

IN THE SUPREME COURT OF MISSOURI
EN BANC

DANIEL J. MARGIOTTA,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	No. SC90249
)	
CHRISTIAN HOSPITAL NORTHEAST-)	
NORTHWEST, et al.,)	
)	
Defendants/Respondents.)	

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

The Honorable Mark D. Seigel, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENTS

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Statement Of Facts

1. Margiotta's Employment at Christian Hospital.

Defendant/Respondent Christian Hospital Northeast-Northwest ("Christian Hospital" or the "Hospital") hired plaintiff/appellant Daniel Margiotta ("Margiotta") on April 11, 2005 to work as a Medical Imaging Technician in the CT Scan Department. L.F. 66; 190.

Margiotta's direct supervisor was Tim Cuff ("Cuff"). L.F. 66, 190. William Lundak ("Lundak") was the manager of the CT Scan Department, and Stuart Schneider was the director of that Department. L.F. 66, 190. As manager of the department, all of the CT Scan employees are "direct reports" under Lundak. L.F. 222, pp. 45-46. Both Lundak and Schneider had authority to terminate Margiotta. L.F. 231-32, pp. 96-97.

While Cuff supervised the day-to-day activities of the CT technicians, Lundak maintained an "open door" policy and often became involved in direct supervision of the employees in the department. L.F. 222, p. 46. Lundak regarded Cuff as a good supervisor, and Cuff received successful evaluations for his performance. L.F. 222, pp. 46-48.

The Hospital terminated Margiotta's employment on December 9, 2005. L.F. 66, 203. This was one day after several of his fellow employees reported that Margiotta lost his temper during a CT scan and began yelling at a patient and a co-worker and throwing things around the room. L.F. 66, 203. The incident on December 8 followed several other incidents during Margiotta's eight-month tenure at Christian Hospital that resulted in reports from co-workers regarding Margiotta's temper and inappropriate behavior.

a. Margiotta is Counseled for Yelling at a Doctor.

In July of 2005, a radiologist named Dr. Patty Joyce informed Lundak that she would no longer work with Margiotta. L.F. 76. Dr. Joyce told Lundak that Margiotta had yelled at her when she asked Margiotta to perform a procedure more quickly. L.F. 76; L.F. 220-21, pp. 28-29. Lundak talked to Margiotta about the incident and told him to apologize to Dr. Joyce. L.F. 76; 222, p. 48. Lundak put a note documenting the report into Margiotta's file. L.F. 221, p. 29, L.F. 84.

While Margiotta testified at his deposition that he did not yell at Dr. Joyce, he did not present any evidence to refute Lundak's testimony that Dr. Joyce had so reported to Lundak. Margiotta did acknowledge that Lundak told him that Dr. Joyce did not want to work with him after this incident and he acknowledged that he talked to Dr. Joyce to smooth things over so they could work together again. L.F. 207-08, pp. 33-36.

b. Margiotta Is Counseled for Failing to Control his Angry Outbursts.

In September 2005, Lundak received complaints from Margiotta's co-workers regarding his unprofessional behavior and poor work performance. L.F. 67, 76. Lundak interviewed these co-workers who reported that Margiotta: "losses [sic] his cool"; is "unable to handle the busy times"; "cannot multi-task"; "curses"; "is unable to handle the volume"; "is always pointing the finger at someone else"; and that "anything unusual sets him off." L.F. 76. Lundak documented these reports in his notes. L.F. 86.

In an e-mail dated September 26, 2005, Lundak summarized these complaints to Cuff and directed Cuff to counsel Margiotta regarding the matters. L.F. 76. Lundak concluded that Margiotta "gets angry over small issues" and that he "needs to work on

multi-tasking” and he suggested that Margiotta “may need a class in anger control.” L.F. 88.

Cuff met with Margiotta on October 7, 2005 to counsel him regarding these issues. L.F. 68, 192. According to the “Record of Counseling Interview” prepared by Cuff, Cuff talked to Margiotta about “learning to control his anger outburst and eliminate[ing] the cursing.” L.F. 90. Margiotta agreed at the meeting that he needed to “work on these areas” and that he would “try to do better.” L.F. 90. Margiotta admitted these facts. L.F. 67-68, 192.

c. Margiotta is Reprimanded for Rudeness to a Patient.

On December 7, 2005, Christian Hospital nurse, Chris Mahurin, documented a complaint regarding Margiotta’s unprofessional treatment of a patient. L.F. 77, 92. Mahurin’s report states that Margiotta refused to help the patient get off the CT scan table and that he was “rude and abrupt.” L.F. 92. The report also states that the patient was “scared by the situation and [Margiotta’s] rudeness.” L.F. 68. Margiotta presented no evidence disputing that Mahurin made this report or Lundak’s statement that the report related to Margiotta. L.F. 77, 192-93.

2. Lundak Investigates Margiotta’s Tantrum on December 8.

On December 8, 2005, Lundak learned of an incident in the CT Scan room involving Margiotta. L.F. 77, 229, pp. 81-84. Lundak went to the CT department and talked to Cuff immediately after the incident occurred. L.F. 229, pp. 82-83. Lundak testified that Cuff told Lundak that, “Dan had become very angry with a patient, started

throwing things. Dave went in to help. He started yelling at Dave. And then I think Cindy took the – got the patient out of the room.”` L.F. 229, p. 82.

Lundak reported the incident to Schneider, who told him to find out everything he could about what took place. L.F. 229-230, pp. 85-86. Lundak told Cuff to talk to the staff and gather more information. L.F. 230, p. 86. Shortly thereafter, another CT technician or Cuff (Lundak was not sure which) informed Lundak of a second altercation involving Margiotta. L.F. 230, p. 88. Lundak was told that Dave Moutria had approached Margiotta to see if he was all right, and Margiotta got very upset, “cursing and talking real loud at Dave again.” L.F. 230, p. 88. Lundak immediately contacted Schneider and Cuff and the three of them got together. L.F. 230, p. 88. Schneider suggested that they get someone involved from the Hospital’s human resources staff – “someone not involved in the department to oversee this.” L.F. 231, p. 90.

Schneider and Lundak then contacted Brian Hartwick, Vice President of Human Resources, and they met with him the next morning. L.F. 77, 231, p. 90. Lundak and Schneider relayed what they had been told about Margiotta’s conduct to Hartwick, who suggested that they get statements from the individuals that observed the incidents. L.F. 231, pp. 89-90. Cuff had spoken with some of these individuals the previous day, and Cuff reported that they had said they were “frightened” during the incidents. L.F. 231, p. 92.

Lundak, Schneider and Hartwick then interviewed all the individuals that were in the CT department the day before. L.F. 232, pp. 94-95. After they described the incidents of the prior day verbally, the individuals were asked to step out of the room and

write a statement. L.F. 232, p. 95. On the morning of December 9th, in addition to Cuff, Lundak, Schneider and Hartwick interviewed: Donna Sorden, a nurse; Jamie Harper, a medical imaging technician; Kim Darabcsek, a medical imaging technician; Dave Moutria, a technical assistant; and, Cindy Rigsby, a medical imaging technician. L.F. 77, L.F. 232, p. 96. All of those individuals completed and signed written statements at that time, with the exception of Cindy Rigsby, whose statement was taken over the phone the morning of the 9th and reduced to writing a few days later. L.F. 94-102, 232, pp. 95-96, L.F. 233, p. 98.

- David Moutria reported that both Cindy and Margiotta were working on patients in the CT Scan room. L.F. 100. He reported that Margiotta told Moutria that he needed help on his side, and Moutria went over. L.F. 100. Moutria reported that “[Margiotta] became upset with the patient.” L.F. 100. According to Moutria, “[t]he patient did not seem to be doing anything wrong.” L.F. 100. Margiotta said he could not proceed with the patient and started to take her off the table. L.F. 100. Moutria returned to that side of the room, and the patient was half on and half off the table. L.F. 100. Moutria helped get the patient on the stretcher and Margiotta became more upset and “thru [sic] a pillow that landed against the wall knocking the suction off.” L.F. 100. Moutria reported that he “tried to calm [Margiotta] down, to no effect.” L.F. 100. Margiotta then “pulled the (2) chucks out from under [the patient] and thru [sic] them onto the red bio tub” and “left abruptly.” L.F. 100. Moutria asked Rigsby to check on the

patient, and then he took the patient out of the CT room. L.F. 100. On his way back, he ran into a supervisor, Mike Carron, and told him that they needed a supervisor because “Dan wasn’t right.” L.F. 101. Moutria further reported that a short time later he returned to the CT room and tried to explain to Margiotta that he was just trying to help, but Margiotta “jumped up from the chair” that he was sitting in, threw a piece of paper on the ground, and said “Dam [sic] it Dave you just don’t understand.” L.F. 101.

