EMPLOYERS: CALIFORNIA WRONGFUL DISCHARGE CAN'T BE BASED ON ORDINANCES

By the Firm's Labor & Employment Department

For California employers, one of the most significant legal RISKS is a wrongful termination lawsuit. For a sometimes bewildering variety of reasons, terminating an employee can wind up with you as a defendant, either in court or negotiating a settlement with someone from the very aggressive, skillful, and innovative plaintiff's bar. There are a lot of situations in which letting someone go can spell real legal trouble. Fortunately, the California Supreme Court recently handed down a decision that both limits and clarifies one of them: the "violation of public policy" claim.

First, a little background. It is fairly settled employment law that an employer cannot punish an employee for exercising a legal right. While California is a right-to-work state, in which employers have considerable freedom in hiring, firing, discipline, and so on, you cannot, in general, fire someone for obeying the law because you disagree, or it has consequences for you. This includes situations in which employers attempt to retaliate against employees for:

1. Refusing to break the law;
2. Performing a legal obligation;
3. Exercising a legal right or privilege; or
4. Reporting a potential violation of an *important* law.

As an example, an employee of a medical practice who notices what she thinks is insurance fraud cannot be fired in retaliation for reporting what she's seen to a government authority. Someone who works for a railroad cannot be fired for reporting falsified safety records. You also cannot fire or discipline someone for taking time away from work to vote, serve on a jury, and so on.

There are some limitations to this. There has to be a connection between the termination and the employee's action. If an employee of a restaurant reports suspicion of serving alcohol to minors to the state's Department of Alcoholic Beverage Control, and is fired six years later, there isn't a connection, and thus, there isn't a case.

Another significant limitation is the "important law" concept. Since at least 1997, California employees have a case for wrongful termination only if the legal policy at issue meets the following criteria:

1. The policy is set forth in a statute or constitutional provision;
2. The policy serves the interests of the public rather than that of the individual;
3. The policy was well-established at the time of the wrongful termination; and

4. The policy is “substantial and fundamental.”

Over the past twenty-odd years, the plaintiff’s bar has successfully included a wide range of statutes, policies, laws, and regulations in these cases. A few weeks ago, however, the California Court of Appeal drew an important line in the case of *Bruni v. The Edward Thomas Hospitality Corporation* (May 14, 2021) ___ Cal.App.5th ___ (“*Bruni”*), which held employees cannot sue for wrongful termination based on the alleged violation of a local ordinance.

The facts of *Bruni* are relatively simple. A restaurant server sued his former employer claiming, among other things, violation of a local recall ordinance; and a wrongful failure to rehire claim based on the alleged public policy expressed in the local ordinance. The key concept here is the claim that a fundamental public policy was expressed in a local ordinance. As it turns out, no, it wasn’t.

The Court affirmed the trial court’s dismissal of the claim because “a municipal ordinance cannot serve as the predicate for a [wrongful termination] tort claim.” The Court went on to hold that wrongful discharge claims must be based on a fundamental public policy “expressed in a constitutional or statutory provision.”

Being a California employer is nobody’s idea of easy. However, with this decision, it just became a little easier. Or at least, clearer. “Public policy” means “state law or constitutional provision,” not a local ordinance.

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