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ON THE COVER:

In conjunction with Pettis County's 175th anniversary, a new hardcover book showcases some three dozen murals portraying the rich and colorful history of the county on the walls of the circuit courtroom at the county courthouse in Sedalia. Pettis in Paint: The Pettis County, Missouri, Murals reproduces the panels of murals in full color, with each accompanied by a description. Longtime Pettis County Circuit Judge Donald Barnes instigated the project and led a fundraising campaign that ultimately resulted in creation of the murals by artist Barbara Manes Campbell. The center mural on the cover of this issue features some of the most significant military, legislative and civic leaders of the county, along with county jails and courthouses throughout the county's history.

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The Case for a Business Judgment Instruction Under the Missouri Human Rights Act

I. Introduction

Courts instruct the jury to explain how its factual determinations affect a trial's outcome under the applicable law.[2] Jury instructions are particularly important in employment discrimination cases, which are often emotionally charged and involve sensitive social issues.[3] And instructions are important because most employment cases rely on circumstantial evidence.[4] Balancing the competing societal interests inherent in employment cases requires thoughtful consideration of the jury instructions.[5] Indeed, "[i]n the field of employment discrimination, courts have struggled for decades to develop and refine an evidentiary framework that fairly balances the interests of the employee who challenges her employer's conduct as discriminatory and the interests of the employer faced with such a suit."[6]

Most employment cases have no direct evidence of discrimination.[7] Rather, the employee will attempt to prove discrimination through inferential evidence.[8] This proof will often be by showing that the employer treated other similarly situated, non-protected employees more favorably. The argument is necessarily indirect: Because the employer was treating other non-protected employees better, the difference in treatment must be due to some discriminatory animus. But is this evidence of intentional discrimination, or simply of an employer's arbitrary or irrational decision?

Robert L. Ortbals, Jr.[1]

Often, that question will be for a jury to decide. But if so, the jury must explicitly understand that if it believes the employee has proved only that the employer made a poor or irrational decision, then it cannot infer that discrimination occurred because the Missouri Human Rights Act[9] (MHRA) imposes liability only for intentional discrimination – not for poor decision-making.[10] Thus, as this article explores, submitting a business judgment instruction to the jury is important because it informs the jury that the employer cannot be liable for exercising its business judgment – even if harsh, unreasonable, or irrational – provided the employer's reasons were not discriminatory. The instruction ensures that the MHRA's proper focus is before the jury.

II. The Delicate Balance Between the Employment-at-Will Doctrine and the MHRA

For nearly 130 years, Missouri has adhered to the employment-at-will doctrine.[11] The doctrine establishes that an at-will employee "cannot maintain an action for wrongful discharge" absent a contrary statutory provision.[12] Thus, the general rule is that an employer can discharge an at-will employee without incurring liability.[13]

Over the years, however, Missouri has developed a number of "exceptions to the employment-at-will doctrine."[14] By making it unlawful for an employer to make employment decisions because of

1 Mr. Ortbals exclusively represents employers and management in employment-related litigation as an associate at Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Kansas City. He received his J.D. from the University of Missouri-Columbia School of Law in 2004, where he was a note and comment editor for the *Missouri Law Review*.

2 John C. Milholland, *Why and How to Instruct a Jury*, *in* MAI p. LVI (6th ed. 2002).

3 William J. Vollmer, Note, *Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 Wash. & Lee L. Rev. 407, 409 (2004); Gerrilyn G. Brill, *Instructing the Jury in an Employment Discrimination Case*, 1998 Fed. Cts. L. Rev. 2, at *a.1 (1998).

4 Vollmer at 409.

5 *Id.* at 410; *see also* 37 William C. Martucci, Missouri Practice § 1:1 (2007 ed. 2006) (discussing the competing considerations inherent in employment law).

6 *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998).

7 *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 818 n.4 (Mo. banc 2007).

8 Susan K. Grebeldinger, *Instructing the Jury in a Case of Circumstantial Individual Disparate Treatment: Thoroughness or Simplicity?*, 12 Lab. Law. 399 (1997).

