



**In the
Missouri Court of Appeals
Western District**

JAMES K. SHERRY,	)	
	)	
Appellant-Respondent,	)	WD83635 Consolidated with
	)	WD83671
v.	)	
	)	OPINION FILED: March 9, 2021
CITY OF LEE'S SUMMIT,	)	
MISSOURI,	)	
	)	
Respondent-Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Cory L. Atkins, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge and
Anthony Rex Gabbert, Judge

The parties cross-appeal from a judgment of the Circuit Court of Jackson County, Missouri ("trial court") which, after a jury trial, awarded James K. Sherry ("Sherry") \$300,000 compensatory damages for his claim of disability discrimination under the Missouri Human Rights Act ("MHRA")¹ and attorneys' fees of \$220,807 against his former employer, the City of Lee's Summit, Missouri ("City"). On appeal, Sherry claims that the

¹ Sections 213.010 et seq. All statutory references are to the Revised Statutes of Missouri (2016) as updated by supplement.

trial court erred in declining to award him front pay, and the City cross-appeals, claiming that the trial court erred in: 1) denying its motions for directed verdict and judgment notwithstanding the verdict because Sherry failed to prove that he was disabled under the MHRA in that he could not perform the essential function of attending work regularly; 2) denying its motions for directed verdict and judgment notwithstanding the verdict because Sherry failed to prove he was disabled under the MHRA in that a temporary recoverable illness is not a substantially limiting impairment; 3) giving Sherry's offered verdict director because it misdirected and confused the jury; 4) permitting evidence of and comment on the possibility that Sherry's illness was work-related because it was speculative and irrelevant; and 5) overruling the City's objection to Sherry's offered jury instruction because it offered the City's refusal to credit Sherry for his years of service when determining his pay upon re-employment as a possible act of discrimination because Sherry did not apply for re-employment with City. We affirm the judgment of the trial court and remand to the trial court for a determination of appropriate attorney fees for this appeal.

Factual and Procedural Background

Sherry worked for the City in its water department for fourteen years, from July 28, 2003, until July 14, 2017. He started as a maintenance worker, and was eventually promoted to equipment operator. Sherry was earning \$24 per hour in 2017. He had hoped to retire from the City; at the time of his termination he was fifty-seven.

During Sherry's employment with the City, he had several serious illnesses. In 2005, Sherry was diagnosed with prostate cancer. He underwent chemotherapy for seven weeks. His cancer went into remission, but after his treatment, he became more prone to

illness. In 2015, he began having abdominal pain, vomiting, diarrhea, and trouble eating. In the fall of 2016, he was diagnosed with acute pancreatitis, a condition where the head of the pancreas is calcified so that it cannot release enzymes into the stomach to digest food. Therefore, the pancreatic enzymes would remain in the pancreas, and they began eating the pancreatic tissue. Sherry had bouts of pancreatitis that would come and go. Although he tried to work through them, he had to go to the hospital for treatment when they became too severe, usually for about two days at a time.

In the fall of 2016, Sherry had his gall bladder surgically removed in an effort to relieve some of the symptoms caused by his pancreatitis. It seemed to help temporarily, but he began having problems again in February of 2017. Sherry's doctor recommended that he have a procedure called Whipple surgery, which involved cutting off the head of the pancreas and rerouting the intestines for food digestion. Because of the lack of leave time he had accrued, Sherry decided to return to work and have the Whipple surgery later, when he had accumulated enough leave time.

At the end of June, however, Sherry contracted an E. coli infection. He had serious symptoms including fever, vomiting, chills, and achiness that were different from his pancreatitis symptoms. He was hospitalized on July 6, 2017, and placed in intensive care. He was diagnosed with an abscess on his liver that had to be drained to heal, which would take approximately six weeks. Sherry provided medical documentation to the City so that he could take his sick leave and FMLA² leave.

² Family and Medical Leave Act of 1993, 29 U.S.C.A. section 2601 et. seq.

