In the Missouri Court of Appeals
Eastern District

DIVISION ONE

LI LIN, Respondent, vs. MATTHEW J. ELLIS, defendant, and THE WASHINGTON UNIVERSITY IN SAINT LOUIS, Appellant.	))))))))))	No. ED105886 Appeal from the Circuit Court of the City of St. Louis Honorable Christopher M. McGraugh Filed: November 13, 2018

OPINION

Washington University appeals from the judgment of the trial court entered after a jury verdict in favor of Dr. Li Lin ("Dr. Lin"), finding Washington University liable for retaliatory discharge, in violation of Section 213.070(2)[1] of the Missouri Human Rights Act ("MHRA"), for discharging Dr. Lin after she repeatedly requested work restrictions as an accommodation for back pain caused by herniated disks.[2] Although Washington University raises five points on appeal, we need only address Points I, III, and IV, in which Washington University argues: Dr. Lin failed to present a submissible case because requesting an accommodation for a disability is

[1] All statutory references are to RSMo (2000), unless otherwise indicated.

[2] Dr. Lin also filed a retaliation claim against her supervisor, Dr. Matthew J. Ellis ("Dr. Ellis"), in his personal capacity. The jury found in favor of Dr. Ellis, and that aspect of the judgment is not being appealed.

not a protected activity that gives rise to a retaliation claim under the MHRA (Point I); the court erred in denying the motion for judgment notwithstanding the verdict because the jury's verdict in favor of Dr. Ellis also exonerated Washington University under the *McGinnis* Doctrine[3] (Point III); and the court erred in submitting the verdict directing instruction for the retaliation claim (Point IV). We need not address Points II and V as our holding in Point IV is dispositive. We reverse and remand for further proceedings.

Factual and Procedural Background

Viewing the relevant facts in the light most favorable to the jury's verdicts, the following evidence was presented at trial. Dr. Lin was employed by Washington University as a medical research scientist from 1996 to 2012. During the course of her employment, Dr. Lin held numerous positions working in various laboratories, each supervised by a different lead researcher. Between 1996 and 2012, Dr. Lin's position was eliminated on at least four occasions because her supervisor left the university. Each time, however, Dr. Lin was quickly able to apply and transfer to a new position in a different laboratory. All of Dr. Lin's work at Washington University was funded by grants secured by the lead researcher in the lab where she was working at the time. Often, Dr. Lin would work on multiple grants at the same time, with a portion of her salary paid for by each grant.

In 2004, Dr. Lin transferred into a position in a laboratory supervised by Dr. Ellis, where she worked for the next eight years until her termination by Washington University on November 30, 2012. During her employment, Dr. Lin began suffering from chronic back pain and was diagnosed with two herniated disks by her physician. She informed Dr. Ellis of her back condition and requested an accommodation to avoid tasks that aggravated her back pain. Dr.

[3] *McGinnis v. Chicago, R.I. & P. Ry. Co.*, 98 S.W. 590 (Mo. 1906).

Ellis provided the requested accommodation. Sometime in 2011, Dr. Lin's back pain became more severe, and she asked to be excused from performing tasks involving cell culture and extensive bench work, both of which required working at a laboratory bench with her back bent over for extended periods of time.

One type of work that Dr. Lin could perform was micro-array analysis, which involved processing DNA from samples of cancer tissue for a project called the R01 Grant. Dr. Ellis accommodated Dr. Lin's request and assigned her to work predominantly on the R01 Grant performing micro-array analysis. The micro-array analysis work related to the R01 Grant was projected to conclude by the end of 2012.

Although Dr. Lin continued to work on other projects, Washington University began paying Dr. Lin's entire salary out of the funds from the R01 Grant. The budget for Dr. Ellis's lab was overseen by Ms. Nicole Nichols, a research administrator employed by Washington University (the "Administrator"). The Administrator stated that the salary arrangement for Dr. Lin was "unusual" because, typically, a portion of a research scientist's salary is funded by each project the scientist is working on.

Although the funding for the R01 Grant was set to expire on December 31, 2013, Dr. Ellis planned to apply for a renewal. If the project was not renewed, Dr. Ellis could also extend the term of the grant without receiving additional funds through a "no cost" extension, so long as he did not use all of the fund prior to December 31, 2013. Every one or two months, the Administrator reviewed the budget for Dr. Ellis's laboratory and funding sources for his employees to ensure each employee had funding to cover their salary. Initially, Dr. Lin was assigned to work on the R01 Grant through December 31, 2011. Washington University continued to fund Dr. Lin's salary from the R01 Grant by extending this date twice, first until

June 30, 2012, and then again until December 31, 2012. However, after Dr. Lin was informed that her position was being eliminated due to lack of funding, this date was revised to November 30, 2012, her termination date.

Sometime in early 2012, Dr. Lin had a minor disagreement with a colleague regarding office correspondence that resulted in a complaint being filed against her. On June 28, 2012, Dr. Ellis forwarded this complaint to the Administrator, asking to have the human resources department initiate a process "with a view to terminating [Dr. Lin's] position" based on this complaint. The Administrator forwarded this request to Ms. Sandra Sledge, a human resources consultant employed by Washington University ("Human Resources").

Human Resources drafted notes for Dr. Ellis explaining that the funding for Dr. Lin's position was running out. When Dr. Ellis met with Dr. Lin in mid-July of 2012, he informed her that funding for her work on the R01 Grant would end in six months and discussed the other types of work she could perform, given the work restrictions due to her back pain. The next day, Dr. Ellis sent an email to the Administrator and Human Resources stating, "I told [Dr. Lin] that the R01 cannot support her beyond the end of the current grant period (December [2012]). This gives me more flexibility in Y5 [2013], to save a bit for a no cost extension in case we have renewal difficulties." Human Resources worked with the Administrator to draft a letter to Dr. Lin explaining the reasons why there was no more funding for her position, which was subsequently used as the justification for Washington University's decision to terminate Dr. Lin's position for lack of funding.

