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## 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.”<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup>

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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).

Other jurisdictions similarly prohibit employers from retaliating against employees who file workers' compensation claims.<sup>4</sup> While most jurisdictions uniformly apply the first three elements, courts differ on the standard of causation required under the fourth element. "Exclusive cause" is the highest standard of causation. An employee must show he or she was discharged *solely* because of filing a workers' compensation claim.<sup>5</sup> A "motivating or significant factor" standard of causation is lower than exclusive cause. It requires employees to show that filing a workers' compensation claim was a significant reason for their discharge.<sup>6</sup> A "contributing factor" standard is lower than the motivating or significant factor standard of causation. It requires an employee to show only a mere correlation between filing a workers' compensation claim and subsequent discharge, namely, that filing a workers' compensation claim was one of the factors contributing to the employer's decision to discharge the employee.<sup>7</sup>

In *Templemire v. W & M Welding, Inc.*, the Missouri Supreme Court lowered the standard of causation in workers' compensation retaliatory discharge cases from the well-established exclusive cause<sup>8</sup> standard to a much lower contributing factor standard.<sup>9</sup> In other words, employees now only need to prove that filing a workers' compensation claim was *one* of the reasons for their termination, as opposed to the *sole* reason for termination.<sup>10</sup> Consequently, Missouri employers face increased liability for workers' compensation retaliatory discharge claims.

This Note argues that the Missouri Supreme Court erred in its decision to promulgate a lesser standard of causation in workers' compensation retaliatory discharge cases. This Note also examines the new contributing factor standard of causation and its effects on Missouri employers. Part I will discuss workers' compensation generally. Part II will trace the evolution of workers' compensation retaliatory discharge cases by examining thirty years of precedent establishing the exclusive cause standard. Part III will examine the

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4. See *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973); *Wallace v. Milliken & Co.*, 406 S.E.2d 358, 360 (S.C. 1973); *Buckner v. Gen. Motors Corp.*, 760 P.2d 803, 806 (Okla. 1988); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 821 P.2d 18, 32 (Wash. 1991).

5. 3 MODERN WORKERS COMP. § 311:12 (1993).

6. Amanda C. Kaiser, Comment, *Workers' Compensation—Anderson v. Standard Register Co.: Tennessee Supreme Court Specifies Elements Required to Establish a Cause of Action for Retaliatory Discharge in Workers' Compensation Cases*, 24 MEM. ST. U. L. REV. 825, 829 (1994).

7. *Kingsaire, Inc. v. Melendez*, 416 S.W.3d 898, 906 (Tex. App. 2013).

8. *Hansome*, 679 S.W.2d at 275.

9. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 384 (Mo. 2014), *as modified on* May 27, 2014.

10. *Id.*

*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.<sup>11</sup> Employees were burdened with overcoming three common law defenses used by employers:<sup>12</sup> assumption of risk,<sup>13</sup> contributory negligence,<sup>14</sup> and the fellow-servant doctrine.<sup>15</sup> The negligence avenue of recovery often left employees with no redress.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> By 1920, all but eight states had established workers' compensation acts to provide benefits for injured employees.<sup>19</sup> Missouri joined the national movement in 1925.<sup>20</sup> The Missouri Workers' Compensation Law was enacted to wholly substitute common law remedies for injured employees.<sup>21</sup> 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. *Gunnnett 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. *Gunnnett*, 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.<sup>22</sup> Employees gave up a potentially higher payout, but employees received speedy and guaranteed compensation for work-related injuries.<sup>23</sup> By 1974, the Missouri workers' compensation legislation became "compulsory for all employers with more than five employees."<sup>24</sup> 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 YEARS OF PRECEDENT

Missouri adheres to the "at-will" employment doctrine, which allows an employer to discharge an at-will employee for any reason or for no reason.<sup>25</sup> An at-will employee has no cause of action for wrongful discharge, absent a statutory or public policy exception.<sup>26</sup> Section 287.780 provides a limited statutory exception to the at-will employment doctrine.

Section 287.780 prohibits employers from retaliating against employees who file a workers' compensation claim. The statute 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."<sup>27</sup> This anti-retaliation provision created a statutory private right of action for retaliatory discharge. The elements for a section 287.780 cause of action were set forth by the Missouri Supreme Court in 1984.

### A. *Hansome v. Northwestern Cooperage Co. (1984)*

The Missouri Supreme Court established elements for a section 287.780 cause of action for the first time in *Hansome v. Northwestern Cooperage Co.*<sup>28</sup> In *Hansome*, an employee exercised his workers' compensation rights after

22. *Id.*

23. *Id.*

24. Yoder, *supra* note 11, at 1099–1100.

25. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. 2010).

26. *Id.* ("[The Missouri Supreme Court] expressly adopt[ed] the following as the public-policy exception to the at-will employment doctrine: An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.") (citations omitted).

27. MO. REV. STAT. § 287.780 (2000).

28. *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).

suffering from a work-related injury.<sup>29</sup> The employee was subsequently discharged approximately a month later because “[he] got hurt on the job[,] drew [his] Workmen’s Compensation, and went back and forth to the doctor’s office.”<sup>30</sup> The employee brought an action against his employer pursuant to section 287.780.<sup>31</sup> A jury returned a verdict for the employee.<sup>32</sup> The Missouri Court of Appeals, Eastern District, reversed.<sup>33</sup> The Missouri Supreme Court affirmed the trial court’s decision.<sup>34</sup>

The court set forth elements to make a submissible case under section 287.780 for the first time. The plaintiff employee had to show: “(1) plaintiff’s status as employee of defendant before injury, (2) plaintiff’s 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.”<sup>35</sup> The first three elements had been met.<sup>36</sup> The crux of the case turned on whether a causal relationship existed between filing the workers’ compensation claim and the employee’s subsequent discharge.<sup>37</sup>

The court cited *Davis v. Richmond Special Road District*<sup>38</sup> and *Mitchell v. St. Louis County*<sup>39</sup> as support for the exclusive cause standard of causation, explaining that “[c]ausality does not exist if the basis for discharge is valid and nonpretextual.”<sup>40</sup> The court applied the exclusive cause standard and found the employee made a submissible case under section 287.780 because he was fired for exercising his workers’ compensation rights.<sup>41</sup>

29. *Id.* at 274.