- Cindy Rigsby reported that she was working on a patient in the CT room and Margiotta was also working on a patient. L.F. 94. She heard Margiotta state that his patient did not have a proper IV. L.F. 94. Margiotta asked Moutria to help him get the patient off the table. L.F. 94. Rigsby reported that she then heard loud screaming coming from the MX8000 room. L.F. 94. “As I came into the doorway Dan was throwing a chuck [sic]¹ down into the floor saying, ‘I’m mad Dave. Will you just shut up! Just shut up about it. I’m mad!’” L.F. 94. Rigsby reported that Margiotta told her he had to go for a walk and left the room and the patient. L.F. 94. Rigsby reported that she checked on the patient, who “seemed scared.” L.F. 94. When Margiotta returned, he went into the area with the computer where Kim, Jamie, Tim, and Dave were located. L.F. 94. Dave asked Margiotta

¹ Lundak explained in his deposition that “Chux” are absorbent pads that go underneath a patient who is incontinent. L.F. 220, p. 84.

what was wrong and Margiotta “started getting loud and told Dave you don’t understand. Just shut up about it.” L.F. 94-95.

- Donna Sorden, R.N. reported that she “witnessed an incident in the CT area in which [Margiotta] was yelling at Dave at the top of his lungs... and throwing objects onto the floor in front of Dave.” L.F. 96. Sorden reported that Cindy told her that shortly before the yelling episode, Margiotta had thrown a pillow in the scanner room and broke the suction canister off the wall. L.F. 96. Sorden also reported that “I truly felt that Dave could have been in physical harm with [Margiotta].” L.F. 96.
- Kim Darabcsek reported that when she was working on a patient in the MX8000, she heard “an argument coming from inside the control room between [Margiotta] and Dave M.” L.F. 97. Darabcsek was sure that the patient in the room could hear the argument. L.F. 97. It appeared to Darabcsek that Dave Moutria was “shaken up” by the incident. L.F. 97.
- Jamie Harper reported that she did not witness the initial conflict between Margiotta and Moutria. L.F. 99. She reported that after lunch, Dave came in and said something to Margiotta and “[Margiotta] began yelling at Dave angrily. There was a patient in the room who could hear everything that was going on.” L.F. 99. Harper also reported that this patient’s procedure had been delayed over 30 minutes, she assumed due to the earlier disturbance. L.F. 99.

In addition to these reports, some of the individuals interviewed on December 9 also told Lundak that Margiotta's anger had been growing for some time. L.F. 232, p. 94. Jamie Harper reported that a few months earlier Margiotta had gotten angry when a patient came down without an arm band. L.F. 97. He yelled at Harper, pointed at her, and shook his fist in the air. L.F. 96, 232, p. 94. Harper "felt threatened" by Margiotta at the time. L.F. 98. Lundak and Cuff had not previously heard about these other incidents. L.F. 232, p. 94.

3. The Hospital Terminates Margiotta.

At the conclusion of these interviews on December 9, 2005, Hartwick, Schneider, and Lundak agreed that they would interview Margiotta and, if there was not "some positive reasoning coming out of it," they would discharge him. L.F. 235, p. 109. Hartwick, Schneider, and Lundak then called Margiotta up to Hartwick's office and asked him about the events of the preceding day. L.F. 234, pp. 102-03. According to Lundak, Margiotta acknowledged that he had gotten angry over something to do with the patient. L.F. 234, p. 104. Hartwick then informed Margiotta that he was discharged. L.F. 235, p. 108.

Lundak testified in his affidavit and his deposition that he, Hartwick and Schneider reached the conclusion that Margiotta needed to be fired because of his "egregious behavior" on December 8, 2005. L.F. 77, L.F. 233, p. 99. Lundak testified that he did not believe there was any appropriate course of action other than discharge because Margiotta's conduct was too "severe" and Lundak had concerns about the safety

of the Hospital's patients and staff. L.F. 232, p. 100. They based their decision on the information available to them at the time including the witness statements that had been collected at that point, their knowledge of Margiotta's prior work performance problems as documented in Margiotta's personnel file, and also their discussions with Cuff and Margiotta following the incident. L.F. 77.

Lundak completed a Hospital form documenting the discharge, in which he referenced Margiotta's yelling and abusive language in front of a patient, the fact that it was the second patient incident that week, and the fact that Margiotta had previously been counseled for angry outbursts and cursing. L.F. 80. The report states that Margiotta's conduct was an "egregious violation of rules of conduct and core values." L.F. 80.

Margiotta's testimony confirmed that he met with Lundak, Hartwick and Schneider on December 9 and that they terminated his job at that meeting. L.F. 131, 207-08, L.F. 211-13, pp. 173-188. Margiotta testified that Hartwick told Margiotta that he was being terminated because he threw a pillow, raised his voice to Moutria, and because of the complaint regarding the transfer of the patient from the stretcher to the CT table. L.F. 132, pp. 210-11. Margiotta confirmed that there was no mention of his complaints about hospital practices. L.F. 211-13, pp. 173-188.

Although Christian Hospital has a mechanism by which Margiotta could have appealed his termination, he did not do so. L.F. 78.

4. Margiotta's Complaints Regarding Hospital Procedures.

In the lawsuit, Margiotta claims that he was fired because of complaints he made during his employment at Christian Hospital regarding patient handling and monitoring.

L.F. 9. With regard to the patient complaints, Margiotta testified as follows:

- Margiotta met with Lundak to discuss three patient care issues. L.F. 121, pp. 130-31. The first issue he raised was the proper procedure to ensure that pregnant women were not scanned. L.F. 121, p. 132. Margiotta believed that his co-worker, Jami Harper, had previously scanned a pregnant woman. L.F. 120, pp. 106-108. Margiotta alleges this occurred sometime between July and September of 2005. L.F. 119, p. 97. At the time, Margiotta did not report this specific incident to any of his supervisors. L.F. 120, p. 109.
- During the meeting with Lundak, Margiotta also raised concerns about patients left unattended in the hallway outside the CT Scan area and the need for assistance in transferring the patients from the stretcher to the CT table. L.F. 121-22, pp. 130-37.
- Following the Lundak meeting, in June or July of 2005, Margiotta told Cuff that patients were still being left unattended in the hallway. L.F. 123, pp. 146-147, L.F. 124, pp. 151-152.
- In the fall of 2005, Margiotta overheard another employee tell Cuff that a patient was dropped while transferring them from the stretcher to the

radiology table and Margiotta said, “Tim, we’ve talked about this before.”

L.F. 135, pp. 154-57.

The above-described incidents are collectively referred to herein as the “patient care complaints.” Margiotta admittedly could not place the timing of any of these incidents within two months of his termination on December 9, 2005. L.F. 71, L.F. 126-27, pp. 161-62. Margiotta did not fill out an incident report or otherwise document any of these alleged incidents. L.F. 127, pp. 161-62. Nor did he ever report any of these incidents to an outside agency or authority. L.F. 129, p. 196. Plaintiff testified that he was never criticized by Cuff, Lundak, or any other Hospital supervisor or manager for raising these issues. L.F. 129, p. 196.

Lundak testified that after Margiotta made these patient care complaints, Lundak generally inquired into the matters, discussed them with the staff, and took any appropriate action. L.F. 223-26, pp. 49-73. Lundak testified that Margiotta’s complaints to him occurred prior to or during the summer of 2005. L.F. 225, p. 60; L.F. 223, pp. 49-50.

When Lundak sent a memo to Cuff in September of 2005 regarding Margiotta’s performance issues, he did not mention the complaints as problems; the only problem he referenced was Margiotta’s reaction to the issues: “Dan gets angry over small issues (patient comes from floor and IV does not work)(waiting on patients from ED), etc.” L.F. 88. Lundak nevertheless testified that when he wrote this memo to Cuff in September, Lundak was not then considering terminating Margiotta. L.F. 226, pp. 67-68.

Margiotta concluded that he was fired for making the patient care complaints based solely upon his belief that the reasons given for his termination at the December 9 meeting were unfounded and because his attempts to deny or explain the events of that day were not successful. L.F. 130-31, pp. 205-211.