The City had several policies in place for sick or disabled employees, including vacation time, sick leave, comp time in lieu of overtime, FMLA leave, short-term disability, and discretionary leave. The City's anti-discrimination policy provided that reasonable efforts would be made to accommodate impairments of qualified employees with disabilities unless the accommodations would place undue burdens on the City. Beginning in 2015, Sherry used all of his accrued vacation, sick time, comp time, short-term disability, and FMLA leave to treat and recover from his various illnesses. On July 10, 2017, he had exhausted all of his available leave. At this point, he still required additional time to recover from his E. coli infection, so he requested discretionary leave from the City under its policy. Discretionary leave was put in place as an option for employees who had run out of their FMLA and paid leave benefits. The discretionary leave policy provided:

311.1. Eligibility: Employees who have exhausted FMLA leave, or who seek unpaid leave for reasons other than FMLA leave, may apply for a discretionary leave of absence after 12 months of service.

311.2. Approval: Discretionary leaves are totally within the discretion of the City and will be granted if the City believes the employee's time away from the job would be in the best interests of both the employee and the City. The Department Director may approve such leave when three days or less are requested. For additional time off, City Manager or his/her designee approval is required. If such a leave is approved, it will be for such length of time and on such other terms and conditions as the City Manager approves.

On July 10, 2017, while Sherry was still in the hospital, Mrs. Sherry spoke with Susan Wayman, the City's benefits specialist, and Wes Owen, Assistant Director of Operations. Wayman stated that Sherry was eligible for short-term disability benefits pending completion of certain paperwork, and Owen explained how Sherry could apply

for discretionary leave under the policy. Mrs. Sherry completed all of the paperwork, and gave it to Sherry's doctors for them to complete their portion. On July 12, 2017, Mrs. Sherry submitted Sherry's paperwork for the discretionary leave and reported that Sherry's doctors determined that he would need six weeks of treatment, which included an abscess bag to drain the fluid from his liver and a self-administered intravenous antibiotic drip. Sherry requested leave until August 29, 2017.

On July 14, 2017, City administration met to discuss whether to grant Sherry the requested discretionary leave. They decided that they would not approve the leave because it was not in the City's best interests. They discussed Sherry's long record of impairments and that they did not know when he would return, and they decided not to hold his position open indefinitely. Owen called Mrs. Sherry to notify her that the City was terminating Sherry.

On July 18, 2017, Mrs. Sherry inquired whether Sherry could be rehired at his prior pay rate and keep his seniority and time accrued toward retirement. The City responded that if Sherry were to be rehired, it would be at the beginning pay rate for whatever position he was able to fill, which would probably be \$13 per hour. The City told Mrs. Sherry that this was because if it hired Sherry in his prior position with his prior pay, the union would file a grievance. Sherry would have retained his position and pay rate had he been granted discretionary leave.

Sherry recovered from his infection within the time frame the doctors had estimated would be required and, since he had been terminated by the City, went ahead and had the Whipple surgery for his pancreatitis in September of 2017. Sherry has not had a

pancreatitis attack since the surgery. He has worked steadily for another employer but has not been able to attain his former rate of pay. The City did not fill Sherry's position for almost a year, and it ultimately hired someone with less experience than Sherry.

Sherry filed suit against the City in May of 2018, claiming discrimination under the MHRA. Sherry's prayer for relief pleaded for "an award of compensatory and punitive damages, pre-judgment and post-judgment interest as provided by law, for his costs expended, reasonable attorneys' fees, and for such other relief as this Court deems just and proper, including equitable relief." A jury awarded Sherry \$300,000 in actual damages but declined to award punitive damages. Sherry filed a post-trial motion for attorneys' fees, costs, and equitable relief in the form of front pay, since the City had stated it could not reinstate Sherry at his former position and rate of pay. Sherry provided an affidavit and expert report of economist Dr. Kurt Krueger. The report calculated Sherry's front pay, which the report defined as future lost wages and benefits over what he was receiving at his new employment over the approximately five years until his estimated retirement, reduced to present value. The City opposed Sherry's request, arguing, as relevant to this appeal, that Sherry did not sufficiently plead for front pay damages. The City requested a hearing on whether Sherry might be reinstated at his former job with the City, but it later withdrew its request for a hearing. The trial court declined to award front pay and also denied the City's motion for judgment notwithstanding the verdict claiming that Sherry failed to make a submissible case of discrimination under the MHRA. This appeal follows.

