IN THE SUPREME COURT OF MISSOURI

No. SC97641

LI LIN, Plaintiff/Respondent,

v.

MATTHEW J. ELLIS, Defendant,

and

WASHINGTON UNIVERSITY, Defendant/Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Twenty-Second Judicial Circuit
Honorable Christopher M. McGraugh, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

TUETH KEENEY COOPER
MOHAN & JACKSTADT, P.C.

James R. Layton, Mo. Bar No. 45631
34 N. Meramec Avenue, Suite 600
St. Louis, Missouri 63105
314.880.3600
314.880.3601 (facsimile)
jlayton@tuethkeeney.com

SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP

Mark J. Bremer, Mo. Bar No. 24696
D. Leo Human, Mo. Bar No. 59787
1 North Brentwood Blvd., Suite 800
St. Louis, Missouri 63105
314.241.3963
314.241.2509 (facsimile)
mbremer@shandselbert.com
lhuman@shandselbert.com

Attorneys for Appellant
Washington University

May 22, 2019

Table of Contents

Appendix

Table of Authorities

Cases

Missouri Statutes

Other Statutes

Rules and Other Authority

Jurisdictional Statement

This is an appeal from an August 25, 2017 judgment, following a jury trial, in the St. Louis City circuit court. Defendant Washington University filed its notice of appeal on September 4, 2017 (D968). The judgment was reversed for new trial by the Missouri Court of Appeals, Eastern District. This Court has jurisdiction as it sustained applications for transfer pursuant to Supreme Court Rule 83.04. Mo.Const. art. V, §10.

Statement of Facts

Plaintiff worked from 2004 to 2012 as a staff scientist in the breast cancer research laboratory of Dr. Matthew J. Ellis at defendant Washington University's School of Medicine. Plaintiff sued both Dr. Ellis and the University alleging that Dr. Ellis's decision to terminate her employment violated the Missouri Human Rights Act, Chapter 213, R.S.Mo. (MHRA).[1] The jury's verdict exonerated Dr. Ellis but found the University liable for his termination decision (D950 p.1). Only the University has appealed.

Background and Certain Facts Not Disputed at Trial

Plaintiff joined Dr. Ellis's lab in 2004 (Tr.360:13-361:1). In 2005, plaintiff approached Dr. Ellis about back pain that occurred when doing certain tasks in the lab (Tr.361:5-17). The tasks she said caused pain included certain work at a microscope and work involving cell culture (also called tissue culture[2]) (Tr.361:12-17, 383:6-11). Also, plaintiff declined tasks that involved laboratory mice, claiming a mouse allergy (Tr.474:19-475:1). At plaintiff's request, she did not perform cell culture or mouse-related tasks in Dr. Ellis's lab (Tr.573:5-13, 474:15-475:1, 572:8-18, 478:19-25, 475:21-24, 573:14-574:1). At the time, Dr. Ellis's lab was unusual for a cancer research lab in having considerable work available that did not involve large amounts of cell culture or mouse work (Tr.482:22-483:13).

Before 2010, plaintiff received training from co-worker Jeremy Hoog to work on the lab's "microarray" process (Tr.370:13-371:4). From 2010 through 2012 plaintiff worked with Hoog on that process (Tr.367:9-25; Deposition of

---

[1] The MHRA was amended in 2017 and several provisions cited in this brief were renumbered or changed as a result of those amendments. Statutory references are to R.S.Mo. (2014) unless otherwise indicated.

[2] For ease of reading, this brief generally uses the term "cell culture." The two terms refer to the same thing and were used interchangeably at trial (Tr.401:11-18, 143:4-6).

Jeremy Hoog ("Hoog depo.") p.13:4-12). The number of microarrays performed in the lab between 2009 and 2014 was:

2009 — 379

2010 — 320

2011 — 293

2012 — 303

2013 — 40

2014 — 29

(Ex.K9, App.A32; Tr.448:25-449:3). Plaintiff performed the majority of them (Tr.367:9-20).

The microarray work was dependent on a stream of patient breast cancer samples (Hoog depo.16:20-17:7, 39:24-40:2; Tr.444:15-447:5; Deposition of Li Lin ("Lin depo.") pp.282:2-283:3, 283:21-284:1 (D894 pp.41-43)). Those samples came from three sources: the Z1031 clinical trial, the POL clinical trial, and the WHIM project (Tr.604:9-605:17; Hoog depo.61:16-62:6). Plaintiff identified these three projects as sources of her main tasks in Dr. Ellis's lab (Tr.364:19-365:20; Ex.2). Two of those sources of clinical samples, the Z1031 and POL clinical trials, were completed and the samples largely exhausted in 2012, causing the decline in work shown above and on Exhibit K9 (Hoog depo.30:10-22; Tr.604:18-605:4). The remaining microarrays performed after 2012 were a small number of redos and samples from the remaining WHIM project (Tr.604:18-605:17; Hoog depo.24:22-25:9). This small number of microarrays was not enough to keep someone busy full time (Hoog depo.25:9-25). Forty microarrays (the total number completed over the course of 2013) could have been approximately two months of work for plaintiff (Hoog depo.26:22-27:2). Besides the microarray work, plaintiff only identified one other project she was working on in 2012: a Department of

Defense (DOD) project that she had assisted Dr. Bob Crowder with in the spring while his technician was out (Tr.365:23-366:5, 590:25-591:7; Ex.2).[3]

The work plaintiff was doing in 2012 (on Z1031, POL, and WHIM) was funded under a federal R01 research grant (Tr.603:2-604:4). The microarray process generated a large amount of data, and the final step in the R01 grant was statistical analysis of that data, which was done in 2013-14 by two biostatisticians (Hoog depo.30:23-31-23; Tr.582:8-583:5).[4] Plaintiff's salary could only be properly allocated to the R01 grant as long as there was a stream of patient samples for her to work on (Tr.308:11-20, 316:17-317:8, 444:15-445:25; Lin depo.283:21-284:1 (D894 pp.41-42)).

In the summer of 2012 plaintiff engaged in a series of discussions regarding her job and what other work she could do with the microarray work coming to an end. These meetings were surreptitiously recorded by plaintiff and the recordings and transcripts of recordings were used extensively at trial by both plaintiff and defendants. The primary disputed issues at trial related to these recorded meetings and the decision to terminate plaintiff's employment that came out of these meetings.

---

[3] At the time plaintiff worked on this project, it was a "pilot" and not yet funded by a DOD grant (Tr.556:12-21, 470:23-471:2).

[4] The R01 grant-funded project was originally scheduled to be completed at the end of 2013 (Tr.297:4-5). Dr. Ellis sought and obtained a "no-cost" extension of the grant to allow one additional year (but with no additional funding) for the statistical analysis work (Tr.308:21-310:19). The Court of Appeals opinion erroneously states that the R01 grant continued to fund microarray work through 2014 (Op.6, 17), but the undisputed evidence was that the remaining work on the project involved data analysis and statistical work (Hoog depo.30:23-31:23), and there was no evidence in the record that the R01 grant was used to fund the small number of microarrays performed after 2012 (which in any event were not enough to employ a person full time).

Events in the Summer of 2012

On June 28, 2012, Dr. Ellis received an email from a coworker of plaintiff describing a verbal altercation involving plaintiff and another coworker regarding delivery of intra-office mail (Tr.621:7-622:11; Ex.33). Having been prompted by this email to revisit the issue of plaintiff's funding status, Dr. Ellis requested a meeting with "HR" to start a process "with a view to terminating [plaintiff's] position" (*id.*; Tr.586:23-587:15).

On July 10, plaintiff had a meeting with Dr. Ellis (Tr.399:1-12). In that meeting, which plaintiff recorded, Dr. Ellis and plaintiff discussed plaintiff's back pain, the R01 grant funding end date, the changing nature of the project, and the need to organize the lab for new grants (Tr.399:3-16, 400:17-401:18). At one point in the discussion, Dr. Ellis stated to plaintiff:

> I don't feel there's anyone else in my lab that if I asked them to do something that they would say they couldn't because of the physical limitation. Everybody would say yes and go and do it except you. And I'm sympathetic because I'm a physician advising you and you have physical disability that prevents you from doing something that's pretty routine in every lab in the university that is focused on cancer biology.

(Tr.744:9-18, 587:24-588:19).

That same day, plaintiff had a separate meeting with Dr. Ellis's grant manager, Nicole Nichols (Tr.389:8-13). Nichols told plaintiff that the R01 grant would be ending, and that a coming new project would have lots of cell culture work and that Dr. Ellis was concerned about whether plaintiff would be able to do that work (Tr.395:12-24). Plaintiff told Nichols she could not do cell culture work (Tr.395:25-396:4). When leaving the meeting with Ms. Nichols, plaintiff had a brief conversation with Sandra Sledge, a Human Resources representative, which was followed up in an email (Tr.396:15-397:9; Ex.46). In that email, Sledge addressed concerns about interactions

between plaintiff and a coworker — a reference to the earlier altercation in June (*id.*). Sledge also suggested that plaintiff should get a doctor's statement regarding her claimed inability to do cell culture work (*id.*).

On July 12, plaintiff again met with Dr. Ellis (Tr.403:8-11). The subject of the meeting was work plaintiff could do on the DOD grant with Dr. Crowder (Tr.403:17-405:15, 590:10-24). At the meeting, which was also attended by Dr. Crowder and his technician, plaintiff was offered approximately five separate tasks she could do on the DOD project (Tr.404:2-25). Plaintiff was silent during that meeting, except that when one task involving working with mice was mentioned plaintiff became upset and stated she had a mouse allergy (*id.*). At trial, when asked by her counsel whether she made it clear to Dr. Ellis that she would help on the DOD grant project, plaintiff acknowledged that she did not do so (Tr.405:12-15). Plaintiff believed offering her work on this project, which could have preserved her employment, was retaliation (Tr.405:25-406:8).

Plaintiff next met, on July 13, with Sledge (Tr.406:16-407:3). The subject matter of that meeting was primarily the June altercation between plaintiff and the coworker (Tr.407:4-13). Plaintiff stated in that meeting that she did not scream and yell at her coworker in June and asked Sledge to investigate whether she had screamed and yelled (Tr.407:14-409:6).

On July 17, plaintiff met once again with Dr. Ellis (Tr.490:18-491:20).[5] Dr. Ellis stated to plaintiff, "I have six months of money on the R01 and then I have to make some difficult decisions about that grant. I don't have another grant to put you on" (Tr.491:1-9). After that meeting, plaintiff sent an email

[5] In connection with this meeting, the Court of Appeals decision erroneously states that "Human Resources drafted notes for Dr. Ellis explaining that the funding for [plaintiff's] position was running out" (Op.4). No such document exists and no testimony or other evidence suggests that one does.

summarizing her understanding of what Dr. Ellis had told her (Tr.491:11-20; Ex.F2). "[H]e said that he could only pay me til the end of Dec 2012. Because he has to save the funding [on my project]" (Tr.491:21-492:4; Ex.F2). Dr. Ellis offered plaintiff an employment reference to assist her in finding another job (Tr.410:21-24).

The next day, July 18, Nichols sent an email asking Dr. Ellis about the meeting and how he would like to proceed with respect to plaintiff (Tr.622:17-623:18; Ex.F4). Dr. Ellis responded: "Essentially she cannot be funded on the new grants (DOD and [Komen] Promise) because she is physically unable to do tissue culture and is allergic to mice. So I told her that the R01 cannot support her beyond the end of the current grant period (december)." (*id.*). He concluded, "I do think I have work for the next 6 months, if she wants to stay in the lab that long. She was very unhappy with me, but there is nothing I can do. I offered her a reference." (*id.*). Sledge responded by indicating she would work with Nichols to prepare a letter (*id.*).

On July 31, plaintiff provided a doctor's note indicating she had herniated discs that required her to avoid work "including but not limited to, cell culture and excessive bench work" (Ex.19; Tr.701:6-9).

The final meeting between plaintiff and Dr. Ellis occurred on August 10 (Tr.413:5-11).[6] At that meeting, which Nichols and Sledge attended, Dr. Ellis again told plaintiff that the direction of his lab was changing, and that her job would end on November 30, 2012 (Tr.413:12-414:15). Plaintiff and Dr. Ellis once again discussed Dr. Ellis giving a job reference for plaintiff, and Dr. Ellis stated that his practice was not to provide a "blanket" reference but that he would provide a reference for a specific job if asked (Tr.599:10-600:22). As

[6] The Court of Appeals opinion incorrectly states that plaintiff had three meetings in early August, one with each of Ellis, Nichols and Sledge (Op.4).

discussed in the July 18 email exchange (Ex.F4), Nichols and Sledge drafted a letter for Dr. Ellis memorialized the decision to end plaintiff's employment (Tr.414:16-21; Ex.22). That letter, which reflected the decision conveyed to plaintiff at the August 10 meeting, was sent by Dr. Ellis to plaintiff on August 28 (*id.*).[7]

Plaintiff's employment ended on November 30, 2012 (Tr.509:16-21). The record does not contain evidence regarding any event between August 2012 and that date. Although the August 28 letter indicated that plaintiff had a right to seek to transfer to another position at the University, there is no evidence that plaintiff applied for a transfer.[8] To rebut a failure-to-mitigate-damages argument, plaintiff presented a job search record listing dozens of jobs she applied for at the University and elsewhere (Ex.24), but the earliest application listed was in January 2013, after her employment with the University had ended. Plaintiff never asked Dr. Ellis to provide a reference for any job she was applying for, either before or after the ending of her employment (Tr.600:21-24).

Evidence Relied on by Plaintiff as Supporting Liability

This case was submitted to the jury on a single theory of liability. The verdict-directing instructions were as follows:

> [Y]our verdict must be for plaintiff if you believe:
>
> First, [defendant] discharged plaintiff, and

---

[7] The Court of Appeals opinion erroneously states that another letter was prepared by Sledge and Nichols "explaining the reasons why there was no more funding" that was "subsequently used as the justification" to terminate plaintiff (Op.4). No such letter exists. The only letter Sledge and Nichols prepared is this August 28 letter, which memorialized the previous decision conveyed on August 10.

[8] The Court of Appeals incorrectly states that plaintiff was terminated without the opportunity to transfer (Op.5, 17).

> Second, plaintiff's request for a reasonable accommodation for herniated discs was a contributing factor in such discharge, and
>
> Third, as a direct result of such conduct, plaintiff was damaged.

(D972 pp.2-3, App.A29-A30). The verdict directors, Instructions 6 and 7, were identical except that Instruction 6 identified the defendant as Dr. Ellis and Instruction 7 identified the defendant as the University (*id*).

In closing argument, plaintiff's counsel surveyed the evidence to support each element under these instructions. With respect to element one, that defendants "discharged" plaintiff, plaintiff cited Exhibit 22, the letter stating that "[p]er our meeting on August 10, 2012, this letter is provided to confirm that the position you have as staff scientist with the Division of Medical Oncology is being eliminated due to lack of funding" (Ex.22; Tr.699:4-9). This, plaintiff argued, "clearly establishes that Dr. Lin was told in August 10, 2012 that the decision was made and that she was notified that she would be fired. August 10, 2012." (Tr.699:10-13).

As to the second element, plaintiff presented her evidence in multiple parts. Plaintiff testified regarding her back pain and herniated discs, describing incidents from 2003 and 2005 in which she was unable to perform certain tasks for herself for a time (Tr.357:16-361:25, 479:1-11). Plaintiff cited Exhibit 16, a July 12, 2012 email from plaintiff referring to her back pain (Tr.700:4-9). Plaintiff also cited a July 10, 2012 email advising plaintiff to get a medical statement regarding her restrictions (Ex.46; Tr.700:22-701:2), and plaintiff's reply that she would get such a statement (Ex.47; Tr.701:3-6). Finally, plaintiff cited the doctor's statement she obtained dated July 31 (Ex.19; Tr.701:6-9).

Plaintiff next addressed the second part of the second element of the instruction — "[w]hy was her request for a reasonable accommodation a factor in her being fired" (Tr.701:22-23). For this element, plaintiff relied on

the audio recording of her July 10 one-on-one meeting with Dr. Ellis, quoted above, in which he stated "you have a physical[] disability that prevents you from doing something that's pretty routine in every lab in the university that is focused on cancer biology" (Tr.744:9-18). Plaintiff also relied on an alleged statement by Dr. Ellis, not audio recorded, that if plaintiff went to talk to "HR" her "days in my lab will be numbered" (Tr.746:19-22). Plaintiff argued, "Dr. Ellis didn't want to accommodate her anymore in July of 2012 because he'd have to figure out how he was going to pair her with other people in the lab on other projects," citing a 2010 email exchange as purported evidence of this (Ex.D2; Tr.701:24-702:6). Plaintiff also cited the June email about plaintiff's involvement in an altercation with a coworker, in which Dr. Ellis raises the possibility of terminating plaintiff's employment, noting that that email did not mention funding (Tr.703:23-704:3; Ex.33). Plaintiff contrasted that email with the final letter terminating plaintiff's employment, which did refer to funding (Tr.704:4-19; Ex.13). These exhibits, plaintiff argued, gave "the view into the decision making process of Dr. Ellis" (Tr.705:5-9). Finally, plaintiff referred to a charge of discrimination naming Dr. Ellis at his current place of employment, Baylor University in Texas (Tr.746:24-747:7). Plaintiff concluded "[t]hat's why we know Dr. Ellis retaliated" (Tr.747:7).[9]

Plaintiff completed her discussion of the evidence supporting liability by identifying evidence that, in her view, rebutted defendant's explanation for plaintiff's termination because of lack of funding. According to plaintiff's counsel, this evidence showed that "Dr. Ellis' lab is awash in money," which

[9] The Court of Appeals decision erroneously states that plaintiff's closing argument "emphasized [Sledge's and Nichols's] involvement in … the decision to terminate her employment" (Op.16). But the evidence surveyed in the text above is a complete recitation of the material plaintiff cited in her closing argument to establish liability, which focused exclusively on establishing Dr. Ellis's allegedly retaliatory state of mind.

plaintiff argued rebutted Dr. Ellis's explanation for his termination decision (Tr.705:10-14).

Defendants' Evidence[10]

The undisputed trial evidence showed that the microarray work plaintiff had been doing, successfully and apparently without impinging on any of plaintiff's work restrictions or preferences, came substantially to an end in 2012 because the data-gathering phase of the research study was ending (Ex.K9; Tr.448:25-449:3; Hoog depo.24:14-25:8). Without that work, there was not a proper way to continue to fund plaintiff's salary on the existing grant (Tr.308:11-20, 313:1-5, 470:5-11; Lin depo.41:6-10 (D893 p.24)).

Plaintiff had experienced similar transitions before, as projects funded by other grants ended. In about 2009, in her last such transition, plaintiff retrained from her prior projects to do the microarray work (Tr.579:5-580:8; Tr.370:13-371:4).

