MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD87999

SHEILA GASSNER,
Respondent,

v.

LINCOLN UNIVERSITY BOARD OF CURATORS TO LINCOLN UNIVERSITY,
Appellant.

Opinion Filed: November 17, 2026

Appeal from the Circuit Court of Cole County, Missouri
The Honorable William E. Hickle, Judge

Before Special Division: Lisa White Hardwick, Presiding Judge, Mark D. Pfeiffer, Judge, and Gary D. Witt, Judge

The Board of Curators of Lincoln University ("University") appeals from the judgment in favor of its former employee, Sheila Gassner, on her claims of hostile work environment based on race and constructive discharge under the Missouri Human Rights Act ("MHRA"). The University contends the circuit court erred in: (1) denying its motion for judgment notwithstanding the verdict ("JNOV") because Gassner's claims were barred by the MHRA's statute of limitations and administrative exhaustion requirement; (2) denying its motion for new trial based on the erroneous exclusion of

relevant evidence under the attorney-client privilege; (3) submitting an erroneous verdict director for Gassner's hostile work environment claim; (4) submitting an erroneous instruction for the defense of failure to mitigate; (5) submitting an erroneous verdict form on punitive damages; and (6) denying the University's motion for new trial or remittitur because the court failed to merge the punitive damages awards on Gassner's two claims. For reasons explained herein, we reverse the actual and punitive damages awards on Gassner's constructive discharge claim and remand for a new trial on damages only for the constructive discharge claim in accordance with this opinion. The judgment is affirmed in all other respects. Gassner's motion for attorney fees on appeal is granted, and the cause is remanded to the circuit court for determination of an award of attorney fees.

Factual and Procedural History[1]

Gassner, a Caucasian woman, began working for the University in 1989. In 1999, she became the Director of Design and Construction, a position that focused on the technical and professional oversight of campus projects. Her duties included representing the University's interests in all new construction projects; drawing plans and specifications for renovation work and preventative maintenance projects; coordinating with departments concerning construction projects; and handling financial recordkeeping and budgetary matters and policies. In this capacity, she managed a small staff of three employees and consistently worked 45 to 48 hours per week. Gassner always had

[1] "We view the facts in the light most favorable to the jury's verdict." *Williams v. City of Kansas City*, 641 S.W.3d 302, 310 n.1 (Mo. App. 2021) (citation omitted).

favorable job evaluations and frequently was rated as "exceeded expectations." She believed her job as Director of Design and Construction was a "good fit" for her because she enjoyed construction and overseeing projects from beginning to end. Additionally, the position gave her the flexibility to help her husband care for their youngest son, who has Down Syndrome and is unable to talk or walk. In November 2013, her annual salary was $77,573.

While Gassner served as Director of Design and Construction, M.F., a Caucasian man, served as Director of Buildings and Grounds. In this position, M.F. managed 40 employees and was responsible for caring for the campus, which consisted of 80 to 100 acres and more than 30 buildings, plus extension offices in Kansas City and St. Louis. His staff included custodians, plumbers, HVAC technicians, electricians, and groundskeepers. M.F. worked an average of 45 hours a week, but during special events such as graduations, band competitions, and entertainment events, all of which required preparation and cleanup, he worked between 60 and 70 hours a week. The position required M.F. to have 24/7 on-call availability to respond to campus emergencies such as broken pipes, flooded hallways, fires, broken boilers, and snow removal. As Director of Buildings and Grounds, M.F.'s annual salary was $65,000.

In November 2013, the University terminated M.F. Rather than hire a replacement for M.F., the President of the University and Chief of Staff, both of whom are African-American men, told Gassner they wanted her to take over M.F.'s duties as Director of Buildings and Grounds in addition to her duties as Director of Design and Construction. When she protested that buildings and grounds was a "huge" department

and she did not think she could handle both departments, the President and Chief of Staff told her, "[W]e think you can do it." They did not discuss increasing her salary. Shortly thereafter, the Chief of Staff gave her a letter informing her she was being reassigned to the new position of Executive Director for Facilities and Planning, effective November 23, 2013. The job description for this position contained all the duties of both Director of Design and Construction and Director of Buildings and Grounds. The reassignment letter stated Gassner would receive an annual salary of $79,000, which was an increase of $1,427, or 1.8%, from the salary she received solely as Director of Buildings and Grounds. The reassignment letter stated if she refused the reassignment, she would be terminated effective December 23, 2013. When Gassner told the Chief of Staff the salary increase was "a lot less" than what she was expecting, the Chief of Staff told her, "There's no more money." Gassner signed the reassignment letter but noted she wanted to renegotiate her salary in six months.

