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Employers Beware: The Missouri Court of Appeals Takes a Bite Out of the Employment At-Will Doctrine

*Dunn v. Enterprise Rent-A-Car Co.*¹

I. INTRODUCTION

In *Dunn v. Enterprise Rent-A-Car Co.*, the Court of Appeals for the Eastern District of Missouri held that Thomas P. Dunn had presented sufficient evidence to state a cause of action for wrongful discharge for refusing to engage in conduct and for reporting conduct which he reasonably believed violated federal securities laws.² *Dunn* continued Missouri's trend of expanding the availability of wrongful discharge actions to at-will employees terminated in contravention of public policy by merely requiring that the employee "reasonably believe" the instances at issue violate the law.³ This Note argues that the Eastern District was correct in extending the exception to the employment at-will doctrine under such circumstances because, in general, the protections afforded to employees as a result of the policy outweigh any burdens that may fall on employers.

II. FACTS AND HOLDING

Thomas P. Dunn began working for Enterprise Rent-A-Car Company ("Enterprise") as an accountant in 1986.⁴ In 1993, Dunn became corporate comptroller and an officer of the company.⁵ The following year, Dunn was given Vice-President officer level status as corporate comptroller, which he held until his termination on January 4, 2001.⁶ As the company's comptroller, Dunn certified each year that Enterprise's financial records were prepared in accordance with generally-accepted accounting principles ("GAAP").⁷ Additionally, he was responsible for certifying that the financial records were in accordance with GAAP for initial public offerings ("IPOs").⁸

1. 170 S.W.3d 1 (Mo. Ct. App. 2005).

2. *Id.* at 7-11.

3. *Id.*

4. *Id.* at 4. Enterprise is a privately held company. *Id.*

5. *Id.* Dunn received positive performance reviews during his employment with Enterprise. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

In 1998, Dunn was directed to begin investigating Enterprise's financial statements and business practices in order to enable Enterprise to prepare for an IPO.⁹ Dunn had concerns about certain company practices, including the imposition of a surcharge on daily rental customers, the billing of customers for vehicle damage, and the selective licensing of vehicles in certain states.¹⁰

Additionally, Dunn was particularly troubled by the 2% per month rate of depreciation used by Enterprise on its vehicles.¹¹ Dunn believed that, while this rate would be acceptable for a privately-held company, a rate of depreciation of 2% per month for a publicly-held company violated GAAP.¹² Instead, he believed that GAAP would require Enterprise to lower its depreciation rate to at least 1.5%.¹³

After a strategic planning meeting in which Enterprise's investment banker suggested that the company would need to reduce its rate of depreciation to 1.5% if it were to go public, Dunn decided to take his concern about the depreciation to upper management.¹⁴ Dunn was told that the company's depreciation rate would not be lowered, and then, he received a warning and was placed on probation until November 1999.¹⁵

Before it could offer stock to the public, Enterprise was required to file a Form S-1 with the Securities and Exchange Commission ("SEC").¹⁶ October 27, 2000, was set as the target date for filing the Form S-1.¹⁷ As corporate comptroller, Dunn was responsible for preparing Enterprise's financial statements in accordance with GAAP with respect to the Form S-1.¹⁸ In his memoranda regarding the financial statements, Dunn concluded that Enterprise would have to lower its monthly depreciation rate to 1.5%.¹⁹ Then, he discovered that his memoranda were changed without his approval so that they set forth different conclusions.²⁰ Enterprise extended its deadline to early spring of 2001 and changed its rate of monthly depreciation to 1.7%.²¹ On January 4, 2001, Dunn was terminated.²²

On May 3, 2001, Dunn filed claims for wrongful discharge for failure to commit an illegal act and for whistleblowing in the Circuit Court of St. Louis

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 4-5.

16. *Id.* at 5.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 6.

22. (26) *Id.*

County.²³ Enterprise moved for a directed verdict with respect to both of Dunn's claims.²⁴ These motions were initially denied, but during Enterprise's presentation of its case, the company renewed its motions and the trial court granted Enterprise a directed verdict on Dunn's claim that he was wrongfully terminated for refusing to commit an illegal act.²⁵ The case was submitted to the jury with respect to Dunn's whistleblowing claim, and the jury returned a \$4,000,000 verdict for Dunn.²⁶ The trial court then granted Enterprise's motion for a judgment notwithstanding the verdict, and in the alternative, for a new trial.²⁷

