WD82336

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SHAHIDAH HAZZIEZ,
Respondent-Appellant,

vs.

CITY OF KANSAS CITY, MISSOURI,
Appellant-Respondent.

On Appeal from the Circuit Court of Jackson County
Honorable S. Margene Burnett, Circuit Judge
Case No. 1516-CV19083

BRIEF OF THE RESPONDENT-APPELLANT

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Jurisdictional Statement

A. General jurisdictional statement

Ms. Hazziez agrees with the City of Kansas City ("the City") that this case does not fall within the Supreme Court's exclusive appellate jurisdiction, that jurisdiction of this appeal lies in the Missouri Court of Appeals, and that venue lies in the Western District (Brief of the Appellant ["CityBr."] 9).

B. The parties' appeals are timely and proper.

In December 2018, the Court asked the parties to brief the issue of whether the trial court's judgment is final and appealable. It is, and the parties' appeals from it are timely and proper.

1. Leadup to the August 2018 judgment

Shahidah Hazziez brought claims against the City and two other groups of defendants: (1) the "Concentra Defendants"; and (2) the "eScreen Defendants", comprising eScreen, Inc. and Alere, Inc. (D2 pp.3-5). Her second amended petition stated seven counts (D2 pp.11-19). Five were against all defendants for violating the Missouri Human Rights Act ("MHRA") (D2 pp.11-17). The other two were against the eScreen Defendants only, for negligence and strict products liability (D2 pp.17-19).

Ms. Hazziez later dismissed her claims against the Concentra Defendants (D3; Ex.573). She also abandoned her race-discrimination claim against all defendants (Count IV) and retaliation claim (Count V) against the eScreen Defendants (D55 pp.17,20; 09/29 Tr.41-42). Finally, the trial court granted summary judgment on all claims against Alere, Inc., and for eScreen, Inc. on Count VII (D119; 09/29 Tr.14-16).

This left these claims for trial: Counts I (disability discrimination), II (sex discrimination), and III (religious discrimination) against the City and eScreen, Inc.; Count V (retaliation) against the City only; and Count VI (negligence) against eScreen, Inc. only. Ms. Hazziez then abandoned all her claims against eScreen by not submitting them to the jury (Tr.1629-78). *See Heckadon v. CFS Enters., Inc.*, 400 S.W.3d 372, 377 n.3 (Mo. App. 2013) (by not submitting cause of action to the jury, party abandoned them, not requiring judgment on them).

Meanwhile, the City filed a third-party petition against Occupational Health Centers of the Southwest, P.C. (D10). The trial court severed the trial of the City's third-party claim from that of Ms. Hazziez's claims (D90 p.1).

At trial, the court directed a verdict for the City on retaliation (Tr.1614-15,1621-22), and the jury entered verdicts on the remaining claims, finding for Ms. Hazziez on "regarded-as" disability discrimination and sex discrimination but finding for the City on her other claims (D91).

The trial court then entered a document titled "Jury Trial Minutes and Judgment on Claims of Plaintiff Shahidah Hazziez", which accepted the verdicts and entered judgment on them accordingly (D94). The parties filed various motions in response, including Ms. Hazziez's motion for new trial on her retaliation claim and for an award of attorney fees (D95; D143).

2. The August 2018 judgment was not final because it was not properly certified under Rule 74.01(b).

In August 2018, the trial court issued what it titled "Post-Trial Order and Amended Judgment" (D120). This recounted the directed verdict and the jury's verdicts, entered judgment on them accordingly, and denied the

parties' pending motions except to award Ms. Hazziez attorney fees and to state that her motion for new trial was premature (D120 pp.1-3).

Additionally, noting that the City's third-party claim remained pending, the court stated that the earlier "judgment" was not a final judgment for purposes of appeal, but that it now was "enter[ing] this final judgment disposing of all issues between Plaintiff and Defendant City of Kansas City only per Rule 74.01(b)" (D120 pp.2-3). It stated this would be the final judgment between the parties and the city, and cited law allowing entry of a final, appealable judgment on less than all claims against all parties pursuant to a "certif[ication] that there is 'no just reason for delay' per Rule 74.01(b)" (D120 pp.2-3). It stated that because this was its final judgment, Ms. Hazziez's premature motion for new trial was deemed filed as of the entry of that judgment (D120 p.3,n.1).

Ms. Hazziez has no doubt the trial court intended this to be the express certification Rule 74.01(b) requires to make an otherwise non-final judgment final. And she agrees with the City that the August 2018 judgment disposed of a "distinct judicial unit" (CityBr.11-12). But she disagrees (CityBr.10) that under existing law the statements in the August 2018 judgment were sufficient to be a Rule 74.01(b) certification.

For, while the trial court cited law allowing it to make an express determination that there was no just reason for delay, it did not actually expressly find there *was* no just reason for delay *here*. But that express certifying language is required, and simply referencing Rule 74.01(b) and its language, as the trial court did here, is insufficient. *See, e.g.*:

- *Johnston v. 411744 A.H. Tannery, Inc.*, 262 S.W.3d 705, 707-09 (Mo. App. 2008) (statement that "No issues remain to be heard in this Court related to the default judgment entered against Bio-Nutraceuticals, Inc. Accordingly, pursuant to Rule 74.01, the Court now enters this final appealable decree" was insufficient);
- *McKeever v. Bi-State Dev. Agency*, 988 S.W.2d 599, 600 (Mo. App. 1999) (same for statement that document would "be deemed a final and appealable judgment"); and
- *Culligan Int'l Co. v. H&S Water Enters.*, 956 S.W.2d 468, 470 (Mo. App. 1997) (same for "This judgment is hereby designated as a final judgment for purposes of appeal within the meaning of Rule 74.01").

3. The September 2019 judgment is final, and the parties' appeals are timely.

Fortunately, the parties later brought this to the trial court's attention. In September 2019, Ms. Hazziez moved to amend the August 2018 judgment to add the proper certification, the City concurred, and the trial court did so (D147; App.A1). On September 18, 2019, the trial court entered a judgment repeating the August 2018 judgment in its entirety but adding, "pursuant to Rule 74.01(b), the Court expressly finds that there is no just reason for delay and all claims and matters between Plaintiff Shahidah Hazziez and Defendant City of Kansas City are final for purposes of appeal" (D147 p.17; App.A17).

Under Rule 74.01(b), this is sufficient. This also was timely, because the trial court could enter that certification at any time. *Spicer v. Donald N. Spicer Revocable Living Trust*, 336 S.W.3d 466, 469 (Mo. banc 2011) ("where

the 'judgment' in question is not final, Rule 75.01 does not apply and the trial court retains jurisdiction to enter a final judgment").

Finally, the parties' notices of appeal, while premature, are timely. Under Rule 81.05(b), "In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal." Now that the judgment is final, the parties' notices of appeal are deemed timely. *Id.*

Therefore, as of September 18, 2019, there is a final judgment disposing of all claims between all parties except the City's third-party claims, properly certified for appeal, and the parties' appeals from it are timely. This Court has jurisdiction.

Statement of Facts

A. Ms. Hazziez's work for the City

Shahidah Hazziez is a Muslim woman, born and raised as a Sunni Muslim practicing orthodox Islam, which is very important to her (Tr.576-77). As part of her faith, she does not eat pork, smoke, drink, or do drugs (Tr.576).

In April 2013, Ms. Hazziez was hired by the City of Kansas City ("the City") as an event coordinator for the City's Health Department's "Aim4Peace" program (Tr.391,427,581-83). Tracie McClendon-Cole, Aim4Peace's director, described it as "a public health approach and framework … to addressing violence" (Tr.390).

At Aim4Peace, Ms. Hazziez was supervised by Ms. McClendon-Cole, Latoya Jones, and Rashid Junaid (Tr.392,546). Dr. Rex Archer, head of the Health Department, was the ultimate authority over Aim4Peace and was Ms. McClendon-Cole's supervisor (Tr.427,441). Ms. Hazziez was a "great worker" with no disciplinary problems (Tr.553).

B. The City's drug testing policy

As Aim4Peace's supervisor, Ms. McClendon-Cole had to know and understand many organizational policies, including the City's drug and alcohol testing policy (Tr.403). She said violation of that policy is cause for disciplinary action following a "fair and thorough investigation" by a supervisor (Tr.404).

Ms. McClendon-Cole said Ms. Hazziez had a "safety sensitive position" requiring random drug testing because Aim4Peace hires people with felony

convictions, though she acknowledged Ms. Hazziez had no felony record (Tr.426-27). Ms. Jones described the process for random drug testing (Tr.553-68). She would receive an email from the City's human resources department, print it out, and give it either to the selected employee or the employee's supervisor (Tr.553). The employee then was expected to report to Concentra, a testing site facility, for testing (Tr.410,554). She had nothing to do with who was selected, when they were selected, or how (Tr.561).

Ms. Jones said that at the bottom of every notification it stated, "A refusal to submit to testing is grounds for termination from city employment" (Tr.562). But she acknowledged she never gave employees a copy of the drug and alcohol policy along with their notification, nor was one available at Concentra or at Aim4Peace (Tr.568). And while Ms. Hazziez was to be provided a copy of that policy, she never received one (Tr.596-98).

Ms. Jones said that if an employee said they cannot submit an adequate urine sample at Concentra, they "should consult their supervisor, call their supervisor or the HR department" (Tr.558). She never had been told that an employee had to stay at Concentra for three hours or submit 45 milliliters of urine, and she did not know a telephone number for employees to call if they had difficulties with the process (Tr.558-59).

The City's policy actually said if an employee is unable to give an adequate urine sample for testing due to a medical condition, the employee had to be evaluated by a physician approved by the City within five days, and if the employee is found to have a medical condition, she will be required to submit to alternative testing, which means a blood test (Tr.429-30,602,791;

Ex.17). The policy did not define "adequate sample" (Tr.782). It did not say "an employee must give 45 milliliters of urine" or otherwise list any quantity (Tr.782-83). Torah Greenlaw, the City's former drug and alcohol policy administrator, said an "adequate sample" would be "a sample that the clinic is able to use for that collection" (Tr.851). Concentra's operations director, Nathan Buster, testified that 45 milliliters of urine in one sample was not necessary, but instead two samples could be split, with one being as little as 15 milliliters (Tr.1363-64).