In early August of 2012, Dr. Lin had three separate meetings: one with the Administrator, one with Human Resources, and one with Dr. Ellis. During each meeting, they discussed Dr. Lin's back condition and work restrictions, as well as the fact that funding for her current

position performing micro-array analysis on the R01 Grant would be running out by the end of 2012. During Dr. Lin's meeting with Human Resources, she was asked to provide a statement from a physician documenting her back condition and the need for accommodations. Dr. Lin provided Washington University with a letter from her physician, which stated she had been diagnosed with two herniated disks in her back and "has chronic pain that is acutely worsened in certain positions, including but not limited to, cell culture and extensive bench work. At times, this requires patient to have chiropractic care and treatment as well as physical therapy." Dr. Lin's physician also recommended that she be accommodated by not being required to do cell culture or extensive bench work "to avoid reinjuring and exacerbating these herniated disks."

On August 10, 2012, Dr. Ellis met with Dr. Lin and informed her that her position in his lab was going to be eliminated. Following this meeting, the Administrator drafted a letter notifying Dr. Lin that her position was being eliminated due to lack of funding and that her salary could only be guaranteed until the end of November 2012. The letter also informed Dr. Lin she was eligible to transfer to any other position available at Washington University for which she was qualified. Dr. Lin received this letter by email on August 28, 2012.

Subsequently, Dr. Lin applied for forty-one available positions at Washington University. However, she was not accepted for any of these positions and was not granted a single interview. Unlike the last four times when her position was eliminated, this time Dr. Lin was unable to quickly transfer to a new position within Washington University. Washington University terminated Dr. Lin's employment on November 30, 2012.

After Dr. Lin was terminated, Dr. Ellis applied for and received a one-year "no cost" extension on the R01 Grant. Dr. Ellis then used the funds from the R01 Grant, originally

budgeted to last until December 31, 2013, to pay salaries for employees in his lab through the end of 2014. The R01 Grant also continued to fund micro-array analysis work through 2014.

On February 20, 2013, Dr. Lin filed a charge of discrimination with the Missouri Commission on Human Rights (the "Commission"), alleging Dr. Ellis and Washington University (collectively "Defendants") discriminated against her based on her disability by failing to provide a reasonable accommodation for her herniated disks, and retaliated against her for requesting a reasonable accommodation by discharging her and preventing her from transferring to a new position at Washington University. After receiving a right-to-sue letter from the Commission, Dr. Lin filed a petition in circuit court on August 7, 2014, asserting her claims of disability discrimination and retaliatory discharge against Defendants.

Prior to trial, Dr. Lin voluntarily dismissed her disability discrimination claims against Defendants, and the case proceeded to a jury trial solely on the retaliation claims. The jury returned verdicts in favor of Dr. Lin on her retaliation claim against Washington University, but against Dr. Lin on her retaliation claim against Dr. Ellis. Washington University filed a motion for judgment notwithstanding the verdict arguing, *inter alia*, that Dr. Lin failed to present a submissible case on her retaliation claim. The court denied the motion. Washington University then filed a motion for reconsideration or, in the alternative, for a new trial, asserting all of the claims raised in this appeal, which was also denied. This appeal follows.

Points on Appeal

Although Washington University raises five points on appeal, we only address Points I, III, and IV. In Point I, Washington University argues the trial court erred in denying the motion for judgment notwithstanding the verdict because Dr. Lin failed to make a submissible case in that "retaliation for seeking a disability accommodation is not a recognized claim under Missouri

law." In Point III, Washington University argues the trial court erred in denying the motion for judgment notwithstanding the verdict because the verdict finding Dr. Ellis not liable for retaliation also exonerated Washington University under the *McGinnis* Doctrine in that Dr. Ellis was the University's agent and his conduct in discharging Dr. Lin was the sole basis for Dr. Lin's claim. In Point IV, Washington University argues the trial court erred in giving Dr. Lin's verdict director, Instruction No. 7, because the instruction omitted an essential element of Dr. Lin's retaliation claim – membership in a protected class – in that the instruction assumed as true the disputed facts that Dr. Lin requested accommodation for a "disability," that her requested accommodation was "reasonable," and that she acted reasonably and in "good faith."

Discussion

I. Requesting an Accommodation is a Protected Activity Under the MHRA

In Point I, Washington University argues the trial court erred in denying the motion for judgment notwithstanding the verdict because Dr. Lin failed to make a submissible case in that "retaliation for seeking a disability accommodation is not a recognized claim under Missouri law." We disagree.

In order to present a submissible case for retaliatory discrimination under the MHRA, Dr. Lin was required to prove three elements: (1) she "participated in a protected activity";[4] (2) Washington University subsequently took adverse employment action against her; and (3) "'a causal connection between the protected activity . . . and the subsequent adverse action.'" *See*

[4] We note that Missouri courts often recite the first element of a claim for retaliatory discrimination as requiring proof that the plaintiff "complained of discrimination." *See, e.g.*, *McCrainey v. Kan. City Mo. Sch. Dist.*, 337 S.W.3d 746, 753 (Mo. App. W.D. 2011). Although most retaliation claims involve retaliation against an employee who has complained about discrimination, both the language of Section 213.070(2) and case law applying it recognize numerous ways that a plaintiff can engage in protected activity other than complaining of discrimination, including "opposing" discriminatory activity and "testify[ing], assist[ing], or participat[ing] in any manner in any investigation, proceeding, or hearing conducted pursuant to [the MHRA.]" Section 213.070(2); *see, e.g.*, *Walsh v. City of Kan. City*, 481 S.W.3d 97, 105 (Mo. App. W.D. 2016) (affirming jury verdict finding employer liable for retaliation against an employee who "participated in an investigation of alleged discriminatory activity").

