No. SC86060

IN THE
SUPREME COURT
OF MISSOURI

PREMIUM STANDARD FARMS, INC., A CORPORATION,
RESPONDENT

v.

JASON SHULER,
APPELLANT.

Appeal from the Circuit Court
of Daviess County, Missouri
Division I

Honorable Warren L. McElwain, Judge

SUBSTITUTE RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

The action is one involving the question of whether Respondent Premium Standard Farms ("PSF") violated Missouri public policy when it discharged Appellant Jason Shuler ("Appellant") on March 30, 2000. The trial court concluded as a matter of law PSF did not and accordingly granted PSF's Motion for Judgment in Accordance With Its Motion for Directed Verdict on June 3, 2002. Appellant appealed that grant to the Missouri Court of Appeals, Western District.

On appeal, the Court of Appeals initially concluded the trial court properly granted PSF's Motion for Directed Verdict (November 25, 2003 Court of Appeals Opinion). After Appellant filed a Motion for Rehearing or Transfer to the Supreme Court, the Court of Appeals reversed itself (April 13, 2004 Court of Appeals Opinion).

PSF filed a Motion for Rehearing or Transfer to the Supreme Court in the Court of Appeals on April 28, 2004. The Court of Appeals denied PSF's Motion for Rehearing or Transfer on June 1, 2004. PSF filed an Application for Transfer to the Supreme Court with this Court on June 15, 2004 pursuant to Missouri Supreme Court Rule 83.04. This Court granted PSF's Application for Transfer on August 24, 2004 pursuant to Rule 83.04. Article V, Section 10 of the Missouri Constitution vests jurisdiction in this Court the same as if the case were heard on original appeal.

STATEMENT OF FACTS

A. Substantive Facts

On March 23, 2000, Land Application Superintendent Richard Snapp and Appellant--in the company of Ben Musick--met at the Ruckman farm office and discussed how to soil sample a field on the Rasmussen farm on which commercial anhydrous had already been applied (Transcript ("Tr.") at 19-20).[1] Appellant claims Mr. Snapp--who was his direct supervisor--told him to take the sample from a field on which commercial anhydrous had not been applied and represent it as coming from the one on which it had, i.e., to misrepresent the origin of the soil sample (Tr. at 19-20, 23). Mr. Snapp claims he told Appellant to take the soil sample from the proper field, but to be sure he and/or his crew did not insert the soil sample probe directly into the chisel tracks made applying the commercial anhydrous because it would produce an inaccurately high nitrogen reading (Tr. at 130-32, 154).[2]

On March 28, 2000, Appellant advised his crew--including Jeff Ellis and Ben Musick--that they were to begin land application of effluent on a specific field the next morning when the temperature reached forty degrees, and he would "be getting [them]"

[1] Under its policies and practices, PSF soil samples fields to help determine the amount of effluent it can apply on the soil in question (Tr. at 12-13). A soil sample is taken by variously inserting a probe into the ground and extracting soil, mixing the extracted soil (the "cores") together, and obtaining a reading from the mixed soil (id.).

[2] Commercial anhydrous is injected into a track made by the chisel and then spreads laterally to the areas between the tracks (Tr. at 131).

the required work order (Tr. at 36, 108, 110, 116-17).[3] Thereafter, Appellant attempted to obtain from Jeremy Hill in PSF's Environmental and Regulatory Compliance Department ("ERC") the required work order, but was unable (Tr. at 29, 37-38; Hill Deposition ("Dep.") at 7). Notably, Mr. Hill did not promise Appellant that ERC would issue the required work order the next morning, either (Tr. at 186-87).

The next morning (March 29), Appellant attended a Land Application meeting (Tr. at 22). During that meeting, Appellant received a page from his crew at the Ruckman farm (id.) and learned--at least according to the testimony of the only other witness that he called to testify on his behalf--that his crew was applying effluent without a work order, but did not order them to stop (Tr. at 64-66, 69). After the meeting concluded, Appellant again tried to obtain the required work order from Rhonda Hoerrman in PSF's ERC Department, but was unable (Tr. at 42-43, 97).

Appellant thereafter informed Land Application Manager Matthew Brock that Mr. Snapp had instructed him on March 23 to misrepresent the origin of a soil sample, including telling Mr. Brock that Mr. Snapp had ***specifically*** directed him to take a soil sample from a field that had not been treated with commercial anhydrous and represent it as coming from one that had (Tr. at 21-23, 165-69). Appellant also told Mr. Brock that Ben Musick was present when Mr. Snapp issued the instruction and could and would confirm that Mr. Snapp had, in fact, issued the instruction (Tr. at 168).

[3] Under PSF's polices and practices, including its Standard Operating Procedures, ERC must issue a work order and the Land Application crew must have the work order ***in hand*** before any application of effluent is allowed (Tr. at 32-33, 183-84).

Thereafter, Appellant left for the Ruckman farm where his crew had begun applying effluent that morning when the temperature reached forty degrees (Tr. at 30-31). When he left for the Ruckman farm, Appellant knew he had been unable to obtain the required work order that he had told his crew the day before he would "secure" (Tr. at 50, 183). However, Appellant did not inform his crew at any time prior to his arrival at the Ruckman farm that he had been unable to "secure" the required work order, and they began applying effluent that morning when the temperature reached forty degrees, as they believed Appellant had instructed the evening before (Tr. at 44, 49-50, 110, 117).[4]

When he arrived at the Ruckman farm and saw his crew applying effluent, Appellant again did not instruct his crew to cease the unauthorized application of effluent (Tr. at 31, 45-49). Instead, he called PSF's ERC department and once again sought the work order he had already been told could not and would not be issued (Tr. at 49-50, 98). Appellant did not instruct his crew to cease the unauthorized application of effluent until Mr. Brock--his supervisor's supervisor--specifically ordered him to (Tr. at 48-49, 179-80).

After instructing his crew to cease the unauthorized application of effluent, Appellant ordered Mr. Musick--who was present for Appellant's instruction the night before to begin applying effluent when the temperature reached forty degrees--to the

[4] Appellant claimed in rebuttal at trial that he told his crew to make sure they had a work order in hand before they started applying effluent (Tr. at 212). However, that was the first time Appellant made that claim (Tr. at 5-59, 180-88), and his crew disputes it (Tr. at 110, 117).

Ruckman farm office (Tr. at 118). Upon Mr. Musick's arrival at the Ruckman farm office, Appellant asked him why he had "fired up without a work order" and suggested that Mr. Musick "not [] say because he told me to" (id.).

After ordering Appellant to instruct his crew to cease the unauthorized application of effluent, Mr. Brock interviewed Mr. Snapp about both the unauthorized application of effluent and Appellant's allegation regarding the soil sample (Tr. at 136-38, 140-41, 168, 171, 179-81). Regarding the unauthorized application of effluent, Mr. Snapp advised Mr. Brock he was not aware of it until he arrived at the Ruckman farm that day, at which point Appellant was instructing his crew upon Mr. Brock's specific order to cease the unauthorized application (Tr. at 136-38, 141, 181, 189).

