IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

KEITH WILDHABER,	)	
	)	
Plaintiff,	)	
	)	Case No. 17SL-CC00133
v.	)	
	)	Division 9
ST. LOUIS COUNTY, MISSOURI,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL OR REMITTITUR, AND/OR MOTION TO AMEND JUDGMENT

COMES NOW Defendant St. Louis County ("Defendant" or the "County"), by and through its undersigned counsel, and for its Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for New Trial or Remittitur, and/or Motion to Amend the Judgment, pursuant to Missouri Supreme Court Rules 72 and 78, states as follows:

I. INTRODUCTION

1. St. Louis County, Missouri prohibits sexual orientation discrimination against its employees, and has done so for some time. More than twenty States do too and have expressly enacted prohibitions against sexual orientation discrimination. Other cities and other political subdivisions across the Nation have followed suit. The County's publicly available ordinances and policies regarding treatment of its employees and citizens express the County's clear position of repugnance of discrimination based upon sexual orientation.

2. Plaintiff's claims in this case are not brought pursuant to a County ordinance. Rather, Plaintiff brought his lawsuit under the Missouri Human Rights Act (the "MHRA"). Plaintiff asserted in his First Amended Petition, Count I, that he had been discriminated against on the basis of his "sex/gender," *i.e.*, because he is male. He did not allege a discrimination claim

based upon his sexual orientation. This made sense because, as Plaintiff has correctly recognized, the MHRA does not currently offer protections against sexual orientation discrimination.

3. The County Executive and the County Counselor have openly and publicly stated their disdain for the state of Missouri law on sexual orientation discrimination. It is their firm opinion that the MHRA should be changed to protect LGBTQIA+ people to the same degree as other protected groups. They recognize that this is not the current state of the law, and find that to be outrageous and a compelling reason to seek changes to the MHRA in the next legislative session. But they are also fiduciaries, responsible to the taxpayers, and must respect the current state of the law, no matter how much they are disappointed by its failure to protect all groups deserving of protection.

4. In this case, a review of the record reveals that the trial of this matter centered almost exclusively on Plaintiff's claims of asserted discriminatory treatment because he is gay. Plaintiff's lawyers argued this theory throughout the trial. Plaintiff and other witnesses were permitted to talk about negative comments—including inadmissible hearsay—that they heard in the workplace about treatment of gay people, even if those persons to whom the out-of-court statements were attributed had no connection whatsoever to any employment decisions regarding Plaintiff. The *ST. LOUIS POST DISPATCH,* which has covered this trial, reported on Saturday, November 23 that the Jury's Verdict was based on Plaintiff's argument he was not promoted "because he is gay."

5. And in the end, a Jury of County residents was permitted to adjudge an un-pleaded claim that Plaintiff knows does not exist under the MHRA. Had Plaintiff pleaded the claim he tried—sexual orientation discrimination, this litigation would have proceeded very differently.

6. Notably, this Jury award of nearly $20 million was supported only by Plaintiff's requested actual damages for lost pay and benefits of $165,000.00 and "garden variety" emotional distress-type damages. The lost pay component Plaintiff testified to at trial totaled $45,000.00, "give or take some." (Tr. 177:5.) Plaintiff remains employed by the County Police Department. The testimony by Plaintiff to explain his claimed damages was sparse. And the Jury awarded extreme punitive damages for "outrageous conduct" upon a claim that Missouri law does not currently recognize.

7. The relatively short trial that permitted this result was fraught with error. As will be explained more fully below, the error at trial included the following:

a. Plaintiff did not present substantial evidence that his sex – *i.e.*, that he is a man – was a factor in any decision not to promote him to Lieutenant;

b. Plaintiff did not present substantial evidence that his transfer was involuntary or that charges of discrimination or this lawsuit was a factor in any decision not to promote him;

c. Plaintiff did not introduce sufficient evidence to support his claim for punitive damages;

d. Instruction No. 7 impermissibly deviated significantly from the Missouri Approved Instructions, did not follow Missouri substantive law, gave the Jury a roving commission to speculate on what was discriminatory without reference to evidence, allowed the Jury to find in Plaintiff's favor on time-barred alleged failures to promote, and applied the incorrect causation standard;

e. Instruction No. 13 did not follow Missouri substantive law, gave the Jury a roving commission to speculate on what was discriminatory without reference to evidence,

allowed the Jury to find in Plaintiff's favor on time-barred alleged failures to promote, applied the incorrect causation standard, allowed the Jury to find in Plaintiff's favor based on a transfer that Plaintiff requested, allowed the Jury to speculate on what would constitute an "undesirable work location," did not require the Jury to find that Plaintiff had a good faith belief that the conduct he opposed in unspecified charges of discrimination was unlawful, and was erroneously submitted to the Jury in the disjunctive;

f. Instruction Nos. 7 and 13 both misdirected and confused the Jury by allowing Plaintiff a double recovery for the same alleged injury regarding failure to promote;

g. Testimony of other individuals regarding other alleged instances of sexual orientation discrimination was improperly admitted;

h. Multiple hearsay statements were admitted despite the overwhelmingly prejudicial effect of those statements;

i. The Court permitted Plaintiff's counsel to argue inaccurately about the state of Missouri law but at the same time prohibited defense counsel from correcting such misstatements to the Jury;

j. Plaintiff's counsel made several misstatements of the law and fact during closing arguments;

k. The monetary damages awarded exceed the caps set forth in Section 213.111.4, R.S. Mo.;

l. The compensatory damage awards were excessive, duplicative, and improperly included future pay components; and

m. The punitive damages do not conform to the evidence presented and do not comply with statutory caps or constitutional limitations.

In addition, the Court has not yet ruled upon Plaintiff's still-pending equitable claims for promotion or front pay, though Plaintiff has not pursued them, and despite the County's request to adjudicate them, which suspends the finality of this dispute.

8. The issue of protection of LGBTQIA+ employees is an issue of national importance. Indeed, the United States Supreme Court is expected to weigh in any day regarding whether Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination. The MHRA is often construed by Missouri courts consistently with federal law when there is an absence of Missouri law. But Missouri law is not unclear on this issue; the MHRA does not currently offer protection against discrimination based upon sexual orientation.

9. As it stands, the majority of U.S. Courts of Appeals, including the Eighth Circuit (which includes St. Louis), also agree with Missouri courts that sexual orientation discrimination is currently unprotected by existing workplace anti-discrimination law.

10. Some current County leaders want the Missouri General Assembly to change employment discrimination laws to offer the same protections for LGBTQIA+ employees that other protected groups enjoy. But courts do not make the laws in our system. It is this Court's duty to apply the law as it is currently written.

11. As set forth more fully below, the County respectfully requests that judgment notwithstanding the verdict should be entered in favor of the County. At minimum, and as also set forth below, a new trial must be granted, or the award remitted in a very significant measure.

II. AS A PRELIMINARY MATTER, THESE MOTIONS ARE PREMATURE, AS NO JUDGMENT DISPOSING OF ALL OF THE ISSUES OF AND AMONG THE PARTIES HAS BEEN ENTERED AND, IN ANY EVENT, THE COURT ENTERED AN "AMENDED JUDGMENT AND ORDER" ON NOVEMBER 22, 2019.

A. No Judgment Disposing of All of the Issues of and Among the Parties Has Been Entered, Given the Pendency of Plaintiff's Claims for Equitable Relief.

12. As an initial matter, the County submits that these Motions are premature, as there has not yet been a judgment disposing of all issues (*i.e.*, claims, rights, and liabilities) of and among the parties in this case.

13. In particular, Plaintiff's claims for equitable relief (an injunction ordering promotion or front pay in lieu thereof) have not yet been adjudicated. (*See* Defendant's Motion to Adjudicate/Dismiss Plaintiff's Claims for Equitable Relief, filed November 15, 2019); *see also Mintner v. Mintner*, 530 S.W.3d 534, 537 (Mo. Ct. App. 2017), *reh'g and/or transfer denied* (Sept. 5, 2017), *transfer denied* (Oct. 31, 2017) ("The law is clear that, until the trial court enters a judgment disposing of all issues and all parties, any appeal is premature. Here, the December 11, 2015, judgment did not dispose of all issues and all parties. Although the trial court heard evidence pertaining to Joseph's equitable claims against Deborah and Stanley at the same time that the jury heard evidence about Joseph's legal claims against Deborah, until the court issued its final judgment on May 26, 2016, Joseph's equitable claims against Stanley and Deborah remained pending. Thus, it would have been premature to file a notice of appeal before that final May 26, 2016 judgment."); *N. Farms, Inc. v. Jenkins*, 472 S.W.3d 617, 624 (Mo. Ct. App. 2015) ("Plainly, there were equitable claims remaining following the trial on Northern Farms' legal claims. And in order to obtain a final judgment, the remaining claims needed to be resolved."); *Spirit & Truth Church v. Barnaby*, 428 S.W.3d 764, 767 (Mo. Ct. App. 2014) ("The parties' competing claims for declaratory relief were finally and completely disposed of in the judgment entered in favor of Respondents and against Appellants. But Respondents' equitable accounting

claim has not been finally resolved: the receiver has not filed its final accounting, the court expressly stayed the receivership, and there remains a pending motion for contempt that cannot be resolved until the receiver's accounting. Thus, there remains much for future determination, and the judgment on that claim is not final and appealable."); *Felling v. Giles*, 47 S.W.3d 390, 395 (Mo. Ct. App. 2001) ("The judgment on the equitable claims was not final so long as the other claims were pending and the plaintiffs could have proceeded with the separate trial and then appealed from the entire judgment. When they did not do so, they took a risk. Our procedure discourages such experimentation with the court's processes."); *Quiktrip Corp. v. City of St. Louis*, 801 S.W.2d 706, 711 (Mo. Ct. App. 1990) ("In the present case, the trial court determined that the City of St. Louis should be enjoined from denying the demolition permits and assessed attorneys' fees against the city, but reserved the issue of damages under § 1983 for future consideration. This division of the remedy between respondents' equitable and legal claims is not an order which can be certified as appealable under Rule 74.01(b). Therefore, appellants' appeal from the court's order regarding § 1983 and its award of attorneys' fees is dismissed as non-appealable.").

14. For this reason, the County filed its Motion to Adjudicate/Dismiss Plaintiff's Equitable Claims, which Motion remains pending and under submission. In this regard, the County again respectfully requests that the Court adjudicate (via dismissal or otherwise) Plaintiff's remaining equitable claims and in doing so, enter a Second Amended Judgment and Order so-stating. In this regard, entry of a Second Amended Judgment and Order will remove all potential confusion and disputes regarding the finality of judgment, for purposes of post-trial motions and appeal.

15. Regardless, at present, the deadline for filing these Motions has not begun to approach. The County expressly reserves its right to file additional motions, or to supplement these Motions, once a judgment disposing of all issues of and among the parties has been entered.[1]

B. <u>Alternatively, at a Minimum, Post-Trial Motions Are Not Due until December 23, 2019, Given the Court's Entry of an "Amended Judgment and Order" on November 22, 2019</u>.

16. In addition, on November 22, 2019, the Court entered a document styled, "Amended Judgment and Order." At minimum, even if the Amended Judgment and Order were to be considered a judgment disposing of all issues of and among the parties as contemplated in Missouri Supreme Court Rule 74.01 (which it is not), the County would have thirty days from its entry, *i.e.*, December 23, 2019, to file post-trial motions, including these Motions. *See* MO. SUP. CT. R. 78.07(d) (". . . Unless an amended judgment shall otherwise specify, an amended judgment shall be deemed a new judgment for all purposes."); MO. SUP. CT. R. 44.01(a) ("In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday."); *Heifetz v. Apex Clayton, Inc.,* 554 S.W.3d 389, 394 (Mo. banc 2018), *reh'g denied* (Sept. 25, 2018), *opinion modified on denial of reh'g* (Sept. 25, 2018) ("As a new judgment, Apex had 30 days from the amended judgment's entry to file a motion for JNOV or new trial."); *State ex rel. Mo. Parks Ass'n v. Mo. Dep't of Nat. Res.*, 316 S.W.3d 375, 381–82 (Mo. Ct. App. 2010) ("Unless an amended judgment shall otherwise specify,

[1] Because complete trial transcripts became available only late on Friday, November 22, 2019, the County largely references only generally herein the testimony of various witnesses called by the parties. In addition, transcripts from *voir dire* are not yet available. The County expressly reserves its right to file additional motions in connection therewith.

an amended judgment shall be deemed a new judgment for *all purposes*, including the time from which a party can file an authorized post-trial motion from the amended judgment." (internal quotation marks omitted)); 17 MO. PRAC., CIVIL RULES PRACTICE § 78.07:5 (2018 ed.) ("The same rules apply to the new judgment as to the original judgment. Thus, the trial court again has 30 days in which to open, vacate, set aside, or amend the new judgment, and any party may again file any authorized after-trial motion within that same 30-day period. The same rules for filing the notice of appeal from the original judgment apply to the new judgment.").

