

IN THE SUPREME COURT OF MISSOURI

No. SC89925

MICHAEL KEVENEY,

Respondent/Cross-Appellant,

vs.

MISSOURI MILITARY ACADEMY,

Appellant/Cross-Respondent

Appeal from the Circuit Court of Audrain County, Missouri
Honorable Keith M. Sutherland, Circuit Judge
Case No. 04AU-CV00024

Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED90595

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

Respondent/Cross-Appellant Michael Keveney (“Keveney”) brought this action against Appellant/Cross-Respondent Missouri Military Academy (“MMA”) alleging that MMA breached his employment contract by firing him without cause and wrongfully discharged him in violation of public policy. MMA filed a motion to dismiss Keveney’s wrongful discharge claim on the grounds that Keveney is not entitled to bring a claim of wrongful discharge in violation of public policy because he was not an at-will employee and that Keveney failed to allege the elements of a wrongful discharge claim. MMA also moved to strike Keveney’s requests for emotional distress damages and punitive damages in connection with his breach of contract claim. On April 15, 2005, the trial court granted both of MMA’s motions.

The parties proceeded to trial on Keveney’s breach of contract claim. On July 17, 2007, a jury returned a verdict in favor of Keveney on his claim and awarded him \$13,300 in damages. The trial court entered judgment in favor of Keveney on July 18, 2007. MMA then filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for a new trial on August 10, 2007, and Keveney filed a motion to amend the judgment to include prejudgment interest on August 16, 2007. On October 24, 2007, the trial court issued an order denying MMA’s post-trial motions. Thereafter, on November 5, 2007, the trial court entered an amended judgment in which it granted Keveney’s motion for prejudgment interest.

Both parties appealed the trial court’s judgment. In a per curium order dated

December 9, 2008, the Court of Appeals affirmed the trial court's judgment in its entirety.

On March 31, 2009, this Court granted Keveney's application for transfer.

The jurisdiction of the Court of Appeals was based upon the general appellate jurisdiction provided by article V, section 3 of the Missouri Constitution. This Court has jurisdiction to consider this appeal pursuant to article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Keveney's Employment with MMA

Keveney began working for MMA on August 27, 2002. Transcript Volume (“Tr. Vol.”) I, p. 178. MMA is a private school in Mexico, Missouri, that educates students from grades six through twelve. *Id.*, p. 180. More than 200 students attend the school each year, all of whom are boys. *Id.*; Tr. Vol. II, p. 307. During the school year, the students live in barracks on the school’s campus. Tr. Vol. I, p. 181.

Keveney was hired by MMA to teach high school English and drama. *Id.*, p. 178. On June 19, 2002, prior to the beginning of Keveney’s employment, the parties entered into a written employment contract that described the terms and conditions of Keveney’s employment. *Id.*, p. 178; Plaintiff’s Exhibit (“Pl. Ex.”) 1.¹ The contract provided that MMA would employ Keveney from August 27, 2002, to May 31, 2003, and that it would pay him a salary of \$26,000 during the term of the contract. Tr. Vol. I, p. 178; Pl. Ex. 1. The contract also provided that Keveney would comply with and enforce all rules, regulations, and policies promulgated by MMA and that MMA could terminate the contract for cause. Pl. Ex. 1.

During his employment with MMA, Keveney reported directly to Richard Ray (“Ray”), who was the academic dean of the high school. Tr. Vol. I, p. 181. Ray supervised

¹MMA filed all the trial exhibits with the Court of Appeals on June 30, 2008. The Court of Appeals subsequently transferred the trial exhibits to this Court on April 7, 2009.

all the teachers at the high school and reported directly to Ronald Kelly (“Kelly”), who was the president of MMA. Tr. Vol. II, pp. 271-72, 299. James Medley (“Medley”) was employed by MMA as the commandant of the school. *Id.*, p. 375. As the commandant, Medley was responsible for the discipline of the students. *Id.*, p. 376. Medley also reported directly to Kelly. *Id.*

Keveney’s performance as a teacher was exemplary. According to Ray, Keveney was a very well-versed teacher and was one of the most knowledgeable teachers in the field of language arts and literature that he had known. Tr. Vol II, p. 275. Ray gave Keveney three performance evaluations during Keveney’s first year of employment with MMA, each of which Ray considered to be positive. *Id.*, pp. 275-79. Keveney did not receive any disciplinary actions during his first year. Tr. Vol. I, p. 186.

Meeting Between Keveney and Kelly in March 2003

In March of each year, MMA begins the process of negotiating new contracts for the teachers whom it wants to return the following year. Tr. Vol. II, pp. 343-44. In March 2003, Kelly scheduled a meeting with Keveney to review and sign his contract for the 2003-2004 school year. Tr. Vol. I, pp. 186-88. Shortly before that meeting occurred, some of the students at MMA had performed a school play. *Id.*, p. 188. As one of the drama teachers, Keveney was involved in helping the students with the play. Tr. Vol. II, p. 318. Kelly believed that the amount of adult content in the play was inappropriate for MMA and, contrary to his normal practice, he did not compliment the students on their performance at the conclusion of the play. Tr. Vol. II, p. 318. Some of the students who participated in the

play told Keveney that they were bothered by Kelly's failure to compliment them on their performance. Tr. Vol. I, pp. 188-189.

When he arrived at Kelly's office to discuss his contract for the 2003-2004 school year, Keveney was upset because of Kelly's failure to compliment the students. *Id.*, p. 188. Kelly asked Keveney what was bothering him. *Id.* Keveney told Kelly that he was upset because some of the students told him that they heard that Kelly thought the play was inappropriate and that he did not like it. *Id.* When he spoke to Kelly about the students' concerns, Keveney was not angry and he did not raise his voice. *Id.*, p. 189. When Keveney mentioned the play, Kelly became very defensive and irate and denied that he had made any negative comments about the play. *Id.*, pp. 189-90. Keveney told Kelly that he was just repeating what the students told him. *Id.* Kelly then asked Keveney whether he was calling him a liar. *Id.* Keveney responded by telling Kelly that he was not calling him a liar. *Id.*, p. 190.

At that point, Keveney began to feel uncomfortable and asked Kelly whether he could return to discuss his contract at another time. *Id.* Kelly told Keveney that he did not want someone working for him who thought he was a liar and asked Keveney for his letter of resignation. *Id.* Keveney was shocked that Kelly had asked him to resign because he had done an excellent job during his employment with MMA. *Id.*, p. 190. After Kelly asked him for his letter of resignation, Keveney became angry. *Id.*, p. 190. Keveney raised his voice, but he did not yell at Kelly. *Id.*, p. 191. He told Kelly that he would write his letter of resignation. *Id.*, p. 190. He also stated that Kelly had "pissed him off" and had "pissed off"

the students and their parents. *Id.*, p. 191. Keveney then left Kelly's office. *Id.* Prior to the time that Kelly asked Keveney for his letter of resignation, Keveney had never lost his composure and remained polite. *Id.*, pp. 190-91.

After he left Kelly's office, Keveney began preparing his letter of resignation. *Id.*, p. 191. Shortly thereafter, Ray went to see Keveney and told him to stop writing the letter. *Id.* Ray told Keveney that Kelly wanted to see him the next day. *Id.* When Keveney met with Kelly the following day, they discussed what had happened the previous day and Keveney apologized for losing his composure after Kelly asked for his letter of resignation. *Id.*, p. 192. Kelly told Keveney that he would not tolerate that sort of "outburst" again. *Id.*, pp. 192-93. Kelly did not prepare anything in writing regarding Keveney's "outburst" and did not issue any written warnings or disciplinary actions to Keveney. *Id.*, p. 196; Tr. Vol. II, p. 347.

Keveney and Kelly then discussed Keveney's contract for the 2003-2004 school year and Kelly offered Keveney a new contract with a ten percent increase in pay. Tr. Vol. I, p. 192. Kelly told Keveney that he received the highest pay increase out of all the teachers. *Id.* Kelly made the decision to give Keveney the pay increase after his conversation with Keveney regarding the school play. Tr. Vol. II, pp. 348-49. Kelly gave Keveney a copy of the contract on March 13, 2003. Tr. Vol. I, p. 194; Tr. Vol. II, pp. 322-23. Kelly attached a handwritten note to the contract that stated as follows: "Mike – I hope you decide to continue your teaching career at MMA. However, I wouldn't sign the contract unless you feel comfortable with it. Best regards, R. Kelly." Tr. Vol. II, pp. 230-31; Defendant's

Exhibit (“Def. Ex.”) A. Keveney signed the contract on June 5, 2003. Tr. Vol. I, pp. 194-95. The contract stated that MMA would employ Keveney until May 31, 2004. Appendix (“App.”), p. A3 (Pl. Ex. 5). Between the date that Keveney signed the contract and October 29, 2003, Kelly did not have any problems with Keveney and no one complained to Kelly during that time period about Keveney’s performance. Tr. Vol. II, pp. 349-50.

