

<b>Exhibit No.:</b>	_____
<b>Issue(s)</b>	AMI/Corporate Governance: Workplace Discrimination
<b>Witness/Type of Exhibit:</b>	Marke/Direct
<b>Sponsoring Party:</b>	Public Counsel
<b>Case No.:</b>	GR-2021-0108

**DIRECT TESTIMONY**

**OF**

**GEOFF MARKE**

Submitted on Behalf of the Office of the Public Counsel

**SPIRE MISSOURI, INC.**

CASE NO. GR-2021-0108

May 12, 2021

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Spire Missouri Inc.'s d/b/a	)	
Spire Request for Authority to Implement a	)	
General Rate Increase for Natural Gas	)	<u>Case No. GR-2021-0108</u>
Service Provided in the Company's	)	
Missouri Service Areas	)	

**VERIFICATION OF GEOFF MARKE**

Geoff Marke, under penalty of perjury, states:

1. Attached hereto and made a part hereof for all purposes is my rate design direct testimony in the above-captioned case.
2. My answer to each question in the attached rate design direct testimony is true and correct to the best of my knowledge, information, and belief.

/s/Geoff Marke  
Geoff Marke  
Chief Economist  
Office of the Public Counsel

## TABLE OF CONTENTS

<b>Testimony</b>	<b>Page</b>
Introduction	1
AMI	1
Corporate Governance: Workplace Discrimination	9

**DIRECT TESTIMONY**  
**OF**  
**GEOFF MARKE**  
**SPIRE MISSOURI, INC.**  
**CASE NO. GR-2021-0108**

1 **I. INTRODUCTION**

2 **Q. Please state your name, title, and business address.**

3 A. Geoff Marke, PhD, Chief Economist, Office of the Public Counsel (OPC or Public Counsel),  
4 P.O. Box 2230, Jefferson City, Missouri 65102.

5 **Q. What are your qualifications and experience?**

6 A. I have been in my present position with OPC since 2014 where I am responsible for economic  
7 analysis and policy research in electric, gas, water, and sewer utility operations.

8 **Q. Have you testified previously before the Missouri Public Service Commission?**

9 A. Yes. A listing of the Commission cases in which I have previously filed testimony and/or  
10 comments is attached in Schedule GM-1.

11 **Q. What is the purpose of your direct testimony?**

12 The purpose of my testimony is to provide support for my recommendation to disallow costs  
13 associated with Spire Missouri Inc.'s ("Spire") deployment of Advanced Metering  
14 Infrastructure ("AMI") investments and for the disallowance of legal costs associated with  
15 workplace discrimination.

16 **II. AMI**

17 **Q. Can you summarize the current state of Spire's meter infrastructure as well as its  
18 planned investments included in this case?**

19 A. Based on existing depreciation schedules, Spire's current "diaphragm" meters are 1/3 of the  
20 way through their useful life.

21 Spire is currently in the process of replacing these existing diaphragm meters with ultrasonic  
22 meters, which are approximately \$25 more incrementally than the replacement of a similar

1 diaphragm meter. As of March 31, 2021, this has resulted in \$10,671,837 in combined costs  
2 between Spire East and West.

3 **Q. Do you support replacing the current meters with more than 2/3 of their remaining useful**  
4 **life left?**

5 A. No. The Company has provided no basis why these investments are prudent or necessary to  
6 provide safe and reliable service.

7 **Q. Would replacement of a diaphragm meter with an ultrasonic meter enable AMI**  
8 **capability?**

9 A. No. Additional large capital investments in network technology, network management  
10 software and data warehouses would be necessary to achieve AMI capability. Moreover,  
11 ultrasonic meters are not necessary for AMI deployment. AMI can be deployed using existing  
12 diaphragm meter technology.

13 **Q. Do you support AMI investments for Spire's natural gas customers?**

14 A. No. I do not believe the benefits of AMI investments for gas customers outweigh the costs.  
15 Especially if the investments result in stranding existing meters before the end of their useful  
16 life.

17 **Q. Did Spire conduct any cost benefit analysis before making these investments?**

18 A. No.  
19 This answer is supported by the response to OPC DR-2047, which includes the following  
20 question, and response:

21 **Question(s):**

22 Has Spire performed a cost benefit analysis for switching to AMI from AMR  
23 meters? If yes, please provide the analysis and any internal report generated.

24 If no, why not?

25 **Response:**

26 Diaphragm meter technology is obsolete. The current vendor of this meter  
27 equipment for Spire is discontinuing the production of residential diaphragm

1 meters in 2021. The incremental cost increase for the ultra-sonic meter is  
2 approximately \$25. The capabilities, safety enhancements, accuracy, and  
3 reliability of the ultra-sonic meter makes it a natural fit for modern meter  
4 equipment. There is no basis for a cost benefit analysis as the current  
5 diaphragm technology is simply obsolete.<sup>1</sup>

6 **Q. Is it Spire's intent to replace the entire meter or just the diaphragm module with the**  
7 **ultra-sonic module?**

8 A. The intent is to replace the entire meter.

9 **Q. Is diaphragm meter technology obsolete?**

10 A. I have been unable to find any source to substantiate this claim.

11 **Q. Who will be Spire's meter vendor?**

12 A. Itron will be the meter vendor for Spire West. It is not entirely clear whether Itron will be the  
13 vendor for Spire East.

14 **Q. Does Itron sell diaphragm meters?**

15 A. Yes. Diaphragm meters are the first types of natural gas meters listed on their sales page. Figure  
16 1 includes a snipped photo of the first natural gas meters displayed on its options page.


---

<sup>1</sup> See GM-2.

1 **Figure 1: Itron Diaphragm Meters<sup>2</sup>**

<p>Category</p> <ul style="list-style-type: none"><li><input type="checkbox"/> Communication Modules 4</li><li><input type="checkbox"/> Meter Installation + Program... 2</li><li><input type="checkbox"/> Standard Commercial + Indust... 2</li><li><input type="checkbox"/> Standard Residential Metering 2</li><li><input type="checkbox"/> Calibration + Test Equipment 1</li><li><input type="checkbox"/> Smart Residential Metering 1</li></ul> <p>Type</p> <ul style="list-style-type: none"><li><input type="checkbox"/> Wireless 3</li><li><input type="checkbox"/> Diaphragm Metering 2</li></ul>	 <p><b>"A" Series</b> Light Commercial and Industrial Gas Diaphragm Meters</p>	 <p><b>400A</b> Heavy Residential and Light Commercial Gas Diaphragm Meter</p>
---	---	---

2

	<h2>I-250</h2> <h3>Residential and Light Commercial Gas Diaphragm Meter</h3> <p>?Precise measurement of consumption is essential for natural gas utilities. The Itron I-250 residential gas meter offers exceptional accuracy and reliability for enhanced revenue assurance and greater confidence in meter performance. Improving on a long-trusted design, the I-250 is Itron's premier residential, positive displacement measurement device. A classic returns.</p> <p><a href="#">Contact Sales</a></p> <p><b>PRODUCT INFORMATION</b></p>
--	---

3

4 **Q. Is there notification regarding the discontinuation of diaphragm meter technology in**  
5 **2021 or the pending obsolescence of diaphragm meter technology on Itron's website?**

6 A. No.

7 **Q. Is Itron the only natural gas meter vendor in the world?**

8 A. No. There are many natural gas meter vendors worldwide including, but not limited to: ABB,  
9 Aclara, DIEHL, Emerson, IMAC, LAO Industria, Schneider, Landis+Gyr, Wyatt and Zenner.

<sup>2</sup> Itron (2021) Gas Meters + Modules. <https://www.itron.com/na/solutions/product-catalog/gas-meters-modules#sort=%40displayz32xname%20ascending>

1 **Q. Do natural gas AMI investments hold the same potential benefits as electric AMI**  
2 **investments?**

3 A. No.

4 **Q. Would natural gas AMI investments save an equivalent amount of dollars in OPEX as**  
5 **has been proposed with electric AMI investments?**

6 A. No. One of the key cost-savings features of AMI investments is the ability to eliminate (or  
7 scale down) paid meter readers as AMI allows remote shut off *and* turn on for a meter. Natural  
8 gas AMI (and AMR for that matter) only allow for remote shut off *not* the ability to remotely  
9 turn on. A field technician would still need to go to the meter to ensure the gas is on (*e.g.*, pilot  
10 light).

11 **Q. Could customers receive cost savings through time-of-use pricing for natural gas like**  
12 **they could (theoretically) from electric time-of-use pricing?**

13 A. The short answer is no. In theory, the interplay between natural gas consumption and pricing  
14 at the distribution company side and natural gas usage on the electric generation side could  
15 provide some pricing efficiency, but the complexity inherent in such a structure is beyond the  
16 scope of this testimony, and is likely solely limited to demand response actions.<sup>3</sup> It merits  
17 emphasizing that the limited number of customers utilizing time-of-use pricing on the electric  
18 side (*i.e.*, pilot programs) has not materialized in any meaningful benefits, let alone enough  
19 benefits to offset the hundreds of millions of dollars borne by customers to date.

20 **Q. Will customers be able to look at their consumption remotely or communicate two-way**  
21 **on a real-time basis?**

22 A. No. Spire will need to make additional capital investments in network technology, network  
23 management software, and data warehouses. This will no doubt cost many more millions of

---

<sup>3</sup> That alone would be a very difficult task and most assuredly not worth the effort given today's natural gas make-up. I am also unaware of any natural gas distribution company demand response potential studies or programs (beyond emergency curtailment). See also: Weiss et al (2018) "Demand Response for Natural Gas Distribution: Opportunities and Challenges" The Brattle Group.

[https://brattlefiles.blob.core.windows.net/files/13929\\_demand\\_response\\_for\\_natural\\_gas\\_distribution.pdf](https://brattlefiles.blob.core.windows.net/files/13929_demand_response_for_natural_gas_distribution.pdf)



1 dollars. Until then, customer will have to be satisfied with the same monthly bills that show  
2 the amount of therms consumed over the billing period as opposed to a possible future where  
3 they could get on the internet and see how many therms they have consumed in a shorter  
4 interval.

5 **Q. Do customers want to know what their interval gas consumption is on a more real-time**  
6 **basis?**

7 A. I am aware of no demand for such a service. Furthermore, the value of knowing one's natural  
8 gas consumption on a more real-time basis as opposed to consumption on a monthly basis  
9 needs to be contrasted with the costs for such a service. I struggle to believe most (or any)  
10 customers are that passionate about their natural gas usage to justify the additional costs.

11 Regardless, until millions of additional dollars of investment are made in network technology,  
12 network management software and data warehouses, customers will be paying a return *on* and  
13 *of* a new meter that functionally does the same thing as the old meter they are still paying the  
14 undepreciated amount for.

15 **Q. Has Spire engaged OPC on how it plans to communicate its AMI deployment to**  
16 **customers or what options it will give customers who wish to opt-out due to perceived**  
17 **medical, privacy, and/or cybersecurity concerns?**

18 A. No. The extent of Spire's communication strategy surrounding meter and/or supporting AMI  
19 investments has been limited to the response to OPC DR-2105:

20 The Company has developed a program where customers who express  
21 concerns are contacted by Customer Experience supervisors to discuss the  
22 technology and the facts around how the equipment operates. The customer  
23 concerns are discussed and if the customer still elects to opt out, the  
24 appropriate equipment is installed, and the customer is told Spire has honored  
25 their wish to opt out.<sup>4</sup>

---

<sup>4</sup> GM-3

1           Furthermore, Spire has elected not to change its tariff to include additional charges for opt-out  
2           customers.

3           **Q.    Have any other Commission’s rejected AMI investment on the basis of costs exceeding**  
4           **benefits for customers?**

5           A.    Yes. In 2019, regulators in Virginia rejected Dominion Energy’s proposed smart meter  
6           rollout, and utility commissions in New Mexico, Massachusetts, and Kentucky all rejected  
7           utility proposals.<sup>5</sup> Keep in mind, Spire has conducted no such cost-benefit analysis nor  
8           provided any such proposal.

9           **Q.    Is there any financial motivation for the Company to replace its existing meter**  
10           **infrastructure with more expensive “smart” meter infrastructure?**

11          A.    Yes. To build out rate base and make more profit.

12          **Q.    When did you first become aware of Spire’s intent to deploy AMI?**

13          A.    On June 25, 2020, in Case No: GO-2020-0416, Spire filed an application before this  
14          Commission seeking a depreciation authority order to establish annual depreciation rates  
15          for the plant accounts related to its new smart meter devices: Account 381.100 - Smart  
16          Meters and Account 382.100 - Smart Meters Installation.

17          **Q.    Did you file comments in that docket?**

18          A.    Yes. On August 28, 2020, the OPC filed a pleading that did not oppose the depreciate rates for  
19          accounts 381.100 and 382.100; however, the pleading included a memorandum co-authored  
20          by me and OPC witness John Robinett that raised prudency concerns regarding the AMI  
21          investments and encouraged Spire to engage stakeholders as to the rationale behind their  
22          potential investment. The memorandum concluded with the following statement:

23                   OPC hopes that Spire will do the proper analysis before making its  
24                   investments and provide the empirical and objective justifications prior to  
25                   seeking recovery. It is much more of a challenge for everyone involved and

---

<sup>5</sup> Walton R. (2020) Most utilities aren’t getting full value from smart meters, report warns. Utilitydive.  
<https://www.utilitydive.com/news/most-utilities-arent-getting-full-value-from-smart-meters-report-warns/570249/>

1 a greater risk to shareholders and ratepayers alike to raise prudency issues  
2 on an investment that is already operational. Missouri is not a pre-approval  
3 state, however, and OPC is not requesting any prudency disallowance for  
4 Spire's investments at this time. This memorandum merely serves as a  
5 placeholder to put Spire on notice that its planned capital investments raise  
6 considerable concern for OPC, as we are highly skeptical that such an  
7 investment would be deemed prudent by a reasonable person.<sup>6</sup>

8 **Q. Those comments were filed more than eight months ago; did Spire engage OPC on the**  
9 **rationale behind the need to replace their meters before the end of their useful life?**

10 A. No. There has been no engagement with OPC on this issue or with any other stakeholder to  
11 my knowledge.

12 **Q. Can you summarize Spire's intent and your arguments as to why the Commission should**  
13 **disallow costs associated with Spire's AMI investments?**

14 A. Yes. A bullet-point summary of my arguments is as follows:

- 15 • Spire is replacing their existing diaphragm meters that have approximately 2/3  
16 remaining useful life with more expensive ultrasonic meters;
- 17 • Additional investment in network technology will be necessary to make these  
18 ultrasonic meters function as fully-capable AMI investments;
- 19 • OPC raised objections to AMI deployment as soon as we were made aware of  
20 Spire's intent and publically challenged the Company to engage stakeholders  
21 on this issue before further capital investment were made eight months ago—  
22 Spire did not engage OPC;
- 23 • Spire has conducted no cost-benefit studies to date nor created an AMI business  
24 proposal justifying the prudency of these investments;
- 25 • Spire has put forward that diaphragm meter technology is obsolete which runs  
26 counter to its own vendors website;

---

<sup>6</sup> See GM-4.

- 1           • Natural gas AMI meters do not produce the same espoused benefits as electric  
2           AMI meters;
- 3           • Several State Commissions around the country have rejected electric AMI  
4           investments for failing to persuasively make the case for electric AMI  
5           investment—Spire has made no attempt at making a case for natural gas AMI  
6           investments which are more limited than their electric counterparts; and
- 7           • It is not clear what benefits customers are receiving from these investments  
8           (either the more expensive ultrasonic meter or the necessary network  
9           technology to enable full AMI capability) that do not already exist today.

10 **Q. What is your recommendation?**

11 A. I recommend the Commission disallow the total costs associated with AMI deployment in  
12 utility account 381100 that Spire is seeking in this rate case, which is \$10,671,837 on a  
13 combined Spire East and West basis as of March 31, 2021.

