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 REPLY BRIEF

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August 23, 2019

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One omission stands out from plaintiff's brief: plaintiff never identifies what work, funded by what research grant, she could have performed in 2013, after her microarray work effectively ended. Dr. Ellis met with plaintiff repeatedly in July 2012 to identify work that she could do to allow her to be funded, but no such work was identified then, and after discovery and trial, plaintiff cannot identify any now. The absence of funded work was the reason Dr. Ellis gave for terminating plaintiff's position, and it was the basis for his defense when he was exonerated by the jury. Plaintiff's brief confirms that the jury's decision was correct.

Plaintiff notes that she was funded on only a single grant in 2012 (Respondent's Substitute Brief ("Resp.br.") p.15). But plaintiff never identifies any other grant she could have been funded on. Plaintiff worked on four projects in 2012 — POL, Z1031, WHIM and DOD (Ex.2; Tr.364:19-365:20, 415:17-24). Her work on three of those (the microarray work: POL, Z1031 and WHIM) was funded on a single grant — the R01 grant (Tr.603:2-604:4).[1] The fourth project, DOD, was an unfunded "pilot" when plaintiff worked on it briefly in the spring while another technician was out for surgery (Tr.556:12-21,470:23-471:2,365:23-366:5,590:25-591:7). That plaintiff's situation was "unusual," and that it would have been better if plaintiff had been funded on multiple grants, highlights the importance of her 2012 meetings with Dr. Ellis to discuss other possible work (Tr.313:1-14). Two grants other than the R01 were discussed then and at trial: the Komen Promise grant, which required cell culture work that plaintiff claimed she could not do, and the DOD grant, which involved mouse work which plaintiff

[1] Previously, plaintiff had worked directly on the WHIM/HAMLET team, but in 2012 her connection to that project consisted only of doing the microarray analyses funded by the R01 grant (Tr.575:2-22,605:5-17).

also refused to do (Tr.602:1-19,403:12-405:15,588:20-589:9,557:3-25). Plaintiff's statement that in 2012 "Ellis and Nichols decided to charge Plaintiff's salary to a single grant" (Resp.br.15) is incorrect, and is not supported by the evidence cited. She was placed on the grant that appropriately funded the microarray work she was doing.

Plaintiff also recounts each job she held with Washington University prior to being hired by Dr. Ellis (Resp.br.13-14) — presumably to suggest that when one job at the University ended, rehiring to another was automatic. That suggestion is unsupported by and contrary to the record. As plaintiff acknowledges, when her previous positions were "eliminated," which last occurred eight years before the events of this case, she "applied for" and "was hired into" another position (Resp.br.13-14). Although plaintiff testified that she "think[s she] start[ed] looking" for a job in September 2012 after learning that her job would be eliminated (Tr.418:17-21), "starting to look" is not applying for available positions, and plaintiff did not even specify whether she was looking for jobs within or outside the University. There is *no evidence in the record* that plaintiff applied for any position prior to her discharge.

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).[2] The earliest application listed was in January 2013 —

[2] Plaintiff suggests that this exhibit, combined with other testimony, shows that plaintiff applied for other jobs at the University prior to her November 30, 2012 discharge (Resp.br.68n.13). It does not. Plaintiff applied for 41 jobs at the University (Tr.198:4-5). Exhibit 24 is the only evidence about what those jobs were, and in it plaintiff listed only "job[s she] appl[ied] some effort" toward (Tr.420:1-5). That plaintiff might have applied for some jobs not on that list provides no evidence of when those other jobs were applied for (before or after November 30) or what the jobs were. The record is devoid of that evidence because it was not a matter raised or contested by plaintiff below.

well after her employment ended. And that bare-bones ledger is silent as to the hiring decisionmakers, nature of the work, qualifications of plaintiff and competing applicants for the position, or any other evidence on which the jury could do anything more than guess why any application was unsuccessful.

ARGUMENT

Point I — Requesting an accommodation is not a protected activity under the MHRA.

Plaintiff does not even attempt to argue that the text of the MHRA recognizes the claim submitted to the jury. Nor could she, as a request for reasonable accommodation constitutes neither opposition to a practice prohibited by the statute nor the filing of a complaint, testifying, assisting, or participating in an investigation conducted pursuant to the statute. R.S.Mo. §213.070(2).

Instead, plaintiff asks this Court to "follow[] federal law to impose requirements not found in the explicit language of the [statutory] provision." Resp.br.29-30. She asks this Court to legislate, in violation of Missouri's constitutional separation of powers (*see* Appellant's Substitute Brief ("App.br.") p.45-46).[3] This Court "lack[s] authority 'to read into a statute a legislative intent contrary to the intent made evident by the plain language.'" *Keeney v. Hereford*, 911 S.W.2d 622,624 (Mo.banc1995)(interpreting same statutory section at issue here). "If the wording in the MHRA is clear and unambiguous, then federal caselaw which is contrary to the plain meaning of the MHRA is not binding." *Daugherty v. Maryland Heights*, 231 S.W.3d 814, 819 (Mo.banc2007)(abrogated on other grounds). Plaintiff offers no argument that §213.070(2) covers this case by its plain language, or even that it is

[3] *See also Bd. of Educ. v. State,* 47 S.W.3d 366,371 (Mo.banc2001)("courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government"); *W.Cent.Mo. Region Lodge v. Grandview*, 460 S.W.3d 425,446 (Mo.banc2015)(policy "is solely the prerogative of the legislative branch" and to hold otherwise would be for the court "to legislate rather than to adjudge"; "The court's function is to declare the law as [the court] discover[s] it in the text furnished us by the [legislative branch] and when we have done so our authority ends.").

ambiguous. To adopt plaintiff's position would require rejecting the plain-language and statute-first interpretive principles that this Court has consistently sought to apply to the MHRA and that the constitution requires.