Keveney’s Reports of Suspected Abuse and His Termination

On October 29, 2003, Keveney was teaching a class when he saw that one of his students, Aaron Burta (“Burta”), had several fist-sized bruises on both of his arms. Tr. Vol. I, p. 198. When he saw the bruises, Keveney thought that Burta may have been a victim of hazing by other students. *Id.* With regard to hazing, MMA’s faculty handbook states as follows:

“Hazing is not permitted at MMA. Hitting or physically harming another cadet, verbal abuse, threats, unusual punishments, or other actions that cause a cadet to be afraid or think he is going to be harmed are hazing. Teachers who have knowledge of any of this activity will report it to the Academic Dean or Junior School Principal.”

Def. Ex. B, p. 14. In addition, section 210.115 of the Missouri Revised Statutes provides that “[w]hen any . . . teacher, principal or other school official . . . has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect . . . , that person shall immediately report or cause a report to be made to the [Division of Family Services] in accordance with the provisions of sections 210.109 to 210.183.” Mo. Rev. Stat. §

210.115.1.² A person who fails to report suspected abuse pursuant to section 210.115 is guilty of a class A misdemeanor, which is punishable by a term of imprisonment of up to one year. Mo. Rev. Stat. § 210.165.1; Mo. Rev. Stat. § 558.011.1(5).

When Keveney saw the bruises on Burta's arms and suspected that he may have been a victim of hazing, he was concerned that Burta might be subjected to retaliatory attacks because the students in Keveney's class had seen Keveney looking at the bruises. Tr. Vol. I, p. 198. In accordance with the faculty handbook, Keveney immediately took Burta out of class and went to report the bruises to Richard Ray. *Id.*, p. 199. When Keveney spoke to Ray about the bruises on Burta's arms, he asked Ray whether Burta played football, which might explain the bruises. *Id.* Ray told Keveney that Burta did not play football. *Id.*, p. 199. Keveney then told Ray that something needed to be done. *Id.* Ray told Keveney that he needed to report the bruises to Medley, since Medley was in charge of student discipline. *Id.* Keveney explained that he did not want to report the bruises to Medley because he had brought things to Medley's attention in the past and nothing had been done. *Id.*, pp. 199-200.

²On February 5, 2003, the Governor of Missouri issued Executive Orders that separated the Division of Family Services into the Children's Division and the Family Support Division under the Department of Social Services. *See C.G. v. Dade County Juvenile Office*, 212 S.W.3d 218, 224 (Mo. App. S.D. 2007). For the purpose of consistency, Keveney will refer to the relevant authority as the "Division of Family Services" throughout this brief.

Keveney told Ray that he was going to report the bruises to Kelly instead. *Id.*, p. 200.

After speaking to Ray, Keveney took Burta to Kelly's office. *Id.*, p. 200. Keveney knocked on the door to Kelly's office and asked for permission to enter. *Id.*, p. 201; Tr. Vol. II, p. 350. Kelly then told him to come in. Tr. Vol. I, p. 201. When Keveney entered Kelly's office, he told Burta to take off his jacket so that Kelly could see the bruises on his arms. *Id.* Keveney then said, "We have a problem in the barracks." *Id.* He also mentioned the possibility of a lawsuit against the school based on Burta's bruises and told Kelly that they needed to do something about the situation. *Id.* Kelly then said to Keveney, "Let's not make a big deal out of this, Mike." *Id.*, p. 202. Kelly also asked Keveney whether any of the other students had seen the bruises on Burta's arms. *Id.* Keveney told Kelly that other students had seen the bruises. *Id.* Kelly then told Keveney that he needed to speak to Medley about the bruises. *Id.*, p. 203. Keveney explained to Kelly that he did not want to speak to Medley because of his unsuccessful attempts to bring issues to Medley's attention in the past, but Kelly insisted that Keveney speak to Medley. *Id.* Keveney complied with Kelly's directive and took Burta to Medley's office. *Id.* During his meeting with Kelly, Keveney did not raise his voice or yell at Kelly. *Id.*, pp. 203, 250.

When he arrived at Medley's office, Keveney again told Burta to take off his jacket so that Medley could see the bruises on his arms. *Id.*, p. 204. He then instructed Burta to leave Medley's office and closed the door. *Id.* At that point, Keveney said, "What the hell is going on in the barracks?" *Id.* Keveney's voice was raised, but he was not yelling at Medley. *Id.* When Medley asked Keveney what he meant, Keveney told Medley that Burta

had obviously been hazed in the barracks. *Id.* He also stated that he had brought issues involving other students to Medley's attention before and nothing had been done to address them. *Id.*, pp. 204-05. Medley responded by saying "we'll handle it." *Id.*, p. 205. Keveney told Medley that he needed to report the bruises to the Division of Family Services immediately and that something needed to be done before Burta returned to the barracks. *Id.*, pp. 205-06. Medley then said to Keveney, "Don't tell me how to do my job." *Id.*, p. 206.

When it appeared to Keveney that Medley was not going to contact the Division of Family Services, Keveney said, "If you're not going to report it I'm going to report it. By law I have to report it." Tr. Vol. I, p. 206. Medley then threw a telephone book on a table and told Keveney to "go ahead and report it." *Id.* Keveney proceeded to pick up the telephone to call the Division of Family Services, and as he was doing so, Medley said, "You ought to worry about your job." *Id.* When Medley threatened Keveney's job, Keveney became angry. *Id.*, pp. 206-07. He told Medley that he should be worried about his job and stated that Burta's father was going to be furious. *Id.*, p. 207. At that point, Medley told Keveney to leave his office and Keveney left. *Id.*, p. 208.

When he left Medley's office, Keveney went back to Kelly's office to speak to him. *Id.*, p. 208. Burta was not with Keveney when he returned to Kelly's office. *Id.* Upon arriving at Kelly's office, Keveney again asked Kelly for permission to enter before walking into his office. *Id.*; Tr. Vol. II, p. 355. After Kelly told him to come in, Keveney told Kelly that Medley had just threatened his job for doing what he was required by law to do, which was to report the suspected abuse of Burta to the Division of Family Services. Tr. Vol. I, pp.

208-09; Tr. Vol. II, p. 358. Keveney then sat down after Kelly asked him to do so. Tr. Vol. I, p. 209.

Shortly after Keveney sat down, the telephone in Kelly's office rang. *Id.* Kelly answered the telephone and had a short conversation that lasted approximately thirty seconds. *Id.* During that conversation, Keveney heard Kelly say "yes, he's here" and "I'll handle it." *Id.* Kelly then hung up the telephone. *Id.* Kelly told Keveney that Medley was the person who called. *Id.*, pp. 209-10. After Kelly hung up the telephone, the topic of the conversation between Keveney and Kelly changed. *Id.*, p. 210. Instead of discussing the situation involving Burta, Kelly began speaking to Keveney about his behavior. *Id.* Kelly mentioned that Keveney was upset, and Keveney told Kelly that he was upset because he had a student with bruises on his arms and he was concerned about the welfare of the student. *Id.* Keveney was not yelling during this conversation, although his voice may have been raised. *Id.*

Kelly then told Keveney that his "outbursts" would not be tolerated. *Id.*, p. 211. When Kelly made that statement, Keveney believed that he was going to be fired and he asked whether Kelly wanted his letter of resignation. *Id.*, pp. 211-12. Kelly immediately said "yes." *Id.* Keveney told Kelly that he would prepare a letter of resignation, but he wanted a letter from Kelly stating that MMA was firing him for doing what he was legally required to do. *Id.* Kelly then told Keveney to get off the campus immediately and Keveney left. *Id.*, p. 212.

The following day, Keveney returned to MMA. *Id.*, pp. 212-13. He was not entirely

certain that MMA had terminated his employment because he thought that it would have been “pretty silly” for MMA to terminate him for reporting the suspected abuse of a student. *Id.*, p. 213. When Keveney spoke to Kelly, Kelly confirmed that he had terminated Keveney’s employment the previous day. *Id.*, p. 213; Tr. Vol. II, p. 335. After Kelly confirmed that Keveney had been terminated, Keveney contacted the Division of Family Services regarding the bruises on Burta’s arms. Tr. Vol. II, p. 401. Keveney asked the Division of Family Services whether MMA had already made a report regarding Burta. *Id.*, p. 402. Based upon the response that he received, Keveney reported the bruising to the Division of Family Services. *Id.*

On December 8, 2003, Kelly sent a letter to Keveney in which he stated the reasons for Keveney’s termination. Def. Ex. F; Tr. Vol. II, p. 335. Kelly acknowledged in the letter that on October 29, 2003, Keveney brought a student to his office because of his “concern about visible bruising on the cadet and whether or not this incident should be reported to a child abuse hotline and the Division of Family Services.” Def. Ex. F.

