NO. WD 61518

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JASON SHULER,
APPELLANT,

V.

PREMIUM STANDARD FARMS, INC., A CORPORATION,
RESPONDENT.

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

Honorable Warren L. McElwain, Judge

BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

The appellant was an employee of the respondent corporation, which discharged appellant from his employment. The appellant sued respondent in Count I for issuing a false service letter and in Count II for wrongful discharge. The jury found for appellant on Count I, but was unable to decide Count II. After the trial, the court granted judgment to respondent on Count II in accordance with respondent's motion for directed verdict. The appellant brings this appeal. This appeal is within the general appellate jurisdiction of Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri as amended in 1983 (V.A.M.S.).

STATEMENT OF FACTS

The appellant, Jason Shuler, was employed by respondent Premium Standard Farms, Inc. and had been so employed since July 5, 1994 (T 6). On March 30, 2000, he held the position of land application supervisor (T 5, 11) whose job duties included supervision of the application of effluent to land owned by the respondent (T 5, 6). Mr. Shuler's qualifications included a B.S. in Animal Technology, a Class A and Class B CAFO (Concentrated Animal Feeding Operations) license, and a Class D Wastewater license. He had served as an instructor for parts of the CAFO training programs conducted by respondent and had helped develop and write many of the training manuals used by respondent (T 60, 61).

Part of the appellant's job as land application supervisor, involved soil sampling. Before effluent (waste) can be applied to the land, it is necessary to take soil samples. This is done in accordance with policies developed by defendant Premium Standard Farms and permits issued by the Missouri Department of Natural Resources (T 10, plaintiff's Exhibit E page 15 and 16). The reason for the state regulations and company policies is to prevent runoff of the waste or nutrient, and to keep it from reaching the water table (T 14, 15, 213, 214, 215, 216). When the nutrient reaches the water table, it is considered a pollutant (T 216).

The appellant testified that on March 23, 2000, his superior, Richard Snapp, instructed the appellant to take a soil sample from a field, which was not the subject field where effluent was to be applied, and falsely represent it as being from the subject field (T 20). In the appellant's words, he was told the following by Richard Snapp: "I don't want you to sample that field. I want you to go into another field (Snapp described the field) and take the sample from there and record it for that field…" (T 20). On March 28, 2000 (T 23) or March 29, 2000 (T 164, 167), the appellant told Mr. Snapp's supervisor, Matt Brock, what Mr. Snapp had told him to do (T 22, 23, 167).

The appellant was fired by respondent on March 30, 2000 (T 25). In response to appellant's request for a service letter, the reason given by respondent for appellant's termination was because appellant violated company policy by

allowing “irrigation equipment to land apply effluent without an approved work order” (T 28, plaintiff Exhibit B).

The appellant testified that he did not apply effluent to the land without a work order (T 28, 29) and was attending a meeting in Princeton, Missouri, 1 hour and 15 minutes away from the field site, when the effluent was applied to the field (T 30). He said that he had requested work orders by telephone on March 28, 2000 (T 29) and on March 29, 2000 he told the crew to begin applying effluent when they had the work orders in hand and when the temperature reached 40 degrees (T 212).

Jeremy Hill, respondent’s environmental compliance manager, testified by deposition that he talked to appellant Jason Shuler on the telephone in the afternoon on March 28, 2000 and that Mr. Shuler had asked for a work order (Hill deposition, page 7). Mr. Hill said he told Mr. Shuler he would talk to Rhonda Hoermann and would need to get into the “Paradox” computer program before he could fax a work order (Hill deposition page 8, 18). Mr. Hill said the computer program required correct acres, correct field identification and soil information (Hill deposition page 17, 18).

