

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DEBORAH HERVEY

RESPONDENT,

**v.
MISSOURI DEPARTMENT OF
CORRECTIONS**

APPELLANT.

DOCKET NUMBER WD72899

DATE: September 13, 2011

Appeal From:

Jackson County Circuit Court
The Honorable J. Dale Youngs, Judge

Appellate Judges:

Division Two: Thomas H. Newton, Presiding Judge and Gary D. Witt, Judge, CONCURRING
Cynthia L. Martin, Judge, DISSENTS IN SEPARATE OPINION

Attorneys:

Julianne O. Germinder and Joel Poole, Jefferson City, MO, for appellant.

David A. Lunceford, Lee's Summit, MO and Jeffrey Bruce, Belton, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD72899

Jackson County

Before Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

The Missouri Department of Corrections appeals a Judgment of the Circuit Court of Jackson County entered in favor of Deborah Hervey for her claim of disability discrimination under the Missouri Human Rights Act.

Affirmed

Division Two holds:

Deborah Hervey ("Hervey") filed suit against the Missouri Department of Corrections ("DOC") for disability discrimination under the Missouri Human Rights Act ("MHRA") and the jury awarded her substantial actual and punitive damages. The trial court reduced the punitive damage award pursuant to section 510.265 and entered the Judgment in her favor. DOC brings six points on appeal.

In Point One, DOC argues the trial court erred because the jury instructions did not require the jury to find Hervey was disabled. We disagree. The verdict directing instruction required the jury to find for the plaintiff only if "disability was a contributing factor" in her discharge and "disability" was defined separately and in accordance with the substantive law of Missouri. While not a model of clarity the instruction does not rise to the level of reversible error. Point One is denied.

In Point Two, DOC argues the trial court erred because the definition of "disability" in the instructions did not include a provision that Hervey could perform the essential functions of her job with or without reasonable accommodation and that any requested accommodations would have enabled Hervey to perform the essential functions of her job. We disagree. The jury instructions followed the statutory definition and required the jury to find that "disability" was a contributing factor in Hervey's discharge and "disability" was defined as requiring a finding that the disability did not interfere with Hervey "performing the job." As this finding that Hervey was able to perform her job is broader than a finding that Hervey could perform the essential functions of her job, we find no error in the instruction conforming to the language of the statute. Point Two is denied.

In Point Three, DOC argues the trial court erred in awarding punitive damages of \$1,303,632.50 under section 510.265 because the trial court did not properly apply the statute when it included the award of attorneys' fees to Hervey in its calculation on the cap of punitive damages. We disagree. The trial court properly included attorneys' fees in the calculation of the cap on punitive damages in that it is included in the "net amount of the judgment" awarded to Hervey. This interpretation does not render "net amount of the judgment" superfluous, as argued by DOC. Also, it furthers the policy goals of the MHRA. Accordingly, we believe this interpretation is in accord with the legislature's intent in enacting the statute. Point Three is denied.

In Point Four, DOC argues the trial court erred in submitting punitive damages to the jury because the recovery of punitive damages is barred by the State's sovereign immunity. We disagree. The MHRA explicitly defines "employer" to include "the state, or any political or civil subdivision thereof" and makes it unlawful for an "employer" to discriminate against employees who have disabilities as defined under the MHRA. Further, the MHRA expressly allows for awards of punitive damages. Accordingly, and consistent with recent Supreme Court precedent, the state has expressly waived its sovereign immunity for punitive damages in MHRA claims. Point Four is denied.

In Point Five, DOC argues the trial court erred in admitting irrelevant and unduly prejudicial testimony of multiple prior unrelated allegations of discrimination and retaliation because it was irrelevant and served only to inflame the minds of the jury. As to the first witness, DOC never objected at trial to her testimony on the basis on which it now claims error. DOC has waived this claim. As to the second witness also, nowhere in the record can we find an objection to her testimony on the basis on which DOC now complains. That claim of error is also waived. Point Five is denied.

In Point Six, DOC argues the trial court erred in admitting evidence of disability law outside of the jury instructions because such evidence was irrelevant and prejudicial. First, DOC argues the testimony of Bill Johnson regarding the Americans with Disabilities Act and the DOC being required by law to enter into the interactive process with Hervey was improper. The record is clear the trial court agreed with DOC and restricted the witness's testimony accordingly. DOC does not identify where in the record the trial court failed to sustain an objection on this basis. DOC also argues that three exhibits were improperly admitted as they consisted of disability statutes which were not the law of the case. However, the trial court admitted those exhibits for the express purpose of cross-examining a witness and specifically instructed the jury that the statutes were not being received as the law of the case. The trial court's limiting instruction that limited the purpose for which this evidence could be used was sufficient to avoid any potential prejudice. Point Six is denied.

Dissenting Opinion holds:

The disability discrimination verdict director was prejudicially erroneous because it failed to require the jury to find a contested essential element of the plaintiff's case--that the plaintiff was disabled.

The verdict directing instruction was modeled after MAI 31.24. That pattern instruction does not submit whether a plaintiff is a member of a claimed protected classification as a separate essential element to be found by the jury. However, in the ordinary case, the plaintiff's membership in a claimed protected classification is not in dispute.

MAI 31.24 instructs that "the protected classification supported by the evidence" should be inserted into paragraph second, which provides that "[the protected classification] was a contributing factor in such [discharge or other claimed discriminatory act]." This suggests that if the plaintiff's membership in the protected classification is in dispute, the fact of membership in the protected classification is not supported by the evidence, and MAI 31.24 should be modified to require the jury to separately find this essential element.

Even if the instructions accompanying MAI 31.24 cannot be so read, it is error to give MAI 31.24 without modification to comport with the substantive law. Plaintiff's membership in a protected classification is an essential element of a claim under the MHRA. It is error to fail to submit a contested essential element in a verdict director.

The error in the verdict director was not cured by the submission of a separate instruction defining "disability." Though jury instructions are to be read as a whole, no authority exists to permit the implication that a jury has been instructed to find an essential element of a plaintiff's case by combining the mere mention of a word in a verdict director with a separate instruction defining that word. Defining a term does not constitute submission of a necessary issue for the jury's determination.

It is as or more likely that the jury read the definition of disability as merely informative, consistent with a conclusion that the reference to disability in the verdict director implied that disability was not in contest.

Even if the submission of a definition of "disability" can be read with the verdict director to have required the jury to find that plaintiff was disabled, the verdict director was still given in error because it submitted two essential elements (whether plaintiff was disabled, and whether disability was a contributing factor in plaintiff's discharge) in a single paragraph of the verdict director.

Majority Opinion by Gary D. Witt, Judge
Dissenting Opinion by Cynthia L. Martin, Judge

September 13, 2011

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