The only case plaintiff relies on for her argument that this Court should go beyond the MHRA statute's plain language is *McCrainey v. K.C. Sch.Dist.*, 337 S.W.3d 746,752-54 (Mo.App.W.D.2011). Resp.br.29-30. But in *McCrainey* the court was interpreting §213.070(2)'s "opposition" clause, which requires a plaintiff to have "opposed any practice prohibited by this chapter." *McCrainey*'s conclusion that the provision requires a "reasonable, good faith belief" that the practice opposed is unlawful did not add to this requirement, but merely resolved an ambiguity by clarifying that the employee need not actually prove that the conduct she complained about in fact violated the statute. Plaintiff has not argued that that the existing statutory language can be interpreted to cover her claim here, and *McCrainey* is therefore not supportive of her improper request to judicially rewrite the statute.

Plaintiff's argument is unmoored from the language of the statute, as demonstrated by her brief's inconsistency even about which statutory clause gives rise to her claim. In places, she suggests her conduct should be viewed as "opposition" (Resp.br.32-34). Elsewhere she suggests that the court treat her request as fitting the "participation" portion of the statute (Resp.br.78). In truth, her claim fits neither clause.

Plaintiff extensively relies on federal case law. Given the absence of any claim by plaintiff that the Missouri statute is ambiguous, it is not appropriate to consider these cases. *See Keeney*, 911 S.W.2d at 624. But ultimately even the federal cases do not help plaintiff, because the federal statute contains a provision (42 U.S.C. §12203(b)) explicitly authorizing the cause of action plaintiff asks this court to recognize — language that is absent from the

MHRA. App.br.43-44. Thus, while the initial round of federal cases imprecisely cited an inapposite statutory paragraph, and in some cases noted their concerns that the language of that paragraph did not appear to encompass the claims in issue,[4] those cases were ultimately correctly decided under the statute in question. Litigants in those cases — operating under a statute that unquestionably covered the conduct alleged — had little incentive to litigate the immaterial question of which paragraph subsection created the claim. Regardless, the imprecision has been corrected in subsequent case law (App.br.43-44&n.18). This Court should not adopt and perpetuate an (immaterial) error from federal cases rather than apply the express language of our statute.

An example of proper governmental separation of powers has recently played out on this very topic in New York. The State and City of New York each have laws with language like the MHRA, prohibiting retaliation because a person "opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." N.Y.Exec.Law §296(e); *see also* N.Y.C.Code §8-107 (prohibiting same). Consistent with the plain text of those laws, New York courts have repeatedly held that these enactments do not create a claim for retaliation for requesting a disability accommodation. *E.g.*, *Witchard v. Montefiore*, 103 A.D.3d 596 (N.Y.App.Div.2013)(under these laws, "a request for reasonable accommodation is not a protected activity for purposes of a retaliation claim"). The New York City Council responded by recently amending the city code to expressly provide a retaliation cause of action for individuals who

[4] *E.g.*, *Kirkeberg v. Canadian Pacific*, 619 F.3d 898,908 (8thCir.2010)("'[i]t is questionable' whether an employee who merely requests a reasonable accommodation 'fits within the literal language of the statute'").

have "requested a reasonable accommodation under this chapter." Int.No.0799-2018.[5] Similarly, if for policy reasons the Missouri legislature wants to create the cause of action pursued by plaintiff here, it can do so. But that is not the courts' role.

Apparently cognizant of the limitations of the MHRA's text, plaintiff now attempts to recast her claim, asserting that, even if her request for accommodation is not protected, she should be deemed to have "opposed" unlawful conduct by making *repeated* requests (Resp.br.32-34). But that is not a claim she pleaded or brought to trial, nor a claim submitted to the jury and on which it was instructed. Plaintiff's claim "must stand or fall" on her theory at trial (App.br.42 n.16). Moreover, the argument is meritless. If a single request for accommodation is not protected activity then repeated requests are not either.

Point II — Plaintiff's claim is time-barred.

A. Timeliness must be adjudicated in this case.

On the central question of law presented by this point — whether the University has a right to an adjudication and determination in this case that plaintiff's charge was untimely — plaintiff's brief confirms that it does. On page 45 of her brief, plaintiff concedes that defendant could have "challenge[d] the timeliness of the filing of the charge with the MCHR and seek to have the MCHR dismiss" the untimely allegations, but asserts that "once Plaintiff filed her lawsuit, it was too late for Defendant to raise this concern." Thus, all *agree* that the question of timeliness could appropriately have been adjudicated with respect to plaintiff's charge, and that the appropriate remedy for untimeliness was dismissal, barring her claim. The

[5] *See* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3474318&GUID=7D4A5818-4021-4732-85CD-33E55A34B282&Options=&Search=.

only remaining questions are *where* (before the MCHR or the court?) and *when* (is it now "too late"?) that issue should be adjudicated. These questions are procedural.