Trial Proceedings

On May 12, 2004, Keveney filed a two-count petition against MMA in the Circuit Court of Audrain County, Missouri. Legal File (“L.F.”), p. 8. In Count I of the petition, Keveney alleged that MMA violated the public policy of Missouri by terminating his employment because of his insistence that Burta’s bruises be reported to the Division of Family Services. *Id.*, pp. 8-10. In Count II of the petition, Keveney alleged that MMA breached his employment contract by terminating his employment without cause prior to the

end of the contract's term. *Id.*, pp. 11-12.

On June 16, 2004, MMA filed a motion to dismiss Count I of Keveney's petition on the grounds that Keveney is not entitled to bring a claim of wrongful discharge in violation of public policy because he was not an at-will employee and that Keveney failed to allege the elements of a wrongful discharge claim. *Id.*, pp. 14-15. MMA also moved to strike Keveney's requests for emotional distress damages and punitive damages in connection with his breach of contract claim. *Id.* On April 15, 2005, the trial court granted both of MMA's motions. *Id.*, p. 41.

The parties proceeded to trial on Keveney's breach of contract claim on July 16 and 17, 2007. *Id.*, p. 4. A jury unanimously found in favor of Keveney on his claim and awarded him damages in the amount of \$13,300. *Id.* The trial court entered judgment in favor of Keveney on July 18, 2007. *Id.*, p. 49. MMA filed a motion for judgment notwithstanding the verdict and a motion for new trial on August 10, 2007. Appellant's Supplemental Legal File ("A.S.L.F."), p. 1. On August 16, 2007, Keveney filed a motion to amend the judgment to include prejudgment interest. L.F., p. 5. The trial court denied MMA's post-trial motions on October 24, 2007. *Id.*, p. 56.

Keveney filed his initial Notice of Appeal in this case on November 5, 2007. Respondent's Supplemental Legal File ("R.S.L.F."), p. 8. On the same day, the trial court entered an amended judgment in which it granted Keveney's motion to amend the judgment and awarded Keveney prejudgment interest in the amount of \$3,748.41. L.F., p. 50. On November 9, 2007, MMA filed a Notice of Cross-Appeal. A.S.L.F., p. 50. MMA also filed

a Notice of Appeal on November 16, 2007, which incorporated the trial court's amended judgment of November 5, 2007. L.F., p. 51. Keveney then filed a second Notice of Appeal on November 27, 2007. R.S.L.F., p. 10.

In a per curium order dated December 9, 2008, the Court of Appeals affirmed the trial court's judgment in its entirety. On March 31, 2009, this Court granted Keveney's application for transfer.

ARGUMENT IN RESPONSE TO MMA’S APPEAL

I.

The Trial Court Properly Denied MMA’s Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict Because Keveney Presented Substantial Evidence at Trial to Demonstrate That He Performed His Obligations under His Employment Contract.

The trial court properly denied MMA’s motion for directed verdict at the close of all the evidence and motion for judgment notwithstanding the verdict. The standard of review of the denial of both motions is essentially the same. *Dhyne v. State Farm Fire and Cas. Co.*, 188 S.W.3d 454, 456 (Mo. 2006). “Judgment notwithstanding the verdict for the defendant is appropriate only if the plaintiff fails to make a submissible case.” *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. 1996). “A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence.” *Dhyne*, 188 S.W.3d at 456. ““Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case.”” *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. 2003) (quoting *Zeigenbein v. Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966)).

“In determining whether the evidence was sufficient to support the jury’s verdict, the evidence is viewed 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.” *Dhyne*, 188 S.W.3d at 456-57. “The jury is the sole judge of the

credibility of the witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony.” *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 584 (Mo. App. W.D. 2002). “This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury’s conclusion.” *Dhyne*, 188 S.W.3d at 457.

To prevail on his breach of contract claim, Keveney was required to prove (1) the existence of a contract or agreement and the terms of that agreement; (2) that he performed or tendered performance; (3) that MMA did not perform; and (4) that MMA’s failure to perform caused Keveney damage. *Venable v. Hickerson Phelps Kirtley & Assoc., Inc.*, 903 S.W.2d 659, 664 (Mo. App. W.D. 1995). MMA initially contends that Keveney failed to present substantial evidence to establish the second element of his claim. Contrary to MMA’s argument, Keveney presented sufficient evidence for a jury to find that he performed his obligations under his employment contract. Therefore, the trial court properly denied MMA’s motion for directed verdict and motion for judgment notwithstanding the verdict.

In its brief, MMA has cited several cases which explain that a party to a contract cannot claim its benefits when he is the first to violate it. *See* Appellant’s Substitute Brief, p. 25. Keveney does not quarrel with this legal proposition. However, what MMA fails to recognize is that whether Keveney substantially performed his obligations under his employment contract is a question of fact that was properly reserved for determination by the jury. *Stegemann v. Helbig*, 625 S.W.2d 677, 679 (Mo. App. E.D. 1981); *see also Tony Thornton Auction Serv., Inc. v. Quintis*, 760 S.W.2d 202, 205 (Mo. App. E.D. 1988) (finding

that plaintiff had burden of proof on “issue of fact” as to whether it performed its obligations under contract).

Keveney presented evidence at trial which demonstrated that he performed all his duties as a teacher for MMA satisfactorily and received excellent performance reviews throughout his employment. Tr. Vol. II, pp. 275-79. Prior to the date of his termination, he never received any written warnings or disciplinary actions for any reason. Tr. Vol. I, pp. 186, 196; Tr. Vol. II, p. 374. MMA’s primary argument is that Keveney’s conduct on October 29, 2003, constituted a material failure to perform his contractual obligations such that Keveney is precluded from claiming a breach of his employment contract based upon MMA’s decision to fire him. Despite MMA’s insistence that Keveney admitted violating the terms of his contract prior to his termination, Keveney disputes that any such admission occurred. There was clearly a factual dispute as to whether Keveney performed his contractual obligations, and the jury’s determination that Keveney performed his obligations was supported by the evidence at trial. Therefore, there is no reason to disturb the jury’s verdict.

Keveney testified at trial that as a teacher in the state of Missouri, he was required by law to report suspected physical abuse of a student to the Division of Family Services, or to ensure that his superiors made such a report. Tr. Vol. I, pp. 205-06. MMA’s faculty handbook also states that hazing is not permitted at the school and that teachers who have knowledge of that type of activity are required to report it to the Academic Dean. Def. Ex. B, p. 14. The jury heard testimony that on October 29, 2003, when Keveney suspected that

one of his students, Aaron Burta, was being hazed by fellow students, he did exactly what he was required to do by state law and MMA's own policies, which was to report the suspected abuse to his superiors. Keveney spoke to Richard Ray, James Medley, and Ronald Kelly about the suspected abuse of Burta. Keveney testified that he did not yell or raise his voice during his initial meeting with Kelly on October 29, 2003. Tr. Vol. I, pp. 203, 250. He did, however, tell Kelly that the suspected abuse of Burta needed to be reported to the Division of Family Services. Tr. Vol. II, pp. 333-34.

After Kelly told Keveney to take his concerns to Medley, Keveney went to Medley's office to speak to him. Tr. Vol. I, p. 203. Keveney testified that when he began speaking to Medley, his voice was raised but he was not yelling. *Id.*, p. 204. According to Keveney, he began yelling only after Medley threatened his job for attempting to contact the Division of Family Services. *Id.*, pp. 206-07. He testified that he was upset because he did not feel that Medley was doing what he needed to do to ensure that Burta was protected from further abuse. *Id.*, p. 207. There was certainly enough evidence at trial for the jury to have found that Keveney was justifiably upset during his meeting with Medley on October 29, 2003, and that his actions did not constitute a failure to perform his obligations under his employment contract.