This time, Dr. Ellis attempted to arrange a similar transition for plaintiff from the microarray work to other tasks:

- In 2011, Dr. Ellis suggested plaintiff get involved in a team with Dr. Cynthia Ma (Tr.575:23-576:10). Plaintiff rebuffed that effort (Tr.522:16-525:17; Ex.D5).
- In their July 10, 2012 meeting, plaintiff and Dr. Ellis discussed work that could potentially be done on the upcoming Komen Promise grant (Tr.588:20-24). But the Komen Promise grant involved a large amount of cell culture work (Tr.602:1-7). At trial, Dr. Ellis testified that being able to do cell culture work on the Komen Promise grant was an essential job function for plaintiff, and plaintiff admitted that most cancer labs do cell

[10] Defendants' evidence is pertinent, under the applicable standards of review, to Points III (regarding the legal effect of the verdict in favor of Dr. Ellis), IV (instructional error), and V (evidentiary error).

culture work (Tr.589:4-9; 482:22-483:6). The meeting ended without a funding plan in place for plaintiff (Tr.589:22-24).

- After the July 10 meeting at which the Komen Promise grant was discussed, Dr. Ellis considered another potential project for plaintiff: the DOD grant being run by Dr. Bob Crowder (Tr.590:10-24). As noted above, plaintiff had done some work on the DOD pilot project that spring, when a technician working on it had missed work for a back injury (Tr.590:25-591:10). This led to a further effort to identify tasks that plaintiff could transition to.
- On July 12, Dr. Ellis met with Dr. Crowder and plaintiff to discuss the status of the pilot and work plaintiff might do on the DOD grant (Tr.591:11-24). Among the tasks plaintiff was asked whether she could do were things that Dr. Ellis believed met all of plaintiff's stated work restrictions and preferences, like the FACS process, which Dr. Ellis testified was similar to the microarray work plaintiff had been doing (Tr.462:12-465:7, 593:6-595:12). Dr. Ellis and Dr. Crowder ended the meeting believing plaintiff had rejected the DOD work (Tr.557:18-25, 597:21-25). And at trial, plaintiff admitted that she never indicated that she was willing to do the offered work on the DOD grant (Tr.405:12-15).
- At their July 17 meeting, Dr. Ellis returned to the need for some kind of transition. He reiterated to plaintiff that her project was coming to an end, that he had "six months of money on the R01," and he did not have another grant to put her on (Tr.490:24-491:10).

Despite these repeated efforts and meetings with Dr. Ellis, plaintiff never indicated what work she could do in Dr. Ellis' lab after 2012 — not at the time when she was meeting with Dr. Ellis and not even at trial. Plaintiff continued to believe that she could work on her existing project indefinitely

(Tr.442:25-444:8, 446:9-18; Lin depo.280:18-281:10, 282:2-283:3, 283:21-284:1 (D894 pp.41-43)). But she admitted at trial that she had no basis to dispute the evidence that the sample stream had in fact come to an end (Tr.448:19-449:3).

Dr. Ellis explained his reasons for terminating plaintiff's employment and addressed and responded to his statements and alleged statements relied on by plaintiff as evidence for her claim (Tr.588:18-590:24, 578:17-24, 628:5-630:1). He testified that when plaintiff made requests over the years not to do certain kinds of work, he honored those requests without requiring formal documentation (Tr.573:5-574:1, 612:2-8). What changed in 2012 was not plaintiff's physical condition or claimed work restrictions, but rather the end of funded work for her on the R01 microarray project (Tr.609:2-8). In his July 17 meeting with plaintiff and July 18 email, Dr. Ellis explained that the R01 could not support plaintiff after 2012 and that she could not work on his other grants (Komen Promise or DOD) for reasons plaintiff and Dr. Ellis had discussed in their meetings of July 10 and 12 (Ex.F4; Tr.490:24-491:10). Dr. Ellis's trial testimony reiterated these points: he testified that, after the July 2012 meetings discussed above, there was not a feasible source of work that would enable the continuation of plaintiff's employment in his lab after the microarray work came to an end, and that he terminated plaintiff's employment for that reason and only after she had rejected every source of alternative work he had identified for her (even work that was consistent with her claimed physical restrictions), and not because of retaliation for an accommodation request (Tr.601:3-602:19, 630:8-631:23, 608:16-609:9, 607:10-12, 602:20-605:17; Exs.F4, 2, 58). So, in their meeting on August 10, he told plaintiff her job that her job would end on November 30, 2012 (Tr.413:12-

414:15).[11]

Although there was evidence that plaintiff had interpersonal conflicts with many of her coworkers (Tr.218:16-220:6, 525:9-17), Dr. Ellis explained that these issues mattered to him only to the extent that they made it more difficult to build teams involving plaintiff (Tr.619:24-620:6, 575:7-17, 579:5-10). When asked about the June incident between plaintiff and a coworker, Dr. Ellis testified that he tried to take things like this "with a grain of salt" but that the email had prompted him to think about the funding gap that would affect plaintiff towards the end of 2012, and that was the reason for his email regarding termination of plaintiff's position (Tr.586:23-587:15). Dr. Ellis testified about two other instances in which interpersonal conflicts had made it more difficult to place plaintiff on teams that would have resulted in her being funded — one involving the attempt to put her on a grant with Dr. Ma and another involving a project called HAMLET (Tr.619:24-620:6, 578:1-16, 575:2-22, 586:23-587:15; Exs.D5, D1).

[11] The Court of Appeals opinion states that after this meeting Nichols revised plaintiff's projected end date of December 31, 2012 to November 30, 2012 (Op.17). Though not entirely clear, this appears to be a reference a spreadsheet that Nichols maintained of grant sourcing in Dr. Ellis's lab (Ex.58). Based on that record, plaintiff's work on the R01 was originally scheduled to end on December 31, *2011*, eleven months before her job actually ended (*id*. at WU-LIN 1458). Over the course of 2012, Nichols revised the spreadsheet to extend the expected end date through June 2012 (WU-LIN 1485) and then through December 2012 (WU-LIN 1488), before ultimately being revised to reflect the end date decided by Dr. Ellis of November 30, 2012 (WU-LIN 1497). These specific details were not raised by plaintiff at trial, presumably because they are fully corroborative of Dr. Ellis's testimony that (1) he had an ongoing funding concern regarding plaintiff long before any of the events that were the focus of the trial, (2) he nonetheless continued plaintiff's employment as long as he could while attempting to determine whether there was another grant to put her on, and (3) he ultimately decided to terminate plaintiff's employment and communicated that decision to plaintiff and to Nichols.

Defendants also adduced evidence to establish that plaintiff's back condition did not rise to the level of a disability and that plaintiff's stated work restrictions were unreasonably broad. Plaintiff claimed that her back condition restricted her from conducting cell culture work and other bench work (Ex.F7; Tr.477:6-482:2). Defendants adduced evidence that the restriction on bench work covered much if not all work plaintiff had done in the lab for years (Tr.480:15-481:22). Other than those claimed work restrictions, plaintiff's testimony regarding restrictions caused by her back pain and herniated discs was limited to incidents from 2003 and 2005 in which she was unable to perform certain tasks for herself for a limited period of time (Tr.357:16-361:25, 479:1-11). Dr. Ellis testified that he believed plaintiff had chronic back pain, which he tried to accommodate, but that he did not believe plaintiff had a disability in a legal or formal sense (Tr.612:2-22).

Procedural History

Plaintiff filed her charge of discrimination with the Missouri Commission on Human Rights on February 20, 2013 (D847). In June 2014, plaintiff requested and was issued notice of right to sue (D842 p.7). The notice stated in boldface that "**administrative processing of this complaint, including determinations of jurisdiction, has not been completed**" (*id.*). Plaintiff then filed this lawsuit, which originally contained both a disability discrimination claim and a retaliation claim (D842).

Early in the litigation, the University and Dr. Ellis filed pre-discovery motions for summary judgment on limitations grounds (D843, D880). In two June 2016 orders, the circuit court denied the motions (D883 & D891). The court acknowledged that "[s]ection 213.075 requires any person claiming to be aggrieved by an unlawful discriminatory practice to file a written verified

complaint with the MCHR within 180 days of the alleged act of discrimination," citing *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 252 (Mo.App.W.D. 2012) (D883 p.5). But, citing *Farrow v. St. Francis Medical Center*, 407 S.W.3d 579, 589 (Mo.banc 2013), the court held that defendants could not raise this defense because they had "failed to seek relief" in a separate administrative lawsuit "following the MCHR's issuance of a right-to-sue letter" (D883 p.6).[12]

In its June 13 Order, the court also found that certain facts were not disputed. These undisputed facts included the date that plaintiff was told her job would be terminated (August 10, 2012) and the date plaintiff's charge was filed (February 20, 2013) — and calculated the charging date was more than 180 days after plaintiff was informed of her termination (D883 pp.1-3). The court also stated it was "uncontroverted" that "[i]t was Dr. Ellis who made the decision to eliminate Plaintiff's position and he personally informed her of the decision" (*id.*).

Following these orders and completion of discovery, defendants jointly filed a post-discovery motion for summary judgment (D899). That motion raised two additional grounds pertinent here. First, defendants argued that plaintiff was not disabled within the meaning of the MHRA, citing undisputed facts showing that plaintiff's back condition did not substantially limit plaintiff in a major life activity (D899 ¶2; D900 pp.6-8 ¶¶27-47). Second, defendants argued that plaintiff's retaliation claim failed because plaintiff had not complained of or opposed discrimination (D899 ¶3).

In response, plaintiff filed suggestions stating that "Plaintiff Is Not Disabled Under the MHRA" and that plaintiff was "not pursuing … an actual

[12] The *Farrow* decision was issued after the University had responded to the administrative charge.

disability theory" (D922 p.5, App.A35) (emphasis original). Plaintiff's factual submission "Admit[ted]" each of the sixteen proffered facts showing plaintiff was not disabled (D929 p.6 ¶¶31-46). Then, shortly before trial, with defendants' motion still under submission, plaintiff filed her Second Amended Petition, removing her disability discrimination claim (D943; *see also* Tr.39:4-7). The next day the circuit court denied the motion for summary judgment with respect to the disability claim as "moot," based on the new Petition (D944 p.2). The circuit court held with respect to the remaining retaliation claim that "[w]hether [plaintiff's] back condition qualifies as a 'disability' … is a question of disputed fact for the jury" (*id.* p.5).

Significant Events and Outcome at Trial

At trial, the University sought to submit into evidence plaintiff's previous written statements that she was not disabled, and other written statements by plaintiff that were inconsistent or tended to discredit her claims and credibility (Tr.23:18-26:23, 436:3-438:8). All of this evidence was excluded (*id.*).

Despite the circuit court's prior ruling regarding the existence of factual issues for a jury, at trial the jury instructions and verdict director proffered by plaintiff and given by the trial court did not require the jury to decide whether plaintiff's request for accommodation of "herniated discs" was a request for accommodation of a "disability," whether the accommodation requested was a "reasonable" one, or whether plaintiff acted reasonably and in good faith (D972 pp.2-3). Defendants' objections to the verdict director, raising each of these points, were overruled (Tr.671:24-674:17); the verdict directing instruction was given as requested by plaintiff (Tr.676:20-677:4).

The jury returned a verdict exonerating Dr. Ellis but finding liability as to the University, and awarding actual damages in the amount of $269,000

(D950 p.1, App.A31). Plaintiff did not object to the verdict or seek to have the jury deliberate further. Punitive damages in the amount of $500,000 were awarded against the University in the second phase of the trial (*id*. p.3).

Post-Trial Proceedings and Entry of Judgment

Judgment was entered in favor of Dr. Ellis but against the University (D951). The University filed a motion for judgment notwithstanding the verdict (JNOV) or new trial raising all issues that are now part of this appeal (D952). Among the issues raised was the upcoming effectiveness of statutory amendments to R.S.Mo. §213.075.1, relating to a defendant's right to raise as a defense the untimeliness of plaintiff's charge. At a hearing on July 31, 2017, plaintiff's counsel acknowledged that "[t]he statute of limitations issue is a procedural issue and not a substantive issue," and that as of August 28, 2017 the amendments would therefore apply to this case (Tr.803:5-7, 809:23-25; *see also* Tr.782:2-10). On August 25, 2017, the last business day before the amendments' effective date, the trial court denied the University's motion and entered an amended judgment against the University awarding $319,635 in attorney's fees and $470,000 in front pay, plus litigation expenses, for a total judgment amount of $1,565,368.44 (D962 p.5). On August 29, 2017, after the amendments to R.S.Mo. §213.075 had gone into effect, the University filed timely post-judgment motions directed to the amended judgment (D964). The trial court never acted on the University's motions, which by operation of Rule 78.06 were deemed overruled on November 27, 2017. The University timely appealed to the Court of Appeals, Eastern District.

Proceedings and Decision in the Court of Appeals

The University raised five points on appeal. Three of these points would warrant the entry of JNOV. Briefly stated, these points were:

1. The claim on which judgment was entered — retaliation for requesting an accommodation — does not exist under Missouri law.
2. Plaintiff's claim is time-barred because plaintiff did not file her administrative charge within 180 days of her termination.
3. The jury's verdict and the judgment exonerating Dr. Ellis also exonerates the University as a matter of law.

Two other points alternatively sought a new trial:

4. The verdict-directing instruction erroneously omitted an essential element of plaintiff's claim — whether plaintiff is a member of a protected class.
5. The trial court erred in excluding certain evidence, especially plaintiff's admission to the court that she "Is Not Disabled Under the MHRA."

The Eastern District, in its Opinion, addressed the first, third, and fourth of these points (Op.1-2).

The Opinion began by rejecting the contention that plaintiff's claim in this case does not exist in Missouri law. The Eastern District acknowledged that the issue is one of first impression in Missouri but held that plaintiff's claim should be recognized, based on federal case law and purported public policy considerations (Op.10-12).

Next, the Eastern District addressed the argument that the verdict exonerating Dr. Ellis also exonerated the University.[13] The Opinion extensively cited and relied on *Stith v. J.J. Newberry Co.*, 79 S.W.2d 447

[13] Plaintiff conceded in the Court of Appeals that "[i]t was undisputed that Ellis made the decision to eliminate Plaintiff's position in his lab. Because the jury found in favor of Defendant Ellis, it could not have awarded Plaintiff any damages based solely on that decision" (Respondent's Court of Appeals Brief p.26 n.3).

(Mo. 1935), a case cited by neither party and which did not involve the issue of inconsistent verdicts (Op.14-15). The Court did not consider this Court's decision in *Burnett v. Griffith*, 769 S.W.2d 780 (Mo.banc 1989), inaccurately stating that that case did not "deal with the issue of inconsistent verdicts" (Op.15 n.7). Based on *Stith*, the court concluded that as long as plaintiff's claim rested "in whole or in part" on conduct of those other than Dr. Ellis, it could be affirmed (Op.16). The Eastern District then concluded, based on its description of plaintiff's argument and on what it described as the evidence at trial, that the verdict against the University was based on the conduct of "the Administrator" (*i.e.*, Nichols) and "Human Resources" (Sledge) (Op.17). The court noted that the evidence against the University was not "overwhelming" but held that it was sufficient (Op.17-18 & n.8).

Finally, the Eastern District addressed the University's claim of instructional error. Applying this Court's decision in *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), the Court held that the verdict directing instruction given at trial omitted an essential element of plaintiff's claim — plaintiff's membership in a protected class — and improperly assumed as true disputed material facts (Op.23). The Opinion specifically noted that the University had disputed at trial whether plaintiff had engaged in good faith, reasonable requests for accommodation of a disability by introducing evidence that plaintiff turned down work assignments that complied with her requested accommodations and there was no other work available that did not involve work she was requesting to avoid (*id.*). On this basis, the Court of Appeals ordered the case reversed and remanded for new trial (Op.24).

The Eastern District did not reach the rest of the University's points on appeal (Op.25). It did not address the University's fifth point, claiming

evidentiary error. It mentioned the University's second point, contending that plaintiff's claim was time-barred. But the court concluded that the University could now properly raise the timeliness defense under the amended version of R.S.Mo. §213.075 and declared the issue moot on appeal, without explaining why its conclusion regarding applicability of the amended statute did not warrant the appellate court entering judgment in favor of the University (Op.25-26).

Both plaintiff and the University sought transfer to this Court. On April 2, 2019, this Court granted the parties' applications for transfer.

Points Relied On

Point I — The circuit court erred in denying the University judgment notwithstanding the verdict because plaintiff failed to submit a cognizable claim in that the plain language of the Missouri Human Rights Act does not authorize a claim of retaliation for seeking a disability accommodation.

R.S.Mo. §213.070(2)

Daugherty v. Maryland Heights, 231 S.W.3d 814 (Mo.banc 2007)

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622 (Mo.banc 1995)

Point II — The circuit court erred in denying the University judgment notwithstanding the verdict because plaintiff's claim is time barred under R.S.Mo. §213.075.1 in that her administrative complaint was not filed within 180 days after the termination decision was made and announced to her.

R.S.Mo. §213.075.1 (2014 & 2017)

Mendelsohn v. State Bd. of Registration for the Healing Arts, 3 S.W.3d 783 (Mo.banc 1999)

Wallingsford v. City of Maplewood, 287 S.W.3d 682 (Mo.banc 2009)

Point III — The circuit court erred in denying the University judgment notwithstanding the verdict because the jury's verdict exonerating Dr. Ellis also exonerates the University in that Dr. Ellis was the University's agent and his conduct in discharging plaintiff was the sole basis for plaintiff's claim as pleaded, tried, and submitted to the jury.

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

Williams v. Venture Stores, Inc., 673 S.W.2d 480 (Mo.App.E.D. 1984)

Zobel v. Gen. Motors, Corp., 702 S.W.2d 105 (Mo.App.E.D.1985)

Presley v. Central Terminal Co., 142 S.W.2d 799 (Mo.App.St.L. 1940)

Point IV — The circuit court erred in giving plaintiff's verdict director, Instruction No. 7, because that instruction omitted one of the essential elements of an MHRA retaliation claim — whether plaintiff is a member of a protected class — in that the instruction assumed the disputed facts that plaintiff requested accommodation of a "disability," that her requested accommodation was "reasonable," and that she acted reasonably and in good faith.

Hervey v. Mo. Dep't of Corr., 379 S.W.3d 156 (Mo.banc 2012)

Medley v. Valentine Radford Commc'ns, Inc., 173 S.W.3d 315 (Mo.App.E.D. 2005)

Shore v. Children's Mercy Hosp., 477 S.W.3d 727 (Mo.App.W.D. 2015)

Point V — The circuit court erred in excluding from evidence statements and pleadings by plaintiff, most notably her abandonment of her disability claim and her written admission through counsel that "Plaintiff Is Not Disabled Under the MHRA," because those statements were admissible in that they were admissions by a party opponent, binding both as judicial admissions and under judicial estoppel, and were substantial probative evidence pertaining directly to disputed issues at trial.

City of Dardenne Prairie v. Adams Concrete and Masonry, LLC, 529 S.W.3d 12 (Mo.App.E.D. 2017)

Contest of Primary Elec. Candidacy of Fletcher, 337 S.W.3d 137 (Mo.App.W.D. 2011)

MCCORMICK ON EVIDENCE (7th ed. 2013) §257

Introduction

This Missouri Human Rights Act (MHRA) case went to trial solely as a retaliation claim. But it never should have gone to trial.

As discussed in Point I, the sole claim submitted to the jury does not exist under Missouri law. A claim that an employer failed to reasonably accommodate an employee's back trouble could potentially be a basis for a disability discrimination claim like the one plaintiff made originally but dropped before trial. But under the plain language of §213.070(2), it is not a basis for the independent *retaliation* claim that plaintiff took to trial.

