IN THE SUPREME COURT OF MISSOURI

No. SC93132

JOHN TEMPLEMIRE,

Appellant,

v.

W & M WELDING, INC.,

Respondent.

APPEAL FROM CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
HONORABLE ROBERT L. KOFFMAN, JUDGE

SUBSTITUTE BRIEF OF RESPONDENT W&M WELDING, INC.

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Respondent adopts Appellant's Statement of Facts with the following supplement.

After Appellant was injured on the job he returned to work with medical restrictions. Gary McMullen testified that no light work was available so he "created some light duty" which allowed Appellant to continue working. He remained on light duty for eleven months until his termination. During that time he received a raise in his salary. [Tr. 588].

The night before Appellant's termination, Mr. McMullen testified that he received a call from a customer asking if it was possible to have his order ready to be picked up by 4:30 p.m. the following day. Gary responded that it would be possible, but time would only allow them to put a prime coat of paint on the railing which had been fabricated. The customer consented to the arrangement and agreed to put the final coat of paint on the product after it was delivered to the customer's site. [Tr. 589, 590].

The next morning Gary arrived at the company plant and, using a forklift, put the railing in the wash bay to be power washed. Around 6:45 a.m. he told Appellant about the phone call and that he needed to have the product available for delivery later that day. Gary testified that he instructed him to wash the product, tell the painter that it was ready to be primed and that he was not to do anything else until this was completed. [TR. 594]. Gary then went to a meeting. When Gary returned from the meeting around 9:30 a.m. the

railing had not been washed; Appellant was leaving the tool room. [Tr. 595]. When Gary asked why the railing had not been washed Appellant responded, "I haven't gotten to it." [Tr. 595]. When asked why he was in the tool room, he said he was taking his break. Gary remarked that Appellant had a scheduled break from nine to nine-fifteen and that it was then 9:40. After a heated discussion Gary terminated Appellant's employment. [Tr. 596].

Appellant gave a deposition in another case. In the course of his interrogation he stated that he had been terminated by Respondent because he had failed to wash a part in the wash bay as he had been instructed to do so by the owner. Later in the deposition he testified that he had been terminated because he had filed a workers' compensation claim. [Tr. 524, 525]

POINTS RELIED ON

I

The trial court did not err in refusing Appellant Templemire's verdict director which modified M.A.I. No. 23.13 by submitting the "contributing factor" standard used in M.A.I. No. 31.24 instead of the "exclusive cause" standard of M.A.I. No. 23.13 and in giving M.A.I. No. 23.13 because Sec.287.780 RSMo has been consistently interpreted by this Court for nearly thirty years to require that a person claiming damages for a retaliatory discharge prove that the "exclusive cause" of the discharge was the exercise of a right given by the statute and the legislature, having enacted numerous changes to the Workers Compensation Act in the interim, is presumed to have been familiar with the "exclusive cause" construction and to have approved it as a part of the law, and inasmuch as the verdict directing instruction patterned after M.A.I No. 23.13 was applicable to the case, it was mandatory that it be given to the exclusion of any other regardless of the "contributing factor" standard used in wrongful termination cases brought under the Missouri Human Rights Act and under the "public policy" exception to the "employment at will" doctrine.

Hansome v. Northwestern Cooperage Co., 679 S.W. 2d 273 (Mo. 1984)

Crabtree v. Bugby, 967 S.W. 2d 66 (Mo. Banc1998)

Blair v. Steadley Company 740 S.W. 2d 66 (Mo. Banc 1998)

RSMo. § 287.780

Rule 72.02(b)

ARGUMENT

I

The trial court did not err in refusing Appellant Templemire's verdict director which modified M.A.I. No. 23.13 by submitting the "contributing factor" standard used in M.A.I. No. 31.24 instead of the "exclusive cause" standard of M.A.I. No. 23.13 and in giving M.A.I. No. 23.13 because Sec.287.780 RSMo has been consistently interpreted by this Court for nearly thirty years to require that a person claiming damages for a retaliatory discharge prove that the "exclusive cause" of the discharge was the exercise of a right given by the statute and the legislature, having enacted numerous changes to the Workers Compensation Act in the interim, is presumed to have been familiar with the "exclusive cause" construction and to have approved it as a part of the law, and inasmuch as the verdict directing instruction patterned after M.A.I No. 23.13 was applicable to the case, it was mandatory that it be given to the exclusion of any other regardless of the "contributing factor" standard used in wrongful termination cases brought under the Missouri Human Rights Act and under the "public policy" exception to the "employment at will" doctrine.