On appeal to the Eastern District, Dunn argued that he had made a submissible case for wrongful discharge based on two of the four public policy exceptions to the general at-will employment doctrine.²⁸ First, Dunn argued that he had a cause of action for wrongful discharge because he was discharged "for refusing to perform an illegal act or an act contrary to a clear mandate of public policy."²⁹ Conversely, Enterprise maintained that because it had not violated any law or requested that Dunn violate any law, Dunn had failed to make a submissible case for wrongful discharge.³⁰ Second, Dunn argued that he was wrongfully discharged "for blowing the whistle on Enterprise for attempting to use accounting methods in connection with its proposed IPO that were not in accordance with GAAP."³¹ On this point, Enterprise argued that the whistleblower exception to the general employment at-will doctrine requires that the employee report a pre-existing violation of the law or a clear mandate of public policy.³²

On the first issue, the Eastern District held that when an at-will employee is fired for reporting or refusing to engage in possible illegal activity, he or she need not allege or prove that the unlawful act was actually completed.³³ Second, the court held that when an at-will employee is terminated

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Generally, an at-will employee can be terminated with or without cause, and an at-will employee will not have a cause of action for wrongful discharge unless the employee is discharged in violation of law or a clear mandate of public policy. See, e.g., *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985). See *infra* Part III.

29. *Dunn*, 170 S.W.3d at 6-7.

30. *Id.* at 7.

31. *Id.* at 9-10.

32. *Id.* at 10.

33. *Id.* at 8. The appellate court reversed and remanded in part and affirmed in part. *Id.* at 3. The court decided that the trial court erred in granting a directed verdict on Dunn's claim that he was wrongfully discharged in violation of public policy for refusing to perform an illegal act and in granting Enterprise's motion for directed

for reporting conduct that he or she reasonably believes violates a clear mandate of public policy, he or she can make a submissible case of retaliatory discharge under the whistleblower exception.³⁴

III. LEGAL BACKGROUND

A. History of the At-Will Employment Doctrine

Missouri's employment law is grounded in the employment at-will doctrine, and thus it generally allows employers to discharge employees with or without cause.³⁵ This doctrine originated in the United States³⁶ and is not followed in most Western European countries.³⁷ Commentators generally agree that the birth of employment at-will as the dominant rule in the United States was in 1877 with Professor Wood's treatise on master-servant law.³⁸

verdict on Dunn's claim that he was wrongfully discharged in violation of public policy under the whistleblower exception when he reported Enterprise's attempted use of accounting methods in connection with its proposed IPO that did not follow GAAP. *Id.* at 7-12.

34. *Id.* at 10-11. The appellate court affirmed the trial court's grant of Enterprise's motion for judgment notwithstanding the verdict on Dunn's claim that he blew the whistle on the illegal business practices of Enterprise. *Id.* at 11.

35. See *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985) ("Under Missouri's employment at will doctrine an employer can discharge--for cause or without cause--an at will employee . . ."). Of course, when an employee has an employment contract with his or her employer, that employee is not an employee at-will, but is an employee with a contract. See Timothy J. Heinsz, *The Assault of the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 861 (1983). Therefore, the contract governs the terms and conditions of his or her employment. *Id.* ("If an employee wished to prevent termination at will, he needed to seek contractual protection from his employer.").

36. See generally James E. Meadows, *Dancing Around Employment At-Will: Can Fraud Provide Plaintiffs a Way to Hold Their Employers Liable?*, 65 MO. L. REV. 1003, 1007-11 (2000) (providing a helpful history of the employment at-will doctrine).

37. Heinsz, *supra* note 35, at 862 ("France, Germany, Great Britain, and Sweden have laws against unjust dismissals.").

38. See Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 520 (2004); see also Heinsz, *supra* note 35, at 859.

[T]he "rule" laid down by Wood states that a hiring in which no duration is expressed is presumed to be terminable at will, although plaintiff remains free to prove that the contract was otherwise. Further, the fact that the hiring states a rate of pay—so much per month or per year—does not, in and of itself, rebut this presumption or establish that the parties intended that the contract should last for at least the period stipulated by the rate of pay.

Following publication of Wood's treatise, "employment at will has had an impressive one hundred year reign: every state in the United States adhered to the employment at will rule with virtually no wrongful discharge exceptions."³⁹ Furthermore, "it had been generally accepted that for all of its difficulties and challenges, the system of employment at will we had inherited in this country was the appropriate one."⁴⁰

The at-will employment doctrine was not viewed as harsh to employees for several reasons:

An individual's employment relationship with any one employer was seldom of long term economic significance. The cultural frontier mentality and the burgeoning variety of commercial enterprises led to an expectation of personal mobility and entrepreneurial instability. The widespread agrarian base of society allowed for much more seasonal and part-time employment. Most important, . . . long-term economic security in the sense of provision for subsistence, food, shelter, medical care, disability protection and retirement or old-age "insurance" was self-insured by the family institution, the basic personal protection unit of society.⁴¹

However, during the middle of the twentieth century, courts began to carve out exceptions to the employment at-will doctrine.⁴² Throughout the 1970s and 1980s, commentators began to argue that employment at-will "insufficiently accounted for the realities of the modern workplace, characterized by an increased dependence of employees on employers, a reduced availability of employees to use the labor market to their advantage, and a decreased

Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 553 (1990).