And as discussed in Point II, plaintiff's retaliation claim was barred because she did not file a timely charge with the Missouri Commission on Human Rights (MCHR). The trial court erroneously concluded that *Farrow* precluded defendants from asserting an untimeliness defense, and in any event the amendments to the MHRA abrogating *Farrow* are applicable to this case and bar plaintiff's untimely claim.

Regardless, the case did go to trial — which, as discussed in Point III, resulted in an inconsistent verdict. The jury absolved Dr. Ellis, who was the sole decisionmaker with respect to plaintiff's discharge, from liability for retaliation. The jury necessarily found that retaliation did not contribute to Dr. Ellis's decision to discharge plaintiff. When the jury decided that Washington University was nonetheless liable for Dr. Ellis's discharge decision, it rendered an inconsistent verdict — one that is binding on plaintiff and compels a judgment for the University notwithstanding the verdict.

Otherwise, two errors would merit a new trial.

As discussed in Point IV, the trial court omitted from the verdict director any requirement that the jury find that plaintiff was a member of a protected class — *i.e.*, that in good faith she sought a "reasonable" accommodation for a

"disability," as those terms are used in the MHRA. The verdict director implicitly instructed the jury to assume that plaintiff had a disability for which she sought a reasonable accommodation. Yet those elements were vigorously disputed. Here, as in *Hervey v. Missouri Department of Corrections*, and as the Eastern District concluded, the omission is an error that requires a new trial.

And as discussed in Point V, the trial court barred the University from introducing key evidence: plaintiff's own judicial admission that she is not actually disabled. That admission was relevant to the questions of whether she had a "disability" for which she was entitled to reasonable accommodation and whether she acted reasonably and in good faith. Its exclusion, too, requires a new trial.

ARGUMENT

I. The circuit court erred in denying the University judgment notwithstanding the verdict because plaintiff failed to submit a cognizable claim in that the plain language of the Missouri Human Rights Act does not authorize a claim of retaliation for seeking a disability accommodation.

Preservation Below and Standard of Review

This point seeks review of the trial court's denial of the University's motions for directed verdict (D949 p.2 ¶5) and JNOV (D964 p.5 ¶9). Review of the trial court's denial of a defendant's motion for JNOV is limited to determining whether the plaintiff made a submissible case. *Hutchens v. Burrell, Inc.*, 342 S.W.3d 399, 403 (Mo.App.W.D. 2011). Where, as here, denial of JNOV is based on a conclusion of law, this Court reviews the decision *de novo*. *Lapponese v. Carts of Colorado, Inc.*, 422 S.W.3d 396, 400-01 (Mo.App.E.D. 2013). The trial court's interpretation of a statute is an issue of law for *de novo* review. *Id*.

Argument

Judgment was entered against the University on plaintiff's claim that Dr. Ellis made the decision to terminate her employment in retaliation for her "request for a reasonable accommodation for herniated discs" (D972 p.3 (verdict-directing instruction)). But no such claim exists under the plain language of the MHRA.

The MHRA authorizes a retaliation claim only where a person:

1. "has opposed any practice prohibited by this chapter" or
2. "has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter."

R.S.Mo. §213.070(2) (App.A16).[14]

Under the statutory text, plaintiff's "request for a reasonable accommodation for herniated discs" was not protected activity on which a retaliation claim can be based. The mere request for accommodation of a physical impairment (or even of a disability) does not constitute (1) opposition to a practice prohibited by the MHRA, nor is it (2) filing a complaint, testifying, assisting, or participating in an investigation, proceeding or hearing conducted pursuant to the statute.

By the terms of the statute, employee protected activity must be *in response* to an unlawful employer action. But making an accommodation request is not opposition to or participation in an agency proceeding concerning any employer action; it is merely providing the employer with information about an impairment and asking the employer to take a desired

[14] "To establish a prima facie case of retaliation under the MHRA, a plaintiff must prove that … she complained of discrimination." *Minze v. Missouri Dept. of Public Safety*, 437 S.W.3d 271, 275 (Mo.App.W.D. 2014); *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 245 (Mo.App.E.D. 2006).

action. It is the first step in an interactive process, initiated by the employee, *before* any employer response or action.[15] The mere request for an accommodation does not fall within either category of protected activity established by the statute.

By contrast, if *in response* to the employee's request the employer refuses to provide a reasonable accommodation, *then* the employee could have a claim under the statute. But it would be a claim for failure to accommodate a disability, not a retaliation claim. *See Medley v. Valentine Radford Commc'ns, Inc.*, 173 S.W.3d 315, 320 (Mo.App.W.D. 2005). And if the employee files a *complaint* about the employer's refusal to grant a reasonable accommodation, that complaint — opposition to a potentially unlawful refusal — could lead to a retaliation claim authorized by the statute. But the mere request for an accommodation does not involve any employer action at all, let alone opposition to employer action.

Here, the claim that was submitted to the jury was not that plaintiff was unlawfully denied a reasonable accommodation. Nor was the claim that she complained about a denial of an accommodation request and was unlawfully discharged as a result of such a complaint. Rather, her claim was that she was discharged simply for having made an accommodation request in the

---

[15] Prior to the employee's initiation of the interactive process by requesting an accommodation, an employer has no duty (and often no knowledge on which) to act. *See Kobus v. College of St. Scholastica*, 608 F.3d 1034, 1038 (8th Cir. 2010) ("[I]t is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."); *EEOC v. Product Fabricators, Inc.*, 763 F.3d 963, 971 (8th Cir. 2014) ("[T]he 'predicate requirement triggering the interactive process is the employee's request for the accommodation.'"); *see also Kerr v. Curators of the Univ. of Missouri*, 512 S.W.3d 798, 812-13 (Mo.App.W.D. 2016) (employee failed to put employer on notice of need for reasonable accommodation of disability).

first place.[16] That allegation involves neither statutorily recognized protected activity — opposition to or participation in an agency proceeding concerning an action by the University — and thus does not state a valid cause of action under the plain language of the MHRA.

We are aware of only one Missouri court that has analyzed this issue in a written decision, *Price v. Senior Citizens Nursing Home Dist.*, No. 14RY-CV00907, 2016 WL 3513503 (Mo.Cir. Ray Cty., June 23, 2016).[17] The court in *Price* held that the plain language of the MHRA does not encompass a cause of action for retaliation for having requested a reasonable accommodation of a disability. The court held that the employee's reporting of her mental disorder and request for a reasonable accommodation "are not distinctly covered by the retaliation prohibitions of the MHRA separate and apart from [her] claim for disability discrimination and that they do not state a claim for retaliation under the MHRA." *Id.* at *24. The court explained:

> Even under the broadest interpretation of a retaliation claim under the MHRA, the first element requires either an act opposing

[16] Plaintiff originally pleaded a disability discrimination claim but abandoned it before trial (D842, D943; Tr.39:4-7). She chose to pursue this case solely on the unsubstantiated legal theory that a "good faith request for a reasonable accommodation is protected activity under the MHRA" (D948 p.4). Plaintiff's claim "must stand or fall" on that theory. *Ross-Paige v. Saint Louis Metro. Police Dep't*, 492 S.W.3d 164, 175 (Mo.banc 2016) ("Parties on appeal generally 'must stand or fall' by the theories upon which they tried and submitted their case in the circuit court below."), citing *Kleim v. Sansone*, 248 S.W.3d 599, 602 (Mo.banc 2008); *cf. Heckadon v. CFS Enters., Inc.*, 400 S.W.3d 372, 377 n.3 (Mo.App.W.D. 2013) ("theories of liability … not submitted [to the jury] are abandoned").

[17] Below, the only Missouri appellate case plaintiff cited was *Kerr*, 512 S.W.3d 798. But in that case the plaintiff did not even plead a claim of retaliation for having requested a reasonable accommodation, and the court affirmed dismissal based on the proposition that unpleaded allegations would not be considered on appeal. *Id.* at 815. Indeed, the Eastern District recognized that there is no Missouri appellate precedent on the issue (Op.9).

> discrimination or the filing of a complaint. … Price fails to allege any action which could satisfy the first element of a retaliation claim under the MHRA. Accordingly, Defendants have met their burden and are entitled to judgment as a matter of law on Price's retaliation claim.

Id. at *25.

In the proceedings below, neither plaintiff nor the circuit court nor the appeals court even attempted to offer any explanation as to how the text of the MHRA could encompass plaintiff's claim. Instead of analyzing the text of the MHRA to determine the scope of Missouri law, both courts relied exclusively upon federal Americans with Disabilities Act (ADA) case law. But this Court has warned against relying on federal case law without careful consideration of textual differences between the MHRA and federal statutes. *E.g.*, *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo.banc 2007) (abrogated by 2017 MHRA amendments on other grounds). The MHRA is "in some ways broader … and in other ways is more restrictive" than parallel federal statutes. *Id*. So this Court has admonished courts to apply the "plain language of the MHRA," and has declared that federal case law must be disregarded where, as here, it is inconsistent with the MHRA's text. *Id*.

The text of the relevant provision of the ADA is quite different than that of the MHRA. In language that is absent from and inconsistent with the MHRA, the ADA explicitly authorizes the claim plaintiff asks this court to adopt. As the Eighth Circuit has explained, under the ADA that claim arises under 42 U.S.C. §12203(b)[18] — a provision that has no counterpart in the

[18] *See EEOC v. North Memorial Health Care*, 908 F.3d 1098, 1102 (8th Cir. 2018) (claim that employer discharged employee for requesting disability accommodation is an "ADA retaliation claim under 42 U.S.C. §12203(b) for interfering with the exercise of the employee's ADA rights").

MHRA. Section 12203(b) of the ADA provides:

> It shall be unlawful to coerce, intimidate, threaten, or *interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed*, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, *any right granted or protected by this chapter*.

(Emphasis added.) The ADA thus expressly establishes a claim for interference with the exercise of rights granted under that federal statute. Such claims are authorized by §12203(b) of the ADA in addition to the retaliation claims it authorizes under §12203(a) against individuals who opposed statutory violations. By contrast, the MHRA's retaliation provision, §213.070(2), contains only language paralleling the opposition and participation clauses of the ADA's §12203(a). It contains no additional language even similar to the ADA's §12203(b) creating a separate and more general cause of action for interference with the exercise of statutory rights. This is a clear example of an instance where the MHRA is "more restrictive" than federal statutes and, under *Daugherty* and as a matter of sound statutory construction, the text of the Missouri statute must control.

The Eastern District rejected textual analysis in favor of purported policy considerations. The court opined that applying the language of the MHRA would lead to "absurd results" because "this would allow an employer to simply provide the employee with the requested accommodation, thereby avoiding any claim of disability discrimination, and subsequently terminate the employee based on their request for the accommodation without any threat of liability." Op.12. Aside from being improper statutory construction — substituting judicial policy preferences for statutory text — this is incorrect. In the hypothetical situation described, the employee would have a claim of disability discrimination — that they were fired because of their disability. The Eastern District offered no reason why such a claim could not

proceed and, if supported, result in a jury verdict and liability.[19] Indeed, in this very case plaintiff pleaded a disability discrimination claim based on precisely the same facts that she and the Eastern District now insist can only be pursued as a retaliation claim (D842 pp.2-4). Plaintiff abandoned her disability claim shortly before trial after acknowledging that she was not in fact disabled under the MHRA (D943; D922 p.5, App.A35), but nothing would prevent a different plaintiff from pursing such a claim. And it should not be forgotten that the claim plaintiff wants this Court to adopt is one that is explicitly recognized — with a clear statutory basis — under the ADA. Any plaintiff who wishes to pursue the specific, narrow claim in issue could to do so either as a disability discrimination claim under the MHRA or as a disability discrimination or retaliation claim under the federal statute.

Regardless, by ignoring the statutory text and adopting its own policy preference, the Eastern District engaged in statutory creation rather than statutory construction, in violation of repeated admonitions of this Court. "Courts lack authority 'to read into [the MHRA] a legislative intent contrary to the intent made evident by the plain language. There is no room for construction even when the court may prefer a policy different from that enunciated by the legislature.'" *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 624 (Mo.banc 1995) (citation omitted); *see also State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320, 327 (Mo.banc 2016) ("Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. The legislature may wish to change the statute. ... But this Court, under the guise of discerning legislative intent, cannot rewrite the statute.") (citations omitted). As this

[19] Neither plaintiff nor the Eastern District identified any case granting judgment as a matter of law against a plaintiff bringing a disability claim on such facts, and we are aware of none.

Court has noted, this requirement is rooted in the constitutional principle of separation of powers. *See Goerlitz v. City of Maryville*, 333 S.W.3d 450, 456 (Mo.banc 2011) ("This Court did not make this the law, but is obligated to enforce the law as duly enacted by the legislature. Therefore, this Court must defer to the plain language of the statute, the time-honored principle of separation of powers and the recognition that policy decisions such as presented in this case are within the providence of the legislature."); Mo. Const. art. 2, §1 (prohibiting one branch of government from "exercis[ing] any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted"). Here, to answer the question of whether the MHRA authorizes a retaliation cause of action based solely on an accommodation request, the Eastern District engaged in unconstitutional judicial policymaking untethered to, and inconsistent with, the statutory text and policy adopted by the General Assembly.

Because the claim on which the University was held liable does not exist under Missouri law, JNOV should be entered in favor of the University.

II. The circuit court erred in denying the University judgment notwithstanding the verdict because plaintiff's claim is time barred under R.S.Mo. §213.075.1 in that her administrative complaint was not filed within 180 days after the termination decision was made and announced to her.

Preservation Below and Standard of Review

This point seeks review of the trial court's denial of the University's motions for directed verdict (D949 p.2 ¶7) and JNOV (D964 pp.3-4 ¶¶6-7). A motion for directed verdict or JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo.banc 2014). Where, as here, denial of JNOV is based on a conclusion of law, this Court reviews the

decision *de novo*. *Lapponese*, 422 S.W.3d at 400-01. The trial court's interpretation of a statute is an issue of law for *de novo* review. *Id.*

Argument

Judgment was entered against the University on a time-barred claim. Although the MHRA requires complaints with the MCHR to be filed "within one hundred eighty days of the alleged act of discrimination," R.S.Mo. §213.075.1, plaintiff failed to do so with respect to the sole claim she took to trial.

The court below found the following facts to be "uncontroverted" or "undisputed":

- "Dr. Ellis informed [Plaintiff] of her upcoming termination in a conversation on August 10, 2012."
- "On February 20, 2013, Plaintiff filed her charge of discrimination …"
- "The date 180 days prior to February 20, 2013 was August 24, 2012."

(D883 pp.1-3, 4-5). Those adjudications are binding under Rule 74.04(d) and, in any event, were established by undisputed evidence and admissions at trial.[20] Plaintiff therefore did not file her charge with the MCHR until more than 180 days after she was notified of her discharge. Her charge was untimely as to claims based on the termination of her employment.

---

[20] Tr.415:6-15, 699:10-13 (termination decision), 418:5-8 (charge date). The MHRA limitation period starts to run on the date the employee is notified of the adverse employment action and is not delayed until the decision later takes effect. *State ex rel. St. Louis County v. Missouri Comm'n on Human Rights*, 693 S.W.2d 173, 174-75 (Mo.App.W.D. 1985); *Daffron v. McDonnell Douglas Corp.*, 874 S.W.2d 482, 485 (Mo.App.E.D. 1994), citing *Delaware State College v. Ricks*, 449 U.S. 250, 251 (1980) (limitation period for employment discrimination claims commences "at the time the [allegedly discriminatory] decision was made and communicated to [plaintiff]").

Because plaintiff's charge was untimely, the University is entitled to judgment in its favor as a matter of law. This result is required under the law prior to the 2017 statutory amendments to §213.075. It also is required under the amended provisions of that section, which clarify the procedures for litigating the timeliness of a charge. Those quintessentially procedural amendments — affecting only the mechanism for raising the otherwise unchanged pre-charge limitation period — apply in this pending case and require entry of judgment in favor of the University. Because application of the amended statute would obviate the need to address questions that have proved controversial under the pre-amendment case law, we begin by addressing the retrospective application of those amendments.

A. Judgment in favor of the University is required under current law because the 2017 amendments to §213.075.1, clarifying the time and manner for raising the issue of timeliness, are wholly procedural and apply in this pending case.

The MHRA currently specifies that a plaintiff's failure to comply with the 180-day charging limitation period is a defense that may be raised at any time either before the MCHR or in a subsequent lawsuit. Section §213.075.1 (2017) provides that an employer may challenge timeliness of the charge "at any time":

> 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*, either during the administrative proceedings before the commission, *or in subsequent litigation*, regardless of whether the commission has issued the person claiming to be aggrieved a letter indicating his or her right to bring a civil action and regardless of whether the employer asserted the defense before the commission.

(App.A22; emphasis added.) This language was adopted in the 2017 amendments to the MHRA.

As plaintiff conceded below, as of August 28, 2017 the amendments to §213.075.1 applied in this case because the provisions are procedural ones that apply immediately and retrospectively (Tr.803:5-7, 809:23-25, 782:2-10). Amendments that are procedural in nature "must be applied retrospectively unless the legislature expressly states otherwise." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 661 (Mo.banc 1986); *accord Wilkes v. Missouri Highway & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo.banc 1988) ("A statutory provision that is remedial or procedural operates retrospectively unless the legislature expressly states otherwise."); *Scheidegger v. Greene*, 451 S.W.2d 135, 137 (Mo. 1970) (procedural or remedial statutory provision "applies to all actions falling within its terms, whether commenced before or after the enactment").[21] The rule exists because "[a] litigant has no vested rights in matters of procedure." *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo.banc 1999) (overruled on other grounds); *accord Scheidegger*, 451 S.W.2d at 137 ("No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights."); *State ex rel. LeNeve v. Moore*, 408 S.W.2d 47, 48 (Mo.banc 1966) (same).[22]

Legislation is "procedural" if it relates to the "machinery used for carrying on the suit" rather than the "rights and duties giving rise to the

---

[21] The legislature did not "expressly state" that the 2017 amendments to R.S.Mo. §213.075.1 were not to be applied upon their effective date in pending cases.

[22] For that reason, the retrospective application of procedural statutes is consistent with the Missouri Constitution, Art. I, §13. *See Mendelsohn*, 3 S.W.3d at 786 (procedural statutes "may be applied retrospectively, without violating the constitutional ban on retrospective laws"), overruled on other grounds, 293 S.W.3d 423 (Mo.banc 2009); *see also Harper v. Harper*, 4 S.W.3d 626, 629 (Mo.App.S.D. 1999) (statutory amendment must be applied retroactively even if the amendment takes effect while the case is on appeal).

cause of action." *Wilkes*, 762 S.W.2d at 28 ("[p]rocedural law prescribes a method of enforcing rights or obtaining redress for their invasion"); *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo.banc 2007). Where the "operative facts" to be adjudicated "are the same both before and after the amendment," the amendment is procedural. *Id.* at 769-70. Changes to "the time and manner of enforcing" existing rights are procedural. *Robinson v. Heath*, 633 S.W.2d 203, 206 (Mo.App.S.D. 1982). For example, legislation concerning the procedure for challenging administrative agency determinations, revising statute of limitation requirements or tolling provisions, and other provisions relating to where, when, and how an issue may be litigated are all classically procedural and are applied retroactively.[23]

In this case, the sole provision at issue is the amendment to §213.075.1 clarifying that the issue of timeliness may be raised as a defense at any time, including in litigation.[24] Section 213.075.1, and that amendment to it, are quintessentially procedural. The amendment does not alter the substance of the underlying cause of action or the nature of the duty and remedy. It merely clarifies when in the process an employer may challenge the

[23] *Mendelsohn*, 3 S.W.3d at 786 (statute that changed procedure for obtaining judicial review of agency decision was procedural and applied retroactively); *Robinson*, 633 S.W.2d at 205-06 (revised limitation period was procedural and retroactive); *Loard v. Tri-State Motor Transit*, 813 S.W.2d 71, 74-75 (Mo.App.S.D. 1991) (tolling provision was procedural and retroactive); *Scheidegger*, 451 S.W.2d at 137 (provisions regarding service of process were procedural and retroactive); *Moore*, 408 S.W.2d at 48 (venue provision was procedural and retroactive).

