HOW *TEMPLEMIRE v. W & M WELDING, INC.* CREATES UNFAIR JOB SECURITY

INTRODUCTION

On April 15, 2014, the Missouri Supreme Court overruled thirty years of precedent in a decision that affects every Missouri employer. The decision has been described as "an easy contender for biggest case of 2014."[1] Imagine the following scenario: Sally Smith, a waitress at Burger Grill, stole money out of the cash register after her Tuesday shift. The next week, Sally was injured when a tray of drinks fell on her hand. Sally subsequently filed a workers' compensation claim. Sally's supervisor fired her a few days later after discovering Sally had stolen money from the cash register. Sally believes she was fired in retaliation for filing a workers' compensation claim and brings an action to recover damages. This scenario illustrates a mixed motive problem, namely, there is both a lawful and potentially unlawful motive for the employer's actions. Should Sally prevail on a claim for workers' compensation retaliatory discharge? If so, how strong does the link need to be between the workers' compensation claim and the subsequent termination?

In Missouri, section 287.780 of the Missouri Revised Statutes prohibits an employer from retaliating against an employee for filing a workers' compensation claim. Section 287.780 provides: "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under [the Workers' Compensation Law]. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer."[2] Before the Missouri Supreme Court's decision on April 15, 2014, in order to bring a submissible case under section 287.780, an employee had to show: "(1) [his or her] status as employee of defendant before injury, (2) [his or her] exercise of a right granted by [the Workers' Compensation Law], (3) employer's discharge of or discrimination against plaintiff, and (4) an *exclusive causal relationship* between plaintiff's actions and defendant's actions."[3]

1. Stephanie Maniscalco, *Lowering of Work Comp Standard Biggest Decision so Far*, MO. LAW. WKLY., July 7, 2014, at 1.

2. MO. REV. STAT. § 287.780 (2000).

3. Hansome v. Nw. Cooperage Co., 679 S.W.2d 273, 275 (Mo. 1984), *overruled by* Templemire v. W & M Welding, Inc., 433 S.W.3d 371 (Mo. 2014) (emphasis added).

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Templemire decision. Part IV will cover the new contributing factor standard and will outline concerns associated with the new lesser standard.

I. HISTORICAL BACKGROUND: WORKERS' COMPENSATION

Prior to the enactment of workers' compensation laws, recovery for employees who were injured on the job was restricted under the common law theory of negligence.[11] Employees were burdened with overcoming three common law defenses used by employers:[12] assumption of risk,[13] contributory negligence,[14] and the fellow-servant doctrine.[15] The negligence avenue of recovery often left employees with no redress.[16] Prior to the enactment of workers' compensation laws, it was estimated that between seventy and ninety-four percent of injured workers who filed a claim against their employer received no compensation for their injuries.[17]

Various state legislatures responded in the early 1900s by enacting workers' compensation legislation to afford a more effective remedy for employees injured on the job.[18] By 1920, all but eight states had established workers' compensation acts to provide benefits for injured employees.[19] Missouri joined the national movement in 1925.[20] The Missouri Workers' Compensation Law was enacted to wholly substitute common law remedies for injured employees.[21] This statute struck a balance between employers and employees; the employer accepted absolute liability, and, in return, the

11. Amanda Yoder, Note, *Resurrection of a Dead Remedy: Bringing Common Law Negligence Back Into Employment Law*, 75 MO. L. REV. 1093, 1097 (2010).

12. Gunnett v. Girardier Bldg. & Realty Co., 70 S.W.3d 632, 635 (Mo. Ct. App. 2002).

13. H. S. J., *Torts—Voluntary Assumption of Risk*, 11 TEX. L. REV. 565, 566 (1933) ("The doctrine of assumption of risk, originating in *Priestley v. Fowler* is generally treated as the voluntary acquiescence by the plaintiff in a risk which either was known or should have been known to him at the time of his injury.") (citation omitted).

14. Jennifer J. Karangelen, Comment, *The Road to Judicial Abolishment of Contributory Negligence Has Been Paved by* Bozman v. Bozman, 34 U. BALT. L. REV. 265, 267 (2004) (defining "contributory negligence" as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm").

15. Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579, 579 (1984) ("The Fellow Servant rule was a rule of tort law created in the mid-nineteenth century. It carved out an exception to the well-established rule of *respondeat superior*, and relieved employers of liability for injuries negligently inflicted by any employee upon a 'fellow servant.'").