39. Bird, *supra* note 38, at 520. Currently, the only state in which employment at-will is not the default rule is Montana. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to 915 (2003); see generally Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMP. RTS. & EMP. POL'Y J. 105 (1999).

40. Walter Olson, *The Trouble With Employment Law*, 8 KAN. J.L. & PUB. POL'Y 32, 32 (1999).

41. (45) Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 191 (1983).

42. (46) See, e.g., Olson, *supra* note 40, at 32 (contending that Lawrence Blades' 1967 Columbia Law Review article "kicked off the modern revolution in state employment law"). See also *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 388 (Conn. 1980) ("We are . . . mindful that the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.").

number and power of collective bargaining agreements.”⁴³ In responding to these voluminous criticisms, courts began to create public policy exceptions to the employment at-will doctrine.⁴⁴

This pro-employee trend in the courts has not been universally applauded, however, as some have maintained that at-will employment relationships should not be interfered with by courts. Indeed, “[t]he cure is in many respects worse than the disease.”⁴⁵ Furthermore, the possible injustices to employees precipitated by an at-will employment relationship are grossly overestimated, and as one commentator notes, “[a]rbitrary firings of deserving individuals abound; only the state can deliver these helpless victims from the clutches of their capitalist masters. This picture is, of course, nonsense.”⁴⁶

Defenders of the at-will employment doctrine have historically argued that employers and employees very rarely alter the default at-will employment relationship, and because at-will employment is the dominant employment scheme, its desirability to the parties is thus reflected.⁴⁷ Assuming that

43. Bird, *supra* note 41, at 521. One court explained the justification for exceptions to the employment at-will doctrine as follows:

[I]n a civilized state where reciprocal legal rights and duties abound the words “at will” can never mean “without limit or qualification,” . . . for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public. An at will prerogative without limits could be suffered only in an anarchy, and there not for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counterbalancing rights and obligations that holds such societies together. Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Sides v. Duke Univ., 328 S.E.2d 818, 826 (N.C. Ct. App. 1985).

44. Bird, *supra* note 41, at 521-22. Between 1979 and 1988, the number of states incorporating the public policy exception to employment at-will more than tripled. From 1984 to 1986, more than five states per year recognized the public policy exception to employment at will for the first time. Similarly, between 1980 and 1987, judicial approval of the implied contract exception increased from fewer than ten states to nearly forty. In just seven years, courts and commentators transformed the at-will rule from a dominant workplace rule to one constrained with exceptions prohibiting outrageous employer conduct. *Id.*

45. Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1933 (1996).

46. *Id.* at 1902.

47. See J. Houtt Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 838 (1995); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV.

the parties desire an employment at-will relationship,⁴⁸ one is left to decide whether the underlying rationale of the at-will employment doctrine is defeated when an employee is terminated for refusing to engage in what the employee reasonably believes is illegal behavior, or for blowing the whistle on such behavior.

Defenders of the at-will employment doctrine also note the economic efficiency of the at-will employment doctrine.⁴⁹ Furthermore, the employment at-will doctrine “was based on a moral proposition that was intuitively easy to grasp, namely that a job ought to be voluntary on both sides. If it isn’t working out, it should at some point end rather than continuing forever against the will of one side.”⁵⁰

An exception to the at-will employment doctrine was first enunciated by a Missouri court, though not in public policy terms, in 1963 by the Missouri Supreme Court in *Smith v. Arthur C. Baue Funeral Home*.⁵¹ In *Smith*, the plaintiff argued that he was wrongfully terminated for engaging in union activity.⁵² The Missouri Supreme Court agreed, holding that “an employer may not discharge an employee for asserting the constitutional right thereby given

947, 948 (1984) (“The survival of the contract at will, and the frequency of its use in private markets, might well be taken as a sign of its suitability for employment relations.”).

48. See Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Posses Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307 (2002) (citing statistical data, to argue that most employees are not even aware of their at-will employee status, and concluding that the at-will employment doctrine represents the best available employment model because requiring just cause for termination would ultimately harm employees more than help them).

My conclusion is that non-legal, behavior-directing mechanisms already provide optimal deterrence to arbitrary discharges in the absence of a just cause legal rule. Both the “no discharge without cause” norm and the employer’s own wealth-maximizing incentives prevent an employer from discharging an employee without cause, regardless of whether the legal rule is at-will or just cause.

