

The Current Status of the Wrongful Discharge Tort Under Mississippi Law

By Heather White Martin

Employment in Mississippi has been “at-will” for more than 100 years, allowing an employer to terminate a non-contractual employment relationship at any time for good reason, wrong reason, or no reason at all.¹ As a result, Mississippi employers were reasonably protected from damages in tort for “wrongful termination” of employees.² As employers began to test the strength of their employment at-will “immunity,” however, Mississippi courts began considering the creation of a public policy exception to the employment at-will doctrine that would, in certain instances, allow a tort action against an employer for wrongful discharge.

Background. Rumbblings against the employment at-will doctrine began as early as 1981, when an employee brought suit alleging that he was unfairly terminated for refusing to dismiss a workers’ compensation claim.³ The Supreme Court then rejected the creation of a common law tort action against an employer for wrongful termination,⁴ but by 1985, the Court acknowledged the softening of the at-will rule by stating that “an employee may be discharged at the employer’s will for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible.”⁵ That concept was not applied, however, until 1987, when a Mississippi federal district court allowed a wrongful termination action against an employer accused of firing an employee who refused to violate state and federal laws.⁶ This long-anticipated public policy exception to the employment at-will doctrine was recognized by Mississippi’s highest court in 1993 in the seminal case of *McArn v. Allied Bruce-Terminix Company, Inc.*⁷

The Scope of McArn. The employee

in *McArn* claimed that he had been terminated for reporting his employer’s criminal conduct. Though the trial judge still refused to create an exception to the employment at-will doctrine, the Mississippi Supreme Court deemed the circumstances worthy and declared a “narrow public policy exception” to the employment at-will doctrine. The *McArn* exception applies in only two circumstances, regardless of whether a written employment contract exists: (1) the employer terminates the employee for refusing to participate in an illegal act; or (2) the employer terminates the employee for reporting his employer’s illegal act to the employer or someone else.⁸

Debate soon materialized regarding the scope of “illegal” acts, specifically, whether the term included civil law violations in addition to criminal acts. Mississippi federal courts again lead the way in sculpting the public policy exception, and they soon determined that the *McArn* exception applied *only* to criminal illegality.⁹ For example, the federal courts dismissed *McArn* claims based on an employee’s reporting of ADA violations,¹⁰ ADEA violations,¹¹ and OSHA violations.¹² Similarly, the courts dismissed *McArn* claims based on an employee’s refusal to subject herself to tort liability¹³ and an employee’s reporting of a work-related injury to the Workers’ Compensation Commission.¹⁴

Expansion of McArn. In each of these instances, the courts prevented an expansion of the public policy exception beyond the scope of criminal acts. In *Rosamond*, the court reasoned that the exception was created to further the State’s interest in promoting compliance with public policy.¹⁵ Therefore, when

Continued on next page

Heather White Martin is an Associate at Balch & Bingham, LLP in Jackson, Mississippi. Heather is a *summa cum laude* graduate of the University of Southern Mississippi and a *cum laude* graduate of Mississippi College School of Law. Her practice largely consists of defending employers and management against various state and federal employment law claims.

The Current Status of The Wrongful Discharge Tort Under Mississippi Law

another statutory remedy (such as the ADA) already protects the public policy at issue, public policy is “sufficiently preserved,” thereby eliminating the need to expand *McArn*.¹⁶ Although Mississippi’s highest court has not explicitly adopted this rationale, no Mississippi court has criticized or contradicted the *Rosamond* court’s rationale in the eight years since its declaration.

Unsettled Issues in Mississippi.

Some uncertainty remains as to whether an employee must prove that what was asked of her (or what she reported) was a crime, or whether she can simply rely on a good faith belief of an employer’s criminal violation in asserting a public policy discharge claim.¹⁷ The Mississippi Court of Appeals recently stated that the “applicability of the [*McArn*] exception does not require that a crime has already been committed, [citation omitted], but it does require that the acts complained of warrant the imposition of criminal penalties, as opposed to mere civil penalties.”¹⁸ This

statement could be an indication that Mississippi courts will ultimately hold that a mere good faith belief of criminal conduct is insufficient to support a wrongful discharge claim. This result is even more likely if Mississippi chooses to follow states with similar public policy exceptions. For example, the Texas Court of Appeals refused to expand its public policy exception to protect an employee who has a good faith belief of criminal misconduct because such an expansion would open the floodgates to a total erosion of the at-will rule.¹⁹ The Texas court reasoned that since its exception was intended to deter criminal violations, a claim under the exception must be supported by “evidence that the act could have resulted in criminal penalties against the employee.”²⁰ Accordingly, a claim that relies on an employee’s mere good faith belief of illegality “goes beyond this exception.”²¹ Given the similarity of Mississippi’s exception to the exception adopted by Texas, Mississippi courts could easily follow the reasoning of the Texas Court of

Appeals and preclude an employee’s *McArn* claim based only on a good faith belief of criminal conduct.