5. Margiotta Acknowledges His Discharge Was Due to Conflict With Co-Workers.

A month after Margiotta's termination, he visited with a psychologist, Dr. Ken Kubicek, and expressed the belief that he may suffer from an "anxiety disorder" and that he had "problems with anxiety for 5 years." L.F. 70, 107. Margiotta told the psychologist that he was terminated from Christian Hospital because he was "having conflict with coworkers" and "problems with peers." L.F. 70, 107-08. Margiotta's summary judgment pleadings admitted these facts. L.F. 70, 195.

6. Margiotta Files this Action for Wrongful Termination.

Margiotta filed the instant lawsuit on or about April 5, 2007 against Christian Hospital and BJC Health System (collectively referred to herein as "defendants). L.F. 8. The single count of the petition alleges that Margiotta was terminated because he "reported to his supervisor and others that the practices being followed for handling and monitoring patients were unsafe." L.F. 8-9. The petition asserts that the termination violates public policy as expressed in statutes and regulations, specifically, 19 CSR 30-20.021(3)(K)(3)(2007), A1, and 42 C.F.R. 482.13(c), A2. L.F. 9. Defendants filed an

answer and amended answer denying the allegations of the petition and asserting affirmative defenses to the wrongful termination claim. L.F. 16-19, 27-32.

On March 28, 2008, defendants filed a joint motion for summary judgment. L.F. 62. Defendants asserted that Margiotta could not prove an exclusive causal connection, or any causal connection, between his termination and the patient care complaints. L.F. 63, 134, 150. The motion argued that there was no evidence to show that he was terminated for any reason other than his own violent and unprofessional conduct. L.F. 63-64. In addition, defendants asserted that the regulations Margiotta cited in his pleadings do not constitute “clear mandates of law” sufficient to support a whistleblower claim. L.F. 64. In support of their motion, defendants submitted a memorandum of law and a statement of uncontroverted facts, supported by affidavits, deposition excerpts and other documentary evidence. L.F. 66-154.

On April 18, 2008, Margiotta’s counsel moved for a continuance of the hearing and ruling on the motion for summary judgment on the grounds that they needed additional time to complete depositions. L.F. 167. The trial court granted the motion for continuance, giving plaintiff until May 7, 2008 to file his opposition to the summary judgment. L.F. 175.

On May 7, 2008, Margiotta filed a response to defendants’ statement of uncontroverted facts, to which Margiotta attached excerpts of the depositions of Dan Margiotta, Bill Lundak, Cindy Rigsby, and Donna Sorden. L.F. 190-248. In response to Defendants’ factual statements, supported with affidavit testimony, that Hartwick, Schneider and Lundak made the decision to discharge Margiotta based on his egregious

behavior on December 8, 2005, Margiotta simply denied the statement on the sole grounds that it was conclusory and hearsay. L.F. 70 (¶16), 195(¶16). Margiotta did not point to any evidence controverting those specific factual statements. L.F. 195 (¶16). Margiotta included several pages of supplement factual allegations, L.F. 193-203, but not one word of them established any causal connection between the patient care complaints and his termination. Margiotta did not file any legal memorandum in opposition to summary judgment.

On May 8, 2008, the day before the scheduled hearing on the summary judgment motion, Margiotta's counsel filed a second motion for continuance of the summary judgment ruling to submit the deposition of Dave Moutria. L.F. 253. The motion asserted that Margiotta's counsel took the deposition on May 7, 2008, but the transcript would not be ready before the hearing on May 9, 2008, and that "Moutria's testimony regarding the incident which defendants claim caused them to discharge plaintiff controverts the evidence defendants offered . . ." L.F. 254.

On May 9, 2008, the trial court heard arguments on the summary judgment and took it under submission. L.F. 275. The court denied plaintiff's motion for a second continuance. L.F. 275. On May 12, 2008, the trial court granted its Order and Judgment sustaining defendant's motion for summary judgment and entering judgment in favor of defendants. L.F. 311.

On May 30, plaintiff filed a combined motion to supplement the record and for reconsideration of the summary judgment. L.F. 313. Attached to the motion was a copy of the entire transcript of the deposition of Dave Moutria. L.F. 316. As grounds for the

motion, plaintiff simply recited the timing of the Moutria deposition and the trial court's prior denial of their motion for continuance and concluded that "the court misapplied the law both procedurally and substantively." L.F. 314-15. The trial court denied the motion on June 9, 2008. Margiotta filed this appeal on June 16, 2008. L.F. 371.

The court of appeals issued an opinion on June 30, 2009 transferring the case to this Court pursuant to Supreme Court Rule 83.02. Two judges held that they would reverse the summary judgment. The majority found that the regulations Margiotta cited were a clear mandate of public policy. The majority did not discuss whether those regulations were specific. The majority also stated that the record contains evidence suggesting that the patient care reports were the exclusive cause of Margiotta's discharge. The majority did not state what that evidence was. The dissent argued that the summary judgment should be affirmed.

Points Relied On

I. The Trial Court Properly Granted Summary Judgment To Defendants On Margiotta's Whistleblower Claim For Wrongful Discharge Because He Did Not Produce Any Probative Evidence That His Reports Of Patient Care Complaints Played Any Causal Role In His Discharge.

A. Margiotta Presented No Evidence That He Was Discharged Because of the Patient Incident Complaints.

B. Minor Discrepancies In The Witnesses' Description Of The December 8 Incident And The Hospital's Response To It Do Not Create An Issue Of Fact About The Reason For Margiotta's Discharge.

- *Criswell v. City of O'Fallon*, 2008 WL 2439753 (Mo. App. June 16, 2008)
- *Porter v. Reardon Machine Co.*, 962 S.W.2d 932 (Mo. App. 1998)
- *Hickman v. May Dep't Stores Co.*, 887 S.W.2d 628 (Mo. App. 1994)
- *Loomstein v. Medicare Pharmacies, Inc.*, 750 S.W.2d 106 (Mo. App. 1988)

II. The Trial Court Properly Granted Summary Judgment To Defendants On Margiotta's Whistleblower Claim For Retaliatory Discharge, Because:

A. A Common Law Retaliatory Discharge Tort Claim Must Remain A Narrow Exception To An Employer's Right To Discipline Employees;

B. The Tort Requires Proof Of A Clear And Specific Mandate Of Public Policy, Which Margiotta Has Not Identified; and

C. The Tort Requires Proof Of An Exclusive Causal Connection Between The Protected Conduct And The Discharge, A Standard Margiotta Cannot Meet.

- *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. banc 1984)
- *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333 (Mo. App. 1995)
- *Lay v. St. Louis Helicopter Airways, Inc.* 869 S.W.2d 173 (Mo. App. 1993)
- *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985)

III. The Trial Court Did Not Abuse Its Discretion In Denying Margiotta's Motion To Strike Paragraphs Of Defendants' Statement Of Uncontroverted Facts, Because The Statement Sufficiently Complied With Rule 74.04(c), In That It Set Forth Factual Allegations In Numbered Paragraphs In A Manner That Allowed Margiotta To Respond To Those Factual Allegations.

- *Estate of Cates v. Brown*, 973 S.W.2d 909 (Mo. App. 1998)
- *Mathes v. Nolan*, 904 S.W.2d 353 (Mo. App. 1995)
- *McAninch v. Robinson*, 942 S.W.2d 452 (Mo. App. 1997)

IV. The Trial Court Did Not Abuse Its Discretion In Denying Margiotta's Second Motion For Continuance To Supplement The Summary Judgment Record Because Margiotta Failed To Establish That The Additional Materials Would Create An Issue Of Fact Relevant To The Summary Judgment Motion.

- *Adams v. City of Manchester*, 242 S.W.3d 418 (Mo. App. 2007)
- *Binkley v. Palmer*, 10 S.W.3d 166 (Mo. App. 1999)
- *State ex rel. Thomas v. Olvera*, 987 S.W.2d 373 (Mo. App. 1999)

Argument

The Hospital terminated Margiotta because he had an uncontrollable temper, cursing and yelling at co-workers and patients alike; throwing things around the room; and leaving patients in danger. There is no evidence that the Hospital terminated him in retaliation for his alleged whistle-blowing. Moreover, the “safety” regulations which he alleges the Hospital violated are much too vague and general to support an action for retaliatory discharge. Thus, regardless of the standard of causation, the trial court properly entered summary judgment for the Hospital.

This case and *Fleshner v Pepose Vision Institute, P.C.*, SC90032, however, are not before this Court primarily for review of evidentiary details. They are before this Court for a definitive ruling on the nature of the common law tort of retaliatory discharge. The facts of this case illustrate perfectly why such claims must remain a narrow exception to the employer’s ability to discipline or discharge an at-will employee.