Regarding Appellant's allegation about the soil sample, Mr. Snapp denied instructing Appellant to misrepresent the origin of a soil sample (Tr. at 137-40, 171). Mr. Snapp told Mr. Brock he had simply advised Appellant to ensure he and/or his crew did not insert the soil sample probe directly into the chisel tracks created by the application of the commercial anhydrous because it would produce an inaccurately high nitrogen reading (id.).[5]

Mr. Brock then advised Mr. Snapp he wanted him, Appellant, and Mr. Musick to meet in Mr. Brock's office the next morning (March 30) at 8 a.m. (Tr. at 180-81). During that March 30 meeting, Mr. Brock investigated both the unauthorized application of effluent and Appellant's allegation regarding the soil sample (Tr. at 181-85). Regarding

[5] Such an instruction was not contrary to PSF's policies in any way (Tr. at 143-44, 170-75).

the unauthorized application of effluent, Mr. Musick reported that Appellant had on March 28 advised his crew they were to begin applying effluent the next morning (March 29) when the temperature reached forty degrees and that he would "secure" the required work order from ERC (Tr. 183-84). Appellant told Mr. Brock he did not "specifically tell Mr. Musick to fire up without a work order, but that he did give the direction to start equipment when the temperature got to 40 degrees and that he was going to be in Princeton for a meeting and that he would secure the work order and bring it back with him" (id.). Mr. Brock then asked both Appellant and Mr. Musick where PSF's Standard Operating Procedures indicated "that a temperature of 40 degrees and a work order being on the way made it acceptable to start up application equipment," and both confirmed they did not (Tr. at 184). Notably, Appellant did not claim to Mr. Brock the morning of March 30 that he had told his crew to make sure they had a work order in hand on or before applying effluent on March 29 (id. at 180-88).

Regarding Appellant's allegation about the soil sample, Appellant retreated from his previous day allegation and stated only that he had ***inferred*** that Mr. Snapp wanted him to misrepresent the origin of the soil sample, not that Mr. Snapp had ***specifically*** directed him to, as he had previously claimed (Tr. at 184-85). Mr. Snapp restated his previous day denial and repeated that he had instructed Appellant only to ensure that he and/or his crew avoid inserting the soil sample probe directly into the chisel tracks created in applying the commercial anhydrous (Tr. at 184-85).

Mr. Brock then met separately with Mr. Musick, who Appellant had indicated could and would confirm Mr. Snapp's instruction to misrepresent the origin of the soil sample (Tr. at 55-57, 168, 185). During that meeting, Mr. Musick did ***not*** confirm

Appellant's allegation against Mr. Snapp. Instead, Mr. Musick refuted Appellant's allegation, confirmed that Mr. Snapp had not "directed [Appellant] to sample from another field and submit those to ERC" and further confirmed that Mr. Snapp had simply instructed Appellant "not to sample within grooves cut in the soil where the anhydrous was applied" (Tr. at 119-21, 185).

As a result of the 8:00 a.m. March 30 meeting, Mr. Brock disciplined Mr. Musick for his role in the application of the effluent without a work order and suspended Appellant while he investigated further (Tr. at 184-87). For his further investigation, Mr. Brock met with PSF's ERC department regarding Appellant's March 28 and 29 attempts to obtain a work order (id.). In those meetings, Mr. Brock learned that Appellant had requested a work order the evening of March 28, but had been unable to obtain one (id.). Mr. Brock also learned that Appellant had requested a work order again the morning of March 29, but had been unable to obtain one (id.).

As a result of (1) his March 30 meeting with Appellant, Mr. Snapp, and Mr. Musick, and (2) his further investigation with ERC, Mr. Brock concluded Appellant had "communicated to his personnel in a manner which led them to believe they could land apply effluent without an open work order, in direct violation of the Land Application/ERC Standard Operating Procedures" and had "relay[ed] information which proved to be unfounded, as regards directions given on the manner and method by which soil sampling should be done, in an attempt to discredit his direct supervisor" (Tr. at 187-88; Exhibit D-1). As a result, Mr. Brock decided to discharge Appellant (Tr. at 187-88; Ex. D-1).

B. Procedural Facts

On February 27 and 28, 2002, the parties tried this case to a jury before the Honorable Warren L. McElwain (Legal File ("L.F.") at 3-6). During trial, Appellant offered only two witnesses--himself and Derryl Niffen--to support his claims, although Mr. Niffen ultimately did not (Tr. at 5-75). However, neither of those witnesses--including Appellant himself--offered even a scintilla of evidence to support Appellant's claim in his First Amended Complaint ("FAP") that "[t]he real reason that Plaintiff, Jason Shuler, was terminated was because he refused to take soil samples from the side of the field (as opposed to the portion of the field which was actively farmed) or from other fields to send to DNR (Missouri Department of Natural Resources) because the soil samples would not have been a correct representation of the content for the entire field but would have been a misrepresentation and false reading . . . ." (L.F. at 10 ¶ 3).

In fact, Appellant completely abandoned that claim at trial. Instead, Appellant claimed during direct examination at trial that PSF "primarily" discharged him because he was a "whistleblower" (i.e., because he reported Mr. Snapp for allegedly instructing him to misrepresent the origin of a soil sample) (Tr. at 24), a claim he had not pleaded in his FAP or at any other time (L.F. at 8-15). On cross-examination, Appellant further conceded he believed PSF also discharged him (1) because they mistakenly believed he had allowed operation of irrigation equipment to land apply effluent without a work order and (2) to avoid paying him his quarterly and annual bonus (Tr. at 54-55, 107-08).

At the close of Appellant's thin case, PSF moved both orally and in writing pursuant to Mo. R. Civ. P. 72.01(a) for a directed verdict on both Counts of Appellant's FAP (Tr. at 75-87). After oral argument, the Court overruled PSF's Rule 72.01(a) motion (id.).

PSF then presented its case to the jury. In its case, PSF (1) reiterated that not even Appellant believed the requisite ***exclusive*** casual connection existed between his refusal to misrepresent the origin of a soil sample and his discharge (Tr. at 107-08), and (2) presented unchallenged evidence that--at the time he made the decision to discharge Appellant--Land Application Manager Matthew Brock believed both that Appellant had "communicated to his personnel in a manner which led them to believe they could land apply effluent without an open work order, in direct violation of the Land Application/DERC Standard Operating Procedures" and had "relay(ed) information which proved to be unfounded, as regards directions given on the manner and method by which soil sampling should be done, in an attempt to discredit his direct supervisor" (Tr. at 119-22, 131-32, 137, 140, 154, 180-88; Ex. D-1).

At the conclusion of its case, PSF moved both orally and in writing pursuant to Mo. R. Civ. P. 72.01(b) for a directed verdict on Counts I and II of Appellant's FAP and further moved the Court to refuse to instruct the jury on punitive damages because Appellant failed to make a submissible case regarding same (L.F. at 25-32). After oral argument, the Court overruled PSF's Rule 72.01(b) motion as to Counts I and II and sustained PSF's motion regarding the submissibility of punitive damages (L.F. at 6). The Court then submitted Counts I and II to the jury for determination (id.).

After approximately four hours of deliberations on February 28, the jury returned a verdict in favor of Appellant on Count I and announced it was deadlocked 6-6 on Count II (L.F. at 5). After consulting with counsel for the parties, the Court then declared a mistrial as to Count II (id.).

On April 1, 2002, PSF filed its Motion for Judgment In Accordance With Its Motion For Directed Verdict pursuant to Rule 72.01(b). After the parties fully briefed PSF's Motion, the Court granted it on June 3, 2002 as follows:

> Upon Count II of plaintiff's First Amended Petition and pursuant to Mo. R. Civ. P. 72.01(b), the Court hereby grants defendant's timely Motion for Judgment In Accordance With Its Motion For Directed Verdict At The Close Of All Evidence for the following reasons: First, plaintiff failed to offer sufficient evidence at trial to support the theory under which he pleaded his claims; Second, plaintiff failed to present sufficient evidence at trial from which a reasonable fact-finder could conclude there was an exclusive causal connection between whatever protected activity he claims and his discharge; and Third, plaintiff failed to present sufficient evidence at trial from which a reasonable fact-finder could conclude Mr. Brock did not honestly believe at the time he made the decision to discharge plaintiff that plaintiff had communicated with his personnel in a manner that led them to believe they could land apply effluent without a work order, which was directly contrary to defendant Premium Standard Farms, Inc.'s policies and practices, or that plaintiff had relayed information that proved to be unfounded, namely that his supervisor had directed him to misrepresent the origin or a soil sample.