14 **III. CORPORATE GOVERNANCE: WORKPLACE DISCRIMINATION**

15 **Q. Spire Missouri President Scott Carter spends a considerable amount of time speaking to**  
16 **value that Spire has delivered to its communities. Do you agree?**

17 A. In general, I do. Importantly, I would also like to take this time to highlight Spire’s recent  
18 commitment with helping its customers throughout the COVID-19 pandemic in the form of  
19 bill and arrearage assistance and late payment plans. Spire has proactively worked with OPC  
20 and other stakeholders on its assistance programs and outreach efforts to help ensure continued  
21 natural gas use for customers of all classes during this challenging past year. Most notably in  
22 reaching settlement agreement in Case No. GU-2020-0376 (COVID-19 AAO) that resulted,  
23 among other things, in a successful shareholder/ratepayer-sponsored, arrearage repayment  
24 plan.

25 Throughout the COVID-19 pandemic, the Company has been a model in community and  
26 customer engagement with proactive efforts across multiple communication channels (in-

1 person, company website, Facebook, Twitter, webinars with Community Action Agencies, call  
2 center customer engagement, earned media, etc...) supporting both its Company-specific  
3 programs and promoting the various federal stimulus programs that have materialized. Simply  
4 put, the Company has stepped up and acted as a good steward and community leader when it  
5 counted and I commend them for their efforts on this front.

6 **Q. Was there anything about Mr. Carter’s testimony that gave you pause?**

7 A. Yes. At one point, Mr. Carter states:

8 Our values are safety, inclusion and integrity. These values define who we are,  
9 how we operate and how we treat one another both inside and outside the  
10 Company. In our workplace, diverse perspectives are welcomed and  
11 embraced, employees are given the tools they need to perform their duties  
12 safely and each employee is expected to get the job done right—every time.  
13 When we live these values internally, it shows outwardly, helping us create  
14 more safe and inclusive neighborhoods and cities where people look out for  
15 each other and strive to do the right thing.<sup>7</sup>

16 **Q. What about that statement gave you pause?**

17 A. The comment about valuing diverse perspectives in the workplace reminded me of a troubling  
18 article I read about Spire surrounding workplace discrimination. According to *News-Press*  
19 *NOW*:

20 A St. Louis jury has awarded \$8.5 million to a St. Joseph woman who  
21 alleged race discrimination and retaliation against natural gas company  
22 Spire Inc.

23 Danielle McGaughey, a 47-year-old African-American, had reported a  
24 hostile environment while working for the company, according to attorneys  
25 who represented her.

---

<sup>7</sup> Case No. GR-2021-0108 Direct Testimony of Scott Carter p. 4, 14-21.

1           The verdict, returned Thursday, is thought to be the largest in Missouri history  
2           for an African-American employee facing race discrimination and the second-  
3           largest for a current employee who chose to sue their employer over any type  
4           of discrimination. The jury assessed \$1.3 million in compensatory damages  
5           and \$7.2 million in punitive damages. The jurors’ decision was announced  
6           after a two-week trial in which the jury found the company liable.<sup>8,9</sup>

7           This case was later upheld by the Eastern District Court of Appeals and again by the Missouri  
8           Supreme Court.<sup>10</sup>

9           **Q.    Would the allegations to this case have occurred prior to Spire’s acquisition?**

10          A.    That is what Spire suggested in a 2020 *News-Press NOW* article which states:

11                   “Most of the allegations involved in this case date back to 2006 and extend  
12                   through 2013, before Spire bought the company in September 2013,”  
13                   Raegan Johnson, a spokesperson for Spire, said. “While we cannot speak to  
14                   the culture under prior owners, we can speak to the company we are today  
15                   and the values that we hold dear — safety, inclusion and integrity.”

16          **Q.    Did the plaintiff agree with that sentiment?**

17          A.    No. According to *The Kansas City Star*:

18                   Danielle McGaughy once sued her employer, Spire Energy, for workplace  
19                   discrimination. She won — and now she’s taking the utility giant to court  
20                   again.

21                   After years of litigation and mudslinging, and being on the wrong end of a  
22                   multimillion-dollar lawsuit, one would think Spire would clean up its act.

23                   Apparently not. . . .

---

<sup>8</sup> Scherer, R. (2018) Jury awards \$8.5M to woman in employment case. *News-PressNow*.  
[https://www.newspressnow.com/news/local\\_news/jury-awards-8-5m-to-woman-in-employment-  
case/article\\_bede49f5-af87-537e-b8dd-3e2409c9e139.html](https://www.newspressnow.com/news/local_news/jury-awards-8-5m-to-woman-in-employment-case/article_bede49f5-af87-537e-b8dd-3e2409c9e139.html)

<sup>9</sup> These costs do not include legal fees or interest, which would also be included.

<sup>10</sup> See GM-5

1 Attorneys for McGaughy filed a separate lawsuit against Spire last month.  
2 McGaughy claims Spire failed to accommodate her chronic medical  
3 condition; discriminated against her based on race, age and sex; defamed her  
4 in the media after the original verdict and retaliated by denying her  
5 promotions.<sup>11</sup>

6 **Q. Were any of these discrimination costs borne by ratepayers?**

7 A. Yes. At least \$300K was charged to Spire Missouri West for litigation costs, but none of the  
8 approximate \$10 million in judgement results were borne by ratepayers according to Spire  
9 discovery. Further discovery will be necessary to clarify if these were the only costs borne by  
10 ratepayers due to discrimination lawsuits leveled against Spire management.

11 **Q. Did you issue discovery on whether or not this was an isolated or systemic issue for Spire?**

12 A. I did. OPC DR-2092 asked for a breakdown of formal discrimination complaints issued by  
13 employees, contractors or customers to Spire’s human resources for the past six years. The  
14 Company objected “on the grounds and to the extent that such request is overly broad and  
15 unduly burdensome, in that the request seeks information regarding the past ten years of formal  
16 discrimination complaints, broken down by year, by utility and by complaint type.”<sup>12</sup>

17 **Q. What is your response?**

18 A. As it stands, the objection just raises more questions for me. For example, how many  
19 discrimination complaints to the Company’s Human Resource Department are we talking  
20 about that Spire could not provide an annual breakdown?

21 **Q. Isn’t this a management problem and not an issue for the Commission?**

22 A. Normally I would say yes. However, if Spire’s management and workplace environment has  
23 a fostered a real and/or perceived problem with inclusiveness, I believe it can result in a  
24 negative multiplier effect across the Company, including, but not limited to: its operations,

---

<sup>11</sup> Porter, T. (2020) “Black St. Joe woman won \$8.5 million for discrimination at Spire. She’s suing again.” *The Kansas City Star*. <https://www.kansascity.com/opinion/opn-columns-blogs/toriano-porter/article245716265.html>

<sup>12</sup> See GM-6

1 ability to attract and retain talent, ability to attract capital, stock valuation, etc. All of these  
2 issues are interdependent and could ultimately negatively impact ratepayers cost of service.  
3 Case in point, presently the conduct of Spire's management has resulted in at least \$300K in  
4 excess legal fees that the Company is seeking to recover in rates. Absent Spire's response to  
5 my discovery, it is difficult to gauge whether or not additionally recommendations are  
6 warranted.

7 **Q. Based on what you know today, do you have any recommendations for the Commission**  
8 **on this topic?**

9 A. I would recommend that the Commission disallow the \$300K in legal fees associated with the  
10 aforementioned discrimination case. Ratepayers should not have to pay legal fees for  
11 successful discrimination lawsuits brought against the Company. These are costs caused by  
12 Spire's management alone.

13 **Q. Does this conclude your testimony?**

14 A. Yes.



CASE PARTICPATION OF  
GEOFF MARKE, PH.D.

Company Name	Employed Agency	Case Number	Issues
Spire Missouri Inc.	Office of Public Counsel (OPC)	GR-2021-0108	<b>Direct:</b> AMI, Corporate Governance: Workplace Discrimination
Missouri American Water	OPC	WR-2020-0344	<b>Direct:</b> COVID-19 / Future Test Year/ Cost Allocation Manual and Affiliate Transaction Rules for Large Water Utilities <b>Direct:</b> Rate Design <b>Surrebuttal:</b> Policy / Future Test Year / Affiliate Transactions Rule / Consolidated Tariff Pricing / Rate Design / Lead Line Replacement
Evergny Missouri West & Evergny Missouri Metro	OPC	EO-2020-0227	<b>Rebuttal:</b> Inefficient Management / Residential Demand Response <b>Surrebuttal:</b> Demand Response Programs
Working Case: To consider best practices for recovery of past-due utility customer payments after the COVID-19 pandemic	OPC	AW-2020-0356	<b>Memorandum:</b> Response to Staff Report on COVID-19 Past-Due Utility Customer Payments
Spire Missouri Inc.	OPC	GO-2020-0416	<b>Memorandum:</b> Notice of prudency concerns regarding natural gas Advanced Metering Infrastructure (“AMI”) investment
Evergny Missouri West & Evergny Missouri Metro	OPC	EU-2020-0350	<b>Rebuttal:</b> Authorized Accounting Order for: Lost Revenues /COVID-19 Expenses / Bad Debt Expense <b>Surrebuttal:</b> Disconnection Moratorium / Arrearage Management Plans / Economic Relief Pilot Program / Outreach / Energy Efficiency / Administrative Procedures
Empire District Electric Company	OPC	EO-2020-0284	<b>Memorandum:</b> Customer Savings Plan / Stateline Combined Cycle Upgrade / DSM / COVID-19 Impact on Modeling / Executive Order on Securing the US Bulk-Power System / SPP Effective Load Carrying Capability / All-Source RFP
Evergny Missouri West	OPC	EO-2020-0281	<b>Memorandum:</b> Wind Power PPAs / DSM / COVID-19 Impact on Modeling / Executive Order on Securing the US Bulk-Power System / SPP Effective Load Carrying Capability / Utility-Scale Solar / All-Source RFP

Evergy Missouri Metro	OPC	EO-2020-0280	<b>Memorandum:</b> Wind Power PPAs / DSM / COVID-19 Impact on Modeling / Executive Order on Securing the US Bulk-Power System / SPP Effective Load Carrying Capability / Utility-Scale Solar / All-Source RFP
Empire District Electric Company	OPC	ER-2019-0374	<b>Direct:</b> Cost and Quality of Service, Stranded Asset, AMI/CIS deployment <b>Rebuttal:</b> Customer Experience / Weather Normalization Rider / Energy Efficiency / Low-Income Pilot Program <b>Rebuttal:</b> Class Cost of Service / Rate Design / Low Income Pilot Program <b>Surrebuttal:</b> Cost and Quality of Service / Reliability Metrics / Asbury Power Plant / Rate Design & CCOS / DSM Programs
Union Electric Company d/b/a Ameren Missouri	OPC	EA-2019-0371	<b>Rebuttal:</b> Solar + Storage
Union Electric Company d/b/a Ameren Missouri	OPC	ER-2019-0335	<b>Direct:</b> Keeping Current Bill Assistance Program <b>Rebuttal:</b> Smart Energy Plan, Keeping Current, Coal Power Plants, CCOS, Rate Design, Pure Power RECs <b>Surrebuttal:</b> Coal Power Plants
Rule Making	OPC	AW-2020-0148	<b>Memorandum:</b> Residential Customer Disconnections and Data Standardization <b>Presentation:</b> Service Disconnection Data Standardization Virtual Rulemaking Workshop
Empire District Electric Company /Kansas City Power & Light & KCP&L Greater Missouri Operations Company/Union Electric Company d/b/a Ameren Missouri	OPC	EO-2020-0047 EO-2020-0046 EO-2020-0045 EO-2020-0044	<b>Memorandum:</b> Additive Manufacturing, Cement Block Battery Storage, Virtual Power Plant, Customer-Side Renewable Generation, Historical Review of energy forecasts (KCPL, GMO and Empire-Specific) and Rush Island and Labadie Power Plant Environmental Retrofits (Ameren specific)
Union Electric Company d/b/a Ameren Missouri	OPC	EA-2019-0309	<b>Rebuttal:</b> Need for the Wind Project/ Economic Valuation / Pre-Site Energy Assessment Omissions
KCP&L Greater Missouri Operations Company & Kansas City Power and Light Company	OPC	EO-2019-0132	<b>Rebuttal:</b> Response to KCPL's MEEIA application, Equitable Energy Efficiency Baseline, WattTime: Automated Emissions Reduction, PAYS, Urban Heat Island Mitigation <b>Surrebuttal:</b> Market Potential Study, Single Family Low-Income
KCP&L Greater Missouri Operations Company	OPC	EC-2019-0200	<b>Surrebuttal:</b> Deferral Accounting and Stranded Assets

Union Electric Company d/b/a Ameren Missouri	OPC	ED-2019-0309	<b>Memorandum:</b> on the “Aluminum Smelter Rate”
Empire District Electric Company	OPC	EO-2019-0046	<b>Memorandum:</b> Response to The Empire District Electric Company d/b/a Liberty Plant In Service Accounting (PISA) Report
KCP&L Greater Missouri Operations Company	OPC	EO-2019-0067	<b>Rebuttal:</b> Renewable Energy Credits
Union Electric Company d/b/a Ameren Missouri	OPC	EO-2019-0314	<b>Memorandum:</b> Notice of Deficiency to Annual IRP Update
Rule Making	OPC	WX-2019-0380	<b>Memorandum:</b> on Affiliate Transaction Rules for Water Corporations
Working Case: Evaluate Potential Mechanisms for Facilitating Installation of Electric Vehicle Charging Stations	OPC	EW-2019-0229	<b>Memorandum:</b> on Policy Surrounding Electric Vehicles and Electric Vehicle Charging Stations
Rule Making	OPC	EX-2019-0050	<b>Memorandum</b> on Solar Rebates and Low Income Customers
Union Electric Company d/b/a Ameren Missouri	OPC	GR-2019-0077	<b>Direct:</b> Billing Practices <b>Rebuttal:</b> Rate Design, Decoupling, Energy Efficiency, Weatherization, CHP
Empire District Electric Company	OPC	EA-2019-0010	<b>Rebuttal:</b> Levelized Cost of Energy, Wind in the Southwest Power Pool <b>Surrebuttal:</b> SPP Market Conditions, Property Taxes, Customer Protections
Empire District Electric Company /Kansas City Power & Light & KCP&L Greater Missouri Operations Company/Union Electric Company d/b/a Ameren Missouri	OPC	EO-2019-0066 EO-2019-0065 EO-2019-0064 EO-2019-0063	<b>Memorandum:</b> Additive Manufacturing and Cement Block Battery Storage (IRP: Special Contemporary Topics)
Working Case: Allocation of Solar Rebates from SB 564	OPC	EW-2019-0002	<b>Memorandum</b> on Solar Rebates and Low Income Customers
Rule Making Workshop	OPC	AW-2018-0393	<b>Memorandum:</b> Supplemental Response to Staff Questions pertaining to Rules Governing the Use of Customer Information
Union Electric Company d/b/a Ameren Missouri	OPC	ET-2018-0132	<b>Rebuttal:</b> Line Extension / Charge Ahead – Business Solutions / Charge Ahead – Electric Vehicle Infrastructure <b>Supplemental Rebuttal:</b> EV Adoption Performance Base Metric
Union Electric Company d/b/a Ameren Missouri	OPC	EO-2018-0211	<b>Rebuttal:</b> MEEIA Cycle III Application <b>Surrebuttal:</b> Cost Effectiveness Tests / Equitable Energy Efficiency Baseline