Trial Court's Denial of Motions for Judgment Notwithstanding the Verdict

We first examine the City's points on appeal, because if the City's cross appeal is successful, it would be unnecessary to address Sherry's single point on appeal. We begin with the City's first two points on appeal; each claims the trial court erred in denying the City's motion for judgment notwithstanding the verdict.

Standard of Review

In reviewing a denial of a motion for directed verdict or for judgment notwithstanding the verdict, "we review the record to determine whether the plaintiff made a submissible case." *Bowolak v. Mercy E.t Cmtys*, 452 S.W.3d 688, 695 (Mo. App. E.D. 2014). "To make a submissible case, a plaintiff must demonstrate that each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case." *Id.* (quoting *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 866 (Mo. App. E.D. 2009). "[W]e review the evidence in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with the verdict." *Id.* "Where reasonable minds can differ on the question before the jury, we will not disturb the jury's verdict." *Id.*

Discussion

The City's first point argues the trial court erred in refusing to grant its motion for judgment notwithstanding the verdict because Sherry did not prove that he was disabled in that he was not able to perform the essential function of attending work regularly. Section

213.010(5) of the MHRA defines "disability" as "a physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job. . . ." Certainly, being unable to attend work regularly would interfere with performing most jobs. The City relies heavily on *Medley v. Valentine Radford Communications, Incorporated*, 173 S.W.3d 315 (Mo. App. W.D. 2005). *Medley* does state that "an employee who cannot regularly come to work is not able to satisfy any functions of the job, let alone the essential ones." *Id.* at 322. *Medley* goes on to state, "An employer is not required to put up with employees who do not come to work and is not required to provide indefinite leaves of absence." *Id.* at 323.

But *Medley* does not hold that a leave of absence is an unreasonable accommodation as a matter of law, as the City urges us to read it. In fact, *Medley* is careful to distinguish other cases where extended leave was found to be a reasonable accommodation. *See, e.g., Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000). *Medley* did not thoroughly analyze whether leave would have been appropriate or possible for Ms. Medley's position other than to say that attendance was important. The Court discussed how Ms. Medley's job could not have been done part-time or from home, but did not factor in that other employees had presumably been doing Ms. Medley's job when she was out with her illness, and other employees absorbed all of her duties after she was terminated; she was not replaced. *Id.* at 318. The Court in *Medley* seemed to focus on the fact that Ms. Medley failed to follow her employer's procedures for times when she had to miss work

due to her illness—she often did not obtain doctors' notes or seek to use the various leave options established by her employer—the Court mentions this fact repeatedly throughout the opinion, even distinguishing *Garcia-Ayala* on that basis. *Id.* at 322. The Court also pointed out that Ms. Medley had missed fifteen weeks of work out of the only twelve months that she was employed. *Id.* at 315. The Court emphasized that Ms. Medley was seeking "an indefinite leave of absence," and that her employer had "no way of knowing when she would be able to work regularly." Here, in contrast, Sherry's doctor had given an estimate of the time he would need for his recovery, so the requested leave was less indefinite.³

The present case is also unlike *Medley* in that there was no evidence that Sherry ignored or abused the City's leave procedures for his various illnesses. During the fourteen-plus years that he was employed with the City, he always obtained medical records to support his absences, and he used the various leave options that the City provided: sick days, vacation, comp time in lieu of overtime, and FMLA leave. All of these were benefits offered by the City, and the City's water operations were able to carry on in Sherry's absences. His replacement was not hired until a year after his termination. Even after Sherry had used all of the leave automatically available to him, the City had a policy in place to provide for discretionary unpaid leave, for which Sherry had applied, providing the accompanying requested medical records. That the City offered discretionary leave to all of its employees who had worked for the City for a minimum of twelve months shows

³ This should not be read to foreclose a situation where a factfinder may determine that a requested leave started out as a reasonable accommodation but becomes unreasonable as time wears on or as circumstances change.

that it deemed extended leave a reasonable accommodation in at least certain circumstances.

