IN THE SUPREME COURT OF MISSOURI

SC88012

DOUGLAS DAUGHERTY,

Appellant

vs.

CITY OF MARYLAND HEIGHTS, MISSOURI

Respondent

Appeal from the Circuit Court of the County of St. Louis
State of Missouri
Honorable B.C. Drumm, Jr.

Substitute Brief of Respondent

McMAHON BERGER, P.C.

James N. Foster, Jr., #28231
Patricia M. McFall, #30810
Amy R. Brown, #53136
Attorneys for Respondent
City of Maryland Heights
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350
(314) 567-5968 (facsimile)

Howard Paperner, Esq.
Howard Paperner, P.C.
9322 Manchester Road
St. Louis, Missouri 63119
City Attorney for
City of Maryland Heights, MO
(314) 961-0097

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This action is one involving the question of whether the burden-shifting framework articulated in McDonnell Douglas v. Green, 411 U.S. 792 (1973), applies under Rule 74.04(c), Missouri Rules of Civil Procedure, when analyzing whether summary judgment is proper in cases brought pursuant to the Missouri Human Rights Act, § 213.010, *et seq*. In addition, this action involves the question of whether the evidence supports the trial court's determination that Respondent showed lawful justification for terminating Appellant, entitling Respondent to judgment as a matter of law.

The trial court entered judgment in favor of Respondent on May 25, 2005, after granting Respondent's Motion for Summary Judgment. The Court of Appeals affirmed the trial court's ruling on June 27, 2006. Pursuant to Rule 83.04, Missouri Rules of Civil Procedure, this Court granted Appellant's Application for Transfer on December 9, 2006.

STATEMENT OF FACTS

In accordance with Rule 84.04(f), Respondent is providing its own Statement of Facts. Appellant's Statement of Facts contains numerous material misrepresentations of the record, as discussed below. Because of the extent of Appellant's misrepresentations, Respondent believes it is necessary to provide a complete Statement of Facts, rather then merely attempting to supplement Appellant's.

A. Appellant's Work History And Relevant Background Facts

Appellant Douglas Daughtery ("Appellant") was born on March 2, 1943 (SLF[1] 2). Appellant began working in law enforcement in 1965, when he was hired as a Police Officer by the City of St. Louis (SLF 6). He worked in that capacity for five years, at which time he entered a new career field (SLF 6). Appellant again worked as a Police Officer for the Webster Groves Police Department from 1973-1975 (SLF 7). From 1975-1985, Appellant was employed by the City of Ellisville Police Department (SLF 7). In 1985, the City of Maryland Heights ("Respondent") created a police department, and Appellant began working for that department at its inception (SLF 7). At the time he was hired by Respondent, Appellant was forty-two (42) years old and he held the rank of Sergeant (LF 83; SLF 2).

Neil Kurlander ("Kurlander") was appointed Chief of Police when Respondent created its police department in 1985 (SLF 7). Thomas O'Connor ("O'Connor"), whose

[1] Citations to the Legal File are indicated as "LF" and citations to the Supplemental Legal File are denoted "SLF."

date of birth is January 24, 1943, was hired as the Deputy Chief (LF 83; SLF 7-8). O'Connor is Appellant's brother-in-law and has been married to Appellant's sister for over thirty (30) years (LF 84; SLF 7-8). Mark Levin ("Levin"), whose date of birth is September 19, 1946, is the City Administrator for Respondent and has held that position since 1985 (SLF 773). In 1985, Michael Kozuszek ("Kozuszek") was hired by Respondent as a Watch Commander with the rank of Sergeant (SLF 472, 475). Kozuszek was promoted to Deputy Chief in January 2000 and attained the rank of Major, a rank he still maintains (SLF 472, 475). Kozuszek, whose date of birth is October 16, 1947, was fifty-two (52) years old when he was promoted to Deputy Chief (SLF 472, 475).

Respondent requires that all Police Department employees with the rank of Captain have a four (4) year college degree (LF 84). Appellant has not earned a four (4) year college degree (LF 84). On October 14, 1998, when Appellant was fifty-four (54) years old, Respondent enacted an ordinance which "grandfathered" Appellant in as Captain and waived the requirement that he have a four (4) year college degree (LF 84; SLF 35). Ordinance No. 98-1448 was passed specifically for Appellant so he could be promoted to Captain (LF 84; SLF 35).

Chief Kurlander planned to retire in January 2000, and O'Connor was going to be promoted as the Chief's replacement (LF 84; SLF 35-36). In late 1999/early 2000, in anticipation of his promotion, O'Connor offered Appellant a position as Commander of the Detective Bureau (LF 84; SLF 35-36). When Appellant assumed command of the Detective Bureau, he was fifty-six (56) years old (SLF 2, 59). In April 2002, O'Connor

transferred Appellant to a Watch Commander position, and Appellant maintained his rank of Captain and his rate of pay (LF 86; SLF 64-65).

In August 2002, Appellant was examined by Dr. Richard Katz to determine Appellant's fitness for duty (LF 86, 97-102, 122-30; SLF 50-51, 53-55). In conjunction with that examination, Dr. Katz referred Appellant for a Functional Capacity Evaluation ("FCE") with Victor Zucarello of Pro Rehab (LF 91, 97-102, 122-30; SLF 24). Both Dr. Katz and Mr. Zucarello, a Vocational Rehabilitation Specialist, concluded that Appellant was unable to perform his duties as a Police Officer for Respondent (LF 95, 97-102, 122-30; SLF 50-51, 53-55). As a result of Dr. Katz and Mr. Zucarello's findings, O'Connor knew that he likely would have to terminate Appellant, but he first wanted to discuss with the City's counsel and Levin the possible options, such as disability benefits, which may have been available to Appellant (LF 87). O'Connor met with Appellant to discuss the implications of Dr. Katz's report and Appellant's options on October 28, 2002 (LF 87).

At the time of Appellant's termination, he was fifty-nine (59) years old (SLF 2). O'Connor, who was six weeks older than Appellant, was also fifty-nine (59) (LF 83; SLF 57). Furthermore, Levin was fifty-six (56) years old, and Kozuszek was fifty-five (55) (SLF 470, 773). Captain Robert Nichols, who was sixty-three (63) years old, replaced Appellant as a Watch Commander (LF 105; SLF 209).

B. Respondent's Policies Contained In Its Personnel Manual And The General Orders

Respondent provides its employees, including Police Department employees, with a sick leave benefit which allows each employee to accumulate 960 hours of paid sick

leave (LF 175-76; SLF 9-11). Additionally, employees of Respondent receive a vacation benefit which allows each employee to accumulate up to 240 hours of paid vacation time (LF 175-76; SLF 9-11). Finally, Respondent provides its employees with up to 80 hours of paid holiday time (LF 175-76; SLF 9-11).

Respondent is an Equal Opportunity Employer, and its policy states that no person shall be discriminated against based upon, among other categories, age and/or disability (LF 145). According to Respondent's policies, "an employee may be transferred, demoted, or separated for disability when the employee cannot perform the essential functions of the position because of physical or mental impairment" (LF 157). In enforcing this policy, Respondent may require an employee to be examined by its physician to determine if the employee is able to perform the essential functions of his or her position (LF 157; SLF 12). Under Respondent's long term disability plan, a disabled employee can receive up to 66% of his or her base salary until the age of sixty-five (65), which is the mandatory retirement age for Police Department employees (LF 168-69; SLF 27).

Respondent requires that each Police Officer notify his or her supervisor of all prescription medication being taken by that officer (LF 194; SLF 11-12). In addition, Respondent maintains a Prescription Drug Policy, as follows:

"**16.5 PRESCRIPTION DRUGS**

a. The legal use of prescribed drugs is permitted on duty only in the manner, combination, and quantity prescribed, and only if it does not impair an employee's ability to perform the essential functions of the job effectively

and in a manner that does not endanger other individuals in the workplace. Employees taking such drugs are required to notify their supervisor.

b. Any employee whose use of prescription drugs results in an act or acts to the detriment of the City, including, but not limited to, excessive absenteeism, tardiness, on-duty accidents, or poor work, and the act does not warrant termination, may be referred for a screening examination, and/or back to their private physician, and/or they may be referred to the Employee Assistance Program for counseling, where in turn they may be referred to a treatment program. Appropriate disciplinary action may also be administered, up to and including termination." (LF 194)

Finally, Respondent's Police Department maintains a policy which prohibits the recording of conversations between employees of the department (LF 88-89; SLF 56-57, 62). Employees who violate this policy are subject to termination (LF 88-89; SLF 56-57, 62). In fact, in 1988, three (3) police officers resigned in lieu of termination after they recorded conversations within the Police Department (LF 88-89). This incident prompted the creation of the General Order prohibiting the recording of such conversations (LF 88-89).

C. The Job Description Of A Police Officer In Respondent's Police Department

All Police Officers employed by Respondent, from the Chief down to the lowest level Patrol Officer, are required to perform all duties of a Police Officer (SLF 13-14). Every Police Officer is required to be able to enact an arrest, subdue an unwilling

perpetrator, pull an accident victim from an accident scene, and lift more than one hundred (100) pounds (LF 97-102, 118-30; SLF 13-14, 57). Appellant admitted that all Police Officers, including those with the rank of Captain, are required to perform these functions (SLF 13-14, 57). Appellant also admitted that the job descriptions provided by Respondent to Dr. Katz were accurate and truthful (SLF 53-54, 57).

D. Appellant's Injury History, Resulting Physical Symptoms And Attendance Problems, And The Circumstances Leading To His Separation From Employment

In 1978 or 1979, while working with the City of Ellisville Police Department, Appellant injured his lower back in the line of duty (SLF 8-9). Appellant was diagnosed with a compressed/ruptured disc and had a laminectomy/fusion of his lower spine (SLF 9).