The first duty of the Hospital – indeed, of any medical provider – is to secure the safety and welfare of its patients. Margiotta’s uncontrollable temper threatened those interests, as well as the safety and welfare of his co-workers. Any employer, especially a hospital, must have the ability to discipline or discharge such employees. A broad retaliatory discharge tort would directly interfere with that ability.

Standard of Review

The Missouri Rules of Civil Procedure encourage the use of summary judgment to permit resolution of claims in order “to avoid the expense and delay of meritless claims

or defenses and to permit the efficient use of scarce judicial resources.” *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* at 380-81.

A defendant establishes a right to summary judgment by showing “facts that negate *any one* of the claimant’s elements,” or “that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of the claimant’s elements.” *Id.* at 381.

This Court’s review of the trial court’s grant of summary judgment is *de novo*. *Id.* at 376. This Court may affirm the trial court’s judgment on any legal theory that is reasonably consistent with the pleadings. *Smith v. Square One Realty Co.*, 92 S.W.3d 315, 317 (Mo. App. 2002); *State ex rel. Conway v. Villa*, 847 S.W.2d 881, 886 (Mo. App. 1993).

This standard of review governs points I, III and V of Margiotta’s brief, which are addressed in Points I and II of this brief. Points II and IV of Margiotta’s brief, which are discussed in Points III and IV of this brief, address discretionary rulings of the trial court relating to the summary judgment proceedings. As set forth therein, those points are reviewed for abuse of discretion.

I. The Trial Court Properly Granted Summary Judgment To Defendants On Margiotta’s Whistleblower Claim For Wrongful Discharge Because He Did Not Produce Any Probative Evidence That His Reports Of Patient Care Complaints Played Any Causal Role In His Discharge.

Both parties agree that, regardless of what the standard is, Margiotta must prove a causal connection between his reports about patient care and his termination. Br. at 15 (plaintiff “must prove . . . that his discharge was attributable to” the reporting). Margiotta’s Point III asserts that he presented sufficient evidence on this point to make a case, at least if he does not have to prove that those complaints were the exclusive cause.

Margiotta is wrong. The record is crystal clear that the Hospital terminated him because he lost his temper, yelled at patients and co-workers, and started throwing things around the room. Since this was the culmination of numerous similar incidents, the Hospital decided that it simply could not continue to employ a rogue worker who could not control his temper.

A. Margiotta Presented No Evidence That He Was Discharged Because of the Patient Incident Complaints.

It is undisputed that the people who decided to terminate Margiotta’s employment believed that, on December 8, 2005, he lost his temper and started yelling at a patient. L.F. 229. They also believed that he threw a pillow against the wall, pulled some Chux from under the patient and threw them into a tub, and threw a piece of paper on the floor. L.F. 100. They also believed that he left a patient half on the CT scanning table and half

off. *Id.* The basis for this belief was the eyewitness testimony of Margiotta's co-workers who had seen or heard his tantrum.

This episode was the culmination of numerous other instances in which Margiotta lost his temper, most of which are undisputed:

- In July 2005, he yelled at a doctor, who refused to work with him again. L.F. 76, 84.
- In September 2005, his co-workers filed repeated complaints about Margiotta's loss of his temper, yelling and cursing. L.F. 76.
- On December 7, 2005, Margiotta refused to help a patient off the CT scan table and yelled at the patient. L.F. 92.

While Margiotta disputed the first incident, he did not dispute any of the others. The Hospital was certainly entitled to take the word of a physician about a technician's behavior at face value. Margiotta did not dispute that his personnel file reflected the doctor's complaint, or that Lundak believed that Margiotta had yelled at the doctor. L.F. 67 (¶4), L.F. 192 (¶4). He did not dispute that Lundak and the other decision-makers relied on Margiotta's personnel records in deciding to terminate him. L.F. 70 (¶16), L.F. 195 (¶16).

It is also undisputed that Lundak, Schneider and Hartwick decided to terminate Margiotta in a meeting called on December 9 in direct response to Margiotta's conduct on December 8. L.F. 77, L.F. 230-233, pp. 88-100. They made the decision immediately after interviewing the members of the Hospital staff that witnessed the incident on December 8 as well as Margiotta himself. L.F. 77, L.F. 232-35, pp. 96-108.

Lundak, Schneider and Hartwick considered Margiotta's prior work performance problems documented in his personnel file at their meeting on December 9, 2005. L.F. 77. That file demonstrates that Margiotta's conduct on December 8 was not an isolated incident, and that Hospital management was concerned about this conduct. The file contained numerous reports from co-workers to the effect that Margiotta "loses [sic] his cool," is "unable to handle the busy times," "cannot multi-task," "curses," "is unable to handle the volume," "is always pointing the finger at someone else," and that "anything unusual sets him off." L.F. 76, 77, 86.

Lundak testified that he did not believe there was any appropriate course of action other than discharge because the December 8 incident was "too severe This is a hospital we work in, and we want to keep our patients safe." L.F. 233, p. 100. Citing to statements in Lundak's affidavit, defendant's statement of material uncontested facts before the trial court asserted:

"On December 9, 2005, Hartwick, Schneider and Lundak made the decision to discharge Plaintiff. They made their decision in accordance with Christian Hospital's Corrective Action policy based on Plaintiff's egregious behavior on December 8, 2005. They based their decision on the information available to them at the time including the witness statements that had been collected at that point, their knowledge of Plaintiff's prior work performance problems which was documented in Plaintiff's personnel file, and also their discussion with Tim Cuff and Plaintiff following the incident."

L.F. 70, ¶ 16 (internal evidentiary citations omitted). In response to that statement, Margiotta admitted the first sentence and denied the remainder of the statement on the sole grounds that it was conclusory and hearsay. L.F. 195, ¶ 16. He presented no evidence contradicting that testimony. *Id.*

These statements were not hearsay, since they were based upon the firsthand account from Lundak's affidavit. L.F. 77, ¶ 12. Since they explained the basis for the decision to terminate Margiotta, they were hardly conclusory. Standing alone, paragraph sixteen makes a prima facie case for summary judgment.

Because the Hospital made a prima facie case for summary judgment, Margiotta could not simply stand on his denials. Rather, he was obliged to produce specific facts to prove, or at least to create a plausible inference, that the patient care complaints motivated his termination. *ITT*, 854 S.W.2d at 381; *White v. Zurbues*, 222 S.W.3d 272, 276 (Mo. banc 2007). He did not do so.

Rather than controvert these facts, Margiotta conceded that he had no basis, other than his own belief, for his conclusion that he was terminated based upon his complaints:

Q: All right. Why do you believe that you were fired from Christian Hospital because there was a protest that you made about patient care issues?

A: I believe I was fired for that reason because the accusations that were made were unfounded and I attempted to, you know, defend myself and counter and it was to no avail. The decision was made before I entered the room I felt.

L.F. 130, p. 205.

Q: Other than the fact that you believe that the accusations made against you were unfounded because your attempts to explain or deny the accusations were not successful and because you think the decision to terminate you was made before you entered the room on that day, December 9th, any other reasons why you believe that you were fired from Christian Hospital because you had raised issues about patient care?

A: No.

L.F. 132, p. 212.

So Margiotta's affidavit asserting that he was fired because of the patient care complaints, L.F. 203, ¶ 90, is mere speculation. As a matter of law, it is not substantial evidence that he was the victim of a retaliatory discharge. *Loomstein v. Medicare Pharmacies, Inc.*, 750 S.W.2d 106, 113 (Mo. App. 1988) (plaintiff's testimony about why he thought he was fired was "merely speculative" and cannot support a verdict).

Margiotta admitted that his discussion with Hospital management on December 9 was limited to his behavior on December 8 and a complaint from a patient regarding a transfer. There was no discussion of his patient care complaints. L.F. 211-13, pp. 173-188. There is no evidence that Hartwick and Schneider, two of the three decision-makers, were even aware of those complaints, Margiotta candidly admitted to a psychologist that he was terminated based on conflict with co-workers. L.F. 107. There is simply no evidence linking his discharge to any complaints he made about patient care.