The Eastern District of this Court recognized in *Lomax v. DaimlerChrysler Corporation*, 243 S.W.3d 474 (Mo. App. E.D. 2007), that, consistent with *Medley*, providing a disabled employee with extended leave could constitute a reasonable accommodation depending on the facts of a particular case, including whether the "employee complied with [the employer's] short-term leave policy and could be easily replaced by temporary workers." *Id.* at 481. *Lomax* reversed the grant of summary judgment to an employer, finding that genuine issues of material fact existed as to whether additional leave time was a reasonable accommodation which should have been made available to the employee. *Id.*

In any event, whether an employee meets the definition of disabled under the MHRA because he can perform a job with a reasonable accommodation in any particular case is a question of fact to be determined by the jury, and the reasonableness of the accommodation requested depends on such factors as "the size and nature of the employer, the number and type of its facilities, and the structure and composition of its work force compared to the costs of providing the accommodation." *Balderidge v. Kan. City Pub. Schs.*, 552 S.W.3d 699, 710 n.8 (Mo. App. W.D. 2018); *see also Lomax*, 243 S.W.3d at 481. The jury in this case examined the evidence and concluded that Sherry was disabled under the MHRA, necessarily finding that his requested accommodation of discretionary leave to recover from his illness was reasonable. We will not disturb the jury's findings on appeal. The City's first point is denied.

The City's second point on appeal is that the trial court erred in denying its motion for judgment notwithstanding the verdict because Sherry did not prove that he was disabled pursuant to the MHRA in that his E. coli infection was a "temporary recoverable illness," which is not a substantially limiting impairment. The City compares Sherry's condition, which had caused him substantial physical difficulties for several years and required numerous hospitalizations and surgeries, to an employee who "suffered a broken leg in an automobile accident, and had to be off work for 6-8 weeks to heal." We find this comparison less than compelling.

For this point, the City points to Missouri's regulations relating to "Handicap Discrimination in Employment," 8 CSR 60-3.060(1). The regulations do, as the City points out, except certain temporary conditions from the definition of physical impairment.⁴ 8 CSR 60-3.060(1)(B)(1) does not refer to any and all temporary recoverable illnesses but rather provides, "*Minor* temporary illnesses shall not be considered physical or mental impairments resulting in a disability. Examples of minor temporary illnesses include, but are not limited to, broken bones, sprains[,] or colds[.]" (Emphasis added). Although Sherry's E. coli infection, which exacerbated his pancreatitis, was temporary and, ultimately, recoverable, it was not minor. Sherry was hospitalized and placed in intensive care. He required a drain on his liver and intravenous antibiotics for an extended period of time. He was unable during this time even to communicate with his employer, and his wife

⁴ 8 CSR 60-3.060(1)(A)1 defines a physical or mental impairment as "[a]ny physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one (1) or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genito-urinary; hemic and lymphatic; skin; and endocrine[.]"

had to communicate for him. He required six weeks to recover from the infection, which included an abscess bag to drain the fluid from his liver and a self-administered intravenous antibiotic drip, and then had a second surgery to alleviate the pancreatitis.

The City compares Sherry's ailments to an employee's acute MS episode in a Tenth Circuit, Americans with Disabilities Act case, *Sorenson v. University of Utah Hospital*, 194 F.3d 1084 (1999). In *Sorenson*, the employee had an episode of MS that left her completely unable to care for herself for one week, but allowed her to continue her work as a nurse after the episode. *Id.* at 1085. The City claims that this supports its position that a temporary impairment does not render an employee disabled. We are unpersuaded. The employee in *Sorensen* was fully able to resume her work as a nurse after her episode; she did not require leave as an accommodation or any other accommodation whatsoever. *Id.* Rather, Ms. Sorensen was found not to be disabled under a completely different statute, the ADA, with a different definition of disability, and the court found that she failed to meet that statute's definition of disability because her MS only precluded her from safely performing the particular job of an AirMed Flight Nurse, and the court concluded that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* at 1088 (quoting 29 C.F.R. § 1630.2(j)(3) (emphasis in original)). Thus, *Sorenson* is inapposite.