Altenhofen v. Fabricor, Inc., 81 S.W.3d 578, 584 (Mo. App. W.D. 2002) (quoting *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993)). On appeal, Washington University does not argue the second or third elements of the retaliation claim, and concedes that Dr. Lin requested an accommodation for her herniated disks. Therefore, the only issue raised in Point I is a question of law, whether an employee's request for an accommodation constitutes a "protected activity" that may serve as the basis for a retaliation claim under the MHRA. This argument requires us to interpret Section 213.070(2), the anti-retaliation provision of the MHRA.

The interpretation of a statute is a question of law, which we review *de novo*. *See Dodson v. Ferrara*, 491 S.W.3d 542, 551 (Mo. banc 2016). Additionally, we review claims challenging the sufficiency of the evidence *de novo*. *Diaz v. AutoZoners*, LLC, 484 S.W.3d 64, 78 n.13 (Mo. App. W.D. 2015). We view the evidence presented at trial, including all reasonable inferences therefrom, in the light most favorable to the jury's verdict, and we disregard all contrary evidence and inferences. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 365 (Mo. App. E.D. 2014). We will affirm where the jury's verdict is supported by substantial evidence. *Id*. We will reverse "only if there is a complete absence of probative facts to support the jury's conclusion." *Id*. (citing *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo. banc 2012)).

Section 213.070(2) of the MHRA protects employees from retaliatory discrimination for participating in conduct protected under the MHRA. *Altenhofen*, 81 S.W.3d at 584. Participation in a protected activity includes opposing any practice prohibited by the MHRA, filing a complaint of discrimination, and testifying, assisting, or participating in any manner in any investigation, proceeding, or hearing conducted pursuant to the MHRA. Section 213.070(2).

Neither party cites any Missouri case law addressing the question of whether an employee's request for an accommodation constitutes a protected activity. We have only found

one case referring to this issue, which implicitly assumes that a request for an accommodation qualifies as a protected activity without actually deciding the issue. *See Kerr v. Curators of the Univ. of Mo.*, 512 S.W.3d 798, 814-15 (Mo. App. W.D. 2016).

Although this appears to be an issue of first impression in Missouri, numerous other jurisdictions have addressed it, including every circuit of the federal court of appeals. *See Solomon v. Vilsack*, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (collecting cases). "In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw [sic] that is consistent with Missouri law." *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

We find federal case law addressing this issue is applicable because federal law is consistent with Missouri law on this point. *See id*. The anti-retaliation provision of the MHRA, Section 213.070(2), prohibits an employer from discriminating against any "person" who has "opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter." The analogous federal law is the anti-retaliation provision of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12203, which prohibits an employer from discriminating against any "individual" who has "opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." Both Section 213.070(2) and 42 U.S.C. §12203 use virtually identical language to describe the conduct that constitutes a protected activity, and the minor differences between the statutes do not have any significance under the circumstances of this case. Therefore, we find federal law is consistent with Missouri law, and we look to relevant federal case law as persuasive authority in resolving

this issue. *See Daugherty*, 231 S.W.3d at 818; *see McCrainey*, 337 S.W.3d at 753 (relying of federal case applying similar anti-retaliation provision of the ADA to interpret Section 213.070(2)).

Every circuit of the federal court of appeals has held that "the act of requesting in good faith a reasonable accommodation is a protected activity" under the anti-retaliation provision of the ADA, 42 U.S.C. §12203. *See Solomon*, 763 F.3d at 15 n.6 (citing rulings from every federal judicial circuit holding that a request for reasonable accommodation is a protected activity); *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 620 n.9 (5th Cir. 2009) (noting uniformity among the circuits that have decided the issue); *Hill v. Walker*, 737 F.3d 1209, 1218 (8th Cir. 2013) ("[A] person who is terminated after unsuccessfully seeking an accommodation may pursue a retaliation claim under the ADA, if she had a good faith belief that the requested accommodation was appropriate."); *see also* 9 Lex K. Larson, Employment Discrimination § 154.10, at p. 154–55, 155 n.25 (2d ed. 2014) ("In addition to the activities specifically protected by the statute, courts have found that requesting reasonable accommodation is a protected activity."); OFFICE OF LEGAL COUNSEL, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES 24 n.7 (2016), https://www.eeoc.gov/laws/guidance/upload/retaliation-guidance.pdf.

The rationale for recognizing a good faith request for a reasonable accommodation as a protected activity is that an employee's right to request an accommodation for a disability is one of the foundations of disability discrimination law. *See Shellenberger v. Summit Bancorp*, 318 F.3d 183, 191 (3d Cir. 2003) ("The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC[.]"). "We have reasoned that 'it would seem anomalous . . . to think Congress intended no retaliation protection

for employees who request a reasonable accommodation unless they also file a formal charge.'" *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477 (1st Cir. 2003) (quoting *Soileau v. Guilford of Me.*, 105 F.3d 12, 16 (1st Cir. 1997)). "This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation." *Soileau*, 105 F.3d at 16. We are persuaded by the rationale of the federal courts, as well as the overwhelming weight of the authority regarding this issue.

Under the MHRA, just like under the ADA, "[a]n employer must make reasonable accommodations to the known limitations of a disabled employee[.]" *Kerr*, 512 S.W.3d at 811 (citation and quotations omitted); *Miller v. Nat'l Cas. Co.*, 61 F.3d 627, 629 (8th Cir. 1995) ("Before an employer must make accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists."). Therefore, the first step for an employee to invoke the statutory protections against disability discrimination is often the act of informing their employer of their disability or requesting an accommodation. *See Kerr*, 512 S.W.3d at 814 (noting employee's failure to inform employer of her disability when concluding employer was not aware of the disability and, therefore, not liable for discrimination). Unless the employee's disability is known to the employer, the employee cannot later claim the employer discriminated based on the employee's disability. *See Id*.

