

Vox Populi: The Public Policy Tort in the Workplace

by

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“[B]eneath the legal façade a faint hope is discernible rising like a distant star over a swamp of uncertainty and perhaps of despair. Those who love their work may sometimes forget that a successful human community requires the performance of many vapid and colorless tasks. Even the most tedious physical labor is enduring and in a sense enjoyable, however, when the laborer knows that his work will be appreciated and his progress rewarded. ‘Work without hope,’ said Coleridge, ‘draws nectar in a sieve, And hope without an object cannot live.’ The ethic which permeates the American dream is that a person may advance as far as his talents and his merit will carry him. And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a glimmer of light in the midnight of it all.” Judge Walter Gewin, *Miller v. International Paper Co.*, 408 F.2d 283, 294 (5<sup>th</sup> Cir. 1969).

The public policy tort claim traces its origins to fundamental concepts of a civil democratic society, i.e., the power of the people, vox populi. At bedrock, the tort in the employment setting called wrongful or abusive discharge is better named the public policy tort. Its predicate is that the people, normally through their elected representatives or their designees, have clearly spoken and enunciated a public policy that should be enforced and is otherwise remedy-less. Fundamental to the tort is the notion that public policy is not to be invented out of whole cloth by the judiciary, but rather the judiciary is empowered only to determine whether a public policy exists and whether it is enforceable in tort. Decades ago the courts transported these tort notions into employment law. And, for decades, the state courts have been refining the body of common law jurisprudence that developed after the states, with virtual unanimity, recognized the public policy tort.

Among the first cases to recognize the tort in the employment context was *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985). In *Wagenseller*, a hospital

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staff nurse allegedly was fired for refusing to participate in a skit that was put on during an employer-sponsored rafting trip. The skit, a parody of the song “Moon River,” required the members of the group to “moon” the audience. The court, while not limiting its recognition of the public policy tort to cases involving violation of a criminal statute, found that firing Wagenseller for refusing to participate in activities that would violate the indecent exposure statute would fulfill the requirements the tort.

The *Wagenseller* court held that “[t]he interests of society as a whole will be promoted if employers are forbidden to fire for cause which is ‘morally wrong’”. 710 P.2d at 1033. The court cited with approval the definition of public policy articulated by the Illinois Supreme Court in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), where the court stated: “There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed.” *Palmateer*, 85 Ill. 2d at 130, 421 N.E.2d at 878-79, quoted in *Wagenseller*, 710 P.2d at 1032.

Over the last two decades, the state courts have grappled with many intellectually challenging issues raised by this new tort, and they will continue to do so in the coming years. One issue that continues to engage the courts’ attention is whether a public policy can be found in a professional code of a self-regulating organization, e.g., lawyers or nurses. For example, in the District of Columbia’s seminal case, *Carl v. Children’s Hospital*, 702 A.2d 159 (D.C. 1997) (en banc) (“*Carl II*”), the plaintiff, a nurse, alleged that she was discharged because of her advocacy for patients’ rights before the legislature and the courts. *Id.* at 160. In support of her claim, she cited, *inter alia*, certain provisions of the national nursing code of conduct, the Code for Nurses With Interpretative Statements, as imposing a duty upon professional nurses to “participate in the legislative process, to advocate positions of public importance on behalf of patients, and to educate the legislature so that it can make informed public policy decisions.” *Id.* at 160 & n.3. The plaintiff argued that the nursing code of conduct therefore expressed a clear mandate of public policy to permit her to speak out publicly on issues affecting the public interest without fear of retaliation. *Id.* at 159. The en banc court, per curiam, reversed dismissal of the case without considering whether the nursing code of conduct could serve as a source of public policy. *Id.* at 161. Four judges who concurred separately indicated that although some professional codes of ethics, such as the lawyers’ Rules of Professional Conduct, might be a source of public policy because they had been adopted by the courts to regulate lawyer conduct, the nursing code of conduct would not fall into that category. *Id.* at 165 (concurring opinion of Terry, Wagner, Farrell, and Ruiz, citing *Warthen v. Toms River Community Memorial Hospital*, 199 N.J. Super. 18, 28, 488 A.2d 229, 234, *cert. denied*, 101 N.J. 255, 501 A.2d 926 (1985); *Wright v. Shriners Hospital for Crippled Children*, 412 Mass. 469, 473, 589 N.E.2d 1241, 1244 (1992)). Three other judges who concurred separately, however, would have held affirmatively that “a professional code of ethics may contain an expression of public policy.” *Id.* at 192, 194

(concurring opinion of Mack, Ferren, and Reid, quoting *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (1980) (recognizing possible public policy interest arising from medical Hippocratic oath or other codes of professional ethics), and citing *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728, 730-31 (1982) (recognizing wrongful discharge cause of action based on pharmaceutical code of ethics)).

