

# IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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## COMPLETE TITLE OF CASE

PRIMITIVO SOTO,

Respondent,

v.

COSTCO WHOLESALE CORP.,

Appellant.

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**DOCKET NUMBER WD78701**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** October 18, 2016

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## APPEAL FROM

The Circuit Court of Jackson County, Missouri  
The Honorable Robert M. Schieber, Judge

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## JUDGES

Division IV: Mark D. Pfeiffer, Chief Judge, Presiding, and James Edward  
Welsh and Alok Ahuja, Judges

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## ATTORNEYS

Daniel G. Curry, Sarah A. Brown, and Anthony E. LaCroix, Kansas City, MO

Attorneys for Respondent,

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

**PRIMITIVO SOTO,** )  
 )  
 ) **Respondent,** )  
**v.** ) **OPINION FILED:**  
 ) **October 18, 2016**  
**COSTCO WHOLESALE CORP.,** )  
 )  
 ) **Appellant.** )

WD78701

Jackson County

Before Division Four Judges: Mark D. Pfeiffer, Chief Judge, Presiding, and James Edward Welsh and Alok Ahuja, Judges

Costco Wholesale Corporation (“Costco”) appeals from the judgment of the Circuit Court of Jackson County, Missouri, entered following a jury verdict in favor of Mr. Primitivo Soto (“Soto”) on his retaliation claim under the Missouri Human Rights Act (“MHRA”).

Costco asserts: (1) the trial court erred in denying Costco’s motion for judgment notwithstanding the verdict because Soto failed to present sufficient evidence to support his retaliation claim under the MHRA; (2) the trial court committed instructional error in that there was no substantial evidence in the record that Costco’s suspension of Soto was in retaliation for his complaint of discrimination; (3) the damages instruction improperly allowed and directed the jury to award “future damages”; (4) the trial court erred in submitting the verdict form to the jury because the verdict form did not provide separate lines for lost wages and other compensatory damages, and as a result of this error, the jury was allowed to award future lost wages that it was not authorized to award; (5) the verdict form violated federal tax law by obscuring the amounts of the verdict that would and would not be subject to federal tax withholding and matching contributions for Social Security and Medicare; (6) the trial court erred in failing to order remittitur of the jury’s damages award; and (7) the trial court erred in granting Soto’s motion for attorney’s fees and costs because Soto’s counsel’s hourly rate and the number of hours billed were unreasonable, certain costs were not recoverable and were excessive, and the claimed pre-judgment and post-judgment interest was excessive.

Soto filed a motion for attorney’s fees on appeal, which was taken with the case.

**AFFIRMED AS MODIFIED; MOTION FOR ATTORNEY’S FEES GRANTED.**

**Division Four holds:**

1. There was sufficient competent evidence to support the jury’s determination that Soto’s charge of discrimination against Costco was a contributing factor in Costco’s decision to suspend and demote Soto.

2. The challenged theory of liability submitted to the jury was supported by substantial evidence to make a submissible case that Soto’s report of discrimination was a “contributing factor” to his suspension.

3. To reverse on grounds of instructional error, the party claiming instructional error must establish that the instruction at issue misdirected, misled, or confused the jury, and that prejudice resulted from the instructional error. Costco did not so argue. Furthermore, Costco’s claim of error was not preserved for review because it was not within the scope of its point relied on.

4. Because this was a case for money damages only, Rule 71.02 requires a general verdict. The general verdict form was an approved MAI instruction and its use was mandatory.

5. Because the Internal Revenue Code effectively eliminates the exclusion from gross income of damages received to compensate for economic loss and emotional distress arising out of claims for discrimination, any decision resolving Costco’s complaint would have no practical effect. Accordingly, Costco’s point on appeal is rendered moot and is dismissed.

6. When the evidence is viewed in the light most favorable to the trial court’s order, the jury’s verdict was not excessive.

7. Because an MHRA case is a tort action, the award of post-judgment interest on the award of attorney’s fees is governed by section 408.040.3. The trial court erred in awarding post-judgment interest on its award of attorney’s fees at the rate of 9% allowed for non-tort actions in section 408.040.2. Accordingly, the trial court’s judgment of post-judgment interest on the award of attorney’s fees and costs is modified to a per annum interest rate equal to the intended Federal Funds Rate plus 5%, until full satisfaction is made.

8. Because the judgment in favor of Soto is affirmed as modified, Soto is the prevailing party. Therefore, his motion for costs and attorney’s fees on appeal is granted, and the cause is remanded to the trial court for the purpose of conducting a hearing to determine the reasonableness of the costs and fees requested and to enter an appropriate award.

**Opinion by: Mark D. Pfeiffer, Chief Judge**

October 18, 2016

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.