30. *Id.*

31. *Id.* at 275.

32. *Id.* at 274.

33. *Hansome*, 679 S.W.2d at 274.

34. *Id.*

35. *Id.* at 275 (emphasis added).

36. *Id.*

37. *Id.*

38. *Davis v. Richmond Special Rd. Dist.*, 649 S.W.2d 252, 255 (Mo. Ct. App. 1983) (“[Section 287.780] reveals a legislative intent that there must be a *causal relationship* between the exercise of the right by the employee and his discharge by his employer arising precisely from the employee’s exercise of his rights, and upon proof, that the discharge was related to the employee’s exercise of his or her rights.”) (emphasis added).

39. *Mitchell v. St. Louis Cty.*, 575 S.W.2d 813, 815 (Mo. Ct. App. 1978) (“[I]t is palpable that a [section 287.780] cause of action lies only if an employee is discharged discriminatorily *by reason of* exercising his or her rights under the Workmen’s Compensation Law.”) (emphasis added).

40. *Hansome*, 679 S.W.2d at 275 n.2.

41. *Id.* at 276.

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*.<sup>42</sup> 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.<sup>43</sup> The jury returned a verdict for the employee.<sup>44</sup> The employer appealed and the court of appeals transferred the case to the Missouri Supreme Court.<sup>45</sup> Judgment was reversed because the trial court had applied a "direct result" standard, rather than the exclusive cause standard set forth in *Hansome*.<sup>46</sup>

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."<sup>47</sup> 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."<sup>48</sup> "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.<sup>49</sup> The exclusive cause standard, in contrast, required an employee to prove that filing a workers' compensation claim was the *only* reason for termination.<sup>50</sup> 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."<sup>51</sup> Those who disagree, the court concluded, "[we]re free to seek redress in the legislative arena."<sup>52</sup>

The exclusive cause standard, articulated in *Hansome* and affirmed in *Crabtree*, was continuously reaffirmed<sup>53</sup> until the Missouri Supreme Court

42. *Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. 1998), *overruled by* *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. 2014).

43. *Id.* at 69.

44. *Id.* at 70.

45. *Id.* at 68.

46. *Id.* at 68, 71.

47. *Crabtree*, 967 S.W.2d at 71 (emphasis added).

48. *Id.* (emphasis added).

49. *Id.*

50. *Id.*

51. *Id.* at 71–72 (citation omitted).

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

53. See *Stephenson v. Raskas Dairy, Inc.*, 26 S.W.3d 209, 214 (Mo. Ct. App. 2000) ("Respondent failed to make a submissible case of discriminatory discharge, in that she did not prove that the exclusive cause of her discharge was the exercise of her workers' compensation rights."); *Blair v. Steadley Co.*, 740 S.W.2d 329, 333 (Mo. Ct. App. 1987) ("[T]here is no doubt but that the declaration of the exclusive causal relationship test in *Hansome* was a declaration of

overruled its own precedent on April 15, 2014. In *Templemire v. W & M Welding, Inc.*, the Missouri Supreme Court lowered the causation standard for workers' compensation retaliatory discharge claims from exclusive cause to contributing factor.

### III. *TEMPLEMIRE v. W & M WELDING, INC.*

#### A. *Facts*

John Templemire ("Templemire") was hired by W & M Welding, Inc. as a painter and general laborer.<sup>54</sup> While performing his usual duties, Templemire's left foot was crushed by a large metal beam that fell from a forklift.<sup>55</sup> Templemire subsequently filed a workers' compensation claim.<sup>56</sup> After only a few weeks, Templemire returned to work, but his physician ordered certain physical restrictions.<sup>57</sup> For instance, Templemire was not able to climb stairs, push, pull, or stand for longer than one hour without a fifteen-minute break.<sup>58</sup> On the morning of November 29, 2006, Templemire was ordered to wash and paint a railing.<sup>59</sup> Templemire performed other tasks while he waited for the railing to be prepared for washing.<sup>60</sup> Later in the afternoon, before washing and painting the railing, Templemire took a break to rest his foot.<sup>61</sup> Gary McMullin ("McMullin"), the owner of W & M Welding, Inc., was infuriated when he found Templemire taking a break and the unwashed railing.<sup>62</sup> McMullin immediately fired Templemire.<sup>63</sup>

#### B. *Procedural Posture*

Templemire subsequently filed suit against W & M Welding, Inc., pursuant to section 287.780, alleging workers' compensation retaliatory discharge.<sup>64</sup> During the jury instruction conference, Templemire argued that

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substantive law."); *Wiedower v. ACF Indus., Inc.*, 715 S.W.2d 303, 306 (Mo. Ct. App. 1986) ("The exclusive cause for the employee's discharge must be the exercise of a right under the Workers' Compensation Law.") (citing *Hansome v. Nw. Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. 1984)).

54. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 373 (Mo. 2014), *as modified on* May 27, 2014.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 374.

59. *Templemire*, 433 S.W.3d at 374.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Templemire*, 433 S.W.3d at 374.



the applicable Missouri Approved Instruction (MAI) verdict director misstated Missouri law because its “exclusive cause” language was contrary to the plain language of section 287.780.<sup>65</sup> Templemire tendered a modified instruction substituting “contributing factor” for the “exclusive cause” language.<sup>66</sup> The circuit court nevertheless instructed the jury on the “exclusive cause” standard of causation, and the jury returned a verdict for W & M Welding, Inc.<sup>67</sup>

On appeal, Templemire alleged that the circuit court erred in refusing to instruct the jury to use the contributing factor standard.<sup>68</sup> In support of his assertion, Templemire argued that the exclusive cause standard is contrary to the statutory language of section 287.780, and also the causation standard applied in both Missouri Human Rights Act and public policy wrongful termination cases.<sup>69</sup>

