A Timely Analysis of Legal Developments

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In This Issue:

February 2010

In a trilogy of cases, the Missouri Supreme Court adopted the public policy exception in wrongful discharge cases and held that an employee need only show that the action of the employee in refusing to violate the law or for "whistleblowing" was a "contributing factor" in the decision to terminate.

The Missouri Supreme Court Adopts and Clarifies the Public Policy Exception in Wrongful Discharge Claims in a Trilogy of Opinions

By Charles E. Reis, IV

In a trio of cases decided on February 9, 2010, the Missouri Supreme Court formally recognized for the first time the cause of action for wrongful discharge based upon the public policy exception for at-will employees. Missouri appellate courts had previously held that such a cause of action existed, but it was unclear in what circumstances the cause of action was available to an employee and what standard of proof was required for an employee to prevail. In three separate opinions, the Missouri Supreme Court expressly adopted the public policy exception to the at-will employment doctrine in holding that an employee may not be terminated: (1) for refusing to violate the law or any well established and clear mandate of public policy expressed in the constitution, statutes, or rules or regulations promulgated by a governmental body, or (2) for reporting wrongdoing to superiors or public authorities. The court noted that not all constitutional provisions, statutes, or rules or regulations give rise to a wrongful discharge cause of action under the public policy exception; the provision must constitute a well-established and clearly mandated public policy. Further, the court indicated that the provision relied upon by the employee must clearly prohibit the conduct at issue.

Under these decisions, the employee now has a minimal burden of showing only that reporting the violations of law or refusing to violate the law was a "contributing factor" to the decision to discharge.

Further, the Missouri Supreme Court reversed prior case law holdings that a cause of action for wrongful discharge was not available to an employee who was employed under contract. The Missouri Supreme Court held that an employee who has a contractual relationship with an employer may pursue a cause of action for wrongful discharge in violation of public policy.

The Three Cases Before the Court

In *Fleshner v. Pepose Vision Institute*, P.C., No. SC90032 (Mo. Feb. 9, 2010), the employee, who worked for a refractive surgery clinic, reported to her employer that she

had received a call from the U.S. Department of Labor (DOL) about the employer's pay practices and had spoken to the DOL investigator about the hours worked by the employees. The employee was terminated the day after she reported the telephone conversation to the employer. The employee brought an action for wrongful termination in violation of public policy and relied on a Missouri statute that makes an employer criminally liable for a Class C misdemeanor for discharging an employee for notifying state officials of improprieties in paying overtime compensation. The case went to trial, and the employee received $30,000 in actual damages and $95,000 in punitive damages.

The Missouri Supreme Court noted that the employee who brought the suit was an at-will employee, and generally could be terminated for any reason or no reason at all. While Missouri appellate courts had previously recognized the public policy exception to the at-will employment doctrine, the Missouri Supreme Court had not addressed the viability of such a cause of action or the parameters under which the cause of action could be brought. In recognizing a cause of action for wrongful discharge under the public policy exception, the court stated that an employee could not be terminated: (1) "for refusing to violate the law or any well-established and clear mandate of public policy" that is set forth in any constitutional provision, statute, or regulation or rule promulgated by a governmental body, or (2) "for reporting wrongdoing or violations of law to superiors or public authorities."

The parties also disagreed regarding which standard of causation should be submitted in the jury instructions, with the employer arguing that the employee's action for reporting an illegal activity or refusing to violate the law be the "exclusive cause" for termination. The appellate courts had previously applied the "exclusive cause" standard in wrongful discharge cases borrowing from the causal standard in statutory workers' compensation retaliation cases. On the other hand, the employee argued that her actions need only be a "contributing factor," which is the causal element required in discrimination cases brought under the Missouri Human Rights Act. The trial court took a different tact and submitted an instruction that allowed the jury to find in favor of the employee if the jury found she was terminated "because she communicated with the United States Department of Labor." The Missouri Supreme Court found that "contributing factor" was the proper standard. The court noted that if either "exclusive cause" or "because" was the required standard for an employee to prevail, the employer might escape liability if the employer established that another reason existed for the employee's termination even though an illegal factor played a part in the decision to terminate the employee.

The Missouri Supreme Court also found that the employee's wrongful discharge claim was not preempted by the Fair Labor Standards Act (FLSA) because the remedies of a FLSA claim do not envelop the remedies allowed under the common law claim of wrongful discharge, which allows for punitive damages.

Finally, the Missouri Supreme Court held that a new trial was warranted because of evidence that anti-Semitic remarks were made during jury deliberations. The court held that if evidence established that the verdict may have been based on ethnic or religious bias, then the parties are deprived of their constitutional right to a trial by a fair and impartial jury.

