In the Missouri Court of Appeals
Eastern District

DIVISION THREE

SHEREEN KADER,	)	No. ED104289
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
vs.	)	
	)	
BOARD OF REGENTS OF HARRIS-STOWE STATE UNIVERSITY,	)	Honorable Mark H. Neill
	)	
Appellant.	)	Filed: January 9, 2018

Opinion

The Board of Regents of Harris-Stowe State University (the "Board") appeals from the judgment of the Circuit Court of the City of St. Louis entered following a jury verdict. The jury found the Board liable on Dr. Shereen Kader's ("Dr. Kader") claims of national origin discrimination and retaliation, and awarded Dr. Kader $750,000 in actual damages and $1,750,000 in punitive damages. The Board raises four points on appeal. The third claim, involving instructional error, is dispositive. Because the trial court erred in submitting the verdict directing instructions, which resulted in prejudice, we reverse and remand for a new trial.

Factual and Procedural History

In 1999, Dr. Kader came to the United States from Egypt to study and obtain a master's degree from Indiana University and a Ph.D. from Pennsylvania State University ("Penn State"). Dr. Kader was in the United States legally on a J-1 visa, which is a non-immigrant visa for

individuals approved to participate in work- and study-based exchange visitor programs. In 2007, Harris-Stowe State University ("HSSU") hired Dr. Kader as an instructor in Early Childhood Development in the College of Education. Dr. Kader was later promoted to assistant professor. From 2007 to 2009, Dr. Kader's employment contract was annually renewed.

Penn State sponsored Dr. Kader's J-1 visa for the 2007, 2008, and 2009 academic years. During this time, HSSU submitted employment information to Penn State so Dr. Kader could maintain her J-1 visa. Shortly after accepting the position at HSSU, Dr. Kader spoke with Virginia Malone ("Ms. Malone"), Director of Human Resources, and Dr. Dwayne Smith ("Dr. Smith"), Vice President of Academic Affairs, about continuing to work at HSSU after her J-1 visa expired in May 2010. Both Ms. Malone and Dr. Smith indicated that HSSU would assist Dr. Kader with obtaining a visa beyond her J-1 status.

In 2009, HSSU appointed Dr. LaTisha Smith (the "Dean"), an African-American woman, as co-chair of the College of Education. Thereafter, HSSU promoted her to Dean of the College of Education, making her Dr. Kader's direct supervisor.

On October 15, 2009, the Dean conducted a faculty evaluation of Dr. Kader's teaching performance. As part of the evaluation process, Dr. Kader performed a self-evaluation, which was then reviewed simultaneously with the Dean's evaluation. The Dean gave Dr. Kader lower marks than Dr. Kader gave herself.[1] The Dean explained the differences were due to written and verbal complaints she received from students about Dr. Kader. Dr. Kader testified she believed the differences were due to her immigration status, national origin, and race.

[1] The evaluation form has sixteen performance categories, and the faculty member is rated on a scale of 1 (unsatisfactory) to 5 (outstanding) in each category. Dr. Kader rated herself as a 5 in all sixteen categories while Dr. L. Smith gave her a 5 in twelve categories and a 4 (excellent) in four categories.

The next day, Dr. Kader went to the Dean's office to further discuss the evaluation, and expressed concern that she was being treated unfairly because of her national origin and immigration status. After the meeting, the Dean sent an email to Dr. Kader, HSSU's President, Dr. Smith, and Ms. Malone, explaining the conversations that occurred with Dr. Kader during the faculty evaluation. Specifically, the Dean confirmed that Dr. Kader's immigration status had come up during the faculty evaluation, and she told Dr. Kader that "it was not fair to bring up the race card." The Dean requested a meeting with Ms. Malone in the Human Recourses Department ("HR") to resolve the conflict.

After receiving the email, Dr. Kader met with Dr. Smith and told him she felt the Dean was targeting her because of her national origin. Dr. Smith indicated he would schedule a meeting with HR so the department could investigate Dr. Kader's complaint. Dr. Kader indicated she intended to bring an attorney to the HR meeting, and she testified Dr. Smith informed her that if she did, she would "face visa complications." It is HSSU's policy that when an employee makes a complaint of discrimination, the complaint must be reported to and investigated by HR. However, neither a meeting was scheduled with HR to address Dr. Kader's complaint nor did HR ever conduct an investigation.

