IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DIMPLE "DENISE" KELLY,	)	
	)	
Appellant,	)	
	)	
v.	)	WD83742
	)	
CITY OF LEE'S SUMMIT, MISSOURI,	)	Opinion filed: March 30, 2021
	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JAMES F. KANATZAR, JUDGE

Division Two: W. Douglas Thomson, Presiding Judge,
Alok Ahuja, Judge and Edward R. Ardini, Jr., Judge

Dimple "Denise" Kelly appeals from the trial court's judgment in favor of the City of Lee's Summit, Missouri, on her claim of wrongful termination under the Missouri Human Rights Act. In her sole point on appeal, Kelly contends that the trial court erred in overruling her objection to the City's lawful justification instruction because it impermissibly modified MAI 38.02. We reverse and remand.

Factual and Procedural History

On July 24, 2014, Dimple Denise Kelly ("Kelly") was hired by the City of Lee's Summit, Missouri, (the "City") as its director of human resources. Kelly is a Black woman with several years of experience in human resources. (Legal File, page 32). At the time of her hiring, she was 58 years old. Upon beginning her employment with the City, Kelly executed a Management Agreement. Under the terms of the Management Agreement, Kelly could be terminated by the City "without cause, while Ms. Kelly is willing and able to perform [her] duties . . . ."

On March 24, 2017, the City terminated Kelly's employment without cause. At the time Kelly was discharged, she was 61 years old. Pursuant to Kelly's timely request under Section 290.140,[1] the City issued its letter of dismissal notifying Kelly that although terminated without cause, "the reason for [her] termination was overall unacceptable performance." The letter then described in detail the purported deficiencies in Kelly's work performance, under four headings: "[f]ailure to understand policies, procedures, ordinances, laws and processes"; "[i]naccurate and late work product"; "[f]requent shifting of responsibility for assigned work"; and "[i]neffective leadership."

On May 25, 2018, Kelly filed a petition against the City alleging racial, age, and sex/gender discrimination in violation of the Missouri Human Rights Act

[1]All references to Sections are to the Revised Statutes of Missouri 2013, unless otherwise indicated.

("MHRA"), pursuant to Section 213.055 *et seq*.[2] On February 24, 2020, a jury trial commenced. At trial, Kelly acknowledged that, under the terms of the Management Agreement, the City retained the right to terminate her employment without cause, or without providing her a reason for such termination. Likewise, Kelly acknowledged that, under the Management Agreement, the City was not required to provide her notice prior to terminating her employment. Nevertheless, the bulk of the City's evidence introduced at trial consisted primarily of Kelly's poor work performance. At the close of all evidence, the City submitted Missouri Approved Jury Instruction (Civil) (7th ed.)[3] ("MAI") 38.02 as its lawful justification converse instruction ("Instruction 9"). As proposed by the City, Instruction 9 modified MAI 38.02 by omitting the word "because" and stating that Kelly was terminated "under the Management Agreement 'without cause.'" Kelly objected to Instruction 9, arguing that "it does not hypothesize a reason," insisting that "the lawful justification instruction requires that [the City] state the reason for the termination." The trial court overruled such objection and submitted Instruction 9 to the jury in due course.

The parties thereafter proceeded to closing arguments. During closing argument, City's counsel made several statements that any evidence concerning Kelly's job performance is not to be a factor in the jury's determinations, and instead that the sole "issues in this case are race, age, and sex/gender."

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[2]Section 213.055.1 states, in pertinent part: "It shall be an unlawful employment practice: (1) [f]or an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual: (a) . . . to discharge any individual . . . ."

[3]MAI 8th edition, though published in 2020, was approved for use effective January 1, 2021, and thus is not applicable to the trial of this case.

Following deliberations, the jury returned its verdict for the City. On March 3, 2020, the trial court entered its judgment. On April 2, 2020, Kelly filed a motion for new trial, which the trial court denied on April 13, 2020. Kelly now appeals from the trial court's judgment.

Standard of Review

"Whether the trial court properly instructed the jury is a question of law that we review *de novo*." *Massood v. Fedynich*, 530 S.W.3d 49, 61 (Mo. App. W.D. 2017) (citing *Hervey v. Mo. Dep't of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012)).

> To reverse on grounds of instructional error, the party challenging the instruction must show that the instruction misled, misdirected, or confused the jury. Further, "[t]he party offering the erroneous instruction has the burden of showing that the erroneous instruction 'created no substantial potential for prejudicial effect.'" It is within the province of this court to determine the prejudicial effect of the erroneous instruction.

Abbott v. Missouri Gas Energy, 375 S.W.3d 104, 107 (Mo. App. W.D. 2012) (internal citations omitted).

