

The Wrong Claim – Defining boundaries to Burk tort actions

Complaints of wrongful termination by employees have been heard in courtrooms across the nation for as long as there has been a legal venue in which to bring and defend such claims. It can be argued that the nature of the employer-employee relationship has been evolving ever since.



In Oklahoma, the employer-employee relationship is characterized by the employment-at-will doctrine. This means that either the employer or employee may end the employment relationship at any time for any reason, barring some exceptions. Exceptions for the employer include retaliatory termination, basing the decision to terminate on the employee's race, gender, religion, national origin and other prior-identified protected classes, and whether the employee is hired under the conditions of a specific contractual agreement that lays out conditions for termination.

In the above exceptions, there are adequate remedies available through various employment and anti-discrimination laws. However, over time, there has been an evolution of claims that exist outside of this framework, where there existed no adequate legal remedies.

In 1989, the Oklahoma Supreme Court began chipping away at the employment-at-will doctrine in a landmark case known as *Burk v. Kmart Corp.* The Court recognized a new actionable tort claim that established an exception to the at-will termination rule in a narrow class of cases, which was subsequently referred to as a *Burk* tort.

“An at-will employee may have an actionable tort claim if his discharge is ‘contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law,’” the Court held.

Burk or not Burk?

Outside of law firm offices, legislative chambers and courtrooms, the term “*Burk* tort” is not very remarkable. Yet, for decades, the questions of which entities can be sued for which alleged employment violations, and which legal remedies are appropriate for the matters at hand, have been and continue to be vigorously argued.

In a recent case brought before the U.S. District Court for the Western District of Oklahoma, Phillips Murrah Director [Byrona J. Maule](#), arguing for the Defense, was granted dismissal of a wrongful termination claim brought under the *Burk* tort framework. This particular, seemingly obscure motion to dismiss is important because, had it not been successful, the claim could have altered current Oklahoma employment law by expanding the *Burk* tort into a new area.

In this recent case, the Plaintiff asserted that the Oklahoma Occupational Safety & Health Standards Act (OOSHSA) established a clear mandate of public policy that was allegedly violated by his employer, a privately owned company in Oklahoma City. However, as pointed out by Maule, in 1984, the Oklahoma legislature specifically removed private employers from the purview of OOSHSA, effectively limiting its public policy statement to only apply to public employers. Therefore, because the OOSHSA Act does not articulate a public policy with regard to a private employer, it could not support a *Burk* tort claim. The Court further found the federal OSHA statutes did not establish an Oklahoma public policy, and therefore did not articulate a public policy on which a *Burk* tort claim could be founded.

The Order handed down by the U.S. District Court for the Western District of Oklahoma quoted *Griffin v. Mullinix*, 1997 OK 120:

“See Griffin, at 179 (“[I]n 1984, the state legislature fundamentally changed the existing Occupational Safety & Health Standards Act, removing private employers from the definition under the Act ... [T]he legislature’s decision to limit application of the Act to public employers limited the entire Occupational Safety & Health Standards Act, including the public policy statement. Therefore, [w]e find that an Act, which at one time applied broadly to all employers and now applies to public employers only, is not an adequate basis upon which to premise the private tort action of a private employee.”).

The Defendant’s Motion to Dismiss was granted, and a subsequent Plaintiff’s Motion to Amend Complaint was denied, based on the Plaintiff’s failure to state a claim against the Defendant upon which relief can be granted. Since the Defendant is a privately-owned company, OSHA did not articulate a public policy that supported a *Burk* tort claim.

By Dave Rhea, Director of Marketing at Phillips Murrah