

**MANAGING THE RISKS POSED BY THE THREE PUBLIC POLICY WRONGFUL
DISCHARGE CASES RECENTLY DECIDED BY THE MISSOURI SUPREME COURT**

By: Gerald M. Richardson

I. An At Will Employee Can Sue His Employer on a Claim Alleging that the Employer Fired Him Because of Either His Refusal to Violate the Law or His Whistleblowing.

On February 9, 2010, the Missouri Supreme Court issued three decisions addressing public policy wrongful discharge claims. These decisions involved employees employed on an at will basis in two of them and in accordance with an employment agreement in the other case.

*First, in **Fleshner v. Pepose Vision Institute**, the court acknowledged a public policy exception to the employment at will rule. This rule generally covers employments where employers hire employees at a stated wage rate without any agreement as to how long their employment relationship will last. In such a relationship, either the employer or the employee may end the employment at any time without advance notice for either any reason, except an unlawful one, or no reason. Examples of a prohibited unlawful reason include an employer's firing an employee because of any one or more of her age, color, disability, gender, jury service, national origin, pregnancy, race, union activities, or voting.*

In *Fleshner*, the court expanded the meaning of an employer's unlawful reason to terminate an at will employee's employment. It held that employers cannot lawfully terminate such an employee because of her either refusing to violate the law or reporting either wrongdoing or violations of the law to superiors or public authorities.

The facts in the *Fleshner* case produced a jury verdict for the employee for \$30,000 in actual damages and \$90,000 in punitive damages. The employer had fired the employee two days after she had told her supervisor that she had answered a federal investigator's questions about the employer's overtime pay practices.

On the employer's appeal, the Missouri Supreme Court first acknowledged the existence of a public policy exception to the employment at will rule. Although several decisions from the Missouri Court of Appeals had previously recognized such an exception, the supreme court had never done so. It then upheld such an exception to the employment at will rule in either of two circumstances. *First, employers cannot lawfully terminate an employee because of her or his refusal to violate either the law or public policy as expressed in the constitution, statutes, regulations promulgated in accordance with a statute, or rules created by a governmental body. Second, employers cannot lawfully fire an employee for reporting wrongdoing or violations of the law to either superiors or public authorities.*

The Missouri Supreme Court next addressed the causation standard for a public policy wrongful termination claim. It held that an employee's proof must show only that either his refusal to violate the law or his whistleblowing involved a "**contributing factor**" to the employer's decision to fire him. According to the supreme court, both the "**exclusive cause**" jury instruction that the employer urged on appeal and the "**because**" jury instruction that the

trial court had used to instruct the jury in *Fleshner* each imposed too high of a causation standard on the employee. It explained that either of those jury instructions would exempt employers from liability that acted with mixed motives. For example, an employer could fire an employee for both lawful and unlawful reasons, such as insubordination and whistleblowing. ***Under the supreme court’s “contributing factor” causation standard, if a jury finds that an employer fired an employee with these mixed motives, it must also hold the employer liable for wrongfully terminating the employee.***

Finally, the employer in *Fleshner* also challenged the application of the retaliatory discharge claim to the employee’s circumstances. She had participated in a federal agency’s investigation of possible violations of a federal law. The employee identified the public policy that her firing had violated as the Missouri minimum wage and overtime statute’s criminalization of the dismissal of employees because of their participation in state agency investigations. The Missouri Supreme Court rejected the employer’s contention. It reasoned that ***the public policy wrongful discharge claim requires no proof of the employer’s direct violation of a statute or regulation. The public policy necessary to support the claim exists if a constitutional provision, statute, or regulation reflects the public policy.***

II. A Contract Employee Can Bring a Public Policy Wrongful Discharge Claim against His Employer.

The second of the three Missouri Supreme Court public policy wrongful discharge decisions addressed whether a contract employee can sue his employer on a public policy wrongful discharge claim. In a 1995 decision, *Luethans v. Washington University*, 894 S.W.2d 169 (Mo. 1995) (en banc), the Missouri Supreme Court had held that a contract employee lacks any right to sue his employer for wrongful discharge. ***In Keveney v. Missouri Military Academy, the court reversed its earlier decision without directly stating that it had done so as follows: “The wrongful discharge cause of action applies equally to at-will and contract employees.”***

The Missouri Supreme Court faced the following facts in *Keveney*. The employer, a military boarding school, employed the employee as a teacher under a written employment agreement. The teacher alleged that he had seen unusual bruises on a student and had suspected that the student had suffered physical abuse. The employee further contended that he had reported the suspected abuse of the student to three of his supervisors. They had allegedly warned him that if he reported the suspected abuse of the student to the Missouri Division of Family Services (“DFS”) that he would lose his job. The teacher maintained that he had insisted that the law required the student’s abuse to be reported to the DFS. After his report to the third supervisor, the school had terminated the employee’s employment.

The teacher sued the employer for both breach of his employment agreement and wrongful discharge in violation of public policy. He identified the public policy that his employment’s termination had violated as a state statute that required both teachers and school officials to report any suspected abuse of minors to the DFS. The trial court dismissed his wrongful discharge claim, but permitted his breach of contract claim to go to trial. The jury entered a verdict for the employee and awarded him \$13,300 in contract damages. The trial

court, however, refused the teacher's request to submit his claim for punitive damages to the jury.

