IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DIMPLE DENISE KELLY,	)	
	)	
Appellant,	)	
	)	
v.	)	WD83742
	)	
CITY OF LEE'S SUMMIT,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION FOR REHEARING OR TRANSFER

COMES NOW Respondent, City of Lee's Summit, and pursuant to Missouri Rule of Civil Procedure 84.17(a)(1), hereby moves this Court for a rehearing in this matter for any one or more of the following reasons:

1. The Opinion misinterprets the law in finding that termination pursuant to the Management Agreement did not constitute lawful justification. The "lawful reason" was that the City had a contractual right to terminate Plaintiff, without articulating specific cause, thereby entitling her to six-month's severance pay. The termination itself was lawful, as long as race, age or sex/gender were not contributing factors. Thus, the City was justified in terminating Mrs. Kelly under that Agreement.
2. The Opinion misinterprets the law in finding that, "The City's submitted instruction did not allow the jury to get to the question of whether there was an underlying *lawful reason*, not in violation of the MHRA, why Kelly was

terminated." To the contrary, Instruction No. 9 told the jury that termination under the Management Agreement was only lawful if it found that Kelly's race, age, or sex/gender was not a contributing factor to her discharge *(i.e., not in violation of the MHRA)*. Rather than misleading the jury in any manner, this Instruction emphasized that the Management Agreement alone was not a defense if it was utilized for an improper reason.

3. The Opinion overlooks the fact that it was Plaintiff Kelly who made her job performance an issue in the case, not the City. She requested a service letter *(which the Opinion mischaracterized as a "letter of dismissal")*, and the City provided one. Under Section 290.140, RSMo., the City was required to set out the "nature and character of [her] service." Plaintiff did not have to put this letter into evidence, but she chose to do so and attempted to prove that the City's assertions were untrue and/or pretextual. The City was thereby forced to respond with evidence proving her poor performance.
4. In criticizing the closing argument of the City's counsel, the Opinion overlooks the fact that the same argument could have been made whether Instruction No. 9 was given or not. Indeed, the dispositive issue was whether the City discriminated against Kelly – the jury found that it did not – and nothing in the instructions mentioned her performance. If Kelly's counsel thought the argument was improper, he could have objected. But no objection was made and the issue was not preserved for appellate review. Further, Plaintiff's counsel had an opportunity to respond to the argument on rebuttal, and actually did so.

WHEREFORE, rehearing should be granted in this matter to avoid establishing bad precedent in Missouri employment law.

IN THE ALTERNATIVE, Respondent moves this Court, pursuant to Rule 83.02,to transfer this matter to the Missouri Supreme Court, for either or both of the followingreasons:

1. There are countless employment agreements in this state that permit termination "without cause," and the question of whether such an agreement provides a lawful justification for discharge of an employee is one of general interest or importance thatshould be decided by the Missouri Supreme Court.
2. The existing law regarding what constitutes a "lawful justification" and when an employer is entitled to an MAI 38.02 instruction should be reexamined and clarifiedby the Missouri Supreme Court. The Opinion unreasonably restricts the use of the lawful justification defense.

WHEREFORE, if rehearing is denied, this Court should order transfer of this matter to the Missouri Supreme Court.

SUGGESTIONS IN SUPPORT

A. OVERVIEW

Defendant-Respondent (hereinafter "City") maintained that it was legally justified in terminating Plaintiff-Appellant (hereinafter "Kelly") because the Management Agreement provided that the City could terminate her without cause, without providing a reason, and without providing notice. The City's exercise of those contractual rights entitled Kelly to receive over $60,000 in severance pay, which

she accepted. Despite the fact that these terms of the Management Agreement were not in dispute, the Opinion determined that theCity's termination of Kelly under that Agreement did not constitute "lawful justification," and that the use of the lawful justification affirmative defense instruction, MAI 38.02, was erroneous.

The Opinion, in that regard, constitutes a misinterpretation of, and departure from, established principles of Missouri law. For these reasons, a rehearing of this matter is warranted. In the alternative, a transfer to the Missouri Supreme Court is warranted, due tothe general interest and importance of whether a lawful justification defense is available to employers who terminate employees "without cause" under employment agreements.