17. Nevertheless, given the apparent confusion regarding the nature of the October 25, 2019 "Judgment and Order" and Plaintiff's pending claims for equitable relief, in an abundance of caution, and without waiving its right to file additional post-trial motions or to supplement these Motions, the County herein moves for judgment notwithstanding the verdict or, alternatively, for a new trial, for remittitur, or to amend the Amended Judgment and Order.

18. As grounds for these Motions, the County renews and incorporates by references the following filings, to the extent they have been denied, overruled, or are still under consideration by the Court:

a. The County's Motion to Dismiss;

b. The County's Motion for More Definite Statement;

c. The County's First Motion *in Limine* regarding Plaintiff's introduction of certain evidence at trial;

d. The County's Second Motion *in Limine* regarding Plaintiff's introduction of unrelated and/or irrelevant statements of alleged discrimination;

e. The County's Fourth Motion *in Limine* regarding introduction of a notation on a St. Louis County Police Department Collaborative Reform Initiative Process Assessment Log;

f. The County's Fifth Motion *in Limine* regarding witnesses statements as to their subjective beliefs or speculation as to whether the County engages in alleged discriminatory and/or retaliatory practices;

g. The County's Sixth Motion *in Limine* regarding introduction of evidence associated with Chief Jon Belmar's sentencing letter on behalf of Michael Saracino, Jr., and any resulting discipline to Chief Belmar;

h. The County's Seventh Motion *in Limine* regarding introduction of unprofessional and offensive statements made by instructors employed by Asymmetric Solutions during training sessions of St. Louis County Police Department personnel;

i. The County's Ninth Motion *in Limine* regarding evidence of prior lawsuits or arbitrations against and/or settlements with the County;

j. The County's Tenth Motion *in Limine* regarding testimony and/or evidence from former Captain Chris Stocker of the St. Louis County Police Department;

k. The County's Twelfth Motion *in Limine* regarding reference to the financial disparity of the parties or the source of any award for damages;

l. The County's Thirteenth Motion *in Limine* regarding testimony and/or evidence from Mary Beth Ruby and Donna Woodland;

m. The County's Fourteenth Motion *in Limine* regarding testimony and/or evidence of affidavits signed by Mary Beth Ruby and Michael Clinton;

n. The County's Motion for Directed Verdict at the Close of Plaintiff's Case;

o. The County's Motion for Directed Verdict at the Close of All Evidence;

p. The County's Motion to Adjudicate/Dismiss Plaintiff's Claims for Equitable Relief;

q. The County's Opposition to Plaintiff's Motion for Attorneys' Fees and Costs; and

r. The County's Supplemental Memorandum in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs.

III. BACKGROUND

19. Plaintiff's First Amended Petition contained two counts against the County: (1) sex discrimination, in violation of Mo. Rev. Stat. § 213.055; and, (2) retaliation, in violation of Mo. Rev. Stat. § 213.070. In both of these counts Plaintiff sought, among other things, compensatory and punitive damages, as well as equitable relief (front pay and an injunction ordering that Plaintiff be promoted to the rank of Lieutenant).[2]

20. Following a five-day trial, on October 25, 2019, the Jury returned its Verdict and the Court entered a document styled, "Judgment and Order" in favor of Plaintiff on both counts, awarding him a total of $19,970,000.00 in damages, comprised of $2,970,000.00 in compensatory damages and $17,000,000.00 in punitive damages.[3]

[2] As noted in the County's Motion to Adjudicate/Dismiss Plaintiff's Claims for Equitable Relief, Plaintiff pleaded an entitlement to both front pay and injunctive relief; however, he, at most, would be entitled to only one such equitable remedy. *See, e.g.*, *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 113 (Mo. Ct. App. 2006) ("When reinstatement is not feasible, the court may grant front pay as an *alternative* equitable remedy." (emphasis added)).

[3] Specifically, the Jury awarded Plaintiff $1,980,000.00 in compensatory damages and $10,000,000.00 in punitive damages on Plaintiff's sex discrimination claim (Count I) and $990,000.00 in compensatory damages and $7,000,000.00 in punitive damages on Plaintiff's retaliation claim (Count II).

21. Thereafter, Plaintiff filed his Motion for Attorneys' Fees and Costs, First Amended Supplement to his Motion for Attorneys' Fees and Costs, and Motion to Amend Judgment to Add Post-Judgment Interest.[4]

22. On November 22, 2019, following argument by the parties through counsel, the Court granted Plaintiff's Motion for Attorneys' Fees and Costs, as supplemented by Plaintiff's First Amended Supplement to his Motion for Attorneys' Fees and Costs, and granted in part and denied in part Plaintiff's Motion to Amend Judgment to Add Post-Judgment Interest.

23. On November 22, 2019, the Court entered a document styled, "Amended Judgment and Order." In its Amended Judgment and Order, the Court again recounted the Jury's Verdict in favor of Plaintiff on both counts, awarding him a total of $19,970,000.00 in damages, comprised of $2,970,000.00 in compensatory damages and $17,000,000.00 in punitive damages. The Amended Judgment and Order also awarded Plaintiff $673,530.00 in attorneys' fees, reflecting Plaintiff's proposed lodestar calculation enhanced by a 2.0 multiplier, as well as $7,896.67 in costs, and post-judgment interest at the rate of 6.5% per annum pursuant to Section 408.040.3, R.S. Mo., effective November 22, 2019 but excluding interest on any portion of any award in which the State of Missouri may ultimately have an interest.[5]

24. "A defendant's motion for judgment notwithstanding the verdict presents the same question as a motion for directed verdict at the close of all the evidence; *i.e.*, whether the plaintiff made a submissible case." *MPROVE v. KLT Telecom, Inc.*, 135 S.W.3d 481, 489 (Mo. Ct. App. 2004) (internal quotation marks and citation omitted). A judgment notwithstanding the verdict for

[4] As noted *supra*, the County also filed its Motion to Adjudicate/Dismiss Plaintiff's Equitable Claims, which was argued and which the Court took under submission on November 22, 2019.

[5] As discussed *supra*, given the pendency of Plaintiff's claims for equitable relief, the "Amended Judgment and Order" is not a judgment disposing of all issues of and among the parties.

the defendant is appropriate where a plaintiff fails to make a submissible case. *See Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. Ct. App. 1997). A case should not be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Aughenbaugh v. Williams*, 569 S.W.3d 514, 523 (Mo. Ct. App. 2018). "Substantial evidence is that which, if true, has probative force upon the issues, from which the trier of facts can reasonably decide a case." *Id.* (internal quotation marks and citation omitted). Questions of whether the evidence is substantial are questions of law, and "no fact essential to submissibility may be inferred in the absence of a substantial evidentiary basis." *MPROVE*, 135 S.W.3d at 489; *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 351 (Mo. Ct. App. 2012). "The evidence and inferences must establish every element and not leave any issue to speculation." *MPROVE*, 135 S.W.3d at 489 (internal quotation marks omitted). The Court "cannot supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences." *Wagner*, 368 S.W.3d at 351 (quoting *MPROVE*, 135 S.W.3d at 489).

25. Missouri Supreme Court Rule 78.01 provides that a court may grant a new trial of any issue upon good cause shown. It is well-established that "a single ground of error . . . appropriately warrants the grant of a new trial." *Baldridge v. Kansas City Public Sch,*, 552 S.W.3d 699, 709 (Mo. Ct. App. 2018) (quoting *Leo Journagan Constr. Co. v. City Utils. of Springfield*, 116 S.W.3d 711, 722 (Mo. Ct. App. 2003)). The purpose of a motion for new trial is to give the trial court a final opportunity to correct any errors that were made during trial without appellate court intervention. *Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 640 (Mo. banc 2013). A trial court is necessarily vested with considerable discretion in granting a new trial on matters which concern issues of fact. *Wagner v. Mortg. Info. Servs., Inc.*, 261 S.W.3d 625, 636 (Mo. Ct. App. 2008) (quoting *Andersen v. Osmon*, 217 S.W.3d 375, 377 (Mo. Ct. App.

2007)). Indeed, in *Hornsby v. West*, the Court of Appeals affirmed the grant of a new trial even though it could not determine with certainty how a defendant was prejudiced. 665 S.W.2d 372, 373 (Mo. Ct. App. 1984). The court reasoned that it could not conclude that no prejudice against the defendant could have resulted based upon the issues at trial and that a new trial was therefore properly granted. *Id.*

26. Further, "[w]here the evidence is such that a jury might reasonably find a verdict for either party, the judge may properly grant one new trial on the grounds that the verdict is against the weight of the evidence." *Jones Store, Inc. v. Whiteley*, 341 S.W.2d 141, 142 (Mo. Ct. App. 1960); *see* MO. SUP. CT. R. 78.02. "It is well settled in Missouri that a circuit court has broad discretion to grant a new trial on the ground that the verdict is against the weight of the evidence, and its decision will be affirmed by an appellate court absent manifest abuse of that discretion." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. banc 2013). It is not an abuse of discretion to grant a new trial where the plaintiff has made a submissible case but where there was substantial evidence to support a verdict for the defendant. *Resco Constr. Co. v. Dawson Cabinet Co.*, 656 S.W.2d 324, 326 (Mo. Ct. App. 1983) (affirming the trial court's grant of a new trial where the prevailing plaintiff had made a submissible case, but where the substantial evidence supported a verdict in favor of the defendant and the defendant's counterclaim). "Discretion is not abused where there was substantial evidence to support a verdict for the party awarded the new trial." *Id.*

27. For the reasons stated *infra*, the Court should grant the County judgment notwithstanding the verdict, or alternatively grant a new trial, reduce the damages awarded, or amend its Amended Judgment and Order.

IV. PLAINTIFF FAILED TO INTRODUCE SUBSTANTIAL EVIDENCE, AND THERE WAS NOT SUBSTANTIAL EVIDENCE IN THE RECORD, TO SUPPORT EACH ELEMENT OF PLAINTIFF'S CLAIMS, AND AS SUCH IT WAS ERROR FOR THE COURT TO DENY THE COUNTY'S MOTIONS FOR DIRECTED VERDICT.

A. The County Is Entitled to Judgment Notwithstanding the Verdict on Plaintiff's Count I (Sex Discrimination under the MHRA) Because Substantial Evidence Does Not Support Each Element of Plaintiff's Claim, Namely, that Plaintiff's Sex Was a Factor—Contributing or Otherwise—in Any Decision Not to Promote Plaintiff to the Rank of Lieutenant.

28. In Count I of his First Amended Petition, Plaintiff sought to recover against the County on the theory that "[b]ecause of his gender/sex, Plaintiff has been subjected to—and continues to be subjected to—unlawful employment discrimination by being denied multiple promotions." (*See* First Amended Petition, ¶ 1.) In other words, Plaintiff pleaded a claim of sex discrimination under the MHRA, Mo. Rev. Stat. § 213.055.1(1)(a).

29. "For an employee to establish a *prima facie* case of sex discrimination in the workplace, the employee must demonstrate: (1) the employee was a member of a protected class; (2) the employee was qualified to perform the job; (3) the employee suffered an adverse employment action; and (4) the employee was treated differently from other similarly situated employees of the opposite sex." *Lampley v. MCHR*, 570 S.W.3d 16, 24 (Mo. banc 2019); *see also* MAI 38.01(A) & n.2 on use; Mo. Rev. Stat. § 213.055.1(1)(a). "The fourth element of a *prima facie* discrimination case also can be met if the employee provides some other evidence that would give rise to an inference of unlawful discrimination." *Lampley*, 570 S.W.3d at 24 (internal quotation marks omitted).

30. Plaintiff failed to offer substantial evidence to establish that his ***sex*** was a contributing factor to the denial of any promotion.[6] Plaintiff, therefore, failed to offer substantial evidence to support his *prima facie* case.

31. Instead of proving his case of sex discrimination, Plaintiff offered only evidence and argument regarding only his ***sexual orientation*** in alleged connection with promotion denials.

32. During opening argument, Plaintiff's counsel previewed that the case submitted by Plaintiff would concern alleged ***sexual orientation*** discrimination—not alleged ***sex*** discrimination:

a. "They won't truthfully admit that Keith's gayness and the fact that he was stereotyped for that was the real reason for him not being promoted so they had to come up with another reason." (Tr. 25:22-25.)

b. "But the reality is that Saracino had his finger on the pulse of the promotional process. He knew exactly what he was talking about when he conveyed the anti-gay sentiments of the command staff." (Tr. 26:9-12.)

c. "Ultimately what I believe the evidence will prove are these things. Number one, that Keith has been denied over 20 promotions due to the County's sex stereotyping bias of Keith supposedly being too gay and needing to tone down his gayness." (Tr. 26:25-27:4.)

