SC90995

IN THE SUPREME COURT OF MISSOURI

RUSSELL STEVENSON,

Plaintiff/Appellant,

v.

HOLLAND-BINKLEY COMPANY,

Defendant/Respondent.

Appeal from the Circuit Court of Warren County, Missouri
The Honorable Keith M. Sutherland, Circuit Judge
Case No. 07BB-CC00058

Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED93169

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Plaintiff Stevenson was formerly employed as a machine operator for Defendant Holland. Defendant Holland terminated Plaintiff Stevenson on July 22, 2005. Thereafter, Plaintiff Stevenson brought the above-captioned cause of action against Defendant Holland for worker's compensation retaliation pursuant to R.S.Mo. § 287.780. The only alleged act of retaliation at issue in this law suit is Plaintiff's termination.

Plaintiff Stevenson's worker's compensation claims against Defendant Holland began around 2000. LF 25-27; 69-70. Plaintiff Stevenson filed at least four (4) worker's compensation claims against Defendant Holland between 2000 and 2002. Id. Plaintiff Stevenson received settlements for these claims during his employment with Defendant Holland, but does not allege that he experienced any instances of retaliation in connection with these claims. LF 25-27; 70.

On July 5, 2005, John Davis, one of Defendant Holland's managers, was reviewing a company telephone bill and noticed that there were several calls to the same number during the month of June 2005. L.F 156-58; 250-52. Mr. Davis did not recognize the number and therefore undertook an investigation to determine the nature of these calls. Id. Ultimately, he determined that the number at issue was Plaintiff Stevenson's home telephone number. Id. Mr. Davis then reviewed the phone bills for other months and determined that there were at least fifty (50) calls to Plaintiff Stevenson's home telephone number. Id.

Defendant Holland has a company handbook which contains the following provisions:

> **The use of the disciplinary steps may be applied when there is a violation of the following rules, however, at all times the Company reserves the right to accelerate any of the steps when imposing discipline when it determines that more severe discipline is warranted under the circumstances.**
>
> . . . .
>
> 20. Unauthorized use of company phones for non-emergency or personal calls is prohibited.
>
> . . . .
>
> **The following rules are considered to be of such serious nature that violation may result in immediate suspension or termination, under most circumstances.**
>
> . . .
>
> 11. Using facility communication systems inappropriately, ie computer, pagers, 2-way radios, phones, etc.
>
> . . .
>
> 21. Falsification of any Company documents or record, including but not limited to, production reports, time cards, completing or tampering with any other employee's time card or providing false information or omitting

material information from any Company record or to and Company representative.

LF 87-91. Emphasis in original.

Significantly, Plaintiff Stevenson does not dispute that he made these phone calls. LF 43 (at page 87 of Plaintiff Stevenson's deposition)(Q. Is it safe to say that you don't dispute that you made any of these calls? A. Never have.). Plaintiff Stevenson likewise does not dispute that the calls were made for personal reasons. LF 29 (at pages 30-31 of Plaintiff Stevenson's deposition)(Q. You don't dispute that the incident that led to your termination, you were using the phone for personal reasons? A. I don't dispute that at all.).

Plaintiff Stevenson also conceded that he submitted time cards to Defendant Holland which reflected that he worked a full eight (8) hour shift on each day that he made these personal phone calls on work time. LF 37 (at page 63-64 of Plaintiff Stevenson's deposition)(Q. And you don't dispute that while you were making these personal phone calls that you were reporting a full eight hours worked? A. That's correct. Q. When in fact you had not worked the eight hours? You had taken at least some time off to make these personal calls? A. Two minutes here and two minutes there, that's correct. Q. And it looks like over the course of a few months the few minutes added up to about an hour and a half? A. Over a two-month period, I believe that was correct).

Plaintiff Stevenson even admits that he used Defendant Holland's telephone for personal use at various other times over the course of his

employment. LF 31 (at page 40 of Plaintiff Stevenson's deposition)(Q. Okay. At any point prior to [your wife] becoming ill did you make any phone calls to your wife, buddy, whoever, on company time? . . A. I have used that phone prior to this, yes. Q. For personal reasons? A. Yes. Over the course of eight years, I most certainly have).

Plaintiff Stevenson also acknowledges that he received a thirty (30) minute lunch break and two (2) ten to fifteen (10-15) minute breaks throughout the course of his workday during which he could have made these personal phone calls, but didn't. LF 27.

Plaintiff Stevenson does not dispute that he received a copy of Defendant Holland's handbook and that he was familiar with this provision. LF 28 (at pages 27-28 of Plaintiff Stevenson's deposition)(Q. . . . You received a copy of [the Handbook] while you were employed by my client, correct? A. Yes. Q. And you're familiar with its contents? A. I read it. Q. And, in fact, you signed off acknowledging receiving a copy? A. Yes, I did.). Plaintiff does not dispute that his admitted conduct was in violation of the Company's handbook. LF 32 (at page 43 of Plaintiff Stevenson's deposition)(Q. And you would agree that those personal calls would be in violation of that handbook? A. *Most certainly they would be*, if that's what you're reading here, yes.)(emphasis added).

