

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

RESPONDENT/CROSS-APPELLANT'S SUBSTITUTE REPLY BRIEF

Gregory A. Rich, #45825
Michelle Dye Neumann, #54127
DOBSON, GOLDBERG, BERNS & RICH, LLP
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366

Attorneys for Respondent/Cross-Appellant

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ARGUMENT

I.

The Trial Court Erred in Granting Missouri Military Academy’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 his initial brief, Respondent/Cross-Appellant Michael Keveney (“Keveney”) provided a number of compelling reasons why the tort of wrongful discharge in violation of public policy should be extended to contractual employees as well as at-will employees. In response, Appellant/Cross-Respondent Missouri Military Academy (“MMA”) has chosen to cling to the mistaken perception that this Court has already decided this issue. As Keveney demonstrated in his initial brief through a detailed analysis of *Luethans v. Washington University*, 894 S.W.2d 169 (Mo. 1995), whether contractual employees may bring a cause of action for wrongful discharge in violation of public policy remains an open issue. Furthermore, MMA has not provided any legitimate explanation for why contractual employees should be treated any differently than at-will employees when important interests of the state are involved. As many other courts have recognized, these interests are no less important when the employee has the benefit of an employment contract. Accordingly, the trial court’s order dismissing Count I of Keveney’s petition should be reversed.

MMA’s argument in response to Keveney’s cross-appeal is long on rhetoric and short on substance. Contrary to what MMA suggests in its brief, this case is not about money. It

is about protecting the citizens of Missouri from the types of egregious conduct engaged in by MMA and ensuring that employers in this state do not participate in activities that contravene fundamental principles of public policy. No employer should be allowed to retaliate against employees—whether at-will or contractual—simply because those employees act in a manner that public policy encourages. Keveney has never described MMA as a “disreputable law breaker,” but it is clear that employers such as MMA are not going to police themselves. Extending wrongful discharge claims to contractual employees will further Missouri’s “interest in deterring reprehensible conduct.” *Luethans v. Washington University*, 1994 Mo. App. LEXIS 1388, at *10 (Mo. App. E.D. Aug. 30, 1994).

MMA argues in its brief that this Court has “explicitly rejected” the existence of wrongful discharge tort claims for contractual employees. According to MMA, this Court held in *Luethans* that because Luethans was a contractual employee, he had no cause of action in tort for wrongful discharge. Keveney respectfully disagrees with MMA’s reading of this Court’s opinion.

In *Luethans*, the question of whether the plaintiff was a contractual employee was not relevant to whether he could bring a claim of wrongful discharge in violation of public policy. Rather, it was relevant to whether the plaintiff was actually “discharged.” If Luethans had been an at-will employee instead of a contractual employee, then he clearly would have been discharged by Washington University because the parties would have had “an indefinite agreement” that Luethans would work as long as the parties wished for the relationship to continue. *See Luethans*, 894 S.W.2d at 172. However, because this Court

found that Luethans was a contractual employee and the terms and conditions of his employment were governed by the written contract between the parties, Luethans no longer had any expectation of continued employment once the contract's term ended. As the Court noted, Luethans "was paid through the end of his contract period when the parties' rights and duties under the contract expired." *Id.* at 172-73. At that point, any claim that Luethans had against Washington University would have been based upon a failure to renew his contract rather than a discharge. Because Luethans alleged in his petition that he had been discharged by Washington University and chose to stand on his pleadings, the Supreme Court found that he had failed to state a claim of wrongful "discharge."

Despite MMA's argument that Keveney has engaged in a "tortured reading" of *Luethans*, Judge Thomas Grady of the Circuit Court of the City of St. Louis has reached the same conclusion as Keveney. *See Thompson v. Saint Louis University*, Cause No. 052-08084 (June 29, 2006) (included in Appendix to Substitute Brief of Respondent/Cross-Appellant at p. A10). While Keveney is certainly not arguing that an unpublished decision from a Circuit Judge is binding on this Court, the *Thompson* decision clearly supports Keveney's interpretation of this Court's holding in *Luethans* and demonstrates that the *Luethans* decision is not as clear as MMA contends.

In *Thompson*, the defendant made the same argument that MMA has made in this case, *i.e.*, that "the public policy exception/wrongful discharge cause of action should be strictly limited to at-will employees and should not apply at all to contract employees." Appendix to Substitute Brief of Respondent/Cross-Appellant ("App."), p. A26. After a

review of *Luethans* and the Court of Appeals' decision in *Adcock v. Newtec, Inc.*, 939 S.W.2d 426 (Mo. App. E.D. 1997), Judge Grady found that whether such a cause of action exists remains an open question in Missouri. App., pp. A25-A26 n.9.