33. Plaintiff's counsel's closing argument confirmed the same, *i.e.*, that the evidence offered by Plaintiff concerned only alleged ***sexual orientation*** discrimination—not alleged ***sex*** discrimination:

[6] As discussed *infra*, with respect to the alleged adverse employment actions on or after August 28, 2017, Plaintiff was required to establish, *inter alia*, that his sex was the *motivating* factor in such adverse employment actions.

a. "Keith's biggest career mistake was coming out of the closet." (Tr. 823:11-12.)

b. "That's almost what you have to say when you conspicuously skip over the gay guy who is at the top of the list every year." (Tr. 826:20-23.)

c. "But what is the environment from a gay employee's perspective? For a gay employee, it sounds like an awful place to work." (Tr. 831:24-832:1.)

d. "Belmar did that to stop the bleeding on the SRU issue and to make it appear, appear that the command staff does not have anti-gay bias." (Tr. 837:14-16.)

e. "Keith told you he heard inappropriate gay comments, but he decided not to complain, because he had already been retaliated against enough." (Tr. 838:10-12.)

f. "What is it like to know that you're an excellent promotion candidate on paper and per the metrics, but you're never going to be promoted because you're too gay and out of the closet?" (Tr. 847:23-848:2.)

g. "Your verdict can send a message, not just to the police department, but to everyone, that this is not acceptable for an employer to treat its employees this way. This verdict could have an impact on other gay employees who are closeted because they're afraid of how their employer will treat them." (Tr. 890-8-14.)

h. "The fact that we're all here and all of this evidence about the County's homophobic and retaliatory atmosphere has come to light, the County should be ashamed." (Tr. 891:3-6.)

34. Plaintiff's counsel's opening and closing arguments were consistent with Plaintiff's testimony—that his belief was that he was discriminated against based on his ***sexual orientation***,

not his ***sex*** (through evidence of sex stereotyping or otherwise). For example, Plaintiff's testimony included:

> Q. Okay. So up to that point, coming out of the closet was not a bad career choice for you; isn't that correct?
>
> A. Well, I would dispute that because we wouldn't be here today if my sexuality wasn't in play.
>
> (Tr. 277:18-22.)
>
> Q. My question, next question, anything else? Anything else that makes you believe that the reason you were not promoted is because you're gay or because of sexual stereotypes?
>
> And your answer, Gender stereotyping based on the fact that I'm a gay male.
>
> (Tr. 290:19-24.)

35. Earlier in this case, Plaintiff correctly acknowledged that sexual orientation is not a protected characteristic under the MHRA. (*See* Plaintiff's Opposition to the County's Motion to Dismiss, incorporated herein by reference, p. 8 (citing *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 483 (Mo. Ct. App. 2015)); (Plaintiff's Fifth Motion *in Limine*, incorporated herein by reference, p. 6 (citing *Lampley v. MCHR*, 570 S.W.3d 16, 23-26 (Mo. banc 2019))).[7]

36. Importantly, the Missouri Supreme Court's decision in *Lampley v. MCHR* does not somehow enable a claim of sexual orientation discrimination under the guise of sex discrimination through evidence of sex stereotyping. *See* 570 S.W.3d at 23-24.

[7] The Eastern District of the Court of Appeals has similarly observed that "sexual orientation is not a protected category under the Missouri Human Rights Act (R.S. Mo. Chapter 213)." *See Moore v. Lift for Life Acad., Inc.*, 489 S.W.3d 843, 847 n.1 (Mo. Ct. App. 2016) (affirming dismissal based on sovereign immunity of claim of wrongful discharge on the basis of sexual orientation and further observing that, while the MHRA is an express waiver of sovereign immunity for public employers, sexual orientation is not a protected category under the MHRA).

37. In this case, the evidence adduced at trial was based entirely on Plaintiff's sexual orientation. Simply put, Plaintiff did not pursue the claim pleaded in his First Amended Petition, *i.e.*, sex discrimination. Instead, Plaintiff submitted a case of sexual orientation discrimination.

38. Had Plaintiff pleaded the claim he actually presented at trial—allegations of sexual orientation discrimination—the Court would have been bound to dismiss the claim for failure to state a claim as a matter of law.[8] *See Moore*, 489 S.W.3d at 847 n.1; *Pittman*, 478 S.W.3d at 481.

39. Until the General Assembly enacts legislation amending the MHRA to include sexual orientation among its protected characteristics, Missouri courts are bound by the current state of the law.[9] *See, e.g., Rebman v. Parson*, 576 S.W.3d 605, 609 (Mo. 2019), *opinion modified and superseded on reh'g* (June 25, 2019) ("In the most general terms, the legislative branch is charged with making the law; the executive branch is charged with enforcing the law; and, as Chief Justice Marshall wrote more than two centuries ago, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). As Plaintiff correctly acknowledged, the current state of the law is that sexual orientation is not a protected characteristic under the MHRA.

40. In short, Plaintiff pleaded a claim of sex discrimination under the MHRA, but did not pursue that claim at trial. Substantial evidence does not exist to support each element of Plaintiff's sex discrimination claim.

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[8] If Plaintiff had moved to conform the pleadings to the evidence, which he did not do, the Court would have been bound by precedent to deny such a motion. That said, as discussed, the Court was bound by precedent to grant the County's Motions for Directed Verdict, given both the evidence adduced by Plaintiff at trial (*i.e.*, alleged sexual orientation discrimination) and the absence of evidence adduced by Plaintiff at trial (*i.e.*, alleged sex discrimination).

[9] Bills were proposed in the Missouri General Assembly as recently as this year to amend the MHRA to include sexual orientation as a protected characteristic. *See* House Bill No. 208 (100th General Assembly); House Bill No. 350 (100th General Assembly). Neither became law. Similarly, every United States Congress since 1974 has considered a proposed bill to add "sexual orientation" as a protected Title VII classification. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 153 & n.23 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (listing them). Not one such bill has passed, either.

41. As a result, the County is entitled to judgment notwithstanding the verdict on Plaintiff's sex discrimination claim under the MHRA (Count I).

42. The County also should be granted a new trial on Plaintiff's claim for sex discrimination because the verdict was against the weight of the evidence, the verdict is against the greater weight of the evidence, and the verdict is against the law under the evidence, for the reasons discussed herein.

B. <u>The County Is Entitled to Judgment Notwithstanding the Verdict on Plaintiff's Count II (Retaliation under the MHRA) Because Substantial Evidence Does Not Support Each Element of Plaintiff's Claim, Namely, that Plaintiff's Transfer to an "Undesirable Work Location" Was Somehow Involuntary or that Any of Plaintiff's Charges of Discrimination or this Lawsuit Was a Factor—Contributing or Otherwise—in Any Decision Not to Promote Plaintiff to the Rank of Lieutenant</u>.

43. In Count II of his First Amended Petition, as submitted in Instruction No. 13, Plaintiff sought to recover damages against the County on the theory that any of Plaintiff's charges of discrimination or this lawsuit was a contributing factor to either any unspecified failure to promote Plaintiff or Plaintiff's transfer to an unspecified, "undesirable work location."[10] (First Amended Petition, ¶¶ 61-64; Instruction No. 13.)

44. "To establish a prima facie case of retaliation requires that a plaintiff prove: (1) [he] complained of discrimination; (2) the employer took adverse action against [him]; and (3) a causal relationship existed between the complaint and the adverse action."[11] *Mignone v. Mo. Dep't of Corr.*, 546 S.W.3d 23, 37 (Mo. Ct. App. 2018), *reh'g and/or transfer denied* (Mar. 22, 2018),

[10] This lack of specificity, *inter alia*, is discussed further *infra* in connection with the County's Motion for New Trial.

[11] As discussed *infra* in connection with the County's Motion for New Trial, although the underlying complaint of discrimination "does not have to involve actual discrimination for a retaliation claim to stand," the plaintiff must have "a reasonable, good faith belief that there were grounds for a claim of discrimination" to sustain a claim of retaliation under the MHRA based thereon. *Shore v. Children's Mercy Hosp.*, 477 S.W.3d 727, 735 (Mo. Ct. App. 2015).

transfer denied (May 22, 2018); *McCrainey v. Kansas City Mo. Sch. Dist.*, 337 S.W.3d 746, 753 (Mo. Ct. App. 2011) (*cited in Kader v. Bd. of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 190 (Mo. banc 2019)); *see also* MAI 38.01(A) & n.2 on use; Mo. Rev. Stat. § 213.070.1(2).

45. Plaintiff failed to adduce substantial evidence at trial that any of his charges of discrimination or this lawsuit was a contributing factor[12] to either: (i) his transfer to an "undesirable work location"; or (ii) any denied promotions.

1. Substantial Evidence Does Not Support Plaintiff's Claim of Retaliation based on Plaintiff's Transfer to Any Allegedly "Undesirable Work Location" Because the Evidence Established that Plaintiff Agreed to Transfer to the Jennings Precinct and that Plaintiff Requested to Be Transferred From the Jennings Precinct.[13]

46. Substantial evidence does not support Plaintiff's claim of retaliation to the extent it is premised on his transfer to an "undesirable work location"—presumably meaning either transfer to or from the Jennings precinct—because the evidence adduced at trial confirmed that:

a. Plaintiff was transferred to the Jennings precinct only upon Plaintiff's agreement to the same, all of which was set in motion by non-discriminatory acts of Plaintiff's close friend, Lieutenant Aaron Roediger (*see* Lieutenant Colonel Troy Doyle's testimony, Tr. 577:7-583:19; Lt. Roediger's testimony, Tr. 654:17-655:11; 655:23-657:8; Defendant's Exhibit K); and that

b. Plaintiff was transferred from the Jennings precinct at his own request. (*See* Tr. 819:22-25 ("Q. . . . But you did request a transfer to the North Precinct; is that correct?

[12] As discussed *supra* n.7, with respect to the alleged retaliation on or after August 28, 2017, Plaintiff was required to establish, *inter alia*, that his sex was the *motivating* factor in such retaliation.

[13] While the County takes issue with Plaintiff's premise that the Jennings precinct is an "undesirable work location," for purposes of clarity, the County refers to the Jennings precinct thusly based solely on Plaintiff's characterization.

The midnight shift? A. I did."); (*see also* Affirmative Defense #5 asserted in the County's Answer to Plaintiff's First Amended Petition.)

47. As a result, substantial evidence does not support Plaintiff's claim of retaliation based on either transfer.

2. Substantial Evidence Does Not Support Plaintiff's Claim of Retaliation based on Any Denied Promotions.

48. Although a complaint of discrimination giving rise to a claim of retaliation under the MHRA "does not have to involve actual discrimination for a retaliation claim to stand," the plaintiff must have "a reasonable, good faith belief that there were grounds for a claim of discrimination[.]" *Shore v. Children's Mercy Hosp.*, 477 S.W.3d 727, 735 (Mo. Ct. App. 2015). As discussed *supra*, Plaintiff did not have a reasonable, good faith belief that there were grounds for a claim of discrimination.[14] As a result, substantial evidence does not support Plaintiff's claim of retaliation based on any denied promotions. *See, e.g.*, *id.* ("[W]e likewise conclude that Dr. Shore could not have had a reasonable, good faith belief that he had alleged grounds for discrimination, because he never complained to Human Resources, to his interim supervisor (Dr. Gamis), or to the Chair of Pediatrics (Dr. Artman) in his many meetings with them that Dr. Woods had discriminated against him on the basis that he was Caucasian."); *see also Kerr v. Curators of the Univ. of Mo.*, 512 S.W.3d 798, 814-15 (Mo. Ct. App. 2016) (affirming trial court's grant of summary judgment in favor of the employer where the plaintiff "identified no protected activity that could qualify for her retaliation claim"); *Lovelace v. Washington Univ. Sch. of Med.*, 931 F.3d 698, 708 (8th Cir. 2019) ("Because Lovelace could not have had a reasonable good faith belief that the conduct she opposed had constituted disability discrimination in violation of the MHRA,

[14] The failure to include the requirement that the Jury find that Plaintiff held a reasonable, good faith belief that there were grounds for a claim of discrimination is discussed *infra* in connection with the County's Motion for New Trial.

the district court did not err in granting summary judgment in favor of WUSM and BJH on Lovelace's MHRA retaliation claim.").

49. Moreover, substantial evidence does not exist in the record that either any of Plaintiff's charges of discrimination or this lawsuit in any way caused any denial of promotion. (*See, e.g.*, Tr. 616:24-618:15.)

50. For all these reasons, the County is entitled to judgment notwithstanding the verdict on Plaintiff's claim of retaliation under the MHRA (Count II).

51. The County also should be granted a new trial on Plaintiff's claim for retaliation because the verdict was against the weight of the evidence, the verdict is against the greater weight of the evidence, and the verdict is against the law under the evidence, for the reasons discussed *supra*.

V. THE COUNTY WAS ENTITLED TO A DIRECTED VERDICT ON PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES, AND PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES OTHERWISE SHOULD HAVE BEEN STRICKEN, BECAUSE PLAINTIFF FAILED TO INTRODUCE EVIDENCE IN THE RECORD REGARDING THE SAME.

52. A submissible case of punitive damages under the MHRA is made only if "the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with ***convincing*** clarity—that is, that it was highly probable—that the defendant's conduct was outrageous because of ***evil motive*** or ***reckless indifference***." *Brady*, 213 S.W.3d at 109 (emphasis added).