Appellant recognizes that the trial court was required to give a verdict directing instruction based on M.A.I. 23.13 because it accurately stated the law as promulgated by the decisions of the Supreme Court and was applicable to the case. [App. brief, 20]. Yet, Appellant claims error on the part of the trial court in giving the instruction mandated by Supreme Court Rule 70.02(b). The basic premise of the appeal is that the Supreme Court was in error when it when it decided *Hansome v. Northwestern Cooperage Co.*, 679

S.W.2d 273 (Mo. 1984) and *Crabtree v. Bugby,* 967 S.W. 66 (Mo. banc 1998), White J., dissenting) which hold that an employee who asserts a claim for retaliatory discharge must prove that the "exclusive cause" of his discharge was for exercising his rights under the Missouri Workers Compensation Act. Appellant urges that a lighter burden should be the standard for recovery, i.e., that the exercise of those rights under the law was only a "contributing factor" in the decision to discharge, not necessarily the exclusive cause for the termination.

Missouri law is well settled. *Hansome* and its prodigy have continuously held that exclusive causation is the proper standard by which to measure the actions of the employer in a discriminatory retaliation case violative of the workers' compensation law. For good reason, exclusive causation should be retained as the causality standard in workers' compensation retaliatory discharge cases.

A. The verdict director, patterned after M.A.I. 23.13, given by the court which hypothesized that the exclusive cause of Appellant's discharge was the filing of a workers' compensation claim accurately stated the law of this state as resolved by the Supreme Court and is not contrary to the language of Section 287.780 RSMo.

Missouri is an "employment-at-will" state. Absent a contract of employment for a specified period of time, employees are considered to be "at will" which means that they can be fired at any time "for any reason or for no reason." *Johnson v. McDonnell Douglas Corp.*, 745 S.W. 2d 661 (Mo.1988); *Crabtree v. Bugby*, 967 S.W. 2d 66 (Mo. banc 1998).

An employer need not have cause to discharge an employee. See *Dake v. Tuell,* 687 S.W.2d 191 (Mo. banc 1985). However, like most rules, the unlimited right to fire has exceptions. For example, an "at will" employee cannot be fired because he or she is "a member of a protected class, such as race, color, religion, national origin, sex, ancestry, age or disability." Section 213.055, RSMo 2005. In addition, Missouri recognizes the public policy exception to the 'at will' employment rule." *Margiotta v. Christian Hospital Northeast Northwest*, 315 S.W. 3d 342, 346 (Mo. banc 2010) citing *Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 92 (Mo. banc 2010). This exception prohibits an employer from discriminating against an employee "for refusing to perform an illegal act or reporting wrongdoing or violations of law to superiors or third parties." *Margiotta*, supra. Both exceptions to the employer's right to terminate an employee-at-will allow an employee to recover damages for wrongful termination simply by proving that membership in a protected class or engaging in a protected activity was a "contributing factor" in the discharge. *Margiotta. supra*; M.A.I. 38.01; M.A.I. 38.03. However, cases brought under the workers' compensation law for wrongful termination require the employee to prove that the "exclusive cause" of the discharge was for exercising his rights under the act. M.A.I. 38.04.

In 1973 the legislature created the first exception to the "employment at will" doctrine. Section 287.780, RSMo grants a cause of action for damages to any employee who suffers discrimination for exercising any rights given by the workers' compensation laws of this state. The right to discharge an employee for any reason or for no reason is again qualified. An employer may not discharge an employee "for exercising his rights

under the [workers compensation] statute." Section 287.780 RSMo.

"The action authorized by this statute has four elements: (1) plaintiff's status as employee of defendant before injury, (2) plaintiff's exercise of a right granted by Chapter 287, (3) employer's discharge of or discrimination against plaintiff, and (4) an *exclusive* causal relationship between plaintiff's actions and defendant's actions." *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. 1984) (emphasis added).