The testing notification the employee received also stated,

> if you are unable to present yourself for testing after this notification, you must inform your supervisor and submit in writing specific reasons why you were unable to be present for testing. The Department of Human Resources will determine whether there was legitimate justification for not reporting. If none exist, it will be deemed that you have refused to submit to testing.

(Tr.1479-80). Nothing in the notification said that if the employee presents herself at a facility and attempts to give a sample but is unable to provide enough and leaves the facility, it is a refusal to submit (Tr.973).

Conversely, § IX(F) of the City's policy, which was different than the policy's "refusal to test" provisions, pertained to positive drug tests and required termination and a mandatory three-year bar on employment if an employee tested positive (Tr.887,1084,1131-32).

Ms. Hazziez submitted to drug tests through this process in July 2013, August 2013, October 2013, and January 2014, all of which were negative and which her supervisors knew were negative (Tr.472,475-76,605; Ex.22).

During several drug tests, Ms. Hazziez was able to produce only a small amount of urine, not enough to reach the 45-milliliter line on the collection device (Tr.606,620,623,681). When that happened, the technician, Wanda, would try to submit the sample anyway, sometimes by combining two different low samples, which always worked and provided enough to test (Tr.606,620,623).

C. May 2014 drug test

In 2009, Ms. Hazziez had an intrauterine device ("IUD") inserted incorrectly, which had to be reinserted in 2010 (Tr.611). In April 2014, the symptoms of an incorrectly inserted IUD flared up again, including abdominal pain, difficulty urinating, and pain during urination (Tr.613-14). On April 23, she went to her gynecologist's office and had the IUD removed (Tr.613-15). But she also was diagnosed with a urinary tract infection ("UTI") or bladder infection, which made urination painful and difficult (Tr.614-15, 895-903). Both before and after her April doctor visit, she told Ms. Jones and Ms. McClendon-Cole about these medical problems – as she put it, "my female issues that I had going on" (Tr.442-43,564,632-33).

Around 8:45 a.m. on May 5, 2014, the City directed Ms. Hazziez to appear at Concentra for a drug test (Tr.547,615; Ex.3). She appeared as directed around 10:15 a.m. (Tr.596,631). A technician, Lacresa Richardson, not Wanda who previously had helped Ms. Hazziez there, took her keys and cell phone and locked them in a cabinet (Tr.614,620-21,626).

Ms. Hazziez twice attempted to give an adequate urine sample at Concentra on May 5 but could not due to the pain and difficulty urinating from her ongoing infection (Tr.619-27).

Ms. Hazziez's first attempt at giving a urine sample was about an inch away from the 45-milliliter line, and there was blood in the sample (Tr.619). The blood alarmed her (Tr.619-20,635). Though she was menstruating at the time, she knew the blood was not from that because she was using a tampon and only was spotting that day (Tr.635). She told the technician, who also saw the blood, that she had a painful UTI or bladder infection and gave as much urine as she could, but the technician instructed her to go to the waiting room, drink water, and try again (Tr.619-21). She told the technician that Wanda was able to make two samples out of a similar sample before without a problem, but the technician replied, "I'm not Wanda, you need to go back and do it again" (Tr.620-21).

After drinking water and waiting until it felt like she needed to urinate, Ms. Hazziez then tried again, but the second attempt produced even less urine and still contained blood (Tr.621-22). This time, it was extremely painful, which she likened to "passing kidney stones" and caused her to "screech" (Tr.622). This alarmed her and she knew she needed to see her doctor immediately (Tr.622-24). She told the technician this and again suggested the technician combine the two samples, but the technician refused, stating she already had thrown out the first sample (Tr.622-23).

The technician put a form in front of Ms. Hazziez, directed her to sign it, and "said if I was to leave the facility that it is deemed as a refusal to

submit" (Tr.625; Ex.37). Though the form stated, "The donor should not be asked to sign this form", the technician would not allow her to leave until she signed the form (Tr.625-26). Ms. Hazziez asked whether she would be terminated from her job for refusing to sign the form, and the technician told Ms. Hazziez to talk to her supervisor at the City (Tr.629).

The technician had handwritten on the form, "Patient refused after two attempts" (Tr.626). Ms. Hazziez wanted to cross that out and write that it was due to a UTI, but she needed to go to the doctor immediately, so she added "due to bladder infection", signed it, and left (Tr.626-28). She wrote the note in the hope that whoever saw the form at the City would know she was asking to be accommodated (Tr.626-29). The technician then allowed her to leave, around 11:30 a.m. (Tr.631).

Ms. Hazziez went directly from Concentra to her healthcare provider's office, immediately calling to make an appointment (Tr.630-31). On the way, she called Aim4Peace to speak with Ms. McClendon-Cole, who was out, so she spoke with Ms. Jones instead and told Ms. Jones what had happened, explaining she had not produced enough urine due to her bladder infection, the same one she had discussed with Ms. Jones previously, and that she was on her way to the doctor (Tr.632-34). Ms. Jones asked whether Ms. Hazziez was okay and said to call her after Ms. Hazziez's appointment, which made Ms. Hazziez think she had permission to go to the doctor (Tr.634).

At her healthcare provider, Ms. Hazziez underwent urinary and vaginal examinations, and was treated for her pain (Tr.632-37,904). This confirmed that the blood in her urine was not from menstruation (Tr.635).

She asked for a doctor's note explaining what had happened so her employer knew she was telling the truth (Tr.636). Ms. McClendon-Cole received that doctor's note at 2:42 p.m. via e-mail (Tr.438,645-46; Ex.66). Dr. Bradley Sullivan, a board-certified obstetrician and gynecologist who headed the practice where Ms. Hazziez was treated, confirmed all this and stated she likely was suffering from urethritis, an inflammation of the urethra (Tr.899).

D. Termination of Ms. Hazziez

After being treated at her healthcare provider's office, Ms. Hazziez returned to work at Aim4Peace (Tr.637). She went to Ms. McClendon-Cole's office, where Mr. Junaid already was, and told both of them all about what had happened (Tr.637). Ms. McClendon-Cole told her to explain all this to Ms. Jones and have Ms. Jones call Kendra Jackson, an administrative assistant at the Health Department (Tr.637). Ms. McClendon-Cole did not believe Ms. Hazziez to be a drug user (Tr.520). Ms. Hazziez and Ms. Jones then had a conference call with Ms. Jackson and explained again "from top to bottom" what had happened (Tr.637-38). Ms. Jackson's responded, "[W]ow, let me call you right back" (Tr.638).

Ms. Hazziez then returned to her own office and began working again, but after a few minutes Ms. McClendon-Cole, Ms. Jones, and Mr. Junaid came and told her she needed to leave the premises because she was under investigation for refusal to submit to testing (Tr.638). She objected that she had not refused to submit and stated she had given two samples, to which Mr. Junaid responded, "nah, sister you are under investigation, you know,

you gotta go, let's go", directed her to leave her things, and escorted her out of the office in front of other workers (Tr.638).

While Ms. Hazziez was on her way home, Ms. Jones called her (Tr.638). Ms. Jones advised that she needed to return to her healthcare provider's office immediately and submit to a drug test, and that she also needed to write an e-mail pleading for her job to Ms. Greenlaw, the former drug and alcohol policy administrator, because the City was moving to terminate her (Tr.638-39).

Ms. Hazziez did exactly as Ms. Jones instructed, first recounting everything that had happened in an e-mail to Ms. Greenlaw at 2:33 p.m. that afternoon, copying Ms. McClendon-Cole, explaining this was entirely due to health complications, pointing to the blood in her urine, and also offering to undergo another test (Tr.639-40; Ex.38). She ended it, "Please understand my condition and my worries with what happened today, and in no way did I automatically refuse the test, but did so after the second attempt due to health complications" (Tr.643; Ex.38). One of her purposes in writing this was for "whoever read that e-mail to just take into consideration what I was going through. I was asking for accommodations, just to be accommodated for, like, I am having health issues" (Tr.643).

Veronica Farlough, the City's drug and alcohol policy administrator, said she did not find the notion of blood in Ms. Hazziez's urine concerning because "Ms. Hazziez was on her menstrual cycle" and "if she's on her menses then the blood in the urine must have come from the menstrual cycle" (Tr.981-82). Ms. Greenlaw, too, opined she found it "incredible" that Ms.

Hazziez would be alarmed by blood in her urine, and so discounted Ms. Hazziez's entire story (Tr.841-42). She said she found it unbelievable that the blood would not be from a woman's menstruation (Tr.841-42). Ms. Farlough, Ms. Greenlaw, and others in the human resources group discussed the fact that Ms. Hazziez was on her menstrual cycle (Tr.1323). Ms. Farlough never checked with a physician whether a urinary tract condition might signal a medical reason someone cannot give an adequate urine sample (Tr.984).

Second, Ms. Hazziez returned to her healthcare provider's office for another urinalysis test (Tr.642-43). They tested for amphetamine, barbiturate, benzodiazepine, cannabinoid, cocaine, opiate, benocyclidine, and ethanol (alcohol), all of which are what the City requires tests for and all of which were negative (Tr.903-04; Ex.68). This result was sent to the City as soon as Ms. Hazziez received it, so by May 8 (Tr.649).

The afternoon of May 5, Ms. Farlough emailed Jackie Dillard, a human resources manager for the Health Department, requesting Ms. Dillard investigate whether Ms. Hazziez refused to submit to drug testing and directing that Ms. Hazziez be removed from her worksite immediately (Tr.1390; Ex.44). Around 4:00 p.m., Ms. Dillard called Ms. Hazziez for her side of what happened, and Ms. Hazziez relayed it all to her, too (Tr.648).

Ms. McClendon-Cole said the recommendation to fire Ms. Hazziez came from human resources based on her refusal to submit to testing by leaving Concentra without approval (Tr.434). Ms. Dillard reported back late that day, copying Ms. Farlough, Ms. Jackson, Ms. Greenlaw, Dr. Archer, and

others, recounting what had happened, what Ms. Hazziez and Ms. Jones had reported, and Ms. Hazziez's medical issues, even attaching her doctor's notes (Tr.652-58; Ex.67). She said she made no findings on whether Ms. Hazziez had refused to submit or any determination on discipline, which would have to come from a supervisor in the Health Department (Tr.1396-97).

The next day, May 6, at 2:39 p.m., Concentra sent Ms. Farlough a formal record that Ms. Hazziez had refused a test (Tr.1010-11; Ex.103). The record did not contain the notes from the form Ms. Hazziez signed about her attempting the test twice or her infection (Tr.1010-11; Ex.103).

