

An Exception to the At Will Employment Doctrine: Missouri's Retaliatory Discharge Doctrine

By Robert W. Stewart, Burton D. Garland, Jr. and Matthew B. Robinson

In December 2006, a Saint Louis County jury awarded damages of nearly \$2.8 million to two plaintiffs in their whistleblower action against Schuster Engineering, Inc. and the company's president.¹ The plaintiffs complained to two directors of the company that the company president engaged in the following wrongful acts: used company funds for personal/family purposes, took excessive vacations, used expense checks to pay employees so as to avoid paying withholding taxes and union withholdings, and reduced the space for the company in the building he owns so he could charge more rent to other tenants. After the president sold his stock in the company to an employee stock ownership plan with a contract retaining him as president, he fired the plaintiffs. The president claimed the plaintiffs complained because they were making a power play to take control of the company.²

In May 2006, a St. Charles County jury awarded \$2.8 million to an employee fired by Bass Pro Outdoor World who claimed his termination was in retaliation for whistle-blowing activity.³ In that case, the plaintiff claimed that he was terminated in retaliation for reporting to both a company loss prevention agent and the acting store manager that he had witnessed the head of security breaking into a car in the parking lot.⁴ These jury verdicts have brought recent attention to the tort of retaliatory discharge, which encompasses whistle-blower actions.

I. The Employment At Will Doctrine and Retaliatory Discharge

In Missouri, employees who lack contracts for a definite period are considered "at will" employees, who may be terminated for any reason other than an illegal reason.⁵ The

best known exception to the at will employment doctrine involves a statutory exception for employment discrimination in violation of the Missouri Human Rights Act and its federal counterpart, Title VII of the Civil Rights Act of 1964. Missouri also recognizes the common law tort of retaliatory discharge in violation

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1. William C. Lhotka, *Former Engineering Executives Awarded \$2.8 Million Judgment*, ST. LOUIS POST-DISPATCH, Dec. 17, 2006, at D8. The verdict is currently being appealed in the Missouri Court of Appeals. *Benz, et al. v. Schuster Engineering, Inc.*, Case No. ED89550, Missouri Court of Appeals, Eastern District.
 2. *Id.*
 3. Valerie Schremp Hahn, *\$2.8 Million for Bass Pro Whistle-Blower Employee Was Fired After Reporting a Boss Broke into a Car*, ST. LOUIS POST-DISPATCH, May 2, 2006, at B1.
 4. *Id.*
 5. *Luethans v. Washington University*, 894 S.W.2d 169,172 (Mo. 1995).
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of public policy.⁶ This common law cause of action is viewed by some as protecting employees who do not have bargaining power to negotiate employment contracts, but have a right to some judicial protection where their behavior as good citizens is penalized by their employers.⁷

The retaliatory discharge tort provides remedies for an at will employee who is terminated for:

(1) refusing to perform an act contrary to the strong mandate of public policy,

(2) reporting employer acts that contravene public policy to superiors or third parties,

(3) acting in a manner public policy would encourage, and

(4) pursuing workers' compensation benefits.⁸

Public policy can be found in the "state constitution," "in the letter and purpose of a constitutional, statutory, or regulatory provision or scheme," in "judicial decisions of the state and national courts," "in the constant practice of government officials," and "in certain circumstances, in professional codes of ethics."⁹

In order to prove a public policy retaliatory discharge claim, a plaintiff must establish:

(1) plaintiff engaged in activity protected by one of the public policy categories,

(2) plaintiff was terminated,

(3) the termination was caused exclusively because of a protected activity, and

(4) plaintiff sustained compensatory damages (including emotional distress damages) or nominal damages and in the proper circumstances, punitive damages.¹⁰

The essential elements of a workers' compensation retaliation claim are recited by MAI 23.13, discussed in more detail *infra*.

This article explores each of the four categories of retaliatory discharge. It then addresses the following issues: employer defenses, individual liability, removal from state to federal court, pleading, and the proper causal link that must be established.

