"Bad News Comes in Threes": Trio of Washington Supreme Court Rulings Broaden the Reach pf Public Policy Wrongful Discharge Tort

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This fall, our Washington Supreme Court decided to revisit the longstanding tort of wrongful discharge in violation of public policy. In a trio of decisions issued on the same day, the Court expanded this right for plaintiff employees. Overturning years of evolving case law, the Court concluded that the existence of "adequate" alternative remedies will no longer preclude employees from maintaining a claim—unless they are intended to be the *exclusive* remedies. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268 (2015); *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252 (2015); and *Rickman v. Premera Blue Cross*, 184 Wn.2d 300 (2015).

Public Policy Wrongful Discharge. In Washington, employees are considered to be employed "at will" unless an employment contract provides otherwise. This means that an employer may generally discharge an employee for good reason, bad reason, or no reason at all. But employers may not discharge employees for illegal reasons, such as for unlawful discrimination or violation of certain whistleblower statutes. Further, the tort of wrongful discharge in violation of public policy has provided an additional narrow exception to the at-will doctrine where discharging an employee violates a clear public policy.

To state a claim for *wrongful discharge in violation of public policy*, plaintiffs have been required to establish four elements: (1) the existence of a clear public policy (the "*clarity element*"); (2) that discouraging the plaintiff's conduct would jeopardize the public policy (the "*jeopardy element*"); (3) the public-policy-linked conduct caused the discharge (the "*causation element*"); and (4) the employer cannot show an overriding justification for the dismissal (the "*justification element*").

Prior Standard. Over years of court rulings, the jeopardy element evolved to require the plaintiff to show that any alternative statutory remedies were inadequate to protect the public policy. This allowed employers to defend against public policy wrongful discharge claims by showing that adequate alternative remedies existed. For instance, in *Korslund v. DynCorp Tri-Cities Servs.*, Inc., 156 Wn.2d 168 (2005), a Hanford employee was discharged after reporting safety violations at the Hanford Nuclear Site. The Court dismissed the employee's claim because the Energy Reorganization Act of 1974 provided comprehensive remedies for adjudicating whistle-blower claims.

The "Trio's" New Standard. In *Rose*, *Becker*, and *Rickman*, the Court announced that it will no longer require courts to examine the adequacy of other available statutory remedies for the jeopardy element. Specifically, the Court held that "the existence of alternative statutory remedies, regardless of whether or not they are adequate, does not prevent the plaintiff from bringing a wrongful discharge claim." Instead, courts will now examine whether lawmakers intended other statutory remedies to be the *exclusive* remedies. If so, those remedies will preempt the tort of wrongful discharge in violation of public policy. If not, an employee may bring a public policy wrongful discharge claim despite the existence of other remedies or other means of promoting the policy.

The Court reminded that under its new clarified standard, there are still four scenarios in which the tort will be obviously available to plaintiffs: "(1) when employees are fired for refusing to commit an illegal act; (2) when employees are fired for performing a public duty or obligation, such as serving on jury duty; (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) when employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistle-blowing." If the facts of a case do not fit precisely into one of these four categories, courts should apply the original four factors: the clarity, jeopardy, causation, and justification elements.

Takeaway. The Court's new trio of public policy wrongful discharge decisions broaden the scope of potential claims. As a result, management discharge decisions will be under greater scrutiny where employees have engaged in any conduct that could implicate a public policy. Employers will still be able to defeat public policy discharge claims by showing that their reasons for termination were unrelated to the employee's public-policy-related conduct. However, because of the trio's new standard, obtaining summary judgment will be more difficult.

Importantly, Washington law does not prohibit disciplinary action, including termination, that is justified by an employee's poor performance or misconduct, even where that employee engaged in protected, public-policy-related activity. Moreover, employees who have engaged in public-policy-related conduct are not entitled to preferential treatment over others who have not engaged in protected activity. However, to minimize the potential for public-policy-discharge claims and maximize the ability to successfully defend them when they do arise, employers should:

- Manage the response to the employee's performance/conduct and protected activity *separately* and never let the two processes touch, *e.g.*, different managers deal with each issue in different meetings, so that the employee cannot easily establish that the discipline was "because of" the protected activity
- Educate supervisors and managers about the potential "halo" effect of protected conduct on performance management and require that HR be informed of any complaints or policy-related conduct
- Address whistleblower-type complaints promptly, take corrective action if appropriate, and remind those accused of misconduct that retaliatory responses are unacceptable and will be grounds for discipline
- Ensure that supervisors consistently document performance problems on an ongoing basis. The documentation will support disciplinary action and counter claims that the decision was in retaliation for protected activity

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