Furthermore, despite Plaintiff Stevenson's vague assertions of selective enforcement of the handbook against him, he cannot point to a single instance in which a member of Defendant Holland's management had knowledge that another

employee used the company phone for personal reasons but declined to impose discipline. LF 42 (at pages 83-84 of Plaintiff Stevenson's deposition)(Q. . . . Again, you cannot point me to a shred of evidence to suggest that a member of management observed these co-workers using the telephone for personal reasons? . . . A. No, I can't tell you if they observed them or not). Simply put, Plaintiff Stevenson has failed to offer sufficient evidence to support a plausible argument for selective enforcement.

The paucity of support for Plaintiff Stevenson's position becomes apparent when the Court considers the testimony of his very own union shop steward – Gary Newmann. Plaintiff Stevenson was a member of the International Association of Machinists District No. 9 while he was employed by Defendant Holland, covered by the Collective Bargaining Agreement between the parties. LF 27. Although his union initially filed a grievance over Plaintiff Stevenson termination, it declined to pursue the matter to arbitration. LF 119. Mr. Newmann assisted Plaintiff Stevenson throughout the grievance process in an attempt to get Defendant Holland to provide him with another chance. However, *even Mr. Newmann believed that Defendant Holland was justified in terminating Plaintiff based upon his admitted and repeated violation of company rules.* LF 118 (at page 45 of Mr. Neumann's deposition)(Q. Do you believe [the company] had just cause in Mr. Stevenson's case? A. They had just cause to terminate him, yes. Q. Do you believe [the company] had just cause? A. Do I believe they had just cause? Yes, otherwise, I would have tried to pursue it to arbitration).

Mr. Newmann also testified that Plaintiff Stevenson's worker's compensation history was *never brought up* by the company during his discussions with Defendant Holland throughout the grievance process. LF 116.

As set forth more fully *infra*, Plaintiff Stevenson has not, and cannot, produce any evidence upon which a reasonable jury could find that his termination was in any way motivated by his worker's compensation history with Defendant Holland. Accordingly, the Trial Court's judgment should be affirmed.

POINTS RELIED ON

I. The trial court properly granted summary judgment to Defendant Holland because Plaintiff's first point relied on which argues that the exclusive causal connection standard is not the proper legal standard to be applied in worker's compensation retaliation cases violates Rule 83.08(b) of the Missouri Rules of Civil Procedure in that he failed to raise the issue to either the trial court or the court of appeals.

V.A.M.R. 83.08(b)

Lane v. Lensmeyer, 158 S.W.3d 218 (Mo. banc 2005)

Blackstock v. Kohn, 994 S.W.2d 947 (Mo. banc 1999)

II. The trial court properly granted summary judgment to Defendant Holland because it correctly applied the "exclusive causation" standard in that this standard is consistent with the legislature's intent of providing compensation to workers for job-related injuries (and not to ensure job security) and stare decisis requires this Court defer to nearly thirty (30) years of unwavering judicial precedent applying this standard

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

Cabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998).

R.S.Mo. § 287.780

R.S.Mo. § 287.800

III. The trial court properly granted summary judgment to Defendant Holland because the uncontroverted evidence supported its finding that Plaintiff Stevenson's worker's compensation claims history was not the exclusive cause of his discharge in that he admittedly violated Defendant Holland's work rules when he repeatedly made personal telephone calls during work time.

R.S.Mo. § 287.780

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998)

IV. The judgment of the Trial Court should be affirmed because Plaintiff's Point Relied On fails to comply with Mo. R. Civ. P. 84.04(d) in that it gives absolutely no explanation as to why, *in the context of the case*, the stated legal reasons support his claim which therefore renders this appeal subject to dismissal

V.A.M.R. 84.04

Kieffer v. Gianino, 301 S.W.3d 119 (Mo. App. E.D. 2010)

Pape v. Huey's Collision Center, 271 S.W.3d 646 (Mo. App. E.D. 2008)

LEGAL ARGUMENT

1. The trial court properly granted summary judgment to Defendant Holland because Plaintiff's first point relied on which argues that the exclusive causal connection standard is not the proper legal standard to be applied in worker's compensation retaliation cases violates Rule 83.08(b) of the Missouri Rules of Civil Procedure in that he failed to raise the issue to either the trial court or the court of appeals

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Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. banc 1997)

* * * *

Rule 83.08(b) of the Missouri Rules of Civil Procedure provides, in pertinent part, that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief . . ." Moreover, this Court has routinely disregarded arguments raised in substitute briefs which violate this prohibition. *See, e.g.*, Lane v. Lensmeyer, 158 S.W.3d 218, 229-30 (Mo. banc 2005)(taxpayer alteration of the challenged tax rate amount for first time before Supreme Court violated Rule 83.08(b)); Blackstock v. Kohn, 994 S.W.2d 947, 953 (Mo. banc 1999)("The Blackstocks did not raise this claim before the court of appeals. This Court, therefore, may not review the claim."); Linzenni v. Hoffman, 937 S.W.2d

723, 727 (Mo. banc 1997)("Those issues were not raised in the brief before the court of appeals. On transfer to this Court, an Plaintiff may not "alter the basis of any claim that was raised in the brief filed in the court of appeals." Those claims are denied.")(internal citations omitted).