Dr. Kader's J-1 visa was originally set to expire on May 14, 2010. Once her visa expired, Dr. Kader would no longer be legally authorized to work at HSSU. However, Penn State granted Dr. Kader an extension of her J-1 visa and work authorization through June 13, 2010. After June 13, Dr. Kader would no longer be in J-1 status, and she would have a thirty-day grace period to depart from the United States if she was unable to obtain a new visa. During the thirty-day grace period, HSSU would be unable to employ Dr. Kader because she would no longer be legally authorized to work in the United States.

Around March 2010, Dr. Kader met with Dr. Smith, Ms. Malone, and HSSU's Vice President of Administration Dr. Robin Shaw ("Dr. Shaw") to discuss the process of obtaining either an O-1 visa or an H-1B visa so she could remain in the United States and continue working following the expiration of her J-1 visa. Both visas require an employer sponsor. To qualify for the H-1B visa, Dr. Kader had to receive a waiver of the two-year home country residency requirement.[2] Dr. Kader asked that HSSU provide the paperwork for the O-1 visa along with the H-1B visa while she waited for the waiver. HSSU agreed to submit the paperwork.

Following the meeting, Dr. Kader hired an attorney, Mr. Stephen Fleming ("Mr. Fleming"), to file the O-1 visa petition. Mr. Fleming sent an email to Dr. Shaw, requesting information in order to file the petition, which Dr. Shaw subsequently provided. On May 21, 2010, Mr. Fleming filed the O-1 visa petition with the United States Citizenship and Immigration Services ("USCIS"). After two weeks passed without being informed of whether the O-1 visa was granted, Dr. Kader contacted the USCIS. The USCIS told Dr. Kader they had requested additional information and supporting documentation from HSSU, but no one from HSSU responded.

On June 11, 2010, two days before her J-1 visa was set to expire, Dr. Kader contacted Dr. Shaw about her visa application. Dr. Shaw denied receiving any such request from the USCIS, and informed Dr. Kader that her visa application had been denied, she had to leave HSSU within thirty days, and her position would be advertised. Dr. Kader then requested a work leave of absence, which Dr. Shaw said HSSU would not provide. On June 14, Dr. Kader also emailed Dr. Smith, requesting a leave of absence, but he never responded. Thereafter, Dr. Kader received a letter from

[2] According to Section 212(e) of the Immigration and Nationality Act, individuals who are in the United States on a J-1 visa are ineligible for an H-1B visa (or other employment-based visa) until after they return to their home country for two years. However, individuals can avoid the two-year home country residency requirement by applying for and receiving a waiver.

Dr. Smith, stating the USCIS denied her O-1 visa application, and HSSU would not appeal the denial.

In August 2010, Dr. Kader filed a charge of discrimination with the EEOC and filed an application for unemployment benefits. Ms. Malone submitted an employer statement, opposing Dr. Kader's application for unemployment benefits, and the application was subsequently denied. Thereafter, Dr. Kader filed a petition in the Circuit Court of the City of St. Louis under the Missouri Human Rights Act, alleging HSSU discriminated against her on the basis of race, national origin, and religion,[3] and retaliated against her for opposing HSSU's discriminatory practices.

A jury trial was held. The jury returned verdicts in favor of Dr. Kader on the claims of national origin discrimination and retaliation, but found in favor of HSSU on the racial discrimination claim. The trial court awarded Dr. Kader $750,000 in actual damages, and $1,750,000 in punitive damages. The Board now appeals. The Board raises four claims of trial court error. The third claim, involving instructional error, is dispositive, and thus we do not address the remaining claims.[4]

Standard of Review

Whether the trial court properly instructed the jury is a question of law that we review *de novo*. *Hervey v. Mo. Dep't of Corr.*, 379 S.W.3d 156, 159 (Mo. banc 2012). We conduct our review in the light most favorable to the record, and an instruction's submission is proper where it is supported by any theory. *Id.* We reverse instructional error only if the error resulted in prejudice and materially affected the merits of the action. *DeWalt v. Davidson Serv./Air, Inc.*, 398 S.W.3d

[3] Dr. Kader later withdrew her claim of religious discrimination.

[4] The Board also alleged Dr. Kader failed to make a submissible case of national origin discrimination (Point I) and retaliation (Point II), and there was insufficient evidence of evil motive and reckless indifference to support the submission of punitive damages (Point IV).

491, 502 (Mo. App. E.D. 2013). The party challenging the instruction must show it misdirected, misled, or confused the jury, and resulted in prejudice to the challenging party. *Id.*

Discussion

In its third point on appeal, the Board argues the trial court erred in denying HSSU's Motion for New Trial because the verdict directors for national origin discrimination (Instruction No. 8) and retaliation (Instruction No. 9) misdirected, misled, or confused the jury, resulting in prejudicial error, in that they included actions that are not adverse employment actions and no evidence established those actions caused any damages.

