original). The Court has followed and applied this reasoning from *Stith* in subsequent cases. *Stoutimore*, 92 S.W.2d, at 470-71; *Devine*, 162 S.W.2d, at 817.

Griffith's [the individual exonerated defendant] conduct is eliminated, the case is barren of any proof that [the corporate defendant] instigated the prosecution of [the plaintiff]." *Id*. In using this language, the Court was simply stating that there was no evidence in the case of anyone other than the individual exonerated defendant who engaged or participated in the alleged wrongdoing. The Court's language did not intend to overrule *Stith*, *Stoutimore*, and *Devine*.

IV. The Verdict Director, Instruction No. 7, Was Not Erroneous (Response to Point IV).

Defendant next argues that the verdict director, Instruction No. 7, was erroneous and necessitates a new trial.

Standard of Review

Whether a jury is properly instructed is a matter of law subject to *de novo* review by the Court. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. 2010). Review is conducted in the light most favorable to the record and, if the instruction is supported by any theory, its submission is proper. *Bach v. Winfield-Foley Fire Protection Dist*., 257 S.W.3d 605, 608 (Mo. 2008). "Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action." *Id*. The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction. *Fleshner v. Pepose*, 304 S.W.3d 81, 90-91 (Mo. 2010).

When the MAIs contain an instruction applicable to a particular case, the approved Instruction must be submitted. Rule 70.02(b). On the other hand, when an MAI must be modified to fairly submit the issues in a case or where there is no applicable MAI such that a not-in-MAI must be given, such instruction must accurately set forth the applicable law and be clear and understandable by a jury composed of ordinary people. Rule 70.02(b); *Kauzlarich v. The Atchison, Topeka, and Sante Fe Ry. Co.*, 910 S.W.2d 254, 260 (Mo. 1995).

Argument

As discussed at *supra*, pp. 23-24, in order to prevail on a MHRA retaliation claim, a plaintiff must establish that: (1) she engaged in an activity protected by the MHRA; (2) a discharge occurred; and (3) her protected activity was a contributing factor in the discharge; and (4) as a direct result of such conduct, she sustained damage. *See* MAI 38.01(A); *Hill*, 277 S.W.3d, at 665 and 668-69 (retaliation claims follow same analysis as discrimination claims); *Williams*, 281 S.W.3d, at 866.

As an initial matter, Defendant contends that the trial court erroneously submitted Instruction No. 7 because Plaintiff could not demonstrate that she engaged in protected activity giving rise to a submissible retaliation claim. For the reasons discussed in Section I, this contention should be rejected. *See*, *supra*, pp. 22-34.

Defendant next contends that Instruction No. 7 was erroneous because it failed to contain an element requiring Plaintiff to prove that she was a member of a protected class. When the status of a plaintiff's membership in a protected class is at issue, a court

should modify MAI 38.01(A) to include an additional element presenting the issue to the jury. *See* MAI 38.01(A), Notes on Use, ¶2 (2014 revision); *see also Hervey v. Missouri Dep't of Corrections*, 379 S.W.3d 156, 160 (Mo. 2012).

According to Defendant, for Plaintiff to be a member of a protected class for her retaliation claim, she had to prove: (1) that she had a "disability" as defined by the MHRA; (2) that the accommodation she requested was "reasonable" as defined by the MHRA; (3) that she requested an accommodation for her "disability"; and (4) that she had a "reasonable, good faith, belief" that she was making a request for a reasonable accommodation for a disability. For the reasons discussed below, Defendant's position is incorrect.

The Court has never addressed what a plaintiff must prove to establish that she is a member of a protected class in a MHRA retaliation claim based on a request for an accommodation. Indeed, this Court has never addressed what a plaintiff must demonstrate to prove that she is a member of a protected class for any type of MHRA retaliation claim. Further, there are no MAIs specifically tailored for MHRA retaliation claims.

The MHRA's prohibition of retaliation is contained in § 213.070 which states that "[i]t shall be an unlawful discriminatory practice…[t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, of participated in any manner in any investigation, proceeding or hearing conducted

pursuant to this chapter." Mo. Rev. Stat. § 213.070(2). This provision of the MHRA divides retaliation claims into two distinct categories: (1) retaliation based upon an individual's opposition to a practice prohibited by the MHRA, and (2) retaliation based on an individual's participation in proceedings under the MHRA. *Gentry v. Orkin, LLC*, 2018 Mo. App. LEXIS 1662, at *10 (Mo. App. W.D. 2018), *vacated upon transfer to this Court*, 2019 Mo. LEXIS 94. The retaliation provisions in federal anti-discrimination statutes similarly divide retaliation claims into these two categories. *See* 42 U.S.C. § 12203(a) (retaliation provision under the ADA); 42 U.S.C. § 2000e-3(retaliation provision under Title VII); 29 U.S.C. § 623(d)(retaliation provision under the Age Discrimination in Employment Act). Courts generally refer to these two categories of retaliation claims as "opposition" claims and "participation" claims, respectively.

Under federal law, what a plaintiff must prove to establish that she is a member of a protected class for a retaliation claim depends upon whether the plaintiff brings an "opposition" claim or a "participation" claim. In general, courts afford broader protection to a plaintiff bringing a "participation" claim than a plaintiff bringing an "opposition" claim. *See Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720-21 (6th Cir. 2008). The basis for this distinction, as cogently explained by Judge Colloton of the United States Court of Appeals for the Eighth Circuit, is founded in the statutory language. *See Gilooly v. Mo. Dept. of Health and Senior Services*, 421 F.3d 734, 741-42 (8th Cir. 2005)(concurring in part and dissenting in part). The language of the opposition clause protects an employee against discrimination because he has opposed an

employment practice "prohibited" by the statute. *Id*. "The text of the 'participation clause,' by contrast, does not connect the protected activity to the unlawfulness of any employment practice." *Id*.