According to the University's Human Resources ("HR") Director from 2000 to 2018, assigning Gassner to two full-time director positions was "a very demanding request" and, pursuant to the University's general practice, she should have been paid a salary commensurate with the degree of additional responsibility. Under the University's 2006-2007 staff compensation proposal, the Director of Design and Construction and the Director of Buildings and Grounds were benchmarked to a salary range of $60,552 to $89,000 for *each* position. Thus, Gassner's salary of $79,000 to perform both jobs simultaneously was slightly above the midpoint of the salary range set for one of those positions.

Per the HR Director, there were no other director positions at the University that were in any way comparable to Gassner's Executive Director for Facilities and Planning position in terms of work hours, required expertise, and dual-department responsibilities. Her daily workload effectively doubled, and she worked 70 to 80 hours a week. In addition to maintaining her existing design and construction project duties and assuming the new 24/7 operational emergency responsibilities for the buildings and grounds, the University also placed Gassner in the President's Cabinet, which required her attendance at administrative and city council meetings. Moreover, although Gassner was required to be on-call 24/7, the Chief of Staff advised her that her employees were not allowed to work overtime.

Over the next few years, Gassner had several discussions about her heavy workload and salary inequity with both the HR Director and her direct supervisor, the Chief of Staff. The Chief of Staff repeatedly told her there was a "budget crisis" and there were no funds available to give her a raise or provide her more staff. During this same time, however, the President and Chief of Staff created three new, high-paying executive positions for which they directly hired African-American men without advertising the job vacancies. They also awarded large salary increases, ranging from 12.5% to 44.5%, to the Chief of Staff and 11 other African-American employees, several of whom had fewer job duties, less expertise, and/or worked fewer hours than Gassner.

According to the HR Director, the funds to pay for these new salaries and salary increases were available through the "President's Contingency Fund," an account the President had "carte blanche" to use at his discretion. Thus, the HR Director believed it

was "inaccurate" for Gassner to be told a "budget crisis" prevented the University from paying her a salary commensurate with her position. When the HR Director warned University leadership that their hiring and compensation practices violated federal and state anti-discrimination laws, the President told the HR Director not to question his decisions, and he began retaliating against the HR Director.

In December 2015, the University hired an outside contractor to manage many of the buildings and grounds employees. Rather than relieving Gassner's workload, the addition of this third-party contractor merely created new problems for her. When the third-party contractor was unable to hire enough workers or maintain the lawnmowers to keep the grass cut, Gassner received University employees' complaints because she was the point of contact. Eventually, she had to hire a separate company to handle mowing. Even with the third-party contractor and the mowing company, Gassner still had to work 65-70 hours each week to fulfill her remaining job duties. She continued to inform the Chief of Staff and the President about her heavy workload and her concern that "things were falling through the cracks." Their response was always, "[Y]ou're doing a good job. Keep it up. We don't have any money."

Meanwhile, one of the new positions the President created and directly hired was the Chief Diversity Officer, an African-American man. Shortly after he was hired, the Chief Diversity Officer announced at a 2017 faculty and staff meeting that "there were too many white people working at the university." A University employee who attended the meeting testified she and the other attendees were "shocked." The Chief Diversity Officer made the same statement a second time in the Foundation Office. According to a

University professor, the Chief Diversity Officer repeatedly pushed hiring directives to department heads in which he advocated they hire more African-American instructors. Concerned that the Chief Diversity Officer's directives constituted civil rights violations, the professor reported him to the University's legal counsel.

The President left his position at the end of June 2017. The Chief of Staff left in May 2018. Around the time of his departure, Gassner decided to research the pay of other employees who worked for the Chief of Staff. She learned many of those employees had received substantial raises during the years that she had been told there was no money for raises. Gassner concluded her race was the basis for the President and the Chief of Staff to lie to her about the lack of available funds to increase her salary and race was the basis for the significant increases in salaries to African-American employees who directly reported to the Chief of Staff.

