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NOTE

Causation Confusion: Missouri's Adoption of a Contributing Factor Standard for Workers' Compensation Retaliation Claims

Templemire v. W&M Welding, Inc., 433 S.W.3d 371 (Mo. 2014) (en banc).

SUZANNE L. SPECKER*

I. INTRODUCTION

“There is nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion[,] than causation.”¹ Causation within the context of workers' compensation law is no exception.² Chapter 287 of the Missouri Revised Statutes is known as “The Missouri Workers' Compensation Act.”³ Section 287.780 of the Act grants workers a civil right to recover against an employer who wrongfully discharges or discriminates against a worker for exercising her rights under Chapter 287, such as when a worker files a workers' compensation claim.⁴ Rather than shedding light on the causation confusion, Section 287.780 only further contributes to it; the statute's plain language is silent on the requisite standard of causation that a worker must satisfy to recover, leaving it up to Missouri courts to determine the appropriate causation standard.⁵

For decades, courts applied an exclusive cause standard to Section 287.780 claims.⁶ Under the exclusive cause standard, a worker could recover for wrongful termination only if the worker could demonstrate that the exercising of his rights under Chapter 287 was the *exclusive cause* for the em-

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1. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 382 (Mo. 2014) (en banc) (quoting W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41, at 263 (5th ed. 1984)) (internal quotation marks omitted).

2. *See id.* at 382.

3. N. Drew Kemp, Note, “*Exclusively*” *Confusing: Who Has Jurisdiction to Determine Jurisdiction Under the Missouri Workers' Compensation Law?*, 78 MO. L. REV. 897, 897 (2013).

4. *See* MO. REV. STAT. § 287.780 (Cum. Supp. 2013).

5. *See id.*

6. *See* discussion *infra* Part III.C.

ployer's decision to terminate him.⁷ Thus, the worker could not recover if the employer could demonstrate any other valid and non-pretextual reason for termination, even if the employer's decision was significantly influenced by the worker's exercise of his rights under Chapter 287.⁸

As this Note argues, the exclusive cause standard frustrated the statute's purpose and effectively sanctioned employer discrimination and retaliation against employees who filed workers' compensation claims.⁹ In *Templemire v. W&M Welding, Inc.*, the Supreme Court of Missouri corrected this mistake by adopting the "contributing factor" causation standard in lieu of the exclusive cause standard.¹⁰ In Part II, this Note analyzes the facts and holding of *Templemire v. W&M Welding, Inc.*¹¹ Next, in Part III, this Note explores the legal background of Missouri's workers' compensation laws, the historical context and policy considerations behind the development of Section 287.780, and the judicial interpretations of Section 287.780's causation element.¹² Part IV examines the court's rationale in *Templemire*.¹³ Lastly, Part V assesses the validity of employer concerns about the implications that may arise from the standard's adoption; provides guidance for employers grappling with how to respond proactively; and considers the pending legislation that, if passed, would overrule *Templemire*.¹⁴ This Note concludes by discussing what Missouri's adoption of the contributing factor standard represents for Missouri employment discrimination law going forward.¹⁵

II. FACTS AND HOLDING

Defendant employer W&M Welding, Inc. ("W&M"), located in Sedalia, Missouri, offers a variety of welding and construction-related services as well as machinery and tool rentals.¹⁶ In October 2005, W&M hired Plaintiff John Templemire to work as a painter and general laborer for approximately \$8.50 per hour.¹⁷ During his employment, Templemire was generally considered a good employee.¹⁸ While working at W&M on January 9, 2006, however, a

7. See discussion *infra* Part III.C.

8. See discussion *infra* Part III.C.

9. See discussion *infra* Part V.C.

10. 433 S.W.3d 371, 384 (Mo. 2014) (en banc).

11. See discussion *infra* Part II.

12. See discussion *infra* Part III.

13. See discussion *infra* Part IV.

14. See discussion *infra* Part V.

15. See discussion *infra* Part VI.

16. *Services*, W&M WELDING, INC., <http://www.wmwelding.com/services> (last visited Mar. 11, 2015).

17. Brief of Appellant John Templemire at 3, *Templemire v. W&M Welding, Inc.*, No. WD 74681, 2012 WL 2153833 (Mo. Ct. App. Apr. 27, 2012), *rev'd*, 433 S.W.3d 371 (Mo. 2014) (en banc).

18. *Id.* This opinion was articulated by Templemire's supervisor who had no criticism of Templemire's work performance. *Id.*

large beam fell and crushed Templemire's left foot, severely injuring him.¹⁹ His injury required surgery and the installation of plating and screws.²⁰ After reporting his injury to W&M, Templemire filed a workers' compensation claim and received benefits.²¹

Due to his injury, Templemire was absent from work for approximately four weeks after the incident.²² He returned to work with various physician-imposed restrictions, including wearing a protective boot on his injured foot.²³ In July 2006, Templemire's doctor further restricted Templemire to seated work because of continuing surgery complications.²⁴ Although the seated work restriction was removed in September 2006, Templemire's doctor ordered Templemire to avoid standing for longer than one hour without a fifteen-minute break to elevate his foot.²⁵ To accommodate these restrictions, W&M's owner, Gary McMullin, placed Templemire on light duty by making him a tool room assistant.²⁶

On the morning of November 29, 2006, a customer requested that W&M wash and paint a railing for pick-up that afternoon.²⁷ According to Templemire, his supervisor instructed him to wash the railing later, after it had been prepared for washing.²⁸ Around 1:50 p.m., Templemire walked toward the wash bay to wash the railing but stopped to rest his foot, which was infected.²⁹ While taking this break, McMullin began cursing³⁰ at Templemire for failing to wash the railing.³¹ Templemire attempted to explain that the railing had only just arrived in the wash bay and that he planned to wash it immediately after his break.³² McMullin fired Templemire on the spot, disregarding W&M's progressive disciplinary policy.³³ After leaving the worksite, Templemire contacted Liz Gragg, the insurance adjuster on his workers' compensation claim.³⁴ When Gragg later called McMullin to dis-

19. Templemire v. W&M Welding, Inc., 433 S.W.3d 371, 373 (Mo. 2014) (en banc).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 373-74.

24. *Id.* at 374.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. When Templemire asked McMullin whether he was sure about firing him because he would "go home and call workman's [sic] comp," McMullin replied that he "d[id]n't give a f— what [Templemire did]" because the employment site was "[his] f—ing place." *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 374-75.

34. *Id.* at 374.

cuss Templemire's discharge, McMullin "went on a [tirade] about [Templemire] 'milking' his injury and [said] that [Templemire could] sue him for whatever."³⁵

Subsequently, Templemire filed suit against W&M in the Circuit Court of Pettis County, Missouri.³⁶ Templemire brought his claim under Missouri Revised Statute Section 287.780,³⁷ alleging that W&M fired him in retaliation for filing a workers' compensation claim.³⁸ At trial, McMullin contradicted Templemire's version of events by testifying that McMullin had placed the railing in the wash bay early that morning and had personally directed Templemire to wash the railing immediately, ignoring other assignments until he was finished.³⁹ McMullin contended that he returned two hours later to discover the railing still unwashed and Templemire taking a break.⁴⁰ According to McMullin, Templemire responded that he needed his break and that McMullin could "take it up with [his doctor]."⁴¹ In response, McMullin alleged that he terminated Templemire for insubordination.⁴²

Templemire provided evidence that McMullin referred to injured employees as "whiners" and had yelled at him because of his injury.⁴³ One witness testified to overhearing Templemire and McMullin arguing just prior to Templemire's termination with McMullin yelling, "All you do is sit on your a— and draw my money."⁴⁴ Templemire also presented evidence that another employee was never fired, despite receiving multiple disciplinary write-ups and having a drug problem; in contrast, Templemire had only ever received one⁴⁵ disciplinary write-up.⁴⁶

Before the case was submitted to the jury, W&M proposed using Missouri Approved Instructions⁴⁷ ("MAI") 23.13.⁴⁸ This verdict director re-

35. *Id.* (internal quotation marks omitted).

36. *Id.*

37. That statute provides the following: "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 (Cum. Supp. 2013).

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

39. *Id.*

40. *Id.*

41. *Id.* at 374-75.

42. *Id.* at 375.

43. *Id.*

44. *Id.*

45. Templemire's only write-up was for "failing to wear a paint mask while in the paint booth." *Id.*

46. *Id.*; *Templemire v. W&M Welding, Inc.*, No. WD 74681, 2012 WL 6681950, at *2 (Mo. Ct. App. Dec. 26, 2012), *rev'd*, 433 S.W.3d 371 (Mo. 2014) (en banc).

47. "MAI" refers to the Missouri Approved Instructions, the jury instructions used in Missouri. See *Templemire*, 433 S.W.3d at 376. MAI 38.04 has since replaced MAI 23.13. *Id.* at 375 n.3.

