MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES K. SHERRY

APPELLANT-RESPONDENT,

v.

CITY OF LEE'S SUMMIT, MISSOURI

RESPONDENT-APPELLANT.

DOCKET NUMBER WD83635 Consolidated with WD83671

DATE: March 9, 2021

Appeal From:

Jackson County Circuit Court
The Honorable Cory L. Atkins, Judge

Appellate Judges:

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

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Attorneys:

Anne W. Schiavone, Kansas City, MO and Amy P. Maloney, Seattle, WA,
for appellant-respondent.

Zachary T. Cartwright, Jr., Lee's Summit, MO, for respondent-appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES K. SHERRY, APPELLANT-RESPONDENT,
v.
CITY OF LEE'S SUMMIT, MISSOURI, RESPONDENT-APPELLANT.

WD83635 (Consolidated with WD83671) Jackson County

Before Division Three Judges: 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") and attorneys' fees of $220,807 against his former employer, the City of Lee's Summit, Missouri ("City"). On appeal, Sherry claims that the 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. Sherry appeals the trial court's denial of his request for an award of front pay.

AFFIRMED AND REMANDED FOR A DETERMINATION OF APPELLATE ATTORNEYS' FEES.

Division Three holds:

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 . . . ." While being unable to work regularly would interfere with performing most jobs, each case depends on the circumstances, and, if an employer is able to accommodate an employee's request for an extended leave of

absence without incurring an undue burden, extended leave may be a reasonable accommodation for a disabled employee under the MHRA.

Missouri's regulations relating to handicap discrimination in employment except minor temporary illnesses from the definition of physical impairment, but Sherry's E. coli infection, which exacerbated his pancreatitis, was not minor, even though it was ultimately recoverable. He was placed in intensive care and required a drain on his liver and intravenous antibiotics for an extended period of time. He then required a second surgery for the pancreatitis. This was sufficient for a jury to find that it constitutes a physical impairment under the MHRA.

The City did not object to Sherry's offered verdict-directing instruction at trial, which was based on MAI 39.01. We do not find that manifest injustice or miscarriage of justice occurred, so we decline to review the instruction for plain error.

There was no abuse of the trial court's discretion in allowing Sherry to present limited evidence of and to mention in argument that Sherry's E. coli infection could have been contracted through his work with the City. Both Sherry and his wife testified that they did not know how Sherry obtained the infection, and the City presented evidence that no other City employees contracted an E. coli infection.

There was no error in the verdict directing instruction allowing the jury to find discrimination in the City's refusal to credit Sherry's years of service when determining his pay upon re-employment. City employees testified that Sherry would not have been able to return at his former position and former rate of pay upon re-employment, due to union issues. Accordingly, Sherry was not required to go through the futile gesture of reapplying.

The award of front pay is an equitable remedy and is discretionary and the trial court did not abuse its discretion in refusing to award front pay, even though Sherry was not reinstated at his former position. Based on the totality of the evidence and circumstances we do not find the trial court abused its discretion in failing to award Sherry front pay.

Opinion by: Gary D. Witt, Judge March 9, 2021

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