Plaintiff Stevenson's substitute brief likewise violates Rule 83.08(b). Indeed, in his Appellant's Brief to the Court of Appeals, Plaintiff Stevenson conceded that the exclusive causal connection standard was the proper standard to be applied in this case. To wit:

> To maintain his claim for retaliatory discharge under the Missouri Workers' Compensation Law, RSMo.§287.780, Stevenson is required to establish the following four elements: . . . (4) an *exclusive causal relationship* between Mr. Stevenson's actions and Defendant Holland's actions.

App. Brief at p.11 (emphasis added).

Moreover, Plaintiff Stevenson's Appellant's Brief is entirely devoid of any reference whatsoever to a different causal standard. Plaintiff's Stevenson's newfound argument along these lines is even more apparent when the Court considers that one of the *reasons for transfer* that he urged this Court to consider in his Application for Transfer was whether the trial court was correct in its factual determination that the "exercise of a right under the Missouri Workers' Compensation Law was the *exclusive* cause of his termination" in this case. App. Transfer at p.2 (emphasis added).

Additionally, this approach was entirely consistent with Plaintiff Stevenson's concessions to the trial court in this regard. See LF at p.297 (i.e. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in which he conceded that he must establish "[a]n exclusive causal relationship" between the exercise of his rights and his termination).

The simple fact of the matter is that the first time that Plaintiff Stevenson advocated that a standard other than an "exclusive causal connection" should be utilized was in his substitute brief to this Court (and likely after being contacted by counsel for organizations which were considering filing amicus briefs in support of a lower causal standard).

It is fundamentally unfair to the administration of justice, and blatantly contradictory to V.A.M.R. 83.08(b), for Plaintiff Stevenson to include this last minute argument in support of his claim. Accordingly, the Judgment of the trial court should be affirmed in all aspects.

2. The trial court properly granted summary judgment to Defendant Holland because it correctly applied the "exclusive causation" standard in that this standard is consistent with the legislature's intent of providing compensation to workers for job-related injuries (and not to ensure job security) and stare decisis requires this Court defer to nearly thirty (30) years of unwavering judicial precedent applying this standard (responds to Plaintiff Stevenson's first point relied on – de novo review)

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

Cabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998).

R.S.Mo. § 287.780

R.S.Mo. § 287.800

* * * *

Despite not being procedurally proper before the Court (as set forth *supra*), Plaintiff and amicus now try to get a third bite at the apple in urging the Court to abandon decades of well-established precedent in this State consistently applying the exclusive causal connection standard to cases arising under R.S.Mo. § 287.780.

In baseball parlance, strike one was Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo. banc 1984) in which this Court adopted the exclusive causal connection for cases under R.S.Mo. § 287.780 for the first time.

Then, approximately fifteen (15) years later, strike two came when this Court unanimously adhered to stare decicis and rejected the plaintiff's attempt to eviscerate the exclusive causal connection standard in Cabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998).

Defendant Holland now asks the Court to throw the final strike by Plaintiff and amicus and once again uphold the doctrine of stare decisis, and put this issue to bed once and for all.

In Crabtree, this Court reaffirmed the exclusive causal connection standard in cases under R.S.Mo. § 287.780. In so doing, this Court relied heavily upon stare decisis as follows:

> 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.

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

The Crabtree court then went even further and declared that the Hansome decision was entirely consistent with the legislative intent underlying R.S.Mo. § 287.780. To wit:

> 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.

Id. at 72 (emphasis in original).

Moreover, this Court recently made a point to distinguish a statutory cause of action under R.S.Mo. § 287.780 from a common law public policy claim based upon an exceptions to the employment-at-will doctrine. Margiotta v. Christian Hospital Northeast Northwest, 315 S.W.2d 342, 346 fn.1 (Mo. banc 2010)("Retaliation for filing a worker's compensation action is also prohibited; however, it is controlled by specific statutory authority and is distinct from other wrongful discharge actions.").

Furthermore, the Missouri Legislature's recent revision to the worker's compensation law does not assist Plaintiff or amicus because it is not applicable to a cause of action under R.S.Mo. § 287.780.

The recent legislation - R.S.Mo. § 287.800 - provides as follows:

> Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any *reviewing* courts shall construe the provisions of this chapter strictly.

