No. SC86543

IN THE
SUPREME COURT
OF MISSOURI

RICHARD KUNKEL,
APPELLANT

v.

ANHEUSER-BUSCH, INC., ET AL.,
RESPONDENTS

Appeal from the Circuit Court
of St. Louis City, Missouri

The Honorable Thomas Grady, Judge

BRIEF AMICUS CURIAE OF THE ST. LOUIS CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT KUNKEL

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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Plaintiff Kunkel asserted a public policy wrongful discharge claim in tort. The Circuit Court granted Defendant Anheuser-Busch, Inc.'s motion for summary judgment. Plaintiff Kunkel filed an appeal to the Court of Appeals for the Eastern District of Missouri. The Court of Appeals affirmed the Circuit Court's grant of summary judgment. Plaintiff Kunkel filed an Application for Transfer to this Court and the Court granted the Application. The Court has jurisdiction pursuant to Article V, Section 10, of the Missouri Constitution.

STATEMENT OF INTEREST

Amicus Curiae St. Louis Chapter of the National Employment Lawyers Association is a voluntary membership organization of approximately 45 lawyers who represent employees in labor, employment and civil rights disputes in the St. Louis area. It is an affiliate of the National Employment Lawyers Association (NELA) which consists of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment discrimination laws to ensure that such laws are fully enforced and that the rights of workers are fully protected. Members of the St. Louis Chapter of NELA regularly represent victims of discrimination and retaliation in cases brought under the MHRA and Missouri common law.

STATEMENT OF FACTS

Plaintiff Richard Kunkel asserts a public policy discharge claim. The Missouri Courts of Appeal have long held that a discharge is unlawful if an employer discharges an employee for: (1) refusing to perform an illegal act or an act contrary to a strong mandate of public policy; (2) reporting wrongdoing or violations of law or public policy to superiors or third parties; (3) participating in an act encouraged by public policy, such as performing jury duty, seeking public office, or joining a labor union; or (4) filing a workers' compensation claim. **Shuler v. Premium Standard Farms, Inc.**, 2004 Mo.App. LEXIS 520, at *1; **Brenneke v. Department of Missouri**, 984 S.W.2d 134, 138 (Mo.App.W.D. 1998); **Boyle v. Vista Eyewear, Inc.**, 700 S.W.2d 859 (Mo.App.W.D. 1985).

In this case, Kunkel bases his claim upon the second exception, commonly referred to as the "whistleblower" exception. Kunkel worked for Defendants ("Anheuser-Busch") as an industrial engineer. During the first ten years of his employment, Kunkel received strong performance reviews, regular merit increases and promotions.

In 1992, Anheuser-Busch assigned Kunkel to evaluate the warehousing operations of business affiliate, M&R Warehouse, Inc. M&R Warehouse, Inc., operated warehouses in Mt. Vernon, Illinois, and its sole client was Anheuser-Busch. During his evaluation of the warehousing operations, Kunkel uncovered multiple instances of alleged illegal activities by M&R Warehouse and Anheuser-Busch employees. He discovered that Anheuser-Busch employees in the Merchandising Department were fraudulently purchasing items for their personal use through M&R Warehouse, Inc. These personal items included such things as ski

apparel, clothes, and baseball tickets. Legal File 240-41. M&R Warehouse then improperly included the cost of those personal items on its invoices to Anheuser-Busch for reimbursement. Id. Kunkel also found other accounting improprieties and environmental violations.[1]

On multiple occasions, Kunkel reported these illegal activities to his managers. Court of Appeals' Memorandum, p. 3. After these reports of illegal conduct, the Merchandising Manager at Anheuser-Busch (whose department was directly implicated in Kunkel's reports of wrongdoing) instructed a M&R Warehouse manager to submit a written complaint to Kunkel's managers about Kunkel's "negative comments" about M&R Warehouse's operations. Court of Appeals' Memorandum, p. 3. The Anheuser-Busch Merchandising Manager also edited and approved the complaint letter before it was sent to Kunkel's managers. Legal File 228-230, 232, 235, and 238.