B. MISINTERPRETATION OF THE LAW

The misinterpretation and misapplication of the law is most evident from a plain reading of the Opinion, because the Opinion itself contains contradictory and irreconcilable pronouncements of the law.

The Opinion acknowledges that Kelly was, essentially, an at-will employee. The Opinion acknowledges that, according to the Missouri Supreme Court, an employer can lawfully terminate an at-will employee for any reason,[1] or for no reason at all. Stated another way, as long as it was non-discriminatory and not against

[1] As used herein throughout, in this context, the phrase "for any reason" means any nondiscriminatory reason not prohibited by law or public policy.

public policy, whatever reason an employer had for terminating an at-will employee was, by definition, "legally justified," because it was within the employer's legal rights to do so according to the Supreme Court. The Opinion goes on to correctly acknowledge that, in the face of accusations of discrimination, an employer is permitted to present evidence that the employer was within its legal rights to terminate the employee. Finally, the Opinion acknowledges that, if requested, a defendant-employer is entitled to use MAI 38.02 to state its lawful reason for terminating an employee, i.e., why the employer was within its legal rights to do so.

Generally speaking, there are myriad reasons why an employer may lawfully terminate an at-will employee: habitual tardiness, excessive absences, failure to follow directions, insubordination, theft, corporate downsizing . . . and the list goes on and on. From a reading of the Opinion, it appears that this Court would have no problem allowing an employer to use MAI 38.02 to set forth any of the above reasons for which theemployer was permitted by law to terminate an at-will employee.

Yet, according to the Opinion, there is one circumstance under which an employer, though legally justified in terminating an at-will employee, would be prohibited from instructing the jury on the employer's legal justification. One circumstance where, the employer is within its legal rights in every respect, but nevertheless would be denied the right to avail itself of a Supreme Court-approved affirmative defense instruction in theform of MAI 38.02.

Availability of Lawful Justification Defense to At-Will Employer

Under Missouri law, an employer who terminates an at-will employee "without cause" under an employment contract is just as legally justified in doing so as is the employer who terminates an at-will employee for habitual tardiness. But according to the Opinion, only the latter employer is entitled to instruct the jury that the termination of its tardy employee was lawful. The employer who terminates its employee for no reason or pursuant to the terms of a management agreement – although being just as much within its legal rights to do so as the employer of the tardy one – is *not* permitted to instruct the jury that the termination of *its* employee was likewise lawful. This is a misinterpretation and uneven application of the law that the Missouri Supreme Court surely did not intend.

A statement on page 9 of the Opinion poignantly encapsulates the misinterpretationof the law in this regard. It reads: "Statements that the City did not act for certain reasons, or that it acted for 'no reason,' are not themselves statements of a lawful reason for Kelly's termination." In the face of the Supreme Court's holding that an employer ***can*** lawfully terminate an at-will employee for no reason, *Fleshner v. Pepose Vision Institute., P.C.,* 304S.W.3d 81 (Mo. banc 2010), the ruling set forth in the Opinion -- that having no reason for the termination "was not a statement of a lawful reason" -- is in direct contravention to the rulings of the Supreme Court.

Similarly, the statement on page 12 of the Opinion is also in direct conflict with the position of the Missouri Supreme Court. It declares, "The City's submitted instruction simply did not allow the jury to reach the question of whether a *lawful reason* existed for Kelly's discharge." *(italics original)*. The placement of the phrase "lawful reason" in italics signifies that this Court does not believe that the City's stated reason – that the Management Agreement allowed the City to terminate Kelly without cause – was a lawful reason. This is an erroneous interpretation of the law. Because an employer can lawfully terminate an at-will employee for any non-discriminatory reason, whatever non- discriminatory reason the City had for terminating Kelly was, by definition, a "lawful reason." It was not the province of this Court to weigh the "sufficiency" of the City's lawful reason. The City's reason for terminating Kelly was what it was, and as long as it was non-discriminatory, it was a "lawful reason" according to the Missouri Supreme Court.Therefore, with respect to the language used in Instruction Number 9 [MAI 38.02] to describe the City's "lawful reason" for terminating Kelly, the decision reached in the Opinion that there was error in the language was a misapplication of Missouri law.