II. The Four Categories of Retaliatory Discharge

A. Refusing to Perform an Illegal Act or an Act Contrary to the Strong Mandate of Public Policy

This category of retaliatory discharge requires a plaintiff to prove that the conduct required by the employer would have been a violation of public policy and that the employee was discharged for refusing to comply with the employer's mandate; i.e., to act in violation of a constitutional, statutory, or regulatory provision or

scheme.¹¹ If an employee, instead of refusing to perform an act contrary to public policy, engages in the activity, the employee cannot state a claim for retaliatory discharge.¹²

In a retaliatory discharge case that initially resulted in a large jury verdict for the plaintiff, *Dunn v. Enterprise Rent-A-Car, Co.*, the employee claimed his termination resulted from his refusal to engage in what he believed to be accounting improprieties.¹³ The plaintiff, Dunn, a corporate comptroller and vice president, had responsibility to certify that the private company's financial records were prepared in accordance with generally accepted accounting prin-

6. *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-37 (Mo. Ct. App. 1998) (citation omitted).
7. *Olinger v. Gen. Heating & Cooling Co.*, 896 S.W.2d 43, 47 (Mo. Ct. App. 1994).
8. See, e.g., *Sivigliano v. Harrah's North Kansas City Corp.*, 188 S.W.3d 46, 48 (Mo. Ct. App. 2006). Although statutory, a claim of retaliatory discharge for filing a workers' compensation claim is often grouped with the public policy retaliatory discharge tort. Mo. Rev. Stat. § 287.780 (2007). The Missouri Legislature amended the Missouri Workers' Compensation Act to provide for retaliatory discharge in 1973. Mo. Rev. Stat. § 287.780.
9. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo. Ct. App. 1985).
10. *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-41 (Mo. Ct. App. 1998); *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147 (Mo. Ct. App. 1995) (citation omitted); *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522, 526 (Mo. Ct. App. 1994); *Olinger v. Gen. Heating & Cooling Co.*, 896 S.W.2d 43, 49 (Mo. Ct. App. 1994); *Reed v. Sale Mem'l Hosp. and Clinic*, 698 S.W.2d 931, 935 (Mo. Ct. App. 1985); *Palmero v. Tension Envelope Corp.*, 959 S.W.2d 825, 828 (Mo. Ct. App. 1997).
11. *Yow v. Village of Eolia*, 859 S.W.2d 920, 922 (Mo. Ct. App. 1993).
12. *Id.*
13. *Dunn v. Enterprise Rent-A-Car, Inc.*, 170 S.W.3d 1, 4 (Mo. Ct. App. 2005).



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ciples ("GAAP"). The company was considering going public through an initial public offering ("IPO") and Dunn alleged he would have had the responsibility to certify the company's financial practices were in accordance with GAAP as a part of the IPO. Dunn also claimed he was asked to review issues surrounding the private company's possible IPO and he suggested several changes the company would have to make to its accounting practices to comply with GAAP. Dunn averred that during a strategic planning meeting, the company's founder openly opposed one of the suggestions. Dunn claims following this meeting he was told the company would not make the change, was given a warning, placed on probation, and was told he could stay if he behaved himself.¹⁴

Dunn was then assigned to research several issues relating to the proposed IPO. As part of the IPO, Dunn testified the company would have to file a Form S-1 with the Securities and Exchange Commission ("SEC"), which would require Dunn to certify to external auditors that the company's financial statements were in accordance with GAAP. After the company established a target date for going public, Dunn and others prepared memoranda setting forth

recommendations as to accounting changes that had to be made. Dunn claimed those memoranda were later changed without his knowledge and that the company pushed back its target date. After this, Dunn claimed he was excluded from meetings discussing the accounting changes that were needed to go public, and was eventually terminated before the IPO was completed. Dunn sued the company, claiming he was terminated for refusing to engage in illegal conduct and for his whistle-blowing.¹⁵

During the company's presentation of evidence at trial, the court granted the company's motion for directed verdict as to Dunn's claim of retaliation for his refusal to perform illegal acts. The court allowed Dunn's whistleblower claim -- alleging his discharge was a result of reporting the employer's behavior -- to proceed to the jury. The jury returned a verdict in Dunn's favor for \$4 million, but the court granted the company's post-trial motion for JNOV, or alternatively, for a new trial. The Missouri Court of Appeals held that Dunn possessed a reasonable belief of a violation of SEC law, and the fact that the company delayed the IPO, rather than defeating his claim, actually bolstered the claim. The appellate court, therefore, reversed (and

remanded) the trial court's directed verdict as to Dunn's claim of retaliation for refusing to engage in acts protected by public policy.¹⁶ The case was never re-tried, and therefore, the truthfulness of Dunn's allegations was never adjudicated.

