

**IN THE
SUPREME COURT OF MISSOURI**

No. SC93132

JOHN TEMPLEMIRE

APPELLANT,

v.

W&M WELDING, INC.

RESPONDENT.

**Appeal from the Circuit Court of Pettis County, Missouri
The Honorable Robert L. Koffman, Judge
Case No. 07PT-CC00019**

**Transferred from the Missouri Court of Appeals, Western District
Appeal No. WD74681**

**BRIEF OF AMICUS CURIAE
MISSOURI CHAMBER OF COMMERCE AND INDUSTRY**

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Amicus Missouri Chamber of Commerce and Industry (hereinafter “Missouri Chamber”) files this Brief pursuant to Missouri Supreme Court Rule 84.05(f)(2). The Missouri Chamber has received consent from both the Appellant and Respondent to file a brief in this matter. Amicus adopts the Appellant’s jurisdictional statement and the Respondent’s statement of facts, contained in the respective briefs of each party, as its jurisdictional statement and statement of facts.

INTEREST OF AMICUS CURIAE

The Missouri Chamber of Commerce & Industry, Inc., (“Chamber”) is a Missouri Not For Profit Corporation in good standing. The Chamber is the largest statewide general business organization in Missouri. The Chamber represents nearly 3,000 employers and almost 200 local chambers of commerce in advancing the cause of Missouri business.

Amicus Missouri Chamber files this brief in support of the position that the “exclusive factor” standard for workers’ compensation retaliatory discharge claims is the correct standard – as evidenced by the Court’s precedent - for claims filed under Section 287.780, RSMo and should remain the standard for workers’ compensation retaliatory discharge claims. Alternatively, if this Court decides to abandon the “exclusive factor” standard, Amicus Missouri Chamber urges the court to adopt a “motivating” instead of “contributing” factor standard for Section 287.780, RSMo claims. Missouri Chamber members have a direct interest in the outcome of this case and this Court’s decision concerning which standard to apply in workers’ compensation retaliatory discharge claims. The Missouri Chamber supports upholding the judgments of the lower courts.

ARGUMENT

I. The judgment of the lower courts holding that the “exclusive cause” standard is the correct standard for the Missouri Approved Instructions verdict-director in workers’ compensation retaliatory discharge claims should be affirmed because the courts were following the verdict-director approved by this Court in that the Court in *Hansome* and *Crabtree* affirmed the “exclusive cause” standard as an element for a cause of action pursuant to Section 287.780, RSMo.

For many years, Missouri law provided clear precedent on the standard to apply in workers’ compensation retaliatory discharge claims. The Court should affirm that precedent in this case.

Missouri is considered an “employment-at-will” state, in that without a contract for employment for a specific period of time, an employee can be fired at any time “for any reason or no reason.” *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. banc 1988), interpreting *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. banc 1985). An employer’s right to termination is not absolute, however. Relevant here, “at will” employees cannot be fired if the legislature has created a cause of action under statute. *See* Section 287.780, RSMo.

Section 287.780, RSMo, grants a cause of action for damages to any employee who suffers retaliation from an employer for exercising any rights granted by the legislature under the workers’ compensation laws of Missouri. The Court in *Hansome* laid out the elements a plaintiff-employee must prove in order to be entitled for relief under Section 287.780, RSMo. *Hansome v. Nw. Cooperage Co.*, 679 S.W.2d 273, 275

(Mo. banc 1984). One of the four elements the plaintiff must prove is the existence of “an exclusive casual relationship between [the] plaintiff’s action and [the] defendant’s actions.” *Id.* The four elements, including the exclusive factor standard, laid out in *Hansome* were reaffirmed by the Court in *Crabtree v. Bugby*. *Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. banc 1998). *Crabtree* is the Court’s most recent decision interpreting the standard for cases brought pursuant to Section 287.780, RSMo, and continues to serve as the precedent utilized in forming the approved jury instructions for statutory section:

“Your verdict must be for plaintiff if you believe: First, plaintiff was employed by defendant, and Second, plaintiff filed a workers' compensation claim, and Third, defendant discharged plaintiff, and Fourth, the *exclusive cause* of such discharge was plaintiff's filing of the workers' compensation claim and Fifth, as a direct result of such discharge plaintiff sustained damage.” Mo. Approved Jury Instr. (Civil) 38.04 (7th ed), (emphasis added).

Thus, this Court has: (1) articulated its opinion as to the correct standard in 287.780 causes of action; (2) reaffirmed that standard in a subsequent examination and provided precedent for the lower courts to follow; and (3) continuously affirmed that the exclusive factor standard is correct – most recently on April 2, 2012 – when the Court published the Missouri Approved Jury Instructions. As stated by Judge Holstein in *Crabtree*,

“Once this Court by case law has resolved the elements of a cause of action pursuant to sec. 287.780, neither the trial court nor the court of appeals is

free to redefine the elements in every case that comes before them. *Mo. Const. art. V, sec. 2*. Similarly, this Court should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of stare decisis, at least in the absence of a recurring injustice or absurd results.” *Crabtree*, 967 S.W.2d at 71-72.