Under federal law, when a plaintiff brings an "opposition" retaliation claim, she does not need to prove that she opposed an employment practice that was actually unlawful. *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006). However, she is required to prove that she had a reasonable, good faith, belief that the employer engaged in discriminatory conduct. *See, e.g., Id.; EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998); *Niswander*, 529 F.3d at 720-21. On the other hand, when a plaintiff brings a "participation" retaliation claim, there is no requirement that she demonstrate that she had a "reasonable belief." *Wyatt v. City of Boston*, 35 F.3d 13-15 (1st Cir. 1994); *Glover v. South Carolina Law Enforcement Division*, 170 F.3d 411, 413-14 (4th Cir. 1999); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969); *Niswander*, 529 F.3d, at 720-21; *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Harris v. Florida Agency for Healthcare Administration*, 611 Fed. Appx. 949, 950-51 (11th Cir. 2015).

The lower Missouri courts have adopted the "reasonable, good faith, belief" standard for "opposition" retaliation claims. *See McCrainey*, 337 S.W.3d, at 753; *Mignone v. Mo. Dept. of Corrections*, 546 S.W.3d 23, 37 (Mo. App. W.D. 2018); *Minze v. Mo. Dept. of Pub. Safety*, 437 S.W.3d 271, 275-76 (Mo. App. W.D. 2014); *Soto*, 502 S.W.3d, at 48. Other than the *Gentry* case (which has been vacated and transferred to this

Court for consideration), no Missouri appellate court has had an occasion to address what elements a plaintiff must prove to establish that she is a member of a protected class for a "participation" retaliation claim. However, because the MHRA retaliation provision is, for all material purposes, identical to the federal retaliation provisions, the Court should likewise conclude that a plaintiff bringing a "participation" retaliation claim does not have to demonstrate that she has a "reasonable belief" that the employer was engaging in discriminatory conduct. The plain language of the statute also supports this interpretation.

As discussed above at pp. 27-28, the federal courts have uniformly held that a plaintiff can bring a retaliation claim under the ADA based upon a request for an accommodation can. For purposes of determining what a plaintiff must prove to be a member of a protected class, most federal courts analyze such retaliation claims more like "participation" claims than "opposition" claims. As such, most federal courts only require a plaintiff to demonstrate that she requested an accommodation "in good faith" and do not require the plaintiff to show a "reasonable belief" that she was entitled to the accommodation. *See Shotwell v. Regional West Medical Center*, 2016 U.S. Dist. LEXIS 116394, at *19-20 (D. Neb.)(August 30, 2016) *aff'd* at 721 Fed. Appx. 562 (8th Cir. 2018) (employee may pursue retaliation claim based upon a request for an accommodation "as long as she had a good faith belief that the requested accommodation was appropriate"); *Heisler v. Metropolitan Counsel*, 339 F.3d 622, 632 (8th Cir. 2003)(same); *Shellenberger*, 381 F.3d, at 190-91 (the exercise of "the right to request an accommodation in good

faith" can be a basis for a retaliation claim"); *Meeks v. Tennessee Dept. of Corrections*, 2016 U.S. App. LEXIS 24277, at *5 (6th Cir. 2016); *Davis v. Phillips 66*, 2018 U.S. Dist. LEXIS 106890, at *4 (N.D. Ca.)(June 26); *Rosario v. Western Regional Off Track Betting*, 2013 U.S. Dist. LEXIS 114259, at *30 (W.D. N.Y.); *Solomon*, 763 F.3d, at 15; *A.C. v. Shelby County Bd. of Educ.*, 711 F.3d, at 698; *but see Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178, 1186-88 (10th Cir. 2016)(plaintiff must show "reasonable, good faith, belief" that he was entitled to an accommodation).

Accordingly, based upon the close similarities between the MHRA's retaliation provision and the federal retaliation provisions as well as the federal case law, the Court should hold that a plaintiff bringing a MHRA retaliation claim based upon a request for an accommodation can demonstrate that she is a member of the protected class by showing that she made the request in good faith.

A. Instruction No. 7 Was Not Erroneous Because It Was Not Disputed Whether Plaintiff Engaged in Protected Activity.

Instruction No. 7 did not contain an element requiring the jury to find that Plaintiff requested an accommodation for her herniated discs in good faith. However, such an element was unnecessary in this case. First, at trial, it was undisputed that Plaintiff in fact requested accommodations for her herniated discs. Tr. 159, 169, 181-82, 191-95, 256, 361-62, 377-79, 382-84, 389, 395-96, 398, 399, 402, 406-07, 411-12, 450-51, 477, 573, 581, 587-88, 612-13, 652-53, and 717.

Moreover, there was no dispute at trial that Plaintiff made the request for an accommodation in good faith. Defendant never denied that Plaintiff had a lower back condition which caused her to experience significant pain and limitations. Tr. 191-92, 358-61, 377, and 401-02. There was also no dispute that performing cell culture work and excessive bench work caused Plaintiff significant difficulties because of her back. Tr. 191-92 and 401-02. Indeed, Ellis and Hoog admitted they recognized that these activities caused Plaintiff back pain. Hoog Dep., pp. 51-52; Tr. 587-88 and 612. When Sledge required Plaintiff to produce medical documentation to substantiate her disability and need for an accommodation, Plaintiff provided such medical documentation from her doctor confirming that she in fact had a significant back condition and need for the accommodations she had requested. Tr. 191-92. 244-45, 477; Respondent's Appendix, A28 (Ex. F7). Defendants never requested Plaintiff to submit to an independent medical evaluation or had another doctor provide any contrary opinion. Tr. 195 and 613. Therefore, Plaintiff's doctor's statement that she had a significant back condition and need for accommodation, as Plaintiff had previously requested, was uncontroverted. Accordingly, Defendant cannot seriously maintain that it ever disputed whether Plaintiff made her request for an accommodation "in good faith."

