# In the
# Missouri Court of Appeals
## Western District

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| **DONNA J. LINDAHL,** | ) | |
| | ) | |
| **Appellant,** | ) | **WD72555** |
| | ) | |
| **v.** | ) | **OPINION FILED: August 2, 2011** |
| | ) | |
| **STATE OF MISSOURI, ET AL.,** | ) | |
| | ) | |
| **Respondents.** | ) | |

**Appeal from the Circuit Court of Johnson County, Missouri**
The Honorable R. Michael Wagner, Judge

Before Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Donna Lindahl ("Plaintiff") filed suit against the State of Missouri and the Missouri Army National Guard ("Defendant") for sex harassment, sex discrimination, and retaliation pursuant to the Missouri Human Rights Act, section 213.010[1] *et seq.*, as it pertained to her prior employment with Defendant.[2] After a jury trial based solely on

[1] All statutory citations are to RSMo 2000 as updated, unless otherwise indicated.

[2] Although the State of Missouri and the Missouri Army National Guard are distinct legal entities, we will refer to them simply as the Defendant for ease of analysis because this Court need not be concerned with their separate identities on appeal in light of the fact that the parties stipulated at trial that the defendants "are one and the same."

Plaintiff's retaliation claim, the jury returned a verdict that awarded Plaintiff no actual damages and $500,000 in punitive damages.

Plaintiff appeals the judgment of the trial court, which granted Defendant's motion for judgment notwithstanding the verdict on the basis that "[n]o punitive damages can be awarded since there was no award of actual damages by the jury." Plaintiff also appeals the trial court's judgment that, *inter alia*, denied Plaintiff's motion for new trial.

The cause is reversed and remanded.

## Factual Background[3]

Beginning in 1999, Plaintiff was a civilian custodial worker at the Missouri National Guard Armory located on Whiteman Air Force Base in Knob Noster, Missouri. On February 18, 2004, Plaintiff notified military police on Whiteman Air Force Base of sexual harassment by Sgt. Mike Lewis, a soldier that was then stationed at the Armory but was never Plaintiff's supervisor. Plaintiff reported that over a fifteen month period, beginning in August 2002 through November 2003, Sgt. Lewis sexually harassed Plaintiff on multiple occasions at the Armory where she worked. Defendant did not dispute at trial that Sgt. Lewis engaged in reprehensible conduct.[4]

Specifically, the incidents began with Sgt. Lewis stopping by the Plaintiff's office and commenting on a poster depicting a muscular man wrapped in a large American flag. Sgt. Lewis repeatedly joked that he was the man in the photo, and asked Plaintiff when

[3] Because of our limited scope of review on appeal on the issues presented, this Court need not attempt to outline in detail the bulk of the evidence that was adduced at trial. Rather, the Court only outlines the information necessary in order to resolve the pertinent issues on appeal. Many factual issues remain in dispute by the parties; however, we need not resolve these issues based on our standard of review as outlined herein.

[4] Based on his conduct, Sgt. Lewis was demoted and transferred, suffering a significant reduction in pay and retirement.

she was going to re-take this photo. Eventually, Plaintiff, an amateur photographer, consented to taking photographs of Sgt. Lewis, which led to Sgt. Lewis being photographed naked holding a small flag on a stick in front of his penis.

Over time, these incidents became even more aggressive, with Sgt. Lewis flashing his penis at Plaintiff without notice. On two occasions, Sgt. Lewis lured Plaintiff into a secluded location, blocked her avenue of escape and exposed himself so that Plaintiff could see his erect penis, and then began to masturbate.

In 2005, Plaintiff filed the instant lawsuit against Defendant in the Circuit Court of Johnson County, which alleged claims of sex harassment, sex discrimination, and retaliation pursuant to the Missouri Human Rights Act ("MHRA"), section 213.010 *et seq.* Prior to trial, Plaintiff made a strategic decision to proceed only on the retaliation claim against the Defendant.

The jury heard evidence that Plaintiff had reported the sexual harassment by Sgt. Lewis to Plaintiff's immediate supervisor at the time, Sgt. Carla Caldwell. However, it was disputed at trial as to when the actions of Sgt. Lewis were discovered by other individuals within the Defendant's chain of command, and why the Defendant did not take concrete action based on this information.