On July 4, 1986, while working in the line of duty for Respondent, Appellant was struck by a drunk driver and his spinal cord was partially severed (SLF 17-19). Appellant was initially paralyzed from the chest down, and his initial prognosis indicated that he would be permanently paralyzed (SLF 17). Dr. David L. Wilkinson treated Appellant for his spinal cord injury from the time of the accident through at least March 31, 2005 (LF 111; SLF 17). Dr. Wilkinson performed surgery on Appellant which alleviated the paralysis, although Appellant's spinal cord still remains partially severed (SLF 17-19). Respondent filed a worker's compensation claim on behalf of Appellant after the injury, and Appellant eventually received compensation for the injury when that claim was settled (SLF 18).

While treating Appellant in 1987, Dr. Wilkinson formed the medical opinion that Appellant should never return to his full and active duties as a Police Officer, but he could return to administrative duties as a Police Officer (LF 112). Dr. Wilkinson believed that Appellant should never return to front line-type duties (LF 112). On August 21, 1987, Dr. Wilkinson released Appellant to return to full duty, with the mistaken understanding that Appellant's full duties were strictly administrative and would not require the physical exertion of a front line Police Officer (LF 112). Specifically, Dr. Wilkinson released Appellant exclusively to "administrative, desk-type duties" (LF 112). When Appellant returned to work in September 1987, Respondent was under the impression that Appellant was returned to full and active duty as a Police Officer, not simply administrative duties (LF 108).

Appellant has continued to suffer from the physical effects of his spinal cord injury, including Brown-Sequard Syndrome, which is a condition associated with the type of injury suffered by Appellant (SLF 30). The symptomology includes: muscle atrophy and weakness on his left side and sensory deficit on the right side of his body; numbness and tingling in his right hand; pain; burning sensations; spasms; constipation; and sexual dysfunction (SLF 30). Appellant also suffers from constant numbness and tingling in his right hand, which is the hand he uses to shoot a weapon (SLF 30). He also experiences contraindications in sensation on his right side, including his hand, leg, and abdomen, where hot feels cold and cold feels hot (LF 112-16, 122-30; SLF 18-20, 29-30). These symptoms cause Appellant to suffer from insomnia (SLF 34). Appellant takes

several medications to relieve these symptoms, including but not limited to: Baclofen, Diazapam (Valium), Flurazepam, Vicodin, Vioxx, and Carisoprodol (LF 108; SLF 3-6).

Often, Appellant's medications would not work, which would cause insomnia, and as a result, he would be absent from work. Additionally, his medications, particularly the Flurazapam and Vicodin, often would not "kick in" until the middle of the night, rendering Appellant unfit for duty the next day (SLF 51-53). Appellant would decide, on his own, while under the influence of these narcotics, whether or not he was fit for duty and would either go to work or call in sick (SLF 19, 51-53).

In 1999 and 2000, Appellant's condition began to deteriorate and his symptoms worsened (LF 234; SLF 33). In late 1999, O'Connor and Kurlander suggested that Appellant take over as Commander of the Detective Bureau, as Earl Rodus, the current Commander, was preparing to retire at the mandatory retirement age of sixty-five (65). Both O'Connor and Kurlander thought this position would be a better fit to accommodate Appellant's absences resulting from his medical condition, as Appellant may be able to change his work schedule to accommodate those days when his medications caused him to be unfit for duty (SLF 31-32, 36, 65). Appellant understood that Kurlander and O'Connor proposed this reassignment in an effort to accommodate Appellant's disability (SLF 35-36). O'Connor told Appellant that this position would be a good way for him stay out of the "limelight" of City Hall, as Levin had not been pleased with Appellant's absenteeism since the 1986 injury (SLF 31-32). Appellant acknowledged that he had been absent from work a lot since his 1986 injury (SLF 31-32). Subsequently, Appellant

accepted the position as Commander of the Detective Bureau (SLF 31-32). Appellant indicated that he and Levin always had a good relationship (SLF 31-32).

On January 19, 2000, while he was Commander of the Detective Bureau, Appellant returned to Dr. Wilkinson and complained that he had pain in his back, his legs would "give out," he had a loss of equilibrium, and his "right hand won't work right" (LF 234; SLF 33). In April 2000, Dr. Wilkinson diagnosed Appellant with degenerative spine disease, or cystic degeneration of the spine, which was related to the 1986 injury (SLF 20-21). That same month, Dr. Wilkinson performed a fusion of Appellant's lumbar spine (SLF 20-21).

As a result of that surgery, Appellant was absent from work from April 2000 until October 9, 2000 (SLF 21). During his absence, Appellant exhausted all of his paid leave entitlements (SLF 22-24). In response, Respondent enacted an Ordinance which allowed all City employees to donate their accumulated paid sick leave to Appellant (SLF 22-24). O'Connor donated one week (40 hours) of his sick time to Appellant (SLF 22-24). Ordinance No. 2000-1849 was passed specifically for Appellant so that he could be paid during his leave of absence (LF 84-85, 236; SLF 22-24). As a result of the Ordinance, Appellant was paid for nearly his entire six (6) month absence (SLF 22-24). The Ordinance expired in December 2000, after Appellant returned to work (SLF 22-24).

After he returned to work in October 2000, Appellant again began accruing paid sick leave and vacation time (SLF 25). However, by June 2001, Appellant had once again exhausted all of his paid leave entitlements due to numerous absences in the first half of 2001 (SLF 25).

In June 2001, Kozuszek approached Appellant about his absenteeism and the fact that Appellant had, once again, exhausted all of his paid leave (LF 201-07; SLF 25-27). Kozuszek explained that Dave Watson, Respondent's Director of Finance, and Levin were concerned about this issue (SLF 25-27). Kozuszek told Appellant that Levin and Watson thought it might be more financially prudent for him to take a disability retirement and receive two-thirds (2/3) of his salary as opposed to having numerous unpaid absences (SLF 25-27). Levin and Watson were concerned that, given Appellant's chronic absenteeism and his exhaustion of his paid leave entitlements, in the long run, Appellant would do better financially if he took advantage of Respondent's disability retirement program (SLF 25-27).

Appellant agreed that he would be eligible for a disability retirement and referred to himself as disabled as a result of his 1986 spinal cord injury (SLF 29-30). Kozuszek encouraged Appellant to consider disability retirement as an option, given his age and disability (LF 201-07; SLF 25, 27, 29). Appellant never denied having a disability and never claimed that he would not be eligible for Respondent's disability retirement program (SLF 27-29). In fact, Appellant had discussed taking disability retirement several times since his 1986 injury and told O'Connor that he intended to file for disability retirement at some point in the future (SLF 27-28).

During 2001 and 2002, O'Connor received several complaints from the Detectives and Sergeants in the Detective Bureau regarding Appellant's lack of leadership and supervision due to his poor attendance and failure to be present in the Bureau (LF 85, 208-25; SLF 37, 39-42, 731-33, 756-59, 821). Specifically, Sergeant Joseph Bova Conti

was having problems with his subordinates, and he believed those problems were impacted by Appellant's failure to come to work (SLF 757-58). According to Sergeant Joseph Delia, Appellant's poor attendance and management style contributed to division in the Detective Bureau (SLF 728, 731-36). As a result of these complaints, O'Connor believed that Appellant was not managing the Bureau properly (LF 85). Appellant felt the Bureau Detectives and Sergeants, particularly Sergeant Delia, were disloyal, as they went outside the chain of command and complained to O'Connor about Appellant's leadership failure and poor attendance (SLF 41-42).

In September 2001, at the direction of O'Connor, Kozuszek approached Appellant to discuss the problems in the Bureau, specifically, Appellant's poor attendance, the friction between the Sergeants, Appellant's exhaustion of his paid leave entitlement, and the overall lack of leadership in the Bureau (LF 85-86; SLF 37, 821). Kozuszek told Appellant that his poor attendance in the Bureau during regular working hours was having an adverse effect, and as a result, Kozuszek instructed Appellant that he was to work a more regular schedule during normal business hours. (LF 85-86; SLF 37, 821). In addition, Kozuszek advised Appellant to refrain from changing his work schedule to meet his personal needs. (LF 85-86; SLF 37, 821). Finally, Kozuszek instructed Appellant to follow the vacation and sick leave policies, specifically, by scheduling vacation in advance and not on the day of a sick day to cover that absence (LF 85-86; SLF 37, 821).

On January 15, 2002, Kozuszek once again counseled Appellant regarding his work schedule (LF 235; SLF 37). Kozuszek mandated that Appellant work a 9:00 a.m. to

5:00 p.m. schedule to alleviate the problems in the Bureau (LF 235; SLF 37). Kozuszek also instructed Appellant to obtain permission in advance from either Kozuszek or O'Connor if Appellant wanted to change his work schedule (LF 235; SLF 37). In addition, Kozuszek requested that Appellant advise him, or in his absence, O'Connor, if Appellant intended to take a vacation day (LF 235; SLF 37). Finally, Kozuszek advised Appellant to follow the directives in the police manual in the event a sick day was necessary (LF 235; SLF 37).

As of January 2002, Appellant was the only Police Department employee to exhaust all of his paid leave entitlement (SLF 39). In addition, Appellant had the greatest level of absenteeism of any Police Department employee in 2001 and 2002 (SLF 39). Appellant did not like working a 9:00 a.m. to 5:00 p.m. shift because it "put [him] right in the middle of rush hour" (SLF 38).

On February 13, 2002, Appellant received an Oral Reprimand from Kozuszek because Appellant failed to follow the vacation policy (SLF 42). Specifically, Appellant used a vacation day to cover a sick day (SLF 42). Appellant admitted that he violated Respondent's policy and Kozuszek's January 15, 2002 directive (SLF 42).