B. Reporting Wrongdoing or Violations of Law or Public Policy by the Employer or Fellow Employees to Superiors or Third Parties

In order to state a claim for retaliatory discharge under this category, an employee must report to his supervisors or third parties serious misconduct of his or her employer that is a violation of the law or public policy.¹⁷ The illegal act reported by the employee need not have actually been committed so long as the employee had a good faith belief the illegal act would soon be committed.¹⁸ Further, an employee must report the alleged unlawful conduct to superiors within the employer-company or to proper governmental authorities.¹⁹ Reports of wrongdoing to the person alleged to be the wrongdoer are not sufficient.²⁰

A threat to report wrongful conduct can potentially serve as the basis for a cause of action.²¹ An employer's mistaken belief that an employee had reported its unlawful conduct to the appropriate administrative agency can also serve as the basis for a claim.²² Reporting criminal activity of co-workers is also protected activity.²³

C. Acting in a Manner that Public Policy Would Encourage

This retaliatory discharge cause of action generally involves conduct that falls outside the first two categories, yet involves an employee's conduct that public policy would encourage. In discussing this type of retaliatory discharge claim, one court stated that the tort is designed to "tempor the harshness of strict application of the employment at will doctrine."²⁴ Examples of conduct protected by this tort include missing work to attend to jury duty,²⁵

14. *Id.* at 4-5.

15. *Id.* at 4-6.

16. *Id.* at 10.

17. *Id.*

18. *Id.*

19. *Brenneke v. Dept. of Mo., Veterans of Foreign Wars of United States of Am.*, 984 S.W.2d 134, 139 (Mo. Ct. App. 1998).

20. *Id.*; *Faust v. Ryder Comm. Leasing & Svcs.*, 954 S.W.2d 383, 391 (Mo. Ct. App. 1997).

21. *Williams v. Thomas*, 961 S.W.2d 869, 873 (Mo. Ct. App. 1998) (suggesting proof of such could have survived summary judgment).

22. *Saffels v. Rice*, 40 F.3d 1546, 1550 (8th Cir. 1994).

23. *Brenneke*, 984 S.W.2d at 138-39.

24. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 875 (Mo. Ct. App. 1985).

25. *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-37 (Mo. Ct. App. 1998) (citation omitted). Jurors called to serve in federal courts are protected from adverse job consequences by 28 U.S.C. § 1875.

seeking public office,²⁶ and joining a labor union (although such a claim may be preempted by the National Labor Relations Act).²⁷ Conversely, probationary employees who were on layoff status and were terminated after filing for unemployment benefits were unable to state a cause of action for retaliatory discharge.²⁸

D. Workers' Compensation Retaliation

Unlike the three other categories, a claim of retaliation for pursuing workers' compensation benefits is statutory in nature.²⁹ An employee must prove the following elements in order to prevail on such a claim:

(1) the plaintiff was employed by the company,

(2) the plaintiff pursued rights under the workers' compensation statute,

(3) the company discharged the plaintiff,

(4) the plaintiff's invocation of rights is the exclusive cause of the company's actions, and

(5) as a direct result of the plaintiff's discharge, the plaintiff sustained damages.³⁰

As discussed in greater detail, *infra*, to prove workers' compensation retaliation, an employee must prove the *exclusive* cause of his or her termination was his or her pursuit of workers' compensation benefits.³¹ Causation does not exist where the employer's reason for its action is valid and non-pretextual.³²

While the timing between the employee's protected activity and his or her termination can be evidence supporting causation, proof of timing alone is insufficient to defeat a summary judgment motion.³³ In order to defeat a summary judgment motion, the employee must prove that, in addition to the proximity in time, the employee performed his job satisfactorily. This proof often comes in the form of performance evaluations.³⁴

Some examples of recognized protected activity include: an employer's knowledge that an employee has contacted a lawyer to assist in pursuing workers' compensation benefits³⁵ and an employee's e-mail to human resources complaining of negative comments by the employee's su-

ervisor concerning the employee's workers' compensation claim.³⁶ Conversely, an employee medically cleared to return to work, but who does not return to work, may be terminated without liability.³⁷

III. Defenses to Retaliatory Discharge Claims

The following defenses to retaliatory discharge claims have been recognized by the Missouri courts:

A. Contract Employees

The retaliatory discharge tort is available only to at will employees.³⁸ Contract employees, therefore, may not pursue retaliatory discharge claims (although such employees may have contractual remedies for

breach of contract).³⁹ Although there are no cases on point, the workers' compensation retaliation claim can presumably be pursued by a contract employee, as the workers' compensation statute does not limit the cause of action to at will employees.