Plaintiff presented evidence that she was retaliated against by the Defendant in numerous ways after reporting the incidents by Sgt. Lewis to the civilian police. Specifically, Plaintiff claimed that she suffered lost wages as a result of a one month

suspension from work after her report to the civilian police,[5] and that she also suffered a pay differential that she claimed Defendant imposed as retaliation in restricting her hours after she reported this conduct. Plaintiff also claimed that the Defendant changed some of her job duties as retaliation after she reported the incidents. Two examples include: (1) Plaintiff was no longer allowed to collect the materials for recycling on the Armory because that position was re-assigned to military personnel; and (2) Plaintiff was directed "to stop burnishing the drill floor, a great source of pride to plaintiff, and allow it to return to concrete."

Plaintiff testified that after she reported the incidents, her existing work environment also deteriorated because of individual conduct at the Armory that the Defendant did not prevent. One example of such conduct is that Plaintiff would find pornographic magazines in the male bunk room following drill weekends.

Plaintiff also presented evidence that her new direct supervisor, Sgt. Beck, did not personally like the Plaintiff. Sgt. Beck was assigned as her supervisor after her report of the incidents.[6] Plaintiff presented evidence that Sgt. Beck secretly videotaped Plaintiff mowing a lawn while on workers' compensation leave in an attempt to have Plaintiff punished. Plaintiff was never charged with any workers' compensation fraud.

[5] Defendant alleged that this suspension was based on Plaintiff's own actions in proceeding to actually take semi-nude photographs of Sgt. Lewis on military property.

[6] There was no evidence that this assignment was in any way influenced by the incidents she reported.

Plaintiff further testified that she suffered emotional damages as the result of Defendant's alleged illegal retaliation. For example, Plaintiff testified that she had "trouble sleeping and eating."[7]

At the conclusion of trial, Plaintiff asked the jury to return a verdict in favor of Plaintiff. In addition to the evidence of lost income of $12,549.59, Plaintiff's trial counsel also suggested that the jury award $250,000.00 in actual damages for Plaintiff's "pain and suffering." Finally, Plaintiff argued that the jury should award punitive damages to Plaintiff "to send the message that this kind of conduct in an organization can't be tolerated."

The jury returned a verdict finding no actual damages, but assessing $500,000 in punitive damages in favor of Plaintiff. The trial court entered a written judgment consistent with the jury's verdict.

Defendant subsequently filed a motion for judgment notwithstanding the verdict, which the trial court granted on the basis that the punitive damage award could not stand as a matter of law, without a finding of actual damages. Plaintiff also filed, *inter alia*, a motion for new trial, and the trial court denied Plaintiff's post-trial motions.

Plaintiff now appeals, bringing four Points.

Further facts will be outlined as relevant in the analysis section below.

**Analysis**

In Point One, Plaintiff argues that the "trial court erred in granting the Defendants' judgment notwithstanding the verdict because Plaintiff made a submissible case on

[7] In 2009, Plaintiff was discharged by the Defendant because of a "budget crisis"; however, Plaintiff has never claimed that her discharge by Defendant was retaliatory in light of the fact that "many . . . positions were eliminated."

retaliation and punitive damages under the [MHRA] . . . and the language of the [MHRA] does not require an award of actual damages to support punitive damages."

"We review a trial court's grant of a motion for JNOV *de novo.*" *Koppe v. Campbell*, 318 S.W.3d 233, 239 (Mo. App. W.D. 2010). "We view the evidence in the light most favorable to the jury's verdict, and give the prevailing party all reasonable inferences from the verdict while disregarding the unfavorable evidence." *Id*. (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 280 (Mo. banc 2007)). "A presumption exists favoring the reversal of a JNOV." *Kinetic Energy Dev. Corp. v. Trigen Energy Corp.*, 22 S.W.3d 691, 697 (Mo. App. W.D. 1999).