The employee appealed the trial court's dismissal of his wrongful discharge claim. The Missouri Supreme Court reversed the dismissal and sent the wrongful discharge case back to the trial court for a trial. It found that the teacher's allegations had stated a claim for wrongful discharge. *The court reasoned that the teacher's allegations, if true, showed that his refusal to do an illegal act or to engage in conduct that violates public policy caused the school to fire him. Effectively, this decision will enable the employee to seek damages beyond the contract damages that the jury awarded him in the first trial. The trial of his wrongful discharge claim will allow him to ask the jury to award both emotional distress and punitive damages.*

III. A Public Policy Wrongful Discharge Claim Requires an Employer's Serious Misconduct that Violates the Law or Well-Established Public Policy Rather Than Merely the Employee's Opposition to the Employer's Legally Permissible Policy.

The last of the Missouri Supreme Court's three recent public policy wrongful discharge decisions involves *Margiotta v. Christian Hospital Northeast Northwest*. In this case, a hospital fired a medical technician on December 6, 2007 after he had a violent outburst at work. He then sued the hospital, alleging that it had terminated his employment because of his internal complaints of safety hazards made on three occasions in 2005. The medical technician identified one federal and another Missouri regulation as the public policy that his dismissal had violated. The federal regulation stated that patients have the right to receive care in a safe setting. The state regulation required hospitals to develop a mechanism to identify and to remedy safety hazards affecting patients. The trial court dismissed the medical technician's lawsuit on summary judgment.

On appeal, the supreme court upheld the trial court's dismissal of the medical technician's wrongful discharge claim. It found the public policy that the termination of the employee's employment had allegedly violated to be too vague. Specifically, neither of the regulations cited by the medical technician had prohibited the conduct about which he had complained to the hospital. *The court emphasized that an employee must allege his having reported serious misconduct that violates the law or well-established and clearly mandated public policy to state a wrongful discharge claim. In addition, it stressed that an employee must further plead and prove that his dismissal violated that law or public policy. The court further noted the absence of whistleblower protection for an employee who merely opposes his employer's legally permissible policy.*

IV. Employers Should Take Action Now to Manage the Risks Posed by Public Policy Wrongful Discharge Claims.

The Missouri Supreme Court has removed any doubt as to whether the Missouri common law recognizes public policy wrongful discharge claims for either at will or contract employees. It has also lessened the proof of causation that an employee must meet to prove such a claim to the least burdensome “contributing factor” level. Employers should expect more employees to bring such wrongful discharge claims both as the only claim in a lawsuit and as an additional claim in suits alleging other wrongful discharge claims, such as employment discrimination claims based on the Missouri Human Rights Act.

In addition, Missouri case law already has a number of Missouri Court of Appeals’ decisions regarding public policy wrongful discharge claims. The supreme court’s *Margiotta* decision clearly requires an employer’s misconduct about which an employee blows the whistle to violate the law or a well-established public policy. The appellate decisions, however, include at least one, *Dunn v. Enterprise Rent-A-Car*, 170 S.W.3d 1 (Mo. Ct. App. 2005), that recognizes a public policy wrongful discharge claim where the employee had only a good faith belief that the employer’s accounting practices had violated certain Securities and Exchange Commission’s regulations. In that case, the employee, a vice president and corporate comptroller, complained about those accounting practices to his employer in the course of its preparation for an initial public offering that it ultimately abandoned. After its abandonment of the initial public offering, the employer fired the employee. The appellate court held that an employee who objects to his employer’s practices that he reasonably believes to violate public policy should be protected from termination. ***Thus, contrary to the plain meaning of the text of the Margiotta decision, an employer risks wrongful discharge liability if it fires an employee who opposes its legally permissible conduct that the employee reasonably believes to involve unlawful conduct.***

At best, an employer can adopt practices to reduce the risk of public policy wrongful discharge claims. Such practices include its adoption a code of ethical business conduct that has a complaints procedure. The policy should encourage employees to use the internal complaints procedure to raise either unlawful or unethical business practices. It should also give employees several different persons to whom they may make such complaints to avoid circumstances in which a complainant must complain to the alleged wrongdoer. If an employee makes a complaint, the employer should investigate the complaint impartially and document its investigation. If the investigation’s results confirm the complaint’s allegations, the employer should implement prompt and effective corrective action. The employer should also document the investigation’s results, its communication of those results to the complaining employee, and the corrective action implemented, if any.

The code of ethical business conduct must also include a provision that prohibits any retaliation against employees who raise complaints through its internal complaints procedure. It further must encourage employees to make complaints about any retaliation that they experience. Upon receiving a retaliation complaint, the employer must investigate it impartially and implement prompt corrective action if the investigation confirms the complaint. As with investigations of complaints of unethical or illegal conduct, the employer must prepare

documents summarizing the investigation's results, its communication of them to the complaining employee, and the corrective action taken, if any.

Finally, employers should conduct training specific to its code of ethical business conduct and internal complaints procedure. Such training should reach both new employees during their orientation and all employees annually on an ongoing basis.

Advertising Material: Commercial solicitations are permitted by the Missouri Rules of Professional Conduct but are neither submitted to nor approved by the Missouri Bar or the Supreme Court of Missouri.