Union Electric Company d/b/a Ameren Missouri	OPC	EA-2018-0202	<b>Rebuttal:</b> Renewable Energy Standard Rate Adjustment Mechanism/Conservation <b>Surrebuttal:</b> Endangered and Protected Species
Kansas City Power & Light & KCP&L Greater Missouri Operations Company	OPC	ER-2018-0145 ER-2018-0146	<b>Direct:</b> Smart Grid Data Privacy Protections <b>Rebuttal:</b> Clean Charge Network / Community Solar / Low Income Community Solar / PAYS/ Weatherization/Economic Relief Pilot Program/Economic Development Rider/Customer Information System and Billing <b>Rebuttal:</b> TOU Rates / IBR Rates / Customer Charge / Restoration Charge <b>Surrebuttal:</b> KCPL-GMO Consolidation / Demand Response / Clean Charge Network / One CIS: Privacy, TOU Rates, Billing & Customer Experience
Union Electric Company d/b/a Ameren Missouri	OPC	ET-2018-0063	<b>Rebuttal:</b> Green Tariff
Liberty Utilities	OPC	GR-2018-0013	<b>Surrebuttal:</b> Decoupling
Empire District Electric Company	OPC	EO-2018-0092	<b>Rebuttal:</b> Overview of proposal/ MO PSC regulatory activity / Federal Regulatory Activity / SPP Activity and Modeling / Ancillary Considerations <b>Surrebuttal</b> Response to parties <b>Affidavit</b> in opposition to the non-unanimous stipulation and agreement
Great Plains Energy Incorporated, Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company, and Westar Energy, Inc.	OPC	EM-2018-0012	<b>Rebuttal:</b> Merger Commitments and Conditions / Outstanding Concerns
Missouri American Water	OPC	WR-2017-0285	<b>Direct:</b> Future Test Year/ Cost Allocation Manual and Affiliate Transaction Rules for Large Water Utilities / Lead Line Replacement <b>Direct:</b> Rate Design / Cost Allocation of Lead Line Replacement <b>Rebuttal:</b> Lead Line Replacement / Future Test Year/ Decoupling / Residential Usage / Public-Private Coordination <b>Rebuttal:</b> Rate Design <b>Surrebuttal:</b> Affiliate Transaction Rules / Decoupling / Inclining Block Rates / Future Test Year / Single Tariff Pricing / Lead Line Replacement

Missouri Gas Energy / Laclede Gas Company	OPC	GR-2017-0216 GR-2017-0215	<b>Rebuttal:</b> Decoupling / Rate Design / Customer Confidentiality / Line Extension in Unserved and Underserved Areas / Economic Development Rider & Special Contracts <b>Surrebuttal:</b> Pay for Performance / Alagasco & EnergySouth Savings / Decoupling / Rate Design / Energy Efficiency / Economic Development Rider: Combined Heat & Power
Indian Hills Utility	OPC	WR-2017-0259	<b>Direct:</b> Rate Design
Rule Making	OPC	EW-2018-0078	<b>Memorandum:</b> Cogeneration and net metering - Disclaimer Language regarding rooftop solar
Empire District Electric Company	OPC	EO-2018-0048	<b>Memorandum:</b> Integrated Resource Planning: Special Contemporary Topics Comments
Kansas City Power & Light	OPC	EO-2018-0046	<b>Memorandum:</b> Integrated Resource Planning: Special Contemporary Topics Comments
KCP&L Greater Missouri Operations Company	OPC	EO-2018-0045	<b>Memorandum:</b> Integrated Resource Planning: Special Contemporary Topics Comments
Missouri American Water	OPC	WU-2017-0296	<b>Direct:</b> Lead line replacement pilot program <b>Rebuttal:</b> Lead line replacement pilot program <b>Surrebuttal:</b> Lead line replacement pilot program
KCP&L Greater Missouri Operations Company	OPC	EO-2017-0230	<b>Memorandum</b> on Integrated Resource Plan, preferred plan update
Working Case: Emerging Issues in Utility Regulation	OPC	EW-2017-0245	<b>Memorandum</b> on Emerging Issues in Utility Regulation / <b>Presentation:</b> Inclining Block Rate Design Considerations <b>Presentation:</b> Missouri Integrated Resource Planning: And the search for the “preferred plan.” <b>Memorandum:</b> Draft Rule 4 CSR 240-22.055 DER Resource Planning
Rule Making	OPC	EX-2016-0334	<b>Memorandum</b> on Missouri Energy Efficiency Investment Act Rule Revisions
Great Plains Energy Incorporated, Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company, and Westar Energy, Inc.	OPC	EE-2017-0113 / EM-2017-0226	<b>Direct:</b> Employment within Missouri / Independent Third Party Management Audits / Corporate Social Responsibility
Union Electric Company d/b/a Ameren Missouri	OPC	ET-2016-0246	<b>Rebuttal:</b> EV Charging Station Policy <b>Surrebuttal:</b> EV Charging Station Policy
Kansas City Power & Light		ER-2016-0156	<b>Direct:</b> Consumer Disclaimer <b>Direct:</b> Response to Commission Directed Questions

			<p><b>Rebuttal:</b> Customer Experience / Greenwood Solar Facility / Dues and Donations / Electric Vehicle Charging Stations</p> <p><b>Rebuttal:</b> Class Cost of Service / Rate Design</p> <p><b>Surrebuttal:</b> Clean Charge Network / Economic Relief Pilot Program / EEI Dues / EPRI Dues</p>
Union Electric Company d/b/a Ameren Missouri	OPC	ER-2016-0179	<p><b>Direct:</b> Consumer Disclaimer / Transparent Billing Practices / MEEIA Low-Income Exemption</p> <p><b>Direct:</b> Rate Design</p> <p><b>Rebuttal:</b> Low-Income Programs / Advertising / EEI Dues</p> <p><b>Rebuttal:</b> Grid-Access Charge / Inclining Block Rates / Economic Development Riders</p>
KCP&L Greater Missouri Operations Company	OPC	ER-2016-0156	<p><b>Direct:</b> Consumer Disclaimer</p> <p><b>Rebuttal:</b> Regulatory Policy / Customer Experience / Historical &amp; Projected Customer Usage / Rate Design / Low-Income Programs</p> <p><b>Surrebuttal:</b> Rate Design / MEEIA Annualization / Customer Disclaimer / Greenwood Solar Facility / RESRAM / Low-Income Programs</p>
Empire District Electric Company, Empire District Gas Company, Liberty Utilities (Central) Company, Liberty Sub-Corp.	OPC	EM-2016-0213	<p><b>Rebuttal:</b> Response to Merger Impact</p> <p><b>Surrebuttal:</b> Resource Portfolio / Transition Plan</p>
Working Case: Polices to Improve Electric Regulation	OPC	EW-2016-0313	<b>Memorandum</b> on Performance-Based and Formula Rate Design
Working Case: Electric Vehicle Charging Facilities	OPC	EW-2016-0123	<b>Memorandum</b> on Policy Considerations of EV stations in rate base
Empire District Electric Company	OPC	ER-2016-0023	<p><b>Rebuttal:</b> Rate Design, Demand-Side Management, Low-Income Weatherization</p> <p><b>Surrebuttal:</b> Demand-Side Management, Low-Income Weatherization, Monthly Bill Average</p>
Missouri American Water	OPC	WR-2015-0301	<p><b>Direct:</b> Consolidated Tariff Pricing / Rate Design Study</p> <p><b>Rebuttal:</b> District Consolidation/Rate Design/Residential Usage/Decoupling</p> <p><b>Rebuttal:</b> Demand-Side Management (DSM)/ Supply-Side Management (SSM)</p>

			<b>Surrebuttal:</b> District Consolidation/Decoupling Mechanism/Residential Usage/SSM/DSM/Special Contracts
Working Case: Decoupling Mechanism	OPC	AW-2015-0282	<b>Memorandum:</b> Response to Comments
Rule Making	OPC	EW-2015-0105	Missouri Energy Efficiency Investment Act Rule Revisions, Comments
Union Electric Company d/b/a Ameren Missouri	OPC	EO-2015-0084	Triennial Integrated Resource Planning Comments
Union Electric Company d/b/a Ameren Missouri	OPC	EO-2015-0055	<b>Rebuttal:</b> Demand-Side Investment Mechanism / MEEIA Cycle II Application <b>Surrebuttal:</b> Potential Study / Overearnings / Program Design <b>Supplemental Direct:</b> Third-party mediator (Delphi Panel) / Performance Incentive <b>Supplemental Rebuttal:</b> Select Differences between Stipulations <b>Rebuttal:</b> Pre-Pay Billing
The Empire District Electric Company	OPC	EO-2015-0042	Integrated Resource Planning: Special Contemporary Topics Comments
KCP&L Greater Missouri Operations Company	OPC	EO-2015-0041	Integrated Resource Planning: Special Contemporary Topics Comments
Kansas City Power & Light	OPC	EO-2015-0040	Integrated Resource Planning: Special Contemporary Topics Comments
Union Electric Company d/b/a Ameren Missouri	OPC	EO-2015-0039	Integrated Resource Planning: Special Contemporary Topics Comments
Kansas City Power & Light	OPC	ER-2014-0370	<b>Direct</b> (Revenue Requirement): Solar Rebates <b>Rebuttal:</b> Rate Design / Low-Income Weatherization / Solar Rebates <b>Surrebuttal:</b> Economic Considerations / Rate Design / Cyber Security Tracker
Rule Making	OPC	EX-2014-0352	<b>Memorandum</b> Net Metering and Renewable Energy Standard Rule Revisions,
The Empire District Electric Company	OPC	ER-2014-0351	<b>Rebuttal:</b> Rate Design/Energy Efficiency and Low-Income Considerations
Rule Making	OPC	AW-2014-0329	Utility Pay Stations and Loan Companies, Rule Drafting, Comments
Union Electric Company d/b/a Ameren Missouri	OPC	ER-2014-0258	<b>Direct:</b> Rate Design/Cost of Service Study/Economic Development Rider <b>Rebuttal:</b> Rate Design/ Cost of Service/ Low Income Considerations <b>Surrebuttal:</b> Rate Design/ Cost-of-Service/ Economic Development Rider
KCP&L Greater Missouri Operations Company	OPC	EO-2014-0189	<b>Rebuttal:</b> Sufficiency of Filing <b>Surrebuttal:</b> Sufficiency of Filing

KCP&L Greater Missouri Operations Company	OPC	EO-2014-0151	Renewable Energy Standard Rate Adjustment Mechanism (RESRAM) Comments
Liberty Natural Gas	OPC	GR-2014-0152	<b>Surrebuttal:</b> Energy Efficiency
Summit Natural Gas	OPC	GR-2014-0086	<b>Rebuttal:</b> Energy Efficiency <b>Surrebuttal:</b> Energy Efficiency
Union Electric Company d/b/a Ameren Missouri	OPC	ER-2012-0142	<b>Direct:</b> PY2013 EM&V results / Rebound Effect <b>Rebuttal:</b> PY2013 EM&V results <b>Surrebuttal:</b> PY2013 EM&V results <b>Direct:</b> Cycle I Performance Incentive <b>Rebuttal:</b> Cycle I Performance Incentive
Kansas City Power & Light	Missouri Public Service Commission Staff	EO-2014-0095	<b>Rebuttal:</b> MEEIA Cycle I Application testimony adopted
KCP&L Greater Missouri Operations Company	Missouri Division of Energy (DE)	EO-2014-0065	Integrated Resource Planning: Special Contemporary Topics Comments
Kansas City Power & Light	DE	EO-2014-0064	Integrated Resource Planning: Special Contemporary Topics Comments
The Empire District Electric Company	DE	EO-2014-0063	Integrated Resource Planning: Special Contemporary Topics Comments
Union Electric Company d/b/a Ameren Missouri	DE	EO-2014-0062	Integrated Resource Planning: Special Contemporary Topics Comments
The Empire District Electric Company	DE	EO-2013-0547	Triennial Integrated Resource Planning Comments
Working Case: State-Wide Advisory Collaborative	OPC	EW-2013-0519	<b>Presentation:</b> Does Better Information Lead to Better Choices? Evidence from Energy-Efficiency Labels <b>Presentation:</b> Customer Education & Demand-Side Management <b>Presentation:</b> MEEIA: Strengths, Weaknesses, Opportunities and Threats (SWOT) Analysis
Independence-Missouri	OPC	Indy Energy Forum 2014	<b>Presentation:</b> Energy Efficiency
Independence-Missouri	OPC	Indy Energy Forum 2015	<b>Presentation:</b> Rate Design
NARUC – 2017 Winter, Washington D.C.	OPC	Committee on Consumer Affairs	<b>Presentation:</b> PAYS Tariff On-Bill Financing
NASUCA – 2017 Mid-Year, Denver	OPC	Committee on Water Regulation	<b>Presentation:</b> Regulatory Issues Related to Lead-Line Replacement of Water Systems
NASUCA – 2017 Annual Baltimore,	OPC	Committee on Utility Accounting	<b>Presentation:</b> Lead Line Replacement Accounting and Cost Allocation



NARUC – 2018 Annual, Orlando	OPC	Committee on Consumer Affairs	<b>Presentation:</b> PAYS Tariff On-Bill Financing Opportunities & Challenges
Critical Consumer Issues Forum (CCIF)—New Orleans	OPC	Examining Policies for Delivering Smart Mobility	<b>Presentation:</b> Missouri EV Charging Station Policy in 4 Acts: Missouri Office of the Public Counsel Perspective
Michigan State, Institute of Public Utilities, 2019	OPC	Camp NARUC: Fundamentals	<b>Presentation:</b> Revenue Requirement
NARUC/US AID, Republic of North Macedonia, Skopje 2019	OPC	NARUC /US AID: Cybersecurity	<b>Presentation:</b> Case Study: The Missouri Experience, Cybersecurity and Data Privacy
Kansas, Clean Energy Business Council (“CEBC”), 2020	OPC	Climate and Energy Project	<b>Presentation:</b> Energy Efficiency and Pay as You Save (PAYS)
Michigan State, Institute of Public Utilities, 2020	OPC	Camp NARUC: Fundamentals	<b>Presentation:</b> Fundamentals of Economic Regulation / Performance Base Regulation
Renew Missouri	OPC	MoBar Continued Learning Education Credit	<b>Presentation:</b> Regulatory Incentives and Utility Performance
Missouri Bar Association	OPC	MoBar Fall Environmental & Energy Law Committee	<b>Presentation:</b> The Virus, The Economy and Regulated Utility Service: An Overview of Utilities and Stakeholders Response to COVID-19 and the Recession to Date
University of Missouri and City of Columbia, MO., 2021	OPC	Advancing Renewables in the Midwest	<b>Presentation:</b> The Heat Is On: Demand Side Management of Urban Heat Islands

**Spire Missouri  
GR-2021-0108**

**Response to Office of Public Counsel Data Request 2047**

Has Spire performed a cost benefit analysis for switching to AMI from AMR meters? If yes, please provide the analysis and any internal report generated. If no, why not?

Requested by Geoff Marke ([geoff.marke@opc.mo.gov](mailto:geoff.marke@opc.mo.gov))

**Response:**

Diaphragm meter technology is obsolete. The current vendor of this meter equipment for Spire is discontinuing the production of residential diaphragm meters in 2021. The incremental cost increase for the ultra-sonic meter is approximately \$25. The capabilities, safety enhancements, accuracy, and reliability of the ultra-sonic meter makes it a natural fit for modern meter equipment. There is no basis for a cost benefit analysis as the current diaphragm technology is simply obsolete.

Signed by: Wesley Selinger

**Spire Missouri  
GR-2021-0108**

**Response to Office of Public Counsel Data Request 2105**

Is Spire currently charging customers a one-time set-up fee for AMI opt-out and/or a monthly non-standard meter reader charges for AMI's currently being deployed? If yes, what are the amounts? If no, what has Spire told customers who express that they do not want AMI?

Request submitted by: Geoff Marke ([Geoff.marke@opc.mo.gov](mailto:Geoff.marke@opc.mo.gov)).

**Response:**

No, Spire is not currently charging a one-time set-up fee or a monthly non-standard meter reading charge for customers who opt out of AMI device installations as this is not part of our existing tariff.

The Company has developed a program where customers who express concerns are contacted by Customer Experience supervisors to discuss the technology and the facts around how the equipment operates. The customer concerns are discussed and if the customer still elects to opt out, the appropriate equipment is installed, and the customer is told Spire has honored their wish to opt out.

Signed by: Michelle Antrainer

-

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Spire Missouri Inc.'s Verified Application for Issuance of a Depreciation Authority Order Related to Smart Meter Devices	) ) ) ) )	Case No. GO-2020-0416
--	-----------------------	-----------------------

**RESPONSE TO STAFF RECOMMENDATION**

**COMES NOW** the Office of the Public Counsel (“OPC”) and for its *Response to Staff Recommendation*, states as follows:

1. On June 25, 2020, Spire Missouri Inc. (“Spire”) filed an application before this Commission seeking a depreciation authority order to establish annual depreciation rates for the plant accounts related to its new smart meter devices: Account 381.100 - Smart Meters and Account 382.100 - Smart Meters Installation.
2. Spire requested the Commission approve a 5% depreciation rate for each account based on a 20 year service life with no net salvage value.
3. On August 27, 2020, the Staff of the Commission (“Staff”) filed its *Recommendation*, which recommended the Commission approve Spire’s application and issue the depreciation authority order as requested.
4. The OPC does not oppose the depreciation rates for accounts 381.100 and 382.100 as proposed by Spire and recommended by Staff.
5. However, the OPC does hold serious concerns regarding the prudence of the smart meter investments for which Spire is seeking this depreciation authority

order. A memorandum outlining the nature of those concerns has been included as Attachment A.