In granting the JNOV, the trial court found that "[n]o punitive damages can be awarded since there was no award of actual damages by the jury." It is undisputed on appeal that "Missouri follows the general rule that no punitive damages can be awarded absent an award of actual or nominal damages." *Williams v. Williams*, 99 S.W.3d 552, 556 (Mo. App. W.D. 2003) (citations omitted). "Nominal damages are significant because such a judgement(sic) determines the right to receive costs, as well as an award of punitive damages." *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522, 527 (Mo. App. W.D. 1994). We thus reject Plaintiff's argument that the MHRA permits an award of punitive damages without an award of actual damages. The common law must apply to the MHRA "'unless a statute clearly abrogates the common law either expressly or by necessary implication.'" *Wiley v. Homfeld*, 307 S.W.3d 145, 149 (Mo. App. W.D. 2009) (quoting *Mika v. Cent. Bank of Kansas City*, 112 S.W.3d 82, 90 (Mo. App. W.D. 2003)). "[T]he Legislature is presumed to have acted with full awareness and complete

knowledge of the present state of the law, including judicial and legislative precedent." *Rozelle v. Rozelle*, 320 S.W.3d 225, 229 (Mo. App. E.D. 2010) (quotation omitted). Indeed, in concluding that punitive damages could be assessed against a city under the MHRA, the Missouri Supreme Court just recently relied on the fact that the legislature did not clarify a different interpretation than established by common law in that context. *See Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011) ("*Because the Missouri General Assembly has not amended or clarified the MHRA in the face of our court of appeals decisions authorizing punitive damages against political subdivisions* and because the Missouri General Assembly included the phrase 'the state, or any political or civil subdivision' in the definition of 'employer' in § 213.010, it is clear the legislature intended to treat the state and its subdivisions in the same manner as it treats other employers.").

Though we do not conclude that the MHRA permits an award of punitive damages without an award of actual damages as argued by Plaintiff, our inquiry into the inconsistent verdict entered by the jury in this case is not complete. Plaintiff points out in her brief the inequity of the JNOV in light of the bench conference immediately following the jury's return of its verdict.

"By awarding [plaintiff] punitive damages but not actual damages, the jury returned an inconsistent verdict," and "the rule in Missouri is that a claim that a verdict is inconsistent to the point of being self-destructive must be presented to the trial court before the jury is discharged or that claim is waived." *Blue v. Harrah's North Kansas City, LLC*, 170 S.W.3d 466, 474 (Mo. App. W.D. 2005). When an inconsistent verdict is

returned by the jury in this context, "the burden was on [Plaintiff] to ask the court to instruct the jury to award him nominal damages if it did not find that he suffered actual damages, and he failed to do so." *Id*. at 474-75. "The law is very clear that [plaintiff's] failure to raise that problem before the jury was discharged means that he has waived that claim." *Id*. at 475 (citations omitted).

After the jury's verdict was announced but before the jury was dismissed, trial counsel had a bench conference outside the presence of the jury regarding the troubling nature of the jury's verdict. At that time, it is clear the trial court was unsure of how to proceed and discussed the possibility of "send[ing] them back in with some kind of instruction." Plaintiff's trial counsel concurred with the trial court, stating the following:

> My preference would be to advise them that they – that this is an inconsistent verdict, that either there has to be actual and punitive or none all the way around. I think that with an instruction they may come back with none for everything, but I think that that makes more sense.

Here, while Defendant argues on appeal that the jury's punitive damage award cannot stand as a matter of law, it is defense counsel that affirmatively encouraged the verdict to stand. Specifically, after plaintiff's counsel stated his preference that the trial court should further instruct the jury so as to avoid an inconsistent verdict, defense counsel made the following statements:

> MR. BRUCE [Defense counsel]: *I don't think there is anything inconsistent about it*, Your Honor. I mean, they said that there were no actual damages.
>
> THE COURT: How can we – I am just – I am a little stumped myself. I mean, there are not actual damages but there are punitive damages.
>
> MR. SIRO [Plaintiff's counsel]: And there is no instruction that talks about-

> THE COURT: I have never seen –
>
> MR. SIRO: *To me, that is an inconsistent verdict*.
>
> MR. BRUCE: The funny thing is that the punitive damages instruction, Number 5, does not require them to find actuals to get punitive. *I don't know if that is right or not.* You know, that's – I know in federal court that that is a requirement and it is set out in an instruction.
>
> THE COURT: But your opinion is, it just is what it is.
>
> MR. BRUCE: *Yeah. I mean, I think we just have to deal with it*. I think they followed the instructions.

