

Oklahoma Legislature Bars Public Policy Discrimination Tort Claims

By Stephanie Johnson Manning and J. Miles McFadden

Sweeping changes to Oklahoma's Anti-Discrimination Act (OADA)¹ mean that Oklahoma employers will no longer face status-based *Burk* public policy tort claims. In a dramatic overhaul of the OADA, Senate Bill 837, signed by Gov. Fallin on May 18, 2011, and effective Nov. 1, 2011, prescribes an exclusive statutory cause of action for plaintiffs seeking to assert claims for violations of the OADA. The bill expressly abolishes common law tort remedies for status based discrimination claims and abrogates the Oklahoma Supreme Court's decisions extending the *Burk* tort to all victims of status based discrimination.² Under the revised OADA, plaintiffs asserting a claim for workplace discrimination are precluded from pursuing a *Burk* tort cause of action and must bring their claim under the OADA, which provides significantly less attractive remedies than are available under *Burk* or federal law.

THE GENESIS AND EVOLUTION OF THE BURK PUBLIC POLICY TORT CLAIM

The Oklahoma Supreme Court first fashioned a public policy exception to the employment "at-will" rule in *Burk v. K-Mart Corp.*³ Specifically, the Supreme Court recognized a new cause of action in tort in a "narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law."⁴ Since announcing its decision, the Supreme Court has struggled to define the boundaries of the tort and to clearly articulate when a plaintiff can bring a claim for status-based employment discrimination under *Burk*, as opposed to

a conduct based claim, such as whistle-blowing. Status-based discrimination occurs when an employer discriminates between applicants or employees with respect to an employment decision based on an identifiable characteristic of that employee, such as race, gender, age or disability.

In *Tate v. Browning-Ferris Inc.*, the court considered whether a discharged employee could pursue a *Burk* claim on the basis of racial discrimination.⁵ The court found that the OADA's statutory remedies were *not* the exclusive remedies for employment discrimination and the *Burk* tort remedies existed cumulatively with the statutory remedy provided in the OADA

for employment discrimination.⁶ In *Tate*, the court noted that the remedies for race discrimination were fewer than those provided for victims of handicap discrimination in that *only* victims of handicap discrimination have a private right of action under the OADA.⁷ Individuals alleging discrimination based on race, color, religion, national origin, and age had only administrative remedies.⁸ Based on this dichotomy, the court recognized that the *Burk* tort was necessary to avoid finding the OADA unconstitutional for treating members of the same class differently.⁹ *Tate* was the first time the court identified this inherent flaw in the OADA and provided the backdrop for a series of decisions by the court left struggling to avoid finding constitutional infirmities in the OADA.

In subsequent cases, the court considered whether a *Burk* tort claim existed for other types of employment discrimination and ultimately focused its analysis on examining whether the OADA statute provided equal remedies for each category of employment discrimination identified in the act. In *List v. Anchor Paint Manufacturing Co.*, the court declined to recognize a common law claim for wrongful constructive discharge in violation of public policy where the claim is predicated upon the employer's conduct rather than the employee's status.¹⁰ The *List* court further went on to hold that where the employee has an adequate statutory cause of action for wrongful discharge which is sufficient to protect his or her rights, that remedy is exclusive and no common law remedy is available under *Burk*.¹¹ In other words, the court concluded that a discharged employee asserting a claim of age discrimination could not bring those claims as a *Burk* tort cause of action because plaintiffs have adequate remedies for age discrimination under the Federal Age Discrimination in Employment Act (ADEA).¹²

Again in *Marshall v. OK Rental & Leasing Inc.*, the court concluded that a constructively discharged employee could not assert a public policy tort claim based on sexual harassment and gender discrimination against the former employer because Title VII provided adequate statutory remedies.¹³ In *Marshall*, the court distinguished *Tate* by noting that at the time of *Tate*, Title VII did not provide adequate remedies, but that since that time Title VII had been amended to allow for jury trial and for compensatory and punitive damages.¹⁴ With its opinion, the court seemed to foreclose plain-

tiffs from asserting a claim of status-based employment discrimination under *Burk*.¹⁵