6. The OPC recognizes that this depreciation authority order request docket is not the proper venue to challenge the prudence of Spire's investments (which is a matter to be decided in Spire's next general rate case), but has chosen to nevertheless raise its concerns here first to put Spire and all other stakeholders on notice of the problems the OPC perceives with these investments and second to ensure the OPC's decision not to challenge this depreciation authority order is not taken as an admission of the prudence of these investments.

7. However, to reiterate, the OPC is not challenging the actual depreciation rates for accounts 381.100 and 382.100 as proposed by Spire and recommended by Staff and is not asking for a hearing in this case.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this response to Staff's *Recommendation* and grant such other relief as it deems just.

Respectfully submitted,

By:           /s/ John Clizer            
John Clizer (#69043)  
Senior Counsel  
Missouri Office of the Public  
Counsel  
P.O. Box 2230  
Jefferson City, MO 65102  
Telephone: (573) 751-5324  
Facsimile: (573) 751-5562  
E-mail: [john.clizer@opc.mo.gov](mailto:john.clizer@opc.mo.gov)

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this twenty-eighth day of August, 2020.

/s/ John Clizer

**Attachment A**

MEMORANDUM

To: Missouri Public Service Commission Official Case File,  
Case No. GO-2020-0416

From: Geoff Marke, Chief Economist  
Missouri Office of the Public Counsel

John Robinett, Engineering Specialist  
Missouri Office of the Public Counsel

Subject: Notice of prudence concerns regarding natural gas Advanced Metering  
Infrastructure (“AMI”) investment

Date: August 28, 2020

**Background:** On June 25, 2020, Spire Missouri Inc. (“Spire Missouri” or “Company”) filed an Application with the Missouri Public Service Commission (“Commission”) requesting the Commission issue a Depreciation Authority Order (“DAO”) assigning new annual depreciation rates for two of the Company’s plant accounts for the depreciation of the Company’s smart meter devices. These new depreciation rates are as follows:

1. 5.0% for Account 381.100 Smart Meters – Based on a 20-year service life and no net salvage
2. 5.0% for Account 382.100 Smart Meter Installations – Based on a 20-year service life and no net salvage

Approximately two months later, Staff submitted a two-page analysis in which it agreed with the Company in total. The purpose of this memorandum is not to raise any concerns about the specific request Spire has made or challenge the proposed depreciation rates. Instead, OPC’s memorandum raises the larger question of why such rates are even being considered in the first place.

**Functionality Concern:** OPC would like the Commission to be aware that, while it does not have a concern with the depreciation lives and rates of these new smart meters, at this current time the meters will function no differently than the Company’s current meters. Attached to this memorandum are Spire’s responses to the OPC’s data requests 8509, 8510 and 8511. OPC points

## Attachment A

out that the two-way capability of these new smart meters will not be possible without the investment in a network as described by Spire in response to OPC data request 8509. Further, Spire's response states that "[t]he current estimate for Spire Missouri West is that [the network investments] will be completed over the next several years." Data request 8511, meanwhile, indicates that Spire's current software packages can read the meters just as the AMR system functions now. Therefore, it will take several years before customers will see the benefits, if any, arising from these new smart meters. Until then, these smart meters will be functionally identical to the existing ones.

**Pre-Investment Prudence Concern:** OPC would like the Commission to be aware, prior to the Company's large capital investment, that it does not believe AMI capital costs are a prudent use of ratepayer dollars. To date there are two utilities (Eversource Missouri Metro and Eversource Missouri West) in Missouri with utility-wide AMI investment. AMI deployment for these two electric utilities began in 4<sup>th</sup> quarter of 2010 with 1,000 remaining AMI meter exchanges scheduled to be complete by the end of the 3<sup>rd</sup> Quarter of 2020. An almost decade-long deployment schedule. During that time, customers have gradually paid a return on and of that investment through an inflated rate base driven by both \$100s of millions of dollars in hardware (AMI) and software (billing system). Despite increased shareholder earnings, there have been no Time-of-Use Rates for customers to utilize in order to take advantage of that AMI hardware. Moreover, due to Plant-in-Service Accounting adoption, there will be no opportunities for consumer advocates to propose tariff changes for a Time-of-Use offering for some time. In short, the benefits produced by this AMI deployment have entirely fallen on the utility-side of the regulatory compact.

In Case Nos. GO-2020-0416, Spire East and Spire West have requested new annual depreciation rates for "smart meter devices." It is unclear what "smart meter devices" constitute, as OPC's discovery regarding Spire's pending capital investments were objected to over relevance, but the OPC is operating under the assumption that these smart meters are functionally identical to AMI meters. Regardless, Smart Meter infrastructure can be a serious capital investment undertaken by a utility. To date, any benefits customers have realized from Eversource Metro and Eversource West's investments in AMI are dwarfed by the increased costs those customers have had to shoulder. Perhaps most perplexing about Spire's presumably near-term decision to add "smart meter



## Attachment A

devices” to its rate base is what benefits its customers could actually experience. On the electric side, TOU rates are theoretically utilized to incentivize customers to consume energy during times when the cost of generating electricity is cheap, and to disincentive energy consumption when the cost of generating electricity is high. No such option exists with a natural gas utility. So what do customers get? This question is put forward now in the hope that Spire East/West will engage stakeholders as to the rationale behind their potential investment.

A recent white paper from the American Council for an Energy-Efficient Economy (“ACEEE”) titled “Leveraging Advanced Metering Infrastructure to Save Energy” concludes the value-statement for AMI is questionable at best because utilities do not choose to maximize the benefits available from AMI.<sup>1</sup> In 2019, regulators in Virginia rejected Dominion Energy’s proposed smart meter rollout, and utility commissions in New Mexico, Massachusetts and Kentucky all rejected utility proposals.<sup>2</sup> Based on those recent results, it would appear unwise to automatically assume AMI would be a prudent investment. When the seemingly most beneficial gain to be obtained from AMI is not even possible because you’re a natural gas utility, the logic of investing millions of dollars is suspect at best.

**Conclusion:** OPC hopes that Spire will do the proper analysis before making its investments and provide the empirical and objective justifications prior to seeking recovery. It is much more of a challenge for everyone involved and a greater risk to shareholders and ratepayers alike to raise prudency issues on an investment that is already operational. Missouri is not a pre-approval state, however, and OPC is not requesting any prudency disallowance for Spire’s investments at this time. This memorandum merely serves as a placeholder to put Spire on notice that its planned capital investments raise considerable concern for OPC, as we are highly skeptical that such an investment would be deemed prudent by a reasonable person.

---

<sup>1</sup> York, D. (2020) Smart meters gain popularity, but most utilities don’t optimize their potential to save energy. *ACEEE* <https://acee.org/blog/2020/01/smart-meters-gain-popularity-most>

<sup>2</sup> Walton R. (2020) Most utilities aren’t getting full value from smart meters, report warns. *Utilitydive*. <https://www.utilitydive.com/news/most-utilities-arent-getting-full-value-from-smart-meters-report-warns/570249/>

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Spire Missouri Inc.’s Verified	)	
Application for Issuance of a Depreciation	)	Case No. GO-2020-0416
Authority Order Related to Smart Meters Devices	)	
	)	

**RESPONSE OF SPIRE MISSOURI TO THE OFFICE OF PUBLIC COUNSEL’S  
DATA REQUESTS 8500 - 8523**

On July 8, 2020, the Office of Public Counsel submitted 24 data requests to Spire Missouri: 8500 through 8523. On July 13, 2020, Spire Missouri submitted its objections to the OPC regarding DRS 8500 through 8509 and 8511 through 8523. On July 20, the OPC responded that they will concede to Spire Missouri’s objections except as to DRS 8509 and 8511. Without waiving its previously submitted objections, Spire Missouri provides the following responses attached and below to OPC DRS 8509, 8510, and 8511. Spire Missouri has never objected to responding to OPC DR 8510.

**RESPONSES**

DR8509 - Will Spire need additional investment beyond the meters themselves? If yes please provide a description of the assets needed and a rough cost estimate and timeframe for expenditures.

**Response:** The AMI system is comprised of two components: the meters and the network. The meters send and receive data and commands from a network canopy of collectors. The network assets will be installed throughout our distribution territory. The network assets will be primarily comprised of network routers mounted at designed locations and heights. In some cases, this will require a tower or pole that is installed and will always require a power feed. The actual timeline and expenditure will be confirmed as the detailed design of the system is completed. The current estimate for Spire Missouri West is that this will be completed over the next several years with an overall expense of approximately \$5M to \$8M.

DR8510 - Please provide the brand and model information for the proposed AMI meter infrastructure. Additionally please provide any technical specifications or resources that indicate internal battery life expectancy.

**Response:** Please see Attachment OPC DR 8510-1 and Attachment OPC DR 8510-2 for the Itron Intelis Smart Meter and Itron 500G Ert technical information sheets.

DR8511 - Does Spire currently have software capable of sending and receiving signals from AMI meters or will that be an additional investment.

**Response:** The AMI system comes with a vendor provided network management software system. This software replaces and modernizes the meter reading and billing systems we utilize today. There will be investment to configure this software for Spire and integrate it with our existing systems. This software will be utilized to manage AMI technology for all Spire customers. The AMI meter equipment can be read by the Company's current system until the AMI network and network software are deployed.


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Spire Missouri Inc.'s )  
Verified Application for Issuance of a ) Case No. GO-2020-0416  
Depreciation )

**VERIFICATION OF GEOFF MARKE**

Geoff Marke, under penalty of perjury, states:

1. Attached hereto and made a part hereof for all purposes is my memorandum in the above-captioned case.
  
2. The information in the attached memorandum is true and correct to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Geoff Marke  
Chief Economist  
Office of the Public Counsel

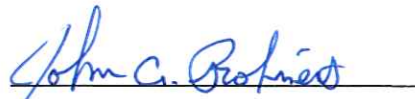
**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Spire Missouri Inc.'s )  
Verified Application for Issuance of a ) Case No. GO-2020-0416  
Depreciation )

**VERIFICATION OF JOHN A. ROBINETT**

John A. Robinett, under penalty of perjury, states:

1. Attached hereto and made a part hereof for all purposes is my memorandum in the above-captioned case.
  
2. The information in the attached memorandum is true and correct to the best of my knowledge, information, and belief.



John A. Robinett

Utility Engineering Specialist

Office of the Public Counsel



**In the Missouri Court of Appeals**  
**Eastern District**  
DIVISION ONE

DANIELLE MCGAUGHY,	)	No. ED107498
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	
	)	Honorable Steven R. Ohmer
LACLEDE GAS COMPANY, et al.,	)	
	)	
Appellants.	)	FILED: April 14, 2020

Laclede Gas Co. (“Appellant”) appeals from the judgment of the Circuit Court of the City of St. Louis, following a jury trial, awarding Danielle McGaughy (“Respondent”) \$1.3 million in actual damages and \$7.2 million in punitive damages on her claims for race discrimination and retaliation. We affirm. We also remand to the trial court to determine the appropriate attorneys’ fees award.

**I. Background**

Based on our applicable standard of review, we review the evidence “in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict.” Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 818 (Mo. banc 2000).

Respondent is an African-American woman born and raised in St. Joseph, Missouri. After finishing high school in 1989, she alternated between going to college and working before

eventually graduating from what is now Missouri Western State University with a paralegal certificate and two-year associate degree in legal studies, in 1996.

After graduating, Respondent began a career in the legal field. First, she went to work for the Jackson County Prosecutor's Office, working in the anti-drug "COMBAT" unit. In this position she performed administrative duties, drafted interrogatories, served search warrants, performed searches in the field, and prepared documents for discovery. After five years with the prosecutor's office, Respondent went to work as a legal assistant for the Jackson County Family Court. In that position she obtained information from confidential informants, prepared documents for discovery, performed legal research and writing, prepared witnesses for testimony, and issued subpoenas for hospital records. Next, an attorney Respondent knew at the Kansas City Public School District ("KCPSD") recruited her to work there. In that role she conducted on-site investigations, investigated complaints about teachers, spoke with witnesses, wrote reports, and debriefed her attorney supervisor. Respondent later went to work with a trademark firm in Atlanta, Georgia, handling discovery matters, before returning to Missouri to work as a municipal court clerk, where she managed pretrial and traffic dockets.

In 2004 Respondent went to work for Missouri Gas Energy ("MGE"), which was later acquired by Appellant. Respondent testified at trial that she took that position because she felt this was "a company that I would retire at." Initially she worked in the legal department at the Kansas City office as a legal assistant. In 2006 she became a full-time gas supply specialist, participating in Sarbanes-Oxley audits, monitoring federal gas tariffs, storage contracts, gas pipeline and supplier contracts, and performing administrative duties. However, the long commute between St. Joseph and Kansas City took away from the time Respondent could spend with her son, whom she raised as a single-mother. Thus, in 2008 she transferred to the St. Joseph office and became an engineering technician.

Once Respondent started working in the St. Joseph office, she immediately began experiencing what she would eventually describe as the “toxic” work environment in that office. She was the only African-American in the St. Joseph office. Her first day in the office, she heard two Caucasian co-workers discussing how “blacks don’t take pride in their work, where they live, or anything.” The woman who was supposed to train her, Diane Munsell (“Munsell”), provided only minimal training. Respondent testified that when she was out of the office, Munsell would go through her desk, making it “her mission . . . to find something to go tell and complain about.” When Respondent’s co-worker Steve Gard (“Gard”), a Caucasian man, confronted Munsell about why she was not adequately training Respondent, Munsell replied, “I don’t want my job taken by a n\*\*\*\*r.”

Things only got worse for Respondent when Robert Hart (“Hart”), became her supervisor roughly two years after she transferred to St. Joseph. Hart reported to Gary Williams (“Williams”), who presided over both the Kansas City and St. Joseph offices. Respondent called multiple witnesses at trial who testified, over Appellant’s objection, to hearing Hart repeatedly use the word “n\*\*\*\*r,” and using the terms “n\*\*\*\*r-rigged” and “jigaboo.” In addition to Hart, fellow employees Barb Labass (“Labass”) and Bill Martin (“Martin”) contributed to the toxic environment. Respondent testified that Labass, whose office was next door to hers, prominently displayed Paula Deen magazines on her desk after the scandal leaked that Deen had used the word “n\*\*\*\*r” in reference to an African-American employee. The magazines were not there before the scandal broke. Additionally, Respondent once found an email Labass was photocopying and circulating in the office. She testified that the email said “that the blacks and Mexicans were taking over,” and that “Obama was going to bankrupt and close all the banks . . . .”



Bill Martin (“Martin”) was also a central figure in the racially charged environment in the St. Joseph office. Martin would mockingly sing in the office, “Free at last, free at last, thank God Almighty, we’re free at last like these m\*\*\*\*\*r f\*\*\*\*\*s are.” One of Respondent’s witnesses at trial also testified that he heard Martin use the n-word “too many times to count.”

Eventually, Respondent had enough. In 2013 she filed a human resources complaint about racial discrimination in the St. Joseph office with Clarence Moran (“Moran”), a Human Resources officer. Her HR complaint pointed to, *inter alia*, Hart and Martin’s conduct in the office. Respondent met with Williams, Moran, and Hart the following Monday. Instead of addressing Respondent’s complaint, Williams accused her of having an intimate relationship with Gard, a Caucasian co-worker. Moran followed Williams by telling Respondent that she needed to look at herself and see why people treated her the way they did. The panel then alleged that Respondent was not helpful to her co-workers, and that a number of them were complaining about her. Respondent noted that her recent performance review had not mentioned anything about co-workers complaining about her.