MMA attempts to distinguish *Thompson* from the present case on the ground that, unlike Keveney's contract, the contract in *Thompson* expired on its own terms and the plaintiff had asserted a claim of "wrongful failure to renew" his employment contract rather than "wrongful discharge." This, however, is a meaningless distinction, as Judge Grady noted in his decision:

"Likewise, the Court concludes that in the end it makes little sense to say that a contract employee can bring a tort claim for retaliatory *discharge* but not a claim for retaliatory *failure to renew* his employment. Such a policy would mean, with respect to contract employees, that irresponsible employers and bad corporate citizens would be free to largely circumvent and evade the underlying purpose of the tort doctrine, by simply waiting a few months until the employee's contract expired rather than instantly 'discharging' him or her for refusing to violate public policy."

App., p. A38.

MMA also contends that there is no sound basis for creating a cause of action in tort for contractual employees because those employees already have protection in the form of remedies for breach of contract. As Keveney noted in his initial brief, however, those remedies are insufficient to deter employers from engaging in conduct that violates public

policy. Notwithstanding MMA’s argument that items such as attorneys’ fees, court costs, and damage to reputation will deter reprehensible conduct by employers, such was clearly not the case here. There is no denying that the threat of compensatory and punitive damages will have a much greater deterrent effect on employers. Furthermore, as Judge Grady noted in *Thompson*,

“the sole purpose underlying the public policy exception cause of action in Missouri has never been just to assist those employees who ‘don’t have the bargaining power’ to negotiate contracts of employment. Rather, the cause has been recognized by Missouri’s courts both in order to protect employees *and* to protect the public when employees’ conduct as good citizens is punished by their employers. A primary purpose of the doctrine is to promote the ends of the law and public policy—not just to protect employees.”

App., p. A23.

The fact that the Missouri legislature has not enacted specific legislation to protect contractual employees from being discharged in violation of public policy is completely irrelevant. What matters for purposes of this case is that the legislature has expressed a clear public policy requiring teachers and school administrators to report suspected abuse of a student or cause such a report to be made. Mo. Rev. Stat. § 210.115.1. It is not necessary for the legislature to enact a specific statute for employers to know that it is wrong to terminate an employee for doing what he is legally required to do. Furthermore, merely because Chapter 210 of the Missouri Revised Statutes does not contain a provision which

addresses the discharge of persons who report suspected child abuse does not mean that the legislature implicitly approves of such actions. Most teachers in Missouri work under some type of employment contract. Under MMA's interpretation of the law, none of those teachers would have any protection from being discharged for reporting suspected abuse of a student. Clearly, the legislature could not have condoned this type of behavior simply by failing to specifically address this scenario in Chapter 210.

In his initial brief, Keveney cited a number of cases from other jurisdictions as persuasive authority for the proposition that there is no logical basis for treating contractual employees differently than at-will employees when employers violate public policy. In response, MMA has attempted to distinguish several of those cases. As an initial matter, MMA has not provided any reasonable explanation for why those cases are not based upon sound principles and good reason. More importantly, MMA has not even attempted to distinguish three of the most persuasive cases cited by Keveney: *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), and *Coleman v. Safeway Stores, Inc.*, 752 P.2d 645 (Kan. 1988). Each of those cases, which were decided by the highest courts in Washington, Utah, and Kansas, respectively, provides a detailed analysis of the reasons for allowing contractual employees to bring common law claims of wrongful discharge in violation of public policy. The rationales provided in each of those cases for extending wrongful discharge claims to contractual employees apply with equal force in the present case.

Keveney certainly acknowledges that other jurisdictions have come to different

conclusions, but as he has argued throughout his initial brief and this brief, the reasons for allowing contractual employees to pursue claims of wrongful discharge in violation of public policy are much more compelling than those provided for denying such claims. Extending these claims to contractual employees will simply reaffirm the long-standing principle 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). For these reasons, Keveney respectfully requests that this Court reverse the trial court’s order granting MMA’s motion to dismiss Count I of Keveney’s petition.

II.

The Trial Court Erred in Granting Missouri Military Academy’s Motion to Dismiss Count I of Keveney’s Petition Because Keveney Has Alleged That He Was Wrongfully Discharged for Acting in a Manner That Public Policy Would Encourage and for Refusing to Perform an Illegal Act.

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). In his initial brief, Keveney argued that he alleged sufficient facts in his petition to establish a claim of wrongful discharge in violation of public policy for acting in a manner that public

policy would encourage and for refusing to perform an illegal act. In response, MMA has made arguments that are both factually and legally incorrect. Because Keveney has pleaded sufficient facts giving rise to liability in this case, there is no basis for MMA's argument that Keveney has failed to state a claim of wrongful discharge in violation of public policy.