In *Collier v. Insignia Commercial Group*, the court did what appeared to be an about-face and effectively overruled *List* and *Marshall* in allowing a *Burk* tort claim for sexual harassment.¹⁶ The court focused solely on the adequacy of the state remedy and held that because the OADA 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*.¹⁷ Based on the disparity of remedies under the OADA, the court concluded that the Legislature could not have intended the administrative remedies to be plaintiff's "exclusive remedy."¹⁸ An interpretation otherwise, according to the court, would accord "asymmetrical remedies to members of a single class of employment-discrimination victims" and render the OADA unconstitutional. The court distinguished its earlier decision in *Marshall* on grounds that the conduct in that case involved conduct by a coworker, not a supervisor.¹⁹

In *Clinton v. State ex rel. Logan County Election Board*, the court attempted to clarify its *Burk* tort analysis and again considered the availability of federal statutory remedies.²⁰ The court stated that, first, a plaintiff must identify a clear public policy that was violated by the employer's termination of the plaintiff, then, courts are to examine whether a federal or state statute is sufficient to protect the public policy goal. According to the *Clinton* court, no *Burk* tort exists if there is an adequate federal or state statutory remedy.²¹ A complete ban on *Burk* torts for status-based plaintiffs, however, was specifically rejected.²²

The Supreme Court came full circle in *Saint v. Data Exchange Inc.*, and reversed its holding in *List* by recognizing a *Burk* claim for age discrimination.²³ In examining the inherent flaw in the OADA, the court found that age discrimination victims are part of the employment discrimination class and that the OADA *must* provide the same remedies for each member of this broad class of victims of discrimination as available to victims of handicap discrimination.²⁴ *Shirazi v. Childtime Learning Center Inc.*, confirmed that the *Burk* tort is available to all victims of status-based discrimination.²⁵

The Supreme Court's decisions sculpting the contours of status-based *Burk* tort claims have

been widely divergent, with the court landing on the bright-line rule that a plaintiff would be allowed to assert a *Burk* tort claim in all cases where the plaintiff asserts a status-based discrimination claim.²⁶ In direct response, the Oklahoma Legislature enacted significant changes to the OADA. The provisions of the revised OADA rein in the use of the *Burk* tort by providing an exclusive statutory remedy for plaintiffs asserting status-based claims.

THE NEW OADA

The revised OADA prohibits discrimination by employers on the basis of race, color, national origin, sex, religion, creed, age or disability.²⁷ Additionally, discrimination on the basis of genetic information was added to the amended OADA, bringing the Oklahoma law in line with the federal Genetic Information Non-Discrimination Act (GINA), which became effective in 2008.²⁸ The amended OADA provides the *exclusive* remedy for individuals alleging status-based discrimination and specifically states that “any common law remedies are hereby abolished.”²⁹ Consequently, common law causes of action such as the *Burk* tort are no longer available to individuals seeking redress for status-based discrimination.

Under the revised OADA, the definitions of “employer” and “employee” have both been revised. An “employer” subject to the statutory claims now includes legal entities, institutions, or organizations, but not individuals.³⁰ The definition of “employee” now specifically excludes independent contractors.³¹ Notably, however, the revision does not limit the liability of employers based on the size of their organization, reflecting the Supreme Court’s decision in *Smith v. Pioneer Masonry Inc.*,³² that employers of all sizes are subject to claims of employment discrimination under the Oklahoma Constitution.

