

PUBLICATION

Tennessee Court of Appeals Rules that An Employee Need Not be a Whistleblower To Establish a Common Law Retaliatory Discharge Claim

March 11, 2009

In a ruling handed down March 2, 2009, the Tennessee Court of Appeals determined that a claim of common law retaliatory discharge may be maintained where an employer's termination of an at will employee is substantially motivated by either the employee's refusal to participate in or to remain silent about an illegal activity or one which violates a clear and well-defined public policy. The employee need not report the alleged illegal activity to anyone. This holding substantially alters an earlier decision in which the Court of Appeals had held that a former employee must allege he reported alleged illegal activities to someone other than the individual who asked him to engage in the alleged activity.

In *Gossett v. Tractor Supply Co., Inc.*, former employee Gary Gossett alleged that, during the course of his employment with Tractor Supply as an inventory control manager, he became aware of "accounting irregularities" and that he was instructed to manipulate data relating to the company's inventory reserve, which he alleged violated the Securities Exchange Act. He acknowledged that he did not report his refusal to manipulate the data to anyone other than the person who asked him to engage in the allegedly illegal activity. He was later terminated when his job was eliminated during a company reorganization.

Defendant Tractor Supply responded that an independent audit of its accounting processes demonstrated its processes were legal. It also asserted that the individual who made the decision to terminate Mr. Gossett was unaware that Mr. Gossett had any concerns or made any complaints of any alleged activity, and that the alleged activities were too remote in time to establish a causal link between the complaint and Mr. Gossett's discharge. It moved for summary judgment on the grounds that Mr. Gossett could not establish a *prima facie* case of retaliatory discharge and that it had articulated a legitimate, nondiscriminatory reason for the termination.

Following a hearing in October 2006, the trial court refused to grant Tractor Supply's motion for summary judgment and set the matter to be heard by a jury in September 2007. In August 2007, however, Tractor Supply filed a motion to reconsider and to grant summary judgment in light of the holding in *Collins v. AmSouth Bank*, which was released on July 26, 2007. Tractor Supply argued that, under *Collins*, in order to succeed on a claim for retaliatory discharge for "refusal to participate," the plaintiff must produce evidence that he reported his refusal to participate to some entity other than the person who asked the plaintiff to participate in the allegedly illegal activities. In response, Gossett argued that the statement on which Tractor Supply relied was *dicta* and should not be relied upon to make a decision. Furthermore, it was inconsistent with prior state law addressing common law retaliatory discharge claims.

In making its decision, the *Gossett* Court revisited the underlying purpose of the common law retaliatory discharge action:

Additionally, the philosophy and the purpose behind the common-law retaliatory discharge action is to temper the at-will doctrine by restricting an employer's right to discharge an employee in contravention of a well-defined and established public policy or when the employee is exercising a statutory or constitutional right.

The Court also reviewed prior state law and determined that no case existed in which a claim was dismissed solely because the plaintiff failed to report the alleged illegal activity. Therefore, it determined that the *Collins* decision was over-broad, and it remanded the case back to the trial court to determine whether Gossett could demonstrate that he had in fact been retaliated against for refusing to participate in alleged illegal activities.

This ruling is consistent with a recent trend of expanding the scope of retaliation claims under both federal and state law. It opens the door to retaliatory discharge claims by plaintiffs who have never reported alleged unlawful activity to anyone, but who have simply refused to participate in unlawful activity. To succeed with such claims, plaintiffs will still need to prove that the activity they refused to participate in was unlawful, and that the employer discharged them based, at least in part, on retaliatory animus stemming from their refusal to participate. If there is any doubt regarding whether an activity is illegal, summary judgment is not appropriate. Likewise, if there is any material issue of fact regarding whether a decision-maker was swayed in any way by an employee's effort to engage in protected activity, summary judgment is not appropriate.

We anticipate that many claims which would have otherwise been dismissed on summary judgment under the *Collins* standard will now survive summary judgment and be allowed to proceed before a jury. This decision underscores why it is important not to "rubber stamp" a supervisor's recommendation for termination without drilling down and determining the actual basis on which this recommendation is made.

The *Gossett* Court declined to address the issue of whether *Collins* was over-broad with respect to Tennessee's official whistleblowing act, known as the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304 (TPPA). This Act requires an at-will employee to establish that he was terminated solely for his refusal to participate in or to remain silent about illegal activities. At this juncture, because the TPPA is known as the "whistleblower law," it would appear courts would limit the statutory cause of action to those employees who actually "blew the whistle." However, the language of the act is the same language that the *Gossett* Court used in ruling on the common law claim. It remains to be seen whether the statutory cause of action may also apply to at-will employees who simply refuse to do what they believe is illegal, without ever reporting such alleged activities to anyone.