In *Keveneny v. Missouri Military Academy*, No. SC89925 (Mo. Feb. 9, 2010), the employee was employed as a teacher pursuant to a written employment contract. The employee suspected that a student was being physically abused. The employee related the possible abuse to his superiors so that they in turn would report the abuse to the Division of Family Services (DFS). The employee alleged that his superiors refused to report the abuse to DFS, and that he was told by his superiors that if he went to DFS, his job would be in jeopardy. On the same day he reported the abuse to his superiors, he was discharged. The employee filed suit for wrongful discharge and breach of contract. The employee's contract permitted his termination only for cause. The trial court dismissed the wrongful discharge count, but submitted the breach of contract claim, with no claim for emotional or punitive damages, to go to a jury, who later awarded him $13,300.

The Missouri Supreme Court noted that Missouri appellate courts only allowed wrongful discharge claims to at-will employees, but had not extended the claim to persons employed under a contract. The court held that a wrongful discharge claim in violation of public policy should be extended to employees who have a contractual relationship. The court determined that the distinction between an at-will employee and a employee under contract was not logical. First, the court reasoned that a wrongful discharge action is based upon

an employer's violation of public policy provisions, and not on the terms of the employment contract. Second, while an employee may sue for breach of contract to remedy any contractual issues, a contractual claim neither concerns a violation of public policy nor acts as a deterrent to the employer for future violations. Third, a contractual employee should be afforded the same protection as an at-will employee, namely, to seek redress for actions taken against him for acting in the public interest. Accordingly, the Missouri Supreme Court stated that the trial court erred in dismissing the wrongful discharge claim.

In *Margiotta v. Christian Hospital Northeast*, et al, No. SC90249 (Mo. Feb. 9, 2010), the employee, an at-will medical technician, was terminated for violent outbursts. The employee filed suit claiming that he was terminated for reporting unsafe practices at the hospital to his superiors. The employee cited a Missouri regulation and a federal regulation relating to the general safety of patients.

The Missouri Supreme Court noted that an employee may not be terminated for refusing to perform an illegal act, or for reporting wrongdoing or violations of law; however, the action for which the suit is brought must be based upon a constitutional provision, statute, or rule or regulation that is based upon a well-established and clearly mandated public policy. The court also held that the employee must establish that "the public policy mandated by the cited provision is violated by the discharge" – in other words, the cited provision must prohibit conduct allegedly engaged in by the employer.

The court noted that the conduct complained of by the employee was not proscribed by the regulations relied upon, and only set out general statements of patient safety. Therefore, the employee's claim failed. Further, the court indicated even if the employee believes that the employer's alleged acts are violations of the law or public policy, that is insufficient to state a cause of action.

Practical Implications

Although the tort of wrongful discharge based upon the public policy exception for at-will employees was previously recognized by Missouri appellate courts, the Missouri Supreme Court trilogy of opinions casts away any doubt as to the viability of a wrongful discharge claim brought for violations of public policy, as well as lessening the burden to establish causation and expanding the type of employees that may bring the claim. With these holdings, employers should be mindful that:

- Plaintiff's attorneys will be much more likely to file a wrongful discharge case because of the lesser burden that requires only a showing that the complaint of illegal activity or wrongdoing was "a contributing factor" in the termination, instead of "the exclusive cause."
- Summary judgment in wrongful discharge cases will now likely be much more difficult to obtain. The Missouri Supreme Court has previously held that "contributing factor" is the proper standard in determining causation in discrimination cases brought under the Missouri Human Rights Act. Additionally, the Missouri Supreme Court has previously stated that summary judgment should rarely be granted in employment cases, and the trial judges in state court, usually with less experienced in employment matters, have adhered to this principle.
- All employees, whether at-will or employees who have a contractual relationship, will now be able to bring a claim of wrongful discharge under the public policy exception.
- Missouri courts in the future will be more likely to apply the public policy exception not only in wrongful discharge cases, but in other cases where an adverse action has been taken against an employee for reporting illegal activities or wrongdoing.
- Employees are much more likely to add a wrongful discharge claim to other claims that the employee may have against a former employer.
- Employers who are sued for wrongful discharge should require an employee bringing suit for wrongful discharge under the public policy exception to specify the particular constitutional provision, statute, or rule or regulation to determine if such provision concerns a well-established and clearly mandated public policy, and that the public policy concerns of the provision directly relate to the discharge.

- Employers should review complaint procedures and ethics policies to ensure that employees have alternative methods to report possible illegal activity or wrongdoing, and that it is clear that such complaints can be made. Employers should make sure that they have trained personnel to handle and investigate claims of illegal conduct or wrongdoing. Supervisors and management should be trained on receiving complaints of alleged illegal activities or wrongdoing.
- Policies against retaliation should be reviewed and modified to provide that there will be no retaliation for complaints of illegal activity or wrongdoing. Supervisors and managers should be instructed that there is to be no retaliation against employees who make any complaints of illegal activity or wrongdoing, and have a clear understanding of who will handle those complaints.

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