Shortly after *Carl II*, in *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873 (D.C. 1998), the plaintiff, a lawyer, predicated her claim for wrongful discharge on Rules 5.1 and 5.2 of the Rules of Professional Conduct. *Id.* at 884. The court assumed without deciding that the Rules cited stated a clear mandate of public policy as required by *Carl II*; however, one member of the panel again stated her belief that a professional code of ethics could constitute an expression of public policy. *Id.* & n.21. Other courts have found that the lawyers' Rules of Professional Conduct and/or Code of Professional Responsibility represent a clear and definitive statement of public policy. See, e.g., *Lewis v. Nationwide Mutual Ins. Co.*, 2003 U.S. Dist. LEXIS 5126, 19 IER Cas. (BNA) 1470 (D. Conn. 2003); *Crew v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 862 (Tenn. 2002).

Most courts have now expanded the reach of the public policy claim beyond mere statutes to include federal, state, and local regulations. See, e.g., *Hubbard v. Spokane County*, 146 Wn. 2d 699, 50 P.3d 602, 611 (2002) (en banc) (director of planning department fired for seeking assistance of county prosecutor to prevent issuance of permit to build new hotel in violation of zoning code and airport master plan); *Washington v. Guest Services, Inc.*, 718 A.2d 1071, 1080 (D.C. 1998) (cook fired for protesting co-worker's violation of food health and safety regulations by spraying cleaning fluid near food); *Parada v. City of Colton*, 24 Cal. App. 4<sup>th</sup> 356, 29 Cal. Rptr. 2d 309 (1994) (building code); *Smith v. Farmers Cooperative Ass'n*, 825 P.2d 1323, 1326 (Okla. 1992) (zoning code); *Adams v. George W. Cochran & Co., Inc.*, 597 A.2d 28, 33 (D.C. 1991) (truck driver fired for refusal to violate municipal regulation prohibiting operation of a motor vehicle lacking valid inspection sticker).

Whether an employee who complains only internally within the corporation regarding suspected illegal activities by the corporation is entitled to pursue a public policy tort claim is a subject of significant debate among the courts. In *Wholey v. Sears Roebuck*, 370 Md. 38, 803 A.2d 482 (2002), the court specifically stated that, as the legislature had not created a general, all-encompassing "whistleblower protection" statute which would protect employees who investigate and internally report suspected criminal activity, the court would decline to act the legislature's stead. *Id.* at 496. On the other hand, in *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999), the court rejected the defense argument that internal complaints regarding violations of law were not covered by the public policy tort. *Id.* at 1331; accord *Lanning v. Morris Mobile Meals, Inc.*, 720 N.E.2d 1128, 1130-31 (Ill. 1999) (wrongful discharge claim can proceed where employee did not report illegal conduct to authorities, but only to employer).

An issue on which the states have split is whether a public policy claim can be predicated on a state's statute that enunciates a public policy, but provides no enforcement mechanism. The issue comes up usually where a state's anti-discrimination statute is not enforceable against the

employer because it does not employ the statutory minimum number of employees for coverage. Maryland, for example, has held that small employers, not covered by the enforcement provisions of Maryland's anti-discrimination law, can be sued, in effect, for discrimination in tort without any cap on damages; whereas larger employers cannot be so sued because the state has provided enforcement mechanisms, albeit only an administrative one, a mechanism far weaker than an uncapped tort claim. *Molesworth v. Brandon*, 341 Md. 621, 628, 637, 672 A.2d 608 (1996). Several other jurisdictions have followed the Maryland approach. See, e.g., *Roberts v. Dudley*, 140 Wn. 2d 58, 70-71, 77, 993 P.2d 901 (2000); *Williamson v. Greene*, 200 W. Va. 421, 431, 490 S.E.2d 23 (1997); *Collins v. Rizkana*, 73 Ohio St. 3d 65, 70-71, 74, 652 N.E.2d 653 (1995); but see *Thibodeau v. Design Group One Architects, LLC*, 802 A.2d 731 (Conn. 2002) (declining to follow Washington, West Virginia, Maryland, and Ohio approach); *Chavez v. Sievers*, 43 P.2d 1022 (Nev. 2002) (same); *Gottling v. P.R., Inc.*, 61 P.3d 989 (Utah 2002); *Burton v. Exam Ctr. Indus. & General Med.*, 994 P.2d 1261 (Utah 2000); *Jennings v. Marralle*, 876 P.2d 1074 (Cal. 1994) (same); *Brown v. Ford*, 905 P.2d 223 (Okla. 1995) (same).