Procedurally, in order to enforce this statutory right, a complaining party must first file a charge of discrimination with the Oklahoma Human Rights Commission or the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act and await a determination from those agencies as to whether they will pursue the action or will issue a Notice of Right to Sue.³³ If a charge of discrimination is not resolved within 180 days of filing a charge, the complaining party may demand a Notice of Right to Sue in order to proceed with the action in court.³⁴

Once the suit is commenced, employer defendants “may allege any defense that is available” under the federal anti-discrimination statutes, including Title VII, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Rehabilitation Act, the Age Discrimination in Employment Act and/or GINA.³⁵ Importantly, the remedies available to a successful plaintiff are far more restrained than those available under federal statutes or previously available under the *Burk* tort for claims of status-based discrimination. While a court may still issue a prohibitory or mandatory injunction requiring the employer to comply with the OADA, including reinstatement or hiring of employees,³⁶ a successful plaintiff may now only recover damages for “backpay and an additional amount as liquidated damages.”³⁷ A court in considering this award will offset that amount with the interim earnings or the amounts earnable with “reasonable diligence” by the party discriminated against.³⁸ Explicitly absent from the OADA are emotional distress damages and punitive damages, further reducing the potential liability an employer may face. Attorney fees, however, *may* be awarded to *either* a prevailing plaintiff *or* a prevailing defendant.³⁹

POTENTIAL EFFECTS OF THE REVISIONS

The amended OADA is tantamount to tort reform in the labor and employment context, ushering in a new, post-*Burk* era for status-based employment discrimination claims in Oklahoma courts. Importantly, these amendments may discourage plaintiffs from exclusively pursuing OADA claims because more lucrative remedies are available under the federal statutes. Consequently, there will likely be a reduction in employment discrimination claims litigated in state court, as plaintiffs that file OADA claims along with federal claims in state court will face removal by employer defendants.

In sum, status-based *Burk* tort claims are not long for Oklahoma courts. Once the amended OADA takes effect on Nov. 1, 2011, plaintiffs seeking redress for status-based discrimination must file federal discrimination claims to obtain the types of lucrative remedies that were once available in *Burk* tort actions.

1. Okla. Stat. tit. 25, §§1101-1901.

2. *Saint v. Data Exchange Inc.*, 2006 OK 59, 145 P.3d 1037 (extending the public policy tort first recognized in *Burk v. K-Mart Corp.* to victims of age discrimination); *Shirazi v. Childtime Learning Center Inc.*, 2009 OK

13, 204 P.3d 75 (clarifying that a *Burk* tort was available to all victims of status-based discrimination).

3. 770 P.2d 24 (Okla. 1989).
4. *Id.* at 28.
5. 833 P.2d 1218 (Okla. 1992).
6. *Id.* at 1227-28.
7. *Id.* at 1227-31.
8. *Id.*
9. *Id.* at 1226-28.
10. 910 P.2d 1011, 1012 (Okla. 1996).
11. *Id.* at 1013.
12. *Id.* at 1013-15.
13. 939 P.2d 1116, 1119-22 (Okla. 1997).
14. *Id.* at 1122.
15. *Id.* at 1119-22.
16. 1999 OK 49, 981 P.2d 321.
17. *Id.* at ¶¶ 11-15, 324-26.
18. *Id.*
19. *Id.* at 326, n. 20.
20. 2001 OK 52, 29 P.3d 543.
21. *Id.* at ¶ 10, 546.
22. *Id.*
23. 2006 OK 59, 145 P.3d 1037.
24. *Id.* at ¶¶ 1-6, 1037-38.
25. 2009 OK 13, 204 P.3d 75.
26. *Id.* at ¶ 10, 79.
27. Act of May 11, 2011, §1 (to be codified as amended at Okla. Stat. tit. 25, §1101).
28. Pub. L. No. 110-233, 122 Stat. 881 (2008).
29. Act of May 11, 2011, §11(A) (to be codified as Okla. Stat. tit. 25, §1350).
30. *Id.* §2 (to be codified as Okla. Stat. tit. 25, §1301).
31. *Id.*
32. 2009 OK 82, 226 P.3d 687.
33. Act of May 11, 2011, §11(B) (to be codified as Okla. Stat. tit. 25, §1350).
34. *Id.* §11(C) (to be codified as Okla. Stat. tit. 25, §1350).
35. *Id.* §11(F) (to be codified as Okla. Stat. tit. 25, §1350).
36. *Id.* §11(G) (to be codified as Okla. Stat. tit. 25, §1350).
37. *Id.*
38. *Id.*
39. *Id.* §11(H) (to be codified as Okla. Stat. tit. 25, §1350).

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