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Changes in Whistleblower Tort Claims in Missouri

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The common law tort of wrongful discharge for whistleblowing was first recognized in Missouri in 1985 with the Court of Appeals decision in *Boyle v. Vista Eyewear, Inc.,* 700 S.W. 859 (Mo. App. 1985). That decision held that an at-will employee may not be terminated for (1) refusing to perform an illegal act or (2) reporting wrongdoing or violations of the law to superiors or third parties. *Boyle* and subsequent appellate decisions recognized a cause of action when the employee was discharged in violation of a clear mandate of public policy as expressed both in the letter and purpose of a constitutional, statutory or regulatory provision or scheme.

This broad definition of the source of the public policy was substantially narrowed on February 9, 2010, by the Supreme Court of Missouri in *Margiotta v. Christian Hospital Northeast Northwest d/b/a Christian Hospital and BJC Health System,* No. SC 90249 (Mo. en banc), in which the employer was represented by JoAnn Sandifer of Husch Blackwell Sanders' St. Louis office. In *Margiotta,* the Court held that the tort would arise only in those situations where the constitutional provision, statute, regulation or rule promulgated by a governmental body explicitly articulates the public policy such that it "clearly gives notices to the employer and employee of its requirements." This decision precludes claims based on an interpretation of the purpose or intent of the law by a judge—the statute or regulation must be specific; vague or general laws or regulations are insufficient. Because an employee claiming wrongful discharge must now plead and prove (1) that he reported to his superiors or public authority serious misconduct by the employer that (2) constituted a violation of the law and of well established and clearly mandated public policy, there should be a reduction in the number of successful claims asserted and it should be easier for employers to have dismissed any claims based on the employee's belief that the actions of the employer were unlawful.

While *Margiotta* benefitted employers by narrowing the scope of whistleblower claims, the two other decisions by the Court on February 9, 2010, reduced the burden of proof for the employee and expanded the employees protected by the law. In *Fleshner v. Pepose Vision Institute, P.C.,* No. SC90032 (Mo. en banc), the Court overruled prior decisions requiring the employee to prove that the whistleblowing activity was the *exclusive* reason for the termination of employment and held that all the employee needed to prove was that the whistleblowing activity was a *contributing factor* to the decision to terminate, the same standard applied in claims of discrimination under the Missouri Human Rights Act. It is sufficient that the protected activity be simply a factor in the terminating decision. If the jury determines that it was, that is sufficient to award a verdict for the employee.

In *Keveney v. Missouri Military Academy,* No. SC89925 (Mo. en banc), the Court expanded whistleblower protection from just "at-will" employees to all employees, including those who are employed under a contract of employment. Since the *Boyle* decision in 1985, Missouri courts had limited whistleblower claims to at-will employees—those who can be terminated for any reason and not just the reasons set forth in an employment agreement. In making this decision, the Court concluded that limiting the tort to at-will employees ignores the underlying purpose of the wrongful discharge cause of action and there was no justification for distinguishing application of whistleblower protection between employees under contract and those employed at will.

What This Means to You

Whistleblower claims are, in essence, retaliation claims that employers face under federal, state and local employment discrimination laws, the National Labor Relations Act and a host of specific whistleblower claims created by state and federal laws. The take-away from these decisions for Missouri employers is that the normal mental checklist of potential exposure for decisions to terminate employees should include consideration whether that decision was motivated at all by complaints the employee has made to superiors or to outside agencies about serious misconduct that constitutes a violation of law and of well established and clearly mandated public policy.

Contact Info

If you have any questions about these developments, please call your Husch Blackwell Sanders attorney.

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