After Kunkel's reports about the illegal activities, Anheuser-Busch management began to engage in a pattern of retaliation against him. Kunkel did not receive a raise from 1992-1996. It removed Kunkel from his assignment at M&R Warehouse, Inc. and placed him into

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[1]Kunkel discovered the improper presence and containment of asbestos and the improper disposal of toxic cleaning solvents at M&R Warehouse facilities. He also found that M&R Warehouse was improperly charging Anheuser-Busch, Inc. for warehouse space that was in fact unused and, perhaps, did not even exist. Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16 by Court of Appeals ("Court of Appeals' Memorandum"), p. 3.

a far less desirable position. Court of Appeals' Memorandum, p. 3. It did not give Kunkel a performance review for the next three years. Legal File 202, 268-69, and 317. Then, after a reorganization in 1997, Anheuser-Busch selected Kunkel for lay off and refused to transfer him to another position. Legal File 136-140 and 207-08.

Kunkel filed a Petition in the Circuit Court for the City of St. Louis alleging a public policy discharge claim under the "whistleblower" exception. The Circuit Court granted Anheuser-Busch's motion for summary judgment on the basis, inter alia, that "plaintiff has failed to rebut Defendants' evidence with competent evidence showing that plaintiff's whistleblowing activities were the exclusive (or even primary) reason for his termination in 1998." The Court of Appeals affirmed, holding that "there was not an exclusive causal connection" between Kunkel's whistleblowing actions and his termination. Court of Appeals' Memorandum, p. 12. In particular, the Court of Appeals found that Kunkel could not show that his termination was the "exclusive cause of his discharge" because the reduction-in-force in which Kunkel was terminated "was due to budget-cutting." Court of Appeals' Memorandum, p.10. The Court granted transfer.

POINT RELIED UPON

THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE COURT OF APPEALS ERRONEOUSLY REQUIRED PLAINTIFF KUNKEL TO DEMONSTRATE THAT HIS "WHISTLEBLOWING" ACTIVITIES WERE THE "EXCLUSIVE FACTOR" FOR HIS DISCHARGE WHEN THE PROPER CAUSATION STANDARD SHOULD BE A "CONTRIBUTING FACTOR" STANDARD.

Brawner v. Brawner

327 S.W.2d 808 (Mo. 1959)

Diehl v. O'Malley

95 S.W.3d 82 (Mo. 2003)

Missouri Approved Instruction 31.24

Brenneke v. Dep't of Missouri

984 S.W.2d 134 (Mo.App. W.D. 1998)

ARGUMENT

THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE COURT OF APPEALS ERRONEOUSLY REQUIRED PLAINTIFF KUNKEL TO DEMONSTRATE THAT HIS "WHISTLEBLOWING" ACTIVITIES WERE THE "EXCLUSIVE FACTOR" FOR HIS DISCHARGE WHEN THE PROPER CAUSATION STANDARD SHOULD BE A "CONTRIBUTING FACTOR" STANDARD.

1. **The Court Should Explicitly Recognize a Cause of Action in Tort for Wrongful Discharge Based on Public Policy.**

In Missouri, when an employee does not have a contract for a certain term of employment, the employee is considered an employee-at-will. **Luethans v. Washington Univ.**, 894 S.W.2d 169 (Mo. 1995). In an at-will employment relationship, the employer and employee have an indefinite agreement that the employee will only work so long as both parties wish the relationship to continue. Id. Either can end the relationship at any time without cause or liability "so long as the act of discharge is not otherwise 'wrongful.'" Id.

The Missouri Courts of Appeal have long held that a discharge is "wrongful" if an employer discharges an employee for: (1) refusing to perform an illegal act or and act contrary to a strong mandate of public policy; (2) reporting wrongdoing or violations of law or public policy to superiors or third parties; (3) acting in a manner public policy would encourage, such as performing jury duty, seeking public office, or joining a labor union; or (4) filing a workers'