After the New President, an African-American woman, was hired, Gassner and each cabinet member had a one-on-one hour-long appointment with her. On June 12, 2018, Gassner explained to the New President what her duties were for design and construction and buildings and grounds. When the New President asked about her "Executive Director" title, Gassner explained she was directing two departments and it was not what she wanted, but it was "forced upon" her. Gassner also told the New President she was aware that other employees had received raises and she had not. In response, the New President told her there were "other ways to value employees and that would be to come up to have dinner with [her] at the president's residence."

Realizing her working conditions were not going to change, Gassner told her husband she could "not do it anymore." Gassner felt she had no choice but to submit her resignation in June 2018, which became effective on July 31, 2018. She was only 55 years old and did not want to retire. Her youngest son was 16 years old and was eligible to stay in school until he was 21, and she had planned to work at least until then if not for the working conditions and the way the University had treated her. When she resigned, her salary had increased to $85,439, due to cost-of-living adjustments and a "leadership team" bonus, but her salary still was not at the top of the range for either one of the two director positions she was performing.

After her resignation, Gassner was contacted in 2019 by the University of Missouri about a part-time construction manager position. However, because she had committed to providing childcare for her eldest son and his wife in exchange for their paying for her health insurance, she did not pursue the position. In 2021, the University of Missouri contacted her again about another construction manager position. Because the position would have required her to work in person in Columbia and incur daycare expenses for her son with special needs, she withdrew her name from consideration. After that, she volunteered at her church or her son's school. She did not attempt to find employment in Jefferson City or the surrounding area.

Gassner filed her complaint of discrimination with the Missouri Human Rights Commission ("MHRC") and Equal Employment Opportunity Commission ("EEOC") on August 6, 2018, and received her right to sue letter on March 6, 2019. On May 31, 2019, Gassner filed a petition for damages against the University asserting claims under the

MHRA for hostile work environment based on race and constructive discharge. For both claims, she requested economic and non-economic actual damages, punitive damages, attorney fees and costs, post-judgment interest, and all other relief the court deemed just and proper under the circumstances.

A seven-day jury trial was held in December 2024. The jury returned verdicts in favor of Gassner on both claims. For her hostile work environment claim, the jury awarded her actual damages of $131,000 and punitive damages of $500,000. For her constructive discharge claim, the jury awarded her $110,000 in back pay, $30,000 in non-economic losses, and punitive damages of $500,000. The University filed a motion to amend the judgment and/or for remittitur and a motion for JNOV or, in the alternative, a new trial.[2] The court granted the University's motion for remittitur in part, reducing the punitive damages award on the constructive discharge claim from $500,000 to $170,000. The University appeals.

Analysis

Points I and II – Denial of Motion for JNOV Based on Timeliness

The University's first two points challenge the circuit court's denial of its motion for JNOV. A plaintiff needs "to offer substantial evidence to support every fact essential to liability" to survive a motion for JNOV. *Holmes v. Kansas City Pub. Sch. Dist*., 571

[2] Gassner also filed a motion for equitable relief and a motion for attorney fees, costs, and expenses. The court denied her motion for equitable relief. The court sustained her motion for attorney fees, costs, and expenses and entered a separate judgment in favor of Gassner and against the University for $1,452,035 in attorney fees and $4,027.61 in costs and expenses. The rulings on these motions are not at issue in this appeal.

S.W.3d 602, 611 (Mo. App. 2018). "Whether the plaintiff made a submissible case is a question of law that this Court reviews *de novo*." *Id*. (quoting *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014)). In determining whether the plaintiff made a submissible case, we view the evidence and all reasonable inferences in the light most favorable to the jury's verdict and disregard all unfavorable evidence and inferences. *Williams v. City of Kansas City*, 641 S.W.3d 302, 315 (Mo. App. 2021). "Indeed, the jury's verdict will be reversed only if there is a complete absence of probative facts to support the jury's conclusion." *Id*. (citations omitted).

In Points I and II, the University contends Gassner failed to make a submissible case because her claims were time barred. Specifically, the University contends Gassner pled a discrete act of discrimination, which was her November 2013 reassignment, and this act occurred more than 180 days before she filed her charge of discrimination on August 6, 2018, and more than two years before she filed her petition on May 31, 2019.