In April 2002, Appellant received an unfavorable performance review based on his poor attendance, his leadership failure in the Detective Bureau, his unilateral changing of his work schedule, his prior counseling on these issues, and his failure to improve in any respect (LF 578-80; SLF 43). Appellant signed the evaluation and did not appeal it, although Respondent's polices allowed for such an appeal (SLF 64).

In April 2002, as a result of the above-referenced problems, O'Connor decided to transfer Appellant out of the Bureau and back to his former position of Watch Commander without a reduction in pay or rank (LF 86). Appellant did not appeal that transfer decision, although Respondent's policies allowed him to do so (SLF 64).

On or about July 9, 2002, Appellant called into the department, as opposed to O'Connor or Kozuszek as directed, and reported that he was sick and would need to take a vacation day the following day, July 10, 2002 (SLF 46-48). July 10, 2002, was a scheduled training day for the Police Department (LF 242-44; SLF 46-48). Appellant admitted that he violated Respondent's policies and Kozuszek's directives when he called the department and took a vacation day (SLF 46-48). Upon learning that Appellant was taking a vacation day, Kozuszek contacted Appellant to question him about his absence from training. Appellant indicated that he was actually sick and suffering from low back pain (LF 242-44; SLF 46-48). Appellant did not allege a work-related injury at that time (LF 242-48; SLF 46-48).

On July 11, 2002, Kozuszek issued an Oral Reprimand to Appellant regarding yet another violation of the vacation and sick leave policy as well as Kozuszek's prior directive (LF 242-44; SLF 46-48). Appellant admitted that he violated both Respondent's policy and Kozuszek's directive (LF 242-44; SLF 46-48). In response to the Oral Reprimand, Appellant, *for the first time*, alleged he had actually suffered a work-related injury on July 9, 2002, which resulted in his absence on July 10, 2002 (LF 242-48; SLF 46-48). Appellant indicated that on July 9, 2002, he allegedly stepped off a curb and felt pain in his lower back, which rendered him unable to stand (LF 245-48; SLF 48).

Appellant missed several days of work and was placed on light duty due to pain in his lower back (LF 238; SLF 45-46). He was released to full duty on August 12, 2002 (LF 238; SLF 48).

After the protracted absences associated with the condition of his back, Respondent required Appellant to submit for a fitness for duty exam (LF 86; SLF 49). Appellant was not surprised by this request because he had been warned in June 2001 that Levin wanted to have him evaluated due to his excessive absenteeism (SLF 49). Appellant admitted that Respondent had a legitimate interest in assessing his fitness for duty and that Respondent had the right, pursuant to its own policies, to send him for a fitness for duty exam (SLF 12, 35).

On August 27, 2002, Appellant was examined by Dr. Richard Katz, M.D. (LF 122-30; SLF 50). Dr. Katz had reviewed Appellant's job description (LF 122-30). Appellant agreed that the job descriptions provided to Dr. Katz were accurate (SLF 53-54, 57). Appellant reported that Dr. Katz was professional and courteous during the exam (SLF 50).

In September 2002, Appellant sought treatment from his treating physician, Dr. Wilkinson. Appellant complained that he was experiencing constant pain in his neck, even when standing still, along with persistent numbness in his right hand. Specifically, Appellant claimed that his right hand would lock up and curl up, preventing him from grabbing certain objects (LF 115).

On October 14, 2002, Appellant submitted to Kozuszek a list of his current prescription medications (LF 249; SLF 48-49). In that submission, Appellant reported to

his supervisors for the first time that he was using Vicodin, despite the fact that he had been taking Vicodin since April 2000 (SLF 5-6, 47-48, 51-53).

Following his examination, Dr. Katz referred Appellant to Victor Zucarello, a vocational rehabilitation specialist at Pro Rehab, P.C., for a Functional Capacity Evaluation ("FCE") (LF 122-30). After the FCE, Mr. Zucarello, who was provided with a copy of Appellant's job description, concluded that Appellant could not perform all the duties of his job, particularly chasing and subduing an unwilling suspect and pulling a victim from an accident scene (LF 95, 97-102, 122-30; SLF 53-55).

On October 28, 2002, Dr. Katz issued a report, incorporating Mr. Zucarello's report (LF 122-30). Dr. Katz found that Appellant was unable to perform the duties of his job, particularly with respect to subduing an unwilling suspect and pulling a victim from an accident scene (LF 122-30). Dr. Katz also concluded that Appellant had not been safe to function in a physical confrontation with an adult male or female since his spinal cord injury in 1986 (LF 122-30). Finally, Dr. Katz indicated that Appellant's medications have the potential to impair his ability to safely operate a handgun (LF 122-30).

Appellant does not dispute that both Dr. Katz and Mr. Zucarello found him unfit to perform the duties of his job as a Police Officer (SLF 13, 50-51, 53-55). Furthermore, Appellant does not dispute that all Police Officers, regardless of rank, are required to perform the same core duties of a Police Officer, including those of a front-line officer (SLF 13-14). In addition, Dr. Wilkinson, Appellant's own treating physician, concurred with the conclusions of Dr. Katz. Dr. Wilkinson believed that Appellant could not

perform the duties of a Police Officer as described in the job description provided by Respondent (LF 112-16). Specifically, Dr. Wilkinson believed that Appellant could not safely apprehend a suspect or operate a handgun (LF 112-16).

Upon receipt of Dr. Katz's report, O'Connor met with Kozuszek, Levin, and Howard Papener ("Papener"), the City Attorney, to discuss various courses of action (LF 87). O'Connor also wanted to consult with Levin regarding the various disability benefits that may be available to Appellant (LF 87). After consulting with counsel, O'Connor decided to terminate Appellant's employment, but he also wanted to encourage Appellant to take advantage of Respondent's disability retirement plan (LF 87).

Appellant does not dispute that O'Connor made the decision to terminate his employment (SLF 55, 60-61). O'Connor told Appellant that he made the decision to terminate and O'Connor testified to that effect at Appellant's post-termination hearing (SLF 55, 60-61). O'Connor made the decision solely based on the medical report of Dr. Katz (LF 88).

After he made the decision to terminate Appellant's employment, O'Connor set up a meeting with Appellant on October 28, 2002. Kozuszek was also present for that meeting (LF 87; SLF 55, 58). O'Connor presented Dr. Katz's report to Appellant and told Appellant that, based on Dr. Katz's medical opinion, he had no choice but to terminate Appellant (LF 87; SLF 55, 58). O'Connor encouraged Appellant to take advantage of Respondent's disability retirement plan (LF 87; SLF 55, 58). Appellant stated that he intended to take disability retirement, but he wanted to wait two more years

(SLF 58). Appellant indicated that the meeting was very uncomfortable, given O'Connor's status as his brother-in-law (SLF 60).

Appellant does not contend that O'Connor was in any way motivated by age in making the decision to terminate him (SLF 58). In addition, Appellant does not contend that Kozuszek had any bias against his age (SLF 58). No one, including O'Connor, ever told Appellant that Levin was motivated by Appellant's age in approving the discharge (SLF 59). Neither O'Connor nor Levin ever said or did anything offensive with respect to Appellant's age or disability (SLF 62-63).

Appellant believes that Levin was out to get him because of his excessive absenteeism and his use of sick time, along with the reasons for his use of sick time. Appellant stated that, if it were not for his use of sick time and the reasons therefore, Levin would not have been after him (SLF 59-60). Appellant contends that Levin's concern regarding Appellant's use of sick time was based upon Levin's belief that Appellant's medical condition was preventing him from performing his job duties (SLF 44). Appellant admitted that he has no facts to suggest that Levin's concern regarding his use of sick time was based on his age (SLF 44). In addition, Appellant believes the only person who perceived him to be disabled was Levin (SLF 63-64). Appellant stated that Levin had this perception because his disability cost Respondent financially (SLF 63-64). Appellant also believes that Levin perceived him to be unable to perform his duties as a Police Officer, and he disagrees with Levin's perception (SLF 63-64). Appellant alleges the only duties Levin perceives he cannot perform are those of a front-line Police Officer

(SLF 63-64). This is the basis for Appellant's perceived disability claim under the MHRA (SLF 63-64).

During the October 28, 2002, meeting, O'Connor was very uncomfortable and was concerned that Appellant would take the decision personally and, in turn, assign blame to O'Connor personally (LF 87). Given his relationship to Appellant, O'Connor did not want this difficult situation to cause a rift in their relationship or in Appellant's relationship with his sister, O'Connor's wife (LF 87). As a result, O'Connor assigned responsibility not only to himself, but also to Levin and Papener (LF 87).

During their conversation, O'Connor told Appellant that, in his opinion, Levin thought Police Officers fifty-five (55) and older were making too much money and Levin wanted them out (SLF 58). Appellant admits that O'Connor never indicated that Levin actually said anything to that effect, but rather, O'Connor was just giving his own opinion (SLF 59-60). In response to O'Connor's opinion, Appellant said "that's age discrimination," and O'Connor simply agreed with him (SLF 58-59). Appellant was the first to mention "age discrimination" in this conversation (SLF 58). There is no evidence that Levin ever actually said anything to support O'Connor's opinion (LF 87-88; SLF 58-60).

O'Connor did not have any reason to believe that Levin was, in fact, trying to get rid of Police Officers over the age of fifty-five (55) (LF 87-88). O'Connor indicated that Levin never said or did anything to make him believe that Levin wanted to get rid of Police Officers over the age of fifty-five (55) (LF 88). In fact, Earl Rodus and Bob Nichols, two Police Officers from the original 1985 hire class, retired at the age of sixty-

five (65), the mandatory retirement age (LF 88). Police Officers Roger Tinti, Preston Kohenskey, Terry Weidner, Emery Albritton, and John Brethorst are each over the age of fifty-five (55) and are still employed by Respondent (LF 88). Finally, O'Connor indicated that Levin has never forced him to terminate any Police Officer, including Appellant (LF 88).