Because the fact of whether Plaintiff requested an accommodation in good faith was undisputed, it was not necessary for the trial court to include a separate element in the verdict director stating that "Plaintiff requested an accommodation for her herniated disc in good faith" or words to that effect. *Mignone*, 546 S.W.3d, at 37-38 ("there can be

no prejudicial error where an instruction omits an element that is not in dispute") *quoting Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 129 (Mo. App. W.D. 1993); *Boggs, ex rel. Boggs v. Lay*, 164 S.W.3d 4, 20 (Mo. App. E.D. 2005). For this reason, Instruction No 7 was not erroneous.

B. Instruction No. 7 Did Not Need to Include Language Requiring Plaintiff to Prove a "Good Faith" Belief.

Even if Defendant had disputed whether Plaintiff had requested any accommodation "in good faith," Instruction No. 7 did not need to include such language.

The Court recently issued MAIs for workers' compensation retaliation claims, which suggest that a "good faith" belief requirement does *not* need to be included in the verdict director submitted to the jury. *See* MAI 38.04 and 38.05 (issued on May 21, 2018). Workers' compensation retaliation cases arising under Mo. Rev. Stat. § 287.780 are analogous to "participation" retaliation cases under the MHRA. In both cases, a plaintiff alleges that an employer terminated her (or took some other negative employment action against her) because she engaged in protected activity under the law. Compare MAI 38.01(A) with MAI 38.04; *see also Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 384 (Mo. 2014). Accordingly, the Court has specifically looked to the MHRA for guidance in how to analyze workers' compensation retaliation claims arising under Mo. Rev. Stat. § 287.780. *See Templemire*, 433 S.W.3d at 384 (court relies upon its interpretation of the MHRA to conclude that the "contributing factor" standard should also apply to workers' compensation retaliation claims arising under § 287.780). In

addition, the MAIs for MHRA and workers' compensation retaliation claims are very similar. Compare MAI 38.01(A) with MAI 38.04 (required elements under a MRHA claim are virtually identical to three of the elements in the workers' compensation retaliation verdict director).

A plaintiff bringing a MHRA "participation" retaliation claim has to show a "good faith" belief. Because of the close similarities in the analysis of MHRA and workers' compensation retaliation claims, there is no discernable reason for why a plaintiff bringing a workers' compensation retaliation claim under § 287.780 would not similarly have to prove that he had a "good faith" belief that he had a legitimate workers' compensation claim. Yet, the MAI verdict director for workers' compensation retaliation claims only includes language that the plaintiff "filed a workers' compensation claim" (or exercised some other right under the workers' compensation laws) and does *not* include language requiring the plaintiff to prove that she had a "good faith" belief. MAI 38.04 and Notes on Use, ¶1 and 38.05 and Notes on Use, ¶1. Because of the similarities between MHRA and workers' compensation laws, a "good faith" belief standard also does not need to be included in verdict directors for MHRA retaliation claims based on a request for an accommodation.

C. Instruction No. 7 Did Not Need to Include Language Requiring Plaintiff to Prove That She Requested a "Reasonable" Accommodation or Had a "Disability" Because Those Were Not Elements of Her Retaliation Claim.

Defendant claims that the verdict director should have included language requiring Plaintiff to prove that she requested a "reasonable" accommodation for a "disability." This claim is without merit.

It is well-established that a retaliation claim is not conditioned on the merits of the underlying claim of discrimination. *McCrainey*, 337 S.W.3d, at 753. Further, the success or failure of the retaliation claim is analytically divorced from the merits of the underlying discrimination claim. *Id.*

The requirements that Plaintiff had a "disability" or that her requested accommodations were "reasonable," would be the elements of an underlying failure-to-accommodate discrimination claim. However, she did not have to prove those elements to prevail upon her retaliation claim. Accordingly, it would have been improper for the trial court to include in the verdict director a requirement that the jury could not find for Plaintiff unless she had proven that she had a "disability" or that the accommodations she sought were "reasonable."

D. Even if Instruction No. 7 Should Have Included Language Requiring Plaintiff to Prove a "Good Faith Belief" or Even a "Reasonable Belief," It is Not a Basis for a New Trial Because Defendant Never Disputed Such Issues at Trial.

As discussed above, a plaintiff is not required to prove a "reasonable" belief to prevail on a MHRA retaliation claim based on a request for an accommodation. Even assuming, *arguendo*, that Plaintiff had to prove both a "reasonable belief" and a "good faith belief," a new trial would still not be warranted because Defendant cannot

demonstrate that any purported error to Instruction No. 7 resulted in prejudice that materially affected the merits of the action. *Bach*, 257 S.W.3d at 608. Defendant cannot prove any such prejudice because Defendant never disputed at trial that whether Plaintiff had a "good faith belief" or a "reasonable belief" that she was requesting a "reasonable accommodation for a disability."

From April to July 2012, Plaintiff made several separate requests for an accommodation for her herniated discs. Tr. 181, 190-91, 383, and 395-402; Hoog Depo., pp. 51-52; Respondent's Appendix, A28 (Ex. F7). On each occasion, Plaintiff's requested accommodation was that she not perform cell culture work and/or excessive bench work. As the nature of the requests reflect, Plaintiff sought the accommodations to insure that Ellis, Hoog, and others did not assign her those job duties in Ellis' lab that caused her significant pain.