Ben Musick was a crew leader for the respondent, working under the appellant (T 114, 15). He testified that the appellant told him to start applying effluent as soon as the temperature hit 40 degrees (T 117). This was corroborated by Jeff Ellis, who was a member of the crew (T 110). Mr. Musick said that he did as he was told in firing up the center pivot when it reached 40 degrees and that

when appellant asked him why he had fired up the center pivot without a work order, appellant told him not to say it was because he (appellant) told him to do so (T 118). Mr. Musick also testified that Richard Snapp did not instruct appellant to misrepresent soil samples (T 121). The witness said Mr. Snapp told appellant not to sample in grooves where anhydrous had been applied (T 120).

The appellant's supervisor was Richard Snapp, to whom the appellant reported directly (T 11, 127, 128, appellant's Exhibit C). Mr. Snapp testified that he knew that neighbors to the subject field had applied anhydrous (T 130) and that he had told appellant to use a zigzag pattern to take samples and to make sure he didn't pull a sample directly from the "groove" where anhydrous had been applied (T 131). He denied telling appellant to take a sample from another field (T 132). With reference to the alleged application of effluent by appellant without a work order, Mr. Snapp said he went to the subject field because he knew they were going to be pumping there (T 137, 138) and that after seeing the appellant talking on the telephone, he heard the appellant give the order to shut down the equipment (T 138).

Witness Deryl Niffen also worked for respondent. He testified that he and the appellant were the training department at Premium Standard Farms (T 60). He also testified that based upon what the appellant said at the Princeton meeting on March 29, 2000, he (Niffen) believed the appellant knew there was land application taking place without a work order (T 66).

At the top of the chain of command in plaintiff's Exhibit C is Matt Brock. Mr. Brock is the one who investigated the application of effluent without a work order (T 183, 184) and who gave the shut down order regarding the application of effluent (T 180). It was Mr. Brock who fired the appellant (T 188). On the disciplinary action form which Mr. Brock wrote, he gave two reasons for appellant's termination. The first reason was for applying effluent to land without a work order. The second was for making unfounded accusations against Richard Snapp (Appellant's Exhibit D-1).

The jury found for plaintiff-appellant on Count I (false service letter) and awarded $1.00 in damages. There was a hung jury on Count II (wrongful discharge). After trial, the Court granted judgment on Count II to respondent in accordance with its motion for directed verdict.

The appellant appeals the judgment on Count II.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN SUSTAINING THE RESPONDENT'S MOTION FOR A DIRECTED VERDICT ON COUNT II OF APPELLANT'S FIRST AMENDED PETITION BECAUSE APPELLANT OFFERED SUFFICIENT EVIDENCE TO MAKE A SUBMISSABLE CASE ON THE ISSUE OF WRONGFUL DISCHARGE IN THAT:

1) APPELLANT GAVE TESTIMONY THAT HE WAS GIVEN ORDERS BY HIS SUPERVISOR, RICHARD SNAPP, TO TAKE

SOIL SAMPLES FROM OTHER FIELDS AND FALSELY REPRESENT THEM AS BEING TAKEN FROM A FIELD ACTIVELY BEING FARMED, FOR SUBMISSION TO THE MISSOURI DEPARTMENT OF NATURAL RESOURCES (T 20), AND

2) THE ORDERS GIVEN APPELLANT WERE IN VIOLATION OF MISSOURI LAW (L.F. 10-14, T 22) AND THE TERMS OF THE PERMIT UNDER WHICH RESPONDENT WAS ACTING (T 10, 20, 21, PLAINTIFF'S EXHIBIT E AT PAGE 15 AND 16 OF THE EXHIBIT), AND
3) APPELLANT BELIEVED THIS WAS THE REASON HE WAS TERMINATED (T 54), AND
4) THIS WAS CORROBORATED BY THE DISCIPLINE ACTION FORM OF TERMINATION GENERATED BY RESPONDENT PREMIUM STANDARD FARMS, INC. (PLAINTIFF'S EXHIBIT D-2), AND
5) THE OTHER REASON CLAIMED BY RESPONDENT TO BE THE REASON FOR APPELLANT'S DISCHARGE (I.E. THAT APPELLANT APPLIED EFFLUENT WITHOUT A WORK ORDER, T 28, 73, PLAINTIFF'S EXHIBIT B AND D-1) HAS BEEN JUDICIALLY DETERMINED BY THE TRIAL COURT TO NOT BE

THE TRUE REASON FOR APPELLANT'S DISCHARGE (L.F. 9, 99).