Id. at 359.

49. Epstein, *supra* note 47, at 982 (“No system of regulation can hope to match the benefits that the contract at will affords in employment relations. The flexibility afforded by the contract at will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted, as all activities are, in conditions of technological and business change. . . . Here, a full analysis of the relevant costs and benefits shows why the constant minor imperfections of the market, far from being a reason to oust private agreements, offer the most powerful reason for respecting them.”). See also Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996) (arguing that the judiciary is ill-equipped to address the issue of job security).

50. Olson, *supra* note 40, at 32.

51. 370 S.W.2d 249 (Mo. 1963).

52. *Id.* at 252.

him to choose collective bargaining representatives to bargain for him concerning his employment.”⁵³ Thus, the first exception to the Missouri at-will employment doctrine was created: “at-will employees terminated for exercising a constitutional right, such as appointing a union representative for collective bargaining purposes, have available a wrongful discharge cause of action.”⁵⁴

The second Missouri case to find an exception to the at-will employment doctrine was *Hansome v. Northwestern Cooperage Co.*⁵⁵ There, the Missouri Supreme Court held that an employee had a cause of action where the employee was discharged for exercising his right to file a claim under the worker’s compensation statute.⁵⁶ The worker’s compensation statute itself prohibits firing an employee because the employee files a claim under the statute.⁵⁷

In 1985, the Missouri Supreme Court reaffirmed its adherence to the employment at-will doctrine in *Dake v. Tuell*.⁵⁸ In *Dake*, employees attempted to bring a wrongful discharge action “by cloaking their claims in the misty shroud of prima facie tort.”⁵⁹ The employees alleged that they were fired for informing their managers that other employees were making fraudulent representations to customers.⁶⁰ The supreme court dismissed the plaintiffs’ petition for failure to state a cause of action, declining to establish “a

53. *Id.* at 254. See MO. CONST. art. I, § 29 (“That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”).

54. Joseph H. Knittig, *Everything You Wanted to Know About Missouri’s Public Policy Exception But Didn’t Know You Should Ask*, 61 MO. L. REV. 949, 951 (1996).

55. 679 S.W.2d 273 (Mo. 1984) (en banc).

56. *Id.* at 276. The worker’s compensation statute provides: “No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.” MO. REV. STAT. § 287.780 (2000). The *Hansome* court enumerated a four-part test an employee must meet to state a claim for retaliatory discharge: “(1) plaintiff’s status as employee of defendant before injury, (2) plaintiff’s exercise of a right granted by Chapter 287, (3) employer’s discharge of or discrimination against plaintiff, and (4) an exclusive causal relationship between plaintiff’s actions and defendant’s actions.” *Hansome*, 679 S.W.2d at 275. “[The] exclusive causal relationship between the employee’s exercise of his right . . . and the discharge . . . has been an extremely difficult burden for an employee to meet.” James W. Riner, Daniel N. McPherson & Brian D. Byrd, *Wrongful Discharge of At-Will Employees in Missouri*, 59 J. MO. B. 34, 37 (2003).

57. *Hansome*, 679 S.W.2d at 875.

58. 687 S.W.2d 191 (Mo. 1985).

59. *Id.* at 192.

60. *Id.*

rule that would permit an at will employee to bring an action for wrongful discharge under the guise of the prima facie tort doctrine."⁶¹

In *Dake*, Judge Blackmar filed a concurring opinion in which he agreed with the court's result, but disagreed with the majority's attempt to "establish an ironclad rule that there may be no action for wrongful termination in the absence of contract or statute."⁶² He encouraged plaintiffs' attorneys to keep trying, and stated that while the majority opinion tended to inhibit the common law process with regard to wrongful termination, he hoped "that future courts realize that [the *Dake* decision] is authoritative only" on its facts.⁶³ As the next section illustrates, many courts have heeded Judge Blackmar's advice, as more exceptions to the employment at-will doctrine have been recognized.⁶⁴

B. The Modern Public Policy Exceptions

The modern Missouri doctrine of wrongful discharge in violation of public policy has evolved into four distinct classes of conduct for which an employee cannot be discharged:

(1) refusing to perform an illegal act or an act contrary to a strong mandate of public policy; (2) reporting wrongdoing or violations of law or public policy by the employer or fellow employees to superiors or third parties; (3) acting in a manner public policy would encourage, such as performing jury duty, seeking public office, or joining a labor union; or (4) filing a workers' compensation claim.⁶⁵

In 1989, the Western District Missouri Court of Appeals, in *Crocket v. Mid-America Health Services*,⁶⁶ announced that "[t]he public policy exception to the employment at will doctrine is narrow, and a plaintiff who seeks to come within its scope must expressly plead that his employer has discharged him because of his refusal to violate the law."⁶⁷

61. *Id.* at 193.