Because requesting an accommodation is a preliminary step in the process of seeking protections under the MHRA, we conclude it constitutes a protected activity that may give rise to a claim of retaliation under Section 213.070(2). *See Hill*, 737 F.3d at 1218 (addressing anti-retaliation provision of the ADA). Additionally, we find requiring the request for an accommodation to be made with a good faith, reasonable belief that it is a request to accommodate a disability is consistent with the standard Missouri courts use in retaliation claims

based on other protected activities under the MHRA. *See McCrainey*, 337 S.W.3d at 754 ("[A] plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim."). Accordingly, we join the federal courts in holding that an employee's request for an accommodation is a protected activity that may serve as the basis for a retaliation claim.

We cannot accept Washington University's assertion that requesting an accommodation is not a "protected activity" under the MHRA because this conclusion would undermine the purpose of the MHRA and lead to absurd results. *See Leiser v. City of Wildwood*, 59 S.W.3d 597, 604 (Mo. App. E.D. 2001) ("We will not interpret a statute or ordinance so as to reach an absurd result contrary to its clear purpose."); *Mercy Hosps. E. Cmtys. v. Mo. Health Facilities Review Comm.*, 362 S.W.3d 415, 419-20 (Mo. banc 2012). "The purpose of the MHRA . . . is to protect individuals from discrimination." *Klee v. Mo. Comm'n on Human Rights*, 516 S.W.3d 917, 924 (Mo. App. W.D. 2017). If an employer could legally discharge an employee because they requested an accommodation for their disability, this would allow an employer to simply provide the employee with the requested accommodation, thereby avoiding any claim of disability discrimination, and subsequently terminate the employee based on their request for the accommodation without any threat of liability. *See Soileau*, 105 F.3d at 16. Such a holding would permit an employer to discriminate and retaliate against an employee who is simply attempting in good faith to assert a right protected by the MHRA. We decline to adopt an interpretation of the MHRA that would lead to such an absurd result and undermine the very purpose of the anti-retaliation provision of the MHRA. *See Leiser*, 59 S.W.3d at 604; *Mercy Hosps. E. Cmtys.*, 362 S.W.3d at 419-20.

Having concluded that an employee's request for an accommodation is a protected activity so long as it is made in good faith, based on a reasonable belief that it is a request to accommodate a disability within the meaning of the MHRA, we now address whether Dr. Lin presented a submissible case to the jury. As stated above, on appeal, Washington University does not argue the second or third elements of the retaliation claim, and concedes that Dr. Lin requested an accommodation for her herniated disks. Therefore, the only question is whether the evidence was sufficient to allow the jury to conclude that Dr. Lin's request for an accommodation for her herniated disks was made in good faith, based on a reasonable belief that it was a request to accommodate a disability within the meaning of the MHRA.

We find the evidence was sufficient.[5] It was undisputed that Dr. Lin had chronic back pain and was diagnosed with two herniated disks by her physician. Dr. Lin requested an accommodation not to perform cell culture or bench work that would require her to work for extended periods at a lab bench with her back bent over. Human resources requested Dr. Lin submit medical documentation of her disability. Dr. Lin provided a letter from her physician confirming her diagnosis, which stated her "chronic pain . . . is acutely worsened in certain positions, including but not limited to, cell culture and extensive bench work[.]" A reasonable juror could infer from this evidence that Dr. Lin's request for an accommodation was made in good faith, based on a reasonable belief that it was a request to accommodate a disability.[6]

[5] Whether the verdict director in this case required the jury to make this finding is discussed in Point IV, *infra*.

[6] We express no opinion as to whether Dr. Lin was actually disabled within the meaning of the MHRA due to her herniated disks and related back pain, as this is not at issue in this appeal. It is well-settled that a plaintiff may prevail on a retaliation claim regardless of whether or not they are disabled. *See McCrainey*, 337 S.W.3d at 753 ("'[T]he success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.'") (quoting *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006)).

Accordingly, we find the trial court did not err in denying Washington University's motion for judgment notwithstanding the verdict. Requesting an accommodation is a protected activity under the MHRA that may serve as the basis of a retaliation claim. Point I is denied.

II. The *McGinnis* Doctrine Does Not Apply

In Point III, Washington University argues the trial court erred in denying the motion for judgment notwithstanding the verdict because the verdict finding Dr. Ellis not liable for retaliation also exonerated Washington University under the *McGinnis* Doctrine in that Dr. Ellis was the University's agent and his conduct in discharging Dr. Lin was the "sole basis" for Dr. Lin's claim.

Under the *McGinnis* Doctrine, "when a claim is submitted on the theory of respondeat superior and the jury returns inconsistent verdicts, exonerating the employee, but holding against the employer, the court must grant the employer judgment notwithstanding the verdict." *Burnett v. Griffith*, 739 S.W.2d 712, 713 (Mo. banc 1987) (citing *McGinnis v. Chicago, R.I. & P. Ry. Co.*, 98 S.W. 590 (Mo. 1906)). However, the *McGinnis* Doctrine does not apply unless the employer's liability is "wholly dependent" on the conduct of the exonerated employee. *Stith v. J. J. Newberry Co.*, 79 S.W.2d 447, 459 (Mo. 1935).

> [U]nless the liability of the master is based *solely* on the negligence of the *particular* servant who is sued and acquitted, that is if the master is guilty of negligence distinct from the negligence or tort of the servant, though combining with it, or the injury is due in whole or in part to the negligence of other servants than the one sued, then an acquittal of the servant sued does not nullify the verdict and judgment may go against the master.

Id. at 458 (emphasis in original).