Coleman v. Winning, 967 S.W.2d 664 (Mo. App. E.D. 1998)
Brenneke v. Deparment of Missouri, Veterans of Foreign Wars, 984 S.W.2d 134 (Mo. App. W.D. 1998)
33 U.S.C. §1251, et. seq
R.S.Mo. Chapter 644, §644.006-644.150
R.S.Mo. §640.700-640.758
C.S.R. 20-6010

POINTS RELIED ON

II.

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTION II B OFFERED BY APPELLANT (L.F. 62) BECAUSE THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE GIVING OF THIS INSTRUCTION IN THAT:

1) APPELLANT GAVE TESTIMONY THAT HE WAS GIVEN ORDERS BY HIS SUPERVISOR, RICHARD SNAPP, TO TAKE SOIL SAMPLES FROM OTHER FIELDS AND FALSELY REPRESENT THEM AS BEING TAKEN FROM A FIELD ACTIVELY BEING FARMED, FOR SUBMISSION TO THE MISSOURI DEPARTMENT OF NATURAL RESOURCES (L.F. 10-14, T22) AND THE TERMS OF THE PERMIT UNDER WHICH RESPONDENT WAS ACTING (T 10, 20, 21, PLAINTIFF'S EXHIBIT E AT PAGE 15 AND 16 OF THE EXHIBIT), AND

2) APPELLANT TOLD RESPONDENT'S REPRESENTATIVE, MATT BROCK, ABOUT THE ORDERS HE WAS GIVEN (T 22, 23, 167), AND

3) APPELLANT WAS TERMINATED EITHER TWO DAYS (T 23) OR ONE DAY (T 188, PLAINTIFF'S EXHIBIT D-1) AFTER THE CONVERSATION, AND

4) THE OTHER REASON CLAIMED BY RESPONDENT TO BE THE REASON FOR APPELLANT'S DISCHARGE (I.E. THAT APPELLANT APPLIED EFFLUENT WITHOUT A WORK ORDER, T 28, 73, PLAINTIFF'S EXHIBIT B AND D-1) HAS BEEN JUDICIALLY DETERMINED BY THE TRIAL COURT TO NOT BE THE TRUE REASON FOR APPELLANT'S DISCHARGE (L.F. 9, 99).

Brenneke v. Deparment of Missouri, Veterans of Foreign Wars,
984 S.W.2d 134 (Mo. App. W.D. 1998)
Missouri Supreme Court Rule 55.33(b)

POINTS RELIED ON

III.

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTION NO. A OFFERED BY APPELLANT (L.F. 61) BECAUSE APPELLANT PROVED THAT THE RESPONDENT'S ACT OF TERMINATING THE EMPLOYMENT OF APPELLANT WAS OUTRAGEOUS AND THE RESULT OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF

OTHERS, JUSTIFYING THE IMPOSITION OF PUNITIVE DAMAGES IN THAT THE UNLAWFUL ACT OF DISCHARGING THE APPELLANT WAS FOR THE EXPRESS PURPOSE OF OBTAINING SHORT TERM ECONOMIC ADVANTAGE FOR THE COMPANY AT THE EXPENSE OF INJECTING POLLUTANTS INTO THE WATER TABLE (T 14-16; 21-23; 213-219) AND DESTROYING THE PLANET EARTH.

Olinger v. General Heating and Cooling Company, 896 S.W.2d 43 (Mo. App. W.D. 1994)

ARGUMENT

I.