M.A.I. 23.13, the verdict director in cases involving wrongful termination for exercising rights under the act is patterned after *Hansome* and requires the jury to find these elements to be true in order to return a verdict for the employee. The statutory exception to the employer's right to fire an "at will" employee provides the basis for Appellant's action.

Section 287.780 RSMo prohibits the discharge of an employee for filing a workers' compensation claim. Appellant, an "at will" employee, claims that his termination was retaliatory because he filed a claim for compensation.

Respondent, in its answer, alleges that employee's termination was non-discriminatory but was for cause--insubordination in that he refused to perform a job given to him by his employer. [LF 0042]. The factual inquiry, therefore, seeks to determine, and measure, the causal relationship between the discharge and the employee's exercise of his rights under the Act.

Appellant contends that the courts of this state have misconstrued the statute and the protection afforded the employee by requiring "an exclusive causal relationship

between plaintiff's actions [claiming benefits under the act] and defendant's actions [retaliation for claiming benefits]". *Hansome*, *id.* Appellant contends that *Hansome* is wrong--the employee should only have to prove that the assertion of his claim for benefits was a "contributing factor" to his discharge.

Appellant draws support for this position from the cases involving discrimination brought under The Missouri Human Rights Act and also those brought under the public policy exceptions to the employment-at-will doctrine. As noted above, in those cases liability can be imposed if the fact finder determines that a contributing factor to the discharge was a consideration of the employee's class membership prohibited by the act or that the employee was engaging in an activity protected by a public policy exception.

Cases brought under the public policy exceptions do not require exclusive causation as the standard for recovery. Those are actions in tort developed under the common law. *Boyle v. Vista Eyewear., Inc.*, 700 S.W.2d 859, 878 (Mo. App. 1985). On the other hand, while retaliation is also prohibited for exercising rights given by workers' compensation laws those cases are "controlled by specific statutory authority and [are] distinct from other wrongful discharge actions." *Margiotta,* end note, supra at 350. This is significant. As explained in *Brenneke v. Department of Missouri, Veterans of Foreign Wars of United States of America*, 984 S.W.2d 134 (Mo. App. W.D. 1998):

> There is a key distinction between whistleblower cases [brought under the public policy exception] and workers compensation discharge cases. While workers compensation cases are statutory, the whistleblower exception to the

employee-at-will doctrine arises under the common law of torts. In part for this reason, some of the other jurisdictions which, like Missouri, treat these public policy claims as arising in tort, do not require proof of exclusive causation, but rather require the employee to prove by a preponderance of the evidence that the discharge was for an impermissible reason. id. at 140.

Because Appellant's cause of action is based on a specific statutory exception to the employment-at-will doctrine, the language of the statute is the appropriate place to begin. Section 287.780 RSMo reads:

> No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages.

While no employer shall discharge or discriminate against any employee for exercising his rights under the workers compensation law, this does not mean that the employer cannot discharge an employee who has asserted a claim for benefits under the act if he has a valid, non-pretextual reason *Hopkins v. Tip Top Plumbing & Heating Co.*, 805 S.W. 2d, 280, 285 (Mo. App W.D. 1991). Therefore, if an employer terminates an employee-at-will *for cause*, for a legitimate reason, or for no reason, and the employee files an action for wrongful termination claiming discrimination, the employee is not entitled to recover. But the employee can recover if he sustains his burden of proof that

the *exclusive* cause of his termination was for exercising his rights under the statute. Without the prohibition in the statute, the employer has the absolute right to fire the employee. Since the statute affords the only lifeline to the employee, the employee must prove that the exclusive cause of his termination was for the reason that he sought benefits under the Act. If he can establish that he was terminated *solely due to* the fact that he claimed benefits, he can recover. *Hopkins v. Tiptop Plumbing & Heating Co.*, 805 S.W. 2d 280, 285 (Mo. App W.D. 1991)

The statute does not deny the employer's right to discharge the employee for any legitimate reason. *Coleman v. Winning,* 967 S.W.2d 644, 648 (Mo. App. E.D. 1998). The statute only prohibits the employer from discriminating against an employee "for exercising any of his rights" under the Act, i.e., ***because*** he exercised his rights under the act. The question is: Did the employer discriminate ***because*** the employee exercised his rights under the statute or did the employer terminate the employee for any reason unrelated to the exercise of his rights under the Act?