compensation claim. **Boyle v. Vista Eyewear, Inc**., 700 S.W.2d 859 (Mo.App.W.D. 1985); **Petersimes v. Crane Company**, 835 S.W.2d 514 (Mo.App.E.D. 1992); **Kirk v. Mercy Hospital Tri-County**, 851 S.W.2d 617 (Mo.App.S.D. 1993); **Yow v. Village of Eolia**, 859 S.W.2d 920 (Mo.App.E.D. 1993); **Lay v. St. Louis Helicopter Airways, Inc.**, 869 S.W.2d 173 (Mo.App.E.D. 1993); **Clark v. Beverly Enterprises-Missouri**, 872 S.W.2d 522 (Mo.App.W.D. 1994); **Olinger v. General Heating & Cooling Co.**, 896 S.W.2d 43 (Mo.App.W.D. 1994); **Lynch v. Blanke Baer & Bowey Krimko, Inc.**, 901 S.W.2d 147 (Mo.App.E.D. 1995); **Adolphsen v. Hallmark Cards, Inc.**, 907 S.W.2d 333 (Mo.App.W.D. 1995); **Shawcross v. Pryo Products, Inc.**, 916 S.W.2d 342 (Mo.App.E.D. 1995); **Adcock v. Newtec, Inc.**, 939 S.W.2d 426 (Mo.App.E.D. 1997); **Faust v. Ryder Commercial Leasing & Services**, 954 S.W.2d 383 (Mo.App.W.D. 1997); **Williams v. Thomas**, 961 S.W.2d 869 (Mo.App.S.D. 1998); **Porter v. Reardon Machine Company**, 962 S.W.2d. 932 (Mo.App.W.D. 1998); **Bell v. Dynamite Foods**, 969 S.W.2d 847 (Mo.App.E.D. 1998); **Brenneke**, 984 S.W.2d, at 138; **Shuler**, 2004 Mo.App. LEXIS 520, at *11.

The Court has never explicitly held that the "public policy" exception to the employment-at-will doctrine gives rise to a viable cause of action in tort. However, the Court has acknowledged, and not disapproved of, the adoption of the public policy exception by the Courts of Appeals. **Luethans v. Washington Univ.**, 894 S.W.2d 169 n.2 (Mo. 1995)(acknowledging Missouri appellate decisions adopting the public policy exception and assuming, without deciding, that the exception exists); **Johnson v. McDonnell Douglas Corp.**, 745 S.W.2d 661, 663 (Mo. 1988)(Court cites **Boyle** and other decisions but finds that

plaintiff could not establish any public policy claim because no statute, regulation, or constitutional provision was implicated in the case).

The at-will employment doctrine is a judicially enunciated public policy. **Luethans v. Washington Univ.**, 894 S.W.2d 169 (Mo. 1995); **Amaan v. Eureka**, 615 S.W.2d 414, 415 (Mo. 1981); **Christy v. Petrus**, 295 S.W.2d 122, 124 (Mo. 1956); **Culver v. Kurn**, 193 S.W.2d 602, 603 (Mo. 1946); **Boyle**, 700 S.W.2d at 871. As such, the doctrine has limits. The Court has repeatedly recognized the "public policy" principle of law under which this Court has held that no one can lawfully do that which tends to be injurious to the public or against the public good. **Boyle**, 700 S.W.2d at 871; **Brawner v. Brawner**, 327 S.W.2d 808, 812 (Mo. 1959); **In re Rahn's Estate**, 291 S.W.2d 120, 122 (Mo. 1927). As the Missouri Courts of Appeal have recognized, this principle of law gives rise to an exception to, or limitation on, the at-will employment doctrine. Under this exception, an employee has a viable cause of action if his employer discharges him for refusing to violate, or reporting the violation of, the law or any well established and clear mandate of public policy. See **Boyle**, 700 S.W.2d at 871; **Brenneke**, 984 S.W.2d at 137-38. The Court should explicitly adopt the "public policy" exception to the employment-at-will doctrine recognized by the Courts of Appeal.

2. **The Court of Appeals Should Be Reversed Because, in a Public Policy Wrongful Discharge Claim, an Employee Should Only Be Required to Prove That the Protected Conduct was a "Contributing" Factor in the Discharge Decision, and**

Not the "Exclusive" Factor.

The Court of Appeals required Kunkel to prove that his "whistleblowing" activity was the exclusive reason for his discharge. The instant case thus presents the Court with an issue of first impression on the appropriate causation standard for a public policy discharge claim. In determining the proper causation standard for public policy discharge claims in tort, it is useful and logical to look to employment discrimination law relating to claims arising under the Missouri Human Rights Act ("MHRA"). As the Court has emphasized, MHRA claims are analogous to other intentional tort claims. **Diehl v. O'Malley**, 95 S.W.3d 82, 87 (Mo. 2003). Indeed, the MHRA's statutory language defining unlawful discrimination is similar to the language found in **Boyle**, the seminal Court of Appeals' decision first recognizing the public policy discharge claim in Missouri. **Compare** Rev.Mo.Stat. § 213.055(1)(it shall be an unlawful employment practice for an employer, "***because of*** the race, color, religion, national origin, sex, ancestry, age or disability or any individual...to fail or refuse to hire or to discharge any individual...")(emphasis supplied) with **Boyle**, 700 S.W.2d at 878 ("employer discharged the employee...***because*** the employee reported to his superiors or to public authorities serious misconduct.")(emphasis supplied).