53. Plaintiff failed to offer evidence establishing that it was highly probable that the County's alleged, actionable conduct was outrageous because of evil motive or reckless indifference.

a. Plaintiff failed to offer sufficient evidence that his sex (*i.e.,* male) was (at least) a contributing factor to the denial of any of his application(s) for promotion. Plaintiff

offered no evidence that the denial of any of his application(s) for promotion was the product of either evil motive or reckless indifference.

b. Similarly, Plaintiff failed to offer sufficient evidence that any of his charges of discrimination or this lawsuit were (at least) contributing factors to either a transfer to an "undesirable work location" or to the denial of any of his application(s) for promotion.

54. As a result, the County was entitled to a directed verdict on Plaintiff's claims for punitive damages, and Plaintiff's claims for punitive damages otherwise should have been stricken. The County is entitled to judgment notwithstanding the verdict, a new trial, an amended judgment, and/or remittitur.

VI. THE COUNTY IS ENTITLED TO A NEW TRIAL BECAUSE CERTAIN INSTRUCTIONAL ERRORS MISDIRECTED, MISLED, AND CONFUSED THE JURY RESULTING IN PREJUDICE TO THE COUNTY.

A. Standard of Review

55. "Whether a jury was instructed properly is a question of law[.]" *Minze v. Mo. Dep't of Pub. Safety*, 437 S.W.3d 271, 275 (Mo. Ct. App. 2014), *reh'g and/or transfer denied* (May 27, 2014), *transfer denied* (Aug. 19, 2014). Where a Missouri Approved Jury Instruction is applicable, its use is ***mandatory***. *Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 837 (Mo. Ct. App. 1984) (emphasis added). It is erroneous to deviate from the MAI form. *Venitz v. Creative Mgmt., Inc.*, 854 S.W.2d 20, 23 (Mo. Ct. App. 1993). "Instructional error is ***presumed prejudicial*** when the verdict is in favor of the party at whose instance the instruction is given." *Karnes v. Ray*, 809 S.W.2d 738, 742 (Mo. Ct. App. 1991) (emphasis added).

56. Further, "[p]rejudicial and reversible error occurs when an instruction is proffered to a jury that gives the jury a roving commission." *McNeill v. City of Kansas City*, 372 S.W.3d 906, 909 (Mo. Ct. App. 2012) (quoting *Hepler v. Caruthersville Supermarket Co.*, 102 S.W.3d 564, 568 (Mo. Ct. App. 2003)). "A 'roving commission' is 'an abstract instruction . . . in such

broad language as to permit the jury to find a verdict without being limited to any issues of fact or law developed in the case." *Id.* at 909-10 (alteration in original) (quoting *Edgerton v. Morrison,* 280 S.W.3d 62, 66 (Mo. banc 2009)).

57. "A 'roving commission' occurs when an instruction assumes a disputed fact or submits an abstract legal question that allows the jury to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability." *Id.* at 910 (quoting *Klotz v. St. Anthony's Med. Ctr.,* 311 S.W.3d 752, 766 (Mo. banc 2010)); *see also Minze*, 437 S.W.3d at 277 ("Words that make actionable the aggregate of all of the defendant's conduct are prohibited and amount to giving the jury a roving commission." (internal quotation marks and citation omitted)).

58. Further, the law is well-settled that "[i]n the case of a disjunctive instruction, ***each*** submission must be supported by substantial evidence." *Ploch v. Hamai*, 213 S.W.3d 135, 140 (Mo. Ct. App. 2006) (emphasis added); *accord Brown v. Shawneetown Feed & Seed Co.*, 730 S.W.2d 587, 589 (Mo. Ct. App. 1987) ("Where an instruction is in the disjunctive there must be evidence to support ***all*** submissions else the giving of it is in error." (emphasis added)). If there is not "evidentiary support for each disjunctive submission, . . . the instruction is defective, erroneous and requires a new trial." *Layton v. Pendleton*, 864 S.W.2d 937, 943 (Mo. Ct. App. 1993); *see also BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 189 (Mo. Ct. App. 2007) ("To submit a claim to the jury, substantial evidence must support each element of a disjunctive jury instruction. Furthermore, in cases involving disjunctive instructions each alternative claim must be able to stand alone and there must be sufficient evidence to support each allegation. If there is not substantial evidence for each disjunctive element, the submission of the entire instruction is in error." (internal quotation marks, citation, and alteration omitted)).

B. <u>The Submission of Instruction No. 7 to the Jury Was Erroneous Because It Deviated From the MAI and Did Not Follow Substantive Law in that Instruction No. 7 Allowed the Jury to Base Its Decision on "Sex Stereotyping," Which Is Not a Protected Class Under the MHRA</u>.

59. MAI 38.01(A) is the mandatory instruction in all sex discrimination cases under the MHRA. The pre-August 28, 2017 version of MAI 38.01(A) instructs a jury:

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

(Emphasis added).

60. Consistent with Missouri law, the "Second" paragraph of MAI 38.01(A) requires that a plaintiff's membership in a protected class be explicitly set forth in the verdict director. *See R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 427 (Mo. banc 2019) (noting "the second element [of a sex discrimination claim] is the plaintiff's membership in a protected class").

61. The Missouri Supreme Court has explained that, in order to prevail on a discrimination claim under the MHRA, a plaintiff must show that an adverse employment action was "motivated by discrimination against a category protected by the anti-discrimination statute at issue which, under the Missouri Human Rights Act, includes race, color, religion, national origin, sex, ancestry, age or disability." *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 521 (Mo.

banc 2009); *see also R.M.A. by Appleberry*, 568 S.W.3d at 427 ("Section 213.065 protects the following classes: race, color, religion, national origin, sex, ancestry, or disability.").

62. Because the MAI 38.01(A) is the applicable instruction in all sex discrimination cases under the MHRA, its submission to the jury was ***mandatory*** and the departure from MAI 38.01(A) is ***presumed prejudicial error***. *Hervey v. Mo. Dep't of Corr.*, 379 S.W.3d 156, 159 (Mo. banc 2012) ("Generally, whenever Missouri Approved Instructions contains an instruction applicable to the facts of a case, such instruction shall be given to the exclusion of any other instructions on the same subject." (internal quotation marks omitted)); *see also Thomas v. McKeever's Enterprises Inc.*, 388 S.W.3d 206, 215 (Mo. Ct. App. 2012) (overturned on other grounds) (holding that the "the trial court nevertheless erred by instructing the jury in a manner contrary to MAI 31.24.[15] In doing so, the trial court failed in its duty to give the mandatory MAI to the exclusion of any other instruction on the same subject."); MO. SUP. CT. R. 70.02(b)-(c).

63. Despite the mandate that MAI 38.01(A) be used in all sex discrimination cases under the MHRA, Instruction No. 7 deviated from MAI 38.01(A) in significant and consequential ways.

64. Specifically, Instruction No. 7 instructed the jury to find:

> On the claim of plaintiff Keith Wildhaber for sex discrimination, your verdict must be for plaintiff if you believe:
>
> First, defendant failed to promote plaintiff, and,
>
> Second, ***sex stereotyping of plaintiff*** was a contributing factor in such failure to promote,
>
> and,
>
> Third, as a direct result of such conduct plaintiff sustained damage.

[15] MAI 38.01(A) was formerly MAI 31.24.

(Emphasis added).

65. This deviation from the mandatory MAI displaced an essential element of Plaintiff's MHRA discrimination claim—that the jury find that Plaintiff's status as a member of a "protected class[] supported by the evidence such as….sex" was a factor in some adverse employment action—in favor of elevating "sex stereotyping" itself to the status of protected class under Missouri law. In this respect, Instruction No. 7 did not follow substantive law and allowed the Jury to render a verdict without finding an essential element of Plaintiff's sex discrimination claim.

66. The Missouri Supreme Court recently held that sex stereotyping "may give rise to an inference of unlawful discrimination upon a member of a protected class" in order to support an essential element of a sex discrimination claim—namely, that "the employee was treated differently from other similarly situated employees of the opposite sex." *Lampley*, 570 S.W.3d at 24. The Court made clear that sex stereotyping is not, however, a protected class or an element of a sex discrimination claim, and it did not amend MAI 38.01(A):

> The [MHRA] clearly provides it is an unlawful employment practice for an employer to discriminate on the basis of sex. Section 213.055.1(1)(a). For an employee to establish a *prima facie* case of sex discrimination in the workplace, the employee must demonstrate: (1) the employee was a member of a protected class; (2) the employee was qualified to perform the job; (3) the employee suffered an adverse employment action; and (4) the employee was treated differently from other similarly situated employees of the opposite sex. ***The fourth element of a prima facie discrimination case also can be met if the employee provides some other evidence that would give rise to an inference of unlawful discrimination. Stereotyping may give rise to an inference of unlawful discrimination upon a member of a protected class.***

Id. (emphasis added) (internal quotation marks and citations omitted).

67. The Missouri Supreme Court further confirmed that "sex stereotyping" is not itself a claim (or protected class) under the MHRA, but rather can be evidence of sex discrimination, in *R.M.A. by Appleberry v. Blue Springs R-IV School District*, decided the same day as *Lampley*:

> [T]he MHRA does not provide for "types" of sex discrimination claims; a claim is either a claim of sex discrimination or it is not. Rather than a "type" of sex discrimination claim, "sex stereotyping" merely is one way to prove a claim of sex discrimination, i.e., "sex stereotyping" can be ***evidence*** of sex discrimination. . . .

568 S.W.3d at 426 n.4.

68. Thus, *Lampley* instructs that "sex-stereotyping," in and of itself, is not a protected class but, rather, can support an inference that an employee was discriminated against on the basis of her sex (*i.e.*, a protected class).

69. Instruction No. 7 did not follow substantive law in this regard. Simply put, it was an incorrect statement of the law. *See Spring v. Kansas City Area Transp. Auth.,* 873 S.W.2d 224, 226 (Mo. banc 1994) ("An instruction must be a correct statement of the law.").

70. The Missouri Supreme Court's decision in *Hervey v. Missouri Department of Corrections* is instructive. In *Hervey*, the Court held that reversal was required when an instruction that did not follow substantive law was submitted to the jury. 379 S.W.3d at 163 (holding that "the submission of a verdict director that did not hypothesize all essential elements of [the plaintiff's] claim was prejudicial error and requires that the trial court's judgment be reversed and the cause be remanded").

71. Here, as in *Hervey*, Instruction No. 7 did not follow Missouri law, and its submission to the jury resulted in prejudicial error. *See Blunkall v. Heavy & Specialized Haulers, Inc*., 398 S.W.3d 534, 542 (Mo. Ct. App. 2013) (Even "a modified MAI should follow the substantive law and be readily understood by the jury."); *see also Smith v. Kovac,* 927 S.W.2d 493, 497 (Mo. Ct. App. 1996). ("The test of a modified MAI or not-in-MAI instruction is whether it follows the substantive law and can be readily understood by the jury. All instructions should require a finding of all ultimate facts necessary to sustain a verdict." (internal citation omitted)).

72. Instruction No. 7 misdirected, misled, and confused the Jury resulting in prejudice to the County. The erroneous instruction allowed the Jury to return a substantial verdict against the County on a claim that has never been recognized under Missouri law. *See Karnes v. Ray*, 809 S.W.2d 738, 742 (Mo. Ct. App. 1991) ("[I]nstructional error is presumed prejudicial when the verdict is in favor of the party at whose instance the instruction is given.").

73. As a result, the submission of Instruction No. 7 to the Jury constituted prejudicial error because it deviated from the mandatory MAI and did not follow substantive law. This error alone demands a new trial on Plaintiff's MHRA discrimination claim (Count I).

C. <u>The Submission of Instruction No. 7 to the Jury was Erroneous Because It Gave the Jury a Roving Commission to Speculate as to What or Which "Failure to Promote" Was Allegedly Discriminatory Without Specific Reference to the Evidence</u>.

74. Instruction No. 7 was also erroneous because it allowed the Jury to generically (and vaguely) find that "defendant failed to promote plaintiff" without reference to any specific or particular denied promotion. This is significant, and consequential, because Plaintiff claimed that 23 promotion denials were discriminatory, and, in submitting Instruction No. 7, the Court gave the Jury an impermissible roving commission to speculate as to what failed promotions, if any, were discriminatory.

75. Under Missouri law, each alleged discriminatory failed promotion "constitutes a ***separate*** actionable unlawful employment practice" *See Tisch v. DST Sys., Inc.*, 368 S.W.3d 245, 254 (Mo. Ct. App. 2012) (emphasis added). Thus, each failed promotion was ***required*** to have been set forth ***separately*** on the verdict director (Instruction No. 7) so that the Jury could specifically determine exactly which, if any, failed promotion was discriminatory.

76. This issue was addressed by the Court of Appeals in *Minze v. Missouri Department of Public Safety*. In *Minze*, the plaintiff testified at trial regarding "numerous actions" of her

employer that she believed to be retaliatory. 437 S.W.3d at 277. To this end, the plaintiff argued that she "should not be limited to identifying specific actions that the employer took against [her]" in retaliation for submitting a complaint of discrimination. *Id*. at 276. The trial court agreed and submitted an instruction to the jury that allowed it to generically find that the defendant took "adverse action" against the plaintiff, without specifically detailing the alleged adverse action in the verdict director. *Id*. The Court of Appeals reversed, holding that the instruction was an impermissible roving commission because "the evidence contained more than one alleged act of retaliation such that the jury could be confused as to which 'adverse action' the instruction was referring . . . and [b]y not setting forth the adverse actions that [the plaintiff] believed were actionable, the jury could have considered all of [the plaintiff's] various complaints about which she testified." *Id.* at 278.