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.

With regard to Keveney's allegation that he was discharged for acting in a manner that public policy would encourage, MMA contends that this type of claim "has been only held to apply to persons participating in activities such as testimony, jury duty, seeking public office, or joining a labor union." *See* Appellant/Cross-Respondent's Substitute Reply Brief, p. 42. However, as the Court of Appeals found in *Entwistle, supra*, this list is not exclusive and "well-defined public policies encourage acting in other manners." 259 S.W.3d at 567. As noted previously, public policy unquestionably encourages teachers to report suspected physical abuse of students.

MMA also contends that Keveney cannot establish a claim because he has not alleged that he was terminated for participating in activities "*required by law*, such as jury service or providing truthful testimony." Appellant/Cross-Respondent's Substitute Reply Brief, p. 41. As an initial matter, MMA is attempting to add new elements to Keveney's claim that Missouri courts do not require, and MMA's argument directly contradicts established case law. For example, there are no laws that *require* persons to vote, join labor unions, or seek

public office, but Missouri courts have held that employers cannot discharge employees for engaging in those activities.

Furthermore, MMA's argument is factually incorrect because teachers are required by law to ensure that suspected abuse of a student is reported to the Division of Family Services. MMA states in its brief that section 210.115 does not require persons to "insist" that others report the suspected abuse of a student to the Division of Family Services. While the statute may not be phrased in that particular manner, it does state that a teacher who "has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect . . . 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 (emphasis added). By "insisting" that his superiors contact the Division of Family Services, Keveney was certainly engaging in activities that are within the scope of the statute and was doing what he was required by law to do. In addition, Keveney did not merely "insist" that his superiors report the suspected abuse, but he also told them that if they did not report it, he was going to contact the Division of Family Services himself. Transcript Volume ("Tr. Vol.") I, p. 206.

As discussed in the previous section, MMA makes much of the fact that Chapter 210 of the Missouri Revised Statutes does not contain a specific provision that prohibits employers from discharging employees who report the suspected abuse of a student. However, as the Court of Appeals held in *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932 (Mo. App. W.D. 1998), Keveney is "not required to show that his discharge was explicitly

prohibited by statute.” *Id.* at 939. Rather, he is “required to show ‘the legal provision violated by the employer, and it must affirmatively appear from the face of the petition that the legal provision in question involves a clear mandate of public policy.’” *Id.* (quoting *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 338-39 (Mo. App. W.D. 1995)). There is no question that section 210.115.1 satisfies this requirement.

A review of Keveney’s petition shows that he has pleaded sufficient facts to state a claim of wrongful discharge in violation of public policy for acting in a manner that public policy would encourage. Accordingly, the trial court’s order granting MMA’s motion to dismiss Count I of Keveney’s petition should be reversed.

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.

MMA initially challenges Keveney’s allegation that he was discharged for refusing to perform an illegal act by arguing that Keveney’s petition does not contain any such allegation. No such allegation, however, is required under Missouri’s pleading rules. Rule 55.05 states that a “pleading that sets forth a claim for relief . . . shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader claims to be entitled.” Mo. R. Civ. P. 55.05. “The purpose of fact-pleading is to ‘present, define and isolate the controverted issues so as to advise the trial court and the parties of the issues to be tried and to expedite the trial of a cause on the merits.’” *Luethans*, 894 S.W.2d at 171-72 (quoting *Walker v. Kansas City Star*

Co., 406 S.W.2d 44, 54 (Mo. 1966)) (internal quotation omitted). “The pleadings limit and define the issues of the case.” *Id.* at 172.

Keveney alleged in his petition that he was discharged in violation of public policy, and he provided specific facts to support his claim. To satisfy the requirements of Rule 55.05, Keveney is not required to label his specific theory of recovery and he is not bound by any label that he may have attached to his petition. *Sivigliano v. Harrah’s N. Kansas City Corp.*, 188 S.W.3d 46, 48 (Mo. App. W.D. 2006); *L.S.L. Sys., Inc. v. Monsanto Corp.*, 723 S.W.2d 939, 941 (Mo. App. E.D. 1987). What matters is whether the facts alleged by Keveney in his petition meet the elements of a claim of wrongful discharge in violation of public policy, not whether Keveney has used a particular label to describe his claim. *See Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. 2001) (holding that “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”).