Moreover, the MHRA and the law prohibiting public policy wrongful discharge have similar objectives: they seek to eliminate employment decisions based upon criteria that society has deemed intolerable. As such, the laws provide a limited job protection against employers who use these illegal criterion in their decisionmaking processes.

The type and presentation of evidence in these cases is also virtually identical. Because

the employer's liability in both types of cases usually turns on whether the illegal criterion played a role in the decisionmaking process, the critical issue is the intent of the individuals who made the challenged employment decision. As a result, most of the parties' evidence directly relates the decisionmaker's intent or motivation. Moreover, because most employers are sophisticated enough not to admit reliance on an illegal criterion in an employment action, the employee's evidence relating to intent almost always involves circumstantial evidence. Based on these fundamental similarities between discrimination claims and public policy wrongful discharge claims, it is entirely logical to apply to public policy wrongful discharge claims the same causation standard used in MHRA claims.

As set forth in the recently approved Missouri Approved Instruction ("MAI") 31.24, the Court has adopted a "contributing factor" standard for MHRA claims. Under MAI 31.24, the Court requires an employment discrimination plaintiff to prove that (1) the defendant engaged in an employment action within the scope of § 213.055; (2) an illegal discriminatory animus was "a contributing factor" in such employment action, and (3) as a direct result of such conduct, the plaintiff sustained damage. Because of the strong similarities between discrimination and public policy claims, the Court should apply the same "contributing factor" standard to public policy wrongful discharge claims. There is certainly no reason or basis to apply a more stringent "exclusive causation" standard in public policy wrongful discharge cases.

The "contributing factor" standard is fully consistent with the general tort standard for proof of causation. Under this standard, an employer will not be liable unless the employee's protected activity actually contributed to the decision to discharge or otherwise retaliate

against the employee. Stated conversely, if the protected activity did not directly contribute to the employer's decision to discharge the employee, the employer will not be liable. Thus, if the employer decides to terminate the employee due to the employee's poor work performance, then the employer is not liable, regardless of whether the employee engaged in any protected activity. In such a situation, the employee's protected activity is simply not a contributing factor in the termination. On the other hand, if the employer has other equally poor-performing employees who have not been terminated, and then terminates the whisteblowing employee due to poor work performance ***and*** the employee's protected activity, then the employer is, and should be, liable for an illegal termination. In such a situation, the employee's protected activity is a "contributing factor," and directly resulted, in the employee's termination.

Ultimately, it is for a jury to determine, based upon the evidence presented in any given case, whether an employee's protected activity was a "contributing factor" that directly resulted in the allegedly retaliatory employment action. In Missouri, juries have been long been relied upon, and are competent, to make these types of determinations. For example, in negligence cases involving multiple alleged causes of damage, it is proper to instruct the jury to determine whether a defendant's "negligence directly caused or directly contributed to cause damage to plaintiff." Missouri Approved Instruction 19.01; **Callahan v. Cardinal Glennon Hospital**, 863 S.W.2d 852 (Mo. 1993). Though not identical, the "contributing factor" standard in a public policy discharge claim involves analogous issues. In both types of cases, a jury will hear evidence concerning multiple reasons or factors allegedly contributing to cause

the plaintiff damage and will be asked to determine whether the one of those reasons or factors "contributed" to cause the damage. As in the negligence cases involving multiple causes of damage, juries are fully competent to determine whether an employee's protected activity was a contributing factor in a discharge decision.

The "contributing factor" standard is also a far more practical standard than an "exclusive causation" standard. It is utterly unrealistic to believe that any conscious decision (especially one as significant as a discharge of an employee) is made because of a single and solitary motivation. Instead, significant decisions are often based on a constellation of motivations and factors, some more substantial than others. Requiring an employee to show that a decision is solely and exclusively motivated by the employee's protected activity is a legal standard that would be completely divorced from, and ignore, the reality of human decisionmaking.