The Opinion also finds fault with the omission of the word "because" in InstructionNumber 9. Simply put, language that the City terminated Kelly without cause "because it had a right to do so under the Management Agreement" would tell the jury exactly the same thing that the Instruction actually did. And it was not for the jury to decide whether that contractual provision was lawful, as it is the court that determines questions of law. Whether you refer to it as MAI 38.02 – Modified, or even a Not in MAI instruction, Instruction Number 9 fairly advised the jury of the law in the case.

Purported Impact of Closing Arguments

As for the impact of Instruction Number 9, the Opinion states: ". . . the City's closing argument – relying on Instruction 9 – told the jury that [Kelly's] evidence that her purported 'overall unacceptable performance' was pretextual, was irrelevant." In reaching this conclusion, the Opinion overlooks several facts. First, defense counsel never used the word "irrelevant" anywhere in his closing argument. Second, to the extent defense counsel's closing argument asked the jury to focus on whether Kelly's race, age, or gender was a factor in her termination, Instruction Number 9 had little, if anything, to do with that. In the verdict director submitted by Kelly – Instruction Number 7 – nowhere does it mention Kelly's job performance as a deciding factor in this case. Kelly's own verdict director only asked whether Kelly's race, age, or gender was a factor in her termination, which is simply what defense counsel's closing argument asked. Similarly, the converse instruction (Instruction Number 8) – to which Kelly did not object – does not mention Kelly's job performance as a deciding factor in this case. It, too, only asked whether Kelly's race, age, or gender was a factor in her termination, which is what defense counsel's closing argument asked. The Opinion overlooks the fact that the arguments made by defense counsel in closing argument were supported by Instructions 7 and 8. Those same arguments would have been made whether or not Instruction Number 9 was given, or was worded differently.

Finally, the Opinion overlooks the fact that any supposed prejudice caused by defense counsel's closing argument was cured by Kelly's counsel's argument in rebuttal. The Opinion states: "By arguing that [Kelly's] circumstantial evidence was irrelevant, the City virtually suggested to the jury that only direct evidence of discriminatory animus could support a verdict in [Kelly's] favor." *(Court's Opinion, page 14)* The City disagrees with the Opinion in that regard, but that notwithstanding, Kelly's counsel had the opportunity, and did take advantage of the opportunity, to rebut any such inference that this Court believes was conveyed – to wit:

> Use your power to reason. Don't fall for the game of Three-card Monte. Think of the reasons they gave. Think about how credible those reasons were, because that's the process. They give a reason. If it makes sense, that's a plausible reason, it looks like that's exactly what happened, then that's the end of the game. Why would you think age, race, or sex had anything to dowith it? But if they give a reason and the reason turns out to be, well, that obviously isn't it, then look at what they accomplished. Right? Because the undeniable truth is that if they can fire the Kelly for any reason in the world except for these three reasons -- age, race, sex/gender -- why would they lie about the reason unless the real reason is one of the three illegal ones? And the answer is they were not. They're liable for discrimination and theyare reckless in terms of their treatment of Kelly's rights.

(Trial Transcript 991:8-23) Thus, Kelly was not prejudiced by any arguments made by defense counsel on closing.[2] Kelly's counsel had the opportunity to argue pretext, and in fact, did argue pretext in both portions of his closing argument. The Opinion appears to have overlooked this fact, as it is not mentioned in the Opinion's analysis.

[2] The Court is reminded that Kelly neither objected to defense counsel's closing argument at trial, nor preserved any objections thereto for appellate review.

C. DEPARTURE FROM EXISTING LAW

As mentioned herein, as well as throughout the Briefs and in the Opinion, the Missouri Supreme Court has held than an employer can lawfully terminate an at-will employee for any reason, or for no reason at all. *Fleshner, supra*. Under such a construct, there are two categories of employers: (1) employers who terminate at-will employees for a specific non-discriminatory reason, and (2) employers who terminate at-will employees forno reason at all. The Missouri Supreme Court treats both categories the same; in the absence of discrimination, the employers in both categories are lawfully justified in terminating an employee. But the Opinion holds that only the first category of employers can use MAI 38.02.