Instruction No. 8, as submitted, stated:

> Your verdict must be for Plaintiff on Plaintiff's national origin discrimination claim if you believe:
>
> First, either:
>
> Defendant did not respond to the USCIS request for evidence to support the O-1 Visa Petition; *or*
> Defendant did not appeal the denial of the O-1 Visa Petition; *or*
> Defendant did not renew Plaintiff's employment contract; *or*
> Defendant denied Plaintiff a work leave of absence; and
>
> Second, Plaintiff's national origin was a contributing factor in Defendant's conduct in any one or more of the respects submitted in paragraph First, and
>
> Third, such conduct directly caused or directly contributed to cause damage to Plaintiff.

(Emphasis added).

Instruction No. 9, as submitted, stated:

> Your verdict must be for Plaintiff on Plaintiff's claim for retaliation if you believe:
>
> First, Plaintiff made complaints of discrimination, and
>
> Second, either:
>
> Defendant did not respond to the USCIS request for evidence to support the O-1 Visa Petition; *or*
> Defendant did not appeal the denial of the O-1 Visa Petition; *or*

> Defendant did not renew Plaintiff's employment contract; *or*
> Defendant denied Plaintiff a work leave of absence; *or*
> Defendant opposed Plaintiff's application for unemployment benefits; and
>
> Third, Plaintiff's complaints of discrimination were a contributing factor in any such actions described in the preceding paragraph Second, and
>
> Fourth, such conduct directly caused or directly contributed to cause damage to Plaintiff.

Missouri Approved Instruction 38.01 (modified); [5] submitted by Plaintiff (emphasis added).[6]

Jury Instruction Nos. 8 and 9 are disjunctive verdict directing instructions. "In order for disjunctive verdict directing instructions to be deemed appropriate, each alternative must be supported by substantial evidence." *Herrington v. Medevac Med. Response, Inc.*, 438 S.W.3d 417, 421–22 (Mo. App. W.D. 2014). "Substantial evidence is evidence which, if true, is probative of the issues and from which the jury can decide the case." *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. banc 2010) (quoting *Powderly v. S. Cty. Anesthesia Assocs. Ltd.*, 245 S.W.3d 267, 276 (Mo. App. E.D. 2008)). This Court must consider the evidence in the light most favorable to Dr. Kader. *Ross-Paige v. St. Louis Metropolitan Police Dept.*, 492 S.W.3d 164, 172 (Mo. banc 2016).

On appeal, the Board argues that aside from not renewing Dr. Kader's employment contract, the remaining alleged discriminatory acts in paragraph First of Instruction No. 8 and paragraph Second of Instruction No. 9 do not constitute adverse employment actions, and Dr. Kader conflates national origin and alienage. Because the alleged discriminatory acts were submitted to the jury as disjunctive theories, the Board argues it is impossible to determine whether the jury improperly returned its verdict on a theory that did not represent an adverse action. Thus,

[5] Instruction Nos. 8 and 9 are based on MAI 38.01, entitled "Verdict Directing—Missouri Human Rights Act."
[6] HSSU also submitted a proposed jury instruction in which the only alleged discriminatory act in paragraph First of Instruction No. 8 and paragraph Second of Instruction No. 9 was "defendant did not renew plaintiff's contract."

the Board asserts it was prejudiced because the instructions allowed the jury to find liability for behavior that is not actionable.

Upon reviewing the evidence in the light most favorable to Dr. Kader, we find Instruction Nos. 8 and 9's disjunctive submission that HSSU discriminated and retaliated against Dr. Kader when "Defendant denied Plaintiff a work leave of absence" was not supported by substantial evidence because the record shows that, at the time she was denied leave, Dr. Kader did not have a valid visa authorizing her to work in the United States, and, therefore, HSSU could not legally employ her.

The evidence presented at trial established Dr. Kader's J-1 visa was originally set to expire on May 14, 2010. Once her visa expired, Dr. Kader would no longer be legally authorized to work at HSSU. However, Penn State granted Dr. Kader an extension of her J-1 visa and work authorization through June 13, 2010. After June 13, Dr. Kader would no longer be in J-1 status, and she would have a thirty-day grace period to depart from the United States if she was unable to obtain a new visa. During the thirty-day grace period, HSSU would be unable to employ Dr. Kader because she would no longer be legally authorized to work in the United States.