Whether Plaintiff had a "good faith" belief or a "reasonable" belief necessarily requires a focus on Plaintiff's state of mind at the time that she requested not to perform cell culture work and/or excessive bench work. Proving that one has a "reasonable" and "good faith" belief is not an onerous requirement. *See Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 674 (7th Cir. 2011); *Channel v. Gates & Sons Bar-B-Q of Mo., Inc.*, 2016 U.S. Dist. LEXIS 171695, at *6 (W.D. Mo. June 2, 2016)(the burden to prove a "reasonable, good faith, belief" is "fairly low"), *quoting* 8th Cir. Civil Jury Instructions § 10.00 Comment (2018). To establish a "reasonable" and "good faith" belief, a plaintiff simply has to show that her belief was "not completely groundless."

Leitgen, 630 F.3d, at 674. Defendant never disputed that Plaintiff's belief that her requests were appropriate failed to meet this low threshold.

First, there was never any dispute at trial that Plaintiff in fact had a significant back condition which caused her significant pain and imposed limitations on her ability to perform some physical activities. Tr. 191-92, 328-61, 377, and 401-02.[15] In fact, Plaintiff's doctor confirmed that she had two herniated discs in her back which caused her chronic pain and required ongoing care and treatment. Respondent's Appendix, p. A28 (Ex. F7). Defendants never questioned the legitimacy or accuracy of the doctor's diagnosis. *See* Tr. 195 and 613. Defendant never obtained an independent medical evaluation or presented any medical testimony to challenge the medical diagnosis. *See* Tr. 195 and 613. Defense counsel never even questioned Plaintiff about her back condition or argued in his opening statement or closing argument that Plaintiff did not in

[15] On appeal, Defendant argues that there was no evidence of "any substantial limitations" from 2005 until Plaintiff's discharge from Defendant, but cites no evidentiary support for this contention. Appellant's Br., p. 94. In fact, the evidence established that Plaintiff had consistent pain and limitations from her lower back condition through her discharge and trial. Tr. 360, 377-78 (Plaintiff refers to her back pain as her "shadow" in that it is always with her), and 382-83; Respondent's Appendix, A28 (Ex. F7). Moreover, Defendant never argued at trial that Plaintiff did not have substantial limitations due to her herniated discs in 2012 when she sought the accommodations. Clearly, Defendant's unfounded argument on appeal is not evidence that it disputed the issue at trial.

fact have herniated discs in her back which caused her the pain and limitations she alleged.[16]

Further, Defendant never disputed at trial that Plaintiff's back condition caused her significant pain when she performed cell culture work or excessive bench work. Tr. 191-92, 382-83, 401-02, 572-73 (Ellis never questioned the legitimacy of Plaintiff's request for an accommodation), Tr. 587-88 (Ellis recognized that Plaintiff had a physical disability that prevented her from performing cell culture work), 612, and 726 (in closing argument, Defendant's counsel admits that "it was very clear that her back problems and her back pain prevented" Plaintiff from performing tissue culture work); Hoog Depo., pp. 51-52; Respondent's Appendix, A28 (Ex. F7). Plaintiff's doctor further confirmed that Plaintiff had these problems when she performed these activities and Defendant, once again, chose not to challenge this assessment. *See* Respondent's Appendix, A28 (Ex. F7). Moreover, Defendant never questioned Plaintiff about the nature and extent of her physical limitations resulting from her herniated discs or challenged her request that she not perform cell culture work or excessive bench work.

Rather than argue that Plaintiff lacked a "good faith" or "reasonable" belief, Defendant chose to take a different tact during the trial. Defense counsel emphasized that Defendants accepted at face value that Plaintiff had significant physical limitations due to

[16] In contrast, defense counsel did question Plaintiff about her mouse allergy and thereby challenged whether that medical condition was legitimate. *See* Tr. 472-74 and 477. Defense counsel did not ask any similar questions regarding Plaintiff's herniated discs.

her herniated discs that prevented her from doing tissue culture work and that Ellis made efforts to accommodate her request throughout her entire employment in Ellis' lab. *See* Tr. 159, 163, 166, 717, and 726.

This trial strategy may have successfully persuaded the jury that Ellis did not have any retaliatory animus and resulted in the jury's verdict in Ellis' favor. However, this approach also precluded an argument that Plaintiff did not have a "good faith" or "reasonable" belief that she was requesting a reasonable accommodation for her back condition. When Defendant maintained throughout the trial that it honored Plaintiff's request for an accommodation throughout her employment, it cannot credibly argue that Plaintiff herself did not have a "good faith" or "reasonable" belief that the accommodations she sought were appropriate.

Given that there was no dispute that (1) Plaintiff had herniated discs in her back, or (2) that such herniated discs caused her substantial pain when performing cell culture or extensive bench work, Defendant cannot, and did not, maintain that Plaintiff's requests that she not perform those very activities which caused her substantial pain were not made in "good faith" or with a "reasonable belief" that her request was appropriate.

An additional factor demonstrating that any purported error to Instruction No. 7 did not result in prejudice that materially affected the merits of the action is that Defendant failed to tender or proffer any proposed jury instruction containing what it contended to be the appropriate verdict director. *See Citizens Bank v. Schapeler*, 869 S.W.2d 120, 129 (Mo. App. W.D. 1993)(failure to tender or offer a corrected instruction

is a factor to be considered in determining whether a party was prejudiced by a purportedly erroneous instruction); *Kopp v. Pennoyer*, 723 S.W.2d 528, 531 (Mo. App. E.D. 1993). In the jury instruction conference, Defendant listed ten objections to Instruction No. 7, one of which related to the absence of "reasonable, good faith, belief" language. Tr. 671-74. However, Defendant never proffered an alternative verdict director with the language and elements it alleged to be appropriate.[17] Tr. 676.