Twenty-one minutes later, at 3:00 p.m., without waiting for the results of any further investigation by Ms. Dillard, checking with anyone at the Health Department, or receiving instructions from any higher authority, Ms. Farlough started composing a letter terminating Ms. Hazziez's employment (Tr.1012; Ex.104). Ms. Farlough sent Ms. Hazziez that letter, which Ms. Hazziez received in the mail May 8 and which stated,

> [T]his letter is to inform you that it was reported that on May 5th, 2014 you refused to submit to a random drug screen. This is considered a refusal to submit to testing according to section 9F of the City of Kansas City, Missouri's Drug and Alcohol Misuse Testing Policy. Your employment shall be terminated.

(Tr.650-51; Ex.7). Ms. Dillard testified that Ms. Farlough did not have the authority to fire anyone on her own (Tr.1391).

The letter cites § IX(F) of the City's policy, which is for a positive drug test, not the "refusal to test" section, and City officials testified this was not correct, because Ms. Hazziez had not tested positive (Tr.887,1084,1131-32). And the City did not send Ms. Hazziez for evaluation by a physician in the

five days after the May 5 testing, as their policy called for (Tr.602,791). The City did not present any alternative test options to Ms. Hazziez after she could not produce the urine sample at Concentra (Tr.603).

Ms. Hazziez was emotionally devastated (Tr.651,669). She had children to take care of, she was stressed because it was hard to pay bills, she was forced to rely on her mother and government assistance, and she almost lost her house (Tr.669,671). She also was humiliated, both by these events and by having to discuss her medical information in court (Tr.671,725).

After Ms. Farlough sent the termination letter, the City conducted an internal inquiry (Tr.448; Ex.41). Even Dr. Archer, the head of the Health Department, wrote he did not believe Ms. Hazziez had refused to submit to testing, which was sent to Ms. Farlough, a city attorney, and the City's accommodations committee (Tr.448-49; Ex.41). Dr. Archer testified that a meeting was held on May 13 between himself and human resources because he did not believe Ms. Farlough could terminate one of his employees on her own, and he did not want to terminate Ms. Hazziez because she had tried to submit to testing twice but was unable due to her medical emergency (Tr.1492). He said this was to explore other options besides termination so he could try to change human resources' minds, but human resources refused and decided on termination for the sake of consistency (Tr.1541-45).

Michael Kitchen, a City human resources manager who had served on the committee to review employee requests for reasonable accommodations and had discussed Ms. Hazziez's case with others in human resources (Tr.1111-12), said that urinary or bladder disorders could be conditions

subject to a need for reasonable accommodation (Tr.1114). He agreed that a condition substantially affecting urination could be a medical situation and a disability (Tr.1115). He also agreed that the City's duty to accommodate is triggered when a determination is made that an individual has a disability or impairment that substantially limits her in one or more of life's major activities (Tr.1116), and that a person with episodic limitations should be looked at when the condition is in an active state (Tr.1120). He said he never was informed that Ms. Hazziez had requested accommodation or notified the City of a disability (Tr.1119).

Teri Casey, another accommodations committee member, echoed this (Tr.1308-09). She also said that accommodation requests or disability notifications do not have to be formal, can be verbal or written, and can be made by a supervisor on an employee's behalf (Tr.1305).

Nonetheless, Ms. Hazziez was terminated effective May 5, 2014 (Tr.412). John Ward, an economics professor, testified that her loss of compensation as a result of her termination was $94,648 (Tr.1102-03).

E. Unemployment-benefits proceedings

Ms. Hazziez then filed for unemployment benefits, which the City contested (Tr.667,839,1030,1038). One of her claims below was that by contesting her unemployment benefits, the City retaliated against her for requesting accommodation and for complaining of discrimination, which violated the MHRA (D2 pp.16-17).

Before trial, citing § 288.215.1, R.S.Mo., which states, "Any finding of fact, conclusion of law, judgment or order made by … any person with the

authority to make findings of fact or law in any proceeding under this chapter … shall not be used as evidence in any subsequent or separate action not brought under this chapter" (Tr.14-15,311), the City moved to exclude any "any evidence or argument of the parties' acts or the events during the unemployment proceedings" (D139 pp.7-9).

Ms. Hazziez argued this statute only applies to findings of fact, conclusions of law, and judgments in those proceedings, and does not exclude anything else (D89 p.10). She conceded she could not introduce the actual findings, conclusions, and judgments from the unemployment proceedings, but argued she still could introduce evidence "that the City tried to stop her from getting benefits", which was relevant to her retaliation claim (Tr.314).

The trial court granted the City's motion and excluded any "document" or "statement that is made" concerning the unemployment proceedings, except for impeachment purposes (Tr.315). It stated that Ms. Hazziez could "proceed with the retaliation claim" anyway "if you've got something that's going to show that Ms. Hazziez made a complaint to the City in any way about her disability" (Tr.315). It only allowed her to "say that the proceeding occurred but by the same token she did receive benefits" and that "it was contested" (Tr.316-17). At the same time, it held "her complaint, prior to everything happening, at the time she was terminated saying I am disabled, I have this medical condition is a question of fact" (Tr.317).

During trial, Ms. Hazziez put Ms. Greenlaw on the stand to make an offer of proof regarding the unemployment proceeding evidence that the court had excluded (Tr.741-42). This included Exhibits 16, a binder of documents,

568, the City's two-page appeal letter to the Labor and Industrial Relations Commission, and 186, an e-mail Ms. Greenlaw sent to her supervisor to review that letter (Tr.747,753-54,757).

In the offer of proof, Ms. Greenlaw recounted Ms. Hazziez's application for unemployment benefits in late May or early June 2014, which she was involved in protesting (Tr.743). At the time, she knew that Ms. Hazziez had sent her the May 5 email at 2:33 p.m. (Tr.744-45; Ex.38). On June 12, after the City protested, a Division of Employment Security ("DES") deputy denied Ms. Hazziez's application because she was discharged for "misconduct" (Ex.16 pp.9,12). On June 19, she appealed to DES's Appeals Tribunal (Ex.16 p.12). The next day, June 20, she filed a charge of discrimination against the City with the Missouri Commission on Human Rights, of which the City received notice by June 30 (Tr.744,1615-16).

Then, in August 2014, a two-day hearing was held on Ms. Hazziez's unemployment benefit application before a DES Appeals Tribunal referee, at which the City continued its protest (Tr.746; Ex.16 p.153). The referee ruled for Ms. Hazziez and reversed the deputy's decision (Ex.16 pp.153-57). Then, though the City does not appeal every case where it originally had contested unemployment, it appealed the referee's decision to the Labor and Industrial Relations Commission (Tr.746-47; Ex.568). In Ms. Greenlaw's appeal letter, she opined the City found it "incredible" that Ms. Hazziez would be alarmed by blood in her urine, and so discounted Ms. Hazziez's entire story because of the notion that she knew the blood was not due to her menstrual cycle (Tr.756,764; Ex.568). Ms. Greenlaw admitted she made no analysis of

whether what Ms. Hazziez was allegedly terminated for was misconduct as Missouri's unemployment laws define it (Tr.758). The Commission affirmed the Appeals Tribunal's decision (Ex.16 p.160).

The court refused to admit Exhibits 16, 568, or 186 into evidence (Tr.751,754-55,767). It also refused the offer of proof (Tr.767). Ms. Hazziez later asked the court to reconsider this, but it would not (Tr.1186-87).

F. Proceedings below

1. Initial proceedings

Ms. Hazziez filed the action below in September 2015 (D1 p.12). In her second amended petition, the defendants were the City and two other groups: (1) the "Concentra Defendants", entities who operated the testing facility and two employees; and (2) the "eScreen Defendants", entities she alleged "developed and administered the testing protocol and selection process," comprising eScreen, Inc. and Alere, Inc. (D2 pp.3-5).

Ms. Hazziez's second amended petition included seven counts (D2 pp.11-19). The first five were against all defendants for violating the MHRA, alleging that the City committed disability discrimination (including both "regarded-as" discrimination and failure-to-accommodate discrimination), sex discrimination, religious discrimination, race discrimination, and retaliation against Ms. Hazziez, and that the Concentra Defendants and eScreen Defendants acted directly in the City's interest and "aided, abetted, assisted, incited, and/or compelled the City's conduct" (D2 pp.11-17). The other two counts were against the eScreen Defendants only, alleging negligence and strict products liability (D2 pp.17-19).

In May 2016, Ms. Hazziez settled with the Concentra Defendants for $30,000 and dismissed her claims against them (D3; Ex.573).

In November 2016, the City filed a third-party petition against Occupational Health Centers of the Southwest, P.C. (D10). The trial court then severed the trial of the City's third-party claim from that of Ms. Hazziez's claims (D90 p.1).

In September 2017, shortly before trial, Ms. Hazziez abandoned her race-discrimination claim against all defendants (Count IV) and retaliation claim (Count V) against the eScreen Defendants (D55 pp.17,20; 09/29 Tr.41-42). The trial court also granted summary judgment on all claims against Alere, Inc., and for eScreen, Inc. on Count VII (D119; 09/29 Tr.14-16).

Therefore, this left these claims for trial: Counts I (disability discrimination), II (sex discrimination), and III (religion discrimination) against both the City and eScreen, Inc.; Count V (retaliation) against the City only; and Count VI (negligence) against eScreen, Inc. only.

On the first day of trial, Ms. Hazziez and eScreen, Inc. entered into an agreement in which she would dismiss all her claims against eScreen and release it from all her claims in exchange for $300,000 (Ex.574). While no formal dismissal was filed, Ms. Hazziez did not submit any claims against eScreen to the jury (Tr.1629-78). The City was allowed to amend an affirmative defense it had stated, citing § 537.060, R.S.Mo., that the settlements with the Concentra Defendants and eScreen should set off any judgment against the City (Tr.1610-14).

2. Trial

The case was tried over eight days in October 2017 (D94 pp.1-3; Tr.ii-v).

When the City moved for a directed verdict at the close of all evidence, the trial court denied it except as to Ms. Hazziez's retaliation claim, Count V, on which over her objection it directed a verdict for the City (Tr.1614-15,1621-22). It stated this was because "the filing of the claim with the Missouri Commission on Human Rights … postdates the unemployment claim proceedings so you have to have the act before you can retaliate and so my ruling is that was not a retaliatory action on the City's part" (Tr.1621).