The Missouri Supreme Court reversed and remanded.<sup>70</sup> Specifically, the Missouri Supreme Court found the exclusive causation standard was unsupported by both case law and the plain language of section 287.780.<sup>71</sup> The court declined to adhere to precedent, overruling the two seminal cases establishing the exclusive cause standard for workers’ compensation retaliation claims.<sup>72</sup> Further, the court held that a contributing factor standard of causation is proper for section 287.780 claims.<sup>73</sup> The Missouri Supreme Court found the circuit court erred when it instructed the jury using “exclusive cause” language, and the error resulted in prejudice that materially affected the case.<sup>74</sup> As a result, Templemire was entitled to a new trial where the jury is instructed using the contributing factor standard.<sup>75</sup>

### C. *Majority Opinion*

#### 1. Historic Construction of Section 287.780

Judge Draper, writing for the majority, began his analysis by examining the historic construction of section 287.780. Section 287.780 was enacted as

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65. *Id.* at 375; “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.” MO. REV. STAT. § 287.780 (2000).

66. *Templemire*, 433 S.W.3d at 375.

67. *Id.*

68. *Id.* at 376.

69. *Id.*

70. *Id.* at 386.

71. *Templemire*, 433 S.W.3d at 382.

72. *Id.*

73. *Id.* at 384.

74. *Id.* at 385.

75. *Id.*

part of the Missouri Workers' Compensation Law and provided a statutory exception to the at-will employment doctrine.<sup>76</sup> Specifically, it provided a private right of action for employees who were "discharged or discriminated against" for filing a workers' compensation claim.<sup>77</sup> 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.<sup>78</sup>

The court next surveyed Missouri cases construing section 287.780, beginning with *Mitchell v. St. Louis County*.<sup>79</sup> *Mitchell* had been the first case to address section 287.780.<sup>80</sup> An employee had alleged her discharge was discriminatory because it had occurred only months after she had filed a workers' compensation claim.<sup>81</sup> The record amply supported that she had been discharged for excessive absenteeism.<sup>82</sup> Causality did not exist, the court had concluded, because the basis for the discharge had not been pretextual.<sup>83</sup> The court in *Templemire* noted that *Mitchell* did not explicitly discuss the proper causation standard to apply, but it generally recognized a need for a causal connection between a workers' compensation claim and subsequent discharge.<sup>84</sup>

The court then examined *Davis v. Richmond Special Road District*.<sup>85</sup> The *Davis* court had stated, "[Section 287.780] reveals a legislative intent that there must be a causal relationship between the exercise of the right by the employee and his discharge by his employer . . . ."<sup>86</sup> The mere discharge of an employee, the *Davis* court stated, was not enough.<sup>87</sup> Rather, an employee was burdened with demonstrating that he had been discriminated against "simply because of the exercise of his or her rights regarding a workers' compensation claim."<sup>88</sup> The court in *Templemire* noted that although *Davis* recognized causation as an

76. *Templemire*, 433 S.W.3d at 376; see *Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 345–46 (Mo. 2010) ("The at-will employment doctrine is well-established Missouri law. Absent an employment contract with a 'definite statement of duration . . . an employment at will is created.' An employer may terminate an at-will employee 'for any reason or for no reason.' The at-will doctrine is '[r]ooted in freedom of contract and private property principles, designed to yield efficiencies across a broad range of industries.'" (citations omitted).

77. *Templemire*, 433 S.W.3d at 377.

78. *Id.*

79. See *Mitchell v. St. Louis Cty.*, 575 S.W.2d 813 (Mo. Ct. App. 1978).

80. *Templemire*, 433 S.W.3d at 377.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 379.

85. *Templemire*, 433 S.W.3d at 377; see also *Davis v. Richmond Special Rd. Dist.*, 649 S.W.2d 252 (Mo. Ct. App. 1983).

86. *Templemire*, 433 S.W.3d at 377 (emphasis omitted).

87. *Id.*

88. *Id.*

element of a workers' compensation retaliatory discharge claim, it had not suggested a heightened exclusive cause standard.<sup>89</sup>

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.*<sup>90</sup> 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.<sup>91</sup> To satisfy the final element, plaintiff had to demonstrate "an *exclusive causal relationship* between [employee's] actions and [employer's] actions."<sup>92</sup> 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.<sup>93</sup> The *Templemire* court found that *Hansome's* reliance on *Mitchell* and *Davis* for the exclusive cause standard had been unfounded because neither contained any reference to a heightened or exclusive cause standard of causation.<sup>94</sup>

The court next considered its decision in *Crabtree v. Bugby*,<sup>95</sup> which had reaffirmed *Hansome's* exclusive cause standard.<sup>96</sup> The court in *Crabtree* had reasoned that "this Court should not lightly disturb its own precedent . . . in the absence of a recurring injustice or absurd results."<sup>97</sup> The court in *Templemire* did not find the majority's reasoning in *Crabtree* compelling. Rather, the *Templemire* court aligned with the dissenting opinion in *Crabtree*, which had challenged the "exclusive cause" standard articulated by *Hansome*.<sup>98</sup> The dissent in *Crabtree* had based its contention on a textual analysis of section 287.780 that revealed an absence of the word "exclusive," as used in the *Hansome* test, as well as any other language that suggested an employee may only recover if he has been discharged *exclusively* because he had filed a workers' compensation claim.<sup>99</sup> Furthermore, the dissent had noted that neither *Mitchell* nor *Davis*, the authority by which the *Hansome* test was based, had used the word "exclusive" in reference to the causation standard under section

89. *Id.* at 379.

90. *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).

91. *Templemire*, 433 S.W.3d at 377–78.

92. *Id.* at 378.

93. *Id.*

94. *Id.* at 379.

95. *See Crabtree v. Bugby*, 967 S.W.2d 66, 71 (Mo. 1998), *overruled by* *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. 2014).

96. *Templemire*, 433 S.W.3d at 378 (citation omitted).

97. *Id.*

98. *Id.* at 379.

99. *Id.* at 378.

