

# Labor and Employment Law Section About Face by Oklahoma Supreme Court Means Discrimination Claims Can be Brought Against Small Employers

## *Smith v. Pioneer Masonry Inc.*

By Kimberly Lambert Love and Shannon P. Wheeler

Gone are the days that Oklahoma small employers are exempt from employment discrimination lawsuits. State and federal statutory antidiscrimination laws such as the Oklahoma Anti-Discrimination Act (OADA),<sup>1</sup> Title VII of the Civil Rights Act, as amended (Title VII),<sup>2</sup> the Age Discrimination in Employment Act (ADEA)<sup>3</sup> and the Americans with Disabilities Act (ADA)<sup>4</sup> apply only to employers with a minimum threshold number of employees (*i.e.* 15 or 20).<sup>5</sup> Oklahoma courts in the past have given deference to this legislative limitation and have likewise held that small employers cannot be sued under the common law public policy tort claim established in *Burk v. K-Mart Corp.*<sup>6</sup> for terminations that allegedly violate Oklahoma's public policy against employment discrimination.<sup>7</sup> However, as part of an ongoing expansion of the *Burk* tort,<sup>8</sup> the Oklahoma Supreme Court held that *all* employers in Oklahoma regardless of size may be liable in tort for employment discrimination.

### **SMITH V. PIONEER MASONRY INC.**

In late 2009, the Oklahoma Supreme Court issued its opinion in *Smith v. Pioneer Masonry Inc.*,<sup>9</sup> holding that small employers (those with less than 15 employees) are no longer immune from common law public policy tort claims alleging employment discrimination. Although small employers remain excluded from statutory remedies for employment discrimination,

the court in *Pioneer* made it clear that employers may be subject to a *Burk* tort claim for employment discrimination "regardless of the number of employees."<sup>10</sup>

In *Pioneer*, Mr. Smith brought suit against his employer, a small construction company with less than 15 employees, alleging that he was constructively discharged due to racial discrimination and harassment.<sup>11</sup> *Pioneer* moved to dismiss the lawsuit based upon *Brown v. Ford*,<sup>12</sup> and argued that a *Burk* tort was not available to the plaintiff because his employer had less than the 15 employee threshold required by the OADA. The *Pioneer* trial court agreed and dismissed the *Burk* tort claim. On appeal, the Oklahoma Court of Appeals affirmed the trial court's decision on the same basis.<sup>13</sup> However, the Oklahoma Supreme Court reversed and overruled its previous precedent in *Brown*.

The *Pioneer* decision appears to be a continuation of the Oklahoma Supreme Court's recent revitalization and expansion of the *Burk* tort principles. For example, in *Saint v. Data Exchange Inc.*,<sup>14</sup> and *Shirazi v. Child Learning Ctr. Inc.*,<sup>15</sup> the court reversed earlier precedent and extended *Burk* tort liability to all forms of discrimination covered by the OADA — reasoning that all individuals subjected to employment discrimination consist of a single class to which the *Burk* tort remedy is available. This holding was

based on Oklahoma Constitution article 5 §46, which “requires that the same remedies must be applicable to everyone within the same class of employment discrimination.”<sup>16</sup> This class of employment discrimination, as defined by the OADA<sup>17</sup> includes race, color, religion, sex, national origin, age and handicap.<sup>18</sup> It is on this same constitutional principle that the Oklahoma Supreme Court based its opinion in *Pioneer*,<sup>19</sup> finding that all employees subjected to discrimination, regardless of the size of their employer, are nonetheless members of that general class who may bring a *Burk* tort claim.<sup>20</sup> Thus, the court held that while the Oklahoma Legislature can exclude small employers from *statutory* remedies under the OADA, such exclusion does not protect small employers from the independent *common law* remedy of a *Burk* tort for discharge based upon discrimination.<sup>21</sup>

#### EXHAUSTION REQUIREMENTS

An interesting issue in light of the *Pioneer* decision is whether employees are required to exhaust administrative remedies prior to bringing a *Burk* tort claim for employment discrimination. The OADA, 25 O.S. §1901, requires claimants to first exhaust administrative remedies prior to filing a complaint for handicap discrimination under the OADA. In *Atkinson v. Halliburton Co.*,<sup>22</sup> the court required the plaintiff to exhaust administrative remedies under §1901 as a prerequisite to filing a *Burk* tort claim for handicap discrimination.<sup>23</sup> The court reasoned that exhaustion of administrative remedies is a long standing jurisdictional requirement before resorting to the court system.<sup>24</sup> Further, the court found that §1901 would be rendered “meaningless and irrelevant” if employees were not first required to exhaust.<sup>25</sup> However, the exhaustion requirement in §1901 only applies to handicap discrimination claims because the OADA does not provide a private right of action for claims of discrimination based on race, color, religion, sex, national origin or age. Following the expansion of the *Burk* tort principles in *Saint* and *Shirazi*, there has been speculation as to whether the rule in *Atkinson* requiring exhaustion of administrative remedies is applicable to a *Burk* tort claimant pleading discrimination

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other than handicap discrimination. Likewise, the new rule set forth in *Pioneer* leads to even more speculation as to whether a *Burk* tort claimant alleging discrimination against a *small* employer will be required to exhaust administrative remedies since the OADA specifically excludes small employers.<sup>26</sup> The speculation arises because the facts in *Atkinson* were limited to only handicap discrimination and the employer had more than 15 employees.

Highlighting the uncertainty of whether claimants alleging discrimination other than disability discrimination are required to exhaust are two unpublished opinions from the U.S. District Court for the Western District of Oklahoma: *Maiahy v. Target Corp.*<sup>27</sup> and *Williams v. Convergys Corp.*<sup>28</sup> In *Maiahy*, Judge Heaton held that the plaintiff must first exhaust administrative remedies prior to asserting a *Burk* tort claim for age and national origin discrimination.<sup>29</sup> However, in *Williams*, Judge Miles-LaGrange allowed the plaintiff to assert a *Burk* tort claim for sex and race discrimination without first exhausting administrative remedies.<sup>30</sup> Neither the Oklahoma Supreme Court nor the 10th Circuit has published an opinion on the issue of exhaustion of administrative remedies for a *Burk* tort claim since *Atkinson* and the court’s recent expansion of the *Burk* tort principles in *Saint*, *Shirazi* and *Pioneer*.

In taking a deeper look at the issue, the court’s holding in *Pioneer* potentially jeopardizes the requirement for claimants to exhaust administrative remedies prior to filing a *Burk* tort claim. This is because *Pioneer* may have created an inconsistency between the procedural requirements that members of the same class are required to follow. Under *Atkinson*, a claimant alleging handicap discrimination against an employer with *more* than 15 employees is required to first exhaust administrative remedies. However, there is no requirement for claimants alleging handicap discrimination whose employer has *less* than 15 employees, to exhaust administrative remedies prior to asserting a tort claim. Thus, if claimants of small employers are *not* required to first exhaust administrative remedies and claimants of larg-

, 2008 OK 105, 202 P.3d 144).

30. 2009 WL 3242036 at \*3. The court based its decision on the 10th Circuit's holding in *Katzer v. Baldor Elec. Co.*, 969 F.2d 935, 938 (10th Cir. 1992) stating "that an employee-plaintiff may state a tort cause of action pursuant to the public policy exception to the at-will employment rule even though there are administrative remedies available to the employee-plaintiff for the alleged discrimination."

31. Okla. Const. Art. 5 §46.

32. See *Atkinson*, *supra* n. 32; *Pioneer Masonry*, *supra* n. 6.

## ABOUT THE AUTHORS



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