(Appendix ("App.") at A1-A2).

Appellant appealed. On appeal, the Court of Appeals initially concluded the trial court properly granted PSF's Motion because "[its] review of the record confirms Shuler did not present substantial evidence in support of his Count II allegation that he was

discharged for 'refusing' to perform an illegal act. . . . Shuler's own testimony clearly established his belief that he was discharged for *reporting* his supervisor's unlawful misconduct" (November 25, 2003 Court of Appeals Opinion at 8).

After Appellant filed a Motion for Rehearing or Transfer to the Supreme Court, the Court of Appeals reversed itself (April 13, 2004 Court of Appeals Opinion). In so doing, the Court concluded Appellant's trial testimony effectively amended his Petition and that the trial court therefore had improperly refused to give Appellant's proposed jury instruction containing his alternative theories of recovery, namely that PSF terminated his employment because he refused to misrepresent the origin of a soil sample ***and*** because he was a "whistleblower" (April 13, 2004 Court of Appeals Opinion at 10-11).

PSF filed a Motion for Rehearing or Transfer to the Supreme Court in the Court of Appeals on April 28, 2004. The Court of Appeals denied PSF's Motion for Rehearing or Transfer to the Supreme Court on June 1, 2004. PSF filed an Application for Transfer to the Supreme Court with this Court on June 15, 2004 pursuant to Missouri Supreme Court Rule 83.04. This Court granted PSF's Application for Transfer on August 24, 2004 pursuant to Rule 83.04.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERROR IN SUSTAINING RESPONDENT'S MOTION FOR A DIRECTED VERDICT ON COUNT II OF APPELLANT'S FIRST AMENDED PETITION

In his Points Relied On I, Appellant claims the trial court erred in sustaining Respondent's motion for a directed verdict on Count II of Appellant's FAP because Appellant offered sufficient evidence to make a submissible case on the issue of wrongful discharge. Appellant is wrong.

STANDARD OF REVIEW

Appellant's Motion for Judgment in Accordance With Its Motion for Directed Verdict essentially presented the Court with the same issue as a motion for a directed verdict; i.e., whether the party with the burden of proof made a submissible case. See McNear v. Rhoades, 992 S.W.2d 877, 886 (Mo. Ct. App. 1999). See also Wells v. Orthwein, 670 S.W.2d 529, 532 (Mo. Ct. App. 1984) (same).[6] "A submissible case

[6] In considering a motion for a directed verdict, the court must view the evidence presented at trial in the light most favorable to the non-moving party to determine whether substantial evidence was introduced that tended to prove facts essential to plaintiff's recovery. Barnett v. LaSociete Anonyme Turbomeca France, 963 S.W.2d 639, 659 (Mo. Ct. App. 1997), cert. denied, 525 U.S. 827 (1998); Gamble v. Bost, 901 S.W.2d 182, 185 (Mo. Ct. App. 1995); Lindsey Masonry Co. v. Jenkins & Assoc., 897 S.W.2d 6, 15 (Mo. Ct. App. 1995). However, "'liability cannot rest upon guesswork, conjecture, or

requires substantial evidence for every fact essential to liability." Davis v. Board of Educ. of the City of St. Louis, 963 S.W.2d 679, 684 (Mo. Ct. App. 1998). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." Id. (quoting Hurlock v. Park Lane Med. Ctr., Inc., 709 S.W.2d 872, 880 (Mo. Ct. App. 1985)). Finally, "[t]he evidence and inferences must establish every element and not leave any issue to speculation." Id. The court considering the motion "is not to supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences." Id.

TEXT OF ARGUMENT

The trial court granted PSF's Motion for Judgment In Accordance With Its Motion for Directed Verdict for three reasons:

> First, plaintiff failed to offer sufficient evidence at trial to support the theory under which he pleaded his claims; Second, plaintiff failed to present sufficient evidence at trial from which a reasonable fact-finder could conclude there was an exclusive causal connection between whatever protected activity he claims and his discharge; and Third, plaintiff failed to present sufficient evidence

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speculation beyond inferences that can reasonably decide the case.'" Englezos v. Newspress and Gazette Co., 980 S.W.2d 25, 30 (Mo. Ct. App. 1998) (quoting Garrett v. Overland Garage and Parts, Inc., 882 S.W.2d 188, 191 (Mo. Ct. App. 1994)). For this reason, a directed verdict is appropriate if any one of the elements of the plaintiff's case is "'not supported by substantial evidence.'" Englezos, 980 S.W.2d at 30 (quoting Mathis v. Jones Store Co., 952 S.W.2d 360, 366 (Mo. Ct. App. 1997)).

at trial from which a reasonable fact-finder could conclude Mr. Brock did not honestly believe at the time he made the decision to discharge plaintiff that plaintiff had communicated with his personnel in a manner that led them to believe they could land apply effluent without a work order, which was directly contrary to defendant Premium Standard Farms, Inc.'s policies and practices, or that plaintiff had relayed information that proved to be unfounded, namely that his supervisor had directed him to misrepresent the origin or a soil sample.

(App. at A1-A2). The trial court was correct as to each reason.

A. *Appellant Failed Properly To Plead His Wrongful Discharge Claim.*

Appellant failed to address in his Brief the first basis for the trial court's grant of PSF's Motion for Judgment In Accordance With Its Motion for Directed Verdict. Appellant's failure means he did not properly raise on appeal any challenge he has to that basis and, therefore, this Court lacks authority to disturb the trial court's ruling. See Russell v. Dept. of Employment Security, 43 S.W.3d 442, 444 (Mo. Ct. App. 2001) (where appellant failed to raise specific allegations of error in her initial brief, they were not preserved for appellate review). In other words, Appellant's failure means this Court must affirm that trial court's grant of PSF's Motion for Judgment In Accordance With Its Motion for Directed Verdict.

1. *The Trial Court Properly Concluded Appellant Failed To Properly Plead Wrongful Discharge.*

Even if Appellant's Brief addressed his failure properly to plead his wrongful discharge claim, Appellant could not have demonstrated the trial court erred in

concluding Appellant failed to offer sufficient evidence at trial to support the theory under which he pleaded his claims. Indeed, Missouri courts have adopted a limited public policy exception to the at-will employment doctrine. This exception protects at-will employees from being discharged for (1) refusing to perform an illegal act contrary to a strong mandate of public policy; (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 public policy would encourage, such as performing jury duty, seeking public office, or joining a labor union; or (4) filing a workers' compensation claim. See Brenneke v. Dep't of Mo., Veterans of Foreign Wars, 984 S.W.2d 134, 138 (Mo. Ct. App. 1998).

Appellant pleaded in Count II of his FAP only that "[t]he real reason that the Plaintiff, Jason Shuler, was terminated was because he refused to take soil samples from the side of the field (as opposed to the portion of the field which was actively farmed) or from other fields to send to DNR (Missouri Department of Natural Resources) because the soil samples would not have been a correct representation of the content for the entire field but would have been a misrepresentation and false reading." (L.F. at 10 ¶ 3). In other words, Appellant pleaded only theory (1), supra.

However, Appellant testified at trial that PSF discharged him "primarily" because he was a "whistleblower" (i.e., because he reported to Mr. Brock that Mr. Snapp had instructed him to misrepresent the origin of a soil sample) (Tr. at 24). As such, Appellant failed at trial even to claim PSF discharged him for the reason he pleaded in his FAP. Appellant's failure entitled PSF to judgment as a matter of law on Count II of his FAP, as the trial court properly concluded.