Surely, the Legislature was referring to appellate courts that *review* decisions of administrative law judges and others who have jurisdiction to provide compensation to injured workers when it enacted this statute. This result is bolstered by the maxim of statutory construction of *noscitur a sociis* which provides that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. State v. Bratina, 73 S.W.3d 625, 627 (Mo. banc 2002); Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651, 660 (Mo. banc 1964). Each of the other terms referenced in R.S.Mo. § 287.800 construe the provisions of the worker's compensation law for providing compensation to claimants; conversely, none of these other individuals construe the provisions of a retaliatory discharge cause of action under R.S.Mo. § 287.780.[1]

[1] Note that amicus argues, somewhat paradoxically, that, one the one hand, the recent amendment to R.S.Mo. § 287.800 provides grounds for the Court to review

Another rule of statutory construction also undermines Plaintiff's argument. Indeed, it has been well-established law for over a century that the Legislature is presumptively aware of the interpretation of existing statutes placed upon them by state appellate courts. State ex rel. Kemp v. Hodge, 629 S.W.2d 353, 358 (Mo. banc 1982). Accordingly, the re-enactment of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption as thus construed. McKay v. Minner, 55 S.W. 866, 867 (Mo. 1900). Applying this logic to the worker compensation retaliation statute, the Legislature was presumptively aware of the exclusive causation standard imposed by Hansome and Crabtree when it reenacted R.S.Mo. § 287.780 in 2005 without change and thereby adopted this construction of the statute. Conversely, if the Legislature had intended to abandon decades of legal precedent construing R.S.Mo. § 287.780 (and thereby bring about a significant change in the legal standard to be applied in cases of this nature) then it most certainly would have done so explicitly by amending R.S.Mo. § 287.780 to provide for a different causal standard. Can it reasonably be said that

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its Handsome and Crabtree decisions, but, on the other hand, that the strict construction language in R.S.Mo. § 287.800 does not apply because the trial court was not a "reviewing court" as the term is used in the statute. Defendant Holland agrees that R.S.Mo. § 287.800 is not applicable, and that its inapplicability provides further support for this Court to adhere to stare decisis.

the Missouri Legislature would depart from decades of precedent by implication (via an amendment to R.S.Mo. § 287.800)? Defendant Holland thinks not.

Lastly, the causation standard applied by other states is not as friendly to Plaintiff's position as amicus characterizes it to be.

First, to the extent that other states have legislatively codified the exclusive causation standard (as referenced in the Alabama, Maryland, New Mexico, and Virginia statutes cited by amicus), it provides further support for the rationale underlying the Handsome and Crabtree decisions – i.e. worker's compensation retaliation cases are in a special category of their own because worker's compensation claims are not meant to provide heightened job security. These statutes reveal that Missouri's interpretation of its worker's compensation retaliation statute is in line with the majority of jurisdictions which impose a heightened evidentiary standard due to the policies underlying legislation of this nature.

Second, Indiana likewise imposes an exclusive causation standard upon worker's compensation retaliation cases. Purdy v. Wright Tree Service, Inc., 835 N.E.2d 209, 212 (Ind. App. 2005)("In order to be successful on a claim for retaliatory discharge, a plaintiff must demonstrate that his or her discharge was solely in retaliation for the exercise of a statutory right."). This holding is even more significant given that a retaliatory discharge claim in Indiana arises under the common law (as opposed to being statutorily based).

Third, even the authority cited by amicus supports a heightened evidentiary standard being applied to worker's compensation retaliation cases. For instance, amicus advocates for a "contributing factor" standard to be applied to worker's compensation cases but then cites a Maine statute and case law interpreting this provision for the proposition that the adverse employment action must be "rooted *substantially and significantly* in the employee's exercise of his rights under the Workers' Compensation Act." Amicus brief at p.8 (emphasis added). *See also* Lavoie v. Re-Harvest, Inc., 973 A.2d 760, 762 (Me. 2009)("The key question for the hearing officer on Lavoie's claim of discrimination was whether the motivation for the employee's termination was rooted substantially and significantly in the employee's exercise of his rights under the Workers' Compensation Act.").[2]

[2] Additionally, amicus relies upon Schmidgall v. Filmtec Corp., 2002 WL 655680 (Minn. App. 2002), which is an *unpublished* decision, for the proposition that Minnesota law does not require an exclusive causal connection standard in worker's compensation retaliation cases. First, this unpublished decision may not serve as precedent per statute. Minn. Stat. § 480A.08.3 ("Unpublished opinions of the Court of Appeals are not precedential."). Additionally, the case that the Schmidgall court cites in support of this proposition – Anderson v. Hunter, Keith, Marshall Co., 417 N.W.2d 619, 626-27 (Minn. 1988) is a sex, martial status, and pregnancy discrimination case under the Minnesota Human Rights Act. Thus,

Similarly, amicus cites a Kentucky statute and case law interpreting this provision and suggests that they stand for the proposition that there must only be "a causal connection between the protected activity and the adverse employment action." Amicus brief at p.7. However, a review of the case law that amicus cites for this proposition – Colorama, Inc. v. Johnson, 295 S.W.3d 148, 152 (Ky. App. 2009) – reveals that Kentucky likewise requires a heightened evidentiary standard in cases of this nature. Specifically, the Colorama court declared that the issue in these cases is "whether [plaintiff's] filing of a worker's compensation claim was a *substantial and motivating factor* but for which he would not have been discharged." Id. (emphasis added).