Neither term, "exclusive causation" nor "contributing factor", is mentioned in Sec. 287.780. Nor is the term "contributing factor" used in the MHRA[1]. Yet, Appellant argues that "exclusive causation" is contrary to the statute while the "contributing factor" standard should be implied. Because the exclusive causation language does not appear in the statute, he argues, it should not appear either in the case law or the instructions. [Appellant's brief, p. 23] Instead, he argues that the statute should be construed to mean

[1] Sections 213.010 to 213.137 RSMo 2000; Section 213.041 RSMO 2006.

that causality may be found by utilizing the contributing factor standard.

Sec. 287.780 RSMo, enacted in 1973, was a revision of the prior statute which did not provide an employee with a cause of action for discrimination. *Christy v. Petrus,* 295 S.W. 2d 122 (Mo. 1956). The only remedy available was a misdemeanor criminal sanction which could only be enforced by the state against the employer. See Historical and Statutory Notes to Sec. 287.770 VAMS.

Therefore, when the court in *Hansome* outlined the elements of the action it wisely analyzed the potential conflict between the proscription in the statute and the employment-at will doctrine and specified that "exclusive causation" be the standard to measure the reason for the discharge. In a footnote to the court's decision, the court said:

Missouri still adheres to the 'at will' doctrine which allows an employer to fire an employee for any reason or no reason. *Amaan v. City of Eureka*, 615 S.W. 2d 414 (Mo. banc 1981), cert. denied, 454 U.S. 1084, 102 S.Ct. 642, 70 L.Ed.2d 619 (1981). The Workers Compensation Act provides a limited exception to the 'at will' doctrine. Absent a statutorily prohibited reason for discharge, in this case an exclusive causal relationship between the discharge and employee's exercise of rights granted by Chapter 287 RSMo 1978, employer is free to fire any employee at will. *Hansome*, loc.cit. 275***Causality does not exist if the basis for discharge is valid and nonpretextual. citing *Rodriguez v. Civil Service Commission,* 582 S.W. 2d 354, 355 (Mo. App. E.D. 1979). *Hansome,* at 275.

In *Blair v. Steadley Company*, 740 S.W. 2d 329 (Mo. App. 1987) plaintiff-appellant

challenged the exclusive causality standard promulgated in *Hansome* contending that it was dictum. The Southern District responded: "We do not regard it as such." id. at 332. The court went on to say that "the exclusive causal relationship test in *Hansome* was a declaration of substantive law." id. at 333.

B. When the General Assembly made major revisions to the workers' compensation laws in 2005 and 2008 it is presumed to have known of the construction of the Sec. 287.780 by this Court in *Hansome* and *Crabtree* and it tacitly approved the interpretation of the wrongful discharge statute which requires an employee to prove exclusive causation as a predicate for recovery.

Sec. 287.087 RSMo. was adopted in 1973. See Historical Notes, VAMS. *Hansome* was decided in 1984. *Crabtree* followed in 1998. Numerous cases were decided in the interim and afterwards by the courts of appeals which have consistently followed these two decisions.

> It is not only the text of a statute that makes the legislative intent known, however, but the judicial decisions that construe and give effect to the statute. State v. Crawford, 478 S.W.2d 314, 317 (Mo 1972). The construction of a statute by a court of last resort becomes a part of the statute" 'as if it had been so amended by the legislature' " (internal citation omitted) *Dow Chemical Inc. v. Director of Revenue, State of Mo.*, 834 S.W. 2d 742, 745 (Mo. 1992).

Significant changes were made to the workers compensation statutes by the

legislature in 2005. "Senate Bills 1 and 130 amended 30 sections of Chapter 287, RSMo 2000 the Missouri Workers Compensation Law." *Missouri Alliance v. Department of Labor*, 277 S.W. 3d 670,674 (Mo. 2009). Section 287.780 was untouched. Exclusive causation was not challenged. More important, the legislature did not see fit to direct that a different standard be adopted.