B. Employer's Lack of Knowledge of Protected Activity of Employee

If the employer is unaware of the employee's protected conduct, the protected conduct cannot serve as the causal basis of the termination.⁴⁰ In workers' compensation retaliation claims, this is particularly applicable where the employee has not pursued rights pursuant to the workers' compensation act until after his or her termination.⁴¹ Conversely, if an em-

26. *Porter*, 962 S.W.2d at 936-37 (citation omitted).

27. *Id.*; *Hinton v. Sigma-Aldrich Corp.*, 93 S.W.3d 755, 759 (Mo. Ct. App. 2002) (NLRA preemption).

28. *Kosulandich v. Survival Tech., Inc.*, 997 F.2d 431 (8th Cir. 1993). Missouri's Employment Security law does, however, provide job protection for employees who testify on behalf of another employee in unemployment proceedings.

29. Mo. Rev. Stat. § 287.780 (2007).

30. MAI 23.13.

31. *Id.*

32. *Wehmeyer v. FAG Bearings Corp.*, 190 S.W.3d 643, 648 (Mo. Ct. App. 2006) (citation omitted).

33. *See, e.g., Ralph v. Lewis Bros. Bakeries, Inc.*, 979 S.W.2d 509, 515 (Mo. Ct. App. 1998); *Coleman v. Winning*, 967 S.W.2d 644, 648 (Mo. Ct. App. 1998); *Hickman v. May Dept. Stores Co.*, 887 S.W.2d 628, 631 (Mo. Ct. App. 1994).

34. *Reed v. Sale Memorial Hosp. and Clinic*, 698 S.W.2d 931, 935 (Mo. Ct. App. 1985).

35. *See, Wiedower v. ACF Inds., Inc.*, 715 S.W.2d 303, 306 (Mo. Ct. App. 1986).

36. *Grider v. Lowe's Home Ctrs., Inc.*, 2006 WL 250541, *7 (W.D. Mo. 2006).

37. *See, e.g., Ralph v. Lewis Bros. Bakeries, Inc.*, 979 S.W.2d 509, 513 (Mo. Ct. App. 1998).

38. *Luethans v. Washington Univ.*, 894 S.W.2d.169, 172-73 (Mo. 1995).

39. *Id.*; *but see, Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 650-51 (Mo. Ct. App. 1989) (failure to renew contract leaves plaintiff a non-employee without rights to sue former employer).

40. *St. Lawrence v. Trans World Airlines*, 8 S.W.3d 143, 150 (Mo. Ct. App. 1999); *Williams v. Thomas*, 961 S.W.2d 869, 874 (Mo. Ct. App. 1998) (public policy claims).

41. *St. Lawrence*, 8 S.W.3d at 150.

ployee complains that his or her discharge is in retaliation for protected conduct, an employer's failure to investigate the employee's allegations can be evidence of an employer's intent to discharge an employee in retaliation for his or her protected conduct.⁴²

C. Statutory Preemption

Federal law preemption of retaliatory discharge causes of action "can occur when: (1) federal law expressly preempts state law; (2) federal law occupies the field so completely that preemption may be inferred; or (3) there is a conflict between federal and state law."⁴³

For example, the Employee Retirement Income Security Act ("ERISA") preempts retaliatory discharge claims where the claims can be said to "relate to" any covered employee ben-

efit plan.⁴⁴ In one case, an employee claimed his termination was retaliatory because he was first denied a return to work, was then placed on long-term disability leave while receiving disability benefits, and finally was terminated when his long-term disability benefits expired.⁴⁵ The court ruled that because his termination was "connected with" and "related to" an ERISA plan, his claim was preempted by ERISA.