77. Here, Plaintiff testified that he believed 23 promotion denials were discriminatory. Each such alleged wrongful promotion denial was a distinct adverse employment action, ***required*** to be set forth ***separately*** in Instruction No. 7.[16] *See Minze*, 437 S.W.3d at 276-78; *Tisch*, 368 S.W.3d at 254.

78. By submitting an instruction to the Jury that generically allowed the Jury to find that Defendant "failed to promote" Plaintiff without regard to specific promotions, untethered to any specific date or other identifying detail, the Jury had no way of determining to which alleged failure to promote Instruction No. 7 was referring. This was erroneous.

[16] To the extent Plaintiff contends that there was only a single adverse employment action—the final denial of promotion, in 2018—then instructional error necessarily still exists based on the applicable causation standard set forth in Instruction No. 7, *i.e.*, motivating factor as opposed to contributing factor. Mo. Rev. Stat. § 213.010.2 (2019). Likewise, as discussed *infra* in the County's Motion for Remittitur, the MHRA's damages cap also necessarily applies. Mo. Rev. Stat. § 213.111.4 (effective August 28, 2017).

79. Missouri courts have held that a jury instruction is considered a roving commission in similar circumstances, where "it is too general or where it submits a question to the jury in a broad, abstract way without any limitation to the facts and law developed in the case." *Coon v. Dryden*, 46 S.W.3d 81, 93 (Mo. Ct. App. 2001); *see Bell v. Redjal*, 569 S.W.3d 70, 95 (Mo. Ct. App. 2019) ("As an initial matter, we acknowledge that if Paragraph First subsections (c) and (d) merely required the jury to find Dr. Redjal 'failed to inform Plaintiff Benny Bell of fractures' or 'delayed treatment of fractures[,]' the instruction would have certainly been too general."); *see also Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 482 (Mo. banc 2005) ("By couching paragraph Second so that the ultimate allegation was that 'Chan made arrangements for Dimerco to take over Scanwell's business operation,' the verdict director made actionable the aggregate of all of Chan's conduct in making those arrangements, even those arrangements that involved mere 'planning and preparation.'"); *McNeill*, 372 S.W.3d at 910 ("To avoid a roving commission, the court must instruct the jurors regarding the specific conduct that renders the defendant liable . . . if an instruction fails to advise the jury what acts or omissions of the party, if any, found by it from the evidence would constitute liability, the instruction is a roving commission.").

80. In this regard, the failure to include any limiting language denoting Plaintiff's specific, allegedly discriminatory promotion denials, including the date of the same, was erroneous, and requires a new trial.

D. <u>The Submission of Instruction No. 7 to the Jury was Erroneous Because It Allowed the Jury to Find in Plaintiff's Favor Based on Time-Barred Alleged Failures to Promote</u>.

81. Moreover, Instruction No. 7 allowed the Jury a roving commission because it is unclear whether the Jury based its verdict on non-actionable promotion denials.

82. Plaintiff testified that the first discriminatory promotion denial occurred in February 2014 (as pled in paragraph 16 of his First Amended Petition), more than two years before he filed his first Charge of Discrimination. Plaintiff also complained about purportedly discriminatory promotions in May 2014, July 2014, January 2015, and August 2015, all of which should have been time barred. (Plaintiff's First Amended Petition at ¶¶ 26, 32).

83. Under the MHRA, a charge of discrimination must be filed within 180 days of the alleged discriminatory or retaliatory act, otherwise, the allegation is not actionable. Mo. Rev. Stat. § 213.075.1; 8 C.S.R. 60-2.025(3); *Tisch*, 368 S.W.3d at 255.

84. In addition, a lawsuit based on an alleged claim arising under the MHRA must be commenced in circuit court "within ninety days from the date of the commission's notification [right to sue] letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party." Mo. Rev. Stat. § 213.111.1.

85. Because Instruction No. 7 was unclear as to which alleged promotion denial the instruction was referencing, it is possible that the Jury improperly considered failed promotions that are time barred and, thus, non-actionable. *See Minze*, 437 S.W.3d at 279 ("Based on this instruction it is possible that the jury improperly considered non-actionable events that were barred by the statute of limitations in determining liability, when those actions were admitted solely to show a course of conduct."); *Scanwell*, 162 S.W.3d at 482 (holding that it is reversible error to permit the jury to consider evidence of non-actionable conduct in arriving at its verdict).

86. For this additional reason, the submission of Instruction No. 7 to the Jury constituted prejudicial error because it allowed the Jury a roving commission.

E. <u>The Submission of Instruction No. 7 to the Jury was Erroneous Because It Applied the Incorrect Causation Standard—Contributing Factor, as Opposed to Motivating Factor—to Some, if Not All, of the Allegedly Discriminatory Denied Promotions</u>.

87. On August 28, 2017, amendments to the MHRA, codified at Section 213.101, R.S. Mo., took effect. Pursuant to Section 213.101.4, the Missouri General Assembly expressly abrogated "*Daugherty* . . . and its progeny as they relate to the contributing factor standard." In doing so, the 2017 amendments to the MHRA replaced the contributing factor standard with the motivating factor standard, thereby requiring that the employee's protected classification "actually played a role in the adverse action or decision and had a determinative influence on the adverse decision or action." Mo. Rev. Stat. § 213.010(19).

88. At trial and in his First Amended Petition, Plaintiff claimed that the denial of several promotions in 2018 were discriminatory. (Plaintiff's First Amended Petition, ¶ 35; Tr. at 121:14-122:14.) Plaintiff filed charges of discrimination on April 23, 2018 and October 17, 2018 as to these failed promotions. (*See* Plaintiff's First Amended Petition, ¶ 43.)

89. In cases brought under the MHRA, Missouri courts have held that the substantive law applicable to a plaintiff's claim is governed by the version of the statute in effect at the time of the alleged discriminatory action. *See MCHR v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 166-70 (Mo. Ct. App. 1999) (noting that the law applicable to the plaintiff's MHRA claims was the law in effect at the time of the plaintiff's alleged injury); *see also Bram v. AT&T Mobility Servs., LLC*, 564 S.W.3d 787, 795 (Mo. Ct. App. 2018) (holding that the law applicable to an MHRA claim was the law in effect at the time of the alleged discrimination); *Folsom v. Mo. State Highway Patrol*, 580 S.W.3d 645, 650 n.1 (Mo. Ct. App. 2019) (same).

90. Here, the Jury should have evaluated Plaintiff's promotion denials occurring on or after August 28, 2017 in accordance with the amended MHRA, which set forth the motivating factor standard for all claims thereunder.

91. Instruction No. 7 used the incorrect standard. It did not instruct the Jury on any standard other than the contributing factor standard, and thus allowed the Jury to evaluate every single failed promotion without regard to the appropriate standard.

92. As a result, the submission of Instruction No. 7 to the Jury constituted prejudicial error because it allowed the Jury to evaluate certain of Plaintiff's claims under the incorrect causation standard. For this reason alone, the County is entitled to a new trial on Plaintiff's MHRA sex discrimination claim (Count I).

F. <u>The Submission of Instruction No. 13 to the Jury was Erroneous Because It Gave the Jury a Roving Commission to Speculate as to What or Which "Failure to Promote" Was Allegedly Retaliatory Without Specific Reference to the Evidence</u>.

93. Over the County's objection, the Court submitted Instruction No. 13 on Plaintiff's claim for retaliation. The submission of Instruction No. 13 was erroneous for the same reasons the submission of Instruction No. 7 was erroneous.

94. Specifically, Instruction No. 13 instructed the Jury:

> On the claim of plaintiff Keith Wildhaber for retaliation, your verdict must be for plaintiff is you believe:
>
> First, either:
>
> > defendant transferred plaintiff to an undesirable work location, or
> >
> > defendant failed to promote plaintiff, and
>
> Second, either:

> plaintiff filed against defendant a Charge of Discrimination with the Equal Employment Opportunity Commission and/or Missouri Commission on Human Rights, or
>
> plaintiff filed a lawsuit against defendant, and
>
> Third, plaintiff's filing of a Charge of Discrimination or lawsuit was a contributing factor in any one or more of defendant's conduct as submitted in paragraph First, and
>
> Fourth, as a direct result of such conduct, plaintiff sustained damage.

95. In using the same vague language that the County "failed to promote" Plaintiff in retaliation for certain acts, Instruction No. 13, like Instruction No. 7, allowed the Jury a roving commission to find that the County failed to promote Plaintiff without regard to the evidence submitted with respect to each allegedly discriminatory failed promotion. The Jury did not have any way of determining to which alleged failure to promote the instruction was referring.

96. For this reason alone, the County is entitled to a new trial with respect to Plaintiff's retaliation claim under the MHRA (Count II).

G. <u>The Submission of Instruction No. 13 to the Jury was Erroneous Because It Allowed the Jury to Find in Plaintiff's Favor Based on Time-Barred Alleged Failures to Promote</u>.

97. Moreover, because of the roving commission, it is possible that the Jury considered, and rendered its Verdict based on, non-actionable, time-barred promotion denials (*i.e.*, those occurring prior to 180 days before Plaintiff's first charge of discrimination or more than 2 years before Plaintiff commenced suit).

98. Instruction No. 13 also allowed the Jury to evaluate Plaintiff's 2018 promotion denials under the incorrect causation standard, as Plaintiff's promotion denials occurring in 2018

should have been evaluated under the version of the statute that took effect on August 28, 2017, which set forth a motivating factor causation standard for all claims under the MHRA.[17]

99. As a result, the submission of Instruction No. 13 to the Jury constituted prejudicial error for the same reasons as the submission of Instruction No. 7. The County is entitled to a new trial on Plaintiff's MHRA retaliation claim (Count II).

H. <u>The Submission of Instruction No. 13 Was Erroneous Because It Allowed the Jury to Find in Plaintiff's Favor Based on a Transfer that Plaintiff Testified He Requested</u>.

100. Instruction No. 13 was erroneous for additional and distinct reasons. Specifically, Instruction No. 13 used vague language that allowed the Jury a roving commission to find that "defendant transferred plaintiff to an undesirable work location." There was, however, evidence adduced at trial that Plaintiff was transferred both ***to*** and ***from*** the Jennings precinct. Instruction No. 13 should have set forth each specific transfer that Plaintiff claimed was retaliatory.

101. This error was undeniably consequential, particularly because Plaintiff explicitly testified that he requested a transfer from the Jennings precinct. (Tr. 819:12-25.)

102. Because Instruction No. 13 allowed the Jury a roving commission, it is not clear whether the Jury considered the transfer ***Plaintiff requested*** to be retaliatory.[18]

103. As a result, the County is entitled to a new trial on Plaintiff's MHRA retaliation claim (Count II).

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[17] Again, to the extent Plaintiff based his claim solely on the final denial of promotion in 2018, then instructional error necessarily still exists based on the applicable causation standard set forth in Instruction No. 13, *i.e.*, motivating factor as opposed to contributing factor. Mo. Rev. Stat. § 213.010(2) (2019). As discussed *infra* in the County's Motion for Remittitur, the MHRA's damages cap also necessarily applies. Mo. Rev. Stat. § 213.111.4 (effective August 28, 2017).

[18] As discussed *supra*, substantial evidence does not support Plaintiff's claim based on his transfer ***to*** the Jennings precinct, either.

I. The Submission of Instruction No. 13 Was Erroneous Because It Allowed the Jury to Find in Plaintiff's Favor Based on a Transfer to an Unspecified, "Undesirable Work Location."

104. Additionally, irrespective of the lack of specificity with respect to the transfer, Instruction No. 13 was also impermissibly vague because it allowed the Jury to speculate as to what would constitute an "undesirable work location." *Coon*, 46 S.W.3d at 93 (noting that an instruction is a roving commission "when it is too general or where it submits a question to the jury in a broad, abstract way without any limitation to the facts and law developed in the case.").

105. For this reason alone, the County is entitled to a new trial with respect to Plaintiff's MHRA retaliation claim (Count II).

J. The Submission of Instruction No. 13 Was Erroneous Because It Did Not Require the Jury to Find that Plaintiff Had a Reasonable, Good Faith Belief that the Conduct He Opposed in his Unspecified Charges of Discrimination or this Lawsuit Was Actually Unlawful.

106. Instruction No. 13 was further erroneous because it did not require the Jury to find that Plaintiff had a reasonable, good faith belief that the conduct he opposed violated the MHRA, as required to prevail on a claim for retaliation under the MHRA. *See Mignone*, 546 S.W.3d at 37-38 ("Under Missouri law, it is unnecessary for a plaintiff claiming retaliation to prove that the conduct they opposed was actually unlawful. Instead, a plaintiff need only have 'a reasonable good faith belief that there were grounds for the claim of discrimination or harassment'" ***and "the verdict director . . . must instruct the jury to find all . . . of . . . [the] elements to find for the plaintiff.***" (alterations in original) (emphasis added)).