287.780.<sup>100</sup> 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.’”<sup>101</sup>

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*.<sup>102</sup> *Fleshner* involved a retaliatory discharge claim based on the public policy exception to the at-will employment doctrine.<sup>103</sup> 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.<sup>104</sup> The employer had offered a jury instruction with the “exclusive cause” language, borrowed from the causation standard for statutory retaliatory discharge as set forth in *Hansome*.<sup>105</sup> The court criticized the exclusive cause standard of causation because “[n]owhere in the workers’ compensation laws does ‘exclusive causal’ or ‘exclusive causation’ language appear.”<sup>106</sup> Additionally, the court had warned that application of the exclusive cause standard would provide a disincentive for employees to report their employers’ violations of the law.<sup>107</sup>

The court in *Templemire* found the exclusive cause standard was unfounded because neither *Mitchell* nor *Davis*, the authority by which the exclusive cause standard was articulated, contained any reference to a heightened exclusive cause standard.<sup>108</sup> The court held that *stare decisis* should not be applied because *Hansome* and *Crabtree* were clearly erroneous.<sup>109</sup> After finding no case law to support the exclusive cause standard, the court next looked for statutory support.

## 2. Plain Language of Section 287.780

The court analyzed the plain language of section 287.780, which “prohibits an employer from discharging or *in any way* discriminating against an

100. *Id.*

101. *Templemire*, 433 S.W.3d at 378 (citation omitted).

102. *See* *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. 2010).

103. *Templemire*, 433 S.W.3d at 378–79.

104. *Id.* at 379; *see also* *Fleshner*, 304 S.W.3d at 90 (“The issue before this Court is how the jury should be instructed as to the appropriate causation standard when an at-will employee is discharged in violation of the public-policy exception.”).

105. *Templemire*, 433 S.W.3d at 379.

106. *Id.*

107. *Id.*

108. *Id.* at 379.

109. *Id.* (The court articulated the standard for adhering to precedent: “adherence to precedent is not absolute . . . [W]here it appears that an opinion is clearly erroneous and manifestly wrong, the rule [of] *stare decisis* is never applied to prevent the repudiation of such decision”) (alteration in original) (citation omitted).

employee for exercising his or her workers' compensation rights."<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> Furthermore, a textual analysis of the statutory language exposed an absence of the words "exclusively," "solely," and "only," any of which would support a heightened or exclusive cause standard.<sup>113</sup> Accordingly, the court found no statutory support for the exclusive cause standard promulgated in *Hansome*.<sup>114</sup>

After concluding that the exclusive cause standard had no support in either case law or statutory interpretation, the *Templemire* court sought to determine the appropriate causation standard for retaliatory discharge claims brought pursuant to section 287.780.<sup>115</sup>

### 3. Appropriate Causation Standard

Templemire urged the court to adopt a "contributing factor" standard, which would allow an employee to recover if the employee's workers' compensation claim was one of the reasons for termination.<sup>116</sup> The employer, on the other hand, urged the court to adhere to a "heightened" or "motivating factor" test.<sup>117</sup> In order to determine the proper causation standard for workers' compensation retaliatory discharge claims, the court looked to case law interpreting other forms of employment discrimination and the statutory language of section 287.780.<sup>118</sup>

In 2007, the court had held, in *Daugherty v. City of Maryland Heights*,<sup>119</sup> that an employee must show his status under the Missouri Human Rights Act (MHRA)<sup>120</sup> was a contributing factor to his discharge.<sup>121</sup> The contributing

110. *Templemire*, 433 S.W.3d at 381.

111. *Id.*

112. *Id.* at 382.

113. *Id.* at 381.

114. *Id.* at 382.

115. *Templemire*, 433 S.W.3d at 382.

116. *Id.*

117. *Id.*

118. *Id.* at 383–84.

119. *See Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. 2007).

120. The Missouri Human Rights Act prohibits an employer from considering age, disability, or other protected characteristics when making an employment decision. MO. REV. STAT. § 213.055 (2014). The MHRA retaliation provision provides:

It shall be an unlawful discriminatory practice . . . [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or

factor standard for MHRA retaliation claims was reaffirmed two years later in *Hill v. Ford Motor Co.*<sup>122</sup> Further, in 2010, the court held in *Fleshner* that the appropriate standard of causation for wrongful discharge claims brought under the public policy exception<sup>123</sup> to the at-will employment doctrine was contributing factor.<sup>124</sup> 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.<sup>125</sup> The court, however, recognized a fundamental difference between the purpose of workers’ compensation laws and the purpose of the MHRA.<sup>126</sup> Nevertheless, the court found commonality in the broad purpose of all employment discrimination laws.<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup> The court found the phrase “in any way” to be consistent with a “contributing factor” standard rather than an “exclusive cause” standard.<sup>130</sup> 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: An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.”) (citations omitted).

124. *Templemire*, 433 S.W.3d at 384.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. MO. REV. STAT. § 287.780 (2014).

130. *Templemire*, 433 S.W.3d at 384.

which is to prohibit employers from discharging or *in any way* discriminating against an employee for exercising his or her rights under chapter 287.”<sup>131</sup>

After analyzing case law interpreting other forms of employment discrimination and the statutory language of section 287.780, the court held the appropriate standard of causation in workers’ compensation retaliatory discharge claims is contributing factor.<sup>132</sup> This means an employee is entitled to relief where filing a workers’ compensation claim was a contributing factor in his or her discharge.<sup>133</sup> In doing so, the Missouri Supreme Court overturned thirty years of precedent.