Keveney also testified that although his voice was raised during his second meeting with Kelly on October 29, 2003, he remained respectful during that meeting until Kelly asked for his letter of resignation. *Id.*, p. 210; Tr. Vol. II, p. 256. Kelly's credibility was called into question at trial when he described his version of what occurred during that meeting. For

example, Kelly initially testified that Keveney was standing the entire time that he was in Kelly's office. Tr. Vol. II, pp. 332. However, as Keveney demonstrated through Kelly's own notes and as Kelly was ultimately forced to admit, Keveney was actually seated during most of that brief meeting. *Id.*, pp. 360-62. In addition, Kelly testified in his deposition that during his second meeting with Keveney, Medley did not call him on the telephone. *Id.*, pp. 355-56. At trial, however, Kelly testified that Medley did call him. *Id.*, p. 355. As noted previously, the jury is the sole judge of a witness's credibility. There was sufficient evidence at trial for the jury to find that, under the circumstances, Keveney substantially performed his obligations under his employment contract by taking actions to ensure the safety and welfare of one of his students and that he did not materially deviate from those obligations.

The cases upon which MMA primarily relies in its brief either do not support its argument or are distinguishable from the present case. For example, in *Craig v. Thompson*, 244 S.W.2d 37 (Mo. 1951), the plaintiff admitted that he failed to appear for work and that his failure to appear for work violated the rules of his collective bargaining agreement. *Id.* at 43. Consequently, there was no dispute about the facts that led to the plaintiff's termination. In the case at bar, unlike *Craig*, there is a factual dispute regarding the circumstances that led to Keveney's termination, the facts upon which MMA based its decision to terminate Keveney's employment, and whether Keveney's termination was wrongful. Keveney and MMA presented conflicting versions of what occurred during the meetings on October 29, 2003, and the jury determined that Keveney's conduct during those meetings, under the circumstances, did not violate the terms of his employment contract.

Furthermore, contrary to MMA's argument, Keveney has never admitted that his conduct violated any of the provisions of his employment contract or constituted cause for his termination.

In *Forkin v. Container Recovery Corp.*, 835 S.W.2d 500 (Mo. App. E.D. 1992), another case cited by MMA, the issue was whether the plaintiff established a claim of tortious interference with a contract or business expectancy by proving that the defendants acted without justification in terminating his employment. *Id.* at 502-03. *Forkin* is not on point for two reasons. First, the plaintiff in *Forkin* was an at-will employee and could be discharged for any reason, as long as the reason was not illegal. *Id.* at 503 ("Clearly, defendants had a legal right to discharge plaintiff, an employee at will, for failure to complete an assignment . . ."). As the Court of Appeals noted, "[n]o liability arises for interfering with a contract or business expectancy if the action complained of was an act which the defendant had a definite legal right to do without any qualification." *Id.* (quoting *Community Title v. Roosevelt Fed. Sav. & Loan Ass'n*, 796 S.W.2d 369, 372 (Mo. 1990)). Second, the claim in *Forkin* involved a different legal standard. In that case, to show that the defendants were not justified in firing him, the plaintiff was required to prove, in part, that they were motivated by malice, which is a much higher standard than in the present case. *Id.* at 503. For these reasons, *Forkin* does not support MMA's argument.

Finally, in *Begley v. Werremeyer Assoc., Inc.*, 638 S.W.2d 817 (Mo. App. E.D. 1982), the Court of Appeals reversed a judgment in favor of the plaintiff on a breach of contract claim because the trial court gave inconsistent instructions to the jury. *Id.* at 819-20. The

court stated in its decision that the plaintiff had the burden of proving substantial performance under his employment contract up until the time of the alleged breach. *Id.* at 820. Significantly, the Court of Appeals did not find that the plaintiff had failed to meet that burden, but rather remanded the case for a new trial. *Id.* at 821. In the present case, MMA does not allege any instructional error and the jury was properly instructed that it could find in favor of plaintiff only if he proved that he performed his obligations under his employment contract.

Because Keveney presented substantial evidence at trial to show that he performed his obligations under his employment contract, there was sufficient evidence to support the jury's verdict. Accordingly, the trial court did not err in denying MMA's motion for directed verdict at the close of all the evidence or MMA's motion for judgment notwithstanding the verdict, and the trial court's judgment in favor of Keveney on his breach of contract claim should be affirmed.

II.

The Trial Court Properly Denied MMA's Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict Because Keveney Presented Substantial Evidence at Trial to Demonstrate That MMA Failed to Perform its Obligations under the Employment Contract by Terminating Keveney's Employment Without Cause.

Keveney also presented substantial evidence at trial to show that MMA violated the

terms of his employment contract by terminating his employment without cause. Keveney has alleged from the beginning of this lawsuit that the real reason that MMA terminated his employment is because he insisted on reporting the suspected abuse of a student to the Division of Family Services. In its brief, MMA has attempted to confuse the issues. MMA contends that Keveney's "subjective state of mind and purpose" do not excuse his misconduct or contractual breaches. Keveney has never argued, however, that his own state of mind has anything to do with his breach of contract claim. Rather, as Keveney has repeatedly stressed throughout this litigation, the relevant consideration is whether MMA acted with an illegal motive in terminating Keveney's employment.

The law in Missouri is clear that in the context of an employment agreement, an employer's true motive for terminating an employee is relevant to the issue of whether the employee was terminated for cause. In *Craig v. Thompson, supra*, this Court stated that "[n]o cause of action for wrongful discharge arises where the employer, *in good faith* and in conformity with the provisions of the employment contract, discharges the employee for the clear or confessed violations of the rules." 244 S.W.2d at 41 (emphasis added). Similarly, in *Roach v. Consolidated Forwarding Co.*, 665 S.W.2d 675 (Mo. App. E.D. 1984), the Court of Appeals affirmed a jury instruction defining "just cause" as "a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice—that is, a cause or ground that a reasonable employer, *acting in good faith* under the collective bargaining agreement here in question, would regard as good and sufficient reason for terminating the services of an employee." *Id.* at 679 n.2 and 680 (emphasis added).

As the foregoing cases demonstrate, an employer must have terminated an employee in good faith for the termination to have been for cause. Keveney presented evidence at trial for the jury to find that MMA's decision to terminate Keveney was based upon his insistence on reporting the suspected abuse of Aaron Burta to the Division of Family Services, and not for any alleged misconduct by Keveney. Evidence that Medley threatened Keveney's job for attempting to contact the Division of Family Services certainly supports this conclusion.

In addition, MMA has repeatedly argued that its decision to discharge Keveney was based in part upon Keveney's meeting with Medley on October 29, 2003. However, Kelly, who was the decision maker, admitted that he did not know the details of that meeting at the time he terminated Keveney and that Keveney's meeting with Medley did not form a basis for his decision to terminate Keveney. Tr. Vol. II, pp. 363-64. Furthermore, Kelly's testimony at trial that he spoke to Medley on the telephone at the time of his second meeting with Keveney on October 29, 2003, directly contradicted his testimony in his deposition. The jury was certainly free to discredit Kelly's version of the events that occurred on October 29, 2003, and to disregard Keveney's meeting with Medley in determining whether MMA had cause to discharge Keveney.

MMA has again cited *Craig v. Thompson* in an attempt to support its argument that, as a matter of law, it had cause to terminate Keveney's employment. As noted previously, however, *Craig* is distinguishable from the present case. In *Craig*, because there were no facts in dispute for the jury to decide, the question was simply whether the plaintiff's admitted violation of his employer's rules constituted cause for his termination. In the

present case, however, the jury was required to decide whether Keveney's conduct, under the circumstances of this case, violated any of the provisions of his contract and whether cause existed for his termination. As this Court held in *Craig*, "where the facts are in dispute as to whether the discharge was or was not wrongful, the question is always one for the jury under proper instructions." *Id.* at 41.

Another critical fact that distinguishes the present case from *Craig* is that in *Craig*, there was no evidence that the employer based its termination decision on anything other than the plaintiff's failure to appear for work. *Id.* at 40 (finding that "[t]here was no evidence from which a jury could have inferred plaintiff's discharge resulted from the bias, prejudice or discrimination of any one"). By contrast, in the present case, there was ample evidence for the jury to have found that MMA did not terminate Keveney for any alleged misconduct, but rather because of his insistence on reporting the suspected abuse of Burta to the Division of Family Services. If MMA did in fact terminate Keveney for that reason, then the jury certainly could have found that MMA did not act in good faith when it terminated Keveney.

There was substantial evidence at trial for the jury to conclude that MMA did not have cause to terminate Keveney's employment. Consequently, Keveney made a submissible case on his breach of contract claim and the trial court did not err in denying MMA's motion for directed verdict at the close of all the evidence or MMA's motion for judgment notwithstanding the verdict. For these reasons, the trial court's judgment in favor of Keveney on his breach of contract claim should be affirmed.

POINTS RELIED ON IN SUPPORT OF KEVENEY’S CROSS-APPEAL

I.