Missouri is a fact pleading state. See Mo. R. Civ. P. 55.05; see also Porter v. Reardon Machine Co., 962 S.W.2d 932, 939 (Mo. Ct. App. 1998). Further, Missouri courts have demanded that plaintiffs invoking one of the limited public policy exceptions to Missouri's at-will employment doctrine plead the facts supporting their claims with particularity and specificity. Indeed, in Adolphsen v. Hallmark Cards, Inc., 907 S.W.2d 333 (Mo. Ct. App. 1995), the plaintiff claimed the defendant terminated his employment in retaliation for reporting violations of Federal Aviation Administration safety regulations. Finding the plaintiff's petition inadequate, the court reasoned the petition "fails to detail the nature of [the Appellant's] complaints concerning the violation of regulations, or the content of the regulations violated"; "fails to inform us as to whether the violations are criminal in nature, nor as to the extent of the safety risk involved in the failure to comply with regulations"; and failed to "plead a violation of a statute," "to identify a regulation which [the Appellant] contends was violated," or to "identify the applicable clear mandate of public policy." Id.

Refusing to accept that every federal "safety regulation" involves a clear mandate of public policy and reiterating "it is necessary that ***each element*** of the cause of action be pleaded," the Adolphsen court explained "[w]hen the defendant's actions are within a category not generally considered actionable (such as discharge of an at-will employee), ***the specific facts on which liability is based must be pleaded with particularity."*** Id. at 338 (emphasis added).

The Adolphsen court then admonished:

> Henceforth, it will not be considered sufficient merely to plead that an employee was discharged because the employee reported the violation of a

regulation by an employer. ***A petition must specify the legal provision violated by the employer, and it must affirmatively appear from the face of the petition the legal provision in question involves a clear mandate of public policy.***

Id. at 337-38 (emphasis added)[7]; see also Porter v. Reardon Machine Co., 962 S.W.2d 932, 939 (Mo. Ct. App. 1998) (plaintiff's pleading deficient where "neither the Petition nor [the plaintiff's] subsequent pleadings, either below or on appeal, explain what aspects of these regulations were allegedly violated by [the defendant]" and "the Court was unable to determine from the pleadings or the record which, if any, of these regulations [the plaintiff] is claiming were violated").

Like the plaintiff in Adolphsen, Appellant failed below to satisfy the strict pleading requirements for public policy wrongful discharge claims. Indeed, Appellant failed to plead at all the theory under which he sought recovery at trial, namely because he was a "whistleblower" (i.e., because he reported to Mr. Brock that Mr. Snapp had instructed him to misrepresent the origin of a soil sample) (Tr. at 24). Appellant pleaded

[7]While Adolphsen involved a "whistleblower" claim, its rationale applies equally to *all* public policy claims. Indeed, the Adolphsen court specifically noted there was no distinction between whistleblower and other public policy wrongful discharge claims, see Adolphsen, 907 S.W.2d at 337, and generally concluded "[w]hen the defendant's actions are within a category not generally considered actionable (such as discharge of an at-will employee), the specific facts on which liability is based must be pleaded with particularity." Id. at 338.

only that PSF discharged him in essence because he refused to perform an illegal act contrary to a clear mandate of public policy. Appellant's failure to plead the theory under which he sought recovery at trial runs far afoul of the strict pleading requirements of Adolphsen and its progeny and entitled PSF to judgment as a matter of law on Count II of Appellant's FAP, as the trial court properly concluded.[8]

2. *The Court of Appeals' Opinion Muddles Missouri's Pleading Requirements And Creates Conflict With Existing Precedent.*

As pointed about above, Missouri courts have long demanded that plaintiffs invoking one of the limited public policy exceptions to Missouri's at-will employment doctrine plead the facts supporting their claims with particularity and specificity. Further, as the Court of Appeals recognized in its November 25 Opinion, "[t]he amended petition alleged Shuler was wrongfully discharged, based on the first public policy exception, for *refusing* to conduct soil sampling in an unlawful manner. At trial,

[8] In his Point Relied on II, Appellant contended the trial court erred in not giving a jury instruction that included in the conjunctive both the theory he pleaded in his FAP and the theory he claimed during his trial testimony (Brief at 22-23). In support of that contention, Appellant cited Supreme Court Rule 55.33(b). Rule 55.33(b) is inapplicable. One, PSF neither expressly or impliedly consented to Appellant changing theories during his trial testimony, as the record demonstrates (Tr. at 76-77). Two, Appellant failed to move to amend to add his "whistleblower" theory at any time, including when he moved to amend his pleading by interlineation (see L.F. at 23).

however, Shuler testified that he was terminated, based on the second public policy exception, for *reporting* his supervisor's directive to unlawfully conduct the soil sampling" (November 25 Opinion at 8). Not having pleaded the theory upon which he proceeded at trial, Appellant could not have met the Adolphsen pleading requirement.

In the April 13 Opinion, however, the Court of Appeals concluded Appellant's trial testimony--namely that "he was discharged as a result of his 'whistleblower' role in reporting his supervisor's directive to unlawfully conduct soil sampling" --effectively amended his various pleadings (April 13, 2004 Opinion at 8-10). In so doing, the Court, in effect, rendered Adolphsen ineffective. If a plaintiff can change stories in the middle of a trial and thereafter proceed on a theory he failed to plead, then Adolphsen's "pleaded with particularity" requirement is of no consequence.

The Court of Appeals did not address Adolphsen in the April 13, 2004 Opinion. PSF submits that Adolphsen explicitly or implicitly limits a party's ability to "amend" his or her pleadings through trial testimony when invoking one of the limited public policy exceptions to Missouri's at-will employment doctrine. Accordingly, PSF respectfully requests that this Court resolve this tension/conflict between the Court of Appeals' April 13 Opinion and Adolphsen by reaffirming the holding in Adolphsen and affirming the trial court's June 3, 2002 grant of PSF's Motion for Judgment In Accordance With Its Motion for Directed Verdict.

B. *Appellant Failed At Trial To Prove The Requisite Exclusive Casual Connection.*

As with the trial court's first basis, Appellant failed to address in his Brief the second basis for the trial court's grant of PSF's Motion for Judgment In Accordance With

Its Motion For Directed Verdict. Appellant's failure means he did not properly raise on appeal any challenge he has to that basis and, therefore, that this Court lacks authority to disturb the trial court's ruling. See Russell, 43 S.W.3d at 444. In other words, Appellant's failure means this Court must affirm that trial court's grant of PSF's Motion for Judgment In Accordance With Its Motion for Directed Verdict.

1. *Appellant Failed To Present Sufficient Evidence Of An Exclusive Causal Connection*

Even if Appellant had addressed the exclusive causal connection issue, Appellant could not have demonstrated that the trial court erred in concluding that Appellant failed to present sufficient evidence at trial from which a reasonable fact-finder could conclude there was an exclusive causal connection between whatever protected activity he claims and his discharge. Regardless of the theory under which Appellant sought recovery at trial, Appellant could prevail on his wrongful discharge public policy claim only if he proved an ***exclusive***[9] casual connection between his claimed protected activity and his discharge. See Brenneke, 984 S.W.2d at 138; Bell v. Dynamite Foods, 969 S.W.2d 847, 852 (Mo. Ct. App. 1998); Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 150 (Mo. Ct. App. 1995); Clark v. Beverly Enterprises-Missouri, Inc., 872 S.W.2d 522, 524 (Mo. Ct. App. 1994); Loomstein v. Medicare Pharmacies, Inc., 750 SW.2d 106, 113

[9] "Exclusive" means "single, sole." See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 433 (1989).

