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Collier v. Insignia: The Oklahoma Supreme Court Makes U-Turn and Expands the Public Policy Tort Exception to Employment At-Will.

By Kimberly Lambert Love and Mary L. Lohrke

On May 25, 1999, the Oklahoma Supreme Court, in a surprising 5–4 decision, expanded the public policy tort exception to Oklahoma's employment at-will rule. In *Collier v. Insignia Commercial Group*, 1999 OK 49, ___ P.2d ___, the Court held that because Oklahoma's Anti-discrimination Act, 25 O.S. §1302, does not allow private suits for sexual harassment, plaintiffs who allege wrongful discharge as a result of sexual harassment may state a cause of action under the common law tort theory recognized by the Court in *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24. As discussed below, the decision, which effectively overrules the Court's earlier decisions in *List v. Anchor Paint Mfg. Co.*, 1996 OK 1, 910 P.2d 1011, and *Marshall v. OK Rental & Leasing, Inc.*, 1997 OK 34, 939 P.2d 1116, changes the framework for analyzing public policy tort claims and has important implications for future consideration of these claims.

In *Collier*, plaintiff claimed that she was sexually harassed by her supervisors and that management suggested that she flirt with prospective customers. Plaintiff contended that she complained to no avail and that her employer retaliated against her by delaying payment of commissions. Plaintiff alleged that as a result, she was forced to resign. Plaintiff filed suit in federal court in the Western District of Oklahoma, alleging violation of Title VII of the Civil Rights Act of 1964 and wrongful discharge in violation of public policy. The federal court asked the Oklahoma Supreme Court to determine whether plaintiff could pursue a *Burk* public policy tort claim for quid pro quo sexual harassment and retaliatory constructive discharge in light of the remedies available under federal and state anti-discrimination laws. 1999 OK 49, ___ P.2d ___.

Noting that constructive discharge has never specifically been approved as a basis for a public policy tort claim, the Court held that a constructive discharge may serve as the predicate for such a claim and set forth guidelines for use by the trial court in determining the validity of plaintiff's claim. According to the Court, the proper focus is the employer's conduct "through the eyes of a *reasonable person standing in the employee's shoes*." *Id.* at ¶10. The trial court should ask whether the employer either knew or should have known of the allegedly intolerable working conditions and whether the conditions were so intolerable that a reasonable person would resign. In reaching this conclusion, the trial court should consider the factors articulated by the United States Supreme Court in *Faragher v. Boca Raton, Fla.*, 524 U.S. 775, 118 S.Ct. 2275 (1998) and *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998), including the frequency and severity of the conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. If

the employer's behavior is so objectively offensive as to alter the conditions of employment, causing plaintiff to resign, plaintiff states a claim for retaliatory constructive discharge which may serve as the basis for a public policy tort claim. *Id.*

Next, the Court held that a plaintiff alleging quid pro quo sexual harassment may pursue a wrongful discharge tort cause of action under *Burk*. The Court reasoned that in order to state a public policy tort claim, a plaintiff must show that: i) the employer violated public policy goals that are clearly stated in existing state law; and ii) there is no adequate, statutorily expressed remedy for the violation. According to the Court, plaintiff satisfied both requirements. Specifically, the Court found that Oklahoma's Anti-discrimination Act "clearly articulates a public policy which castigates sexual harassment in the workplace." *Id.* at ¶11.

Focusing solely on the state law remedy, the Court further found that Oklahoma's Anti-discrimination Act does not provide an adequate remedy for victims of quid pro quo sexual harassment because it does not allow a civil cause of action against the employer. While the statute allows a private cause of action for employees who are discriminated against on the basis of disability, it only provides an administrative remedy for employees subject to quid pro quo sexual harassment. Based on this disparity, the Court concluded that the Legislature could not have intended the administrative remedies plaintiff's to be "exclusive remedy." *Id.* at ¶¶13-14. An interpretation otherwise, according to the Court, would accord "asymmetrical remedies to members of a single class of employment-discrimination victims" and render the anti-discrimination statute unconstitutional. *Id.* at ¶14. The Court distinguished its earlier decision in *Marshall v. OK Rental & Leasing, Inc.*, 1997 OK 34, 939 P.2d 1116, on grounds that the conduct in that case involved conduct by a coworker, not a supervisor. *Id.*

In a sharp dissent, Justice Kauger, joined by Justices Hargrave, Simms and Summers, argued that the Court's focus should not be on the remedies that are available under state law, but on those afforded by federal law. The dissent pointed out that Title VII of the 1964 Civil Rights Act provides plaintiffs with "full and complete recovery," including compensatory and punitive damages, attorney's fees, costs, and expenses. Moreover, federal claims are enforceable in state court. *Id.*, dissenting opinion, at ¶4.