The Trial Court Erred in Granting MMA’s Motion to Dismiss Count I of Keveney’s Petition, Because a Claim of Wrongful Discharge in Violation of Public Policy Should Be Extended to Contractual Employees as Well as At-Will Employees, in That the State’s Vital Interest in Prohibiting Employers from Acting in a Manner Contrary to Public Policy Does Not Vary Depending upon an Employee’s Contractual Status.

Luethans v. Washington University, 894 S.W.2d 169 (Mo. 1995)

Smith v. Bates Technical College, 991 P.2D 1135 (Wash. 2000)

Retherford v. AT&T Communications of the Mountain States, Inc., 844 P.2d 949 (Utah 1992)

Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280 (Ill. 1984).

II.

The Trial Court Erred in Granting MMA’s Motion to Dismiss Count I of Keveney’s Petition, Because the Facts Alleged in the Petition Meet the Elements of a Recognized Cause of Action, in That Keveney’s Allegations Are Sufficient to State a Claim That He Was Wrongfully Discharged for Acting in a Manner That Public Policy Would Encourage and for Refusing to Perform an Illegal Act.

Entwistle v. Missouri Youth Soccer Ass’n, 259 S.W.3d 558 (Mo. App. E.D. 2008)

Kirk v. Mercy Hospital Tri-County, 851 S.W.2d 617 (Mo. App. S.D. 1993)

Teachout v. Forest City Community Sch. Dist. 584 N.W.2d 296 (Iowa 1998)

III.

The Trial Court Erred in Granting MMA’s Motion to Strike Keveney’s Claims for Emotional Distress Damages and Punitive Damages in Count II of His Petition, Because Such Damages Should Be Allowed When a Contract Is Breached in Violation of Public Policy, in That the State’s Interest in Preventing Employers from Engaging in Reprehensible Conduct Is Not Adequately Protected with Traditional Contract Remedies.

Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896 (Mo. 1990)

Ladeas v. Carter, 845 S.W.2d 45 (Mo. App. W.D. 1992)

Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437 (Miss. 1999)

Vernon Fire & Casualty Ins. Co. v. A. W. Sharp, 349 N.E.2d 173 (Ind. 1976)

ARGUMENT IN SUPPORT OF KEVENEY'S CROSS-APPEAL

I.

The Trial Court Erred in Granting MMA's Motion to Dismiss Count I of Keveney's Petition, Because a Claim of Wrongful Discharge in Violation of Public Policy Should Be Extended to Contractual Employees as Well as At-Will Employees, in That the State's Vital Interest in Prohibiting Employers from Acting in a Manner Contrary to Public Policy Does Not Vary Depending upon an Employee's Contractual Status.

The trial court erred in granting MMA's motion to dismiss Count I of Keveney's petition based upon MMA's argument that a claim of wrongful discharge in violation of public policy is available only to at-will employees. "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). In reviewing the trial court's decision, this Court must assume that all of Keveney's averments are true and liberally grant to Keveney all reasonable inferences therefrom. *Id.* "No attempt is made to weigh any facts alleged as to whether they are credible or persuasive." *Id.* "Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.* This Court's review of the trial court's order is de novo. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

Since 1985, Missouri courts have expressly recognized a cause of action for wrongful discharge in violation of public policy. In *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo.

App. W.D. 1985), the Western District of the Court of Appeals held that “where an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for wrongful discharge.” 700 S.W.2d at 878. Soon thereafter, the Eastern and Southern Districts of the Court of Appeals concurred with the holding in *Boyle*. See *Beasley v. Affiliated Hosp. Products*, 713 S.W.2d 557 (Mo. App. E.D. 1986); *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo. App. S.D. 1993). Although this Court has never expressly adopted a cause of action for wrongful discharge in violation of public policy, the Court has acknowledged that the Court of Appeals has recognized such a cause of action. See *Luethans v. Washington University*, 894 S.W.2d 169, 171 n.2 (Mo. 1995).

In its motion to dismiss, MMA argued that an employee whose employment is governed by a written employment contract may not assert a wrongful discharge claim. Although Missouri courts have thus far limited wrongful discharge claims to at-will employees, there is no logical reason why employees who work under written employment contracts should not also be protected from being discharged in violation of public policy. Extending wrongful discharge claims to contractual employees as well as at-will employees would further the state’s interest in protecting its citizens from actions that cause harm to the public good and help ensure that all employers conduct their affairs in compliance with

public policy.

MMA based its argument on this Court's decision in *Luethans, supra*. The Court of Appeals also cited *Luethans* in support of its decision to affirm the dismissal of Keveney's wrongful discharge claim. Because of the importance of *Luethans* to the issues involved in this appeal, it is necessary to provide a brief overview of the factual and procedural history of that case. In *Luethans*, the plaintiff, Tod Luethans, was employed by Washington University as a veterinarian. 894 S.W.2d at 170. During Luethans' employment, Washington University sent him annual letters of appointment, the last of which covered the period from July 1, 1989, to June 30, 1990. *Id.* In July 1989, after Luethans reported abuses of laboratory animals to his superiors and discussed the possibility of reporting the abuses to outside authorities, Washington University informed Luethans that his services would no longer be needed, but that he would continue on the payroll until June 30, 1990. *Id.*

Luethans then brought an action against Washington University for wrongful discharge in violation of public policy. *Id.* The trial court initially dismissed Luethans' petition for failure to state a claim and the Court of Appeals then reversed the trial court's order and remanded the case for further proceedings. *See Luethans v. Washington University*, 838 S.W.2d 117 (Mo. App. E.D. 1992). On remand, Washington University filed a motion for summary judgment on the ground that Luethans was not entitled to bring a wrongful discharge claim because he worked under an employment contract. *Luethans*, 894 S.W.2d at 171. The trial court granted the motion for summary judgment and Luethans again appealed to the Court of Appeals. *Id.*

In the second appeal, the Court of Appeals affirmed the trial court's grant of summary judgment. *See Luethans v. Washington University*, 1994 Mo. App. LEXIS 1388, at *9 (Mo. App. E.D. Aug. 30, 1994). In doing so, the Court of Appeals noted that "Missouri case law only allows the public policy exception for at-will employees." *Id.* at *8. However, the Court of Appeals specifically found that "[w]hether a public policy exception should be extended to contract employees is an issue of both general interest and importance" and transferred the case to this Court. *Id.* at *9. The Court of Appeals found this to be an important issue because "Missouri . . . has an interest in deterring reprehensible conduct." *Id.* at *10.

A review of this Court's decision in *Luethans* shows that the Court never reached the precise question posed by the Court of Appeals in the second appeal and disposed of the case on much narrower grounds. After examining the petition and the undisputed facts, the Court found that Luethans failed to properly plead his cause of action. *Luethans*, 894 S.W.2d at 172. While Luethans' petition alleged that he was "discharged" by Washington University, the evidence demonstrated that he was not actually discharged, but rather his employment contract was simply not renewed. *Id.* The Court found this to be a critical distinction, as reflected in its holding: "Washington University has a right to judgment as a matter of law because Luethans pled his cause of action under wrongful discharge when his employment with Washington University expired under the terms of their employment contract." *Id.*

As a result of this Court's holding that Luethans failed to properly plead his cause of action, it was not necessary for the Court to decide whether a public policy claim should be

extended to contractual employees. Therefore, the Court's statement in *Luethans* that "a wrongful discharge action is only available to an employee at will" is merely dicta because it was not essential to the Court's decision. 894 S.W.2d at 173; *see Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 132 (Mo. App. E.D. 2006) ("Statements are obiter dicta if they are not essential to the court's decision of the issue before it.").

Consistent with its normal practice, this Court decided *Luethans* as narrowly as possible, and questions that the Court did not answer in *Luethans* remain viable for subsequent decision. *See Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 902 (Mo. 1990). In fact, the Court specifically referred to some of those "viable" questions in its decision and contemplated that *Luethans* may have been entitled to recover damages under different circumstances:

"Whether there also may exist liability for a 'wrongful' failure to renew a contract or what types of damages may be recovered for a breach of contract in a 'whistleblower' situation are questions that remain open. The pleadings have not pled these issues or provided any factual framework for us to determine what considerations might be involved by way of elements or defenses. *Luethans* has apparently opted to stand on his wrongful discharge pleadings and we decline to consider whether a separate unpled and as yet unrecognized tort or theory of damages should have been alleged in their place."

Luethans, 894 S.W.2d at 172.

As the foregoing discussion of *Luethans* demonstrates, and contrary to the argument made by MMA in its motion to dismiss, *Luethans* did not resolve the issue presented in this appeal: whether an employee working under an employment contract who is discharged prior to the expiration of the contract's term can maintain a cause of action for wrongful discharge in violation of public policy. Accordingly, Keveney respectfully suggests that this issue remains open in Missouri and that public policy claims should be extended to contractual employees.