In an effort to show that it did dispute whether Plaintiff had a "good faith" belief or a "reasonable" belief that she was requesting a reasonable accommodation, Defendant points to various arguments and evidence it presented at trial. In particular, Defendant relies upon its contentions and evidence at trial that the funding for Plaintiff's job was ending and that Plaintiff did not, or would not, agree to assignments that might have allowed her position in Ellis' lab to be extended beyond November 2012. *See* Appellant's Br., pp. 98-99 (Ellis "identified other projects that would [purportedly] preserve plaintiff's employment" and "indisputable evidence showed that the patient sample stream on which her work depended did end in 2012"). In doing so, Defendant

[17] It appears that Defendant's objection in the jury instruction conference is the first and only time that Defendant raised the issue of "reasonable, good faith, belief" standard before or during trial. At trial, Defendants never moved to dismiss Plaintiff's claim on the ground that she had failed to demonstrate a "reasonable, good faith, belief." Defendant moved for a directed verdict, but never on that basis. D946, D949, and D952, pp. 1-6. Moreover, Defendant did not allege that Plaintiff did not have a "reasonable, good faith, belief" in its answer or in its multiple motions for summary judgment prior to trial. *See* D843, D878, and D899. While Defendant's failure to raise this argument in these pleadings and motions does not preclude Defendant from making the argument at trial, it is certainly further evidence that Defendants never truly disputed whether Plaintiff had a "reasonable" or "good faith" belief.

improperly conflates the issue of the appropriateness of Plaintiff's request that she not be assigned work in Ellis' lab that caused her substantial pain with the separate issue of whether Defendants had a legitimate basis to eliminate Plaintiff's position in Ellis' lab in November 2012. Evidence regarding the ending of the microarray work or the absence of other jobs that Plaintiff could perform was certainly relevant to the latter issue. However, such evidence has no relevance to whether Plaintiff had a "good faith" or "reasonable" belief regarding that her request not to perform work activities that caused her substantial pain.

When Plaintiff made her accommodation requests in April-July 2012, Plaintiff was responding to attempts or discussions by Ellis and Hoog to assign her work in the lab that would cause her substantial pain. *See* Tr. 376-78, 384, and 399-402. She sought to insure that she did not have to perform the jobs in Ellis' lab that caused her substantial pain for the remainder of her tenure in his lab, regardless of whether that time were to be six weeks, six months, or six years. That is how Defendant interpreted her requests. Sledge testified that even after she, Ellis, and Nichols notified Plaintiff that her job in Ellis' lab was eliminated on August 10, 2012, she took steps to insure that Defendants complied with Plaintiff's request for accommodation for the remainder of Plaintiff's tenure in Ellis' lab. Tr. 194-95, 249-50, and 654. Under such circumstances, Defendant never disputed whether Plaintiff had "reasonable" or "good faith" beliefs that her requests that she not be assigned those work activities that caused her substantial pain were appropriate. Evidence that Ellis allegedly had no viable position in his lab after

November 2012 that complied with Plaintiff's physical limitations related to a separate issue that simply has no bearing on whether Plaintiff's requests in April-July 2012 were made in "good faith" or with "reasonable" belief.[18]

Defendant also argues that Plaintiff's purported refusal to accept a work assignment on the DOD grant shows that it disputed whether Plaintiff had a "good faith" belief or a "reasonable" belief. *See* Appellant's Br., p. 98. Again, Defendant's argument misses the mark. In this meeting, characterized by Ellis as a "team building exercise," Ellis discussed with Plaintiff whether she would agree to accept several assignments relating to the DOD grant. Tr. 403-04, 462-65, and 593-98. Most of the work on the DOD grant involved mouse work. Tr. 562. According to Plaintiff, she told Ellis that he could give her all of those assignments except for the assignments relating to mouse work (because of her allergy to mice). Tr. 404, 470, and 596-98. According to Ellis, Plaintiff never rejected the assignment, but he had the "overwhelming sense" she was not interested in doing the work. Tr. 597.

Whether Plaintiff acted "reasonably" in that meeting is simply not relevant to whether Plaintiff had a "good faith" or a "reasonable" belief that her requests for an accommodation was appropriate. The question is *not* whether Plaintiff acted "reasonably" in all of her interactions in the workplace. It is whether Plaintiff's request

[18] Notably, there was no evidence that, after August 10, 2012, Plaintiff demanded a reasonable accommodation in the form of being given a position in Ellis' lab after November 2012. If she had, the evidence that she knew there was no work for her after 2012 that met her accommodations would be relevant to whether she had a "good faith" or "reasonable" belief that such a request was appropriate.

for an accommodation was made "in good faith" and/or with a "reasonable belief" that it was appropriate. While the accounts of the meeting vary somewhat, importantly, no one alleged that Plaintiff ever requested an accommodation for her back condition in the meeting or that her previous requests for accommodations were ever discussed in the meeting. Therefore, her conduct in the meeting, when her request for accommodation was never discussed, is simply not relevant to that issue. Notably, Defendant has made no effort to explain how Plaintiff's conduct in this meeting relates to whether she had a "good faith" or "reasonable" belief.