The western district opinion in *Porter v. Reardon Machine Co.*, 962 S.W.2d 932 (Mo. App. 1998) is instructive here. The employee filed a wrongful discharge claim

asserting that he was fired for complaining to superiors, and threatening to call the EPA, about the adequacy of the ventilation and the face masks provided for welding operations. 962 S.W.2d at 934. Based on these concerns, Porter refused to perform the welding job he had been hired to do. *Id.* The employer gave Porter a written warning specifically referring to his complaints and his threats to call the EPA. *Id.* When Porter continued to refuse to perform welding work, he was terminated. *Id.*

The trial court granted summary judgment for the employer, and the court of appeals affirmed. Even if the plaintiff could prove that his complaints concerned statutory violations, he did not sufficiently prove causation:

“He failed to present evidence from which the jury could find he was fired for complaining to his superiors, which is the essence of whistleblowing. The facts set out above leave no question but that Reardon was willing to employ Mr. Porter despite his complaints, and that it fired him because he refused to do his job due to his belief that the ventilation and face masks were inadequate.”

962 S.W.2d at 940.

The same is true here. The Hospital continued to employ Margiotta for months after his complaints about alleged safety violations. Margiotta admitted that none of his supervisors ever chastised him or made any negative comments about those complaints. L.F. 126-27, pp. 161-62; L.F. 129, pp. 196-97.² He even agreed that Lundak was

² One of his co-workers told Margiotta that he was a whiner, but she was not a supervisor. L.F. 129, pp. 196-97.

“interested in hearing what I had to say” on those topics. L.F. 121, p. 130. And Margiotta did not dispute the Hospital’s evidence that Lundak investigated and followed up on the complaints. L.F. 223-26, pp. 49-73, L.F. 128, pp. 166-67.

Moreover, the patient care complaints are too remote in time to support a legitimate inference of causation. The relevant complaints occurred during the summer of 2005. The discharge did not occur until December 2005, months thereafter, and after repeated incidents of Margiotta’s misconduct.

The Supreme Court of the United States has held that a legitimate inference of causation based on temporal proximity between a protected act and an adverse employment action “must be ‘very close’” in time. *Clark County S.D. v. Breeden*, 532 U.S. 268, 273 (2001).

Similarly, in *Hickman v. May Dep’t Stores Co.*, 887 S.W.2d 628 (Mo. App. 1994), plaintiff filed a claim for workers’ compensation benefits. Seven months later, he received a negative job evaluation and two months later he was terminated:

“We hold that absent other substantial evidence of causality, the temporal proximity of these events is an insufficient basis on which to submit a retaliatory discharge claim to a jury.”

887 S.W.2d at 631, *citing Mitchell v. St. Louis County*, 575 S.W.2d 813, 815 (Mo. App. 1978) (discharge “several months after” filing claim was not causally related). *Accord*,

Hess v. Sanofi-Synthelabo Inc., 503 F. Supp.2d 1178, 1189 n.5 (E.D. Mo. 2007) (three months after protected conduct insufficient).³

Margiotta claims that the Hospital has implicitly admitted that events seven months prior to his termination “could have motivated their decision,” because Lundak considered the July incident involving Dr. Floyd. Br. at 29-30. This argument ignores the difference between a positive averment of fact, like Lundak’s testimony, and an inference. The cases hold that seven months between an event and a termination is too remote to permit a reasonable inference of causation.

This is particularly true when, as here, the evidence establishes that events subsequent to the complaints caused the discharge. Margiotta’s only misconduct that pre-dated his complaints was the July episode when he yelled at Dr. Floyd. Everything else that led to his termination happened after his complaints.

The presence of intervening events undermines any inference that otherwise might be drawn from the temporal proximity of the discharge and the protected activity. In *Hess*, during the three-month period between the plaintiff’s alleged refusal to perform an illegal act and her discharge, the employer documented two incidents that warranted the discharge. For this additional reason, the court found that the plaintiff did not create an issue of fact as to whether she was discharged for failing to perform illegal acts some

³ The incident in the fall of 2005 in which Margiotta overheard a co-worker tell Cuff about a patient being dropped does not count; the whistle-blower there was the co-worker, not Margiotta. L.F. 135, pp. 154-57.

three months earlier. *Id.* at 1189. *See also Loomstein*, 750 S.W.2d at 113 (granting judgment notwithstanding the verdict against employee’s public policy wrongful discharge claim when it “is also reasonable for one to conclude that other intervening events precipitated [plaintiff’s] discharge”).

Cases decided under the standard Margiotta claims should govern this case – the contributing factor standard applicable to Missouri Human Rights Act (MHRA) cases – demonstrate that this standard would produce the same result. For example, in *Reyna v. Barnes & Noble Booksellers*, 2009 WL 929135 (W.D. Mo. 2009), the district court granted summary judgment against the employee on his MHRA claim asserting discharge due to racial discrimination. The court noted that “the only evidence to which Reyna points in asserting that he was discrimination [sic] against are his own self-serving allegations and speculations, which are wholly insufficient to create an issue of fact.” *Id.* at *5.

Whatever standard the Court ultimately decides to employ, there is simply no evidence of a causal connection between the patient incident complaints and Margiotta’s termination. The trial court correctly granted summary judgment to defendants.

B. Minor Discrepancies In The Witnesses’ Description Of The December 8 Incident And The Hospital’s Response To It Do Not Create An Issue Of Fact About The Reason For Margiotta’s Discharge.

Since the only reason the Hospital terminated Margiotta was his inability to control his temper, he cannot point to any real evidence that the patient care complaints

played any role in that termination. Instead, he claims that various minor discrepancies in the testimony of the Hospital's witnesses are evidence of pretext.

For example, Margiotta claims that the witnesses to his outburst on December 8 disagreed about where it took place and who was present. Br. at 26-27. These details are quite irrelevant to the main issue: whether they reported to the Hospital that Margiotta lost his temper, yelled at a patient and a co-worker, and started throwing things. All of the Hospital's witnesses agreed that he did so. Moreover, it is undisputed that the Hospital's management questioned them the next day and they reported that Margiotta had thrown a tantrum. L.F. 94-102, 218, p. 44, 232, pp. 95-96, L.F. 233, p. 98.

Any minor discrepancies in where the tantrum took place or who watched it are irrelevant:

“[W]hile the testimony of Defendants Lowery and Smothers is not totally in accord, it is clear that the Plaintiffs were terminated because of their ongoing disagreement with Defendant Lowery regarding the escrow accounts. . . . The Court does not find this alleged discrepancy to be sufficient to support an argument that these reasons were pretextual.”

Criswell v. City of O'Fallon, 2008 WL 2439753 (E.D. Mo. 2008) (Webber, J.) at *10.

More fundamentally, these witnesses were not the decision-makers. *Lomax v. Daimler-Chrysler Corp.*, 243 S.W.3d 474 (Mo. App. 2007), holds that significant discrepancies in the testimony of the decision-maker about the reasons for an adverse employment action may warrant a finding of pretext. But any discrepancy in the testimony about **what** Margiotta did is quite irrelevant to **why** he was fired. If the

decision-makers believed he threw a temper tantrum, and fired him because of it, it does not matter where he threw it or who observed it.

Margiotta also claims that the tantrum could not have been severe because one witness testified that Cuff observed it and did nothing to intervene. He then jumps to the conclusion that Lundak must have been lying when he testified that Cuff told him that the employees were frightened. Br. at 27-28. There is no evidence that Lundak believed that Cuff had sat silently throughout the episode, so this inference is not reasonable.

Margiotta claims that Lundak could not have believed that Margiotta was dangerous because Lundak did not fire Margiotta until the end of the day on December 9. Br. at 28. Lundak's desire to find out what happened, so he could make a reasoned decision, hardly supports an inference that he did not believe what the witnesses told him. If he had fired Margiotta first thing in the morning, Margiotta would argue that the decision was uninformed and therefore pretextual.

Margiotta also complains that Lundak decided to give Margiotta an opportunity to speak before firing him. Since, according to Margiotta, his answers in the interview gave Lundak "no basis for firing him," Lundak's stated reasons must be pretextual. Br. at 28-29. This is nothing less than an argument that a jury's disbelief of Lundak's testimony makes a submissible case, and it is wrong as a matter of law:

“[R]ejection or disbelief of all or any part of defendant's testimonial account would not have been the equivalent of, and would not have constituted an acceptable substitute for, affirmative proof of those contrary facts essential to plaintiff's recovery”

Merriman v. Johnson, 496 S.W.2d 326, 331 (Mo. App. 1973), and cases there cited.

Margiotta presented absolutely no evidence to dispute Lundak's testimony that the Hospital terminated Margiotta based upon the contents of his personnel file and the statements (accurate or not) of the witnesses. *See* L.F. 70, 77, 194. Regardless of whether an exclusive causation standard or some lesser standard of causation applies, the trial court properly granted summary judgment to the defendants on Margiotta's wrongful discharge claim.