The MHRA requires employees to file a charge of discrimination with the MHRC within 180 days of any alleged discriminatory act. § 213.075.1.[3] A lawsuit under the MHRA must be brought "no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party." § 213.111.1. The timeliness of a claim depends upon whether the claim is based upon a discrete act or a continuing violation. *Tisch v. DST Sys., Inc.*, 368 S.W.3d 245, 253 (Mo. App. 2012). A discrete act occurs "at a particular moment in time," such as termination, failure to promote, denial of

[3] All statutory references are to the Revised Statutes of Missouri 2016.

transfer, or refusal to hire. *Id*. "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice," which are not actionable if time barred. *Id*. at 254 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (internal quotation marks omitted)). "However, prior acts may be used as background evidence in support of a timely claim." *Id*. (footnote omitted).

The continuing violation exception permits a plaintiff to recover for acts of discrimination occurring before the 180-day and two-year filing periods "if the discrimination is a series of interrelated events." *Brennan v. Harris-Stowe State Univ.*, 722 S.W.3d 396, 406 (Mo. App. 2025) (quoting *Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685 (Mo. banc 2009)). To successfully assert the continuing violation exception, the plaintiff must: (1) "demonstrate that at least one act occurred within the filing period"; and (2) "show that the current claim of discrimination is part of a series of interrelated events, rather than isolated or sporadic acts of intentional discrimination." *Tisch*, 368 S.W.3d at 252 (internal quotation marks and citation omitted). The plaintiff establishes a continuing violation by showing "'a series of closely-related, similar events that occurred within the same general time period and stemmed from the same source' that 'continued into the limitations period.'" *Id*. at 254 (citation omitted). Courts are "to look for 'day-to-day' discriminatory events that occur on a regular basis, which events may not be significant individually but establish a continuing violation due to their cumulative effect." *Id*. at 255 (citation omitted). The continuing violation exception applies "to conduct that is 'part of an ongoing practice or pattern of discrimination' by

the employer." *Plengemeier v. Thermadyne Indus., Inc.*, 409 S.W.3d 395, 402 (Mo. App. 2013) (citations omitted).

Here, Gassner presented evidence that at least one act contributing to her hostile work environment occurred between February 7, and August 6, 2018, the 180-day period before she filed her charge of discrimination, and between May 31, 2017, and May 31, 2019, the two-year period before she filed her lawsuit. Specifically, on June 12, 2018, Gassner told the New President that she had been directing two departments since November 2013 and that she was aware that other employees had received raises and she had not. Rather than address Gassner's concerns about her excessive workload and disparate pay, the New President told her there were "other ways to value employees and that would be to come up to have dinner with [her] at the president's residence."

Gassner also presented evidence showing a series of interrelated events spanning four and a half years since November 2013, when she was forced to take on the duties of two directors, which resulted in her having to supervise more than 40 employees and work 70 to 80 hours per week without a commensurate pay raise. Gassner testified that, throughout this four-and-a-half-year period, she repeatedly sought relief through her chain of command, complaining to the Chief of Staff, the President, the New President, and the HR Director, none of whom eased her workload or increased her compensation. Instead, the Chief of Staff and the President told her there was no money to increase her salary. During this same time, however, the Chief of Staff and the President were increasing the salaries of several African-American directors without assigning them significant additional job responsibilities, and they were creating new director positions

and directly filling those positions with African-Americans without advertising job vacancies. This constituted sufficient evidence of an ongoing practice or pattern of discrimination establishing a continuing violation. Gassner's hostile work environment claim was not time barred.

As for her constructive discharge claim, a "constructive discharge occurs when the employer deliberately renders an employee's working conditions so intolerable that the employee is forced to quit their job." *Marcantonio v. Bd. of Curators Lincoln Univ*., 702 S.W.3d 153, 179 (Mo. App. 2024) (citation omitted). Gassner testified she resigned after discovering the University had been lying to her about its alleged budget crisis and the New President indicated she was not going to get any relief from her workload or a commensurate pay increase. These events, which rendered her working conditions so intolerable that she was forced to quit her job, occurred well within the statutory time periods.

The circuit court did not err in denying the University's motion for JNOV. Points I and II are denied.