(Mo. Ct. App. 1988); see also Sturgeon v. Monsanto Co., 2001 WL 66279 *1 (8th Cir., Jan. 29, 2001).[10]

Appellant failed at trial to offer sufficient evidence from which a reasonable fact-finder could conclude PSF discharged him exclusively for refusing to perform an illegal act contrary to a clear mandate of public policy or for being a "whistleblower."[11] Indeed, Appellant's own trial testimony utterly defeated such exclusivity. As a result, PSF was entitled to judgment as a matter of law on Count II of Appellant's FAP.

During direct examination, Appellant testified PSF "primarily" discharged him because he was a "whistleblower" (i.e., because he reported to Mr. Brock that Mr. Snapp had instructed him to misrepresent the origin of a soil sample) (Tr. at 24). During cross-examination, Appellant conceded he believed PSF discharged him for two additional reasons, including because they mistakenly believed he had allowed operation of irrigation equipment to land apply effluent without a work order and to avoid paying him

[10] To prevail on a "whistleblower" claim, Appellant had to prove the same exclusive causal connection. See Sturgeon, 2001 WL 66274 *1.

[11] In his Brief, Appellant claimed "[t]he causation standard in these cases is unclear" (Brief at 18). Appellant is wrong, as the cases cited supra confirm. Further, Appellant's counsel agreed on the record at trial that an "exclusive" causal connection was required (Tr. at 84). Finally, Appellant's counsel submitted for the Court's consideration proposed jury instructions requiring an "exclusive" causal connection. See, e.g., App. at A84 and A85. Appellant, therefore, cannot now challenge that causation standard. See, e.g., Pinkstaff v. Hill, 827 S.W.2d 747, 751 (Mo. Ct. App. 1992).

his quarterly and annual bonus (Tr. at 54-55, 107-08).[12] In other words, Appellant conceded at trial PSF had at least ***three*** reasons for discharging him, including (1) because PSF believed he allowed operation of irrigation equipment without a work order; (2) because he reported Mr. Snapp's alleged order to misrepresent the origin of a soil sample; and (3) to avoid paying him his quarterly and annual bonus.[13] Obviously, "three" reasons is not a "single, sole" reason and is therefore not an ***exclusive*** reason as required by Missouri law.

Appellant failed at trial to offer sufficient evidence from which a reasonable fact-finder could conclude he had established the requisite exclusive casual connection, much less the required "substantial" evidence of same. Indeed, as Appellant concedes in his Brief (Brief at 17), the only "evidence" Appellant offered at trial to support his claim was the proximity between his allegation against Mr. Snapp and his discharge. However, especially in light of the fact that Appellant's own trial testimony utterly refuted his claim

[12] In so doing, Appellant confirmed his deposition testimony, where he admitted "I believe the first reason that they terminated me was for the false belief that I allowed irrigation to occur without a work order. Number two, I believe they terminated me because I was a whistle blower on attempts to falsify information to the Department of Natural Resources on taking soil samples and locations and specific sites, and number, three, it just happened to coincide very well and very plainly with the end of the quarter bonus program" (Tr. at 107-08).

[13] Notably, Plaintiff did not plead any of those three claimed reasons in his FAP (L.F. at 8-15).

(id. at 54-55, 107-08), the inference Appellant seeks from such proximity is unreasonable and nothing other than rank speculation. Thus, the trial court properly concluded Appellant could not avoid judgment as a matter of law based on unreasonable inferences and/or rank speculation. See Englezos, 980 S.W.2d at 30; Davis, 963 S.W.2d at 684.

2. *This Court Should Clarify The Exclusive Causation Requirement For Missouri Public PolicyDischarge Cases.*

The Court of Appeals' April 13, 2004 Opinion appears to conflict with Missouri precedent and raises three questions of general importance that this Court should resolve: (1) whether wrongful discharge public policy claims sounding in tort require proof of an "exclusive" causal connection, as wrongful discharge public policy claims sounding in statute do[14]; (2) if so, whether a plaintiff who asserts more than one protected activity as the cause of his discharge can prove such an "exclusive" causal connection; and (3) if a plaintiff who asserts both protected and non-protected activity as the cause of his discharge can prove such an "exclusive" causal connection.

As pointed out above, Appellant claimed before trial that PSF had discharged him for refusing to perform an illegal act. Appellant abandoned that claim at trial, however, and claimed there that PSF had discharged him for being a "whistleblower," because they mistakenly believed he had allowed operation of irrigation equipment to land apply

[14] This Court has not yet decided whether the exclusive causation requirement applied to statutory public policy wrongful discharge claims also applies to whistleblower or other public policy claims sounding in tort.

effluent without a work order, ***and*** to avoid paying him his quarterly and annual bonus. As a result, the trial court concluded PSF was entitled to judgment as a matter of law.

In overturning the trial court's grant, the Court of Appeals' April 13, 2004 Opinion suggested the requirement of an "exclusive" causal connection may not apply to public policy claims sounding in tort, concluded a plaintiff could demonstrate such a connection even if he asserts multiple protected activities in support of that connection, and failed to resolve whether a plaintiff could demonstrate such a connection where he acknowledges non-protected activities played at least a part in the decision to discharge him. (April 13 Opinion at 10-11). The Court of Appeals' April 13, 2004 Opinion was not consistent with Missouri precedent.

As pointed out above, Missouri law has long required the plaintiff to prove an "exclusive" causal connection to prevail on any the four public policy exceptions to Missouri's general at-will employment doctrine. Bell v. Dynamite Foods, 969 S.W.2d 847, 852 (Mo. Ct. App. 1998). In its April 13 Opinion, however, the Court of Appeals questioned the requirement of an "exclusive" causal connection for wrongful discharge public policy claims sounding in tort, as opposed to statute (April 13, 2004 Opinion at 10). In so doing, the Court of Appeals raised the possibility that the plaintiff's evidentiary burden in wrongful discharge public policy claims sounding in tort ought to be treated differently than those sounding in statute (Id.). The Court of Appeals' Opinion further recognized it has previously raised the same question (Id.).

Additionally, the Court of Appeals' April 13 Opinion confused the "exclusive" causal connection requirement. Specifically, Appellant claimed at trial that PSF discharged him for three reasons, including two that did not involved any protected

activity at all: (1) because they mistakenly believed he had allowed operation of irrigation equipment to land apply effluent without a work order; and (2) to avoid paying him his quarterly and annual bonus. Because Appellant had to establish an exclusive causal connection between his alleged protected activity and his discharge, Appellant's own testimony defeated that exclusivity and entitled PSF to judgment as a matter of law.

In its April 13 Opinion, however, the Court of Appeals did not address that issue. Instead, it concluded that the trial court committed reversible error by not instructing the jury that it should find in favor of Appellant if he proved the exclusive reason for [his] discharge was because [he]: "1) refused to carry out the orders of his supervisor, Richard Snapp, to take soil samples from other fields and represent those samples as being taken from a field which was actively being farmed . . . ***and*** 2) informed his supervisor's superior, Mathew Brock, that his supervisor, Richard Snapp, made this order . . ." (April 13, 2004 Opinion at 11 (emphasis added)). In so doing, the Court concluded Appellant's proposed jury instruction "was proper in that it required the jury to find his termination was exclusively caused by his protected conduct," notwithstanding that it listed separate protected activities in the conjunctive.[15]

In other words, not only did the Court of Appeals ignore that Appellant acknowledged that non-protected activities played a role in the discharge decision--thus defeating any "exclusive" causal connection requirement--it went further and held ***for the***

[15] As discussed more fully below, in so doing, the Court of Appeals approved a jury instruction that it had already concluded was not supported by substantial evidence. See Section II.B, infra.

first time that a plaintiff could satisfy the "exclusivity" requirement with multiple protected activities, i.e., that a plaintiff is not required to choose in advance the theory under which he is proceeding, but instead can offer the jury a medley of activities from which to choose, provided they are all "protected" activities. This Court should clarify that multiple protected activities do not satisfy the exclusivity requirement. Additionally, even if this Court determines multiple protected activities satisfy the exclusivity requirement, this Court should address whether a plaintiff can meet that standard where he acknowledges that non-protected activities played a part in the discharge decision.