Contrary to the General Order of the Police Department, Appellant surreptitiously tape-recorded his October 28, 2002, conversation with O'Connor and Kozuszek by intentionally concealing the tape-recorder in his pocket (SLF 57). Appellant admitted that he violated the department's General Order by secretly recording the conversation (SLF 56-57). In fact, Appellant acknowledged that he would have been terminated had O'Connor or Kozuszek discovered that he recorded the conversation without their consent or knowledge (SLF 62). By comparison, in 1988, three (3) Police Officers resigned in lieu of termination when the department learned that they had surreptitiously recorded conversations (SLF 88-89).

At the end of the October 28, 2002, meeting with O'Connor and Kozuszek, Appellant was told to take some time off (SLF 65). Appellant was also told that he was being temporarily assigned to Community Services while he considered his options (SLF 65). To this date, Appellant has not applied for Respondent's disability retirement program. After his termination, Captain Robert Nichols replaced Appellant as a Watch Commander (LF 105). Nichols was sixty-three (63) years old at the time he took over Appellant's former position (LF 105). Nichols retired at the mandatory retirement age of

sixty-five (65), at which time Captain William Fink, who was fifty (50) years old, assumed the position of Watch Commander (LF 105; SLF 209-10).

Appellant appealed his termination to the Board of Police Commissioners, which upheld his termination. The Circuit Court for St. Louis County, upon review of the administrative record, found that Appellant's termination was supported by substantial evidence, was not arbitrary and capricious, and was not unlawful. Appellant then filed suit in the Circuit Court for St. Louis County, alleging that Respondent violated the MRHA by terminating him based on his age and his perceived disability (LF 7-16). Respondent was granted summary judgment on all claims, and this appeal follows (LF 796-98).

ARGUMENT

A. The Trial Court Did Not Err In Stating That, Pursuant to Rule 74.04, Missouri Rules of Civil Procedure, A Plaintiff Is Required To Establish The Elements Of His Claim To Create A Question Of Fact For The Jury As To An Essential Element, To Wit, In The Instant Case, Whether An Improper Consideration Of Age Or Disability Contributed To The Defendant's Termination Decision. (Response to Appellant's Point Relied On II)

Appellant argues that the trial court erred by applying an improper standard of law when considering Respondent's Motion for Summary Judgment. The trial court found that Appellant was not able to establish a *prima facie* case of either age discrimination or discrimination on the basis that he was "regarded as" disabled. Specifically, regarding the age discrimination claim, the trial court found that the record showed Appellant was not replaced by a younger Police Officer and Appellant could not establish that he was performing his job at a level that met Respondent's legitimate expectations. Considering the "regarded as" disabled claim, the trial court found the record established that Appellant's physical impairment prevented him from performing his job and Respondent did not mistakenly perceive Appellant as having a physical impairment that substantially limited a major life activity. Moreover, the trial court found that Respondent had articulated a legitimate, non-discriminatory reason for Appellant's discharge, namely, Respondent based its decision on the medical conclusion that Appellant could not safely perform as a Police Officer.

In his Point Relied On II, Appellant claims that the trial court erred by not applying the correct standard of law. Appellant argues that the burden-shifting framework articulated in McDonnell Douglas v. Green, 411 U.S. 792 (1973) (hereinafter "McDonnell Douglas standard" or "McDonnell Douglas framework") is no longer the applicable standard to be used at the summary judgment stage in discrimination cases under the Missouri Human Rights Act[2] (MHRA), § 213.010, *et seq*., R.S.Mo. Instead, Appellant asserts that the Missouri Approved Instruction (MAI) 31.24[3], the verdict

[2] The MHRA provides, in pertinent part, that:

1. It shall be an unlawful employment practice:

(1) for an employer, *because of* the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, national origin, sex, ancestry, age or disability[.]

§ 213.055, R.S.Mo. (emphasis supplied)

[3] MAI 31.24 provides:

Your verdict must be for plaintiff if you believe:

director adopted by this Court for plaintiffs in MHRA cases, provides the proper framework for analyzing a motion for summary judgment.

Missouri Rule of Civil Procedure 74.04(c) provides, in pertinent part, that summary judgment shall be granted "if…there is no genuine issue as to any material fact and…the moving party is entitled to judgment as a matter of law." In ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993), this Court addressed the application of Rule 74.04. The court noted, "Rule 74.04 establishes a step-by-step procedure….Lack of adherence to the text of the rule, however, and a lingering disfavor of summary judgment, have robbed this rule of its usefulness." Id. at 376. This Court sought to "clarify the analysis and dispel any remaining doubt that summary judgments play an essential role in our system." Id. When a defending party, such as Respondent, moves for summary judgment, it is not necessary for the movant to controvert each element of the non-movant's claim. Id. at 381. In order to establish a

---

> First, defendant *(here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of Section 213.055, R.S.Mo.)* plaintiff, and
>
> Second, *(here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age or disability),* was a contributing factor in such *(here, repeat alleged discriminatory act, such as "failure to hire," "discharge," etc.)*, and
>
> Third, as a direct result of such conduct, plaintiff sustained damage.

right to summary judgment, a movant who is a defending party must show: "(1) facts that negate *any one* of the claimant's elements, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of the claimant's elements, or (3) that there is no genuine dispute as to the existence of *each* of the facts necessary to support the movant's properly-pleaded affirmative defense." Id. (emphasis added in addition to emphasis in original).

Appellant completely ignores long-standing precedent by arguing that a motion for summary judgment in a case under the MHRA should be analyzed using MAI 31.24. Indeed, Appellant cannot cite any authority to support this position. If Appellant's argument were to be adopted by this Court, the summary judgment standard of Rule 74.04 would be wholly eviscerated and trial courts would be required to apply a *unique* "standard of law" to every substantive area of law or cause of action for which a Missouri Approved Instruction has been formulated. The Missouri Approved Instruction would "trump" any statute, rule, or controlling decision applicable to a defending party.

This Court has long held that employment discrimination claims brought under the MHRA should be evaluated and analyzed using the McDonnell Douglas burden-shifting framework. See Midstate Oil Co., Inc. v. Missouri Commission on Human Rights, 679 S.W.2d 842, 845 (Mo. banc 1984). Under the McDonnell Douglas standard, a plaintiff must show the following to establish a *prima facie* case of discrimination: (1) he was a member of the protected group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he suffered an adverse employment action; and

(4) he was replaced by a person not in the protected class. See, e.g., West v. Conopco Corp., 974 S.W.2d 554, 556-57 (Mo.App. E.D. 1998), app. for transfer denied, Sept. 22, 1998; Richmond v. Board of Regents of University of Minnesota, 957 F.2d 595, 598 (8th Cir. 1992) (age discrimination elements stated).[4] When a plaintiff makes a claim for discrimination based on disability, he must establish a *prima facie* case by proving the following: (1) he has a disability within the meaning of the MHRA; (2) he was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) he suffered an adverse employment action because of his disability. See, e.g., Medley v. Valentine Radford Communications, Inc., 173 S.W.3d 315, 319 (Mo.App. W.D. 2005), app. for transfer denied, Nov. 1, 2005; Epps v. City of Pine Lawn, 353 F.3d 588, 591 (8th Cir. 2003).[5]

[4] It has been decided the same analytical framework applies for age discrimination claims and is utilized under both the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq*. and the MHRA. Missouri courts consider federal ADEA decisions when analyzing MHRA age claims. West, 974 S.W.2d at 556; Rinehart v. City of Independence, Mo., 35 F.3d 1263, 1265 n.1 (8th Cir. 1994).

[5] Missouri courts also consider federal court decisions in cases brought under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, *et seq.*, when analyzing claims for disability discrimination under the MHRA. Medley v. Valentine Radford Communications, Inc., 173 S.W.3d 315, 319 (Mo.App. W.D. 2005) (citations omitted).

If a plaintiff is able to satisfy this burden of proof, the burden of production shifts to the defendant to show a legitimate, non-discriminatory reason for its action. Richmond, 957 F.2d at 598. The plaintiff must then present sufficient evidence to raise a factual dispute not only as to whether the employer's proffered reason is credible, but also as to whether the total mix of evidence creates an inference that the employer improperly used an impermissible factor (i.e., age) in making its decision. West, 974 S.W.2d at 557 n.2. In other words, the plaintiff's evidence must support an inference that the employer's reason for termination is a pretext *for discrimination*. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1334 (8th Cir. 1996); see also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 507-08 (1993).

In Midstate Oil, this Court held that claims brought under § 296.020 R.S.Mo., the precursor to § 213.055, should be analyzed using the McDonnell Douglas framework. 679 S.W.2d at 846. The Court noted that "a substantial number" of states use the McDonnell Douglas standard when evaluating cases brought under state anti-discrimination laws.[6] Id. at 845. The Court called the McDonnell Douglas framework "a

[6] The court cited to seven states—Connecticut, Delaware, Illinois, Minnesota, New Jersey, Ohio, and Vermont—to illustrate this point. All of those states still apply McDonnell Douglas when analyzing claims under their anti-discrimination laws. See, e.g., Dept. of Transp. v. Commission On Human Rights and Opportunities, 272 Conn. 457, 464 n.9, 863 A.2d 204, 208 n.9 (Conn. 2005); Gallucio's v. Kane, 1995 WL 656818

sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Id., quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (internal quotation marks omitted). Indeed, Missouri courts have continued to analyze discrimination cases under McDonnell Douglas for over twenty years. See, e.g., Igoe v. Dept. of Labor and Industrial Relations, __ S.W.3d ___, 2006 WL 3007072 (Mo.App. W.D. 2006), app. for transfer denied, Jan. 30, 2007; Young v. American Airlines, Inc., 82 S.W.3d 647 (Mo.App. E.D. 2005), app. for transfer denied, Feb. 28, 2006).

