Stoel Rives World of Employment
Inisght and Commentary on Labor and Employment Law
PUBLISHED BY STOEL RIVES LLP ATTORNEYS AT LAW

Stoel Rives World of Employment

Posted at 6:00 AM on August 29, 2014 by Alyson L Palmer

Washington Court of Appeals Expands "Jeopardy" Element of Claim for Wrongful Discharge in Violation of Public Policy

This month the Washington State Court of Appeals, Division III issued a ruling in *Becker v. Community Health Systems, Inc.* that expands protections in a wrongful termination action based on violation of a public policy.

In *Becker*, the Plaintiff, a former chief financial officer for Community Health Systems, Inc. ("CHS"), alleged that while CHS initially represented that it would have a $4 million operating loss, Becker calculated a projected $12 million operating loss in 2012. When CHS requested Becker revise his projection prior to submitting it to the U.S. Securities and Exchange Commission ("SEC"), Becker refused. CHS placed Becker on a performance improvement plan and conditioned his continued employment on revising the loss projection. Becker documented his concern with the CHS calculation and advised the company that unless it remedied its misconduct he would be forced to resign. CHS accepted Becker's notice as a resignation.

Becker sued in superior court for wrongful discharge in violation of public policy (he also filed a whistleblower retaliation complaint with the U.S. Occupational Safety and Health Administration). After the trial court denied CHS's motion to dismiss for failure to state a claim under CR 12(b)(6), CHS sought discretionary review with the Court of Appeals.

The elements of a claim of wrongful discharge in violation of public policy in Washington require the plaintiff establish (1) the existence of a clear public policy (the clarity element); (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (the jeopardy element); (3) that the public-policy-linked conduct caused the dismissal (the causation element); and (4) the defendant is not able to offer an overriding justification for the dismissal (the absence of justification element)." *See Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). The heart of the dispute in *Becker* is whether Plaintiff was able to establish the "jeopardy" element. Ordinarily, when a plaintiff has other available means for promoting the public policy that are adequate, such as remedies under state or federal statutes, the common law public policy claim must fail.

The *Becker* Court found that the plaintiff's complaint adequately alleged the jeopardy element of a wrongful discharge claim under CR 12(b)(6), and that his case could proceed. The Court reached that conclusion despite the fact Becker had available remedies under no less than five statutes, including the Sarbanes-Oxley Act of 2002 ("SOX"), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Securities Act of Washington, under which he could have sought protection from retaliation or helped authorities prosecute CHS for misconduct in securities reporting. The Court found that each of these forms of relief were inadequate to "fully vindicate public policy," because they did not foreclose simultaneous use of other remedies. Rather, each law acknowledged that it was a nonexclusive source of relief. The Court explained that reliance on upholding the public policy under such circumstances renders public policy enforcement uncertain "at best."

Washington employers should proceed with caution when evaluating potential plaintiff's common law claims for wrongful termination in violation of public policy. Even where the former employee could have utilized extensive federal and state laws and related mandatory agency reporting provisions, Washington courts may now find these statutes inadequate to preserve the public interest when the legislative text does not explicitly indicate the law is an exclusive form of protection.

Anchorage AK | Portland OR | Seattle WA
Vancouver WA | Sacramento CA | San Francisco CA
San Diego CA | Lake Tahoe CA | Minneapolis MN
Salt Lake City UT | Boise ID | Washington DC
Telephone: 800.887.8635
Facsimile: 503.220.2480