Analysis

In her sole point on appeal, Kelly argues that the trial court erred in overruling her objection to Instruction 9 because it impermissibly modified MAI 38.02 and thereby prejudiced her. Kelly claims that Instruction 9 was impermissibly modified because (1) the City's instruction failed to hypothesize the asserted lawful justification for the termination of her employment and (2) the City failed to include the pattern instruction's mandatory causation language in removing the word "because."

"Generally, at-will employees may be terminated for any reason or for no reason." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 91 (Mo. banc 2010) (quoting *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. banc 1988)). "As a matter of law, the discharged at-will employee has no cause of action for wrongful discharge." *Id*. However, "the MHRA modifies the at-will employment doctrine by instructing employers that they can terminate employees, but their reason for termination cannot be improper." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d at 94 (citing Section 213.055.1). "Under the MHRA, if race, color, religion, national origin, sex, ancestry, age, or disability of the employee was a 'contributing factor'[4] to the discharge, then the employer has violated the MHRA." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d at 94. If, as claimed by Kelly, race, age or sex is a contributing factor to an employee's termination, then the termination is for an improper reason. Conversely, an employer may provide evidence that termination occurred for a proper, or *lawful, reason* – a lawful justification.

To that end, if supported by the law and the evidence, a defendant (employer) may request a "lawful justification" instruction. MAI 38.02, Notes on Use[5] (2017

[4]"Contributing factor" was the standard applicable to Kelly's claim. However, the standard has since been changed to "motivating factor," pursuant to S.B. 43 which became effective August 28, 2017, after Kelly's discharge.

[5]"'From the strict adherence to M.A.I. so often and forcefully reiterated by the Supreme Court, has developed the equally forcible admonition that the "Notes on Use" thereof be religiously followed.'" *Clark v. Mo. & N. Ark. R.R.*, 157 S.W.3d 665, 671 (Mo. App. W.D. 2004) (quoting *Royal Indem. Co. v. Schneider*, 485 S.W.2d 452, 458 (Mo. App. W.D. 1972)). "And, since 'MAI instructions, promulgated and approved by the Supreme Court, are authoritative if applicable to the factual situation . . . this court, as was the trial court, is bound by them as surely as it is bound by Supreme Court cases and rules.'" *Clark*, 157 S.W.3d at 671 (quoting *Lindsay v. McMilian*, 649 S.W.2d 491, 493-94 (Mo. App. W.D. 1983)).

Revision). MAI 38.02 instruction, titled "Missouri Human Rights Act – Lawful Justification," is this "lawful justification" instruction, and reads as follows:

> **Your verdict must be for defendant if you believe:**
>
> **First, defendant** (*here insert alleged discriminatory act submitted in plaintiff's verdict directing instruction such as . . . "discharged" . . . .*) **plaintiff because** (*here set forth the alleged lawful reason such action was taken*), **and**
>
> **Second, in so doing** (*here insert the protected classification submitted by plaintiff, such as race, color, religion, national origin, etc.*) **was not a contributing factor.**

MAI 38.02 (underline added). Because it is a converse instruction[6], use of MAI 38.02 is completely at the option of defendant. See MAI 38.02, Notes on Use (2017 Revision). "Lawful justification" may be argued without submission of such an instruction should defendant so desire. *Id.* However, if defendant elects to submit MAI 38.02, "it must be in the form of the MAI 38.02." MAI 38.02.

In the case at hand, the City's proposed Instruction 9 read:

> Your verdict must be for defendant if you believe:
>
> **First, Defendant terminated Plaintiff under the Management Agreement "without cause," and**

[6]We recognize that, in *Gaal v. BJC Health System*, 597 S.W.3d 277 (Mo. App. E.D. 2019), the Eastern District of this Court recently appeared to characterize MAI 38.02 as an *affirmative defense* instruction, rather than as an affirmative converse. *Id.* at 290. The lawful justification "defense" does not appear to fall within the definition of an "affirmative defense," however, since an "affirmative defense" is generally understood to be "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's ... claim, ***even if all the allegations in the complaint are true***." *Allen v. Titan Propane, LLC*, 484 S.W.3d 902, 905 (Mo. App. S.D. 2016) (citations and internal quotation marks omitted). MAI 38.02 seeks to directly contradict one of the essential elements of a plaintiff's cause of action: that a protected characteristic was a contributing factor in an adverse employment action. Thus, it does not appear to be a classic "affirmative defense." If Instruction 9 is properly characterized as an affirmative converse, it appears that the City would not have been entitled to its submission, because the City had separately requested a "true converse" instruction, which was submitted as Instruction 8. Generally, "a defendant is entitled to only one converse instruction for each of plaintiff's verdict directing instructions." *Gaal*, 597 S.W.3d at 289.