Tr. 636-37 (emphasis added).

Based on the record before this Court, it is clear that Plaintiff would have taken the affirmative action of having the jury further instructed on the law to prevent the rendering of this inconsistent verdict *but for the actions of Defendant's counsel*. "Invited error" is "[a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling." *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 531-32 (Mo. App. W.D. 2008). "It hardly lies in the mouth of the defendant to object here to a technical blunder which he waived on the trial by adopting the error." *Noble v. Blount*, 77 Mo. 235 (Mo. 1883).

Accordingly, were it not for the fact that defense counsel actively misrepresented to the trial court that the error could be corrected by the trial court after the jury was discharged, it is clear that the Plaintiff would have requested, and the trial court would have instructed, the jury to further deliberate in order to ameliorate the inconsistent verdict. As pointed out by Plaintiff, "Defendant's counsel did not mention the *Blue v.*

*Harrah's* case to the Court or plaintiff's counsel before the Court dismissed the jury, *nor did he mention that he had represented one of the defendants in that case*." (Emphasis added.) Defense counsel, for the first time at oral argument on appeal admitted that he was aware of and considering the holding in *Blue* at the time he urged the trial court to accept the jury's inconsistent verdict. He has offered no explanation as to why he would have actively misled the trial court as it pertains to this controlling case precedent in light of the fact that he was one of the primary litigants before this Court in *Blue*.[8]

Furthermore, the doctrine of judicial estoppel prevents defense counsel in reaping the windfall below of taking inconsistent positions as to whether the jury's verdict was inconsistent. "Judicial estoppel will lie to prevent litigants from taking a position, under oath,[9] 'in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits ... at that time.'" *State Bd. of Accountancy v. Integrated Fin. Solutions, L.L.C.*, 256 S.W.3d 48, 54 (Mo. banc 2008) (quoting *Shockley v. Dir., Div. of Child Support Enforcement,* 980 S.W.2d 173, 175 (Mo. App. E.D. 1998)). The Eastern District in *Vinson v. Vinson,* 243 S.W.3d 418, 422 (Mo. App. E.D. 2007), outlined the following principles that pertain to the doctrine of judicial estoppel:

> While judicial estoppel cannot be reduced to a precise formula, the United States Supreme Court has indicated that whether judicial estoppel applies requires the consideration of three factors:

[8] Counsel did make a nonsensical and semantical argument that he did not believe the jury's verdict in this case was an "inconsistent verdict," but still wished this court to apply the holding in *Blue* which was premised upon the fact a verdict of this nature was inconsistent.

[9] We recognize the defense counsel's statements were not made under oath but this Court has previously held that "even when the prior statements were not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d at 145.

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position.... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Id.* (quoting *Zedner v. United States,* 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citations and internal quotation marks omitted))). "While acknowledging that under United States Supreme Court precedent these factors are not fixed or inflexible prerequisites, we will analyze each factor in turn." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 140 (Mo. App. W.D. 2011).

At the bench conference prior to the jury's discharge, defense counsel affirmatively represented that the trial court's verdict was not an inconsistent verdict, but only days later defense counsel filed his motion JNOV that relied predominately on *Blue*, in which this Court re-affirmed the principle that "[b]y awarding [plaintiff] punitive damages but not actual damages, the jury returned an inconsistent verdict." *Blue*, 170 S.W.3d at 474.[10] The first element of judicial estoppel applies to this case because the Defendant cannot take such "clearly inconsistent" positions in the same litigation, especially since Defendant's representations clearly misled the trial court and opposing