107. As a result, the County is entitled to a new trial with respect to Plaintiff's MHRA retaliation claim (Count II).

K. <u>The Disjunctive Form of Instruction No. 13 Requires a New Trial on Plaintiff's MHRA Retaliation Claim (Count II) for Any Single Error Set Forth Herein</u>.

108. Each of the errors set forth herein requires a new trial because Instruction No. 13 was submitted to the Jury in the disjunctive (*e.g.*, transferred to an undesirable work location *or* failed to promote, and filing a charge of discrimination *or* a lawsuit). *See Kader*, 565 S.W.3d at 190 (reversing and remanding for new trial where jury instructions on retaliation claim were phrased in the disjunctive, one alternative of which was not actionable conduct); *Ross-Paige v. Saint Louis Metro. Police Dep't*, 492 S.W.3d 164, 176 (Mo. banc 2016) ("While it is clear the jury found in [the plaintiff's] favor on at least one of the disjunctive theories …, there is no way of discerning which theory the jury chose. Consequently, this Court cannot rule out the possibility that the jury improperly returned its verdict upon a theory that was not supported by substantial evidence and that misdirected or confused the jury".).

109. As the Court of Appeals has explained:

> To submit a claim to the jury, substantial evidence must support each element of a disjunctive jury instruction. "Furthermore, in cases involving disjunctive instructions[,] each alternative claim . . . must be able to stand alone and there must be sufficient evidence to support each allegation." "***If there is not substantial evidence for each disjunctive element, the submission of the entire instruction is in error.***"

BMK Corp., 226 S.W.3d at 189 (second alteration in original) (emphasis added) (citations omitted). Here, the disjunctive instruction (*e.g.*, transferred to an undesirable work location *or* failed to promote, and filing a charge of discrimination *or* a lawsuit) made it impossible to discern which theory the Jury chose and, importantly, whether the Jury based its verdict on a theory that was not supported by substantial evidence.

110. As a result, the submission of Instruction No. 13 to the Jury constituted prejudicial error because it allowed the Jury a roving commission to find that "defendant transferred plaintiff

to an undesirable work location" without regard to the evidence, without guidance as to what constitutes an "undesirable work location," and because it was submitted in the disjunctive.

L. The County is Entitled to a New Trial Because Instructions Nos. 7 and 13 Misdirected and Confused the Jury by Improperly Allowing Plaintiff a Double Recovery for the Same Alleged Injury.

111. Instructions Nos. 7 and 13 are erroneous because both instructions allowed the Jury to find that Plaintiff was entitled to recovery because of the County's "fail[ure] to promote" Plaintiff, which resulted in a possible double recovery for the exact same harm.

112. As the Court of Appeals has explained:

> [A] party may not recover duplicative damages for the same wrong. While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of a double recovery, which is a species of unjust enrichment and is governed by the same principles of preventive justice.

Echols v. City of Riverside, 332 S.W.3d 207, 212 (Mo. Ct. App. 2010) (alteration in original) (citation omitted).

113. In this respect, *R.J.S. Security, Inc. v. Command Security Services, Inc.*, is instructive. There, the plaintiff submitted to the jury verdict directors for two separate theories of liability (fraud and breach of express representation) based on the same alleged act—namely, that the defendant had misrepresented the amount of the insurance premiums that would be incurred by the plaintiff. 101 S.W.3d 1, 17 (Mo. Ct. App. 2003). The trial court entered judgment in favor of the plaintiff on both claims, but barred recovery on the second theory of liability—the breach of express representation—on the grounds that it was based on the same theory as the fraud claim. *Id.*

114. On appeal, the plaintiff argued that the court should not have barred recovery on the second theory of liability. *Id.* The Court of Appeals disagreed, explaining that, "the court did not err in allowing one recovery for the same wrong," *i.e.*, the trial court correctly barred the

plaintiff from recovering duplicative damages on the same operative facts submitted under different theories. *Id.*

115. Here, the submission of the vague language that "Defendant failed to promote Plaintiff" on Instructions Nos. 7 and 13 impermissibly allowed Plaintiff a double recovery on the same operative factual allegations.

116. For this additional reason, the County is entitled to a new trial.

VII. THE COUNTY IS ENTITLED TO A NEW TRIAL BECAUSE THE COUNTY WAS UNFAIRLY PREJUDICED BY CERTAIN EVIDENTIARY AND OTHER RULINGS, INCLUDING THE ADMISSION OF TESTIMONY OF OTHER INDIVIDUALS REGARDING OTHER ALLEGED INSTANCES OF SEXUAL ORIENTATION DISCRIMINATION, THE ADMISSION OF IRRELEVANT, HEARSAY STATEMENTS, AND THE COUNTY'S INABILITY TO CORRECT PLAINTIFF'S MISSTATEMENTS OF LAW, AND OTHERWISE DID NOT SATISFY PLAINTIFF'S BURDEN.

A. The County Is Entitled to a New Trial Because the County Was Unfairly Prejudiced by the Admission of Testimony of Other Individuals Regarding Other Alleged Instances of Sexual Orientation Discrimination.

117. At trial, Plaintiff was permitted to elicit testimony from Mary Beth Ruby and Sergeant Jennifer Williams regarding the alleged sexual orientation discrimination they (or in the case of Sergeant Williams, her daughter) faced as police officers employed by the County. For the reasons previously stated in the County's First Motion *in Limine* regarding the admission of such evidence, which are incorporated again herein, the testimony was inadmissible.

118. As an initial matter, and as addressed herein, Plaintiff should not have been allowed to present any testimony as to sexual orientation discrimination. In this regard, these witnesses did not offer testimony on, for example, non-compliance with sex stereotypes.

119. Moreover, alleged treatment of other employees in different circumstances, and involving different decision makers, was wholly irrelevant as it has no tendency to prove that the County discriminated or retaliated against Plaintiff. This evidence was highly prejudicial, and its

admission ultimately resulted in multiple mini-trials on a claim that is not cognizable under Missouri law.

120. Evidence that is not both logically and legally relevant to prove a proposition that is material to the case should be excluded from trial. *Medley v. Joyce Meyer Ministries, Inc*., 460 S.W.3d 490, 495 (Mo. Ct. App. 2015). Evidence is logically relevant if it tends to prove or disprove a fact in issue. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 185-86 (Mo. Ct. App. 2012). Evidence is legally relevant where its probative value outweighs its prejudicial effect. *Medley*, 460 S.W.3d at 495. Irrelevant and immaterial evidence should be excluded because its admission has a tendency to draw the jury's attention away from the issues it has been called to resolve. *Barr v. Plastic Surgery Consultants, Ltd*., 760 S.W.2d 585, 588 (Mo. Ct. App. 1988). Moreover, the character of a party is generally irrelevant in a civil action as it "distracts from the main issues and also carries the danger of prejudice and surprise." *Gamble v. Hoffman*, 732 S.W.2d 890, 893 (Mo. banc 1987).

121. The Missouri Supreme Court's ruling in *Cox v. Kansas City Chiefs Football Club, Inc.* does not change this standard or somehow require the Court to admit Plaintiff's proffered testimony. In *Cox*, the plaintiff alleged a company-wide policy of discrimination executed over a several months-long period of time before and after his termination. The Court held that evidence offered by several employees who, like the plaintiff, were older than 40 and terminated within a three-year time period and replaced by younger workers was admissible as the circumstances surrounding the terminations were sufficiently similar. Notably, these workers were terminated directly or indirectly by the same decision maker who terminated the plaintiff. Thus, Cox involved the same decision (termination), by the same decision-maker, over a close period in time. 473 S.W.3d 107, 111 (Mo. banc 2015).

122. Here, neither Ms. Ruby nor Sergeant Williams offered testimony in any way relevant to Plaintiff's claims of sex discrimination, as it relates to denied promotions by Chief Belmar or otherwise.

123. This testimony also was erroneously admitted because it was wholly irrelevant and highly prejudicial to the County. *See State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 827 (Mo. banc 1995); *Still v. Ahnemann*, 984 S.W.2d 568, 573 (Mo. Ct. App. 1999).

124. For all these reasons, the County is entitled to a new trial on both of Plaintiff's claims.

B. <u>The Court Improperly Admitted Multiple Hearsay Statements, and the Unfair, Prejudicial Effect of Those Statements Was Significant and Requires a New Trial</u>.

125. The undisputed record evidence in this case, including Plaintiff's own testimony, demonstrates that Chief Jon Belmar was the sole decision-maker in each of the twenty-three promotional decisions about which Plaintiff complained. (*See, e.g.,* Plaintiff's testimony at Tr. 199:17-200:14.)

126. In its Second Motion *in Limine*, the County sought to exclude hearsay statements of Board of Police Commissioner John Saracino, retired Lieutenant Colonel Terry Roberds, and others who had no role in the decision to promote Plaintiff.

127. Nevertheless, the Court denied the County's Second Motion *in Limine* and, over the County's objections, the Court allowed Plaintiff to testify about the following alleged out-of-court comments:

a. Plaintiff testified that Mr. John Saracino (a non-employee, civilian Police Board Commissioner) told him, "Keith, the command staff has a problem with your sexuality. If you ever want to see a white shirt, you need to tone down your gayness." (Tr. 83:11-13); and

b. Plaintiff testified that retired Lieutenant Colonel Roberds told him at a retirement party, "Keith, the biggest mistake you made in your career was coming out of the closet." (Tr. 89:14-17.)

128. The record evidence established that neither Mr. Saracino nor Mr. Roberds had anything to do with promotional decisions to the position of Lieutenant in the police department, much less with the decisions about which Plaintiff complains. Indeed, Mr. Saracino was a civilian, non-employee who was not regularly involved in day-to-day administration in the police department, and Mr. Roberds was no longer a St. Louis County employee at the time he allegedly made the comment. Plaintiff did not contend and could not establish that these isolated, out-of-court comments were somehow attributable to Chief Belmar, or to St. Louis County, generally.

129. The Court also allowed Mary Beth Ruby to testify about out-of-court statements that she attributed to Lieutenant Colonel Gregory, without foundation or context; she testified that, on an unspecified date in 2015, she heard Lieutenant Colonel Gregory say in a purported conversation with "another [unidentified] member of command staff" that "The Bible says [homosexuality] is an abomination." (Tr. 321:15-23.) There is no evidence that Lieutenant Colonel Gregory had any contact with Plaintiff, and certainly he had no role in the promotional processes at issue. His alleged, isolated and out-of-court statement had no bearing on the claims in this case.

130. These hearsay statements should have been excluded, as the County argued *in limine*.

131. "When a witness offers the out-of-court statements of another person to prove the truth of the matter asserted in the statement, the testimony is hearsay." *Mason v. Wal-Mart Stores, Inc.*, 91 S.W.3d 738, 743 (Mo. Ct. App. 2002). "Hearsay is generally excluded because the out-

of-court statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made." *Id*. The burden is on the party attempting to introduce the hearsay to establish some exception, and foundation on which it may be introduced. *State v. Huckleberry*, 544 S.W.3d 259, 261 (Mo. Ct. App. 2017).

132. Plaintiff did not meet his burden here, and these statements should not have been admitted. These statements do not qualify, as Plaintiff contended, as "statements against interest" or some sort of evidence of "subsequent conduct" because they were not made by the sole decision-maker, Chief Jon Belmar, whose mind set and conduct were at issue in this case. (*See, e.g.*, Plaintiff's response to objections at Tr. 83:1-17.) Moreover, they were not against the speakers' pecuniary interest, and did not expose the speakers to civil or criminal liability, and the "subsequent conduct" of Mr. Saracino, retired Lieutenant Colonel Roberds, and Lieutenant Colonel Gregory was never at issue in this case. These purported, hearsay statements do not qualify for any exception to the prohibition on hearsay, and they should not have been admitted. *See Kerr*, 512 S.W.3d at 810-811 (holding that an out-of-court statement *attributable to the decision-maker* allegedly demonstrating his age-based bias was inadmissible hearsay and lacked foundation). They were isolated, stray remarks, allegedly made by a non-employee civilian commissioner, a retired officer, and a lieutenant colonel who had no relationship to Plaintiff. They were not attributable to Chief Belmar, and provided no insight into the promotional decisions at issue in this case.

133. Moreover, these statements had no probative value and were highly and unfairly prejudicial. As discussed *supra*, Plaintiff pursued a sex discrimination claim in this case, and statements that purported to establish some type of anti-gay attitude among certain officers confused the Jury as to the nature of the claim asserted, and unfairly influenced jurors who may

have found the irrelevant statements offensive. Plaintiff improperly seized on the prejudice these alleged comments generated; he repeatedly recited Mr. Saracino's, Mr. Roberds', and Mr. Gregory's purported statements in his opening and closing arguments. (*See, e.g.*, Tr. at 12:20-23; 16:13-15; 17:19-20; 822: 23-25; 828: 21-22; 834:3-5.) They became flash points in his case. These isolated, hearsay comments allowed the Jury to improperly infer—without any foundation or opportunity for the County to confront the declarant—that the County held some sort of bias against Plaintiff, even though they were completely disconnected from Chief Belmar, the sole decision-maker here.