> Second, in doing so, neither race, age nor sex/gender was a contributing factor.

City's proposed Instruction 9 modified MAI 38.02 by deleting the word "because." As the 'alleged lawful reason,' City proposed "under the Management Agreement 'without cause.'" Over objection, the trial court approved proposed Instruction 9.

We are guided by Supreme Court Rule 70.02(b)[7] which directs that "[w]henever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." "The law is well-settled that where an MAI instruction applies to the case, the use of such instruction is mandatory." *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 128 (Mo. App. W.D. 2006) (citing *Clark v. Mo. & N. Ark. R.R.*, 157 S.W.3d 665, 671 (Mo. App. W.D. 2004)). In fact, in its Comment titled "How To Use This Book" MAI warns that:

> You may have the ability to improve an instruction in MAI but you do not have the authority to do it. Do not do it. The use of a provided MAI is mandatory. If you think the change of a word or phrase will make it a better instruction, do not do it. You will be falling into error if you do.

MAI, "How To Use This Book" (7th ed.).

Indeed, long ago our Supreme Court made clear the need that "mandatory directions be followed and that the pattern instructions be used as written" to make the "system work" and to "preserve its integrity and very existence[.]" *Brown v. St.*

[7]All references to Rules are to the Missouri Rules of Civil Procedure (2018), unless otherwise noted.

Louis Pub. Serv. Co., 421 S.W.2d 255, 258 (Mo. banc 1967)); *see also Syn*, 200 S.W.3d at 128. In so holding, the *Brown* court explained:

> If counsel are permitted to improve the approved instructions, even within the confines of specific precedents, the value of these instructions will be lost. Each such improvement by one counsel will prompt an offsetting improvement by his opponent and after a while the court will not be able to find the original with a divining rod.

Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d at 258 (internal quotation marks omitted).

When addressing a submitted instruction which deviates from MAI, we perform a four-step analysis:

> First, if the MAI prescribes a particular form of instruction, submission of that instruction is mandatory. If the appropriate MAI instruction is not used, prejudicial error is presumed. Second, the proponent of the instruction bears the burden of demonstrating nonprejudice. The presumed prejudice prevails unless the proponent makes it "perfectly clear" that no prejudice ensued. Third, the appellate court determines if any prejudicial effect is created. Finally, to be reversible, the error must materially affect the merits of the case.

Abbott, 375 S.W.3d at 109 (quoting *Syn*, 200 S.W.3d at 128-29) (citations and footnote omitted).

Addressing the first step of this analysis, we review the submitted MAI converse instruction, 38.02. Initially, we note this instruction need not be given at all. However, if defendant elects to submit it, "it must be in the form of this MAI 38.02". MAI 38.02, Notes on Use (2017 Revision). Here, the City elected to submit the converse instruction. However, not heeding the Notes on Use, the City modified MAI 38.02 by deleting the word "because." As the 'alleged lawful reason,' the City proposed "under the Management Agreement 'without cause.'"

Besides its deletion of the word "because," the City's proffered lawful justification instruction erroneously departed from MAI 38.02 in a second significant respect. In paragraph "First," MAI 38.02 instructs the court to "*set forth the alleged lawful reason*" an adverse employment action was taken. The City inserted the statement that it had terminated Kelly "under the Management Agreement 'without cause.'" But the statement that it had terminated Kelly "without cause" is not a statement of a *reason* for Kelly's termination – it is only a statement that the City did *not* act for particular reasons. The management agreement defines "cause" as: certain criminal convictions or misconduct; "serious breach" of the Agreement or City regulations; or "[n]eglect of duties or general neglect of the business of the City." Thus, "cause" is defined as circumstances rooted in the employee's conduct or work performance. By stating in Instruction 9 that it had terminated Kelly *without* "cause," the City was simply identifying reasons which did *not* explain its termination of Kelly. In its brief and during argument, the City emphasizes that it was entitled to terminate Kelly for "no reason." But a statement that it had terminated Kelly for "no reason," or that it had terminated Kelly in the absence of circumstances constituting "cause," is not a statement of a *reason* for Kelly's termination. Statements that the City did *not* act for certain reasons, or that it acted for "no reason," are not themselves statements of a "lawful reason" for Kelly's termination.

Due to these unauthorized modifications to MAI 38.02, we must presume prejudicial error. Accordingly, the City, as the proponent of modified 38.02, must

demonstrate nonprejudice by making it "perfectly clear that no prejudice ensued." This they cannot do.

