



UPDATE YOUR EMPLOYEE TERMINATION REVIEW CHECKLIST

Oklahoma Supreme Court Significantly Expanded the Burk Public Policy Tort Claim

By Chris Thrutchley

May 31, 2016

SUMMARY

On March 8, 2016, the Oklahoma Supreme Court significantly expanded the reach of the infamous *Burk* public policy wrongful discharge tort claim in *Moore v. Warr Acres Nursing Center, LLC*, 2016 OK 28. **Here's the key takeaway for employers:** *Moore* substantially increased your risk of being sued for violating public policy. You should add a new box to your employee termination review checklist. Not only must you make sure the discharge doesn't violate public policy expressed in the Oklahoma Constitution or an Oklahoma statute, but now you must make sure it doesn't violate public policy expressed in an Oklahoma or federal regulation. Before firing an at-will employee, evaluate whether any facts create an inference that a significant factor motivating the decision was the employee's action **required** by a regulation or the employee's refusal to do something a regulation **prohibits**. In doing so, you should coordinate with counsel regarding the types of state and federal regulations that could apply to your employees and could create the most risk.

DETAILS OF THE MOORE DECISION

The issue in *Moore* was whether firing a nurse for missing work due to the flu violates Oklahoma public policy and constitutes wrongful discharge, where state and federal health regulations prohibit a nurse from working with the flu. *Moore* held it would violate Oklahoma public policy. *Id.* at ¶1.

The facts are these. *Moore* worked as nurse at a nursing center. The Director of Nursing heard *Moore* vomiting, said he must have a virus or the flu, and sent him home. *Moore*'s physician took him off work for three days. *Moore* called in to report his status per company policy. Days later, Warr Acres fired *Moore*. *Moore* sued alleging Warr Acres fired him for not working with the flu in violation of public policy. Warr Acres countered that it fired *Moore* because he had been written up five times for insubordination, spreading rumors, not completing tasks, and rebellious behavior.

The law prior to *Moore* was much more narrow. As a result, employers faced much less risk of being sued for wrongful discharge claims based on an alleged violation of Oklahoma public policy. That's changed.

In *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24, the Oklahoma Supreme Court created a “narrow” exception to the at-will employment rule when an employee is fired in violation of Oklahoma public policy. *Moore*, 2016 OK 28, ¶¶15-17. It became known as the “*Burk*” public policy tort claim.

Then, in *Clinton v. State of Oklahoma ex rel. Logan County Election Board*, 2001 OK 52, 29 P.3d 543, the Court reiterated that an at-will employee can’t prosecute a *Burk* tort unless the employer violated “an Oklahoma public policy goal that is clear and compelling and is articulated in existing Oklahoma constitutional, statutory or jurisprudential law.” *Moore*, 2016 OK 28, ¶18. The Court did not list state or federal regulations as a source of Oklahoma public policy upon which a *Burk* tort claim could be based.

In *Vasek v. Board of County Commissioners*, 2008 OK 35, 186 P.3d 928, the Court listed the essential elements of viable *Burk* tort claim: (1) an actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma, and (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal. *Moore*, 2016 OK 28, ¶19 (emphasis added). Once again, the Court did not say a state or federal regulation would support the prosecution of a *Burk* tort claim.

The *Moore* decision changes that and substantially expands the scope of the *Burk* tort claim by holding that state and federal regulations can now form the basis of a *Burk* tort claim. To justify its expansion of the *Burk* tort, *Moore* relied in part on *Silver v. CPC-Sherwood Manor, Inc.*, 2004 OK 1, 84 P.3d 728. In *Silver*, the Court reversed a district court’s dismissal of a viable *Burk* tort claim, where a nursing home cook had been fired for going to the emergency room with diarrhea and throwing up at work. *Id.* at ¶1. In doing so, *Silver* expressly limited the basis of its holding to public policy articulated in Oklahoma statutes, emphasizing as follows:

This Court need not mire itself in the controversy which confronted the Court of Civil Appeals concerning whether certain *agency rules* promulgated by the Oklahoma Department of Health provide a permissible source of public policy in this matter.

Silver, 2004 OK 1, ¶6 (emphasis added). Oklahoma’s public health *statutes* articulate public policy prohibiting holding, preparing, or delivering food under conditions where it may have been rendered injurious to health. *Id.* at ¶7.

Though *Silver* refused to rely on public health regulations as a source of public policy supporting a *Burk* tort claim, *Moore* read *Silver* broadly and used it to justify expanding the *Burk* tort to include state and federal regulations. *Moore*, 2016 OK 28, ¶¶21-22. *Moore* reasoned as follows. The Oklahoma Constitution directs the Legislature to create state agencies like the Board of Health. *Id.* at ¶23. The Legislature may delegate rule making authority to agencies. *Id.* Agencies may create binding rules similar to statutes. *Id.* Oklahoma Department of Health regulations cover infection control. *Id.* at ¶25. To protect the health of nursing home residents, the health regulations prohibit employees with communicable infections from working. *Id.* A nurse’s license may be revoked for not complying with quality of care standards. *Id.*

Moore also looked to federal regulations governing infectious disease control. *Id.* at ¶26. Federal rules governing Medicare and Medicaid services bar employees with communicable diseases from coming in contact with residents. *Id.* Federal standards require nursing home residents to be protected from the flu. *Id.* Over 100 people died in Oklahoma from the flu last year. “Obviously,” concluded the Moore Court, “precautions must be taken to prevent the transfer of such a communicable and potentially deadly disease.” *Id.* at ¶29.

CONCLUSION

As the dissenting Justices in Moore warned, “an employer must [now] consult [state and federal] rules and regulations before exercising the decision to terminate an employee.” *Moore*, 2016 OK 28 (Winchester, J., dissenting at ¶2). Thus, employers should add another step to their termination review checklist before finalizing the decision to discharge an at-will employee.

Be watching for more information from GABLEGOTWALS on this topic. We will be conducting a free webinar addressing practical steps employers should take to minimize their risk of liability in light of the *Moore* decision.

Chris Thrutchley is an attorney of GableGotwals who assists and represents clients in the area of Labor and Employment Law, ERISA and general litigation.

This article is provided for educational and informational purposes only and does not contain legal advice or create an attorney-client relationship. The information provided should not be taken as an indication of future legal results; any information provided should not be acted upon without consulting legal counsel.



1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Ok 74103
(918) 595-4810

cthrutchley@gablelaw.com
www.gablelaw.com