On the other hand, the exclusive causation standard is contrary to the advancement of the public policy giving rise to public policy discharge claims. The purpose of a public policy discharge claim is to allow an employee to engage in protected activity without fear of retribution from his or her employer based on the protected activity. Once an employee's protected conduct has directly resulted in, or contributed to, his or her discharge, the very outcome that public policy seeks to prevent has in fact occurred. The employee has lost his or her job because of his protected activity. The presence of other factors in the decision should simply not be relevant to the issue of whether the employer engaged in illegal conduct if the protected activity contributed to the termination.

Furthermore, the adoption of the exclusive causation standard would have a tremendous chilling effect on employees. Employees will unquestionably be deterred from refusing to engage in, or reporting, illegal conduct if their employers can legally fire them for engaging in protected activity simply because some other factor might have also played a role in the discharge, no matter how trivial that factor might be. This result is directly contrary to public policy.

In addition, the exclusive causation standard would create an extremely difficult (if not impossible) evidentiary burden on the employee. In the discrimination context, Judge Posner has eloquently articulated the difficulties an employee has in proving the intent or motivation of a decisionmaker:

> Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against–the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for [the challenged employment action for] a worker who is not superlative.

Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987). In a public policy wrongful

discharge claim, these observations apply with equal force. In fact, the application of an exclusive causation standard–a far more stringent standard than applied in discrimination cases–would make the evidentiary burdens far greater than even those described by Judge Posner such that it would be virtually impossible for an employee to prevail.

In most other states, courts and legislatures have rejected an "exclusive" causation standard. They have instead required an employee to prove by the preponderance of the evidence a causal connection between the discharge and the protected activity or that the protected activity was a motivating or determining factor in the discharge. See **Brenneke**, 984 S.W.2d at 140 n.4 (citing cases from other jurisdictions); see also **Crabtree v. Bagby**, 967 S.W.2d 66, 74 (Mo. 1998)(White, C.J., dissenting)(approving of cases in which the Missouri courts adopted a "direct result" standard for causation rather than the "exclusive" standard); **Teachout v. Forest City Community School District**, 584 N.W.2d 296, 301 (Iowa 1998)(in public policy case, plaintiff must show that his protected activity was a "determinative" factor in discharge); **Schlichtig v. Inacom Corp.**, 278 F.Supp.2d 597, 607 (under New Jersey statute prohibiting whistleblowing, plaintiff must show that protected conduct was a "substantial motivating" or "determining" factor); **Buckner v. General Motors Corp.**, 760 P.2d 803, 806-07, 810 (Okla. 1988)(under Oklahoma law, employee's protected activity must be "significant factor" in discharge decision); **Guy v. Mutual of Omaha Ins. Co.**, 79 S.W.3d 528, 534 (Tenn. 2002)(causal connection required in whistleblower action under Tennessee statute); **Anderson v. Meyer Broadcasting Corp.**, 630 N.W.2d 46, 53 (N.D. 2001)(under statutory whistleblower claim, causal connection required); **Heartlein v. Illinois Power Co.**,

601 N.E.2d 720, 728 (Ill. 1992)(in public policy case, plaintiff must show a causal connection between protected activity and discharge); **Shallal v. Catholic Soc. Svcs. Of Wayne County**, 566 N.W.2d 571, 574 (Mich. 1997)(same); **Hubbard v. United Press Int'l, Inc.**, 330 N.W.2d 428, 444 (Minn. 1983)(same); **Ridenhour v. IBM Corp.**, 512 S.E.2d 774, 778 (N.C.App. 1999); **Shockey v. City of Portland**, 837 P.2d 505, 509-10 (Or. 1992); **Shovelin v. Central N.M. Elec. Co-Op**, 850 P.2d 996 (1993).