48. *Id.* at 375.

quired the jury to find for W&M unless Templemire's filing of a workers' compensation claim was the "exclusive⁴⁹ factor" in W&M's decision to terminate him.⁵⁰ Templemire, however, contended that by using an exclusive factor standard, W&M's proposed jury instruction misstated the law.⁵¹ For this reason, Templemire proposed a modified version of MAI 23.13, substituting a contributing factor standard for the MAI's exclusive factor standard.⁵² In the alternative, Templemire submitted a pretext instruction, which advised the jury that if it found W&M's stated reason for firing Templemire to be mere pretext, the jury could find exclusive causation in favor of Templemire.⁵³ The trial court refused both of Templemire's proposed instructions and instead instructed the jury on MAI 23.13's exclusive factor standard.⁵⁴ The jury returned a verdict for W&M.⁵⁵

Templemire appealed to the Western District of the Missouri Court of Appeals, alleging that the trial court erred by rejecting both of his proposed instructions.⁵⁶ Applying the standard first articulated by the Supreme Court of Missouri in *Hansome v. Northwestern Cooperage Company*,⁵⁷ the Court of Appeals determined that the trial court was correct in using the exclusive causation standard.⁵⁸

In the alternative, Templemire argued that the trial court erred by refusing to submit his pretext instruction.⁵⁹ Templemire contended that without a pretext instruction, the exclusive causation standard required the jury to find that if there was any other possible reason for his discharge other than retali-

49. The trial court rejected Templemire's proposed verdict director, which stated:

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

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim, and

Third, defendant discharged plaintiff, and

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

and

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

Id. at 375 n.4 (emphasis added) (internal quotation marks omitted).

50. *Id.* at 375.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Templemire v. W&M Welding, Inc., No. WD 74681, 2012 WL 6681950, at *1 (Mo. Ct. App. Dec. 26, 2012), *rev'd*, 433 S.W.3d 371 (Mo. 2014) (en banc).

57. 679 S.W.2d 273 (Mo. 1984) (en banc), *overruled by Templemire*, 443 S.W.3d 371.

58. Templemire, 2012 WL 6681950, at *5.

59. *Id.* at *3.

tion, then W&M was entitled to a verdict.⁶⁰ The appellate court disagreed, however, because Templemire failed to satisfy “his burden to demonstrate that the MAI instructions submitted actually misstate[d] the law.”⁶¹ The Court of Appeals affirmed the trial court’s judgment, holding that a pretext instruction was not required, and the trial court did not abuse its discretion in refusing to give one.⁶²

After the Court of Appeals issued its opinion, the Supreme Court of Missouri granted transfer.⁶³ The Supreme Court reversed and remanded, holding that to prove a claim under Section 287.780, an employee must prove that her filing of a workers’ compensation claim was a “contributing factor” to the employer’s discrimination or the employer’s decision to discharge the employee.⁶⁴ The Supreme Court further held that *Hansome* and *Crabtree v. Bugby* were overruled to the extent that their holdings were inconsistent with the court’s decision.⁶⁵

III. LEGAL BACKGROUND

In this Part, Section A surveys the development of Missouri’s workers’ compensation laws, including the public-policy exception to Missouri’s at-will employment doctrine and the statutory exceptions under the Missouri Human Rights Act (“MHRA”) and Section 287.780 of the Missouri Workers’ Compensation Act. Section B discusses the historical context and policy considerations behind Missouri’s workers’ compensation law, the development of Section 287.780, and the proposed amendments to Section 287.780. Finally, Section C discusses judicial interpretations of Section 287.780’s causation element. Specifically, Section C examines Missouri Court of Appeals and Supreme Court of Missouri decisions relating to the appropriate causation standard in employment discrimination cases, including those brought under workers’ compensation law and the MHRA.

A. *The At-Will Employment Doctrine and Its Exceptions*

Generally, Missouri’s at-will employment doctrine holds that an employer may terminate an at-will employee “for any reason,” including no reason at all.⁶⁶ Several public-policy and statutory exceptions to this general

60. *Id.* at *5.

61. *Id.* at *6.

62. *Id.* at *7.

63. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 375 (Mo. 2014) (en banc). The case was transferred in accordance with Article Five of the Missouri Constitution. *Id.* (citing MO. CONST. art. V, § 10).

64. *Id.* at 384-86.

65. *Id.* at 382.

66. *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 101 (Mo. 2010) (en banc).

rule do exist, however.⁶⁷ Beginning in 1985 with *Boyle v. Vista Eyewear, Inc.*, the Missouri Court of Appeals first articulated what the *Boyle* court described as a “narrow” public-policy exception to the at-will employment doctrine.⁶⁸ The Supreme Court of Missouri, however, did not explicitly recognize this exception until nearly twenty-five years later in *Fleshner v. Pepose Vision Institute, P.C.*⁶⁹ Additional exceptions to the at-will employment doctrine were later established in the MHRA, which mandates that employers cannot terminate their employees, including at-will employees, on the basis of “race, color, religion, national origin, sex, ancestry, age, or disability.”⁷⁰

Another statutory exception to Missouri’s at-will employment doctrine, much like the public-policy exception under tort law that was articulated in *Boyle* and *Fleshner*, is codified in Missouri Revised Statute Section 287.780.⁷¹ This Section requires: “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.”⁷² The application of this statutory exception to workers’ compensation retaliation claims, specifically the statute’s silence on the matter of causation, has produced considerable confusion within the courts.⁷³

67. See *infra* notes 68-72 and accompanying text.

68. 700 S.W.2d 859, 871 (Mo. Ct. App. 1985). The Court of Appeals first laid out this exception, stating:

[W]here an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct [sic] that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.

Id. at 878.

69. 304 S.W.3d 81, 91-92 (Mo. 2010) (en banc). The Supreme Court of Missouri expressly adopted the public-policy exception under tort law, stating:

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. If an employer terminates an employee for either reason, then the employee has a cause of action in tort for wrongful discharge based on the public-policy exception.

Id. at 92 (internal citations omitted).

70. *Id.* at 95 (citing MO. REV. STAT. § 213.055.1 (2000)).

71. MO. REV. STAT. § 287.780 (Cum. Supp. 2013).

72. *Id.*

73. See discussion *infra* Part III.C.

B. The Policy Considerations Underlying Missouri Workers' Compensation Law

Significant policy considerations supported the Missouri Legislature's adoption of Chapter 287.⁷⁴ For instance, in 1921 an estimated 25,000 Missouri employees were killed or injured at their jobs.⁷⁵ Of those employees, a shocking eighty percent received no compensation whatsoever.⁷⁶ In 1925, with the stated purpose of "remedy[ing] the harsh effects of inadequate recoveries by workmen against their employers under common law tort doctrines," the Missouri Legislature adopted the Missouri Workers' Compensation Act (the "Act").⁷⁷ The Act remains part of Missouri's original workers' compensation law,⁷⁸ and its original version required that it "be liberally construed with a view to the public welfare."⁷⁹

Although the Act's passage better ensured that workers would be compensated for their work-related injuries, the law provided little protection from employer retaliation in response to workers filing compensation claims.⁸⁰ For instance, under the 1925 version of Section 287.780, an employer who wrongfully discharged an at-will employee was reprimanded with mere misdemeanor violations.⁸¹ The General Assembly addressed this problem in 1973 by amending the statute to grant workers the right to file a civil action for damages for wrongful discharge.⁸² In 2005, the Act was further amended "to provide that its provisions [must] be construed strictly and to require the evidence to be weighed impartially."⁸³ The 2005 revisions nar-

74. See *infra* notes 75-77 and accompanying text.

75. *Todd v. Goostree*, 493 S.W.2d 411, 416 n.2 (Mo. Ct. App. 1973), *superseded by statute*, Missouri Employers Mutual Insurance Company Act, S.B. 251, 87th Gen. Assem., 1st Reg. Sess. (Mo. 1993).

76. *Id.*

77. *Id.* at 416; see also *State ex rel. Elsas v. Mo. Workmen's Comp. Comm'n*, 2 S.W.2d 796, 797 (Mo. 1928) (en banc).

78. *Christy v. Petrus*, 295 S.W.2d 122, 124 (Mo. 1956) (en banc).

79. MO. REV. STAT. § 3764 (1939), *amended by* MO. REV. STAT. § 287.800 (Supp. 2005); see also *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 911 (Mo. 1934) (noting that the Workmen's Compensation Act must be liberally construed).

80. The 1925 version of Section 287.780 provided:

Every employer, his director, officer or agent, who discharges or in any way discriminates against an employee for exercising any of his rights under this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment.