Four claims went to the jury: "regarded-as" disability discrimination, failure-to-accommodate disability discrimination, sex discrimination, and religious discrimination (D91). The City submitted separate verdict forms for each (D141 pp.24,32,40,48,55), which the court issued (D91). The City also sought and received this jury instruction: "Evidence has been presented concerning the acts of third-parties who are neither the Defendant nor Defendant's employees. You may not consider the acts of such third-parties to be the acts of Defendant" (D93 p.9).

The jury returned verdicts for Ms. Hazziez on "regarded-as" disability discrimination, awarding her $100,000 in compensatory damages and no punitive damages, and on sex discrimination, awarding her $72,000 in compensatory damages and no punitive damages, and for the City on her remaining two claims (D91). When the jury reported its verdict, the City offered no objection (Tr.1785-88).

3. Post-trial

The trial court then entered a document titled "Jury Trial Minutes and Judgment on Claims of Plaintiff Shahidah Hazziez", accepting the verdicts and entering judgment for Ms. Hazziez for $100,000 and $72,000 (D94 p.5).

Ms. Hazziez moved to amend that judgment to add equitable relief and attorney fees (D95). The City opposed this, arguing in part that the prior settlements with eScreen and the Concentra Defendants made her not a prevailing party because they eliminated the jury's verdicts (D112 pp.3-10). The City also moved the court to declare the post-trial document it entered was not a "judgment," to merge the damages in the two verdicts, and to eliminate those damages due to the settlements (D109-11).

Ms. Hazziez also moved for a new trial on her retaliation claim (D143). She argued the court should not have excluded the unemployment-benefits-proceeding evidence, and that the evidence at trial made a submissible case for retaliation (D143 pp.2-3). The City opposed this (D144 p.2).

In August 2018, the trial court issued what it titled, "Post-Trial Order and Amended Judgment" (D120). Noting that the City's third-party claim remained pending, it stated the earlier "judgment" was not a final judgment for purposes of appeal, but that it was now "enter[ing] this final judgment disposing of all issues between Plaintiff and Defendant City of Kansas City only per Rule 74.01(b)" (D120 pp.2-3). The court denied Ms. Hazziez's claims for equitable relief but granted her $303,660 in attorney fees (D120 pp.2,16).

The court then denied the City's requests to merge the two verdicts or to eliminate the damages (D120 p.3).

As to merger, the court recounted that the City had submitted separate verdict forms, had not requested the jury be instructed on one verdict form, and did not object to the verdicts as flawed or inconsistent when the jury returned (D120 pp. 4-5). It stated that the City should not be permitted to stand idly by, gamble on a favorable verdict, and then complain when the verdict is adverse (D120 pp.4-5). It also noted that no prior MHRA case has authorized such a merger, nor did the MHRA authorize it (D120 p.4). It held that construing the jury's verdicts liberally, the jury properly saw the two wrongful acts, "regarded-as" discrimination and sex discrimination, as separate concepts and harms, and this was further shown by the different amounts the jury awarded (D120 pp.4-5).

As to elimination, the court held an MHRA case is not a "tort action" to which § 537.060 applies (D120 p.6). It also held that regardless, the City obtained an instruction that the jury was not to consider any third party's actions when determining its liability, two of Ms. Hazziez's claims against the eScreen Defendants were not MHRA claims at all, and those in which both the City and the settling defendants were named together named those other defendants under a conspiracy theory only, including one allegation against Concentra that did not apply to the City (D120 p.7). It held that even if § 537.060 applied to an MHRA case, the City "failed to show the injuries or damages covered by the settlements overlap with the injuries and damages sustained by Plaintiff as a result of Defendant's action under the MHRA and that Plaintiff's injuries or damages covered by the settlements were included in the jury's verdicts" (D120 pp.7-8).

The trial court also held that because the earlier document it titled "judgment" had not been a final judgment, Ms. Hazziez's motion for new trial was premature and would be deemed filed following entry of the August 2018 judgment (D120 p.3,n.1). Within 30 days of the August 2018 judgment, the City again moved to amend the judgment or for remittitur, arguing the merger and elimination of the verdicts, as well as the elimination of the attorney-fee award under an argument that Ms. Hazziez was not a "prevailing party" (D121-23). During that period, Ms. Hazziez also re-moved for a new trial on her retaliation claim (D124 p.1). The trial court denied these motions on November 21, 2018 (D128 p.1).

The City then appealed to this Court nine days later (D129). Ten days after that, Ms. Hazziez cross-appealed (D134).

On September 18, 2019, the trial court entered what it titled, "Post-Trial Order and Second Amended Judgment", repeating the August 2018 judgment in its entirety and only adding at the end, "pursuant to Rule 74.01(b), the Court expressly finds that there is no just reason for delay and all claims and matters between Plaintiff Shahidah Hazziez and Defendant City of Kansas City are final for purposes of appeal" (D147 p.17; App.A17).

Respondent's Argument

I. The trial court properly acted within its discretion in refusing to "merge" the jury's two MHRA verdicts in Ms. Hazziez's favor, because viewing the evidence in the light most favorable to that decision, the jury was free to find that the damages Ms. Hazziez suffered from the City regarding her as a drug user were different than and separate from those she suffered from the City discriminating against her due to her sex.

(Response to the City's Point I)

Standard of Review

Standard if preserved: abuse of discretion

A "circuit court is vested with considerable discretion in ruling on a motion to amend judgment, and [this Court] will not reverse a circuit court's decision on the motion to amend the judgment unless there is abuse of discretion." *Gill Constr., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 711 (Mo. App. 2004). Similarly, this Court "review[s] the trial court's denial of a motion for remittitur for an abuse of discretion" and in doing so "review[s] the evidence in the light most favorable to the trial judge's decision." *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 211 (Mo. App. 2013). This means "defer[ring] to the trial court's credibility determinations, and accept[ing] as true the evidence and inferences favorable to the judgment while disregarding contrary evidence." *Holm v. Wells Fargo Home Mortg., Inc.*, 514 S.W.3d 590, 596 (Mo. banc 2017).

Abuse of discretion is "[t]he most deferential standard of review" and "severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court." *In re Marriage of Stephens*, 954 S.W.2d 672, 678 (Mo. App. 1997). "An abuse of discretion occurs when the trial court's

'ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 436 (Mo. banc 2016) (citation omitted).

"If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Hancock v. Shook*, 100 S.W.3d 786, 794 (Mo. banc 2003).

Not preserved: plain error

The City concedes that its first point is not preserved for appeal. It requests review for plain error (CityBr.26-27). This further circumscribes even the stringently deferential abuse-of-discretion standard.

Plain-error review is "discretionary and rarely granted in civil cases," *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 617 (Mo. App. 2009), and "should be used sparingly." *MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo. App. 2012) (citation omitted). To meet the burden to prove plain error when ordinary review is for abuse of discretion, the City must prove the trial court's "ruling was an obvious and clear abuse of discretion, which affected a substantial right of the appellant and resulted in a manifest injustice or miscarriage of justice." *State v. Brown*, 577 S.W.3d 870, 876-77 (Mo. App. 2019) (citation omitted).

* * *

In its first point, the City argues that the trial court committed plain error in not "merging" the jury's $72,000 verdict for Ms. Hazziez on sex discrimination into its $100,000 verdict for her on "regarded-as"

discrimination and limit her recovery to $100,000. It argues this is because her only injury was "termination", which was the same in both claims, making her damages redundant.

The City's argument is without merit. It fails to understand the difference between a "discriminatory act" and the "injury" and "damages" for that injury in the MHRA context, or to view the evidence in the light most favorable to the trial court's decision not to merge the verdicts.

While the discriminatory act, termination, was the same in both verdicts, the law of Missouri is that the jury was entitled to find that Ms. Hazziez's noneconomic damages for being regarded as a drug user were different than and separate from her damages for being discriminated against due to her sex. The trial court properly acted within its discretion in determining so. And the City does not come remotely close to meeting its heightened plain-error-review burden to show an *obvious* abuse of discretion.

A. The City's first point is not reviewable because it invited the alleged error.

At the outset, more than just not preserved for review, the City's first point is not reviewable at all.

A party "may not take advantage of self-invited error or error of [her] own making." *Johnson v. State*, 477 S.W.3d 2, 8 (Mo. App. 2015). "No … judgment should be affected, in any manner, by an error committed at the insistence of the" party. *Id.* "It is axiomatic that a 'party cannot lead a trial court into error and then …' lodge a complaint about the action." *Waters v. Meritas Health Corp.*, 478 S.W.3d 448, 458 (Mo. App. 2015) (citation omitted).

In short, "a party may not complain on appeal of an alleged error in which he joined, acquiesced or invited by his conduct …." *N. Farms, Inc. v. Jenkins*, 472 S.W.3d 617, 623 (Mo. App. 2015) (citation omitted). Under this doctrine, a party who proposes a jury instruction that the court issues cannot later complain that the form of that instruction was plain error. *State v. Holmes*, 491 S.W.3d 214, 220 (Mo. App. 2016).

Here, the City submitted separate verdict forms for each of Ms. Hazziez's claims (D141 pp.24,32,40,48,55), which is what the court gave the jury (D91). The City never objected to the submission of separate verdict directors or forms, nor did it request Ms. Hazziez's discrimination claims be considered on one single form for a single damages consideration (Tr.1629-78).

In denying the City's request to "merge" the two verdicts, the trial court recounted this (D147 pp.4-5; App.A4-5). It noted that the City should not be permitted to propose separate verdict directors and forms, stand idly by, gamble on a favorable verdict, and then complain the verdicts should be "merged" when the verdicts are adverse to it (D147 pp.4-5; App.A4-5).

By requesting separate verdict directors and forms and receiving exactly what it requested, the City joined, acquiesced, or invited the jury's entry of separate damage awards for "regarded-as" discrimination and sex discrimination. As the trial court held, the City cannot now argue the entry of separate awards was error.

B. Viewing the evidence in the light most favorable to the trial court's decision, the jury properly found that the damages Ms. Hazziez suffered from the City regarding her as a drug user were different than and separate from those she suffered from the City discriminating against her due to her sex.

If the City's argument is reviewable, it is without merit. Viewing the evidence in the light most favorable to the trial court's denial of the City's motions to amend and for remittitur, while the discriminatory act, "termination", was the same in both the regarded-as-discrimination verdict and the sex-discrimination verdict, the injury and damages flowing from each was different and separate.

