

SC90995

IN THE SUPREME COURT OF MISSOURI

RUSSELL STEVENSON,

Plaintiff-Appellant,

v.

HOLLAND-BINKLEY COMPANY,

Defendant-Respondent.

**On Appeal from the Circuit Court of Warren County, Missouri
Honorable Keith M. Sutherland**

SUBSTITUTE BRIEF OF APPELLANT RUSSELL STEVENSON

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Jurisdictional Statement

This action is before the Supreme Court of Missouri on Appellant Russell Stevenson's application for transfer from the Missouri Court of Appeals, Eastern District, which was sustained on September 21, 2010. The subject matter of this appeal is a violation of Section 287.780 of the Missouri Revised Statutes.

The Circuit Court of Warren County, Missouri entered summary judgment in favor of Defendant Holland-Binkley Company (hereinafter, "Holland") and against Appellant Russell Stevenson (hereinafter, "Stevenson") on May 13, 2009. On June 19, 2009, Stevenson filed a Notice of Appeal to the Missouri Court of Appeals, Eastern District. The Missouri Court of Appeals, Eastern District affirmed the trial court's decision on April 20, 2010. This Court then accepted Stevenson's application for transfer.

The jurisdiction of the Court of Appeals was based on the general appellate jurisdiction found in Article 5, Section 3 of the Constitution of the State of Missouri. This Court has jurisdiction to consider this appeal pursuant to Article 5, Section 10 of the Constitution of the State of Missouri.

Statement of Facts

Russell Stevenson (hereinafter “Stevenson”) worked for Holland-Binkley Company (hereinafter “Holland”) in the shipping and receiving department from November 3, 1997 to July 22, 2005. LF 16. According to John Davis, Stevenson’s supervisor for the last four to five years of his employment with Holland, Stevenson was a good employee and performed his job duties well. LF 145-146.

During his employment with Holland, Stevenson suffered several work-related injuries, which led him to file three workers’ compensation claims against Holland in 2000. LF 5, 70. In December of 2004 Holland’s representatives approached Stevenson about settling his workers’ compensation cases and suggested that Holland might be willing to increase their settlement offer to \$35,000.00 if Stevenson would leave his employment. LF 265-267, 271. However, in February of 2005, Holland was advised by its attorneys that a settlement offer on Stevenson’s workers’ compensation cases could not be conditioned on a separation agreement because this could be interpreted as a violation of Section 287.780 of the Missouri Workers’ Compensation Act. LF 275-281. Thereafter, in the spring of 2005, Stevenson settled his workers’ compensation claims with Holland, without a separation agreement, for \$66,002.27. LF 68, 70.

Within a week of settling his workers’ compensation claims with Holland

Stevenson's supervisor, John Davis told him: "We're going to get rid of you. I'm going to fire you." LF 68. Then, in May of 2005, Stevenson's wife became ill and Stevenson began making calls to his home during his work day to check on her. LF 29-31.

Stevenson advised John Davis of his wife's illness. *Id.* According to Holland's telephone records for May and June of 2005, Stevenson placed 50 telephone calls to his home phone number during his work day to check on his wife. LF 75-76, 289-292. The cumulative duration of these phone calls was one hour and thirty-two minutes. *See Id.*

Of these fifty telephone calls:

- a. Only five (5) lasted longer than 5 minutes, with the longest call lasting 8 minutes and 5 seconds;
- b. Seven (7) lasted between 3 and 5 minutes;
- c. Twelve (12) lasted between 1 and 3 minutes;
- d. Two (2) lasted between 30 and 60 seconds;
- e. The remaining twenty-four (24) calls each lasted less than 30 seconds, with fourteen (14) of these calls lasting 6 seconds or less.

See Id.

On July 8, 2005, John Davis became aware of the telephone calls Stevenson had made in May and June of 2005 and suspended him, pending his termination. LF 156, 250-251. On July 22, 2005, Stevenson was terminated by Holland for "personal use of the Company phone system in violation of Company rules." LF 286. On August 17, 2005, Holland submitted a final response to the grievance Stevenson filed regarding his

termination. LF 287-88. In this response, Holland stated:

In fact, Mr. Stevenson made over 50 calls to his home during a two-month period. With rare exception all calls were made on Company time.