And these procedural questions have now been answered by legislation. The 180-day limitations defense "may be raised … *at any time*, either during the administrative proceedings … *or in subsequent litigation*." R.S.Mo. §213.075.1(2017)(emphasis added). Because these changes are purely procedural — declaring the tribunal and time for adjudication and not its substantive content or result — they are binding and apply in this pending case, as a matter of well-settled Missouri law. App.br.49-53.

Plaintiff' claims that this statutory provision should not apply rests on her assertion that it would constitute a "newly-created limitations period" (Resp.br.51). But the limitations period here is not new — it is the same one that has always existed and that plaintiff admits could have been raised before the MCHR. When plaintiff filed her charge, she was obligated by statute to file within 180 days, and (as plaintiff admits) an untimely charge could be dismissed, barring her claim. The same is true today. And even if the statutory amendment were deemed to be a "newly-created limitations period" as plaintiff erroneously asserts, under Missouri law it would still apply retroactively.[6]

Whatever the proper procedure was for raising this question previously, under the new statute there can be absolutely no question that it is properly

[6] *See Rabin v. Krogsdale*, 346 S.W.2d 58,60 (Mo.1961)(because "statutes of limitation relate to the remedy only," "the legislature [can], either by extending or reducing the period[,] regulate the time within which suits may be brought *even on existing causes of action*")(original emphasis, citation omitted); *Robinson v. Heath*, 633 S.W.2d 203,206 (Mo.App.S.D.1982).

raised in a lawsuit filed in the circuit court, which is exactly what the University did here.

Because the statute is applicable, there is no need for the Court to go back and address the questions presented under *Farrow* and *Tivol*. Regardless, plaintiff's characterization of those cases is incorrect. Plaintiff dismisses the suggestion that in *Farrow* the defendant had waived the issue of timeliness (Resp.br.42). But *Tivol* holds that in *Farrow* "the employer had not preserved the issue of timeliness … and therefore it was waived." *State ex rel. Tivol Plaza v. MCHR*, 527 S.W.3d 837,845 (Mo.banc2017). Given this holding, the remainder of plaintiff's discussion of *Farrow* — relying on statements in that case that timeliness is not a requirement — must necessarily be either (1) inapposite propositions relating to the jurisdictional questions addressed in that case or (2) *dicta*. If the employer waived the issue, the Court could not have held that timeliness is not required. Likewise, in *Tivol*, the issue presented was the availability of a remedy by writ, and the Court did not (and could not) make any holding regarding whether timeliness can be raised in a lawsuit.[7]

B. Plaintiff's remaining arguments are without merit.

Plaintiff offers a number of new arguments for the first time on appeal, all of which are without merit.

First, plaintiff offers a new, unfounded contention that the statute of limitations did not begin to run on August 10, 2012, the date she

[7] This Court accepted briefing in *Tivol* on the question now before it: whether timeliness of a charge may be raised in a plaintiff's subsequent lawsuit. However, that question was not squarely presented there because *Tivol* was a writ case. This lawsuit presents the first opportunity for the Court to issue a holding squarely addressing this topic since *Wallingsford*. App.br.53. However, the question need not be reached in this case as well if the amended statute is determined to apply.

acknowledges (and the trial court held) that Dr. Ellis informed her of her job elimination (Resp.br.21). Rather, she claims the limitations period began to run later, when she claims "damage … was sustained" (Resp.br.36). She relies on R.S.Mo. §516.100, which expressly states that it applies only to the limitation periods set out in Chapter 516 for various specified causes of action. Section 516.100 does *not* apply to the MHRA, which has its own limitation. *See Davison v. Dairy Farmers*, 449 S.W.3d 81,83 (Mo.App.W.D. 2014)(MHRA contains its own statutes of limitations, separate from Ch.516).

Based on that inapplicable law, plaintiff then argues (Resp.br.38) that Dr. Ellis's decision did not become final until after August 10, 2012. The conclusively-adjudicated record facts are to the contrary. As the trial court determined, "[o]n August 10, 2012, Plaintiff was told that her last day of work would be November 30, 2012," and "Dr. Ellis informed [plaintiff] of her upcoming termination in a conversation on August 10, 2012" (App.br.47& n.20).

The law governing this point was stated in *State ex rel. St.L. County v. MCHR*, 693 S.W.2d 173,174-75 (Mo.App.W.D.1985), which held, in a case where it was "agreed that the complaint was filed more than 180 days after [the plaintiff] was notified of the discipline but less than 180 days after the" discipline was completed, that "[t]he act of discrimination" occurred when plaintiff was notified. That holding is consistent with the federal rule stated in *Ricks* and adopted in *Daffron* (App.br.47 n.20).