62. *Id.* at 194 (Blackmar, J., concurring).

63. *Id.*

64. *See infra* Part III.B.

65. *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-37 (Mo. Ct. App. 1998) (citing *Boyle v. Vista Eyewear Inc.*, 700 S.W.2d 859, 873-75 (Mo. Ct. App. 1985)). The third and fourth exceptions will not be discussed in this Note, because they are not relevant to the instant case. For further information about the third and fourth exceptions, see *Riner, supra* note 59, at 36-38.

66. 780 S.W.2d 656 (Mo. Ct. App. 1989).

67. *Id.* at 658 (citation omitted).

1. Refusing to Perform an Illegal Act or an Act Contrary to a Clear Mandate of Public Policy

The first exception to the at-will employment doctrine, refusal to engage in an unlawful act or act against a clear mandate of public policy, states that the employer must require the employee to engage in conduct that violates a constitutional provision, a statute, an ordinance, or a regulation.⁶⁸ This rule was articulated one year after *Dake*,⁶⁹ in *Beasley v. Affiliated Hospital Products*.⁷⁰

In *Beasley*, an employee brought a wrongful discharge action for his termination, which was the result of his refusal to fraudulently predetermine the winners of an advertised raffle of hospital equipment donated and manufactured by his employer.⁷¹ The employee claimed that by following his manager's orders, he would have violated both state and federal criminal laws.⁷² Thus, the Eastern District held that the employee had stated a cause of action under the first public policy exception.⁷³

In 1988, in *Johnson v. McDonnell Douglas Corporation*,⁷⁴ the Missouri Supreme Court did not "deem it necessary to engraft a so-called 'public policy' exception onto the employment at will doctrine."⁷⁵ In *McDonnell Douglas*, an employee was fired for missing work after she attended a deposition.⁷⁶ She argued that a public policy exception to the employment at-will doctrine should allow her to state a claim for wrongful discharge.⁷⁷ In distinguishing *Smith*,⁷⁸ *Boyle*,⁷⁹ and *Beasley*,⁸⁰ the court noted that in each of those cases, a "statute, regulation based on a statute, or constitutional provision [was] implicated."⁸¹ In *Johnson's* case, because no such statute, regulation, or constitu-

68. Riner, *supra* note 56, at 35.

69. *See supra* notes 58-63 and accompanying text.

70. 713 S.W.2d 557 (Mo. Ct. App. 1986).

71. *Id.* at 559.

72. *Id.* Plaintiff alleged that fraudulently predetermining the raffle winners would violate: "§ 570.140 RSMo [Deceptive Business Practice]; § 570.150 RSMo [Commercial Bribery]; § 570.160 RSMo [Bait Advertising, False Advertising]; Title 18 U.S.C. § 1341 [Mail Fraud]; and Title 18 U.S.C. § 1343 [Wire Fraud]." *Id.*

73. *Id.* at 561.

74. 745 S.W.2d 661 (Mo. 1988) (en banc).

75. *Id.* at 663.

76. *Id.* at 662.

77. *Id.* at 662-63.

78. *See supra* notes 51-54 and accompanying text.

79. *See infra* notes 89-92 and accompanying text.

80. *See supra* notes 70-73 and accompanying text.

81. *McDonnell Douglas*, 745 S.W.2d at 663.

tional provision gave her the right to attend a deposition, the court rejected her claim for wrongful discharge.⁸²

In *Johnson v. World Color Press, Inc.*,⁸³ an employee alleged that he was discharged in retaliation for opposing accounting practices that he believed violated federal securities laws.⁸⁴ After initially determining that public policy includes federal law, the court pointed out that federal securities regulations were “designed to provide investors with full disclosure . . . to protect investors against fraud, and to promote ethical standards of honesty and fair dealing.”⁸⁵ Accordingly, the court found that “public policy favors full disclosure, truthfulness and accuracy in the financial reports made by businesses to the government and to the public, and that an employee who voices objection to practices which he reasonably believes violate this policy should be protected from being discharged.”⁸⁶ Finally, the court held that the plaintiff was not required to plead conclusively that federal securities laws were violated.⁸⁷

82. *Id.* at 663-66 (Blackmar, J., dissenting) (arguing that summary judgment was inappropriate because the employee may have had a contractual employment relationship with the employer based on the employee handbook). One of the first cases to recognize a public policy exception to the at-will employment doctrine involved the employee and judicial proceedings. *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (holding that an employee stated a cause of action when he was terminated by his employer for disobeying orders to commit perjury).

83. 498 N.E.2d 575 (Ill. App. Ct. 1986).