[10] While it may be true that defense counsel did not expressly contend in his JNOV that the verdict is "inconsistent," his reliance on *Blue* is tantamount to making such a contention. Defense counsel argues on appeal that "whether the verdict was truly inconsistent does not alter the propriety of the trial court's judgment in favor of the Guard." But this argument ignores the fact that *but for* the jury's inconsistent verdict, Defendant would have had no basis to argue in his JNOV motion that this punitive damage award could not stand because the jury did not award actual damages. Furthermore, Defendant argues that it "did not believe the verdict was inconsistent, based on the evidence, argument and instructions presented to the jury . . . clearly demonstrates that the jury concluded [Plaintiff] did not suffer any 'tangible employment action' as an act of retaliation in this case." But if this were the case, Defendant fails to explain why the jury awarded Plaintiff $500,000 in punitive damages.

counsel at the bench conference as to the applicable law. Therefore, the Defendant "succeeded in persuading a court to accept that party's earlier position," which is the second element of this test. *Vinson*, 243 S.W.3d at 422. Finally, there can be no doubt that if the doctrine of judicial estoppel were not applied in this case, Defendant would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" because *Blue* makes it clear that timing is of the essence in raising this issue prior to the jury being discharged. *Id*. Had Defendant remained consistent in relying on the legal principles of *Blue* at the *bench conference* as he does today, the record makes clear that the trial court would have further instructed the jury to deliberate to avoid the jury rendering an inconsistent verdict. Defendant compounded the confusion by representing to the trial court that the parties would just have to deal with the verdict, implying that if there were a problem it could be fixed after the jury was discharged, a scenario that was clearly contrary to the holding in *Blue* which instructs that an inconsistent verdict must be addressed before the jury is discharged.

"We do not question that it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *New Hampshire*, 532 U.S. at 753, 121 S.Ct. 1808 (quotation omitted). "We are unpersuaded, however, that [Defendant's] position ... fairly may be regarded as a product of inadvertence or mistake." *Id.* As previously mentioned, defense counsel was an attorney of record in *Blue* and admitted at oral argument that it was not a mistake that counsel *repeatedly* informed the trial court at the bench conference that the verdict was not inconsistent when the holding in *Blue* was premised on the fact that it was.

"The doctrine of judicial estoppel exists to prevent parties from playing fast and loose with the court." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d at 143 (citation omitted). While we acknowledge that not all inconsistent positions in litigation constitute "clearly inconsistent" positions justifying judicial estoppel, we cannot condone Defendant's clearly inconsistent positions in this case. *See Egan v. Craig*, 967 S.W.2d 120, 126–27 (Mo.App. E.D.1998) (citations omitted) ("[B]ased on the facts presented, it does not appear plaintiff was attempting to impugn the integrity of the courts. Plaintiff suffered from a debilitating disease which left him unable to perform the job he held for almost twenty years.... Thereafter, due in large part to the fluctuating character of MS, plaintiff recovered to the point where his doctor released him to work with restrictions. Plaintiff attempted to find employment which met the restrictions placed on him ... Under these facts, we do not conclude plaintiff was playing fast and loose with the courts so as to justify the application of judicial estoppel.")

Moreover, our analysis is not predicated solely on the fact that Defendant's "clearly inconsistent" position was at best disingenuous and self-serving, because the Missouri Supreme Court has held that the rule of judicial estoppel is also to preserve "the dignity of the courts and insure order in judicial proceedings." *Edwards v. Durham*, 346 S.W.2d 90, 101 (Mo.1961) (citing *Sturm v. Boker*, 150 U.S. 312, 14 S.Ct. 99, 37 L.Ed. 1093 (1893)). "Were parties allowed to take inconsistent positions at their whim, it would allow chaotic and unpredictable results in our court system, which of course would

be problematic for a host of reasons." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d at 143.

Particularly in the context of jury service and the sanctity of a jury verdict, we apply the doctrine of judicial estoppel because these "are not subjects to be taken lightly" in order to "instill[] confidence in our judicial system." *Id*. Because the failure to apply this doctrine would nullify the jury's verdict in this case, the "'balance of equities' 'firmly tip' 'in favor of'" the application of this equitable doctrine. *Id.* (quoting *New Hampshire*, 532 U.S. at 751, 121 S.Ct. 1808).

