**MISSOURI COURT OF APPEALS--WESTERN DISTRICT**

**DIVISION II**

**JANET SUTTON, PRESIDING JUDGE**

**ALOK AHUJA, JUDGE,**

**MARK D. PFEIFFER, JUDGE**

**OCTOBER 11, 2023**

**UNIVERSITY OF CENTRAL MISSOURI**

**WARRENSBURG, MISSOURI**

**WD85653**

**Cherylene R. Combs, Respondent,**

**v.**

**Gary Combs, Appellant.**

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Appellant Gary Combs (“Husband”) appeals the judgment of the Circuit Court of Clay County granting Cherylene Combs’ (“Wife”) motion to amend or set aside the judgment of dissolution of marriage and entering an Amended Judgment of Dissolution of Marriage. The parties’ marriage was dissolved by judgment on July 27, 2020. That judgment was entered based on a negotiated settlement between the parties. As part of the judgment, Husband was to pay Wife the sum of $180,000, and the distribution was to occur within 30 days of the dissolution of the marriage. Instead, however, Husband provided for distribution to Wife through a defined contribution plan. Distribution under this plan was made only once Husband reached retirement age, and, even then, only as a monthly benefit. On May 19, 2021, Wife filed a motion to set aside the judgment pursuant to Rule 74.06. Wife contended that the requirement that the $180,000 be paid within 30 days from a liquid retirement account was an integral component of the settlement agreement because Wife was losing the marital home and the payment would allow Wife to obtain permanent housing. Further, the funds available in the benefit plans were insufficient to cover the equalization payment. The circuit court ultimately granted the motion to set aside and entered an Amended Judgment on July 19, 2022. This appeal followed.

Appellant’s point on appeal:

1. The trial court erred granting Wife’s Motion to Amend or Set Aside the Judgment for Dissolution of Marriage, because the finding was an abuse of discretion, in that Wife failed to identify a reason to set aside the Judgment under Rule 74.06 nor did she meet the standard for establishing any of the acceptable reasons to amend or set aside a Judgment under Rule 74.06.

**WD85660**

**Phillip Crisp, Appellant,**

**v.**

**Missouri School for the Deaf, Department of Elementary & Secondary Education, Respondent.**

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Appellant Phillip Crisp appeals from the judgment of the Circuit Court of Boone County finding that the Missouri School for the Deaf, Department of Elementary and Secondary Education (“MSD”) had not discriminated against Crisp. The facts as alleged at trial were that MSD hired Crisp as a custodial supervisor in 2017. He was employed until July 22, 2020. Crisp suffered from a permanent and progressive disease that caused tremors and shaky speech. To compensate, Crisp spoke in a louder voice and changed his hand gestures. Crisp made MSD and the custodial staff aware of his condition. In 2018, MSD made Crisp aware that one of the custodial staff had complained that Crisp was intimidating because of his hand gestures and tremulous voice. Crisp obtained a note from his treating neurologist stating, in part, that he suffers from “essential tremors and tremulous speech due to [his condition].” There was testimony that Crisp provided the note to MSD, but the jury also heard evidence from the MSD’s Human Resources Department that it never received the note. The MSD campus was shut down from March 2020 through June 2020 due to Covid-19; although, during this time, Crisp was scheduled to work two days a week. After June 2020 when the campus reopened, four of the nine custodians under Crisp’s supervision complained to MSD about Crisp’s behavior. Following an investigation, MSD terminated Crisp. Crisp brought suit against MSD for discrimination pursuant to the Missouri Human Rights Act (“MHRA”). Following a jury trial, judgment was entered in favor of MSD. This appeal followed.

Appellant’s points on appeal:

1. The trial court erred in giving Instruction No. 9 for Crisp’s disability discrimination claim because Instruction No. 9 failed to comply with the requirement of an instruction expressing the business judgment rule intended by § 213.101.2, RSMo, in that Instruction No. 9 was not a general instruction expressing the business judgment rule rejected in *McBryde*.
2. The trial court erred in giving Instruction No. 9 for Plaintiff’s MHRA disability discrimination claim because Instruction No. 9 confused and misdirected the jury in that it was an affirmative converse instruction containing detailed evidentiary facts in violation of Rule 70.02 without any paragraph format or conjunctive language, allowing the jury to assume as true disputed matters, altered the required “motivating factor” language of Instruction No. 8, submitted and undefined legal conclusions not reflected in the MHRA and conflicted with the employer's obligation not to discriminate against a disabled employee under § 213.055, RSMo, and 8 CSR 60-3.060 of the MHRA.
3. The trial court erred in giving Instruction No. 14 for Crisp’s retaliation claim because Instruction No. 14 failed to comply with the requirement of an instruction expressing the business judgment rule intended by § 213.101.2, RSMo, in that Instruction No. 14 was not a general instruction expressing the business judgment rule rejected in *McBryde*.
4. The trial court erred in giving Instruction No. 14 for Plaintiff’s MHRA retaliation claim because Instruction No. 14 confused and misdirected the jury in that it was an affirmative converse instruction containing detailed evidentiary facts in violation of Rule 70.02 without any paragraph format or conjunctive language, conflicted with the required “motivating factor” language of Instruction No. 13, submitted undefined legal conclusions not reflected in the MHRA and conflicted with the employer's obligation not to retaliate against an employee under § 213.070, RSMo, of the MHRA.

