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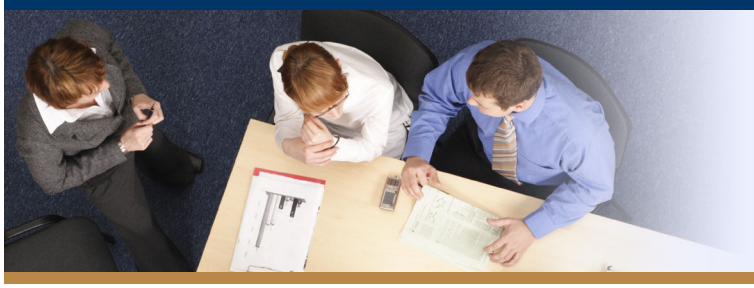
Employment Law ALERT

FEBRUARY 25, 2009



Oklahoma Supreme Court Again Expands Employer Exposure In Discrimination Cases

In a critical follow-up to *Kruchowski, et al. v. The Weyerhaeuser Company*, a case we first brought to your attention in December, the Oklahoma Supreme Court has again expanded the scope of damages available to employees asserting certain discrimination claims against Oklahoma employers.

On February 24, 2009, the State's highest court issued its opinion in *Shirazi v. Childtime Learning Center, Inc.*, casting additional light on the so-called "public policy" wrongful discharge claim under Oklahoma law. Reversing a litany of cases extending nearly 20 years, the current court has declared that "public policy" tort claims should be available to plaintiffs alleging wrongful discharge based upon race, color, religion, sex, national origin, or handicap. This ruling expands upon the holding of *Kruchowski*, which provided the same "public policy" claim to purported victims of age-based wrongful termination.

This ruling will undoubtedly usher in a significant change in the litigation of wrongful discharge claims in Oklahoma. Most importantly, the broad availability of this cause of action will expose Oklahoma employers to nearly unlimited damages in routine discrimination cases — effectively eliminating the well-known damage caps provided under federal employment laws.

Backround

Since 1989, the Oklahoma Supreme Court has recognized a cause of action for at-will employees that claim to have been terminated in violation of the expressed "public policy" of Oklahoma. These "public policy" claims are also known as "Burk tort" claims, after the 1989 case that first recognized the legal theory.

However, almost immediately following *Burk*, courts refused to allow a "public policy" claim in cases of traditional discrimination, even though the public policy expressed in the Oklahoma Anti-Discrimination Act ("OADA") clearly prohibited such discrimination. The courts routinely concluded that no state law cause of action was necessary in such cases because federal anti-discrimination laws provided adequate remedies for victims of illegal discrimination.

This distinction has always been of critical importance. Federal anti-discrimination laws generally provide caps on certain forms of damages. For example, a successful race discrimination plaintiff suing under Title VII of the Civil Rights Act of 1964, a federal law, cannot recover more than $300,000 in punitive and emotional distress damages — even against a very large employer. Although back pay, front pay and attorney's fees may be added to this sum, Title VII claims are typically susceptible to a reasonable calculation of maximum exposure to the employer. And, multi-million dollar verdicts from emotional juries are routinely reduced pursuant to the caps provided by federal law.

Oklahoma's "public policy" tort claim carries no such damage caps. Thus, the courts' initial refusal to apply the *Burk* legal theory to ordinary discrimination claims kept the maximum exposure calculation available to employers.

A New Trend

Consistent efforts by the plaintiff's bar in Oklahoma have now resulted in the reversal of this long-held precedent. In *Kruchowski*, the Oklahoma Supreme Court held that the Oklahoma Constitution requires uniform remedies be made available to all members of a given class. Specifically, the Court concluded that victims of age discrimination are not provided the same remedies as those available to victims of other forms of discrimination, and therefore, a "public policy" claim should be available to those plaintiffs. Thus, after *Kruchowski*, a purported victim of age discrimination is no longer limited to the recovery of back pay and "liquidated" damages under the federal Age Discrimination in Employment Act ("ADEA"). Rather, he could now recover essentially unlimited damages under the "public policy" framework.

The *Kruchowski* Court left open the possibility, however, that such a ruling would only apply to age discrimination plaintiffs. The *Shirazi* opinion, issued on February 24, 2009, forecloses that hope. The Court has now made clear that:

> [A] plaintiff may pursue a state law *Burk* tort claim for wrongful discharge in violation of public policy when the available remedies to the same class of employment discrimination victims are not the same — regardless of whether the remedies originate under federal or state law. Lest there be any mistake, pursuant to the Oklahoma Anti-Discrimination Act, 25 O.S. 2001 §1302, race, color, religion, sex, national origin, age, and handicap are the types of discrimination within the same employment class to which we refer.

It is beyond dispute that, when examining both federal and state

laws, the remedies available to these groups of individuals are not "the same." Thus, the Oklahoma Supreme Court has now, in direct contradiction to its prior pronouncements, expressly provided a state law "public policy" cause of action for victims of discrimination. Without the damage caps provided by federal law, maximum exposure for an employer in a discriminatory discharge case is simply no longer quantifiable. That is exposure is, for the most part, now unlimited.

Another significant result of this ruling will be a change in the venue of most wrongful discharge cases. Because discriminatory discharge cases have, until now, been decided under federal law, employers have insisted upon trial in federal, rather than state, courts. These federal venues have traditionally provided several advantages to employers over state courts, including stricter adherence to procedural and discovery rules, as well as more favorable jury pools and better results with summary judgment motions. Now that employees are able to file a state law "public policy" claim, employers will most often be precluded from seeking trial in federal court. Simply put, better plaintiffs' lawyers will likely file solely state law claims — with no federal law at issue, the federal courts will have no jurisdiction over the case.

The Bottom Line

While the December *Kruchowski* decision hinted at a sea-change in Oklahoma employment litigation, the text of the opinion left some doubt as to its full effects. The *Shirazi* decision erases all such doubt. Absent immediate intervention by the Oklahoma legislature to significantly amend or repeal the OADA, which forms the basis of both decisions, litigation of wrongful discharge claims in Oklahoma will be significantly changed by the *Shirazi* decision. Employers now face unlimited financial exposure in more hostile court rooms, where their termination decisions will be increasingly scrutinized.

Now, more than ever, employers must ensure that termination decisions are based upon legitimate, non-discriminatory and non-retaliatory justifications, and that underlying documentation supports those justifications. Employers should further consider implementing a mandatory arbitration program to limit the effect of potential runaway juries.

As always, should you have any questions about this change in Oklahoma law, or possible ways to minimize its impact, please contact any of McAfee & Taft's labor and employment attorneys.

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