This Court has found that “public policy” is defined generally as “that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.” *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. 1959). A growing number of jurisdictions across the country have recognized that allowing at-will employees to sue for wrongful discharge in violation of public policy while preventing contractual employees from doing the same is merely an artificial distinction that fails to adequately fulfill the purpose of this type of claim. Appellate courts from at least ten states and the District of Columbia have held that employees who work under the terms of either an individual employment contract or a collective bargaining agreement have a cause of action in tort when they are discharged for reasons that contravene public policy, notwithstanding that they may also have a cause of action for breach of contract.³

³See *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980); *Byrd v. VOCA Corp. of Wash., D.C.*, 962 A.2d 927 (D.C. 2008); *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d

Furthermore, the Circuit Court for the City of St. Louis has held that contractual employees may sue for either wrongful discharge or wrongful failure to renew a contract in violation of public policy. *See Thompson v. Saint Louis University*, Cause No. 052-08084 (June 29, 2006) (included in Appendix at p. A10). Based upon the persuasive reasoning of these courts, this Court should follow the trend.

One of the principal reasons for allowing contractual employees to sue for wrongful discharge in addition to breach of contract is that these claims serve different purposes. The purpose of a breach of contract claim in the employment context is to compensate an employee for his personal losses. By contrast, “the tort of wrongful discharge is not designed to protect an employee’s purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy.” *Smith v. Bates Technical College*, 991 P.2d 1135, 1140 (Wash. 2000); *see also Retherford v. AT&T Communications of the Mountain*

634 (Haw. 1992); *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280 (Ill. 1984); *Coleman v. Safeway Stores, Inc.*, 752 P.2d 645 (Kan. 1988); *Bednarek v. United Food and Commercial Workers Int’l Union*, 780 S.W.2d 630 (Ky. Ct. App. 1989); *Ewing v. Koppers Co., Inc.*, 537 A.2d 1173 (Md. 1988); *Lepore v. National Tool and Mfg. Co.*, 540 A.2d 1296 (N.J. Super. Ct. App. Div. 1988); *Dunwoody v. Handskill Corp.*, 60 P.3d 1135 (Or. Ct. App. 2003); *Retherford v. AT&T Communications of the Mountain States, Inc.*, 844 P.2d 949 (Utah 1992); *Smith v. Bates Technical College*, 991 P.2d 1135 (Wash. 2000).

States, Inc., 844 P.2d 949, 960 (Utah 1992) (finding that “[a] primary purpose behind giving employees a right to sue for discharges in violation of public policy is to protect the vital state interests embodied in such policies”).

There is no question that ““society as a whole has an interest in ensuring that its laws and important public policies are not contravened.”” *Ewing v. Koppers Co., Inc.*, 537 A.2d 1173, 1175 (Md. 1988) (quoting *Adler v. American Standard Corp.*, 291 Md. 31, 42 (Md. 1981)). This interest is no less important when an employee has the benefit of an employment contract. See *Koehrer v. Superior Court*, 226 Cal.Rptr. 820, 826 (Cal. Ct. App. 1986) (“Discharge for, e.g., exercise of an employee’s civil rights, is equally tortious as to an employee with a specified term contract as for an at-will employee.”). No employer should be permitted to willfully violate Missouri public policy simply because its employees are not employed at will. “Extending the tort of wrongful discharge to *all* employees advances the underlying purpose of the tort by prohibiting *any* employer from frustrating the important public policies of this state.” *Smith*, 991 P.2d at 1143.

Another compelling reason for extending the tort of wrongful discharge in violation of public policy to contractual employees is that the remedies available in a breach of contract action are insufficient to deter employers from engaging in the types of conduct that a wrongful discharge claim is intended to prevent. As in the present case, an employee who is discharged in violation of an employment contract is typically limited to recovering the amount of income that he would have earned if he had worked through the remainder of the contract, less any income that he earned in the interim. *Puller v. Royal Casualty Co.*, 196

S.W. 755, 762 (Mo. 1917). These remedies “would satisfy only the private interests of the parties to the agreement, *i.e.*, by restoring a wrongfully discharged employee to his or her position and making him or her whole.” *Retherford*, 844 P.2d at 960. Contractual remedies “clearly do not ‘capture the personal nature of the injury done to a wrongfully discharged employe[e].’” *Dunwoody v. Handskill Corp.*, 60 P.3d 1135, 1141 (Or. Ct. App. 2003) (quoting *Holien v. Sears, Roebuck and Co.*, 689 P.2d 1292, 1303 (Or. 1984)).

“[W]here existing remedies will not fully vindicate the public interest, the tort of wrongful discharge steps in to fill that gap.” *Dunwoody*, 60 P.3d at 1140. The tort remedies available in a wrongful discharge action “are designed not only to remedy the breach and make the employee whole, but to deter and punish violations of vital state interests.” *Retherford*, 844 P.2d at 960. Providing contractual employees with the ability to recover punitive damages in tort when they are discharged in violation of public policy will help ensure that employers in this state act in compliance with public policy. *See Peterson v. Browning*, 832 P.2d 1280, 1285 (Utah 1992) (“In the case of the public policy exception, potential punitive damages will exert a valuable deterrent effect on employers who might otherwise subject their employees to a choice between violating the law or losing their jobs.”). As the Supreme Court of Illinois found in *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280 (Ill. 1984),

“If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against a violator of an important public policy of this

State. It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee. The public policy against retaliatory discharges applies with equal force in both situations.”

Id. at 1284.

Missouri courts have justified the public policy exception to the employment-at-will doctrine on the ground that “it protects ‘a myriad’ of employees without the bargaining power to command employment contracts and are ‘entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.’” *Clark v. Beverly Enterprises-Missouri*, 872 S.W.2d 522, 525 (Mo. App. W.D. 1994). However, as courts in other jurisdictions have recognized, denying a contractual employee the right to sue for wrongful discharge in violation of public policy “illogically grants at-will employees *greater* protection from these tortious terminations due to an erroneous presumption the contractual employee does not ‘need’ such protection.” *Smith*, 991 P.2d at 1141; *see also Ewing*, 537 A.2d at 1175 (finding that “it would be illogical to deny the contract employee access to the courts equal to that afforded the at will employee”); *Koehrer*, 226 Cal.Rptr. at 826 (finding no basis to provide greater remedy to at-will employee than that available to contractual employee). All employees in Missouri, not just at-will employees, deserve to be protected from retaliatory conduct by their employers when they engage in conduct that furthers important state interests.

The facts of the present case provide a perfect example of why the tort of wrongful discharge in violation of public policy should be extended to contractual employees. When Keveney suspected that one of his students was being physically abused by other students or staff members, he found himself in a no-win situation. On the one hand, if he failed to report the suspected abuse to the Division of Family Services or failed to cause such a report to be made, he risked criminal prosecution. *See* Mo. Rev. Stat. § 210.165.1 (making it a class A misdemeanor to fail to report suspected abuse as required by Mo. Rev. Stat. § 210.115). On the other hand, if he informed his superiors at MMA of the suspected abuse or made an effort to contact the Division of Family Services, he risked losing his job, with his only remedy being the amount of money that he would have earned under his contract through the end of the 2003-2004 school year. Contractual employees should not have to choose between two equally undesirable options, especially when the health and welfare of the public is at stake.

Providing Keveney and other contractual employees with a cause of action in tort when they are discharged in violation of public policy will ultimately benefit all citizens of Missouri. As the Court noted in *Boyle, supra*, “employers who operate within the mandates of the law and clearly established public policy as set out in the duly adopted laws” will have nothing to fear from these types of claims “because their operations and practices will not violate public policy.” 700 S.W.2d at 878. For the foregoing reasons, Keveney respectfully requests that this Court reverse the trial court’s order dismissing Keveney’s claim that he was wrongfully discharged in violation of public policy.

II.

The Trial Court Erred in Granting MMA’s Motion to Dismiss Count I of Keveney’s Petition, Because the Facts Alleged in the Petition Meet the Elements of a Recognized Cause of Action, in That Keveney’s Allegations Are Sufficient to State a Claim That He Was Wrongfully Discharged for Acting in a Manner That Public Policy Would Encourage and for Refusing to Perform an Illegal Act.