Additionally, “a decision of this court should not be lightly overruled, particularly where the opinion has remained unchanged for many years” and stare decisis “should be disregarded only in cases where the decision to be overturned is ‘clearly erroneous and manifestly wrong.’ ” *Eighty Hundred Clayton Corp. v. Dir. of Revenue*, 111 S.W.3d 409, 411, n.3 (Mo. banc 2003). Finally, adherence to precedent and the doctrine of stare decisis promotes stability and predictability in the law. See *Ronnoco Coffee Co. v. Dir. Of Revenue*, 185 S.W.3d 676, 681, n. 11 (Mo. banc 2006).

Here, the precedent remained unchanged and is not “clearly erroneous and manifestly wrong.” No evidence has been introduced to show that this standard has produced recurring injustice or absurd results. Additionally, if the legislature felt compelled to change the standard, it could have done so in 2005 and 2008, when the workers’ compensation laws were last amended. The standard was not addressed, nor amended, and thus was tacitly approved.¹ The precedent has not changed and the law has

¹ For a more detailed analysis of this point, see Respondent’s Substitute Brief Point 1, Section B and the Missouri Organization of Defense Lawyers amicus brief.

not been amended. It would follow, then, that the law is currently in the same state as it has always been. This is important, because just as precedent guides court decisions, it also ensures certainty for the business community and predictability in the laws in which Missouri businesses must adhere. Given this history, the “exclusive factor” standard for claims under Section 287.780, RSMo, that guided the lower courts’ decisions should continue to stand as good law.

II. In the alternative, if the Court decides to abandon the “exclusive cause” standard for claims under Section 287.780, RSMo, the Court should adopt a “motivating factor” standard because the “motivating factor” standard would fulfill the purpose of the statute and would create certainty for businesses in the state of Missouri.

Amicus Missouri Chamber is cognizant of the holding in *Daugherty v. Maryland Heights* concerning employment discrimination in MHRA cases. However, amicus suggests that if the court were to abandon the “exclusive standard” in favor of a new standard, *Daugherty’s* precedent is distinguishable from Section 287.780, RSMo, claims and a “motivating factor” – rather than a “contributing factor” - standard should be adopted.²

² This brief intentionally does not discuss the *Daugherty* analysis that applied the “contributing factor” standard in MAI 31.24 in determining summary judgment. *See Daugherty*, 231 S.W.3d at 820. While the *Daugherty* Court did shift the summary

In *Daugherty*, the Court gave a clear indication of its intent to move away from a pattern of analysis found in employment discrimination cases found in federal court. *Daugherty v. Maryland Heights*, 231 S.W.3d 814, 819 (Mo. banc 2007); (“Past [Missouri Human Rights Act] MHRA cases have followed a pattern of analysis articulated by the federal courts. But this Court’s 2003 decision holding that jury trials are available under the MHRA, followed by the adoption of a pattern verdict directing instruction...signals an opportunity to review the analysis applied in MHRA cases.” *Id.* at 819.).

As indicated in note 6 of *Daugherty*, under federal law, there are two avenues by which plaintiffs can be successful in an employment discrimination claim in an MHRA case. *Daugherty*, 231 S.W.3d at 818, n. 6. Most relevant here, under the standard outlined in *Price Waterhouse v. Hopkins*, the employee is required to produce direct evidence that age or disability “played a *motivating part* in [the] employment decision.” *Id.*, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), (emphasis added).

However, the *Daugherty* Court noted that:

“[n]othing in this statutory language of the MHRA requires a plaintiff to prove that discrimination was a substantial or determining factor in an employment decision; if consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient.”

judgment framework away from the federal analysis, the concern of this brief is to discuss the resulting causation standards used.

Daugherty, 231 S.W.3d at 819, referencing *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 170 (Mo.App.2006).

“Previously, MHRA discrimination analysis has focused on determining if a challenged employment decision was ‘motivated’ by an illegitimated purpose.” *Daugherty*, 231 S.W.3d at 819, referencing *Midstate Oil Co., Inc. v. Mo. Comm’n on Human Rights*, 679 S.W.2d 842, 845 (Mo. banc 1984). However, the *Daugherty* court, in examining the Plaintiff-Appellant’s assertion that “contributing factors” was the correct standard to be utilized in surviving summary judgment, found that “the ‘contributing factor’ language used in MAI 31.24 is consistent with the plain meaning of the MHRA.” *Daugherty*, 231 S.W.3d at 819. In doing so, the Court moved the standard for employment discrimination claims filed under the MHRA from a “motivating factor” standard, found in federal case law, to a “contributing factor” that the Court asserted is consistent with the MHRA.