One aspect of plaintiff's argument is a claim that her termination was not an "inevitable" consequence of the August 10 decision. But the end of plaintiff's employment did "inevitably" flow from the termination decision; nothing else was identified in the record as necessary to complete the process. Indeed, the record is silent as to any events between August 10 and

November 30, confirming that the August 10 decision was final and self-executing.[8]

Plaintiff argues that the August 10 decision should not start the limitations clock because she still had "the opportunity to look for other jobs within or outside the University" (Resp.br.38-39). But that would render the fundamental *St.L. County/Daffron/Ricks* rule a nullity, as in nearly every termination case a discharged employee may apply for other jobs. And here, there is no evidence that plaintiff applied for other jobs prior to her discharge. If plaintiff had applied and not been hired, that non-hiring decision could have been the basis for a separate claim — one to be pleaded, proven and submitted based on a separate set of facts. But it would not be a basis to hold that the decision challenged in *this* case lacked finality.[9] In short, the decision plaintiff is complaining about was made and communicated to her on August 10, and the statute began to run on that date.

The same result follows from a straightforward statutory analysis. Section 213.075's statute of limitations begins to run upon the "act of discrimination" — not, as plaintiff would prefer, when "damage … was sustained." "Discrimination" is "conduct proscribed herein, taken because of [a protected classification]." R.S.Mo. §213.010(6). The "conduct" here that was

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[8] Plaintiff's admission that Dr. Ellis was "likely the final decision maker" (Resp.br.63) further shows that there were no intervening events between his August 10 decision and plaintiff's discharge.

[9] Even if plaintiff *had* applied for and been hired into another University job, the decision to terminate her position in Dr. Ellis's lab would have been potentially actionable (*see Mignone v. Mo. D.O.C.*, 546 S.W.3d 23,32 (Mo.App.W.D.2018)(holding "reassignment" claim submissible under the MHRA)), and plaintiff would still have needed to challenge that decision in an agency charge within 180 days of its occurrence. Thus, even assuming (contrary to evidence) that the August 10 letter was a mere "transfer," the statute of limitations still began to run on that date.

allegedly "taken because of" plaintiff's purported protected status was Dr. Ellis's decision to eliminate her position, conveyed on August 10, 2012. The alleged "discriminatory act"— the place where "conduct" allegedly causally intersected with claimed protected classification — was the August 10 decision to end plaintiff's employment.

This textually-required result is affirmed by public policy considerations. Statutes of limitations are favored (App.br.64 n.37), and as a matter of the public policy behind this particular statute (App.br.59-66), prompt notice is necessary to serve the statutory goals of prompt mediation and remediation.

Plaintiff's additional claim that this point was not preserved for appeal (Resp.br.35) is incorrect. "A trial court should enter a directed verdict when the plaintiff fails to make a submissible case or when the defendant establishes an affirmative defense as a matter of law." *Pitman v. Columbia*, 309 S.W.3d 395,401 (Mo.App.W.D.2010). The untimeliness of plaintiff's charge was properly raised in defendants' motions for directed verdict and JNOV (App.br.46). The material facts are not in dispute, and judgment should have been entered accordingly.

Finally, plaintiff cites *Estate of Pierce*, 969 S.W.2d 814 (Mo.App.W.D. 1998), for the argument that the judgment below should not be disturbed because it was a "part of a proceeding completed prior to the effective date" of the new statute (Resp.br.37-38). But *Pierce* concerned a statute that came into effect "several months" *after* the judgment had become final and appealable. 969 S.W.2d at 822-23. There, the decision below was correct at the time the judgment became final; there was no error to correct on appeal. Here, the new statute went into effect on August 28, *before* the judgment was final or appealable, and the University's timely motion for JNOV was filed on August 29. That motion was not overruled until November 27, months after

the new statute's effective date. The decision to overrule the University's motion was erroneous under the law in effect when that decision was made.[10]

Point III — The verdict for Dr. Ellis requires JNOV for the University.

Plaintiff attempts to show the verdict is not inconsistent by identifying two separate claims that she alleges were present in this case: (1) Dr. Ellis's decision to eliminate plaintiff's position in his lab, and (2) the University's alleged "failure to retain her in another position" (Resp.br.54). These two claims are analytically distinct, and the reasons they fail are distinct as well. The first claim, based on Dr. Ellis's discharge decision, fails because the verdict exonerating Dr. Ellis also exonerates the University for his discharge decision (III.B, below). The second claim, based on an alleged "failure to retain," fails because that claim did not exist at trial, so the jury could not have based its verdict on it (III.C). Before examining these claims, however, we briefly review the legal standard that applies to this inconsistent verdict case.