In *Burnett v. Griffith* ("*Burnett I*"), the plaintiff was arrested by an off-duty police officer who was working as a security guard employed by two private companies. 739 S.W.2d at 712-13. The plaintiff sued the security guard as well as his employers for assault, false imprisonment,

and malicious prosecution. *Id*. On the assault charge, the jury returned a verdict in favor of the plaintiff and against all three defendants. *Id*. at 713. On the false imprisonment claim and the malicious prosecution claim, the jury returned verdicts finding the security guard not liable, but finding his employers liable. *Id*. Applying the *McGinnis* Doctrine, the Supreme Court held that the jury's verdict exonerating the security guard on the false imprisonment claim also exonerated his employers because the claim was based solely on the conduct of the police officer, and the only theory of liability against the employers was *respondeat superior* based on the actions of that security guard. *Id*. at 715-16. In contrast, the Supreme Court held that the verdict in favor of the security guard did not exonerate his employers on the malicious prosecution claim because the claim was not based solely on the conduct of the security guard, since other individuals employed by the defendant companies were allegedly involved in the decision to prosecute the plaintiff. *Id*. at 716.[7]

In *Stith*, the plaintiff was injured when she slipped on ice that had accumulated on the sidewalk in front of a store. *Stith*, 79 S.W.2d at 451. The plaintiff sued the manager of the store as well as his employer, the owner of the store, for negligence. *Id*. The Missouri Supreme Court held that the *McGinnis* Doctrine did not apply because the employer's liability was not "wholly dependent" upon the negligence of the manager, where three other employees were working in the employer's store at the time of the plaintiff's injury. *Id*. at 460. Although the plaintiff's

[7] Washington University also relied on *Burnett v. Griffith*, 769 S.W.2d 780, 784 (Mo. 1989) ("*Burnett II*"). However, the opinion in *Burnett II* did not address the *McGinnis* Doctrine or deal with the issue of inconsistent verdicts. After the Supreme Court in *Burnett I* found the *McGinnis* Doctrine did not require judgment notwithstanding the verdict on the malicious prosecution claim, the Court remanded the case to consider whether there was sufficient evidence to support the jury's verdict on the malicious prosecution claim. *Burnett I*, 739 S.W.2d at 716. The case was then transferred back to the Supreme Court, which found there was insufficient evidence. *Burnett II*, 769 S.W.2d at 784. Therefore, the holding regarding the sufficiency of the evidence in *Burnett II* has no bearing on the issue Washington University raises in Point III regarding the inconsistency of the jury's verdicts.

allegations did not identify which of the defendant's employees acted negligently, the Court noted "[i]t was not material or necessary to show which one of the employees was to blame or most to blame in this matter." *Id*.; *see also Devine v. Kroger Grocery & Baking Co.*, 162 S.W.2d 813, 817 (Mo. 1942) ("*If the liability of the master is not predicated solely upon the negligence of the employee in whose favor a verdict has been found, but upon the negligence of another employee, or that of the employer himself*, a verdict against the employer is not inconsistent.") (emphasis in original).

Washington University argues the retaliation claim was based solely on the conduct of Dr. Ellis, which must be excluded under the *McGinnis* Doctrine because the jury found him not liable. The question is whether Dr. Lin's theory of liability was "wholly dependent" upon the conduct of Dr. Ellis, or whether there was evidence that others employed by Washington University were involved in the decision to terminate Dr. Lin.

Although Dr. Lin's petition did not identify any specific individual other than Dr. Ellis, Dr. Lin's theory of liability against Washington University, as presented in opening statement and closing argument, encompassed the conduct of employees other than Dr. Ellis by suggesting that the decision to terminate her was based "in whole or in part" on the conduct of these other employees. *See Stith*, 79 S.W.2d at 458. Dr. Lin, in both opening statement and closing argument, referenced the Administrator and Human Resources and emphasized their involvement in the interactive process following her request for an accommodation, as well as the decision to terminate her employment. Generally, a party's theory of the case is presented in opening statements and closing arguments. *See Wilson v. River Mkt. Venture*, 996 S.W.2d 687, 696 (Mo. App. W.D. 1999).

Similarly, there was evidence at trial that Washington University's liability was based on the conduct of the Administrator and Human Resources. There was evidence that the Administrator received a complaint regarding misconduct between Dr. Lin and a colleague, and was asked to initiate a process with Human Resources "with a view to terminating [Dr. Lin's] position." However, Dr. Lin was not terminated for misconduct based on that complaint. Instead, Dr. Ellis, the Administrator, and Human Resources decided to inform Dr. Lin her position was being eliminated due to lack of funding from the R01 Grant. Subsequently, Human Resources and the Administrator both met one-on-one with Dr. Lin to discuss her disability and her future employment prospects. Dr. Lin received a termination letter explaining the lack of funding for her position. The Administrator then revised the budget to indicate Dr. Lin's funding from the R01 Grant would end on November 30, 2012, rather than December 31, 2012. Despite the explanation given to Dr. Lin, the R01 Grant did not run out of funding in November of 2012. On the contrary, the R01 grant continued to fund micro-array analysis work in Dr. Ellis's laboratory through the end of 2014. On November 30, 2012, Washington University terminated Dr. Lin's employment without the opportunity to transfer to any of the forty-one positions for which she applied, despite the fact that she was told she was eligible to transfer to any available position for which she was qualified.