In 2008, the legislature amended Sec. 287.020 (10). It recognized that it was aware of the judicial constructions placed on the meanings of various terms in the chapter when it mandated: "In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations of the meaning of [various terms] to include, but not be limited to, holdings in" two cases decided by this Court and one by the Western District.

Again, the legislature, as it did in 2005, failed to reject or abrogate the judicial construction of Section 287.780 adopting exclusive cause as the standard for recovery. That standard had become "a part of the statute as if it had been amended by the legislature" *Dow, ibid.*

In *Crabtree v. Bugby*, 967 S.W. 2d 66 (Mo. banc 1998), (White J., dissenting) Judge Holstein, writing for the Court said:

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. Id. at 71.

Appellant asks the court to redefine the elements of this statutory cause of action which were resolved in *Hansome* in 1984, reaffirmed in *Crabtree* in 1998, and strictly followed by our appellate courts with an implicit seal of approval given by the legislature. The thrust of his argument is that employees cannot win because the exclusivity standard is insurmountable and allows employers to discriminate and "avoid liability by pointing to anything other than exercising workers' compensation rights as a basis for termination or discrimination." [Appellants brief, p. 20]. This unsupported argument suggests that juries do not have the common sense or ability to discern the true reason for an employee's discharge. The net result of changing the causality standard from "exclusivity" to "a contributing factor" would be to provide an employee with a ticket to guaranteed employment. No employer would dare terminate an employee who has a claim for benefits, even for cause. Termination would be met in each instance with litigation. Judge Holstein said it best in *Crabtree*:

If there is an injustice or an absurdity, it would be for this Court to abandon the requirement that the discharge be exclusively caused by the exercise of rights pursuant to the workers' compensation law. Under that rule, an employee who admittedly was fired for tardiness, absenteeism, or incompetence at work would still be able to maintain a cause of action for discharge if the worker could persuade a factfinder that, in addition to the

other causes, a cause of discharge was the exercise of rights under the workers' compensation law. Such rule would encourage marginally competent employees to file the most petty claims in order to enjoy the benefits of heightened job security.

The purpose of the workers' compensation law, including the rule of liberal construction, is to compensate workers for job-related injuries; it is not to insure job security. *Hansome*, 679 S.W.2d at 277 (Donnelly, J., dissenting). Nothing in the plain language of sec. 287.780 expresses such a legislative intent. In addition, no words express any intent to wholly abolish the employment at will doctrine for those who have filed workers' compensation claims. We decline the invitation to give the statute such an expansive construction. Those who disagree with the statute and this Court's precedent analyzing the statute are free to seek redress in the legislative arena.

[*Crabtree*, supra at 72].

Appellant is free to seek redress in the state legislature. If that body is satisfied that the courts have applied the wrong causality standard, it is free to amend the statute to read that an employee is entitled to recover damages for discrimination if the employee can prove that his claim for benefits under the compensation act was a contributing factor in the employer's decision to the discharge. Since the cause of action was created by statute, the legislature is the appropriate body to review the courts' interpretation of its product. Presumably, the legislature is satisfied with *Crabtree* and *Bugby* or it would have spoken before now.

C. The verdict directing instruction given by the court, patterned after M.A.I. No.

23.13 accurately stated the law, was applicable to the case, not subject to modification, and therefore, it was required to be given to the exclusion of any other including that offered by Appellant.

Supreme Court Rule 70.02(b) mandates the giving of an approved M.A.I. instruction on the subject matter to the exclusion of all others. Appellant offered a verdict directing instruction which modified the retaliatory discharge instruction in workers' compensation cases by borrowing the "contributing factor" causation standard approved for use in cases involving discrimination brought under both the Missouri Human Rights Act (M.A.I 31.24) and the public policy exceptions to the employment-at-will doctrine (M.A.I. 31.25). That modified instruction reads:

On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a worker's compensation claim, and

Third, defendant discharged plaintiff, and

Fourth, plaintiff's filing of the worker's compensation claim was a contributing factor in such discharge, and

Fifth, as a direct result of such discharge plaintiff sustained damage.

[L.F. 0078, A 19]

The trial court refused the instruction and made the following comment in its order overruling plaintiff's motion for a new trial.