9 Sections 213.010, *et seq*. RSMo. 2008.

10 It is an unlawful employment practice to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, national origin, sex, ancestry, age or disability[.]" Section 213.055.1(1)(a) RSMo. 2008 (emphasis added); *see State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87 (Mo. banc 2003) (an action under the MHRA seeks to redress an intentional wrong); *Cf.. Stemmons v. Mo. Dep't of Corr.*, 82 F.3d 817, 819 (8th Cir. 1996) (quoting *Blake v. J.C. Penney Co., Inc.*, 894 F.2d 274, 281 (8th Cir. 1990)) ("It is well settled that an employer 'is entitled to make its own subjective personnel decisions … for any reason that is not discriminatory.'").

11 *See Boogher v. Md. Life Ins. Co.*, 8 Mo. App. 533 (1880) (recognizing employment-at-will doctrine in Missouri).

12 *Dake v. Tuell*, 687 S.W.2d 191, 192-93 (Mo. banc 1985) ("an employer can discharge – for cause or without cause – an at-will employee who does not otherwise fall within the protective reach of a contrary statutory provision …"). *Id.* at 193.

13 *Id.* at 193.

14 *See Brenneke v. Dep't of Mo., VFW*, 984 S.W.2d 134, 138 (Mo. App. W.D. 1998) (discussing public policy exception to employment-at-will doctrine).

an employee's or an applicant's protected characteristics, the MHRA constitutes a statutory exception to the doctrine.[15]

To balance the competing interests between the employment-at-will doctrine and the MHRA, the best conceptual framework is to consider the doctrine as providing a presumption that a discharge is lawful - thus, requiring the dismissed employee to rebut the presumption by showing that the discharge violated the MHRA.[16] The delicate balance between the employment-at-will doctrine and the MHRA was probably best articulated in 1993 by the Missouri Court of Appeals, which recognized that when an employment discrimination lawsuit is "[s]tripped of its racial discrimination costuming, [it] is an alleged wrongful discharge case by an employee at will. Such actions do not lie in Missouri."[17] Thus, it is imperative that in an employment discrimination lawsuit, the jury remains focused on the issue before it – whether a protected classification was a contributing factor in the employment decision.[18]

III. Proving Unlawful Discrimination Under the MHRA

Under the MHRA, employees bear the burden of proving that employers intentionally discriminated against them because of their protected characteristic.[19] The burden can be carried "by direct or circumstantial evidence" of discriminatory motive.[20] Most employment discrimination cases present no direct evidence of an employer's discriminatory motive.[21] Ultimately, an employee meets his or her burden if the jury believes that the employee's protected characteristic was a contributing factor in the employment decision.[22]

A. Proving Discrimination at Trial

In the typical employment discrimination trial, the employee will present evidence of the employer's allegedly discriminatory conduct or statements and argue that discrimination was a contributing factor in the employment decision. For example, in *Daugherty v. City of Maryland Heights*, the employee presented evidence of age discrimination through a tape recording of a decision-maker telling the employee "that the city administrator was trying to get rid of employees over the age of 55."[23] The employer will then deny that discriminatory animus contributed to the decision.[24] This denial will usually include discrediting the employee's evidence and offering a legitimate, non-discriminatory explanation for the employment decision.[25] Usually, employers will put on as much evidence as they can to prove that they had legitimate reasons for their actions.[26]

Often, the employee will anticipate the employer's non-discriminatory explanation and attempt to discredit it by offering evidence that the employer's explanation is simply a pretext for unlawful discrimination.[27] The employee will often attempt to show pretext by offering evidence demonstrating that other similarly situated employees who had engaged in similar conduct were treated more favorably.[28] The jury must then decide whether the employee's protected characteristic was a contributing factor in the employment decision.[29]

B. Persuading the Jury That the Employee Has Been a Victim of Intentional Discrimination – The Need for a Business Judgment Instruction

In both direct- and indirect-evidence cases, persuading the jury that intentional discrimination occurred usually requires the jury to simultaneously accept the employee's contention that discrimination was a contributing factor in the employment decision, and to reject the employer's explanation that the decision was made for legitimate, non-discriminatory reasons.[30] Because the jury may reject the employer's explanation, the business judgment instruction becomes crucial.

15 *See* § 213.055, RSMo. 2008. *See* Robin V. Foster, Comment, *Employment At Will: When Must an Employer Have Good Cause For Discharging an Employee?*, 48 Mo. L. Rev. 113, 116 (1983) (noting that the predecessor to the MHRA, the Missouri Fair Employment Practices Act, §§ 296.010-.070 RSMo. (1978), was a statutory limitation to the employment-at-will doctrine).

