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OBA Labor and Employment Law Section:

Clinton v. Logan County Election Board: The Oklahoma Supreme Court Comes Full Circle In Clarifying the Public Policy Tort Exception to Employment At-Will

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On June 26, 2001, a previously divided Oklahoma Supreme Court unanimously¹ clarified the availability of a tort cause of action under *Burk v. K-Mart Corp.*² for wrongful discharge in violation of Oklahoma's public policy. In *Clinton v. State ex. rel. Logan County Election Bd.*,³ the court held that an at-will employee who has an adequate federal or state statutory remedy for wrongful discharge may not bring a *Burk* tort claim.

In *Clinton*, the plaintiff sued her employer in federal court in the Western District of Oklahoma, alleging that she had been fired because she was pregnant in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").⁴ The plaintiff sought leave from the district court to amend her complaint to add a *Burk* tort claim. The district court certified to the Oklahoma Supreme Court the question of whether a gender status-based discrimination claim, such as one's status as a pregnant female, is actionable under a *Burk* public policy tort theory.⁵ The court rephrased the certified question to ask:

When an employer discharges a terminable at-will employee based on the employee's status and the reason for the discharge violates Oklahoma's clear and compelling public policy, but the employee has an adequate federal statutory remedy for the wrongful discharge, may that employee bring a tort claim under *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24, for wrongful discharge in violation of Oklahoma's public policy?⁶

The court held in the negative, stating that the existence of an adequate federal statutory remedy precludes an independent *Burk* tort claim.⁷

In so holding, the court reaffirmed the doctrine of employment at-will, which is deeply entrenched in Oklahoma jurisprudence. This doctrine allows an employee to leave his or her employment for any reason without incurring liability. Likewise, an employer may terminate the employment relationship with or without reason without incurring liability to the employee.⁸ The court explained that it created a narrow exception to this rule in *Burk v. K-Mart*⁹ by allowing a tort remedy when a discharge violates an Oklahoma public policy goal that is clearly articulated in the Oklahoma constitution, statutes or case law.¹⁰

The court acknowledged up front the uncertainty surrounding the nature of the *Burk* tort resulting from its previous decisions in *List v. Anchor Paint*,¹¹ *Marshall v. OK Rental & Leasing*¹² and *Collier v. Insignia Financial Group*.¹³ In *List*, the court refused to recognize a *Burk* tort claim for a plaintiff alleging age discrimination on the grounds that the federal Age Discrimination in Employment Act ("ADEA")¹⁴ provided an adequate statutory remedy. The court held that the ADEA was

plaintiff's exclusive remedy.¹⁵ Similarly, in *Marshall*, the court declined to recognize a *Burk* claim based upon sexual harassment because the plaintiff had an adequate statutory remedy under Title VII.¹⁶ Hence, the law after *List* and *Marshall* stood that if a plaintiff had an adequate federal remedy, he or she could not also bring a parallel *Burk* tort claim.

The 5–4 decision in *Collier v. Insignia Financial Group*¹⁷ created uncertainty as to the continued viability of *List* and *Marshall*. In *Collier*, the court held that an adequate state remedy would preclude the availability of a *Burk* tort claim.¹⁸ In holding that a plaintiff subject to *quid pro quo* sexual harassment could state a *Burk* tort claim, the court focused solely on the state law remedy and found that state law did not provide an adequate remedy because Oklahoma's Anti-Discrimination Act, 25 O.S. §1101 et seq., does not allow a private suit for sexual harassment.¹⁹ While the state statute allows a private cause of action for employees who are discriminated against on the basis of disability, it provides only an administrative remedy for employees subject to other forms of discrimination, including sexual harassment. After *Collier*, the general consensus was that plaintiffs alleging discrimination, with the possible exception of disability discrimination, could pursue a tort cause of action notwithstanding the existence of an adequate federal statutory remedy.

The *Clinton* court attempted to square the holdings in *List*, *Marshall* and *Collier*. In doing so, the court came full circle, adopting the sharp *Collier* dissent. The *Collier* dissent argued that the court's focus should not have been on the remedies available under state law, but rather on those afforded by federal law. The dissent pointed out that Title VII provides plaintiffs with "full and complete recovery," including compensatory and punitive damages, attorney's fees, costs and expenses.²⁰ In adopting the arguments in the *Collier* dissent, the *Clinton* court recognized that when an adequate statutory remedy exists, a common law remedy, i.e. the *Burk* tort, is not necessary.²¹ The court harmonized the three opinions by focusing on its silence as to a federal remedy in *Collier*, implying that the *Collier* opinion was never contrary to *List* or *Marshall*.²² The court continued by reiterating that, although a federal statute cannot serve as the source of Oklahoma public policy, it can function to remedy the wrong and protect Oklahoma citizens from discriminatory employment practices. Thus, the court held that an adequate federal remedy barred a cause of action based upon a *Burk* tort.²³

The court concluded by clarifying the elements of a *Burk* tort cause of action. First, a plaintiff must identify an Oklahoma public policy goal that has been violated. The public policy must be clear, compelling and articulated in the Oklahoma constitution, statutes or case law. At this stage, it is imperative to assess whether an adequate statutory remedy, either state or federal, exists to correct the wrong. If such a statutory remedy exists, a *Burk* tort claim is precluded. If no such statutory scheme exists, a *Burk* tort claim lies.²⁴ The initial determinations of the existence of a public policy goal and the adequacy of the statutory remedy are questions of law reserved for the court.²⁵ Second, a plaintiff must establish at-will employee status and that his or her discharge, actual or constructive, violated the articulated Oklahoma public policy.

In sum, after *Clinton*, a common law claim based on the public policy exception to the employment at-will doctrine will not be available if an adequate state or federal statutory remedy exists sufficient to protect Oklahoma public policy.

1. Justice Kauger concurring and Justice Opala concurring in result.

2. 1989 OK 22, 770 P.2d 24.

3. 2001 OK 52, __ P.3d __.

4. 42 U.S.C. §2000e-(k).
5. 2001 OK 52, ___P.3d ___.
6. *Id.* at ¶ 4.
7. *Id.*
8. *Id.* at ¶ 5.
9. 1989 OK 22, 770 P.2d 24.
10. *Clinton* at ¶ 6.
11. *List v. Anchor Paint Mfg. Co.*, 1996 OK 1, 910 P.2d 1011.
12. *Marshall v. OK Rental & Leasing, Inc.*, 1997 OK 34, 939 P.2d 1116.
13. *Collier v. Insignia Financial Group*, 1999 OK 49, 981 P.2d 321.
14. 29 U.S.C. §626.
15. *List v. Anchor Paint Mfg. Co.*, 1996 OK 1, ¶ 18, 910 P.2d 1011.
16. *Marshall v. OK Rental & Leasing, Inc.*, 1997 OK 34, ¶ 23, 939 P.2d 1116.
17. *Collier v. Insignia Financial Group*, 1999 OK 49, 981 P.2d 321.
18. *Id.* at ¶ 15.
19. *Id.* at ¶ 14.
20. *Id.*, dissenting opinion, at ¶ 4.
21. *Clinton* at ¶ 9.
22. *Id.* at ¶ 7.
23. *Id.*
24. *Id.*
25. *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778.

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