Had defense counsel remained silent during the course of the bench conference in question, the result in this case *may* be different, as counsel could at least argue that he had not affirmatively invited error.[11] But defense counsel chose not to remain silent, and instead made positive affirmations to the trial court as to the substance of Missouri law that were patently incorrect (that the jury's verdict was not inconsistent and that even if it was it could be fixed by the trial court after the jury was discharged). And then, only days later, Defendant took the contrary position in relying on our holding in *Blue* in filing the instant motion for JNOV in order to argue that the jury's verdict awarding $500,000 to the Plaintiff should be overturned as a matter of law and could not be fixed after the jury was discharged.

Alternatively, Defendant argues (in what is labeled as Defendant's Fifth Point Relied On) that the "trial court did not err in granting a judgment notwithstanding the

[11] Certainly Section 4-3.3(a)(2) of the Rules of Professional Conduct requires that a lawyer shall not knowingly, "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

verdict in favor of Respondent because the National Guard is immune from suit under the *Feres* doctrine in that [Plaintiff's] lawsuit asked the civilian courts to interfere in the operation of military, which is prohibited by the United State Constitution." Prior to trial, Defendant filed a motion for summary judgment, in which Defendant sought dismissal of Plaintiff's lawsuit on the basis of the *Feres* doctrine. The trial court denied the motion for summary judgment.

The Eighth Circuit outlined the applicable scope of the Feres doctrine in the following passage:

> In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court held that members of the armed forces who sustained injury while on duty due to the negligence of other servicemembers or the military itself could not sue the United States . . . In a later case, *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), the Supreme Court further articulated the policy basis of *Feres* and its progeny. Underlying *Feres* was a recognition of "the peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of [FTCA] suits on discipline." *Id.* at 299, 103 S.Ct. 2362 (quoting *United States v. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) (internal quotation marks omitted)). The Court counseled that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." *Id.* at 300, 103 S.Ct. 2362. . . .
>
> The courts of appeals have extended *Feres* to encompass Title VII claims by servicemembers against the military. **While the text of Title VII makes its strictures applicable to "employees ... in military departments," 42 U.S.C. § 2000e-16(a), that provision has generally been interpreted to apply only to civilian employees of the armed forces. *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir.1978) ("[N]either Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States.");** *see also* 29 C.F.R. § 1614.103(d)(1) (EEOC regulation noting that Title VII applies to "military departments," but not to "[u]niformed members of the military departments"). Thus, as a general rule, the *Feres*

> doctrine precludes claims brought by servicemembers under Title VII arising out of activities that are incident to military service. *See Hupp v. U.S. Dep't of the Army*, 144 F.3d 1144, 1147 (8th Cir.1998); *see also, Overton v. N.Y. State Div. of Military and Naval Affairs*, 373 F.3d 83, 89 (2d Cir.2004); *Brown v. United States*, 227 F.3d 295, 299 (5th Cir.2000); *Mier v. Owens*, 57 F.3d 747, 749-50 (9th Cir.1995). The *Feres* doctrine also generally applies to members of the National Guard, as well as members of the regular military. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 667 n.1, 672, 673-74, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (applying *Feres* to block a third-party indemnity claim against the United States over the death of a National Guard officer); *see also Hupp*, 144 F.3d at 1147.

*Wetherill v. Geren*, 616 F.3d 789, 792-94 (8th Cir. 2010) (emphasis added).

Because Plaintiff was undisputedly a civilian employee of the Defendant, we need not be detained by Defendant's argument that it is immune from suit under the *Feres* doctrine. Simply put, Defendant has failed to meaningfully distinguish caselaw that assists our interpretation of MHRA in this context in lieu of the fact that it is undisputed that there is no Missouri case dealing with the application of the *Feres* doctrine to the Missouri National Guard. "In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is consistent with Missouri law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

"There is no question that Congress intended for § 717(a) [of Title VII] to afford protection against discrimination to civilian employees and applicants for civilian employment in the Departments of the Army, Navy and Air Force." *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978); *see also In re Complaint Of Vulcan Materials Co. v. Massiah*, 2011 WL 1718896, 13 (4th Cir. 2011) ("In its most recent decision applying the *Feres–Stencel Aero* doctrine, the Court reiterated that the concern

for interference with military discipline lies 'at the heart of the *Feres* doctrine' and distinguishes suits brought against the United States by servicemembers injured in the course of military service from those brought by civilian employees.").