C. *Appellant Failed to Present Any Evidence With Which To Question Mr. Brock's Beliefs When He Discharged Appellant.*

Appellant's Brief fails to point to sufficient evidence that PSF discharged him for engaging in any protected activity. Indeed, the only "evidence" Appellant pointed to at all was the proximity between his report of Mr. Snapp's alleged direction to misrepresent the origin of a soil sample and the date of his discharge (Brief at 17-18).[16] Even if that proximity were sufficient evidence of the requisite exclusivity, such evidence merely

[16] The remainder of Appellant's argument in his Point Relied on I is devoted to his bald claims as to why PSF discharged him (Appellant's Brief at 17), his repetition that Mr. Snapp's decision--as relayed by Appellant--was unlawful (which PSF does not dispute for purposes of this appeal) (Appellant's Brief at 17), and his unfounded questions regarding the causation standard (Appellant's Brief at 18-20).

made his prima facie case. See Wiedower v. ACF Indus., Inc., 715 S.W.2d 303, 307 (Mo. Ct. App. 1986).[17]

Once a prima facie case is made, then the defendant may "rebut the plaintiff's evidence by showing that there was a legitimate reason for the discharge." Coleman v. Winning, 967 S.W.2d 644, 648 (Mo. Ct. App. 1998). PSF met that burden with evidence that Mr. Brock determined--based on his March 30 investigation--that Appellant had "communicated to his personnel in a manner which led them to believe they could land apply effluent without an open work order, in direct violation of the Land Application/ERC Standard Operating Procedures" (Tr. at 180-88; Ex. D-1).

Appellant, therefore, could prevail on his public policy claim only if he could "persuade the jury that the employer's reason was pretextual . . ." Wiedower, 715 S.W.2d at 307. In attempting to show pretext, Appellant proceeded under the McDonnell-Douglas burden-shifting framework most frequently used in Title VII litigation but incorporated into workers' compensation retaliation cases in Coleman, 967 S.W.2d at 648, and in Wiedower, 715 S.W.2d at 307. Under that framework, Appellant could prove pretext by showing either that PSF did not honestly believe its articulated reason for discharging him or by showing it treated similarly situated employees differently than it treated him. See Newman v. Greater Kansas City Baptist and Community Hosp. Ass'n, 604 S.W.2d at 620, 622 (issue is what the employer believed,

[17] As pointed out above, Appellant had nothing other than unreasonable inferences and/or rank speculation to tie his allegation against Mr. Snapp to his discharge. See § I.B., supra.

not whether the plaintiff did what the employer believed he did); State ex. rel. Swyers v. Romines, 858 S.W.2d 862, 864 (Mo. Ct. App. 1993) ("[r]elevant factors in evaluating pretext include the employer's treatment of similarly situated [employees] . . . ."). [18] Appellant failed at trial to present any evidence of either, much less the requisite "substantial" evidence.

1. *Appellant Offered No Evidence At Trial From Which A Reasonable Fact-Finder Could Have Concluded Mr. Brock's Reason For Discharging Appellant Was Not Honestly Held*

[18] In his Brief, Appellant claims the fact the jury found for Appellant on his service letter claim (Count I) establishes conclusively his wrongful discharge public policy claim (Count II) (Brief at 19-20). Appellant is wrong. In light of the jury's failure to find for Appellant on Count II, its finding for him on Count I means either (1) the jury concluded the service letter listed an incomplete reason (because it did not mirror Ex. D-1) or (2) the jury concluded Appellant had not done what Mr. Brock believed he had done when he discharged him, i.e., that he had not in fact "communicated to his personnel in a manner which led them to believe they could land apply effluent without an open work order, in direct violation of the Land Application/ERC Standard Operating Procedures . . . ." Otherwise, the jury would have found for Appellant on Count II, too. Whether the jury believed the service letter was incomplete or that Appellant had not engaged in the conduct of which he was accused is irrelevant to his Count II claim. See Newman, 604 S.W.2d at 620, 622.

On March 30, 2000, Mr. Brock investigated both[19] the March 29 unauthorized application of effluent by Appellant's crew and Appellant's claim that Mr. Snapp had directed him to misrepresent the origin of a soil sample (Tr. at 180-88). Regarding the unauthorized application of effluent, Mr. Musick reported that Appellant had on March 28 advised his crew they were to begin applying effluent the next morning (March 29) when the temperature reached forty degrees and that he would "secure" the required work order from ERC (Tr. at 183-84).

Appellant did not disagree with Mr. Musick on March 30 (id.). In fact, Appellant told Mr. Brock he did not "specifically tell Mr. Musick to fire up without a work order, but that he did give the direction to start equipment when the temperature got to 40 degrees and that he was going to be in Princeton for a meeting and that he would secure the work order and bring it back with him" (id.). In other words, Appellant implicitly conceded he had "communicated to his personnel in a manner which led them to believe they could land apply effluent without an open work order, in direct violation of the Land Application/ERC Standard Operating Procedures" (Tr. at 180-88; Ex. D-1).

Regarding Appellant's allegation about the soil sample, Appellant retreated during Mr. Brock's March 30 investigation from his previous day allegation that Mr. Snapp had ***specifically*** instructed him to misrepresent the origin of the soil sample and stated only that he had ***inferred*** that Mr. Snapp wanted him to do so (Tr. at 184-85). Unlike Appellant's inconsistency, Mr. Snapp restated his previous day denial and repeated that

[19] Mr. Brock investigated both "issues" on March 30 because they both came to his attention on March 29 (Tr. at 42-43, 48-49, 64-66, 69, 97, 179-88).

he had instructed Appellant only to ensure that he and/or his crew avoid inserting the soil sample probe directly into the chisel tracks created in applying the commercial anhydrous (Tr. at 184-85).

Mr. Musick, who Appellant had indicated could and would confirm Mr. Snapp's instruction to misrepresent the origin of the soil sample (Tr. at 55-57, 168, 185), refuted Appellant's allegation and confirmed that Mr. Snapp had not "directed [Appellant] to sample from another field and submit those to ERC" (Tr. at 119-21, 185). Indeed, Mr. Musick confirmed that Mr. Snapp had asked Appellant only "not to sample within the grooves cut in the soil where the anhydrous was applied" (Tr. at 120).

As a result of his March 30 investigation, Mr. Brock concluded Appellant had "communicated to his personnel in a manner which led them to believe they could land apply effluent without an open work order, in direct violation of the Land Application/ ERC Standard Operating Procedures" and had "relay[ed] information which proved to be unfounded, as regards directions given on the manner and method by which soil sampling should be done, in an attempt to discredit his direct supervisor" (Tr. at 187-88; Exhibit D-1).

At trial, Appellant failed to offer any evidence whatsoever to question Mr. Brock's belief. For example, Appellant did not offer any witness who confirmed Mr. Snapp's direction to misrepresent the origin of the soil sample. He also did not offer any witness who confirmed that his crew had misconstrued his March 28 instruction regarding application of effluent. He finally did not offer any witness who alleged or even suggested PSF in any way tried generally to skirt its Standard Operating Procedures

and/or reacted against or tried to silence employees who raised questions about those Procedures and/or PSF's compliance therewith.[20]

Instead, Appellant simply argued he had not engaged in the conduct underlying Mr. Brock's belief. However, the question is not whether Appellant engaged in the underlying conduct. The question is whether Mr. Brock believed Appellant had engaged in the underlying conduct when he decided to discharge Appellant. That he unquestionably did dooms Appellant's claim as a matter of law, as the trial court properly concluded. See Newman, 604 S.W.2d at 620, 622; see also Calder v. TCI Cablevision of Missouri, Inc., 298 F.3d 723, 730-31 (8th Cir. 2002); Dorsey v. Pinnacle Automation Co., 278 F.3d 830, 837-38 (8th Cir. 2002) (holding analysis focuses on whether the articulated reason is the true reason, not whether it was a correct reason for the decision).