THE TRIAL COURT ERRED IN SUSTAINING THE RESPONDENT'S MOTION FOR A DIRECTED VERDICT ON COUNT II OF APPELLANT'S FIRST AMENDED PETITION BECAUSE APPELLANT OFFERED SUFFICIENT EVIDENCE TO MAKE A SUBMISSABLE CASE ON THE ISSUE OF WRONGFUL DISCHARGE IN THAT:

1) APPELLANT GAVE TESTIMONY THAT HE WAS GIVEN ORDERS BY HIS SUPERVISOR, RICHARD SNAPP, TO TAKE SOIL SAMPLES FROM OTHER FIELDS AND FALSELY REPRESENT THEM AS BEING TAKEN FROM A FIELD ACTIVELY BEING FARMED, FOR SUBMISSION TO THE MISSOURI DEPARTMENT OF NATURAL RESOURCES (T 20), AND

2) THE ORDERS GIVEN APPELLANT WERE IN VIOLATION OF MISSOURI LAW (L.F. 10-14, T 22) AND THE TERMS OF THE PERMIT UNDER WHICH RESPONDENT WAS ACTING (T 10, 20, 21, PLAINTIFF'S EXHIBIT E AT PAGE 15 AND 16 OF THE EXHIBIT), AND
3) APPELLANT BELIEVED THIS WAS THE REASON HE WAS TERMINATED (T 54), AND
4) THIS WAS CORROBORATED BY THE DISCIPLINE ACTION FORM OF TERMINATION GENERATED BY RESPONDENT PREMIUM STANDARD FARMS, INC. (PLAINTIFF'S EXHIBIT D-2), AND
5) THE OTHER REASON CLAIMED BY RESPONDENT TO BE THE REASON FOR APPELLANT'S DISCHARGE (I.E. THAT APPELLANT APPLIED EFFLUENT WITHOUT A WORK ORDER, T 28, 73, PLAINTIFF'S EXHIBIT B AND D-1) HAS BEEN JUDICIALLY DETERMINED BY THE TRIAL COURT TO NOT BE THE TRUE REASON FOR APPELLANT'S DISCHARGE (L.F. 9, 99).

APPLICABLE STANDARD OF REVIEW

The trial court in the instant case granted respondent's motion for directed verdict on appellant's Count II pursuant to Missouri Supreme Court Rule 72.01(b) after the jury was unable to reach a verdict. A motion for directed verdict, whether made before or after a jury is given opportunity to decide the case, contests that the same issue, whether the appellant has made a submissable case. (Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996); Rustici v. Weidemeyer, 673 S.W.2d 762 (Mo. banc 1983). In determining whether appellant has made a submissable case, the court must review the evidence in the light most favorable to the benefit of all reasonable inferences. (In Re: Estate of Mapes, 738 S.W.2d 853 (Mo. banc 1987). A directed verdict is proper only when reasonable minds could not differ as to the proper verdict after review of all the evidence in a light most favorable to the appellant (Angotti v. Celotex Corp., 812 S.W.2d 742 (Mo. App. W.D. 1991).

TEXT OF ARGUMENT

Missouri adheres to the employment-at-will doctrine. This gives employers the right to hire and fire their employees at will. (Dake v. Tuell, 687 S.W.2d, 191 (Mo. banc 1985).

However, there is an exception to this doctrine, which Missouri calls the "public policy exception". (Brenneke v. Department of Missouri, Veterans of Foreign Wars, 984 S.W.2d 134 (Mo. App. W.D. 1998).

Four exceptions have developed and are recognized by the courts: 1) discharge for refusal to perform an illegal act; 2) discharge for reporting violation of law or public policy; 3) discharge for acting in a manner public policy would encourage (accepting jury duty, seeking public office, etc.); or 4) discharge for filing a workers compensation claim. (Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. App. W.D. 1985); Clark v. Beverly Enterprises – Missouri, 872 S.W.2d 522 (Mo. App. W.D. 1994).