Based on this evidence, the jury could reasonably infer that the conduct of other employees, either independent of or "combining with" the conduct of Dr. Ellis, was sufficient to hold Washington University liable, even though the conduct of Dr. Ellis alone did not rise to the level of liability.[8] *See Stith*, 79 S.W.2d at 458 ("[I]f the master is guilty of negligence distinct

[8] While we acknowledge the evidence against Washington University may not have been overwhelming because there was no "smoking gun," employment discrimination and retaliation cases are generally decided on circumstantial evidence. *See Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 867 (Mo. App. E.D. 2009). "[D]irect evidence is not common in discrimination cases because employers are shrewd enough to not leave a trail

from the negligence or tort of the servant, *though combining with it*, or the injury is due in whole or in part to the negligence of other servants than the one sued, then an acquittal of the servant sued does not nullify the verdict and judgment may go against the master.") (emphasis added). Similar to the malicious prosecution claim in *Burnett I* and the negligence claim in *Stith*, Dr. Lin's retaliation claim was not based solely on the conduct of a single employee, Dr. Ellis. The *McGinnis* Doctrine does not apply when Washington University's potential liability was not "wholly dependent" on the conduct of Dr. Ellis. *Id*. at 459-60. Therefore, the verdicts exonerating Dr. Ellis but finding Washington University liable were not so inconsistent as to require the trial court to enter judgment notwithstanding the verdict.[9]

Accordingly, we find the trial court did not err in denying Washington University's motion for judgment notwithstanding the verdict. Point III is denied.

III. The Verdict Director for the Retaliation Claim was Erroneous

In Point IV, Washington University argues the trial court erred in giving Dr. Lin's verdict director, Instruction No. 7, because the instruction omitted an essential element of Dr. Lin's retaliation claim – membership in a protected class – in that the instruction assumed as true the disputed facts that Dr. Lin requested accommodation for a "disability," that her request was "reasonable," and that she acted reasonably and in "good faith."

Whether a jury was properly instructed is a question of law, which this Court reviews *de novo*. *Hervey v. Mo. Dep't of Corr.*, 379 S.W.3d 156, 159 (Mo. banc 2012). We review the

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of direct evidence. In these cases, circumstantial evidence may be used to prove the facts necessary to sustain a recovery." *Id*. (citations and quotations omitted).

[9] The *McGinnis* Doctrine is not intended to resolve all instances where a jury's verdict may appear inconsistent, but only "where the intent of the jury can[] be ascertained from the face of the verdict." *Chas. Grosse & Son, Inc. v. Cass Bank & Tr. Co.*, 925 S.W.2d 208, 210 (Mo. App. E.D. 1996) (citing *Burnett I*, 739 S.W.2d at 712-15) (*McGinnis* Doctrine did not apply where jury's verdicts inconsistently exonerated one partner while finding the other liable).

record in the light most favorable to submission of the instruction. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. banc 2010). "To reverse on grounds of instructional error, the party challenging the instruction must show that the offending instruction misdirected, misled or confused the jury, and prejudice resulted." *Powderly v. S. County Anesthesia Assocs., Ltd.*, 245 S.W.3d 267, 276 (Mo.App. E.D. 2008) (citing *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 458 (Mo. banc 2006)).

> Whenever Missouri Approved Instructions [("MAI")] contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

Rule 70.02(b).[10] "[D]eparture from an applicable MAI constitutes error, its prejudicial effect to be judicially determined." *Hervey*, 379 S.W.3d at 159 (citing Rule 70.02(b)-(c)). "If a particular MAI does not state the substantive law accurately, it should not be given." *Id*.

There is no MAI verdict director for a retaliation claim under the MHRA. Although there are MAI verdict directors for disability discrimination under the MHRA, see MAI 38.04 (2012 Revision), and retaliation under the Workers Compensation Law, see MAI 38.03 (2012 Revision), neither of these claims is based on Section 213.070(2). Therefore, neither of these instructions would be an accurate statement of the substantive law in this case without modification.

Where, as here, there is not an MAI instruction applicable to the facts of the case, the court must give an instruction that accurately reflects the substantive law. *See Clark v. Missouri*

[10] All rule references are to Missouri Supreme Court Rules (2017), unless otherwise indicated.

& Northern Arkansas R.R. Co., 157 S.W.3d 665, 672 (Mo. App. W.D. 2004). Additionally, "[i]f an instruction following MAI conflicts with the substantive law, any court should decline to follow MAI." *Id*. at 671. A verdict director that does not separately hypothesize the existence of all essential elements of a plaintiff's claim, or assumes as true a disputed fact essential to the claim, is erroneous. *Hervey*, 379 S.W.3d at 163.

During the jury instruction conference, Dr. Lin proffered a verdict director for the retaliatory discharge claim based on MAI 38.01(A) (2014 Revision), which is the verdict director for a discrimination claim under the MHRA where the plaintiff's membership in a protected class is not at issue. *See id*., Notes 2-3.[11] Instruction No. 7 stated:

> On plaintiff's claim of retaliation, your verdict must be for plaintiff if you believe:
> First, the defendant Washington University discharged plaintiff, and
> Second, plaintiff's request for a reasonable accommodation for her herniated disks was a contributing factor in such discharge, and
> Third, as a direct result of such conduct, plaintiff was damaged.

Washington University objected to Instruction No. 7 arguing, *inter alia*, that the instruction did not follow the substantive law because it omitted an essential element of Dr. Lin's retaliation claim – membership in a protected class – in that the instruction assumed as true the disputed facts that plaintiff requested accommodation for a "*disability*," that her requested accommodation was "*reasonable*," and that she acted reasonably and in "*good faith*." Washington University requested that the verdict director be modified to include a paragraph addressing this additional element, which would require the jury to find the existence of these

[11] Our holding in Point IV is limited to cases tried prior to August 28, 2017, the effective date of S.B. 43, which enacted sweeping changes to the MHRA and expressly abrogated all MAI jury instructions for civil actions brought under the MHRA, including the version of MAI 38.01(A) at issue in this appeal. *See* S.B. 43, 99th Gen. Assemb., First Reg. Sess. (Mo. 2017); Section 213.101 RSMo (2017). On May 21, 2018, the Missouri Supreme Court approved a revision to the MAI including a revision to the Missouri-approved jury instructions for cases involving employment discrimination, effective January, 1, 2019. *In re New & Revised MAI-Civil Instructions, Notes on Use, Comments, & Historical Notes*, 2018 Mo. LEXIS 295 (May 21, 2018).

disputed facts. Dr. Lin argued the verdict director did not need to be modified because Dr. Lin's membership in a protected class was not at issue as "there was no evidence to the contrary." The trial court overruled Washington University's objection and instructed the jury based on the verdict director submitted by Dr. Lin.