After that meeting, Respondent called the company’s HR hotline and filed a complaint with the third-party Appellant used to administer HR complaints. On April 17, 2013, Respondent drafted a formal memo outlining her complaint in further detail, and sent the Memo to Williams, Moran, Hart, and HR Vice President, Deborah Hayes (HR VP). Williams then called her, said “you got their f\*\*\*\*\*g attention” and hung up the phone. The third-party investigator who spoke with Respondent confirmed there was no evidence of her co-workers complaining about her performance, but the investigation eventually concluded that there was no discrimination. Hart was eventually transferred to Kansas City, where he remained in a management role, and continued the conduct about which Respondent complained. He was also allowed to keep his company car. Before his transfer, Hart told Williams that Respondent did

not have enough work to keep her busy, so Respondent was given an additional workload without an increase in pay.

The toxic environment in the St. Joseph office continued after Respondent's HR complaint, despite the company ordering a diversity training. In February 2014, Martin barged into Respondent's office, joined by two other men, and began shouting at Respondent. Martin yelled "[y]ou don't know a f\*\*\*\*\*g thing and you don't do a f\*\*\*\*\*g thing. You're a nothing and a nobody." Martin also warned Respondent that she needed to "f\*\*\*\*\*g leave me off your radar." Respondent complained to Moran, but again, nothing was done.

#### *The Claims Supervisor Position*

Around the time of the incident with Martin, Appellant posted an opening for a claims supervisor position. By that time Respondent had a bachelor's degree in legal studies and was pursuing a master's degree. Because she had prior experience in the legal field, and this position would provide a substantial raise, Respondent applied for the position. Respondent was eventually interviewed by a panel consisting of Nicole Fondren ("Fondren"), an African-American HR employee, Mike Smith ("Smith") one of Appellant's in-house lawyers, and Joe Gallagher ("Gallagher"), the Claims Manager. When Respondent emerged from this interview as the top candidate, Gallagher decided he wanted to interview more people. Smith then approached Laura Garcia ("Garcia"), who is Caucasian and worked for Williams, to apply despite the fact that she had not applied for the position. A new round of interviews was held, except this time Fondren, the lone African-American on the original panel, was replaced by Cindy Dove ("Dove"), a Caucasian woman who performed HR investigations for Appellant in Kansas City. Garcia was hired for the position.

### *Transfer to Kansas City*

In May 2014, with roughly one week's notice, Williams ordered Respondent to begin commuting the 63 miles to the Kansas City office three days a week. Respondent was disappointed, because she had transferred from the Kansas City office to St. Joseph due to the long commute, and the fact it took away time with her son. Williams testified at trial that she was transferred to assist with the increased workload brought on by Appellant's acquisition of MGE. Despite the allegedly increased workload and a budget increase of millions of dollars, Respondent was the only employee transferred. Respondent testified that she had never seen another employee transferred for non-disciplinary reasons. Additionally, her office in St. Joseph was confiscated, and she was forced to work in a cubicle for the two days per week that she remained working there. All of the other office staff worked from private offices.

On February 11, 2016, Respondent filed this suit in the Circuit Court of the City of St. Louis, alleging race discrimination and retaliation. Following a two-week trial, the jury unanimously returned a verdict in Respondent's favor, awarding her \$1.3 million in actual damages and \$7.2 million in punitive damages. The trial court entered judgment on September 6, 2018. On October 5, 2018, Appellant filed a motion for a new trial and for judgment notwithstanding the verdict, as well as a motion to amend the judgment to enforce the damage cap imposed by the 2017 amendments to the Missouri Human Rights Act ("MHRA"). The circuit court denied those motions on January 4, 2019, and Appellant filed a notice of appeal on January 8, 2019.

## **II. Discussion**

Appellant raises six points on appeal. First, Appellant argues the trial court erred in denying its motion to amend the judgment to enforce the damage cap because the court was obliged to follow the law as it existed on the date of judgment, in that Respondent had no vested

right to punitive damages until judgment was entered. For large companies like itself, Appellant argues the 2017 amendments to the MHRA cap all damages, other than back pay and interest thereon, at \$500 thousand. Appellant reasons that while Respondent's actual damages were much more than \$1 million, no one has a vested right to punitive damages until the entry of judgment, and thus the trial court should have applied the law in effect at the time of judgment and eliminated the punitive damages award.

Second, Appellant argues the trial court erred in allowing Respondent's "me too" evidence in support of her hostile work environment claim, because such evidence was irrelevant. Appellant reasons that because none of the "allegedly hostile remarks" were directed to, nor heard by, Respondent, the evidence from other current and former employees regarding their own experiences was irrelevant, and its prejudicial effect far outweighed any probative value.

Third, Appellant argues the trial court erred in denying its motion for a directed verdict on Respondent's claim for race discrimination for several reasons. Appellant first reasons that Respondent did not have a submissible case of discriminatory failure to promote, in that there was no substantial evidence her race played any role in that decision. Next, Appellant reasons that Respondent did not have a submissible case of a hostile work environment because the evidence specific to her was isolated and incidental, rather than severe or pervasive. Appellant also reasons that if the Court grants any relief on the merits, Appellant is entitled to a new trial on all issues.

Fourth, Appellant argues the trial court erred in denying its motion for a directed verdict on Respondent's retaliation claim. Appellant argues Respondent did not have a submissible case of retaliation on her failure to promote claim because there was no substantial evidence that her complaint played a causal role in the decision not to promote her. Appellant also reasons that

Respondent did not have a submissible case of retaliation on her other retaliation claims because there was no substantial evidence that her complaint played a causal role in those decisions. As Appellant argues in point three, it also argues in point four that any relief on the merits entitles Appellant to a new trial on all issues.

Fifth, Appellant argues the trial court erred in giving jury instruction No. 6 (“Instruction 6”) because it did not submit all of the elements of a hostile work environment, in that it did not require a finding that the alleged harassment was so severe or pervasive that it affected a term, condition, or privilege of her employment, or that Appellant knew or should have known of it.

Sixth and finally, Appellant argues the trial court erred in awarding Respondent attorneys’ fees. Appellant reasons that the award was premature, because an outright reversal would require denial of any attorneys’ fees, and a reversal on any ground other than the damage cap would require a new trial.

### **Points I, III, IV, & V**

Because Appellant’s first, third, fourth, and fifth points are all analyzed under the *de novo* standard of review, we will analyze them separately from Appellant’s second and sixth points.

#### **A. Standard of Review**

Issues of statutory interpretation, whether there was sufficient evidence to submit an issue to the jury, and the propriety of instructions given to the jury are all questions of law that this Court reviews *de novo*. Hervey v. Mo. Dept. of Corrections, 379 S.W.3d 156, 163 (Mo. banc 2012); Vintila v. Drassen, 52 S.W.3d 28, 40 (Mo. App. S.D. 2001); Hopfer v. Neenah Foundry Co., 477 S.W.3d 116, 124 (Mo. App. E.D. 2015). Appellate review of the sufficiency of the evidence to support the giving of an instruction is made “in the light most favorable to its submission,” and if the instruction is supportable by any theory, its submission is proper. Vintila, 52 S.W.3d at 28; see also Hopfer, 477 S.W.3d at 124.

## B. Analysis

### **Point I: The Trial Court did not Err in Refusing to Cap the Punitive Damages Award**

In its first point on appeal, Appellant argues the trial court erred in denying its motion to amend the judgment to enforce the damage cap because the court was obliged to follow the law as it existed on the date of judgment, in that Respondent had no vested right to punitive damages until the judgment was entered. We disagree.

The primary rule of statutory interpretation is to “ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.” Hervey, 379 S.W.3d at 163. Where the language of a statute is “unambiguous and clear,” this Court will give effect to the language as written, and will not engage in statutory interpretation. Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007). Effective August 2017, the Missouri Legislature Amended Section 213.111, RSMo,<sup>1</sup> to provide for a cap on punitive and actual damages via Senate Bill 43 (“S.B. 43”). The amended statute states, in pertinent part:

4. The sum of the amount of **actual damages . . . and punitive damages** awarded under this section shall not exceed for each complaining party:

(1) Actual back pay and interest on back pay; and

. . .

(2)(d) In the case of a respondent who has **more than five hundred employees** in each of twenty or more calendar weeks in the current or preceding calendar year, **five hundred thousand dollars.**

Section 213.111.4 (emphasis added). The prior version of Section 213.111 contained no such cap.

---

<sup>1</sup> Unless otherwise indicated, all statutory references are to the Revised Statutes of Missouri in effect in February 2016, when Respondent filed this case.

The Western District of this Court recently decided this same issue in Dixson v. Missouri Dep't Corr., and we find that case dispositive of Appellant's first point. 586 S.W.3d 816 (Mo. App. W.D. 2019). In August 2016, Dixson filed a petition for damages against the Missouri Department of Corrections ("DOC"), alleging race discrimination, hostile work environment, and retaliation. Id. at 822. A jury trial was held in December 2017, where several of Dixson's co-workers corroborated Dixson's account of his work experiences. The jury returned a verdict in Dixson's favor on his retaliation claim, awarding him \$280 thousand in actual damages and \$1.2 million in punitive damages. Id. On appeal, the DOC argued that the court erred in failing to apply the damages cap imposed by the S.B. 43 amendments to the MHRA, in that the damages cap was "merely procedural or remedial," and could thus be applied retrospectively. Id. at 825.

The Western District disagreed, holding that the damages cap applied only prospectively and to retroactively apply the cap would be unconstitutional. Id. at 826-27. Crucial to the Western District's decision was the fact that the damages cap "has the effect of limiting the *total damages* that a plaintiff may recover, including compensatory damages." Id. at 826. The Western District also rejected the DOC's argument that the damages cap could be retroactively applied solely to the punitive damages award, reasoning that such an argument "asks this court to effectively rewrite Section 213.111.4, to create a separate cap on punitive damages, where none was enacted by the legislature." Id. Further, the court likened the DOC's argument to "an argument that we should sever a portion of Section 213.111.4 that cannot constitutionally be applied retroactively . . . from the limitation on punitive damages," and found that doing so would be "rewriting a statute to do something different than what the legislature intended." Id. Interestingly, Appellant joined in the DOC's argument, as *amicus curiae*, and was mentioned by name in the Dixson court's opinion. Id. at 825. Appellant's argument fails for many of the same reasons as the DOC's argument in Dixson.

First, Appellant’s argument fails because, like in Dixson, applying the damages cap in this case would violate the prohibition against retrospective laws. The Missouri Constitution states, “no . . . law . . . retrospective in its operation . . . can be enacted.” Mo. Const. Art., I Section 13. Statutory amendments are presumed to operate prospectively, and the only exceptions to that rule are (1) where the legislature “clearly expresses an intent that the amendment be given retroactive application,” or (2) the statute is merely procedural or remedial, rather than substantive. Dixson, 586 S.W.3d at 825. Respondent filed her case on February 11, 2016. The amended Section 213.111.4 took effect in August 2017, more than a year later. Section 213.111.4. Because the legislature expressed no such intent that the amendment to this statute apply retroactively, the first exception does not apply here. Further, the second exception does not apply because the statute is not merely procedural or remedial. As the Dixson court explained, Section 213.111.4 enacted one aggregate cap, which caps not only the actual damages, but also punitive damages. Id. at 826.

Appellant also argues that the trial court could have simply applied the cap to the punitive damages award, relying on Vaughan v. Taft Broad. Co., and a litany of other inapposite service letter cases. 708 S.W.2d 656 (Mo. banc 1986); see also Ball v. Am. Greetings Corp., 752 S.W.2d 814 (Mo. App. W.D. 1988), Dippel v. Taco Bell Corp., 716 S.W.2d 342 (Mo. App. E.D. 1986). In Vaughan, the Missouri Supreme Court ruled that “punitive damages are remedial and a plaintiff has no vested right to such damages prior to the entry of judgment.” 708 S.W.2d at 660. The Vaughan Court held further that “punitive damages are never allowable as a matter of right and their award lies wholly within the discretion of the trier of fact.” Id. However, Vaughan is wholly inapposite because it dealt with a statute only addressing punitive damages, and only in service letter cases. Id. at 659. Further, Appellant’s argument ignores the fact that the Dixson court, addressing this same issue, found this argument “akin to an argument that we



should sever a portion of Section 213.111.4,” and refused to rewrite the statute “to do something different than what the legislature enacted.” Dixson, 586 S.W.3d at 826. We also refuse to do so.

Appellant’s argument also fails in light of the Missouri Supreme Court’s decision in Klotz v. St. Anthony’s Med. Ctr., 311. S.W.3d 752 (Mo. banc 2010). In Klotz, the Court held “the legislature cannot change the substantive law for a category of damages after a cause of action has accrued,” and applying that rule, the Court held that the statute at issue, which placed a cap on non-economic damages, could not be retroactively applied to a claim accruing prior to the statute’s effective date. Id. at 760. Here, the damages cap in Section 213.111.4 limits the total number of damages a plaintiff may recover, including compensatory damages. Thus, under Klotz, Section 213.111.4 must be interpreted to apply only prospectively to actions that accrued on or after its effective date of August 28, 2017. See Dixson, 586 S.W.3d at 826. Respondent filed her case more than a year before that date.

Our holding is further supported by the Missouri Supreme Court’s adoption of new Missouri Approved Jury Instructions (“MAI”) concerning the MHRA. In May 2018, the Supreme Court adopted new MAIs concerning the new standard to be applied when assessing MHRA claims and the new damages cap. See Bram v. AT&T Mobility Services, LLC, 564 S.W.3d 787, 795 (Mo. App. W.D. 2018). With regard to damages, the Supreme Court approved MAI 38.09, which states:

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any actual damages including back pay, other past [and future] economic losses, and any past [and future] emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-economic losses as a direct result of the occurrence mentioned in the evidence.

MAI 38.09; see also Dixson, 586 S.W.3d at 827 (quoting MAI 38.09). The Court also approved a new verdict form, MAI 38.10, which requires the jury to individually list the dollar amount of

damages it awards for each category of actual damages, back pay, past economic losses not including back pay, future economic losses, and non-economic losses. MAI 38.10; see also id.

Both MAI 38.09 and 38.10 are necessary for the jury to apply the damages cap in Section 213.111.4, “as the statute requires the court to determine the sum of the amount of all of the separate categories of actual damages plus punitive damages . . . .” Id. Most important to our purposes here, the Supreme Court specifically stated that these new instructions only apply to “actions accruing on or after August 28, 2017.” MAI 38.09; MAI 38.10. Further, the Committee Comments and Notes on Use to each of these approved instructions direct practitioners to older instructions regarding damages and verdict forms “[f]or MHRA actions accruing before August 28, 2017. . . .” MAI 38.09 Committee Comment G; MAI 38.10, Notes on Use 6. As we have discussed at numerous points in our analysis of Appellant’s first point, Respondent filed her case more than a year before the S.B. 43 amendments to Section 213.111.4 took effect.

Whereas retroactively applying the Section 213.111.4 damages cap to Respondent’s damages award would be unconstitutional, Appellant’s first point is denied.

**Point III: Respondent Made a Submissible Case of Discriminatory Failure to Promote and of a Hostile Work Environment<sup>2</sup>**

In its third point on appeal, Appellant alleges the trial court erred in denying its motion for a directed verdict on Respondent’s claim for race discrimination because (1) Respondent did not have a submissible case of failure to promote, in that there is no substantial evidence that her race played any role in that decision, and (2) Respondent did not have a submissible case of a hostile work environment, in that the evidence specific to her was isolated and incidental rather

---

<sup>2</sup> On October 23, 2019, Appellant filed a Motion to Strike Section III(A)(2)(a) of Respondent’s Amended Brief. Appellant faults Respondent for stating, “[Respondent] directly experienced racial hostility” and then discussing the “me too” evidence she did not personally experience. The motion was ordered taken with the case. Appellant argues that this section of Respondent’s brief created the “misleading impression” that she directly experienced all of the “me too” evidence. Further, even where a party’s compliance with Rule 84.04 is “less than stellar,” this Court has the discretion to review the argument on the merits. See Perry v. Tiersma, 148 S.W.3d 833, 835 (Mo. App. S.D. 2004). Thus, even if Appellant is correct that this portion of Respondent’s amended brief is misleading, we are not misled and review on the merits. The motion is denied.

than severe and pervasive. Further, Appellant alleges that if this Court grants any relief on the merits, it is entitled to a new trial on all issues.