Appellant relies upon State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003) and the approval of MAI 31.24 to argue that entitlement to a jury trial somehow changed the summary judgment analysis. However, Appellant's reliance on Diehl and MAI 31.24 for this claim is misplaced. In Diehl, this Court held only that a plaintiff has a right to a jury trial in cases brought under the MHRA. Id. at 92. In response to the decision in Diehl, this Court in its normal course promulgated and approved MAI 31.24, a verdict

---

(Del.Super. 1995); Deen v. Lustig, 337 Ill.App. 3d 294, 302, 785 N.E.2d 521, 529 (Ill.App. 4 Dist. 2003); Meads v. Best Oil Co., 725 N.W.2d 538, 542 (Minn.App. 2006); Gerety v. Altantic City Hilton Casino Resort, 184 N.J. 391, 399, 877 A.2d 1233, 1237 (N.J. 2005); Williams v. Akron, 107 Ohio St.3d 203, 205, 837 N.E.2d 1169, 1172 (Ohio 2005); Robertson v. Mylan Laboratories, Inc., 176 Vt. 356, 364, 848 A.2d 310, 318 (Vt. 2004). Four of these states provide for jury trial of such claims and none have approved instructions.

directing instruction, for use by juries in such cases. The fact that a claim is jury triable does not impact the application of Rule 74.04 or the McDonnell Douglas analysis to such claim at the summary judgment stage. Moreover, the fact that MAI 31.24 employs the term "contributing factor" does not render the McDonnell Douglas analysis incorrect or obsolete.

There are fundamental differences between the evaluation of a case at summary judgment and the evaluation of a case at the close of all evidence at trial. When an employment discrimination case is submitted to a jury, the plaintiff has "presumably already established genuine controversy as to whether the adverse employment action was motivated, at least in part, by discrimination based on a protected characteristic. By contrast, at the summary judgment stage, the controlling issue ordinarily is whether or not there exists a genuine issue of fact regarding *any* discriminatory motive." Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017 (8th Cir. 2005) (emphasis in original). At the summary judgment stage, courts focus on the ultimate question of law, that is, whether there is a factual dispute as to whether the employer intentionally discriminated against the employee based on a protected characteristic. Id. at 1018, citing Rothmeier, 85 F.3d at 1336-37. In the instant case the question is whether a material factual dispute exists as to whether age and/or perceived handicap played any improper contributing role in Respondent's decision-making regarding Appellant's employment.

The advent of jury trial under the MHRA did not change the substance of the statute or its remedies, nor does such change the question for a court at summary judgment. Diehl merely allowed a plaintiff's claim for damages to be decided by a jury

rather than a judge. The language of the MHRA, and by extension, the plaintiff's burden under the statute, remains unchanged. MAI 31.24 only provides a framework for the jury to issue its factual determination once the case reaches that point. MAI 31.24 did not abrogate the long-standing use of the McDonnell Douglas framework when analyzing cases at the summary judgment stage. Surely, in order to overturn more than two decades of case law and to ignore Rule 74.04 would require a profound and direct pronouncement.

Appellant relies on Desert Palace v. Costa, 539 U.S. 90 (2003), to argue that discrimination cases should be analyzed using jury instructions rather than the McDonnell Douglas standard. Appellant notes that the jury instruction used in Desert Palace is similar to MAI 31.24, thus implying that, under Desert Palace, the use of MAI 31.24 at summary judgment is proper. However, Desert Palace is not applicable here because it involved giving a mixed-motive instruction to a jury and did not address evaluation of a motion for summary judgment. Moreover, Missouri does not authorize a mixed-motive instruction but only the combination of MAI 31.24 (contributing factor) and MAI 31.25 (lawful justification).

In Desert Palace, the Supreme Court of the United States held that direct evidence of discrimination was not required in order to prove discrimination in so-called "mixed motive" cases under Title VII, 42 U.S.C. § 2000e-2(m). Id. at 101. The jury instruction at issue in Desert Palace provided, in part, as follows: "You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the

defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason." Id. at 97. The instruction also provided that the plaintiff was not entitled to damages if the defendant proved that it would have made the same decision regardless of the plaintiff's sex. Id. Respondent submits that the jury instruction given in Desert Palace is not substantially similar to MAI 31.24. But even assuming, *arguendo*, that the instructions are similar, the holding of Desert Palace does not alter the McDonnell Douglas analysis at the summary judgment stage.

Since Desert Palace, the U.S. Supreme Court has continued to use the McDonnell Douglas framework to evaluate motions for summary judgment. See, e.g., Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). In addition, Missouri courts have continued to analyze discrimination claims using McDonnell Douglas both since the advent of MAI 31.24 and subsequent to Desert Palace. Igoe v. Dept. of Labor and Industrial Relations, ___ S.W.3d ___, 2006 WL 3007072 (Mo.App. W.D. 2006), app. for transfer denied, Jan. 30, 2007; Young v. American Airlines, Inc., 82 S.W.3d 647 (Mo.App. E.D. 2005), app. for transfer denied, Feb. 28, 2006). A number of federal Circuit Courts of Appeals also have held that the McDonnell Douglas framework is still applicable in analyzing motions for summary judgment. See, e.g., Tysinger v. Police Dept. of City of Zanesville, 463 F.3d 569, 577 (6th Cir. 2006); Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 319 n.5 (4th Cir. 2005); Keelan v. Majesco Software, Inc., 407 F.3d 332, 341 (5th Cir. 2005); Simpson v. Des Moines Water Works, 425 F.3d 538, 542 n.4 (8th Cir. 2005); Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004).

Thus, it is clear that Desert Palace had no impact on the analysis of discrimination claims at summary judgment. Similarly, while the adoption of MAI 31.24 gave the plaintiff a verdict director to be used when his case reaches a jury, MAI 31.24 does not change the application of McDonnell Douglas at the summary judgment stage where the ultimate legal question is the focus: whether a genuine factual issue exists regarding *any* discriminatory motive. Strate, 358 F.3d at 1017.

Furthermore, by arguing that MAI 31.24 provides the proper framework for analyzing a motion for summary judgment, Appellant ignores the existence of MAI 31.25, the lawful justification instruction for employment discrimination cases.[7] In McBryde v. Ritenour School Dist., 207 S.W.3d 162 (Mo.App. E.D. 2006), app. for

[7] MAI 31.25 provides as follows:

> Your verdict must be for defendant if you believe:
>
> First, defendant *(here insert alleged discriminatory act submitted in plaintiff's verdict directing instruction such as "failed to hire," "discharged," or other act within the scope of Section 213.055, R.S.Mo.)* plaintiff because *(here set forth the alleged lawful reason such action was taken)*, and
>
> Second, in so doing *(here insert the protected classification submitted by plaintiff, such as race, color, religion, national origin, etc.)* was not a contributing factor.

transfer denied, Dec. 19, 2006, the Court of Appeals examined the use of MAI 31.24. The court found that, using MAI 31.24, a jury may hold an employer liable when the plaintiff proves that "an *improper* consideration is a contributing factor [in an employment decision], regardless if other factors also exist." Id. at 170. (emphasis added). Reading MAI 31.24 together with MAI 31.25, it is clear that an employer may consider an employee's protected classification, such as age or disability, so long as that consideration is not *improper*. In other words, circumstantial evidence of a consideration of age or disability is not enough for a plaintiff to prevail if the plaintiff cannot show that the consideration was *improper*—that is, supplied the unlawful motivation for an employment decision. Considering MAI 31.24 in conjunction with MAI 31.25 provides a framework for the *jury* to consider the evidence on behalf of both parties but does *not* suggest that summary judgment is to be denied if plaintiff adduces *any* evidence of use of a protected characteristic in an employer's decision making, *unless* plaintiff shows the use was an *improper* factor. That is, the "improper contributing use" of the protected characteristic must be shown to have caused plaintiff harm. The contributing factor must have been used *against* plaintiff. This is a showing of discrimination "because of" a protected status, which is what § 213.055 requires.

The circumstances of this case provide an example of when an employer may have considered both age and disability without doing so unlawfully. Dr. Katz found that Appellant could not safely perform the functions of a front-line Police Officer, and thus Appellant was unable to perform his job. Respondent, knowledgeable of Appellant's age and disability, encouraged Appellant to apply for early retirement so he could continue to

receive income. Appellant refused to consider this option, and Respondent was left with no choice but to terminate Appellant *because* he could not safely perform the required functions of his job. In doing so, Respondent's consideration of Appellant's age and disability were not improper.

In addition, MAI 31.24 necessarily contains a causation requirement. In order for a plaintiff to prevail, he must prove that he was harmed "as a direct result" of the employer's conduct. In McBryde, the court noted that an improper consideration of a protected classification is unlawful so long as that consideration played any role in the employment decision. 207 S.W.3d at 170. Plaintiff must submit *evidence* to prove that the protected classification was, *in fact*, a factor that caused the employer to make its decision. Without this causation element, a plaintiff cannot recover. No such evidence has been adduced in this case which establishes that on no set of facts could plaintiff prevail and thus summary judgment is appropriate.

Based upon the above discussion, it is clear that a motion for summary judgment in an MHRA case must be analyzed using the McDonnell Douglas framework. As discussed below in response to Appellant's Points Relied On III and IV, Appellant did not present any evidence of a direct causal link between Respondent's alleged discriminatory animus and Appellant's termination. Appellant has failed to satisfy his evidentiary burden under McDonnell Douglas to raise an inference of such discriminatory motivation. As such, the trial court applied the correct standard in ruling on Respondent's motion for summary judgment and Appellant's Point Relied On II is without merit.

B. The Trial Court Did Not Err In Deciding That Evidence Was Adduced Establishing Respondent's Lawful Justification For Terminating Appellant. (Response to Appellant's Points Relied On III And IV.)