[24] The question presented here is not whether all aspects of the 2017 amendments to the MHRA are applicable retrospectively. Absent legislative intent to the contrary, when a new statute is procedural or remedial in one part but substantive in another, the procedural elements are applied retrospectively even if other parts of the statute are not. *See Hess*, 220 S.W.3d at 769 (holding amendments to Missouri's Merchandising Practices Act retroactive in part), citing *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961).

untimeliness of an administrative charge. It directs when and how to assert a statute of limitations affirmative defense, which is itself "a procedural tool." *Dorris v. State*, 360 S.W.3d 260, 268 (Mo.banc 2012). It "prescribes a method of enforcing rights" and "the machinery used for carrying on the suit," *Wilkes*, 762 S.W.2d at 28, and must therefore be applied to this pending case. *See Scheidegger*, 451 S.W.2d at 137 (procedural statutory provision "applies to all actions falling within its terms, whether commenced before or after the enactment").

Mendelsohn is particularly significant. There, this Court held that a statutory amendment "creating a different process for litigants to challenge" an administrative agency determination (the statute "changed the procedure for seeking judicial review") was procedural and applied retrospectively. 3 S.W.3d at 786. That rationale compels the conclusion here that the amendments to R.S.Mo. §213.075.1, which clarified the procedure for seeking judicial review of the timeliness and proper administrative exhaustion of an administrative charge, are likewise procedural and must be applied in this case. Similarly, if changes to a statute of limitations itself are procedural and apply retrospectively, as held in *Robinson*, 633 S.W.2d at 206 ("No rights were changed by the new section, just the time and manner of enforcing them."), then so too is a mere clarification as to how the limitations defense is raised.

Indeed, the Missouri appellate courts have already determined the procedural nature of R.S.Mo. §213.075.1. In addressing the pre-amendment version of the very same MHRA limitation provisions at issue here, all seven judges of this Court (in *Farrow*) and all 11 judges of the en banc Court of Appeals, Western District (in *Tivol*) acknowledged that §213.075.1 is

"procedural."[25] Even plaintiff has conceded that "[t]he statute of limitations issue is a procedural issue" (Tr.803:5-7) and that the statutory amendments to §213.075.1 must be applied retroactively after August 28, 2017 (Tr.782:2-10, 809:23-25). And the Eastern District, in deciding this case below, also apparently concluded that the amendment applied in this case, citing the amended statutory provision as the basis for its curious holding that this Point was "moot" (Op.25). But the Point is not "moot." To the contrary, the Eastern District's conclusion that the University may raise the timeliness of plaintiff's charge "at any time" is a case-dispositive conclusion of law. Based on the undisputed facts, that legal conclusion calls for immediate judgment in the University's favor.

The adjudication and result that the University now seeks is precisely the same as the one that should originally have occurred as a result of appropriate administrative processing. When plaintiff filed her untimely charge, R.S.Mo. §213.030(7) directed the MCHR to "receive, investigate, initiate, and pass upon complaints alleging discrimination," and §213.075.3 required the Commission's executive director ("shall") to investigate the complaint promptly. Regulation 8 C.S.R. §60-2.025(7)(B) directed the MCHR to dismiss or close any complaint at any stage for lack of jurisdiction or in the

[25] *See Farrow v. St. Francis Medical Center*, 407 S.W.3d 579, 590 (Mo.banc 2013) ("the *procedures* set forth in chapter 213" and in Administrative Procedure Act, chapter 536); *State ex rel. Tivol Plaza, Inc. v. MCHR*, No. WD78477, 2016 WL 1435970, at *1 (Mo.App.W.D. 2016) (discussing *Farrow*'s holding regarding "the proper *procedure* for challenging the Commission's issuance of a notice of right to sue on untimely claims"); *id.* at *10 (Ahuja, C.J. dissenting) (discussing "*procedure*" by which "an employer can challenge the timeliness of an employee's administrative charge"); *id.* at *11, 15 & n.2, 16 (Newton, J., dissenting) (discussing "*procedural* guidance … regarding the remedy available to employers seeking judicial review of the timeliness of a charge"; "appropriate *procedure* under *Farrow*"; and "*procedures* available" to challenge timeliness) (emphases added).

absence of any available remedy, without issuance of a right-to-sue letter. *Farrow*, 407 S.W.3d at 589. The absence of a right-to-sue letter would have barred plaintiff from filing a civil suit on an untimely claim. R.S.Mo. §213.111.1. The only difference now is that the untimeliness adjudication would occur in court instead of the agency. This result does not change anything about what facts must be adjudicated — the 180-day requirement is exactly the same. Nor does it change the legal result of that adjudication — under either the old or the new statute an adjudication of untimeliness would legally bar plaintiff from pursuing a civil action on an untimely claim. The only change is one of tribunal, a change that is manifestly procedural, not substantive. *See Mendelsohn*, 3 S.W.3d at 786; *Hess*, 220 S.W.3d 769-70; *Moore*, 408 S.W.2d at 48. The amended statute thus applies in this case. *Id.*

Under current law, applicable in this case, the issue of timeliness must be adjudicated in this case and, based on undisputed facts, judgment must be entered for the University.

B. Judgment in favor of the University was required under the law that was in effect prior to the 2017 amendments to §213.075.1.

1. Missouri case law, including of this Court, requires adjudication of timeliness in this case, as a matter of administrative exhaustion.

Even prior to the 2017 amendments to §213.075.1, Missouri case law held that the issue of the timeliness of a plaintiff's administrative charge could be adjudicated in a subsequent lawsuit. *See*, *e.g.*, *Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685 (Mo.banc 2009) ("[Plaintiff]'s claim is timely … if she alleged that [defendant] engaged in unlawful discrimination at some point after [180 days before her] discrimination complaint."); *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 255 (Mo.App.W.D. 2012) ("only those acts that occurred 180 days before … the date [plaintiff] filed his MCHR discrimination

charge, are actionable"; "[a]ll prior discrete discriminatory acts are untimely filed and no longer actionable"); *Grissom v. First Nat. Ins. Agency*, 364 S.W.3d 728, 734 (Mo.App.S.D. 2012) ("[plaintiff] must demonstrate that at least one act occurred within the [180-day] filing period"); *Thompson v. Western-Southern Life Assur. Co.*, 82 S.W.3d 203, 206 (Mo.App.E.D. 2002) ("Any act of discrimination occurring outside the 180-day period is considered 'merely an unfortunate event in history which has no present consequences.'"); *Pollock v. Wetterau Food Dist. Group*, 11 S.W.3d 754, 763 (Mo.App.E.D. 1999) ("A victim of discrimination asserting claims based on the MHRA must file an administrative charge with the MCHR within one hundred and eighty (180) days of the discriminatory act …"); *Daffron*, 874 S.W.2d at 484 ("a plaintiff's compliance with the 180 day time limit is a prerequisite to the maintenance of a civil employment discrimination action"); *see also Minze v. Missouri Dep't of Pub. Safety*, 541 S.W.3d 575, 579 n.4 (Mo.App.W.D. 2017) (citing *Daffron*).

The timeliness requirement is part of the administrative process established by the MHRA — and the MHRA requires that process be exhausted before petitioning the courts for relief. *Reed v. McDonald's Corp.*, 363 S.W.3d 134, 143 (Mo.App.E.D. 2012), citing *Alhalabi v. Missouri Dep't of Natural Resources*, 300 S.W.3d 518, 524 (Mo.App.E.D. 2009); *Kerr v. Missouri Veterans Comm'n*, 537 S.W.3d 865, 874 (Mo.App.W.D. 2017); *see also State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 90 (Mo.banc 2003) (acknowledging "[t]he [MHRA's] requirement that a complaint be filed first with the human right commission as a precondition to seeking relief in court").[26] This Court

[26] The administrative exhaustion requirement is an area where the MHRA and Title VII are consistent, and Missouri courts have therefore looked to federal precedent on this issue. *See Alhalabi*, 300 S.W.3d at 524, citing *Tart v. Hill Behan Lumber*, 31 F.3d 668, 671 (8th Cir.1994) & *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 630 (8th Cir. 2000).

confirmed and applied the MHRA's exhaustion requirement in *Farrow v. St. Francis Medical Center*, 407 S.W.3d at 594, affirming summary judgment on the plaintiff's retaliation claim on that basis and relying on *Alhalabi*'s statement of the doctrine. Administrative exhaustion requires a litigant to timely pursue their remedies at the administrative level. *Alhalabi*, 300 S.W.3d at 524 (under the MHRA, "a claimant must exhaust administrative remedies by *timely* filing an administrative complaint") (emphasis added); *Kline v. Board of Parks & Recreation Com'rs*, 73 S.W.3d 63 (Mo.App.W.D. 2002) (holding employee failed to exhaust her administrative remedies by not "timely" pursuing internal appeals) (Breckenridge, J.); *Shafinia v. Nash*, 372 S.W.3d 490, 494 (Mo.App.W.D. 2012) (affirming summary judgment where appellant did not "timely" pursue and exhaust administrative remedies).[27] In the cases cited above — *Wallingsford*, *Tisch* and their companions — the

[27] Based on statutory provisions similar to the MHRA, timely administrative filing is required to pursue a federal employment discrimination lawsuit (*see, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002)) and courts in every federal circuit have recognized that requirement for administrative exhaustion. *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27, 33 (1st Cir. 2009); *Falso v. Gates Chili Cent. Sch. Dist.*, 408 Fed. Appx. 494, 495 (2d Cir. 2011); *Waresak v. State Farm Mut. Auto. Ins. Co.*, No. 02:04cv1418, 2005 WL 2155538, at *1 (W.D. Pa. Sept. 6, 2005) (citing *Ostapowicz v. Johnson Bronze Co.,* 541 F.2d 394, 398 (3d Cir.1976)); *Thiessen v. Stewart-Haas Racing, LLC*, 311 F. Supp. 3d 739, 743 (M.D.N.C. 2018) (citing *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 139 (4th Cir. 2007)); *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002); *Norman v. Rolling Hills Hosp.*, No. 3:10-0500, 2010 WL 2901881, at *2 (M.D. Tenn. July 22, 2010) (citing *Sabouri v. Ohio Dept. of Job & Family Servs.,* 29 Fed. Appx. 253, 255 (6th Cir.2002)); *Salas v. Wisconsin Dep't of Corr.*, 493 F.3d 913, 921 (7th Cir. 2007); *Stuart*, 217 F.3d at 630 (8th Cir.); *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002); *Riley v. Tulsa Cty. Juvenile Bureau ex rel. Tulsa Cty. Bd. of Comm'rs*, 421 Fed. Appx. 781, 783 (10th Cir. 2010); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001); *Durant v. D.C. Gov't*, 875 F.3d 685, 695 (D.C. Cir. 2017).

courts applied this exhaustion-of-administrative-remedies requirement by adjudicating whether plaintiff in those cases filed an administrative charge within the permitted 180 days.

Plaintiff in this case failed to exhaust her administrative remedies because she did not file a timely administrative charge. The remedy for failure to exhaust administrative remedies is judgment for defendant as a matter of law. *Farrow*, 407 S.W.3d at 594. Therefore, under case law in place prior to the 2017 amendments to §213.075.1, the University was entitled to judgment in its favor as a matter of law.

Below, plaintiff contended that this case law was, in effect, silently abrogated by *Farrow*. That is not correct. In addition to holding that administrative exhaustion was required, *Farrow* also held that the employer there had waived its claim of untimeliness (a holding that does not apply in this case for reasons explained in Point II.B.4, below). In the Court of Appeals, plaintiff relied on broader statements in *Farrow*, not necessary to any of its holdings, which plaintiff interpreted to mean that timely administrative filing is not required at all under the MHRA (Respondent's Court of Appeals Brief p.28). That contention is contrary to the MHRA's statutory text and would fundamentally undermine the legislature's statutory scheme. We begin by addressing the statutory text.

2. The MHRA statute requires administrative exhaustion in compliance with the requirements of §213.075.1, including with respect to timeliness.

The MHRA creates a comprehensive administrative process for the handling of claims. The explicit provisions of the MHRA require that administrative action occur in a prompt manner. The mechanism the statute adopts to ensure compliance with the administrative process is to require individuals to participate in that process with a timely administrative

complaint before they have a right to seek relief in a civil action. The text and structure of the statute require timely administrative exhaustion as a requirement to maintain a civil action.

The only circumstance in which the MHRA (both prior to its amendment and now) authorizes an employee to file a lawsuit is if upon request she receives a notice of right-to-sue after "filing of a complaint alleging an unlawful discriminatory practice pursuant to section 213.055, 213.065 or 213.070." R.S.Mo. §213.111.1. The "filing" of such a "complaint" is therefore a necessary precondition to receiving a right-to-sue notice and filing a lawsuit.[28]

The key questions, then, are what constitutes "a complaint alleging an unlawful discriminatory practice" and how is it "fil[ed]"? The text of the statute provides clear answers. Like §213.111.1, the MHRA's definition section defines "unlawful discriminatory practice" by reference to the actions prohibited by sections 213.055, 213.065 or 213.070. *See* §213.010(18). And

[28] Section 213.111.1 (App.A27) provided, in relevant part:

> If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice pursuant to section 213.055, 213.065 or 213.070 to the extent that the alleged violation of section 213.070 relates to or involves a violation of section 213.055 or 213.065, or subdivision (3) of section 213.070 as it relates to employment and public accommodations, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint. … Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge.

how does one "fil[e]"[29] a complaint alleging an unlawful discriminatory practice? By following §213.075.1, which sets forth several requirements for such a complaint: it must be filed with the MCHR; it must be in writing; it must be signed; it must be verified; it must state the name and address of the respondent; it must set forth the particulars of the alleged discriminatory act; and it must be filed *"within one hundred eighty days of the alleged act of discrimination."*[30] Accordingly, the *only* "complaint" authorized by the statute is one filed within 180 days of the alleged unlawful act. By the very terms of the statute, the filing of a complaint that meets the requirements of §213.075.1 — including timeliness — is a necessary requirement to exhaust administrative remedies prior to the filing of a civil action.

This construction of the MHRA's plain language — *i.e.*, reading the provisions of the entire statute as one coherent whole to ascertain legislative intent — is required by settled law: "The cardinal rule of statutory construction is that the intention of the legislature in enacting the statute

---

[29] To "file" a legal paper or instrument means "to deliver [it] after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabr. ed. 2002). Thus, as a matter of plain language, "filing a complaint" requires compliance with applicable statutory conditions and requirements. *See Kader v. Bd. of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 187 (Mo.banc 2019) (interpreting the MHRA: "the plain and ordinary meaning of a term may be derived from a dictionary, and by considering the context of the entire statute in which it appears").

[30] R.S.Mo. §213.075.1 (App.A17; emphasis added) stated:

> Any 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 eighty days of the alleged act of discrimination*, which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice and which shall set forth the particulars thereof and such other information as may be required by the commission.

must be determined and the statute as a whole should be looked to in construing any part of it." *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo.banc 2000); *Shipley v. Columbia Mut. Ins. Co.*, 712 S.W.2d 375, 378 (Mo.banc 1986). This Court recently reiterated this principle in an MHRA case:

> "The provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Bachtel v. Miller Cty. Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003). "In determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes *in pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 35 (Mo. banc 2008).

R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 429 (Mo.banc 2019); *see also Kader*, 565 S.W.3d at 187. Interpreting one section that requires the filing of a "complaint" (§213.111.1) without considering the companion section that defines and sets out the required content and timing of such "complaint" (§213.075.1) is contrary to this "cardinal rule."

Properly construed, the meaning and statutory foundation of the MHRA's administrative exhaustion requirement is apparent. The statute does not merely require the filing of some undefined "complaint," it requires a "complaint" that complies with the requirements of §213.075.1, including timeliness. That is the conclusion reached in the cases cited above (Point II.B.1), consistent with a proper analysis of the statutory text.

3. The timely exhaustion requirement is an essential part of MHRA's statutory scheme, and exists to further the statute's express policy and purpose.

Timely administrative exhaustion is an essential part of the MHRA's statutory scheme. The statute establishes a detailed administrative process overseen by the MCHR, which it created "to encourage fair treatment for and to foster mutual understanding and respect among, and to discourage

discrimination against, any racial, ethnic, religious or other group protected by this chapter, members of these groups or persons with disabilities." R.S.Mo. §213.020.2. The prompt administrative filing of complaints serves this end in a number of ways.

Perhaps most critically, when an employer receives credible notice that one of its employees may have engaged in unlawful discrimination — particularly when the allegation shows a pattern of such conduct — the employer can promptly address the situation. This is facilitated by the MCHR's statutory directive "[t]o implement the purposes of this chapter first by conference, conciliation and persuasion so that persons may be guaranteed their civil rights and goodwill be fostered." R.S.Mo. §213.030(2). Conciliation efforts will not always succeed, but when the allegation is serious and credible an employer has a direct interest in acting as soon as possible, because such action may prevent ongoing wrongdoing.[31] In this situation, the charging requirement is in the direct shared interest of an employer and of that employer's ongoing workforce (including the complainant if still employed), all of whom will directly benefit from the situation being addressed as soon as possible.

The importance of addressing situations that involve ongoing wrongdoing is directly reflected in the statute. When it receives a charge, the MCHR is authorized to pursue it either administratively or in the circuit

[31] In cases of non-supervisory harassment, prompt employer action may support a defense to liability. *See Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 83 (Mo.App.W.D. 2015) (in such situations employer is liable only if it "knew or should have known of the [conduct] and failed to take proper remedial action"). As this evinces, the goal of the MHRA is for employers to *act* to prevent discrimination in the workplace — a purpose that is substantially facilitated by ensuring that employers receive prompt notice of alleged discriminatory conduct.

court. R.S.Mo. §§213.075.6-.16 & 213.076. The statutory scheme recognizes that in some cases immediate action may be necessary to prevent a continuing and potentially irreparable wrong — it therefore specifically gives the agency authority to pursue temporary or preliminary relief when "prompt judicial action is necessary to carry out the purposes of this chapter." R.S.Mo. §213.126.2.