134. Admission of this prejudicial hearsay evidence affected the outcome of trial. A new trial should be granted.

C. The County Is Entitled to a New Trial Because the Court Improperly Granted Plaintiff's Fifth Motion *in Limine*, which Prohibited the County from Arguing to the Jury that the Evidence Adduced at Trial Did Not Satisfy Plaintiff's Burden of Proving, *Inter Alia*, Sex Discrimination, and Because the Unfair Prejudice to the County Was Compounded by Plaintiff's Counsel's Legal Arguments to the Jury, which the County Was Precluded by Court Order from Rebutting.

135. In addition, prior to trial, the Court granted Plaintiff's Fifth Motion *in Limine*, in which Plaintiff sought to preclude the County from making any argument to the Jury regarding what findings would be required in order for Plaintiff to prevail on his sex discrimination claim. The County was precluded from advising the Jury that discrimination based on Plaintiff's sexual orientation would not satisfy the second component of Instruction No. 7.

136. "In general, under Missouri law, it is not the prerogative of counsel to inform the jury as to the substantive law of the case, . . . or to read the statutes to the jury. . . . It is improper for counsel to argue questions of law not within the issues, or inconsistent with the instructions of the court, . . . or to present false issues." *State v. Jordan*, 646 S.W.2d 747, 751 (Mo. banc 1983) (alterations in original) (citation omitted); *accord State v. Oates*, 12 S.W.3d 307, 312 (Mo. banc

2000). "However, the general rule does not forbid all mention of the law in argument." *Jordan*, 646 S.W.2d at 751; *State v. Corpier*, 793 S.W.2d 430, 444 (Mo. Ct. App. 1990). "While it is improper for counsel to define the law, it is not error for counsel to discuss the law without defining it." *Jordan*, 646 S.W.2d at 751 (citation omitted); *accord Corpier*, 793 S.W.2d at 444. "Certainly counsel may argue the facts as they pertain to the law declared in the instructions of the court." *Jordan*, 646 S.W.2d at 751; *accord State v. Giannico*, 642 S.W.2d 651, 654 (Mo. banc 1982).

137. The County was improperly precluded from arguing to the Jury what evidence could or could not satisfy Plaintiff's burden relating to whether or not Plaintiff's sex was (at least) a contributing factor in the promotional decisions at issue. The prejudice to the County was unfairly compounded by, among other things, Plaintiff's counsel's closing argument:

> "You know what's going on here, folks: sex stereotyping. They have installed a glass ceiling that prevents Keith from advancing his career because he is too gay to fit a stereotype. ***It's against the law. It's against the law.***"

(Tr. 823:16-20 (emphasis added).) In other words, Plaintiff expressly, and inaccurately, argued the law. The County was prohibited from discussing the matter entirely, as the County obeyed the Court's Order.

138. The County was further prejudiced in this regard with respect to Plaintiff's retaliation claim, in that the County was necessarily precluded from arguing whether Plaintiff had a good faith, reasonable belief regarding whether his allegation of discrimination was protected under the MHRA. Again, the County was unfairly prejudiced, and the Jury was unnecessarily confused, in this regard.

139. As a result, the County is entitled to a new trial on both of Plaintiff's claims.

D. <u>The County Is Entitled to a New Trial Based on the Court's Other Erroneous, Additional Evidentiary Rulings, which Unfairly and Unduly Prejudiced the County</u>.

140. In addition to the foregoing, the Court erred in denying the following Motions *in Limine* of the County, which denials resulted in the introduction of inadmissible evidence that substantially and unfairly prejudiced the County, thus necessitating a new trial:

a. The County's Second Motion *in Limine* regarding Plaintiff's introduction of unrelated and/or irrelevant statements of alleged discrimination;

b. The County's Fourth Motion *in Limine* regarding introduction of a notation on a St. Louis County Police Department Collaborative Reform Initiative Process Assessment Log;

c. The County's Fifth Motion *in Limine* regarding witnesses statements as to their subjective beliefs or speculation as to whether Defendant engages in alleged discriminatory and/or retaliatory practices;

d. The County's Sixth Motion *in Limine* regarding introduction of evidence associated with Chief Jon Belmar's sentencing letter on behalf of Michael Saracino, Jr., and any resulting discipline to Chief Belmar;

e. The County's Seventh Motion *in Limine* regarding introduction of unprofessional and offensive statements made by instructors employed by Asymmetric Solutions during training sessions of St. Louis County Police Department personnel;

f. The County's Ninth Motion *in Limine* regarding evidence of prior lawsuits or arbitrations against and/or settlements with Defendant;

g. The County's Tenth Motion *in Limine* regarding testimony and/or evidence from former Captain Chris Stocker of the St. Louis County Police Department;

h. The County's Twelfth Motion *in Limine* regarding reference to the financial disparity of the parties or the source of any award for damages;

i. The County's Thirteenth Motion *in Limine* regarding testimony and/or evidence from Mary Beth Ruby and Donna Woodland; and

j. The County's Fourteenth Motion *in Limine* regarding testimony and/or evidence of affidavits signed by Mary Beth Ruby and Michael Clinton.

141. As a result, the County is entitled to a new trial on both of Plaintiff's claims.

E. Plaintiff's Misstatements of Law and Fact During Closing Arguments Necessitate a New Trial.

142. In closing argument, Plaintiff repeatedly stated that discrimination based on sexual orientation or "sex stereotyping" constitutes actionable, unlawful discrimination under the MHRA. (*See, e.g.*, Tr. 823:16-20 ("[The County] installed a glass ceiling that prevents Keith from advancing his career because he is too gay to fit a stereotype. It's against the law. It's against the law."); Tr. 846:20-24).

143. "[M]isstatements of law are impermissible during closing argument, and a positive and absolute duty, as opposed to a discretionary duty, rests upon a trial judge to restrain such arguments." *Langdon v. Wight*, 821 S.W.2d 508, 511 (Mo. Ct. App. 1991) (alteration in original) (internal quotations and citations omitted); *see also Bradley v. Waste Mgmt.*, 810 S.W.2d 525, 528 (Mo. Ct. App. 1991) (reversing a jury verdict and commenting "[m]isstatements of law are impermissible during closing argument and a trial court has the duty, not discretion, to restrain and purge such arguments"); *Dorris v. Zayre Corp.*, 619 S.W.2d 326, 328 (Mo. Ct. App. 1981) ("[P]laintiff's counsel's closing argument compounded the error by encouraging the jury to make the defendant 'pay' for this 'very, very malicious act' . . . . This argument tended to give the impression that a definition different than that contained in MAI 16.01 should be employed in

determining whether defendant acted maliciously. Having considered the totality of the circumstances, including the above, we hold that the omission of MAI 16.01 was prejudicial."); *Hill v. Barton*, 579 S.W.2d 121, 126-27 (Mo. Ct. App. 1979) ("We hold defense counsel misstated the law when he told the jury, without qualifications, that neither party could recover if the jury found both were at fault for the accident. . . . The trial court was required to prohibit or correct the improper argument, and failure to do so mandates reversal of the judgment below on plaintiffs' claims."). Plaintiff's misstatement of the elements of Count I, and his inaccurate statement about what discrimination is actionable and unlawful under the MHRA confused and misled the jury, and requires a new trial.

144. Plaintiff also accused Captain Guy Means of committing a crime during his closing argument, which was not a record fact and appears to have been designed to incense the Jury. (Tr. 832:21-834:1; 877:9-12).

145. While counsel, generally, is afforded wide latitude in closing argument to suggest inferences from the evidence, it is impermissible for counsel to go beyond the record or to urge prejudicial matters the law does not support. *Porter v. City of St. Louis*, 552 S.W.3d 166, 174 (Mo. Ct. App. 2018); *see also Williams v. Bailey*, 759 S.W.2d 394, 397-98 (Mo. Ct. App. 1988) ("Defense counsel also made references in closing argument designed to emphasize the evidence of [defendant's] good driving record and good character. Defense counsel's argument exploited improperly admitted evidence for the purpose of eliciting sympathy, thus insuring the prejudicial effect of the evidence."). Over the County's objection, Plaintiff's counsel repeatedly referenced lying, and informed the jury – without support on the record – that a witness had committed a crime. This went beyond permissible comment, and had a significant, prejudicial effect on the Jury. A new trial is warranted.

F. The County Is Entitled to a New Trial Based on the Cumulative Errors Discussed Herein.

146. Each of the errors set forth *supra* independently entitles the county to a new trial. Likewise, these errors cumulatively require a new trial. *See, e.g.*, *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 39 (Mo. Ct. App. 2013) (explaining that cumulative error can warrant a new trial "even without deciding whether any single point would constitute grounds for reversal" (citing *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 536 (Mo. Ct. App. 1991))).

147. The cumulative, prejudicial effect to the County from the errors identified *supra* denied the County the fair trial to which it is entitled.

148. As a result, the County is entitled to a new trial on both of Plaintiff's claims.

VIII. ALTERNATIVELY, IF THE COURT DOES NOT GRANT JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL, THE COURT SHOULD EXERCISE ITS DISCRETION TO REDUCE THE AMOUNT OF DAMAGES AND ATTORNEYS' FEES AWARDED TO PLAINTIFF VIA AMENDED JUDGMENT AND/OR REMITTITUR.

149. The County has moved herein for judgment notwithstanding the verdict and a new trial. If this relief is denied, in the alternative, the Court should order a new trial unless Plaintiff agrees to a remittitur of the excessive award of damages in this action. *See* MO. SUP. CT. R. 78.10(b).

150. "A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." Mo. Rev. Stat. § 537.068.

151. As an initial matter, this Jury's award was improper because the County's conduct did not warrant an award of damages, as Plaintiff failed to make a submissible case on any

cognizable legal theory (as set forth *supra*) and failed to show that any damages were caused by the County's alleged unlawful conduct.

152. Even if damages were appropriate in this case, which the County denies, the award—with respect to both compensatory and punitive damages—is excessive and unreasonable, and requires reversal and a new trial unless Plaintiff agrees to a substantial remittitur.

153. Under Missouri law, excessive verdicts arise in two circumstances: "(1) where the verdict is simply disproportionate to the proof of injury and results from an honest mistake by the jury in assessment of the evidence and, (2) where the verdict's excessiveness is engendered by trial misconduct and thus results from the bias and prejudice of the jury." *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. Ct. App. 1997), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013).

154. As explained *supra* and in support of the County's Motion for Judgment Notwithstanding the Verdict and the County's Motion for New Trial, the record in this case reveals that the Jury's damages award was grossly excessive and based on bias and confusion, requiring a new trial.

155. Alternatively, a disproportionate verdict "may be corrected by an enforced remittitur and does not require a retrial." *Id.*; *see also Stewart v. Partamian*, 465 S.W.3d 51, 59 (Mo. banc 2015). "The trial court has broad discretion in ordering remittitur." *Hill v. City of St. Louis*, 371 S.W.3d 66, 80 (Mo. Ct. App. 2012). "Remittitur relief does not depend upon some trial error or misconduct, but is ordered when the jury errs by awarding a verdict which is simply too bounteous under the evidence to prevent injustice." *Moore v. Mo.-Neb. Express, Inc.*, 892 S.W.2d 696, 714 (Mo. Ct. App. 1994). Remittitur is an equitable remedy whereby a trial court may order a reduction of a damages award to produce "equitable compensation, to bring jury verdicts in line

with prevailing awards, and to eliminate the retrial of lawsuits." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 175 (Mo. Ct. App. 1997), *overruled on other grounds by Badahman*, 395 S.W.3d 29.

156. In this case, Plaintiff testified that he incurred $165,000 in actual damages, and further sought damages for garden variety emotional distress. The Jury's Verdict awarded $2,970,000 in compensatory damages, *i.e.*, $165,000 in actual damages and $2,805,000 in emotional distress damages. Remittitur is necessary to bring the Jury's Verdict in alignment with, among other things, prevailing awards, and to conform to the evidence.

A. <u>The Monetary Damages Awarded on October 25, 2019, as Set Forth in the November 22, 2019 Amended Judgment and Order, Should be Remitted to Comply with the Caps Set Forth in Section 213.111.4</u>.

157. Section 213.111.4 of the MHRA provides, as relevant here, that "[t]he sum of the amount of actual damages, including damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and punitive damages awarded under this section shall not exceed for each complaining party: (1) Actual back pay and interest on back pay; and . . . [2](d) In the case of a respondent who has more than five hundred employees in each of twenty or more calendar weeks in the current or preceding calendar year, five hundred thousand dollars." Mo. Rev. Stat. § 213.111.4. These limitations on damages took effect on August 28, 2017.

158. Plaintiff submitted evidence to the Jury of the County's alleged failure to promote him, which he claims last occurred on October 10, 2018 (for which he claims he was issued the right to sue on May 2, 2019), and which he claims continued through the date of trial (Tr. 121:14 – 122:14).