#### *D. Dissent*

Judge Fischer and Judge Wilson dissented from the majority’s overruling of *Hansome* and *Crabtree*.<sup>134</sup> The dissent’s main concern stemmed from the majority’s failure to adhere to *stare decisis*.<sup>135</sup> The dissent noted that the court was not tasked with a matter of first impression.<sup>136</sup> The court should have been bound by precedent, especially “when that precedent concerns settled questions of statutory interpretation,” as it did in this case.<sup>137</sup> Absent a more compelling need, the dissent contended, passage of time and a change in court membership is not enough to overturn precedent.<sup>138</sup> Further, hindsight as to whether the exclusive cause standard was correct does not change the fact that the court had construed section 287.780 in *Hansome*, and thus the court should have been bound by it.<sup>139</sup>

The dissent further argued that the failure of the legislature to enact legislation on this subject matter, namely, the standard of causation in workers’ compensation retaliation cases, acted as ratification of the court’s statutory interpretation.<sup>140</sup> The Missouri Legislature overhauled the workers’ compensation law in 2005, while specifically leaving the judicial interpretations in *Hansome* and *Crabtree* undisturbed.<sup>141</sup> The dissent emphasized that such legislative action demonstrated an “intent to retain the exclusive cause standard for workers’ compensation retaliation claims.”<sup>142</sup> The majority’s opinion thus offended the legislature’s ratification of the exclusive

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 386 (Fischer, J., dissenting).

135. *Templemire*, 433 S.W.3d at 386.

136. *Id.*

137. *Id.*

138. *Id.* at 386–87.

139. *Id.* at 389.

140. *Templemire*, 433 S.W.3d at 390.

141. *Id.* at 389–90.

142. *Id.* at 390.

cause standard of causation.<sup>143</sup> The dissent warned that “[e]ven if the ‘contributing factor’ standard is the better rule, this Court should not usurp the legislative function by re-deciding settled questions of statutory construction due *solely* to a change of heart.”<sup>144</sup>

The new contributing factor standard of causation for workers’ compensation retaliatory discharge is controversial. The new standard will have far-reaching effects on all Missouri employers. Accordingly, the next section of this Note discusses concerns associated with the new lesser standard of causation.

#### IV. NEW STANDARD: THE MISSOURI SUPREME COURT GOT IT WRONG

In a 5–2 decision, the Missouri Supreme Court abandoned the exclusive cause standard of causation, overruling its own precedent, which had explicitly established the standard of causation for workers’ compensation retaliatory discharge claims. In doing so, the court has burdened employers. It is now easier for employees to bring frivolous workers’ compensation retaliatory discharge claims, creating heightened job security. Accordingly, the circuit court’s decision, which relied on the exclusive cause standard, should have been affirmed<sup>145</sup> for six reasons: (A) the contributing factor standard fails to align workers’ compensation retaliation claims with MHRA claims, (B) the exclusive cause standard has remained unchanged for thirty years, (C) the exclusive cause standard is consistent with the legislature’s intent, (D) precedent in other states supports a heightened standard of causation, (E) a heightened standard of causation would align Missouri with federal discrimination laws, and (F) the new contributing factor standard has far-reaching, adverse implications on Missouri employers.

##### A. *The contributing factor standard fails to align workers’ compensation retaliation claims with MHRA claims*

The court in *Templemire* established that a submissible case for workers’ compensation retaliatory discharge requires an employee to show that filing a workers’ compensation claim is only a contributing factor to the employee’s discharge.<sup>146</sup> The new contributing factor standard fails to align section 287.780 cases with MHRA retaliation cases as the majority in *Templemire*

143. *Id.*

144. *Id.*

145. I will also alternatively argue that the court should have applied *at least* a significant or motivating factor standard, which is higher than contributing factor but lower than exclusive cause. *See infra* Part IV(D).

146. *Templemire*, 433 S.W.3d at 384.



intended.<sup>147</sup> A comparison of the new jury instruction for workers' compensation retaliatory discharge cases and the jury instruction for MHRA retaliation cases indicates that the standard for section 287.780 cases is even more burdensome on employers than for MHRA cases. The contributing factor standard is now reflected in Missouri Approved Instruction (MAI) 38.04, the jury instruction used in retaliatory discharge cases brought under section 287.780. MAI 38.04 became effective on January 1, 2015 and provides the elements of a section 287.780 cause of action:

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim, and

Third, defendant discharged plaintiff, and

Fourth, plaintiff's filing of the workers' compensation claim was a *contributing factor* to plaintiff's discharge, and

Fifth, as a direct result of such discharge plaintiff sustained damage.<sup>148</sup>

The MHRA instruction, MAI 38.01(A), includes similar language;<sup>149</sup> however, MAI 38.01(A) also includes affirmative defense language: "unless you believe plaintiff is not entitled to recover by reason of Instruction Number \_\_\_\_ (*here insert number of affirmative defense instruction*)."<sup>150</sup> The newly revised MAI 38.04 does not include affirmative defense language. In addition to the affirmative defense option, employers subject to a MHRA retaliation claim may also use a "lawful justification" jury instruction. MAI 38.02 directs the jury to find for the employer if there was a lawful reason for the alleged discriminatory act and the protected classification was not a contributing factor.<sup>151</sup> There is no "lawful justification" jury instruction for employers subject to a claim under section 287.780. Consequently, the new "contributing factor" standard fails to align workers' compensation retaliatory discharge cases with MHRA cases. In order to truly align these causes of action, the

147. *Id.* at 382, 384 ("[The standard] now aligns workers' compensation discrimination with other Missouri employment discrimination laws.").

148. MO. APPROVED JURY INSTR. (CIVIL) 38.04 (7th ed.) (emphasis added).

149. MO. APPROVED JURY INSTR. (CIVIL) 38.01(A) (7th ed.) ("Your verdict must be for plaintiff if you believe: First, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*) plaintiff, and Second, (*here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age or disability*) was a contributing factor in such (*here, repeat alleged discriminatory act, such as "failure to hire," "discharge," etc.*), and Third, as a direct result of such conduct, plaintiff sustained damage. \* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number \_\_\_\_ (*here insert number of affirmative defense instruction*)].").

150. *Id.*

151. MO. APPROVED JURY INSTR. (CIVIL) 38.02 (7th ed.).

legislature should provide employers who are subject to a workers' compensation retaliatory discharge claim with affirmative defenses and a lawful justification option. Otherwise, workers' compensation retaliatory discharge cases are actually more burdensome on employers than MHRA cases.