A plaintiff in a discrimination suit can survive summary judgment in one of two ways: (1) he can present direct evidence of discrimination, or (2) he can create an inference of discrimination under McDonnell Douglas, including sufficient evidence of pretext. West, 974 S.W.2d at 556; Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). As discussed above, it is well-settled that Desert Palace did not affect application of McDonnell Douglas at the summary judgment stage.

1. Appellant Has No Direct Evidence Of Discrimination.

Appellant argues that he can survive summary judgment because he presented direct evidence of discrimination. Specifically, Appellant alleges that the surreptitiously-recorded conversation he had with Chief O'Connor on October 28, 2002, constitutes direct evidence of age discrimination. In addition, Appellant claims that the fact that he was sent to Dr. Katz for a medical evaluation constitutes direct evidence of disability discrimination.

Direct evidence is defined as "evidence which if believed proves the existence of the fact in issue without inference or presumption." State v. Famber, 358 Mo. 288, 293, 214 S.W.2d 40, 43 (Mo. 1948) (citation and internal quotation marks omitted). See also Stern v. Employers' Liability Assur. Corp., Ltd. Of London, England, 249 S.W. 739, 741 (Mo.App. 1923) (noting that "direct evidence" is "evidence which immediately points to the question at issue, or is evidence of the precise fact at issue and on trial, by witnesses

who can testify that they saw the act done, or heard the words spoken which constitute the facts to be proved") (citation omitted). In the context of discrimination cases, direct evidence is "a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment decision." Griffith, 387 F.3d at 736. Direct evidence can include conduct or statements made by decision-makers which directly reflect the alleged discriminatory attitude. Schierhoff v. Glaxosmithkline Consumer Healthcare, L.P., 444 F.3d 961, 966 (8th Cir. 2006), quoting Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993). However, "stray remarks in the workplace, statements by non-decision-makers, and statements by decision-makers unrelated to the decisional process do not constitute direct evidence." Id. (internal quotation marks and citation omitted).

Appellant's conversation with O'Connor on October 28, 2002, does not constitute direct evidence. Appellant admitted that O'Connor made the decision to terminate him, and he did not believe that O'Connor was motivated by age (SLF 55, 58, 60-61). Levin, the City Administrator to whom O'Connor referred in the conversation, was not a decision-maker, nor did O'Connor state that his decision regarding Appellant was related in any way to his speculation regarding what Levin might do if given the opportunity to cut costs. The conversation is nothing more than inadmissible hearsay regarding O'Connor's speculation of what a non-decision-maker might do if given the opportunity. O'Connor's speculation that Levin would terminate older employees if given the chance

does not mean that O'Connor would act similarly or that Levin told O'Connor what to do or that such speculation factored into O'Connor's decision.

O'Connor, the decision-maker, stated that his decision was based solely on Dr. Katz's report (LF 88). Appellant claims without any basis in the record that O'Connor relied upon improper motivation in making his decision and that the evidence of O'Connor's intent to shift blame to Levin is "O'Connor's own bald and later-scripted deposition statements." See Appellant's Substitute Brief at p. 59. Appellant's argument is not well-taken. While O'Connor admitted that terminating his brother-in-law was very uncomfortable and difficult and that he was concerned that Appellant would blame him personally, harming their familial relationship, this explanation for referring to Levin's attitude does *not* raise an inference of *O'Connor's* improper reliance on age or disability to decide to terminate his brother-in-law.[8]

[8] In arguing that the October 28, 2002, conversation is direct evidence of discrimination, Appellant relies on the *transcript* of that conversation as his only evidence. Appellant surreptitiously recorded that conversation by concealing a mini-cassette recorder in his pocket. Appellant cannot rely on the transcript of that conversation because the transcript is not admissible. The tape itself, which has not been produced in this record or in the record below, is the best evidence of the conversation. Moreover, the tape and the transcript both lack foundation. The transcript indicates that large portions of the tape were inaudible, and the transcription of the tape was unduly influenced by Appellant inasmuch as he unilaterally informed the court reporter who

Appellant also argues that the fact that he was sent to Dr. Katz for an evaluation constitutes direct evidence of discrimination. Appellant claims that the exam was not job-related and was not consistent with business necessity. However, Appellant does not have any evidence to support this assertion beyond his own speculation.

Respondent's policies provide that an officer may be sent for an evaluation to assess his fitness for duty at any time (LF 157; SLF 12). Respondent sent Appellant for the examination with Dr. Katz when it became clear that Appellant's attendance pattern was unusual and was interfering with the performance of his job (LF 86). Respondent knew that Appellant had previously suffered an on-the-job injury that had lasting effects,

---

transcribed the tape of the identity of the speakers. Furthermore, Appellant's surreptitious tape recording was a direct violation of Respondent's policies and warranted termination in and of itself (LF 88-89; SLF 56-57). See McAlliney v. Marion Merrell Dow, Inc., 992 F.2d 839, 842 (8th Cir. 1993) (setting forth the requirements for introducing tape recordings into evidence and noting that such a recording can also be excluded under Federal Rule of Evidence 403 if its probative value is substantially outweighed by a danger of confusion). See also Still v. Ahnemann, 984 S.W.2d 568, 575 (Mo.App. W.D. 1999) (citing Federal Rule of Evidence 403 in support of the principle that evidence is inadmissible if its probative value is outweighed by the risk of confusion or prejudice); and Carlyle v. Lai, 783 S.W.2d 925, 929 n.3 (Mo.App. W.D. 1989) (noting that Missouri's balancing test for weighing the probative value of evidence against the danger of undue prejudice parallels Federal Rule of Evidence 403).

and Respondent wanted to be sure that Appellant's injury was not interfering with his ability to perform his job duties (LF 86). Dr. Katz did find, in fact, that Appellant could not perform the duties of a front-line Police Officer, duties which were required of all officers regardless of rank (LF 122-30).

Appellant cannot rely on his own belief that the medical exam was undertaken because Respondent perceived him to be disabled. Appellant's argument is self-serving, and his own thoughts as to why Respondent took the action it did does not constitute direct evidence.

2. Appellant Has Not Established A *Prima Facie* Case of Age Discrimination.

As discussed above, in order for Appellant to survive summary judgment on his age discrimination claim, he must establish a *prima facie* case by showing that (1) he was a member of the protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was terminated; and (4) he was replaced by a younger employee. Richmond, 957 F.2d at 598; see also West, 974 S.W.2d at 556. If the plaintiff makes a *prima facie* showing, the burden of production shifts to the defendant to offer a legitimate, non-discriminatory reason for its action. Id. If the defendant is able to do so, the plaintiff must present sufficient evidence to (1) raise a question of fact as to whether defendant's proffered reason was pretextual and (2) create a reasonable inference that age was a reason for the adverse employment action. West, 974 S.W.2d at 557 n.2.

The trial court did not err in granting summary judgment because Appellant was unable to establish a *prima facie* case. In particular, Appellant has no evidence to suggest

that he was performing, or was able to perform, his job at a level that met Respondent's legitimate expectations due to his poor attendance. The medical opinion of Dr. Katz confirms that plaintiff could not perform the duties all officers must be ready and able to perform and plaintiff has *no* evidence that he was replaced by a younger employee. In fact, his replacement (Nichols) was sixty-three (63), four years older than Appellant (LF 105). Furthermore, it is undisputed that Respondent based its decision to terminate Appellant *solely* on the opinion of Dr. Katz (LF 88). This is clearly a legitimate, non-discriminatory reason. Finally, Appellant cannot prove that Respondent's stated reason was pretext for illegal age discrimination.

a. Appellant Was Not Performing His Job At A Level That Met Respondent's Legitimate Expectations.

Appellant argues that he satisfied all the requirements of his position as Captain and all the medical evidence supports that claim. However, Appellant's argument completely disregards the undisputed evidence in this case. Appellant was unable to meet Respondent's legitimate expectations because he did not regularly show up for work. Regardless of the reasons behind his absences, regular attendance is an essential function of any job, and Appellant could not satisfy this requirement. See Medley, 173 S.W.3d 321-22 (citation and internal quotation marks omitted); Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445-46 (8th Cir. 1998). Respondent could have discharged Appellant solely based on his attendance record.

Appellant himself freely admitted that all Police Officers, regardless of rank, are required to perform the same core functions, including operating a handgun safely and

efficiently, enacting an arrest, subduing and restraining an uncooperative perpetrator, and pulling a victim from an accident scene (LF 97-102, 118-30; SLF 13-14, 57). Appellant notes that, as a Captain, he would not be expected to perform those physical duties on a frequent basis. However, regardless of the frequency with which officers would perform them, Respondent has a legitimate expectation that its Police Officers be physically capable of performing their duties. Appellant may have been fortunate in not encountering uncooperative suspects or accident scenes on a daily basis, but the expectation that he safely and adequately perform in those situations is not diminished by lack of frequency.

Dr. Katz explicitly found that Appellant could not perform the physical duties of a Police Officer (LF 122-30). His opinion is supported by the Functional Capacity Evaluation performed by Mr. Zucarello (LF 95, 97-102, 122-30; SLF 53-55). In addition, Dr. Wilkinson, who had been treating Appellant since his spinal cord injury in 1986, supported Dr. Katz's conclusion (LF 112-16). Appellant argues that the opinions of his experts, Dr. Feinberg and Mr. England, contradict Dr. Katz's findings. However, Dr. Feinberg and Mr. England both met with Appellant years *after* his termination. Appellant did not present any evidence at his post-termination hearing to contradict Dr. Katz's opinion. At the time it was forced to make a decision regarding Appellant's ability to perform his job, the only opinion Respondent had to rely upon was Dr. Katz's.

b. Appellant Was Not Replaced By A Younger Employee.

Appellant relies on Hindman v. Transkrit Corp., 145 F.3d 986 (8th Cir. 1998), in arguing that he did not have to establish that he was replaced by a younger employee.