16. Yoder, *supra* note 11, at 1098.

17. *Gunnett*, 70 S.W.3d at 635.

18. *Id.*

19. *Id.*

20. *Id.* at 365 n.2 (explaining that Missouri's Workers' Compensation Law was adopted in 1925 and became effective in 1927).

21. Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo. Ct. App. 1978).

employee forewent his right to pursue a negligence claim against his employer.[22] Employees gave up a potentially higher payout, but employees received speedy and guaranteed compensation for work-related injuries.[23] By 1974, the Missouri workers' compensation legislation became "compulsory for all employers with more than five employees."[24] In addition to a system of recovery for employees injured on the job, the Missouri Workers' Compensation statute protects employees from retaliatory discharge by employers.

II. WORKERS' COMPENSATION RETALIATORY DISCHARGE: THIRTY Y

B. Crabtree v. Bugby *(1998)*

The exclusive cause standard set forth in *Hansome* was reaffirmed fourteen years later by the Missouri Supreme Court in *Crabtree v. Bugby*.[42] In *Crabtree*, an employee brought a retaliatory discharge claim against her employer, pursuant to section 287.780, alleging she was discharged for filing a workers' compensation claim.[43] The jury returned a verdict for the employee.[44] The employer appealed and the court of appeals transferred the case to the Missouri Supreme Court.[45] Judgment was reversed because the trial court had applied a "direct result" standard, rather than the exclusive cause standard set forth in *Hansome*.[46]

On appeal, the employer challenged the employee's verdict director who instructed the jury to return a verdict for employee if, "as a *direct result* of plaintiff's filing a claim for compensation, defendant discharged plaintiff."[47] The court found employee's verdict director had not accurately stated the law because claims brought pursuant to section 278.780 required an "*exclusive causal relationship* between the plaintiff's cause of action and the discharge."[48] "Direct result" language, the court reasoned, permitted the jury to return a verdict for the employee even though there were *multiple* reasons for her termination.[49] The exclusive cause standard, in contrast, required an employee to prove that filing a workers' compensation claim was the *only* reason for termination.[50] The court refused to disturb its own precedent, absent "a recurring injustice or absurd results," reasoning that "neither the trial court nor the court of appeals is free to redefine the elements in every case that comes before them."[51] Those who disagree, the court concluded, "[we]re free to seek redress in the legislative arena."[52]

The exclusive cause standard, articulated in *Hansome* and affirmed in *Crabtree*,

part of the Missouri Workers' Compensation Law and provided a statutory exception to the at-will employment doctrine.[76] Specifically, it provided a private right of action for employees who were "discharged or discriminated against" for filing a workers' compensation claim.[77] Section 287.780 was enacted as part of the original workers' compensation law in 1925 and amended in 1973 with the language that remains today.[78]

The court next surveyed Missouri cases construing section 287.780, beginning with *Mitchell v. St. Louis County*.[79] *Mitchell* had been the first case to address section 287.780.

element of a workers' compensation retaliatory discharge claim, it had not suggested a heightened exclusive cause standard.[89]

In 1984, the Missouri Supreme Court, for the first time, articulated the exclusive cause standard of causation for claims brought pursuant to section 287.780 in *Hansome v. Northwestern Cooperage Co*.[90] In *Hansome*, the Missouri Supreme Court set forth four elements a plaintiff had to demonstrate pursuant to a claim for retaliatory discharge under section 287.780.[91] To satisfy the final element, plaintiff had to demonstrate "an *exclusive causal relationship* between [employee's] actions and [employer's] actions."[92] The court in *Templemire* expressed concern that the *Hansome* test had been based on *Mitchell v. St. Louis County* and *Davis v. Richmond Special Road District* rather than an analysis or interpretation of the statutory language of section 287.780.[93] The *Templemire* court found that *Hansome*'s reliance on *Mitchell* and *Davis* for the exclusive cause standard had been unfounded because

287.780.[100] Consequently, the dissent in *Crabtree* rejected the *Hansome* test, and it characterized the "exclusive cause" language as "'an aberration' . . . [which] 'appears to be plucked out of thin air.'"[101]