2. *Appellant Failed To Offer Any Evidence At Trial That PSF Treated Similarly Situated Employees Better Than It Treated Him*

Appellant also failed to show at trial that PSF treated similarly situated employees more favorably than it treated him. In the McDonnell-Douglas context from which Weidower and Coleman borrowed, "[the plaintiff] has the burden of proving that he and the disparately treated [employees] were 'similarly situated in all relevant respects.'"

[20] In fact, Appellant did not even claim any such effort by PSF. Instead, he claimed that PSF wanted to discharge him because he was not of the "in crowd" (Tr. at 24).

Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994).[21] To be "similarly situated," the employees must have the same supervisor see Harvey, 38 F.3d at 972, must have similar work histories, see Williams v. Ford Motor Co., 14 F.3d 1305, 1310-11 (8th Cir. 1994), including similar disciplinary records, Ward v. The Procter & Gamble Paper Prods. Co., 111 F.3d 558, 561 (8th Cir. 1997); and must have similar tenures. Smith v. Monsanto Chemical Co., 770 F.2d 719, 723-24 (8th Cir. 1985). Finally, "[t]o be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of comparable seriousness." Harvey, 38 F.3d at 972. Importantly, "it is not up to the employer to prove dissimilarity." Lanear v. Safeway Grocery, 843 F.2d 298, 300 (8th Cir. 1988); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1254 (8th Cir. 1981). Instead, as pointed out previously, it is a ***plaintiff's burden*** to prove similarity in ***all*** relevant respects. Harvey, 38 F.3d at 972. This factually intensive act "is a rigorous test for plaintiff to pass." Id.; Young v. Warner-Jenkinson Co., 990 F. Supp. 748, 758 (E.D. Mo. 1997) ("This is a rigorous test.").

Appellant made no effort to pass that test at trial. Indeed, Appellant offered no evidence that any other PSF employee was similarly situated to him in all relevant respects, much less treated more leniently for the same or a substantially similar offense. In fact, Appellant did not point to any other PSF supervisor whose crew had applied effluent without a work order and who had not been discharged as a result. Appellant did

[21] Because Coleman and Wiedower incorporated Title VII's burden shifting analysis into workers' compensation retaliation cases, it is appropriate to rely on federal cases interpreting that analysis.

not even point to any other PSF supervisor who he claimed violated a PSF policy or SOP and had not been disciplined as a result. Instead, Appellant disputed only his culpability, which is not evidence of pretext, much less the requisite "substantial" evidence. See § I.C.a., supra. Accordingly, the trial court properly concluded PSF was entitled to judgment as a matter of law on Count II of Appellant's FAP.

II.

THE TRIAL COURT DID NOT ERROR IN REFUSING TO GIVE INSTRUCTION II.B. OFFERED BY APPELLANT (L.F. 62)

In Point Relied On II, Appellant argues the trial court erred in refusing to give instruction II.B. offered by Appellant because there was sufficient evidence to justify the giving of the instruction. Appellant is wrong.

STANDARD OF REVIEW

Whether the trial court properly instructed the jury is a question of law. See First State Bank of St. Charles, Missouri v. Frankel, 86 S.W.3d 161, 173 (Mo. Ct. App. 2002). This Court reviews the trial court's refusal to submit an instruction for abuse of discretion. See id. An instruction must be supported by substantial evidence. See id. "Substantial evidence is that that evidence which, if true, is probative of the issues and from which the jury can decide the case." Id. A trial court does not commit error by rejecting an instruction that either misstates the law or would have confused the jury. See State v. Derenzy, 89 S.W.3d 472, 475 (Mo. 2002). Further, this Court will not reverse a trial court for refusing to give an instruction unless the refusal was prejudicial error. See Frankel, 86 S.W.3d at 173.

TEXT OF ARGUMENT

Appellant offered little argument in his Brief to support his Point Relied On II. In fact, Appellant argued only that the trial court ought to have sua sponte concluded under Supreme Court Rule 55.33(b) that he had amended his pleadings to present two separate theories of recovery in a matter that required an ***exclusive*** causal connection. Appellant is wrong.

A. Appellant's Proposed Jury Instruction Misstated The Law, Would Have Confused The Jury, And Was Not Supported By Substantial Evidence.

First, Rule 55.33(b) is inapplicable. Appellant never invoked it at trial, even after PSF moved for a direct verdict at the close of his evidence because he had failed to present evidence at trial regarding the theory of recovery he pleaded in his FAP (Tr. at 76-77; L.F. at 23). Further, PSF never expressly or impliedly consented to issues not raised by the pleadings being tried, as its motion for directed verdict at the close of Appellant's evidence demonstrates (id).

Second, Appellant's proposed jury instruction II.B. both misstated the law and would have confused the jury. Appellant's proposed jury instruction II.B stated:

> Your verdict must be for plaintiff and against defendant on Count Two of plaintiff's claim, if you believe:
>
> First, defendant discharged plaintiff from his employment;
>
> Second, the exclusive reason for such discharge was because plaintiff:
>
> 1) refused to carry out the orders of his supervisor, Richard Snapp, to take soil samples from other fields and represent those samples as

being taken from a field which was actively being farmed, for submission to the Missouri Department of Natural Resources ***and***

2) informed his supervisor's superior, Mathew Brock, that his supervisor, Richard Snapp, made this order, and

Third, as direct result of such discharge, plaintiff sustained damage.

(App. at A85).

As pointed out above, Missouri recognizes four public policy exceptions to its at-will employment doctrine. As further pointed out above, to prevail on any one of those exceptions, the plaintiff must prove there was an ***exclusive*** causal connection between the alleged protected activity and his or her discharge. Appellant's proposed jury instruction ignored that requirement. Indeed, Appellant's proposed jury instruction listed separate protected activities under different theories of recovery in the conjunctive. In other words, if given, then Appellant's proposed jury instruction would have asked the jury to determine whether two separate reasons together combined were the "single, sole" reason PSF discharged him. In other words, Appellant's proposed jury instruction both misstated the law and made no sense. The trial court properly refused to give it.

Appellant's proposed jury instruction also was not supported by substantial evidence. Appellant pleaded only under theory (1), supra (L.F. at 10 ¶ 3). Appellant proceeded at trial, however, only under theory (2), supra (Tr. at 5-75). With the requirement of an ***exclusive*** causal connection, Appellant could not proceed under both theories, and the trial court properly declined to instruct the jury on both in the same instruction.

In any event, an appellate court should not reverse a trial court for refusing to give an instruction unless the refusal was prejudicial error. See Frankel, 86 S.W.3d at 173. With the trial court in effect having concluded that Appellant failed to make a submissible case, Appellant cannot now complain that the trial court improperly instructed the jury, or, if he can, that he was prejudiced thereby.

B. The Court of Appeals' Opinion Approves An Improper Jury Instruction.

In its April 13, 2004 Opinion, the Court of Appeals concluded the trial court committed reversible error by not submitting Appellant's proposed jury instruction. However, the Court of Appeals had previously concluded Appellant had not submitted any evidence--much less "substantial" evidence--in support of the first prong of his proposed jury instruction. Specifically, the Court of Appeals concluded in its November 25, 2003 Opinion that "Shuler did not present substantial evidence in support of his [pleaded] allegation that he was discharged for 'refusing' to perform an illegal act" (see November 25 Opinion at 8).