The evidence in this case supports an inference by the fact finder that the severity of Sherry's E. coli infection was increased due to his pancreatitis and his prior treatment for cancer, which left him more prone to illness and infections, and while an E. coli infection might not constitute a "physical impairment" under the MHRA and the

accompanying regulations for every person in every circumstance, we are unwilling to say that such an infection, especially in combination with other ailments, cannot constitute a physical impairment in any person and under any circumstance as a matter of law.⁵

Finally, the City claims that the trial court erred in denying its motion for judgment notwithstanding the verdict because Sherry did not provide substantial evidence of a "record of impairment." This argument was not preserved as it appears nowhere in the City's motion for directed verdict, and we therefore do not address it further.

The City's second point on appeal is denied.

Jury Instructions

The City's third point on appeal is that the trial court erred in submitting the verdict director to the jury because MAI 38.01(B) contains a "defect" in that it misstates the law because it does not require the jury to find that the employee was disabled by an impairment of record. The paragraph of the verdict director which the City finds objectionable reads:

First, plaintiff had a physical impairment or **physical impairment of record that substantially limits one or more of plaintiff's major life activities;**

Standard of Review and Discussion

The City concedes that the verdict director was based on MAI 38.01(B) and that the City did not preserve this alleged error by objecting to the verdict director on this basis at trial. Nonetheless, it urges the Court to review this issue *de novo* or, in the alternative, for

⁵ Moreover, the pancreatitis itself was a physical impairment under the MHRA. It caused Sherry to miss work several times over a period of roughly two years, required multiple hospitalizations, and ultimately required two surgeries (gall bladder removal and the Whipple surgery) to alleviate.

plain error. In civil cases, courts may review unpreserved errors for plain error, in their discretion, "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 84.13(c).⁶

We do not find that manifest injustice or miscarriage of justice occurred in this case, and so we decline to conduct the requested plain-error review. The verdict directed to the jury was based on an MAI instruction, which is presumed to be correct and is required to be given to the exclusion of any other instruction on the same subject. *SKMDV Holdings, Inc. v. Green Jacobson, P.C.*, 494 S.W.3d 537, 553, 555 (Mo. App. E.D. 2016). The City contends that the instruction misstates the law and confused the jury in that it erroneously allowed the jury to find a "physical impairment of record that substantially limits one or more of plaintiff's major life activities," while it is a "legal impossibility" that an impairment of record limits a plaintiff's major life activities. Rather, the City contends, an impairment of record can only be perceived by the employer as limiting the employee's activities while it in fact does not. This contention is refuted by *Bowolak*, 425 S.W.3d at 688. *Bowolak* expressly found that record of impairment, being regarded as having an impairment, and having an actual impairment were "not inconsistent and/or mutually exclusive conditions." *Id.* at 696, n.5. The City's third point on appeal is denied.

Sherry's Infection as a Work-Related Illness

⁶ All Rule references are to the Missouri Supreme Court Rules (2020), as updated by its August supplement.

The City's fourth point on appeal is that the trial court erred in allowing Sherry to present evidence of and to mention in argument that Sherry's E. coli infection could have been contracted through his work with the City.

Standard of Review

A trial court has considerable discretion in the admission of evidence at trial, and an appellate court will reverse only for an abuse of that discretion. *Secrist v. Treadstone, LLC*, 356 S.W.3d 276, 280 (Mo. App. W.D. 2011). "A ruling constitutes an abuse of discretion when it is 'clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" *Cox v. Kan. City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. banc 2015). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014). Furthermore, to warrant reversal, the admission of any evidence, even if admitted in an abuse of the trial court's discretion, must have prejudiced the objecting party by materially affecting the merits of the action. *Cox*, 473 S.W.3d at 114.