The MCHR also uses information gathered from charges to make state-wide and, through its statutorily-directed partnership with the EEOC,[32] national policy. The MCHR can observe patterns and trends that may affect entire workforces or industries, and address those issues with rules, guidance, or systemic remediation efforts.[33] At the most fundamental level, this advances the core societal interest and purpose of the MHRA — eradicating unlawful discrimination not only in individual instances but across the state. This process benefits everyone: it helps employers, who can use guidance from the agency to adopt best practices and minimize legal risk; and it helps employees, who benefit by not experiencing discriminatory

[32] Pursuant to the MHRA (§§213.030(12) & .075.2) and federal law (29 C.F.R. §1601.70), the EEOC and MCHR share charging information and otherwise work cooperatively in their shared mission.

[33] *See* R.S.Mo. §213.030(9) (authorizing agency "[t]o issue publications and the results of studies and research which will tend to promote goodwill and minimize or eliminate discrimination in housing, employment or in places of public accommodation"); §213.030(10) (agency will "provide each year to the governor and to the general assembly a full written report of all its activities and of its recommendations"); §213.030(3) & (6) (agency to "adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter" and "formulate policies to implement the purposes of this chapter and to make recommendations to agencies and officers of the state and political subdivisions in aid of such policies and purposes").

practices that are eliminated due to agency action.[34] More broadly, it serves the clear policy imperative that the relevant information be received as promptly as possible so that decisions by employers, employees, and the MCHR (or the EEOC) can reflect the best available facts.

These policy goals are apparent from the text of the MHRA and are consonant with case law interpreting parallel federal provisions.[35] Each goal also is substantially facilitated by the timely administrative exhaustion requirement. An individual employee-plaintiff may or may not have personal interests that align with these policy goals. For many plaintiffs, their primary interest is retrospective — seeking a remedy for alleged past wrongs. But the

[34] As an example of this information-gathering function, the EEOC began gathering data regarding charges affecting LGBT individuals in 2013. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm. This data played a role in initiating a national discussion on this topic, and it is indisputable that many employers and places of public accommodation voluntarily adopted policies and practices as a direct result, years before this Court recognized that these individuals may be protected under the MHRA in its recent decisions in *R.M.A.* and *Lampley*.

[35] *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994) ("Exhaustion of administrative remedies is central to Title VII's statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts."); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180–81 (1989) ("In Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation.") (abrogated by statute on other grounds); *Morgan*, 536 U.S. at 121 (the "particular purpose of the filing requirement" is "to give prompt notice to the employer"); *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 853 (8th Cir. 2012) (noting that exempting claims from Title VII's administrative framework "could frustrate the conciliation process").

public has an interest in prospective action as well — to eradicate discrimination going forward. To protect that interest, as well as all other benefits of the administrative process, the statute imposes the 180-day administrative filing requirement. To improperly construe the statute to allow lawsuits to be filed in the absence of a timely administrative complaint would undermine the purposes of the administrative scheme crafted by the General Assembly.

The legislature made a choice in requiring administrative exhaustion as a condition before filing a private civil lawsuit. Some plaintiffs would undoubtedly prefer to entirely forgo that process and go directly to court. The legislative rejection of that option reflects its rejection of the notion that the administrative process exists solely for the employee's benefit, to participate in or not as he or she chooses. If the administrative process were there only to benefit employees, employees would not be *required* to participate. Rather, that process exists in part to serve individual employees, but also to serve the interests of employers, other employees not directly represented or participating in a particular charge, and the public at large.[36] The statutory

[36] Though this issue was not reached by the majority in that case, the dissent in *Cox v. Kansas City Chiefs Football Club*, 473 S.W.3d 107, 129 (Mo.banc 2015) (Fischer, J.), aptly stated:

> The Commission was not created merely to vindicate individual employee's rights. It has the power to order remedies that have this effect, but that it not its purpose. Instead, the Commission's purpose is to vindicate the public's interests in eradicating workplace discrimination. To enable the Commission to fulfill this broader public purpose, §213.075 requires all those who have suffered such discrimination to present their claims to the Commission so that the Commission may determine which claims it will pursue in the public's interest and which the employees will be able to pursue on their own. Many times, the Commission's "right of first refusal" under §213.075 (*et seq.*) runs contrary to the preferences of employees (and their counsel), who would prefer to retain control over their claims.

exhaustion requirement vindicates each of these interests.

The MHRA's two-year time limitation in §213.111.1 serves a different purpose from the 180-day charging requirement. Rather than contribute to the administrative process, the two-year statute protects the interests addressed by all statutes of limitations: promoting repose and stability by requiring that claims be brought before the courts so they can move towards resolution as the rules and processes of our justice system permit.[37] The 180-day requirement, unlike the two-year statute, does not ensure that court proceedings begin on a claim in any prescribed period of time. Although a charging party is required to file a charge promptly, nothing requires them to request a right-to-sue notice. Without the two-year statute, a charge could be filed and allowed to molder in the administrative process indefinitely before reaching a court, creating an unresolved potential legal liability that is contrary to the public policies of stability and repose.

The Missouri statutory arrangement is substantially similar to statutes in place in dozens of other states, as well as the federal system. The majority of states use an administrative process as an initial clearinghouse for complaints of discrimination, and nearly every state imposes strict timing

[37] "[S]tatutes of limitations promote repose by giving security and stability to human affairs." *De Paul Hosp. Sch. of Nursing, Inc. v. Sw. Bell Tel. Co.*, 539 S.W.2d 542, 547 n.5 (Mo.App.St.L. 1976); *see also Dorris*, 360 S.W.3d at 269 ("[A] statute of limitations is a legislative declaration of public policy … to encourage our citizens to seasonably file and to vigilantly prosecute their claims for relief."), citing *State ex rel. & to Use of Collector of Revenue of City of St. Louis v. Robertson*, 417 S.W.2d 699, 701 (Mo. App. 1967) ("the public interest is best served by the certainty gained by the prohibition of untimely … claims"); *Pirtle v. Cook*, 956 S.W.2d 235, 244 (Mo.banc 1997) ("statutes of limitations are favored") (citation omitted).

requirements for that filing.[38] The notion that the Missouri legislature enacted a statute with the same basic requirements as those in the federal system and adopted by dozens of other states, but intended them to mean something entirely different is very strange and contrary to the statutory text. It is apparent that Missouri enacted these statutory provisions in reference to the federal system and with the same intention as every other state when adopting similar provisions — to establish an administrative system and require plaintiffs to promptly participate in that system before pursuing a private lawsuit.

The timing and administrative requirements adopted by the Missouri legislature and in dozens of other jurisdictions represent a compromise of competing interests — the interest in prompt and systemic administrative remediation of unlawful discrimination that may affect entire workforces or industries, balanced against an individual plaintiff's interest in receiving redress for past wrongful acts. These interests are reconciled by permitting a

---

[38] The federal system requires administrative filing in either 180 or 300 days depending on the availability of relief before a state agency. 42 U.S.C. §2000e-5(e)(1). Most states have adopted similar arrangements requiring prompt administrative filing. *E.g.*, Arizona, Ariz. Rev. Stat. Ann. § 41-1481A (180-day filing requirement); California, Cal. Gov't Code §12960(d) (one year); Colorado, C.R.S. §24-34-403 (6 months); Connecticut, Conn. Gen. Stat. §46a-82(e) (180 days); Delaware, Del. Code Ann. tit. 19, §712(c)(1) (300 days); Florida, Fla. Stat. §760.11(1) (365 days); Georgia, O.C.G.A. §45-19-36 (180 days); Idaho Code §67-5907 (1 years); Illinois, 775 ILCS 5/7A-102(A)(1) (300 days); Indiana Code §22-9-1-3(p) (180 days); Iowa Code §216.15(13) (300 days); Kentucky, Ky. Rev. Stat. §344.200 (180 days); Maine, 5 Me. Rev. Stat. Ann. §4611 (300 days); Massachusetts, Mass. Gen. Laws ch. 151B, §5 (300 days); Minnesota, Minn. Stat. §363A.07, Subd. 3 (one year); Montana, Mont. Code Ann. §49-2- 501 (180 days); Nebraska, Neb. Rev. Stat. §48-118(2) (300 days); New Hampshire, N.H. Rev. Stat. Ann. §354-A:21 (180 days); New Mexico, NMSA 28-1-10A (300 days); Oklahoma, 25 Okla. Stat. §1350(B) (180 days).

private right of action, but requiring those who want to pursue that action to first timely engage in the administrative process. Other compromises could be reached that balance these interests in different ways. But what matters is the balance reached by the legislature in the statutes it enacted. *See Keeney*, 911 S.W.2d at 624; *State ex rel. Heart of Am. Council*, 484 S.W.3d at 327.

The fallacy of plaintiff's contention is demonstrated by the arbitrary windfalls and losses it would create for employers and employees alike, as it would make the right to file a lawsuit entirely dependent on when the MCHR happened to get around to processing the complaint — a matter of chance. Consider the situation in which Employee A and Employee B file untimely administrative complaints on the same day. The MCHR gets to Employee A's complaint first, and within six months after its filing determines that it lacks jurisdiction because the complaint was untimely. As *Farrow* makes clear, the agency must then dismiss the complaint without issuing a right-to-sue-notice and Employee A is barred from bringing a subsequent lawsuit against her employer. By contrast, the MCHR does not get to Employee B's complaint within six months of filing. In that circumstance, the statute authorizes Employee B to request and requires the agency to issue a right-to-sue notice. If Employee B's employer were then not permitted to raise timeliness as a defense in the ensuing lawsuit, Employee B would be allowed to proceed with a lawsuit (and ultimately, perhaps, obtain a judgment). Whether an employee may sue and whether an employer may be sued would be reduced to a game of administrative roulette: Employee A is barred from suing Employer A because the MCHR was able to promptly process her complaint, while Employee B gets to sue Employer B despite the untimeliness of his charge merely because the agency, for whatever reason — maybe because the

investigator assigned to his complaint was out of the office on leave, maybe because the first letter of Employee B's last name was near the end of the alphabet — did not process his complaint as quickly as Employee A's. The constitutional guarantees of equal protection and due process do not permit the right to sue or to not be sued to hinge on such randomness,[39] and sound statutory construction must avoid such absurd and unconstitutional results.[40] That is why the legislature chose statutory language conveying that, under any circumstances, timely administrative exhaustion is required before pursuing a subsequent civil action.

The Court should affirm and apply the Missouri law, as it existed prior to the 2017 amendments, holding that plaintiff's claim is barred by her failure to file a timely administrative charge, and order judgment in favor of the University.

4. The trial court's conclusion that *Farrow* prevented adjudication of timeliness was incorrect — *Farrow* was never applicable in this case and its facts did not present the question now before the Court.

The circuit court allowed plaintiff's claim to be submitted to the jury based on a misunderstanding of *Farrow*. The court below believed that *Farrow* required the University to have raised the timeliness issue directly

---

[39] Laws "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920); *see also Petitt v. Field*, 341 S.W.2d 106, 109 (Mo. 1960) ("[a]rbitrary selection" cannot be justified; distinctions must be "based on differences reasonably related to the purposes of the" statute).

[40] *See In re M.D.R.*, 124 S.W.3d 469, 472 (Mo.banc 2004) (construing statute "to avoid the constitutional challenge"); *McDonald v. McDonald*, 766 S.W.2d 715, 720 (Mo.App.E.D. 1989) ("Statutes should be construed to avoid constitutional confrontations.").

with the MCHR before the MCHR issued a right to sue letter, or in a separate writ proceeding afterward, and that its failure to do either waived that defense (D883 p.6). That conclusion was incorrect. *Farrow* was never applicable to this case, for reasons this Court made clear in *State ex rel. Tivol Plaza, Inc. v. MCHR*, 527 S.W.3d 837 (Mo.banc 2017).

In *Tivol*, the Court explained that *Farrow* applied to a "narrow factual circumstance" in which the MCHR issues a notice of right to sue before 180 days have elapsed. *Tivol*, 527 S.W.3d at 844. In that particular circumstance, "[n]othing requires the MCHR to issue a right-to-sue letter" and the MCHR's decision to grant right-to-sue therefore constitutes an "implicit[] finding" that the charge was timely. *Farrow*, 407 S.W.3d at 589. *Tivol*, on the other hand, involved a different situation than *Farrow*. As the Court explained:

> [I]n the instant cases, unlike in *Farrow*, 180 days had elapsed, and … the MCHR was required to issue the right-to-sue letters to the employees and terminate all proceedings related to their complaints pursuant to section 213.111.1 even though it had not yet determined its jurisdiction. At that point, the MCHR had no statutory authority to make any findings of fact related to the complaints, implicitly or otherwise, including whether they had been timely filed.

Tivol, 527 S.W.3d at 845. As this Court recognized, in *Farrow* the MCHR had exercised its own discretionary authority to issue a right-to-sue notice without request before 180 days had elapsed. Because the MCHR was not compelled by statute to issue the notice and terminate the proceedings, the agency's action reflected an "implicit[]" determination that the charge was timely and that the agency therefore possessed jurisdiction. *Id.* at 844 (quoting *Farrow*, 407 S.W.3d at 589). In *Tivol*, by contrast, the MCHR was statutorily compelled to issue a right to sue notice because it had been requested after the charge had been pending more than 180 days. In such

circumstances, there was no jurisdictional determination as to timeliness ("implicit" or otherwise) for the employer to challenge.

This case is like *Tivol*, not *Farrow*. The notice of right to sue here, as in *Tivol*, was issued because the charge had been pending more than 180 days and the MCHR was therefore required by statute to do so, even though it had *not* made a jurisdictional determination. The notice itself states as much: "This notice of right to sue is being issued as required by Section 213.111.1, RSMo, because it has been requested in writing 180 days after filing of the complaint. … **Please note that administrative processing of this complaint, including determinations of jurisdiction, has not been completed.**" D842 p.7 (original emphasis). Here, as in *Tivol*, there was no "implicit[] finding" that plaintiff filed a timely charge. On the contrary, the MCHR explicitly stated that it had *not* made a jurisdictional determination. An employer cannot be deemed to have waived a challenge to a determination that the agency did not make.

Nor did *Farrow* overrule or abrogate the fundamental administrative exhaustion requirement that warrants judgment in favor of the University here. The holding of *Farrow* was that the defendant had waived the timeliness issue under the particular circumstances presented. Below, plaintiff contended that *Farrow* went beyond this holding and ruled that a timely administrative charge is not a statutory prerequisite to a subsequent lawsuit. But to the extent *Farrow* could be argued to have done so, it would have been *dicta*: having held that the employer waived a timeliness defense by not raising it at the administrative stage or in a separate writ proceeding, there would have been no need for the Court to then decide whether, if the timeliness issue had *not* been waived, it would have been a valid defense to a

subsequent lawsuit.[41] In fact, *Tivol* explicitly acknowledged that *Farrow* had engaged in *dicta*, 527 S.W.3d at 839, 845, and stated that *Farrow*'s holding should be construed in light of the issues that were properly presented in that case. *Id.* at 845.

One issue that was before the Court in *Farrow* was whether the timely filing requirement was a "jurisdictional" precondition for filing a civil action. 407 S.W.3d at 591. That issue needed to be addressed because the Court held that the employer had waived its timeliness challenge. But if, as the employer contended, timeliness were a matter of subject matter jurisdiction, there could be no waiver.[42] As this Court carefully explained in *McCracken*, this is the primary significance of the question whether a particular requirement is "jurisdictional." 298 S.W.3d at 477-78. *Farrow* therefore appropriately and necessarily examined the jurisdiction issue and

---

[41] *See Byrne & Jones Enters, Inc. v. Monroe City R-1 Sch. Dist.,* 493 S.W.3d 847, 855 (Mo.banc 2016) ("Judicial decisions must be construed with reference to the facts and issues of the particular case, and that the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision. … If the courts' language was intended to address circumstances beyond the facts of those cases, it is dicta.") (internal citations and quotations omitted); *State on Information of Dalton v. Miles Laboratories*, 282 S.W.2d 564, 573 (Mo.banc 1955) ("Any reported opinion should be read in the light of the facts of that particular case, and it would be unfair as well as improper to give permanent and controlling effect to casual statements outside the scope of the real inquiry.") (internal quotations omitted); *State ex rel. Anderson v. Houstetter*, 140 S.W.2d 21, 24 (Mo.banc 1940) ("The Constitution requires the courts of appeal to follow our prior controlling decisions, but it does not require that they follow mere dicta of this court. Such expressions of opinion, not in anywise necessary for the actual decision of any question before the court, are not controlling authorities in any sense ... .").

[42] *See McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 477 (Mo.banc 2009) ("Subject matter jurisdiction cannot be waived.").

determined, pursuant to *J.C.W. ex rel. Webb v. Wyciskalla*, that the timely filing requirement is not a *jurisdictional* matter. *Farrow*, 407 S.W.3d at 591 (not a "jurisdictional" "prerequisite" or "precondition[]").[43]

But the decision that filing a timely charge was not *jurisdictional* does not mean that filing a timely charge was not *required* by the statute. As *Farrow* itself recognized, a requirement that is not "jurisdictional" may still "prevent judicial remedies." *Id.*[44] Nothing before the Court in *Farrow* would have required overruling *Wallingsford*, *Tisch*, *Pollock* and similar cases. Nor did *Farrow* overrule *Alhalabi* and other cases recognizing the administrative exhaustion requirement. To the contrary, *Farrow* actually applied that requirement, citing *Alhalabi* with approval. *Farrow*, 407 S.W.3d at 594. Thus, the trial court's conclusion that *Farrow* altered these statutory exhaustion requirements or prevented the University from raising them in litigation was incorrect.

This Court has suggested that R.S.Mo. §213.085.2 (and the incorporated procedures of the Administrative Procedures Act, Chapter 536) may be an appropriate mechanism for employers to challenge administrative timeliness/jurisdictional determinations in some circumstances. *Farrow*, 407 S.W.3d at 589-90; *Tivol*, 527 S.W.3d at 844. But that statute — which provides for judicial review of "a final decision, finding, rule or order of the commission" — is inapplicable in cases like this one (and *Tivol*) where the

---

[43] The U.S. Supreme Court reached a similar conclusion in *Zipes v. Trans World Airlines, Inc.*, holding that a timely charge is not a "jurisdictional prerequisite" to a Title VII case, and the timeliness requirement is therefore subject to "waiver, estoppel, and equitable tolling." 455 U.S. 385, 393 (1982).

[44] Administrative exhaustion is an example of this — a doctrine that "has historically been characterized as an issue of subject matter jurisdiction," but is more correctly recognized as "a matter of limits on the court's authority." *Kerr*, 537 S.W.3d at 874 (MHRA case) (citing *Shafinia*, 372 S.W.3d at 494).

MCHR has *not* made a jurisdictional determination, final or otherwise. *Tivol*, 527 S.W.3d at 844-46. Under these circumstances, the proper and only available mechanism for adjudication of the timeliness of an administrative charge is in the litigation filed by the employee pursuant to the right to sue notice, as the University did here. This is what the governing statute contemplates and requires and it is the only result that comports with traditional notions of due process.[45]

* * *

Under both the law as it existed at the time this lawsuit was filed and the statutory amendments that apply to this case, plaintiff's untimely administrative charge bars this action. Accordingly, judgment should be entered in favor of the University.