A. Plaintiff must show an "independent" claim, and the conduct of Dr. Ellis must be "eliminated."

Plaintiff repeatedly misstates the legal standard. According to plaintiff, as long as someone other than Dr. Ellis was "involved" in the discharge decision, that should be enough to escape the verdict's inconsistency (*e.g.*, Resp.br.55,57,60-65). No case plaintiff cites supports this assertion. Instead, settled Missouri law requires that plaintiff show the existence of an

[10] *Branson v. Biedenstein*, 618 S.W.2d 665,670 (Mo.banc1981), which plaintiff also cites, held that the statute in question, including "new and more onerous requirements," was "procedural" and applied to a pending lawsuit that was initiated before the statute was enacted, except insofar as a subsection of the statute expressly stated certain portions were to be applied prospectively only. *Id.* This case fully supports the University's position.

independent claim, predicated on actions of someone other than Dr. Ellis, that can support the jury's verdict with respect to each element. *Burnett v. Griffith*, 769 S.W.2d 780,783-84 (Mo.banc1989)("*Burnett II*"); *Zobel v. Gen. Motors*, 702 S.W.2d 105,106 (Mo.App.E.D.1985); *Vaughn v. Sears*, 643 S.W.2d 30,33 (Mo.App.E.D.1982); App.br.76-77 and see n.49 (*Burnett I* requires independent claim). The strong, categorical rule that applies in this circumstance is rooted, ultimately, in the preclusive force of a binding final judgment. *See Helm v. Wismar*, 820 S.W.2d 495,497-98 (Mo.banc1991).

Every case cited by plaintiff is consistent with this governing legal standard. *Burnett I* fully supports this statement of the law. *Stoutimore v. Atchison*, 92 S.W2d 658,661-62 (Mo.1936) is another case like *Devine* (addressed at App.br.81 n.53), involving company liability based on the independent legal duty of a property owner to an invitee. *Stith v. J.J. Newberry* is not an inconsistent verdict case (App.br.81 n.52).[11] Plaintiff's remaining cases are either easily distinguishable or actually support the

[11] Contrary to Resp.br.72n.14, *Stith* held:

> The error in this case is not in any inconsistent and contradictory finding by the jury … but in the fact that the court, under an erroneous view of the law, perhaps, or a misinterpretation of the evidence … refused to submit [the employee's negligence] to the jury. The error was in that the court erroneously discharged [the employee] from liability as a matter of law. The truth is that, when the court sustained the demurrer to the evidence as to [the employee], the servant, it should have sustained the demurrer as to [the] Company as master if its liability was wholly dependent on [the employee's] negligence, but that was an error of the court and not any inconsistency or contradiction in the jury's verdict.

79 S.W.2d 447,459 (Mo.1934). "[T]he rule as to contradictory and inconsistent verdicts being self–destructive" did "not apply," the court held, when brought about by this "error of law." *Id.*

University.[12] In contrast, the University's case law — beginning with *Burnett*, *Vaughn*, and *Zobel* (*see* App.br.76-80) — is on point. In order to avoid judgment as a matter of law, plaintiff must show an independent claim, excluding the actions of Dr. Ellis, and not merely cursory "involvement" by others.

B. The decision to terminate plaintiff's employment was made by Dr. Ellis, and no independent claim exists with respect to that decision.

Plaintiff has repeatedly admitted that "[i]t was Dr. Ellis who made the decision to eliminate Plaintiff's position and he personally informed her of the decision" (App.br.73). In her brief to this Court, she admits that "Dr. Ellis initiated the decision" and was "likely the final decision maker" (Resp.br.54, 63). Given these admissions and the uncontroverted evidence at trial, no independent claim can remain relating to the termination decision. The decision to discharge plaintiff was made by Dr. Ellis, and the jury's verdict is a conclusive adjudication that plaintiff's request for a reasonable accommodation for herniated discs was *not* a contributing factor in such discharge (*see* D972 p.2 (jury instruction)).

Plaintiff nonetheless insists that two others, Sandra Sledge and Nicole Nichols, were "involved" in one of two ways: (1) they allegedly "formulated

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[12] *Moran v. N.Cty.Neurosurgery*, 714 S.W.2d 231,232 (Mo.App.E.D.1986), *affirmed* JNOV because "exoneration of the servant exonerated the master." The other two cases plaintiff cites contained jury instructions that identified actions other than those by the exonerated employee. *See Stacy v. Truman*, 836 S.W.2d 911,914-15,923 (Mo.banc1992)(discussing each employee's role where instructions "submitted disjunctive assignments of negligence, including negligent acts by other employees")(abrogated on other grounds); *Turman v. Schneider*, 768 S.W.2d 108,112 (Mo.App.W.D.1988)(instructions stated that the actions in question were done by the exonerated employee "and other employees"). The instructions here did not identify other culpable employees.

the reasons" provided to plaintiff for her termination and (2) they "played a role in determining the date on which Plaintiff's position would be eliminated." But these assertions, even taken at face value, do not amount to a claim *independent of Dr. Ellis's exonerated actions* that could support the jury's verdict. And the claim submitted here was retaliatory discharge, not retaliation in setting a date or in formulating reasons.

Regardless, the record supports neither assertion. Plaintiff's basis for contending that Nichols and Sledge "formulated the reasons" for plaintiff's termination is an email Nichols sent to Dr. Ellis referring to the scheduled end-date for plaintiff's R01 work and asking "[p]lease let us know what you would like to happen" (Ex.F4). That email, where *Nichols asks Dr. Ellis* for direction, directly contradicts plaintiff's contention. Furthermore, by the time this email was sent, on July 18, Dr. Ellis had met with plaintiff no less than three times, on July 10, 12, and 17, and had exhaustively discussed with plaintiff the ending of her work on the R01 and other possible projects and grants for 2013 (Tr.399:1-12,403:8-16,490:16-492:4). It was Dr. Ellis's response to Nichols, conveying the result of those meetings, not her original inquiry, that stated the reasons for plaintiff's termination: "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)" (Ex.F4). Given that Dr. Ellis made the decision to discharge plaintiff and he consistently stated, both at the time and at trial, that the decision was based on the lack of grant-funded work (Tr.608:16-609:8), it is not possible for the jury to have concluded that that reason was an untrue

cover for retaliation and still to have exonerated Dr. Ellis.[13]