Discussion

At several points during the trial, evidence was presented speculating that Sherry could possibly have contracted his E. coli infection during his work with the City. Soon after he developed his infection, Sherry even considered filing a workers' compensation claim, and Sherry's wife said as much in an email to a City employee. At trial, the City's attorney argued that Sherry's illness was not work-related, and asked several witnesses

about the possibility of Sherry's illness being work-related or whether other water department employees had ever contracted E. coli infections at work. On cross-examination, both Sherry and his wife admitted they were not sure whether Sherry contracted his infection through his work, and Mrs. Sherry testified that he never filed the workers' compensation claim for this reason. The City's counsel reiterated during closing argument that no one knew how Sherry had contracted his infection and that no other City employee had ever contracted E. coli from work. We conclude that the brief speculation that Sherry's infection could have been contracted while he was at work was insufficient to affect the merits of the action. As such, we find no cause for reversal on this basis, and the City's fourth point is denied.

Instructional Error

The City's fifth and final point on appeal also alleges instructional error in that it allowed the jury to consider whether the City's refusal to credit Sherry for his service upon rehire constituted discrimination because Sherry never in fact reapplied to work for the City after his termination.

Standard of Review

Whether a jury was properly instructed is a matter of law which we review *de novo*. *Hervey v. Mo. Dept. of Corr.*, 379 S.W.3d 156, 159 (Mo. banc 2013). "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" to warrant reversal. *Id.*

Discussion

Instruction 6, to which the City objected, read as follows:

Your verdict must be for plaintiff Kevin Sherry against defendant City of Lee's Summit, Missouri, if you believe:

First, plaintiff had a physical impairment or physical impairment of record that substantially limits one or more of plaintiff's major life activities;

Second, such impairment did not interfere with performing the job in question if provided reasonable accommodation;

Third, defendant City of Lee's Summit, Missouri, either

terminated plaintiff; or

did not offer plaintiff short-term disability, or

did not offer plaintiff discretionary leave, or

would not credit plaintiff for his years of service when determining his pay upon re-employment, and

Fourth, plaintiff's disability was a contributing factor in defendant's decision to terminate plaintiff's employment, its decision not to offer short-term disability, its decision not to offer discretionary leave, or **its decision not to credit plaintiff's years of service when determining pay upon re-employment, and**

Fifth, as a direct result of such conduct, plaintiff sustained damage.

(Emphasis added).

Sherry was not required to have actually reapplied for employment with the City for this verdict director to have been supported by substantial evidence. Mrs. Sherry testified that following Sherry's termination and while he was hospitalized, she inquired whether Sherry could be rehired at his prior pay rate. City responded that, due to union considerations, Sherry could only be rehired for an introductory position at the introductory pay rate of \$13 per hour instead of the \$24 per hour that he was earning as an equipment

operator at the time of his termination. Also, at the trial, Mark Schauffler, the Director of Water Operations, affirmed in his testimony that Sherry would not be able to return at his former position and pay rate if he were to seek re-employment. And although it took a year for the City to replace Sherry, his former position had since been filled. This evidence is sufficient to allow the jury to find that the City discriminated against Sherry by failing to credit his fourteen years of service when determining his pay rate upon re-employment without Sherry having to go through the futile gesture of actually applying for such re-employment.⁷ Accordingly, the City suffers no prejudice by the inclusion of the instruction, and the City's fifth point on appeal is denied.

Equitable Relief

We next move to Sherry's single point on appeal, which is that the trial court abused its discretion in declining to award him front pay after the jury found that his termination was discriminatory on the basis of his disability.

Standard of Review

A review of a trial court's refusal to amend a judgment is for abuse of discretion. *Coyle v. City of St. Louis*, 408 S.W.3d 281, 291 (Mo. App. E.D. 2013). "As an equitable

⁷ We find somewhat analogous a case involving another portion of the MHRA, *Van Den Berk v. Mo. Commission on Human Rights*, 26 S.W.3d 406 (Mo. App. E.D. 2000). *Van Den Berk* notes that the MHRA, as it applies to housing, finds as a discriminatory practice a refusal to negotiate with members of a protected class as well as a refusal to rent to them, and states:

Common sense dictates that when a landlord refuses to negotiate, an offer to rent becomes an exercise in futility. The purpose of the statute is frustrated if we require the victim of a landlord's refusal to negotiate to prove the elements of a refusal-to-rent case because a refusal to negotiate accomplishes the identical discriminatory result as a refusal to rent. Therefore, a prospective tenant faced with a landlord's refusal to negotiate does not have to make an offer to rent in order to raise a housing discrimination claim.