Point III – Denial of New Trial Motion Based on Erroneous Exclusion of Evidence

In Point III, the University contends the circuit court erred in failing to grant its new trial motion based on the erroneous exclusion of evidence. We review both the denial of a motion for new trial and the exclusion of evidence for an abuse of discretion. *Reed v. Kansas City Mo. Sch. Dist*., 504 S.W.3d 235, 240 n.4 (Mo. App. 2016). The circuit court abuses its discretion if 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." *Id*. at 240 (quoting *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. banc 2015)).

The circuit court excluded the evidence at issue on the basis it was protected by attorney-client privilege. "While a circuit court's factual findings and credibility determinations are given substantial deference, a circuit court's application of law to its factual findings is reviewed *de novo*." *Cole v. Kansas City S. Ry. Co*., 713 S.W.3d 180, 188 (Mo. banc 2025) (internal citation omitted). "Thus, whether the facts of a case as found by the circuit court can give rise to attorney-client privilege presents an issue of law this Court reviews *de novo*." *Id*.

"The attorney-client privilege protects confidential communications between an attorney and a client concerning representation of the client." *State ex rel. Garrabrant v. Holden*, 633 S.W.3d 356, 359 (Mo. banc 2021) (citation omitted). The attorney-client privilege attaches to:

> (1) information transmitted by voluntary act of disclosure; (2) between a client and his lawyer; (3) in confidence; and (4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted.

Id. at 359-60 (internal quotation marks and citation omitted). "To be privileged, the communication must be made in order to secure legal advice." *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406, 414 (Mo. App. 2021). The party asserting attorney-client privilege has the burden of proving the privilege applies. *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 116 (Mo. App. 2012).

The evidence Gassner asserted was protected by attorney-client privilege was an unsigned draft of her resignation letter to the University. Gassner never delivered it to the University. Gassner typed the draft letter before she met with her attorney later that day. Gassner testified she prepared the draft letter for the purpose of getting a working draft of her resignation letter in her hand so she could have a meaningful discussion with her attorney about what her letter of resignation to the University should look like. In excluding the draft letter, the circuit court found that, because Gassner prepared it as an implicit request for obtaining legal advice, the draft letter was protected by attorney-client privilege.

The University argues Gassner did not prepare the draft letter to secure legal advice but instead did so for the purpose of memorializing her reasons for retiring. The University's argument ignores our standard of review. Clearly, the court accepted Gassner's testimony as to her purpose in preparing the draft letter, and we defer to its decision to do so. *Cole*, 713 S.W.3d at 188. Applying the law to the court's factual findings, the draft letter was information Gassner voluntarily disclosed to her lawyer in confidence, not shared with anyone else, for the purpose of obtaining legal advice. Therefore, the attorney-client privilege applied to the draft letter.

The University next argues Gassner waived the privilege by producing it in discovery. Gassner's counsel informed the court he did so inadvertently, saying, "[I]t's my screw up in producing documents. It should never have been produced." Waiver of the attorney-client privilege must be voluntary. *Garrabrant*, 633 S.W.3d at 360. "Disclosure of information in response to an adverse party's discovery inquiry is not

voluntary." *State ex rel. Chance v. Sweeney*, 70 S.W.3d 664, 670 (Mo. App. 2002). Moreover, pursuant to Rule 56.01(b)(9)(B), "The production of privileged or work-product protected documents, . . . whether inadvertent or otherwise, is not a waiver of the privilege." Gassner did not waive the application of the attorney-client privilege to her draft letter.[4] The circuit court did not abuse its discretion in excluding Gassner's draft resignation letter and denying the University's new trial motion on this ground. Point III is denied.

Points IV and V – Instructional Error

In Points IV and V, the University alleges the court erred in instructing the jury. Whether the jury was properly instructed is a question of law we review *de novo*. *Hazziez v. City of Kansas City*, 728 S.W.3d 609, 613 (Mo. App. 2025). To constitute reversible error, the instructional error must have materially affected the merits of the

[4] The University also argues Gassner waived the application of attorney-client privilege because her counsel attached the draft letter as an exhibit to her petition. Gassner asserts this was also inadvertent, and that "neither party realized the wrong version of the document had been filed until the University submitted the Record on Appeal in this Court." The University raises this argument for the first time on appeal. "It is well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *Masters v. Dawson*, 711 S.W.3d 334, 337 (Mo. banc 2025) (citation omitted). The University asks us to review this unpreserved claim for plain error. "[P]lain error review is rarely granted in civil cases." *Williams v. Mercy Clinic Springfield Cmtys*., 568 S.W.3d 396, 412 (Mo. banc 2019). We will exercise our discretion to review for plain error "only if there are substantial grounds for believing that the trial court committed error that is evident, obvious and clear and where the error resulted in manifest injustice or miscarriage of justice." *Id*. (citation omitted). The record before us does not provide substantial grounds for believing the circuit court committed evident, obvious, and clear error that resulted in manifest injustice or miscarriage of justice.