84. *Id.* at 576.

85. *Id.* at 577.

86. *Id.* at 578.

87. *Id.* The court explained that “an employee with a reasonable belief that illegal activity is occurring should be able to report his belief to his superiors in an effort to ensure management’s compliance with the law without fear of discharge.” *Id.* Defendants made the argument that “the tort of retaliatory discharge is designed to protect lower level employees and not high level managers such as plaintiff.” *Id.* at 580. The court replied, “[w]e decline defendants’ invitation to create a class of employees who are excluded from recovering under retaliatory discharge.” *Id.*

However, New York requires an actual violation of a law. Although, the court in New York based its decision in *Bordell v. General Electric Company* on statutory interpretation rather than on public policy or judicial precedent. 208 A.D.2d 219, 221 (N.Y. App. Div. 1995). In *Bordell*, the employee alleged that seven fellow employees had possibly been exposed to significant levels of radiation, requiring the employee to report the incident to the authorities, and that he was terminated for voicing his concerns. *Id.* at 220. Basing its analysis on the interpretation of a state labor statute, the New York court held that the employee did not have a cause of action unless an actual law was violated. *Id.* at 221.

On the other hand, as the Oregon Court of Appeals in *McQuary v. Bel Air Convalescent Home, Inc.*, stated, “the social harm from reporting in good faith a complaint that may turn out, after investigation, to be unfounded is potentially far less than the harm of not reporting a well-founded complaint for fear of the consequences.” 684 P.2d 21, 24 (Or. Ct. App. 1984). The court added that “[t]he social

2. The Whistleblower Exception: Reporting Employer Wrongdoing⁸⁸

The whistleblower exception was first recognized by the Western District of the Missouri Court of Appeals in the 1985 case, *Boyle v. Vista Eyewear, Inc.*⁸⁹ This exception provides relief for “at will employees terminated for reporting an employer’s violation of the law as found in a statute or regulation based on a statute, such as the violation of an FDA regulation.”⁹⁰

In *Boyle*, an employee brought a wrongful discharge claim against her employer, alleging that the employer fired her because she warned her employer that if it did not follow federal regulations in its manufacture of eyeglasses, she would notify authorities of her employer’s practice of falsely attesting to the hardening and testing of eyeglass lenses.⁹¹ Ultimately, the

benefit from investigating all potentially significant violations of a patient’s statutory rights is far greater than the social benefit, if any, from allowing an employer to terminate an employe [sic] who in good faith reports to the appropriate authorities situations which prove not to be violations.” *Id.*

88. For a helpful discussion of the whistleblower exception as applied by the states generally, see Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000). Not all jurisdictions extend the public policy exception to whistleblowers. See, e.g., *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (allowing exception only for employees terminated for refusing to perform an illegal act).

We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in *East Line & R.R.R. Co. v. Scott*. That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act.

Id. at 735.

89. 700 S.W.2d 859, 870-78 (Mo. Ct. App. 1985) (“[W]here an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct [sic] that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.”). Judge Berrey dissented. *Id.* at 878 (Berry, J., dissenting) (“In view of the recent pronouncement regarding discharge of at will employees as set forth in *Dake v. Tuell*, I must dissent.”) (citation omitted).

90. Knittig, *supra* note 54, at 955.

91. *Boyle*, 700 S.W.2d at 870. The employee alleged her employer was violating 21 C.F.R. § 801.410, which provides in pertinent part:

In the impact test, a 5/8 -inch steel ball weighing approximately 0.56 ounce is dropped from a height of 50 inches upon the horizontal upper surface of the lens. The ball shall strike within a 5/8 -inch diameter circle located at the geometric center of the lens. The ball may be guided but not restricted in its fall by being dropped through a tube extending to within

court held that employers “are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes and regulations promulgated pursuant to statute.”⁹²

Often, an issue in whistleblower cases is whether the employee has reported the wrongdoing to the appropriate persons. In *Adcock v. Newton, Inc.*,⁹³ the Missouri Court of Appeals for the Eastern District held that for the whistleblower exception to apply, the employee must report the violation to proper authorities, such as “law enforcement authorities or employer security persons.”⁹⁴ Then, in *Faust v. Ryder Commercial Leasing & Services*,⁹⁵ the Western District held that an employee’s report of wrongdoing to the wrongdoer itself did not afford the employee the protection of the whistleblower exception.⁹⁶

However, in *Lynch v. Blanke Baer & Bowey Krimko, Inc.*,⁹⁷ the Eastern District explicitly held that the whistleblower exception will apply if notification is given to “proper” company authorities.⁹⁸ In *Lynch*, an employer argued that the whistleblower exception did not apply, because an employee did not “report or threaten to report his concerns to any outside agency or to the FDA.”⁹⁹ The Eastern District rejected this argument, pointing to *Boyle*’s instruction “that plaintiff report[] violations to his superiors.”¹⁰⁰ Thus, an em-

approximately 4 inches of the lens. To pass the test, the lens must not fracture; for the purpose of this section, a lens will be considered to have fractured if it cracks through its entire thickness, including a laminar layer, if any, and across a complete diameter into two or more separate pieces, or if any lens material visible to the naked eyes becomes detached from the ocular surface.