The second assertion, that Nichols and Sledge "played a role" in determining the date of plaintiff's termination, ignores the undisputed evidence that plaintiff was told by Dr. Ellis at the August 10 meeting that her job would end at the "end of November," which is precisely what happened (Tr.413:22-415:16,298:23-299:3). Details about the setting of plaintiff's end date have never been raised as a claim in this case — nothing like this was ever argued at any stage of the proceedings — but regardless, the decision about plaintiff's particular end date, like the termination decision itself, was made by Dr. Ellis, who was exonerated.

And these deficient assertions suffer from a further defect that cuts across all of plaintiff's theories: plaintiff cites absolutely nothing in the record — and there is nothing — that would support an assertion that Nichols or Sledge ever acted out of a retaliatory animus toward plaintiff for having requested an accommodation.[14] Plaintiff's speculation about Sledge and

[13] Plaintiff's further reference to plaintiff being funded on a "single grant" goes nowhere. She attributes this state of affairs jointly to "Nichols … and Ellis" but (1) there is no evidence that Nichols decided or had any authority to decide which grant plaintiff was funded on — Dr. Ellis was the principal investigator on the grant and the supervisor of his lab employees, including plaintiff (Tr.262:24-263-3); and (2) Ellis's admitted participation and his subsequent exoneration proves there was no retaliation here. And in any event, plaintiff has never identified another grant that she should have been funded on, so the choice in 2012 was between funding on one grant or none.

[14] In lieu of that missing evidence, plaintiff relies on inapposite case law. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011), involved false and "fabricated" allegations by one employee against the other, with clear evidence linking those falsifications to plaintiff's protected status. In *Kientzy v. McDonnell-Douglas*, 990 F.2d 1051 (8thCir.1993), plaintiff proved a pattern of sex-based disparate treatment by a supervisor, whose disciplinary referrals resulted in termination. *Ferguson v. Lincoln Univ.*, 498 S.W.3d 481 (Mo.App.W.D.2016), involved animus statements that were properly admitted into evidence. *Cox*

Nichols is pure guesswork well outside the realm of permitted inference. *See Osterhaus v. Gladstone Hotel*, 344 S.W.2d 91,94-95 (Mo.1961); *Trimble v. Pracna*, 167 S.W.3d 706,712-13 (Mo.banc2005).

C. No independent claim was submissible or submitted to the jury based on an alleged "failure to retain."

Plaintiff's also argues the verdict can be rescued based on "Defendant's [the University's] failure to retain her in another position" or to "provide her with other employment" (Resp.br.61,65). No such claim was submitted to the jury. And no evidence in the record would have permitted submission of such a claim.

The verdict directing instructions for each defendant referred to a single retaliatory act — the "discharge" of plaintiff (D972 pp.2-3). On its face, this refers directly to the termination decision made by Dr. Ellis. That is how plaintiff tried her case — as shown by her counsel's closing argument discussing the "discharge" element in the instructions and where he mentioned just the termination decision by Dr. Ellis (Tr.698:16-699:23).

Plaintiff's *post hoc* suggestion that the jury could have expanded the word "discharge" to include the University's alleged "failure" to offer her a new job (Resp.br.62) is a distortion of both the jury instructions and the record. There is no evidentiary basis on which such a claim could have been submitted to the jury. There is no evidence (1) that plaintiff applied for any position at the University prior to her discharge; or, even if she had, (2) that

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v. K.C. Chiefs, 473 S.W.3d 107 (Mo.banc2015), which involved a theory and evidence of "a top-down effort" by a group of high-level managers, none of whom were exonerated, is simply inapposite. In both *Grissom v. First National*, 364 S.W.3d 728 (Mo.App.S.D.2012), and *Buchheit v. MCHR*, 215 S.W.3d 268 (Mo.App.W.D.2007), the case was pursued under federal burden-shifting analysis and plaintiff proved a *prima facie* case of discrimination, which plaintiff has not and cannot do here as to either Nichols or Sledge.

there was an available position for which she was qualified and that met her accommodation requirements; (3) of the identities of the hiring decisionmaker for any job; (4) that any such decisionmaker had any knowledge about plaintiff's accommodation request;[15] or (5) that the decisionmaker unlawfully rejected any application based on a retaliatory motive. Such an impermissibly speculative claim, *Osterhaus*, 344 S.W.2d at 94, would fail at the threshold for lack of any evidence that plaintiff applied for any position prior to her 2012 discharge. And plaintiff cannot create a claim "simply by arguing that [her] employer is a larger company and people have moved around before, so surely [s]he could have transferred to another job." *Folsom v. Mo.Highway Patrol*, WD82081,*8-9 (Mo.App.W.D. June 20, 2019)(citing additional authorities).