III. The circuit court erred in denying the University judgment notwithstanding the verdict because the jury's verdict exonerating Dr. Ellis also exonerates the University in that Dr. Ellis was the University's agent and his conduct in discharging plaintiff was the sole basis for plaintiff's claim as pleaded, tried, and submitted to the jury.

Preservation Below and Standard of Review

This point seeks review of the trial court's denial of the University's motion for JNOV (D964 pp.2-3 ¶¶3-4). Pursuant to *Burnett v. Griffith*, 739 S.W.2d 712, 715 (Mo.banc 1987) ("*Burnett I*"), this point of error was properly preserved and raised in a timely post-judgment motion for JNOV. Where denial of JNOV is based on a conclusion of law, this Court reviews the decision *de novo*, and factual questions are reviewed interpreting the evidence in the light most favorable to the verdict, giving the verdict the benefit of all reasonable inferences. *Lapponese*, 422 S.W.3d at 400-01. Under

[45] "An employer cannot be denied *any* avenue to have this issue decided by the courts." *Tivol*, 2016 WL 1435970, at *10 (vacated on transfer) (Ahuja, C.J., dissenting) (original emphasis).

case law discussed in the argument below, *e.g.*, *Burnett v. Griffith*, 769 S.W.2d 780, 782 (Mo.banc 1989) ("*Burnett II*"), the Court's review must accept the jury's conclusion that Dr. Ellis's decision to discharge plaintiff did not violate the MHRA.

Argument

Setting aside that plaintiff's retaliation claim never should have gone to a jury, as a matter of law the jury's exoneration of the individual defendant, Dr. Ellis, requires entry of JNOV in favor of the University.

A. Plaintiff's case against both defendants was based on a single adverse action (discharge) taken by a single decisionmaker (Dr. Ellis).

Plaintiff chose to sue two defendants for the same action (her discharge) by the same decisionmaker (Dr. Ellis). The jury verdict director was identical for both defendants, changing only the defendant's name (D972 pp.2-3, App.A29-A30). The court entered a binding pretrial adjudication, pursuant to Rule 74.04(d), that "[i]t was Dr. Ellis who made the decision to eliminate Plaintiff's position and he personally informed her of the decision" (D883 p.2; *see also* D845 p.3). And plaintiff reiterated this fact on appeal, admitting "[i]t was undisputed that Ellis made the decision to eliminate Plaintiff's position in his lab" (Respondent's Court of Appeals Brief p.26 n.3). At all stages of this litigation — in her administrative charge (D842 p.7), in her Petition (D842) and Amended Petition (D943), and at trial (*see* pp.22-25, above, surveying plaintiff's trial theory and evidence) — plaintiff focused exclusively on the motivation of Dr. Ellis in making the decision to end her employment. Her entire case against both defendants was aimed at providing what plaintiff called a "view into the decision making process of Dr. Ellis" to show that "her request for a reasonable accommodation was a contributing factor in her discharge" (Tr.705:5-9).

B. The judgment in favor of Dr. Ellis is final, binding, and conclusively exonerates him of wrongdoing.

Rejecting plaintiff's theory, the jury returned a verdict in favor of Dr. Ellis, finding that plaintiff's accommodation request was *not* a contributing factor in his decision to terminate her employment.[46] That verdict was reduced to a judgment (D951), which is now "absolutely final." *Presley v. Central Terminal Co.*, 142 S.W.2d 799, 803 (Mo.App.St.L. 1940); *see also Williams v. Venture Stores, Inc.*, 673 S.W.2d 480, 483 (Mo.App.E.D. 1984) (in appeal involving corporate defendant where verdict exonerating individual defendant was not appealed, individual's "vindication by verdict is now final"); *Stanton v. Hart*, 356 S.W.3d 330, 338 (Mo.App.W.D. 2011) (employee was "exonerated" and "absolved" of liability); *Burnett II*, 769 S.W.2d at 782 ("[t]he jury exonerated … the employee").

In an analogous case, involving an unappealed judgment in favor of an individual defendant and an appeal from a jury verdict against a corporate defendant, the Court of Appeals stated:

> [O]ne issue of the case has been finally adjudicated below and is not before us: the defendant driver was not negligent on the pleaded and submitted ground … . [T]he jury so found by its verdict in his favor; judgment for him was entered accordingly; [plaintiff] did not file a motion for new trial; and she has not appealed from the judgment in [the driver's] favor. That book is closed.

---

[46] Plaintiff neither objected to the verdict and judgment in favor of Dr. Ellis nor sought to reconcile the inconsistent verdicts through MAI 2.06 ("Inconsistent or Erroneous" verdict) — as was her legal burden to do while the jury was still empaneled. *See Lindahl v. State*, 359 S.W.3d 489, 493-94 (Mo.App.W.D. 2011) ("The law is very clear that [plaintiff's] failure to raise that problem [inconsistent verdicts in MHRA case] before the jury was discharged means that he has waived that claim."); *accord Burnett I*, 739 S.W.2d at 715; *Burnett II*, 769 S.W.2d at 782; *Jacobs v. Bonser*, 46 S.W.3d 41, 46 (Mo.App.E.D. 2001).

Goedecke v. Bi-State Dev. Agency of Missouri-Illinois, 412 S.W.2d 189, 191 (Mo.App.St.L. 1967).

The jury's verdict and the final judgment exonerated and vindicated Dr. Ellis of the alleged wrongdoing, conclusively establishing that his decision to discharge plaintiff did not violate the MHRA. "[P]laintiff is precluded from re-litigating" those issues, *i.e.*, from claiming or arguing that Dr. Ellis's decision to end her employment was somehow in retaliation for her accommodation request. *Helm v. Wismar*, 820 S.W.2d 495, 498 (Mo.banc 1991). As in *Goedecke*, "[t]hat book is closed."

C. The final judgment in favor of Dr. Ellis mandates entry of JNOV in favor of the University.

The final judgment in favor of Dr. Ellis precludes any liability by the University for the decision made by Dr. Ellis, the University's agent, necessitating judgment for the University notwithstanding the verdict.

"The only way, in which corporations can act in the commission of wrong or otherwise, is by and through their agents." *Presley*, 142 S.W.2d at 803; *see also Signet Graphic Prod. v. First Nat. Bank of Clayton*, 570 S.W.2d 717, 723 (Mo.App.St.L. 1978) (a corporation "acts only through its authorized officers, agents and employees"). Because "an MHRA case is a tort action,"[47] Missouri courts apply such common law agency principles to claims under the statute. *See Diaz*, 484 S.W.3d at 76 ("agency principles apply" to MHRA claims). In an MHRA action, "[s]upervisory employees … are treated as agents of a corporation" whose acts and state of mind may be "imputed" to the employer. *Alhalabi*, 300 S.W.3d at 529. Under the MHRA's "agency principles … [,] the

[47] *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 57 (Mo.App.W.D. 2016); *see also State ex rel. Diehl*, 95 S.W.3d at 86-87 (MHRA action "is analogous to an action at common law" and "a modern variant" of common law tort); *Bowolak v. Mercy East Communities*, 452 S.W.3d 688, 704 (Mo.App.E.D. 2014) (same).

employer is held vicariously liable for the acts of the supervisor." *Diaz*, 484 S.W.3d at 76 (under MHRA, a supervisor's "tangible employment action" becomes "the act of the employer, and the employer is liable for the discriminatory conduct") (citation and quotation omitted); *see also* 8 C.S.R. §60-3.040(17)(D)(1) (under MHRA regulations, employer is subject to "vicarious liability" for supervisory conduct).

But just as agency principles impute *liability* from a supervisory employee to the employer, those same principles can establish *nonliability*: "It has long been the law of this State that, when recovery is sought against an employer and an employee on the basis of the employee's wrongful act, *exoneration of the employee exonerates the employer*." *Williams*, 673 S.W.2d at 482 (emphasis added).[48] An employer's "liability may not rest on [an exonerated employee's] acts." *Burnett II*, 769 S.W.2d at 783. This principle "applies with much greater force to a case … involv[ing] malfeasance," *Presley*, 142 S.W.2d at 803, such as an MHRA case. Where an individual employee has been absolved of liability by jury verdict, this Court has described a verdict against the employer for that employee's actions as "inconsistent and unreasonable," "wrong," a "travesty upon the law," and a "monstrosity." *McGinnis v. Chicago, R.I. & P. Ry. Co.*, 98 S.W. 590, 592-94 (Mo. 1906).

Distilled and synthesized, Missouri case law holds that a verdict that exonerates the employee but finds liability as to the employer can only stand if "plaintiff's case was pleaded, tried and submitted below" on "an independent theory of liability." *Zobel v. Gen. Motors Corp.*, 702 S.W.2d 105,

[48] *See also*, *e.g.*, *Burnett I*, 739 S.W.2d at 715 ("exoneration of the employee operates to exonerate the employer"); *Helm*, 820 S.W.2d at 497 ("[I]f a jury finds that the employee is not negligent, the employer is exonerated as a matter of law.").

106 (Mo.App.E.D.1985); *see also Vaughn v. Sears, Roebuck & Co.*, 643 S.W.2d 30, 33 (Mo.App.E.D.1982) (requiring showing that employer liability could rest on "independent actions or policies"). This Court has declared that because "liability may not rest on [the exonerated employee's] acts," those acts must be "eliminated" from consideration. *Burnett II*, 769 S.W.2d at 783-84. Where the trial evidence, pleadings and jury instructions do not support an independent claim against the employer the necessary result is JNOV in favor of the employer. *See id.* (JNOV because "no evidence" supported an independent claim); *Zobel*, 702 S.W.2d at 106; *Vaughn*, 643 S.W.2d at 33 (JNOV where there was "no evidence" to support verdict based on "independent" employer conduct); *Burnett I*, 739 S.W.2d at 715 (JNOV where plaintiff's petition and jury instructions did not raise an independent theory of liability against the employer).[49]

In this case, it was undisputed and admitted that "[i]t was Dr. Ellis who made the decision to eliminate Plaintiff's position and he personally informed her of the decision" (D883 p.2). Under *Burnett II*, this means that the decision to discharge plaintiff must be eliminated from consideration. Plaintiff acknowledged as much in the Court of Appeals: "[b]ecause the jury found in favor of Defendant Ellis, it could not have awarded Plaintiff any damages

[49] *Burnett I* and *II* are two decisions from this Court as a result of the same trial and appeal. In *Burnett I*, transferred prior to decision by the Court of Appeals, the Court clarified the rules regarding which party had the burden to object in an inconsistent verdict case like this one and addressed the inconsistency of the verdict insofar as it was apparent from the pleadings and jury instructions. 739 S.W.2d at 713-715. In *Burnett II*, transferred after the Court of Appeals decision, the Court addressed inconsistency of the verdict based on the evidence. 769 S.W.2d at 784. Plaintiff's claim here fails both under *Burnett I* (because she did not plead or submit a claim independent of Dr. Ellis's conduct) and *Burnett II* (because of the dearth of evidence to support such a claim).

based solely on that decision" (Respondent's Court of Appeals Brief p.26 n.3). But the elimination of Dr. Ellis's discharge decision from the case leaves nothing else. No other alleged adverse employment action was submitted to the jury. The jury instructions reference only plaintiff's "discharge" (D972 pp.2-3). If the jury "could not have awarded Plaintiff any damages" based on plaintiff's discharge, then it *could not lawfully have awarded damages at all* under the instructions given. The jury's verdict that Dr. Ellis's discharge decision was not retaliatory absolutely precludes the University from being liable for that decision as a matter of law.

Plaintiff did not need to sue Dr. Ellis. But she chose to for tactical or personal reasons. She could have pursued other pleaded theories of liability against the University, but she chose to abandon them.[50] As this Court has observed, plaintiff's "strategy in relying on respondeat superior, [her] acquiescence in the inconsistent verdicts, and [her] decision not to pursue alternative strategies created a situation where defendants could invoke the *McGinnis* Doctrine. If [plaintiff] has suffered a loss it is because [her] strategy failed not because the *McGinnis* rule is unjust." *Burnett I*, 739 S.W.2d at 715.

In rejecting her claim against Dr. Ellis, the jury exercised its fact-finding power to decide between two versions of events, and it chose Dr. Ellis's. Dr.

---

[50] *See Williams,* 673 S.W.2d at 482 ("By electing to submit her case against [the employer] solely on the basis of [the individual defendant manager's] actions, plaintiff abandoned any other theory of recovery which may have been available to her through her pleadings."); *Burnett I*, 739 S.W.2d at 715 ("when Burnett submitted instructions which referred to the conduct of Griffith alone, he abandoned any other theory of recovery which might have been available to him," citing *Williams*); *Heckadon*, 400 S.W.3d at 377 n.3 ("theories of liability … not submitted [to the jury] are abandoned"); *Zobel*, 702 S.W.2d. at 106 (plaintiff abandoned any theory of liability not "pleaded, tried and submitted below").

Ellis had a compelling story to tell. For seven years, from 2005 to 2012, he had worked with plaintiff to find her tasks in the lab that met her preferences and requirements (Tr.573:5-574:1, 612:2-22). Those efforts were often frustrated by plaintiff herself, who rebuffed attempts to get her working on new projects and had interpersonal conflicts with some of her coworkers (Tr.218:16-220:6, 525:9-17, 578:1-16, 575:2-22; Exs.D5, D1). Dr. Ellis pressed plaintiff to take on new projects because her job was 100% dependent on having grant-funded work to do (Tr.308:11-20, 313:1-5, 470:5-11; Lin depo.41:6-10 (D893 p.24)). In July 2012, with the microarray work coming to an end, Dr. Ellis met with plaintiff numerous times to attempt to find new work for her, but she rejected every alternative project he identified — even those that met her claimed physical restrictions (*see* pp.25-26, above). Despite Dr. Ellis's frustration with plaintiff — which he expressed at one point in his statement that plaintiff couldn't do tasks that are "pretty routine in every lab in the university" — Dr. Ellis continued trying to find plaintiff work in order to preserve her employment (Tr.588:7-590:24). After a later meeting, where plaintiff rejected work on the DOD grant that met every one of her stated restrictions and requirements, Dr. Ellis was out of options to fund plaintiff's salary (Tr.592:19-597:25, 601:3-602:19; Ex.F4).

The jury watched Dr. Ellis review plaintiff's own exhibits and explain why they supported his testimony. Using Exhibit 2, an exhibit proffered by plaintiff as a listing of tasks she had historically performed in the lab, Dr. Ellis explained that every one of those tasks was a part of the microarray work that plaintiff had been doing and was now going away (Tr.602:20-605:17). Using Exhibit 58, a listing of all funding sources in his lab, he explained that the only grants on the list that could have supported plaintiff's salary after 2012 were (1) the Komen Promise grant, which plaintiff claimed

to be unable to do because it involved heavy amounts of cell culture, and (2) the DOD grant — though he "would have to beg, borrow and steal" to make it work — which plaintiff also rejected (Tr.601:3-602:19). Plaintiff never offered any substantive rebuttal to this testimony or any clear statement of what work, funded by what research grant, she believed she could have done after her existing project concluded at the end of 2012. The jury rightfully concluded that Dr. Ellis did not act wrongfully against plaintiff and its verdict for him requires all inferences to be drawn in his favor.

This Court has directed that the remedy in these circumstances is JNOV: when "the jury returns inconsistent verdicts, exonerating the employee, but holding against the employer, the court *must* grant the employer judgment notwithstanding the verdict." *Burnett I*, 739 S.W.2d at 713 (emphasis added); *see also id.* at 715 ("the *McGinnis* doctrine *requires* the court to correct the error by granting defendant a judgment notwithstanding the verdict") (emphasis added).[51] Plaintiff failed to prove her case against Dr. Ellis. The necessary result of that failure is JNOV for the University.

D. The lower courts relied on erroneous analysis to deny JNOV.

1. The Court of Appeals' theory that liability could be predicated on the conduct of University employees other than Dr. Ellis is legally and factually unfounded.

In rejecting this point, the Court of Appeals mistakenly ruled that the verdict could be upheld if Dr. Ellis's conduct, "combin[ed] with" that of others, was sufficient to make a case for liability. That assertion is contrary to *Burnett II*, 769 S.W.2d at 783, and other cases, which require the elimination

[51] *See also Burtrum v. U-Haul Co. of Southern Mo.*, 658 S.W.2d 70, 72 (Mo.App.S.D. 1983); *Forbes v. Forbes*, 987 S.W.2d 468, 469-70 (Mo.App.E.D. 1999); *Teschner v. Physicians Radiology*, 761 S.W.2d 665, 667 (Mo.App.E.D. 1988).

of Dr. Ellis's conduct and that plaintiff's claim against the University must have been "independent" of her claim against Dr. Ellis. *Zobel*, 702 S.W.2d at 106; *Vaughn*, 643 S.W.2d at 33. The Eastern District instead relied on dictum from *Stith v. J.J. Newberry Co.*, 79 S.W.2d 447 (Mo. 1934). But *Stith* — a case not cited by either party — was not an inconsistent verdict case. In *Stith*, "the only question submitted to the jury was the negligence of the [] Company." *Id.* at 458-59.[52] Thus, in finding the Company liable, "[t]here was no error, inconsistency or contradiction in the jury's verdict." *Id.*[53] The Eastern District therefore failed to apply this Court's precedent and instead erroneously relied on an inapplicable legal standard to improperly consider plaintiff's allegations against Dr. Ellis ("combining with" others), in spite of an unappealed jury verdict and final judgment exonerating him of any wrongdoing.

This legal mistake was marshalled in aid of a factual narrative that is not rooted in the record and a theory of the case that was never raised by plaintiff. Because the court erroneously did not believe it was necessary for plaintiff to show the existence of an independent claim, it conducted no meaningful review of plaintiff's petition (though it acknowledged that the

[52] The problem in *Stith* was that the trial court had (incorrectly) dismissed the employee from the case prior to trial — but that did not exonerate the employee, and the *Stith* court in fact expressly held that "[h]ad the jury been allowed to [decide the employee's liability], it likely would have found [him] guilty of negligence … ." *Id.* The statement in *Stith* that the Company might be liable for his negligence "combining with" others' makes perfect sense where, unlike here, there was no jury verdict exonerating the employee.

[53] The other case cited by the Eastern District, *Devine v. Kroger Grocery & Baking Co.*, 162 S.W.2d 813 (Mo. 1942), also does not support its decision. The company's liability there was a product of its independent legal duty as an owner of the premises, and the exoneration of a company employee on a negligence theory therefore did not exonerate the company on that independent theory. *Id.* at 817-818.

"petition did not identify any specific individual other than Dr. Ellis," Op.16) and it did not review the jury instructions at all. Rather, turning to its characterization of the record, the court stated that "Dr. Ellis, the Administrator [Nichols], and Human Resources [Sledge] decided to inform Dr. Lin her position was being eliminated due to lack of funding from the R01 Grant" (Op.17). It is unclear how, even if this incorrect statement had been supported by the record, it could be relevant given the jury's conclusion that the discharge decision was lawful. In any event, if the court was suggesting that the discharge decision was made jointly by Dr. Ellis, Nichols and Sledge, it did not explain how that conclusion can be reconciled with the trial court's finding (and plaintiff's admission) that it was "uncontroverted" that "[i]t was Dr. Ellis who made the decision to eliminate Plaintiff's position and he personally informed her of the decision" (D883 p.2), or with plaintiff's further concession to in her appeal brief that "[i]t was undisputed that Ellis made the decision to eliminate Plaintiff's position in his lab" (Respondent's Court of Appeals Brief p.26 n.3). These admissions are conclusive and require judgment in the University's favor as a matter of law.