The trial court also erred in granting MMA’s motion to dismiss Count I of Keveney’s petition based upon MMA’s argument that Keveney failed to allege the elements of a wrongful discharge claim. To state a claim for wrongful discharge in violation of public policy, an employee must allege that he was discharged for: (1) refusing to perform an act contrary to a strong mandate of public policy or an illegal act; (2) reporting wrongdoing or violations of law or public policy by the employer or fellow employees to superiors or third parties; (3) acting in a manner that public policy would encourage; or (4) filing a workers’ compensation claim. *Entwistle v. Missouri Youth Soccer Ass’n*, 259 S.W.3d 558, 566 (Mo. App. E.D. 2008). Keveney has alleged sufficient facts in his petition to establish a claim under the second and third public policy exceptions.

A. The Allegations in Keveney’s Petition Are Sufficient to State a Claim of Wrongful Discharge in Violation of Public Policy for Acting in a Manner That Public Policy Would Encourage.

A review of the petition shows that Keveney alleged that he was discharged by MMA for acting in a manner that public policy would encourage. Specifically, Keveney alleged

that on October 29, 2003, he observed large bruises on the arms of one of his students and believed that the bruises may have been the result of abuse by students and/or staff members of MMA. L.F., p. 9 (paragraphs 7 and 8). He also alleged that, as required by Missouri law, he reported the bruises to his superiors at MMA and requested that they report the bruises to the Division of Family Services. L.F., pp. 9-10 (paragraphs 9, 10, 11, 13, and 14). Finally, Keveney alleged that MMA terminated his employment because of his continued insistence that the student's bruises be reported to the Division of Family Services. L.F., p. 10 (paragraph 16). These facts are sufficient to state a claim of wrongful discharge in violation of public policy.

There is no question that Missouri has a vital interest in preventing child abuse. This interest is clearly expressed in section 210.112 of the Missouri Revised Statutes, which is part of a comprehensive statutory scheme to ensure that children throughout Missouri are protected to the maximum extent possible. That section provides as follows:

“It is the policy of this state and its agencies to implement a foster care and child protection and welfare system focused on providing the highest quality of services and outcomes for children and their families. The department of social services shall implement such system subject to the following principles: (1) *The safety and welfare of children is paramount . . .*”

Mo. Rev. Stat. § 210.112.1 (emphasis added).

To ensure that children are protected from abuse, public policy encourages, and in some cases requires, the reporting of suspected abuse. Section 210.115 requires the persons

who have the most frequent contact with children, including teachers, to report suspected abuse to the Division of Family Services or to cause such a report to be made. Mo. Rev. Stat. § 210.115.1. As noted previously, a teacher who has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect and fails to report such abuse is guilty of a class A misdemeanor. Mo. Rev. Stat. § 210.165.1. There can be no stronger expression of public policy by the state of Missouri than to threaten individuals with imprisonment for failing to report suspected child abuse.

Although Keveney alleged in his petition that he did not actually contact the Division of Family Services until after his termination by MMA, the fact that he reported the suspected abuse to his superiors and indicated his intent to contact the Division of Family Services before his termination is sufficient for Keveney to state a claim of wrongful discharge in violation of public policy. The Supreme Court of Iowa addressed a similar situation in *Teachout v. Forest City Community School District*, 584 N.W.2d 296 (Iowa 1998). In that case, the plaintiff, a teaching assistant, alleged that she was discharged in violation of public policy after she reported suspected abuse of students to the principal of the school where she worked. 584 N.W.2d at 298. The plaintiff reported the abuse to a state agency while she was still employed by the school, but the school was not aware of her report until the day after her termination. *Id.* at 299. Therefore, the court had to decide whether the plaintiff's intent to report child abuse could constitute protected activity so as to support a claim of retaliatory discharge. *Id.* at 302.

The court in *Teachout* found that the plaintiff's good faith intent to file a report of

child abuse would constitute protected activity. *Id.* As the court stated,

“It would be contrary to the public policy articulated in our child abuse laws to allow an employer to take adverse action on the basis of an employee’s intent to report child abuse. That is because the employer’s action would have the effect of discouraging the reporting of suspected abuse in direct opposition to the public policy of encouraging the reporting of child abuse. Consequently, if Teachout had a subjective good-faith belief that child abuse had occurred, she is protected from any retaliatory action by her employer causally related to her intent or threat to report the abuse.”

Id.

Based on the foregoing rationale and Missouri’s strong interest in protecting children from abuse, Keveney’s allegations in the present case that he reported suspected abuse of a student to his superiors and expressed his intent to contact the Division of Family Services are sufficient to show that he acted in a manner that public policy would encourage. Assuming the truth of Keveney’s allegation that he was discharged for engaging in these activities, Keveney has stated a cause of action for wrongful discharge in violation of public policy and the trial court erred in dismissing Count I of Keveney’s petition.

B. The Allegations in Keveney’s Petition Are Sufficient to State a Claim of Wrongful Discharge in Violation of Public Policy for Refusing to Perform an Illegal Act.

Keveney’s petition also alleges sufficient facts to state a claim of wrongful discharge

in violation of public policy for refusing to perform an illegal act. In paragraph 11 of his petition, Keveney alleged that he reported the student's bruises to Jim Medley and requested that Medley report the bruises to the Division of Family Services. L.F., p. 9. Keveney then alleged in paragraph 12 of his petition that Medley told him that he should be worried about his job if he reported the bruises to the Division of Family Services. *Id.* Keveney also alleged that after Medley threatened his job, he requested that Ronald Kelly report the bruises to the Division of Family Services, but Kelly refused to do so. *Id.*, p. 10 (paragraphs 14 and 15). Finally, Keveney alleged that based upon his continued insistence that the bruises be reported to the Division of Family Services, MMA terminated his employment. *Id.* (paragraph 16).

By insisting that the student's bruises be reported to the Division of Family Services, Keveney refused to violate sections 210.115 and 210.165 of the Missouri Revised Statutes, which make it illegal for Keveney to fail to report the suspected abuse of a child. If MMA discharged Keveney for refusing to violate the requirements of these statutes, then Keveney would have a cause of action for wrongful discharge in violation of public policy. Keveney's allegations are clearly sufficient to survive a motion to dismiss for failure to state a claim.

The facts of the present case are similar to those in *Kirk v. Mercy Hospital Tri-County*, 851 S.W.2d 617 (Mo. App. S.D. 1993). In *Kirk*, the plaintiff was a registered nurse who alleged that she was wrongfully discharged for refusing to follow her direct superior's order to stay out of a dying patient's care. 851 S.W.2d at 618, 622. The plaintiff contended that her discharge violated a clear mandate of public policy as reflected in the Nursing Practice

Act (NPA), Mo. Rev. Stat. §§ 335.011 to 335.096. *Id.* at 620. The NPA created the Missouri State Board of Nursing and gave the Board the power to adopt rules and regulations to carry into effect the provisions of the NPA. *Id.* at 621. The Board is specifically authorized by the NPA to cause the prosecution of all persons who violate the provisions of the NPA. *Id.*

One of the questions presented for the court's review in *Kirk* was whether there existed a clear mandate of public policy that prohibited the defendant from discharging the plaintiff. *Id.* at 620. In reversing the trial court's grant of summary judgment in favor of the defendant, the Court of Appeals found that "the NPA and regulations thereunder sets forth a clear mandate of public policy that Plaintiff not 'stay out' of a dying patient's improper treatment." *Id.* at 622. The court found it significant that the plaintiff "could clearly risk discipline and prosecution by the State Board of Nursing if she ignored improper treatment of a patient under her care." *Id.* at 622. Ultimately, the Court of Appeals held that the plaintiff should have "an opportunity to establish her allegations that her discharge resulted from her performance of a mandated lawful act contrary to the directions of her employer." *Id.* at 623.

In the case at bar, Keveney also alleges that his discharge resulted from his performance of a mandated lawful act contrary to the directions of his employer. The public policy of Missouri clearly dictates that Keveney take affirmative action to address suspected cases of child abuse even when his employer threatens his job for doing so. By ignoring MMA's threats and continuing to insist that the suspected abuse be reported to the Division of Family Services, Keveney refused to violate a clear mandate of public policy.

Accordingly, Keveney has stated a claim of wrongful discharge in violation of public policy and the trial court's order dismissing Count I of Keveney's petition should be reversed.

III.

The Trial Court Erred in Granting MMA’s Motion to Strike Keveney’s Claims for Emotional Distress Damages and Punitive Damages in Count II of His Petition, Because Such Damages Should Be Allowed When a Contract Is Breached in Violation of Public Policy, in That the State’s Interest in Preventing Employers from Engaging in Reprehensible Conduct Is Not Adequately Protected with Traditional Contract Remedies.

The trial court erred in granting MMA’s motion to strike Keveney’s claims for emotional distress damages and punitive damages in Count II of his petition based upon MMA’s argument that such damages are not available in a breach of contract action. These types of damages are necessary to fully compensate contractual employees who are discharged in violation of public policy and to deter employers from contravening important state interests. Accordingly, the trial court’s order should be reversed.