The duty of the trial court is to properly determine the law of the case and see that the facts presented support the presentation of the case to the trier of fact for determination. The Court, in the case before it, was requested by the plaintiff to go outside the requisites of the Missouri Approved Instructions (hereinafter referred to as M.A.I.). It was determined that the law was properly expressed in M.A.I. and the request was refused. The Court has not been persuaded to change its mind.

The motion is denied.

[L.F. 0132].

The court instead gave the instruction, No. 7, patterned after M.A.I. No.23.13. It reads:

On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a worker's compensation claim, and

Third, defendant discharged plaintiff, and

Fourth, the exclusive cause of such discharge was plaintiff's filing of the worker's compensation claim, and

Fifth, as a direct result of such discharge plaintiff sustained damage.

[A 14, L.F .0053]

It was mandatory that this instruction be given. It was applicable and approved for use in retaliatory discharge cases brought under the workers compensation law. Rule 72.02(b). Appellant's proffered instruction utilizing the contributing factor standard could have permitted a recovery even though the reason for his discharge was the fact that he was insubordinate in refusing to perform a job given by his employer. Appellant even admitted at trial that he had previously given sworn deposition testimony in another case surrounding the reason for his discharge. [TR. 524,525]. When asked why his employer discharged him he responded: "Because I didn't perform a job he -- that the owner had asked me." When asked to identify the job he answered, "[t]o wash something in the wash bay." However, later in the same deposition, he testified that his termination was a result of workers' compensation retaliation. [Tr. P 524,525]. His testimony, therefore, attributes two reasons for his termination -- insubordination and retaliatory discharge. His argument thus goes: Even though I was discharged for insubordination (cause), I am also entitled to recover my lost wages and other damages because retaliation was a contributing factor in my discharge.

Again, *Crabtree* is instructive.

As previously noted, one element of an action for damages against an employer under sec. 287.780 is an exclusive causal relationship between the plaintiff's cause of action and the discharge. Because the verdict director did not hypothesize that the exclusive cause of plaintiff's discharge was the filing of the workers' compensation claim, the

instruction did not accurately state the law. The instruction is erroneous in permitting the jury to return a verdict for plaintiff even though the reason for her discharge included causes other than the filing of a workers' compensation claim. *Crabtree v. Bugby*, 967 S.W. 2d 66, 71 (Mo. banc 1998) (White, J., dissenting)

By its order dated April 2, 2012, published in M.A.I. 7th Ed. 2012, page xxv, the Supreme Court of Missouri en banc approved and adopted the Missouri Approved Jury Instructions, (MAI), Notes on Use, and Committee Comments submitted to the Court by the Committee on Jury Instructions. Many instructions contained in previous editions have been revised or withdrawn. New instructions have also been added. M.A.I. 23.13, Verdict Directing—Retaliatory Discharge or Discrimination—Workers' Compensation, remains unchanged but has been renumbered. It is now M.A.I. 38.04. Its continued use remains mandatory. Id.

II

The trial court did not err in refusing Appellant Templemire's "pretext" jury instruction which is not in M.A.I. because the instructions given by the court as a whole accurately stated the law in Missouri regarding workers' compensation retaliation in that the jury was properly instructed on the subject of credibility, which includes pretext, and also because the instruction would have given the jury a roving commission in that it is an abstract statement of law that does not submit any ultimate issue to the jury for determination.

Appellant claims discrimination, retaliatory discharge for asserting a worker's

compensation claim. Respondent denies the claim, asserting that the discharge was for insubordination. Appellant responds that Respondent's reason for discharge is pretext. "It is for the jury, then to assess whether the cause attributed by the employer was pretext, rather, and to return a verdict accordingly." *Hopkins v. Tip Top Plumbing and Heating Co.,* 806 S.W. 2d 280, 284 citing *Wiedower v. ACF Indus.*, 715 S.W. 2d 303, 307 (Mo. App. 1986). "In a claim under Sec. 287.780 the factual question is frank and not elusive." *Hopkins* at 285.

Appellant offered, and the court refused to give, the following instruction not found in M.A.I.