The City relies on *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d at 91, merely for the principle that "at-will employees[8] may be terminated for any reason or for no reason," and therefore no lawful reason was required. While this statement succinctly describes the at-will employment doctrine, it does nothing to address the exception to that doctrine created by the MHRA. "[T]he *MHRA modifies the at-will employment doctrine* by instructing employers that they can terminate employees, but their reason for termination cannot be improper." *Fleshner,* 304 S.W.3d at 94 (citing Section 213.055.1). In other words, termination must be for a *lawful reason.* It is *this lawful reason* that MAI 38.02 seeks in paragraph First when stating, "here set forth the alleged *lawful reason* such action was taken."

Therefore, the City's mere reliance on the at-will employment doctrine is misplaced. The City's argument is essentially that their submitted instruction, which only addressed the general at-will employment doctrine, suffices in a case where an exception to the general doctrine was at issue. The City's submitted instruction did not allow the jury to get to the question of whether there was an underlying *lawful reason*, not in violation of the MHRA, why Kelly was terminated. Rather, MAI 38.02 as modified by the City kept the jury from getting to the question of whether there was a lawful reason for discharge by keeping that question at arms-length and simply limiting the jury to deciding whether Kelly was an at-will employee.

[8]Kelly concedes in her brief that she was the contractual equivalent of an at-will employee of the City.

In attempting to demonstrate nonprejudice of its modified instruction, the City also relies on *Koppe v. Campbell*, 318 S.W.3d 233 (Mo. App. W.D. 2010), a quantum meruit case. There, the MAI instruction was modified by the addition of all factors which may be considered in determining the reasonable value of services performed. *Id*. at 245. This court found that such factors were properly considered by the jury, and, accordingly, there was no actual prejudice. *Id*. While the court in *Koppe* noted that the modified MAI instruction actually imposed a greater burden on the party submitting it, *id*. at 246-47, our case is not so similarly situated. Rather, here, the jury was misdirected by not getting to the factual question of whether there was a lawful reason, and not an unlawful reason, for the City to terminate Kelly. Here, the intention of the instruction was thwarted by asking the jury to answer an entirely different question: was Kelly an at-will employee. Notably, in *Koppe*, the only instructions case cited by the City, this Court cautioned parties who consider modifying instructions, stating: "While we do not approve of adding the additional language to [the proposed instruction], and would not recommend that it be done in other cases, no prejudice resulted in this case. *Id*. at 247.

The City has not met its burden of demonstrating nonprejudice, nor have they "made it perfectly clear that no prejudice ensued" by their modified 38.02 instruction. Hence, the presumed error persists and this court must determine if any prejudicial effect is created. *Abbott*, 375 S.W.3d at 109.

MAI 38.02 is the "lawful justification" defense instruction *for employment discrimination. Gaal,* 597 S.W.3d at 289-90. Hence, it is axiomatic that the lawful

reason postulated in the "lawful justification" defense instruction must be a non-discriminatory reason. As submitted by the City and approved by the trial court, the modification to MAI 38.02 is prejudicial, for there was no non-discriminatory reason postulated thereby. Rather than giving a non-discriminatory lawful reason *why* the termination occurred, the instruction simply stated the City *can* take such action. In doing so, the jury was led to believe that they must find for City as to Paragraph First of 38.02 if they believe that "Defendant terminated Plaintiff under the Management Agreement 'without cause.'" The City's submitted instruction simply did not allow the jury to reach the question of whether a *lawful reason* existed for Kelly's discharge. Herein is where the prejudicial effect lies, for this is where the lawful reason to discharge is to be considered by the jury, should an employer desire their lawful reason to be considered. By removing this vital decision from the jury and replacing it with a separate and distinct question of fact, prejudicial effect occurred.

Further, removing the word "because" from Paragraph First in MAI 38.02 and adding the word "under" in its place changes the complexion of the instruction altogether. The definition of "because" is "for the reason that: SINCE." Merriam-Webster Dictionary (11th ed. 2020). In contrast, the definition of "under," as used in this instruction, is "subject to the control of, [i.e.] under the terms of the contract." Merriam-Webster Dictionary (11th ed. 2020) (when used as a preposition). When applying these definitions to Paragraph First of MAI 38.02, the enormity of the change is readily seen. Rather than the instruction stating "Defendant terminated Plaintiff *for the reason that*" along with a lawful reason (such as "her job performance

was unacceptable") as stated in the pattern MAI 38.02, it is wholly changed to "Defendant terminated Plaintiff *subject to the control of* the Management Agreement" as the City's modified 38.02 states. Thus, instead of the question being, was she terminated for a lawful reason, it became could she be terminated under the Management Contract; distinct questions, indeed.