159. As discussed *supra*, neither Instruction No. 7 nor Instruction No. 13 specified dates of any alleged denied promotion. Accordingly, given that the last alleged denied promotion occurred on October 10, 2018 and that Plaintiff claimed the discrimination continued through trial, Plaintiff's claims are subject to the damages caps set forth in Section 213.111.4. The damages award cannot exceed an amount equal to actual back pay (*i.e.*, a maximum of $45,000 (*see* Tr. 176:17-177:7)) and interest plus $500,000. *See Red Dragon Restaurant*, 991 S.W.2d at 166-70 (noting that the law applicable to the plaintiff's MHRA claims was the law in effect at the time of the plaintiff's alleged injury); *see also Bram*, 564 S.W.3d at 795 (Mo. Ct. App. 2018) (holding that the law applicable to an MHRA claim was the law in effect at the time of the alleged discrimination); *Folsom*, 580 S.W.3d at 650 n. 1 (same).

160. As a result, the Court should order a new trial unless Plaintiff agrees to an amended judgment remitting any monetary award in compliance with the limitations set forth in Section 213.111.4.

B. <u>The Compensatory Damage Awards Were Excessive, Duplicative, and Improperly Included Future Pay Components</u>.

161. If judgment notwithstanding the verdict and a new trial are denied in this case, the compensatory damages awarded to Plaintiff were excessive and should be remitted to a reasonable amount. Even if some compensatory damage amount could be appropriate, which the County denies, the awards here were not supported by substantial evidence at trial. Plaintiff submitted to the Jury that his "***total*** economic damages," based exclusively on his calculation, were $165,000. (Tr. 176:12-178:16; 847:17-19 (emphasis added).) Plaintiff provided only limited testimony of any emotional harm. There was no evidence that he ever sought any treatment. The evidence does not support an award of $1,980,000 on Count I and $990,000.00 on Count II in compensatory damages. The compensatory damages should be remitted on this basis alone.

162. As explained *supra*, Instructions Nos. 7 and 13 asked the Jury to compensate Plaintiff for the County's allegedly unlawful failure to promote him. In both counts submitted to the Jury, Plaintiff asked for compensation for the same alleged injury, an unspecified lost promotion, in the form of lost salary, lost vacation pay, reduced retirement benefits, and emotional distress. ***Indeed, in his closing argument, Plaintiff explained that in Count II he sought the "same kind of stuff" he sought in Count I, "the economic damages resulting from being denied promotions."*** (Tr. 850:24-851:5 (emphasis added).)

163. Accordingly, this Court should grant the County's Motion for New Trial; alternatively, and while granting a new trial is the appropriate remedy, the Court should, if nothing else, substantially remit the compensatory damages awards to mitigate this prejudicial, admitted double compensation.

164. Plaintiff testified that he believed that retirement benefits in the future might somehow be affected by the County's allegedly discriminatory or retaliatory failure to promote him because, in the future, he might retire as a sergeant rather than a lieutenant. (Tr. 177:19-178:14; 847:10-16.) This is highly speculative; there was not sufficient evidence to support this allegation as a component of damages. Moreover, this invited the Jury to improperly include their calculation of future lost wage and benefit damages, which is impermissible under the MHRA; the issue of front pay in lieu of reinstatement/promotion are exclusively for the Court—not the Jury. *See Brady*, 213 S.W.3d at 113. Plaintiff knows this and sought *in limine* to preclude this from trial.

C. <u>The Court Should Enter an Amended Judgment Reducing the Attorneys' Fees Awarded to Plaintiff Because Plaintiff Was Not Entitled to a Lodestar Multiplier</u>.

165. As discussed at length in the County's Opposition to Plaintiff's Motion for Attorneys' Fees and Costs and the County's Supplemental Memorandum in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs, Plaintiff was not entitled to a multiplier on his lodestar attorneys' fees calculation.

166. Underpinning Plaintiff's requested multiplier was the concept that, absent a multiplier, Plaintiff's counsel will not be fairly incented or rewarded for their efforts in this case. However, Plaintiff's counsel would receive a significant fee—based on the current damages award in this case. As set forth in the Affidavit of Russell C. Riggan, attached to Plaintiff's Motion for Attorneys' Fees and Costs (at Paragraph 11 therein), Plaintiff's attorneys will be paid on a contingency. This was confirmed in the fee agreement produced at the hearing which the Court reviewed, and which was requested to be filed under seal in connection with the County's Supplemental Memorandum in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs.

167. Plaintiff's counsel does not need—as incentive, reward, or otherwise—an additional $336,765.00. Judge Ohmer of the Circuit Court of the City of St. Louis, Missouri recently reached the same conclusion in rejecting the Plaintiff's request for a multiplier in *McGaughy v. Laclede Gas Co.*, 1622-CC00315, Final Post-Trial Order and Amended Judgment (22nd Cir. Ct. Jan. 4, 2019). In *McGaughy*, the plaintiff was awarded $8.5 million in damages. In rejecting the plaintiff's request for a fee multiplier, Judge Ohmer specifically observed that the plaintiff's counsel had been retained on a contingency basis in which counsel would be compensated based upon a percentage of the total judgment and not limited by the fee award. (*See id.*, ¶ 9.)

168. The same analysis and result should obtain here.

169. For the foregoing reasons, the County respectfully requests that, in the event the Court does not grant judgment notwithstanding the verdict or a new trial, the Court nonetheless amend and/or remit the attorneys' fees and costs previously awarded to Plaintiff. Reducing for certain unrecoverable paralegal time and the erroneously granted 2.0 multiplier, the amended award of attorneys fees' would be $334,277.50, and the amended costs and expenses award would be $7,896.67.

D. <u>The Punitive Damages Award Must Be Remitted To Conform to the Evidence and To Comply with Statutory Caps and Constitutional Limits</u>.

170. Likewise, this Jury's punitive damages award was improper because the evidence adduced at trial did not support an award of punitive damages. Even if punitive damages could be appropriate in this case, which the County denies, the award is excessive and unreasonable, and requires reversal and a new trial unless Plaintiff agrees to a substantial remittitur of the punitive damages award. Moreover, the punitive damages award must be remitted to conform with statutory caps and constitutional limits.

171. As set forth *supra*, Plaintiff failed to introduce sufficient evidence to support a claim of sex discrimination or retaliation. Likewise, plaintiff failed to adduce clear and convincing evidence needed to allow a reasonable juror to conclude that it is highly probable that the County's conduct was outrageous because of evil motive or reckless indifference to Plaintiff's rights.

172. Assuming *arguendo* that some award of punitive damages was proper, which the County denies, the Court should remit the punitive damages award as excessive. In *Hill v. City of St. Louis*, the plaintiffs presented evidence that white deputies used racial slurs in addressing African-American deputies, and that a white supervisor hung up a hangman's noose in the plaintiffs' building. The jury returned a verdict of $25,000 in actual damages for one plaintiff,

$125,000 in actual damages for the other plaintiff, and $350,000 in punitive damages for each plaintiff. 371 S.W.3d at 70. The trial court found the punitive damages awards were "excessive and shock the conscience," and ordered remittitur down to $75,000 in punitive damages for each plaintiff. *Id.* at 80. The Court of Appeals affirmed, holding that "[t]he $75,000.00 in punitive damages awarded to each plaintiff is warranted to deter future workplace harassment, but is not so excessive as to shock the conscience." *Id*.

173. Recent reported punitive damage awards in Missouri employment cases are far smaller than what was awarded here, and show that the damages awarded here are excessive, including:

a. $230,000 in compensatory damages and $576,075 in punitive damages, *Baldridge v. Kansas City Pub. Sch.,* 552 S.W.3d 699 (Mo. Ct. App. 2018) (dismissal of longtime school guidance counselor);

b. $1.2 million in actual damages and $1.5 in punitive damages on claims of age and sex discrimination, $100,000 in actual damages and $75,000 in punitive damages on a claim of retaliation, *Kerr v. Mo. Veterans Comm'n,* 537 S.W.3d 865 (Mo. Ct. App. 2017) (dismissal of state official);

c. $500,000 in actual damages and $1 million in punitive damages, *Hesse v. Mo. Dep't of Corr.,* 530 S.W.3d 1 (Mo. Ct. App. 2017) (gender harassment and retaliation claims of prison employee);

d. $50,000 in compensatory damages and $37,500 in punitive damages, *Turner v. Kansas City Pub. Sch.*, 488 S.W.3d 719 (Mo. Ct. App. 2016) (age and retaliation claims of school secretary);

e. $75,000 in compensatory damages and $1 million in punitive damages, *Diaz v. Autozoners*, LLC, 484 S.W.3d 64 (Mo. Ct. App. 2015) (hostile work environment and retaliation);

f. $200,000 in compensatory damages and $2 million in punitive damages, *Ellison v. O'Reilly Auto. Stores, Inc*., 463 S.W.3d 426 (Mo. Ct. App. 2015) (disability discrimination);

g. $50,000 in compensatory damages and $500,001 in punitive damages, *Bowolak v. Mercy E. Communities*, 452 S.W.3d 688 (Mo. Ct. App. 2014) (disability discrimination).

174. These cases demonstrate that the punitive award against the County is excessive and should be remitted.

175. Additionally, if this Court determines that the compensatory damages are not subject to the limitations set forth in Section 213.111.4, effective August 28, 2017 (which the County disputes), then the Court nevertheless should remit any punitive damages award to comply with the statutory cap. *See Vaughan v. Taft Broad. Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. Ct. App. 1983) ("Our research has . . . surfaced three cases where legislation precluding punitive damages in a situation akin to that we have before us where the courts held that prior to entry of judgment no plaintiff has a vested right to punitive damages and a statute precluding an award of punitive damages may constitutionally be applied retroactively."); *but see Contra Dixson v. Mo. Dep't of Corrections*, WD 81804, 2019 WL 3294205, at *5 (Mo. Ct. App. July 23, 2019) (reasoning that there was no way to separate the limitations in 213.111.4 to apply only to punitive damages award and affirming the trial court's decision not to apply the caps in that case).

176. Further, in connection with the reduction in attorneys' fees awarded as discussed *supra*, the punitive damages award in this case must be reduced in accordance with Section 510.265, which provides: "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant." Mo. Rev. Stat. § 510.265.1.

177. For the reasons set forth in the County's Motion to Adjudicate/Dismiss Plaintiff's Claims for Equitable Relief, the November 22, 2019 "Amended Order and Judgment" does not constitute a judgment under Rule 74.01. However, if the relief awarded therein should stand, which the County disputes, the Court should amend and/or remit its Amended Judgment and Order to remove the 2.0 multiplier for attorneys' fees, upon which the punitive damages award must be remitted from $17,000,000.00 to $16,521,387.50 or less in order to comply with the statutory standard.

178. Finally, the punitive awards in this matter are so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, under principles articulated by the U.S. Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

179. In reviewing a punitive damages award for excessiveness, due process and reasonableness requirements compel consideration of the degree of reprehensibility of the defendant's conduct, the relationship between the punitive damages award and the harm or potential harm suffered by the plaintiff, and the difference between the award and the civil penalties authorized or imposed in comparable cases. *Letz*, 975 S.W.2d at 177-78; *BMW*, 517 U.S. at 574-575. Missouri courts have considered the following additional factors in determining the

propriety of a punitive award: (1) aggravating and mitigating circumstances surrounding the defendant's conduct; (2) the degree of malice or outrageousness of the defendant's conduct; (3) the defendant's character, financial worth, and affluence; (4) the age, health, and character of the injured party; (5) the nature of the injury; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and trial court to appraise the plaintiff's injuries and other damages. *Letz*, 975 S.W.2d at 178; *see also Alcorn v. Union Pacific R.R.*, 50 S.W.3d 226 (Mo. banc 2001), *overruled on other grounds by Badahman*, 395 S.W.3d 29 ($140 million punitive award remitted by trial court to $50 million and then reversed outright by Supreme Court).

180. The punitive damages awarded in this case against the County are grossly excessive and should be substantially remitted. The factors supporting remittitur include the following:

a. The first two factors—aggravating and mitigating circumstances and the degree of malice and outrageousness of the defendants' conduct—warrant a substantial remittitur. *Letz*, 975 S.W.2d at 178.

b. The sixth factor (awards approved and given in comparable cases) also weighs in favor of remittitur (*see* cases cited *supra*). Even if the evidence could somehow support submitting the claim for punitive damages against the County, the evidence does not support punitive damages of $10 million on Count I and $7 million on Count II.

181. For all these reasons, in the event the Court does not grant the County's Motion for Judgment Notwithstanding the Verdict or the County's Motion for New Trial, the Court should exercise its discretion to reduce the amount of damages awarded.

IX. CONCLUSION

WHEREFORE, Defendant St. Louis County, Missouri respectfully requests this Court sustain its Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for New Trial or Remittitur, and/or Motion to Amend the Judgment, and prays for such other and further relief as this Court deems just and proper.

Respectfully submitted,

LEWIS RICE LLC

Dated: November 25, 2019

By: /s/ Neal F. Perryman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via the Court's electronic filing system on this 25th day of November, 2019, on counsel of record. In addition, the undersigned certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of foregoing and this Certificate.

/s/ Neal F. Perryman