The court continued its discussion with *Fleshner v. Pepose Vision Institute, P.C.*, the first case to question the exclusive cause standard since it was first articulated in *Hansome*.[102] *Fleshner* involved a retaliatory discharge claim based on the public policy exception to the at-will employment doctrine.[103] The court for the first time had recognized a public policy exception to the at-will employment doctrine, and thus had to determine the proper causation standard to apply.[104] The employer had offered a jury instruction with the "exclusive cause" language, borrowed from the causation standard for statutory retaliatory discharge as seri they9 8M18.9( )] TJ/TT8 1 Tf0.0921 Tc0 Twm

employee for exercising his or her workers' compensation rights."[110] This language, the *Templemire* court reasoned, dictated a clear legislative intent to prohibit an employer from giving *any* consideration to an employee's workers' compensation claim.[111] Requiring an employee to show his or her discharge was based *solely* or *exclusively* on the fact that he or she filed a workers' compensation claim, the court warned, would allow for *some* discrimination, which runs afoul of legislative intent.[112] Furthermore, a textual analysis of the statutory language exposed an absence of the words "exclusively," "solely,"

factor standard for MHRA retaliation claims was reaffirmed two years later in *Hill v. Ford Motor Co.*[122] Further, in 2010, the court held in *Fleshner* that the appropriate standard of causation for wrongful discharge claims brought under the public policy exception[123] to the at-will employment doctrine was contributing factor.[124] The *Templemire* court stated that a contributing factor standard of causation would accordingly "align[] workers' compensation discrimination with other Missouri employment discrimination laws," such as the MHRA and the public policy exception to Missouri's at-will employment doctrine.[125] The court, however, recognized a fundamental difference between the purpose of workers' compensation laws and the purpose of the MHRA.[126] Nevertheless, the court found commonality in the broad purpose of all employment discrimination laws.[127] The court reasoned as follows:

> [T]here can be no tolerance for employment discrimination in the workplace . . . . Discrimination against an employee for exercising his or her rights under the workers' compensation law is just as illegal, insidious, and reprehensible as discrimination under the [Missouri Human Rights Act] or for retaliatory discharge under the public policy exception of the at-will employment doctrine.[128]

The court also considered the statutory language of section 287.780 to determine the proper standard of causation. Section 287.780 prohibits an employer from discriminating against an employee "in any way" for exercising his or her rights under the Missouri Workers' Compensation Law.[129] The court found the phrase "in any way" to be consistent with a "contributing factor" standard rather than an "exclusive cause" standard.[130] Thus, the court maintained, a contributing factor standard "fulfills the purpose of the statute,

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> participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter.

MO. REV. STAT. § 213.070(2) (2014).

121. *Templemire*, 433 S.W.3d at 383.

122. *Id.* at 383; *see also* Hill v. Ford Motor Co., 277 S.W.3d 659, 665 (Mo. 2009).

123. Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. 2010) ("[T]his Court expressly adopts the following as the public-policy exception to the at-will employment doctrine:

petty claims in order to enjoy the benefits of heightened job security."[160] Employees who were fired for legitimate reasons, such as absenteeism or incompetence, would still be able to bring a retaliation claim against their employers if they had recently filed a workers' compensation claim.[161] Employers may, as a result, hesitate to fire otherwise incompetent employees in order to avoid the increased costs of a potential retaliation claim. Abandoning the exclusive cause standard in favor of a lower contributing factor standard would thus result in heightened job security, a far cry from the purpose of workers' compensation.[162] As a result, work quality will likely decline and employers may hesitate to expand their workforce.

The precedent for a section 287.780 cause of action had been well established and should have been followed. Mere disagreement with the statutory analysis of a predecessor court is not enough.[163] If the exclusive cause standard was problematic, redress was available in the legislative arena.[164]

C. The exclusive cause standard is consistent with the legislature's intent

The actions, or in this case inactions, of the Missouri Legislature support the exclusive cause standard of causation for retaliatory discharge actions brought against an employer. Despite thirty years of opportunity, the Missouri Legislature did not change the exclusive cause standard first articulated by the court in *Hansome*.[165] While legislative inaction might sometimes be ambiguous, in this case it is not. The legislature ratifies a judicial interpretation by enacting legislation on the same subject matter without changing the judicial interpretation.[166] In 2005, the Missouri Legislature revised the Workers' Compensation Law, leaving the cause of action under section 287.780 unaltered.[167] The legislature's failure to revise section 287.780 after judicial interpretation can be construed as adoption of the exclusive cause standard developed by courts.[168]

160. *Id.*

161. *Id.*

162. *Id.* ("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.").

