Three Wrongful Discharge Against Public Policy Cases

Traditionally, most private sector employees in the United States are employed at-will, meaning they can be fired for any reason, even bad reasons. Over time, exceptions to at-will have developed through federal and state statutes, for example, laws that make it illegal for employers to fire employees based on disability, race, sex, age, or other reasons. Roughly forty years ago, state courts also began to create exceptions to the at-will doctrine that forbade employers from discharging employees for reasons that violate public policy. Allowing an employer to fire employees who blow the whistle on violations of the law or who refuse to violate laws would undermine laws that legislatures have enacted. Three recent Missouri cases, decided the same day, discuss the wrongful discharge against public policy cause of action.

Case 1

As part of a U.S. Department of Labor investigation of an employer's failure to pay its employees overtime, an investigator contacted an employee at her home. The next day, the employee reported the conversation to her supervisor. She was fired the next day. The employee then sued for wrongful discharge in violation of public policy and failure to pay overtime.

The Missouri Court of Appeals has recognized wrongful discharge in violation of public policy as an exception to at-will employment since 1985. In this case, for the first time, the Missouri Supreme Court recognized that a legal claim exists when an employer discharges "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 that constitutes violations of the law and of such well established and clearly mandated public policy." The exception was to ensure that "no one can lawfully do that which tends to be injurious to the public or against the public good."

The Missouri Supreme Court explained: "Although the general rule in Missouri is that an at-will employee may be terminated for any reason or no reason, the at-will-employment doctrine is not static. It may be modified directly by or through public policy reflected in the constitution, a statute, a regulation promulgated pursuant to statute, or a rule created by a governmental body. To find otherwise would allow employers to discharge employees, without consequence, for doing that which is beneficial to society."

Wrongful discharge in violation of public policy can take many forms. In this case, the Missouri Supreme Court adopted two types: Forbidding termination of an at-will employee for (1) refusing to commit unlawful acts of acts in violation of law or public policy or (2) whistleblowing, that is reporting wrongdoing or violations of law to superiors or public authorities. (Other states also protect (1) fulfilling a public obligation, such as jury duty, and (2) exercising a legal right, such as filing for workers compensation benefits.)

The court also held that, to be protected, an employee must have been personally affected or "the law violated prohibit or penalize retaliation against those reporting its violation." It did not require that reports be made to outside, as opposed to internal, authorities. Finally, the decision also discussed the appropriate jury charge for this cause of action. *Fleshner v. Pepose Vision Institute*, Case No.SC90032 (Mo. Feb. 9, 2010)
http://www.adl.org/civil_rights/ab/Pepose_En%20banc2.pdf

Case 2

The second case involves a private sector teacher employed under a written employment contract who was fired after insisting that the school report to the state Division of Family Services that a student had unusual bruises. The school administrators told the teacher that his job would be jeopardized if he reported the bruises to the state. He was fired that same day.

The employee sued claiming that he had been wrongfully discharged against public policy. In Missouri, and in other states, the public policy must be set out in a state or federal constitution, law or regulation. Under Missouri law, the failure of a teacher or school officials to report abuse would be a misdemeanor. In other words, there was a clear mandate of public policy.

Until this case, Missouri courts had not allowed wrongful discharge claims for contract employees. The Missouri Supreme Court held that there were "at least three compelling reasons" to allow contract employees to sue for wrongful discharge in violation of public policy. First, employers are not allowed to contract out of the law, or as the court explained, "Limiting wrongful discharge actions to at-will employees rests implicitly on the incorrect assumption that the constitutional, statutory or regulatory interests at issue can be limited through private contracts. An employer's obligation to refrain from discharging an employee who refuses to participate in or conceal actions inconsistent with public policy does not depend on the terms and conditions of the employment contract." Second, remedies against an employer who wrongfully fires an employee in violation of public policy are different from breach of contract claims. They include deterrents against future violations of public policy and to ensure that employers obey the law. Third,

there is no logical reason to allow at-will employees to sue for wrongful discharge but not contract employees.*Keveney v. Missouri Military Academy*, Case No.SC89925 (Mo. Feb. 9, 2010) http://www.courts.mo.gov/file.jsp?id=36974

Case 3

The third case involves a claim by an at-will medical imaging technician that he had been wrongfully discharged because he had reported violations of federal and state safety regulations related to patient care. The claims included (1) leaving patients unattended in the hospital's hallways; (2) complaining about the hospital's using only one orderly to transfer patients, for example, from a stretcher to a CT scanning table, causing one patient to be dropped; and (3) reporting that a pregnant woman had been given a CT scan, "a practice he considered unsafe." The court explained that, while "a wrongful discharge action must be based on a constitutional provision, a statute, a regulation based on a statute or a rule promulgated by a governmental body. . . . not every statute or regulation gives rise to an at-will wrongful termination action." In addition, there must have been serious misconduct.

In this case, the court majority found that the regulations cited by the employee were vague and did not forbid the conduct. The dissenting judge disagreed: "The regulations in this case express a clear and important public policy requiring hospitals to take steps to ensure patient safety. Procedures that result in patients being dropped off tables unquestionably involve matters included in the hospital's regulatory obligation to provide a safe environment for its patients." In addition, "the reality that many valid statutes or regulations provide general guidelines designed to regulate the unpredictable and nearly infinite array of specific fact patterns that fit within the regulatory purpose of the law. By requiring a plaintiff to identify a regulation that specifically proscribes the reported conduct, the principal opinion eliminates wrongful discharge actions based on conduct that, while not specifically proscribed by a regulation, is nonetheless clearly contrary to the purpose of the regulation." *Margiotta v. Christian Hospital Northeast Northwest*, Case No.SC90249 (Mo. Feb. 9, 2010) http://www.courts.mo.gov/file.jsp?id=36973