Taking all of this into consideration, Defendant Holland urges the Court to adhere to nearly thirty (30) years of its well-established precedent and re-affirm that an exclusive causal connection is the appropriate evidentiary standard in worker's compensation retaliation cases. Any contrary holding would be contrary to the Legislature's intent in enacting R.S.Mo. § 287.780 as well as precedent from a majority of other jurisdictions around the Nation.

Minnesota law on the appropriate standard in worker's compensation retaliation cases is far from settled on this issue.

3. The trial court properly granted summary judgment to Defendant Holland because the uncontroverted evidence supported its finding that Plaintiff Stevenson's worker's compensation claims history was not the exclusive cause of his discharge in that he admittedly violated Defendant Holland's work rules when he repeatedly made personal telephone calls during work time (responds to Plaintiff Stevenson's second point relied on – de novo review)

R.S.Mo. § 287.780

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998)

Hickman v. May Department Stores Co., 887 S.W.2d 628 (Mo. App. E.D. 1994)

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 873 (Mo. App. E.D. 2009).

* * * *

A. Background on the worker's compensation retaliation claim, and the legal standard applicable to claims of this nature

The worker's compensation retaliation statute - R.S.Mo. § 287.780 - provides as follows:

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 against his employer.

In Crabtree v. Bugby, 967 S.W.2d 66, 70 (Mo. 1998)(en banc), the Supreme Court of Missouri set forth the elements that a plaintiff must prove in order to prevail upon a claim of worker's compensation retaliation, as follows: (1) plaintiff's status as an 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 action and defendant's actions. In response to the Crabtree decision, the Missouri Supreme Court Committee on Civil Jury Instructions promulgated the following verdict directing instruction for worker's compensation retaliation claims into the Missouri Approved Instructions which likewise incorporates the exclusive causal connection standard:

23.13 [2000 New] Verdict Directing – Retalitory Discharge or Discrimination – Worker's Compensation

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.

Missouri Approved Jury Instructions (Civil)(emphasis added).

Against this background, Missouri courts universally agree that exclusive causation does not exist if the employer's basis for discharge is valid and non-pretextual. *See*, *e.g.*, St. Lawrence v. Trans World Airlines, Inc., 8 S.W.3d 143, 149 (Mo. App. E.D. 1999)(plaintiff failed to present sufficient evidence of pretext where she admitted that she violated the employer's work rules when she forged another employee's name on sign-in sheet, but merely asserted that this reason for her termination was "a convenient excuse)(affirming summary judgment in favor of employer); Wehmeyer v. Fag Bearings Corp., 190 S.W.3d 643, 649 (Mo. App. S.D. 2006)(plaintiff failed to present sufficient evidence of pretext where she failed to show that the medical restrictions placed upon her were unjustified, or that there were other positions that were available which she could perform). Stated slightly differently, if the evidence demonstrates that the employer had just cause for terminating the employment, other than for the employee's exercise of his/her rights under the Worker's Compensation Act, then the employee cannot recover for retaliatory discharge under R.S.Mo. § 287.780. St. Lawrence, 8 S.W.3d at 150; Bloom v. Metro Heart Group of St. Louis, Inc., 440 F.3d 1025, 1028 (8th Cir. 2006).

B. Application of the law to Plaintiff Stevenson's termination

Plaintiff Stevenson does not dispute that he engaged in the conduct for which he was disciplined – i.e. his admitted and repeated violations of the

company handbook. Rather, Plaintiff Stevenson alleges that these admitted violations of company policy were a pretext for Defendant Holland's true reason for terminating him – i.e. in response to his worker's compensation claims.

In this regard, Plaintiff Stevenson's allegations of pretext can be summarized as follows: (i) Defendant Holland's offer of severance benefits to Plaintiff Stevenson in connection with the negotiation of a settlement of his most recent worker's compensation claim provides circumstantial evidence that Defendant Holland did not want him to remain employed by it, (ii) his termination was pretextual because other employees utilized Defendant Holland's telephone for personal purposes but were not disciplined, and (iii) Plaintiff Stevenson believes that Defendant Holland should have utilized progressive discipline for his admitted misconduct rather than proceeding directly with termination. Defendant Holland will address each argument individually *infra*.

i. <u>The alleged temporal proximity between Plaintiff Stevenson's exercise of his rights and his discharge is insufficient to overcome the exclusive causal connection standard in light of his admitted misconduct</u>

Plaintiff Stevenson relies heavily upon Defendant Holland's offer of severance benefits to Plaintiff Stevenson around December 2004 in connection with the negotiation of a settlement of his most recent worker's compensation claim in an attempt to circumstantially establish that the true reason for his termination was due to the exercise of his worker's compensation rights. Indeed,

Plaintiff Stevenson attempts to denigrate the company for making an offer of this nature by arguing that it "attempt[ed] to force Stevenson to quit his job as a condition of settling his workers' compensation claims." Pl. Substitute Brief at p.19.