16 Henry H. Perritt, Jr., Employee Dismissal Law & Practice § 1.02 (5th ed. 2006).

17 *Koszor v. Ferguson Reorganized Sch. Dist. R-2*, 849 S.W.2d 205, 207 (Mo. App. E.D. 1993).

18 *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 820 (Mo. banc 2007); MAI 31.24 (6th ed. Supp. 2007).

19 Section § 213.055, RSMo. 2008; *Estate of Latimer*, 913 S.W.2d 51, 55 (Mo. App. W.D. 1995); *Mo. Comm'n on Human Rights v. City of Sikeston,* 769 S.W.2d 798, 801 (Mo. App. S.D. 1989); MAI 3.01 (6th ed. 2002); MAI 31.24 (6th ed. Supp. 2007).

20 *City of Sikeston*, 769 S.W.2d at 801.

21 *See Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 818 n.4 (Mo. banc 2007) (noting that direct evidence is not common in employment discrimination cases); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (there will seldom be eyewitness testimony to the employer's mental processes); *E.E.O.C. v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) (direct evidence is not common in employment cases); *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) ("employers rarely leave a paper trail – or 'smoking gun'" showing its discriminatory intent); Grebeldinger, note 7, at 399.

22 *Daugherty*, 231 S.W.3d at 820; MAI 31.24 (6th ed. Supp. 2007).

23 *Daugherty,* 231 S.W.3d at 820-21.

24 *See* Brill, note 3, at *21.

25 *See* MAI 31.25 (6th ed. Supp. 2008) (instructing that if the jury believes the employer's legitimate explanation, then the verdict should be for the employer); Brill at *21-*22 (noting that the employer will usually take the position that it had legitimate reasons for its actions and that the employee has not proven that discrimination was a factor in the decision).

26 *See* Brill at *4(B)

27 *Id*.

28 *Id*.

29 MAI 31.24 (6th ed. Supp. 2007).

30 *See* Brill at *16-*18 (discussing how a jury cannot simultaneously accept that discrimination contributed to the employment decision and that the employment decision was based on legitimate factors); *see Conway v. Mo. Comm'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App. E.D. 1999) (coupling the prima facie case elements with the jury's disbelief of the reasons put forth by the employer may suffice to show intentional discrimination).

A business judgment instruction informs the jury that the employer cannot be liable for exercising its business judgment as long as the employer's reasons were not discriminatory – even in cases where the jury disagrees with the employment decision or believes it to be harsh and unreasonable.[31] The instruction allows the jury to consider the employer's explanation in a mindset consistent with the employment-at-will doctrine and the MHRA's purpose – prohibiting intentional discrimination in employment decisions.[32] A business judgment instruction is also consistent with the employee's burden of proving intentional discrimination rather than simply rebutting the employer's articulated reason for its actions.[33]

The evidence usually offered during an employment discrimination trial also highlights the need for a business judgment instruction. In the typical trial, the "court will … allow evidence … that the employer's action was … unjustified" or unreasonable.[34] This evidence will often be that the employee was treated less favorably than similarly situated employees who were not within the protected class.[35] The evidence is admitted because it may support an inference that the employer's proffered reason for its decision was not its true reason.[36] But once this evidence is introduced, there is a risk that the jury will misunderstand its purpose and believe that it can find for the employee if it finds the employer's conduct to be improper, harsh, or unreasonable, but not necessarily discriminatory.[37]

IV. The Business Judgment Instruction in Other Jurisdictions

In *Loeb v. Textron, Inc.*, the First Circuit first articulated the idea that the jury must understand that its focus is on the employer's motivation – not its business judgment.[38] There, the court considered to what extent the *McDonnell Douglas*[39] burden-shifting approach applied to jury trials under the Age Discrimination in Employment Act.[40] A key issue, which was unanswered at that point, was the burden that articulating "a legitimate, nondiscriminatory reason" for the employment action placed on the employer.[41] The court concluded that the employer's burden was only one of production and that the burden of persuasion remained on the employee at all times.[42] Thus, once the employer states a non-discriminatory reason, the employee must persuade the jury that the stated reason is a pretext or cover-up for what was actually a discriminatory purpose.[43]