Another interesting debate ongoing in the courts is whether the public policy can be a public policy created by the federal government. Maryland, for example, seems clearly to adopt the position that there must be a clear policy, and whether it is found only in federal law is unimportant. See *Lee v. Denro, Inc.*, 91 Md. App. 822, 605 A.2d 1017, 1020 & n.2 (Md. App. 1992) (assuming without deciding that employee can base claim for wrongful discharge under Maryland law on asserted violation of public policy exhibited by violation of federal statutes); see also *Danfelt v. Board of County Comm'rs of Washington County*, 998 F. Supp. 606 (D. Md. 1998) (court permitted employee to assert wrongful discharge claim based on FMLA); *Phillips v. St. Mary Reg'l Med. Ctr.*, 116 Cal. Rptr. 2d 770, 96 Cal. App. 4<sup>th</sup> 218 (2002) (plaintiff sued non-profit religious corporation for race and sex discrimination; California anti-discrimination statute exempted religious entities, but court found public policy against race and sex discrimination in state's constitution and Title VII). In Virginia, it has been held by the federal courts, a claim predicated on a federally-created public policy is not cognizable under state law. *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431 (E.D. Va. 2002); see also *McCarthy v. Texas Instruments, Inc.*, 999 F. Supp. 823, 829 (E.D. Va. 1998) ("such a claim must find root in a state statute []; it cannot have its genesis in an act of Congress"); *Oakley v. May Dept. Stores*, 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (the wrongful termination exception to the at-will doctrine "is predicated on public policies derived from Virginia statutes, not federal laws."); cf. *Szaller v. American Nat'l Red Cross*, 293 F.3d 148, 151 (4<sup>th</sup> Cir. 2002) ("federal policy is enforced by the means Congress specifies, not through state-law wrongful discharge actions"). In contrast, Judge Diane Wood of the 7<sup>th</sup> Circuit has opined that to refuse to permit the state common law claim of public policy tort to be predicated on a federally-created policy would violate the supremacy clause of the Constitution. See *Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 277 F.3d 936, 942 (7<sup>th</sup> Cir. 2002).

The debate still rages as to whether the employee must show that the employer's decision to terminate was motivated only in substantial part for reasons antithetical to the public policy, or whether that must be the sole cause for the termination. See *Sabine Pilot Serv., Inc. v. Houck*, 28 Tex. 339, 687 S.W.2d 733, 735 (1985) (the public policy exception to the general doctrine of

employment-at-will “covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act”); *Adams v. George W. Cochran, Co. Inc.*, 597 A.2d 28, 34 (D.C. 1991) (following *Sabine*, “[A] discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee’s refusal to violate the law, as expressed in a statute or municipal regulation.”); *see also Owens v. National Medical Care, Inc.*, 2004 U.S. Dist. LEXIS 19340, \*25 n.8 (D.D.C. 2004) (rejecting argument that *Carl II* decision relaxes *Adams*’ sole factor requirement); *but see White v. American Airlines, Inc.*, 915 F.2d 1414 (10<sup>th</sup> Cir. 1990) (district court erred by failing to instruct jury that employer should be held liable for wrongful discharge if termination was “significantly motivated” by employee’s refusal to commit perjury; “We see no basis for distinguishing the common law tort claim at issue here from the statutory retaliatory discharge provisions at issue in [worker’s compensation] cases.”). Assuming the substantial factor test applies, underlying such a holding is a recognition of mixed motive analysis and the burden of proof issues in such cases as illustrated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Presumably, the plaintiff-employee in a state recognizing the substantial factor test can argue that the burden of proof shifts to the employer once the employee has proffered sufficient evidence to establish that an illicit motive was a substantial motivating factor. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081, 1089 (1984) (“once the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee”); *cf. Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (co-defendants both shot negligently while hunting in the woods; where co-defendants failed to establish which one was responsible for plaintiff’s injury, both were liable).

One can expect in the post-Enron world that there will be an increase in wrongful termination claims where the dischargee argues that the termination was because he blew the whistle on corporate accounting fraud. “With the sole exception of the war on terrorism, no issue dominates current thought more than the corporate and accountancy ethical scandals which have rocked our country. Insider trading, overstated corporate earnings, shredded documents, and a host of related issues dominate the national news, business journals, and law reviews. It is within this societal framework that the case now before us for decision must be judged.” *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 74 (Ind. Ct. App. 2002).

Each of us proudly fights the good fight for our clients in these cases. One of the glories of our practice is that we have been and are participants and witnesses to history. The expansion and development of the public policy tort is yet another historic expansion of employee rights in the workplace.