Missouri courts have rejected similar attempts to create an inference of discrimination by virtue of alleged proximity between the exercise of a protected right and an adverse employment action. For instance, in Hickman v. May Department Stores Co., 887 S.W.2d 628, 630-31 (Mo. App. E.D. 1994) the court held that there was insufficient evidence to submit a worker's compensation retaliation claim to the jury when a span of seven (7) months elapsed between the protected conduct and the adverse action. *See also* Mitchell v. St. Louis County, 575 S.W.2d 813 (Mo. App. 1978)(summary judgment appropriate where several months passed between protected right and discharge).

Similarly, a span of nearly (8) months elapsed between the company's severance offer in December 2004 and Plaintiff's discharge for admitted misconduct on July 22, 2008. Accordingly, Plaintiff cannot rely on alleged temporal proximity between these events to support his claim.[3]

Essentially, Plaintiff Stevenson attempts to achieve heightened job security as a result of his worker's compensation claims. Plaintiff Stevenson would have

[3] In any event, the offer of severance benefits is an inadmissible offer of settlement.

the Court ignore his repeated misconduct. Plaintiff Stevenson would have the Court ignore the fact that he was aware that he was continuously violating a rule. Plaintiff Stevenson would have the Court believe that he is untouchable and can act with continuous disregard of legitimate workplace rules, because the company allegedly tried to "get rid of him" by virtue of its offer of a severance package in connection with the negotiation of a resolution of his most recent worker's compensation claims. Plaintiff Stevenson would have the Court believe that this highly circumstantial evidence provides him with carte blanche to act as he pleases in the workplace. However, this is precisely the result that the Crabtree Court squarely rejected. Crabtree, 967 S.W.2d at 72. Any contrary result would utterly eviscerate the exclusive causation standard.

Additionally, this highly circumstantial evidence is even less persuasive when the Court considers that Plaintiff Stevenson had filed several worker's compensation claims against Defendant Holland over the course of his employment, and that he does not allege that he was discriminated against as a result of these worker's compensation claims. It simply does not make any sense that Defendant Holland would tolerate his numerous worker's compensation claims and related settlements and absences for over five (5) years but then suddenly decide to discriminate against him in July 2005. Nor did Plaintiff Stevenson offer any evidence of such.

In this regard, the present case is similar to Lehman v. United Parcel Service, Inc., 2007 WL 603085 (W.D. Mo. Feb. 22, 2007) in which the plaintiff

had applied for and received worker's compensation in the past – including a year-long stretch during which he was unable to work – after which he was allowed to return to his previous job. The court granted summary judgment to the employer based upon the lack of evidence adduced by the plaintiff and the fact that the employer has previously allowed him to return to work once he recovered from another injury, which suggested no reasonable juror could find that the employer retaliated against him for making a claim under the Workers' Compensation Law.

It's not as though this was the first time that the company was required to pay worker's compensation benefits to Plaintiff Stevenson, or any other employee. It's not as though the company terminated Plaintiff Stevenson immediately after he rejected its offer of severance benefits, and without any wrongdoing whatsoever on his part. It simply defies logic, and well-established precedent from this Court, to permit Plaintiff Stevenson to use the employer's offer of severance benefits to serve as a "get-out-of-jail-free card" once he returns to the workplace. Accordingly, Plaintiff Stevenson's argument along these lines should be rejected, and *must be* rejected for the sake of the orderly operations of workforces and even-handed treatment of employees in this State.

ii. Plaintiff Stevenson has failed to satisfy his burden to present evidence that similarly situated employees were treated differently for similar misconduct, and therefore his allegations of pretext must fail

In order to show pretext, Missouri law is well-established that a plaintiff must show that the employees are similarly situated in all relevant aspects. Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 873 (Mo. App. E.D. 2009). Specifically, "the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." Buchheit, Inc. v. Missouri Commission on Human Rights, 215 S.W.3d 268 (Mo. App. W.D. 2007). *See also* Cherry v. Ritenour School Dist., 361 F.3d 474, 479 (8th Cir. 2004)(same); EEOC v. Trans States Airlines, Inc., 462 F.3d 987, 993-94 (8th Cir. 2006)(same). Thus, the plaintiff has the burden to substantiate his or her allegations with sufficient probative evidence that would permit a finding in his or her favor that is based upon more than mere speculation, conjecture, or fantasy. Smith v. Fairview Ridges Hospital, __ F.3d __, 2010 WL 4226529 at * 9 (8th Cir. 2010).

Plaintiff Stevenson's only allegation of disparate treatment is his unsubstantiated statement that "he was aware of other Holland employees that used company phones to make personal calls, but were not terminated and were simply allowed to reimburse Holland for the calls." However, Plaintiff Stevenson fails to offer any additional insight regarding these alleged instances of disparate treatment such as (i) the identity of the employee, (ii) whether any management official was aware of the misconduct, (iii) whether the use of the company phones pre-dated the company's revision of its handbook in June 2005 (see LF 77), and

(iv) whether the employee engaged in a single instance of misconduct, or whether the misconduct was engaged in a repeated pattern of misconduct like Plaintiff Stevenson. Additionally, any allegations of disparate treatment must necessarily be limited to those involving Plaintiff Stevenson's supervisor – i.e. Mr. John Davis. Buchheit, Inc., 215 S.W.3d at 280-81. These allegations also must be limited to non-management personnel who are subject to the handbook provisions. Id. (citing cases finding that management and non-management are not similarly situated because they were not subject to same standards of conduct).