Keveney alleged in his petition that MMA terminated his employment for insisting that a student’s bruises be reported to the Division of Family Services. These facts are sufficient to state a claim for wrongful discharge in violation of public policy because, by insisting that the students bruises be reported to the Division of Family Services, Keveney was refusing to violate section 210.115 of the Missouri Revised Statutes, which makes such reporting mandatory. Therefore, Keveney’s allegations are sufficient to survive a motion to dismiss.

Oddly, MMA also contends that Keveney’s claim fails because Keveney “blew the

whistle” to the alleged wrongdoers. Contrary to MMA’s argument, Keveney does not allege in this action that he is entitled to relief as a “whistle blower,” which involves an entirely different legal analysis. Keveney has never alleged that he reported illegal conduct to his supervisors and the cases cited by MMA stating that “blowing the whistle” to the alleged wrongdoers does not constitute protected conduct are inapposite.

As the foregoing discussion demonstrates, Keveney has alleged sufficient facts in his petition to state a claim of wrongful discharge in violation of public policy for refusing to perform an illegal act and the trial court’s order granting MMA’s motion to dismiss 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.

As noted above, Keveney suggests that whether contractual employees may bring a cause of action for wrongful discharge in violation of public policy remains an open issue. However, should this Court disagree and accept MMA’s assertion that such a cause of action is available only to at-will employees, then tort damages should be available when a contract is breached in violation of public policy. MMA argues that market or economic consequences should govern the breach of a contract between two parties. This argument

makes sense in cases where the consequences of the breach do not extend beyond the parties to the contract. However, where important interests of the state of Missouri are affected by the breach, the same rationale that courts have traditionally used to justify an exception to the employment-at-will doctrine should also be used to allow an exception to the general rule that damages in a breach of contract action are limited to the economic consequence of the breach.

MMA contends that permitting tort damages in a breach of contract action would be inappropriate because juries do not examine issues of motivation in a breach of contract case. However, this is simply not true. In the present case, the jury was called upon to decide a factual dispute over whether MMA had cause to terminate Keveney's employment, which depended in part upon whether MMA acted in good faith. Accordingly, motivation was a crucial issue. The verdict in this matter shows that the jury found that MMA was motivated by something other than Keveney's performance when it made the decision to terminate his employment. Thus, contrary to MMA's assertion, allowing tort-type damages in cases where an employment contract is breached in violation of public policy would not expand the evidentiary issues in this type of case.

MMA also asserts that any job termination results in emotional distress, and yet "Missouri remains an at-will jurisdiction where persons who lose their jobs, as a rule, have no cause of action for 'emotional distress.'" *See* Appellant/Cross-Respondent's Substitute Reply Brief, p. 53. MMA is correct in arguing that, in a typical case involving the termination of an employee-at-will, damages for emotional distress are not available.

Emotional distress damages are, however, available to an employee who was terminated in violation of public policy. Keveney does not suggest that tort damages should be available for *any* termination. Rather, Keveney submits that when a person's employment contract is terminated in violation of public policy, that person should be entitled to the same types of damages that are available to a non-contractual employee who is terminated in violation of public policy.

Furthermore, allowing Keveney to recover damages for emotional distress in this case would be consistent with the general rule in a breach of contract case that "a plaintiff may recover the benefit of his or her bargain as well as damages naturally and proximately caused by the breach and damages that could have been reasonably contemplated by the defendant at the time of the agreement." *Birdsong v. Bydalek*, 953 S.W.2d 103, 116 (Mo. App. S.D. 1997). For damages to have been proximately caused by the breach, they must have been "reasonably foreseeable at the time the parties entered into the contract." *Id.* It is clearly foreseeable that the discharge of a contractual employee for acting in a manner that public policy encourages would cause emotional distress.

This case presents a classic example of the type of situation in which compensatory and punitive damages should be allowed for the breach of a contract. This Court expressly left this question open in *Luethans*, and Keveney submits that the trial court erred in striking Keveney's claims for emotional distress damages and punitive damages in Count II of his petition.

CONCLUSION

For the reasons stated above and in his initial brief, 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 order 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.

DOBSON, GOLDBERG, BERNS & RICH, LLP

By: _____

Gregory A. Rich, #45825
Michelle Dye Neumann, #54127
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366

Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Respondent/Cross-Appellant's Substitute Reply Brief 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 4,252 words.

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

DOBSON, GOLDBERG, BERNES & RICH, LLP

By: _____

Gregory A. Rich, #45825
Michelle Dye Neumann, #54127
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366

Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on July 14, 2009, one copy of the foregoing document and one floppy disk containing the foregoing document were mailed postage prepaid to:

Ian P. Cooper
Katherine L. Nash
TUETH KEENEY COOPER MOHAN & JACKSTADT, P.C.
34 N. Meramec, Suite 600
St. Louis, MO 63105