Russell's behavior violated multiple operating rules as cited in the attached reprimand, but in particular, #11 of the Safety and Conduct on the Job handbook which states, "Using facility communication systems inappropriately, i.e. computer, pagers, 2-way radios, phones, etc." The Company has deemed this violation to be so severe as to result in immediate suspension or termination under most circumstances. The Company need not give any warnings, verbal or written, and will proceed to suspension or termination as circumstances are warranted.

Id. According to these two letters, Holland's sole reason for terminating Stevenson was his use of the company phones to make personal calls, in violation of company rules. LF 286-288. Stevenson was terminated despite the fact that other Holland employees had used the company phones for personal reasons in the past and were not terminated, but were instead allowed to reimburse Holland for the calls. LF 32-36.

The Safety and Conduct on the Job handbook referenced by Holland in its grievance response is the company handbook that Stevenson received when he started with Holland. LF 18. This handbook lays out two categories of rules for Holland employees, which are differentiated from each other by the punishment an employee receives for violating a rule. LF 87-92. A violation of a rule in the first category results

in graduated disciplinary steps, starting with a verbal warning that gets noted in the employee's personnel file, then moving on to a written warning, then to a final written reprimand, which may include a suspension from work and, finally, termination. LF 87. Rule 20 in this section of the handbook states: "20. Unauthorized use of company phones for non-emergency or personal reasons is prohibited." LF 87, 89.

A violation of a rule in the second category, on the other hand, is considered to be of such a serious nature that it will, under most circumstances, result in immediate suspension or termination. LF 18-19, 89-92. Rule 11 in this section of the handbook, which Holland admits is the rule it relied on to terminate Stevenson, states: "11. Using facility communication systems inappropriately, ie computer, pagers, 2-way radios, phones, etc." LF 90.

John Davis admitted that there is no meaningful difference or distinction between the conduct covered by Rule 20 and Rule 11 above. LF 169-174. He further admitted that supervisors at Holland are given discretion to use their judgment and experience on a case-by-case basis to determine the punishment for a violation of the rules delineated in the Safety and Conduct on the Job handbook. LF 149-153. He also admitted that, even though he had the discretion to do so, he chose not to punish Stevenson under the graduated disciplinary steps, and instead suspended him, pending termination. LF 166-169.

On July 12, 2007, Stevenson filed suit alleging that Holland wrongfully discharged him for exercising his rights under the Missouri Workers' Compensation Act,

in violation of Section 287.780 of the Missouri Workers' Compensation Act. LF 8-10. Holland filed its motion for summary judgment on December 10, 2008. LF 14. In this motion, Holland alleged for the first time that Stevenson was also terminated for falsifying his timecards. LF 17-19. The Trial Court granted Holland's motion for summary judgment on May 13, 2009 and Stevenson appealed. LF 325, 326.

Points Relied On

- I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE IT INCORRECTLY APPLIED THE “EXCLUSIVE CAUSATION” STANDARD TO PLAINTIFF’S CLAIM FOR WRONGFUL DISCHARGE UNDER SECTION 287.780 OF THE MISSOURI WORKERS’ COMPENSATION ACT IN THAT, WHEN THIS SECTION IS STRICTLY CONSTRUED, AS REQUIRED BY SECTION 287.800 OF THE ACT, THE PLAIN AND UNAMBIGUOUS TERMS OF SECTION 278.780 CONTAIN NO REFERENCE TO AN EXCLUSIVE CAUSATION STANDARD

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. banc 2007)

Fleshner v. Pepose Vision Institute, P.C., No. SC90032 (Mo. 2/9/2010) (Mo. 2010)

McCracken v. Wal-Mart Stores E., L.P., 298 S.W.3d 473 (Mo. banc 2009)

Robinson v. Hooker, 2010 WL 2998605 (Mo.App. W.D.)