The "merger" doctrine the City cites "prevent[s] a party from being compensated twice for the same injury." *Heckadon*, 400 S.W.3d at 380 (citation omitted). Under it, while "a single transaction may invade more than one right[,] and a plaintiff is entitled to proceed on numerous theories of recovery, he is not allowed to be made more than whole or receive more than one full recovery for the same harm." *Id.* (citation omitted). "'[A] plaintiff must establish a separate injury on each theory' presented at trial." *Id.* (citation omitted).

Conversely, separate damages from two different injuries are not mergeable. *See BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 197 (Mo. App. 2007) (where plaintiff alleged and proved different economic injuries and damages from its separate causes of action, verdicts properly were not merged).

Every decision the City cites in which this Court applied this doctrine to merge one verdict into another were purely economic-damage cases that

involved one single economic injury. None involved any noneconomic damages, let alone for two separate injuries. *See Heckadon*, 400 S.W.3d at 380 (same loss of difference in value of vehicle in MMPA claims against two separate defendants); *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 177 (Mo. App. 2012) (same damage to property from nuisance under two theories); *Senu-Oke v. Modern Moving Sys., Inc.*, 978 S.W.2d 426, 432 (Mo. App. 1998) (same $150,000 for loss of goods retained by defendants under theories of breach of contract, replevin, and conversion); *Kincaid Enters., Inc. v. Porter*, 812 S.W.2d 892, 901 (Mo. App. 1991) (same compensation for benefits and gain buyer would have made had terms of contract been performed under theories of breach of contract and fraud).

Not only is counsel for Ms. Hazziez unable to find any reported decision applying this doctrine to two discrimination verdicts under the Missouri Human Rights Act, but it appears no Missouri court ever has applied it to separate noneconomic-damage verdicts at all.

Especially in the context of the MHRA, this makes sense. Different discriminatory acts – e.g., sex discrimination contributing to termination and being regarded as a drug user contributing to termination – are separate discriminatory injuries under the MHRA and are subject to separate noneconomic-damage awards. Viewing the evidence in the light most favorable to the trial court's decision to deny remittitur, that is exactly what happened here.

The MHRA makes it an "unlawful employment practice" "[f]or an employer, because of the race, color, religion, national origin, sex, ancestry,

age or disability of any individual" "[t]o 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." § 213.055.1(1)(a), R.S.Mo. (2014) (App.A21). In § 213.010(5), R.S.Mo. (2014), the MHRA defines "discrimination" as "any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment" (App.A19). And in § 213.010(4)(c) it defines "disability" as including that "a person may be considered to have a disability if that person … [i]s erroneously regarded as currently illegally using, or being addicted to, a controlled substance" (App.A18).

Under the MHRA, permissible damages include not only "economic damages" but also noneconomic damages "incurred for emotional distress, humiliation, and anxiety." *Hurst v. Kan. City, Mo. Sch. Dist.*, 437 S.W.3d 327, 337 (Mo. App. 2014) (citation omitted). And the emotional distress does not have to be medically diagnosable or proven with expert testimony. *Conway v. Mo. Comm'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App. 1999) (joined by Russell, C.J., and Blackmar, S.J.). Showing that the plaintiff "was embarrassed and upset" by the discriminatory act and it "caused … anxiety" is enough. *Hurst*, 437 S.W.3d at 337.

Whether and to what extent a plaintiff in an MHRA case was damaged due to a discriminatory act is a question for the jury. *Id.* at 336-37. And "[a]ppellate review of a jury's verdict begins with the recognition that the jury retains 'virtually unfettered' discretion in reaching its decision" as to the

amount of noneconomic damages. *Stewart v. Partamian*, 465 S.W.3d 51, 57 (Mo. banc 2015) (citation omitted).

Here, Ms. Hazziez testified that losing her job due to the discrimination she suffered emotionally devastated her (Tr.651,669). She had children to take care of, she was stressed because it was hard to pay bills, she was forced to rely on her mother and seek government assistance, and she almost lost her house (Tr.669,671). She also was humiliated, both by what had happened to her and by having to discuss her personal medical information in front of a court and jury (Tr.671,725).

But assigning numeric values to the compensation for those noneconomic damages was up to the jury. Being falsely regarded as a drug user and suffering discrimination due to her sex are two different injuries. § 213.055.1(1)(a). And the jury was instructed correctly that it was only to award damages for each of those individual injuries: the instructions told them to assess "such sum as you believe will fairly and justly compensate plaintiff for any damages … that defendant's conduct directly caused or directly contributed to cause" (D93 pp.14,19,24,29).

The jury decided that the emotional harm Ms. Hazziez suffered from being labeled as a drug user was worth $100,000, whereas the emotional harm she suffered having her health conditions disregarded due to gender-based stereotypes and assumptions was worth $72,000. It was entitled to do this, because these were separate wrongs with separate damages. The law of Missouri is that merger does not apply. *BMK Corp.*, 226 S.W.3d at 197.

The City points to two decisions it argues support merger in this context (CityBr.27-28). In the first, *Echols v. City of Riverside*, an MHRA case, the Court *did not* apply a reduction for double recovery, holding receiving unemployment compensation *does not* offset the damages a plaintiff receives against an employer due to a retaliatory discharge. 332 S.W.3d 207, 212 (Mo. App. 2010). The Court held that otherwise, it would "serve to negate the jury's award of compensatory damages, a recognition of the wrongdoing of the employer." *Id.* And in the second, *Washburn v. Kan. City Life Ins. Co.*, a federal case that did not involve the MHRA or separate noneconomic-damage awards, the Eighth Circuit held economic damages from a claim of breach of contract for terminating employment merged into a single claim of age discrimination for terminating that same employment. 831 F.2d 1404, 1410-11 (8th Cir. 1987).

The City also briefly points to Ms. Hazziez's counsel telling the jury that any damages would be "merged" (CityBr.20,31). But he was referring to the two *disability* discrimination verdicts, "regarded-as" and "failure-to-accommodate" (Tr.1713), which were one count instructed in two alternative ways. He was not stating that *all* damages would be merged (Tr.1713).

The trial court's decision not to merge the jury's two verdicts for Ms. Hazziez was a proper exercise of its discretion. It certainly was not something no reasonable person could say was proper, or an obvious, clear abuse of discretion resulting in a manifest injustice or miscarriage of justice.

The Court should affirm the trial court's judgment on the jury's verdicts for "regarded-as" disability discrimination and sex discrimination.

II. The trial court properly refused to eliminate the jury's verdicts under § 537.060, R.S.Mo., because that statute does not apply to damages awarded under the MHRA, and viewing the evidence in the light most favorable to the trial court's decision, the injuries and damages that the settlements with eScreen and the Concentra Defendants covered did not overlap with those she suffered from the City's MHRA violations.

(Response to the City's Points II and III)

Standard of Review: *Murphy v. Carron*

The City argues that the trial court's decision to deny its motion to reduce the judgment under § 537.060, R.S.Mo., is reviewed *de novo* (CityBr.32). But review of the denial of a § 537.060 setoff request only is *de novo* when "there are no … factual disputes" and the ruling purely is as a matter of law. *Heckadon*, 400 S.W.3d at 378 n.4. Here, there was a factual dispute "as to whether the predicate condition to the application of § 537.060 – 'multiple tortfeasors being liable for the same injury' is established" and "there were factual issues involved" in the trial court's determination. *Id.*; *see* D147 pp.6-8 (App.A6-8) (citing *Stevenson v. Aquila Foreign Qualifications Corp.*, 326 S.W.3d 920 (Mo. App. 2010)).

Therefore, the standard of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), applies. *Id.* (citing *Stevenson*, 326 S.W.3d at 925). This Court "will affirm the judgment … unless there is no substantial evidence to support it, … it is against the weight of the evidence, or … it erroneously declares or applies the law." *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 359 (Mo. App. 2012) (citing *Stevenson*, 326 S.W.3d at 924). This Court "defer[s] to the trial court on factual issues and view[s] the evidence and all

reasonable inferences drawn there from in the light most favorable to the trial court's judgment, disregarding all contrary evidence." *Id.*

* * *

In its second and third points, the City argues that the trial court erred in not eliminating the jury's $172,000 in verdicts under § 537.060, R.S.Mo., due to Ms. Hazziez's $30,000 settlement with the Concentra Defendants and $300,000 settlement with eScreen. It argues the trial court was required to presume that the settlements were for the same injuries the City inflicted on Ms. Hazziez because Ms. Hazziez's petition requested that liability among the defendants be joint and several for her MHRA counts (CityBr.33-40). It then argues that § 537.060 required the trial court to eliminate the jury's verdicts, because Ms. Hazziez did not rebut that presumption (CityBr.40-45).

This is without merit. By its own terms, § 537.060 only applies to jointly and severally liable tortfeasors. Section 537.060 does not apply here, because the law of Missouri is that all liability among defendants under the MHRA is individual and separate, never joint and several.

Moreover, viewing the evidence in the light most favorable to the trial court's decision, the injuries and damages the settlements with eScreen and the Concentra Defendants covered did not overlap with those the City inflicted on her in violation of the MHRA. The jury held the City liable for damages that only it, alone, inflicted on Ms. Hazziez.

A. Section 537.060, R.S.Mo., does not apply to awards under the MHRA, because all MHRA liability between defendants is individual and separate, not joint and several.

Section 537.060 provides in relevant part that

> When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons **liable in tort for the same injury or wrongful death**, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor. The term "noncontractual indemnity" as used in this section refers to **indemnity between joint tort-feasors culpably negligent**, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

(App.A25) (emphasis added).