On appeal, Washington University reasserts its objection before the trial court that the verdict director is erroneous because it omits an essential element of Dr. Lin's retaliation claim and assumes disputed facts as true. In support of this argument, Washington University cites *Hervey,* 379 S.W.3d at 160. In *Hervey v. Missouri Department of Corrections*, a case involving a claim of disability discrimination, the Missouri Supreme Court held that MAI 31.24 (2005), the precursor to MAI 38.01, failed to hypothesize an essential element of a disability discrimination claim – membership in a protected class – because it assumed as true the disputed fact that the plaintiff was disabled. *Id*.

> When a plaintiff's status as a member of a protected class is in dispute . . . the substantive law requires that the jury find, as an essential element of the plaintiff's claim, that the plaintiff is in fact a member of the protected class claimed. Despite the substantive law, MAI 31.24 does not provide the trial court with direction in situations in which the defense contests the plaintiff's status as a member of a protected class. Instead, it presumes that the plaintiff's status as a member of a protected class is uncontested, as is common for claims based on classifications such as race or sex.

Id. The Court held that a verdict director must hypothesize the existence of all essential elements of the plaintiff's claim, and cannot assume as true a disputed fact that is essential to the claim. *Id*. at 163. The Court stated, "Whether Ms. Hervey was legally disabled at the time of her discharge is an essential element of her MHRA claim, so the verdict-directing instruction must require the jury to find that Ms. Hervey was disabled under a *separately enumerated paragraph*." *Id*. (emphasis added). The Court reasoned that "[s]uch a requirement ensures that the jury members focus on each element separately and prevents an instruction from creating an assumption that an

element is true and not in dispute." *Id*. at 160. The Court concluded, "The submission of a verdict director that did not hypothesize all essential elements of Ms. Hervey's claim was prejudicial error and requires that the trial court's judgment be reversed and the cause be remanded." *Id*. at 163.

Following its holding in *Hervey*, the Missouri Supreme Court approved a revision to the MAI, which created MAI 38.01(A), for use in all employment discrimination cases under the MHRA where the plaintiff's membership in a protected classification is not in dispute, and MAI 38.01(B), for use in disability discrimination cases under the MHRA where the plaintiff's disability is disputed. MAI 38.01(A) (2014 Revision); MAI 38.01(B) (2014 New). In the "Notes on Use" for MAI 38.01(A), Note 3 states, "Use only where plaintiff's disability is not at issue. Where plaintiff's disability is disputed, use MAI 38.01(B)." To date, the Missouri Supreme Court has not issued an MAI instruction for retaliation claims under the MHRA.

A retaliation claim under the MHRA is not a claim of disability discrimination and, therefore, does not require the plaintiff to prove he or she is disabled within the meaning of the MHRA. *See McCrainey*, 337 S.W.3d at 753. Therefore, neither MAI 38.01(A) nor MAI 38.01(B) would have been an appropriate verdict director in this case without modification.

As explained in Point I *supra*, the MHRA requires a plaintiff to prove he or she engaged in a protected activity. *See id*. at 754. In a retaliation claim, engagement in a protected activity is what makes the plaintiff a member of a protected class under the MHRA. Therefore, similar to the Court's holding in *Hervey*, it stands to reason that a verdict director in a retaliation case is erroneous if it fails to contain a separately-enumerated paragraph hypothesizing the existence of facts supporting that the plaintiff engaged in a protected activity where that element is disputed. Accordingly, we hold that, in a retaliation case under the MHRA where the protected activity is

the plaintiff's request for an accommodation, the verdict director must include a separately-enumerated paragraph requiring the jury to find that the plaintiff requested an accommodation in good faith, based on a reasonable belief that it was a request to accommodate a disability.[12]

Here, Washington University disputed that Dr. Lin had engaged in a protected activity throughout the trial. Washington University introduced evidence that Dr. Lin turned down assignments for work that complied with her requested accommodation, and there was no other work Dr. Lin could perform that did not involve work she was requesting not to do as an accommodation. This evidence challenged whether Dr. Lin engaged in a protected activity because it supported an inference that Dr. Lin's request for an accommodation was not based on a good faith, reasonable belief that it was appropriate under the MHRA.

However, the verdict director omitted this element of her claim and assumed as true disputed facts. Since the issue of whether Dr. Lin engaged in a protected activity was in dispute, the more appropriate MAI instruction to use as a model verdict director would have been MAI 38.01(B), appropriately modified to hypothesize the facts showing Dr. Lin engaged in a protected activity. Because Dr. Lin's submitted verdict director was modeled on MAI 38.01(A),

[12] Our holding is supported by the fact that the verdict director for a retaliation claim under the Workers' Compensation Law, MAI 38.04, contains a separately-enumerated paragraph specifically requiring the jury to find the plaintiff engaged in a protected activity by either filing a complaint or otherwise exercising a right under the Workers' Compensation Law. *See* MAI 38.04, Note 2 (stating: "Describe the right exercised by the plaintiff under the workers' compensation law if it was other than filing a claim for compensation."). Similarly, the verdict director for a claim of wrongful discharge in violation of public policy, MAI 38.03, also contains a separately-enumerated paragraph requiring the jury to find the plaintiff engaged in a protected activity by acting or refusing to act pursuant to a duty imposed by law. *See* MAI 38.03, Note 1. We also find instructive the Missouri Jury Instruction Companion Handbook, which includes a set of jury instructions for a case involving retaliation based on the plaintiff's request for an accommodation. *See* Mary L. Reitz, *Missouri Jury Instruction Companion Handbook 2017–2018*, 9:7, at 1416 (Thomson Reuters 2017). The verdict director in that case was based on MAI 38.01(A), but was modified to contain an additional paragraph stating: "First, Plaintiff, based on a good faith belief either requested a reasonable accommodation of time off for medical treatment, or made a report of her disability[.]" This modification was based on the holding in the *Hill v. Walker*, the federal case from the Eight Circuit Court of Appeals discussed *supra*, which held,"[A] person who is terminated after unsuccessfully seeking an accommodation may pursue a retaliation claim under the ADA, if she had a good faith belief that the requested accommodation was appropriate." *See id*; *Hill*, 737 F.3d at 1218.