MO. REV. STAT. § 3725 (1939), *amended by* MO. REV. STAT. § 287.780 (Cum. Supp. 2013).

81. MO. REV. STAT. § 3725 (1939).

82. MO. REV. STAT. § 287.780 (Cum. Supp. 2013).

83. *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 673 (Mo. 2009) (en banc).

rowed the Act's scope, effectively limiting the broad coverage that workers had previously enjoyed.⁸⁴ The text of the 1973 version of Section 287.780, however, was left unchanged and remains in effect today.⁸⁵

Missouri's 2014 General Assembly recently sought to amend Section 287.780 by clarifying the causation standard required for workers' compensation retaliation claims.⁸⁶ Missouri House Bill No. 1468 ("HB 1468") sought to replace Section 287.780 with the following:

287.780. No employer or agent shall discharge or [in any way] discriminate against any employee for exercising any of his or her rights under this chapter *when the exercising of such rights is the exclusive cause of the discharge or discrimination*. Any employee who has been discharged or discriminated against *in such manner* shall have a civil action for damages against his employer.⁸⁷

Although HB 1468 died in committee,⁸⁸ this issue may be taken up again in the future. Analysis of this bill and its potential implications is discussed in more detail in Part V.

C. *The Evolution of the Appropriate Causation Standard*

Mitchell v. St. Louis County was the first case to apply the 1973 amended Section 287.780 to a plaintiff employee's claim for wrongful termination in retaliation for filing a workers' compensation claim.⁸⁹ In that 1978 decision, the Eastern District of the Missouri Court of Appeals affirmed the trial court's entry of a directed verdict for the employer.⁹⁰ The court reasoned that the employer presented sufficient evidence for a valid and non-pretextual motive for terminating the employee because of the employee's frequent absences from work.⁹¹ The court provided further guidance that a civil action under Section 287.780 exists only if the "employee [was] discharged discriminatorily by reason of exercising his or her rights" under workers' compensation law.⁹²

Next, in 1983, *Davis v. Richmond Special Road District* interpreted Section 287.780, specifically construing the plaintiff employee's burden to demonstrate a causal connection between his or her termination and the filing

84. See, e.g., *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 513 (Mo. 2012) (en banc) (Teitelman, C.J., dissenting) ("[T]he 2005 amendments certainly were drafted to limit worker's compensation awards.").

85. § 287.780.

86. See H.B. 1468, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

87. *Id.* (emphasis added).

88. *Id.*

89. 575 S.W.2d 813, 815 (Mo. Ct. App. 1978).

90. *Id.* at 814.

91. *Id.* at 815-16.

92. *Id.* at 815.

of his or her workers' compensation claim.⁹³ The *Davis* court construed the legislative intent behind Section 287.780 as "authoriz[ing] recovery for damages if, upon proof, it [could] be shown that the employee was discriminated against or discharged *simply because* of the exercise of his or her rights regarding a workers' compensation claim."⁹⁴ Later that same year, in *Hansome v. Northwestern Cooperage Co.*, the Supreme Court of Missouri, relying exclusively⁹⁵ on *Mitchell* and *Davis*, outlined the four elements⁹⁶ required for a plaintiff employee to prove a claim under Section 287.780.⁹⁷ Without providing any statutory interpretation or analysis for the fourth element of causation, the court put forth the appropriate causation standard as requiring "an *exclusive* causal relationship between [the] plaintiff's actions and [the] defendant's actions."⁹⁸ As its sole explanation for adopting the exclusive causation standard, the court stated, "Causality does not exist if the basis for discharge is valid and non-pretextual."⁹⁹

Fourteen years later, the Supreme Court of Missouri reaffirmed *Hansome's* exclusive causation standard by applying it to the Section 287.780 claim in *Crabtree v. Bugby*.¹⁰⁰ Judge White disagreed with the *Crabtree* majority, however, contending:

[S]ection [287.780] does not contain any language suggesting that an employee is entitled to an action when they have been discharged "solely" or "exclusively" because they sought the protection afforded by workers' compensation. At a minimum, an employee has suffered discrimination when the employee is discharged even in part for filing a claim.¹⁰¹

Judge White further noted the flaws in *Hansome's* decision, emphasizing that "[t]he 'exclusive' language in *Hansome* appear[ed] to have been

93. 649 S.W.2d 252, 255 (Mo. Ct. App. 1983).

94. *Id.* (emphasis added).

95. In listing the four elements, the *Hansome* court neglected to analyze or interpret Section 287.780. See 679 S.W.2d 273, 275 (Mo. 1983) (en banc), *overruled by* *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371 (Mo. 2014) (en banc). Instead, the court merely cited *Mitchell* and *Davis* for support that exclusive causation was the appropriate standard. See *id.*

96. The first three elements are "(1) plaintiff's status as employee of defendant before injury, (2) plaintiff's exercise of a right granted by Chapter 287, (3) employer's discharge of or discrimination against plaintiff." *Id.*

97. *Id.*

98. *Id.* (emphasis added) (citing *Davis*, 649 S.W.2d 252; *Mitchell v. St. Louis Cnty.*, 575 S.W.2d 813 (Mo. Ct. App. 1978)).

99. *Id.* at 275 n.2.

100. 967 S.W.2d 66, 70 (Mo. 1998) (en banc) (citing *Hansome*, 679 S.W.2d 273, 275 n.2) (indicating that Section 278.780 requires an "exclusive causal relationship between the discharge and the employee's exercise of rights granted" under Missouri's workers' compensation law), *overruled by* *Templemire*, 433 S.W.3d 371.

101. *Id.* at 73 (White, J., dissenting).

plucked out of thin air” because none of the court’s cited authority, including *Mitchell* and *Davis*, used such language.¹⁰² Judge White concluded his dissent by deeming *Hansome* to be “an aberration” that contradicted Chapter 287’s broad policy goal of protecting workers.¹⁰³

For another twelve years, the exclusive causation standard set forth in *Hansome* and its predecessors remained unchallenged.¹⁰⁴ Then, in *Fleshner v. Pepose Vision Institute, P.C.*, the Supreme Court of Missouri explicitly questioned the validity of this standard’s application in the public-policy exception context.¹⁰⁵ On appeal, the employer in *Fleshner* contended that the trial court erred by refusing to instruct the jury using *Hansome*’s exclusive causation standard – the same standard applied in prior Missouri decisions on wrongful discharge claims under Section 287.780.¹⁰⁶ The court disagreed, however, noting that Missouri workers’ compensation laws fail to even mention the “exclusive causation” language first adopted in *Hansome*.¹⁰⁷ Further, the court noted the distinction between public-policy cases like *Fleshner* and statutorily-based cases brought under Section 287.780 like *Hansome*.¹⁰⁸

Instead of the exclusive-causation standard, the court in *Fleshner* adopted the contributing factor standard for public-policy exception cases.¹⁰⁹ To arrive at this conclusion, the court considered policy rationales, the causation standards in other jurisdictions, and the causation standard used in recent Missouri employment discrimination cases.¹¹⁰ First, the court reasoned that an exclusive causation standard would discourage employees from reporting their employers’ violations because employees would lack protection from being terminated.¹¹¹ Under the exclusive causation standard, employers would be entitled to allege that while the employee’s reporting played some role in the employer’s decision to fire the employee, some other reason also contributed to the decision to terminate, such as tardiness.¹¹² Therefore, the employee’s termination would not be *exclusively* caused by the employee’s exercising of her rights under law, and thus, the employer would prevail.¹¹³

102. *Id.* at 74.

103. *Id.*

104. See *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92-93 (Mo. 2010) (en banc) (noting that the *Hansome* and *Crabtree* exclusive causation standard had continued to be reiterated as the appropriate standard).

105. *Id.* at 93 (“[P]ublic policy requires rejection of ‘exclusive causation’ as the proper causal standard for the public-policy exception.”).

106. *Id.* at 92.

107. *Id.* (“Nowhere in the workers’ compensation laws does ‘exclusive causal’ or ‘exclusive causation’ language appear.”).

108. *Id.* at 93.

109. *Id.* at 95.

110. *Id.* at 92-95.

111. *Id.* at 93.

112. *Id.*

113. *Id.*

Next, the *Fleshner* court noted that other jurisdictions had adopted a causation standard other than “exclusive cause.”¹¹⁴ Finally, the court analogized the public-policy exception in *Fleshner* to the MHRA’s employment provisions.¹¹⁵ In *Daugherty v. City of Maryland Heights*, the court adopted a contributing factor standard for proving discrimination under the MHRA.¹¹⁶ The *Fleshner* court reasoned that like the public-policy exception, the MHRA modifies the at-will employment doctrine by prohibiting employers from terminating their employees for improper¹¹⁷ reasons.¹¹⁸ Thus, the *Fleshner* court concluded, both types of cases “turn on whether an illegal factor played a role in the decision to discharge the employee.”¹¹⁹ *Fleshner* ended by observing that an employer’s action is “no less reprehensible” merely because the employer terminates an employee based exclusively on an improper reason versus partially on an improper reason, and the causation standard should reflect this principle.¹²⁰

This overview of causation standards used in wrongful termination claims, whether arising under a public-policy exception, the MHRA, or Section 287.780, illustrates the level of variance in causation standards. In fact, the causation standard required in statutory workers’ compensation retaliation claims is inconsistent with the causation standard required in other areas of Missouri’s employment discrimination law. With this body of law in mind, the Supreme Court of Missouri decided *Templemire*.