As this language about "liable in tort for the same injury or wrongful death" and "indemnity between joint tort-feasors" makes plain, under this statute "a judgment entered against a defendant may be reduced by the amounts recovered by a plaintiff pursuant to settlement agreements entered into between the plaintiff and joint tortfeasors." *Bell v. Redjal*, 569 S.W.3d 70, 100 (Mo. App. 2019). "The plain language of the statute declares the defense of reduction under section 537.060 only applies between joint tortfeasors who are 'liable in tort for the same injury.'" *Id.*

"Joint and several liability occurs where the concurrent or successive negligent acts or omissions of two or more persons, although acting

independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury." *Id.* (quoting *Sanders v. Ahmed*, 364 S.W.3d 195, 212 (Mo. banc 2012)). "In other words, joint tortfeasors are two or more defendants whose alleged tortious conduct causes an indivisible injury to the plaintiff within the same transaction of facts." *Id.*

Conversely, if the defendants' liability is not joint, but instead is independent of each other, § 537.060 does not apply. "[A] mere claim by the plaintiff that multiple independent tortfeasors caused a plaintiff's injury is not sufficient to trigger the application of section 537.060 when the plaintiff settles with one of the independent tortfeasors." *Id.*

"In some instances, though, the plaintiff's pleadings and an ensuing settlement may give rise to a rebuttable presumption of joint liability for purposes of the statutory reduction." *Id.* "Once this presumption arises, the plaintiff must then show the injuries are divisible." *Id.* at 101. But "where the plaintiff's pleadings are not sufficient to establish joint liability, the burden of proving that element remains on the non-settling tortfeasor seeking the reduction." *Id.*

This "burden is not met by the fact that the plaintiff has merely claimed joint liability." *Sanders*, 364 S.W.3d at 212 (quoting *Stevenson*, 326 S.W.3d at 928). Instead, "under the facts as pleaded, a jury" must be able to "find both sets of defendants jointly liable." *Id.*

In *Stevenson*, for example, the plaintiff was injured in a car crash by one set of defendants who later settled. 326 S.W.3d at 923. Three years

later, the plaintiff's injuries were aggravated in a second crash with the trial defendants. *Id.* While the plaintiff had pleaded that both sets of defendants should be jointly and severally liable, this was not legally possible. *Id.* For, under the facts as pleaded, a jury could not find both sets of defendants jointly liable, because the injuries for which the trial defendants were sued were divisible from those governed by the settlement, as the trial defendants aggravated the initial injury and were liable only for that damage. *Id.* at 928.

The same as in *Stevenson* is true here, but for a different reason. The trial court held § 537.060 does not apply to MHRA actions because MHRA actions are not "torts", and instead § 537.060 only applies to negligence cases (D147 p.6; App.A6). While Ms. Hazziez agrees (see her brief on this issue below (D117 pp.3-6)), the Court does not have to reach that question.

Instead, the most glaring problem with the City's request to apply § 537.060 to this MHRA cases is that co-defendants in MHRA cases are *never* jointly and severally liable, but instead only ever are individually and separately liable.[1] Even though Ms. Hazziez did request the trial court to find the defendants jointly and severally liable, as in *Stevenson* (which the Supreme Court approved of in *Sanders*) this was not legally possible. Tellingly, *no* reported MHRA case *ever* even has mentioned defendants being jointly liable. Nor has § 537.060 ever been applied to an MHRA case.

The only provision of the MHRA allowing a plaintiff in an employment action to sue others besides her actual employer is § 213.010(7), which

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[1] The trial court observed that the City argued throughout this case "that the liability of the various defendants are not joint and several" (D147 p.7; App.A7). Ms. Hazziez concedes that, in this, the City was right.

provides the term "employer" also includes "any person directly acting in the interest of an employer" (App.A19).[2] And "person" includes both individuals and corporations. *Id.* at (14) (App.A19).

Here, Ms. Hazziez sued the City as her "employer" (D2 p.3). She also sued the eScreen Defendants and Concentra Defendants as persons who "acted in the City's interest with respect to Ms. Hazziez and aided and abetted the acts set forth here" (D2 pp.3-4,11-17). She also separately sued the eScreen Defendants for negligence and products liability, requesting separate damages awards against those defendants (D2 pp.17-19).

It is well-established that when someone besides the traditional employer is sued under the MHRA as an "employer" under § 213.010(7), that person is individually and separately liable, not jointly and severally liable with the traditional employer. "[T]he plain and unambiguous language under this definition of employer **imposes individual liability** in the event of discriminatory conduct." *Reed v. McDonald's Corp.*, 363 S.W.3d 134, 139 (Mo. App. 2012) (emphasis added) (citing *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 669 (Mo. banc 2009)).

The traditional employer is still liable, but so is the "employer" under § 213.010(7), only individually and separately. *See Hill*, 277 S.W.3d at 669 (supervisory employee involved in the retaliatory conduct would be individually and separately liable); *Leeper v. Scorpio Supply IV, LLC*, 351 S.W.3d 784, 792 (Mo. App. 2011) (managing member was individually and

[2] In 2017, the General Assembly made major revisions to the MHRA, including removing this language from the definition of "employer." But this case falls under the prior version of the act, which included this language.

separately liable for sexual harassment); *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 113 (Mo. App. 2006) (individual supervisors participating in age discrimination and retaliation would be individually and separately liable); *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 241, 244 (Mo. App. 2006) (CEO participating in sexual harassment would be individually and separately liable).

So, the law of Missouri is that two defendants who both engage in discriminatory conduct against the plaintiff in violation of the MHRA are not jointly and severally liable, but instead are individually and separately liable for their discriminatory injuries. And this makes sense, given that "[t]he MHRA's prohibition against discrimination serves a remedial purpose," *State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 392 (Mo. App. 2013), "to protect individuals from discrimination." *Klee v. Mo. Comm'n on Human Rights*, 516 S.W.3d 917, 924 (Mo. App. 2017). One way it deters discrimination is by addressing each defendant's wrongdoing separately and awarding the plaintiff damages separately for that wrongdoing.

So, the law of Missouri is that regardless of what Ms. Hazziez requested in her petition, it was legally impossible for the City and any of the other defendants to be jointly liable for damages she received against them under the MHRA. Therefore, § 537.060 is inapplicable to Ms. Hazziez's settlements with the other defendants.

B. Regardless, viewing the evidence in the light most favorable to the trial court's decision not to apply § 537.060, the injuries and damages that the settlements with eScreen and the Concentra Defendants covered did not overlap with those Ms. Hazziez suffered from the City's MHRA violations.

As the trial court recognized (D147 pp.6-7; App.A6-7), even if § 537.060 somehow could apply to MHRA cases, it still would not apply to the facts of this case. Here, each defendant committed separate injuries resulting in separate losses, for which they would not be jointly liable.

First, the jury was weighing and awarding damages to Ms. Hazziez *only* for the City's conduct. The City made sure of this, because it obtained a jury instruction making this clear: "Evidence has been presented concerning the acts of third-parties who are neither the Defendant nor Defendant's employees. You may not consider the acts of such third-parties to be the acts of Defendant" (D93 p.9). And just as the trial court observed (D147 p.7; App.A7), the City had argued separate liability throughout the case, only now arguing joint and several liability after it lost. Before trial, the City sought an order in limine barring the presentation of any evidence of the acts of other defendants (D139 pp.6-7), which the trial court granted (09/29 Tr.31). Before and during trial, the City argued many times that it could not be held jointly liable for the eScreen Defendants' or Concentra Defendants' actions (09/29 Tr.40; Tr.365,731,1354,1632-33).

Second, the facts bear out that Ms. Hazziez's claims against the eScreen Defendants and Concentra Defendants were for separate wrongs, for which the City would not be liable.

Ms. Hazziez settled with the Concentra Defendants for $30,000 in 2016 (D3; Ex.573). The essence of her allegations against them were that they failed to accommodate her medical condition even though she directly requested accommodation, and they failed to offer her an alternate form of testing (D2 pp.6-8,10-16). Concentra's personnel were rude and dismissive to her, and then retaliated against her by evading a subpoena and then appearing at an unemployment-benefits hearing to testify against her (D2 pp.6-8,10-11).

This is different than what the City did to Ms. Hazziez, and the City would not be liable for her damages due to the Concentra Defendants' actions. The City argues Ms. Hazziez's damages against the Concentra Defendants are the same as against it because her injury is that she was terminated. As Ms. Hazziez explained *supra* at 39-41, this is not so. The City's discriminatory act giving rise to her cause of action is that she was terminated. *Supra* at 39-41. But her injury was how she was damaged as a result, including (crucially) emotional distress damages. *Supra* at 39-41.

The Concentra Defendants damaged Ms. Hazziez differently than the City did. No one at Concentra ever made the decision to fire her, or even was aware that she was going to be fired. The distress she felt by being ignored and insulted at the clinic, and then having Concentra stymie her unemployment benefits, is distinct from the sex discrimination and regarded-as-disability discrimination that she suffered at the City's hands.

The differences between Ms. Hazziez's claims and damages against the City and those against eScreen are equally distinct from what the jury found

the City responsible for. Her core issue against eScreen – and the claim on which she and eScreen ultimately compromised – was the negligence claim. The essence of that claim was that eScreen faked a doctor's signature on test results and deleted relevant explanation of her condition (D2 p.8; 09/29 Tr.44; Tr.1195,1201). That injury is the intangible harm of having *false medical information* communicated about oneself, which, like the Concentra Defendants' injury, essentially is an emotional harm.

As Ms. Hazziez argued below, "Claims like this are high-risk, but against a large company can be high-reward" (D117 p.7). Perhaps the jury would have found no or nominal damages. But perhaps the jury would have been outraged and awarded Ms. Hazziez millions of dollars in compensatory and punitive damages. Her $300,000 settlement with eScreen (Ex.574) reflects a compromise in the middle. But as with the Concentra Defendants, eScreen never participated in any decision to fire Ms. Hazziez or even knew about that decision. And the City did not participate in eScreen's negligence.

Conversely, from the evidence and the instructions, the jury found against the City on two injuries that only the City could have committed. Only the City falsely labeled Ms. Hazziez a drug user. Only the City discriminatorily assumed there was no medical problem due to Ms. Hazziez being on her menstrual cycle, an assumption to which a man would not have been subject, ignoring other potential explanations. Only the City terminated Ms. Hazziez due to that discrimination.

The trial court correctly held § 537.060 does not apply to this case. This Court should affirm the trial court's judgment.

Cross-Appellant's Points Relied On

I. The trial court erred in directing a verdict for the City on Ms. Hazziez's claim for retaliation *because* a directed verdict is a presumptively reversible, drastic action only appropriate in the rare circumstance that the plaintiff has not presented a submissible case on any one element of her claim even when all evidence and inferences in her favor are taken as true and all contrary evidence and inferences disregarded *in that* viewing the evidence and inferences in the light most favorable to Ms. Hazziez, she presented a submissible case on all three elements of retaliation: (1) she engaged in protected activities of opposing discrimination, requesting accommodation for her medical condition, and later filing a charge of discrimination, (2) the City took the adverse action against her of opposing her application for employment benefits, and (3) the adverse action was causally linked to the protected activity.