163. *Id.* at 71–72.

164. *Crabtree*, 967 S.W.2d at 72.

165. Hansome v. Nw. Cooperage Co., 679 S.W.2d 273, 275 (Mo. 1984).

166. Templemire v. W & M Welding, Inc., 433 S.W.3d 371, 388 (Mo. 2014) (Fischer, J., dissenting).

167. *Changes in Missouri Workers Compensation Law*, HEALTHLINK (Aug. 2005), http://www.healthlink.com/documents/mo_compensa

> to, the worker's failure to observe health or safety standards adopted by the employer, or the frequency or nature of the worker's job-related accidents.[173]

Although the statutory text does not provide language such as "exclusively," "solely," or "only," Washington courts have interpreted the statutory text as requiring a heightened standard of causation.[174]

their termination.[179] A heightened standard of causation would align Missouri with other states as well as the federal government.

E. A heightened standard of causation would align Missouri with the federal government

A lower standard of causation means Missouri is departing even further from federal anti-discrimination statutes. Since 2007, there has been a general trend toward lowering the burden of proof necessary for a Missouri employee to recover in employment discrimination cases. This trend began in *Daugherty v. City of Maryland Heights*, where the court lessened the burden of proof for MHRA discrimination cases from "motivating factor" to "contributing factor."[180] The *Templemire*

court would help make Missouri more "economically competitive."[196] For instance, businesses would no longer have to keep track of different federal and state standards, increasing certainty as to what the laws are. Furthermore, a higher standard of causation would decrease the number of frivolous suits, freeing up resources for employers to expand their businesses.

A higher causation standard would also protect Missouri's small businesses. "Small businesses are crucial to the fiscal condition of the state," representing 97.6% of all employers in Missouri.[197] In 2010, there were 115,038 small business employers.[198] A lower standard of causation in workers' compensation retaliatory discharge cases, such as the one promulgated in *Templemire*, will make it easier for employees to sue their employers. As a result, employees may bring frivolous lawsuits against their employers in the hopes of getting a settlement. Those businesses have no choice but to spend money to defend the lawsuits. The legal costs will have a detrimental effect on small business owners whose financial resources are limited. Small businesses may in turn be wiped out by the additional costs.

The easier it is for employees to sue their employer, the bigger the disincentive for small businesses to do business in Missouri. All Missourians must be protected; not only employees who are discriminated against, but business owners as well. Aligning Missouri workers' compensation retaliatory discharge cases more closely with federal discrimination laws would protect both employees and employers.

F. The lower standard has far-reaching implications for Missouri employers

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court expressed concern regarding the potential uptick in Title VII retaliation claims as a result of a lower standard of causation.[203] The Court noted that Title VII retaliation claims were already being made with "ever-increasing frequency."[204] As of 2013, the number of Title VII retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) "ha[d] nearly doubled in the past fifteen years."[205] The Court reasoned that "lessening the causation standard could . . . contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat [discrimination]."[206] Accordingly, the Court interpreted the language in the Title VII retaliation statute as requiring a heightened standard of causation.[207]

In addition to expanding employer liability and increasing the frequency of workers' compensation retaliatory discharges claims, a lower standard of causation has practical effects as well.

3. Procedural and Practical Changes for Courts and Employers

a. The *Templemire* decision should be given prospective-only effect

The new standard of causation established in *Templemire* creates a logistical issue—when should the new standard take effect? The Missouri Court of Appeals, Eastern District, in *Kueffer v. Brown*, established a three-part test to be applied when determining whether overruling decisions should be applied retroactively to previous cases or prospectively to future cases.[208] A Missouri Supreme Court decision overruling a previous substantive law should be given prospective-only effect:

> (1) if the decision establishes a new principle of law by overruling clear past precedent; (2) if the purpose and effect of the newly announced rule will be retarded by retroactive application; and (3) if, after balancing the interests of those who may be affected by the change in law and weighing the degree to which parties may have relied upon the old rule and the hardship the parties might suffer from retroactive application of the new rule against the possible hardship to the parties who would be denied the benefit of the new rule, retrospective application would be unfair.[209]

203. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531 (2013).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 2533.
208. Kueffer v. Brown, 879 S.W.2d 658, 663–64 (Mo. Ct. App. 1994).
209. *Id.*

disciplinary actions transparent and fair,"[216]