HR PERSPECTIVES

Summer 2009

A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

Iowa Supreme Court Recognizes Claims of Wrongful Discharge for Reporting Safety Violations

by JILL R. JENSEN-WELCH

For the second time this year the Iowa Supreme Court has expanded the reach of wrongful discharge claims in this state. In January, the court held that administrative regulations, and not just statutes, can contain public policies that can form the basis of a wrongful discharge claim, and that individuals can be held personally liable for wrongfully discharging an employee. *Jasper v. H. Nizam, Inc.*, 2009 Iowa Sup. LEXIS 6 (Iowa Jan. 23, 2009). That case specifically involved Department of Human Services regulations regarding minimum standards of operation of child care centers. (See the article in the Spring 2009 edition of Hire Perspectives.) Now, in *George v. D.W. Zinser Co.*, No. 07-1495 (Iowa Mar. 13, 2009), the court held that employees who believe they have been terminated in retaliation for reporting safety violations to IOSHA may file a wrongful discharge lawsuit, too.

In January 2007, Jeffrey George notified the Iowa Division of Labor of possible safety violations he witnessed while performing lead abatement work for his employer, the D.W. Zinser Company, a few months earlier. Five days later, the company learned of the IOSHA complaints and Mike Zinser left two messages on George's phone indicating a meeting was needed as soon as possible. The next day, David Zinser told George there was no work for him and to return the company truck George had in his possession. Twice over the next week, George met with David Zinser with a concealed recording device. George did so "[f]ollowing the advice of the Division." George claimed the company refused to assign him to any work because of the IOSHA report, and George's employment was later terminated. On February 8, 2007, the company was assessed penalties for eight serious IOSHA violations.

George filed a complaint with the Division of Labor alleging he had been terminated in retaliation for reporting unsafe working conditions under IOSHA, Iowa Code Chapter 88.9(3). The Division of Labor dismissed George's complaint and found that he had been laid off, along with other employees, a few days *before* he filed his IOSHA report. While his complaint of retaliation was still being investigated at the Division of Labor, George filed a lawsuit in state court for wrongful discharge in violation of the Iowa public policy encompassed within IOSHA. The company tried to have George's lawsuit dismissed, claiming that George's only and exclusive remedy for retaliation for his IOSHA report was an administrative complaint with the Division of Labor, and that IOSHA did not authorize private litigation.

The issue in this case – whether a lawsuit for wrongful discharge in violation of the public policy behind IOSHA is viable – was one of first impression for the Iowa Supreme Court. Previously, this was an unsettled area of Iowa law. On the one hand, an Iowa federal trial court had ruled that the administrative remedies within IOSHA were sufficient to require their exhaustion before a plaintiff could bring a wrongful discharge suit in court. *Kornischuk v. Con-Way Central Express*, 2003 U.S. Dist. LEXIS 14459, *7 (S.D. Iowa June 4, 2003). On the other hand, the Eighth Circuit Court of Appeals (also a federal court) had held that IOSHA would *not* pre-empt a wrongful discharge claim in Iowa because the administrative remedies within the statute were not required of a plaintiff, but were only one option that a plaintiff could pursue. *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 899-902 (8th Cir. 2004). To its credit, the Eighth Circuit recognized that its decision was "not free from doubt," and it was only hesitantly predicting what the Iowa Supreme Court might do if faced with this issue in the future.

It turns out the Eighth Circuit guessed right in *Kohrt* and the Southern District of Iowa guessed wrong in *Kornischuk*. In *George*, the Iowa Supreme Court has ruled that an individual employee can bring a claim of wrongful discharge for reporting IOSHA violations without exhausting administrative remedies with the Iowa Division of Labor.

There are two lessons to be learned from this case. First, and most obvious, is not to terminate an employee because s/he reported the company to IOSHA for what the employee, in good faith, believed to be violations of safety rules. This kind of retaliatory discharge will surely lead to litigation. Second, and less obvious, is to assume employees are recording conversations—especially sensitive

conversations. Company officials, supervisors, and managers must be extremely cautious about what is said to employees and how it is said. It is easier and easier to surreptitiously record conversations, so the risk of being recorded without your knowledge is higher than ever before. Remember that in Iowa, only one party to the conversation needs to know and consent to the recording of the conversation.

If you have questions regarding wrongful discharge claims, please contact a member of the Firm's Employment and Labor Law Group or the Dickinson attorney with whom you normally work.

MORE INFORMATION

Click here to see contact information for members of Dickinson's Employment and Labor Law Group.
Click here for more information about Dickinson's Employment and Labor Law Group, including recent articles by members of the group.
Click here to report technical difficulties, to submit additions to our distribution list, or if you would like to stop receiving our email communications.

HIRE PERSPECTIVES

Summer 2009

Hire Perspectives is published periodically by the law firm of Dickinson, Mackaman, Tyler & Hagen, P.C., 699 Walnut Street, Suite 1600, Des Moines, Iowa 50309.

Phone: 515.244.2600 Fax: 515.246.4550 Web: www.dickinsonlaw.com Email: info@dickinsonlaw.com