Respondent presented two theories of race discrimination: (1) discriminatory failure to promote her to the claims supervisor position; and (2) hostile work environment. To present a submissible case, a plaintiff must show “each and every fact essential to liability is predicated upon legal and substantial evidence.” Giddens, 29 S.W.3d at 818. We view the evidence “in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict.” Id.

*Failure to Promote Respondent to the Claims Supervisor Position*

Because we apply the MHRA as it existed prior to the S.B. 43 amendments, Respondent needed to only show that her race was “a contributing factor” in the decision not to promote her. See Bram, 564 S.W.3d at 795. A contributing factor is a condition that “contributes a share in anything or has a part in producing the effect.” Jones v. Galaxy 1 Mktg., Inc., 478 S.W.3d 556, 573 (Mo. App. E.D. 2015) (quoting Lomax v. DaimlerChrysler Corp., 243 S.W.3d 474, 482 (Mo. App. E.D. 2007)) (internal quotations omitted). Further, under this standard the discrimination need not be a substantial or determining factor in the employment action. Id. at 572-73.

The MHRA defines discrimination as “any unfair treatment based on race . . . as it relates to employment. . . .” Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 (Mo. banc 2007) (quoting Section 213.010(5)). Employment discrimination cases are inherently fact based, and “often depend on inferences rather than on direct evidence . . . because employers are shrewd enough not to leave a trail of direct evidence.” Cox v. Kansas City Chiefs Football Club, Inc., 473 S.W.3d 107, 116 (Mo. banc 2015); see also Daugherty, 231 S.W.3d at 818. Further,

rejecting the defendant’s justification for an employment decision “will permit the trier of fact to infer the ultimate fact of intentional discrimination,” and upon such rejection, further proof of discrimination is not required. Ferguson v. Curators of Lincoln Univ., 498 S.W.3d 481, 491 (Mo. App. W.D. 2016).

Here, the issue is whether Respondent’s race played **any** part in Appellant’s decision not to promote her to the claims supervisor position. At trial, and now on appeal, Appellant argued the decision to promote Garcia, instead of Respondent, was based on the fact that Garcia “had prior hands-on experience in on-site investigations in the field of natural gas.”<sup>3</sup> Viewing the evidence in the light most favorable to the result reached by the jury, we hold that Respondent presented substantial evidence showing that her race played a role in Appellant’s decision not to promote her, in that she showed Appellant’s reason was merely pretextual. See Giddens, 29 S.W.3d at 818.

Respondent presented evidence at trial that particularized experience in the field of natural gas was not one of the original qualifications for the claims supervisor position. The original panel that interviewed Respondent consisted of Smith, one of Appellant’s in-house attorneys in Kansas City; Gallagher, the Laclede Claims Manager; and Fondren, an HR employee. Fondren was the lone African-American on the panel. Fondren testified at trial that, prior to the interview, she held a “pre-hire meeting” with Gallagher to discuss what he was looking for in the person to fill the position. Fondren testified that she took good notes at the meeting, and her notes did not say anything about a job requirement of on-site investigation experience for the company, or that on-site investigations experience was required at all. The actual job requirements listing stated only that applicants should have “two years of experience responding to . . . incidents concerning on scene investigations.” The remaining job

---

<sup>3</sup> Garcia testified at trial that Garcia is her married name, and she identifies as Caucasian.

qualifications were focused on the legal aspects of the position. The job posting also asked for a bachelor's degree, or equivalent experience.

Further, Respondent presented evidence that she met many of the requirements for this position. Prior to her employment with Appellant, Respondent worked for the Kansas City Public School District ("KCPSD"), where she conducted on-site investigations. This included investigating complaints regarding teachers, speaking with witnesses, drafting reports, and discussing the issues with those investigations with her attorney supervisor. Respondent also worked at the Jackson County Prosecutor's Office, the Jackson County Family Court, and a patent and trademark law firm before her employment with Appellant. Those positions included duties drafting discovery documents, executing search warrants, field searches, legal research and writing, preparing witnesses for testimony, and issuing subpoenas. Additionally, Respondent had a Bachelor's degree and was working towards a Master's degree.

Respondent also presented evidence showing that Garcia did not actually have much experience with on-site investigations. Smith testified at trial that Garcia had only worked in the field for less than a year, and Williams testified that she was "rarely out of the office." Gallagher testified that before hiring Garcia he had never done an on-site investigation with her, that he had not spoken with anyone who had done an on-site investigation with her, and that he had not spoken with anyone who claimed to have knowledge of her doing on-site investigations. Smith testified that the skills required for the on-site investigations could be "learned on the job." Further, Garcia did not have the amount of legal experience Respondent did, and while Respondent had a Bachelor's degree and was working towards her Master's, Garcia had a cosmetology degree. Additionally, Respondent showed that Garcia did not originally apply for the claims supervisor position, applying only after Smith asked her to do so. Smith testified that after Respondent emerged from the interviews as the top candidate, Gallagher decided he wanted

to interview more people.<sup>4</sup> Respondent also showed that despite his policy of hiring from within, and having African-Americans working in his department over the years, Gallagher never hired an African-American in his 28 years as manager.

Finally, Respondent presented evidence that the panel that interviewed her the second time was potentially tainted. For Respondent's second interview, Appellant replaced Fondren, the lone African-American interviewer on the first panel, with Dove, a Caucasian HR employee. This resulted in an all-Caucasian panel. Respondent presented evidence, via the testimony of Allen Rumbo ("Rumbo"),<sup>5</sup> of Dove's discriminatory animus. Rumbo worked at Appellant's Lee's Summit location, and he testified that Dove was his contact when it came to employee issues at Appellant. Rumbo testified that he hired two African-American employees to work in Lee's Summit, and that Dove stated on a conference call that "people are starting to talk about the type of people that you're hiring in Lee's Summit." Further, Rumbo testified that when he later interacted with Dove about wanting to hire another African-American named W.W, Dove made a then-unsubstantiated claim that W.W had "anger issues," because "when we were interviewing him you could see that he had his fist clenched." Dove also knew about Respondent's HR complaint, but we will address that issue in our analysis of Appellant's fourth point. Adding Dove to the interview panel created an all-Caucasian panel with one person who likely had a discriminatory animus, and one person who had not hired an African-American in his 28 years as a manager.

Thus, Respondent presented a submissible case of a discriminatory failure to promote her to the claims supervisor position by showing (1) experience with on-site investigations in the

---

<sup>4</sup> At trial, Respondent's counsel and Smith had the following exchange:

Counsel: Okay. So what happened was [Respondent] emerged as the top contender and [Gallagher] said to you, hey, I actually want to interview other people, correct?

Smith: Correct.

<sup>5</sup> We will discuss Appellant's issues with Rumbo's testimony, as well as the testimony of many of Respondent's other witnesses, in our analysis of Appellant's second point.

field of natural gas was not an original qualification for the claims supervisor position; (2) she met many of the qualifications for the position; (3) that Garcia was not as qualified for the position as Appellant suggested, and that Garcia only applied because Smith asked her to after Respondent emerged from the interviews as the top candidate; and (4) that replacing Fondren on the interview panel with Dove resulted in an all-Caucasian panel, comprised of Dove's likely discriminatory animus, and Gallagher, who had not hired an African-American in his 28 years as a manager. The jury could find Appellant's reason for not promoting Respondent was pretextual. See Ferguson, 498 S.W.3d at 491 (finding that rejecting the defendant's justification for an employment decision will permit the trier of fact to infer the ultimate fact of intentional discrimination, and upon such rejection, further proof of discrimination is not required); see also McGhee v. Schreiber Foods, Inc., 502 S.W.3d 658, 673 (Mo. App. W.D. 2016) ("Evidence that an employer's explanation for its decision is unworthy of credence is one factor that "may well suffice to support liability") (internal citation omitted) (internal quotation omitted). The jury heard this evidence, and disregarded Appellant's reason for not promoting Respondent. See McGhee, 502 S.W.3d at 673.

#### *The Hostile Work Environment*

Respondent also presented a submissible case of a hostile work environment. A successful claim of a hostile work environment requires the plaintiff to show: (1) she is a member of a group protected under the MHRA; (2) she was subjected to "unwelcome . . . harassment"; (3) the plaintiff's membership in the protected group was a contributing factor in the harassment; and (4) a term, condition, or privilege of the plaintiff's employment was affected by the harassment. Bram, 564 S.W.3d at 797. Racial discrimination creates a hostile work environment when "discriminatory conduct either creates an intimidating, hostile, or offensive work environment, or has the purpose or effect of unreasonably interfering with an individual's

work performance.” Alhalabi v. Mo. Dept. Nat. Res., 300 S.W.3d 518, 526 (Mo. App. E.D. 2009). Further, in most claims of a hostile work environment, the discriminatory acts are “not of a nature that can be identified individually as significant events; instead, the day-to-day harassment is primarily significant . . . in its *cumulative* effect.” Id. at 526 (citing Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 763 (Mo. App. E.D. 1999)).

Appellant only challenges Respondent’s showing that a term, condition, or privilege of her employment was affected, arguing that “the balance of [Respondent’s] evidence consists of generalities, offensive remarks unrelated to race, and isolated incidents involving her.” Discriminatory harassment affects a term condition, or privilege of employment if it is “sufficiently severe or pervasive enough to alter the conditions of the plaintiff’s employment and create an abusive working environment.” Id. at 527. The harassing conduct must be severe and pervasive “as viewed subjectively by the plaintiff and as viewed objectively by a reasonable person.” Fuchs v. Dept. of Revenue, 447 S.W.3d 727, 734 (Mo. App. W.D. 2014) (citing Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 244-45 (Mo. App. E.D. 2006)). A plaintiff can show that harassment affected a term, condition, or privilege of her employment by showing a tangible employment action, or an abusive working environment. Hill v. Ford Motor Co., 277 S.W.3d 659, 666 (Mo. banc 2009); Fuchs, 447 S.W.3d at 732-33. Further, in assessing the hostility of an environment, this Court has previously stated that we look to the totality of the circumstances. See Cooper, 204 S.W.3d at 245. Here, Respondent showed both a tangible employment action, and an abusive working environment.

A tangible employment action is “a significant change in employment status,” and “the means by which the supervisor brings official power of the enterprise to bear on subordinates.” Hill, 277 S.W.3d at 666. Some examples of tangible employment actions include “failure to promote . . . undesired reassignment . . . [and] a decision causing a significant change in . . .



work assignments.” Id. at 667. We discussed at length above how Respondent has shown Appellant discriminatorily failed to promote her, and will discuss it further in our analysis of Appellant’s fourth point, thus we will not discuss it further here. But Respondent also presented evidence that she was transferred to Kansas City, and that she was given additional work without additional pay. With one week’s notice in May of 2014, Williams notified Respondent that she would be required to work in Kansas City three days a week. Respondent had moved from Kansas City to St. Joseph in order to spend more time with her son. Kansas City is more than 60 miles away from St. Joseph. Respondent testified that she was unaware of any other person who was ever transferred for non-disciplinary reasons, and Williams testified that Respondent was the only person transferred. Further, Respondent was given additional work without a pay increase, and for the two days per week that she worked in Kansas City, her office was confiscated and she was forced to work in a cubicle in the middle of the workplace. All of the other office staff had offices to work from, and prior to her transfer, Respondent had an office in which she could work. Thus, Respondent presented substantial evidence of a tangible employment action.

Respondent also presented substantial evidence of an abusive working environment. As discussed above, racial discrimination creates a hostile work environment when “discriminatory conduct either creates an intimidating, hostile, or offensive work environment, or has the purpose or effect of unreasonably interfering with an individual’s work performance.” Alhalabi, 300 S.W.3d at 526. Respondent presented substantial evidence that the discrimination at Appellant’s St. Joseph office interfered with her job performance, testifying “I continue to look over my shoulders,” and stating that the environment “makes me feel as though being African-American, I’m not worthy to work in this office because that’s just not what they’re used to.” Respondent testified further that the environment made her “second guess my own self,” and “keep myself a little guarded” at work.

Additionally, Respondent testified to multiple instances of racial hostility. Her very first day on the job, Respondent heard a Caucasian construction foreman and a lead survey foreman discussing how “blacks don’t take pride in their work, where they live, or anything.” Additionally, there was the instance where a Caucasian co-worker referred to President Obama as a “monkey.” And when news broke that celebrity Chef Paula Deen used the word “n\*\*\*\*r” to an African-American employee, Labass displayed several Paula Deen magazines on her desk. Another time Respondent went into the copy room and found an email Labass was photocopying. The email stated, “that the blacks and Mexicans were taking over and the Caucasians needed to take their money out of the banks because Obama was going to bankrupt and close all the banks and that they needed to take their money and invest it in gold bars.” Appellant attempts to dismiss Respondent’s evidence by arguing that these remarks were isolated and incidental, rather than severe and pervasive. However, Appellant’s argument ignores the fact that in most claims of a hostile work environment, the discriminatory acts are “not of a nature that can be identified individually as significant events; instead, the day-to-day harassment is primarily significant . . . in its *cumulative* effect.” *Id.* at 526.

It is important to note that in assessing the hostility of an environment this Court looks to the totality of the circumstances. *Cooper*, 204 S.W.3d at 245. Respondent testified that her supervisor, Robert Hart, would make snide comments whenever she asked a question, that he would make her feel like “the village idiot,” and that she felt he was trying to degrade her in front of her co-workers, and minimize her capabilities. In 2013 Respondent made an HR complaint to Moran, an HR officer, regarding Hart’s conduct and the racial environment in the office. In response, Respondent was called to a meeting with Moran, Williams, and Hart. Moran mentioned that he had discussed her concerns with Williams and Hart, and then Williams alleged that Respondent was having an intimate relationship with Gard, a Caucasian co-worker.

Moran then told her, “I think you need to take a look at yourself; sometimes we have to take a look at ourselves and see why people treat us the way they do,” and Hart accused her of not being helpful to her co-workers.

Respondent also presented evidence that her issues were not limited to Hart, Williams, Moran, and Labass. Respondent testified Martin would come into the office and mockingly sing “negro spirituals,” singing “free at last, free at last, thank God almighty we’re free at last like these mother f----s are.” Respondent’s 2013 HR complaint also alluded to some of Martin’s conduct, leading to Martin angrily entering her office with two other Caucasian co-workers telling her to “keep me off your radar,” and “[y]ou don’t know a f-----g thing and you don’t do a f-----g thing. You’re a nothing and a nobody.” Respondent would later participate in an investigation of this incident.

Additionally, Respondent called Gard to testify at trial. He testified that he heard Martin use the term “n\*\*\*\*r” “too many times to count,” and that he heard Martin refer to Respondent as a “dumb jig” one time in the office. Gard also testified he heard Martin refer to Respondent as a “dumb black bitch” on another occasion. Further, the woman who was supposed to train Respondent, Munsell, refused to adequately do so. Gard testified that when he asked Munsell why she did not want to train Respondent, Munsell told him it was because “I don’t want my job taken by a n\*\*\*\*r.”

In McKinney v. City of Kansas City, another case decided by the Western District, the plaintiff sued the city for race discrimination, a hostile work environment, and retaliation. 576 S.W.3d 194, 197 (Mo. App. W.D. 2019). The plaintiff’s lone explicitly racial incident was a Caucasian supervisor beginning her tenure by announcing in the presence of several African-American employees “that she was driving the bus and if the employees didn’t like the way she was driving they could sit in the back or get off.” Id. The court found that this evidence,

combined with other race neutral acts, was sufficient for the plaintiff to have a submissible claim of a hostile work environment. Id. at 200-01.

In Respondent's case, she had more than one explicitly racial piece of evidence about the environment at Appellant's St. Joseph office. Further, she also submitted the evidence of Hart demeaning her in front of her colleagues, Martin aggressively yelling at her in her office in front of two other employees, and the fact that she was accused of having an intimate relationship with a Caucasian employee when she filed an official HR complaint. Looking at the totality of the circumstances, we hold Respondent provided substantial evidence that the cumulative effect of all of these incidents created a hostile work environment. Cooper, 204 S.W.3d at 245; Alhalabi, 300 S.W.3d at 526. As discussed above, the harassing conduct must be severe and pervasive "as viewed subjectively by the plaintiff and as viewed objectively by a reasonable person." Fuchs, 447 S.W.3d at 734 (citing Cooper, 204 S.W.3d at 244-45). Respondent showed that she was personally offended. Further, once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury. Id. Here, the jury found that a reasonable person would have been offended by the conduct at issue in this case, and we will not invade that finding.