RSMo. §213.010(5)

RSMo. §287.780

RSMo. §287.800

II. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER PLAINTIFF'S EXERCISE OF HIS RIGHTS UNDER THE MISSOURI WORKERS' COMPENSATION ACT WAS THE EXCLUSIVE CAUSE FOR HIS TERMINATION BY DEFENDANT, IN THAT THE SUMMARY JUDGMENT EVIDENCE DEMONSTRATES THAT THE REASON GIVEN BY DEFENDANT FOR TERMINATING PLAINTIFF WAS PRETEXTUAL

Coleman v. Winning, 967 S.W.2d 644 (Mo. Ct. App. 1998)

Crow v. Crawford & Company, 259 S.W.3d 104 (Mo. Ct. App. 2008)

Kummer v. Royal Gate Dodge, Inc., 983 S.W.2d 568 (Mo. Ct. App. 1998)

Wiedower v. ACF Industries, Inc., 715 S.W.2d 303 (Mo. Ct. App. 1986)

RSMo. §287.780

Argument

- I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE IT INCORRECTLY APPLIED THE “EXCLUSIVE CAUSATION” STANDARD TO PLAINTIFF’S CLAIM FOR WRONGFUL DISCHARGE UNDER SECTION 287.780 OF THE MISSOURI WORKERS’ COMPENSATION ACT IN THAT, WHEN THIS SECTION IS STRICTLY CONSTRUED, AS REQUIRED BY SECTION 287.800 OF THE ACT, THE PLAIN AND UNAMBIGUOUS TERMS OF SECTION 278.780 CONTAIN NO REFERENCE TO AN EXCLUSIVE CAUSATION STANDARD

Recent decisions by the Supreme Court of Missouri suggest that the trial court applied the wrong causation standard to Stevenson’s claim for discrimination under Section 287.780 of the Missouri Workers’ Compensation Act, requiring reversal of its decision granting summary judgment in favor of Holland.

Section 287.780 of the Missouri Revised Statutes states: “No employer or agent shall discharge or in any way discriminate against any employee for exercising his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.” Historically, claims for

discrimination under this section could only be maintained if there was “an exclusive causal connection between” the employee exercising his rights under the Act and the employer’s discrimination against or discharge of the employee. *See Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984) and *Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. banc 1998).

However, the Missouri Supreme Court’s recent decision in *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473 (Mo. banc 2009) suggests that this “exclusive causation” standard is no longer proper. In *McCracken* this Court, while analyzing the definition of “statutory employee” under the Missouri Workers’ Compensation Act, noted that the Missouri General Assembly amended the Act in 2005 and added Section 287.800, which requires that “reviewing courts shall construe the provisions of th[e] [Act] strictly.” *Id.* at 481 (citing RSMo. §287.800). A strict construction analysis means that:

a “statute can be given no broader application than is warranted by its plain and unambiguous terms.” *Harness v. S. Copyroll, Inc.*, 291 S.W. 3d 299, 303 (Mo. App. 2009). The operation of the statute must be confined to “matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter.” *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 828 (Mo. App. 2009) (*citing* 3 Sutherland Statutory Construction §58.2 (6th ed. 2008)). ““A strict construction of a statute presumes nothing that is not expressed.””

Robinson v. Hooker, 2010 WL 2998605 at 6-7 (Mo.App. W.D.).

Strict construction of Section 287.780 of the Missouri Workers' Compensation Act leads to only one conclusion: The "exclusive causation" standard is nowhere to be found. This conclusion has already been confirmed by this Court in *Fleshner v. Pepose Vision Institute, P.C.*, No. SC90032 (Mo. 2/9/2010) (Mo. 2010), which pointed out that "[n]owhere in the workers' compensation laws does "exclusive causal" or "exclusive causation" language appear." *Id.* at 15.

Since the trial court in Mr. Stevenson's case granted summary judgment against him by using a causation standard that is not actually found under a strict construction of Section 287.780 of the Missouri Workers' Compensation Act, its decision should be reversed and the case remanded for further proceedings. Such a ruling, however, would beg the question: What causation standard should be used in discrimination cases under Section 287.780?

