

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**LAURA THOMAS AND ADAIRE STEWART, APPELLANTS
vs.
MCKEEVER'S ENTERPRISES, INC., RESPONDENT**

DOCKET NUMBER WD73675

Date: October 9, 2012

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable Michael W. Manners, Judge

Appellate Judges:

Division One: Joseph M. Ellis, P.J., James E. Welsh and Alok Ahuja, JJ.

Attorneys:

Amy K. Maloney, for Appellants

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Matt J. O'Laughlin, Co-counsel for Appellants

Paul D. Seyferth, for Respondent

Michael L. Blumenthal, Co-counsel for Respondent

Brent N. Coverdale, Co-counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

LAURA THOMAS AND ADAIRE STEWART, APPELLANTS

v.

MCKEEVERS ENTERPRISES, INC., RESPONDENT

WD73675

Jackson County, Missouri

Before Division One Judges: Joseph M. Ellis, P.J., James E. Welsh and Alok Ahuja, JJ.

On July 16, 2008, Laura Thomas and Adaire Stewart (collectively, “Appellants”) were discharged from their positions at McKeever’s Enterprises Inc., d/b/a McKeever’s Price Chopper (“Respondent”), where they worked as pharmacy technicians. At the time of Appellants’ discharge, both were over the age of forty. Each Appellant subsequently filed a petition in the Circuit Court of Jackson County alleging age discrimination in violation of the Missouri Human Rights Act (“MHRA”). The two cases were later consolidated for trial.

At trial, Respondent’s counsel made several comments during closing argument that the real issue for the jury to decide was whether Appellants would still be working for Respondent *but for* their age. Appellants’ counsel did not object to these statements. In Appellants’ rebuttal to Respondent’s closing argument, Appellants’ counsel stated she did not know where the “but for” language used by Respondent’s counsel came from. Respondent objected to Appellants’ counsel’s statement as a misstatement of the law. The trial court sustained the objection and issued an oral curative instruction immediately thereafter, in which the court stated that Appellants were required to prove that but for their age, they would not have been terminated. Appellants did not object to the trial court’s curative instruction.

After deliberating for approximately forty minutes, the jury returned verdicts in favor of Respondent on each Appellant’s age discrimination claim. The trial court entered its judgment accordingly. Appellants then filed a motion for new trial in which they alleged instructional error resulted from the trial court’s curative instruction because Appellants were not required to prove “but for” causation under the MHRA. The trial court denied Appellants’ motion for new trial. Appellants now appeal from the judgment.

REVERSED AND REMANDED

Division One holds:

(1) Appellants properly preserved for appellate review the issue of whether the trial court’s curative instruction was a misstatement of the law by including the argument in their motion for new trial because Appellants could not effectively object to the curative instruction, as it was part of the trial court’s ruling on Respondent’s objection. The trial court issued its curative instruction after brief argument at the bench by the parties regarding Respondent’s counsel’s objection to Appellants’ counsel’s statement regarding “but for” causation. Thus, there was no action that Appellants reasonably could have taken to preserve the issue for appeal other than raising it in the motion for new trial.

(2) The trial court erred in denying Appellants’ motion for new trial because the trial court erred when it instructed the jury in a manner contrary to the applicable Missouri Approved Instruction (“MAI”) in MHRA cases. Prior to closing argument, the jury was instructed pursuant to MAI 31.24 (now designated MAI 38.01), which the parties agreed was the appropriate MAI in MHRA cases. The trial court’s subsequent curative instruction during closing argument, however, deviated from MAI 31.24 when it instructed the jury that Appellants must prove that but for their age, they would not have been terminated. Thus, the trial court failed in its duty to give the mandatory MAI for MHRA cases to the exclusion of any other instruction.

(3) The trial court's curative instruction misled and confused the jury because the instruction was inconsistent with the applicable MAI for MHRA cases that was given prior to closing argument and amounted to a misstatement of the law in that it implied to the jury that Appellants had to prove that age was the sole or exclusive cause of their discharge, when nothing in the MHRA's statutory language requires a plaintiff to prove that discrimination was the substantial or determining factor in an employment decision.

(4) It generally will be considered error for a trial court to attempt to instruct the jury on but for causation because, although juries are peculiarly well suited to decide cause in fact, cause in fact is a complex, legal formula used for determining the submissibility of a plaintiff's case and, thus, cannot easily be explained or understood by lay jurors. The term "but for causation" is not to be used when instructing the jury, as it is the standard by which courts determine whether a submissible case has been made and instructing the jury by use of such term creates the potential for confusion.

Opinion by Joseph M. Ellis, Judge

Date: October 9, 2012

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