Therefore, Respondent had a submissible case of a hostile work environment in that she showed a term, condition, or privilege of her employment was affected, and that the hostility was severe and pervasive. Because Respondent made a submissible case of both discriminatory failure to promote, and a hostile work environment, point three is denied.

#### **Point IV: Respondent Made a Submissible Case of Retaliation**

In its fourth point on appeal, Appellant alleges the trial court erred in denying its motion for a directed verdict on Respondent's retaliation claim. Appellant argues Respondent did not have a submissible case of retaliation on her retaliatory failure to promote claim, or on her other

retaliation claims, because she did not show that her HR complaint played a causal role in those decisions. We disagree.

As we discussed in our analysis of Appellant’s third point, to present a submissible case a plaintiff must show “each and every fact essential to liability is predicated upon legal and substantial evidence.” Giddens, 29 S.W.3d at 818. We view the evidence “in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict.” Id.

To present a prima facie case of retaliation, the plaintiff must show “(1) she complained of discrimination; (2) the employer took adverse action against her; and (3) a causal relationship existed between the complaint of discrimination and the adverse employment action.” Cooper, 204 S.W.3d at 245 (citing Thompson v. W.-S. Life Assur., 82 S.W.3d 203, 207 (Mo. App. E.D. 2002)). To retaliate is to “inflict in return,” and retaliation includes “any act done for the purpose of reprisal that results in damage to the plaintiff . . . .” Walsh v City of Kansas, 481 S.W.3d 97, 106 (Mo. App. W.D. 2016) (citing Keeney v. Hereford Concrete Prods., Inc., 911 S.W.2d 622, 625 (Mo. banc 1995)). Further, the plaintiff must satisfy that causation standard by showing the complaint of discrimination was a “contributing factor” to Employer’s adverse employment action. Templemire v. W&M Welding, Inc., 433 S.W.3d 371, 383 (Mo. banc 2014). A contributing factor is a “condition that contributes a share in anything or has a part in producing the effect.” Soto v. Costco Wholesale Corp., 502 S.W.3d 38, 48 (Mo. App. W.D. 2016). If the plaintiff’s protected activity was “even one contributing factor” in the employer’s decision to act in reprisal, then there was an unlawful retaliation. Id.

*Failure to Promote Respondent to the Claims Supervisor Position*

Appellant argues there cannot be any causal connection between Respondent's 2013 HR complaint and Appellant's failure to promote her in 2014, "because no one who made that decision even knew about the complaint." However, this argument is belied by the record.

While Respondent did not present direct evidence that Appellant decided not to promote her because of her HR complaint, she presented circumstantial evidence. Because cases involving claims of retaliatory motive are inherently fact-based, usually depending on inferences rather than direct evidence, circumstantial evidence that "tends to support an inference" of retaliatory motive is sufficient. Holmes v. Kansas City Pub. Sch. Dist., 571 S.W.3d 602, 611 (Mo. App. W.D. 2018). Some examples for circumstantial evidence of causation include good work record prior to the adverse employment action, close temporal proximity between the complaint and the adverse action, atypical treatment, and facts showing the employer's explanation for the action is unworthy of credence. Soto, 502 S.W.3d at 49-50. To begin with, Respondent presented evidence in the form of her testimony that she received annual performance evaluations, and she always met or exceeded expectations. Further, we discussed in our analysis supra that Appellant's justification for not promoting Respondent—that she did not have enough experience with on-site investigations in the field of natural gas—was unworthy of credence. Thus, Respondent presented circumstantial evidence of a causal relationship between her complaint and the decision not to promote her. See id.

Additionally, Respondent presented even more circumstantial evidence that Appellant's failure to promote her was retaliatory. Gallagher testified on cross-examination that the hiring decision was made by him, Smith, Fondren, and Dove. We discussed Dove's racial biases in our analysis of Appellant's third point, supra. Further, Moran testified that he informed Dove about Respondent's complaint. Thus, someone aware of Respondent's HR complaint was in a position

to influence the decision on whether to promote Respondent to the claims supervisor position. See Cf. Ferguson, 498 S.W.3d at 490 (finding that bias by someone in the position to influence the ultimate decision maker relevant in an age-discrimination claim). Respondent needed to show only that her complaint was a contributing factor in Appellant's decision not to promote her. Templemire, 433 S.W.3d at 383. Further, we view all of the evidence in the light most favorable to the verdict, and here the jury found Respondent had met her burden. We will not disturb that finding. Giddens, 29 S.W.3d at 818.

#### *Additional Duties and Transfer to Kansas City*

Respondent also presented a submissible case that Appellant retaliated against her by adding additional duties to her workload and transferring her to Kansas City three days a week. As discussed above, Respondent only needed to show that her complaint was a contributing factor in Appellant's decision to add additional duties to her workload, and to transfer her to Kansas City three days a week, in order to meet her causation burden. Templemire, 433 S.W.3d at 383. As discussed above, because cases involving claims of retaliatory motive are inherently fact-based, usually depending on inferences rather than direct evidence, circumstantial evidence that "tends to support an inference" of retaliatory motive is sufficient. Holmes, 571 S.W.3d at 611. Some examples for circumstantial evidence of causation include good work record prior to the adverse employment action, close temporal proximity between the complaint and the adverse action, atypical treatment, and facts showing the employer's explanation for the action is unworthy of credence. Soto, 502 S.W.3d at 49-50.

Regarding Appellant's assigning additional duties to Respondent, the evidence at trial showed this was done at Hart's behest, after Respondent had filed her HR complaint against Hart. Moran testified on cross-examination that as part of the conclusion of the investigation into Hart's conduct, additional duties were added to Respondent's workload. Thus, there was

evidence of close temporal proximity between Respondent's first HR complaint and Appellant's decision to give her additional work duties. See id. Further, Williams testified that at the end of the investigation he spoke with Hart about Respondent's job responsibilities, and it was Hart's suggestion that Respondent did not have enough work to keep her busy. Williams testified further that as a result of that conversation, "more work was added to [Respondent's] plate." Both Moran and Williams testified that Respondent was not provided additional pay along with this increase in her workload. While Appellant argues that duties were also taken away from Respondent's workload, our standard of review requires we view the evidence in the light most favorable to the verdict reached by the jury, "giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 29 S.W.3d at 818. Here, the jury found Respondent showed Appellant's decision to add duties to her workload was in retaliation for her first HR complaint, and we decline to disturb that finding.

Respondent also provided a submissible case that her transfer to Kansas City was retaliatory. Appellant argues Respondent cannot prove a causal relationship between her HR complaint and her transfer to Kansas City because there was not a "close temporal relationship" between her complaint and her transfer. However, a close temporal relationship between a protected activity and the retaliatory act is only one of the ways a plaintiff can show causation. Here, regardless of whether Respondent showed a close temporal relationship between her complaint and transfer, she showed that Appellant's business reasons for the transfer were unworthy of credence.

Appellant's justification for transferring Respondent to Kansas City three days a week was that they needed her there to assist two supervisors in the construction department at the Kansas City office. Respondent called Williams to testify at trial, and he stated, "[Appellant] . . . wanted to accelerate our gas main program . . . We were averaging eight to ten miles a year until the



transition. They wanted us to immediately double and triple that . . . .” Williams testified further that “the construction foreman needed help with all the paperwork that was involved,” and that was why Respondent was transferred to Kansas City. However, Williams also testified that Appellant dramatically increased the budget for this work, from \$14 million to more than \$40 million. Despite this budget increase and alleged need for support in the Kansas City office, Respondent was the only employee forced to commute to Appellant’s Kansas City office. Additionally, Respondent testified that “there’s no need for me to be in Kansas City. I can retrieve paperwork, emails, documents or a fax. We can get emailed to us the work order packet and not have to retrieve them off our database,” and further that there is no aspect of her job duties in Kansas city requiring face-to-face interaction, or hands-on work. That Appellant had retaliatory intent in making this decision is further supported by the fact that Respondent was transferred after making her HR complaint, even though she was told before that complaint that her job would not change after Appellant’s purchase of the company. The jury heard all of this testimony and then found in favor of Respondent. We will not disturb that finding. See Giddens, 29 S.W.3d at 818.

Additionally, Respondent showed that transfer is an atypical treatment at Appellant’s offices. Soto, 502 S.W.3d at 49-50. Respondent testified that she had never heard of anyone being transferred from one of Appellant’s offices for non-disciplinary reasons. In fact, as part of his punishment for his discriminatory conduct in the St. Joseph office, Hart was involuntarily transferred to Kansas City. Thus, Respondent also provided a submissible case that her transfer to Kansas City was in retaliation for her HR complaint.

Therefore, we hold that Respondent presented a submissible case that Appellant did not promote her to the claims supervisor position, added to her workload, and transferred her to Kansas City, all in retaliation for her HR complaint. As we discussed supra, because cases

involving claims of retaliatory motive are inherently fact-based, usually depending on inferences rather than direct evidence, circumstantial evidence that “tends to support an inference” of retaliatory motive is sufficient. Holmes, 571 S.W.3d at 611. Respondent’s evidence tends to support an inference of retaliatory intent, in that she showed Dove was part of the group of decision-makers for the claims supervisor position and knew about her HR complaint, that she was only assigned additional duties at the behest of the same man against whom she filed her HR complaint, and that Appellant’s justification for her transfer to Kansas City was pretextual. Point four is denied.

#### **Point V: Instruction No. 6 Was Proper**

In its fifth point on appeal, Appellant argues the trial court erred in giving Instruction No. 6 because it did not submit all of the elements of a hostile work environment claim. Appellant asserts that the instruction should have required a finding that the alleged harassment was so severe or pervasive that it affected a term, condition, or privilege of Respondent’s employment, and also a finding that Appellant knew or should have known of it. We disagree.

When analyzing whether a jury was properly instructed, our review is conducted “in the light most favorable to the record,” and if the instruction is supported by any theory its submission is proper. Hervey, 379 S.W.3d at 159. We reverse only if the instructional error resulted in prejudice that “materially affects the merits of the action.” The party challenging the instruction bears the burden of showing the instruction “misdirected, misled, or confused the jury, resulting in prejudice . . . .” Id. (citing Fleshner v. Pepose, 304 S.W.3d 81, 90-91 (Mo. banc 2010)).

The Missouri Rules of Civil Procedure provide rules for the instruction of juries in Rule 70.02. That rule states, “whenever [MAI] contains an instruction applicable in a particular case . . . such instruction *shall* be given *to the exclusion of any other instructions on the same*

*subject.*” Mo. R. Civ. Pro. 70.02(b) (emphasis added). Rule 70.02 states further that “the giving of an instruction in violation of the provisions of [this rule] shall constitute error, its prejudicial effect to be judicially determined . . . .” Rule 70.02(c). A proper instruction submits “only the ultimate facts, not evidentiary details, to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over another.” Twin Chimneys Homeowners Ass’n v. J.E. Jones Const. Co., 168 S.W.3d 488, 497-98 (Mo. App. E.D. 2005). Further, the test is “whether the instruction follows the substantive law and can be readily understood by the jury.” Id. at 498.

Appellant faults Instruction No. 6 for numerous reasons. First, Appellant argues that the instruction failed to provide all of the elements of a hostile work environment claim, specifically that the trial court failed to provide the element that the harassment was sufficiently severe or pervasive that it affected a term, condition, or privilege of Respondent’s employment, and also that the court failed to provide the element that Appellant knew or should have known of the harassment and failed to take proper action. We hold that this argument fails because Instruction No. 6 was proper in that it followed the applicable MAI, it submitted only the ultimate facts to the jury, and it followed the substantive law.

Employment discrimination actions brought before the S.B. 43 amendments utilize MAI 38.01(A). That MAI reads as follows:

Your verdict must be for plaintiff if you believe:

First, defendant (here insert the alleged discriminatory act, such as ‘failed to hire’ ‘discharged’ or other act within the scope of [Section] 213.055, RSMo) plaintiff, and

Second, (here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age, or disability) was a contributing factor in such (here repeat alleged discriminatory act . . .), and

Third, as a direct result of such conduct, plaintiff sustained damage.

MAI 38.01(A). Instruction No. 6 read in pertinent part:

Your verdict must be for Plaintiff on her race discrimination claim if you believe:

First, Defendants either

Subjected Plaintiff to unwelcome harassment that either created an intimidating, hostile, or offensive work environment or unreasonably interfered with her work performance, or

Failed to promote Plaintiff to Claims Supervisor, and

Second, Plaintiff's race was a contributing factor in such conduct, and

Third, as a direct result of such conduct, Plaintiff sustained damage.

Looking at the MAI language and the language from Instruction No. 6, it is clear the trial court religiously followed the MAI instruction, as it was required to do. See Clark v. Missouri & N. Ark. R.R. Co., Inc., 157 S.W.3d 665, 671 (Mo. App. W.D. 2004) (finding that it is well settled that when a MAI instruction is applicable, its use is mandatory) (quoting Bueche v. Kansas City, 492 S.W.2d 835, 840 (Mo. banc 1973)); see also Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d 255, 258 (Mo. banc 1967) (“if this court is to make this system work, and preserve its integrity and very existence, we must insist that mandatory directions be followed and that the pattern instructions be used as written”).

Instruction No. 6 was also proper because it submitted only the ultimate facts to the jury. J.E. Jones Const. Co., 168 S.W.3d at 497-98. MAI 38.01(A) instructs the trial court to “insert the alleged discriminatory act . . . within the scope of [Section] 213.055” in Paragraph First of the instruction. MAI 38.01(A). Further, the Notes on Use provide that the trial court can appropriately modify Paragraph First of the instruction “if the evidence . . . demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in [Section] 213.055 . . .” MAI 38.01(A); Clark, 157 S.W.3d at 671 (finding that notes on use should be religiously followed). Thus, the Notes on Use to MAI 38.01(A) provide that in hostile

work environment claims, the trial court must insert language in Paragraph First providing the ultimate facts the jury must find.

We have already discussed in our analysis of Appellant's third and fourth points, supra, why its conduct was sufficiently severe and pervasive to create a hostile work environment. In Missouri, "discrimination creates an actionable hostile work environment when discriminatory conduct either creates an intimidating, hostile, or offensive work environment or has the purpose or effect of unreasonably interfering with an individual's work performance." Fuchs, 447 S.W.3d at 733. Under Missouri law, then, an intimidating work environment, a hostile work environment, an offensive work environment, or an environment that unreasonably interferes with someone's work performance are all actionable forms of discrimination, and by their very nature constitute discrimination that is severe and pervasive. Thus, these were the ultimate facts that needed to be submitted to the jury. See id. Instruction No. 6 submitted all of these to the jury, and thus submitted the ultimate facts to the jury.

For similar reasons, Instruction No. 6 was also proper because it followed the substantive law. The court followed the Notes on Use from MAI 38.01(A) to fill in the ultimate facts in Paragraph First of Instruction No. 6. Further, the court took the language directly from the Fuchs case. See id. When discussing the jury instructions with the attorneys, the court mentioned that there was "not a definition of hostile work environment," so ". . .we took the language directly from that case and inserted into the verdict director . . . [t]hat is right from that case, and that's as close a definition as I could find . . . so I think that is the proper guidance for the jury . . . ." Thus, the trial court followed the substantive law, in that it followed the applicable MAI and Notes on Use, and took the definition of a hostile work environment directly from an applicable case.

Even assuming *arguendo* Instruction No. 6 was improper for failing to submit all of the elements of a hostile work environment, Appellant still cannot show prejudice because the jury awarded punitive damages. A jury’s decision to award punitive damages on a hostile work environment claim “indicates the discriminatory harassment was severe and pervasive, and indicates that the addition of [the words severe and pervasive] in [the] jury instruction . . . would not have made a difference.” Alhalabi, 300 S.W.3d at 528. Thus, Appellant was not prejudiced by the lack of such language in Instruction No. 6.