IV. THE INSTANT DECISION

In *Templemire v. W&M Welding, Inc.*, the Supreme Court of Missouri held that an employee who brings a wrongful termination claim under Missouri Revised Statute Section 287.780 must demonstrate that his or her filing of a workers’ compensation claim was a “contributing factor” to the employ-

114. *Id.* (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 301-02 (Iowa 1998)) (holding that employee’s exercise of rights must be the “determinative factor” in employer’s adverse action); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002) (holding that employee’s exercise of rights must be the “motivating factor” in employer’s adverse action); *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998) (holding that employee’s exercise of rights must have been a “substantial factor” in employer’s adverse action); *Cardwell v. Am. Linen Supply*, 843 P.2d 596, 600 (Wyo. 1992) (holding that employee’s exercise of rights must have “significantly motivated” employer’s adverse action).

115. *Id.* at 94.

116. *Id.* (citing 231 S.W.3d 814, 820 (Mo. 2007) (en banc)).

117. Under the MHRA, improper reasons for terminating employees include on the basis of their “race, color, religion, national origin, sex, ancestry, age, or disability.” MO. REV. STAT. § 213.055.1 (Cum. Supp. 2013).

118. *Fleshner*, 304 S.W.3d at 94.

119. *Id.*

120. *Id.* at 94-95.

er's discrimination or decision to discharge the employee.¹²¹ Further, the court held that the decisions in *Hansome v. Northwestern Cooperage Company*¹²² and *Crabtree v. Bugby*¹²³ were overruled to the extent that they applied a different causation standard.¹²⁴

A. The Majority Opinion

Judge George W. Draper, III, began the majority's analysis with an overview of Missouri's at-will employment doctrine and the historic construction of Section 287.780.¹²⁵ To provide this overview, the court examined several workers' compensation retaliation cases discussed above: *Mitchell*, *Davis*, *Hansome*, and *Crabtree*.¹²⁶ Next, the court turned its attention to *Fleshner*, the foundation for Templemire's argument.¹²⁷ First, the court noted that *Fleshner* was a public-policy exception case, while Templemire's case was a statutory exception claim.¹²⁸ The court further noted that the *Fleshner* court explicitly refused to adopt the exclusive causation standard applied in *Hansome* and its progeny because the *Fleshner* court believed that: (1) the exclusive causation standard would likely discourage employees from filing claims, and (2) such an impossible causation standard would fail to accomplish the purpose of the public-policy exception to protect the employees that were meant to be protected.¹²⁹

The court next dismissed W&M's argument that *stare decisis* should apply, reasoning that precedent should not be followed when it is "clearly erroneous and manifestly wrong."¹³⁰ The court went on to classify as erroneous the holdings in *Hansome* and *Crabtree* because it agreed with the *Crabtree* dissent that the "exclusive" language used in both decisions appeared to be "plucked out of thin air"¹³¹ and was not based on any prior case¹³² or the statute.¹³³

121. 433 S.W.3d 371, 373 (Mo. 2014) (en banc).

122. 679 S.W.2d 273 (Mo. 1984) (en banc), *overruled by Templemire*, 433 S.W.3d 371.

123. 967 S.W.2d 66 (Mo. 1998) (en banc), *overruled by Templemire*, 433 S.W.3d 371.

124. *Templemire*, 433 S.W.3d at 373.

125. *Id.* at 376-79.

126. *Id.*

127. *Id.* at 378-79.

128. *Id.* at 379.

129. *Id.* (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 93 (Mo. 2010) (en banc)).

130. *Id.* (quoting *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390-91 (Mo. 2002) (en banc)) (internal quotation marks omitted).

131. *Id.* (quoting *Crabtree v. Bugby*, 967 S.W.2d 66, 74 (Mo. 1998) (en banc), *overruled by Templemire*, 433 S.W.3d 371) (internal quotation marks omitted).

132. The court was referring to *Davis* and *Mitchell*. *Id.*

133. *Id.* (citing MO. REV. STAT. § 287.780 (2000)).

Next, the court noted that the plain language of Section 287.780 forbids discriminating “*in any way*” against an employee for filing a workers’ compensation claim.¹³⁴ Furthermore, Section 287.780 was enacted at a time when workers’ compensation laws were construed in favor of workers.¹³⁵ In contrast, the court went on, the exclusive causation standard serves as a narrow interpretation of Section 287.780, which favors employers.¹³⁶ The court concluded by emphasizing that the exclusive causation standard allows an employer to discriminate as long as the discrimination is not the exclusive cause of terminating an employee.¹³⁷ In the court’s view, such a standard “effectively deprive[d] an employee’s right to remedy the evil of being discriminated against or discharged for exercising workers’ compensation rights,” and cases requiring the plaintiff to prove this standard were overruled.¹³⁸

After overruling the exclusive causation standard, the court considered what the appropriate causation standard should be.¹³⁹ It looked for guidance in recent Missouri precedent that specifically addressed the proper causation standard for proving various forms of employment discrimination, including *Daugherty*,¹⁴⁰ *Hill*,¹⁴¹ and *Fleshner*.¹⁴² Based on the Supreme Court of Missouri’s precedent and the plain language of the statute, the court held that the contributing factor standard was the proper standard for Section 287.780 claims.¹⁴³

The court noted that adopting the contributing factor standard served two purposes.¹⁴⁴ First, it emphasized Section 287.780’s phrase, “*in any way*,” reasoning that the contributing factor standard fulfilled the statute’s purpose of prohibiting employers from terminating or discriminating *in any way* against an employee for exercising his or her workers’ compensation

134. *Id.* at 381.

135. *Id.*

136. *See id.*

137. *Id.* at 382.

138. *Id.*

139. *Id.* at 382-85.

140. *Id.* at 383 (citing *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. 2007) (en banc) (holding that a plaintiff must prove that his or her protected status under the MHRA was a “contributing factor” to his or her termination or discrimination)).

141. *Id.* (citing *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665 (Mo. 2009) (en banc) (explaining that although the claims for discrimination, as in *Daugherty*, are located in a different MHRA section from claims for retaliation, as in *Hill*, “there [is] no substantive difference between the claims with respect to causation”)).

142. *Id.* at 384 (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 94 (Mo. 2010) (en banc) (rejecting the exclusive causation standard’s application to both the MHRA and the public-policy exception to Missouri’s at-will employment doctrine)).

143. *Id.*

144. *Id.*

rights.¹⁴⁵ Second, the court reasoned that the “contributing factor” standard “align[ed] workers’ compensation discrimination [laws] with other Missouri employment discrimination laws.”¹⁴⁶ While the court acknowledged that the workers’ compensation laws served a different purpose than the MHRA, it vehemently renounced this difference as irrelevant due to policy, stating, “[T]here can be no tolerance for employment discrimination in the workplace.”¹⁴⁷

The court then addressed W&M’s concern that rejecting the exclusive causation standard would make Section 287.780 a “job security act,” encouraging employees to file workers’ compensation claims for extra job security.¹⁴⁸ The court dismissed W&M’s concern by noting that since the statute’s amendment in 1973, the legislature had created many statutory exceptions to Missouri’s at-will employment doctrine.¹⁴⁹

Finally, the court assessed whether Templemire was prejudiced by the “exclusive cause” jury instruction rather than the “contributing factor” jury instruction.¹⁵⁰ The court considered the substantial evidence that Templemire had provided to be proof of W&M’s discrimination.¹⁵¹ In the court’s view, by instructing the jury that Templemire’s termination had to be *exclusively* in retaliation for his filing a workers’ compensation claim, any evidence of some other reason to terminate Templemire would have undermined his claim.¹⁵² Thus, because the majority found that the “contributing factor” standard was the proper causation standard and that Templemire was prejudiced by the trial court’s use of the exclusive causation standard, it concluded¹⁵³ that Templemire was entitled to a new trial.¹⁵⁴

145. *Id.*

146. *Id.*

147. *Id.* (“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 MHRA or for retaliatory discharge under the public policy exception of the at-will employment doctrine.”).

148. *Id.* at 384-85.

149. *Id.* at 385.