In discussing the employee's burden in proving pretext, the court noted that while the "employer's judgment or … action may seem poor or erroneous …, the relevant question is simply whether the given reason was a pretext for illegal discrimination."[44] And while "[t]he employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, … [it] does not have to be a reason that the … jur[y] would act on or approve."[45] Ultimately, according to the court, "the employer is entitled to make [its] own policy and business judgments … as long as [they are not] pretext[s] for discrimination."[46] And "[t]he jury must understand that its focus is to be on the employer's motivation … and not on its business judgment."[47] Thus, the court concluded that the trial court should explain to the jury that an employer is entitled to make its own subjective business judgments.[48]

Similar to *Loeb*, and building upon its own precedents regarding an employer's business judgment,[49] the Eighth Circuit, in *Walker v. AT & T Technologies*,[50] became the first circuit to reverse a jury verdict

31 *See* Brill at *29; *see, e.g.,* § 5.94 Business Judgment-Title VII Cases, Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, p. 240 (2007).("You may not return a verdict for the plaintiff just because you might disagree with the defendant's (decision) or believe it to be harsh or unreasonable.").

32 *See State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87 (Mo. banc 2003) (an action under the MHRA seeks to redress an intentional wrong).

33 *See* Grebeldinger, note 8, at 418; *see also Estate of Latimer*, 913 S.W.2d 51, 55 (Mo. App. W.D. 1995) (it is the employee's continuing burden to prove intentional discrimination and of persuading the jury that the reasons given by the employer are pretext for intentional discrimination).

34 *See* Brill at *31.

35 *See, e.g., H.S. v. Bd. of Regents,* 967 S.W.2d 665, 672 (Mo. App. E.D. 1998).

36 *See* Brill at *31; *see also Reeves v. Sanderson Plumbing Prods., Inc.*,530 U.S. 133, 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive.").

37 *See* Brill at *31; *see also* 37 Martucci, note 5, at § 16:13 (discussing how jurors will often focus on whether the employer took an objectively fair approach with the employee in making the ultimate employment decision at issue).

38 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

39 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* approach is traditionally used in cases where there is no direct evidence of intentional discrimination. *Conway v. Mo. Comm'n on Human Rights*, 7 S.W.3d 571, 574 (Mo. App. E.D. 1999). Under this approach, "the plaintiff has the initial burden" to prove "a prima facie case of discrimination." *Id*. "The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for" its actions. *Id*. The plaintiff then must prove that the employer's explanation is pretext for intentional discrimination. *Id.* at 574-75.

40 29 U.S.C. §§ 621-634; *Loeb*, 600 F.2d at 1010-11.

41 *Loeb*, 600 F.2d at 1011-12.

42 *Id*.

43 *Id*.

44 *Id.* at 1012 n.6.

45 *Id*.

46 *Id*.

47 *Id*.

48 *Id.* at 1019.

49 *See, e.g., Neufeld v. Searle Labs.*, 884 F.2d 335, 340 (8th Cir. 1989) (recognizing that "courts have no business telling [employers] how to make personnel decisions"); *Bell v. Gas Serv. Co.*, 778 F.2d 512, 515 (8th Cir. 1985) (employment discrimination statute's intent is not to review whether employer's business judgment was correct); *Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 n.3 (8th Cir. 1985) (an employer may develop "arbitrary, ridiculous and [even] irrational" policies as long as they are applied in a "non-discriminatory manner.").

50 995 F.2d 846 (8th Cir. 1993).

due to the trial court's failure to issue a business judgment instruction.[51] The court reasoned that because the evidence focused on comparing the employee's qualifications with his replacement's qualifications, the jury could have been misled without a business judgment instruction.[52] And "an employer has the right to make business decisions – to assign work, to change an employee's duties, to refuse to assign a particular job, and to discharge – for good reason, bad reason, or no reason at all, absent intentional age discrimination[.]"[53] Thus, the jury should have been instructed that the employer "was entitled to exercise its business judgment in making the promotion decision."[54]

Since *Walker*, the Eighth Circuit has consistently recognized that "a business judgment instruction is crucial to [the] fair presentation" of an employment discrimination case, and that the trial "court must offer it whenever it is proffered by the [employer]."[55] Other jurisdictions have also held that a business judgment instruction is a standard instruction crucial to the fair presentation of the case.[56] And several courts have also affirmed instructions that contain business judgment language.[57]

V. Using a Business Judgment Instruction Under the MHRA

In 2006, in *McBryde v. Ritenour School District*,[58] the Missouri Court of Appeals held that the trial court did not commit reversible error by failing to submit a business judgment instruction to the jury.[59] But *McBryde* relied upon shaky case law and did not substantively analyze the considerations that favor a business judgment instruction. Further, *McBryde* did not hold – nor has any Missouri court ever held – that submitting a business judgment instruction to the jury was error. Thus, despite *McBryde*, employers should continue offering a business judgment instruction and Missouri trial courts should consider submitting a business judgment instruction to the jury.