Id. at 871; see also 21 C.F.R. § 801.410(d)(2).

92. *Boyle*, 700 S.W.2d at 877.

93. 939 S.W.2d 426 (Mo. Ct. App. 1996).

94. *Id.* at 429 (“Adcock never reported any illegal or unethical conduct to the proper authorities He merely wrote a note to a fellow employee questioning the wisdom of paying a secretary for hours she did not work.”).

95. 954 S.W.2d 383 (Mo. Ct. App. 1997).

96. *Id.* at 391 (The court decided that reporting wrongdoing to the perpetrator of the wrongdoing was, in effect, a “courtesy warning” and that “[i]t allows wrongdoers to escape detection and avoid prosecution for past wrongdoing, while in no way affording the victims an opportunity to protect themselves from further wrongdoing, all contrary to the clear mandate of public policy implicated here.”).

97. 901 S.W.2d 147 (Mo. Ct. App. 1995).

98. *Id.* at 150-51.

99. *Id.*

100. *Id.* at 151. The relevant portion of *Boyle* states that “where an employer has discharged an at will employee . . . because the employee reported to his superiors . . . serious misconduct [sic] that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action.” *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo. Ct. App. 1985).

ployee will be protected by the whistleblower exception if the employee reports wrongdoing to a superior who does not also happen to be the main perpetrator of the wrongdoing or illegal act.

IV. INSTANT DECISION

In *Dunn v. Enterprise Rent-A-Car Co.*,¹⁰¹ the Court of Appeals for the Eastern District of Missouri had to decide whether Dunn would be protected by the public policy exceptions to the employment at-will doctrine, even though Enterprise did not ultimately violate the law in the filing of its IPO.¹⁰² Judge Booker T. Shaw, writing for a unanimous court, noted that no Missouri case had directly dealt with this issue, but that the Illinois Court of Appeals for the Fifth District had ruled on this issue with similar facts in *Johnson v. World Color Press, Inc.*¹⁰³

First, the *Dunn* court addressed the “refusal to perform an illegal act” public policy exception. The Eastern District found that Dunn had presented evidence that he was in charge of preparing Enterprise’s financial statements for its IPO, and that Enterprise had requested that he prepare those statements in a fashion that led Dunn to believe that GAAP were not being followed, in violation of federal securities regulations.¹⁰⁴ Furthermore, according to the court, Dunn had presented evidence showing that he was terminated for his refusal to comply with Enterprise’s instructions on preparing its financial statements.¹⁰⁵ Thus, the Eastern District agreed with the reasoning of the Illinois Court of Appeals in *World Color Press*.¹⁰⁶

Although Enterprise contended that Dunn’s actions would not have violated the law and that no law was ever violated, the court found that because Dunn reasonably believed that following Enterprise’s directives would have resulted in a violation of the law or a clear mandate of public policy, “it was not necessary for him to ‘allege or prove conclusively the law has been violated in order to state a cause of action.’”¹⁰⁷ Furthermore, the court explained that because Dunn “may have been instrumental in helping to prevent what he reasonably believed to be an unlawful act, he should be protected by the law

101. 170 S.W.3d 1 (Mo. Ct. App. 2005).

102. *Id.* at 7.

103. 498 N.E.2d 575 (Ill. App. Ct. 1986).

104. *Dunn*, 170 S.W.3d at 7.

105. *Id.*

106. *Id.* See *supra* notes 83-87 and accompanying text.

107. *Dunn*, 170 S.W.3d at 9 (quoting *Johnson v. World Color Press, Inc.*, 498 N.E.2d 575, 578 (Ill. App. Ct. 1986)). Although employees such as Dunn are not required to know exactly what the law is, their employers have been held to know what the law is. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) (“The employer is bound to know the public policies of the state and nation as expressed in their constitutions, statutes, judicial decisions and administrative regulations, particularly, as here, those bearing directly upon the employer’s business.”).

for his efforts.”¹⁰⁸ Thus, the court reasoned that the fact that Enterprise did not ultimately violate any law for failing to follow GAAP did not defeat Dunn’s claim of retaliatory discharge.¹⁰⁹ Therefore, the court held that Dunn had alleged a submissible case under the first public policy exception to the employment at-will doctrine.¹¹⁰