II. The Trial Court Properly Granted Summary Judgment To Defendants On Margiotta's Whistleblower Claim For Retaliatory Discharge, Because:

- A. A Common Law Retaliatory Discharge Tort Claim Must Remain A Narrow Exception To An Employer's Right To Discipline Employees;**
- B. The Tort Requires Proof Of A Clear And Specific Mandate Of Public Policy, Which Margiotta Has Not Identified; and**
- C. The Tort Requires Proof Of An Exclusive Causal Connection Between The Protected Conduct And The Discharge, A Standard Margiotta Cannot Meet.**

Since *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985), the courts of appeals have allowed a common law tort for retaliatory discharge in four discrete circumstances:

- The employee refused to perform an illegal act;

- The employee reported a violation of law or public policy to superiors or to public authorities;
- The employee participated in actions that public policy encourages, such as serving on a jury or seeking to join a union;
- The employee filed a workers' compensation claim.

Lynch v. Blanke Baer & Bowey Krimko, 901 S.W.2d 147, 150 (Mo. App. 1995).

Most claims – like Margiotta's – arise under the first or second exception, and the legal principles applicable to these exceptions are the same. This Court has assumed the viability of the tort, but “has not expressly defined nor adopted” it. *Luethans v. Washington University*, 894 S.W.2d 169, 171 n.2 (Mo. banc 1995).

In *Luethans*, this Court described the exception as a “limited public policy exception.” 894 S.W.2d at 171 n.2. *Boyle* described the exception as “narrow,” 700 S.W.2d at 871, while *Mehrer v. Diagnostic Imaging Center, P.C.*, 157 S.W.3d 315, 319 (Mo. App. 2005), described it as both “limited” and “narrow.”

For the reasons set forth below, public policy requires that the tort continue to be a narrow exception to the employer's ability to discipline its employees. That means that the public policy that supports the whistle-blower exception must be clear and specific, not vague and general. It also means that the employee must prove an exclusive causal connection between the protected activity and the discharge or other discipline.⁴

⁴ Point I-B responds to Point V of plaintiff's brief. Point I-C responds to Point I of plaintiff's brief.

A. A Common Law Retaliatory Discharge Tort Claim Must Remain A Narrow Exception To An Employer's Right To Discipline Employees.

As the facts of this case so well illustrate, the public policy exception lies at the intersection of two important but directly competing public interests. On the one hand, it is surely desirable for employees to refuse to commit crimes or to inform on those who do. But it is equally important that the employer have the ability to discipline its employees.

It is absolutely unacceptable for a hospital employee to yell at physicians, or to yell and curse at patients, or to throw things around the room. It is absolutely unacceptable for such an employee to leave patients half on and half off a CT scan table. To fulfill its first duty to the patients – protecting their welfare and safety – a hospital must be able to discipline and if necessary discharge such a rogue employee.

Employees like Margiotta also cause serious problems for their co-workers and for the efficient conduct of the employer's business. Any self-respecting physician would refuse to work with a technician that yelled at her, as Dr. Joyce did, but that is hardly conducive to the efficiency of the Hospital. Nor is employee morale likely to improve after listening to Margiotta's rants.

The employer also faces serious legal risks if it retains an employee who throws things at patients. The patient has a potential cause of action for assault and battery. It is not unlikely that the patient would couple those claims with claims for negligent hiring and negligent retention and seek punitive damages as a remedy.

An employer also faces serious legal liability to its employees if it permits one of their number to create a hostile working environment based on sexual or racial harassment. The Hospital does not suggest that Margiotta engaged in that kind of conduct, but other employees of other employers have in the past and doubtless will in the future. This Court's holding in the instant case will govern the ability of employers to discipline racist or sexist employees and the consequences of doing so.

The point is simple: both as a matter of law and as a matter of logic, the employer has a right to insist that its employees follow its "reasonable rules, orders and instructions" and the failure to do so is grounds for termination. *Stokes v. Enmark Collaborative*, 634 S.W.2d 571, 573 (Mo. App. 1982). And society has a strong interest in seeing to it that the employer can and does discipline rogue employees, including discharging them in appropriate cases.

Resolution of the parameters of the whistle-blower retaliatory discharge claim necessarily involves a tradeoff between these two competing social purposes. The lower the Court sets the bar for retaliatory discharge tort claims, the harder and more expensive it becomes for an employer to enforce necessary discipline or to terminate employees, like Margiotta, who pose a danger to the health and safety of patients and co-workers.

Suppose the Court lowers the bar sufficiently that Judge Stith's decision in *Reardon* comes out the other way. Any employee can refuse to do his or her job based on some real or imaginary concern about safety and the employer can do nothing about it without facing a lawsuit.

The reason that Missouri courts have historically stressed the narrow and limited nature of the whistleblower exception is precisely because there are legitimate public policy concerns about interfering with an employer's ability to impose necessary discipline. This Court has cautioned against "judicial invasion of management decisions" via tort claims against an employer. *Dake v. Tuell*, 687 S.W.2d 191, 193 n.4 (Mo. banc 1985). In deciding the parameters of the common law tort, the Court must consider those concerns.

B. The Tort Requires Proof Of A Clear And Specific Mandate Of Public Policy, Which Margiotta Has Not Identified.

The Missouri courts that have recognized retaliatory discharge tort claims by whistle-blowers have unanimously required a clear and specific public policy mandate. The general safety regulations on which Margiotta relies, of which he was not even aware during his employment, are far too general to satisfy this requirement.

The seminal case on this tort, *Boyle*, required plaintiff to prove a "well established and clear mandate of public policy." 700 S.W.2d at 878. *Boyle* found such a mandate in the "specific directives" that the FDA had imposed on eyeglass manufacturers, *id.* at 876, to wit, the lens does not break when a steel ball of a specified weight is dropped from a specified height. *Id.* at 872.

By contrast, "[v]ague regulations may not be sufficiently clear to make enforcement practicable through employment-related litigation." *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 338 (Mo. App. 1995). The courts of appeals have routinely

affirmed dismissals or summary judgments when the statute or regulation on which the whistle-blower relies is not clear and specific.

In *Lay v. St. Louis Helicopter Airways, Inc.*, plaintiff was a helicopter pilot. One day, he refused on three separate occasions to fly when directed to do so on the basis of his professional judgment that the flights would be too dangerous. The employer fired him.

Lay relied on an FAA regulation stating that the “pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.” He also relied on a code of ethics by the Helicopter Association International, stating that pilots must “exercise their best judgment to ensure a maximum safety factor at all times.”

The court of appeals for the eastern district affirmed a summary judgment in favor of the employer:

“The FAA’s regulation concerning a pilot’s responsibility and the ‘Code of Ethics’ requirement that a pilot use his best judgment are *not clear mandates* which allow employee to fall within the public policy exception. Nether imposes a duty on an employer to refrain from terminating a pilot whose judgment calls are contrary to the employer’s judgment. ”

869 S.W.2d at 177 (emphasis added).

The western district reached a similar conclusion in *Adolphsen*. Plaintiff was a co-pilot and aircraft mechanic whom Hallmark fired. His petition alleged that Hallmark had not complied with “federal ‘safety regulations’” and his report of this violation to the

chairman of the board caused his termination. The western district held that these allegations were too vague to state a cause of action:

“[T]here are all kinds of regulations. A regulation may be vague (such as a regulation that “no person may operate an aircraft in a careless or reckless manner”) or it may be specific (such as a requirement that a written aircraft lease shall include a “truth-in-leasing clause” in large print). A regulation may be related to safety (such as that no one shall operate an airplane under the influence of alcohol) or not so related (such as those related to the terms of aircraft leases).”

907 S.W.2d at 338. *Accord, Reardon*, 962 S.W.2d at 940 (affirming summary judgment when some regulations were of “minor importance” and none were tied to plaintiff’s termination).

Margiotta’s petition asserts that he reported violations of 19 CSR 30-20.021(3)(K)(3)(2007), A1 and 42 C.F.R. 482.13(c), A2. L.F. 9. These regulations are much too vague to support a whistle-blower claim. 19 CSR 30-20.021(3)(K)(3), provides:

“Each hospital shall develop a mechanism for the identification and abatement of occupant safety hazards in their facilities. Any safety hazard or threat to the general safety of patients, staff or the public shall be corrected.”

42 C.F.R.482.13(c) provides:

(c) Standard: Privacy and safety.

(1) The patient has the right to personal privacy.

- (2) The patient has the right to receive care in a safe setting.
- (3) The patient has the right to be free from all forms of abuse or harassment.

A2.