As the foregoing discussion demonstrates, Defendants never actually disputed at trial whether Plaintiff had a "good faith" or "reasonable" belief that she was requesting a reasonable accommodation for her disability. Therefore, any failure to include an additional element requiring Plaintiff to establish that she had a "good faith" or "reasonable" belief that her request for an accommodation was appropriate was not prejudicial and did not materially affect the merits of the action. Accordingly, a new trial is not warranted on that basis.

V. The Circuit Court Did Not Err in Excluding from Evidence a Title of a Section from Plaintiff's Counsel's Brief (Response to Point V).

Defendant's final contention is that a new trial is warranted because the trial court refused to introduce into evidence an exhibit containing a page from a brief filed by Plaintiff's counsel during this case.

Standard of Review

"A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." *Cox*, 473 S.W.3d, at 114 (internal quotations omitted). "A ruling constitutes an abuse of discretion when it is 'clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" *Id.* (*quoting Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. 2014). "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." *Lozano*, 421 S.W.3d, at 451-52 (internal quotations omitted).

Even when a trial court abuses its discretion in excluding evidence, Missouri appellate courts are "loathe to vacate a jury's verdict and resulting judgment on such grounds." *Lozano*, 421 S.W.2d, at 451. "Instead, '[b]y both statute and rule, an appellate court is not to reverse a judgment unless it believes the error committed by the trial court against the appellant materially affected the merits of the action." *Id.*, at 451-52.

Argument

At trial, Defendant sought to introduce into evidence Exhibit M3, an exhibit containing a page from Plaintiff's Opposition to Defendant's Motion for Summary Judgment and for Sanctions. Tr. 436-38; Appellant's Appendix, A34-A36.[19] On that

[19] The exhibit actually consisted of three pages. The first page of the exhibit contains the cover page of the brief and the last page contains the signature page. Thus, only the

page, Plaintiff's counsel entitled a section of his brief: "Plaintiff is Not Disabled Under the MHRA." Appellant's Appendix, A35. In the text of that section of the brief, Plaintiff's counsel explained to the trial court that Plaintiff was no longer "pursuing her disability claim under an actual disability theory" and that, as a result, the "question of whether she has an actual disability" was no longer relevant. *Id.* Plaintiff's counsel further emphasized that Plaintiff continued to pursue a disability discrimination claim on the basis that Defendant "regarded [her] as disabled." *Id.*; *see also* D922, pp. 5-6.

At trial, Defendant apparently sought to show the jury the title of this section in Plaintiff's counsel's brief. *See* Tr. 436. Defendant contends that the trial court's refusal to allow admission of this portion of Plaintiff's counsel's brief warrants a new trial. This contention is without merit.

For evidence to be admissible, it must be both logically and legally relevant. *State v. Barriner*, 111 S.W.3d 396, 400 (Mo. 2003). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. 2010). "Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Anderson*, 306 S.W.3d, at 538. "If the prejudice of the logically relevant evidence outweighs its probative value, it should be excluded." *State v. Tisius*, 362 S.W.3d 398, 408 (Mo. 2012).

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second page of the exhibit contains the purportedly "substantive" information that Defendant sought to introduce into evidence.

First, the language in Plaintiff's counsel's brief has little, if any, logical relevance because the title to the section of the brief does not constitute an admission of Plaintiff or meaningfully relate to any issue material to the trial. Admittedly, the title of the section of the brief was unartfully drafted. Yet, it is clear from the text of the brief that Plaintiff was not actually conceding that she was not "disabled" within the meaning of the MHRA. Instead, as stated in the text of the brief, it was Plaintiff's position that she was no longer pursuing her disability discrimination claim on the basis of an "actual disability," but continued to pursue her claim, at that time, on the basis that Defendant "regarded" her as disabled.[20] Plaintiff's decision not to pursue her disability discrimination claim based on an "actual disability" is not an admission that she is not disabled under the MHRA. Indeed, in notifying the trial court that she continued to pursue her claim that she was "regarded as" disabled, she clearly maintained that she was "disabled" as that term is defined by the statute. While Plaintiff's counsel title to the section of his brief was inaccurate, it was not an admission.

Moreover, because Plaintiff ended up proceeding to trial on her retaliation claim only, the title of the section in Plaintiff's counsel's brief had no bearing on whether the existence of a material fact was more or less probable. *See Anderson*, 306 S.W.3d, at 538. As discussed above, to prevail upon her retaliation claim, Plaintiff did not have to prove

[20] A person has can establish that she is "disabled" within the meaning of the MHRA if she has "a physical or mental impairment which substantially limits one or more of a person's major life activities" *or* is "regarded [by her employer] as having such an impairment." Mo. Rev. Stat. § 213.010(4).

that she had an actual disability or was otherwise "disabled" under the MHRA. *See*, *supra*, p. 83. The section title that Plaintiff "was not disabled under the MHRA" was thus irrelevant to Plaintiff's retaliation case.

The section title is also irrelevant to whether Plaintiff had a "good faith" belief that she was requesting a reasonable accommodation for a disability. Plaintiff's counsel filed the brief in 2017, more than four years after Plaintiff's termination from Defendant. *See* Appellant's Appendix, A34. Moreover, there is no evidence in the record that Plaintiff ever saw the brief prior to its filing. Under such circumstances, the section title in the 2017 brief has no bearing whatsoever on whether Plaintiff had a "good faith" or "reasonable" belief in 2012 that she had a disability when she sought an accommodation for her herniated discs. For these reasons, the evidence at issue had no logical relevance.