Additional prejudice is shown upon considering the Notes on Use to MAI 38.02, which provide that the "lawful justification" instruction may be submitted "[i]f supported by the law *and the evidence*." (emphasis added). Thus, the use of MAI 38.02 is predicated on the defendant offering evidence of *the lawful reason* for plaintiff's discharge. At trial, in attempting to refute Kelly's claims, the City offered substantial evidence of the nature of Kelly's alleged poor work performance, such as projects Kelly failed to complete, and policies or procedures that Kelly was slow to understand. In fact, all five of the City's witnesses testified primarily to matters that allegedly demonstrated Kelly's deficient work performance. Yet, this evidence, which provides a reason to give the 38.02 legal justification instruction, if at all, was not incorporated into the pattern MAI 38.02 to make a proper instruction. Instead, the City provided a wholly different question to the jury, whether Kelly could be discharged under the Management Agreement, a fact which Kelly had already conceded. Where, as here, the defendant is provided the benefit of the 38.02 converse instruction for lawful justification, yet is able to sidestep the need to provide any lawful reason *at all* and submit a wholly different, contractually-based, cause for termination, prejudice occurs.

Finally, the prejudicial effect of Instruction 9 was furthered by the City's closing argument. The City repeatedly emphasized that evidence regarding Kelly's performance was irrelevant, despite having spent a majority of the trial discussing and introducing evidence relating to Kelly's poor performance. Relying on the modified instruction, the City was able to state to the jury, "[o]ver the last week, *we spent 95 percent of your time talking about something that's not even in the verdict forms that you're given*." The City's closing argument suggested that it was *irrelevant* whether the performance deficiencies it had identified in the service letter as "the reason for [Kelly's] termination" were actually accurate. But this ignores that evidence that an employer's stated reasons for discharge were pretextual can be some of the most powerful circumstantial evidence supporting a discrimination claim:

> Evidence that an employer's explanation for its decision is "unworthy of credence" is one factor that "may well suffice to support liability." "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Indeed, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." And "upon such rejection, [n]o additional proof of discrimination is required."

Ferguson v. Curators of Lincoln Univ., 498 S.W.3d 481, 491 (Mo. App. W.D. 2016) (citations omitted). Despite these bedrock legal principles, however, the City's closing argument – relying on Instruction 9 – told the jury that Kelly's evidence that her purported "overall unacceptable performance" was pretextual was irrelevant. By arguing that Kelly's circumstantial evidence was irrelevant, the City virtually suggested to the jury that only direct evidence of discriminatory animus could support a verdict in Kelly's favor.

Thus, Instruction 9 enabled the City to make such an argument, which misled the jury as to the applicable law. "Although opening and closing statements are not to be considered as evidence at trial, we may consider closing argument in determining whether a contended instructional error had any prejudicial effect." *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 120 (Mo. App. W.D. 2006) (citing *Rudin v. Parkway Sch. Dist.*, 30 S.W.3d 838, 842 (Mo. App. E.D. 2000)).

We recognize that Instruction 9 required the jury to find not only that the City had terminated Kelly "under the Management Agreement 'without cause,'" but also, in paragraph "Second," that "in doing so, neither race, age nor sex/gender was a contributing factor." Paragraph "Second" does not neutralize the prejudicial effect of the erroneous wording of the first paragraph of Instruction 9. The City had separately requested a true converse instruction, Instruction 8, which advised the jury that its verdict must be for the City unless it found that "race, age, or sex-gender was a contributing factor in [Kelly's] discharge." Given Instruction 8, all that was added by Instruction 9 was the direction to the jury to determine whether the City had terminated Kelly "under the Management Agreement 'without cause.'" The instruction as given was prejudicial in that it misled the jury in a manner that materially affected the merits of the case. Kelly should be afforded a new trial.

In this finding, we are reminded of the concluding paragraph of *Abbott*, 375 S.W.3d at 111, in which the court stated:

> In so ruling, we caution counsel to resist the temptation to inject evidentiary or argumentative detail into the otherwise bland statements of law contained in instructions in hopes of gaining some advantage. Further, the circuit court should be alert to such attempts lest the institutional value of pattern

> instructions be lost. Identifying instructions "is a very real and vital duty in the administration of justice and no trial judge can abdicate judicial responsibilities to the discretion of the trial lawyers who prepare the instructions. No judge should fail in this duty upon the premise that if the lawyers want to create error they are free to do so." MAI, "How To Use This Book," p. LIV.

We reverse and remand to the circuit court for a new trial.

W. DOUGLAS THOMSON, JUDGE

All concur.