An obvious starting point would be to examine the causation standard applied to other employment discrimination cases that arise from statutory authority. For example, in cases involving employment discrimination under the Missouri Human Rights Act, the "contributing factor" causation standard is used. *See Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 817-18 (Mo. banc 2007). *Daugherty* involved an unlawful discharge under the Missouri Human Rights Act that was premised on age and disability discrimination. *See Id.* In *Daugherty*, this Court analyzed the MHRA's definition of "discrimination", which includes "**any** unfair treatment based on race, color, religion,

national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing.’ Section 213.010(5) (emphasis added).” *Id.* at 819 (emphasis added in original). This Court then noted that, “[n]othing in this statutory language of the MHRA requires a plaintiff to prove that discrimination was a substantial or determining factor in an employment decision; if consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient.” *Id.* This Court concluded that the “contributing factor” causation standard “is consistent with the plain meaning of the MHRA.” *Id.* at 820.

Similarly here, the plain language of Section 287.780 provides that “No employer or agent shall discharge or in any way discriminate against any employee for exercising his rights under this chapter.” (emphasis added). This language closely resembles the provisions of the Missouri Human Rights Act reviewed by this Court in *Daugherty*, thereby providing a rational basis for using the “contributing factor” causation standard in cases of discharge or discrimination under the Missouri Workers’ Compensation Act.

Because the Trial Court applied the wrong causation standard in granting Holland’s motion for summary judgment, the Court should reverse and remand this case for further proceedings. Additionally, the Court should instruct the trial court to use the “contributing factor” causation standard in all further proceedings.

II. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER PLAINTIFF’S EXERCISE OF HIS RIGHTS UNDER THE MISSOURI WORKERS’ COMPENSATION ACT WAS THE EXCLUSIVE CAUSE FOR HIS TERMINATION BY DEFENDANT, IN THAT THE SUMMARY JUDGMENT EVIDENCE DEMONSTRATES THAT THE REASON GIVEN BY DEFENDANT FOR TERMINATING PLAINTIFF WAS PRETEXTUAL

Even should this Court determine that the “exclusive causation” standard is the appropriate standard for cases brought under Section 287.780 of the Missouri Workers’ Compensation Act, summary judgment still was not proper because the evidence, when viewed in the light most favorable to Stevenson, shows that Holland’s non-discriminatory reason for terminating him was merely a pretext.

Because this case is on appeal from an Order granting summary judgment, “the review is essentially *de novo* with the appellate court employing the same tests as should be employed by the trial court in deciding whether to grant the motion.” *Coleman v.*

Winning, 967 S.W.2d 644, 647 (Mo. Ct. App. 1998) (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). As such, this Court should review the record in the light most favorable to Stevenson and Stevenson should also be accorded the benefit of all reasonable inferences from the record. *See Id.* Missouri courts have repeatedly emphasized that “[s]ummary judgment is granted only where no genuine issue of material fact exists and judgment is proper as a matter of law.” *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. banc 1993). A genuine factual dispute exists when the record contains competent evidence of two plausible, but contradictory accounts of the essential facts. *Id.*

To maintain a claim for retaliatory discharge under Section 287.780 of the Missouri Workers’ Compensation Act, Stevenson must establish the following four elements:

1. His status as an employee of Defendant Holland before injury;
2. His exercise of a right granted by the Workers’ Compensation Law;
3. Defendant Holland’s discharge of or discrimination against Mr. Stevenson; and
4. An exclusive causal relationship between Stevenson’s actions and Holland’s actions.

See Coleman v. Winning, 967 S.W.2d 644, 648 (Mo. Ct. App. 1998). Here, the first three elements are not in issue. The parties agree that Stevenson was employed by Holland from November 3, 1997 until July 22, 2005 and that Stevenson filed three separate

workers' compensation claims against Holland during his employment. LF 16. The parties also agree that Stevenson's workers' compensation claims against Holland were filed and resolved during the period of his employment, as his cases were settled in the spring of 2005. LF 68, 70. Finally, the parties agree that Holland fired Mr. Stevenson on July 22, 2005, shortly after his workers' compensation claims were resolved. LF 286.

As to the fourth element, the parties disagree as to Holland's actual reason for terminating Stevenson and it is this issue that formed the basis of Holland's motion for summary judgment. LF 14-15. However, "summary judgment is seldom appropriate in cases involving proof of elusive facts such as intent, motive, fraud, duress, undue influence, mental capacity and the like, which must almost always be proved by circumstantial evidence." *Crow v. Crawford & Company*, 259 S.W.3d 104, 113 (Mo. Ct. App. 2008).