150. *Id.*

151. *Id.* The court found the following evidence persuasive: that “McMullin repeatedly yelled at Templemire and complained to others about his injury, characterizing Templemire as a ‘high maintenance employee’ who ‘s[at] on his a— and dr[e]w [his] money’”; that “other injured workers were belittled for their injuries[,] . . . described as ‘whiners,’ [and] did not receive accommodations when injured”; that “one [injured worker] was discharged shortly after filing a workers’ compensation claim”; that Templemire’s discharge went against W&M’s “progressive discipline policy”; and that McMullin told Gragg that Templemire was “milking his injury.” *Id.*

152. *Id.*

153. The court did not address Templemire’s pretext argument because it was given in the alternative. *Id.* at 385-86. The court noted that Templemire’s pretext concerns were irrelevant now that the jury would be instructed on the contributing factor standard, rather than the exclusive causation standard. *Id.*

154. *Id.* at 385.

B. *The Dissent*

In his dissent, Judge Zel M. Fischer, joined by Judge Wilson, expressed that he would have affirmed the trial court's decision because the trial court correctly followed Missouri precedent in *Hansome* and *Crabtree*.¹⁵⁵ Judge Fischer emphasized the importance of *stare decisis*, and he attributed the majority's decision to change the causation standard to the court's changing membership, rather than to any real legal need to overturn precedent.¹⁵⁶ Agreeing with W&M's argument, Judge Fischer contended that legislative inaction with respect to a court's statutory interpretations is a form of legislative ratification, which a court should not overrule.¹⁵⁷

Judge Fischer further argued that the majority erred by relying on *Fleshner* to support its decision to abandon the exclusive causation standard because of the distinction between a wrongful termination claim brought under the public-policy exception, as in *Fleshner*, and a wrongful termination claim brought under Section 287.780, as in the instant case.¹⁵⁸ Judge Fischer concluded his dissent by emphasizing that the precedents set by *Hansome* and *Crabtree* were interpretations of a statute, and thus, these interpretations "should [be] give[n] the greatest *stare decisis* effect."¹⁵⁹ Further, Judge Fischer continued, the General Assembly's 2005 amendments to the workers' compensation laws and the Assembly's inaction with respect to Section 287.780 illustrated the legislature's intent to retain the exclusive causation standard, not abandon it.¹⁶⁰ Accordingly, Judge Fischer concluded that the majority should have abided by *stare decisis*, reaffirmed the precedent set by *Hansome* and *Crabtree*, and affirmed the circuit court's judgment in favor of W&M.¹⁶¹

V. COMMENT

The Supreme Court of Missouri's recent adoption of the contributing factor standard for workers' compensation retaliation claims has already proved controversial among employers and defense attorneys.¹⁶² This Part begins by assessing the validity of defense attorneys' concerns in light of how the contributing factor standard has already been applied to MHRA claims. Next, this Part provides guidance for employers in understanding the contributing factor standard, examining what constitutes a "contributing factor" and what proactive measures employers can take to reduce their future liability.

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

156. *Id.* at 386-87.

157. *Id.* at 387-88.

158. *Id.* at 389.

159. *Id.*

160. *Id.* at 390.

161. *Id.*

162. See discussion *infra* Part V.A.

Finally, this Part concludes by commenting on the Missouri Legislature's wisdom in not passing proposed legislation that would have overruled *Templemire*.

A. Causation Complications: What's All the Fuss About?

The *Templemire* court's decision to adopt the contributing factor causation standard rather than the exclusive cause standard has already created a fair amount of controversy, especially among defense attorneys.¹⁶³ Defense attorneys and plaintiffs' attorneys alike are justified in their focus on causation because the applicable causation standard in the employment law context has a great deal of practical importance to employment lawyers.¹⁶⁴ For instance, the applicable causation standard may make plaintiffs' attorneys more or less likely to take a case, and the causation standard may dictate whether a case survives the summary judgment stage.¹⁶⁵ Further, the causation standard given in jury instructions may dramatically influence jurors' decisions about liability for or against the employer.¹⁶⁶

Within mere days of the *Templemire* decision, defense attorneys responded by posting legal news updates online, sounding the alarm for their employer clients with foreboding article titles such as, "Employers Beware: Missouri Supreme Court Heightens the Risk of Dismissing Employees Who Filed Workers Compensation Claims"¹⁶⁷ and "Missouri Supreme Court Makes it Easier for Employees to Pursue Workers' Compensation Retaliation Claims."¹⁶⁸ Defense attorneys voiced concerns about the negative repercussions following the contributing factor standard's recent adoption, including concerns that the standard would allow weak employee claims to prevail, encourage the filing of frivolous lawsuits, increase the total number of lawsuits, and make it virtually impossible for employers to obtain summary judgment.¹⁶⁹

163. See, e.g., C. Brooks Wood, *Missouri Supreme Court Makes It Easier for Employees to Pursue Workers' Compensation Retaliation Claims*, LEXOLOGY (June 30, 2014), <https://www.lexology.com/library/detail.aspx?g=2224358e-a9b2-41af-ae48-e1809836cddf>; see also Jacquelyn M. Meirick, *Missouri Supreme Court Lowers Employees' Burden of Proof in Workers' Compensation Retaliation Claims*, LEXOLOGY (Apr. 21, 2014), <https://www.lexology.com/library/detail.aspx?g=f02d0ed8-537f-4d60-a11e-0d747111dfe5>.

164. See generally Mark J. Oberti & Richard T. Seymour, *Causation Issues in Employment Law*, CV001 A.L.I.-A.B.A. 959 (2013).

165. *Id.* at 967.

166. *Id.*

167. Timothy J. Sarsfield et al., *Employers Beware: Missouri Supreme Court Heightens the Risk of Dismissing Employees Who Filed Workers Compensation Claims*, LEXOLOGY (May 5, 2014), <https://www.lexology.com/library/detail.aspx?g=7d8b759e-fb99-44d5-9fad-315072ded058>.

168. Wood, *supra* note 163.

169. See *id.*

As of this writing, *Templemire* was the only workers' compensation retaliation claim in which the contributing factor standard had been applied. Thus, whether defense attorneys' concerns about the standard are warranted will only be determined with time and with future applications of the standard to Section 287.780 claims. Still, because the *Templemire* court's decision was largely influenced by the standard's adoption for other areas of Missouri employment law – the MHRA in 2007 and the public-policy exception in 2010¹⁷⁰ – the way that the contributing factor standard has been applied to these claims sheds some light on the similar sort of consequences that defense attorneys can expect as a result of the standard's application to Section 287.780 claims. This section analyzes such cases to better evaluate some of defense attorneys', and presumably employers', concerns about the standard's application to Section 287.780.¹⁷¹

First, employers worry that workers will have an easier time proving weak claims under the contributing factor standard, which will encourage the filing of frivolous lawsuits.¹⁷² One defense attorney, for instance, described this concern by noting that under the contributing factor standard, “the employee can recover even if discriminatory intent was, for example, 10% of the reason for the job action.”¹⁷³ This is likely an accurate representation of how the contributing factor standard operates in theory, but in practice, such dramatically weak claims are not being litigated, much less producing employee victories.¹⁷⁴ In contrast, existing case law suggests that when claims are

170. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 376, 383 (Mo. 2014) (en banc).

171. Cases that pre-date the adoption of the contributing factor standard for MHRA and public-policy exception claims are largely unhelpful in this endeavor. Thus, this inquiry is limited to MHRA claims after *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. 2007) (en banc), and to public-policy exception claims after *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (en banc).

172. See Wood, *supra* note 163.

173. *Id.*

174. For representative MHRA claims applying the contributing factor standard in which the employee prevailed by providing robust evidence, see, for example, *Hurst v. Kan. City, Mo. Sch. Dist.*, 437 S.W.3d 327 (Mo. Ct. App. 2014) (affirming jury verdict entered for sixty-one-year-old school district employee who established that her age was a contributing factor in the employer's decision to eliminate her position where evidence included that the district did not re-hire the four eldest applicants, hired the four substantially younger applicants, and created suspicious and contradictory new hiring standards to justify eliminating the four older employees); *Leeper v. Scorpio Supply IV, LLC*, 351 S.W.3d 784 (Mo. Ct. App. 2011) (affirming jury verdict entered for two female employees who established that their sex was a contributing factor in the harassment where evidence included ongoing instances of inappropriate physical sexual force, sexual comments, and stalking carried out by both a store manager and a supervisor); *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854 (Mo. Ct. App. 2009) (affirming jury verdict entered for flight attendant employee who established that her complaint of a pilot sexually harassing her was a contributing factor in her termination where evidence included the legitimacy of her complaint, her

weak, the employer – not the employee – prevails at both the summary judgment stage and at trial.¹⁷⁵ Furthermore, courts still appear to require robust levels of evidence for plaintiff employees to prevail on employment discrimination claims, even with the contributing factor standard.¹⁷⁶ Employers are undoubtedly correct that employees will have a comparatively “easier” time proving their claims than they had under the harsher exclusive cause standard, but the evidence suggests that employees will not prevail on legitimately weak claims, contrary to employers’ fears.¹⁷⁷

With that said, some less-than-compelling employment discrimination claims do sometimes make it to trial,¹⁷⁸ and quite plausibly, an increased number of legitimately frivolous employment discrimination cases may be settling out of court. Further, the contributing factor standard provides workers with greater leverage in settlement negotiations, and employers may be more likely to pay settlements for weaker workers’ compensation retaliations claims as a result. Still, the fact that these frivolous claims are not making it to trial and resulting in visible victories for employees suggests that employers’ concerns – that workers will be incentivized to file more frivolous lawsuits than under the exclusive cause standard – are likely unfounded.