A. *McBryde*'s Flawed Reasoning

Without any substantive analysis, *McBryde* concluded that because the Supreme Court of Missouri had not approved an MAI business judgment instruction, the trial court's failure to submit one to the jury was not reversible error.[60] In rejecting Eighth Circuit precedent on the issue, the court cited three federal decisions for support: *Julian v. City of Houston, Texas*,[61] *Trident Investment Management, Inc. v. Amoco Oil Co.*,[62] and *Kelley v. Airborne Freight Corp*.[63] But a closer look at these three federal decisions demonstrates that they do not reject using a business judgment instruction.

In fact, *Trident Investment Management* is not even an employment discrimination decision; nor does it discuss a business judgment instruction.[64] *Julian*, on the other hand, actually is an employment decision that involves a business judgment instruction – but it actually endorses using business judgment language. There, the employer argued that the trial court erred in refusing to submit the employer's proffered business judgment instruction.[65] The court disagreed because the trial court's instructions already communicated that the employer had a right to exercise its business judgment.[66] Because the trial court had already instructed the jury that the employer could exercise its business judgment, the employer was not entitled to the specific language it requested.[67] Further, the Fifth Circuit has since followed *Julian* to approve a business judgment instruction, noting that *Julian* had approved similar business judgment language.[68]

Similar to *Julian*, *Kelley* held that the trial court did not err in failing to submit a business judgment instruction, but the court stated that a business judgment instruction could have been useful in the case.[69] Further, the court noted that while a business judgment instruction may not be required in all cases, when assessing an employer's non-discriminatory reason the jury must focus on the employer's motivation – not its business judgment.[70]

Perhaps equally as troubling as *McBryde*'s reliance on unsupportive case law was its determination that the trial court did not err in refusing the proffered business judgment instruction because the

51 *Id.* at 849-50.
52 *Id.* at 850; *see* Grebeldinger, note 8, at 418.
53 *Walker*, 995 F.2d at 850.
54 *Id.*; *see* Grebeldinger, note 8, at 418.
55 *See Langlie v. Onan Corp.*, 192 F.3d 1137, 1141-42 (8th Cir. 1999); *Scamardo v. Scott County*, 189 F.3d 707, 711 (8th Cir. 1999); *Stemmons v. Mo. Dep't of Corr.*, 82 F.3d 817, 819 (8th Cir. 1996).
56 *See Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1234-35 (11th Cir. 2004); *Skaggs v. Elk Run Coal Co., Inc.*, 479 S.E.2d 561, 588 n.33 (W. Va. 1996).
57 *See, e.g., Kanida v. Gulf Coast Med. Personnel LP*, 363 F.3d 568, 581 (5th Cir. 2004); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425-27 (10th Cir. 1993); *Sosa v. S. Cal. Permanente Med. Group*, No. G035664, 2006 WL 2147694, at *23 (Cal. App. 4 Dist., 2006).
58 207 S.W.3d 162 (Mo. App. E.D. 2006).
59 *Id.* at 171.
60 *Id*.
61 314 F.3d 721 (5th Cir. 2002).
62 194 F.3d 772 (7th Cir. 1999).
63 140 F.3d 335 (1st Cir. 1998).
64 *Trident,* 194 F.3d at 773-81.
65 *Julian*, 314 F.3d at 727.
66 *Id*.
67 *Id.* at 727-28.
68 *Kanida*, 363 F.3d at 581.
69 *Kelley*, 140 F.3d at 350.
70 *Id.* at 351 n.6 (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)).