Regarding the whistleblower exception to the employment at-will doctrine, the court employed similar reasoning. First, the court noted that public policy “encourage[s] employees to report *suspected* wrongdoing by co-workers.”¹¹¹ The court also stated that “[p]ublic policy would certainly not be served by requiring an employee to wait until his or her employer completes the unlawful act before reporting it and before being protected by the whistleblower exception to the employment at-will doctrine.”¹¹² The court found that even though Enterprise postponed its IPO and did not ultimately violate federal securities regulations, Dunn should still be protected by the public policy exception to the employment at-will doctrine.¹¹³

V. COMMENT

The Eastern District’s decision in *Dunn* is in line with the majority of state court decisions in that it does not require an actual violation of law to trigger the first two public policy exceptions to the employment at-will doctrine.¹¹⁴ Unconstrained by contrary statutes, as was the case in *Bordell*, the *Dunn* court held that “[p]ublic policy would certainly not be served by requiring an employee to wait until his or her employer completes the unlawful act before reporting it and before being protected by the whistleblower exception to the employment at-will doctrine.”¹¹⁵

In *Dunn*, the court found that the policies for exceptions to the at-will employment rule outweighed competing policies attempting to justify the at-will employment doctrine.¹¹⁶ Limiting the illegal activities of employers is best achieved, as the Eastern District noted, by protecting employees who are “terminated from . . . employment for objecting to practices [they] reasonably believe[] violate this policy.”¹¹⁷ The logic of this assertion is intuitively valid

108. *Dunn*, 170 S.W.3d. at 9.

109. *Id.* at 8.

110. *Id.* at 9.

111. *Id.* at 10.

112. *Id.*

113. *Id.*

114. See generally Callahan & Dworkin, *supra* note 91, at 120-22.

115. *Dunn*, 170 S.W.3d at 10.

116. *Id.*

117. *Id.* at 8.

and has also been articulated by several other courts.¹¹⁸ While the utility of the employment at-will doctrine is shown by its status as the traditional American employment scheme and the fact that it is economically efficient, when an employer attempts to violate the law, these positive aspects of the employment at-will doctrine are defeated by the concerns of the employee who does the right thing by either refusing to partake in the illegal activity or by blowing the whistle on such activity. Accordingly, the employee who does the right thing should not be terminated for disobeying his or her employer under such circumstances.

Additionally, many of the original justifications for the employment at-will doctrine no longer exist. Modern employment relationships are predominately long term, the majority of our economy is no longer agriculturally based, and long term economic security is now provided by the employer.¹¹⁹ Because of these modern realities, many commentators have criticized the employment at-will doctrine as anachronistic.¹²⁰ While this Note does not contend that the employment at-will doctrine should be entirely abandoned, the existence of the argument that the employment at-will doctrine has outlived its usefulness supports the proposition that the public policy exceptions support the court's decision in *Dunn*, which solidified the extension of these various exceptions to cases where the employee is fired for refusing to violate the law or reporting activity that he reasonably believes violates the law.

Hopefully, the ramifications of the *Dunn* opinion will encourage employees to both refuse employers' orders to break the law and to blow the whistle on employers' wrongdoing. There are, however, possible negative effects of the Eastern District's decision. Increasing the availability of these causes of action will undoubtedly lead to increased court costs for employers. For example, it is possible the courts will be flooded by litigation, with employees making tenuous arguments about their "reasonable belief" about the legality of a particular issue.

118. See, e.g., *Belline v. K-Mart Corp*, 940 F.2d 184, 188 (7th Cir. 1991) ("[A]n employee's retaliatory discharge claim should not turn on the happenstance of whether the irregular conduct she reports is actually criminal."); *Palmer v. Brown*, 752 P.2d 685, 689-90 (Kan. 1988) ("[W]e have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort."); *Johnson v. World Color Press, Inc.*, 498 N.E.2d 575, 577-78 (Ill. App. Ct. 1986).

119. See *supra* note 44 and accompanying text.

120. See, e.g., Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 YALE L. & POL'Y REV. 39 (2000).

VI. CONCLUSION

In extending the protection of public policy exceptions to at-will employees who reasonably believe that their employers might be involved in illegal conduct, *Dunn* took a positive step in helping to protect employees and society from employers' wrongdoing. Charging an employee with knowing precisely when the law is violated would be both illogical and unfair. In *Dunn*, the Eastern District signaled that employers cannot terminate at-will employees for refusing to follow orders to engage in potentially illegal conduct. Hopefully this decision will cause employers to act legally and if they do not, allow employees to stand up to employers by refusing to engage in wrongdoing, or by reporting such misconduct.

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