Second, employers worry that the contributing factor standard’s adoption for Section 287.780 claims will produce a “significant uptick in lawsuits

good work record prior to the complaint, the proximity in time between the complaint and termination, and the poor performance records that followed the complaint as pretext for her termination); *Stanley v. JerDen Foods, Inc.*, 263 S.W.3d 800 (Mo. Ct. App. 2008) (affirming jury verdict entered for employee who established that his age was a contributing factor to his demotion and termination where evidence included that supervisor told employee that the business owner wished to replace him with a younger man, asked him how old he was, and advised him to consider retirement).

175. For representative cases in which the employer prevailed over a less-compelling claim, despite the contributing factor standard, see, for example, *Fields v. United Parcel Serv., Inc.*, No. 4:11CV581 CDP, 2012 WL 3871980 (E.D. Mo. Sept. 6, 2012) (granting summary judgment to UPS employer in MHRA claim and noting that employee failed to provide evidence demonstrating that his diabetes-related disability was a contributing factor to UPS’s termination decision where UPS had documented the employee’s ongoing dishonest conduct and other violations of company policy), *aff’d per curiam*, 511 F. App’x 600 (8th Cir. 2013); *McCullough v. Commerce Bank*, 349 S.W.3d 389 (Mo. Ct. App. 2011) (affirming jury verdict entered for bank employer where sixty-one-year-old African American employee alleged violation of the MHRA in that his race and age were a contributing factor in the bank’s decision to terminate him, while the bank alleged that employee was fired because of an investigation revealing four unauthorized account transfers); *Pittman v. Ripley Cnty. Mem’l Hosp.*, 318 S.W.3d 289 (Mo. Ct. App. 2010) (affirming jury verdict entered for hospital employer where employee alleged violation of the MHRA in that her filing of a sexual harassment complaint was a contributing factor in the hospital’s decision not to promote her).

176. See cases cited *supra* notes 174-75.

177. See cases cited *supra* notes 174-75.

178. See, e.g., *Anderson v. Shade Tree Servs. Co.*, No. 4:12CV01066 ERW, 2013 WL 3884166 (E.D. Mo. July 26, 2013); *McCullough*, 349 S.W.3d 389.

claiming some form of retaliation.”¹⁷⁹ This may very well be the case. Because the *Templemire* decision effectively broadens the definition of retaliation and discrimination under Section 287.780, more worker claims will satisfy the contributing factor standard than would have satisfied the exclusive cause standard.¹⁸⁰ Further, plaintiffs’ attorneys may be more likely to take on Section 287.780 claims that, prior to *Templemire*, they would have declined.

With the new standard’s adoption, workers may feel more empowered to file claims against their employers in the first place because of the greater likelihood that they will recover.¹⁸¹ The net result is that *Templemire* is likely to produce a greater number of claims against employers, just as defense attorneys have predicted.¹⁸² Although this is certainly a troubling result for employers, such a result is debatably a positive one for Missouri: assuming that the resulting increase in filed claims against employers is composed of legitimate claims of discrimination or retaliation under Section 287.780, wronged workers are clearly justified in litigating such claims.¹⁸³

Finally, employers fear that the contributing factor standard’s adoption will make it “as scarce to obtain summary judgment – dismissal by the court before trial – in workers’ compensation retaliation cases as it now is in employment discrimination and retaliation cases.”¹⁸⁴ This prediction has some merit but is arguably hyperbolic. With the standard’s adoption for MHRA claims in 2007, the Supreme Court of Missouri advised, “Summary judgment should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inferences rather than on direct evidence.”¹⁸⁵ There is little question that summary judgment is more difficult to obtain in employment discrimination and retaliation cases under the contributing factor standard than it was under the exclusive cause standard. This is because under the exclusive cause standard, if the employer could demonstrate *any* valid and non-pretextual reason for terminating the employee, even if the employee’s protected class or activity was the primary reason behind the employer’s act, then summary judgment could plausibly be granted for the employer.¹⁸⁶

Still, deeming summary judgment’s occurrence as “scarce” is probably an overstatement. Despite the exclusive cause standard’s adoption for MHRA claims and the court’s warning to avoid using summary judgment for

179. Wood, *supra* note 163.

180. See *Templemire v. W&M Welding, Inc.* 433 S.W.3d 371, 384-85 (Mo. 2014) (en banc).

181. See *id.*

182. See, e.g., Wood, *supra* note 163.

183. See *Templemire*, 433 S.W.3d at 382 (noting that the exclusive cause standard “effectively deprive[d] an employee’s right to remedy the evil of being discriminated against or discharged for exercising workers’ compensation rights”).

184. Wood, *supra* note 163.

185. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. 2007) (en banc).

186. See *supra* notes 112-13 and accompanying text.

employment discrimination cases, the evidence demonstrates that prevailing on summary judgment is still feasible and a somewhat regular occurrence for employers.¹⁸⁷ Therefore, employers can still expect to win on summary judgment for some future Section 287.780 claims, though as defense attorneys warn, summary judgment will not be granted as liberally as it may have been under the exclusive cause standard.

Although *Templemire*'s adoption of the contributing factor standard will lead to some frustrating consequences for employers, the overall effect of adopting the contributing factor standard over the exclusive cause standard is a positive one, moving Missouri employment law in a more equitable direction. Consider Mr. Templemire, for instance.¹⁸⁸ His claim of wrongful discharge in retaliation for filing a workers' compensation claim was supported by substantial and compelling evidence that his exercising of his Section 287.780 rights played a significant role in his employer's decision to terminate him.¹⁸⁹ And yet, as illustrated at both the trial court and appellate court levels, even a compelling and legitimate claim of blatant retaliation like Templemire's still could not survive the exclusive cause standard.¹⁹⁰ Where even strong claims like Templemire's were failing, it was clear that the causation standard for Section 287.780 claims needed improvement. Under *Templemire*, the contributing factor standard's adoption corrects this mistake and properly places workers on more equal footing with employers when it comes to litigating Section 287.780 claims.

Furthermore, Missouri's renewed interest in protecting workers from workplace injuries and any resulting retaliation arguably outweighs employer concerns about future increased liability.¹⁹¹ Employers are protected from

187. For various instances of courts granting employers summary judgment under the contributing factor standard, see, for example, *Porter v. City of Lake Lotawana*, 651 F.3d 894 (8th Cir. 2011) (applying Missouri law and affirming District Court's granting of summary judgment for employer on MHRA wrongful termination claims); *Carter v. CSL Plasma Inc.*, No. 4:13-CV-00814-FJG, 2014 WL 5438374 (W.D. Mo. Oct. 24, 2014) (applying Missouri law and granting summary judgment for employer on MHRA gender discrimination and retaliation claims); *Shirrell v. Saint Francis Med. Ctr.*, 24 F. Supp. 3d 851 (E.D. Mo. 2014) (applying Missouri law and granting summary judgment for employer on MHRA religious discrimination claim); *Fields v. United Parcel Serv., Inc.*, No. 4:11CV581 CDP, 2012 WL 3871980 (E.D. Mo. Sept. 6, 2012) (applying Missouri law and granting summary judgment to UPS employer in MHRA disability-related wrongful termination claim), *aff'd per curiam*, 511 F. App'x 600 (8th Cir. 2013); *Hilfiker v. Gideon Sch.* Dist. No. 37, 403 S.W.3d 667 (Mo. Ct. App. 2012) (granting summary judgment for employer on MHRA age discrimination claim).

188. See discussion *supra* Parts II, IV.

189. See discussion *supra* Parts II, IV.

190. See *Templemire v. W&M Welding, Inc.*, No. WD 74681, 2012 WL 6681950, at *7 (Mo. Ct. App. Dec. 26, 2012) (affirming trial court judgment entered in favor of employer W&M), *rev'd*, 433 S.W.3d 371 (Mo. 2014) (en banc).