Supreme Court of Missouri would have drafted and adopted such an instruction if it had intended that courts submit one in MHRA cases.[71] This simplistic reasoning is flawed for several reasons. First, the law regarding jury instructions under the MHRA is in its infancy because jury trials have been available only since 2003, and because the first MHRA jury instructions were not approved until 2005.[72] Second, because jury trials under the MHRA are a relatively recent phenomenon, the Supreme Court of Missouri has not drafted or adopted all necessary instructions under the MHRA. For example, the MHRA unquestionably prohibits retaliation.[73] Yet the Supreme Court of Missouri has not drafted or adopted any MAI instructions regarding retaliation actions.[74] Surely, one would not assert that an employee could not submit a retaliation instruction simply because the Supreme Court of Missouri had not yet adopted such an instruction. Finally, the court ignored the fact that if no MAI instruction exists and an instruction is necessary to submit the case fairly, a "not in MAI" instruction should be submitted.[75]

A. Offering a Business Judgment Instruction

The Supreme Court of Missouri should consider drafting and adopting a business judgment instruction, but employers should continue offering a "not in MAI" instruction until it does. Without a business judgment instruction, jurors do not have the proper analytical framework to consider the evidence before them in an employment discrimination trial. Two competing principles are at work in any employment discrimination case – an employer's right to direct its business through personnel decisions versus prohibiting intentional discrimination. But current MAI instructions make jurors aware of only the latter consideration. Yet the evidence generally presented usually touches on both concerns.

Thus, the jury must explicitly understand that its task is to determine whether intentional discrimination occurred – not whether the employer's decision was correct. This key distinction flows from the fact that under the employment-at-will doctrine, adverse employment decisions are inherently valid.[76] Thus, Missouri law begins with the presumption that an adverse employment decision is valid and the employee must prove that the termination was invalid under the MHRA.[77] But without a business judgment instruction, the jury will never be aware that the MHRA is an exception to the employment-at-will doctrine.

Further confounding the matter is that direct evidence of discrimination will rarely be offered. Rather, the evidence offered, without the proper focus, will tend to speak to the correctness of an employer's actions. This evidence may be properly admitted, but a real danger exists that an uninformed jury will mistake its task for determining whether the correct decision was made.

Employers should, therefore, offer a not-in-MAI business judgment instruction as allowed under Rule 70.02. Employers can rely upon a number of examples in drafting their instruction.[78] And regardless of the format followed, the business judgment instruction should not be argumentative or complicated.[79] The instruction should simply convey to the jury that in making its determination, it cannot question the employer's business judgment or find against the employer simply because it disagrees with the employer's decision or finds the decision harsh or unreasonable. This limiting instruction is generally acceptable under Missouri law where the verdict-directing instruction does not properly limit the scope of the jury's consideration.[80]

VI. Conclusion

In employment discrimination cases, juries are faced with competing societal interests inherent in employment law – the employer's right to direct its business versus society's interest in prohibiting intentional discrimination. The evidence presented will often touch on both competing interests. Yet the jury's charge is to consider only whether intentional discrimination occurred – not whether the employer made a good decision.

A business judgment instruction should, therefore, be proffered by employers and submitted by trial courts. The instruction would allow the jury to consider the evidence presented in the proper framework, satisfying the competing goals between the employment-at-will doctrine and the MHRA. With a business judgment instruction, the jury truly would be in a better position to appreciate how its factual determinations properly should affect the trial's outcome under the MHRA.

VII. Appendix

The Eighth Circuit's model business judgment instruction is as follows:

"You may not return a verdict for the plaintiff just because you might disagree with the defendant's (decision) or believe it to be harsh or unreasonable."[81]

71 *McBryde*, 207 S.W.3d at 171.

72 *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 819 (Mo. banc 2007).

73 *See* § 213.070(2), RSMo. 2008, *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995) (MHRA prohibits retaliation).

74 *See* MAI *passim* (6th ed. Supp. 2007).

75 Rule 70.02 (2008).

76 *See* Perritt, note 16, at § 1.02.

77 *See id.*; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (employee retains the "ultimate burden of persuading the trier of fact that he [or she] has been the victim of intentional discrimination.").

78 *See, e.g.*, 5-88 Hon. Leonard B. Sand et al., Modern Federal Jury Instructions-Civil ¶ 88.04[5] (LexisNexis, 2007); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, 5.94 (2007) ; 3C Kevin F. O'Malley et al., Federal Jury Practice & Instructions-Civil § 171.75 (5th ed. 2001).

79 *See* Rule 70.02(b) (2007).

80 *See, e.g., Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 240-41 (Mo. banc 2001) (discussing proper use of limiting instructions where defendant raised concerns that the "verdict-directing jury instruction" would allow the jury to find defendant liable based on impermissible considerations).

81 Section 5.94 Business Judgment-Title VII Cases, Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, p. 240 (2007).