This dichotomy of treatment between categories of employers has no basis or support in Missouri law. There is nothing in MAI 38.02 or in the Notes on Use to MAI 38.02 which provides that, of the employers who lawfully terminate their employees, thatinstruction may be used only by certain categories of employers, but not by others. There is nothing in Missouri law that states that employers who terminate at-will employees for no reason are *less* lawful than those who terminate their at-will employees for a specific reason. The law makes no distinction in that regard. Yet, the Opinion makes that distinction with respect to an employer's right and ability to use MAI 38.02. This departure from Missouri law creates an inequitable stratification of employers heretofore unrecognized in Missouri employment law.

As a practical matter, it is in the circumstance where an employer terminates an at-will employee for no reason that MAI 38.02 is most warranted. Most laymen, of which juries are comprised, are likely of the belief that an employer is required to have a reason in order terminate an employee. Of course, judges and lawyers know that this is not the law – at least not in Missouri with respect to at-will employees – but the average juror does not. So in a wrongful discharge case where an employer has terminated an at-will employee for no reason, it is *doubly* important that the jury be instructed that it is lawful for an employer to terminate an employee without having a reason. The purpose of jury instructions is to guide the jury as to what the law is. For this reason, the availability to an employer of the legal justification instruction (MAI 38.02) in such a circumstance is critically vital. Otherwise, jurors may be laboring (and deliberating) under a misconception of the law. To hold that an employer in the above-described scenario is notentitled to a lawful justification instruction – because having no reason is not a legal justification – would serve to unfairly and inequitably disadvantage any such employers and deprive them of a fair adjudication of the accusations against them.

D. GENERAL INTEREST AND IMPORTANCE OF QUESTION OF LAW

The decision that some employers who lawfully terminate at-will employees are entitled to use MAI 38.02, while other employers who also lawfully do so are not, raises important questions of law that are of general interest to the public, to the business community, and to the practicing bar. Employers need certainty in the law. They need to

know with some certainty that, if they lawfully terminate an at-will employee, the jury ina discrimination lawsuit arising therefrom will be instructed on the lawfulness of their termination decision. Not only do employers need that certainty, but the practicing bar needs that certainty as well, in order to accurately advise employer-clients on the state of the law. There are undoubtedly countless employment agreements throughout our State which permit termination "without cause" or without having to state a reason. If allowed to stand, conclusion reached in the Opinion that an employer is not lawfully justified in terminating an at-will employee in a manner the Supreme Court has already said ***is*** lawful, will cast the body of Missouri employment law into uncertainty and disarray.

E. CONCLUSION

The City has great respect for this Court and its members. In this particular instance, however, it does appear that the misinterpretation of, and departure from, established principles of Missouri law are evident in the Opinion. Lawful justification is lawful justification. And the Supreme Court has said that, when it comes to at-will employment, an employer is lawfully justified both when it terminates an at-will employee for any (non- discriminatory) reason, or for no reason at all. Both circumstances are permitted under the law. Both circumstances are equally justified legally. In both circumstances, the employer is entitled to have the jury instructed on the legal justification for its terminationof the employee. The determination contained in the

Opinion in this matter – that it was erroneous and prejudicial for MAI 38.02 to be given in a case where an employer terminates an employee "without cause" – is in contravention to these principles of law.

Based on the foregoing legal and factual analysis, the City respectfully requests a rehearing in this matter, or in the alternative, for transfer of this matter to the Missouri Supreme Court, and for such other relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

I do hereby certify that, on the 13th day of April 2021, I electronically filed the foregoing with the clerk of the court by using the Missouri e-filing system, which will send a notice of electronic filing to the following:

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I further certify that, on the above date, I mailed the above and foregoing document first class, postage prepaid, to the following non-participants in the Missouri e-filing system:

None

s/ Keith A. Cutler
KEITH A. CUTLER