191. See *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 384 (Mo. 2014) (en banc) (interpreting Section 287.780's purpose as prohibiting employers from

future liability in their capacity to respond proactively to the contributing factor standard's adoption: by applying clear anti-discriminatory disciplinary policies in the workplace and avoiding discrimination or retaliation against injured workers.¹⁹² In contrast, employees lack this option; employees have nothing more than those protections provided by Section 287.780. Thus, on balance, the contributing factor standard's adoption for Section 287.780 claims, even if more employee-friendly, makes good sense for Missouri.

As with any change, however, unintended consequences may arise out of the standard's application to future Section 287.780 claims, some of which may negatively impact employers. Therefore, as future Section 287.780 claims arise and the contributing factor standard is applied, Missouri courts and the legislature must diligently re-evaluate the standard's consequences, whether intended or not, while keeping both employer and employee interests in mind.

B. The Employer's Guide to the Contributing Factor Standard

The *Templemire* decision's adoption of the contributing factor standard for Section 287.780 claims represents a dramatic change in workers' compensation retaliation law, a change that encourages employers to take steps to reduce future liability. Unfortunately for employers, the novelty of the contributing factor's application to Section 287.780 claims means uncertainty – aside from *Templemire*, there is virtually no guidance as to what a contributing factor looks like within the context of a workers' compensation retaliation claim. While *Templemire* clearly adopted the contributing factor standard for claims brought under Section 287.780, what facts are sufficient to prove this standard remain a mystery. As a result, employers are left with scant guidance as to how to proactively adapt their workplace policies or how to handle future Section 287.780 claims. This section provides information on what employers can expect from the contributing factor standard's adoption for Section 287.780 claims, as well as guidance for how employers can proactively respond.

First, the way that courts have interpreted and defined the contributing factor standard in recent MHRA and public-policy exception cases sheds light on how the contributing factor standard will likely be applied within the workers' compensation retaliation context.¹⁹³ So, what is a “contributing factor”? Notably, the Missouri Court of Appeals recently denied an employer's contention that the trial court erred by failing to provide a definition of

terminating or discriminating *in any way* against an employee for exercising his or her worker's compensation rights).

192. See discussion *infra* Part V.B.

193. Cases that pre-date the adoption of the contributing factor standard for MHRA and public-policy exception claims are largely unhelpful in this endeavor. Thus, this inquiry is limited to MHRA claims after *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. 2007) (en banc), and to public-policy exception claims after *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (en banc).

“contributing factor” to the jury.¹⁹⁴ The Court of Appeals, instead, held that the contributing factor standard did not require additional definition for the jury because the words are “commonly used and readily understandable.”¹⁹⁵

What, then, would a reasonable juror understand “contributing factor” to mean? One dictionary defines a “contributing factor” as “something that is *partly* responsible for a development or phenomenon.”¹⁹⁶ As such, jurors will likely interpret this standard to mean that an employee’s filing of a workers’ compensation claim need only be “partly responsible” for an employer’s decision to terminate the employee for it to constitute a contributing factor. Similarly, Missouri courts have defined a “contributing factor” as a factor “that contributed a share in anything or has a part in producing the effect.”¹⁹⁷

Also informative for employers is that the contributing factor standard requires a lower threshold of proof than employment discrimination claims brought under federal law.¹⁹⁸ The Missouri Court of Appeals explained the effective difference in standards: under Missouri law, an employee “can recover so long as her complaint of discrimination was ‘a reason’ for termination, whereas under federal law, [an employee] can recover only if her complaint of discrimination was ‘the reason’ for her termination.”¹⁹⁹

Perhaps even more telling is how courts assess the evidence for why the employee was terminated. For purposes of summary judgment, for example, the court is not focused on an employer’s extensive proof that its decision to terminate an employee was justified.²⁰⁰ Instead, the court’s focus is on whether the employee’s protected class or activity played any role in the employer’s decision to terminate the employee, even when coupled with exten-

194. *DeWalt v. Davidson Serv./Air, Inc.*, 398 S.W.3d 491, 505 (Mo. Ct. App. 2013) (rejecting defendant employer’s argument that the trial court erred by not defining the term “contributing factor” for the jury because the term has a legal or technical meaning that would mislead or confuse the jury).

195. *Id.*

196. *Contributing Factor*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/contributing-factor> (last visited Apr. 12, 2015) (emphasis added).

197. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 867 (Mo. Ct. App. 2009) (quoting *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 170 (Mo. Ct. App. 2006)) (internal quotation marks omitted).

198. *Daugherty*, 231 S.W.3d at 818-19 (explicitly rejecting the federal framework’s application to employment discrimination claims brought under Missouri law and noting that Missouri’s discrimination safeguards are not identical and offer greater protection).

199. *Porter v. City of Lake Lotawana*, 651 F.3d 894, 898 (8th Cir. 2011) (emphasis added) (applying Missouri law to a MHRA claim and noting that Missouri’s contributing factor standard is more lenient than the federal standard).

200. *Hilfiker v. Gideon Sch. Dist. No. 37*, 403 S.W.3d 667, 670 (Mo. Ct. App. 2012) (noting the irrelevance of the employer’s extensive proof that its termination decision was justified and noting instead the comparatively greater importance of evidence that the employee’s age played some role in the employer’s termination decision).

sive proof that the termination was justified.²⁰¹ Finally, in contrast to the federal standard, employees bringing employment discrimination claims under Missouri law are not required to show that the employer treated “similarly-situated” employees differently, just that the protected characteristic contributed to the wrongful termination.²⁰²

The previous discussion illustrates the way that the contributing factor standard has been defined for MHRA and public-policy claims in Missouri, which is likely indicative of how the standard will be defined for future Section 287.780 claims.²⁰³ But, what exactly does a “contributing factor” look like, and just how little evidence can workers provide to satisfy this new standard? Currently, *Templemire* provides the sole example of what constitutes sufficient evidence to prove a Section 287.780 claim under the contributing factor standard. The *Templemire* court found the following evidence persuasive: that a supervisor “repeatedly yelled at [the employee] and complained to others about his injury, characterizing [him] as a ‘high maintenance employee’ who ‘s[a]t on his a— and dr[e]w [his] money’”; that “[o]ther injured workers were belittled for their injuries[,] . . . described as ‘whiners,’ and did not receive accommodations” for their injuries; that another employee was terminated “shortly after filing a workers’ compensation claim”; that the employee’s termination was “contrary to [the] [e]mployer’s progressive discipline policy”; and that a supervisor stated to the workers’ compensation insurance claims adjuster that “he believed [the employee] was ‘milking his injury.’”²⁰⁴ *Templemire*’s list of sufficient evidence under the contributing factor standard is not an exhaustive one, however, and because employment disputes revolve around the credibility of witnesses and issues of fact, the contributing factor standard will require significant fine-tuning with each new case. Furthermore, future determinations of whether certain facts are sufficient proof of discriminatory intent will largely be in the hands of jurors and judges.

Despite the uncertainty surrounding the new standard’s adoption, employers still have several strategies available to them, and summary judgment is still a viable option in many cases. MHRA claims in which the employer was granted summary judgment provide some guidance for how employers can adapt their workplace policies to better insulate themselves from liability.

Existing case law suggests three factors that may mean the difference between a grant or denial of summary judgment under the contributing factor standard: (1) the decision maker’s lack of knowledge that the employee filed

201. *Id.*

202. *Holmes v. Kan. City Mo. Bd. of Police Comm’rs*, 364 S.W.3d 615, 626-27 (Mo. Ct. App. 2012).

203. *See Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 383 (Mo. 2014) (en banc) (citing *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665 (Mo. 2009) (en banc)) (explaining that although the claims for discrimination, as in *Daugherty*, are located in a different MHRA section from claims for retaliation, as in *Hill*, “there [is] no substantive difference between the claims with respect to causation”).