Id. at 412-13.

remedy, the decision to award or deny front pay falls within the discretion of the trial court." *Pitcher v. Centene Corporation*, 602 S.W.3d 216, 243 (Mo. App. W.D. 2020) (citing *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 524 (Mo. banc 2009)).

Discussion

As Sherry points out, the MHRA makes equitable relief, in the form of either reinstatement or front pay,⁸ available to a plaintiff who has suffered discrimination. The objective of equitable relief is to make the plaintiff whole. *Id.* In *Coyle*, the city employer conceded that front pay was appropriate, the employee having established his case for discrimination, and this court merely remanded for a determination of the proper amount. 408 S.W.3d. at 292. However, an award of front pay is not mandatory when reinstatement is not feasible, even when discrimination has been established as equitable relief is discretionary.

In *Gilliland*, also cited by Sherry, the Missouri Supreme Court noted that, while a trial court, pursuant to section 213.111⁹ "can consider front pay in lieu of reinstatement[, as] an equitable remedy, the decision to award or deny front pay falls in the discretion of the trial court." 273 S.W.3d at 524. *Gilliland* was unusual in that the plaintiff's MHRA claims were all unsuccessful, and he prevailed on a common law constructive-discharge claim, but the Court still addressed the trial court's discretion and surmised that "the trial

⁸ "Front pay is an equitable remedy, an offshoot of the court's equitable power to grant reinstatement and otherwise make whole a victim of discrimination." *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 524 (Mo. banc 2009). "The term 'front pay' describes a lump sum representing the discounted present value of the difference between the earnings an employee would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment." *Id.* at 520 n.3 (internal citations and quotation marks omitted).

⁹ In *Gilliland*, the Supreme Court cites to section 213.211, which does not exist in RSMo. We believe the Court intended to cite to section 213.111.

court determined that front pay was unnecessary because the jury's award of \$60,000 sufficiently compensated Gilliland for his loss." *Id.* The statute specifically prefaces the equitable remedies with the word "may" when it provides that "[t]he court may grant as relief, as it deems appropriate . . ." making the grant or denial of equitable relief always a discretionary decision of the trial court. However, the legislature when it adopted the MHRA expressed its intent that a person subject to discrimination should be made whole both for the past damages that have occurred as well as authorizing punitive damages and various equitable remedies. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 88-89 (Mo. banc 2003) (citing section 213.111). Those equitable remedies include reinstatement, or front pay in lieu of reinstatement. Accordingly, to refuse to compensate a victim of discrimination for the future damages caused by the inability of the employee to be reinstated appears inconsistent with the intent of the legislature. *See Berry v. Volkswagen Grp. of Am., Inc.*, 397 S.W.3d 425, 433 (Mo. banc 2013).

In this case, the issue of front pay was extensively briefed by both parties in their respective post-trial motions. There is no question the trial court had sufficient guidance before it to make this discretionary call. The evidence presented at trial was that Sherry's lost wages up to the date of trial were \$30,880 and the jury awarded \$300,000 compensatory damages, which included his emotional damages. The expert's report, presented to the court post-trial, concluded that Sherry's potential claim for front pay, discounted to present value of future lost wages and benefits for approximately five years until the age of retirement was \$182,082. We conclude that in this case, it was within the trial court's discretion after consideration of all of the evidence including the sum awarded

to Sherry by the jury to determine that front pay would not be awarded in this case. We cannot say that the trial court abused its discretion in this regard. Sherry's point on appeal is therefore denied.

Conclusion

For all of the above-stated reasons, we affirm the judgment of the trial court in all respects. Sherry filed a motion with this court for an award of his attorneys' fees on appeal pursuant to section 213.111 and Local Rule 29, which we took with the case. Sherry's motion is granted, and while appellate courts have the authority to award attorney fees on appeal, because the trial court is better equipped to hear evidence and determine the reasonableness of the fee requested, we remand to the trial court to determine a reasonable award of attorneys' fees on appeal. *Goins v. Goins*, 406 S.W.3d 886, 892 n. 1 (Mo. banc 2013).



Gary D. Witt, Judge

All concur