In a breach of contract action, a successful plaintiff’s damages are typically measured using the “benefit of the bargain” rule. *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. 1999). In other words, the plaintiff “is entitled to the loss the fulfillment of the contract would have avoided or that its breach has caused.” *Id.* While the general rule is that neither emotional distress damages nor punitive damages are available in a breach of contract action, Missouri courts have recognized that tort damages may be available under certain circumstances. *See, e.g., Ladeas v. Carter*, 845 S.W.2d 45, 52 (Mo. App. W.D. 1992) (finding punitive damages appropriate where the breach of contract

amounts to an independent and wilful tort); *Carter v. Oster*, 112 S.W. 995, 999 (Mo. App. 1908) (stating that “the rule is to compensate for mental suffering . . . in actions on contracts if the breaches were of a sort which would cause mental pain as a proximate and natural result”).

As noted previously, this Court stated in *Luethans* that “[w]hether there also may exist liability for a ‘wrongful’ failure to renew a contract or what types of damages may be recovered for a breach of contract in a ‘whistleblower’ situation are questions that remain open.” *Luethans*, 894 S.W.2d at 172; *see also Misischia v. St. John’s Mercy Med. Ctr.*, 30 S.W.3d 848, 862-63 (Mo. App. E.D. 2000) (acknowledging issues left open by *Luethans*). In the present case, Keveney submits that allowing a contractual employee who is discharged for engaging in conduct that public policy would encourage to recover damages for emotional distress and punitive damages is necessary to fully compensate the employee and to deter employers from contravening important state interests. Otherwise, employers throughout the state are free to discharge contractual employees in violation of public policy without being liable for anything beyond what they would have owed the employee under the contract.

Courts frequently cite the English case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), as the origin of the premise that tort damages are not available in a breach of contract action. In *Hadley*, the court held that damages for breach of contract are limited to those which may reasonably have been contemplated by the parties at the time they entered into the contract. *Weber Implement Co. v. Acme Harvesting Machine Co.*, 187 S.W.

874, 876 (Mo. 1916). The basis for this holding is that the market should rule decisions regarding contracts and that the parties should be allowed to determine whether to break a contract based solely upon the economic consequences of the breach. *Wells v. Holiday Inns, Inc.*, 522 F. Supp. 1023, 1028 n.4 (E.D. Mo. 1981). “Whatever ethical implications may be involved, the party breaking a contract is given a legal option to perform or pay damages.” *Id.*

There are two principles underlying the court’s holding in *Hadley*. First, the market or economic consequences, not ethical implications, should govern the breach of a contract between two private individuals. Second, in entering a contract, the individuals should have a reasonable expectation of the economic consequences of a breach so that the parties can make informed decisions in the marketplace. In a situation where an employment contract is breached in violation of public policy, however, both of these principles are overridden by public policy concerns, thereby making emotional distress damages and punitive damages appropriate.

Generally, contracts affect only the private interests of the parties involved and, therefore, it is reasonable to allow parties the freedom to make and break contracts. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 902 (Mo. 1990). “Our system . . . is not directed at *compulsion of promisors to prevent* breach; rather it is aimed at relief to *promisees to redress* breach.” *Id.* Where, however, the breach of a contract would undermine important public policies, the state has an interest in preventing the breach and ensuring that employers conduct their affairs in compliance with public policy. When the

state's interest is demeaned by the breach of the contract, the breaking of the contract is no longer simply a matter between two private parties. Limiting an aggrieved party's damages to the economic consequences of the breach does not redress the damage caused by the violation of public policy.

As this Court noted in *Peterson*, courts have recognized exceptions to the rule prohibiting punitive damages in breach of contract cases. *See Peterson*, 783 S.W.2d at 902-03. One exception is where the breach of contract is coupled with violations of fiduciary duty. *Id.* at 903. In *Peterson*, the Court cited with approval the case of *Brown v. Coates*, 253 F.3d 36, 39-40 (D.C. Cir. 1958), in which the District of Columbia Circuit held that punitive damages were warranted in a case where a trained and experienced professional held himself out to the public as worthy to be trusted for hire and intentionally and consciously disregarded that trust. *Peterson*, 783 S.W.2d at 903. Punitive damages were necessary in that case to deter particularly reprehensible conduct, which is one of the purposes of punitive damages. *See Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. 1989). The rationale for imposing punitive damages in a case involving the violation of a fiduciary duty applies with equal force to a situation in which the breach of a contract violates strong public policies of the state. In such a case, protecting the community by imposing punitive damages on the breaching party is just as important as providing redress to the aggrieved party.

While many states have recognized a cause of action in tort for contractual employees who have been terminated in violation of public policy, several other states have instead allowed punitive damages in certain types of contract actions. Mississippi is one such state.

In *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437 (Miss. 1999), the Mississippi Supreme Court expressed the policy behind allowing punitive damages in what it described as a tortious breach of an employment contract:

“The public has a legitimate interest in seeing that people are not discharged for reporting illegal acts or not participating in illegal acts which may result in harm to the public interest. Anyone who terminates an employee for such reason should be allowed a jury instruction on the issue of punitive damages in order to deter similar future conduct.”

Id. at 443.

Similarly, under Indiana law, punitive damages may be awarded in a contract action where it appears “that the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer and parties similarly situated.” *Vernon Fire & Casualty Ins. Co. v. A. W. Sharp*, 349 N.E.2d 173, 180 (Ind. 1976). Vermont also allows parties to recover punitive damages in actions alleging the breach of an employment contract where the breach “has the character of a willful and wanton or fraudulent tort.” *Glidden v. Skinner*, 458 A.2d 1142, 1144 (Vt. 1983). When a contract is terminated in violation of public policy, as in the present case, punitive damages are certainly appropriate.

Damages for emotional distress also serve to deter and punish violations of vital state interests. An employer who violates a clear mandate of public policy should be liable for the more expansive damages normally available in tort actions due to the nature of the conduct.

In addition, allowing the recovery of damages for emotional distress where an employee is terminated from his employment for acting in a manner that public policy encourages does not run afoul of the rationale stated in *Hadley v. Baxendale* because such damages are reasonably foreseeable. The Court of Appeals has recognized that it is appropriate to award damages for “mental suffering . . . in actions on contracts if the breaches were of a sort which would cause mental pain as a proximate and natural result.” *Carter*, 112 S.W.2d at 999. Furthermore, in a case involving termination from employment, this Court found that:

“Mental pain and suffering proximately resulting from a wrong which in itself constitutes a cause of action is a proper element of compensatory damages.’

There can be no doubt but that mental pain and suffering is a proximate result of a wrong which affects a man’s economic security and prevents him from earning a living for himself and family.”

Ackerman v. Thompson, 202 S.W.2d 795, 799 (Mo. 1947) (quoting 25 C.J.S. *Damages* § 63).

In this matter, Keveney suffered not only the loss of his employment, but the anguish of having to decide between performing his legal and moral duty to report suspected child abuse and possibly losing his employment and livelihood. It was hardly unforeseeable to MMA that Keveney would suffer mental pain and anguish when faced with this difficult decision. Therefore, Keveney should be allowed to recover emotional distress damages in connection with his breach of contract claim.

As set forth previously, Keveney submits that providing contractual employees with a cause of action in tort when they are discharged in violation of public policy would best

protect the citizens and employees of Missouri. However, in the event this Court finds that such a claim is available only to at-will employees, allowing tort damages for a breach of contract that violates public policy would serve the purposes of protecting vital state interests and providing contractual employees with the same protections as at-will employees. Accordingly, Keveney respectfully requests that this Court reverse the trial court's order granting MMA's motion to strike Keveney's claims for emotional distress damages and punitive damages in Count II of his petition.

CONCLUSION

For the reasons stated above, Keveney respectfully requests that this Court affirm the trial court's judgment in favor of Keveney on his breach of contract claim and reverse the trial court's orders dismissing Keveney's wrongful discharge claim and striking his demand for emotional distress damages and punitive damages in connection with his breach of contract claim.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Substitute Brief of Respondent/Cross-Appellant complies with the limitations set forth in Rule 84.06(b). According to the word count function of Corel WordPerfect 10, the foregoing brief, from the Table of Contents through the Conclusion, contains 14,555 words.

The undersigned also certifies that the floppy disk filed with the Substitute Brief of Respondent/Cross-Appellant has been scanned for viruses and is virus-free.

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The undersigned certifies that on June 12, 2009, one copy of the foregoing document and one floppy disk containing the foregoing document were mailed postage prepaid to:

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