Collier has potentially far-reaching application and changes the framework for analyzing public policy tort claims. As previously noted, the decision effectively overrules the Court's earlier decisions in *Marshall v. OK Rental & Leasing, Inc.*, 1997 OK 34, 939 P.2d 1116, and *List v. Anchor Paint*, 1996 OK 1, 910 P.2d 1011. In *List*, the Court refused to recognize a wrongful discharge tort claim for a plaintiff who alleged age discrimination on grounds that the federal Age Discrimination in Employment Act provided an adequate statutory remedy and was, therefore, the plaintiff's exclusive remedy. The Court in *List* distinguished its holding in *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, 833 P.2d 1218, where the Court recognized a *Burk* public policy tort claim predicated on racial discrimination in order to provide the plaintiff an adequate remedy – compensatory and punitive damages – then unavailable under federal or state law. Similarly, in *Marshall*, the Court refused to allow a wrongful discharge tort claim based on sexual harassment. Relying on *List*, the Court in *Marshall* observed that Title VII, amended after *Tate*, now provides for jury trial and for compensatory and punitive damages. Because the plaintiff in *Marshall* had adequate remedies under Title VII, plaintiff was not allowed to pursue a public policy tort claim. *Collier* has potentially far-reaching application and changes the framework for analyzing public policy tort claims. As previously noted, the decision effectively overrules the Court's earlier decisions in *Marshall v. OK Rental &*

Leasing, Inc., 1997 OK 34, 939 P.2d 1116, and *List v. Anchor Paint*, 1996 OK 1, 910 P.2d 1011. In *List*, the Court refused to recognize a wrongful discharge tort claim for a plaintiff who alleged age discrimination on grounds that the federal Age Discrimination in Employment Act provided an adequate statutory remedy and was, therefore, the plaintiff's exclusive remedy. The Court in *List* distinguished its holding in *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, 833 P.2d 1218, where the Court recognized a *Burk* public policy tort claim predicated on racial discrimination in order to provide the plaintiff an adequate remedy – compensatory and punitive damages – then unavailable under federal or state law. Similarly, in *Marshall*, the Court refused to allow a wrongful discharge tort claim based on sexual harassment. Relying on *List*, the Court in *Marshall* observed that Title VII, amended after *Tate*, now provides for jury trial and for compensatory and punitive damages. Because the plaintiff in *Marshall* had adequate remedies under Title VII, plaintiff was not allowed to pursue a public policy tort claim.

After *Collier*, plaintiffs alleging discrimination will be allowed to pursue a tort cause of action, even though such plaintiffs arguably have an adequate federal statutory remedy available for the same violation. Indeed, plaintiffs suing for discrimination may forgo altogether the federal statutory remedies, as plaintiffs suing in tort can potentially recover unlimited compensatory and punitive damages. *Collier* will impact smaller employers who would otherwise have limited exposure under Title VII because of caps on compensatory and punitive damages. Further, employers may be forced to defend in state court (as opposed to removing to federal court) cases in which plaintiffs assert as the sole basis for recovery a tort cause of action relying on Oklahoma's Anti-discrimination Act as the source of public policy.

One question arising from the *Collier* decision is whether a plaintiff asserting a public policy tort claim can avoid the requirement of timely exhausting administrative remedies as a prerequisite to filing suit. In *Atkinson v. Halliburton Co.*, 1995 OK 104, 905 P.2d 772, the Oklahoma Supreme Court held that a plaintiff suing for discrimination based on disability could not pursue a wrongful discharge public policy claim without first pursuing a charge of discrimination as required by Oklahoma's Anti-discrimination Act. Arguably, the law has returned to its pre-*List* state and *Atkinson* applies to restrict the pursuit of a public policy claim when the plaintiff has failed to timely exhaust administrative remedies.

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