The record fully supports plaintiff's admission and the trial court's finding. The decision to terminate plaintiff's employment and the reasons for that decision are captured in a single email exchange, dated July 18, 2012, from Dr. Ellis to Sledge and Nichols (Ex.F4). In that exchange Nichols asked Dr. Ellis about his July 17 one-on-one meeting with plaintiff, stating "[p]lease let us know what you would like to happen" (*id.*). Dr. Ellis then fully explained his reasons why plaintiff could not continue in her job: "Essentially she cannot be funded on the new grants (DOD and Promise) because she is physically unable to do tissue culture and is allergic to mice. So I told her that the R01 cannot support her beyond the end of the current grant period

(december)." (*id.*). He concluded, "I do think I have work for the next 6 months, if she wants to stay in the lab that long. She was very unhappy with me, but there is nothing I can do. I offered her a reference." (*id.*). Notwithstanding the Court of Appeals's assertion that Nichols and Sledge "decided to inform Dr. Lin her position was being eliminated due to lack of funding from the R01 Grant," the unequivocal record evidence is that Dr. Ellis made that decision and gave his reasons for it (as plaintiff has repeatedly admitted).

The record shows that Nichols and Sledge did nothing more than provide peripheral administrative support to Dr. Ellis once he decided to discharge plaintiff — a decision the jury found to be lawful. Dr. Ellis, as a faculty member and principal investigator, was plaintiff's supervisor (Tr.262:24-263-3). Dr. Ellis's July 18 email (Ex.F4) bases his decision on information that he had but Nichols and Sledge did not. Specifically, his conclusion that plaintiff could not work on the Komen Promise grant or the DOD grant because "she is physically unable to do tissue culture and is allergic to mice" (*id.*) directly reflects the content of meetings that Dr. Ellis had with plaintiff to discuss those two grants. In the first meeting, on July 10, they discussed the cell culture work that was needed for the Komen Promise grant and plaintiff told Dr. Ellis she could not do that work (Tr.399:3-16, 400:17-401:18). In the second meeting, on July 12, they discussed the DOD grant and plaintiff stated she had a mouse allergy (Tr.404:2-405:15). Neither Nichols nor Sledge was present for either one of these meetings, and there is no record of their discussing Komen Promise or DOD with plaintiff. And as to the R01 grant, when Dr. Ellis wrote "I do think I have work for the next 6 months" on that grant, his statement was a direct reflection of the amount of microarray work remaining to be performed (*see* Ex.K9). There is no evidence that Nichols or

Sledge had knowledge of the extent of remaining microarray sample stream. They provided administrative support to Dr. Ellis by preparing a draft letter for his signature reflecting his termination decision and the reasons he had given them for it (Ex.22), and by attending the August 10 in-person meeting where Dr. Ellis conveyed his decision to plaintiff (Tr.193:10-13), but they did not make the decision. The record fully supports plaintiff's admission that it was Dr. Ellis who made the (lawful) decision to terminate plaintiff's employment.

The Eastern District's theory suffers from a further deficiency that the Opinion does not even attempt to factually address: there is absolutely no evidence in the record that could sustain a submissible case that Nichols or Sledge harbored any unlawful retaliatory motive as to plaintiff.[54] Nor does the Opinion even suggest the existence of any such evidence. Plaintiff, who never raised the theory adopted by the Court of Appeals, also never addressed it. In her closing argument, plaintiff surveyed in detail the evidence that, in her view, proved the "contributing factor" element of her claim and that evidence had nothing to do with Nichols or Sledge (*see* pp.23-24, above). It was all proferred in an effort to give "the view into the decision making process of *Dr. Ellis*" (Tr.705:5-9) (emphasis added). Plaintiff is bound

[54] Acknowledging that the evidence against Nichols and Sledge "may not have been overwhelming" (Op.17 n.8), the Eastern District cited *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 867 (Mo.App.E.D. 2009), for the proposition that there did not need to be a "smoking gun" to establish liability. But review of *Williams* shows that, while the evidence in that case was "circumstantial," there was substantial evidence regarding the motives of the alleged wrongdoer (he had repeatedly fired employees who made complaints of sexual harassment). Here, there was no evidence of any unlawful retaliatory motivation on the part of Nichols or Sledge.

on appeal by the theory she tried below.[55]

The bottom line is that Dr. Ellis's defense and the University's defense in this action were the same. Dr. Ellis testified that he terminated plaintiff's employment for a legitimate, non-retaliatory reason: the end of her grant-funded work. This was the only question in genuine dispute that was put to the jury, in its instructions.[56] Under the pleadings, instructions, evidence, legal theories and argument below, the verdict exonerating Dr. Ellis conclusively established that defense. There was no "independent" claim against the University.[57]

2. The trial court relied on flawed analysis in denying the University's JNOV motion.

The trial court denied the University's JNOV motion based on a different fundamental misunderstanding of the law. While acknowledging the *Burnett/McGinnis* doctrine, the court erroneously stated:

> By contrast, Plaintiff's case against Washington University was not based on respondeat superior liability, but on the MHRA, which imposes direct liability upon an employer for creating or maintaining a discriminatory workplace. While an employer's liability may arise from the acts of its supervisors because the only way a corporation acts is through its agents, 'that is in no way the

[55] *Ross-Paige*, 492 S.W.3d at 175 (parties "must stand or fall" on their theories at trial), citing *Kleim*, 248 S.W.3d at 602.

[56] The jury should properly have been instructed regarding a second disputed issue, whether plaintiff sought a reasonable accommodation for a disability and did so reasonably and in good faith, but it was not. *See* Point IV, below.

[57] The Court of Appeals also appears to suggest that the true reason for plaintiff's termination may have been the June "complaint regarding misconduct between Dr. Lin and a colleague" (Op.17). But that incident did not involve any even allegedly protected activity that could support a retaliation claim — it had nothing to do with plaintiff's back condition or any requested accommodation for that condition — so the verdict cannot be affirmed on that basis. Nor can the court's speculation be reconciled with Dr. Ellis's testimony, which the jury accepted.

> same as being held vicariously liable for the actions of the supervisors.' *Diaz v. Autozoners, LLC*, 484 S.W.3d [at] 86 ….

(D963 p.3). The court misunderstood both *Diaz* — which actually *supports* application of the *Burnett/McGinnis* doctrine here — and the claim submitted to the jury by plaintiff.

In *Diaz*, the court explained "two different legal theories" under the MHRA. 484 S.W.3d at 76. The first applies where the adverse employment action was taken by a "supervisor," in which "agency principles apply, and the employer is held vicariously liable for the acts of the supervisor." *Id*. (the supervisor's action "becomes … the act of the employer, and the employer is liable for the discriminatory conduct"), citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758, 762 (1998) (quotations omitted). The *Diaz* case thus confirms that under the MHRA's agency principles, the employer is vicariously liable for the conduct of its supervisors. That was precisely the nature of the claim submitted to the jury here — that the University was liable for Dr. Ellis's decision to discharge plaintiff — and is precisely the type of vicarious liability claim to which the *Burnett/McGinnis* doctrine applies.

Diaz also explained that where, unlike this case, the discriminatory conduct at issue is that of a *non-supervisor*, these agency principles do not apply and the employer cannot be held vicariously liable. When a claim is based on the acts of a non-supervisory employee (or, as in *Diaz*, a customer), vicarious liability principles are inapplicable and the employer may be held liable only for "its *own* negligence in allowing the conduct." *Diaz*, 484 S.W.3d at 76 (emphasis original, citation omitted). So the employee must prove *both* underlying discriminatory conduct by a customer or non-supervisory employee *and* negligence on the part of the employer, over and above that discriminatory conduct. *Id*. at 76, 83. That is done by adding an essential element to the plaintiff's cause of action: in addition to proving

discriminatory conduct, a plaintiff must establish that the employer "knew or should have known of the [conduct] and failed to take proper remedial action." *Id*. at 83. The Court in *Diaz* explained that under those circumstances, "an employer's liability … is not based on an application of respondeat superior" and — in the language relied upon by the trial court below in denying the University's JNOV motion — "that is in no way the same as being held vicariously liable for the actions of the supervisors." *Id*. at 86. Because Diaz's claim did not involve unlawful supervisory conduct and therefore was instead based on "a negligence theory," *id*. at 77, "vicarious liability was not at issue," *id*. at 86.

Here, a negligence theory was not applicable (or asserted). Dr. Ellis was supervisor for the people in his lab, including plaintiff (Tr.262:24-263-3). The sole claim submitted to the jury was a vicarious liability claim based on a specific supervisory action (discharge of plaintiff), and there properly was no element in the verdict director regarding a separate negligence theory (D972 p.3).[58] Accordingly, in denying the University's JNOV motion, the trial court below confused the non-supervisory negligence claim in *Diaz* with the claim submitted to the jury here, which sought to hold the University vicariously liable under the MHRA's agency principles for the discharge decision made by Dr. Ellis.

In short, the only legal authority cited by the trial court in attempting to distinguish *Burnett/McGinnis* confirms that where, as here, the adverse employment action on which the plaintiff's claim is based was taken by a

[58] Apart from being inapplicable and unasserted, any negligence claim would have required plaintiff to prove an underlying discriminatory act (*see Diaz*, 484 S.W.3d at 83-84), which plaintiff in this case failed to do, as demonstrated by the verdict in favor of Dr. Ellis. *See Burnett II*, 769 S.W.2d at 783 (exoneration of employee defeated essential element of plaintiff's claim against employer, requiring JNOV).

supervisor, "agency principles apply, and the employer is held vicariously liable for the acts of the supervisor," *Diaz* at 76, and that therefore the *Burnett/McGinnis* doctrine applies. As stated in *Presley*:

> The verdict of the jury removed the very foundation upon which the charge against defendant … of derivative liability rested. The foundation having thus fallen, the superstructure went down with it.

142 S.W.2d at 802. The *Burnett/McGinnis* doctrine mandates JNOV in favor of the University in light of the jury's exoneration of the individual defendant.

IV. The circuit court erred in giving plaintiff's verdict director, Instruction No. 7, because that instruction omitted one of the essential elements of an MHRA retaliation claim — whether plaintiff is a member of a protected class — in that the instruction assumed the disputed facts that plaintiff requested accommodation of a "disability," that her requested accommodation was "reasonable," and that she acted reasonably and in good faith.

Preservation Below and Standard of Review

This point seeks review of the trial court's ruling rejecting the University's objections to the verdict-directing instruction (*see* Tr.671:24-674:17). The University specifically objected to the lack of an element in the verdict director requiring plaintiff be found to be a member of a protected class (Tr.673:18-21), the lack of a required finding that any accommodation requested must have been for a disability (Tr.673:6-9), lack of any finding that the accommodation requested must be reasonable (Tr.673:14-17), and that the accommodation must have been requested reasonably and in good faith (Tr.673:10-13). All these objections were overruled (Tr.676:20-677:4). These instructional errors were again raised and preserved in the University's motion for new trial (D964 pp.8-10).

Whether a jury was instructed properly is a question of law that this Court reviews *de novo*. *Kader*, 565 S.W.3d at 186. The Court views the evidence in the light most favorable to submission of the instruction. *Ross-Paige*, 492 S.W.3d at 172. 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. *Id*., citing *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156, 159 (Mo.banc 2012).

Argument

The first, fundamental element of any MHRA claim is the plaintiff's membership in a class protected by the statute. Plaintiff claims she was in a protected class because she allegedly requested a reasonable accommodation of a disability. As addressed in the University's Point I, above, however, plaintiff's purported protected activity — requesting a reasonable accommodation of an alleged disability — did not render her a member of a protected class under R.S.Mo. §213.070(2). That is a primary reason for the trial court's inability to fashion a proper jury instruction and verdict director — it was trying to instruct the jury on a cause of action not authorized by and incompatible with the language of the statute.

In this Point, the University assumes that plaintiff stated (and timely asserted) a valid claim, and turns to the circuit court's failure to require the jury to make any factual determinations as to protected class. The court instead instructed the jury to simply assume that plaintiff was disabled and sought a reasonable accommodation for her disability. That, as demonstrated by the closely analogous *Hervey v. Missouri Department of Corrections*, is an

error that requires a new trial.[59] The Eastern District's analysis on this Point was sound, and may be adopted by this Court.

A. A jury must be instructed to find whether a plaintiff is a member of a protected class.

Again, the most fundamental element of any MHRA claim is the plaintiff's membership in a class protected by the statute. *See* R.S.Mo. §§213.055, .070(2) (delineating protected classifications for discrimination and retaliation claims); *Lampley v. Missouri Comm'n on Human Rights*, 570 S.W.3d 16, 24 (Mo.banc 2019) (first element is that "the employee was a member of a protected class"); MAI 38.01(A) & Note 2 (when in dispute, jury must be required to find whether plaintiff is member of protected class); MAI 38.01(B) & Comment D (same). Here, according to plaintiff's theory (accepted by the trial court), plaintiff's protected class would be that she "requested a reasonable accommodation for her disability" (D944 p.5; D948 pp.4-6; *see also* D972 p.3 (verdict-directing instruction)).

In *Hervey*, this Court held that "[w]hen a plaintiff's status as a member of a protected class [under the MHRA] is in dispute … the substantive law requires that the jury find, as an essential element of the plaintiff's claim, that the plaintiff is in fact a member of the protected class claimed." 379 S.W.3d at 160. "Because the purpose of the verdict directing instruction is to hypothesize propositions of fact to be found or rejected by the jury, the verdict directing instruction must hypothesize the facts essential to the plaintiff's claim." *Id.* (citation omitted). Specifically, "each essential element of the cause of action should be set out in a separate paragraph of the verdict director. Such a requirement ensures that the jury members focus on each

[59] Other recent decisions overturning MHRA verdicts for instructional error are: *Ross-Paige*, 492 S.W.3d 164; *Kader*, 565 S.W.3d 182; *Minze*, 437 S.W.3d 271.

element separately and prevents an instruction from creating an assumption that an element is true and not in dispute." *Id.* at 161 (citation and quotations omitted). Instructions that assume disputed facts improperly remove those issues from the jury's determination and constitute "prejudicial error." *Id.* at 160-63.

The jury instruction in *Hervey* failed to follow these requirements. The jury was instructed:

> Your verdict must be for the Plaintiff if you believe:
>
> First, Defendant discharged Plaintiff; and
>
> Second, disability was a contributing factor in such discharge; and
>
> Third, as a result of such conduct, Plaintiff sustained damage.

Id. at 159. Because the instruction "did not require the jury to find explicitly that Ms. Hervey was disabled," *id.*, the Court concluded:

> [The instruction] did not instruct the jury adequately about the substantive law in this case. The instruction was erroneous because it assumed as true a disputed fact, that Ms. Hervey was disabled, thereby relieving Ms. Hervey of her burden of proving an essential element of her disability discrimination claim under the MHRA. Whether Ms. Hervey was legally disabled at the time of her discharge is an essential element of her MHRA claim, so the verdict-directing instruction must require the jury to find that Ms. Hervey was disabled under a separately enumerated paragraph. The submission of a verdict director that did not hypothesize all essential elements of Ms. Hervey's claim was prejudicial error and requires that the trial court's judgment be reversed and the cause be remanded.

Id. at 163.

After *Hervey*, the Missouri Approved Instructions for MHRA claims were revised. The MAI now specifically provide: "Where the status of the plaintiff's membership in a protected class is at issue, … Paragraph First in the verdict directing instruction shall be in the following form: … 'here insert one or

more of the protected classifications supported by the evidence … .'" MAI 38.01(A), Note 2; *see also* MAI 38.01(B) (Comment D: "This instruction is based on [*Hervey*], wherein the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, *the holding in this regard is applicable to other protected classifications where membership in that class is in dispute*.") (emphasis added).[60]

B. Here, the jury instructions and verdict director failed to require the jury to determine whether plaintiff was a member of a protected class.

Under *Hervey* and the MAI, the jury should have been required to determine whether plaintiff was a member of a protected class under the MHRA. But the jury was not required to make that finding. Instead, over the University's repeated objections, the trial court issued the same jury instructions, modified for a retaliation claim, that were given in *Hervey* and rejected as prejudicially erroneous. The jury here was instructed:

> [Y]our verdict must be for plaintiff if you believe:
>
> First, defendant Washington University discharged plaintiff, and
>
> Second, plaintiff's request for a reasonable accommodation for herniated discs was a contributing factor in such discharge, and
>
> Third, as a direct result of such conduct, plaintiff was damaged.

(D972 p.3).

[60] As the Court of Appeals noted (Op.23 n.12) in support of its reversal of the judgment on this basis, though there is no MAI specifically tailored for MHRA retaliation claims, the workers' compensation retaliation model instruction (MAI 38.04) contains a separately-enumerated paragraph specifically requiring the jury to find that plaintiff engaged in a protected activity. But the instruction in this case did not include such an element.

Under plaintiff's theory of liability, she fell within a protected class because she requested a reasonable accommodation of a disability. That factual issue was hotly contested. Defendants presented detailed evidence to show that plaintiff was not disabled and that the accommodation she requested was not reasonable, including evidence that plaintiff turned down work assignments that met her stated requirements and that there was no other work plaintiff could perform. But the trial court did not require the jury to decide these disputed issues of fact. Even worse, the jury was directed to assume plaintiff's version of events to be true. The instruction assumed that she had sought a reasonable accommodation for a disability, and instructed the jury only to determine whether that assumed fact was a contributing factor in her discharge. This was the same "prejudicial error" committed in *Hervey*.

In order to determine whether plaintiff had proved her membership in the claimed protected class, the jury should have been required to make three findings: (1) that plaintiff requested accommodation of a *disability*; (2) that the accommodation she requested was a *reasonable* accommodation; and (3) that her request was made *reasonably and in good faith*.

1. Whether plaintiff requested accommodation of a *disability*

The MHRA only requires reasonable accommodation of a "disability." R.S.Mo. §213.010(4). In denying the University's summary judgment motion just before trial, the circuit court ruled that "[w]hether [plaintiff's] back condition qualifies as a 'disability' that may give rise to a protected request for accommodation is a question of disputed fact for the jury" (D944 p.5). But at trial, the jury was not instructed to determine whether plaintiff met this definition. In fact, the term "disability" was not found in the verdict director,

which referred only to plaintiff's "herniated discs" and required the jury to assume that that condition constituted a disability under the statute.