Conclusion. The *McArn* public policy exception to the employment at-will doctrine has proceeded largely without change since its declaration in 1993. However, the scope of the exception has been clarified to include criminal illegality to the exclusion of civil violations. While our state’s courts must still address certain unresolved issues, the public policy exception does not appear to be one which will, absent legislative intervention, substantially erode the long standing at-will rule.

¹ *Rosamond v. Pennaco Hosiery, Inc.*, 942 F. Supp. 279, 285 (N.D. Miss. 1996) (citing *Butler v. Smith & Tharpe*, 35 Miss. 457 (1858)).

² If the termination was motivated by some type of unlawful discrimination, an employee could bring suit under federal anti-discrimination statutes which prohibit discrimination because of gender, race, age, disability, religion, pregnancy, union status, or for complaining about such discrimination (retaliation).

³ *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).



**Legal Professional
Liability Coverage
for America's
Greatest
Law Firms**

- Financial Stability - Rated "A" by A.M. Best*
- Coverage For All Firm Sizes
- Optional Monthly Payment Plan

⁴ Kelly, 397 So. 2d at 877.

⁵ Shaw v. Burchfield, 481 So. 2d 247, 253 (Miss. 1985).

⁶ Laws v. Aetna Finance Co., 667 F. Supp. 342 (N.D. Miss. 1987). The court based its decision on Mississippi Supreme Court dicta and the lack of evidence indicating that Mississippi would decline to adopt a narrow public policy exception to the employment at-will doctrine where an employee is terminated for refusing to commit unlawful acts for his employer.

⁷ McArn v. Allied Bruce-Terminix Co., Inc., 626 So. 2d 603, 606 (Miss. 1993).

⁸ McArn, 626 So. 2d at 607.

⁹ Rosamond, 942 F. Supp. at 286-87. This article does not discuss the relationship between the McArn exception and Mississippi's whistleblower statute, which protects a state employee who reports "an alleged improper governmental act" whether civil or criminal. The reader should be aware, however, that the whistleblower statute may provide state employees with another "exception" to the at-will employment doctrine. See MISS. CODE ANNOTATED § 25-9-171 et seq.

¹⁰ Rosamond, 942 F. Supp. 287.

¹¹ Spencer v. Lowe's Home Centers, Inc., 1999 WL 33527108 (N.D. Miss. 1999).

¹² Howell v. Operations Management International, Inc., 161 F. Supp. 2d 713, 719 (N.D. Miss. 2001), aff'd, 2003 WL 22303057 (5th Cir. 2003).

¹³ Langford v. Amory Public School District, 2001 WL 10790002 (N.D. Miss. 2001).

¹⁴ Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So. 2d 25 (Miss. 2003).

¹⁵ Rosamond, 942 F. Supp. at 286-87.

¹⁶ Id.

¹⁷ Other states, like Texas, require a plaintiff to prove that the act requested or committed by the employer would be or was a crime. This requirement prohibits the plaintiff from relying on a good faith belief of some criminal violation. See, e.g., Ran Ken, Inc. v. Schlapper, 963 S.W. 2d 102, 107 (Tex. App. Austin 1998).

¹⁸ Hammons v. Fleetwood Homes of Miss., Inc., 2004 WL 2711313, at *3 (Miss. Ct. App. 2004). In Hammons, the plaintiff "failed to identify an illegality" in claiming that he was terminated for reporting his employer's alleged scheme to withhold a refrigerator from a mobile home buyer. Id. As such, the Circuit Court dismissed the plaintiff's McArn claim, and the Court of Appeals affirmed that dismissal. Id.

¹⁹ Ran Ken, Inc. v. Schlapper, 963 S.W. 2d 102 (Tex. Ct. App. Austin 1998).

²⁰ Id. at 105. The Texas court emphasized that "the element of criminal penalties must be conclusively proved." Id.

²¹ Id. at 106. The court stated that allowing an employee to rely on a good faith belief of illegality "would impose liability on an employer who fires an employee for refusing to perform (or even for investigating) a legal act," thus expanding the narrow scope of the public policy exception and interfering with legitimate managerial decisions.

MEDIATION

AL POVALL

Attorney-at-Law

(practice limited solely to mediation)

Over 25 years litigation experience in state and federal courts of Mississippi*, Alabama, Connecticut, Missouri*, Tennessee, Louisiana, Kentucky, District of Columbia* and North Carolina*.

1300 Fillmore Avenue
Oxford, MS 38655
662-513-6487

*admitted

The University of Mississippi
Center for
Continuing Legal Education
**CAMBRIDGE
STUDIES PROGRAM**
AT DOWNING COLLEGE
CAMBRIDGE UNIVERSITY, ENGLAND
JULY 11-15, 2005

For course information you may contact UM-CLE at:
Phone (662) 915-7283, Fax (662) 915-5138

Credits: 12 CLE credits including Ethics

E-mail: moore@olemiss.edu
www.outreach.olemiss.edu

UM THE UNIVERSITY OF MISSISSIPPI
CONTINUING LEGAL EDUCATION CLE