*B. The exclusive cause standard has remained unchanged for thirty years and should remain unchanged*

The majority's failure to adhere to well-established precedent threatens the fabric of our legal system.<sup>152</sup> "What makes this country's legal system the envy of the modern democratic world, and what sets it apart from most others, is the reliability of the outcome of cases based on the doctrine of *stare decisis*."<sup>153</sup> Missouri case law provided clear precedent on the standard of causation to apply in workers' compensation retaliation cases. The Missouri Supreme Court articulated a standard for section 287.780 cases and has reaffirmed that standard.<sup>154</sup>

Judicial abandonment of the exclusive cause standard requires an injustice or absurdity.<sup>155</sup> "[A] decision of this Court should not be lightly overruled, particularly where the opinion has remained unchanged for many years and is not clearly erroneous and manifestly wrong."<sup>156</sup> The court in *Crabtree* explained that "[m]ere 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* . . . in the absence of a recurring injustice or absurd results."<sup>157</sup> Adherence to the doctrine of *stare decisis* ensures stability and predictability in the law.<sup>158</sup> The majority in *Templemire* failed to convey any injustice or absurdity to overcome the steadfast deference to *stare decisis*.

In *Crabtree*, the Missouri Supreme Court actually warned of the absurd results that would occur if the exclusive cause standard for a section 287.780 cause of action was abandoned.<sup>159</sup> The court cautioned that a lesser standard of causation "would encourage marginally competent employees to file the most

152. See *Templemire*, 433 S.W.3d at 386 (Fischer, J., dissenting).

153. *Id.*

154. *Id.* at 377–78. The "exclusive cause" standard of causation for section 287.780 workers' compensation retaliatory discharge cases was first articulated in *Hansome* and reaffirmed in *Crabtree*. *Id.*

155. *Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. 1998), *overruled by* *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. 2014).

156. *Eighty Hundred Clayton Corp. v. Dir. of Revenue*, 111 S.W.3d 409, 411 n.3 (Mo. 2003) (citation omitted).

157. *Crabtree*, 967 S.W.2d at 71–72.

158. *Ronnoco Coffee Co. v. Dir. of Revenue*, 185 S.W.3d 676, 681 n.11 (Mo. 2006).

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

petty claims in order to enjoy the benefits of heightened job security.”<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup> If the exclusive cause standard was problematic, redress was available in the legislative arena.<sup>164</sup>

*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*.<sup>165</sup> 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.<sup>166</sup> In 2005, the Missouri Legislature revised the Workers’ Compensation Law, leaving the cause of action under section 287.780 unaltered.<sup>167</sup> 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.<sup>168</sup>

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\\_compensation\\_law.pdf](http://www.healthlink.com/documents/mo_compensation_law.pdf) [<http://perma.cc/8FB8-YC2S>] (listing specific changes in Missouri’s Workers’ Compensation Law and failing to indicate any changes to section 287.780).

168. *Dow Chem. Co. v. Dir. of Revenue*, 834 S.W.2d 742, 745 (Mo. 1992) (“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.’”) (citation omitted).

The Missouri Legislature has, in the past, specifically rejected judicial interpretations of Missouri's Workers' Compensation Law. For instance, in section 287.043, the legislature specifically rejected and abrogated earlier case law interpreting the meaning of "owner."<sup>169</sup> This illustrates that the Missouri Legislature has rejected a judicial interpretation that ran afoul of the legislature's intent. Conversely, the Missouri Legislature allowed the "exclusive cause" interpretation of section 287.780 to stand while it made specific revisions on the same subject matter,<sup>170</sup> constituting ratification by Missouri's Legislature of the "exclusive cause" standard. The dissent in *Templemire* warned that "[t]o overrule a legislative ratification of this Court's prior statutory interpretations is to encroach on the function of the legislature."<sup>171</sup> Therefore, legislative intent supports an exclusive cause standard of causation in workers' compensation retaliatory discharge cases.

*D. Precedent in other states supports a heightened standard of causation*

In addition to thirty years of precedent in Missouri, well-established laws in other states shed light on the need for a standard of causation higher than contributing factor. The court in *Templemire* held that the text of section 287.780 demanded a low standard of causation, namely, the contributing factor standard, because of the phrase "in any way," and an absence of the words "exclusively," "solely," or "only."<sup>172</sup> However, similar statutory causes of action for retaliatory discharge in other states, which use or omit similar language, require a higher standard of causation. Other state statutes, like section 287.780, do not explicitly require a heightened standard in the statutory language, but they have nevertheless been interpreted by courts to require a higher standard. For instance, in Washington, section 51.48.025 of the Revised Code of Washington provides:

No employer may discharge or *in any manner* discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title. However, nothing in this section prevents an employer from taking any action against a worker for other reasons including, but not limited

169. MO. REV. STAT. § 287.043 (2015) ("In applying the provisions of subsection 1 of section 287.020 and subsection 4 of section 287.040, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'owner', as extended in the following cases: *Owner Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 133 S.W.3d 162 (Mo. App. S.D., 2004); *Nunn v. C.C. Midwest*, 151 S.W.3d 388 (Mo. App. W.D., 2004).") (emphasis added).

170. *Changes in Missouri Workers Compensation Law*, *supra* note 167.

171. *Templemire*, 433 S.W.3d at 388 (Fischer, J., dissenting).

172. *Id.* at 381.

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.<sup>173</sup>

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.<sup>174</sup> For example, the court in *Wilmot v. Kaiser Aluminum & Chemical Corp.* applied a substantial factor standard of causation, which required the employee to prove that filing a workers' compensation claim was a "substantial" or "significant" factor in the employer's decision to discharge the employee.<sup>175</sup> Additionally, section 51.48.025 uses the phrase "in any manner," much like the phrase "in any way," used in section 287.780. Unlike the *Templemire* court, Washington courts construe this language as requiring a heightened standard of causation, namely, a substantial factor standard.<sup>176</sup> While this is not as strict as the exclusive cause standard, it is a higher standard than the contributing factor standard because an employee must show more than a mere correlation between filing a workers' compensation claim and subsequent discharge.