However, Appellant's reading of Hindman is incorrect, and the undisputed evidence clearly shows that Appellant was, in fact, replaced by an older employee.

In Hindman, the employee who was demoted presented evidence that, although he was not replaced by a single person, several younger co-workers were reassigned his job duties. Id. at 989. The court held that a material fact existed because "it is entirely conceivable…that an ADEA plaintiff who was demoted and effectively replaced by many individuals adopting his duties may still be able to establish that he was the object of impermissible discrimination related to his age". Id. at 992 (citations omitted). However, the court did note that, had the employee been replaced by one individual, that fact would have been relevant in evaluating the employer's motive. Id.

Unlike the employee in Hindman, Appellant was replaced by one individual employee, Captain Nichols (LF 105). No material factual dispute exists regarding this issue and Appellant cannot distort the facts of Hindman to create one. Appellant, who was fifty-nine (59) years old at the time of his termination, admitted that he was replaced by Nichols, who was sixty-three (63) and able to perform all officer duties (LF 105). Two years later, Nichols retired at the mandatory retirement age of sixty-five (65), and Captain William Fink, who was fifty (50) years old, was appointed to the Watch Commander position formerly held by Appellant (LF 105; SLF 209-10). There is absolutely no evidence to suggest that Appellant was replaced by a younger employee.

c. Appellant Cannot Establish That Respondent's Non-Discriminatory Reasons For His Termination Were Pretextual.

The trial court found, and Appellant does not dispute, that Respondent articulated a legitimate, non-discriminatory reason for Appellant's discharge, namely, its reliance on Dr. Katz's report. Appellant contends that he has sufficient evidence to show that Respondent's reason was pretextual. However, Appellant admitted that O'Connor made the decision to terminate him, and he did not believe that O'Connor was biased by age (SLF 55, 58, 60-61).

Courts are particularly reluctant to infer discrimination when a plaintiff is a member of the protected age group when he was hired and when he was fired. See Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174 (8th Cir. 1992); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). "It hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." Proud, 954 F.2d at 797 (internal quotation marks and citation omitted).

Moreover, the application of this inference is unaffected by the passage of time between the hiring and firing decisions. As the Sixth Circuit explained, "to say that time weakens the same actor inference is not to say that time destroys it….Thus, a short period of time is not an essential element of the same actor inference, at least in cases where the plaintiff's class does not change." Buhrmaster, 61 F.3d at 464. See also Kelleher v. Aerospace Comm. Credit Union, 1996 WL 498107, at *8 (E.D. Mo. 1996), aff'd, Lewis

v. Aerospace Comm. Credit Union, 114 F.3d 745 (8th Cir. 1997) (district court noting that "[c]ourts are particularly reluctant to infer discrimination when a plaintiff is a member of a protected group both when he was hired and when he was fired….").

When Appellant was hired by Respondent in 1985, he was forty-two (42) years old (LF 83; SLF 2). When Respondent passed the ordinance allowing Appellant to attain the rank of Captain without a four (4) year college degree, Appellant was 54 (LF 84; SLF 35). Appellant was 56 when he was promoted to Commander of the Detective Bureau, and he was 59 when he was terminated (SLF 2, 59). During his entire tenure with Respondent, Levin was the City Administrator and O'Connor was employed as either the Deputy Chief or Chief of Police (LF 83; SLF 7-8, 773). Applying the same-actor inference, such facts run counter to any finding of pretext. See Lowe, 963 F.2d at 174.

Appellant points to what he believes are inconsistencies in Respondent's reasons for his termination. However, the undisputed evidence shows that Respondent has always consistently relied on Dr. Katz's opinion as its sole basis for Appellant's termination. Appellant's chronic absenteeism did lead to his examination with Dr. Katz, but Respondent did not make the decision to terminate Appellant until after it received the doctor's report (LF 88).

Appellant attempts to complicate the issue regarding his absenteeism by claiming that from 2000 through 2002, there were other Police Officers who took more sick leave than he did. While on its face this may appear to be true, a closer examination of the facts reveals that Appellant is leaving out a large portion of the story. First, while some officers may have taken more sick time than Appellant in a particular year, Appellant is

the only employee who consistently had an awkward pattern of attendance. In fact, when he was reassigned to the Detective Bureau in 1999, Appellant was told that Levin had been concerned about his absences since his 1986 injury (SLF 31-32). Simply put, Appellant did not take the most sick days from 2000 through 2002 because he did not have the sick time to use. Appellant had been absent for approximately six months following his surgery in 2000, and during that time, he exhausted his leave bank (SLF 21-24). When he returned to work later that year, he began accumulating leave once again, but because of his continued absences, it was difficult for him to accrue any substantial amount of leave time (SLF 25). Because he used the few sick days that he had, Appellant continued to manipulate the leave system by rearranging his schedule and taking vacation and holiday time instead of sick time. This abuse of the system led to Kozuszek's directives and reprimands regarding work schedules and proper use of sick and vacation time.

Appellant relies on Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005), in arguing that his "remarkable eighteen (18) year work history casts doubt" on Respondent's motivations for his termination. See Appellant's Substitute Brief at p. 70. However, Strate is distinguishable. In Strate the plaintiff did indeed have a positive work history. 398 F.3d at 1020. The court noted, however, that "evidence of a strong employment history will not alone create a genuine issue of fact regarding pretext and discrimination." Id. Appellant had a long history of employment with Respondent. However, it is inaccurate to state that his history was unblemished. Unfortunately, Appellant suffered a serious injury while on duty in 1986 (SLF 17-19). Since that time,

Respondent had attempted to accommodate Appellant. In addition, Appellant benefited because O'Connor, his brother-in-law, was Deputy Chief and later Chief of Police. O'Connor tried to protect Appellant, as evidenced by Appellant's reassignment to the Detective Bureau in 1999 (SLF 31-32, 36, 65). At that time, O'Connor noted that Levin had been unhappy with Appellant's pattern of attendance since the 1986 injury, and O'Connor hoped the reassignment would take Appellant out of the "limelight" (SLF 31-32). In the end, O'Connor could do only so much to protect his brother-in-law. Once O'Connor received Dr. Katz's report indicating that Appellant could not perform his duties, O'Connor was left with no choice but to terminate Appellant.

Despite Appellant's attempts to mischaracterize the factual record, it is clear that Respondent has consistently stated that Appellant was terminated based on Dr. Katz's report (LF 88). At the time of his termination and at his post-termination hearing, Appellant did not present any evidence to dispute Dr. Katz's findings. In addition, Dr. Wilkinson, who had treated Appellant since 1986, agreed with Dr. Katz's conclusion that Appellant could not physically perform as a Police Officer (LF 112-16). Appellant tries to cast doubt on Dr. Wilkinson's opinion by recklessly questioning Dr. Wilkinson's credibility and accusing the doctor of signing a false affidavit. Appellant's accusations are wholly unsupported by the record. In 1987, Dr. Wilkinson indicated that Appellant could return to full and active duty (LF 112). However, Dr. Wilkinson was never informed that Appellant would be expected to perform the physical functions of a front-line Police Officer upon his return to duty (LF 112). Dr. Wilkinson released Appellant to return to work only with the understanding that Appellant would be performing solely

administrative, desk-type duties (LF 112). Appellant's effort to create a fact issue regarding Dr. Wilkinson's opinion is unfounded.

Appellant argues that O'Connor's statements during their October 28, 2002, conversation, which Appellant surreptitiously taped in violation of Respondent's policy, establish a question of fact regarding the reason for his termination. Appellant ignores, however, the fact that the purported transcript of the conversation included in the Legal File is completely unauthenticated and lacking evidentiary foundation.[9] Additionally, Appellant ignores the fact that he admitted during his deposition that O'Connor made the decision regarding his termination and he did not believe that O'Connor was motivated by age (SLF 55, 58, 60-61). Similarly, O'Connor testified that he never believed Levin intended to terminate Appellant because of his age (LF 88).

Moreover, although O'Connor did state that he believed Levin wanted to get rid of "more expensive" employees and agreed when Appellant suggested that such action could constitute age discrimination, the undisputed facts establish that O'Connor merely agreed with Appellant—his brother-in-law—in an effort to avoid elevating the conversation to a confrontation and to encourage Appellant to take advantage of the available insurance and disability benefits (LF 87-88). The undisputed evidence also demonstrates that O'Connor never actually believed that Levin had any bias toward

[9] As noted above, Respondent submits that the tape, which was not produced here or in the trial court, and the transcript are inadmissible and, therefore, should not be considered.

police officers over the age of fifty-five (55) and was unaware of any instance of age discrimination or age bias by Respondent, in the Police Department or otherwise (LF 88). O'Connor stated that he was similarly unaware of any intention to get rid of Police Officers once they reached the age of fifty-five (55) (LF 88). Moreover, Appellant is the only Police Officer over the age of fifty-five (55) who was terminated from the Police Department.

Accordingly, the evidence clearly shows that Respondent relied solely on Dr. Katz's report when terminating Appellant. As such, Appellant cannot prove that Respondent's reason for his termination was pretextual.

3. Appellant Has Not Established A *Prima Facie* Case of Disability Discrimination.

In order to prove a *prima facie* case of handicap discrimination under the MHRA, the employee must show that (1) he is a member of a protected class because he is handicapped under the Act; (2) he was discharged; and (3) there is evidence to infer that the handicap was a factor in the discharge. Cook v. Atoma Intern. Of America, Inc., 930 S.W.2d 43, 46-47 (Mo.App. E.D. 1996); Welshans v. Boatmen's Bancshares, Inc., 872 S.W.2d 489, 493 (Mo.App. E.D. 1994). The MRHA defines "handicap" as "a physical or mental impairment which substantially limits one or more of a person's major life activities, a condition perceived as such, or a record of having such impairment, which with or without reasonable accommodation does not interfere with performing the job…" R.S.Mo. §213.010(4).