Next, Appellant faults Instruction No. 6 for not requiring the jury to find Appellant “knew or should have known of the alleged hostile environment and did nothing about it.” Appellant asserts this is a valid defense to claims of harassment by supervisors and co-employees. To begin with, the argument was waived. Rule 70.03 addresses objections to instructions, stating “[c]ounsel **shall** make specific objections to instructions considered erroneous,” and requiring counsel “objects thereto on the record **during the instructions conference**, stating distinctly the matter objected to and the grounds of the objection.” Rule 70.03 (emphasis added). Failure to make such an objection means that argument is waived on appeal. See Williams v. Mercy Clinic Springfield Cmtys., 568 S.W.3d 396, 415 (Mo. banc 2019). Appellant failed to make this specific objection at the instructions conference, instead objecting to the lack of the “severe and pervasive” language in the instruction, and the trial court’s rejection of its affirmative defense instruction. Further, Appellant’s proposed hostile work environment instruction did not include such a defense. Additionally, Appellant failed to include this argument in its motion for a new trial. Thus, Appellant waived this argument.

Even if Appellant properly preserved this argument for our review, it still fails because this proposed element is applicable only to cases involving sexual harassment, and only when the plaintiff seeks to hold the employer liable under a negligence theory of liability. See Diaz v.

Autozoners, LLC, 484 S.W.3d 64, 76 (Mo. App. W.D. 2015). This is a case of racial discrimination, thus Appellant’s argument that Instruction No. 6 failed to include such an element fails.

Appellant also faults the trial court for rejecting Appellant’s affirmative defense instruction. This proposed instruction read in pertinent part:

You must find for Defendants on Plaintiff’s racial [sic] hostile work environment claim if you believe:

First, Defendants exercised reasonable care to prevent harassment in the workplace on the basis of race, and also exercised reasonable care to promptly correct any harassing behavior that does [sic] occur, and

Second, Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities approved by Defendants.

This defense is available only where “**no tangible employment action occurs**,” and requires “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff . . . unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm . . . .” Diaz, 484 S.W.3d at 76 (emphasis added).

Appellant’s argument fails for two reasons. First, this affirmative defense is only available in sexual harassment cases. The MHRA does not “explicitly provide for . . . any . . . affirmative defense.” Wells v. Lester E. Cox Med. Ctrs., 379 S.W.3d 919, 926 (Mo. App. S.D. 2012); see also MAI 38.01(A) Notes on Use 4 (“in including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in [MHRA] cases”) (citing id.) However, the Missouri Code of State Regulations provides that this affirmative defense is available in sexual harassment cases. 8 CSR Section 60-3.040(17)(D)(1). There is no such regulation providing for such a defense in the context of a racial discrimination case. Further, this affirmative defense is only

available where there is no tangible employment action. See Diaz, 484 S.W.3d at 76 (“this defense is **not available**, however, when the supervisor’s harassment culminates in a tangible employment action”) (internal quotations omitted) (emphasis added). We have already discussed how Appellant’s actions culminated in multiple tangible employment actions. Thus, the trial court was correct when it denied Appellant’s proposed affirmative defense instruction because it was inapplicable to this case.

For these reasons, we hold that Instruction No. 6 was proper and the trial court properly rejected Appellant’s affirmative defense. Appellant’s fifth point is denied.

### **Points II and VI**

Appellant’s second and sixth points are reviewed for an abuse of discretion, thus we review them separately from the rest of Appellant’s points.

#### **A. Standard of Review**

The trial court has “broad discretion” in determining whether to admit or exclude evidence. Kerr v. Mo. Veterans Comm’n, 537 S.W.3d 865, 876 (Mo. App. W.D. 2017) (internal quotations omitted) (citing Ferguson, 498 S.W.3d at 489). Thus, we review the trial court’s decisions regarding the admission of evidence for an abuse of discretion. Id. at 877.

Additionally, to successfully challenge the trial court’s award of attorneys’ fees on appeal, the appellant must show the award was an abuse of discretion. Cullison v. Thiessen, 51 S.W.3d 508, 513 (Mo. App. W.D. 2001). The trial court abuses its discretion “if its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” Kerr, 537 S.W.3d at 876. (internal quotations omitted).

#### **B. Analysis**

##### **Point II: The Trial Court did not Abuse its Discretion in Admitting Respondent’s “Me too” Evidence**



In its second point on appeal, Appellant argues the trial court erred in admitting Respondent's "me too" evidence in support of her hostile work environment claim. Appellant reasons that such evidence was irrelevant because the allegedly hostile remarks were neither directed to, nor heard by plaintiff, and the prejudicial effect of such evidence far outweighed any probative value. We disagree.

Employment discrimination cases are inherently fact based, and "often depend on inferences rather than on direct evidence . . . because employers are shrewd enough not to leave a trail of direct evidence." Cox, 473 S.W.3d at 116. Thus, "individual plaintiffs claiming discriminatory employment action on the basis of . . . any . . . protected classification, generally must rely on circumstantial evidence." Id. As with all other forms of evidence, circumstantial evidence of employment discrimination must be both logically and legally relevant to be admissible. Id. Evidence is logically relevant if "it tends to make the existence of any consequential fact more or less probable, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case." Hesse v. Mo. Dept. Corr., 530 S.W.3d 1, 5 (Mo. App. W.D. 2017). Evidence is legally relevant if "its probative value outweighs any prejudicial effect on the jury." Id.

Appellant challenges the admission of the following evidence: (1) Rumbo's testimony that Hart told him to "turn that jigaboo music off" in the St. Joseph facility; (2) Rumbo's testimony recounting a conversation with Mark Olvera ("Olvera") in which he stated that St. Joseph "don't do blacks and women"; (3) Katie Jones Shirey's ("Shirey") testimony regarding Hart's jigaboo comment, and that Hart used the word "n\*\*\*\*r" more than once; (4) Gard's testimony that he heard Martin refer to President Obama as a "f\*\*\*\*\*g monkey," and that Martin had used the n-word on multiple occasions; (5) Phil Campbell's ("Campbell") testimony that Hart told other employees that they "n\*\*\*\*r-rigged the cards"; and (6) D'Angelo Ferguson's

(“Ferguson”) testimony that Shane Mitchell (“Mitchell”), who worked under Hart’s supervision, referred to “jigaboo music” many times. The crux of Appellant’s argument is that because Respondent did not hear many of the statements which these “me too” witnesses testified, they are irrelevant to her hostile work environment claim. This is not the law.

To be sure, the testimony of these witnesses was logically relevant to Respondent’s hostile work environment claim. She was alleging that the racism of her supervisor and colleagues created a racially hostile work environment. The fact that Hart, Martin, and other Caucasian employees repeatedly used racial slurs makes it more probable that this was the case. Hesse, 530 S.W.3d at 5 (noting that evidence is logically relevant if it makes any consequential fact more or less probable). Further, this corroborated Respondent’s own testimony about the racial hostility she experienced in the workplace. Respondent described the workplace as “toxic,” and that the environment “made it difficult to work.” She testified about her first day in the St. Joseph office, where she overheard two Caucasian employees talking about how “blacks don’t take pride in their work, where they live, or anything,” that she heard co-employees refer to President Obama as a “f\*\*\*\*\*g monkey,” and that Martin would walk into the office mockingly singing “negro spirituals.” Respondent also testified that Hart tried to make her appear incompetent, alleging her co-workers were complaining, and that Hart never degraded any of the Caucasian employees like he did Respondent. Additionally, Respondent testified that when she filed her HR complaint she was questioned about whether she was having an intimate relationship with Gard, a Caucasian co-worker. Thus, the testimony of these “me too witnesses” was logically relevant to Respondent’s hostile work environment claim. The principal issue is whether this testimony was legally relevant.

When considering “me too” evidence, “courts look to and weigh aspects of similarity between party and non-party employees given the facts, context, and theory of the specific case

at issue.” Id. (quoting Cox, 473 S.W.3d at 123). Further, “there is no one set of agreed-upon factors, and no one factor is dispositive.” Dixon, 586 S.W.3d at 830 (internal quotations omitted) (quoting Cox, 473 S.W.3d at 122). We find the case of Cox v. Kansas City Chiefs Football Club, Inc., instructive to our analysis on this issue. 473 S.W.3d at 107. In that case, Cox (“Mr. Cox”) was a former Chiefs employee who filed an age-discrimination suit against the team after he and a number of employees over the age of fifty were fired and replaced with younger people. Id. at 111-12. The trial court ruled that the testimony of other former employees as to their ages and the circumstances surrounding their termination was inadmissible because the other employees “were . . . fired or forced out by different managers and worked in different departments, among other distinctions,” and were therefore not similarly situated to Mr. Cox. Id. at 111.

On transfer from the Western District, the Missouri Supreme Court held that the trial court abused its discretion in excluding this circumstantial evidence, noting that the “standard for admitting such testimony as circumstantial evidence of the employer’s discriminatory intent . . . depends on many factors, including the plaintiffs [sic] circumstances and theory of the case.” Id. Further, the Court discussed that the admissibility of such evidence should be determined “on a case-by-case basis.” Id. at 121. The Court also held that evidence of discriminatory actions at the hands of other decisionmakers is admissible if “relevant to the plaintiffs [sic] circumstances and theory of the case . . . .” Id. at 123. Then, looking at Mr. Cox’s theory of the case, the court found the trial court abused its discretion in not admitting the “me too” evidence at issue. Id.

Looking to the facts and circumstances of this case, and in light of Respondent’s theory of the case, we hold the trial court did not abuse its broad discretion in admitting the testimony of the “me too” witnesses. While the circumstances for Rumbo, Shirey, Gard, Campbell, and Ferguson were not similar in every way to Respondent’s situation, their differences were “less

relevant than their commonalities.” See Dixson, 586 S.W.3d at 831 (quoting Hesse, 530 S.W.3d at 5). Rumbo, Campbell, and Ferguson were all African-Americans employed at the same company, who all experienced racially hostile conduct, including actions by Hart, those under his supervision, and Martin. Further, while Campbell and Shirey were Caucasian, they also experienced much of the same conduct by the same parties, and Gard was even viewed as being too friendly with Respondent, to the extent that the parties at fault accused Respondent of having an intimate relationship with him. As the court in Cox held, these similarities made this “me too” evidence “relevant and admissible in this case even when the other . . . employees are not similarly situated in all respects.” 473 S.W.3d at 111. Therefore, in addition to being logically relevant, this evidence was also legally relevant and admissible.

That the trial court did not abuse its discretion in admitting this evidence is further supported by examination of the evidence it found inadmissible. First, the trial court sustained Appellant’s counsel’s objection to Shirey’s testimony that Campbell’s Caucasian co-workers viewed him as lazy. Further, the court refused to admit Campbell’s evidence about his claim to the Equal Employment Opportunity Commission regarding seniority issues, finding “this is certainly an insufficient connection.” Thus, it cannot be said that the trial court’s decision was “so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” Kerr, 537 S.W.3d at 876.

Therefore, the trial court did not abuse its discretion in admitting this “me too” evidence, and point two is denied.

**Point IV: The Trial Court did not Abuse its Discretion in Awarding Respondent Attorneys’ Fees**

In its sixth and final point on appeal, Appellant alleges the trial court erred in awarding Respondent attorneys’ fees, because the award was premature. Appellant reasons that because an outright reversal on appeal would require a denial of attorneys’ fees, and a reversal on any

ground other than the damage cap would require a new trial, the trial court abused its discretion in awarding Respondent attorneys' fees. We disagree.

The MHRA provides that “the court may . . . as it deems appropriate . . . award court costs and reasonable attorney fees to the prevailing party other than a state agency or commission or a local commission . . . .” Section 213.111.2. The determination of reasonable attorneys' fees is “in the sound discretion of the trial court,” and we will reverse only where the amount is “arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration.” Brady v. Curators of Univ. of Mo., 213 S.W.3d 101, 114 (Mo. App. E.D. 2006). Further, if the trial court determines a plaintiff has prevailed, it should award attorneys' fees “unless special circumstances would render such an award unjust.” Id. at 115 (quoting Lippman v. Bridgecrest Estates I Unit Owners Ass'n, Inc., 4 S.W.3d 596, 598 (Mo. App. E.D. 1999)). Such an exception is “extremely narrow,” and is applied only “in unusual circumstances and then only upon a strong showing by the party asserting it.” Id.

In its principal brief on appeal, Appellant indicates that the award of attorneys' fees was improper only if this Court reverses on other grounds. From pages 73-74 of that brief, Appellant states, “if [Appellant] prevails on any of its arguments that plaintiff lacked a submissible case on any theory, [Appellant] is entitled to a new trial on all issues. **In those circumstances**, any award of attorneys' fees would have to await the outcome of a new trial.” Further, in its reply brief, Appellant states, “[t]he parties are in agreement that the issue of attorneys' fees depends on the outcome of the appeal.” Seeing no errors warranting reversal, we cannot hold that the trial court abused its broad discretion in awarding attorneys' fees to Respondent. Point six is denied.

*Respondent's Motion for Attorneys' Fees on Appeal*

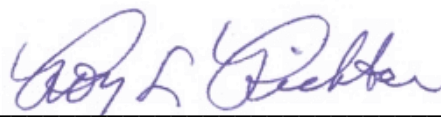
We now address Respondent's Motion for Attorneys' Fees on Appeal. Respondent filed this Motion on September 27, 2019, requesting this Court “award her attorney's fees, expenses,

and costs on appeal should the Court deem her a prevailing party.” The Motion did not request a specific amount of fees, but requested that this Court “permit her to provide supplemental documentation in support of this motion when the work on the appeal is complete.” On October 7, 2019, this Motion was ordered taken with the case.

Section 213.111 authorizes a court to award “court costs and reasonable attorney fees to the prevailing party.” Section 213.111.2; Dixson, 586 S.W.3d at 831. This includes fees incurred on appeal from the trial court’s judgment. Mignone v. Mo. Dep’t of Corr., 546 S.W.3d 23, 45 (Mo. App. W.D. 2018). The prevailing party is “one that succeeds on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing the suit.” Id. Because we affirm the trial court’s judgment in Respondent’s favor, she is the prevailing party and is entitled to an award of costs and reasonable attorneys’ fees incurred on appeal. See id.; see also Dixson, 586 S.W.3d at 831. While this Court has the authority to allow and fix the amount of attorneys’ 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.” Accordingly, we grant Respondent’s Motion for Attorneys’ Fees on Appeal, and remand the case to the trial court to hear evidence and argument on this issue, and to determine the appropriate fee.

### **III. Conclusion**

The judgment of the trial court is affirmed. In granting Respondent’s motion for attorneys’ fees, we remand to the trial court to determine the appropriate fee.



---

ROY L. RICHTER, Judge

Robert M. Clayton III, P.J., concurs  
Robert G. Dowd, Jr., J., concurs

**Spire Missouri**  
**GR-2021-0108**

**Response to Office of Public Counsel Data Request 2092**

The direct testimony of Scott Carter p. 4 lines 14-18 states:

*Our values are safety, inclusion and integrity. These values define who we are, how we operate and how we treat one another both inside and outside the Company. In our workplace, diverse perspectives are welcomed and embraced, employees are given the tools they need to perform their duties safely and each employee is expected to get the job done right—every time.*

- Please provide a breakdown of the past ten years' worth of formal discrimination complaints issued by employees, contractors or customers to Spire's (or Laclede Gas or Missouri Gas Energy) human resources. Please provide the breakdown as follows:
  - By year (2015 to present)
  - By utility (Spire East/Laclede Gas or Spire West/MGE)
  - By complaint type (including but not limited to the following categories: sex, race, color, national origin, religion, age, disability, etc...).

DR Requested by Geoff Marke ([Geoff.marke@opc.mo.gov](mailto:Geoff.marke@opc.mo.gov)).

**Objection:** Spire objects to this Request on the grounds and to the extent that such request is overly broad and unduly burdensome, in that the request seeks information regarding the past ten years of formal discrimination complaints, broken down by year, by utility and by complaint type. Furthermore this information is equally available to OPC through public records. Spire objects to the extent this request is irrelevant as it seeks information regarding discrimination claims which are not relevant to the questions of law and fact at issue in this proceeding. Spire further objects on the separate and independent grounds to the extent this request seeks information outside the relevant time period for this case in that it requests information pertaining to the past ten years. Materials dating back ten years, are not relevant to the questions of law and fact at issue in this proceeding. The Company further objects to this request to the extent it seeks information protected by the attorney client and work product privileges.

**Response:** Please see the Company's objection. The objection, restated above, was issued to the OPC on April 22, 2021.