> **You may find that plaintiff exercising his workers compensation rights was the exclusive cause of defendant's decision to discharge plaintiff if the defendant's stated reasons are not the true reasons, but are a pretext to hide retaliation against plaintiff for exercising his workers compensation rights.**

[L.F. 0131, A 22]

Appellant's premise that the jury was misdirected because there was no instruction on the importance of the veracity of the employer's alleged reasons for termination is unfounded. The court gave M.A.I. Instruction 2.01 [LF 0118, A5] which clearly advises the jury that it is the sole judge of the credibility of the witnesses. By definition, "credibility" encompasses "pretext". Is the evidence of the alleged motive for the discharge, insubordination, worthy of belief? If so, it is credible. If not, it is pretextual.

M.A.I. 2.01 applies equally to the evidence offered by both employer and

employee. Paragraph 11 of that instruction entitled "DELIBERATIONS" advises the members of the jury that they may give "any evidence or the testimony of any witness such weight and value as [they] believe that testimony is entitled to receive." id. In determining the "weight and value of the testimony of any witness" the jury is instructed that it can consider "the interest of the witness in the outcome of the case***[and] the inclination of the witness to speak truthfully or untruthfully" id. There is to be no distinction in the perception of the credibility of either party.

The instruction offered by plaintiff focuses the jury on the credibility of the *defendant's* witnesses and the value of the evidence offered in support of its affirmative defense. It suggests that the jury look closely at the stated reasons offered by *defendant* for plaintiff's discharge. It heightens the jury's interest to speculate if the defendant has sold them a bill of goods. That instruction is no different than an instruction which could be offered by an employer that reads:

> **You may find that plaintiff exercising his rights under the workers Compensation was not the exclusive cause of defendant's decision to discharge plaintiff if the defendant's stated reasons for the discharge are true.**

M.A.I. 2.01 is neutral. The credibility of the evidence offered by either party is measured by the same yardstick. Under 2.01 the jury is allowed to weigh and value the evidence offered by defendant. It is instructed to consider the inclination of its witnesses to speak the truth as well as their interest in the outcome of the case. It needs no

supplement. The jury is free to believe or disbelieve the evidence offered by defendant concerning the reason for discharge. The approved instruction tells them so.

Nothing prevented Appellant from developing evidence of pretext at trial. In fact, the trial was *all about the reason for the discharge*. It is consistent with the theory of M.A.I that the lawyers develop the facts permissibly inferred from the evidence, apply them to the instructions given by the court, and argue the facts to the jury. A pretext instruction is unnecessary. The jury, guided by M.A.I. 2.01 and argument of counsel can easily understand the issue, i.e., is the employer's stated reason for discharge worthy of belief. If it is not, or if it is questionable, it is the responsibility of the employee's lawyer to argue the evidence and its permissible inferences to the jury that the exclusive cause of the discharge was retaliation. Then, the job of the jury is to determine the facts.

In a case brought for employment discrimination under the Missouri Human Rights Act plaintiffs tendered a pretext instruction[2] similar to the one offered by plaintiff which would have allowed the jury to infer discrimination based upon the falsity of the defendant's assigned reason (insubordination) for terminating the plaintiff's employment. The Western District affirmed the trial court's refusal to give the instruction. *McCullough*

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[2] If you find that the stated reasons for [Appellants'] terminations are not the true reasons why [Commerce Bank] terminated [Appellants'] employment, you may, but need not, find the state reasons are pretext to hide [Commerce Bank's]intent to discriminate and conclude that [appellants'] [race or age]was a contributing factor in [Commerce Bank's] decision to terminate his employment. McCullough at 398.

v. Bank, 349 S.W. 3d 389, 112 Fair Empl. Prac. Cas. (BNA) 1786 (Mo. App 2011). The court commented that "nothing prevented Appellants from offering evidence to suggest that Commerce Bank's explanation for their termination was pretextual or from arguing to the jury that it could draw the reasonable inference from the pretextual explanation that race and age were contributory factors in Appellants termination." id. at 399.