Compounding this error, whether plaintiff's back condition constituted an actual disability was *not* a disputed fact: she expressly *admitted* "Plaintiff Is Not Disabled Under the MHRA" (D922 p.5). That admission was consistent with the evidence at trial. Plaintiff testified that her back impairment was intermittent, with specific testimony regarding flare-ups in 2003 (which caused her to need to take leave from work that year) and 2005 (when she hired someone to help with cooking for a period of time), but no evidence of any substantial limitations in the nearly seven years between the 2005 episode and the termination of plaintiff's employment (Tr.359:1-360:8, 361:5-362:7). Under the MHRA, "[i]ntermittent, episodic impairments are not disabilities." *Kramer v. K&S Assocs.*, 942 F. Supp. 444, 446 (E.D.Mo. 1996) (citing 8 C.S.R. §60-3.060(1)(B)); *see also Cook v. Atoma Int'l of Am., Inc.*, 930 S.W.2d 43, 47 (Mo.App.E.D. 1996) (impairments of a "transitory nature" do not meet the MHRA definition of "disability"); *Clark v. YRC Freight*, 4:14-cv-00668-FJG, 2016 WL 918047, at *10-11 (W.D.Mo. Mar. 8, 2016) (judgment for defendant in MHRA disability case, where employee's back impairment — which required surgery and caused him to miss five months of work — was a "temporary problem[]" and thus did not constitute a disability under the MHRA); *Ponder v. Verizon North, Inc.*, 4:09-cv-1763-CAS, 2010 WL 4868080, at *11-12 (E.D.Mo. Nov. 23, 2010) (plaintiff's back pain, which caused discomfort if plaintiff sat for an extended period, did not substantially limit a major life activity, requiring judgment for defendant under the MHRA).[61]

[61] "Disability" includes both "a physical or mental impairment which substantially limits one or more of a person's major life activities," and "being regarded as having such an impairment." R.S.Mo. §213.010(4). In order to be entitled to a reasonable accommodation, plaintiff would have to fit the "actual

Moreover, despite the infrequency of her symptoms, plaintiff claimed that her back condition restricted her from conducting cell culture work and other bench work (Ex.F7; Tr.477:1-25). If the jury believed plaintiff, then that limitation prevented her from performing what were essential job functions, and thus disqualified her from being considered disabled under the MHRA definition. As this Court has explained:

> [T]he MHRA definition of "disability" includes that an MHRA-protected impairment ***cannot*** *"interfere with performing the job …* in question." Section 213.010(4). The MHRA protects employees from disability discrimination for a disability that is "***unrelated*** *to a person's ability to perform the duties of a particular job or position*" and that "***does not*** *substantially interfere with a person's ability to perform the essential functions of the employment*" at issue. 8 CSR 60-3.060(1)(F).

Daugherty, 231 S.W.3d at 822 (emphasis added).[62]

---

disability" prong of the MHRA's definition of "disability" — *i.e.*, that her impairment in fact substantially limited a major life activity. That is because employees who fit only the "perceived" (or "regarded as") prong — those whose employers erroneously perceive them to be substantially limited in a major life activity — are not, as a matter of law, entitled to accommodation. *See, e.g., Fischer v. Minneapolis Pub. Sch.*, 792 F.3d 985, 990 n.3 (8th Cir. 2015) ("an employer has no duty to accommodate an employee who is not actually disabled"; "'regarded as' plaintiffs are not entitled to reasonable accommodations"); *Nichols v. ABB DE, Inc.*, 324 F. Supp. 2d 1036, 1044-45 (E.D.Mo. 2004) (same, MHRA claim).

[62] *See also Medley*, 173 S.W.3d at 320 (emphasis added, citations omitted):

> [I]n order to be disabled under the MHRA, a person must have an impairment that limits a major life activity and with or without reasonable accommodation *that impairment must not interfere with performing a job*. This is the main difference between the MHRA and the ADA, which prohibits discrimination against a qualified individual with a disability. The MHRA makes the question of *whether the job can be performed* with or without reasonable accommodation *a part of the test to determine whether an employee is disabled … .*"

The accommodation plaintiff requested was to be excused from all cell culture work and to limit all other bench work (Ex.F7; Tr.477:1-25). The bench work that plaintiff asked to avoid included, for example, working with a microscope (Tr.478:19-22). Yet working at a microscope and other bench tasks were essential to her work as a laboratory staff scientist — in fact, they included nearly all duties plaintiff had been performing in the lab for years (Tr.589:4-9, 480:15-481:22). The evidence, including admissions by plaintiff, established that such restrictions would have prevented her from working in most if not all cancer research labs (Tr.482:4-483:4). Because her back condition "interfere[d] with performing the job … in question," plaintiff was not "disabled" under §213.010(4) as a matter of law. *See Medley*, 173 S.W.3d at 321-25 (plaintiff not "disabled" under MHRA because impairment interfered with ability to perform essential job functions).

But at the very least, this question should have been put to the jury. In violation of *Hervey*, however, the trial court failed to have the jury determine whether plaintiff was disabled, and compounded that error by giving instructions that assumed plaintiff was disabled.

2. Whether plaintiff requested a *reasonable* accommodation

An accommodation is not reasonable if it does not enable an employee to perform the essential functions of her job or otherwise requires "fundamental alterations" of the job. *Medley*, 173 S.W.3d at 320-25. But plaintiff didn't ask for an accommodation that would enable her to perform the essential functions of her job as a staff scientist. She requested to be excused from performing duties that were fundamental to her work as a staff scientist in a cancer research laboratory. She asked for a different job. Because "her suggested accommodation did not enable her to do the essential functions of her job," it was unreasonable as a matter of law. *Id*. at 324-25.

But again, at the very least, this was a question of fact for the jury. The trial court should have followed *Hervey* and instructed the jury to find whether plaintiff requested a reasonable accommodation, rather than erroneously instructing the jury to assume that she did. *See Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235, 247 (Mo.App.W.D. 2016) (plaintiff's accommodation request "could certainly be perceived [by the jury] as unreasonable").

3. Whether plaintiff's accommodation request was made *reasonably and in good faith*

A plaintiff asserting an MHRA retaliation claim must prove that her allegedly protected activity was undertaken reasonably and in good faith. *Shore v. Children's Mercy Hosp.*, 477 S.W.3d 727, 735 (Mo.App.W.D. 2015) (affirming judgment as a matter of law on MHRA retaliation claim because plaintiff "could not have had a reasonable, good faith belief that he had alleged grounds for discrimination"). Under *Hervey*, a trial court's instructions must "require[] the jury to find that [the plaintiff] had a reasonable, good-faith belief that the conduct she challenged violated the MHRA." *Mignone v. Missouri Dep't of Corr.*, 546 S.W.3d 23, 38 (Mo.App.W.D. 2018).[63] At trial, plaintiff admitted that she bore this burden (Tr.38:10-12).

[63] In *Mignone*, the trial court did specifically instruct the jury in a separate paragraph to find whether the plaintiff "reasonably believed" she was opposing unlawful conduct. *Id.* at 32, 38. Although the trial court did not include the additional "good faith" language as it should have, and the Court of Appeals criticized that improper omission, the Court concluded that the omission was not reversible error because the term "reasonable belief" could have been construed by the jury to include both of the requisite objective and subjective components. *Id.* at 38. Here, by contrast, the jury was not even instructed to find whether plaintiff possessed a reasonable belief that she was entitled to an accommodation, and *Mignone* compels reversal of the judgment.

Here, had the jury been so instructed, it readily could have found that plaintiff did not act reasonably or in good faith. Plaintiff's admission that she was *not* actually disabled raised the question of how she could have had a reasonable and good faith belief that she was entitled to an accommodation of an admittedly non-existent disability. Plaintiff acknowledged to the court below that "[t]he allegations about disability are … the predicate facts that give rise to [plaintiff's] belief that she needed an accommodation" (Tr.38:15-18). Yet the court removed this entire question — both of plaintiff's belief and any necessary factual predicates for that belief — from jury consideration.

When Dr. Ellis identified other projects that would preserve plaintiff's employment, she rejected every option. Some because she claimed her back prevented her from performing the cell culture and other bench work those jobs would require — even though she had been performing bench work for years in her current position (Tr.480:15-481:22). Others because of a claimed but undiagnosed and undocumented mouse allergy (Tr.468:19-22, 233:24-25). Still others for no reason at all, even though *they satisfied her claimed restrictions* regarding bench work and mouse work (Tr.462:12-465:5, 593:6-595:12). Plaintiff *rejected the very accommodation she requested* (*see id.*).

A fundamental premise of plaintiff's actions seems to have been her firmly entrenched — but objectively false — belief that she could continue to do her existing microarray project and not transition to other work. Plaintiff's testimony showed that, despite being told by Dr. Ellis that the project was coming to an end (Tr.491:1-9, 492:1-4), she simply refused to believe that the work she was doing would go away at the end of 2012, when the microarray sample stream dried up (Tr.442:25-444:8, 446:9-18; Lin depo. 280:18-281:10, 282:2-283:3, 283:21-284:1 (D894 pp.41-43)). But the undisputed and indisputable evidence showed that the patient sample stream on which her

work depended did end in 2012 (Ex.K9, App.A32-A33; Tr.448:25-449:3, 604:18-605:4; Hoog depo.30:10-22). Thus, when plaintiff rejected work that met all of her stated workplace restrictions (Tr.593:6-595:12), she was laboring under an objectively demonstrated misapprehension of fact, which she maintained despite having been repeatedly told the true facts at the time. Whether plaintiff's actions and requests, premised on this objectively false belief, were objectively reasonable was a (if not *the*) core factual question in this case. But the jury was never given a chance to address it.

* * *

In sum, not only did the trial court fail to instruct the jury to make the factual findings necessary to determine whether plaintiff was a member of the statutorily protected class, its instructions directed the jury to assume that disputed element. This Court's holding in *Hervey* thus applies verbatim here: "The submission of a verdict director that did not hypothesize all essential elements of [plaintiff's] claim was prejudicial error and requires that the trial court's judgment be reversed and the cause be remanded." 379 S.W.3d at 163.

V. The circuit court erred in excluding from evidence statements and pleadings by plaintiff, most notably her abandonment of her disability claim and her written admission through counsel that "Plaintiff Is Not Disabled Under the MHRA," because those statements were admissible in that they were admissions by a party opponent, binding both as judicial admissions and under judicial estoppel, and were substantial probative evidence pertaining directly to disputed issues at trial.

Preservation Below and Standard of Review

This point seeks review of the trial court's ruling excluding from evidence all "legal pleadings and abandoned pleadings" (Tr.25:19-22; *see also* complete colloquy at Tr.22:5-26:23). The trial court reiterated and reaffirmed its ruling in response to an offer of proof from the University seeking to admit

as evidence a brief filed by plaintiff stating that "Plaintiff Is Not Disabled Under the MHRA" (Tr.436:3-438:8). The proffered exhibits are M3 (App.A34-A36) and M3.5, redacted and unredacted versions of the same document (*also at* D922 p.4). These errors were again raised and preserved in the University's motion for new trial (D964 pp.10-13).

Appellate courts give substantial deference to the decisions of trial courts as to the admissibility or exclusion of evidence, which will not be disturbed absent a showing of an abuse of discretion. *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo.App.S.D. 2001). Further, to be a ground for reversal or order of a new trial, the court's error in admitting or excluding evidence must be prejudicial and not harmless. *Id.*

Argument

In denying the University's motion for summary judgment on the retaliation claim that was eventually submitted to the jury, the circuit court ruled that "[w]hether [plaintiff's] back condition qualifies as a 'disability' that may give rise to a protected request for accommodation is a question of disputed fact for the jury" (D944 p.5). But when the University at trial attempted to introduce key evidence related to that disputed fact, the court excluded plaintiff's unequivocal admission that she did not have an actual "disability," as that term is defined in the MHRA.

Before trial, plaintiff admitted, implicitly and explicitly, that she did not have an actual disability. Implicitly, she did so by abandoning her pleading that asserted a disability discrimination claim. And, explicitly, when she told the court "Plaintiff Is Not Disabled Under the MHRA" (D922 p.5, App.A35) (capitalization and underscore in original). Specifically, she conceded that she was not actually disabled, but rather was proceeding under the theory that Dr. Ellis erroneously "perceived" her to have a disability (*id.* p.6) and then

abandoned even that claim when she dismissed her disability discrimination count entirely.[64]

Despite plaintiff's abandonment and admission, at trial the court allowed plaintiff to present evidence and assert to the jury that she had a disability for which she needed a reasonable accommodation (Tr.38:15-18, 39:4-40:24, 126:8-11, 127:15-18, 195:4-5, 745:11-15). The court then barred the University from explaining to the jury that plaintiff had admitted she did not have an actual disability. The circuit court broadly excluded from evidence all "legal pleadings and abandoned pleadings" (Tr.25:19-22; *see also* colloquy at Tr.22:5-26:23). The court reaffirmed its categorical exclusion of all such evidence when the University proffered two exhibits for use in plaintiff's cross examination, Exhibits M3.5 and M3 (Tr.436:3-438:8). Those exhibits contain plaintiff's representation that "Plaintiff Is Not Disabled Under the MHRA" (*see id.*). The trial court ruled that the documents were not "judicial admissions" and were inadmissible:

> It is my ruling that any sort of offering of the pleadings in this case would be one, are not judicial admissions necessarily and particularly this document is not and as such, it would be wholly inappropriate and inadmissible to offer this Exhibit M 3.5 in whatever form, redacted or unredacted.

(Tr.437:17-23). The circuit court was wrong in holding that the documents were not admissible "judicial admissions."

Statements in pleadings "have the standing of judicial admissions." MCCORMICK ON EVIDENCE (7th ed. 2013) §257; *see also City of Dardenne Prairie v. Adams Concrete and Masonry, LLC*, 529 S.W.3d 12, 18 (Mo.App.E.D. 2017) ("Allegations or admissions of fact contained in the pleadings of a case generally are binding on the pleader."). Even "[a]mended,

[64] In order to be entitled to an accommodation, plaintiff would need to show that she was actually disabled. *See* p.94 n.61, above.

withdrawn, or superseded pleadings … may be used as evidentiary admissions." MCCORMICK §257; *accord Mitchell Eng'g Co. v. Summit Realty Co.*, 647 S.W.2d 130, 141-42 (Mo.App.W.D. 1982) ("statements in abandoned pleadings" are "admissible as competent and substantial evidence"). And the statements need not be in a formal pleading; "briefs can be the source of judicial admissions." *Ortmeyer v. Bruemmer*, 680 S.W.2d 384, 395 n.5 (Mo.App.W.D. 1984).

Plaintiff's written admission was therefore admissible. The jury should have been allowed to consider how plaintiff could be entitled to a reasonable accommodation of a disability that she admitted she did not have, as well as how she could have had a reasonable and good faith belief that she was entitled to accommodation of a non-existent disability.

This Court's recent decision in *Vacca v. Mo. Dep't of Labor & Indus. Relations*, No. SC96911, 2019 WL 1247074 (Mo.banc March 19, 2019) (motion for rehearing pending), illustrates the clear erroneousness of the trial court's decision to exclude plaintiff's admission from evidence. Vacca, like plaintiff, took inconsistent positions in court regarding the extent of his disability and ability to work. He testified in his MHRA case that he could have continued to work for another 20 years while in his dissolution proceeding claiming that he was totally unable to work. *Id.* at *1. The jury in *Vacca* was apprised of the inconsistent positions taken by plaintiff,[65] but this Court held that that was not enough — the taking of inconsistent positions in litigation amounted to a "misuse of the courts" and Vacca was estopped from presenting evidence at trial that contradicted his prior judicial statements. If it was error in

[65] *See Vacca v. Missouri Dep't of Labor & Indus. Relations, Div. of Worker's Comp.*, No. ED104100, 2017 WL 5146154, at *11 (Mo.App.E.D. Nov. 7, 2017) (vacated) (regarding plaintiff's prior representations that he was incapable of working: "[t]he jury was presented with this evidence at trial").

Vacca to even *permit plaintiff to testify* in a manner that contradicted his prior representations to the courts, then the trial court's refusal in this case to even *allow the jury to consider* plaintiff's judicial flip-flops was reversible error.

In fact, as in *Vacca*, plaintiff here should have been barred by judicial estoppel from contradicting her admission that she did not have an actual disability. Judicial estoppel "is invoked to protect the dignity of the judicial proceedings and to prevent parties from playing fast and loose with the judicial process." *Id*. at *1. Its purpose is to "instill[] confidence in our judicial system that one party will not be allowed to take 'clearly inconsistent' legal positions on any given day according to that party's whims." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 143-44 (Mo.App.W.D. 2011) (citations omitted). The key requirement for judicial estoppel is that a party's positions must be "clearly inconsistent." *Vacca* at *8. That requirement is met here. Plaintiff's counsel told the jury that plaintiff made an accommodation request "because of her disability" (Tr.126:8-11, 127:15-18). Those statements are irreconcilable with plaintiff's representation to the court that she is not actually disabled (D922 p.5, App.A35).

Vacca also explained other "non-exclusive" factors courts look to when applying judicial estoppel. *Vacca* at *9. Those factors include litigation success "either as a preliminary matter or as part of a final disposition" and whether the plaintiff would "derive an unfair advantage." *Id*. at 11-12. Plaintiff did achieve litigation success — the purpose of her representation that she was not actually disabled was to avoid entry of summary judgment, and she achieved that, persuading the court to deny summary judgment on that question as "moot" (D944 p.2). And, just like in *Vacca*, she derived an

unfair advantage by forcing the University to attack her claim of a disability at trial when she herself had admitted she was not disabled. *Id*. at 12. Judicial estoppel should be applied to bar plaintiff's contention that she was disabled.

Plaintiff's admission was, at the very least, an evidentiary admission against interest that should have been admitted for the jury to consider in determining whether plaintiff had an actual disability that entitled her to a reasonable accommodation or reasonably and in good faith believed that she did. *See Mitchell Eng'g*, 647 S.W.2d at 140-41. This evidence was both *logically* relevant to plaintiff's claim that she had sought an accommodation "of her disability" and *legally* relevant to avoid confusion of the jury regarding which issues were in genuine dispute and which were not. *Cf. Cox*, 473 S.W.3d at 122. The trial court's erroneous and prejudicial exclusion of plaintiff's admission required new trial. Again, and alternatively to JNOV, the judgment should be reversed and the case remanded for new trial.

Conclusion

Defendant Washington University respectfully prays that the Court order judgment in its favor as a matter of law or, alternatively, reverse the judgment and remand the case for a new trial, conducted in accordance with principles stated in *Helm*, 820 S.W.2d 495, 497-99 (discussing the "issue of the scope of retrial" as to corporate defendant in light of preclusive effect of verdict in first trial with respect to its employee).

Respectfully submitted,

TUETH KEENEY COOPER MOHAN
& JACKSTADT, P.C.

/s/James R. Layton
James R. Layton, Mo. Bar No. 45631
34 N. Meramec Avenue, Suite 600
St. Louis, Missouri 63105
314.880.3600
314.880.3601 (facsimile)
jlayton@tuethkeeney.com

SHANDS, ELBERT, GIANOULAKIS
& GILJUM, LLP

Mark J. Bremer, Mo. Bar No. 24696
D. Leo Human, Mo. Bar No. 59787
1 North Brentwood Blvd., Suite 800
St. Louis, Missouri 63105
314.241.3963
314.241.2509 (facsimile)
lhuman@shandselbert.com
mbremer@shandselbert.com

Attorneys for appellant
Washington University

Certificate of Compliance

The undersigned hereby certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). According to the word count feature of Microsoft Office Word 2013, this brief, not including the cover, certificate of service, this certificate, and signature block, contains 30,393 words.

/s/James R. Layton

Certificate of Service

The undersigned certifies that an electronic copy of the foregoing was served by operation of the Court's electronic filing system on this 22nd day of May, 2019, on all counsel of record in this case.

/s/James R. Layton