Having reached that conclusion, the Court of Appeals could not properly approve Appellant's proposed jury instruction, as it did in its April 13, 2004 Opinion. Specifically, Appellant's failure to offer any evidence whatsoever to support the first of the two reasons he stated in the conjunctive in his proposed jury instruction--namely that PSF terminated his employment because he refused to misrepresent the origin of a soil sample—meant the proposed jury instruction was not supported by substantial evidence and was therefore improper. Accordingly, PSF submits it would have been reversible error for the trial court to have given an improper instruction and the Court of Appeals concluded wrongly otherwise.

III.

THE TRIAL COURT DID NOT ERROR IN REFUSING TO GIVE INSTRUCTION NO. A. OFFERED BY APPELLANT[22]

In Point Relied On III, Appellant argues the trial court erred in refusing to give Instruction No. A offered by Appellant because Appellant proved that Respondent's act of terminating his employment was outrageous and the result of evil motive or reckless indifference to his rights. Appellant is wrong.

STANDARD OF REVIEW

Whether the trial court properly instructed the jury is a question of law. See Frankel, 86 S.W.3d at 173. This Court reviews the trial court's refusal to submit an instruction for abuse of discretion. See id. An instruction must be supported by substantial evidence. See id. "Substantial evidence is that that evidence which, if true, is probative of the issues and from which the jury can decide the case." Id. A trial court does not commit error by rejecting an instruction that either misstates the law or would have confused the jury. See Derenzy, 89 S.W.3d 472 at 475. Further, this Court will not reverse a trial court for refusing to give an instruction unless the refusal was prejudicial error. See Frankel, 86 S.W.3d at 173.

TEXT OF ARGUMENT

The trial court's refusal to give Appellant's Instruction No. A was not prejudicial. After the jury deadlocked, the trial court concluded Appellant failed to make a

[22] The Supreme Court need not address this issue; it would be determined in the first instance on any retrial.

submissible case on Count II of his FAP. By logical extension, Appellant could not have met the heightened standard to make a submissible case on punitive damages. Even if he could, he cannot claim to have been prejudiced by the Court's refusal to instruct the jury on punitive damages when the jury deadlocked on liability.

Further, punitive damages are imposed for the purpose of punishment and deterrence." Ellis v. Kerr-McGee Chemical, L.L.C., 1999 WL 969278, *4 (Mo. Ct. App., October 26, 1999). See also Barnett, 963 S.W. 2d at 659 (same); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. banc 1996) (same); Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 177 (Mo. Ct. App. 1997) (same). In fact, "***[t]he remedy is so harsh that it should be applied only sparingly***." Ellis, 1999 WL 969278 *4 (emphasis added). See also Rodriguez, 936 S.W.2d at 110 (same); Shady Valley Park & Pool, Inc. v. Fred Weber, Inc., 913 S.W.2d 28, 37 (Mo. Ct. App. 1995) (acknowledging that, even before the Supreme Court heightened the standard for punitive damages, "[t]he uniform tenor of the recent cases [was] that punitive damages are to be the exception rather than the rule").

"Evidence must meet the clear and convincing standard of proof on all claims for punitive damages." Rodriguez, 936 S.W.2d at 111. "Cases have described the clear, cogent and convincing standard of proof as that which instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact-finder of the truth of the proposition to be proved." Lewis, 5 S.W.3d at 582-83. See also In re Interest of M.N.M., 681 S.W.2d 457, 459 (Mo. Ct. App. 1984) (same).

Appellant's evidence at trial utterly failed to meet that standard. Indeed, the only evidence Appellant "offered" at trial in support of his wrongful discharge claim was the proximity between his allegation about Mr. Snapp and his discharge (Brief at 17). As pointed out above, that proximity was insufficient to make a submissible case (see § I, supra), as the trial court properly concluded. Necessarily, then, it was insufficient to make a submissible case on punitive damages.

Appellant's reliance on Olinger v. General Heating and Cooling Co., 896 S.W.2d 43 (Mo. Ct. App. 1994), is misplaced. In Olinger, the plaintiff voiced concerns to supervisory personnel about being required to prepare and submit false rebate claims. When the number of false rebates increased, she reported the conduct to the FBI and began assisting the FBI in its investigation. See id. at 46. After the FBI conducted a surprise raid and told the employer it had an information, the plaintiff "immediately became the object of suspicion, and she experienced threats of personal harm and property damage." Id. The defendant then placed the plaintiff on indefinite leave and, after pleading guilty to mail fraud and losing a significant piece of business as a result, fired her. See id.

In concluding the plaintiff made a submissible case on punitive damages, the Olinger court pointed out that

> [the defendant] took no action against [the plaintiff] until after the FBI raided the company and told [the defendant] that it had an informant. [The plaintiff] was suspected and immediately became the target of threats and accusations. Those persons who made threats against her were not placed on leave. [The plaintiff]

was the only employee placed on leave during the FBI investigation . . . . She was the only employee involved in the fraudulent operation to be fired.

Although [the defendant] asserted that it eliminated [the plaintiff's] job to reduce overhead by "downsizing" . . . [the defendant's] service letter omitted downsizing as a reason for [the plaintiff's] discharge.

Id. at 44-48.

Other than that both he and the plaintiff in Olinger were fired, Appellant's allegations bear no resemblance to the situation of the plaintiff in Olinger. Unlike the plaintiff in Olinger, Appellant did not become "the target of threats and accusations" after reporting that Ms. Snapp had directed him to misrepresent the origin of the soil sample. Unlike the plaintiff in Olinger, Appellant was not treated differently than everyone else involved. Indeed, Mr. Brock disciplined both Appellant and Mr. Musick for their roles in the unauthorized application of effluent (Tr. at 180-88). Unlike the defendant in Olinger, PSF did not create a reason to discharge Appellant after he complained about Mr. Snapp. Instead, Mr. Brock decided to discharge Appellant only after he thoroughly investigated both Appellant's allegation that Ms. Snapp had directed him to misrepresent the origin of a soil sample and the unauthorized application of effluent (Tr. at 180-88). Mr. Brock's investigation contradicted Appellant's allegation against Mr. Snapp and confirmed--based on Appellant's own statements--his culpability with respect to the unauthorized application of effluent (Tr. at 180-88; Ex. D-1).

Appellant simply failed at trial to make a submissible case on punitive damages. Indeed, Appellant failed completely to offer any evidence that PSF engaged in the

"repeated bad acts" that Missouri courts have required to submit punitive damages under the Rodriguez standard. See Fabricor, Inc. v. E.I. DuPont de Nemours & Co., 24 S.W.3d 82, 99 (W.D. Mo. 2000) (recognizing that Missouri courts generally require evidence of "repeated bad acts" to support submission of punitive damages to a jury). Absent that showing, the trial court properly refused to instruct the jury on punitive damages.

CONCLUSION

For the foregoing reasons, PSF respectfully requests that the Court affirm the trial court's June 3, 2002 grant of PSF's Motion for Judgment In Accordance With Its Motion for Directed Verdict.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. The attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 12,211 words as determined by Microsoft Word 2000 software; and

2. Pursuant to the Rules of the Court, appellant certifies that an original and ten copies of Brief of Appellants were sent by overnight delivery this 1st day of October, 2004 to Thomas F. Simon, Clerk, Supreme Court of Missouri, 207 W. High Street, Jefferson City, Missouri, and that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, was mailed, postage prepaid, this 1st day of October, 2004, to:

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The undersigned hereby certifies that a copy of the foregoing was served via U.S. Mail, postage prepaid, this 1st day of October, 2004, upon:

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