At issue in this case is the state of mind of respondent Premium Standard Farms, Inc. when it discharged the appellant from his employment.

The court gave the following verdict directing instruction, to-wit:

"INSTRUCTION NO. II

Your verdict must be for plaintiff and against defendant on Count Two of plaintiff's claim, if you believe:

First, defendant discharged plaintiff from employment, and

Second, the exclusive reason for such discharge was because plaintiff 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

Third, as a direct result of such discharge, plaintiff sustained damage." (L.F. 56).

This instruction was supported by substantial evidence. Appellant testified he had been given these orders (T 20). He (appellant) had objected to these orders

and refused to carry them out. Appellant notified the appropriate superior (T 22) who acknowledged that he had indeed been told about the alleged orders (T 167).

The real reason that the appellant, 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 the 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.

The orders given to appellant were unlawful (L.F. 10-14) in that they violated the Federal Water Pollution Act (33 U.S.C. §1251, et. seq); Missouri Clean Water Law (R.S.Mo., Chapter 644, §644.006 through 644.150); Concentrated Animal Feeding Operation (R.S.Mo. §640.700 through 640.758); rules and regulations authorized by R.S.MO. §644.026(8); C.S.R 20-6010 for construction and operating permits; as well as the permits themselves (Plaintiff's Exhibits E and I; T 10). (See also L.F. 10-15 where the provisions violated by the respondent are set out in their entirety in appellant's petition).

The respondent terminated the appellant's employment either one day after respondent learned the appellant had refused to carry out the order (T 23) or two days after, according to appellant (T 164, 167). This sequence of events is logically relevant to prove the respondent's state of mind at the time of appellant's discharge. In the words of appellant, he was not one of the "old crowd" (T 24) because he would not do what was perceived to be in respondent's interest.

In order to evaluate the credibility of witnesses in this case, one needs to understand and appreciate the appellant, Jason Shuler. It is true that all witnesses called by respondent still worked for respondent and were called for the express purpose of attacking Mr. Shuler's credibility. However, despite it all, Mr. Shuler's testimony stands tall. He was the one who helped write the materials for training and whose responsibility it was to participate in the actual instruction of the employees (T 7, 8). The jury in this case simply did not believe that he would disregard the very procedures he had put in place (L.F. 70).

The appellant, Jason Shuler, was discharged for refusing to perform an unlawful act, contrary to the directions of his employer. The conduct required by the respondent/employer would have amounted to a violation of the Federal Water Pollution Act (33 U.S.C., §1251, et.seq.); Missouri Clean Water Act (R.S.Mo. Chapter 644, §644.06-644.150); Concentrated Animal Feeding Operation (R.S.Mo. §640.700 through 640.758); rules and regulations authorized by R.S.MO. §644.026(8); C.S.R. 20-6010 for construction and operating permits; as well as the permits themselves.

The causation standard in these cases is unclear. There have been some cases that have required exclusive causation. However, the most recent case dealing with causation is Brenneke v. Department of Missouri, Veterans of Foreign Wars, 984 S.W.2d 134 (Mo. App. W.D. 1998). In that case, the trial court's instruction required only that the termination be "because of" the

whistleblowing, and not that whistleblowing be the exclusive cause for termination.

The Court of Appeals for the Western District concluded that the Courts which were requiring excusive causation (as seen in Lynch v. Blanke, Baer & Bowey Krimko, Inc., 901 S.W.2d 147 (Mo. App. E.D. 1995) had borrowed that "requirement from Missouri Supreme Court cases interpreting statutory actions for retaliatory discharge due to filing a workers' compensation claim. Those cases require proof of exclusive causation." Brenneke at 140. The Brenneke Court went further to state that jurisdictions which treat wrongful discharge cases like tort actions such as the State of Missouri, require only that the employee prove by a preponderance of the evidence that the termination was for an impermissible reason. The appellant, Jason Shuler, has done that.