action. *D.W. by & through L.W. v. Hogan Preparatory Acad., Inc.*, 713 S.W.3d 654, 671 (Mo. App. 2025). "The party challenging the instruction has the burden of showing the instruction misdirected, misled, or confused the jury, thereby resulting in prejudice." *Id*. (citation omitted).

In Point IV, the University contends the court erred in submitting Instruction 8, the verdict director for Gassner's hostile work environment claim. Instruction 8 provided:

> On Plaintiff's claim for hostile work environment against Defendant Lincoln University, your verdict must be for Plaintiff if you believe:
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> *First*, starting from November 2013, Plaintiff was subjected to unwelcome harassment that was sufficiently severe or pervasive such that a reasonable person in Plaintiff's position would find the work environment intimidating, hostile, offensive, or abusive, and
>
> *Second*, the unwelcome harassment continued after February 2018; and
>
> *Third*, Plaintiff's race was a contributing factor in such hostile work environment; and
>
> *Fourth*, as a direct result of such conduct, Plaintiff sustained damage.

The University argues that, because the instruction included no specific acts of unwelcome harassment upon which the jury could find liability, it was an impermissible roving commission. "A roving commission occurs when an instruction assumes a disputed fact or submits an abstract legal question that allows the jury to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability." *Minze v. Mo. Dep't of Pub. Safety*, 437 S.W.3d 271, 277 (Mo. App. 2014) (internal quotation marks and citations omitted).

The University did not assert this error in the instructions conference but raised it for the first time in its supplemental memorandum in support of its motion for new trial. To preserve a claim of instructional error, a party must object "on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection." *McGaugh v. Naudet*, 733 S.W.3d 441, 475 (Mo. App. 2026) (citations omitted). When a specific objection to a civil jury instruction is not made prior to submission of the case to the jury, the matter is not preserved, and review may only be had for plain error under Rule 84.13. *Id*. at 475-76.

Pursuant to Rule 84.13(c), "[p]lain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of injustice has resulted therefrom." "However, plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections." *McGaugh*, 733 S.W.3d at at 476 (internal quotation marks and citations omitted).

Contrary to the University's contention, a plaintiff alleging a hostile work environment claim is not required to prove a specific, discrete, adverse employment action. *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 732 (Mo. App. 2014). "In most cases of hostile work environment harassment, the discriminatory acts are not of a nature that can be identified individually as significant events; instead, the day-to-day harassment is primarily significant, both as a legal and as a practical matter, in its cumulative effect." *Id*. (citation omitted). "There is simply no precedent for the proposition that an abusive working relationship created by severe or pervasive conduct

is not actionable unless the plaintiff is also subject to a specific, discrete, adverse employment action." *Id*. at 732-33 (footnote omitted). Rather, to establish a hostile work environment claim, the plaintiff must prove "discriminatory conduct either creates an intimidating, hostile, or offensive work environment or has the purpose or effect of unreasonably interfering with an individual's work performance." *Id*. at 733 (citation omitted). These are the ultimate facts that needed to be submitted to the jury. *See McGaughy v. Laclede Gas Co*., 604 S.W.3d 730, 756 (Mo. App. 2000) (finding language similar to Instruction 8 sufficient to submit a hostile work environment claim to the jury). Consequently, the University failed to establish the circuit court plainly erred in submitted Instruction 8 to the jury. Point IV is denied.

In Point V, the University contends the circuit court erred in submitting Instruction 16, the failure to mitigate damages instruction. Specifically, the University argues Instruction 16 impermissibly deviated from the pattern MAI instruction for failure to mitigate damages and prejudiced the University by holding it to a higher evidentiary burden than was required.