The National Labor Relations Act ("NLRA") preempts retaliatory discharge claims where an employee's conduct is protected by the NLRA, the act complained of is an unfair labor practice, or the act complained of is subject to §7 or §8 of the NLRA.⁴⁶ The critical inquiry is whether the conduct is identical to or different from what could have been, but was not, presented to the National Labor Relations Board.⁴⁷ Whether an em-

ployee could pursue a retaliatory discharge action based on the Missouri Constitution's right to organize and bargain collectively, without the NLRA's preemptive force, is a new and open question.⁴⁸

Public policy-based claims have also been held to be preempted by the Labor Management Relations Act ("LMRA"), where such claims are "inextricably intertwined with the construction of the terms of the labor contract."⁴⁹ For example, preemption under the LMRA occurs when a court must interpret a collective bargaining agreement to determine whether it is for a "definite term" and whether it provides for dismissal only upon "just cause." If so, the employee is not an at will employee, and, therefore, cannot maintain a cause of action for retaliatory discharge in violation of public policy.⁵⁰

Finally, courts will not recognize a common law claim where a statutory remedy exists.⁵¹ A classic example of this type of preemption is where the public policy alleged as the basis for the retaliatory discharge claim is based on the Missouri Human Rights Act or Title VII of the Civil Rights Act of 1964.⁵² Other examples include the Age Discrimination in Employment Act⁵³ and the Family Medical Leave Act.⁵⁴

D. Collateral Estoppel

Where the reasons for an employee's discharge have been litigated in a prior proceeding, such as arbitration, collateral estoppel prevents relitigation of that issue.⁵⁵ Thus, for example, an arbitrator's ruling that an employer had justifiably refused to reinstate an employee due to the employee's inability to physically perform the job collaterally estopped the employee's workers' compensation retaliatory discharge claim.⁵⁶

IV. Liability of Supervisors and Others for Retaliatory Discharge

Whether supervisors or other individuals employed by an employer can be held liable for retaliatory discharge depends upon the precise claim. A claim of workers' com-

42. See *Brenneke*, *supra* note 20, at 144.

43. *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 345 (Mo. Ct. App. 1995).

44. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

45. *Dunn v. Astaris, L.L.C.*, 2007 WL 172382, *2 (E.D. Mo. 2007).

46. *Hinton v. Sigma-Aldrich Corp.*, 93 S.W.3d 755, 759 (Mo. Ct. App. 2002).

47. *Id.*

48. *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-37 (Mo. Ct. App. 1998) (recognizing public policy cause of action for an employee's termination for joining a labor organization); *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 254 (Mo. 1963) (upholding an award of damages to an employee fired for his union activity in violation of the Missouri Constitution, Art. I, § 29); *cf. Independence Nat'l Educ. Assoc. v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. 2007).

49. *Ley v. Ackerman*, 2007 WL 148770, *2 (E.D. Mo. 2007) (citing *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000)).

50. *Id.*; *cf. Egan v. Wells Fargo Alarm Servs.*, 23 F.3d 1444 (8th Cir. 1994). The LMRA does not preempt workers' compensation retaliatory discharge claims. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988); *see also, Cook v. Hussman Corp.*, 852 S.W.2d 342, 344 (Mo. 1993).

51. *See, e.g., Davis v. Bemiston-Carondelet Corp.*, 2005 WL 2452540, *15 (E.D. Mo. 2005).

52. *Id.*

53. *Osborn v. Prof. Serv. Inds., Inc.*, 872 F. Supp. 679, 681 (W.D. Mo. 1994).

54. *O'Neill v. Major Brands, Inc.*, 2006 WL 1134476, *2 (E.D. Mo. 2006).

55. *Pratt v. Purcell Tire and Rubber Co., Inc.*, 846 S.W.2d 230, 232 (Mo. Ct. App. 1993).

56. *Id.*

pensation retaliation requires that the defendant be an "employer" as defined by the Missouri Workers' Compensation Act, which excludes individuals such as supervisors.⁵⁷

Under the public policy-based cause of action, the Missouri Court of Appeals ruled a corporate officer who had fired the plaintiff was not liable because he was acting as an agent of the corporation and not in his individual capacity.⁵⁸ The issue of individual liability for public policy-based retaliatory discharge claims has not been fully developed and further legal developments concerning this topic can be expected.

