

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

DANNY HOLMES

Appellant-Respondent

v.

KANSAS CITY MISSOURI BOARD OF POLICE
COMMISSIONERS, BY AND THROUGH ITS MEMBERS

Respondent-Appellant

DOCKET NUMBER WD72852 and WD72853

DATE: January 31, 2012

Appeal From:

Circuit Court of Jackson County, MO
The Honorable David Michael Byrn, Judge

Appellate Judges:

Division One
Alok Ahuja, P.J., Thomas H. Newton, and James Edward Welsh, JJ.

Attorneys:

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**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

DANNY HOLMES, Appellant-Respondent, v. KANSAS
CITY MISSOURI BOARD OF POLICE COMMISSIONERS,
BY AND THROUGH ITS MEMBERS, Respondent-Appellant

WD72852 and WD72853

Jackson County

Homicide Detective Hutcheson requested Officer Holmes assist in a missing persons search. Holmes's inquiries led himself and his partner, Officer Hamre, to an apartment. After asking to speak to the occupants, they entered the apartment. Holmes saw two men and a gun. The officers handcuffed the men, and Holmes put the gun into the freezer. Holmes called Hutcheson, who instructed him not to arrest the men or recover evidence. While leaving, Holmes saw a box of bullets, which he took with him when neither man acknowledged ownership. The officers then spoke with their field sergeant, who told them to follow Homicide's instructions. Holmes wrote a supplement to the missing persons report and faxed it to Hutcheson. The body of the missing person was subsequently discovered and one of the men in the apartment was charged with murder.

Almost three years later, the prosecutor for the murder case contacted Holmes. He told her of the events in the apartment, which was not in the information she had obtained. An Internal Affairs investigation was conducted. Holmes, an African-American, was terminated, but Hutcheson and Hamre, who were Caucasian, were recommended for suspension.

Holmes filed suit, seeking damages for discrimination under the MHRA, for whistleblowing, and for breach of contract. The jury awarded Holmes \$250,000 actual damages and \$250,000 in punitive damages on his MHRA claim; \$3,500,000 on his whistleblowing claim; and \$2,500,000 on his breach of contract claim. The trial court granted his motion for attorney fees in part by awarding approximately one-third of the request. The Board appeals raising six points, and Holmes cross-appeals raising one point.

AFFIRMED IN PART, REVERSED IN PART, ATTORNEY FEES REMANDED.

Division One Holds:

In its first two points, the Board contends the trial court erred in denying its motions for directed verdict and for JNOV on Holmes's breach of contract claim. While section 84.600 provides that non-probationary officers may be terminated only for cause, the statute cannot serve as the basis for a breach of contract action. The Board's first point is granted and the judgment awarding Holmes damages for breach of contract is reversed. The Board's second point is rendered moot.

In its third point, the Board contends the trial court erred in denying its motions for directed verdict and JNOV on Holmes's whistleblower claim because it was barred by sovereign immunity. Public entities are generally protected from suit in tort by sovereign immunity, but not from suits for breach of contract. While the fourth count of Holmes's petition could be construed to encompass a breach of contract claim for whistleblowing, the whistleblower

instruction was submitted to the jury as a claim in tort. As such, it was barred by sovereign immunity. The Board's third point is granted and the judgment awarding Holmes damages for whistleblowing is reversed.

In its fourth and fifth points, the Board raises arguments concerning Holmes's MHRA claim. Its fourth point argues that Holmes failed to make a submissible case because he failed to show that the Board "treated any similarly-situated police department employees any differently." Under the MHRA, discrimination is "*any* unfair treatment" based on a protected characteristic and our Supreme Court has held that MHRA claims are properly analyzed to determine whether a discriminatory reason was a "contributing factor." The jury was properly instructed in accord with the MAI and Holmes set forth legal and substantial evidence on the facts essential to liability from which the jury could reasonably decide his claim.

The Board's fifth point argues the trial court erred in submitting punitive damages to the jury. The Board seems to equate the facts of *Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011) with a requirement that there must be direct evidence of intentional misconduct to submit punitive damages. Direct evidence of intentional conduct is not required. Evil intent may be implied from reckless disregard of another's rights and interests, and employment discrimination cases are inherently fact-based and necessarily rely on inferences rather than direct evidence. The Board's fifth point is denied. Our disposition of the preceding points renders the Board's sixth point moot.

We next turn to Holmes's appeal. In his sole point, Mr. Holmes disputes the trial court's award of only one-third of his attorney fees. The trial court reasoned that because only the MHRA authorized attorney fees and Mr. Holmes's claims were "inextricably intertwined" with the other claims, Mr. Holmes was only entitled to approximately one-third of his request. The trial court erred in denying his claim for this reason. We remand to the trial court to apply the appropriate standard in awarding attorney fees and to consider the overall relief obtained by Mr. Holmes in determining an appropriate fee.

Holmes's motion for attorney fees on appeal is granted and remanded to the trial court for appropriate determination.

Opinion by Thomas H. Newton, Judge

January 31, 2012

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