These regulations are no more specific than those which the courts rejected in *Lay* and *Adolphsen*. Neither regulation mandates or prohibits any particular practice or procedure. They do not require that patients be accompanied by hospital staff when waiting for a CT scan. They do not specify how many people should assist in transferring patients onto the CT scan table. Both regulations merely require “safe operations” without in any way specifying what is or is not “safe.”⁵

The kind of specific regulation that *Boyle* involved is essential to prevent juries from second-guessing employers on how to conduct their operations. “Safety” is an inherently subjective concept. The terminated employee will swear that his method of doing things is the only “safe” way; the employer retorts that its method is just fine. The

⁵ The Southern District’s opinion in *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo. App. 1993)(cited by Plaintiff in the Court of Appeals) dealt with an entirely situation. In that case, the Hospital provided no treatment to a dying woman. Plaintiff, a nurse, complained and was told to keep out of it. The Court of Appeals emphasized that the Plaintiff risked loss of her license under the applicable nursing regulations if she did not protest. *Id.* at 622. Margiotta, in contrast, could not conceivably claim that the cited regulations required him – under threat of discipline – to make the patient complaints.

jury gets to pick the answer with all the benefit of hindsight and all the sympathy toward an employee who lost his or her job.

Dispensing with the requirement of specificity guarantees that the employer has lost control over its employees. As the trial court in *Reardon* observed:

“Under Plaintiff’s theory, any at-will employee can complain generally about the safety of his or her workplace without being required to present any corroborative evidence for this subjective belief and, under threat of lawsuit, refuse to perform the job for which he or she was hired; literally being able to dictate the physical environment of a given workplace.”

962 S.W.2d at 936.

Finally, allowing recovery based on these kinds of broad, general regulations allows entirely too much opportunity for creative, after-the-fact lawyering. Margiotta admitted that he was unaware of either regulation during his tenure at the Hospital and he never told anyone that he believed the Hospital had violated them. L.F. 128; 167-68. The real threat to the general safety of the patients was Margiotta’s conduct – yelling, cursing and throwing things in patient care areas. That is why he was terminated.

In virtually every area of the economy, a creative lawyer can find some vague, general regulation enjoining the employer to “be safe” or “fly right” or “do good.” If complaints about these kinds of general, subjective issues constitute protected conduct, Missouri employers have essentially lost control of their work forces. That would make Missouri a far less attractive place for employers to do business – not exactly the kind of public policy the state should favor in these economic times.

Margiotta's discussion of this issue is virtually nonexistent. He recites the two federal regulations in question and asserts that he complained about conditions that violated them, but he says nothing about the requirement that those regulations be specific. Br. at 40-41.

C. The Tort Requires Proof Of An Exclusive Causal Connection Between The Protected Conduct And The Discharge, A Standard Margiotta Cannot Meet.

Point I of Margiotta's brief asserts that the trial court erred in requiring him to establish an exclusive causal connection between his allegedly protected acts and his termination. In recognition of the public policy tradeoffs that the tort requires, every prior holding of Missouri courts on retaliatory discharge has imposed such a requirement.

At the outset, Margiotta has waived his right to challenge the exclusive causation standard because he did not raise the issue in the trial court. Margiotta filed no opposition to the Hospital's motion for summary judgment. He cannot raise the argument for the first time on appeal. *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. App. 1996); *D.E. Properties v. Food For Less*, 859 S.W.2d 197, 201 (Mo. App. 1993).

The issue is properly preserved in *Fleshner*, and the Hospital believes that the Court would benefit from a full exposition of why exclusive causation is necessary in a retaliatory discharge case. The source of the rule is Judge Billings' opinion for this Court in *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. banc 1984), a

unanimous opinion on this issue. *Hansome* involved a retaliatory discharge for the exercise of rights under the workers' compensation statute, in violation of § 287.780, R.S.Mo. *Hansome* requires "an exclusive causal relationship" between the exercise of rights protected under the statute and the termination. 679 S.W.2d at 275.

The Court next revisited the issue in *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. banc 1998). *Crabtree* reaffirmed the exclusive causation requirement for retaliatory discharge claims involving workers' compensation issues:

"[T]his Court should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of stare decisis, at least in the absence of recurring injustice or absurd results."

967 S.W.2d at 71-72.

As previously noted, the courts of appeals have treated retaliation for invoking workers' compensation rights as one of the four types of common law tort of retaliatory discharge. In reliance on *Hansome* and *Crabtree*, Missouri courts have unanimously held that the plaintiffs' burden in all such claims is exclusive causation. *E.g.*, *Bell v. Dynamite Foods*, 969 S.W.2d 847, 852 (Mo. App. E.D. 1998); *Grimes v. City of Tarkio*, 246 S.W.3d 533, 536 (Mo. App. W.D. 2008); *Lynch*, 901 S.W.2d at 152.

Once again, the higher standard of causation is essential to preserve the employer's ability to discipline its work force. It is by no means unheard of for an employee who knows that he or she is on shaky ground to blow the whistle on some

innocuous conduct as a means of obtaining some job security. As this Court held in *Crabtree*:

“[A]n employee who admittedly was fired for tardiness, absenteeism, or incompetence at work would still be able to maintain a cause of action for discharge if the worker could persuade a factfinder that, in addition to other causes, *a* cause of discharge was the exercise of rights under the workers’ compensation law. Such rule would encourage marginally competent employees to file the most petty claims in order to enjoy the benefits of heightened job security.”

967 S.W.2d at 72 (emphasis original).

Margiotta’s arguments for a different result are not persuasive. It is quite true, for example, that whistle-blower retaliatory discharge claims arise under the common law instead of a statute. Br. at 17. It is precisely because these are common law claims that this Court is free to adapt the tort to consider the competing public policies at stake.

When it comes to a common law tort, the question of public policy is “better resolved by the judiciary.” *Carver v. Shafer*, 647 S.W.2d 570, 575 (Mo. App. 1983):

“[A] court’s refusal to decide questions of public policy is a mistaken abdication of the function of a common law judge. “Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy”

Id., quoting O.W. Holmes, *The Common Law* (1881) at 35-36.

The Hospital recognizes that, in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007), this Court held that the plaintiff in an MHRA case needed only to show that an improper factor contributed to the adverse employment decision. But the holding rested entirely on the statutory language. 231 S.W.3d at 818. In interpreting a statute, this Court must follow the legislature's policy choice. At common law, the Court is free to develop its own policy.

As the Hospital has explained, whistle-blower retaliation claims are fundamentally different from the discrimination claims that are the primary focus of the MHRA and much more subject to abuse. An employee cannot "set up" his or her employer for the latter kind of claims. Clearly, if an employer makes an employment decision based on race, gender, age, disability or religion, rather than the individual's qualifications, skills and performance, the employer should be subject to a discrimination lawsuit.

Whistle-blower retaliation claims are different. An employee who is nervous about getting disciplined or discharged can "set up" the employer by blowing the whistle about something and then claiming that fully-justified discipline is retaliation. That gives the employer the unpleasant choice of facing a lawsuit for actual and punitive damages or surrendering control of the workplace to recalcitrant employees.

Requiring the employee to prove exclusive causation does make it harder for plaintiffs to win retaliatory discharge cases. Given the ease with which the tort may be abused, it should be harder. Requiring proof that retaliation is merely a contributing factor makes a lawsuit much too easy for feckless employees like Margiotta who ought to be discharged.

Margiotta claims that other states do not require exclusive causation in retaliatory discharge cases. Br. at 20-21. As Margiotta's own brief recognizes, many of these cases involve statutes on which the courts must defer to the legislature. *E.g.*, *Buckner v. General Motors Corp.*, 760 P.2d 803 (Okla. 1988); *Hubbard v. United Press Int'l*, 330 N.W.2d 428 (Minn. 1983). None of them consider the special nature of whistle-blower retaliatory discharge cases or their ready susceptibility to abuse. Thus, none offer a persuasive reason for abandoning the exclusive causation requirement that Missouri courts have historically required.

At bottom, Margiotta is arguing that he can collect 100% of his actual and punitive damages if he can prove that 1% of the Hospital's motive for terminating him was retaliation, even though 99% of the motive was his misconduct toward patients and his co-workers. As a matter of policy, this makes no sense.

The Court need not reach this issue to decide Margiotta's appeal because he did not preserve the point and he has no evidence that retaliation played any role in his termination. If the Court does decide the issue, either in this case or in *Fleshner*, the Court should retain the exclusive causation requirement. At the very least, given the ready possibility of abuse, the Court should require that retaliation be the employer's predominant motive.