The court determined the University was entitled to have the jury instructed on Gassner's failure to mitigate damages, which is an affirmative defense to her constructive discharge claim. Note 4 of the Notes on Use for MAI 4.01, the pattern damages instruction applicable to Gassner's constructive discharge claim, directs counsel to "[s]ee MAI 32.29 for the appropriate method of submission of failure to mitigate damages in cases other than FELA." As this is not a FELA case, MAI 32.29 provides the appropriate pattern instruction for submission of the University's defense. MAI 32.29 states:

> If you find in favor of plaintiff, you must find that plaintiff failed to mitigate damages if you believe:
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> First, plaintiff *(insert act sufficient to constitute failure to mitigate, such as "failed to return to work")*, and
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> Second, plaintiff thereby failed to use ordinary care, and
>
> Third, plaintiff thereby sustained damage that would not have occurred otherwise.

(Footnotes omitted).[5] Consequently, the University proposed Instruction B, patterned on MAI 32.29:

> If you find in favor of plaintiff, you must find that plaintiff failed to mitigate damages if you believe:
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> First, plaintiff failed to obtain employment after she retired, and
>
> Second, plaintiff thereby failed to use ordinary care, and
>
> Third, plaintiff thereby sustained damage that would not have occurred otherwise.
>
> As used in this instruction, "ordinary care" means that degree of care that an ordinary careful person would use under the same circumstances.

In pretrial briefings and during the instruction conference, Gassner argued MAI 32.29 and, therefore, proposed Instruction B, did not accurately reflect the law on failure to mitigate because it did not include all the elements of the defense as stated in *Stewart v. Bd. of Educ. of Ritenour Consol. Sch. Dist., R-3*, 630 S.W.2d 130, 134 (Mo. App. 1982). *Stewart* adopted the following test for failure to mitigate damages:

> A former employer meets its burden of proof of "mitigation of damages" if the employer proves that (a) one or more discoverable opportunities for

[5] The information contained in the footnotes is not at issue in this appeal.

> comparable employment were available in a location as, or more convenient than, the place of former employment, (b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs.

Stewart, 630 S.W.2d at 134 (quoting *Ryan v. Superintendent of Schs. of Quincy*, 374 Mass. 670, 373 N.E.2d 1178, 1181 (1978)). Therefore, Gassner proposed that the court submit Instruction 16, which stated:

> If you find in favor of plaintiff on her claim of constructive discharge against Defendant Lincoln University, you must find that plaintiff failed to mitigate damages if you believe:
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> *First*, one or more discoverable opportunities for comparable employment were available in a location as, or more convenient than, the place of former employment, and
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> *Second*, plaintiff unreasonably made no attempt to apply for any such job, and
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> *Third*, it was reasonably likely that plaintiff would have obtained comparable employment, and
>
> *Fourth*, plaintiff thereby failed to use ordinary care, and
>
> *Fifth*, plaintiff thereby sustained damage that would not have occurred otherwise.
>
> As used in this instruction, "ordinary care" means that degree of care that an ordinary careful person would use under the same circumstances.

Accepting Gassner's argument, the circuit court refused the University's proposed Instruction B and used Instruction 16 to instruct the jury on the University's affirmative defense of failure to mitigate damages.

Rule 70.02(b) provides, "Whenever 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*." (Emphasis added.) *See also Hazziez*, 728 S.W.3d at 613-14; *Crisp v. Mo. Sch. for Deaf*, *Dep't of Elementary & Secondary Educ*., 681 S.W.3d 650, 659 (Mo. App. 2023) (stating that, when an applicable MAI instruction exists, its submission is mandatory). "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." *Crisp*, 681 S.W.3d at 659 (internal quotation marks and citations omitted).

Gassner argues the submission of MAI 32.29 was not mandatory because the pattern instruction did not accurately state the law on mitigation of damages. *See Hervey v. Mo. Dep't of Corr*., 379 S.W.3d 156, 159 (Mo. banc 2012) (stating the principle that, if an MAI instruction "does not state the substantive law accurately, it should not be given"). Gassner's argument about the accuracy of MAI 32.29 ignores the fact that the Supreme Court promulgated MAI 32.29 in 2002, 20 years after the Eastern District of this court decided *Stewart*. If the Supreme Court wanted to include the elements from *Stewart* in the MAI instruction, it could have. It did not. Notably, no Missouri state case, at either the intermediate appellate or Supreme Court level, has cited *Stewart* since MAI 32.29 was promulgated, and no cases have held that the elements stated in *Stewart* must be included in a failure to mitigate damages instruction.