In Missouri, "[p]roof that an employee was terminated solely in consequence of his exercise of his rights under the Workers' Compensation Law is necessarily indirect because the employer is not likely to admit that retaliation was his motive." *Coleman v. Winning*, 967 S.W.2d 644, 648 (Mo. Ct. App. 1988). Using circumstantial evidence to prove an essential element does not mean that it is subject to speculation. *See Id.* Furthermore, an employer is not entitled to summary judgment in a workers' compensation retaliatory discharge case simply because it can state a non-discriminatory purpose for the termination. *See Id.* If the summary judgment facts contain conflicting evidence on the real reason for the discharge, the question is one for the jury. *See*

Kummer v. Royal Gate Dodge, Inc., 983 S.W.2d 568 (Mo. Ct. App. 1998). *See also* *Wiedower v. ACF Industries, Inc.*, 715 S.W.2d 303, 307 (Mo. Ct. App. 1986) (holding that “[W]here 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.”).

Here, in granting Holland’s motion for summary judgment, the Trial Court ignored a great deal of circumstantial evidence that calls into question, and in some cases, flat-out contradicts Holland’s stated reason for terminating Stevenson. In its termination letter of July 22, 2005 and its grievance response of August 17, 2005, Holland stated that it terminated Stevenson solely because of his personal use of the company phones in May and June of 2008, in violation of company rules. LF 286-288. However, the record on appeal demonstrates that Holland actually first attempted to terminate Stevenson almost six months earlier. LF 265-267, 271. In December of 2004, Holland and Stevenson were discussing settlement of Stevenson’s workers’ compensation cases. *Id.* During these negotiations, Holland offered to increase its settlement offer if Stevenson would agree to leave his employment with Holland. *Id.* After Holland was advised that this arrangement would likely be a violation of RSMo. §287.780, Holland backed down and agreed to resolve Stevenson’s workers’ compensation cases without a separation agreement in the spring of 2005. LF 275-281, 68, 70. However, Holland’s attempt to force Stevenson to quit his job as a condition of settling his workers’ compensation claims is clear evidence that Holland wanted to terminate Stevenson long before he began making phone calls in May and June of 2005. This evidence, standing alone, flatly contradicts Holland’s claim

that it terminated Stevenson because of his phone usage in May and June of 2005 and presents a jury question as to whether this reason is pretextual.

The record contains additional evidence suggesting that Holland wanted to terminate Stevenson long before he made the phone calls in May and June of 2005. About a week after Stevenson settled his workers' compensation cases in the spring of 2005, and before Stevenson made the calls in May and June, John Davis, Stevenson's supervisor, threatened to terminate him by saying: "We're going to get rid of you. I'm going to fire you." LF 68. These threats lend further credence to the notion that Holland's termination of Stevenson for making phone calls in May and June of 2005 is pretextual, especially when combined with Holland's failed attempt to condition settlement of his workers' compensation claims on a separation agreement. In fact, given this threat's proximity to the resolution of Stevenson's workers' compensation claims, a jury could easily conclude that it was an express declaration of Holland's retaliatory intent, which would be persuasive proof of Stevenson's causality element.

An examination of the events surrounding Stevenson's termination in July of 2005 reveals additional circumstantial evidence suggesting that Holland's stated reason for terminating Stevenson was pretextual. When viewed in the light most favorable to Stevenson, the evidence in the record shows that Holland purposely overstated the nature and seriousness of his rule violation so that it could terminate him. According to the record, between May and June of 2005 Stevenson made fifty (50) phone calls during work hours to check on his wife. LF 75-76, 289-292. The total duration of these phone

calls was one hour and thirty-two minutes. *Id.* This works out to an average of just two minutes per work day of time. *Id.* A closer look at the telephone log reflects that twenty-four (24), of the phone calls lasted thirty seconds or less, with fourteen of these phone calls lasting just six seconds or less. *Id.* The single longest phone call lasted barely over eight minutes. *Id.* In addition, all of these phone calls were made to his home to check on his wife, whom Holland knew had been suffering from an illness. LF 75-76, 289-292, 29-31. According to Holland, it was these phone calls that required that Stevenson be terminated. LF 286-288.