it did not include a separately-enumerated paragraph hypothesizing the facts supporting Dr. Lin's membership in a protected class, i.e. that her request for an accommodation was made in good faith, based on a reasonable belief that it was a request to accommodate a disability.

Although the second paragraph of the verdict director required the jury to find that Dr. Lin's request for an accommodation was a contributing factor in Washington University's decision to discharge her, this paragraph assumed that her request constituted a protected activity. This was insufficient to satisfy the requirement in *Hervey* that a verdict director contain separately-enumerated paragraphs addressing each essential element of the plaintiff's claim and hypothesizing the existence of all material facts in dispute. *See Hervey*, 379 S.W.3d at 163.

Nowhere in the verdict director was the jury required to find Dr. Lin's request was made in good faith, based on a reasonable belief that it was a request to accommodate a disability. Because this was a disputed fact essential to Dr. Lin's retaliation claim that was not hypothesized in a separately-enumerated paragraph, the instruction was confusing. We cannot conclude that the jury was not misdirected or misled into believing that firing Dr. Lin because she requested an accommodation necessarily constituted discrimination, regardless of whether the request was in good faith, based on a reasonable belief that it was a request to accommodate a disability. Thus, the erroneous verdict director prejudiced Washington University because it permitted the jury to ignore evidence challenging an essential element of Dr. Lin's retaliation claim. An erroneous jury instruction results in prejudicial error where, as here, it allows the jury to find in favor of a party based on facts that are not dispositive of liability. *See Walton v. City of Seneca*, 420 S.W.3d 640, 651 (Mo. App. S.D. 2013).

Accordingly, we find the trial court erred in instructing the jury because the verdict director misdirected, misled, and confused the jury in that it omitted an essential element of a

retaliation claim, and assumed as true disputed facts material to the claim, resulting in prejudice. Point IV is granted.

IV. All Other Arguments are Moot

Our holding in Point IV is dispositive. Therefore, Washington University's arguments regarding the timeliness of Dr. Lin's administrative charge of discrimination (Point II) and the admissibility of evidence (Point V) are moot. *See Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo. App. W.D. 1999). When an event occurs that makes the court's decision unnecessary, the case is moot and generally should be dismissed. *Id*. An appellate court may dismiss a case for mootness *sua sponte*. *Id*.

We need not address Washington University's argument in Point II that Dr. Lin's claim was time-barred under Section 213.075, as this case is being remanded for further proceedings, and Section 213.075 has since been amended to permit a party to challenge the timeliness of a plaintiff's filing of the initial charge of discrimination with the Commission "at any time." *See* S.B. 43, 99th Gen. Assemb., First Reg. Sess. (Mo. 2017).[13] "[A] subsequent statutory amendment may moot a case when an amendment removes the question at issue so that any judgment 'would not have any practical effect upon any then existing controversy'[.]" *See Mo. Coal. for the Env't. v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 135 (Mo. banc 1997)

[13] The amendment to Section 213.075 RSMo (2017) became effective on August 28, 2017, less than three months after the jury's verdict and just three days after the trial court issued its amended judgment in this case. The amended version of Section 213.075 RSMo states:

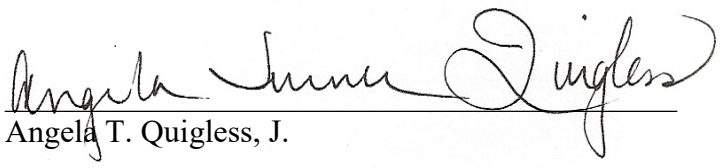
> The failure to timely file a complaint with the commission may be raised as a complete defense by a respondent or defendant at any time, either during the administrative proceedings before the commission, or in subsequent litigation, regardless of whether the commission has issued the person claiming to be aggrieved a letter indicating his or her right to bring a civil action and regardless of whether the employer asserted the defense before the commission.

(quoting *Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. banc 1984)). Accordingly, Point II is dismissed as moot.[14]

Additionally, because we are reversing for further proceedings and a new trial, we need not address Washington University's argument in Point V that the trial court erred in excluding evidence during trial. Accordingly, Point V is also dismissed as moot. *Duncan v. Andrew Cty. Mut. Ins. Co.*, 665 S.W.2d 13, 15 (Mo. App. W.D. 1983) (reversing and remanding a judgment for a new trial moots claims of evidentiary error that occurred in the first trial).

Conclusion

The judgment against Washington University is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.[15]



Angela T. Quigless, J.

Roy L. Richter, P.J., and
Robert M. Clayton III, J., concur.

[14] We express no opinion regarding the merits of Washington University's argument in Point II, either as to how the amendment to Section 213.075 applies in the context of a case pending before the trial court following remand from the appellate court, or as to whether Dr. Lin's charge was timely filed with the Commission.

[15] Prior to oral argument, Dr. Lin filed a motion for attorneys' fees, and the motion was taken with the case. This motion is denied, as we are remanding the case for further proceedings. *See Edmonds v. Hough*, 344 S.W.3d 219, 225 (Mo. App. E.D. 2011).