Further, as a matter of law, "discharge" and "failure to hire" are distinct potentially discriminatory acts, separately listed in both the statute (R.S.Mo. §213.055(1)(a)) and the pattern jury instruction (MAI 38.01(A)). Plaintiff elected to only submit the former and abandoned the latter. *See Williams v. Venture Stores*, 673 S.W.2d 480,482 (Mo.App.E.D.1984); App.br.78 n.50.

Finally, plaintiff's petition never refers to any "failure to retain" by anyone other than Dr. Ellis. The allegation that defendants did "not provide her with other employment" (D943 p.4¶20) refers, as the trial record confirms, to her theory that *Dr. Ellis* retaliated against plaintiff by failing to provide her with other jobs in his lab (Tr. 706:5-707:1,139:17-22,701:24-702:3) and "blackballed" her by allegedly refusing to provide a reference letter (Tr.369:11-18,411:3-8,599:10-601:2,122:5-12). Plaintiff's new theory that someone *other* than Dr. Ellis should have provided her a job at the University

[15] In general, University hiring decisionmakers do not have information about applicants' medical condition (Tr.640:22-644:24).

was not alleged in her petition, argued at trial, nor submitted to the jury.

Plaintiff's argument is analogous to that made and rejected in *Burnett*, where the plaintiff, having lost at trial his case against a security guard for malicious prosecution, attempted to preserve his verdict against the guard's employer by arguing that "conduct by other officers, agents or employees" provided a basis for the verdict. 769 S.W.2d at 783-84. This Court rejected that argument, holding that there was "no evidence" that anyone other than the guard "instigated Burnett's arrest." *Id*.[16] Here, no claim pursued was independent of the actions of Dr. Ellis and, as in *Burnett II*, "[o]nce consideration of [the exonerated employee's] conduct is eliminated," there is nothing left and JNOV is required. *Id*.

Point IV — The verdict directing instructions omitted an essential element of plaintiff's claim.

Plaintiff admits that "[w]hen the status of a plaintiff's membership in a protected class is at issue, a court should … include an additional element presenting the issue to the jury" (Resp.br.74-75). But no element in the jury instruction given in this case required that proof. The failure to instruct on such an essential element is reversible instructional error — here just as in *Hervey v. Mo. D.O.C.*, 379 S.W.3d 156 (Mo.banc2012).[17]

Though plaintiff has never provided a clear example of what a proper

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[16] Similar arguments were made and rejected (and JNOV was granted) in *Williams*, 673 S.W.2d at 483 (arguing verdict might be based on company "policy" or conduct of other employees), *Kuenzle v. M-K Bus Lines*, 644 S.W.2d 380,381 (Mo.App.E.D.1982)(no "independent" claim despite argument verdict against company could rest on faulty brake maintenance in addition to exonerated driver), and *Vaughn*, 643 S.W.2d at 33 ("no evidence" to support verdict based on employer's "independent actions or policies").

[17] Notwithstanding plaintiff's suggestion (Resp.br.88&n.17), the University's objections to the verdict-directing instruction fully preserved this point. App.br.88; *Ross-Paige v. St.L. Police*, 492 S.W.3d 164,171-72 (Mo.banc2016).

instructional element hypothesizing her membership in a protected class would look like, it is clear what theory she argued and submitted below. Plaintiff argued "that Defendants retaliated against her when she requested a reasonable accommodation for her disability" and that "[a]n employee's good faith request for a reasonable accommodation is protected activity under the MHRA" (D944 p.5; D948 pp.4-6). Plaintiff thus founded her claim on a request for (1) a "reasonable accommodation" for (2) a "disability." But plaintiff *never was required to prove* either of those things — she did not have to prove her requested accommodation was "reasonable" or that it was for a "disability." Instead, the instruction improperly assumed both.

Plaintiff now attempts to avoid the requirement to even prove the facts that her own instruction improperly and incorrectly assumed to be true by citing cases holding that a "reasonable, good faith, belief" that certain conduct was protected can be enough to assert a claim under the §213.070(2)'s "opposition" clause. *E.g.*, *McCrainey*. Those cases give plaintiffs who have a good faith, reasonable belief that they have "opposed [a] practice prohibited by this chapter" protection from retaliation. Once again, however, the jury instruction here did not include this element. So even if plaintiff is correct that a "reasonable, good faith" belief that she was requesting a reasonable accommodation for a disability could be sufficient, the judgment must still be reversed.[18]

While citing these Missouri cases requiring "good faith" and "reasonable[ness]," plaintiff will not even admit she had the burden that her

[18] Plaintiff cites the MAI for workers' compensation retaliation (38.04), but cites no case holding that the "reasonable, good faith" requirement is the same there as under the MHRA. If such an element is required and in dispute, *Hervey* would mandate modification of the workers' compensation MAI just as it did the MHRA MAI. Moreover, MAI 38.04 requires proof of protected conduct, which the instruction here omitted.

cases impose. Instead, she makes a novel contention that her claim should be treated as somehow arising under the separate "participation" clause of the MHRA's retaliation provision (Resp.br.78). This contention is legally groundless. A "participation" claim requires proof that a plaintiff was discriminated against for participating in an "investigation, proceeding or hearing conducted pursuant to this chapter [213]." §213.070(2). No such claim has ever been made in this case, nor could it. As recently noted in *Mignone*, 546 S.W.3d at 38-39, although courts may sometimes fail to properly distinguish between the two requirements, both *objective* "reasonableness" and *subjective* "good faith" are required to pursue an MHRA retaliation claim.