To the contrary, Plaintiff Stevenson has not, and cannot, point to a single instance in which *any* members of Defendant Holland's management knowingly declined to impose discipline upon other employees under similar circumstances. LF 44 ("Q. . . . Again, you cannot point me to a shred of evidence to suggest that a member of management observed these co-workers using the telephone for personal reasons? . . . A. No, I can't tell you if they observed them or not."). Accordingly, the most that Plaintiff Stevenson can do is present "speculation, conjecture, or fantasy" in support of his allegations of disparate treatment, and therefore his claim must fail as a matter of law.

iii. Plaintiff Stevenson's admitted and repeated misconduct violated several provisions of the handbook, he was on notice that any such violation could result in immediate termination, and this Court does not sit as a super-personnel department to second guess the appropriateness of the level of discipline

that the company assessed through the exercise of its management rights and discretion to impose

In his substitute brief, Plaintiff Stevenson candidly admits that he made personal phone calls on company time, but argues that Defendant Holland "mischaracterize[d]", "artificially manufactured", and "manipulate[ed]" the situation to impose a more severe level of discipline than was necessary for the offense. This argument should be rejected for several reasons.

First, Plaintiff Stevenson admitted that he received a copy of the handbook and was familiar with its contents. LF 28. Given that this is the case, then Plaintiff Stevenson was likewise familiar with the provision in the handbook which provided that, for less severe offenses, "[t]he use of the disciplinary steps ***may*** be applied when there is a violation of the following rules, however, at all times the Company ***reserves the right to accelerate any of the steps when imposing discipline when it determines that more severe discipline is warranted under the circumstances***." LF 87 (emphasis added).

Thus, Plaintiff Stevenson was certainly aware that the company reserved its right to proceed directly with termination under appropriate circumstances such as these. Indeed, Plaintiff Stevenson seems to concede as much by failing to address the impact of this provision in his substitute brief.

Additionally, Plaintiff Stevenson's substitute brief also fails to address the fact that he admitted that his conduct also violates one of the more severe offenses

in the handbook – i.e. falsification of his time card when he indicated that he worked a full eight (8) hour shift when, in actuality, he worked less than eight (8) hours, due to being away from his workstation when he was making personal phone calls on company time. LF 37. Unquestionably, Plaintiff Stevenson was on notice that an offense of this nature would provide grounds for immediate discharge.

Moreover, Plaintiff Stevenson assumes that his personal phone calls all constitute a single offense, but the facts reveal that he engaged in this improper conduct on at least fifty (50) separate occasions over the course of several months. L.F 156-58; 250-52. Discipline was appropriate in *each and every instance of misconduct*. Thus, when viewed in this light, the evidence suggests that termination was appropriate because the separate instances of misconduct more than outnumbered the steps in the company's progressive discipline policy.

Lastly, Plaintiff Stevenson attempts to minimize his admitted misconduct by arguing that (i) the calls only lasted a few minutes, and (ii) his intentions were pure because he was calling to check on his sick wife. Pl. Substitute Brief at p. 20-21. However, these efforts at mitigation are unpersuasive when the Court considers (i) Plaintiff Stevenson's blatant disregard for company rules was not limited to using the phone for personal calls on the instances when he called to check on his wife because he admitted to using the phone for personal calls on other occasions as well, and (ii) Plaintiff Stevenson had adequate time to make these calls during break and lunch periods, but did not. LF 27, 31.

In any event, this Court do not sit as super-personnel departments that re-examine an entity's business decisions. Willnerd v. First National Neb., Inc., 558 F.3d 770, 779 (8th Cir. 2009)("it is not the court's role to second-guess businesses' assessment of general economic conditions, their own performance, and their own staffing needs"); King v. Hardesty, 517 F.3d 1049, 1063 (8th Cir. 2008)(we "reiterate that the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination"); Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 973 (8th Cir. 1994)(same). Rather, this Court's inquiry is limited to whether the given reason for termination was pretext for illegal discrimination. Id. *See also* Herrero v. St. Louis University Hospital, 929 F. Supp. 1260, 1268 (E.D. Mo. 1996). Thus, Defendant Stevenson's arguments regarding the level of discipline that the company chose to impose for his admitted misconduct are unavailing.