The respondent, in its service letter, claimed that appellant was discharged because he applied effluent to land without a work order (Plaintiff's Exhibit B, T 28). With the court's judgment on Count I, it has been judicially determined that this was not the true reason for the Appellant's discharge (L.F. 70, 99).

With this reason removed, there is one remaining reason, which is set out in respondent's disciplinary action form (Plaintiff's Exhibit D-1). The remaining reason given in this exhibit is a paper trail and more evidence of respondent's state of mind. Respondent simply would not tolerate appellant's refusal to act as ordered, even though the act was unlawful. Jason Shuler was terminated because he refused to act as ordered and to falsify soil samples and submit them to the

Missouri Department of Natural Resources, and he reported this order to a superior. At that point, Mr. Shular was terminated from Premium Standard Farms.

Evidence is logically relevant to prove or disprove a mental state if its existence appears more or less probable than it did before the evidence was offered. (State v. Mathews, 33 S.W.3d 658 (Mo. App. S.D. 2000). It is respectfully submitted that the appellant has offered substantial evidence, both direct and circumstantial, to support his verdict directing instruction. Where the facts are in dispute as to whether the discharge was or was not wrongful, the question is always one for the jury under proper instruction (Coleman v. Winning, 967 S.W.2d 664 (Mo. App E.D. 1998).

ARGUMENT

II.

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTION II B OFFERED BY APPELLANT (L.F. 62) BECAUSE THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE GIVING OF THIS INSTRUCTION IN THAT:

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14, T22) AND THE TERMS OF THE PERMIT UNDER WHICH RESPONDENT WAS ACTING (T 10, 20, 21, PLAINTIFF'S EXHIBIT E AT PAGE 15 AND 16 OF THE EXHIBIT), AND

2) APPELLANT TOLD RESPONDENT'S REPRESENTATIVE, MATT BROCK, ABOUT THE ORDERS HE WAS GIVEN (T 22, 23, 167), AND
3) APPELLANT WAS TERMINATED EITHER TWO DAYS (T 23) OR ONE DAY (T 188, PLAINTIFF'S EXHIBIT D-1) AFTER THE CONVERSATION, AND
4) THE OTHER REASON CLAIMED BY RESPONDENT TO BE THE REASON FOR APPELLANT'S DISCHARGE (I.E. THAT APPELLANT APPLIED EFFLUENT WITHOUT A WORK ORDER, T 28, 73, PLAINTIFF'S EXHIBIT B AND D-1) HAS BEEN JUDICIALLY DETERMINED BY THE TRIAL COURT TO NOT BE THE TRUE REASON FOR APPELLANT'S DISCHARGE (L.F. 9, 99).

APPLICABLE STANDARD OF REVIEW

A jury instruction offered by counsel for submission, must be supported by substantial evidence. In determining whether substantial evidence exists, the court reviews the evidence and inferences in a light most favorable to the party tendering the instruction. (Holden v. Schenherr, 55 S.W.3d 505 (Mo. App. W.D. 2001).

TEXT OF ARGUMENT

As set out in Point Relied On II, there is no question but that the appellant went over his supervisor's head in the chain of command and talked to his supervisor's superior, Matt Brock, about the unlawful order he had been given (Plaintiff's Exhibit C, T 22, 23). Mr. Brock admitted the conversation (T 167) and actually referenced it in the disciplinary action form, which was used to terminate appellant's employment. None of this was any surprise to respondent. The respondent's evidence openly referred to this contact between appellant and Mr. Brock.