Further, the evidence has no legal relevance. Because Plaintiff was not required to prove a "disability" to prevail upon her retaliation claim, the introduction of the portion of Plaintiff's counsel's brief would have likely caused unfair prejudice of the issues and misleading of the jury. In addition, if Defendant had been able to introduce into evidence the portion of Plaintiff's counsel's brief in opposition to a motion for summary judgment, Plaintiff would have been required to introduce evidence and argument to explain the context of the title, the summary judgment procedure, and the irrelevance of such a statement in the retaliation case. Such evidence would also create a risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, and a waste of time. *See Anderson*, 306 S.W.3d, at 538. The minimal, if any, probative value of the evidence

is far outweighed by its costs. Accordingly, the evidence also did not have legal relevance. *Id.*

For these reasons, the trial court did not abuse its discretion in excluding Exhibit M3.

Even if the trial court had abused its discretion in excluding the portion of Plaintiff's counsel's brief, Defendant has failed to demonstrate that the exclusion of the evidence materially affected the merits of the action. "The 'litmus test' is whether the improperly excluded evidence would have changed the outcome . . ." *Aliff v. Cod*y, 26 S.W.3d 309, 321 (Mo. App. W.D. 2000). "The exclusion of evidence which has little, if any, probative value is usually held not to materially affect the merits of the case and hence, error in rejecting such evidence is not grounds for reversal." *Lewis v. Wahl*, 842 S.W.2d 82, 85 (Mo. 1992).

Defendant cannot legitimately claim that the trial court's refusal to admit the portion of the brief into evidence would have changed the outcome of the trial. As explained above, the evidence had little or no relevance because Plaintiff did not have to prove to the jury that she was "disabled." Moreover, even though the trial court refused the admission of the exhibit, Defendant remained free to elicit testimony or introduce other evidence regarding whether Plaintiff reasonably believed in 2012 that she had a disability. However, for whatever tactical reasons, Defendant chose not to introduce such evidence from any other sources. Defendant cannot show that the exclusion of Exhibit M3 materially affected the outcome of the trial.

Defendant argues that the Court's recent decision in *Vacca v. Missouri Department of Labor and Industrial Relations*, 2019 Mo. LEXIS 87, requires a conclusion that the trial court's exclusion of Exhibit M3 was reversible error. This argument is meritless.

Vacca involved a MHRA retaliation claim. 2019 Mo. LEXIS, at *1. Before he filed his MHRA action, the plaintiff in *Vacca* testified in a separate dissolution proceeding that he was totally unable to work. *Id*., at *2 and 12-13. Based upon such testimony, the circuit court awarded him maintenance benefits. *Id*., at *12, 13, and 28. Several months after providing his testimony in the dissolution proceeding, he filed his MHRA action. *Id*., at *12. The case went to trial. In direct contradiction to his testimony in the dissolution proceeding, the plaintiff testified during the MHRA trial that if he had not been fired, he would have been able to continue working for 20 more years. *Id*., at *14 and 28-29. Based upon this testimony, he sought substantial economic damages from the jury. *Id*., at *14. The jury returned a substantial verdict in his favor. *Id*., at *14-15. Defendants appealed on the basis that judicial estoppel should have precluded the plaintiff's claim of lost future wages. *Id*., at *1-2.

Relying in significant part on the United States Supreme Court's opinion in *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); the Court found that the doctrine of judicial estoppel is a "flexible, equitable doctrine intended to preserve the integrity of the courts." *Vacca*, 2019 Mo. LEXIS, at *27. In determining whether to apply judicial estoppel in a particular case, the Court identified several relevant factors: (1) whether a

party's later position is "clearly inconsistent" with its earlier position; (2) whether a party succeeded in persuading a court to accept that party's earlier position such that it creates a perception that either the first or second court was misled, a risk of inconsistent court determinations, or a threat to judicial integrity; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id*., at *20-21, *quoting New Hampshire*, 532 U.S., at 749. These factors are to be considered as "guideposts" and not "elements." *Id*., at *28.

In *Vacca*, the Court concluded that the application of judicial estoppel was appropriate. First, the Court found that the plaintiff's testimony and pleadings in the dissolution proceeding was that he was "permanently and completely disabled" was "clearly inconsistent" with his testimony in the MHRA lawsuit was that he was not disabled from working. *Id*., at *28-29. The Court also found the plaintiff successfully persuaded the trial court in the dissolution matter to award him maintenance benefits based upon his testimony that he was totally disabled. *Id*., at *30. Finally, the Court held that the third consideration from *New Hampshire* was met because he received disability and maintenance benefits based upon the inconsistent statement in the dissolution proceeding. *Id*., at *30-31. Under such circumstances, the Court concluded that the application of judicial estoppel was necessary to preserve the dignity of the Courts. *Id*., at *31.

Vacca does not support the conclusion that the trial court erroneously excluded Exhibit M3. As an initial matter, Defendant never asserted that Exhibit M3 should be admissible based upon judicial estoppel. *See* Tr. 436-38. Therefore, any argument that Exhibit M3 should be admitted on that basis has been waived. Further, even if judicial estoppel might be applicable in this case (which it clearly is not), it would not be a basis to admit Exhibit M3. If judicial estoppel were applied, the proper remedy would have been to prevent Plaintiff from testifying that she had a disability, not admitting Exhibit M3 into evidence. *See Vacca*, 2019 Mo. LEXIS, at *33-34. Yet, Defendant never objected at trial to Plaintiff's testimony about her back condition.

