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EMPLOYER BEWARE: Employers Face Increased Wrongful Discharge Claims

Recent rulings from the Missouri Supreme Court gives Missouri employers cause for concern. On February 9, 2010, in three separate opinions, the Court continued to erode the employment at-will doctrine and kept course with its recent pro-employee holdings. For the first time, the Missouri Supreme Court expressly adopted the cause of action for wrongful discharge based on the public policy exception to the employment-at-will doctrine. The Court ruled that an at-will employee may not be terminated for: (1) 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) reporting wrongdoing or violations of law to superiors or public authorities, *i.e.* whistle-blowing.

While Missouri appellate courts have recognized this cause of action for some time, it was the Supreme Court's first explicit recognition and recitation of what circumstances will give rise to such a wrongful discharge claim. The Court further ruled that for an employee to prevail on such a claim, he or she need only prove that his or her refusal to violate the law or a well-established and clear mandate of public policy was a "contributing factor" in the employer's decision to terminate. The standard is much easier for an employee to meet than the "exclusive" causation standard that had been applied by the appellate courts for years. The new "contributing factor" standard is the same lower standard that the Missouri Supreme Court adopted in 2007 for Missouri Human Rights Act violations. One court has defined "contributing factor" as that which "contributed a share in anything or has a part in producing the effect."

In the second case of the trilogy, the Missouri Supreme Court ruled that contract employees may now bring claims against employers for wrongful discharge based on the public policy exception, in addition to pursuing any available contract remedies. Previously, the public policy exception applied only to at-will employees.

The impact of these cases is somewhat tempered by the Court's third case in the trilogy. In the third case, the Court ruled an employee must demonstrate that the statutory or regulatory provisions relied on by the employee specifically proscribe the conduct reported, complained of, or refused. The Court found not all statutes or regulations give rise to an at-will wrongful termination, and a vague or general statute, regulation, or rule cannot be successfully pled under the at-will (and now contract) wrongful termination theory.

How does this affect Missouri employers?

In light of the Missouri Supreme Court's endorsement of the public policy exception, plaintiff's counsel will aggressively begin using this exception in cases where any adverse employment action is taken against an employee for refusal to violate the law or for reporting wrongdoing – not just termination.

What should employers do to decrease potential liability?

- Employers' anti-retaliation policies should also be reviewed to ensure that they clearly state that the employer will not retaliate against an employee who complains of illegal activity or wrongdoing.
- Employers should ensure they have proper reporting systems and mechanisms in place for employees to report illegal activity or wrongdoing, and existing and new employees should be informed of them.
- Employers should train managerial and supervisory employees on its anti-retaliation policies and on conducting proper investigations of all claims of retaliation.
- Employers must take all complaints of retaliation or whistle-blowing seriously and immediately investigate the complaint, properly document the outcome of any investigation; and take corrective action, if necessary.
- Employers should have trained personnel or a third-party investigator available to investigate all claims of illegal activity or wrongdoing, properly document the outcome of any investigation and take corrective action, if necessary.
- Further, if an employee brings an action for wrongful discharge based on the public policy exception, the employer should immediately contact legal counsel to evaluate whether the employee has properly pled and relied upon a particular statute, regulation or policy to support his or her claim.

The Cases

- *Fleshner v. Pepose Vision Institute*, No. SC90032 (Mo. Feb. 9, 2010): An at-will employee brought an action for wrongful discharge based on the public policy exception after she was terminated for speaking with the U.S. Department of Labor during an investigation of her employer's overtime compensation practices. The employee was awarded \$30,000 in actual damages and \$95,000 in punitive damages. On appeal, the employer argued that the trial court erred in rejecting its proposed verdict director that instructed the jury that the proper causal standard in a wrongful discharge action based on the public policy exception was exclusive causation.

The Court adopted the public policy exception to the at-will employment doctrine, holding that an at-will employee may not be terminated for: 1) 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) reporting wrongdoing or violations of law to superiors or public authorities. Further, overruling previous appellate cases using the exclusive causation standard, the Court found the proper instruction for the causal standard in a wrongful discharge claim based on the public policy exception is "contributing factor." The Court reversed and remanded the trial court's judgment on other grounds.

[Click here](#) to read the Missouri Supreme Court Opinion.

- *Michael Keveney v. Missouri Military Academy*, No. SC89925 (Mo. Feb. 9, 2010): A contract employee appealed from the trial court's dismissal of his claim for wrongful discharge based on the public policy exception. The employee alleged that he was terminated for his insistence that his superiors report his suspicions that a student was being physically abused to the Division of Family Services (DFS). As a teacher, the employee had a mandatory duty to report suspected child abuse, or face criminal charges. *See* Mo. Rev. Stat. Section 210.115 (2000). Therefore, his refusal not to report the abuse constituted a refusal to perform an illegal act.

The Court found, though Missouri courts declined to extend the wrongful discharge cause of action to contract employees in the past, there was no justification for allowing an at-will employee to recover for wrongful discharge while denying the same remedy to a contract employee. It further held disallowing wrongful discharge actions by contract employees undermines the rationale behind the public policy exception, reasoning that a wrongful discharge action is premised on a conflict between the conditions of employment and constitutional, statutory, or regulatory provisions, which cannot be limited by contract or remedied by a breach of contract action. The Court reversed the trial court's dismissal of the contract employee's wrongful discharge claim.

[Click here](#) to read the Missouri Supreme Court Opinion.

- *Margiotta v. Christian Hospital Northeast*, No. SC90249 (Mo. Feb. 9, 2010): An at-will employee brought a wrongful discharge claim based on the public policy exception, alleging that he was terminated for reporting three separate incidents of safety violations of patient care to his supervisors. The employee relied on federal and Missouri regulations to support his claim. The federal regulation provided, "The patient has the right to receive care in a safe setting." 42 C.F.R. 482.13(c)(2). The Missouri regulation provided, "Each hospital shall develop a mechanism for the identification and abatement of occupant safety hazards in their facilities. Any safety hazard or threat to general safety of patients, staff, or the public shall be corrected." 19 C.S.R. 30-20(K)(3).

The Court found not every statute gives rise to an at-will wrongful termination, and a vague or general statute cannot be successfully pled under the at-will wrongful termination theory. It ruled for a wrongful discharge action to fall within the public policy exception, it must be based on a constitutional provision, statute, or regulation that specifically proscribes the reported acts or conduct reported. The court affirmed the trial court's grant of summary judgment in favor of the employer, finding that the regulations cited by the employee failed to encompass the specific incidents at issue.

[Click here](#) to read the Missouri Supreme Court Opinion.

If you have any questions regarding the impact of these three new Missouri Supreme Court opinions, please call or email your Lashly & Baer attorney, or [James C. Hetlage](#) or [Timm W. Schowalter](#).