Berger v. Emerson Climate Techs., 508 S.W.3d 136 (Mo. App. 2016)
Williams v. Trans States Airlines, Inc., 281 S.W.3d 854 (Mo. App. 2009)
McCrainey v. Kan. City Mo. Sch. Dist., 337 S.W.3d 746 (Mo. App. 2011)
Soto v. Costco Wholesale Corp., 502 S.W.3d 38 (Mo. App. 2016)
213.070, R.S.Mo.

II. The trial court erred in excluding any "document" or "statement that is made" concerning Ms. Hazziez's unemployment-benefits proceedings, including Ms. Greenlaw's testimony and Exhibits 16, 186, and 568 *because* this misapplied the law, as § 288.215.1, R.S.Mo., only excludes "[a]ny finding of fact, conclusion of law, judgment or order" made in an unemployment proceeding, and § 288.215.3 expressly allows any other evidence from an unemployment-benefits proceeding *in that* Ms. Hazziez was not seeking to introduce any finding of fact, conclusion of law, judgment, or order from her unemployment-benefits proceedings, and instead the evidence of what happened in those proceedings and the City's actions there and arguments made there were relevant and probative to her retaliation claim.

State ex rel. Unnerstall v. Berkemeyer, 298 S.W.3d 513 (Mo. banc 2009)

§ 288.215, R.S.Mo.

Cross-Appellant's Argument

I. The trial court erred in directing a verdict for the City on Ms. Hazziez's claim for retaliation *because* a directed verdict is a presumptively reversible, drastic action only appropriate in the rare circumstance that the plaintiff has not presented a submissible case on any one element of her claim even when all evidence and inferences in her favor are taken as true and all contrary evidence and inferences disregarded *in that* viewing the evidence and inferences in the light most favorable to Ms. Hazziez, she presented a submissible case on all three elements of retaliation: (1) she engaged in protected activities of opposing discrimination, requesting accommodation for her medical condition, and later filing a charge of discrimination, (2) the City took the adverse action against her of opposing her application for employment benefits, and (3) the adverse action was causally linked to the protected activity.

Preservation Statement

This point is preserved for appellate review. Ms. Hazziez opposed the City's directed-verdict motion (Tr.1614-15,1621-22) and preserved that objection in her motion for new trial (D143 pp.2-3; D124 p.1).

* * *

Standard of Review

This Court reviews a directed verdict for a defendant for "whether a submissible case was made by the plaintiff." *Crane v. Drake*, 961 S.W.2d 897, 900 (Mo. App. 1998). The Court "will view evidence and permissible inferences most favorable to the plaintiff, disregard contrary evidence and

inferences and determine whether, on evidence so viewed, plaintiff made a submissible case." *Friend v. Holman*, 888 S.W.2d 369, 371 (Mo. App. 1994).

"An appellate court reviewing a trial court's direction of a verdict in favor of a defendant must recall that directing a verdict is a drastic measure." *Id*. "[A] presumption is made in favor of reversing the trial court's grant of a directed verdict unless the facts and any inferences from those facts are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to a result." *Id.*

* * *

A directed verdict for a defendant is a drastic action that this Court presumes to be reversible error. It only lies if, viewing all evidence and inferences in the light most favorable to the plaintiff, no reasonable mind could find for her.

The trial court erred in directing a verdict for the City on retaliation here. Ms. Hazziez's retaliation claim alleged that her request for accommodation and charge of discrimination were contributing factors in the City's decision to oppose her application for unemployment benefits, continue opposing it, contest it at a hearing, and then appeal when she won that hearing. She presented evidence that the City did this after she had opposed her suspension and requested accommodation due to her health condition and then also after she had filed a charge of discrimination. She also presented evidence that the City's opposition relied on the same sex stereotypes and assumptions for which the jury found it liable for sex discrimination.

The Court should remand this case for a new trial on retaliation.

A. Ms. Hazziez engaged in protected activity by opposing the City's discriminatory conduct in suspending her due to her medical condition, by seeking accommodation for that condition, and by filing a formal charge of discrimination.

Section 213.070(2), R.S.Mo. (2014) (App.A23), makes it

> an unlawful discriminatory practice for an employer … [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter [i.e., the MHRA] or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter.

So, to prevail on a claim of retaliation, a plaintiff must demonstrate (1) she engaged in some protected activity, (2) the employer took adverse action, and (3) the adverse action was causally linked to the protected activity. *Cooper*, 204 S.W.3d at 245.

Here, Ms. Hazziez argued she engaged in two protected activities for which the City retaliated against her by opposing her application for unemployment benefits. First, she argued her email on May 5 was an opposition to taking adverse action against her due to her medical condition and a request for accommodation for her medical condition, and the City opposed her unemployment benefits in retaliation for that (Tr.11,363,367). Second, she argued the City continued its opposition after receiving her discrimination charge on June 20, including at a hearing and by appealing to the Labor and Industrial Relations Commission (Tr.11).

It is well-established that filing a formal charge of discrimination is a protected activity, retaliation for which is prohibited under § 213.070(2). *See Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 47-49 (Mo. App. 2016)

(employee's charge of discrimination against employer was contributing factor in employer's decision to suspend and demote plaintiff; verdict for plaintiff on retaliation affirmed); *Turner v. Kan. City Pub. Schs.*, 488 S.W.3d 719, 722-24 (Mo. App. 2016) (employee's charge of discrimination against employer was contributing factor in employer's decision to terminate her; verdict for plaintiff on retaliation affirmed). So, at the very least Ms. Hazziez's formal charge against the City was a protected activity.

But viewed in the light most favorable to her, Ms. Hazziez's May 5 email opposing her suspension and bringing attention to her mistreatment for a medical condition was a sufficient opposition, too. The scope of oppositional behavior to meet the first element of a retaliation claim is broad and extends to "someone who has taken no action at all to advance a position beyond disclosing it." *Crawford v. Metro. Govt. of Nashville & Davidson Cty.*, 555 U.S. 271, 277 (2009). "'When an employee communicates a belief that the employer engaged in … a form of employment discrimination, that communication' virtually always constitutes the employee's *opposition* to the activity." *Id.* at 276 (citation omitted; emphasis and ellipsis the Court's).

Assessing whether an employee engaged in oppositional behavior is based on the employee's reasonable belief rather than a requirement that the employee knows the finer points of the law governing discrimination when she makes a complaint. *McCrainey v. Kan. City Mo. Sch. Dist.*, 337 S.W.3d 746, 754 (Mo. App. 2011) ("a plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim"). Nor is "a retaliation claim under the

MHRA … conditioned on the success of the underlying discrimination or harassment claim." *Id.* (citation omitted).

Viewed most favorably to her, taking all inferences in her favor as true, Ms. Hazziez had a good-faith, reasonable belief she was opposing something the MHRA prohibited: discriminating against her due to a medical condition. She stated, "Please understand my condition and my worries with what happened today and in no way did I automatically refuse the test but did so after the second attempt due to health complications" (Ex.38). She also stated she had not been made aware "that a refusal after the 2nd attempt could result in my termination" (Ex.38). She argued this was "oppos[ing] the decision of the City to suspend her and then to fire her" due to her medical condition (Tr.11-13,305). Therefore, this e-mail was a protected activity, too.

The e-mail also was a protected activity because it sought accommodation for a disability. Teri Casey testified that requests for accommodation or notifications of a disability do not have to come on a form and can be verbal or written, non-form-based requests (Tr.1305). Ms. Hazziez testified that by drawing attention to her medical condition as the reason for not completing the test, she "was asking for accommodations, just to be accommodated for, like, I am having health issues" (Tr.643).

The Eighth Circuit has held a claim that an employer retaliated against an employee for seeking accommodation is proper under the MHRA. *See Markham v. Wertin*, 861 F.3d 748, 756-58 (8th Cir. 2017) (reversing dismissal of claim of retaliation for seeking accommodation for disability). This mirrors cases under federal civil rights laws, in which every U.S. Court

of Appeals circuit has held a request for accommodation is a protected activity. *See Solomon v. Vilsack*, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (collecting cases); *see especially Hill v. Walker*, 737 F.3d 1209, 1218 (8th Cir. 2013) ("[A] person who is terminated after unsuccessfully seeking an accommodation may pursue a retaliation claim under the ADA, if she had a good faith belief that the requested accommodation was appropriate"). And in *Kerr v. Curators of Univ. of Mo.*, this Court implicitly assumed without deciding so that a request for an accommodation qualifies as a protected activity under the MHRA. 512 S.W.3d 798, 814-15 (Mo. App. 2016).

Last year, in *Lin v. Ellis*, this Court directly addressed this question and held "[r]equesting an [a]ccommodation is a [p]rotected [a]ctivity Under the MHRA[.]" No. ED105886, 2018 WL 5915533 at *3-7 (Mo. App. Nov. 13, 2018). It analyzed the issue in detail, exploring the identities of Missouri and federal anti-discrimination law in this regard, and adopted the rationales of the federal courts for applying this same principle to the MHRA. *Id.* While the Supreme Court later transferred the *Lin* case, *see* No. SC97641 (Mo. banc Jan. 11, 2019), the Court should hold the same here as it did in *Lin*.

Therefore, Ms. Hazziez engaged in three protected activities: (1) opposing the discriminatory treatment of her in her May 5 e-mail; (2) seeking accommodation for her medical condition in her May 5 e-mail; and (3) filing her discrimination charge on June 20.

B. The City took adverse action against Ms. Hazziez by opposing her application for unemployment benefits by continuing that opposition, and by appealing the decision granting her benefits.

Section 213.070(2)'s language is broad and prohibits retaliation "in any manner". *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 625 (Mo. banc 1995) (quoting § 213.070(2)). To retaliate means to inflict in return. *Id.* Per § 213.070(2), retaliation includes any act done for the purpose of reprisal that results in damage to the plaintiff, even if the act is not otherwise the subject of a claim in contract or tort. *Id.*

Here, Ms. Hazziez argued the City's adverse action against her was opposing her application for unemployment benefits. The law of Missouri is that this is an adverse action supporting a retaliation claim. *See Berger v. Emerson Climate Techs.*, 508 S.W.3d 136, 146-47 (Mo. App. 2016) (plaintiff stated submissible retaliation claim for employer opposing unemployment application; reversing dismissal); *see also Steele v. Schafer*, 535 F.3d 689, 696 (D.C. Cir. 2008) (same under federal law); *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1090 (10th Cir. 2007) (same).

