



Expanding Public Policy Exceptions to At Will Employment

by *Evan D Chinn and Jeffrey James*

Under Washington common law, employment is presumed to be "at will." Employers may theoretically terminate employees for any reason or no reason. Of course, the legislature has eroded the employment at will doctrine, such as through passage of civil rights statutes that prohibit terminating an employee for discriminatory reasons or for engaging in protected conduct. Courts have also eroded the employment at will doctrine by recognizing the tort of wrongful discharge in violation of public policy. [*Danny v. Laidlaw Transit Services, Inc.*](#), a new decision from the Washington Supreme Court, expands the public policy exception to employment at will even further.

Elements of a Public Policy Claim

To sustain the tort of wrongful discharge in violation of public policy under Washington law, a plaintiff must establish (1) the existence of a clear mandate of a public policy (the clarity element); (2) that discouraging the conduct in which s/he engaged would jeopardize the public policy (the jeopardy element); (3) that the public-policy-linked conduct caused the dismissal (the causation element); and (4) the employer must not be able to offer an overriding justification for the dismissal (the absence of justification element).

Surprisingly, the existence of a "clear mandate of public policy" is not always clear. Courts continue to populate the list of public policy mandates. For example, Washington courts have recognized public policy mandates in zoning and building codes and administrative regulations, or when cooperating with law enforcement officials, reporting safety violations, whistle-blowing to a regulatory authority, or refusing to violate a statute. In addition, other states have identified public policy mandates in consulting with an attorney about legal rights, protecting employee pay from garnishment and reporting elder abuse, among others.

Public Policy Against Domestic Violence

In *Danny*, an employee and her five children experienced ongoing domestic violence at the hands of her husband. The employer granted her time off to move to escape the violence and to seek assistance in prosecuting her husband. Upon returning to work, she was demoted and then terminated, allegedly for falsification of payroll records. She sued, claiming she was terminated for requesting leave from work to respond to domestic violence and that such termination violated public policy. The U.S. District Court hearing the case asked Washington's Supreme Court to decide whether Washington recognized a public policy against domestic violence.

The Washington Supreme Court answered affirmatively. Examining legislative, judicial, constitutional and executive writings, the Court declared that Washington has a "clear mandate of public policy of protecting domestic violence survivors and their families and holding abusers accountable." Having established a clear mandate of public policy, the Court returned the case to federal court for trial on the wrongful discharge claim.

What *Danny* Signals for Washington Employers

Today, it is illegal to deny victims of domestic violence requested leave under Washington's Domestic Violence Leave Law ("DVLL"), which took effect April 1, 2008 (see our [May 2008 Employment Note](#) for more details). Significantly, the DVLL was not in effect at the time of the employee's leave requests and termination in *Danny*. In searching for a "clear mandate" of public policy, a majority of Washington's Supreme Court looked in part to a law *that did not exist at the time the employee was terminated*. Four justices dissented, issuing sharply worded opinions critical of the majority. One dissenting Justice noted ironically that the four dissenting opinions were evidence that there was not a "clear mandate" of public policy.

Employer Guidance to Minimize Risk

Over time, the doctrine of employment at will continues to erode. *Danny* suggests that Washington courts may go to great lengths to recognize clear mandates of public policy in cases where the termination seems particularly harsh. Employers, therefore, should keep the following points in mind when assessing the risks posed by a potential termination.

- Remember that the tort of wrongful discharge in violation of public policy applies to all employers, regardless of size
- Consider all facts carefully before taking adverse action. Are there sympathetic circumstances beyond the employee's control that suggest making an exception to employer policy might be a better course than strict adherence?
- Educate managers about the tort and when it might apply. This can be done in the context of periodic training in employment law and managerial practices
- Review documentation supporting the termination decision. Has the employee been given fair and sufficient notice that the conduct in question will lead to termination? It is especially important to have good documentation of the reasons supporting termination in cases where the employee has a sympathetic reason for her/his behavior
- Be wary of employees who have prior grievances or reported alleged employer misconduct to government authorities. Public policy claims often arise in cases of alleged retaliatory discipline or discharge

*This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233.

© 2008 SEBRIS BUSTO JAMES

