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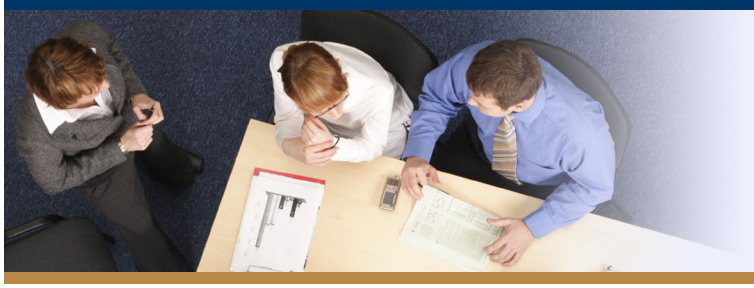

Employment Law ALERT
NOVEMBER 23, 2009

Oklahoma Supreme Court Extends Public Policy Tort Liability to All Employers

For years, Oklahoma courts have agreed that small employers — defined as employers with fewer than 15 employees — cannot be sued for terminations that allegedly violate Oklahoma's public policy against employment discrimination. The small employer exemption was adopted from federal employment law, which almost universally exempts smaller employers from liability. The stated purpose for the federal small employer exemption is that Congress (and until now the Oklahoma courts) does not want to impose the type of liability (and attorney fees) on small employers that could result in bankruptcy from even a single case; it is a pragmatic balancing of civil rights and social policy against economic policy. That protection, however, now has been stripped away by the Oklahoma Supreme Court, leaving Oklahoma employers of any size at risk of being sued for terminations that allegedly violate Oklahoma's public policy against employment discrimination.

In *Jerry Smith v. Pioneer Masonry, Inc. 2009 OK 82 (11/10/09)*, Smith sued his former employer for constructive discharge in violation of Oklahoma's public policy. Smith's specific claim was that his employer had allowed other employees to create a racially hostile work environment. The trial court dismissed Smith's case because it held that the public policy embodied in Oklahoma's Anti-Discrimination Act (OADA), which prohibits race discrimination in employment and on which Smith's claim was based, does not apply to employers like Pioneer Masonry who employ fewer than 15 people. The Oklahoma Court of Civil Appeals affirmed the dismissal on the same basis. In their decisions, both the district court and the Court of Appeals relied on a prior Oklahoma Supreme Court case that said the language of the OADA limits its application to employers with 15 or more employees.

However, on appeal the Oklahoma Supreme Court overruled its prior decision that the lower courts had relied on, and held that Oklahoma employers with fewer than 15 employees are not immune to common law public policy tort claims, also known as Burk tort claims. In its opinion, the Supreme Court has continued its recent trend of interpreting public policy tort independently from the OADA's statutory limits and, in doing so, broadening the application of public policy tort.

The *Pioneer Masonry* opinion is short, and the Court's analysis is only briefly stated. Relying heavily on its prior opinion in *Tate v. Browning-Ferris, Inc., 1992 OK 72*, the Court first held that there is no express statement in the OADA that the Legislature intended for that statute to provide the sole remedy for Oklahoma employees who allege employment discrimination. Consequently, plaintiffs can now pursue a statutory claim for race discrimination under the OADA and also pursue an independent, common law (private) claim for race discrimination under public policy tort theory. This is true even though the public policy tort claim is based on the statement of Oklahoma public policy contained in the OADA. There's nothing new here.

The Supreme Court also rationalized its broad application of public policy tort by reiterating its holding in several other recent opinions to the effect that because the OADA only provides a private legal claim for victims of handicap discrimination, but not for other types of employment discrimination claimants (e.g., race discrimination claimants), it would violate the Oklahoma Constitution's prohibition against "special laws" favoring one member of a class over other members of the same class were the Court not to recognize a public policy tort claim for all types of employment discrimination claimants. It appears as if the Supreme Court has as much as said, "We are required to do this to save the Legislature from its poor drafting."

The Supreme Court's next analytical step is where it ventured onto new ground. The Court held that even though a small

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Oklahoma employer may not be subject to a statutory claim for employment discrimination, it is not similarly excluded from liability under common law. The Supreme Court glossed over the fact that the statutory and common law claims are inter-related; indeed, the OADA is the *sine qua non* of public policy tort based on employment discrimination — there could be no common law public policy tort claim for employment discrimination but for the existence of the OADA and its statement of policy against employment discrimination. In this vein, the Supreme Court also failed to address the self-evident fact that the OADA contains *both* a clear statement of public policy against employment discrimination and also an equally clear statement of policy against liability for employers with fewer than 15 employees.

Instead of resolving these questions, however, the Supreme Court simply summed up by stating that one of the main purposes of the OADA is to prohibit discrimination in employment, thus it constitutes a "general declaration of public policy" on the subject of employment discrimination; and, whereas the statute provides remedies against employers with 15 or more employees, the common law public policy tort claim (now) applies to all employers regardless of the number of its employees.

The Take Away

Over the last couple of years, the Oklahoma Supreme Court has been quick to overrule several of its prior opinions developed over many years that had limited the scope of public policy tort. The *Pioneer Masonry* opinion is simply one more step in that direction, albeit a rather dramatic one. **The "take away" from this opinion is simple — *every Oklahoma employer regardless of size* is now subject to a private lawsuit alleging termination in violation of Oklahoma's public policy against employment discrimination**, as stated in the OADA, which obviously includes claims by all classes of protected persons (i.e., race, gender, etc.).

The practical effect of the Supreme Court's ruling is that many small Oklahoma employers may be forced into quick settlements of *disputed* employment discrimination claims because they cannot afford the expense of litigation, similar to the development of wage and hour claims against small employers under the Fair Labor Standards Act.

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