Plaintiff's stated position on her burden of proof before the jury reduces to an absurdity. To be in a protected class, plaintiff must show either that she sought a reasonable accommodation for a disability or, if *McCrainey* is held to be applicable, that she reasonably and in good faith believed that she was seeking a reasonable accommodation for a disability. But taking plaintiff's brief literally, she disclaims the burden to prove any element of what she views as the "underlying discrimination claim" (Resp.br.82-83)(i.e., that she sought a reasonable accommodation for a disability), while also disclaiming both the burden to show a "reasonable belief" (p.78) and to show "good faith" (p.81-82). Plaintiff's position would eliminate the first element of her claim. That is not the law — at the very least plaintiff was required to prove a reasonable, good faith belief that she requested a reasonable accommodation for a disability, which the jury instruction failed to require.

Although plaintiff suggests these points were not contested at trial, the record demonstrates that defendants offered significant evidence that she

failed to meet these requirements.[19] Had it been properly instructed, the jury could have found that plaintiff did not reasonably and in good faith believe the accommodation she requested was reasonable where:

- She refused every offer of grant-funded work that was made to her in July 2012, including work that satisfied her claimed physical restrictions (App.br.25-26,98).
- She never identified what work she could or would have done had her employment continued — and Dr. Ellis testified there was none (Tr. 601:3-605:17).
- Her accommodation request required elimination of essential job functions, which is unreasonable as a matter of law (App.br.96-97).
- Her requests were based on her refusal to accept that the work she had been doing would no longer be available — based on a belief that was objectively false and was contrary to the accurate information provided by Dr. Ellis at the time (*id*.98-99; Ex.K9).

And had it been properly instructed, the jury could have found that plaintiff did not reasonably and in good faith believe the accommodation requested was for an actual disability within the meaning of the law where:

- She *admitted* before trial that she was not actually disabled (*id*.100-101).[20]
- The evidence established that she was not disabled because her

[19] These issues were not "unmistakably conceded," the stringent standard required to take a question away from the jury, *Harvey v. Washington*, 95 S.W.3d 93,98 (Mo.banc2003). They were strenuously contested.

[20] Plaintiff emphasizes that Dr. Ellis accepted her assertion of back issues (Resp.br.86). But he testified that he did not believe she had a disability in the formal or legal sense (Tr.612:4-22), and his acceptance of her assertion is irrelevant to whether she had a reasonable, good-faith basis to assert legal disability in the first place.

back issues were only intermittent and because her claimed impairment interfered with her ability to perform essential job functions (App.br.93-96).

- She rejected offers of alternative work that satisfied her claimed restrictions (*id*.98).
- Some of her accommodation requests (e.g., not to do mouse work or work on the DOD grant) were unrelated to her back issues or any claimed disability (*id*.20,26,98).

Reasonableness, good faith, and whether a particular impairment rises to the level of a disability are highly fact-intensive questions, appropriate for jury decision, and plaintiff cites no case removing those issues from the jury's consideration.

Plaintiff argues that all of this evidence should be held to go to whether "Defendants had a legitimate basis to eliminate Plaintiff's position in Ellis' lab," not to whether she was in a protected class (Resp.br.89). But it can, and does, go to both. This is not anomalous. It is no different than what occurs in a straightforward disability discrimination case, where determining whether a plaintiff is disabled requires a factual finding whether plaintiff's impairment would "interfere with performing the job in question if provided a reasonable accommodation." MAI 38.01(B); *see also* R.S.Mo. §213.010(4) (2014); *Daugherty*, 231 S.W.3d at 821. In such a case, plaintiff's ability to perform the job could necessarily be raised *both* as a defense regarding whether the plaintiff was properly a member of the class protected in the statute *and* whether the employer had a legitimate reason for any decision that was made. The same is true here — whether the accommodations plaintiff sought were reasonable is highly probative both of the justification

for Dr. Ellis's decision and of whether the requests were protected in the first place.

Finally, plaintiff's brief focuses attention on one particular meeting: on July 12, when plaintiff and Dr. Ellis discussed work on the DOD grant and plaintiff refused all work that was offered (Resp.br.90-91). Plaintiff argues that the meeting had nothing to do with her requests for accommodation. But the whole point of that meeting was to find work that plaintiff could do and that met her stated limitations, and the evidence from that meeting directly calls into question both the reasonableness and, perhaps even more squarely, the good faith of plaintiff's accommodation request. Plaintiff there refused work that met *every one of* her stated work restrictions and could have preserved her employment (Tr.462:12-465:5,593:6-595:12,405:1-15). Refusing work that meets all stated requirements and making additional requests without any factual or demonstrated medical basis raises an unmistakable question whether her requests were made reasonably and in good faith.

Conclusion

JNOV should be ordered for the University or, alternatively, the judgment should be reversed for a new trial.

Respectfully submitted,

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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 7,749 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 23rd day of August, 2019, on all counsel of record in this case.

/s/James R. Layton