The trial court granted its directed verdict primarily on this prong. It stated "the filing of the claim with the Missouri Commission on Human Rights … postdates the unemployment claim proceedings so you have to have the act before you can retaliate and so my ruling is that was not a retaliatory action on the City's part" (Tr.1621).

This was error. First, Ms. Hazziez's application for unemployment benefits was in late May or early June 2014 (Tr.743; Ex.38). By that point, she already had written the May 5 e-mail opposing discrimination and

seeking accommodation. Even under the trial court's reasoning that this action temporally could not qualify as an adverse action, it was wrong.

More importantly, the City continued to oppose Ms. Hazziez's application in new ways after her charge of employment discrimination. She made the charge on June 20, which the City received June 30 (Tr.744,1615-16). While the City's original opposition only had been in writing (Ex.16 pp.9,12), in August, after the charge, it appeared for a two-day hearing at which it vigorously contested the application, including by in-person testimony (Tr.746; Ex.16 p.153). Finally, when in the face of all that Ms. Hazziez was successful in winning benefits, the City appealed the grant of benefits to the Labor and Industrial Relations Commission (Tr.746-47; Ex.568). Ms. Greenlaw testified that the City does not do this in every case (Tr.746-47).

All of these were actions taken "in any manner" that the City inflicted on Ms. Hazziez. Under § 213.070.1(2), they were adverse actions on which Ms. Hazziez can base her retaliation claim. *Keeney*, 911 S.W.2d at 625; *Berger*, 508 S.W.3d at 146-47.

C. Ms. Hazziez showed a causal connection between her protected activity and the City's adverse action.

A causal connection between the protected activity and the retaliatory conduct can be proven circumstantially. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 868 (Mo. App. 2009). Viewing the evidence in the light most favorable to Ms. Hazziez, taking all evidence and inferences in her favor as true and disregarding all contrary, there was substantial evidence to link

her complaints and accommodation request to the City's retaliatory act of opposing her application for unemployment benefits.

Ms. Hazziez wrote her e-mail on May 5, pointing to blood in her urine, explaining she was scared, requesting not to be suspended or terminated for a medical issue, and reiterating that this was all due to her medical problem (Ex.38). Over the next three months, during which she filed a formal charge of discrimination, the City opposed her application for unemployment benefits, opposing it more strenuously *after* she filed her formal charge. *Cf. Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819-20 (8th Cir. 1998) (three months between protected activity and an adverse action was sufficient temporal connection); *Williams*, 281 S.W.3d 868-69 (adverse action less than 60 days after protected activity supports inference of retaliatory motive).

One of the City's main responses in opposition to Ms. Hazziez's unemployment benefits was to bring out the same sexist trope against her for which the jury found it liable for sex discrimination: that she was lying that the blood in her urine alarmed her, because she was a woman menstruating. Even outside of her offer of proof, Ms. Greenlaw admitted to the jury that she had written it was the City's position that it was "incredible" Ms. Hazziez would be alarmed by blood in her urine, and so she was lying for this reason (Tr.841-42). The City engaged in sex discrimination to oppose Ms. Hazziez's application, pointing directly to her first protected activity in doing so.

And once the City received Ms. Hazziez's formal charge, it could have dropped its opposition. But it did the opposite: it doubled down and contested the application in a two-day hearing. Then, it took what by its own

admission was the extraordinary action of appealing the final decision to the Labor and Industrial Relations Commission.

As in *Williams*, "viewing the evidence in the light most favorable to" Ms. Hazziez, "sufficient evidence was presented to make a submissible case of retaliat[ion]." 281 S.W.3d at 869. "[W]hen the evidence is viewed in the light most favorable to [Ms. Hazziez], giving her the benefit of all reasonable inferences, … [it would have] allow[ed] the jury to conclude that" the City opposed her application for unemployment benefits "in retaliation for making her claim of" discrimination and her request for accommodation. *Id.*

"There is a presumption in favor of reversing a trial court's grant of a motion for directed verdict unless, upon consideration of the facts most favorable to the plaintiff, those facts are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to a result." *Dunn v. Enter. Rent-A-Car Co.*, 170 S.W.3d 1, 3 (Mo. App. 2005) (citations omitted). Reasonable minds certainly could have found that Ms. Hazziez engaging in protected activities was a contributing factor to the City's adverse action of opposing her application for unemployment benefits.

The Court should reverse the trial court's directed verdict on Ms. Hazziez's retaliation claim and remand this case for a new trial on that claim.

II. The trial court erred in excluding any "document" or "statement that is made" concerning Ms. Hazziez's unemployment-benefits proceedings, including Ms. Greenlaw's testimony and Exhibits 16, 186, and 568 *because* this misapplied the law, as § 288.215.1, R.S.Mo., only excludes "[a]ny finding of fact, conclusion of law, judgment or order" made in an unemployment proceeding, and § 288.215.3 expressly allows any other evidence from an unemployment-benefits proceeding *in that* Ms. Hazziez was not seeking to introduce any finding of fact, conclusion of law, judgment, or order from her unemployment-benefits proceedings, and instead the evidence of what happened in those proceedings and the City's actions there and arguments made there were relevant and probative to her retaliation claim.

Preservation Statement

This point is preserved for appellate review. Ms. Hazziez made an offer of proof at trial of the evidence at issue (Tr.741-67), later asked the trial court to reconsider the exclusion of that evidence (Tr.1186-87), and then preserved the issue in her motion for new trial (D143 pp.2-3; D124 p.1).

* * *

Standard of Review

The "decision to admit or exclude evidence" is reviewed for "an abuse of discretion", which generally occurs when the "ruling is clearly against the logic of the circumstances, is so arbitrary and unreasonable as to shock the sense of justice, and shows a lack of careful consideration." *Gamble v. Browning*, 277 S.W.3d 723, 727-28 (Mo. App. 2008). But a court also "can

abuse its discretion … through the application of incorrect legal principles." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). "[W]hen the issue is primarily legal, no deference is warranted and" review is de novo. *Id*.

To reverse a judgment for the improper exclusion of evidence, the appellant also must show that it was prejudicial – that it materially affected the merits of the case. *Gamble*, 277 S.W.3d at 729. "The exclusion of evidence has a material affect [*sic*] on the outcome if its inclusion would have altered the outcome of the case." *Id.*

* * *

The trial court excluded any "document" or "statement that is made" concerning Ms. Hazziez's unemployment-benefits proceedings, except for impeachment purposes (Tr.315). It did this *solely* because it believed § 288.215.1, R.S.Mo., required it to do so. This misapplied the law, requiring reversal and remand for a new trial on Ms. Hazziez's retaliation claim.[3]

Section 288.215.1 provides, "Any finding of fact, conclusion of law, judgment or order made by … any person with the authority to make findings of fact or law in any [unemployment-benefits proceeding] … shall not be used as evidence in any subsequent or separate action" that is not an unemployment-benefits proceeding (App.A24). Section 288.215.3 then provides, "Nothing in subsection 1 of this section shall be construed to prevent the use of evidence presented in any proceeding under this chapter in any other proceeding not brought under this chapter" (App.A24).

[3] While this evidence also may have been relevant to Ms. Hazziez's other claims, she is not requesting a new trial on those claims, only her retaliation claim on which the trial court directed a verdict.

Here, Ms. Hazziez sought to introduce testimony of Torah Greenlaw and materials introduced in her unemployment proceedings (Tr.741-58; Ex.16,186,568). She openly conceded that she could not introduce the actual findings, conclusions, and judgments from the unemployment proceedings, and would excise those from what she was seeking to introduce; she only sought to show how "the City tried to stop her from getting benefits", which was relevant to her retaliation claim (Tr.314). She argued § 288.215.3 specifically allowed her to introduce all *other* materials from the unemployment action besides findings, conclusions and judgments, which is all she wanted to introduce (Tr.314).

But the trial court ruled that § 288.215.1 did not just bar findings, conclusions, and judgments from unemployment proceedings, but required exclusion of any "document" or "statement that is made" concerning the unemployment proceedings *at all*, except for impeachment purposes (Tr.315).

The primary rule of statutory construction "is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009) (citations omitted). "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert verbiage or superfluous language in a statute." *Id.* (citations omitted).

The trial court's application of § 288.215.1 violated this rule. The statute *only* excludes "[a]ny finding of fact, conclusion of law, judgment or

order made by … any person with the authority to make findings of fact or law in any" unemployment-benefits proceeding (App.A24). It then expressly states that this prohibition does not exclude any other "evidence presented in any" unemployment-benefits proceeding. *Id.* at .3 (App.A24).

If the General Assembly had intended to bar any "document" or "statement that is made" concerning an unemployment-benefits proceeding, it would have said so. But it specifically *did not* do that. It limited its exclusion to "findings of fact", "conclusions of law", and "judgments" or "orders", which were "made by … any person with authority" to make them under Chapter 288. This was not superfluous language and must be given effect.

Moreover, by enacting subsection 3 of § 288.215.1, the General Assembly made plain that it was *not* its intention to bar anything else. Per its express terms, any other evidence *besides* findings, conclusions, and judgments or orders from an unemployment proceeding *are* admissible in civil court proceedings.

Here, the full history of the City's opposition of Ms. Hazziez's unemployment benefits was relevant and probative to her retaliation claim. It would have further shown the City's retaliatory motive in deciding to oppose her benefits. Ms. Hazziez was prejudiced by its exclusion.

The trial court did not seem to have a qualm with that, but instead believed its hands were tied by statute. They were not.

In ordering a new trial on Ms. Hazziez's retaliation claim, the Court should direct the trial court not to exclude this evidence.

Conclusion

The Court should affirm the verdicts against the City on Ms. Hazziez's claims for "regarded-as" disability discrimination and sex discrimination. But it should reverse the directed verdict for the City on her retaliation claim, remand this case for a new trial on that claim, and direct that the trial court not exclude any of the materials from her unemployment-benefits proceedings at that trial except those which § 288.215 specifically bars.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 15,490 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P. C. per Rule 55.03(a), and that on September 27, 2019, I filed a true and accurate Adobe PDF copy of this brief of the appellant-respondent and its appendix via the Court's electronic filing system, which notified the following of that filing:

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