Vacca also does not support the application of judicial estoppel in this case. Most fundamentally, Plaintiff never took a position at trial that was "clearly inconsistent" with an earlier position. When examining whether a party has taken "clearly inconsistent" positions, a court must examine and interpret the allegedly contrary representations in their full contexts. *See Kirk v. Schaeffler Group USA, Inc.*, 887 F.3d 376, 385 (8th Cir. 2018)(cited with approval by Court in *Vacca*). When Plaintiff's counsel's brief is examined in the proper context, as discussed above, it is clear that Plaintiff's actual position in the brief was that she was no longer pursuing her disability discrimination claim on the basis of an "actual" disability. The decision not to pursue an "actual" disability claim is not inconsistent with her contention that she had a "good faith" or "reasonable" belief that her request for an accommodation for her herniated discs was appropriate. Even if Plaintiff had conceded in the brief that she was not "disabled"

within the meaning of the MHRA, that concession would not be "clearly inconsistent" with the position that she had a "good faith" or "reasonable" belief in 2012 that her request for an accommodation for her herniated discs was appropriate. *See McCrainey*, 337 S.W.3d, at 753 (the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination claim).

Moreover, Plaintiff's "conduct" which serves as the foundation for Defendant's claim that Plaintiff took an earlier "clearly inconsistent" position is a far cry from the plaintiff's conduct in *Vacca* that formed the basis for the earlier inconsistent position. In this case, Defendant bases Plaintiff's earlier position on a single section heading taken out of context in a brief that Plaintiff herself never saw. In contrast, in *Vacca*, the plaintiff provided detailed and unequivocal testimony under oath. Such unambiguous testimony provided a sound basis for the Court to conclude that the plaintiff had taken a "clearly inconsistent" position in the dissolution proceeding. A single section header cannot be similarly found to create a "clearly inconsistent" position for purposes of judicial estoppel, particularly given the other text in the brief which reflects the true meaning of Plaintiff's actual position. There is simply no showing of "clearly inconsistent" positions in this case.

Next, whereas the plaintiff in *Vacca* persuaded the Court in the dissolution proceeding to award him maintenance benefits based upon his "clearly inconsistent" testimony, Defendant has failed to identify what Plaintiff's decision not to pursue her "actual disability" claim persuaded the trial court to do.

Another critical distinction between the instant case and *Vacca* is that, in this case, Defendant contends that Plaintiff's "clearly inconsistent" positions occurred in the *same* proceeding. In *Vacca*, the plaintiff provided "clearly inconsistent" testimony in two separate proceedings in two separate courts. The distinction is critical to whether judicial estoppel should apply. In this case, the trial court was fully aware of the section header on which Defendant claims an "inconsistency." *See* D930, pp. 2-3. As a result, there was little to no danger that a perception would be created that the trial court, fully aware of both representations, would be misled, that there would be a risk of inconsistent determinations, or that there would be a threat to judicial integrity. *See Vacca*, 2019 Mo. LEXIS, at *20-21, *quoting New Hampshire*, 532 U.S., at 749. Notably, Defendant has not identified any case in which judicial estoppel has been applied where the allegedly inconsistent positions occurred in a single proceeding. *See also Brooks v. Fletcher*, 337 S.W.3d 137, 146 (Mo. App. W.D. 2011)(cited with approval in this Court's decision in *Vacca*)("Missouri courts in particular have consistently refused to allow litigants to take contrary positions in *separate proceedings* to insure the integrity of the judicial process.")(emphasis supplied).

Finally, whereas the plaintiff in *Vacca* obtained a benefit in the form of maintenance benefits based upon his inconsistent testimony, Plaintiff in the instant case obtained absolutely no benefit or unfair advantage from the header in her counsel's

brief.[21] *Vacca* provides no basis on which to conclude that the trial court abused its discretion in excluding Exhibit M3.

Defendant also apparently seeks to appeal the trial court's pretrial ruling on a motion in limine. *See* Appellant's Br., p. 99 (This point seeks review of the trial court's ruling excluding from evidence all "legal pleadings and abandoned pleadings"). However, to the extent that Defendant seeks review of an evidentiary error other than the trial court's refusal to admit Exhibit M3, Defendant has failed to preserve any issue for appellate review.

The law is clear that "a trial court's ruling on a motion in limine seeking to exclude evidence is considered interlocutory in nature and is subject to change during the trial." *State v. Mickle*, 164 S.W.3d 33, 55 (Mo. App. W.D. 2005). "To properly preserve a challenge to the admission of evidence, the objecting party must make a specific objection to the evidence at the time of its attempted admission." *Id.* "Missouri courts strictly apply these principles based on the notion that trial judges should be given an opportunity to reconsider their prior rulings against the backdrop of the evidence actually adduced and in light of the circumstances that exist when the questioned evidence is actually proffered." *Id.*

[21] In the trial court, Defendant suggested that Plaintiff obtained a "benefit" by "avoiding summary judgment." *See* D952, p. 9, ¶ 13a. Yet, Defendant has made no attempt to explain how notifying the court that she was not pursuing an "actual" disability claim helped her avoid summary judgment.

Because Defendant made an offer of proof regarding Exhibit M3, which the trial court rejected, Defendant arguably preserved the issue of the exclusion of that particular exhibit for appellate review. Tr. 436-38. However, Defendant never made an offer of proof for any other documents or other evidence relating to "legal pleadings" or "abandoned pleadings" at any other time at trial. Other than Exhibit M3, Defendant has not even identified what other evidence it claims the trial court should have admitted into evidence. Accordingly, other than the trial court's refusal to admit Exhibit M3, Defendant has failed to preserve any purported evidentiary error.

CONCLUSION

For the foregoing reasons, the Order and Amended Judgment should be affirmed in all respects.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that Respondent's Brief complies with the limitations set forth in Local Rule 360. According to the word count function of Microsoft Word, the foregoing brief, from the Table of Contents through the Conclusion, contains 26,642 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 19, 2019, the foregoing document was served through the electronic filing system upon:

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