Defendant argues on appeal that while caselaw indicates the *Feres* doctrine initially applied only to military employees, the immunity has been extended to civilian employees of the government because they play an integral role in military functions. But Defendant cites no caselaw wherein a civilian employee was precluded from bringing a Title VII suit against the government based on the *Feres* doctrine.

Therefore, we conclude that the trial court did not err in concluding that the *Feres* doctrine was inapplicable to Plaintiff's lawsuit, and thus Defendant's JNOV motion cannot be sustained on this basis.

For all of these reasons, Plaintiff's First Point is granted.[12]

**Remedy**

We next must address the appropriate remedy for our holding under Point One.

Rule 84.14 provides that "the appellate court shall award a new trial or partial new trial, reverse, or affirm the judgment or order of the trial court, in whole or in part, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case." "Rule 84.14 permits us to enter the judgment that the

[12] In Points Three and Four, Plaintiff argues that the trial court erred in denying her motion for attorney's fees and her motion for injunctive and equitable relief. On remand, the trial court may enter a judgment pertaining to these matters consistent with this opinion if the Plaintiff is the prevailing party pursuant to Missouri law upon the retrial of this matter. "A prevailing party is one that succeeds on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing suit." *Alhalabi v. Missouri Dept. of Natural Resources*, 300 S.W.3d 518, 530 (Mo. App. E.D. 2009). However, because Plaintiff is no longer employed by Defendant, we are dubious that she is entitled to injunctive and/or equitable relief pursuant to MHRA. But we need not resolve that specific issue since this matter must be remanded. Further, Plaintiff filed a motion for attorney's fees and costs on this appeal, which we took with the case. As the prevailing party in this appeal, the Plaintiff is entitled to her attorney's fees and costs on this appeal.

trial court ought to give, and unless justice otherwise requires, we shall dispose finally of the case." *In re Estate of A.T.*, 327 S.W.3d 1, 3-4 (Mo. App. E.D. 2010). However, as the Plaintiff pointed out at the bench conference, if the case had been sent back to the jury as an inconsistent verdict, as Plaintiff requested, the jury may have come back with nothing on both actual and punitive damages. Further, as defendant pointed out during oral argument, had the case been sent back to the jury in the manner initially requested by Plaintiff, Defendant might have claimed that any resultant verdict awarding both actual and punitive damages was error. Finally, we do not know whether the trial court would have come to realize, but for being misdirected by the affirmative efforts of defense counsel, that the proper response to the jury's verdict was to either send the case back for consideration of a nominal damage award or to itself enter such an award. Though we realize that Plaintiff did not expressly ask the trial court to enter (or ask the jury to consider) an award of nominal damages as guided by *Blue*, we are not prepared to affirm the court's grant of JNOV based on that technicality in light of our discussion above.

We do not know, if the jury had been instructed on nominal damages, or had the trial court been asked to itself consider the entry of such an award, what would have been done with such an instruction or request. Therefore, we conclude that this matter must be remanded for a new trial on all issues.

**Point II**

In Point Two, Plaintiff argues that the trial court erred in denying Plaintiff's motion for new trial. Based on our holding under Point I, this Point is now moot.

## Conclusion

The judgment of the circuit court is reversed and the cause remanded for a new trial on all issues. As the prevailing party in this appeal, we grant Plaintiff's motion for attorney's fees on this appeal. Although this court has "the authority to allow and fix the amount of attorney's fees on appeal, we exercise this power with caution, believing in most cases that the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested." *Rosehill Gardens, Inc. v. Luttrell*, 67 S.W.3d 641, 648 (Mo.App.W.D.2002). Therefore, on remand the trial court shall conduct a hearing to determine the reasonableness of the attorneys' fees requested on appeal.

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Gary D. Witt, Judge

All concur