However, the court, when asked to include this event in the verdict directing instruction, refused to do so. The instruction offered by the appellant was the following:

"INSTRUCTION NO. II B – refused

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, Matthew Brock, that his supervisor, Richard Snapp, had made this order, and

Third, as a direct result of such discharge, plaintiff sustained damage." (L.F. 62)

This instruction was opposed by respondent even though it puts an extra burden on appellant. Respondent's argument at trial was that it was not pleaded. In response, appellant cites Supreme Court Rule 55.33(b), which provides as follows:

> "(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

It is respectfully submitted that the evidence offered by both appellant and respondent effectively amended the pleadings under the rule. (It is noted that the court directed a verdict in this case before ruling on appellant's motion to amend the pleadings to conform with the wording of the instruction above set out.) (L.F. 92).

ARGUMENT

III.

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTION NO. A OFFERED BY APPELLANT (L.F. 63) BECAUSE APPELLANT PROVED THAT THE RESPONDENT'S ACT OF TERMINATING THE EMPLOYMENT OF APPELLANT WAS OUTRAGEOUS AND THE RESULT OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS JUSTIFYING THE IMPOSITION OF PUNITIVE DAMAGES IN THAT THE UNLAWFUL ACT OF DISCHARGING THE APPELLANT WAS FOR THE EXPRESS PURPOSE OF OBTAINING SHORT TERM ECONOMIC ADVANTAGE FOR THE COMPANY AT THE EXPENSE OF INJECTING POLLUTANTS INTO THE WATER TABLE (T 14-16; 21-23; 213-219) AND DESTROYING THE PLANET EARTH.

APPLICABLE STANDARD OF REVIEW

A jury instruction offered by counsel for submission must be supported by substantial evidence. In determining whether substantial evidence exists, the court reviews the evidence and inferences in light most favorable to the party tendering the instruction. (Holden v. Schenherr, 55 S.W.3d 505 (Mo. App. W.D. 2001).

TEXT OF ARGUMENT

The trial court refused Instruction No. A tendered by appellant. This was a punitive damage verdict directing instruction and is set out as follows:

"INSTRUCTION NO. A

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction Number _____ was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number _____ , you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct." (L.F. 63)

The appellant specifically, and in extreme detail, explained that when a worker for the respondent overdoses a specific spot with nutrient, it is very, very mobile in the soil and when the plant material isn't able to remove it, it will go straight down to the water table (T 215, 216). When it makes contact with the water table, it is considered a pollutant (T 216). If soil sampling isn't done properly, there is a danger to the ground water (T 217, 218).

The appellant acted because of conscience. He refused to put the financial interest of Premium Standard Farms above the interest of the environment and those who inhabit this planet. Preservation of a planet with a capacity to support life should be a public policy worthy of recognition by the State of Missouri. Premium Standard Farms was poisoning the ground water, pure and simple. And when the appellant refused to go along, he was terminated.

In Olingher v. General Heating & Cooling Co., 896 S.W.2d 43 (Mo. App. W.D. 1994), the plaintiff was fired because she refused to submit false rebate claims and was fired after she notified her superiors and the FBI. The court held this was the type of "outrageous" conduct that warranted the submission of a punitive damage instruction to the jury.

In the instant case, the evil of Premium Standard Farms is even greater than that in the Olingher case. Think of using the waste of 100,000 hogs massed on one farm (T 10) to pollute the ground water used by humans. We all live on the same planet and use this water. It is of extreme importance that it be kept pure. The appellant respectfully submits that there is substantial evidence in this case to justify giving the punitive damage instruction offered by appellant (L.F. 63).

CONCLUSION

In light of the foregoing, the appellant requests this Court reverse the judgment of the trial court on Count II of his First Amended Petition and remand this cause for a retrial on the merits.

Respectfully Submitted,

STEPHENS, DRAKE & LARISON

By_____

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,114 words as determined by Microsoft Word 2000 software; and

2. Pursuant to the Rules of this Court, appellant certifies that an original and ten copies of Brief of Appellants were hand delivered this 18th day of February, 2003 to Terence G. Lord, Clerk, Missouri Court of Appeals, Western District, 1300 Oak, Kansas 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 18th day of February, 2003, to:

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