V. Removal of Claim to Federal Court on the Basis of Federal Question Jurisdiction

Missouri workers' compensation retaliation claims have been held not to be removable to federal court pursuant to 28 U.S.C. § 1445(c), which does not permit the removal of claims arising under a state's workers' compensation law.⁵⁹ This is true regardless of whether removal is based on the federal court's diversity jurisdiction or federal question jurisdiction. The only exception to this rule is the complete preemption doctrine, which provides for removal where the plaintiff's cause of action is completely preempted by federal law, such that the claim will be deemed to only facially relate to workers' compensation law.⁶⁰

With regard to public policy retaliatory discharge claims, one district court has held such claims can be removed on federal question jurisdiction only where the public policy arises exclusively from federal law sources.⁶¹ Thus, where a plaintiff asserts public policy based on both state and federal law, the plaintiff's claim may not be removed to federal court based on federal question jurisdiction. This is because the plaintiff could rely on state law to assert his claim, meaning interpretation of the federal law was not "essential" to the plaintiff's claim.⁶²

VI. Pleading Standards

In order to survive a motion to dismiss, a plaintiff must plead the specific legal provision he or she claims

the employer violated and the pleading must affirmatively demonstrate that the legal provision involves a clear mandate of public policy.⁶³ Where a statute has a comprehensive remedial scheme, such that it preempts the tort of retaliatory discharge, retaliatory discharge may not be pleaded in the alternative.⁶⁴ This is significant where the statute also provides administrative exhaustion requirements that were not met by the plaintiff, such as Title VII claims.

VII. Exclusive Causation versus Direct Causation Requirement in Jury Instructions

In both workers' compensation retaliation cases and public policy cases, courts have consistently held that the employee's protected conduct must be the exclusive cause of his or her discharge.⁶⁵ With respect to public policy cases, that result has been questioned by one panel of the Missouri Court of Appeals because tort claims generally

require only a "direct" causal requirement; i.e., "because of," relying on tort principles and decisions of other state courts that have ruled only a direct causal requirement need be met.⁶⁶ This issue was presented to the Missouri Supreme Court, but the supreme court retransferred the case to the Missouri Court of Appeals apparently without deciding the issue.⁶⁷ The court of appeals then issued a ruling without issuing a written opinion.⁶⁸

VIII. Conclusion

The retaliatory discharge cause of action has been successfully used to curb employer conduct in violation of the State's public policy. Its lack of any administrative exhaustion requirements encourages employees who have been discharged to bring such claims in appropriate circumstances. It is important for employers to be prepared to prevent and defend against such claims through proper training, investigations of complaints, and investigations of employee misconduct.

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57. *Kennedy v. Office of Admin., Div. of Design and Constr.*, 917 S.W.2d 213 (Mo. Ct. App. 1996).
 58. *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 153-154 (Mo. Ct. App. 1995).
 59. *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1247 (8th Cir. 1995).
 60. *Id.*
 61. *Zimmerle v. Atlantic Express of Missouri, Inc.*, 2004 WL 2980684, *2 (E.D. Mo. 2004).
 62. *Id.*
 63. *Sivigliano v. Harrah's North Kansas City Corp.*, 188 S.W.3d 46, 49 (Mo. Ct. App. 2006) (citation omitted).
 64. *Davis v. Bemiston-Carondelet Corp.*, 2005 WL 2452540, *15 (E.D. Mo. 2005).
 65. *Hansome v. Northwestern Cooperage*, 679 S.W.2d 273, 275-76 (Mo. 1984); *Stephenson v. Raskas Dairy, Inc.*, 26 S.W.3d 209 (Mo. Ct. App. 2000); *Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. 1998); *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147 (Mo. Ct. App. 1995) (citation omitted).
 66. *Brenneke v. Dept. of Mo., Veterans of Foreign Wars of United States of Am.*, 984 S.W.2d 134, 140-41 (Mo. Ct. App. 1998).
 67. Substitute Brief of Respondents, *Kunkel v. Anheuser Busch, Inc.*, SC86543.
 68. *Kunkel v. Anheuser Busch, Inc.*, 165 S.W.3d 166 (Mo. Ct. App. 2005).