**WD85920**

**Menard, Inc., Appellant,**

**v.**

**Stephen Barber and Division of Employment Security, Respondents.**

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Appellant Menard, Inc. (“Menard”) appeals the determination of the Labor and Industrial Relations Commission (“Commission”) finding that their former employee, Stephen Barber, was entitled to unemployment compensation benefits. The facts before the Commission were that Barber had been employed by Menard from December 29, 2016, until February 10, 2021. Shortly before his termination, Barber had been on medical leave which caused a deactivation of the “payroll function” of his employee badge that allowed employees to make purchases using their badge. On February 1, 2021, Barber attempted to buy a candy bar and soda, totaling $3.56, as a snack during his break. Because his payroll function was still deactivated, he was unable to complete the purchase. He, however, still took the snacks to the breakroom and consumed them. Barber testified that he intended to pay for the items at the end of his shift and he informed his employer immediately of the issue with his badge. On February 5, 2021, Barber informed Menard that he would be absent from work for surgery related to a previous workplace injury. Menard terminated Barber on February 10, 2021, for theft. Barber paid the store $3.56 before leaving the store on that date. Barber sought unemployment benefits. Menard challenged Barber’s eligibility claiming that he has been terminated for violating the store’s zero tolerance policy against theft. Initially, a deputy at the Division of Employment Security determined that Barber was disqualified from receiving unemployment benefits because he committed misconduct for consuming merchandise before paying for it. The Appeals Tribunal reversed the determination. The Commission affirmed the decision of the Appeals Tribunal. This appeal followed.

Appellant’s points on appeal:

1. The Labor and Industrial Relations Commission erred in affirming the decision of the Appeals Tribunal because under RSMo § 288.210 there was not sufficient competent evidence supporting the decision, in that the testimonial evidence indicated that Respondent was discharged for misconduct connected with his work under RSMo § 288.050.2, as he was terminated by Appellant for theft in violation of company policy.
2. The Labor and Industrial Relations Commission erred in affirming the decision of the Appeals Tribunal because under RSMo § 288.210 the facts found by the Commission do not support the award in that the facts found by the Commission demonstrate the Respondent was discharged for misconduct connected with work under RSMo § 288.050.2, as he was terminated by Appellant for theft in violation of company policy.

**WD86026**

**Lance Lanier, Appellant,**

**v.**

**City of Columbia, Missouri, Respondent.**

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Appellant Lance Lanier appeals the decision of the Labor and Industrial Relations Commission (“Commission”) finding that, although Lanier had been involved in a work place accident, he had not met his burden of proof to show that the accident was the prevailing factor in causing his resulting medical condition and injury. The facts as alleged to the Commission are that Lanier was an employee of the City of Columbia Fire Department on one of its HAZMAT and rescue teams. Lanier testified that he injured his left shoulder in January 2017 while responding to a structure fire. Between January 2017 and December 2017, Lanier testified that he had no physical issues with his shoulder. On December 1, 2017, Lanier was participating in a high-rise training exercise. During the exercise, Lanier experienced two injuries. During one exercise a hose Lanier was carrying got caught, and he began to fall but was able to grab the railing and prevent the fall. He testified that at this point his right shoulder started to hurt. During a different exercise, Lanier was carrying a dummy victim, and he believed that the movement required to move the dummy around corners reinjured his left shoulder. Lanier, however, completed the training exercise. Lanier testified that, following the training, he informed his lieutenant that his shoulders were hurting. He was taken to Boone Hospital for evaluation. Ultimately, Lanier had surgery on his right shoulder on January 20, 2018, and his left shoulder April 26, 2018. Appellant continued to have problems but was released at maximum medical improvement in October 2019. The Commission adopted the findings and recommendations of the Administrative Law Judge. Those findings were that the there was an accident on December 1, 2017, but that Lanier failed to meet his burden of proof to demonstrate that, the accident was the prevailing factor in causing his injuries. The Commission found that because the accident was not the prevailing factor, Lanier was not entitled to worker’s compensation benefits. This appeal followed.

Appellant’s points on appeal:

1. The Commission erred in concluding Appellant’s December 1, 2017 accident was not the prevailing factor in causing Appellant’s medical condition and resulting disability because its conclusion was against the sufficient competent evidence in that it disregarded the medical records, opinions, and conclusions of the Appellant’s treating physicians.
2. The Commission erred in concluding Appellant’s December 1, 2017 accident was not the prevailing factor in causing appellant’s medical condition and resulting disability because it ignored Missouri authority that recognizes that an aggravation of a pre-existing but non-disabling condition can be compensable if a job-related injury escalates the condition to a disability.
3. The Commission erred in concluding that Appellant was not diagnosed with shoulder strains as it was against the sufficient competent evidence in the record, in that it disregarded the medical records before it diagnosing Appellant with bi-lateral shoulder strains.