M.A.I. 2.01(9) entitled "CLOSING ARGUMENTS" reads in part: "In closing arguments, the lawyers have the opportunity to direct your attention to the significance of the evidence and to suggest the conclusions that may be drawn from the evidence." Appellant's counsel was obviously was aware of his right to attack the credibility of Respondent's president, Gary McMullin, whose stated reason for the discharge was insubordination. His closing argument took full advantage of that opportunity: ("What juries get to do is you get to infer things from the evidence because I have learned over the years that 12 people are so much smarter even than good lawyers like Mr. Buckley.) [Tr. 673,674]. ("You can choose to ignore the testimony that Gary McMullin gave, that every one of you, I believe, in your hearts knows is untrue") [Tr. 678]. ("And you know what, honestly, I think you're going to come to the conclusion that Gary McMullin never thought he [Templemire] was insubordinate. He was angry about the work comp claim.") [Tr. 683] ("You have to decide the credibility of the witnesses in this case, and I am confident, ladies and gentlemen, that you can do that.") [Tr. 703]. Even though Appellant claims prejudice in the court's refusal to give the pretext instruction, he fully developed the concept of insubordination as a pretext for the discharge. It is inconceivable that Appellant suffered prejudice by the court's refusal to give the instruction when the issue

was laid before the jury. It is inconceivable that the jury could not understand the only ultimate issue for determination without the aid of the pretext instruction that was rejected by the court.

Furthermore, the pretext instruction was properly rejected by the court because it grants a "roving commission" for the jury to find exclusive causation for Appellant's discharge and, therefore, liability of the defendant. "A 'roving commission' occurs when an instruction assumes a disputed fact or submits an abstract legal question that allows the jury 'to roam freely through the evidence and choose any facts which suited its fancy or its perception of logic' to impose liability. If an instruction fails to advise the jury what acts or omissions of the party, if any, found by it from the evidence, would constitute liability, the instruction is a roving commission." *Coon v. Dryden and Fotopolus*, 46 S.W. 3d 81, 92. (Mo. App, S.D. 2001). (internal citations omitted)

The language of the tendered instruction ("if defendant's stated reasons are not the true reasons") would allow the jury to speculate on the reasons for the discharge. The instruction does not require the jury to find the reasons for the discharge which are untrue and which would qualify as pretextual and therefore permit an inference of exclusive causation. Respondent only attributed one reason for the discharge—insubordination. The use of the word "reasons" in the instruction implies that there was more than one. The instruction would allow the jury a roving commission to determine another reason for the employer's decision to discharge which would then be a predicate for liability. It is gen-

eral. It fails to require any finding, and it is not limited to the facts developed in the case. It is an abstract suggestion to the jury in aid of plaintiff's cause.

Finally, it is difficult to imagine that the Respondent's reason for discharge was pretextual given the fact that Appellant admitted that he previously testified under oath that he was discharged because he failed to wash a part in the bay when he was asked to do so by his employer. [Tr. 524, 525]. Since Appellant stated that the reason for his termination was insubordination, given under oath, Respondent should have been entitled to a verdict as a matter of law. *Coleman v. Winning*, 967 S.W.2d 644, (Mo. App. E.D. 1998).

CONCLUSION

The interpretation of Sec. 287.780 RSMo by the Supreme Court which requires an employee to prove that the exclusive cause of a retaliatory discharge was the exercise of a right under the statute is consistent with the application of the employment-at-will doctrine, has been tacitly approved by the legislature and should remain the causation standard in the action. M.A.I. 23.13, adopted by the Court, properly submitted the elements of the cause to the jury. Further, the jury was properly instructed by M.A.I. 2.01 on the credibility of the evidence which allowed proper consideration of the claim of pretext and rendered the instruction offered by Appellant unnecessary. The trial court did not err in refusing to give the instructions offered by Appellant Templemire.

WHEREFORE, Respondent prays the judgment of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATION

Pursuant to Mo. R.Civ.P. 84.06(c), I hereby certify that Respondent's Substitute Brief includes the information required by Rule 55.03, complies with the limitations in Rule 84.06(b) and contains 6,215 words excluding the parts of the brief exempted by Rule 84.06(b), according to the Microsoft Word system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that on April 29, 2013, a true and correct copy of the foregoing Substitute Brief was filed electronically using the Missour Courts e-Filing System, which provided notice and service of the fling to counsel of record for appellant:

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