204. *Id.* at 385.

a workers' compensation claim prior to his decision to terminate the employee;²⁰⁵ (2) a lack of evidence suggesting that the employee's workers' compensation claim was considered in the employer's decision to terminate him;²⁰⁶ and (3) a thorough, well-documented history of the employee's poor performance or insubordination, coupled with termination that complies with the employer's disciplinary policy.²⁰⁷

Unfortunately, this first factor may not be as helpful to employers defending against Section 287.780 claims as it is for employers defending against MHRA claims²⁰⁸ because to qualify for workers' compensation benefits, the employee must report a workplace injury to his supervisor.²⁰⁹ Further, a workplace injury can be catastrophic and is often highly visible to employees and supervisors, unlike a quiet instance of discriminatory harass-

205. *Cf., e.g., Porter v. City of Lake Lotawana*, 651 F.3d 894, 898-99 (8th Cir. 2011) (affirming the District Court's granting of summary judgment for the employer because the "decision makers" who terminated the employee provided sworn testimony that they were unaware of the employee's discrimination complaint when they decided to terminate her). *But see Anderson v. Shade Tree Servs. Co.*, No. 4:12CV01066 ERW, 2013 WL 3884166, at *9 (E.D. Mo. July 26, 2013) (denying employer's motion for summary judgment primarily because the decision maker knew of employee's drug addiction, the alleged disability, which the court found may have influenced the decision maker and could be construed as a contributing factor). *Anderson* suggests that a decision maker's mere knowledge of the employee's protected characteristic or activity may be sufficient to defeat an employer's motion for summary judgment. *See id.*

206. *Cf., e.g., Shirrell v. Saint Francis Med. Ctr.*, 24 F. Supp. 3d 851, 860 (E.D. Mo. 2014) (granting summary judgment for employer on MHRA claim, in part because there was no evidence that the final decision maker's awareness of employee's Jewish heritage played any role in her decision to terminate employee); *Hilfiker v. Gideon Sch.* Dist. No. 37, 403 S.W.3d 667, 670-72 (Mo. Ct. App. 2012) (granting summary judgment for employer on MHRA age discrimination claim because the total lack of evidence that the employee's supervisors had spoken in ways suggestive of age discrimination, coupled with the employee's mere personal opinion that he was terminated because of his age, was insufficient to prove that his age was a contributing factor in the employer's decision to terminate him).

207. *See, e.g., Shirrell*, 24 F. Supp. 3d at 860-61 (granting summary judgment for hospital on MHRA claims for several reasons, including that employer provided thorough documentation of patient complaints about the nurse employee, her attendance policy violations, and her negligent performance of job duties, all of which warranted discharge under the employer's "Progressive Corrective Action Policy").

208. *See, e.g., Porter*, 651 F.3d at 898-99.

209. *See* MO. REV. STAT. § 287.420 (Cum. Supp. 2013) ("No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.").

ment.²¹⁰ As a result, the “decision maker” who decides to terminate the employee will most likely be aware of the employee’s workplace injury and his filing for workers’ compensation. Thus, employers arguing for summary judgment on Section 287.780 claims will generally be unable to argue that the employment decision maker was unaware of the employee’s workers’ compensation claim at the time he was terminated.

Still, the remaining two factors do provide guidance for employers concerned about limiting their liability. First, when workplace injuries occur, employers must be hyper-vigilant about their responses.²¹¹ Employers must refrain from making any comments about general workplace injuries or an individual’s injury, especially comments that could be construed negatively.²¹² As previously demonstrated, a plaintiff-employee cannot make a case based on her mere opinion that discrimination occurred; she must have some level of circumstantial evidence suggesting discrimination.²¹³ Logically, providing an employee with any substantive reason to believe that her employer retaliated against her based on her workplace injury or her filing for benefits increases an employer’s liability.

Second, employers should re-visit their disciplinary action policies and consistently follow them. These policies should clearly define exactly what employee misconduct warrants termination, how misconduct is handled, and how many instances of misconduct and warnings are required before termination is appropriate. Following these disciplinary policies is vital – W&M’s departure from its disciplinary policy in *Templemire* was one element of Mr. Templemire’s case used to prove the contributing factor standard.²¹⁴ In addition, employers should note that legitimate, extensive, and well-documented grounds for employee dismissal can still insulate employers from liability under the contributing factor standard, so long as there is no evidence sug-

210. See, e.g., *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 373 (Mo. 2014) (en banc) (employee was severely injured when a large beam fell from a forklift and crushed his foot).

211. See *Templemire*, 433 S.W.3d at 381 (reversing and remanding for employee’s workers’ compensation retaliation claim where evidence included that employer referred to injured employees as “whiners” and stated that the employee was “milking his injury”); cf., e.g., *Stanley v. JerDen Foods, Inc.*, 263 S.W.3d 800, 804 (Mo. Ct. App. 2008) (affirming jury verdict entered for employee who established that his age was a contributing factor to his demotion and termination where evidence included that supervisor told employee that the business owner wished to replace him with a younger man, asked him how old he was, and advised him to consider retirement).

212. Cf. *Stanley*, 263 S.W.3d at 804.

213. See, e.g., *Shirrell v. Saint Francis Med. Ctr.*, 24 F. Supp. 3d 851, 859 (E.D. Mo. 2014); see also *Fields v. United Parcel Serv., Inc.*, No. 4:11CV581 CDP, 2012 WL 3871980, at *3 (E.D. Mo. Sept. 6, 2012), *aff’d per curiam*, 511 F. App’x 600 (8th Cir. 2013).

214. See *Templemire*, 433 S.W.3d at 385.

gesting that the employee's workers' compensation claim played a factor in the decision.²¹⁵

C. *The Impact of Proposed Legislation*

As of this writing, proposed legislation that would have amended Section 287.780 did not pass.²¹⁶ Had it passed, however, HB 1468 would have put the causation issue to rest and overruled *Templemire*.²¹⁷ The proposed amendment specifically mandated that to recover for wrongful termination, a worker's exercising of Chapter 287 rights must be the "exclusive cause" for the employer's termination or discrimination of the worker.²¹⁸

As previously discussed, adoption of this strict causation standard would have swung the pendulum back to favor employers over workers, making it virtually impossible for workers to recover under Section 287.780, potentially discouraging workers from filing workers' compensation claims, insulating employers from liability under Section 287.780, and sanctioning discrimination and retaliation against injured workers that is accompanied by some other motive.²¹⁹ Furthermore, this legislation would have again caused Missouri's workers' compensation law to be inconsistent with the remainder of Missouri's modern employment law.²²⁰ As such, Missouri law would have returned to providing disparate protection for at-will employees, depending on whether their claims were brought under the MHRA, public policy, or Section 287.780.

215. See, e.g., *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 361 (8th Cir. 2009) (stating, while noting that the employer's presentation of documented poor performance by the employee was a potentially legitimate explanation for terminating him, that "[b]ased on the trial record, it would have been reasonable for a jury to have accepted either of these explanations and to have found that retaliation was not a contributing factor in [the employee's] termination"); see also *Al-Birekdar v. Chrysler Grp., LLC*, 499 F. App'x 641, 647 (8th Cir. 2013) (finding that employer's presentation of well-documented, reported complaints about employee was a "valid alternative rationale for [the employee's] termination," but jury also reasonably could have found that his termination was in retaliation for filing a complaint about discrimination); *Shirrell*, 24 F. Supp. 3d at 860-61; *Fields*, 2012 WL 3871980, at *3; *McCullough v. Commerce Bank*, 349 S.W.3d 389, 391-92 (Mo. Ct. App. 2011).

216. See H.B. 1468, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); see also *supra* Part III.B.

217. See H.B. 1468 (proposing to amend Section 287.780 to adopt the exclusive cause standard); see also *Templemire*, 433 S.W.3d at 384 (holding that the exclusive cause standard no longer applied to claims brought under Section 287.780).

218. See H.B. 1468.

219. See *supra* text accompanying notes 112-13, 136-38.

220. See *supra* text accompanying notes 146-47.

VI. CONCLUSION

How should the *Templemire* decision be regarded? There is no question that *Templemire* increases employer liability for Section 287.780 claims. As previously discussed, however, employers can implement proactive measures to effectively prevent such claims from arising in the first place, including revisiting their disciplinary policies and maintaining fair and non-discriminatory employment practices. Further, slight modifications to employers' workplace practices now will help employers defend against Section 287.780 claims when they arise later.

Arguably, no causation standard is perfect, including the contributing factor standard. Moreover, there is little doubt that the causation standard will remain the center of debate between plaintiffs' attorneys and defense attorneys, employers and employees. With that said, *Templemire* represents a step in the right direction, and Missouri's strong interest in protecting workers from workplace injuries and any resulting retaliation or discrimination supports the current balance present in Section 287.780 claims. If the contributing factor standard is applied to future Section 287.780 claims in the seemingly fair manner that it has been applied to MHRA and public-policy claims,²²¹ the contributing factor standard will represent a satisfying alternative to the exclusive cause standard.

Of course, only time will tell what consequences, both intended and unintended, will arise from the contributing factor standard's application to Section 287.780 claims. Despite this uncertainty, *Templemire's* adoption of the contributing factor standard rightfully indicates a renewed concern for protecting Missouri workers, the very impetus behind the Missouri legislature's creation of the original Missouri Workers' Compensation Act in 1925. Regardless of whether one agrees with the *Templemire* decision, there is no denying that Missouri employment law is now more consistent than before and sends a clear message to employers that "there [will] be no tolerance for employment discrimination in the workplace," no matter if it is based on protected classes under the MHRA or based on the exercising of workers' compensation rights under Section 287.780.²²²

221. See discussion *supra* Part V.A.

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