Of particular note, *Daugherty* cited *McBryde v. Ritenour Sch. Dist.*, a Missouri Court of Appeals, Eastern District, case which examined whether “motivating factor” is a higher threshold standard than “contributing factor.” *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162 (Mo.App.2006). The court in *McBryde*, in examining the plain meaning of the terms, was not convinced that the “motivating factor is a higher threshold than [the] contributing factor.” *Id.* at 170. In essence, the *McBryde* court found that the terms’ meanings were without difference. In all due deference to the *Daugherty* and *McBryde* courts, Amicus Missouri Chamber suggests that there is a difference in application in the lower courts between what constitutes a motivating factor and a contributing factor and further that this distinction materially alters the analysis.

This Court has determined that the “contributing factor” standard should be applied for MHRA cases and the “exclusive cause” standard applied for Section 287.780, RSMo, actions. Further, consistent with these separate standards, a distinction can be made between MHRA and 287.780 actions, as the Court correctly interpreted the broad scope of the definition of discrimination in the MHRA statutes and no such corresponding definition exists under Chapter 287, the Missouri Workers’ Compensation Law. While the MHRA defines discrimination to include “any unfair treatment” based on protected characteristics, a 287.780 claim is confined to instances of discrimination against any employee for exercising any right granted under Chapter 287. MHRA claims are expansive and not confined by Missouri statute. Section 287.780 claims, on the other hand, are confined solely to the rights granted - and subsequently violated by an employer - under the Workers’ Compensation laws. If the Court chooses to modify the standard for 287.780 claims, the “contributory factor” standard should be afforded no greater weight than current precedent or a “motivating factor” standard.

While it is true that Chapter 287 is to be interpreted in favor of promoting the public welfare and not to undermine the public policy goals of protecting workers, it is also the case, as Judge Holstein stated in *Crabtree*, that the law is “not to insure job security.” *Crabtree v. Bugby*, 967 S.W.2d 66, 72 and 74 (Mo. banc 1998). A motivating factor standard provides a “middle-ground” position that ensures protections for both the employers and employees.

Whereas a “contributory factor” test requires a court to determine if a protected characteristic was a *consideration* in the termination, a “motivating factor” standard seeks

to determine if a challenged employment action was *motivated* by an illegitimate purpose. See *Daugherty*, 231 S.W.3d at 819. Consideration and motivation are two separate terms with two separate *plain* meanings. Consideration, as defined in Webster's Third New International Dictionary, means "something that is considered as a ground of opinion or action" or "a taking into account." Motivation, on the other hand, as defined by Webster's Third means "a motivating force or influence." As so defined, it is clear that the "motivating factor" standard is a higher standard of proof, and a more appropriate standard in this instance, than a mere "contributing" factor test.

Looking to federal law as a guide, the "motivating factor" standard is used in all Title VII discrimination cases brought under 42 U.S.C. § 2000e-2(m), where the test is whether the plaintiff's protected status was a "motivating factor" in a challenged employment decision. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The "motivating factor" standard is also recommended by the Committee on Model Jury Instructions for the 8th Circuit in: (1) discrimination cases arising under the Americans with Disabilities Act; (2) Title VII retaliation cases; and (3) First Amendment retaliation cases. See *Pedigo v. P.A.M Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), *Prejean v. Warren*, 301 F.3d 893, 900-01 (8th Cir. 2002), and *Mt. Health City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), respectively.

If the Court's changes the standard for 287.780 claims, the "motivating factor" standard provides sufficient protections for both parties. By its essence, 287.780 claims require retaliation, an affirmative act based off of the condition precedent that a claim has

been filed. This requires a higher degree of intent, a motivation to act rather than just a mere consideration that the presence of a claim contributed to the employer's decision.

There is a spectrum to consider when evaluating the respective standards. Just as if the Court were to find the "exclusive cause" factor to be too burdensome for employees, Amicus Missouri Chamber suggests that the Court would also hold that the "contributing factor" analysis is too low a burden to be meaningful in an analysis. Thus, these standards would be in contrast to the motivating factor, as it would provide a balance that offers both parties the chance to prove their case without "tipping the scales" one direction or the other.

The "motivating factor" standard promotes good public policy, is consistent with the intent of the Missouri Workers' Compensation Law, and is consistent with federal law and how Missouri interpreted MHRA cases pre-*Daugherty*. If the Court departs from its long held "exclusive factor" standard then the Court should utilize the "motivating factor" standard in future cases.

CONCLUSION

Based on the foregoing, amicus Missouri Chamber urges this Court to uphold the judgments of the lower courts and affirm the “exclusive cause” standard as the correct standard to apply in Section 287.780, RSMo actions. However, if the Court so chooses to abandon the “exclusive factor” standard, *amicus* Missouri Chamber urges the Court to adopt the “motivating factor” standard in its place.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06 (c), this brief: (1) complies with 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 2,846 words, exclusive of the section exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2003.

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The undersigned hereby certifies that a copy of the foregoing was filed electronically via Missouri CaseNet and served, this 26th day of April, 2013 to:

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