Similarly, Oregon courts have required a heightened standard of causation for workers' compensation retaliatory discharge claims, despite a lack of explicit statutory language, such as "exclusively," "solely," or "only." Section 659A.040 of the Oregon Revised Statutes provides:

It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in [the Workers' Compensation Law] or has given testimony under the provisions of those laws.<sup>177</sup>

The court in *Lewis v. Wal-Mart Stores, Inc.* interpreted section 659A.040 to require a heightened standard of causation, namely, substantial factor or "a factor that made a difference."<sup>178</sup>

Interpretations of similar statutory causes of action indicate that the court in *Templemire* should have, at the very least, adopted a significant factor standard of causation. This standard of causation is higher than a contributing factor standard but lower than exclusive cause, and it would require employees to show that filing a workers' compensation claim was a "substantial factor" in

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173. WASH. REV. CODE § 51.48.025 (2015) (emphasis added).

174. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 821 P.2d 18, 30 (Wash. 1991).

175. *Id.*

176. *Id.*

177. OR. REV. STAT. § 659A.040 (2013).

178. *Lewis v. Wal-Mart Stores, Inc.*, Civil No. 08-410-ST, 2009 WL 3462056, at \*7 (D. Or. Oct. 21, 2009).

their termination.<sup>179</sup> 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.”<sup>180</sup> The *Templemire* decision continued the trajectory by lowering the standard of causation in workers’ compensation retaliatory discharge cases from “exclusive cause” to “contributing factor.”<sup>181</sup> As a result, the contributory factor standard of causation widens the gap between Missouri and federal discrimination laws.

A gap exists between the causation standard for MHRA retaliation cases and its federal counterpart. The MHRA prohibits an employer from discriminating “because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual[.]”<sup>182</sup> The retaliation provision of the MHRA provides:

It shall be an unlawful discriminatory practice . . . [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter[.]<sup>183</sup>

Missouri courts apply a “contributing factor” standard of causation for retaliation cases brought under the MHRA.<sup>184</sup> Thus, an employee must show that “color, religion, national origin, sex, ancestry, age, or disability”<sup>185</sup> was a contributing factor in the employer’s alleged discriminatory act.<sup>186</sup>

On the federal level, a higher standard of causation is required in retaliation cases. The Age Discrimination in Employment Act (ADEA) was

179. *Wilmot*, 821 P.2d at 30.

180. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819–20 (Mo. 2007).

181. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 384 (Mo. 2014).

182. MO. ANN. STAT. § 213.055 (West 2012).

183. *Id.* § 213.070.

184. *Daugherty*, 231 S.W.3d at 820.

185. MO. ANN. STAT. § 213.055.

186. *Daugherty*, 231 S.W.3d at 820; *see also* MO. APPROVED JURY INSTR. (Civil) 38.01(A) (7th ed.); MO. APPROVED JURY INSTR. (Civil) 38.01(B) (7th ed.).

enacted in 1967 to protect employees from arbitrary age requirements.<sup>187</sup> Under the ADEA, it is unlawful for an employer to discriminate against an employee “because of such individual’s age.”<sup>188</sup> The ADEA retaliation provision provides:

It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.<sup>189</sup>

An employee bringing a disparate-treatment claim under the ADEA must show that age was the “but-for” cause of the employer’s alleged age discrimination.<sup>190</sup> “The parameters of this but-for standard are unclear, with some suggesting it will require proof of sole causation.”<sup>191</sup> Therefore, a “but-for” causation standard can be construed as a heightened standard, more akin to the exclusive cause standard than a contributing factor standard of causation.

On the federal level, under Title VII, it is unlawful for an employer to discriminate “because of such individual’s race, color, religion, sex, or national origin.”<sup>192</sup> Title VII’s retaliation provision provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>193</sup>

Federal courts apply traditional “but-for” causation for retaliation cases brought under Title VII.<sup>194</sup> Thus, an employee must show “the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”<sup>195</sup>

The exclusive cause standard of causation would thereby align Missouri discrimination laws more closely with federal protections. In doing so, the

187. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 167 (2009).

188. 29 U.S.C.A. § 623(a)(1) (West 2006).

189. *Id.* § 623(d).

190. *Gross*, 557 U.S. at 177.

191. Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67, 69 (2013).

192. 42 U.S.C.A. § 2000e-2 (West 2006).

193. *Id.* § 2000e-3.

194. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

195. *Id.*

court would help make Missouri more “economically competitive.”<sup>196</sup> 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.<sup>197</sup> In 2010, there were 115,038 small business employers.<sup>198</sup> 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*

##### *1. Expansion of Employer Liability*

The *Templemire* holding will greatly expand employer liability by lowering the standard of causation necessary for discharged employees to prevail against an employer for retaliatory discharge claims.<sup>199</sup> The contributing factor standard of causation promulgated in *Templemire* means employees can prevail in an action against their employers, even if there was a legitimate reason for the disciplinary action or discharge. Employees may, as a result, attempt to shield themselves from disciplinary action by filing petty workers’ compensation claims. For example,

196. Wes Duplantier, *Controversial Workplace Discrimination Law Passes Missouri House*, AOL JOBS (Feb. 10, 2012), <http://jobs.aol.com/articles/2012/02/10/controversial-workplace-discrimination-law-passes-missouri-house/> [http://perma.cc/C9RE-QX8A].

197. *Small Business Profile: Missouri*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. (Feb. 2013), <http://www.sba.gov/sites/default/files/advocacy/mo12.pdf> [http://perma.cc/65LR-HRAB].

198. *Id.*

199. Maniscalco, *supra* note 1, at 1, 14.



[A]n 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.<sup>200</sup>

Any employee who is discharged and has filed a workers' compensation claim, whether petty or not, is a possible plaintiff and a lower standard of causation will increase their odds of success.<sup>201</sup> Accordingly, employers may hesitate to discharge employees who have filed workers' compensation claims, causing unproductive employees to remain in the workforce, essentially creating unfair job security.

