

Summary of SC92145, *Deborah Hervey v. Missouri Department of Corrections*

Appeal from the Jackson County circuit court, Judge J. Dale Youngs

Argued and submitted March 27, 2012 opinion issued Aug. 14, 2012

Attorneys: The department was represented by General Counsel Ronald Holliger, James R. Ward and Julianne O. Germinder of the attorney general's office in Jefferson City, 9573) 751-3321. Hervey was represented by Anthony L. DeWitt, Edward D. Robertson Jr. and Mary Doerhoff Winter of Bartimus, Frickleton, Robertson & Gorny PC in Jefferson City, (573) 659-4454; and David A. Lunceford of The Lunceford Law Firm in Lee's Summit, (816) 525-4701.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The department of corrections appeals a discrimination judgment against it by a former employee. In a 4-2 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. The verdict director the trial court submitted to the jury was prejudicial because it failed to require the jury to make a finding about an essential element of the employee's discrimination claim as determined by the substantive law governing the claim. As such, the judgment must be reversed, and the cause remanded. The trial court's method of calculating punitive damages – by including attorney fees awarded to the employee in the “net amount of the judgment” on which it based its calculation – was a correct application of statutory law.

Judge George W. Draper III wrote a dissenting opinion. He would find, based on the record as a whole, that the jury was instructed properly and that the jury considered whether the employee was disabled in rendering its verdict. He would affirm the trial court's judgment, including its calculation of damages.

Facts: Deborah Hervey worked as a probation officer for the department of corrections from 1983 to 1986, from 2002 to 2005 and again beginning in 2007. On her first day at work in 2007, she told the department that she had a “mental disorder diagnosis” and that, as a result, she may require accommodations. Then and on other occasions, she requested certain accommodations, of which she received some but not all. Consistent with the policy applicable to all returning employees that have not been employed at the department for more than two years, Hervey was required to complete a nine-month probationary procedure. At the end of the nine months, the department notified Hervey that she had failed to complete her probationary period successfully and that her employment was terminated. The department indicated her work performance was not satisfactory because Hervey was not carrying a full workload by the end of the probationary period and was late in filing reports. Hervey sued, alleging the department discriminated against her because of her disability and that it discharged her in retaliation for her complaints of discrimination. During the April 2010 trial, the department contested whether Hervey legally was disabled. Over the department's objection, the trial court submitted to the jury Hervey's proffered verdict director for her disability discrimination claim. The court rejected the department's proffered verdict director, which would have required the jury to find specifically

that Hervey was disabled to find in her favor. The jury returned a verdict in Hervey's favor on her disability discrimination claim and ultimately awarded her more than \$127,000 in actual damages and \$2.5 million in punitive damages. Following post-trial motions filed by both parties, the court entered judgment in Hervey's favor for more than \$127,000 in actual damages, nearly \$36,300 for front pay, nearly \$97,400 in attorney fees and approximately \$1.3 million in punitive damages, a reduction from the jury's award. The department appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The verdict director the trial court submitted to the jury was erroneous because it assumed as true the disputed fact of whether Hervey was disabled, thereby relieving Hervey of her burden of proving an essential element of her disability discrimination claim. This instruction was patterned after Missouri approved instruction No. 31.24, but if a particular approved instruction does not state the substantive law accurately, it should not be given. The source of the substantive law here is the state's human rights act, codified in chapter 213, RSMo. Under section 213.111, a plaintiff claiming disability discrimination must show that: the plaintiff is legally disabled; the plaintiff was discharged; and the disability was a factor in the plaintiff's discharge. As such, when the fact of whether a plaintiff is a member of a protected class on the basis of disability is in dispute, the substantive law requires the jury to make a specific finding as to this fact. The verdict director for employment discrimination in MAI 31.24, however, does not submit as a separate hypothesized fact whether the plaintiff is a member of a protected classification on the basis of disability, assuming instead this is not a disputed fact. That a portion of the verdict director requires the jury to find whether disability was a contributing factor in the plaintiff's discharge is not sufficient; the jury must find specifically whether the plaintiff legally is disabled. Further, submission of the defective instruction constitutes prejudicial error because it fails to submit all essential elements of the claim. Because the erroneous instruction was prejudicial, the trial court's judgment must be reversed, and the cause must be remanded.

(2) The trial court's calculation of attorney fees awarded to Hervey is a correct application of section 510.265.1, RSMo. This section limits the amount of punitive damages in certain civil cases to five times the "net amount of the judgment awarded to the plaintiff against the defendant." The meaning of "net amount of the judgment" in section 510.265.1(2) is an issue of first impression. Because the legislature did not define this phrase, the words are given their plain and ordinary dictionary meaning. The dictionary defines "net" as "free from all charges or deductions" as "opposed to gross," while "judgment" is defined as "a formal decision or determination" by a court, "an obligation (as a debt) created by a decree of a court" and a "court's final determination of the rights and obligations of the parties in a case." Under section 213.111.2, RSMo, the relief available to a prevailing plaintiff in a discrimination case under the human rights act includes actual and punitive damages as well as court costs and reasonable attorney fees. As such, the amount of attorney fees is part of a "judgment" under its dictionary definitions. Here, the trial court included the attorney fees in determining the "net amount of judgment" it used to calculate the maximum amount of punitive damages under section 510.265. When the trial court applied this section, it subtracted only the amount of the punitive damages award from its calculation to arrive at a net amount because there were no other appropriate setoffs or reductions, then calculated this net amount by five pursuant to the statute.

Dissenting opinion by Judge Draper: The author would uphold the verdict as he would find the jury in this case was instructed properly and was not misdirected, misled or confused in rendering its verdict. When examining the record as a whole, it is evident the question of Hervey's disability was placed squarely before the jury as a threshold issue. One of the instructions contained a definition of "disability" that comports verbatim with the statutory definition of "disability" in section 213.010(4), RSMo. Further, the verdict director was patterned exactly after Missouri Approved Instruction 31.24 without modification. Rule 70.02 provides that, if there is an applicable approved instruction, "such instruction shall be given" and that giving an instruction in violation of the rule is error. There can be no doubt that the issue of whether Hervey was disabled was contested hotly throughout the trial, and because jurors are presumed to follow instructions, this Court must assume the jury considered the definition of "disability" as well as whether disability was a contributing factor in Hervey's discharge, which it could not have found absent a finding that she was disabled. The author would affirm the trial court's judgment, including its calculation of damages pursuant to section 565.265.1, RSMo.