However, a review of Holland's employee handbook reveals that Stevenson did not, in fact, have to be terminated for making these phone calls. Rule 20 of Holland's *Safety and Conduct on the Job* handbook states that "[u]nauthorized use of company phones for non-emergency or personal reasons is prohibited." LF 89. It also states that the punishment for a violation of this rule involves four graduated disciplinary steps. LF 87. The first step is a verbal warning, with the punishment increasing to a written warning, a final written reprimand and, finally, termination upon additional violations. *Id.* Despite the fact that Rule 20 perfectly describes Stevenson's conduct in this matter, Holland did not use the graduated disciplinary steps to punish him. Instead, Holland chose to mischaracterize Stevenson's conduct as "using facility communication systems inappropriately, ie computer, pagers, 2-way radios, phones, etc." LF 287-88. According to the employee handbook, a violation of this rule (Rule 11) is of such a serious nature that it results, in most circumstances, in immediate suspension or termination. LF 89-92.

By mischaracterizing Stevenson's conduct as "using facility communication systems inappropriately" instead of the more logical "unauthorized use of Company phones for personal reasons," Holland artificially manufactured a way to immediately suspend and fire Stevenson for conduct that, under any reasonable reading, should have been punished through graduated disciplinary steps. Holland's manipulation of the employee handbook to artificially orchestrate Stevenson's termination is further exemplified by Stevenson's testimony that he was aware of other Holland employees that used the company phones to make personal calls, but were not terminated and were simply allowed to reimburse Holland for the calls. LF 32-36. These machinations by Holland in order to obtain the desired result do not pass "the smell test," and constitute further evidence that Holland's stated reason for termination of Stevenson was a pretext.

In his deposition, Stevenson's supervisor, John Davis, admitted that the two rules described above have no meaningful difference. LF 169-174. He also testified that Holland supervisors were essentially given the discretion to ignore the employee handbook and use their judgment and experience on a case-by-case basis to determine an employee's punishment, or lack of punishment, for violations of the rules. LF 149-153. In summary, the evidence shows that Holland had the discretionary ability to manipulate and misuse its employee handbook to terminate Stevenson. From this, a jury could easily conclude that Holland's stated reason for terminating Stevenson was pretextual and was created to conceal the truth that Holland fired Stevenson for exercising his rights under the Workers' Compensation Act, as it had attempted to do in December of 2007.

Finally, Holland's own motion for summary judgment raises another possible reason for Stevenson's termination, thus calling into question whether its original reason was pretextual. In its motion, Holland first states that Stevenson was terminated for violating the rule prohibiting using the facility communication systems inappropriately. LF 17-19. However, Holland goes on to suggest for the first time that Stevenson was also, or alternatively, terminated for falsifying his time card. LF 18-19. Under similar circumstances in the 1998 case of *Coleman v. Winning*, 967 S.W.2d 644 (Mo. Ct. App. 1998), the trial court's granting of a summary judgment was reversed when the employee pointed to evidence that the employer offered two different reasons for his discharge. *Id.* at 648. The *Coleman* court noted that where there is inconsistency in the material facts, judgment as a matter of law is not appropriate. Viewing all of the foregoing evidence, that is undoubtedly the case here.

Conclusion

For the reasons set forth above, the Court should reverse the judgment of the trial court and remand the case for further proceedings with instructions that the trial court apply the "contributing factor" causation standard to Stevenson's claim of wrongful discharge under Section 287.780 of the Missouri Workers' Compensation Act.

However, even should the Court find that the "exclusive causation" standard is proper, the Court should still reverse the judgment of the trial court and remand the case for further proceedings because the evidence demonstrates that the non-discriminatory reason given by Holland for terminating Stevenson was pretextual, entitling Stevenson to

a jury trial on this issue.

Respectfully Submitted,

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Certification

Pursuant to Missouri Rule of Civil Procedure 84.06(c), Counsel for Appellant states that this Substitute Brief of Appellant Russell Stevenson complies with the limitations contained in Rule 84.06(b) in that it contains 4,836 words. Counsel for Appellant further states that a copy foregoing Substitute Brief of Appellant Russell Stevenson, along with a CD containing a Microsoft Word version of this Brief were mailed, postage prepaid, this 18th day of October, 2010 to:

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