On June 11, 2010, Dr. Kader contacted Dr. Shaw about her visa application and requested a work leave of absence. However, at this time, Dr. Kader's J-1 visa was set to expire in two days, and she had not received either an O-1 visa or an H-1B visa. As a result, Dr. Shaw told Dr. Kader that HSSU would not grant her a work leave of absence. Likewise, on June 14, when Dr. Kader requested a work leave of absence from Dr. Smith, her J-1 visa had expired, she was within the thirty-day grace period, and she was no longer legally authorized to work at HSSU. Under the circumstances of this case, we decline to find that denying employment or a work leave of absence

to an individual who no longer has a valid visa, authorizing him or her to legally work in the United States is discriminatory or retaliatory conduct.

Missouri case law involving claims of national origin discrimination is sparse. In the absence of state law, we may consider federal law as persuasive authority. *A.H. v. Indep. Sch. Dist.*, 466 S.W.3d 17, 23 (Mo. App. W.D. 2015). The facts of this case are similar to a case from the Eighth Circuit, *Lixin Liu v. BASF Corp.*, 409 F. App'x 988 (8th Cir. 2011) (per curiam). There, the plaintiff was a citizen of China, and legally resided in the United States on an H1-B visa, a temporary work visa, sponsored by his employer. Shortly before the plaintiff's visa expired, his employer decided to move its research offices from Iowa to North Carolina. *Id.* at 988. The employer offered research positions in the new location to nine employees, but did not offer the plaintiff a position because he would be unable to work once his visa expired. The plaintiff filed suit, alleging his employment was terminated due to unlawful national origin discrimination. *Id.* at 990. On appeal, the Eighth Circuit upheld a grant of summary judgment, finding the plaintiff's argument conflated national origin and alienage. *Id.* at 991. The court found the plaintiff failed to prove national origin-based discrimination because his employment was terminated based on his immigration status—specifically, that his work visa was set to expire—not his Chinese ancestry. *Id.*

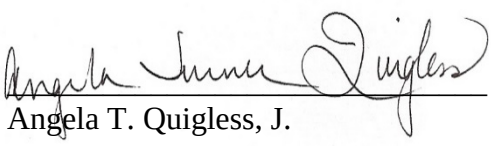
Here, like *Lixin Liu*, Dr. Kader's argument conflates national origin and alienage. As stated above, the evidence established Dr. Kader's visa and work authorization expired on June 13. At the time Dr. Kader requested a leave of absence, her J-1 visa was about to expire, and she had neither an O-1 visa nor an H-1B visa to remain eligible for employment. Thus, as in *Lixin Liu*, because HSSU could not legally employ Dr. Kader once her visa expired, HSSU denied Dr. Kader a work leave of absence because of her immigration status not her Egyptian ancestry.

Furthermore, under federal law, it would have been illegal for HSSU to employ, or continue to employ, Dr. Kader unless she had legal work authorization. The International Reform and Control Act of 1986 ("IRCA") prohibits the hiring and knowing employment of unauthorized aliens. *See* 8 U.S.C. § 1324a(a)(1)(A). The IRCA also makes it unlawful for an employer "to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." *Id.* § 1324a(a)(2). Employers who violate one of these prohibitions may be subjected to a wide range of federal civil and criminal penalties. *See id.* § 1324a(e)–(f). Therefore, as a matter of law, had HSSU granted Dr. Kader a work leave of absence and allowed her to continue working, it would have been in direct violation of federal law and subject to punishment because it knew her visa had expired, and she was no longer authorized to work in the United States.

Having determined that Instruction Nos. 8 and 9 included an alleged discriminatory act—denial of a work leave of absence—which was not supported by substantial evidence, the Board also proved prejudice resulted from the submission of the instructions. *See Dewalt*, 398 S.W.3d 502. As such, we need not determine whether the remaining alleged discriminatory acts in the instructions are also supported by substantial evidence because they were submitted to the jury as disjunctive theories. Notably, HSSU admits in its brief that the failure to renew Dr. Kader's contract, alone, would have been a proper discriminatory and retaliatory act to submit to the jury. However, as there is no way to determine upon which disjunctive theory the jury chose, we cannot rule out the possibility that the jury improperly returned its verdict upon a finding that HSSU discriminated against Dr. Kader by denying her a work leave of absence, which misdirected or confused the jury. *See Ross-Paige*, 492 S.W.3d at 176. Accordingly, the trial court committed reversible error in submitting Instruction Nos. 8 and 9 to the jury. Point III is affirmed.

Conclusion

Because we hold the trial court committed instructional error, which resulted in prejudice, we need not address the Board's remaining points on appeal. The trial court's judgment is reversed, and the cause is remanded for a new trial.



Angela T. Quigless, J.

Gary M. Gaertner, Jr., P.J., and
Robert M. Clayton III, J., concur.