The "contributing factor" standard is also consistent with federal employment law. When Congress passed Title VII, a federal statute prohibiting employment discrimination, it explicitly rejected amendments that proposed to limit an employer's liability to instances where discrimination was the sole cause of the employment action. **Griffith v. City of Des Moines**, 2004 U.S.App. Lexis 21438, at *18 (8th Cir. October15, 2004)(Magnuson, D.J., sitting by designation, concurring). In rejecting this amendment, a senator commented:

> The difficulty with this amendment [limiting liability to cases where discrimination was the "sole" cause] is that it would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

110 Cong.Rec. 13, 837-38 (1964). As enacted, Title VII was meant to eradicate "discrimination, subtle or otherwise." **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 801 (1973). In 1991, Congress amended Title VII to make clear that Title VII prohibits any

employment decision where the illegal discrimination was ***a*** motivating factor, even if other factors also motivated the decision. 42 U.S.C. § 2000e-2(m) (emphasis supplied); see also **Manual for Model Jury Instructions for the District Courts of the Eighth Circuit**, § 5.01 (defining "motivating factor" as "a consideration that moved the defendant toward its decision").[2]

The Missouri Courts of Appeals have disagreed about the appropriate causal connection to apply. Some courts have applied an exclusive causation standard. See, e.g., **Bell v. Dynamite Foods**, 969 S.W.2d 847, 852 (Mo.App. 1998); **Lynch**, 901 S.W.2d at 150. Other Missouri courts, though, have suggested that exclusive causation is not required. **Brenneke**, 984 S.W.2d at 140; see also **Boyle**, 700 S.W.2d at 878 (plaintiff must show that the employer discharged the employee ***because*** the employee engaged in the whistleblowing activity).

The Missouri Court of Appeals cases that require exclusive causation do not provide any well-reasoned basis for adopting such a stringent standard. **Lynch**, 901 S.W.2d at 150 (states requirement for exclusive causal connection without discussion); **Faust v. Ryder Commerical Leasing & Svcs.**, 954 S.W.2d 383, 391 (Mo. App. 1997)(same); **Bell**, 969

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[2]Similarly, the federal law prohibiting retaliation against whistleblowing, the Sarbanes-Oxley Act, 18 U.S.C. §1514A, does not require the employee to show that the whistleblowing activity was the sole basis for discharge. Instead, under the law, the employee must only show that his protected activity was a "contributing factor" in the challenged employment action. 29 C.F.R. §1980.104(b).

S.W.2d at 852 (same); **Loomstein v. Medicare Pharmacies, Inc.**, 750 S.W.2d 106, 113 (Mo. App. 1988). The basis for the adoption of the exclusive causation standard by these courts may be this Court's decision in **Crabtree v. Bagby**, 967 S.W.2d 66 (Mo. 1998) in which the Court adopted an exclusive causation standard for retaliatory discharge claims arising under Rev.Mo.Stat. § 287.780, a provision within the Workers' Compensation Act. Under § 287.780:

> No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter [the Workers' Compensation Act]. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

The exclusive causation requirement adopted by the Court in **Crabtree** was founded on, and limited to, this statutory language. Moreover, the Court made clear that it sought to strictly construe §287.780 because the central purpose of the Workers' Compensation Act is to provide benefits for work-related injuries and not to provide job security. **Crabtree**, 967 S.W.2d at 72. Thus, the Court's decision to strictly construe this statutory provision and adopt the exclusive causation standard was largely based upon, and closely tied to, the legislative purpose for the Workers' Compensation Act. Accordingly, the Court's application of the exclusive causation standard in **Crabtree** is specific to §287.780 and is not applicable in other contexts.[3] Indeed, the Court has rejected the exclusive causation standard in the statutory

[3]In addition, as pointed out by then-Judge White, the language at §287.780 does not compel, or even suggest, that exclusive causation is required for workers' compensation

context of the MHRA. See **MAI 31.24**. Because the public policy discharge claims arise in tort and not by statute, there is obviously no legislative purpose compelling the application of the exclusive causation standard in such cases.

CONCLUSION

The Court should reverse the Court of Appeal's decision and remand the case for further proceedings consistent with the Court's decision. The Court should require that Kunkel establish, on remand, that his protected activity was a contributing factor in the decision to discharge him. It should not require him to prove that his protected activity was the "exclusive" cause for the discharge.

Respectfully submitted,

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retaliation claims. See **Crabtree**, 967 S.W.2d at 74 (White, J., dissenting).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06, the undersigned certifies that the foregoing brief was prepared using Corel WordPerfect 10. The font used to prepare the foregoing brief is Times New Roman with a 13-point type. According to the word count function of Corel WordPerfect 10, the foregoing brief contains 4829 words.

The undersigned also certifies, pursuant to Rule 84.06(g) that the computer disk provided herewith has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 31, 2005, two (2) copies of Amicus Brief of St. Louis Chapter of National Employment Lawyers Association were hand delivered to each of the following individuals:

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