Moreover, the Committee Comments for MAI 32.29 clearly show the Supreme Court promulgated MAI 32.29 for the purpose of adopting a *uniform* approach to the submission of failure to mitigate damages. Comment A of the Committee Comments on MAI 32.29 recognizes that, "[i]n the past, varied approaches have been suggested for the manner of instructing on the issue of mitigation of damages." Comment B further states that, "to avoid potential inconsistencies in alternative methods of submission[,] . . . the Committee has concluded that it is best to adopt a uniform approach to the submission of the doctrine of mitigation of damages in all cases as reflected in MAI 32.29 and the revision of MAI 4.01."

Instruction 16 improperly deviated from MAI 32.29. Because MAI 32.29 did not need modification, prejudicial error is presumed. *Hazziez*, 728 S.W.3d at 613-14 (citations omitted). Indeed, the University did suffer prejudice. Rather than having to prove only the elements set forth in MAI 32.29 to establish its affirmative defense, the University was required to prove three additional elements. Instruction 16 imposed a greater burden on the University than MAI 32.29 and was, therefore, prejudicial. *See Arnold v. Ingersoll-Rand Co*., 908 S.W.2d 757, 762-63 (Mo. App. 1995).

The error materially affected the merits of the case. The jury awarded Gassner $110,000 in back pay, which was the full amount of actual damages her counsel requested in closing arguments on her constructive discharge claim, plus $30,000 in non-economic losses. Gassner had testified, however, that she did not pursue two positions in Columbia she was offered because she did not want to be too far away from Jefferson City, but she also did not seek employment in Jefferson City or the surrounding area.

Had the University been required to prove only that Gassner failed to use ordinary care in not obtaining employment as required in MAI 32.29, instead of the additional elements set forth in Instruction 16, the amount of actual damages awarded may have been different. The judgment awarding Gassner actual damages on her constructive discharge claim is reversed. Because "[i]t is fundamental that a jury must award actual damages before it is authorized to award punitive damages," *Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 220 (Mo. App. 2010) (citation omitted), the punitive damages award on the constructive discharge claim is also reversed. The cause is remanded for a new trial on damages for Gassner's claim for constructive discharge, with the jury properly instructed on the University's affirmative defense of failure to mitigate using an instruction patterned on MAI 32.29. Point V is granted.

Points VI and VII – Award of Punitive Damages on Both Claims

In Point VI, the University contends the court erred in submitting a verdict form that allowed the jury to award punitive damages on both her hostile work environment and constructive discharge claims. In Point VII, the University argues the court erred in denying its motion for remittitur to merge the two punitive damages awards to prevent a double recovery. Our reversal of the punitive damages award on the constructive discharge claim renders it unnecessary to decide these points. If, on retrial, the jury awards Gassner punitive damages on her constructive discharge claim, the University is free to reassert its duplicative recovery argument to the circuit court.

Attorney Fees on Appeal

Gassner has timely submitted a motion for an award of attorney fees on appeal. The MHRA authorizes this court to make an award of attorney fees to the prevailing party. § 213.111.2. "A prevailing party is one that succeeds on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing suit." *Wilson v. City of Kansas City*, 598 S.W.3d 888, 898 (Mo. banc 2020) (citation omitted). As discussed herein, Gassner has prevailed on the University's challenge to the timeliness of her claims, the exclusion of the draft resignation letter, and the submission of the verdict director for her hostile work environment claim. Therefore, we grant her motion for attorney fees on appeal as to fees incurred on these issues. Although we have the authority to allow and fix the amount of attorney fees on appeal, "we exercise this power with caution, believing in most cases that the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested." *Holmes v. Mo. Dep't of Corr.*, 697 S.W.3d 97, 104 (Mo. App. 2024) (citation omitted). Accordingly, the case is remanded for further determination of the attorney fees to be awarded to Gassner for this appeal.

Conclusion

The actual and punitive damages awards on Gassner's constructive discharge claim are reversed, and the cause is remanded for a new trial on damages for the constructive discharge claim in accordance with this opinion. The judgment is affirmed in all other respects. Gassner's motion for attorney fees on appeal is granted, and the

cause is remanded to the circuit court for determination of a reasonable award of attorney fees.



Lisa White Hardwick, Presiding Judge

All concur.