## 2. Increased Frequency of Claims

A lower standard of causation makes it easier for employees to file claims and recover pursuant to section 287.780. The lower standard for liability means employers are more likely to violate the retaliation provision. Increased employer liability will signal to all employees who have exercised their workers' compensation rights that they might be able to win a retaliation claim, even if they do not think it had anything to do with their discharge. As a result, the number and frequency of frivolous claims will likely increase, overcrowding courts. Increased frequency of potentially meritless claims may cause employers to forego hiring additional employees in order to avoid the added costs of petty claims. To that end, employers may choose to relocate in states with a higher standard for retaliatory discharge claims, hurting the Missouri economy.

The Supreme Court of the United States expressed similar concerns when considering the proper standard of causation in Title VII retaliation claims. Title VII's retaliation provision makes it unlawful

[F]or an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>202</sup>

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200. *Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. 1998), *overruled by* *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. 2014).

201. James B. Kennedy, *Missouri Supreme Court Overrules 3 Decades of Retaliatory Discharge Law*, EVANS & DIXON, LLC (2014), <http://www.evans-dixon.com/article/2616/Missouri-Supreme-Court-Overrules-3-Decades-of-Retaliatory-Discharge-Law.aspx> [<http://perma.cc/MWJ6-VGP2>].

202. 42 U.S.C.A. § 2000e-3 (West 2006).

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.<sup>203</sup> The Court noted that Title VII retaliation claims were already being made with “ever-increasing frequency.”<sup>204</sup> 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.”<sup>205</sup> 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].”<sup>206</sup> Accordingly, the Court interpreted the language in the Title VII retaliation statute as requiring a heightened standard of causation.<sup>207</sup>

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.<sup>208</sup> 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.<sup>209</sup>

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.*

Application of the *Kueffer v. Brown* three-part test indicates the *Templemire* holding should be applied prospectively to workers' compensation retaliation cases. The first prong is met because *Templemire* overruled thirty years of precedent established by *Hansome* and *Crabtree*. These seminal cases established the exclusive cause standard of causation. The Missouri Supreme Court explained that "the reasoning in *Hansome*, and the cases it relied on, is flawed. Therefore, . . . [*Hansome* and *Crabtree*] no longer should be followed."<sup>210</sup> The court failed to follow precedent and instead elected to adopt a lower standard of causation.

The second prong is also met. Application of this rule retroactively would "allow a litigant who failed to respond to his opponent's summary judgment motion to appeal the prior ruling and re-open a case that has already been appropriately dismissed by the trial court."<sup>211</sup> Although not stated in the *Templemire* opinion, one can "assume that it was *not* the Supreme Court's purpose and intended effect in *Templemire*."<sup>212</sup> Fundamental fairness dictates that employers should not have to litigate a matter again.<sup>213</sup>

The third prong, which balances the interests of those affected by the change in law, favors prospective-only application of the new contributing factor standard. Employees and employers "operate[] under and [rely] on the application of the law as it currently stands, not as the law may one day be."<sup>214</sup> The standard for workers' compensation retaliatory discharge claims was well settled for thirty years, indicating a longstanding reliance by employers on the old exclusive cause standard.

Having met the *Kueffer v. Brown* three-part test, the *Templemire* holding should be applied prospectively to workers' compensation retaliation cases.

#### b. Action Required

Employers should be aware of the implications of the *Templemire* decision before taking disciplinary action against employees who have exercised their workers' compensation rights. Although Missouri is an at-will state, it is no longer enough for an employer to have a legitimate motive behind discharging an employee. Now, employees only need to show that filing a workers' compensation claim was a contributing factor in the employer's decision to discharge the employee.<sup>215</sup> Employers should take the following precautions to protect themselves from such inquiries: (1) "strive to make the reasons for

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210. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 382 (Mo. 2014).

211. Respondent's Brief on the Merits at 9, *Deml v. Sheehan Pipeline Constr. Co.*, No. ED101461 (Mo. Ct. App. 2014), 2014 WL 4783299, at \*9.

212. *Id.*

213. *Id.* at 10.

214. *Id.* at 9.

215. *Templemire*, 433 S.W.3d at 384.

disciplinary actions transparent and fair,”<sup>216</sup> (2) “take all disciplinary actions knowing that the action may be reviewed or second guessed in a subsequent proceeding should the employee claim retaliation,”<sup>217</sup> and (3) seek legal counsel when discharging an employee who has filed a workers’ compensation claim.<sup>218</sup>

#### CONCLUSION

The Missouri Supreme Court erred in overturning the exclusive cause standard of causation for a section 287.780 cause of action. The *Templemire* decision lowered the standard of causation in workers’ compensation retaliatory discharge claims from “exclusive cause” to “contributing factor.” As a result, employees only have to show that filing a workers’ compensation claim was a contributing factor in their termination. In doing so, the court failed to align workers’ compensation retaliatory discharge claims with other Missouri employment discrimination laws as it intended. Furthermore, the Missouri Supreme Court’s decision overturned thirty years of well-established precedent that had been ratified by the Missouri Legislature. Additionally, similar statutory schemes in other states support, at the very least, a “significant factor” standard of causation. Finally, *Templemire* has far-reaching, adverse implications for employers. The Missouri Supreme Court expanded potential liability for Missouri employers, and, as a result, the number of frivolous claims will likely increase. Employers will be forced to decide whether firing someone is worth the potential expense of a workers’ compensation retaliatory discharge claim, thus creating unfair job security.

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216. *Breaking Legal News in Missouri: Templemire v. W & M Welding*, MCANANY, VAN CLEAVE & PHILLIPS, P.A., [http://www.mvplaw.com/news\\_story.asp?newsID=143](http://www.mvplaw.com/news_story.asp?newsID=143) [<http://perma.cc/NH95-A58V>] (last visited Sept. 24, 2015).

217. *Id.*

218. Conor Neusel, *Changing Times: Missouri Supreme Court Reinterprets Workers’ Compensation Law*, MICKES GOLDMAN O’TOOLE, LLC (May 1, 2014), <http://www.mickesgoldman.com/articles/changing-times-missouri-supreme-court-reinterprets-workers-compensation-law-by-conor-neusel/> [<http://perma.cc/6L9Y-9UE2>].

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