4. The judgment of the Trial Court should be affirmed because Plaintiff's Point Relied On fails to comply with Mo. R. Civ. P. 84.04(d) in that it gives absolutely no explanation as to why, *in the context of the case*, the stated legal reasons support his claim which therefore renders this appeal subject to dismissal

V.A.M.R. 84.04

Kieffer v. Gianino, 301 S.W.3d 119 (Mo. App. E.D. 2010)

Pape v. Huey's Collision Center, 271 S.W.3d 646 (Mo. App. E.D. 2008)

* * * *

Rule 83.08(b) of the Missouri Ruled of Civil Procedure provides that "[t]he substitute brief shall confirm with Rule 84.04. Thus, Rule 84.04(d) of the Missouri Rules of Civil Procedure provides as follows:

> (1) Where the appellate court reviews the decision of a trial court, each point shall:
>
> > (A) identify the trial court ruling or action that the Plaintiff challenges;
> >
> > (B) state concisely the legal reasons for the Plaintiff's claim of reversible error; and
> >
> > (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

A point which merely states what the alleged error is without stating why it is error does not satisfy Rule 84.04(d). Megarel Willbrand & Co., LLC v. FAMPAT Ltd. Partnership, 210 S.W.3d 205, 209 (Mo. App. E.D. 2006). *See also* Mo. R. Civ. P. 84.04(d)(4)("[a]bstract statements of law, standing alone, do not

comply with this rule."). The requirement that the point relied on clearly state the contention on appeal is not simply a judicial word game or a matter or hypertechnicality on the part of appellate courts; rather, the rule gives notice to opposing parties of the precise matters to be contended with and to inform the courts of issues presented for review. Lyles v. Robert Half Corp., 219 S.W.3d 854, 856 (Mo. App. E.D. 2007).

It is not proper for an appellate court to speculate as to the point being raised by the Plaintiff and the supporting legal justification and circumstances. Rothschild v. Roloff Trucking, 238 S.W.3d 700, 702-03 (Mo. App. E.D. 2007). A point which fails to substantially comply with Rule 84.04 preserves nothing for review and is inadequate to invoke the Court's jurisdiction. Livingston v. Schnuck Markets, Inc., 184 S.W.3d 617, 619 (Mo. App. E.D. 2006).

For instance, in Pape v. Huey's Collision Center, 271 S.W.3d 646, 646-47 (Mo. App. E.D. 2008) the Plaintiff's point relied on read as follows: "The Labor and Industrial Relations Commission erred in its conclusion that Employee/Plaintiff's injury did not arise or [sic] of or occur in the course of his employment." The Pape court found this statement to be insufficient to comply with Rule 84.04(d) because is merely stated the alleged error without stating *why* it was error.

Similarly, in Kieffer v. Gianino, 301 S.W.3d 119 (Mo. App. E.D. 2010) the court recently held that a litigant failed to comply with Rule 84.04(d) when her point relief upon read as follows:

THE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ENTERED AN ORDER CLARIFYING ITS JUNE 30, 2008 ORDER BECAUSE THE COURT DID NOT HAVE JURISDICTION TO ENTER AN ORDER AFTER IT LOST JURISDICTION BY ORDER OF LAW ON OR ABOUT OCTOBER 23, 2008.

The Kieffer court noted that the point relief upon gave absolutely no explanations as to why, in the context of the case, any legal reasons supported the claim of reversible error. Accordingly, dismissal of the appeal was appropriate.

The same result is appropriate herein. Plaintiff Stevenson's second point relied on states as follows:

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT BECASE THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER PLAINTIFF'S EXERCISE OF HIS RIGHTS UNDER THE MISSOURI WORKERS' COMPENSATION ACT WAS THE EXCLUSIVE CAUSE FOR HIS TERMINATION BY DEFENDANT, IN THAT THE SUMMARY JUDGMENT EVIDENCE DEMONSTRATES THAT THE REASON GIVEN BY DEFENDANT FOR TERMINATING PLAINTIFF WAS PRETEXTUAL.

Substitute Brief at p.10-11,16.

This statement likewise fails to conform with Rule 84.04(d) by failing to explain why, *in the context of this case*, the legal reasons support Plaintiff's claim of reversible error. To the contrary, Plaintiff Stevenson's point relief on is an

abstract statement of law without any specific factual references to the facts of his particular claim. It is merely an abstract statement which may be generally applicable to any number of appeals. In this regard, Plaintiff Stevenson's point relief upon is materially indistinguishable from the Plaintiff's deficient statements in Pape and Kieffer. Accordingly, Plaintiff Stevenson's appeal should be dismissed for failure to comply with Rule 84.04(e).

CONCLUSION

For the foregoing reasons, the Judgment of the Trial Court should be affirmed.

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CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for Defendant hereby states:

1) The foregoing brief contains 8,477 words, which is within the applicable limitations in length set forth in Rule 84.06(b);

2) Plaintiff is filing a CD-ROM pursuant to Rule 84.06(g), appropriately labeled, containing the brief in Microsoft Word format. The submitted CD-ROM has been scanned for viruses, and the virus-scanning software has reported that the CD-ROM is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that one (1) copy of the foregoing Defendant Brief, together with a virus free CD-ROM containing the brief in Microsoft Word 2003, were served, by placing same in the United States Mail, postage prepaid, this 30th day of November 2010 to:

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