Each disability under the statute must substantially limit or be perceived to substantially limit a major life activity such as "communication, ambulation, self-care, socialization, education, vocational training, employment, and transportation." 8 CSR § 60-3.060(1)(C). A person whose impairment interferes with the performance of the job is not protected by the MHRA unless the person can perform the job with a reasonable accommodation. Berkowski v. St. Louis County Bd. of Election Com'rs., 854 S.W.2d 819, 826 (Mo.App. E.D. 1993). The question of reasonable accommodation is part of the test of whether a handicap exists. Umphries v. Jones, 804 S.W.2d 38, 41 (Mo.App. E.D. 1991). There is no obligation to provide a reasonable accommodation in a perceived disability case, when, as in the instant case, the Appellant does not claim to be actually disabled. See Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999) (holding that "regarded as" disabled plaintiffs are not entitled to reasonable accommodations).

The limiting adjectives "substantially" and "major" indicate the perceived "impairment must be a significant one." Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995), citing Byrne v. Board of Education, School of West Allis, 979 F.2d 560 (7th Cir. 1992). A person is "regarded as having" an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment. The focus is on the impairment's effect upon the attitudes of others. Id., citing Byrne, 979 F.2d at 566.

In order to be "regarded as" disabled, a plaintiff must show the defendant *mistakenly* believed he had a physical impairment that substantially limited one or more major life activities, or defendant *mistakenly* believed he had an actual, non-limiting

impairment which substantially limited one or more major life activities. Brunko v. Mercy Hosp., 260 F.3d 939, 942 (8th Cir. 2001), citing Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999) (emphasis added). Moreover, a person is regarded as substantially limited in the major life activity of working if the employer regards him as significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. EEOC v. Woodbridge Corp., 263 F.3d 812, 815-16 (8th Cir. 2001).

a. Respondent Did Not Mistakenly Regard Appellant As Disabled.

Appellant argues that Respondent perceived him to be disabled because Dr. Katz had released Appellant to return to work "as a supervisory captain." See Appellant's Substitute Brief at p. 76. At no time did Dr. Katz release Appellant to return to work. Dr. Katz simply performed an evaluation to determine if Appellant was fit for duty as a Police Officer (LF 122, 128). In making his findings, Dr. Katz considered the job description of a Police Officer for Respondent (LF 122-30). As Appellant admitted during his deposition, all officers, regardless of rank, are expected to perform the duties of a front-line Police Officer (SLF 13-14, 57). Dr. Katz specifically found that Appellant was not able to perform those duties (LF 130).

In addition, Appellant argues that "decision-makers, including Chief O'Connor, Major Kozuszek, and Mark Levin…perceived [him] as old and disabled." See Appellant's Substitute Brief at p. 76. First, Appellant's characterization of Kozuszek and Levin as "decision-makers" is not supported by the evidence. During his deposition,

Appellant admitted that O'Connor made the decision to terminate him (SLF 55, 60-61). Second, Appellant points to no evidence whatsoever to support his assertion.

Finally, Appellant argues that Respondent mistakenly believed that he had attendance problems, which perpetuated Respondent's misperception regarding the extent of Appellant's medical condition. As discussed above, Respondent was concerned with Appellant's awkward attendance pattern over a number of years. The evidence shows that Appellant violated the vacation and sick leave policies on multiple occasions, and he was the only Police Officer to exhaust his bank of leave time (LF 85-86, 201-07, 235, 242-44; SLF 25-27, 37, 39, 42, 46-48, 821). Respondent was not *mistaken* in its belief that Appellant had attendance problems.

Likewise, Respondent was not *mistaken* that Appellant's medical condition had an impact on his attendance. Respondent initially became concerned about Appellant's medical condition because of his attendance issues (LF 86; SLF 49). As a responsible employer, Respondent sent Appellant for a medical evaluation which confirmed that Appellant could not, in fact, perform the duties of a Police Officer due to his physical restrictions (LF 122-30). Respondent relied solely on the medical evaluation of Dr. Katz in terminating Appellant (LF 88). See Conant v. City of Hibbing, 271 F.3d 782, 785 (8th Cir. 2001); Brunko, 260 F.3d at 941; EEOC v. Exel, Inc., 208 F.Supp.2d 1013, 1022-23 (E.D.Mo. 2002) (reliance on medical restrictions issued by licensed physicians is a legitimate, non-discriminatory basis for employment actions).

In Brunko, the employee returned to work after an injury with a permanent 40-pound lifting restriction. 260 F.3d at 941. The employer required that all employees be

capable of lifting at least 75 pounds, and because the employee could no longer meet that requirement, she was terminated. Id. On appeal, the court found that the employer did not mistakenly perceive that the employee had a disability; rather, the employer's belief was based on the opinion of the employee's physician. Id. at 942. In addition, the court held that the employer did not perceive that the employee's lifting restriction substantially limited her in the major life activity of working, as an impairment that disqualifies an employee from a narrow range of jobs is not substantially limiting. Id. (citations omitted).

Similar to Brunko, Respondent based its decision to terminate Appellant solely on the opinion of Dr. Katz (LF 88). Respondent did not have a mistaken belief that Appellant could not perform his job duties. In addition, there is absolutely no evidence that indicates that Respondent believed Appellant was incapable of performing any job except certain core duties of the Police Officer position. Thus, Respondent did not mistakenly perceive Appellant to be limited in any major life activity. As the court noted in Brunko, "[t]he major life activity of working does not mean working at a particular job of that person's choice." Id. (internal quotation marks and citations omitted). Inasmuch as there is no evidence indicating that Respondent believed Appellant was disqualified from a broad class of jobs, Appellant cannot establish that he was "regarded as" disabled within the meaning of the MHRA.

b. Appellant Could Not Perform As A Police Captain.

As Appellant admits, he must establish both that he satisfies all the requisite skill, experience, education, and other job related requirements of a Police Officer employed

by Respondent and that he can perform, with or without reasonable accommodation, the essential functions of the job. See Appellant's Substitute Brief at p. 76. However, Appellant cannot satisfy this burden.

Once again, Appellant argues that all the medical evidence indicates that he was able to perform as a Captain. However, once again, Appellant ignores the fact that, in his deposition, he admitted that all officers, regardless of rank, are required to perform the duties of a front-line officer (SLF 13-14, 57). Dr. Katz and Mr. Zucarello, who performed the FCE, both concluded that Appellant could not perform some of those core functions, i.e., being able to physically subdue an unwilling perpetrator, pulling a victim from an accident scene, lifting over 100 pounds, and safely operating a handgun (LF 95, 97-102, 122-30). Dr. Wilkinson, who had treated Appellant since his spinal cord injury in 1986, agreed with Dr. Katz's conclusions (LF 112-16). In fact, Dr. Wilkinson stated that he would have never released Appellant to return to work if he knew Appellant would be required to perform front-line officer duties (LF 112).

Also as discussed above, Appellant cannot rely on the fact that Captains perform the core Police Officer duties infrequently. Regardless of how often ranking officers are called upon to perform front-line duties, they are still expected to perform them.

Appellant also argues that he was held to a higher standard in the required duties of a Captain. Appellant points to a description of Police Officer duties that Kozuszek provided to Dr. Katz to support his claim. Dr. Katz was initially provided with the description of a Captain's duties from Respondent's personnel manual (LF 122-30). Dr. Katz could not make his conclusions without more information, which he requested from

Respondent (LF 122-30). Kozuszek merely listed an example of what duties front-line officers would be expected to perform to assist Dr. Katz in writing his report (LF 122-30). As noted above, all officers were required to perform those duties. Most importantly, Appellant admitted in his deposition that the job descriptions provided by Respondent to Dr. Katz were accurate with respect to the duties required of his position (SLF 53-54, 57). Thus, Appellant's argument that he was held to a higher standard is without merit.

Because the undisputed evidence shows that Appellant was not capable of performing as a Captain because he could not perform the core duties of a Police Officer, Appellant does not satisfy the definition of "disabled" under the MHRA, and therefore cannot prove a *prima facie* case.

CONCLUSION

For all the foregoing reasons, the trial court did not err in applying the McDonnell Douglas framework and in granting Respondent's motion for summary judgment. As such, Respondent respectfully requests that this Court enter an order affirming the judgment of trial court. In the alternative, Respondent respectfully requests that this Court retransfer this cause to the Court of Appeals for reinstatement of that court's decision.

McMAHON BERGER, P.C.

Howard Paperner, Esq.
Howard Paperner, P.C.
9322 Manchester Road
St. Louis, Missouri 63119
City Attorney for
City of Maryland Heights, MO
(314) 961-0097

James N. Foster, Jr.,#28231
Patricia M. McFall, #30810
Amy R. Brown, #53136
Attorneys for Respondent
City of Maryland Heights
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350
(314) 567-5968 facsimile

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing was mailed, first class, postage prepaid, this 14th day of February, 2007, to:

Greg Kloeppel
Kevin J. Dolley
The Kloeppel Law Firm &
Law Offices of Kevin J. Dolley, LLC
9620 Lackland
St. Louis, Missouri 63114
Counsel for Appellant

Ferne P. Wolf
D. Eric Sowers
Sowers & Wolf, LLC
1401 S. Brentwood Blvd., Suite 575
St. Louis, Missouri 63144
Counsel for Amicus Curiae

Kathryn Render
8390 Delmar Boulevard, Ste. 218
St. Louis, Missouri 63124

CERTIFICATE OF COMPLIANCE

I certify that this brief is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 14,999 words, which is within the word count limit provided for in Rule 84.06(b). This brief is otherwise in compliance with Rule 84.06(b).

I also certify that the computer disk served in conjunction with Respondent's Substitute Brief has been scanned and is virus free.