III. The Trial Court Did Not Abuse Its Discretion In Denying Margiotta’s Motion To Strike Paragraphs Of Defendants’ Statement Of Uncontroverted Facts, Because The Statement Sufficiently Complied With Rule 74.04(c), In That It Set Forth Factual Allegations In Numbered Paragraphs In A Manner That Allowed Margiotta To Respond To Those Factual Allegations.

In Point II of his brief, Margiotta asserts that the trial court erred in granting summary judgment because the statement of uncontested facts had too many facts in some of the separately numbered paragraphs. Margiotta moved to strike these paragraphs for this alleged non-compliance with Rule 74.04. L.F. 251. The trial court effectively denied the motion to strike on May 12, 2008 when it granted summary judgment for defendants, based upon, *inter alia*, consideration of “all” statements of uncontroverted facts and the responses thereto. L.F. 311.

Margiotta claims that the applicable standard of review is *de novo*. Br. at 22. That is the proper standard for an order granting summary judgment. It is not the proper standard for an order denying a motion strike. This Court reviews those rulings for abuse of discretion. *Frankel v. Hudson*, 196 S.W. 1121, 1124 (Mo. banc 1917); *Kanton v. Luettecke Travel Serv., Inc.*, 901 S.W.2d 241, 246 (Mo. App. 1995).

Rule 74.04(c)(1) requires a moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue” Defendants’ statement of facts contained separately numbered paragraphs, and those paragraphs set forth the material facts on which the motion was

based. The motion therefore complied with Rule 74.04(c)(1). *See Estate of Cates v. Brown*, 973 S.W.2d 909, 916 (Mo. App. 1998) (“In the instant case, the respondent’s motion for summary judgment complies with Rule 74.04(c)(1) . . . [it] contains separately numbered paragraphs setting out facts alleging that there are no genuine issues of material fact to be decided.”). Nothing in Rule 74.04(c)(1) requires the movant to set forth each *sentence* in its own numbered paragraph, particularly when the sentences all relate to one overall factual assertion.

Assuming *arguendo* that any of defendants’ statement of facts were technically noncompliant with Rule 74.04(c)(1), Missouri courts have held that such minor noncompliance does not warrant reversal. *Cates*, 973 S.W.2d. at 916; *McAninch v. Robinson*, 942 S.W.2d 452, 455 (Mo. App. 1997); *Mathes v. Nolan*, 904 S.W.2d 353, 355 (Mo. App. 1995). These courts have reasoned that the purpose of Rule 74.04(c)(1) is “to apprise the opposing party, the trial court, and the appellate court of the specific basis upon which the movant claims it is entitled to summary judgment.” *Mathes*, 904 S.W.2d at 355. Consequently, “[w]here . . . a responding party sufficiently understands the issues to make a specific response, and the issues presented are clear to the trial and appellate courts, the particular requirements of Rule 74.04(c) may be considered as having been met.” *McAninch*, 942 S.W.2d at 455, *citing Agribank FCB v. Cross Timbers Ranch*, 919 S.W.2d 263, 267-38 (Mo. App. 1996).

Margiotta’s response to the statement of facts reveals that he both understood the basis for the motion and was able to specifically respond to each numbered paragraph.

L.F. 190. Margiotta does not argue that this hypertechnicality prejudiced him in any way. Point II is frivolous.

IV. The Trial Court Did Not Abuse Its Discretion In Denying Margiotta’s Second Motion For Continuance To Supplement The Summary Judgment Record Because Margiotta Failed To Establish That The Additional Materials Would Create An Issue Of Fact Relevant To The Summary Judgment Motion.

In Point IV of his appeal, Margiotta claims that the trial court erred in denying him a second continuance of his deadline to respond to summary judgment so that he could file the deposition transcript of Dave Moutria. Even though Margiotta’s counsel had already taken the deposition, and knew precisely what Moutria had to say, she did not comply with Rule 74.04(f) in explaining precisely what testimony she proposed to use. So the trial court properly denied the motion.

A trial court has discretion to refuse a party’s motion to continue a summary judgment hearing, and this Court reviews for abuse of that discretion. *Ronollo v. Jacobs*, 775 S.W.2d 121, 126 (Mo. banc 1989); *Adams v. City of Manchester*, 242 S.W.3d 418, 427 (Mo. App. 2007). “The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.” *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000), quoting *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991).

Rule 74.04(f) governs the continuance of summary judgment motion proceedings to allow for additional discovery. The rule provides:

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated in the affidavits facts essential to justify opposition to the motion cannot be presented in the affidavits, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 74.04(f).

To justify a continuance, an affidavit has to do more than just assert that “further discovery might provide the necessary evidence.” *State ex rel. Thomas v. Olvera*, 987 S.W.2d 373, 376 (Mo. App. 1999). It must “specify what additional evidence supporting the existence of a factual dispute” would be adduced by such deposition. *Binkley v. Palmer*, 10 S.W.3d 166, 173 (Mo. App. 1999). “It is not sufficient to allege that further discovery ‘might’ enable a party to stumble upon necessary evidence.” *Kemp Constr. Co. v. Landmark Bancshares Corp.*, 784 S.W.2d 306, 309 (Mo. App. 1990), citing *Gal v. Bishop*, 674 S.W.2d 680, 683 (Mo. App. 1984). Absent a showing that additional discovery would have shown the existence of a genuine issue of material fact, a trial court does not abuse its discretion in refusing a request for a continuance prior to ruling on a summary judgment motion. *Adams*, 242 S.W.3d at 427.

Here, Margiotta attached the affidavit of his counsel, M. Beth Fetterman, to his second motion for continuance. L.F. 253, 256. The affidavit contains only a conclusory statement that the testimony of Dave Moutria raises “material facts to dispute issues raised by defendant in its Motion for Summary Judgment.” L.F. 257. The affidavit further states the affiant’s belief that “Moutria’s testimony has established disputed issues

of material fact regarding the incident that occurred on December 8, 2005 and the true reason(s) for plaintiff's termination." L.F. 257. That is a far cry from the specificity that the Rule requires.

Margiotta claims that the affidavit was "as descriptive as possible given that this was not a requested continuance to obtain an affidavit from a witness where the moving party knows in advance what the witness is going to say." Br. at 37. Margiotta does not inform the Court that his counsel had deposed Moutria the preceding day and knew exactly what Moutria said in his deposition. Counsel could have provided a summary of the relevant portions of that testimony. She did not.

Based on that silence, the trial court reasonably concluded that Moutria *could not* offer any evidence bearing upon the reasons for Margiotta's termination. Moutria was not involved in the decision to terminate Margiotta and was not present when that decision was made. L.F. 233-35, pp. 97-108. The record already contained Moutria's statement, taken immediately after the December 8 incident, with his account of the events of that day. L.F. 100-102. This is the relevant account of those incidents for purposes of summary judgment because it is the account that was before the Hospital management when they made the decision to terminate Margiotta. L.F. 77. Any testimony by Moutria could not relate to the only real issue, the reason why the Hospital terminated Margiotta.

Margiotta's accusation that defendants "hid" this witness until shortly before the deadline for filing summary judgment is ludicrous. Br. at 38. Margiotta himself should have been well aware his counsel might want to depose Moutria – the individual he

yelled at on December 8, 2005. Although Margiotta filed his petition on April 5, 2007, Margiotta's counsel did not provide defendants' counsel with a list of the individuals they wanted to depose until March 13, 2008. L.F. 8, 170. In response, defendants' counsel advised Margiotta's counsel that Moutria was no longer a Hospital employee. L.F. 170. Upon request, defendants' counsel provided contact information for Moutria. L.F. 170. Though trial was set for May 19th, L.F. 267, Margiotta's counsel did not obtain subpoenas for these depositions until April 28, 2008 and did not schedule the depositions until May 7th, the date the responsive summary judgment pleading was due. L.F. 249.

The trial court did not abuse its discretion when it refused to allow Margiotta a second extension of time to file Moutria's testimony.

Conclusion

For these reasons, respondents, Christian Hospital Northeast-Northwest d/b/a Christian Hospital and BJC Health Systems, respectfully request this Court to affirm the grant of summary judgment.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 12,563 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Word 2003. The undersigned counsel further certifies that the accompanying CD has been scanned and is free of viruses.

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing brief and a CD were forwarded this 24th day of August, 2009, by first class mail, postage prepaid, to:

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Appendix

Mo. Code Regs. Ann. Title 19, § 30-20.021(3)(K)(3) (2007).....A 1

42 C.F.R. § 482.13(c)A 2